

MAY 7, 1990

VANCOUVER, B.C.

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4 THE REGISTRAR: Order in court. In the Supreme Court of British
5 Columbia, this 7th day of May, 1990. Delgamuukw
6 versus Her Majesty the Queen at bar, my lord.
7 THE COURT: Mr. Grant.
8 MR. GRANT: Yes, my lord. Before I commence, I would like to
9 raise a -- raise the scheduling for this week with
10 your lordship, and propose the scheduling for this
11 week.
12 THE COURT: Yes. What's the date today?
13 MR. GRANT: The 7th.
14 THE COURT: Thank you. All right. What do you suggest?
15 MR. GRANT: My lord, this is what we propose, that we would go
16 today from 10:00 'til 4:00, and then have an evening
17 session tonight from 7:00 to 9:00. I am proposing
18 these, and of course if your lordship is unavailable,
19 if we can alternate the evenings, then that's fine
20 with us. Just let me follow through. So an evening
21 session this evening from 7:00 to 9:00. Tomorrow
22 going from 9:00 in the morning until 5:30.
23 THE COURT: Well, there is a problem there, Mr. Grant. I made a
24 commitment several months ago to deal with a matter at
25 4:00 o'clock tomorrow afternoon, which would take
26 about an hour. There is too many people involved to
27 change it, but I can continue on after that.
28 MR. GRANT: My lord, as I want to be clear, is that we have
29 tentatively made the schedule. If we can get these
30 hours in, and of course I fully anticipate there may
31 be some problems for your lordship, but the total
32 hours is what we mean.
33 THE COURT: As I say, I can come back after 4:00 o'clock
34 until -- and go on for -- as long as you want after
35 that to make up that hour.
36 MR. GRANT: Well, that may be.
37 THE COURT: So what do you suggest tomorrow?
38 MR. GRANT: Well, starting at 9:00 and going 'til 4:00, in light
39 of your lordship's commitment, and then if necessary
40 come back for an hour and-a-half.
41 THE COURT: That would be from 5:00 until 6:30?
42 MR. GRANT: Depending on your lordship's --
43 THE COURT: That's satisfactory.
44 MR. GRANT: On Wednesday, May 9th, to commence at 9:30 and go
45 'til 5:30, and then have an evening sitting there,
46 7:00 to 9:00.
47 THE COURT: Yes.

Proceedings

1 MR. GRANT: On Thursday commence at 9:30 and go to 5:30, and it
2 may go for 15 minutes later.
3 THE COURT: Yes.
4 MR. GRANT: 5:45 or 6:30 at the outside. On Friday go 9:30 'til
5 5:00, and Saturday 9:30 to 4:00. And then on Monday
6 the 14th solely for the purpose of the closing
7 statement of the chiefs, start at 9:00, or if that's a
8 problem, 9:15 'til 10:00, 9:00 'til 10:00. And that
9 would be just for the closing of the chiefs, and that
10 would be the completion of the plaintiffs' argument.
11 If we can get those hours in.
12 THE COURT: Yes.
13 MR. GRANT: I am not sure if your lordship --
14 THE COURT: I think what I'll do is I'll take that with me at the
15 morning adjournment, and I can put it with my
16 schedule. I presently believe it's quite
17 satisfactory, but I will confirm that at the morning
18 break. I haven't heard from any of your learned
19 friends.
20 MR. WILLMS: We'll be sure we are available, my lord.
21 THE COURT: Yes. All right. Thank you.
22 MR. GRANT: My lord, just so that you -- in the course of the
23 break what I have done is I have not given you
24 everything on the balance of the territories, and I
25 have done that, but I went from the place where I had
26 stopped, the Gwiiyeehl territory, and I had the
27 corrections made to it. So that this could replace
28 that part of your argument of volume 6.
29 THE COURT: Yes. Thank you.
30 MR. GRANT: Starting at page 60. And I am ready to commence my
31 argument there, and I believe my friend wants to say
32 something before I start.
33 THE COURT: Let me just understand what you just said. You are
34 going to replace some pages that you haven't yet dealt
35 with?
36 MR. GRANT: Not pages that I have dealt with. I understand you
37 may have used them for notes, so those ones -- those
38 will only be typos.
39 THE COURT: Madam Registrar can be doing that while I hear from
40 your learned friend.
41 MR. WILLMS: My lord, I have a judgment of the Supreme Court of
42 Canada from Friday, which I gave to my friend this
43 morning, which does touch on matters raised in the
44 plaintiffs' argument. And I just wanted to make sure
45 that my friends had a copy of that argument. It's not
46 in anybody's authorities, obviously, but it does touch
47 on issues that the plaintiffs are advancing.

1 The second thing is that -- and I'm not suggesting
2 that my friend deals with this right now, but while
3 he's on 646-9-A and 9-B, that is the territorial map,
4 we, in order to understand the case that we have to
5 meet, we would like to know whether or not my friends
6 say that those boundaries, do they -- as part of their
7 declaratory relief do they seek a declaration that
8 other aboriginal peoples have no jurisdiction within
9 those boundaries? That's something that we've been
10 struggling with in looking up my friends' argument,
11 and these are -- I hesitate to rise in my friends'
12 argument, my lord, but these are things that if we
13 don't have something to go on before we start our
14 argument, we are going to be shooting at perhaps
15 something that we don't need to shoot at. So that's
16 one question.

17 The other issue which we wonder is do the
18 plaintiffs seek a declaration that as between the
19 plaintiffs, the house boundaries are the boundaries,
20 because my friends have proven all of these, what they
21 call internal boundaries, and we are trying to
22 understand whether or not they seek a declaration that
23 as among the Gitksan and the Wet'suwet'en those are
24 the boundaries.

25 The other point is with respect to the claim
26 against the province in respect of the provincial
27 laws. And we can't -- we don't understand whether the
28 plaintiffs are only seeking a declaration that within
29 the boundaries on 9-A and 9-B the plaintiffs -- the
30 province's laws don't have any application within
31 those boundaries, or are they only seeking that the
32 laws of the province don't apply to the plaintiffs
33 within those boundaries. That is, is it inapplicable
34 to the plaintiffs, or are the laws inapplicable
35 generally within those boundaries?

36 And the final question is in respect of the
37 declaration that provincial laws have no application,
38 do those apply to Gitksan and Wet'suwet'en people who
39 are residing outside the boundaries. In other words,
40 are they seeking it in rem in respect of the territory
41 only so that the invalidity of the provincial laws
42 that my friends advance applies only within 9-A and
43 9-B, or do they say that if a Gitksan or Wet'suwet'en
44 person lives in Prince Rupert and your lordship has
45 made some declaration in respect of a provincial law
46 that it follows the Gitksan and the Wet'suwet'en
47 person? And as I said, my friends don't

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1 need to deal with that today, but before they close.
2 THE COURT: Well, I suppose you say it's part of their case.
3 MR. WILLMS: Yes, it is, because we are trying to figure out
4 what the declaration in respect of provincial laws is.
5 Is it solely territorial? Is it territorial limited
6 to the Gitksan and the Wet'suwet'en people? And the
7 other point is do they say they have jurisdiction over
8 all of this territory in 9-A and 9-B to the exclusion
9 of all other aboriginal peoples?
10 THE COURT: All right. Well, I am sure you have heard what your
11 friend said, Mr. Grant, and deal with it as you may be
12 advised.
13 MR. GRANT: I intend that it will be dealt with as part of my
14 argument.
15 THE COURT: All right. Thank you.
16 MR. GRANT: I have no comment on the Horseman case. I haven't
17 had a chance to review the decision.
18 THE COURT: Thank you. All right. Mr. Grant, are you ready?
19 MR. GRANT: Yes. This morning I intend to deal in greater or
20 lesser detail -- in lesser detail with some of the
21 territories, but just to focus as to where they are
22 and the evidence with respect to them.
23 And I would like to start with Gwiiyeehl, Mr.
24 Chris Skulsh's territory. That is, he is the head
25 chief, Gwiiyeehl, the house territory is his house.
26 There are two of these territories, my lord, referring
27 to page 60, and they are both referred to in evidence
28 of Mr. Muldoe, and are both reflected on Exhibit 486,
29 which is the sketch -- this sketch map, my lord.
30 That's one that I referred you to last week. And I
31 can show them to you on the large map while Madam
32 Registrar is getting them. These are the territories
33 that are -- that's too high -- these are the
34 territories in here and up here of Gwiiyeehl, in the
35 Kispiox Valley and up at the headwaters of the
36 Kispiox.
37 THE COURT: Thank you.
38 MR. GRANT: Now, I just referred --
39 THE COURT: The northern one -- oh, yes, they are both on the
40 sketch.
41 MR. GRANT: They are both on the sketch, my lord, and that's the
42 sketch map referred to by Mr. Muldoe.
43 The first one, the Cullon Creek territory, which
44 is located the southern most of the two, Mr. Muldoe
45 was instructed by Mr. Walter Skulsh, the former holder
46 of the name Gwiiyeehl, and he was advised it belonged
47 to Gwiiyeehl, and he -- this is how he described that

1 continuity of ownership in his evidence.

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"Well, it was owned by the former Gwiiyeehl for a good many years, and they are still using the same name today. That could be the Gwiiyeehl, the same name a couple of thousand years ago. But whenever one passed onto the next family or take over the name and it keeps on going like that right up to today."

And then Mr. Muldoe, of course, on page 61 has heard this territory described in the feast hall. You go to page 62, my lord. Mr. Muldoe describes where he has hunted on this territory, and the territory has the reference to the beaver hunting ground on the sketch map, and he has hunted and trapped there. He explains again who with, Johnson and Jackie Williams. Johnson being Gwiiyeehl's brother-in-law, and Jackie being the grandson of Gwiiyeehl. So that's that grandfather's right or Amniyetxw, A-m-n-i-y-e-t-x-w, being reflected there as well as a spousal right. Of course if Jackie Williams is the brother-in-law of Gwiiyeehl, then he's married to someone from his house.

The next territory is the Baldy Mountain territory. That's the small territory much further north. And it basically comprises the territory of the mountain and the area around the mountain. Mr. Muldoe described this as well, and on page 63 of his evidence quoted where he says that it's quite a high mountain --- I'm sorry, at the bottom of the page he said:

"It's pretty steep, and it's only one way he can come out of those places. The place they call An Lax Leeyim Huupxwit. And that's the place where during the early days I believe that some of the people that hunts there, they dig a place into the mountain, oh, about eight or ten inches apart that goes up to about a hundred yards up on the side of the mountain. That's mostly grass mountain along there. No rock. They dig those in so you can make a step as you go along there ... if you ask me it must be pretty close to 90 degrees. Pretty steep. I say if you stand up three feet away from it you will be falling back. When you are going up

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1 that hill there with your pack on your face is
2 no longer about ten or twelve inch from the
3 mountain from the ground. And also you've got
4 to crawl on -- you've got to be pretty well
5 prepared to get out of there. You got to be
6 crawling on your hands and feet too as well.
7 It's very steep, almost like that. Like when
8 you standing you can't -- you just about
9 standing like that, and make it really hard to
10 step into all this little dugouts. If you make
11 any false move in there you down to the bottom
12 of the mountain again, so that's why they named
13 the place An Lax Leeyim Huupxwit. As far as
14 the Indian call it forehead right next to the
15 earth."

16
17 Now, my lord, I quoted that, and he described how
18 old the steps are on the mountain to demonstrate that
19 it's an example once again of the depth of knowledge
20 and the geographic knowledges of the people, and this
21 demonstrates the basis of the people's ownership of
22 the territory in the plaintiffs' submission.

23 Now, I would like to move to the next
24 territories --

25 THE COURT: Can you remind me. Have I heard any other evidence
26 about those steps? Here is something physical and
27 tangible we could look at, and assess -- I take it
28 they weren't examined by any archaeologists?

29 MR. GRANT: The steps, no.

30 THE COURT: Any pictures of them in evidence?

31 MR. GRANT: I don't believe so, my lord. This is -- these steps
32 are up the mountain, and I think that they are -- and
33 they weren't shown on the viewing, but these are the
34 steps, as I say, that were looked at on the mountain.
35 They were not -- they were -- I will check with
36 respect to photographs. I don't believe there is, but
37 I can check that.

38 THE COURT: Allright.

39 MR. GRANT: On the next territory is the Wii Elaast territory,
40 and this is the territory of the House of Wii Elaast.
41 James Angus Jr. is the present chief with that name.
42 And that, once again, is shown on page -- Exhibit 486,
43 my lord.

44 THE COURT: Thank you.

45 MR. GRANT: Both of the territories. You see up near -- just
46 south of Kuldoe, you see the Wii Elaast territory.

47 THE COURT: Yes.

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1 MR. GRANT: And then down near Kispiox you see a small territory
2 right along the Skeena River near Kliiyem Lax Haa.
3 THE COURT: Yes, I see it.
4 MR. GRANT: Now, my lord, I submit that the logic of the
5 location of those two territories makes more sense
6 when we understand that Wii Elaast is one of the Wolf
7 chiefs from Kuldoe. And of course that's the reason
8 why he has a territory in the Kuldoe area. But the
9 fact that he has a small territory along the Skeena
10 River, which is described in the evidence, and you can
11 see that Spagaytasx, S-p-a-g-a-y-t-a-s-w, which is a
12 mountain that separates it from the Kliiyem Lax Haa
13 territory, demonstrates that he is one of the Wolf
14 chiefs from Kuldoe that came down earlier to Kispiox.
15 That is, he's been there longer than some of the more
16 recent ones, such as Gyolugyet.
17 Now, with respect to the northern territory, on
18 page 66 I refer to the cabins on Exhibit 486 of Wii
19 Elaast, which are marked as triangles. And there is a
20 small smoke house at the creek called Giist flowing
21 from the mountain. Now, these were previous locations
22 seen by Mr. Muldoe, but they are not standing today.
23 Once again I refer you to Mr. Muldoe's evidence on
24 page 67 with respect to the Waulp territory. That
25 demonstrates that it is a geographic, although it's a
26 rectangular shaped territory. It is based on
27 geographic demarcation, being the mountains. And
28 again Mr. Muldoe, as we saw with Mr. Williams,
29 describes spontaneously in his evidence the boundary
30 without any difficulty, and he knew it. Mr. Muldoe
31 went with the former Wii Elaast in the summer and in
32 the winter on these territories.
33 I would like to move to the territory of Wii
34 Muglusxw.
35 THE COURT: There is another Wii Elaast property up at New
36 Kuldo, is there not?
37 MR. GRANT: Yes. I'm sorry, my lord --
38 THE COURT: That's off this map. Are you going to deal with it
39 separately?
40 MR. GRANT: Sorry, my lord. There is the territory that is on
41 this map, Wii Elaast, the northern one is near New
42 Kuldo. There is two territories.
43 THE COURT: I'm sorry, that is north of Kuldo?
44 MR. GRANT: That is -- it's just south of Kuldo -- of New Kuldo,
45 yes.
46 THE COURT: Yes.
47 MR. GRANT: And both of the territories are on this map.

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1 THE COURT: Yes. All right. So there is only two?
2 MR. GRANT: There is only two Wii Elaast territories.
3 THE COURT: Before you leave 466.
4 MR. GRANT: Yes, my lord.
5 THE COURT: I am sure you will come back to it. Can you remind
6 me what the evidence is about the territory north of
7 Kliiyem Lax Haa and south of Gwii yeehl? Its got a
8 blue boundary around the south and the east side, and
9 a red one on the north.
10 MR. GRANT: I see what -- I think that it was not -- that's one
11 crossing over the river, if I recall. Just a moment.
12 Oh, yes. That is the territory Yagosip that Mr. Steve
13 Robinson spoke to.
14 THE COURT: All right. So it's described in the evidence?
15 MR. GRANT: Yes, it's described in the evidence, and I'll come
16 to Yagosip's territories.
17 THE COURT: All right. Okay.
18 MR. GRANT: Now, here, my lord, there is a -- on page 69 I would
19 like you to correct something that was missed, that
20 there is only one territory of Wii Muglusxw. It says
21 there are two. There is in fact only one territory of
22 Wii Muglusxw. And this is the Skins Lake territory,
23 which, as you can see, is a derivative from the
24 Gitksan word, Skunsnat, and this territory is on
25 Exhibit 486 as well. It's again a territory within
26 the Kispiox Valley, and if you recall a few weeks ago
27 when I was explaining the wilnadahl of Kliiyem Lax
28 Haa, I explained that Wii Muglusxw was one of those
29 Kispiox Wolf chiefs closely related of the -- one of
30 the closest proximities to Kliiyem Lax Haa. And an
31 indication of this is the fact that the Wii Muglusxw
32 territory is only in the Kispiox area, that is in the
33 Kispiox Valley, which are generally the territories of
34 the Kispiox chiefs.
35 Now, I have summarized the evidence of Mr. Muldoe
36 on the Skunsnat territory on those two pages, and you
37 can see that there is some of the markings, some of
38 the place names are referred to on Exhibit 486, my
39 lord. And I had intended under the heading of
40 Skunsnat to have reference to Exhibit 486 as its
41 reflected there for your lordship.
42 I would like to move into the territories of Geel.
43 Of course, as your lordship has heard, Geel is
44 Fireweed chief of Kispiox. Present holder of that
45 name is Walter Harris. And there are a number of
46 territories of Geel. Now, the first one is Lax Didax,
47 the first one I wish to deal with, and they are on

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1 Exhibit 486, and it's of course the territory, the
2 furthest northwest on Exhibit 486, my lord, just south
3 of Antgulilbix's territory.

4 THE COURT: Yes.

5 MR. GRANT: And -- now, this territory, my lord, it's important
6 for you to note that this is different than any of the
7 other territories, in that this is a territory that
8 the evidence demonstrates is jointly owned by Geel and
9 Dawamuxw. These are both Fireweed chiefs, and this is
10 the only territory of which Dawamuxw has a claim in
11 this action. And I would like to -- I refer you to
12 the evidence of Mr. Muldoe with respect to his
13 training on this territory, and on page 72 the
14 evidence halfway down is that Geel and his family hunt
15 and trap on the territories, hunt marten, fisher and
16 beaver, and then Mr. Muldoe's son, Lloyd Muldoe were
17 opening trails in that territory, and he gave evidence
18 of that.

19 Now, Mr. Muldoe testified that the area of the
20 Nangeese River between the two Geel territories and
21 the area to the west of the Geel territory belonged to
22 the Kitwancool people. And I would just as soon deal
23 with that as I am over there. And this, my lord, is
24 pretty dramatic. You can see it's this area here
25 which is like a notch.

26 THE COURT: Yes.

27 MR. GRANT: Because Mr. Fred Wale was cross-examined by, I
28 believe, Mr. Mackenzie on this territory, and there
29 was a dispute relating to traplines there, but Mr.
30 Wale, who was speaking about the Gwoimt territories,
31 G-w-o-i-m-t, Mr. Wale did not make a claim to that
32 territory, but there was a trapline dispute there, and
33 there is much evidence. I'm sure you'll hear from my
34 friends on that. But the important thing is that
35 Nangeese is not part of this court action. It's
36 understood by Mr. Muldoe to be Kitwancool territory,
37 and it's not part of the claim.

38 Now, the other dramatic incident with respect to
39 this Geel/Dawamuxw territory of Lax Didax is Mr.
40 Muldoe's evidence referred to on page 73 of the chiefs
41 getting together to protect the territory and the fish
42 spawning grounds on it from logging. And he stated:

43
44 "On that territory there anywhere from along the
45 Kispiox River and runs right up to -- to
46 Antgulilibix up to Kispiox east and upper
47 Kispiox and right into Williams Lake, that's

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1 all spawning ground along there for all species
2 of lake salmon and coho, sockeye and other fish
3 that goes right up there."
4

5 And of course your lordship recalls that a
6 territory of many lakes, and it's obviously a very
7 prime spawning area.
8

9 "It's a real good spawning ground up there and
10 so is right around -- right around Stevens Lake
11 there. And they started, the forestry started
12 pushing the road on the east side of the
13 Kispiox River, and they just about come right
14 up to right across from Stevens Lake there, and
15 they go that far. And they haven't logged
16 there yet but they propose to log there. And
17 also not too far from on the west side on
18 Kispiox River and they go and log right up past
19 Nangeese."
20

21 And reflecting here, of course, past Nangeese
22 going into this area.
23

24 "And they have, I believe, you might see it on
25 the map just where the road is and they are
26 getting pretty close and they were supposed to
27 extend the road and going into Swan Lake, but
28 somewhere some way or another nobody want them
29 to go in there ... all the chiefs get together
30 and they protest. They don't want no -- no
31 logging to be done into Williams Lake, because
32 they have been destroying a lot of different
33 places where the fish been spawning, and one of
34 the best spawning grounds is up there."
35

36 And as the evidence reflects, Mr. Muldoe goes on
37 to explain, I've just summarized it, that three or
38 four years ago the road building stopped and logging
39 did stop there.

40 THE COURT: Which of these lakes is Williams Lake?

41 MR. GRANT: It would be -- I don't believe it's labelled on
42 this map.

43 THE COURT: Is it in the Nangeese River notch, or is it in the
44 northerly Geel property?

45 MR. GRANT: I don't want to -- I believe it was in the -- I
46 can't be sure of that, my lord.

47 THE COURT: All right. Never mind.

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1 MR. GRANT: I'll check that.
2 THE COURT: I can check it.
3 MR. GRANT: It's reflected in Mr. Muldoe's affidavits. It's
4 reflected in Mr. Muldoe's affidavit, and I will check
5 that.
6 THE COURT: I can find it on the map, I'm sure.
7 MR. GRANT: Yes. And -- but you see Stevens Lake on there.
8 It's just -- Stevens Lake is within the Geel -- the
9 northern Geel Dawamuxw territory.
10 THE COURT: Is it the large one on Stevens Lake?
11 MR. GRANT: That's right. And then Swan Lake is the one just
12 outside the very large black one.
13 THE COURT: The large one?
14 MR. GRANT: It's much larger, and it's within the Kitwancool
15 territory.
16 THE COURT: All right.
17 MR. GRANT: Now, my lord, on the bottom of 73 I deal with the
18 Dawamuxw/Geel relationship. Dawamuxw has the same
19 territory as Geel. In this case the territory should
20 be found to be held by both Dawamuxw and Geel. In
21 fact, my lord, these are the same wilnat'ahl.
22 Dawamuxw is not shown on the map because he's closely
23 related to Geel's House. Now, the proximity is
24 demonstrated through the genealogies, and rather than
25 pulling genealogies, I've summarized and given you the
26 references. This is how close the relationship goes.
27 One of the sub-chiefs in Dawamuxw's House was Martha
28 Niiyasdaxhuuk, and this should be --
29 THE COURT: Madam Reporter will need a spelling for that.
30 MR. GRANT: On page 74. And that should be referred to as page
31 73A, my lord. I'll be correcting that on the disk.
32 When Martha Niiyasdaxhuuk died, the name was taken
33 into Geel's House, and the present holder of this name
34 is Geel's nephew, John Heit, and that's known on both
35 the Dawamuxw genealogy and the Geel genealogy, and
36 it's also reflected in the cross-examination of Pete
37 Muldoe. Not that particular point, but the other
38 point of Dawamuxw and Geel being on the same
39 territory. Pete Muldoe testified to that in his
40 evidence. And so this is the only situation in which
41 the plaintiffs are saying that with respect to this
42 territory it is held by two houses.
43 Now, I would like to refer to the Luu Andilgan
44 territory of Geel on page 74, and this is the
45 territory to the east of Nangeese River, about forty
46 miles north. It is the one just south of the Nangeese
47 notch or actually south and east of the Nangeese

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1 notch. And the names referred to in the third
2 paragraph are some of the key places in that
3 territory. Mr. Muldoe testified to ten of those
4 names. He's hunted goat in that territory, and the
5 place where the goat has been hunted is shown on the
6 map, Exhibit 486. He also gave evidence about
7 groundhog hunting on the very northern part of that
8 territory. Of course this is very high terrain. And
9 then beaver trapping along Sweetin River. And they
10 are all shown on Exhibit 486.

11 Now, the third territory is the Barker Creek
12 territory. This is the territory that is at the very
13 top, my lord. It's a territory acquired by Geel as a
14 result of a Tsiisxw. Walter Blackwater testified to
15 this territory, and I summarized his evidence there,
16 and it's in Exhibit 605, which is his affidavit.

17 Now, on page 76 I refer to the evidence of Martha
18 Brown. She travelled on this territory with her
19 mother and her stepfather, the former Geel, when she
20 was between the ages of 12 and 19. She stopped going
21 to the Geel territory when her stepfather died.

22 Martha explained the territory was beside the
23 Kliiyem Lax Haa territory in the north, and Geel
24 acquired this territory by a Tsiisxw with the Stikine
25 people. To the north is the boundary with the
26 Tahltans, which she refers to as the Stikene.

27 Martha Brown described some of the geographical
28 features on this territory, that they were right
29 beside each other, and she also, my lord, said that
30 this territory, there were two separate Tsiisxw with
31 the Stikine relating to these territories, that this
32 territory here was acquired through a separate Tsiisxw
33 as a different time than this Kliiyem Lax Haa
34 territory, and it was a killing of Geel's children or
35 members of Geel's House that acquired that. And
36 that's Martha Brown's evidence.

37 Now, I now wish to refer to the territory of
38 Antgulilbix, Mary Johnson. And there are two
39 territories of Mary Johnson.

40 THE COURT: Can you remind me of the reason for the difference
41 in the boundary of the Geel property and the southwest
42 portion of it as between overlay 9-A and -- what is
43 this one?

44 MR. GRANT: I'm sorry, the other was trapline. I have it. I
45 understand. Thank you.

46 Now, these two territories of Antgulilbix, one is
47 very close to the village of Kispiox on the west side

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1 of the Skeena near Date Creek, and the second one is
2 up on the Upper Kispiox River 50 miles north of the
3 Village of Kispiox, and it's on exhibit -- the second
4 one is reflected on Exhibit 486, and was testified to
5 by Pete Muldoe. And there should be a notation under
6 Xsi Wis An Skit territory that it was reflected on
7 Exhibit 486, my lord.

8 Mary Johnson in her oral evidence described the
9 main topographical features as being the Upper
10 Kispiox, Mount Kologet and Andap Matx. Those are
11 shown on the map, and I can see Andap Matx on the
12 Exhibit 486, my lord. It's at the very top end.

13 Now, she -- Mr. Muldoe testified, as did Miss
14 Johnson, that Tsibassa was the main chief in the House
15 of Antgulisbix who managed and looked after this
16 territory. The present Tsibassa was too ill to
17 testify, because of his health, and Mr. Muldoe
18 testified. I believe that was explained by Mr. Muldoe
19 or Mr. Sterritt.

20 Now, in this northern territory, my lord, on page
21 79 I refer to the fact that there is no evidence of
22 logging or mining on this territory at all. And Mr.
23 Muldoe testifies that he knows the territory. He's
24 been shown the boundary, but he hasn't seen a map of
25 the territory at that time. And Delgamuukw's
26 territory joins right together with this, according to
27 Mr. Muldoe.

28 Now, with reference to Exhibit 17-9-B, Mrs.
29 Johnson said that there is a place where the murder of
30 Yeel took place -- on page 80.

31 THE COURT: Yes.

32 MR. GRANT: And this is how the ridge got its name. And I
33 referred you to that, but there is a tree standing
34 there smeared with blood and that's their own paint,
35 and a crest on the tree of the sun. The sun was put
36 there because it belongs to the Gisgaast, the
37 Fireweed. You recall the Sky children adaawk of the
38 Fireweed clan, and that's part of where that crest
39 arises from. And then the tree represents the
40 compensation that's an exchange of blood, and it won't
41 be taken back until the end of the world. And she
42 went on to describe the particular compensation, what
43 occurred in the murder of Yeel. Now, that territory
44 is reflected there, and it is shown on Exhibit
45 646-9-A.

46 I would like to go to the territory of Andamhl.
47 And this territory is a territory that my learned

1 friends make much of in their summary of argument.
2 First of all Mrs. Johnson tied this territory to the
3 adaawk of the one-horn goat, and I am not going to
4 repeat what was said there, because that's already
5 been referred to in evidence or in argument I should
6 say. But on page 82 she refers to the fact that the
7 village on that mountain in the adaawk is called Wilt
8 Galli Bax, and then she describes Wilt Galli Bax where
9 they hunted for groundhogs. And this is reflected in
10 the adaawk, and this is an example of where the adaawk
11 ties to the territory.

12 And if I can take you to page 84 of my argument,
13 my lord. Mrs. Johnson identifies this Andamhl site as
14 being a mountain behind Glen Vowell village. She
15 identifies Exhibit 17-9-A as a map of the territory.
16 On the other side of that boundary she described --
17 she identified a boundary as Xsan Max Hlo'o. On the
18 other side of the boundary the territory belongs to
19 Ma'uus.

20 Now, we say, My Lord, one element of the houses'
21 knowledge of the territory, which is important for
22 defining the boundaries and for ownership, is the
23 element of presence. And Mrs. Johnson testified about
24 her great great grandmother using cedar bark for dye
25 from the territory, and her Aunt Emily Latz hunting
26 and trapping on the mountain in this territory. She
27 was told about the territory from her great great
28 grandmother. She reiterates in her evidence that this
29 was known as Antgulilbix's hunting ground, and she
30 describes the uses of the territory for hunting
31 groundhog, for berry picking.

32 Now, I refer to when she took the name on the
33 bottom of page 85 and on page 86, my lord. Mrs.
34 Johnson testified in cross-examination, she was told a
35 few days before testifying the territory on the other
36 side belonged to Johnathan Johnson, Ma'uus. Her
37 grandfather never mentioned this territory to her, but
38 she believed what Johnathan Johnson said. Now we are
39 not relying on that statement of her alone to say that
40 that's Ma'uus's territory. In fact Jeff Harris Sr.
41 gave detailed evidence about the Ma'uus territory, but
42 she knew who Johnathan Johnson was, and she agreed
43 with him. But that, as I say, isn't proof of the
44 territory of Ma'uus, and it was never intended to be
45 so.

46 MR. WILLMS: My lord, it was Mr. Sterritt that told her what
47 Johnathan Johnson said. It wasn't Johnathan Johnson

Submissions by Mr. Grant

1 directly.

2 THE COURT: That's correct.

3 MR. GRANT: I know that, and I'm sure you recall that, my lord.
4 I wasn't suggesting anything else.

5 Now, Mrs. Johnson also identified Xsu Wil Masxwit,
6 another creek on the territory, and that's a creek
7 that flows from the mountain called Wil Masxwit. She
8 was cross-examined between the difference of her
9 evidence and her interrogatory affidavit, and it was
10 suggested that she was not aware that Ma'uus's
11 boundary was different. What she said was:

12
13 "No. I was told by my grandmother and Auntie
14 Emily, later, that our boundary is Xsan Max
15 Hlo'o. That's the creek and we didn't claim
16 Ma'uus territory."
17

18 Here referring to the territory to the north.
19 Later by Mr. Goldie's cross-examination she verified:

20
21 "No we didn't say we owned the whole mountain,
22 we said that -- that there is a clearing where
23 Gyadim Lax Ts'inaast lives."
24

25 This is that mountain where that fairly powerful
26 and frightening person lived that you may recall I
27 referred you to last week or two weeks ago.

28
29 "But right on top of the mountain is Ma'uus,
30 they showed me on the map. But ... is where
31 this mean man lives, and that's where Xsan Max
32 Hlo'o runs down, that's our boundary."
33

34 Now, I say, my lord, that the evidence of Mrs.
35 Johnson on this point is consistent with the evidence
36 that on the other side this is the territory of
37 Ma'uus.

38 Now, she wasn't sure whose the territory was, but
39 she knew it wasn't her territory, and that's the
40 point. That's what she was taught by her grandmother.
41 Now, she was asked about the territory to the north of
42 Andamhl, and she says:

43
44 "It's so plain, sir, this Wil Masxwit. The
45 mountain is called Wil Masxwit. That's where
46 our ancestors got the mountain goat, main food,
47 and groundhog that they used the skin for the

Submissions by Mr. Grant

1 feasts, and this Wil Masxwit and Xsu Wil
2 Masxwit comes from Wil Masxwit and runs into
3 Kispiox River. So they call this Xsu Wil
4 Masxwit -- Antgulilbix' Genip Jap. That means
5 that Antgulilbix' hunting ground in the ancient
6 time. So next to Xsu Wil Masxwit is Ma'uus
7 boundary ..."

8
9 Now, she was asked then if she knew where Ma'uus'
10 territory was, and she said yes, she knew where it was
11 before she spoke to Mr. Sterritt about the map.
12 Now, again what she is reflecting is she knew it was
13 not her territory.

14 Now, Marvin George then testified to the creation
15 of 17-9-A, and I've referred you to that, because much
16 is made of that map, and he stated:

17
18 "This is a map of Antgililbix and it's on a
19 scale of 1:50,000 also, and again a topographic
20 series, and again from the base that was
21 prepared for by Terra Surveys. And boundaries
22 from -- on this particular map different from
23 the boundaries on the previous map and would be
24 based on information that was brought to me by
25 Neil Sterritt."

26
27 Mr. George explained what led him to make the
28 change.

29
30 "It would be previous to May 13, the day May 13
31 on this map, which would indicate that's the
32 day that I finished preparing this actual map,
33 but the information would have come to me
34 before that ... again information from Neil
35 Sterritt, his understanding of where Xsu Wil
36 Masxwit was. It was identified as Date Creek,
37 and the location of Date Creek is the -- where
38 Xsu Wil Masxwit as labelled. It's -- Xsu Wil
39 Masxwit. Date Creek on the NTS series is where
40 this particular feature is labelled on this
41 map."

42
43 As a result Mr. George made the alteration
44 depicted on Exhibit 646-9A, which is the claim that we
45 have.

46 Now, what's important here, my lord, is to
47 remember that we have other witnesses testifying to

1 this as well.

2 Mary Moore testified to the territory of
3 Luutkudziiwus immediately south of this territory, and
4 she said with respect to where it abutts on
5 Antgililbix:

6
7 "Here it runs east about two miles along the
8 height of land to Andamahl, and it continues
9 east to the source of Xsi Moolaa. It then runs
10 down Xsi Moolaa to Xsan. It then runs down the
11 centre line of Xsan to the starting point."

12
13 Now, Mrs. Moore stated in her affidavit that
14 Antgililbix's territory was to the north. And she
15 also said Xsi Moolaa is also called Sika Doak Creek,
16 and said that was the boundary, and this is in her
17 evidence of cross-examination, between Antgililbix and
18 Luudkuziiwus.

19 My lord, what's important about this is that when
20 any of these territorial witnesses were cross-examined
21 on the territories, you would find this, and it's
22 important because the defendants then took an approach
23 in certain cases to not cross-examine, and that's, of
24 course -- these are the ones where they are making
25 much of the apparent contradiction.

26 She also said -- on the other side of the mountain
27 bordering her territory was the territory of the
28 Kitwancool people. The name of the mountain is
29 Andimahl, and again that's consistent with the
30 evidence of Mary Johnson. There were no other
31 questions put to Mrs. Moore concerning the location of
32 the boundary with Antgililbix, or the fact that
33 Antgililbix owned the territory to the north of the
34 described boundary. And what I say, my lord, is if
35 the defendants are going to rely upon some mapping
36 discrepancy to challenge the reputation of
37 Antgililbix, they should put to that neighbouring
38 chief what she knows about that. And they declined to
39 do so, because they know full well that if they did it
40 would undermine their own argument.

41 Now, again what happens regarding this territory
42 is Jeff Harris Sr. spoke to the Ma'uus territory to
43 the north, and I have given you the description and
44 explanation there. You find a fascinating occurrence
45 here, because Mr. Harris was asked no questions in his
46 cross-examination about the boundary description
47 between Ma'uus and Antgililbix. He was cross-examined

1 in court. He was not examined about the ownership of
2 the territory to the south being in the House of
3 Antgililbix. And once again, any challenge to the
4 reputation of that Antgililbix territory should have
5 led to a questioning of that witness as to the
6 territory to the north, but it wasn't.

7 Now, I say, my lord, that on both the south and
8 north of the Antgililbix territory, Andamahl, the
9 defendants chose not to examine on the boundary
10 description. Hence, they must now be taken to have
11 accepted those descriptions of Mrs. Moore and Mr.
12 Harris.

13 Now, I refer back to Exhibit 17-9-A and Mr.
14 George's evidence of the 17-9-A mapping. And Mr.
15 George refers to the change on the bottom of page 91.
16 Mr. Sterritt on page 92 testified that he provided
17 information on which Exhibit 19 was drawn, and Exhibit
18 19 was different than 17-9-A. And he referred to
19 David Gunanoot and Percy Sterritt and others in his
20 evidence. Now, he went on to explain, and this was in
21 cross-examination, how the assumption he had operated
22 on that Date Creek was Xsu Wil Masxwit was wrong. He
23 said:

24
25 " ... It was -- while listening -- and I had
26 gone through interviews with Mary Johnson under
27 that assumption, and it was while listening to
28 the cross-examination of Mary Johnson in
29 Smithers, I was in the Court and listening, and
30 I realized that there was something wrong,
31 something wasn't fitting with -- and I didn't
32 know what it was. There was just something
33 didn't seem right in terms of what she was
34 explaining, because she was saying it
35 correctly, but what she was saying and what my
36 understanding was. So I did not talk to her, I
37 went to my Uncle Percy, and I asked him 'Can
38 you tell me which way -- or where Xsu Wil Masxw
39 is?' And he said 'Yes, it's Date Creek, but it
40 turns right when you go further up Date Creek.'
41 And I confirmed that, I talked to Jeff Harris
42 as well, and I asked him if he could show me
43 where Xsu Wil Masxw went. So if you -- in
44 fact, if you come up Date Creek.

45 Q Okay. Now, just let's -- to assist us here, if
46 we can start at the time at this Kispiox River,
47 where does Date Creek, the creek that's named

1 Date Creek start?"

2

3

And then he describes where it starts on the next page, and then in the second paragraph of his answer:

5

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Q All right. And do you recall about when it was you had the conversation? "

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I would like to move into the territories of Wii

36

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41

42

my lord.

43

THE COURT: Yes.

44

MR. GRANT: Mr. Muldoe will be -- now, Mr. Muldoe described this in his evidence, and he was instructed by Able Tait and Luus and Albert Tait, Delgamuukw. He travelled the territory with Able Tait and was told the

45

46

47

Submissions by Mr. Grant

1 boundaries. And he reflects that in the territory
2 description that he gives where he says:

3
4 "Yes they tell me about the boundaries of the
5 territory. But as we travel along, me and Able
6 Tait, we travel along above. That's where we
7 have his trapline. We can see all this area
8 down here and he pointed out to me all this
9 territory who it belonged to."

10
11 In describing the territory thus he pointed to the
12 boundary around the Wii Minosik territory. And he
13 testified that he heard this described in the feast,
14 and he testified when he travelled along the foot
15 trail on the west side, west of the Skeena River on
16 the way to Shaladamus, he could observe the Smoke
17 Lake territory from there.

18 The next territory is the Xsandap Matx or Fort
19 Creek territory. And Mr. Morrison was permitted to
20 speak by Robert Stevens on this territory. It's about
21 48 miles northeast of Kiskagagas, and is to the east of
22 the Ant Gilek territory of Waiget.

23 I would like to pause there, because I don't
24 believe I am coming back to Exhibit 486, and I would
25 like to refer you, my lord, to answer a question you
26 raised on Friday -- Friday a week ago to page 45 of my
27 written argument earlier. And this is with respect --

28 THE COURT: In this volume?

29 MR. GRANT: Yes. Should be in that volume, my lord. This is
30 with respect to the Wii gyet territory. As you
31 recall, you asked and questioned why this territory
32 was so oddly shaped and elongated. And then the
33 second paragraph on 45 I have summarized the evidence
34 which explains it. In fact, my lord, this Wiigyet
35 territory is comprised of three different parts. The
36 northern part was originally owned by people of
37 Kuldoe, by Luu Goo Mx of the House of Wiigyet. The
38 part of the territory at Deep Canoe Creek, which is
39 the middle part of the territory, my lord, and you can
40 see Deep Canoe on Exhibit 486 was owned by Wiigyet and
41 Am Mayt Lilixws, and the south eastern portion of the
42 territory, that area closest to Kiskagagas, was owned by
43 Wii Seeks and Waiget.

44 Now, these houses, I am referring here to Wiigyet,
45 Wii Seeks and Waiget, were separate, but are now
46 combined, and of course they are all Fireweed. So
47 what you have in fact here is something that could

Submissions by Mr. Grant

1 look and it could have been drafted as well like the
2 Gyolugyet territory, where you see the Gyolugyet
3 territory has three divisions reflecting it. And the
4 Wii gyet territory -- yes, this territory here could
5 equally have been divided here and in this area and
6 have the three portions. And that explains the
7 discrepancy.

8 And you will find -- and I come to the Wii Gaak
9 territory, the same kind of thing happens with Wii
10 Gaak. It's divided actually amongst different chiefs
11 among the house. That was the reference I had
12 intended to refer you to last Friday and hadn't found
13 them.

14 THE COURT: Thank you. I notice on the 46 there is another
15 territory that doesn't seem to be assigned. That's
16 immediately south of that most south easterly portion
17 of Wiigyet's territory.

18 MR. GRANT: Yes.

19 THE COURT: West side of the Skeena.

20 MR. GRANT: Yes. The reason those aren't shown is because the
21 only territories depicted were the ones that Pete
22 Muldoe spoke to, and that particular territory there
23 is -- that appears to be -- that's part of the Gwoimt
24 territory, but you see Gwoimt crosses over the Skeena
25 River. The major part is on the side -- the east side
26 of the Skeena River, but it crosses over there. So
27 that's part of the Gwoimt territory. And that
28 territory was testified to by Fred Wale.

29 THE COURT: Thank you.

30 MR. WILLMS: My lord, does my friend have evidentiary evidence
31 to the three different parts of the territory that he
32 just referred to?

33 MR. GRANT: It's cited on page 45. Volume 103, pages 65-20 to
34 65-23.

35 I would like to refer to the second territory of
36 Wii Minosik, the Xsandap Matx territory. And that's
37 reflected on Exhibit 379, my lord, map A. And it's
38 this inverted L-shaped territory that is here, my
39 lord.

40 THE COURT: Yes. Thank you.

41 MR. GRANT: Now, this territory was spoken to by James Morrison,
42 and as I say, it's located 48 miles northeast of the
43 village of Kisgagas and to the east of the Antgililbix
44 territory of Waiget. Now, that, of course, is a
45 territory that is now claimed by Weget, but the chief
46 within the Weget House is Wiigyet that is responsible
47 for it, and I referred you to that last week.

Submissions by Mr. Grant

1 Now, on the bottom of page -- or Mr. Morrison's
2 knowledge, of course, came from his father, Simon
3 Morrison, as well as the other persons listed at the
4 top of page 97. He hunted on the territory with the
5 permission of Wii Minosik, and he hunted goat on the
6 territory beyond Fort Creek. He described the trail
7 that he went up at shown on Exhibit 379-A, and you can
8 see the route of that trail, and he went to the camp
9 indicated by the triangular marker, which is Wii
10 Minosik's camp on the -- right in the elbow, the
11 inside of the elbow of the map.
12 Do you have that?
13 THE COURT: Yes.
14 MR. GRANT: Exhibit 379, the sketch map, my lord.
15 THE COURT: I don't think so.
16 MR. GRANT: 378, 379.
17 THE COURT: Is it here? Oh, thank you.
18 MR. GRANT: Then you can see the trail.
19 THE COURT: Yes. I have it.
20 MR. GRANT: There are two. One's coloured and the other isn't.
21 And it's map A, my lord.
22 THE COURT: Is this the A, B series?
23 MR. GRANT: It's the A, B series.
24 THE COURT: I didn't think it was. Yes, all right.
25 MR. GRANT: Now, you can see, of course, there the village of
26 Gitangasx, which is identified on map A of that
27 series, and that was identified by Mr. Morrison in his
28 evidence.
29 THE COURT: You said Gitangasx?
30 MR. GRANT: Gitangasx. It's outside the territory but it is
31 reflected on the map. And on the bottom left-hand
32 corner, my lord --
33 THE COURT: Yes.
34 MR. GRANT: -- Mr. Morrison identified a photograph of the -- of
35 this territory, and he named 18 land features by
36 Gitksan names on this territory.
37 The next territory I would like to refer you to is
38 from the B map, and it's another territory of Wii
39 Minosik. It's the Gwin Dak territory. And it's the
40 small territory surrounded by Tsa Bux on two sides and
41 Wiigyet to the north. This territory is -- this
42 territory here that's being referred to, my lord. So
43 it's much closer to Kiskagas area, and it's the area
44 where they go on the mountains, and then this small
45 territory, which is a small mountain --
46 THE COURT: Where is -- not Kiskagas, the other one. The one we
47 just mentioned.

Submissions by Mr. Grant

1 MR. GRANT: Gitangasx would be up in this area here. Gitangasx
2 Creek is there.
3 THE COURT: Yes. Thank you.
4 MR. GRANT: Now, this, as I say, is located eight miles north of
5 Kisgagas above Sperry Creek, and the main feature of
6 the territory is the mountain called Gwin Dak, and
7 that's why the territory is, of course, referred to
8 that way. And it's an example where everybody knows,
9 that is knowledgeable chiefs in the feast know when
10 Gwin Dak is referred to, they know the territory that
11 is being referred to. And this is the one where there
12 is significant goat hunting, and Mr. Morrison's son
13 described where he has hunted goat on that territory.
14 I refer to on page 100 of my argument, I refer to
15 all of that. And I would ask you to note, and I don't
16 need to read it, but the evidence of Mr. Morrison of
17 his presence, and the knowledge of the training
18 regarding hunting on page 100 and 101.
19 And the final territory of Wii Minosik is the Dam
20 Tutsxwhl Ax, Blackwater Lake territory of Wii Minosik,
21 and this is a territory described in evidence by
22 Walter Blackwater of the House of Niist. And he had
23 permission. He was instructed about this territory by
24 his father, Jimmy Blackwater, who was the former Wii
25 Minosik, and by his grandfather Moses Stevens, the
26 former holder of the name Dawamuxw, and his
27 grandmother Esther Stevens. And he goes on to
28 describe who else referred him to that territory.
29 THE COURT: That is north still of map A, is it not?
30 MR. GRANT: Yes, my lord.
31 THE COURT: Not shown on this map.
32 MR. GRANT: Not shown on that map. It's the small area, I
33 believe, that I referred you to over here.
34 THE COURT: Yes. It's this large area here. Yes. All right.
35 MR. GRANT: It's much further north.
36 THE COURT: That's said to be 55 miles north of Kisgagas?
37 MR. GRANT: Yes. It's a large territory, and of course the
38 reason Walter Blackwater gave evidence of it was
39 because -- and was given permission to, is because he
40 was brought up on this territory, and it being his
41 father, the former holder of the name Wii Minosik.
42 In cross-examination Mr. Blackwater stated that Mr.
43 Stevens was familiar with the boundaries, but didn't
44 know the names of these places and mountains. And
45 he -- Robert Stevens traps on the territory with David
46 Blackwater, and they did that up to two years ago.
47 And this is the territory that Mr. Blackwater

Submissions by Mr. Grant

1 testified that his parent's house is behind the lake
2 on this territory. And he testified that between 1948
3 and 1966 he trapped with his father in the area of
4 Blackwater Lake. So he named 26 features on this
5 territory that he knew.

6 I am going to come back to the territory to the
7 south of that, and we'll return to Moses Stevens at
8 that time.

9 The next territory I wish to deal with, or the
10 next house territories, are those of Wii Gaak. And
11 the first territory is the Barker Creek territory,
12 which was testified to by James Morrison. This is the
13 territory 65 miles north of the village of Kisgagas.
14 And it's shown on Exhibit 379, my lord, the sketch
15 map, and it's the furthest north of the Wii Gaak
16 territories. It's this one here.

17 THE COURT: Yes. I don't know that it's on 39.

18 MR. GRANT: Well, it's on map A. Is that 378 on your copy, my
19 lord?

20 THE COURT: Oh, 378. I'm sorry. Did you say 379?

21 THE COURT: Yes. I don't know that that's in this book.

22 MR. GRANT: I'll leave that for your reference.

23 THE COURT: Thank you. Thank you. Yes, all right. I see it up
24 here. Yes. Thank you.

25 MR. GRANT: Now, there is an interesting -- in terms of the
26 legal proposition that is being argued in this case,
27 there is an interesting twist to this territory, my
28 lord. If you go to page 105, you can see the evidence
29 of my argument -- the evidence of Mr. Morrison as to
30 the acquisition of this territory by Wii Gaak. It was
31 previously held by Wii Minosik, but was transferred to
32 Wii Gak by Jack Wright because Wii Gaak had helped the
33 House of Wii Minosik, and he stated:

34
35 "He helped him at the feast; he helped him also
36 other things."

37
38 He goes on to describe him on the trail.

39
40 " ... and they both working together on Wii
41 Minosik so the only way they can thank him is
42 to give him a portion of land, and another
43 thing is why they were given that land, portion
44 of land to them, because they have the land of
45 themselves, hunting ground. So the way they
46 change these people is give something which is
47 the livelihood in those days where they can get

Submissions by Mr. Grant

1 food, and this is why they were given this
2 portion of land because Wii Minosik has large
3 portion of land himself so that's the reason
4 they are given to Ax Moogaasxw, which is Jack
5 Wright, and also the witness of the Clan
6 Fireweed, Frog Clan and the Wolf clan, also the
7 witness to approve what was taken in that feast
8 hall. That is why it's important in the feast
9 hall and what was taken place in the feast
10 hall."

11
12 Now, Wii Minosik held the territory, according to
13 the evidence of -- and that should be volume 93.

14 THE COURT: You said 83?

15 MR. GRANT: You see -- yes, in the second paragraph I say volume
16 83. It should be 93, page 5196.

17 THE COURT: Yes.

18 MR. GRANT: According to James Morrison's evidence Wii Minosik
19 held the territory for thousands of years, and -- but
20 it was during Jack Wright's lifetime it was transferred
21 to the House of Wii Gaak. And you can see with
22 respect to that territory on Exhibit 646-9A that under
23 the name Wii Gak you have the sub-chief's name Ax
24 Moogsxw, because that's who Wii Minosik gave to within
25 Wii Gaak's House, but it's within the understanding
26 that it's in Wii Gaak's House.

27 Now, it's our submission this is evidence of the
28 internal authority of the chiefs in dealing with the
29 territory.

30 The evidence is clear that at the time of contact
31 this was Wii Minosik territory. So if your lordship
32 finds that that is a triggering event in terms of
33 declarations of ownership of house territories, the
34 territory is Wii Minosik's at that time, but it was
35 later transferred to Wii Gaak. And I say that this is
36 an example of the internal authority of the chiefs, my
37 lord, that I have described in evidence and in
38 argument before. And it allows such transfers to
39 occur internally. And that's why it's referred to as
40 the Wii Gaak territory.

41 On page 106 Mr. Morrison testified about his
42 meaning of the caretaker role in relation to this
43 northern territory of Wii Gaak, and he said, and I
44 quote him, and I don't need to repeat that, but I say,
45 my lord, and he said that it's a law -- that there is
46 a Gitksan law that permits the transfer of territory
47 from the chief of one clan to the chief of another.

Submissions by Mr. Grant

1 And I say, my lord, in this case the transfer is
2 witnessed in the feast. And I say, my lord, that this
3 is very unusual that this has happened in this way,
4 but it did happen in this case, and it's not an ad
5 hocery to the system, but it is dealing with different
6 types of circumstances and how they are handled by the
7 chiefs together.

8 It was clear from Mr. Morrison's evidence, my
9 lord, that if it had not been announced at the feast,
10 that this transfer would not have been recognized in
11 the same way.

12 THE COURT: Do we know when Mr. Jack Wright was alive?

13 MR. GRANT: Yes, my lord, through the genealogies of Wii Gaak we
14 know. I believe Mr. Jack Wright died -- it's either
15 the late -- mid or late seventies, as I recall. So
16 it's about that time. And he was -- he was Thomas
17 Wright's -- I believe he was his brother, if I
18 remember rightly. So it's around that period of time.
19 So he -- this would have occurred in the earlier part
20 of the century.

21 I would like to refer briefly to the An Gil
22 Galanas and Xsu Wii Ax or Sustut River territory.

23 THE COURT: Perhaps we'll take the morning adjournment before
24 you do that.

25 MR. GRANT: Sure.

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

28
29 (PROCEEDINGS ADJOURNED FOR A BRIEF RECESS)

30
31
32
33 I HEREBY CERTIFY THE FOREGOING TO BE
34 A TRUE AND ACCURATE TRANSCRIPT OF THE
35 PROCEEDINGS HEREIN TO THE BEST OF MY
36 SKILL AND ABILITY.

37
38
39
40 _____
41 LORI OXLEY
42 OFFICIAL REPORTER.
43 UNITED REPORTING SERVICE LTD.
44
45
46
47

Submissions by Mr. Grant

1 (PROCEEDINGS RESUMED AT 11:35)
2
3 THE REGISTRAR: Order in court.
4 THE COURT: Mr. Grant, the schedule you suggested, as I have it,
5 is satisfactory, except that I'm not sure that I can
6 be ready to start tomorrow after my other commitment
7 until 5:30, and I think that that should be 5:30 to
8 7:00 if you want to move an hour ahead, if that's
9 convenient.
10 MR. GRANT: I'll discuss that at noon with counsel doing that,
11 and of course we'll try to move it as close to 4:00
12 o'clock.
13 THE COURT: I think the best I can do is say 5:30 to 7:00,
14 something like that.
15 MR. GRANT: Yes. That would be -- my lord, I'm not sure what I
16 said today, whether we'll go to 4:00 or 5:00.
17 THE COURT: Today you said 4:00.
18 MR. GRANT: Yes. It may be that we need to go until 4:30 in
19 light of what's happened, but --
20 THE COURT: All right, 4:30, sure.
21 MR. GRANT: I was referring to Sustut River territory, which
22 belongs to the House of Wii Gaak. Wii Gaak, as you
23 may recall, my lord, is a Wolf Clan chief from
24 Kisgegas, and this territory is located along the
25 Shelagyot, Sicintine, Squingula, Sustut and the Skeena
26 River north of Kisgegas. I'm on page 107.
27 THE COURT: Yes.
28 MR. GRANT: Now, once again, my lord, this is territory similar
29 to Wii Gaak's territory that is very long and
30 elongated, and in fact, encompasses a number of
31 different groups of chiefs within that territory
32 within the house. Now, this territory was described
33 by the present holder of the name Wii Gaak in Exhibit
34 601, and he was cross-examined on that.
35 Now, if you go to page 108, my lord, I explain
36 once again that, and the reason I listed all those
37 rivers is that because the territory is actually
38 subdivided. Different parts of the territory are
39 looked after by other chiefs in Wii Gaak's house. Mr.
40 Sterritt's part was close to Sustut River, where his
41 mother's side of the family traps, and that's
42 reflected in his evidence. It's all one territory
43 with different names. Mr. Sterritt identifies a
44 smaller Wii Gaak territory, and this is the Barker
45 Creek territory that I've referred you to already, and
46 he described the boundary around the Barker Creek
47 territory. Now, Mr. Sterritt dealt with a timber

Submissions by Mr. Grant

1 supply area north of Sustut because that area is in
2 his house territory, and that was elucidated in
3 cross-examination.

4 Now, Mr. Sterritt, on page 109, described going
5 out on the territory, and I think this demonstrates
6 how the different parts of territory were used and how
7 they were accessed. He said:

8
9 "Wii Gaak has a trail out from Kisgegas" --

10
11 Now, if you look at Exhibit 378, by the way, my lord,
12 you will see the Wii Gaak cabin right at the very
13 southern end of the map. It's outside of those
14 territories, but you can see it. This is on the south
15 of the Wii Minosik territory.

16 THE COURT: Yes.

17 MR. GRANT: And that of course is reflective -- that's quite far
18 up in the territory up in here in the northern area,
19 and that's where the evidence is of him going up, how
20 they access the territory through going through it.
21 Now, before 1984, Mr. Sterritt had regularly hunted on
22 that territory:

23
24 "Wii Gaak has a trail out from Kisgegas, and it
25 goes up An Makh1" --

26
27 I'm quoting from page 109:

28
29 "-- they call it and this is in the olden days,
30 if you are going to put a trail through
31 somebody's territory, you get their permission
32 and you use it as a trail only. And Wii Gaak
33 did this, take a short cut up into the sort of
34 southwest corner of his territory. Now, this
35 trail, which I think I have described on a part
36 of the territory, it goes up into the
37 mountains, Tsim an Makh1, where you go through
38 sort of a valley and you cut over a pass down
39 in towards Shelgyote. Now this trail continues
40 right on up to Sicintine and it goes to the
41 valley of Tsuusgwin Xsi Gwin Gwila'a which
42 flows more or less south. That's a tributary
43 of Xsi Gwin Gyila'a...so that pass is where the
44 trail goes through down into Wii Gaak's, where
45 he lived on the north side of the Sustut
46 River....There is a cabin, it's about half a
47 mile or three quarters of a mile going north on

Submissions by Mr. Grant

1 the Skeena. There is sort of a low land closer
2 to Sustut, so they go up on a height of land, I
3 was there when my father had a cabin there. He
4 was trapping with my brother, and that's where
5 Wii Gaaks, that's where they usually camp and
6 work out from there. So in this area I am
7 talking about that was the height of land
8 between Wii Gaak and Tsabux. And so we used to
9 go into it to hunt goat and moose around in
10 that area. So it's for years and years we have
11 a cabin up in that area."
12

13 Thomas Wright also trapped on the Wii Gaak
14 territory, and he gave evidence, Thomas Wright in his
15 commission evidence referred to that. His older
16 brother, Simon Wright, took the name of Wii Gaak, and
17 he died in 1966. Now, I have here the reference to
18 Jack Wright, who took care of everything on Wii Gaak's
19 territory. He didn't hold the name because he was
20 quite bedridden, and when he died in 1982 Mr. Sterritt
21 took the name. Now, that was 1982. That was Jack
22 Wright who I referred you to earlier, my lord.

23 THE COURT: Yes.

24 MR. GRANT: Nii Kyap has the territory to the east of Wii Gaak,
25 but both chiefs came out of the same house and came
26 from Gitengas. And this is a reflection on both Wii
27 Gaak and Nii Kyap are both Wolf chiefs with the same
28 ancient origin, so they're part of the same Wilnadahl
29 but their territories are separate, they're seen as
30 separate houses, now they're understood to be separate
31 houses.

32 On page 111 I refer to the fact that Mr. Sterritt
33 confirmed that he has not completed the name, and on
34 the bottom of page 110 and the top of page 111, my
35 lord, in cross-examination Mr. Sterritt was directly
36 asked -- this is one of the defence theories that was
37 put to him, whether an earlier Wii Gaak got the
38 territory after the Hudson's Bay Company came in in
39 1820, and he said in answer in cross-examination:
40

41 "Now, there's a lot of people living there,
42 years and years ago, long before the Hudson's
43 Bay people. Why would a territory like that
44 just be sitting empty, nobody claiming it and
45 if Thomas said that the land was unoccupied Mr.
46 Sterritt said he didn't know his exact
47 meaning."

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1 Now that, my lord, I'll check the exact quotation
2 because that last part is clearly not a quote, but
3 that is the reference in the evidence.
4 THE COURT: What is that, page 48 and 49?
5 MR. GRANT: Yes. I'll give that to you. That is Exhibit 601-A.
6 THE COURT: 601-A page 48 and 49.
7 MR. GRANT: Yes. That's the cross-examination of Neil Sterritt,
8 Sr.
9 THE COURT: Thank you.
10 MR. GRANT: I would like to move now to the territory of Tsabux,
11 and there are three territories of Tsabux. The first
12 one is the territory reflected on Exhibit 378, map B,
13 and this is a territory -- this is a territory about
14 25 miles north of Kisgegas, and it's a small
15 territory, my lord. There's two territories referred
16 to on that map.
17 THE COURT: Is the northeastern --
18 MR. GRANT: This is the northeastern of the two, and it's this
19 small territory in here, and then there's another one
20 that's longer. Now, I'm not going -- I've reviewed
21 the evidence there, and I only say that with respect
22 to this, that the territory, as Mr. Morrison says, he
23 described:
24
25 "Where the snow is hard and it is like cement...
26 during the hunting season it's just really
27 solid. It is not a crust, it is something in
28 between this mountain that is really solid."
29
30 And this is the meaning of the name of this territory.
31 And there's a cabin on the territory that he
32 describes.
33 Now, I would like to refer you to the Shelf Ridge
34 territory, which is the -- also depicted on Exhibit
35 378, and it's the territory that comes down and
36 encompasses Kisgegas south, and again, James Morrison
37 described that in his evidence. He was told about
38 this territory by Alec Brown, Thomas Wright, Henry
39 Wright, Simon and Jack Wright, David Gunanoot and
40 Simon Morrison. Now, the major features of this
41 territory are Lax An Hakw or Shelf Ridge, my lord, and
42 you observed that in the course of the viewing. If
43 you can go to page 115 and if you have Exhibit 378, my
44 lord, as well, you can see the prime area of Tsim An
45 Gokhl, which is the mountain on the easterly side of
46 this territory, which was used for goats, and this
47 particular mountain, which is marked out, was held by

Submissions by Mr. Grant

1 Wii Gaak. So that is like an enclave within the
2 Tsabux territory that is held by Wii Gaak, and it's
3 shown there, and I think you have that.
4 THE COURT: Yes.
5 MR. GRANT: I refer to that on page 115, my lord. Now, I would
6 like to go to page 117, because something was made of
7 the common hunting area around Kisgegas, and Mr.
8 Morrison described this in his evidence. On page 117
9 I've summarized it. It was agreed by the people of
10 Kisgegas there would be a common hunting area open to
11 the people of the village. There was also a common
12 trapping area. All the high chiefs of Kisgegas
13 decided to create this common area. They comprised
14 the Fireweed, Frog and Wolf clans, and it's depicted
15 of course in the -- on 378.
16 THE COURT: Where are you in your text?
17 MR. GRANT: Sorry, my lord, I'm on page 117.
18 THE COURT: Thank you.
19 MR. GRANT: In that middle paragraph.
20 THE COURT: Yes.
21 MR. GRANT: And all of the high chiefs of the Kisgegas village
22 decided to create the common area. They comprise the
23 Fireweed, Frog and Wolf clans. Smaex, of the House of
24 Tsabux, agreed with the creation of a common area.
25 However, it was -- it was understood that this common
26 area still belonged to Tsabux. So this is a territory
27 that the chiefs agreed to but it was within the Tsabux
28 territory. In this case, it was as a result of
29 agreement that Tsabux would let all of the chiefs
30 utilize the territory, and that's different than some
31 of the other common areas which Miss Mandell referred
32 you to the other day.
33 I would like to refer you now to the next
34 territory of Tsabux, which is the Red Creek territory.
35 This is 60 miles northeast of Kisgegas to the north of
36 Bear Lake, and there are 13 topographical features
37 attested to by Mr. Sampson, and Mr. Sampson of course
38 was born at Bear Lake in 1934. He's the present
39 holder of the name Haimadimtxw, a chief within Nii
40 Kyap's house, and he's describing -- in this area he's
41 describing this territory here on the eastern border
42 north of Nii Kyap territories and east of Wii Gaak.
43 THE COURT: Tsabux is spelled T-S-A-B-U-X?
44 MR. GRANT: That's right.
45 THE COURT: It's spelled different ways in -- no, I'm sorry,
46 it's spelled the same way, it's just two words in one
47 place, one word in the other.

Submissions by Mr. Grant

1 MR. GRANT: I believe it's one word in the pleadings and --
2 THE COURT: It may be one word here too.
3 MR. GRANT: Right.
4 THE COURT: It's a large space.
5 MR. GRANT: It's spread across.
6 THE COURT: Yes. It's one word, is it?
7 MR. GRANT: Yes. I'm not going to say anything further about
8 that, subject to hearing anything further in terms of
9 the defendant's position. I've summarized the
10 evidence in this section on that particular territory,
11 and it was testified to by Mr. Sampson, who was
12 cross-examined.
13 Then I would like to go to the Nii Kyap
14 territories, my lord. And of course these -- the
15 first one, the Babine River territory was described by
16 O'Yee, Joshua McLean, and he was cross-examined. He
17 described 15 geographical features and on the boundary
18 within the territory in their Gitksan names, and he
19 described -- I've summarized there, he described the
20 feast that he put up. Now, in cross-examination Mr.
21 McLean was asked if he knew when the house of Nii Kyap
22 left Gitangas. I'm at page 121, my lord. To this he
23 replies:
24
25 "The way it was told to me it was 100's and
26 100's of years ago that they left Gitangast.
27 They found a fishing site at Kisgagaas, and
28 that was one of the reasons why they moved."
29
30 And that's of course that whole migration. You heard
31 David Gunanoot's evidence of where he talks about the
32 move from Gitangas down to Kuldo and over to Kisgegas.
33 THE COURT: Well, that's not what Mrs. McKenzie describes
34 though, is it; didn't she describe the migration from
35 Gitengas to Kuldo and then to Kispiox?
36 MR. GRANT: And then to Kisgegas, oh, yes, yes, that's right.
37 THE COURT: I don't think she mentioned --
38 MR. GRANT: Gyolugyet did not go to Kisgegas, Gyolugyet went
39 straight to Kispiox. Nii Kyap went a different route
40 from the Kuldos, he went to Kisgegas.
41 THE COURT: Is Joshua McLean the person at this time who lives
42 at Kisgegas?
43 MR. GRANT: Yes. Joshua is one of the people that traps at
44 Kisgegas.
45 THE COURT: Thank you.
46 MR. GRANT: He lives there probably over six months of the year.
47 And then he described a territory at -- on the north

Submissions by Mr. Grant

1 side of the Babine River, and he's here referring to a
2 fishing site of Nii Kyap, which is within the
3 territory of Miluulak, and that's described in his
4 cross-examination.

5 Now, the next territory of Nii Kyap is that
6 described by Mr. Jack in his affidavit, Exhibit 596.
7 And Mr. Jack travelled with Peter Wilson, who formerly
8 held the name of Haimadimtxw, on his territory. He
9 was also taught it by David Gunanoot. Mr. Jack --
10 this is one of the witnesses who moved to Burns Lake
11 and stopped going to Sguingula around 1950, but he did
12 go to the Bear Lake territory twice a year between
13 1950 and 1982, and this is -- this is the territory to
14 the west of Bear Lake. And Thomas Jack, of course, is
15 one of those persons from the house that -- his
16 knowledge, because he lived at Bear Lake, he knew this
17 territory, but the -- but it's an example of where the
18 persons related by house are the -- are the proper
19 plaintiffs and not those who are members of particular
20 bands or band membership. The Bear Lake territory was
21 also depicted by Thomas Jack in his affidavit, and as
22 I say on page 123, my lord, he was born at Bear Lake
23 in 1929. He speaks both English and Gitksan and is a
24 member of Nii Kyap's House. He trapped at Bear Lake
25 until 1982, and he explained in cross-examination the
26 boundaries of the Dam Smaex, that's the Bear Lake, of
27 course, "Smaex" being Gitksan for "lake" -- or for
28 "Bear", territory is the same as the Paul Jack
29 registered trapline, but he agreed that he learned the
30 territory from his brother Paul Jack.

31 Now, the house of Nii Kyap owns the territory 40
32 miles northeast of the Village of Kisgegas, and I go
33 to page 124 and again we see that Thomas Jack
34 described 14 features of the territory at Bear Lake.
35 Now, this is, of course, an area that was described at
36 the Burns Lake feast as belonging to Nii Kyap, and
37 James Morrison testified to that.

38 The next territory of Nii Kyap, the fourth one, is
39 the Tutadi territory. So what I've covered now is
40 these territories down in this area, along in here and
41 here, and I'm moving up into this Tutadi territory.

42 THE COURT: The other two territories really could be one,
43 couldn't they, they're contiguous with only --

44 MR. GRANT: Yes, that's right. There's basically a delegation
45 within the house situation, and in this case, as in
46 the Gyolugyet case, they're split, as you recall on
47 Exhibit 5, Gyolugyet, these lines were not separated

Submissions by Mr. Grant

1 and they could -- it would not have any effect on the
2 action or the declaration of your lordship if this
3 line wasn't here, it's just an internal house matter
4 more than anything else.
5 THE COURT: The lake itself seems to be the boundary between
6 those two territories.
7 MR. GRANT: That's right.
8 THE COURT: Yes, all right.
9 MR. GRANT: That's right.
10 THE COURT: Thank you.
11 MR. GRANT: And of course the other Nii Kyap territory is the
12 one south of Kisgegas. That's the one Joshua McLean
13 utilizes and O'Yee utilizes and is still on.
14 THE COURT: The Tutadi property is the one that has been
15 excluded from time to time in the claim area?
16 MR. GRANT: It's the one Mr. Macaulay marked with yellow, I
17 believe, yep.
18 THE COURT: Yes, thank you.
19 MR. GRANT: Now, this is a territory owned by Nii Kyap, it's
20 northeast of Bear Lake 70 miles from Kisgegas. On
21 page 125, my lord, with respect to this territory, I
22 refer to the evidence of Mr. Morrison, who testified
23 about the split bear and the ptarmigan in relation to
24 the Tutadi Lake territory, and I've already referred
25 you to that and the utilization of crests as
26 establishing the territory and the uniqueness of this
27 ptarmigan that is up in that northeastern section.
28 Now, on page 126 Neil Sterritt, Sr., Solomon Jack,
29 Steve Robinson and Robert Jackson all spoke of the Nii
30 Kyap territory at Tutadi and said that it belonged to
31 Nii Kyap. David Gunanoot gave the history of his
32 great crest at the meeting of Carrier-Sekani chiefs in
33 Burns Lake. Now, what I say with respect to this
34 evidence, my lord, is that of course you have sworn
35 evidence of -- you have sworn evidence of the
36 territory by Neil Sterritt, who testified by way of
37 affidavit and otherwise, but also the reputation is
38 demonstrated through the knowledge and agreement of
39 these other chiefs. Now, Mr. Morrison, in his
40 evidence, did say that there was a dispute within Nii
41 Kyap's house as to who owned the territory, but that
42 was because the people did not understand that they
43 were all in Nii Kyap's house, and this of course is --
44 this is what came out in the Burns Lake feasts and
45 also in the evidence that your lordship heard, that in
46 fact of course these people were in Nii Kyap's house,
47 and that was that confusion that was -- arose as a

Submissions by Mr. Grant

1 result of band membership. And none of the chiefs
2 disagreed. Now, I have reiterated or referred to both
3 Mr. Morrison's evidence on the feast with respect to
4 this territory as the Burns Lake feast did focus on
5 this territory, amongst others, and that's on page
6 127, and I'm not going to repeat that except that the
7 photograph of -- there's a photograph of the crest on
8 the blanket, which is the crest of the Tutadi Lake
9 territory. That's Exhibit 381.

10 Now, the last territory, the fifth territory of
11 Nii Kyap, is in the far northeast corner, and it's the
12 notch that protrudes north of Nii Kyap in this area
13 here, and Mr. Sterritt testified to this.
14 Unfortunately, Mr. Gunanoot passed away before the
15 affidavit process was completed and was unable to give
16 the evidence. Once again, you see on page 128 that
17 this is a territory used by Muut of the House of Nii
18 Kyap and was also used by Haimadimtxw, a member of the
19 Wilnadahl of Nii Kyap. Now, in fact, Haimadimtxw is a
20 member of the House of Nii Kyap, my lord, and this was
21 reflected in the evidence of Mr. Sampson. A portion
22 of the territory runs through the centre of Kluatantan
23 Creek to the Kluatantan River.

24 I would like to go over to the far northwest to
25 the territory of Skiik'Mlaxha, who is presently Johnny
26 Wilson. And this is the territory of Awigii or Bowser
27 Lake. Now, this territory was previously owned by the
28 Stikine people and was transferred by them to
29 Skiik'Mlaxha in a peace settlement at an undetermined
30 date, and I say, my lord, it was probably at a time of
31 indirect contact in the early 1800's. Hence, the
32 Stikine though are predecessors to this territory.
33 The evidence though indicates that through the adaawk
34 this territory was previously owned by the Gitksan.
35 And I'm referring here to the Gunanoot evidence, and
36 that would be the commission evidence of Neil
37 Sterritt, Sr. -- I'm sorry, of Jessie Sterritt, that's
38 right. That should be Jessie Sterritt.

39 THE COURT: I'm sorry, where should that change be made?

40 MR. GRANT: You see on the bottom of the first paragraph under
41 Awigii, it says "Sterritt Commission", that's the
42 evidence of Jessie Sterritt.

43 THE COURT: Oh, yes.

44 MR. GRANT: Both David Gunanoot and Jessie Sterritt described
45 the Xsiisxw and they also referred to this territory
46 as formerly belonging to the Gitksan, and this is
47 consistent with the analysis of the adaawk by Miss

1 Marsden. So I say, my lord, that this territory is a
2 legitimate part of the Gitksan claim. And of course,
3 if your lordship finds that -- your lordship finds
4 that the exercise of sovereignty is a key date in
5 terms of the findings, I say that the evidence --
6 certainly there's indirect contact, there's evidence
7 of a gun, but the evidence is that -- and that's
8 consistent with the Stikine getting access through the
9 Russians or through earlier times from the coast, but
10 that it's before 1846 that this happened. Now, this
11 territory was confirmed by James Morrison in his
12 cross-examination, because he was cross-examined on
13 the Kitwancool territory. I just want to point out,
14 my lord, that the territorial boundary of Kitwancool
15 as shown in the histories, territories, and laws of
16 Kitwancool does not run in a straight line, and this
17 was testified to by Mr. Morrison and by Mr. Solomon
18 Marsden. Gerald Gunanoot, who had trapped in this
19 territory and learned its boundaries from his uncle,
20 the former Nii Kyap, testified to the boundaries. On
21 page 132 I refer to Mr. Gunanoot's evidence, and this
22 is important in terms of why these certain witnesses
23 were the ones who gave evidence. Mr. Gunanoot said:

24
25 "When the Beaver were getting to be medium size
26 then we start getting leery about trapping
27 anymore in that part of the area so that they
28 will grow again so we move to a different
29 location. Then we get the big ones, and that
30 will give the younger ones a chance to
31 increase. And this is why we do cover our
32 territories, the area. And from year to year
33 we move around. Okay. We might end up with
34 seven areas for example this winter. Next
35 winter we are in a different seven areas."

36
37 And Mr. Gunanoot himself had travelled there in the
38 fall of '87 and January of '86, and Johnny Wilson
39 knows the territory as it's described.

40 Now, Gerald Gunanoot explained that he testified
41 about being more familiar with the territory because
42 he was born there and was raised among the elders, and
43 he described the boundary around Treaty Creek, which
44 your lordship observed in the viewing, and this was --
45 and he confirmed that -- it's clear that Gerald
46 Gunanoot is unsure as to whether the peace settlement
47 occurred, his evidence was, very early 1900's, 1800's

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1 or maybe late 17's, but the evidence of David Gunanoot
2 and Jessie Sterritt, I say, pushes it back, although
3 it's certainly a proto-contact or early contact time.
4 And this is one of two territories, my lord, we agree
5 it was acquired post -- proto-contact at least.
6 On page 133 I refer to the --
7 THE COURT: Well, does the passage on page 130 relating to early
8 1800's relate to the same territory as the passage on
9 132, which refers to the very early 1900's, 1800's or
10 maybe 17's?
11 MR. GRANT: That's the same territory. That's the passage from
12 Gerald Gunanoot. The passage earlier is from David
13 Gunanoot, his uncle, and Jessie Sterritt, both of whom
14 are more elderly and knowledgeable about that. This
15 goes to the whole concept of the specialty. Gerald
16 Gunanoot knew the territory, he was less sure about
17 the time of acquisition, clearly from that answer.
18 MR. MACKENZIE: Excuse me, my lord, my friend was speaking about
19 this being one of two territories which the plaintiffs
20 agree was transferred in a post-contact period. Is my
21 friend referring to the reference in the Statement of
22 Claim to territories, the Amendment to the Statement
23 of Claim at particulars?
24 MR. GRANT: I'm not referring to particulars, I'm speaking from
25 memory. I don't have the statement in front of me if
26 my friend has some concern.
27 THE COURT: What do you say is the other one?
28 MR. GRANT: Well, I don't have the particulars in front of me,
29 and I realize that was my friend's or your
30 lordship's --
31 THE COURT: Mr. Mackenzie will know what the other one is that's
32 in the particulars.
33 MR. MACKENZIE: Well, I'm instructed, my lord, that the two in
34 the particulars are Kliiyem lax haa and Niist, and
35 that's why I rose, to ask whether or not my friend is
36 adding this one here, Skiik'mlaxha, to those.
37 MR. GRANT: That's right. I think my friend is referring to --
38 I want to go back to that, my lord, because I think I
39 said that it wasn't referred to in here. It's
40 certainly a territory referred to in the
41 proto-contact, and I want to go back to those
42 particulars. I don't disagree with what my friend
43 says, but I probably spoke a little too --
44 THE COURT: All right.
45 MR. GRANT: Without the particulars in front of me. But this
46 territory, what we say was acquired in the
47 proto-contact, and I think as my friend's framed it

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1 up, the question was related to post-contact, and this
2 we say was in the proto-contact period. So it's not
3 included in that list.

4 THE COURT: Well, it is post-proto if it's 1900's.

5 MR. GRANT: Yes -- oh, yeah, but, my lord, what I say is that,
6 you see, Mr. Gunanoot, really when he says very early
7 1900's, 1800's and maybe late 1700's, he didn't know.

8 THE COURT: No, obviously.

9 MR. GRANT: Okay. But David Gunanoot, his uncle, and Jessie
10 Sterritt know, and what's clear is that there is a gun
11 involved in that Xsiisxw, so it's clearly there is
12 some -- it's in the proto-contact period is our
13 argument.

14 THE COURT: Thank you.

15 MR. GRANT: Now, on page 134, Jessie Sterritt confirmed that
16 Johnny Wilson uses the Bowser Lake territory today,
17 and described the nature of its use. It's used right
18 up to the present time. And David Gunanoot, in his
19 commission, also testified to that.

20 I'd like to refer you now to the territories of
21 Miluulak, and there are four of those territories.
22 The present chief is Alice Jeffrey. Two of these
23 territories are close to Kisgegas and the third is
24 south of Tutadi Lake, and the fourth is just north of
25 Chipmunk Creek. So there is some disparity, although
26 they're all northern Frogs' territories, of course,
27 there's this one here Tutadi, there is this one here,
28 and then there's this one very large one, very close
29 to Kisgegas, and this one that goes right up the draw
30 from Kisgegas right up in this area. The Wii Tax or
31 Gunanoot Lake territory was described in evidence by
32 Robert Jackson, Sr., who was the present holder of the
33 name Xsem Gitgiigeenix. It is set out on page 135 of
34 my argument. He named 22 land features by their
35 Gitksan names. On page 136, Mr. Jackson was born on
36 the Haiwas territory at Dgil Dgila in the Driftwood
37 Range. His grandmother held the name Miluulak and his
38 grandfather held the name Wii Seeks, and he hunted and
39 trapped on this Gunanoot territory. My lord, I have
40 set out and summarized the evidence there, and I don't
41 think I need pursue it further with respect to that
42 territory, the acquisition, transfer at feasts, et
43 cetera. Now, that's the large territory southeast of
44 Kisgegas.

45 THE COURT: Yes.

46 MR. GRANT: Now, on page 138 I refer to the Sam Green Creek
47 territory, which of course was the subject of the

1 other matter in this court, and that is on the other
2 side of Shelf Ridge, and it's that very narrow
3 territory that goes up the draw. Mr. Jackson and his
4 son, Vince Jackson, hunt and trap in the territory,
5 continue to do so to the present day, and that's
6 described by Mr. Jackson in his evidence.

7 Then the third territory is the Two Lake Creek
8 territory. This is the one that is 80 miles northeast
9 of the village of Kisgegas on the north side of the
10 Sustut River, and that's a territory just south of
11 Tutadi. Mr. Sterritt has testified to this territory,
12 and again, he was instructed by the former Nii Kyap,
13 David Gunanoot, and by John Green and by Arthur
14 Sampson. John Green was a member of the House of
15 Miluulak. To the south of that territory, my lord, is
16 the territory of the Carrier-Sekani. He's heard this
17 territory described in the feast as belonging to the
18 House of Miluulak. I'm on page 139, my lord.

19 And the final territory of Miluulak is the Duti
20 River territory, Mika Dee Aa, which Sam Morrison
21 testified to. Sam Morrison is from the same -- he is
22 the brother of James Morrison, and he is of the same
23 house as James Morrison. He is now blind, my lord,
24 and he gave his evidence by way of commission --
25 sorry -- by way of affidavit, and he was
26 cross-examined in Hazelton out of court. And Sam
27 Morrison and his father, Simon, who held the name
28 Waiget, hunted and trapped on the territory of Wiigyet
29 to the south of the Duti River. James Morrison
30 described the boundaries of the territory at Chipmunk
31 Creek. Now, Sam Morrison testified that Duti River is
32 managed by Robert Jackson from the House of Miluulak,
33 and that's in his cross-examination on his affidavit.
34 He also referred to the feast being held by Alice
35 Jeffrey. Sam Morrison's father taught him that
36 territory when he was about 23 or 24. Now, you can
37 understand it a bit better when you look at the
38 geography, because here's the Wiigyet territory that
39 they would have worked in, Sam Morrison and James
40 Morrison, with his father, and the north side is the
41 Miluulak territory. And Sam Morrison was taught the
42 boundaries of the Miluulak territory by his father.
43 Sam Morrison -- well, Mr. Morrison trapped Chipmunk
44 Creek area until 1959 or 1963. I just -- this is an
45 interesting point: Miluulak's adaawk, supposedly
46 recorded by Barbeau, concerning the sighting of the
47 first white man at Bear Lake, was read to Mr. Sam

Submissions by Mr. Grant

1 Morrison, and his response about whether he knew it
2 was:

3
4 "I don't even know what this is. It's just a
5 joke. The name of Waiget's totem pole was
6 Milkst and on it was the grouse. The carving
7 on the totem pole was the night robin, but --
8 okay. Night drummer, that's the grouse. And
9 he acquired this crest when there was a fight
10 with -- there was a war with him and Xsuwii
11 Guus."

12
13 In other words, what you see here, my lord, is Mr. Sam
14 Morrison knew the Xsuwii Guus adaawk and refers to
15 that of Waiget; Waiget, as you remember, being his
16 father. But he -- but the reference to Miluulak's
17 adaawk to the first white man at Bear Lake is
18 something he did not know, and that's not surprising
19 because it's a very recent recording, relatively
20 recent. Also, he's not connected or related to
21 Miluulak, so there would be no reason for him to be
22 taught that adaawk about the first sighting.

23 THE COURT: Could you show me again, please, the Chipmunk Creek
24 property, territory.

25 MR. GRANT: Mm-hmm. It's this one here, my lord.

26 THE COURT: Yes.

27 MR. GRANT: Chipmunk Creek is right along the border.

28 THE COURT: Between Miluulak and Waiget?

29 MR. GRANT: That's right.

30 THE COURT: Yes, all right.

31 MR. GRANT: So they actually work this territory, but his father
32 taught him this northern Miluulak territory.

33 THE COURT: Yes, all right.

34 MR. GRANT: They had a long presence there.

35 THE COURT: I'm sorry. And the Duti River territory -- I'm
36 sorry, no.

37 MR. GRANT: That is the same.

38 THE COURT: Is it, or is that not the one that's immediately
39 south of Nii Kyap?

40 MR. GRANT: No. Just a moment, my lord. No. This is Duti
41 River right here, this is the Duti River territory.

42 THE COURT: All right.

43 MR. GRANT: Okay. So when you refer to this --

44 THE COURT: What are you calling the one south of Nii Kyap?

45 MR. GRANT: This one here is Two Lake.

46 THE COURT: Two Lake?

47 MR. GRANT: Two Lake territory.

Submissions by Mr. Grant

1 THE COURT: Oh, yes.
2 MR. GRANT: And I've listed it and it's been described by Mr.
3 Sterritt.
4 THE COURT: Yes, all right, thank you.
5 MR. GRANT: Now, I would like to move to the territory of
6 Haiwas, and there's only one of those territories.
7 I'm on page 142. Now, Haiwas is a separate house but
8 of the same clan as Miluulak. They're both from
9 Kisgegas, they're both of the same Wilnadahl, they now
10 have separate territories, and Haiwas originated in
11 Miluulak's house. The Haiwas territory, which was
12 testified to by Robert Jackson, Sr., is east of
13 Kisgegas and bounded by the Driftwood -- that should
14 be the "Driftwood Range", my lord, not the "Driftwood
15 Theatre", and west of the Kotsine Mountain.
16 THE COURT: Yes.
17 MR. GRANT: And this is this territory here.
18 THE COURT: Yes.
19 MR. GRANT: Directly to the east, and it moves up, as you can
20 see, comes within -- it's surrounded on two sides by
21 Nii Kyap, and that looks rather strange, but what you
22 can see is there's this mountain in this range here,
23 and this draw, and there's actually a height of land
24 that goes around like that.
25 THE COURT: Yes.
26 MR. GRANT: So it's logical -- it's not logical on a map, but
27 it's logical on the land, and that of course is
28 something to be remembered with respect to all of
29 these boundaries. They may look strange, but they
30 make a lot of sense when people are travelling them.
31 THE COURT: On our view did we -- we stopped on Kotsine Mountain
32 first and then went on to Bear Lake?
33 MR. GRANT: That's right.
34 THE COURT: Yes, all right.
35 MR. GRANT: That's right. And we overlooked Bear Lake.
36 THE COURT: On the second stop.
37 MR. GRANT: Yep.
38 THE COURT: Yes, thank you.
39 MR. GRANT: Now, Mr. Jackson was directly questioned about the
40 Carrier-Sekani claim to the Driftwood Range territory,
41 and he answered:
42
43 "I explained to them -- that once belonged to,
44 or did belong to Lax Seel, which is a Frog
45 Clan. And William Charlie is Lax Gibuu. So
46 there is no way Lax Gibuu can look after Frog
47 territory. And he understands that, but

Submissions by Mr. Grant

1 nevertheless they still say that's their
2 boundary, which is Sekani didn't come from --
3 from William Charlie. When I stated at this
4 Frog, to William Charlie he never answered me
5 or comment about it. The only thing I ask him
6 was -- was one question. I ask him whose
7 territory that was and his answer was that it
8 was Lax Seel territory (Driftwood Range)...I
9 know he knows that -- who's the rightful owner
10 on that territory. And it's clear to my mind
11 he knows -- he's got the knowledge that
12 rightfully belong to Miluulak."

13
14 Now, that is with -- that is with respect to this
15 territory. And you must recall that here what's being
16 referred to is that Haiwas originated from Miluulak,
17 but in his evidence Mr. Jackson was clear that Haiwas
18 was a separate house. And I've given the reference to
19 that on the bottom of page 142. And he also was clear
20 in his cross-examination that Haiwas was responsible
21 for this territory. So -- but it's from the Miluulak
22 Wilnadahl, if you follow that point, because they
23 are -- they originated out of the same house.

24 Now, the House of Niist owns two territories north
25 of Kispiox, and the present holder is David
26 Blackwater. Now, it's very important to remember that
27 Niist is the Wolf clan and that Walter Blackwater, who
28 testified to these two territories, is from the House
29 of Niist. Now, Walter Blackwater was born at
30 Blackwater Lake, Damdochax, and he grew up and his
31 grandfather took him to the Niist territory at Kotsine
32 Creek. He moved -- he didn't move to Kispiox until
33 1956. Until that time he lived at Blackwater, and
34 after that time he moved back and forth between the
35 territory and Kispiox.

36 THE COURT: I'm a little surprised by the reference to the fact
37 that they're north of Kispiox. They're a long way
38 north of Kispiox.

39 MR. GRANT: Long way north of Kispiox, and you're right. It
40 could be in the affidavits, it's a geographical
41 connection, but yes, it's way up in here.

42 THE COURT: Yes, that's fine.

43 MR. GRANT: Of these two territories. And it would equally make
44 sense of relating them to Kuldo and Kisgegas on other
45 affidavits. Now, the Kotsine Creek territory, my
46 lord, the significance of that -- that northern one is
47 that it's a border territory of Gitksan with the

Submissions by Mr. Grant

1 Taltan. I've referred to the sources on page 145, and
2 the fact that Mr. Blackwater referred to photographs
3 of the territory, those at volume 2 is with reference
4 to Mr. Sterritt's photo albums. And Mr. Benson,
5 testifying to the Gyolugyet territory, confirmed that
6 the territory to the east of Gyolugyet on the north,
7 the northern Gyolugyet territory is Niist territory.
8 Now, again, Mr. Blackwater demonstrates his knowledge
9 of this distant territory by his description of the
10 features at 146. He explained how Kotsine Creek got
11 its name:

12
13 "And the reason why they -- it's called Maxhla
14 Nihl Tsenden is because there is two creeks
15 coming from both ends, and Maxhla means over,
16 and that's one going to the Skeena and one
17 going to the Nass, and that is why it is called
18 Maxhla Nihl Tsenden."

19
20 And what he is referring to there is that the
21 territory, the creeks going both ways. The
22 responsibilities within the House of Niist are with
23 Gibeumgyet a sub-chief within the house, to look after
24 it, and again Mr. Blackwater confirmed that:

25
26 "It's a vast territory, but they are different
27 people that hold -- that are responsible for
28 different parts of the territory in the House
29 of Niist."

30
31 Then there is a part of the territory in the northwest
32 corner given to the House of Niist by way of a peace
33 settlement called Xsiisxw. This territory is in a
34 bulge because:

35
36 "It didn't belong to us to begin with, but
37 because of the murder it was a payment from the
38 Stikine people."

39
40 And he described this in re-examination and explained
41 that the territory does not go past Maxhla Biluust
42 Maawxs. Now, this is the area that I'm referring to
43 in the particulars as post-contact Xsiisxw, my lord,
44 not the whole territory, but you see this bulge that
45 comes over here, so this area in here was acquired as
46 a result -- -- it was acquired as a result of a
47 Sxiisxw, and this was a later Sxiisxw, the evidence

1 demonstrates. That's just this part, not the entire
2 territory. And again, that's a huge territory but
3 it's subdivided within the house, and we could have
4 easily depicted on 646-9-A, as we did with Nii Kyap
5 and Gyolugyet by having subdivisions, but we did not
6 do so. The next territory is that of Taax Tsinihl
7 Denden on page 147, and again Mr. Walter Blackwater
8 described this. It's 16 miles north of Kuldo.
9 Eighteen geographical points are referred to here, and
10 I've pointed that out to your lordship on the map.

11 The next territory is that of Gyolugyet, Mrs.
12 McKenzie's territory. As I set out on the beginning
13 of 148, each of the chiefs of her house share a
14 portion of the territory. These are Madeek, Hla'oxs,
15 Kwamoon and Gadilo'o. They're all in her house at
16 this time. I've summarized the history of her
17 acquisition of the name, and I go to page 149, my
18 lord, and she explained -- although she herself had
19 not travelled on the territory, she explained the
20 maintenance of the boundaries in her evidence. She
21 said:

22
23 "Because there are witnesses there, the Head
24 Chief is there to witness it and another thing
25 too, where our territory is, there are other
26 territories that he has to go through to get to
27 our territory. So this has to be explained in
28 the feasting that the people up there, my
29 neighbours, our neighbours around our territory
30 if they see him they know where his destination
31 is, where he is going to go and trap."
32

33 And this is with respect to announcing at the feast
34 that her husband would be allowed to go up on that
35 territory. Now, in 1978 Albert Tait talked to Mrs.
36 McKenzie specifically about the mountains, creeks and
37 rivers on this territory, and in 1983 he told her he
38 wanted to leave her with everything he knew and
39 understood -- that should be not "his", my lord, but
40 "this territory" from his father Luus. And then she
41 describes the importance of the adaawk. As I say on
42 the next page, she had not been on this territory but
43 travelled to her husband's. And on the second -- on
44 page 150 she says, I refer to her evidence, that she's
45 maintained contact or been kept informed about what's
46 happening on the territory in the last 20 years. The
47 neighbours, like Delgamuukw and Djogaslee have gone

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1 through her territory to get to their own, and that is
2 apparent when one sees the relationship of these two.
3 Djogaslee territory is in along the side here to
4 acquire going this way, and the Delgamuukw territories
5 are also to the east, so that they travel in these
6 territories and they watch this one. Now, this is one
7 of the less accessible territories at this time, my
8 lord, that is accessible by contemporary routes.

9 THE COURT: I have a recollection that someone told me that this
10 territory, Gyolugyet, was nearly 5,000 square miles.
11 That couldn't be right?

12 MR. GRANT: No.

13 THE COURT: That didn't seem to be right.

14 MR. GRANT: I think that --

15 THE COURT: I'd like to try to remember that.

16 MR. GRANT: I don't have the reference, but as I recall, during
17 the cross-examination of Mrs. McKenzie, she didn't
18 know the size.

19 THE COURT: Mm-hmm.

20 MR. GRANT: And I can't recall if she was -- if some very large
21 figure was put to her on cross that was clearly not
22 correct. I recall something about that as well, my
23 lord, and I can --

24 THE COURT: That would be 20 percent of the total territory,
25 it's not even close to that.

26 MR. GRANT: It's certainly not that size.

27 THE COURT: There were bigger territories than that too, I
28 think.

29 MR. GRANT: That's right.

30 THE COURT: All right, thank you.

31 MR. GRANT: Now, Mr. Benson, on page 151, was given permission
32 by Mrs. McKenzie to describe and speak in respect to
33 the Gyolugyet territories, and he was a member of the
34 House of Luus from the village of Kuldo, and he gave
35 it by way of affidavit. And in his evidence he
36 divided the Gyolugyet territory into three parts, and
37 each part was described separately in the affidavit.
38 So there's that distinction between how he described
39 it and how it was on Exhibit 5, but subject to what
40 I'm going to say, I -- on that, the division isn't
41 really important in terms of your findings, because
42 all three portions are Gyolugyet's. He described that
43 he actually went out there with Marianne Jack, and I
44 referred to -- refer to that on page 152. Now, if you
45 look at the three sections of the territory, my lord,
46 the Kuldo Creek section is the southern most one, and
47 he was instructed about this territory by Abel Tait,

Submissions by Mr. Grant

1 the former Luus, on page 152. Now, Mr. Benson
2 identified land features, including Kuldo Mountain,
3 and he testified that to the west of this territory is
4 the territory of Antgulilbix. And in
5 cross-examination he corrected his affidavit to say
6 that the territory of Gyolugyet is on both sides of
7 Xsagan Gaxda, that's Kuldo Creek, my lord, and that
8 the boundaries are the mountains on the left side. He
9 learned about the territory of Kuldo Creek from
10 Mathias Wesley and not from Phillip Brown. However,
11 Phillip Brown told him that this territory belonged to
12 Gyolugyet. Now, the provincial defendants, in their
13 summary of argument focus on the southern territory of
14 Gyolugyet and the apparent discrepancy between Mary
15 McKenzie and Richard Benson's evidence. Now, if you
16 look at Mary McKenzie's evidence, my lord, she
17 described this entire territory with reference to
18 certain geographic place names, and the very first
19 name she refers to is Xsagan Gaxda or Kuldo Creek.
20 She goes on to explain -- and I've given you the
21 citation -- that all of these creeks, including Kuldo
22 Creek, are inside the territory. She then goes on to
23 explain the territory goes with the adaawk. She did
24 not describe the adaawk in detail in her evidence
25 relating to this territory. However, you subsequently
26 heard an example of a detailed adaawk in the evidence
27 of Art Matthews that I've referred you to earlier.
28 Now, Mrs. McKenzie confirmed that when her grandmother
29 taught her the adaawk she described the territory by
30 the creeks and the mountains. These were the same
31 creeks and mountains described by Mrs. McKenzie in her
32 own evidence, and this was her cross-examination by, I
33 believe, Mr. Plant. Mrs. McKenzie went on to explain
34 that this very large territory was actually divided
35 between sub-chiefs within the house. Hlo'ox utilized
36 and managed the territory around Kuldo Creek, Madeek
37 utilized the territory around Xsa'an Lo'op, and
38 Kwamoon utilized the territory around Sankisoots.
39 Therefore, although it's very large, it's subdivided
40 between the three chiefs, and this is what you see in
41 646-9-A and in Mr. Benson's affidavit.

42 THE COURT: I think, Mr. Grant you've got quite a ways to go in
43 this territory. I think we should adjourn until two
44 o'clock, please.

45 MR. GRANT: Yes.

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

Submissions by Mr. Grant

(LUNCHEON ADJOURNMENT TAKEN AT 12:30)

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

Graham D. Parker
Official Reporter.
United Reporting Service Ltd.

Submissions by Mr. Grant

1 (PROCEEDINGS RESUMED PURSUANT TO AN ADJOURNMENT)

2

3 THE REGISTRAR: Order in court.

4 THE COURT: Mr. Grant.

5 MR. GRANT: Thank you, my lord.

6 THE COURT: I am on page 154, Mr. Grant. Where are you?

7 MR. GRANT: I am on page 154.

8 THE COURT: All right, thank you.

9 MR. GRANT: My lord, I was talking about this territory of
10 Gyolugyet and of course this territory here that I
11 focus on, the Kuldo Creek territory, is the southern
12 most of those three territories on this map. It is
13 the one that has Kuldo Creek and there is two
14 territories with the name of Kuldo Creek, this is one
15 of them, and Mauus is the other one. But the
16 significance here, my lord, is -- of this whole
17 proposition made by the other side is whether Kuldo
18 Creek itself is the boundary or the height of land and
19 the boundary described here shows the height of land
20 as belonging to Gyolugyet and it includes the height
21 of land, the watershed of Kuldo Creek, rather than
22 Kuldo Creek itself.

23 Now, I'd like to go through this because this is
24 one of the -- this is one of the three examples
25 utilized by the Provincial Defendant challenged, the
26 territorial ownership. Now, the affidavit -- the
27 Provincial Defendants in their argument make a major
28 issue of this boundary of Kuldo Creek, and the
29 affidavit of Mr. Benson does appear to be different
30 from his evidence, but Mr. George did not rely on the
31 affidavit but on the evidence of cross-examination to
32 map Exhibit 646-9A. Now, this distinction is that
33 distinction between the creek itself, the boundary, or
34 that height of land. And Mr. Sterritt explained his
35 misunderstanding with respect to the mapping at Kuldo
36 Creek.

37

38 "Q...Now, Mr. Sterritt, if you'll look at the
39 southern portion of the territory..."

40

41 This is of course in cross-examination:

42

43 "...and I would ask you if you see any
44 adjustment in the boundary referred -- in the
45 southern portion as a result of information
46 came to you after that map was prepared?

47

Submissions by Mr. Grant

1 A. Yes. Here is where I was having --"

2

3 I am sorry, this I believe is in direct at this point:

4

5 "Here is where I was having -- personally was
6 having a great deal of difficulty in getting
7 this straight, partly because of the name of
8 the creek, Xsagan Gaksea....Which is Kuldo
9 Creek. It was -- as you go up that creek and
10 swing around to the left, that's what's known
11 on the map as Kuldo Creek, and it's what I
12 talked about this morning in relation to Mary
13 Johnson's, the map of Antgulibix and Tsibasaa,
14 Dam Ansa Angwas....Richard Benson had clarified
15 that there was a name change at the junction
16 downstream from that river -- or from that
17 creek when it entered Xsagan Gaksea....In any
18 event, I was having trouble determining where
19 the boundary of Gyolugyet went in this area,
20 and subsequently, during the commission of
21 Richard Benson, he identified that the boundary
22 continued along the height of land south of
23 Kuldo Creek, down to the junction of Kuldo
24 Creek and what is locally known as Little Kuldo
25 Creek or Gwiis Xsagan Gaksea....And that's
26 under the name of Mauus...on the map.

27

28 Q. That is on the map that's in front of you?

29

30 A. Yes. So there is a change to go
31 approximately through the name Mauus and on
32 down to the junction of Little Kuldo Creek and
33 Big Kuldo Creek.

34

35 Q. And did that change conform to the evidence
36 of Richard Benson?

37

38 A. Yes, it did."

39

40 And then he says:

41

42 "A. And the other change is that the line
43 should go through the lake at the head of Kuldo
44 Creek, which I described this morning.

45

46 Q. All right. Apart from the evidence of
47 Richard Benson on commission, was there any

1 other information about that change..."

2

3 And he refers to the information from Pete Muldoe and
4 Jeff Harris Senior. Then he is asked if Exhibit 9-A,
5 646-9A, the map, reflects the changes he's been
6 informed, and he says:

7

8 "A. Yes. The area that we are talking about is
9 very close to New Kuldo, and this black line of
10 9-A corresponds to the changes that I am
11 talking about, as well as the change in
12 Gyolugyet's territory to exclude Xsu Wii Luu
13 Dagwigit....at the head of Taylor River".

14

15 Now, what I say, my lord, is Mr. Sterritt clearly
16 delineated the distinctions in the mapping process.
17 The evidence of Mr. Benson and Mrs. McKenzie is not
18 inconsistent on this point. The Province makes much
19 that it is. I say Mrs. McKenzie indicated that Kuldo
20 Creek was one of the principal creeks within her
21 territory. Mr. Benson clarified in his evidence on
22 cross-examination that the boundary followed the
23 height of land to the west of Kuldo Creek. This is
24 the evidence relied upon by Mr. George to depict the
25 territory on 646-9A. Now, of course Mrs. McKenzie
26 gave her evidence in May 1987, and Mr. Benson gave his
27 evidence in November of 1987, and Mr. Sterritt gave
28 his evidence on September 14, 1988.

29

30 The defendants did not cross-examine Jeff Harris
31 Senior who testified as to the territory of Mauus at
32 Kuldo Creek on this boundary. Mr. Harris' affidavit
33 is consistent with the evidence that I have described
34 of Mrs. McKenzie, Mr. Benson and Mr. Sterritt. In
35 fact, the Provincial Defendant raised nothing in
36 cross-examination with respect to the Kuldo Creek
37 territory, Mauus, that is in cross-examination of Mr.
38 Harris Senior.

38

39 Now, it is significant that Mr. Sterritt obtained
40 information on the boundary from Jeff Harris Senior,
41 and of course this was known to the defendants when
42 they cross-examined Mr. Harris. That would have been
43 in December 1988, and Mrs. McKenzie goes on to
44 indicate that she identified the territories mapped
45 and exhibited 5 in the proceedings. So the
46 distinction is when a person says that the territory
47 includes Kuldo Creek it's understood, and when Mrs.
48 McKenzie says Kuldo Creek is within the territory it

1 is understood that this is the -- is it understood
2 that this is the boundary or that that's included
3 within. The evidence -- the overwhelming evidence of
4 all of these witnesses is that it follows the height
5 of land and clearly there are small creeks going into
6 Kuldo Creek which are part of that territory as they
7 are part of the watershed of Kuldo Creek, and that was
8 where the apparent discrepancy may have appeared. But
9 I say on the sworn evidence of all four witnesses,
10 Jeff Harris Senior, Mary McKenzie, Richard Benson, and
11 Neil Sterritt, the evidence on the whole is consistent
12 with that boundary.

13 There are two additional territories, the
14 Shanalope Creek territory and the Taylor River
15 territory. Now, Mr. Benson gave evidence of these as
16 well and of course Marianne Jack, the relation of Mrs.
17 McKenzie. She -- Mr. Benson travelled on the
18 territory with her.

19 Now, on page 159, I -- it is significant, my lord,
20 that Mr. Benson referred to -- referred to the
21 neighbours of the Gyolugyet territory as being
22 Niist -- Niist, Skiik'm Lax Haa and Djogaslee. I am
23 on page 159.

24 THE COURT: Is this the centre of the three?

25 MR. GRANT: No.

26 THE COURT: Is the --

27 MR. GRANT: The centre one is Shanalope Creek, it is on 158.

28 THE COURT: It is the centre one.

29 MR. GRANT: Yes, the northern one is Taylor River.

30 THE COURT: All right.

31 MR. GRANT: And so Mr. Benson testified that Niist being a
32 neighbour here, which is consistent with the evidence
33 of the other witness, testified his evidence of
34 Skiik'm Lax Haa is consistent with Jerry Gunanoot's
35 evidence. This is consistent with Walter Blackwater's
36 evidence, and this is consistent with -- come back to
37 this, I believe it's Walter Wilson testified to this
38 if I remember rightly, and Djogaslee. And so he
39 describes each of the ones surrounding this northern
40 territory which is the Taylor River territory. Taylor
41 River is up in here. Now, once again at page 159, I
42 have put in the reference of Mr. Sterritt's
43 cross-examination on the difference between the
44 interrogatory map and the boundary as depicted on
45 646-9A. He said, in answer to a question:

46

47 "I just want you to look at this map and ask you

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1 if you received subsequent information from a
2 hereditary chief or hereditary chiefs, which
3 led you to conclude there was a change in the
4 boundary as it's described in this map?"
5

6 Mr. Sterritt said:
7

8 "A. Yes. I had always been told that the
9 creek, Xsihl Guugan....which appears on
10 topographic maps as Taylor River, that that
11 belonged to Gyolugyet. And the extrapolation
12 that I made was that the territory of Gyolugyet
13 went to the very headwaters of the Taylor
14 River.
15

16 Q. And that's what is shown on this exhibit?"
17

18 That's the interrogatory map, my lord.
19

20 "Q. Did subsequent information you received
21 alter that boundary?
22

23 A. Yes, it did. I had been told about a creek
24 named Xsu Wii Luu Dagwigit....A creek named Xsu
25 Wii Luu Dagwigit was somewhere in the north end
26 of this territory, and David Gunanoot actually
27 first described that creek to me as a trail
28 route that he had taken from the Bell-Irving
29 River over to the Upper Nass River. And in --
30 I eventually located where that was, and in
31 doing that, I also had discussions,
32 subsequently, that explained that Xsu Wii Luu
33 Dagwigit was the territory of the House of
34 Niist.
35

36 Q. And from whom did you obtain those
37 instructions?
38

39 A. Walter Blackwater.
40

41 Q. Niist is the hereditary chief who has
42 territory north of Gyolugyet?
43

44 A. And east."
45

46 And so he says -- on page 160 near the end of that
47 quote:

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1
2 "Q. Now, in -- was there a change in the
3 boundary in the northern portion of Gyolugyet's
4 territory that borders with Niist?

5
6 A. Yes. The boundary followed the height of
7 land south of Xsu Wii Luu Dagwigit until it
8 crossed where -- just below where Xsu Wii Luu
9 Dagwigit entered the main Taylor River.

10
11 Q. All right. And can you tell us at about
12 what time it was that you received the
13 information that led to that change?

14
15 A. In 1987."

16
17 Now, this change, my lord, is reflected from the
18 interrogatory map, is reflected in 646-9A, and it is
19 apparent once again the description given by Mr.
20 Sterritt that the reason for the discrepancy between
21 the interrogatory map and 9-A at this point is as a
22 result of a misunderstanding by Mr. Sterritt in which
23 he extrapolated with respect to the Taylor River
24 belonging to Gyolugyet. And this mistake is reflected
25 in the final map.

26 And then Mr. Benson goes on to describe that he
27 went through all three of these Gyolugyet territories
28 with Marianne Jack in the 30s and 40s and this is how
29 he learned about the territory. And he testified in
30 1935 going for four days up the right side of Taylor
31 River, and this is where they are talking about here
32 is actually quite far north, they go right up along
33 the Taylor River up into this area here and they went
34 for four days up there.

35 THE COURT: Does the Taylor flow southward into the Nass?

36 MR. GRANT: Yes, the Taylor flows -- that's right, it flows down
37 here to the Nass at this boundary and of course the
38 Nass is the boundary between the northern and the
39 central Gyolugyet territory. And then again it is
40 consistent on page 162, Mr. Benson, in his
41 cross-examination I think by Mr. Plant, confirmed that
42 the territory north of Xsihl Guugan was Charlie
43 Sampson, that is Niist, and so he went right up into
44 that area and was told across there is where Niist is.

45 And Mr. Benson -- the last quote, he goes on and
46 describes his travel through the territory and the
47 place that he knew, and on page 163 part-way down that

1 quote he says -- I am sorry, the top:

2
3 "I know all these place on these mountains and
4 you see what they told me, that's what I really
5 like to tell, you see, because I supposed to
6 tell the truth. That's what you said when I
7 began. Nothing but the truth. That's what --
8 that's what I am doing...I am telling what I
9 already been -- I walked through and I see
10 these creeks and I walk through there and I
11 know where they are and I know who it belongs
12 to. They tell me right beginning before I
13 start even my uncle. Well, they had a story
14 what spread out, you know, about Gyolugyet and
15 they start telling me, but I can't remember
16 them all. But the only thing that I remember,
17 that's when I go on it and trap through there
18 and I really been many times on it. And just
19 that one I really know, that's what I am trying
20 to tell the truth about it and nothing but the
21 truth. That's true. That's what I am -- I'm
22 doing the best I could."
23

24 What he is describing in that quote in
25 cross-examination is that he is saying as Stanley
26 Williams did, I have walked it, I know it and I know
27 who it belongs to, and of course that's why he
28 testified on behalf of Gyolugyet because he knew the
29 territory so well.

30 The next territory or house that I wish to speak
31 to is the territories of Djogaslee, and Djogaslee is a
32 member of the Frog Clan from Gitanmaax. The present
33 holder of the name Djogaslee is Walter Wilson, and he
34 testified to three territories. Before I get into
35 these, my lord, I want you to appreciate the comment
36 in the third paragraph that Djogaslee and Axtii Dzeek
37 are two chiefs from the same house. In
38 cross-examination, Mr. Wilson explained this. Now,
39 Mr. Wilson, my lord, gave evidence twice; once with
40 respect to fishing sites and once with respect to the
41 territories and that was out of court. And these
42 pages -- references here are to Exhibit 602A.

43 THE COURT: I take it then, Mr. Grant, that you dispute the
44 evidence that suggests that there was no settlement at
45 Gitanmaax.

46 MR. GRANT: Oh, yes. Even at the time of contact?

47 THE COURT: Yes.

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1 MR. GRANT: Yes, yes. We don't agree with that proposition, my
2 lord.

3 THE COURT: Do you say that it was part of Temlaxham or do you
4 say it was a separate centre, on the other side of the
5 river of course?

6 MR. GRANT: Yeah. Well, except to the extent that Temlaxham is
7 such a spread out place but it appears the adaawk and
8 the historical evidence that the community of
9 Gitanmaax, and I believe Mr. Adams will come back to
10 this this week, but the community at Gitanmaax arises
11 from the Wolves -- I am sorry, from the Frogs and the
12 Wolves that came into Gitanmaax and that's -- so when
13 you look at Djogaslee you look at Gyetm galdoo, you
14 look at these people whose territories are close to
15 Gitanmaax, the history takes them to Temlaxham. So it
16 appears that people that were left came to Gitanmaax.
17 Of course the name is "people of the fire", I believe
18 Walter Wilson described that in his evidence. It may
19 have been another witness but it's with reference to
20 the method of fishing at night in the river with
21 torches and we say that certainly predates the
22 contact.

23 Now, Mr. Wilson described the successorship of the
24 names of Djogaslee and Axtii Dzeek back to his great
25 grandmother's sister on his mother's side. Of course
26 there is a genealogy of this as well. He said the
27 successor to his name will be the present of Ax
28 Weegasxw. He described how three houses split and
29 moved into Gitanmaax from T'emlaxamit and established
30 a settlement at Mission Point and at Sagat. When the
31 houses split they were in separate physical buildings,
32 but today there is only one house. Mr. Wilson
33 described how the chiefs controlled and conserved the
34 fish runs and that they did not need the permit system
35 of the Department of Fisheries. And he went through
36 the process of showing where Axtii Dzeek sat in the
37 long house and stayed, and Djogaslee -- and they came
38 apart and they came together. But these are two
39 leading chiefs of the same house at this time, the
40 time that your lordship is concerned with now.

41 Now, the first territory is the Irving Creek
42 territory and this is the one north of the Nass and
43 east of the junction of the Nass and Bell-Irving.
44 Now, this is a territory that Mr. Wilson -- that is
45 located south of the Skiik'm Lax Haa and west of
46 Gyolugyet's territory that I have taken you to and to
47 the west is the Kitwancool Gitksan.

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1 Daniel Skawill showed Mr. Wilson's father and his
2 sister this boundary. He showed him the area and he
3 also showed the area to William Wale and Ben Wale,
4 both from the House of Djogaslee, they were Walter
5 Wilson's uncles and they would trap together.

6 Now, this is the history of this particular
7 territory according to Mr. Wilson.

8
9 "Oh, yes that's where he (Daniel Skawill) spent
10 most of his time in the early days. He's a
11 real good trapper. And he had to put up a big
12 feast, and he didn't have enough money and the
13 hides and everything so he talked to my great
14 uncle Willie, if Willie could help put up that
15 big feast. It costs really a lot of money and
16 hides, everything. So Willie did it. That's
17 how Willie got that area. In return to pay
18 Willie back, Daniel give him that area. So
19 every village, the whole eight village were
20 there to witness everything what was happening,
21 so everything knows. Every high chief in each
22 village know the transfer of that land to
23 Willie Wilson and he knows Daniel Skawill gave
24 them the -- they walked the boundary them days.
25 So that's how we know the boundary, the
26 traditional boundary, not the one DIA give out
27 them days."

28
29 Now, this is another situation where, in
30 accordance with the rulings, it is an internal
31 transfer among the Gitksan but a transfer from Skiik'm
32 Lax Haa, Daniel Skawill, to Djogaslee.

33 Now, Mr. Wilson says that Axtii Dzeek is the
34 person who deals with this Gail Creek territory and
35 that really should be reflected in the next passage,
36 the next territory.

37 He testified in cross-examination, my lord, that
38 the territory at Irving Creek was transferred from
39 Daniel Skawill to Djogaslee, but it was still Gitksan
40 territory before that transfer. Of course Daniel
41 Skawill is a Frog as well, and Mr. Wilson described an
42 An Tsok, which is similar to the term used for other
43 places of wealthy resources; it was a free area for
44 everyone, and that's a camp within that territory.

45 The next territory I wish to speak to of Gail's --
46 I am sorry, of Djogaslee's is the Gail Creek
47 territory. And so it's unusual for a Frog chief from

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1 Gitanmaax to get a territory so far north but this is
2 because of the relationship that he got this one that
3 I just spoke about.

4 The next territory of Djogaslee that I wish to
5 refer to is this territory here, my lord, and that's
6 the Gail Creek territory on the Babine. It is on the
7 south shore of the Babine on the even boundary just
8 south of Miluulak's territory. And that's referred to
9 as Djogaslee Axtii Dzeek, Axtii Dzeek being a chief
10 within his house who manages the territory for the
11 house.

12 Now, this is the territory about 25 miles
13 northeast of Gitanmaax on the south shore of the
14 Babine River. And I have reiterated what he's
15 learned, how he's learned about this territory and who
16 from, and he said in cross-examination that Djogaslee
17 Axtii Dzeek and Ax Weegasxw own the territories of
18 Djogaslee but here this one is being managed by Axtii
19 Dzeek. Now, there is another territory which is the
20 Sagat territory, and that's on the Bulkley, it is
21 further south, it's right in here, my lord.

22 THE COURT: This is Sagat.

23 MR. GRANT: This is Sagat, this territory here. Now --

24 THE COURT: This one is also called Axtii Dzeek?

25 MR. GRANT: Axtii Dzeek, yes. Axtii Dzeek manages these two
26 territories and Djogaslee himself manages this
27 northern territory but they are all within the one
28 house. Now, this is a territory that's on the border
29 with the Wet'suwet'en, and Sagat is a geographical
30 feature and the territory that he referred to as the
31 people who remained behind, it is one of the features
32 of their adaawk, the people from Tamlaxham, and you
33 can see its proximity to Tamlaxham.

34 Now, on page 169, and this is from his
35 cross-examination, Mr. Wilson does say that the
36 boundaries of this territory go to Boulder Creek but
37 he does also say in cross-examination his house is not
38 claiming to that creek because of the Wet'suwet'en
39 House of Wah Tah Keg't claims to Porphyry Creek and
40 the boundary has to be settled in a feast.

41 Now, my lord, it is my submission that this
42 evidence indicates a long-standing common border
43 between the Gitksan and Wet'suwet'en. The difference
44 between what Djogaslee says and what the Wet'suwet'en
45 say is not one leading to a major dispute in this
46 situation but there is that evidence and, again, it's
47 in evidence of a claim and not in evidence of proof.

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1 And when Mr. Rush was referring to the Wet'suwet'en
2 territories as was Ms. Mandell, they clearly
3 established through the evidence of Bazil Michell,
4 Madeline Alfred, and Henry Alfred that their territory
5 goes to Porphyry Creek, so the discrepancy is a very
6 short one that is on that -- the way you can describe
7 it is that long, straight stretch there on the highway
8 and one end is Porphyry Creek and the other end is
9 Boulder Creek, it is about two miles.

10 THE COURT: Dangerous piece of highway.

11 MR. GRANT: Judge Hutchinson hated driving it because of the
12 tickets on that section.

13 THE COURT: All kinds of trouble on those highways.

14 MR. GRANT: The closest thing to a freeway in the north.

15 So I want to say that and that evidence is there,
16 but I am -- but he makes it clear in his
17 cross-examination that they are claiming that they
18 have a claim to that but they are not claiming it in
19 this action and it's understood that the territory is
20 Wet'suwet'en.

21 The next territory is that of Gwinin Nitxw. There
22 is two territories located on either side of the
23 Skeena River and these are the territories, the most
24 northerly one is 28 miles north of Kuldo, and then
25 there is the one immediately to the south of it. Now,
26 the first of these territories was testified to by
27 Solomon Jack, Gwinin Nitxw, and he was -- this is the
28 more southerly of the two territories, my lord, and I
29 think you recall where these are --

30 THE COURT: Yes I do, yes.

31 MR. GRANT: They are quite large and in the centre, so this is
32 the territory we are dealing with first and then this
33 one I want to spend a few moments on.

34 THE COURT: You are dealing with the southerly one first?

35 MR. GRANT: Yes, and that's the territory that Solomon Jack
36 testified to. And I have explained in the argument on
37 page 170 and 171 the sources of the references, and
38 then Solomon Jack explained that his brother, Arthur
39 Kusick, the former Gwinin Nitxw, would come to him
40 about the boundaries. Solomon Jack in fact was shown
41 the boundaries by his father and grandfather and he
42 was shown the traplines, and there were eight
43 traplines in this southern part of the territory.

44 Now, I make some reference to here and I will come
45 back to it on 172. Mr. Jack explained how Moses
46 Stevens, Dawamuuxw, came to be on the northern
47 territory of Gwinin Nitxw at Slamgeesh. He was there

1 because his father was in Gwinin Nitxw's House and he
2 was allowed to use the area for hunting and trapping
3 of Slamgeesh. Subsequently the area was registered as
4 a trapline. But it belongs to Gwinin Nitxw. And this
5 is the evidence of Solomon Jack, the present holder of
6 the name Gwinin Nitxw.

7 Now, that particular piece of the argument really
8 goes under Galaanhl Giist, the Slamgeesh River
9 Territory to the north. And this -- of the
10 territories I am going to deal with, I'd like to spend
11 a bit more time with this than the others because this
12 again is the third of the Gitksan territories that my
13 friends in their summary of argument focus on to
14 challenge the concept of ownership.

15 Walter Blackwater testified to this territory by
16 way of an affidavit and he was cross-examined in the
17 summer of '88. He was given permission to testify to
18 it by Solomon Jack. He was instructed by Moses
19 Stevens, the former Dawamuuxw from the House of
20 Dawamuuxw; by his grandmother, Esther Stevens, the
21 former Asgii; and by his mother, Mary Blackwater, and
22 by his uncle Charles Stevens; all of them, except
23 Moses Stevens, came from the House of Niist. And also
24 by his father, Jimmy Blackwater, who was the former
25 Wii Minosik.

26 Now, Mr. Blackwater, in his affidavit and in his
27 cross-examination, identified this territory as
28 belonging to Gwinin Nitxw. His knowledge of it is
29 very apparent by the 43 geographic features on the
30 boundary and within the territory that he identified
31 by Gitksan names.

32 In cross-examination, he confirmed on page 174, my
33 lord, that the Slamgeesh territory is owned by Gwinin
34 Nitxw. He testified: "He said that was Solomon
35 Jack's territory".

36 Mr. Blackwater also explained the earlier mapping
37 confusion in which there was an identification on the
38 map that it was under the name of Dawamuuxw. He says,
39 and his evidence I think is very clear on this point:
40

41 "I'll try to make it clear to you what went on
42 on this territory here. To begin with it all
43 started with my grandmother who is known as
44 Ester Stevens. Asgii is her Gitksan name.
45 Ester and Gwinin Nitxw were just like sisters
46 back then, and she took Ester and her husband
47 to be caretakers of this territory as long as

1 they want to be, and this is what happened.
2 Ester stayed there until -- as long as she
3 could, and when she passed on that territory
4 was given back to Gwinin Nitxw and the reason
5 why I am telling you is because I want it made
6 clear, real clear to you, what that -- that
7 this happened and this is why that land
8 returned back to Gwinin Nitxw, because it was
9 his to begin with or hers to begin with."

10
11 Now, Ester of course is from the House of Gwinin
12 Nitxw and was married to Moses Stevens.

13 Now, the Provincial Defendant has focused on this
14 territory to challenge the reputation in the community
15 as to boundaries and ownership of house territories.
16 The evidence presented in my submission shows that
17 there was apparent confusion with respect to this
18 territory because of the distinction between
19 registered traplines and house territories. There are
20 also other rights within the Gitksan system which led
21 to an apparent -- and I focus on apparent confusion as
22 to ownership of the territory. That is apparent to an
23 outsider or appearing to be that -- a confusion.
24 These rights have already been explained and they
25 include Yugwilaatxw Rights, that is the right of Moses
26 to be on his wife's territory; Amniyetxw, that's the
27 grandfather rights and House Ownership; and finally
28 Use Rights and House Ownership. And Use Rights is
29 really incorporated into the other two but it's --
30 some of the terminology says Use Rights in this
31 debate.

32 The real issue raised by the defendants is whether
33 this territory belongs to Dawamuuxw or Gwinin Nitxw,
34 and I emphasize this, my lord: There is no suggestion
35 by the defendants or in our submission no evidence
36 that it's not Gitksan territory. It's clear to the
37 defendant -- I mean the evidence is who's is this,
38 Dawamuukw's or Gwinin Nitxw's.

39 Now, in a 1982 statements Art Kusick, the former
40 Gwinin Nitxw, explained the apparent confusion. He
41 said:

42
43 "We got this land from the Stikine way before my
44 grandfather's time. We owned Blackwater area
45 but they used it so long they kept it."

46
47 Referring to Dawamuuxw. Now, Mr. Sterritt explained

1 to the court why this territory had earlier been
2 referred to as Dawamuukw's. This was in the course of
3 his cross-examination, my lord, the court -- and your
4 lordship intervened when Mr. Goldie went to another
5 topic and asked:

6
7 "THE COURT: But you have said the members of
8 this house, some of them, at least the leading
9 ones, were born and raised up in the Slamgeesh
10 area?"

11
12 Mr. Sterritt:

13
14 "A. No, that's not what I said. What I said
15 was the grandchildren of --"

16
17 This is the grandchildren of Moses Stevens:

18
19 "...who are on one side are Wolf and on another
20 side are Frog, were born and raised up at well,
21 Blackwater-Slamgeesh.

22
23 THE COURT: Yes?

24
25 A. And that they're the ones who were very
26 knowledgeable about the territories and are the
27 ones who were informing me about this
28 relationship.

29
30 THE COURT: Did I not understand correctly that
31 the -- that people from the House of Dawamuuxw
32 were there because of this right acquired
33 through marriage and in the
34 Blackwater-Slamgeesh area?"

35
36 And that understanding is exactly the case, and he
37 says:

38
39 "A. Yes. That was the husband.

40
41 THE COURT: The husband, yes.

42
43 A. He was married to the Wolf side, who were
44 parents of or grandparents of Walter Blackwater
45 and David Blackwater."

46
47 That was a correction, he said they were the

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1 grandparents, of course.

2

3 "THE COURT: Well, was there only the one person
4 that was in that area by way of -- by rights
5 acquired through marriage?

6

7 A. Moses Stevens.

8

9 THE COURT: Just Moses Stevens? And his
10 descendants, where did they live?

11

12 A. Well, Moses Stevens' children would be in
13 the House of -- of Niist.

14

15 THE COURT: I see, all right.

16

17 A. His descendants -- well, his nephews and
18 nieces or his brothers and sisters would be in
19 the House of Dawamuuxw.

20

21 THE COURT: Was this territory originally
22 assigned to Dawamuuxw merely because of the
23 presence on the land of Moses Stevens?

24

25 A. Yes.

26

27 THE COURT: I see.

28

29 A. That was the reason."

30

31 Now, 13 days later, Mr. Goldie returned to the subject
32 of this territory during his cross-examination. He
33 referred Mr. Sterritt to a taped interview with Walter
34 Blackwater in 1983. At the commencement of Mr.
35 Blackwater's cross-examination at 2:00 p.m. on
36 September 1, 1988, Mr. Mackenzie advised plaintiff's
37 counsel that he had not received the tape.
38 Plaintiffs' counsel was taken by surprise and had
39 assumed the tape had been delivered after August 24,
40 1988. The entire sequence of requests with respect to
41 the 1983 tape was explained to the court by
42 plaintiffs' counsel. The plaintiffs also invited the
43 defendants to reopen the cross-examination of Walter
44 Blackwater, an invitation which was never accepted.
45 And that reference, I don't have the copy of the
46 transcript but Mr. Rush at that reference, my lord,
47 explained the whole sequence of what happened with the

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1 tape and in fact it was -- I mean, the plaintiffs
2 never took issue that the defendants should have the
3 right to reopen cross-examination of Mr. Blackwater
4 with the tape in their hands.

5 Now, Mr. Sterritt agreed, as set out on the tape,
6 that in 1983 Walter Blackwater in this interview
7 attributed the Gwinin Nitxw territory at Slamgeesh to
8 Dawamuukw. And this is what he said, explaining the
9 apparent contradiction:

10
11 "Q. And you -- now, Mr. Blackwater obviously
12 changed his mind?

13
14 A. Well, I don't know. He clarified in his
15 own mind as to why Moses Stevens was there,
16 because of his wife, and that it really
17 belonged to the House of Gwinin Nitxw. And at
18 the time he was talking 1983, referring to it
19 in that sense.

20
21 Q.I'm suggesting to you that he changed
22 his view on who owned that territory?

23
24 A. I disagree with you. I disagree with you.
25 He -- he came to me, either him or David, about
26 a year ago and said he wanted to explain that
27 it really belonged to Gwinin Nitxw; that Moses
28 Stevens was there because of his grandmother,
29 Walter Blackwater's grandmother. And the only
30 explanation that I could offer for that is that
31 Moses Stevens ended up having that registered
32 in his name as a trapline and that that could
33 be the reason, but in fact it's very clear that
34 the area is Gwinin Nitxw's. Solomon Jack had
35 mentioned it to me. I hadn't had anything else
36 to go on, but at some point Walter Blackwater
37 came forward and explained the reason why it
38 was really Gwinin Nitxw's territory and not
39 Moses Stevens, not Dawamuukw."

40
41 In further cross-examination, Mr. Sterritt
42 confirmed Moses Stevens, the former Dawamuukw, is the
43 father of Charles Stevens and Mary Blackwater. Mary
44 of course is the mother of David and Walter.

45 THE COURT: This is the territory where we had lunch, is it not?

46 MR. GRANT: Yes, that's right.

47 THE COURT: And who was the Blackwater that was with us?

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1 MR. GRANT: David. That was his brother, David.

2 THE COURT: Thank you.

3 MR. GRANT: Now, in the course of the cross-examination, it was
4 urged from Mr. Sterritt that the Blackwater affidavit
5 was a sham. Now, this proposition, my lord, was never
6 put to Walter Blackwater. In fact, the defendant did
7 not reopen the cross-examination of Mr. Blackwater
8 after receipt of the 1988 tape although there was an
9 opportunity to do so in November and December of 1988,
10 and in fact Mr. Macaulay suggested he might even do
11 so.

12 There is no suggestion, my lord, in any of this
13 exchange that Mr. Blackwater or his house, remember he
14 is from Niist, would benefit from the apparent change
15 from Dawamuukw to Gwinin Nitxw. In fact, the
16 informant about the territory, the person who
17 apparently changed his understanding, had nothing to
18 gain. In any event, the territory was not suggested
19 by Mr. Blackwater to belong to the House of Niist.

20 Now, my lord, the only explanation for the
21 difference, and Mr. Blackwater was not cross-examined
22 again on this, on the tape, the only explanation for
23 the difference was that he was confusing the rights of
24 his grandfather through Yuugilaatxw in 1983 with the
25 House, it is important to remember in this context
26 that Moses Stevens was one of the principal teachers
27 of Walter Blackwater with respect to the boundaries of
28 the territory. And the second is, my lord, that --
29 and I will come to it, is with respect to the trapline
30 registration confusion. I submit, my lord, the only
31 conclusion to be taken from the Federal and
32 Provincial's failure to cross-examine Walter
33 Blackwater directly on the 1983 statement is that they
34 did not want him to explain the reason for the
35 difference between the tape and his affidavit because
36 such an explanation would undermine the argument that
37 they are making.

38 Now, Mr. Solomon Jack in 1982 stated Gwinin Nitxw
39 let him, Dawamuuxw, trap in there; his dad was from
40 our clan like. Now, this was Solomon Jack's
41 explanation as to why Dawamuukw trapped on part of the
42 territory. This was a cross cousin relationship, my
43 lord. You can see that Moses Stevens had rights
44 through his father and then through his wife. Mr.
45 Sterritt explained Solomon Jack is here referring to
46 Moses Steven's trapping and not his ownership of that
47 territory and, once again, he raises in

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1 cross-examination at a later point when asked by Mr.
2 Goldie he says:

3
4 "Q. Yes. Now, so we have it so far as any
5 material that is available to us, a certain
6 consistency; Art Kusick, Solomon Jack and
7 Walter Blackwater all suggesting that the
8 territory -- Slangeesh territory was Dawamuukw?
9

10 A. No. What Art Kusick is saying and Solomon
11 Jack are saying is that Dawamuukw is in that
12 area, but Solomon says it's because of his --
13 he mentions because of the father, Dawamuukw's
14 father.
15

16 Q. Yes.
17

18 A. It's what he says on the tape, but he also
19 says that it is the territory, it's Wolf
20 Territory under Gwinin Nitxw. Walter also
21 comes -- and Walter comes -- and also what
22 Solomon is saying is that they are trapping in
23 that area. That Moses Stevens is trapping. He
24 doesn't say that he owns it, but in the terms
25 of what we are doing in terms of defining, or
26 what he was describing was where they trapped,
27 but he has already established that there. It
28 wasn't -- I still don't see that Walter was
29 saying -- or pardon me, Solomon was saying it
30 in a hostile way in any way at all in terms of
31 a conflict. Eventually Walter Blackwater came
32 forward to me and pointed out that the reason
33 Dawamuukw was there is because of his wife,
34 because of the family.
35

36 Q. All right.
37

38 A. And it's Gwinin Nitxw land, and to me the
39 sequence from 1982 to 1983 to 1988 is just
40 building on the same information and them
41 sorting through that."
42

43 Now, I also want to point out that both Mr.
44 Sterritt and Mr. Blackwater referred to the
45 clarification of boundaries by way of a September 6,
46 1986 helicopter flight. This evidence of course is
47 not focused on by the defendants when they challenged

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1 the ownership of this territory.

2 Thirty-two days later after first raising this
3 with Mr. Sterritt, Mr. Goldie raised it again with him
4 and he returned to the issue, again referring to field
5 notes of Mike Morrell in 1979. And then he says:

6
7 "Q. And this too he records as belonging in the
8 territory of Dawamuukw?"
9

10 Mr. Sterritt said:

11
12 "A. Yes. And this is the -- what Walter
13 pointed out to me that it was Moses Stevens who
14 was married to a member or to a wolf and that
15 it was really Gwinin Nitxw's territory. It's
16 the same area that is properly Gwinin Nitxw."
17

18 Now, I have already referred you to the fact that
19 they did not cross-examine Mr. Blackwater with respect
20 to the 1983 tape which would have required reopening,
21 that they were invited to do, the 1983 tape of
22 interview; the January 12, 1987 interview with Walter
23 Blackwater, or the Mike Morrell interview with David
24 Blackwater and Bobby Stevens respecting the Slamgeesh
25 territory.

26 Now, since they elected not to reopen
27 cross-examination of Walter Blackwater, the sworn
28 evidence before the court is that the Slamgeesh
29 Territory belongs to Gwinin Nitxw. This is consistent
30 with the affidavit of Walter Blackwater, the sworn
31 evidence of Walter Blackwater on cross-examination,
32 the sworn evidence of Neil Sterritt over the course of
33 over 30 days at different times, and the 1982
34 interview with Art Kusick, and the sworn evidence of
35 Solomon Jack. And I add as a sixth, my lord, the
36 sworn evidence of James Morrison who described the Wii
37 Minosik territory bordering on this territory and
38 referred to the neighbouring territories as belonging
39 to Gwinin Nitxw.

40 Now, finally, my lord, after both Mr. Blackwater
41 was examined and Mr. Sterritt was examined, the
42 defendants cross-examined Gwinin Nitxw himself,
43 Solomon Jack on December 6, 1988.

44 It becomes even more clear that the territory was
45 Gwinin Nitxw in his cross-examination when asked when
46 Gwinin Nitxw lost the Slamgeesh territory, this is in
47 cross-examination, he stated:

1
2 "Q. All right. But when you answer that, you
3 thought that you had lost your territory?
4

5 A. No, I didn't. I said we lost it through
6 the white man's law by registering it by them
7 registering that trapline.
8

9 Q. And who was the person that registered the
10 trapline?
11

12 A. Moses Stevens, as far as I know. I'm
13 not -- I haven't even looked at the register,
14 but I heard he registered it.
15

16 Q. Well, now you say you never lost the
17 territory at all?
18

19 A. No. But we just lost it through the white
20 man's, that's what I supposed to say on that.
21

22
23

24 A. The reason why our people before me -- I
25 don't know it was after I was born or before,
26 but Moses Stevens, his father came out of
27 Gwinin Nitxw's House and yet he wanted to trap
28 on Gwinin Nitxw's trapline. So they told him,
29 according to my grandmother, they told him to
30 use Slamgeesh Lake, and it's -- that area is so
31 big we couldn't -- we couldn't use it, we
32 couldn't trap on it all the time, eh. So they
33 cut -- actually, the southern part is closer to
34 Kisgagaas, that's why my grandparents trap
35 there all the time. And the first thing they
36 do with that thing was register it on the Moses
37 Stevens. That's what they told me, I didn't
38 see the register of what, or whether it wasn't
39 registered."
40

41 My lord, the defendants never put the suggestion
42 this territory belonged to Dawamuukw to Solomon Jack
43 in his cross, and they had all of the information at
44 that time.

45 In summary, the sworn testimony of all witnesses
46 demonstrates that the Slamgeesh territory belongs to
47 Gwinin Nitxw. The early statement of Art Kusick, the

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1 former Gwinin Nitxw, is consistent with this; all
2 witnesses explained why Dawamuukw had rights of
3 access; and the defendants refused to seek an
4 explanation from Walter Blackwater.

5 Now, my lord, skipping the next paragraph but
6 going down, the plaintiffs have never denied that the
7 imposition of the trapline registration has impacted
8 the system. In this case, what you see is a very
9 classic example of it, the freezing in time of the
10 trapline registration by issuing it to Moses Stevens,
11 a chief with privileged rights of access, has led to
12 some confusion. But when you take all the evidence
13 together, my lord, it's my submission that the
14 community reputation is that this territory belongs to
15 Gwinin Nitxw. The source of this community reputation
16 is the deceased chiefs who passed on the boundaries
17 and the ownership to the living Gitksan. Now, my
18 lord, this is not to say that the living chiefs do not
19 discuss house territories and boundaries among
20 themselves. That is an obvious aspect of any
21 reputation within a community. To suggest the fact of
22 such discussions makes the reputation evidence
23 inadmissible, as the Provincial Defendant does, is to
24 make a mockery of the reputation evidence exception
25 enunciated by the courts. Just say with that example,
26 my lord, that no aboriginal society with an oral
27 history would be able to prove territory ownership.
28 This is precisely the absurd result that Blackburn
29 L.J. rejected in the Milirrpum case with respect to
30 this territory.

31 THE COURT: That's a little strong, isn't it?

32 MR. GRANT: Well, it may be strong but I say that what -- what
33 he was dealing with is how do you prove -- with an
34 oral society how do you prove ownership or how do you
35 prove that territoriality. And you have to of course
36 in a community reputation, you have to go among living
37 people are talking about it as well. I submit that
38 you should accept the reputation evidence that this is
39 Gwinin Nitxw's territory. If however you accede to
40 the Provincial argument, then we are stuck with the
41 recognition of the territory as belonging to Dawamuukw
42 but in either case there is no argument that it is not
43 Gitksan territory and properly included in the
44 territory claimed in this case.

45 THE COURT: That's what I was suggesting to you back in 1987,
46 wasn't it, that did it matter?

47 MR. GRANT: Which house held the territory? Well, the

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1 difficulty is because of the nature of the system and
2 the society, it would have been much easier of course
3 for the plaintiffs to establish the one territory, but
4 in order to establish that territory and why there
5 were these relationships with the other groups we had
6 to establish the house territories. But the evidence
7 in my submission is that it is Gwinin Nitxw's
8 territory.

9 MR. MACKENZIE: My lord, perhaps I should rise just to clarify
10 my friend's comment that there is no argument. He is
11 referring to the Provincial Defendants. Perhaps just
12 for information --

13 THE COURT: Where is that, Mr. Mackenzie?

14 MR. MACKENZIE: Page 178-7.

15 THE COURT: There is no argument.

16 MR. MACKENZIE: My friend says: "In either case there is no
17 argument that the territory is not Gitksan territory",
18 and my friend has referred in those terms several
19 times I take it to the Provincial Defendant's argument
20 and for purposes of information, perhaps I could just
21 adhere that there is an argument that that territory
22 is subject to overlapping claims by Stikine and the
23 Nishga people so in that sense there is an argument.

24 MR. GRANT: Well, I appreciate my friend's comment. I should
25 say there is no valid argument in my submission
26 because any of these competing claims my friends did
27 not call a single Nishga or Stikine witness to prove
28 that any of the territory wasn't Gitksan. It is just
29 a question of reputation as I understand is as far as
30 they can go based on these claims to the Federal
31 Government.

32 Now, my lord, I want to say here that -- and this
33 is something that I don't want to overly gild the
34 lily. I mean, this is the very nature of reputation
35 evidence and it can lead in a history like we have
36 been dealing in this case to confusion, and it's not
37 perfect. And it would be nice if none of those --
38 that confusion was there but it was, and I am being
39 frank about that, but we still say we proved it and
40 that it's an example of how confusion can arise. I'd
41 like to move into the territory of Baskelaxha, and
42 this is the territory located 13 miles north of Kuldo
43 running south from the Nass to the Skeena River, and
44 there is only one territory. The present holder of
45 this territory is William Blackwater, and William
46 Blackwater is -- he is the brother of Walter
47 Blackwater but was adopted into Baskelaxha House. As

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1 you recall, that was a very small house. And so this
2 is -- and this is the territory we are referring to
3 here.

4 Now, I don't wish to say anything more regarding
5 that territory. I will move on to the territories of
6 Mauus, Jeff Harris Junior, on page 178-10. These
7 territories, my lord, start with the Kuldo Creek
8 territory and this is the territory that Jeff Harris
9 Senior described in his affidavit and of course,
10 although my friends make a fair amount about the
11 boundary of the Kuldo Creek territory, Mr. Harris was
12 not cross-examined on this boundary and confirmed the
13 boundary as on 646-9A and it is the small territory in
14 that south Kuldo Creek.

15 THE COURT: Yes. I see it.

16 MR. GRANT: Now, I want to clarify something that may be
17 confusing because I only refer to the territories --
18 this is the one territory here, my lord, in Kuldo
19 Creek, and then there is this territory here and this
20 one here. But what happened was that Mr. Harris
21 referred to the boundary of all of this at once and
22 then he says there is a space there that is Wii
23 Eelast, Amagyet, so the fact it's under one head,
24 there is two territories, but there are two there.
25 And that's referred to as the Xsa Gay Laaxan territory
26 testified in --

27 THE COURT: The northern one?

28 MR. GRANT: No, the northern one is the Kuldo Creek territory.

29 THE COURT: All right.

30 MR. GRANT: And you can see it's Gwiis Xsagan Gaxda, it is the
31 small Kuldo Creek, that's what it really means.

32 THE COURT: All right.

33 MR. GRANT: Now, on page 178-11, Mr. Harris -- I refer to the
34 Xsa Gay Laaxan which are the two that are close to
35 Kispiox and this is described in his affidavit as one
36 territory. And on the next page -- just a minute, I
37 am sorry, on Exhibit 610 itself, I will just refer you
38 to the reference, my lord. Yes, on -- in the
39 affidavit Exhibit 610 at paragraph 11 he describes the
40 Xsa Gay Laaxan territory and he says at the end:

41
42 "Enclosed within the boundary described above is
43 the Lax Hla Gant territory owned by Amagyet."
44

45 which is described in section C of this affidavit, so
46 what he did was he just went around the external
47 boundaries and he said but there is this other

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1 territory of Amagyet, and then he goes on to describe
2 that separately. And I'd like to move to that
3 territory of Amagyet on page 178-13.

4 THE COURT: Yes.

5 MR. GRANT: This is the territory owned by the House of Amagyet
6 and I have put and cared for by Wii Eelast at this
7 time, my lord. At the time of the swearing of the
8 affidavit a successor to the name of Amagyet had not
9 as yet been chosen. Mr. Harris Senior attended
10 funeral feast for Percy Wilson, the former holder of
11 the name, and at that time Mr. Angus Senior was
12 designated a speaker for the house until a successor
13 to the name was chosen. And then it goes on to
14 explain that by the time of the cross-examination, a
15 feast had been held. Leo Braton was selected as the
16 successor to the name but the name was allowed to rest
17 for a while. Mr. Harris describes this territory and
18 he was taught about it by the former holder of the
19 name.

20 I am going now to the territory of Gwoimt. This
21 is a territory of the -- Gwoimt is a Wolf chief from
22 Kisgagaas, and Fred Wale was the person who described
23 this territory. And it's Mr. Wale himself, he is one
24 of the persons that resides part of the year in
25 Kisgagaas even today and of course this is the
26 territory that's being discussed here and it is the
27 one that notches across the Skeena, my lord, on 486,
28 you had -- you have that space.

29 THE COURT: Yes, I have it.

30 MR. GRANT: And it is the territory that Anlagaasmdeex which is
31 a site of a fishing village. And Tsubux is part of
32 the Gwoimt wilnadahl, they worked together in the
33 feast hall, and they utilized the fishing stations at
34 Anlaagaasimdeex. Mr. Wale testified to that in his
35 cross-examination. He also explained on -- page 16 I
36 am, my lord. He also explained where his cabins were,
37 the diminishing game and logging, and then he
38 explained that his house originally came from the
39 village of Anlaagaasimdeex, and this is a place which
40 is part of present day Kisgagaas at the west end of
41 the village. It is at this location that the Gwoimt
42 pole was located.

43 In cross-examination, my lord, the dispute over
44 the Gitan Gwalxw area near Swan Lake was raised,
45 that's the notch between the two Gails, and that was
46 raised in cross-examination but that territory is not
47 a subject of the claim and it's the evidence of --

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1 evidence -- Mr. Wale did not know of that dispute and
2 it's our submission that the evidence is that that's
3 Kitwancool territory. In any event, it's not part of
4 the area in this action.

5 I'd like to go to the territory of Gutginuxw which
6 is on the Skeena River northeast of Kispiox. Willie
7 Morrison is the head chief. Abel Brown, a witness who
8 you saw in evidence, I believe --

9 THE COURT: Yes.

10 MR. GRANT: -- testified to this in cross-examination and he
11 described at the time geographical features on the
12 boundary, witness the territory by their own names.
13 And I can direct you to that one.

14 THE COURT: I have located it.

15 MR. GRANT: Thank you. It is a relatively large one near
16 Kispiox and going out. The other next two territories
17 I am going to focus on will be starting with
18 Luutkudziiwas territory -- it touches on the
19 Kitwancool territory and also, my lord, this would
20 be -- if you looked at the chiefs in terms of village
21 of proximity, Gaxsbgabaxs came from the western
22 village, Luutkudziiwas is the western most of the sort
23 of central Gitksan chiefs, and then Luutkudziiwas, he
24 also has a territory over on the east which borders
25 very closely to the territory of Smogelgem, just a
26 sliver of Gyetm galdoo in between.

27 THE COURT: All right. Can we take the afternoon adjournment
28 then?

29 MR. GRANT: Certainly, my lord.

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

32
33 (PROCEEDINGS ADJOURNED FOR A RECESS)

34
35 I hereby certify the foregoing to
36 be a true and accurate transcript
37 of the proceedings transcribed to
38 the best of my skill and ability.

39
40
41
42 _____
43 Tannis DeFoe,
44 Official Reporter,
45 UNITED REPORTING SERVICE LTD.

46
47

Submissions by Mr. Grant

1 (PROCEEDINGS RECOMMENCED AT 3:15 P.M.)
2
3 THE REGISTRAR: Order in court.
4 THE COURT: Mr. Grant.
5 MR. GRANT: Yes, my lord. Before going on, if you look at
6 Exhibit 486, one of the questions that you raised with
7 me was with respect to Williams Lake, and actually
8 that's a boundary lake on the territory up in the
9 northwest corner right at that notch that sticks out.
10 THE COURT: Oh, yes. I see it.
11 MR. GRANT: That's Williams Lake that Mr. Muldoe is referring
12 to.
13 THE COURT: Yes.
14 MR. GRANT: I am referring to the two territories of
15 Luutkudziiwus, and the first one is the Hazelton Creek
16 territory described in evidence by Mrs. Moore. She is
17 a chief within the house, and was authorized to speak.
18 Mr. MacKenzie was too sick to give evidence in this
19 case.
20 Now, the proximity of the two Luutkudziiwus'
21 territory is indicative, as it is of Djogslee of the
22 antiquity of this Frog House in the territory. In
23 fact this Hazelton Creek territory is in the location
24 of Temlaxam itself. I refer you to page 20, where
25 Mrs. Moore -- page 178-20, Mrs. Moore's evidence in
26 the second last paragraph -- the last sentence is
27 consistent with the evidence of Mary Johnson with
28 respect to the boundary of Antgulilibix' territory to
29 the north of this territory. She also, of course,
30 refers to the Kitwancool on the other side of
31 Andamahl, which is that little notch, so that she
32 touches on it. And this is where that mountain is
33 where Mary Johnson says on the other side is
34 Kitwancool. And she goes up to there as well, this
35 Luutkudziiwus' territory.
36 And of course with respect to the Kitwancool
37 boundary that's also consistent with the evidence of
38 Stanley Williams, who also described that location,
39 that Kitwancool boundary.
40 THE COURT: I take it it's intended that there is a narrow
41 corridor running along the Kitwancool border belonging
42 to Gaxsbgabaxs, is it? Is that -- that's what this
43 map shows. Does your show the same thing?
44 MR. GRANT: Oh, yes. Where Gaxsbgabaxs, it's around Burdick
45 Creek (?), which you can see here, Burdick Creek is a
46 boundary between Gaxsbgabaxs and Luutkudziiwus.
47 Actually there is a long extension and only a very

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1 small point at the height of Luutkudziiwus, the
2 northern point of Luutkudziiwus' territory that
3 touches on the Kitwancool.

4 The next territory is the Madii Lii territory. In
5 this case was testified to by Arthur Risdale, the
6 brother of the present Chief Luutkudziiwus. And he
7 was taught this by Tom Campbell, who is now deceased.

8 Just a point to be made there with respect to
9 this, is that Kenny Muldoe are -- or Kenny MacKenzie,
10 Simon Muldoe and Delbert Turner trap in the Madii Lii
11 territory. They have permission to do so.

12 And Kenny MacKenzie is of the son of the present
13 Luutkudziiwus, and it's understood that he will only
14 have that right to use the territory until his father
15 dies.

16 Now, the next territory I am referring to is quite
17 close to that. It's the territory of Gyetem Galdoo.
18 And this long narrow sliver here that intervenes
19 between Luutkudziiwus and Smogelgem along the
20 boundary. This is the only territory of Gyetem
21 Galdoo -- the only territory of Gyetem Galdoo.

22 THE COURT: Except for the mountain top.

23 MR. GRANT: That's right.

24 THE COURT: Yes. All right.

25 MR. GRANT: Now, David Green, chief in the House of Wii Gaak,
26 Wagil Wil, testified to this territory. He was taught
27 the territory by Charles Clifford, the former Gyetem
28 Galdoo, and by Thomas Wright, the former Guuhadak and
29 the late Dick Lattie. Mr. Green himself was born at
30 Kisgagas and is 77 years old. I have summarized his
31 evidence, and the references on his cross-examination
32 are to Exhibit 595-A, my lord. That's the transcript
33 of his cross-examination, and those page references
34 are all to that exhibit.

35 But he refers to the meaning on page 178-24 of An
36 Djem Lan translated means "pot of fish eggs". This is
37 where the spawning is done on the territory. And he
38 also referred to Gyetem Galdoo as having a fishing --
39 Seeley Lake, and this is that -- to that small piece
40 that Wii'goob'l refers to. Gyetem Galdoo and
41 Wii'Goobl are very close, although separate houses and
42 the same wilnat'ahl.

43 THE COURT: I thought Mrs. Ryan said she owned Seeley Lake.

44 MR. GRANT: Seeley Lake, my lord, is within the territory now --
45 Seeley Lake itself is within the territory of Spookw.
46 Gwaans, that Hanamuxw territory comes up close to
47 Seeley Lake, but she -- her evidence was that Spookw

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1 owns the other side, and he owns Seeley Lake.
2 THE COURT: Spookw does?
3 MR. GRANT: Yes.
4 THE COURT: I thought you just said Gyetem Galdoo --
5 MR. GRANT: I am going to come to that. The territory here,
6 Seeley Lake is within the territory of Spookw, but
7 there is a place that Spookw gave evidence of that
8 Wii'goob'l holds, and it's this end of the lake. It's
9 that small -- it's on the fishing site map actually.
10 And there is a -- the outlet of Seeley Lake belongs to
11 Wii'goob'l.
12 THE COURT: All right.
13 MR. GRANT: Okay. That's what is being referred to in this case
14 in cross-examination by David Green. But the former
15 head chief of that wilnat'ahl group was Gyetem Galdoo.
16 Gyetem Galdoo and Wii'goob'l are very close, and
17 Jessie Sterritt described it -- that Wii'goob'l
18 right -- Wii'goob'l ownership of that Seeley Lake
19 reference.
20 THE COURT: Mrs. Ryan not also object to the Carnaby Mill as --
21 MR. GRANT: The Carnaby Mill is in her territory, and it's
22 further down. Seeley Lake --
23 THE COURT: Yes, I remember it is.
24 MR. GRANT: After you pass Seeley Lake there is actually a creek
25 right near where that truck stop is, and that creek or
26 very -- that creek, that watershed, that boundary
27 between Hanamuxw and Spookw.
28 THE COURT: All right. Did Mrs. Ryan not say that Seeley Lake
29 was hers?
30 MR. GRANT: No. I mean, my lord, certainly not that I recall.
31 I recall her referring to it, but that it was on the
32 Spookw side of the boundary.
33 THE COURT: All right.
34 MR. GRANT: I certainly, given your accuracy of memory, I will
35 check that, but I'm fairly certain of that.
36 THE COURT: It's pretty vague at this moment.
37 MR. GRANT: I'm sure I would recall if she said that it was
38 hers.
39 THE COURT: Thank you.
40 MR. GRANT: Now, I now refer to the territory of Spookw, and
41 this is the one territory along the Skeena and Bulkley
42 River, page 178-25. And this is Mr. Robinson, Steve
43 Robinson was taught the boundaries of this territory
44 by his father and by his mother, as well as by Mary
45 Johnson, who was the former Yagosip, another Mary
46 Johnson, of course, the Mary Johnson who gave
47 evidence. And by Frank Clark, the former Spookw.

1 Now, there is a place within that territory known
2 as Daxso'op, which is a pond at the outlet of Seeley
3 Lake. This belongs to the House of Wii'goob'l, and
4 this outlet pond is also known as Wii Gidii Sitax.
5 That is the reference that Sylvester Green -- or I'm
6 sorry, that's the reference that David Green is
7 referring to. That is the location that is understood
8 to belong to Wii'goob'l. Wii'goob'l and Gyetem
9 Galdoo are in the same wilnat'ahl. When we look at it
10 by house, it's Wii'goob'l, but if you look at by
11 larger group, Gyetem Galdoo was -- formerly would have
12 been referred to -- he is the leading chief of the
13 Frogs one may say. So there is that connection.

14 Now, I just like to emphasize this quote from Mr.
15 Robinson. On cross-examination he was cross-examined
16 on again interrogatory maps and map changes. But this
17 is what he said in cross-examination:

18
19 "The maps can change, you see, you can draw a
20 map here and they say cut it in half and
21 then -- but Spookw's territory has its own
22 boundaries from the time that they were here.
23 You see, this is what I mean, I'm going to
24 explain to you ... maps can change, but the
25 territory itself stays, and we know."

26
27 And I ask you to keep that in mind, as Mr. Rush is
28 going to shortly deal with the mapping, that the
29 chiefs' evidence is that the territories stays, the
30 mapping may change, but that's because of the enormous
31 project or task of mapping the oral knowledge of the
32 territories.

33 Mr. Robinson explained why Lost Lake belongs to
34 Yagosip, and I referred to that, and then when he was
35 cross-examined with reference to this outlet pond, he
36 made it clear in his testimony that Seeley Lake itself
37 belonged to Spookw, but the outlet pond at the
38 northeast end of the lake was owned by Gyetem Galdoo,
39 "because Gyetem Galdoo had a fishing site right in the
40 mouth of -- Station Creek, coming out there."

41 Now, here again what you have is Gyetem Galdoo,
42 Wii'goob'l interchanged, but it is that wilnat'ahl,
43 Gyetem Galdoo and Wii'goob'l, that own that outlet
44 pond.

45 Then Mr. Robinson talks about his knowledge, and
46 he disagrees with Mr. Sterritt's notes that Spookw had
47 no land.

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1 Now, in cross-examination Mr. Mackenzie suggested
2 that territories were -- I'm on page 28. A
3 re-creation, a creation that you prepared for the
4 court case. And this is Mr. Robinson's answer to
5 that. He said:

6
7 "It's not a creation, it's there and then we
8 know what our land is. We didn't create -- I'm
9 not -- I'm not a magician to create anything,
10 to do anything like that -- -- -- but we are
11 talking about land and all get together and
12 then we were denied by the B.C. government,
13 they wouldn't recognize us as people of this
14 country."

15
16 And that is the evidence of the territory and
17 generally of the concept of re-creation. It's
18 something that's created, I would say, by the
19 defendants in their argument, but is it true?

20 Yagosip's territory is referred to next, and this
21 is the territory north of the Bulkley up the Babine
22 trail. There are two territories. And Guuhadak was
23 authorized to use part of this territory. You
24 remember that Yagosip was one of those Wolf chiefs who
25 came down from Kiskagagas, and therefore is closely
26 related to Guuhadak, and this -- the territory that we
27 are referring to here, my lord. Its right on -- to
28 the east and going up in the mountains, to the east
29 and north of Hazelton.

30 THE COURT: Yes.

31 MR. GRANT: And then you asked about the notch between Gwii
32 Yeehl and Kliiyem Lax Haa, and that's the Yagosip
33 territory up here on the Kispiox, that's the second
34 territory, that's not shown on 486, but there is a
35 space there for it. It's on the west side of the
36 Kispiox.

37 THE COURT: Yes. All right.

38 MR. GRANT: Both these territories were testified to by Mr.
39 Robinson.

40 And I would like to refer you now to the territory
41 of Woosimlaxha. And this is the territory located
42 along the Skeena and Bulkley Rivers near the village
43 of Gitanmaax. And Victor Mowatt is the present holder
44 of that name. And Woosimlaxha territory, I will refer
45 to the Nika Teen ones as well, which are next, is this
46 territory that really encompasses and surrounds on
47 three sides the Nika Teen territory. And it comes

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1 right out from Kispiox and going east to Nine Mile
2 Mountain and then down to the Bulkley River. And then
3 inside that insert is Nika Teen, one territory, which
4 encompasses Gitanmaax actually, and is -- goes along
5 the Skeena and then across the river in the area of
6 the south Hazelton is another Nika Teen territory, but
7 it doesn't go very far up the mountain.

8 THE COURT: All right.

9 MR. GRANT: Now, Mr. Robinson again testified to these three
10 territories I referred you to, and referred to 13
11 geographical features on the Woosimlaxha or Robinson
12 Lake territory. The territory referred to as Mount
13 Glen is that territory close to Gitanmaax of Nika
14 Teen, and again Mr. Robinson testified to the
15 boundaries of this territory.

16 Now, the reference on the bottom, my lord, at page
17 32 should be under the next territory, because it's
18 really talking about across the river. And he
19 explained the boundary line between the Spookw
20 territory and this Nika Teen territory was the
21 boundary at approximately 14 hundred foot elevation on
22 the mountain. Above that point it belonged to Spookw.
23 It was the top part of the mountain. Then he
24 described his own presence on the territory close to
25 Hazelton and Dam Gan Gyuuxs, is the territory which is
26 on the Lower Chicago Creek down slope from Hagwilget
27 Peak.

28 Now, finally, my lord, I refer you to the
29 Wii'goob'l territories. And of course we have
30 referred to the one at the outlet of Seeley Lake,
31 which is just a very small place, and there is another
32 territory at Sallysout Creek, and this is testified to
33 by Mr. Benson. And that is the main territory of
34 Wii'goob'l. And Mr. Benson was cross-examined on
35 that, and his -- his evidence is there. Have you seen
36 that?

37 THE COURT: Yes.

38 MR. GRANT: My lord, I am going to -- I have alluded with
39 respect to the Gwinin nitxw territory and others to
40 the concept of the reputation, and I am going to
41 return to the legal side of that argument. But we
42 have now reviewed the evidence, and I say we fairly
43 reviewed it, those areas of suggested contradiction we
44 have endeavoured to incorporate, but we have reviewed
45 the evidence of all of these territories, and we say
46 that you should make a finding at the end of the day
47 that these territories, as depicted on 646-9-A and

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1 9-B, are with respect to 9-A, the Gitksan territories,
2 and with respect to 9-B, the Wet'suwet'en territories,
3 and that they have been proven as belonging to the
4 houses that are depicted there.
5 THE COURT: Have you not a count of how many territories there
6 are?
7 MR. GRANT: 133.
8 THE COURT: 133 territories?
9 MR. GRANT: Yes.
10 THE COURT: Somewhere in the argument there must be a list of
11 the --
12 MR. GRANT: The territories.
13 THE COURT: -- the territories claimed by each chief.
14 MR. GRANT: Yes. First of all with respect to the Wet'suwet'en,
15 I believe Mr. Rush has included that at the first --
16 or --
17 THE COURT: I remember seeing it somewhere at the beginning.
18 MR. GRANT: I am going to -- I will be providing you with a
19 listing of all of the -- these territories, an index
20 in effect to this section of the argument, which will
21 list territories of each chief underneath the name of
22 the chief.
23 THE COURT: All right.
24 MR. GRANT: So that will be put at the front of this, and --
25 THE COURT: That will be very helpful.
26 MR. GRANT: Yes. Mr. Rush is prepared to commence argument on
27 the mapping question.
28 THE COURT: Thank you.
29 MR. RUSH: I am handing up a copy of the argument.
30 THE COURT: It goes in this volume 6?
31 MR. RUSH: Goes in the back of volume 6, my lord. It's
32 numerical -- it's sequential.
33 My lord, Mr. Grant made the point in conclusion of
34 his last item of argument that I seek to make as well
35 in respect to the question of the mapping of the
36 Gitksan and Wet'suwet'en territory east as shown in
37 Exhibits 646-9-A and 646-9-B. And the point is made
38 at the commencement of the argument after I have set
39 out the plaintiffs' plea on the first of the page 456
40 of this argument. The point is simply that the
41 territory set out in the Statement of Claim is the
42 land of the Gitksan and Wet'suwet'en chiefs delineated
43 by the external boundaries or boundary line shown on
44 646-9-A and 9-B.
45 THE COURT: Yes.
46 MR. RUSH: And, my lord, that is a point that's made in
47 paragraph 4 -- well, paragraph 3 really, I suppose, of

1 page 456.

2 Now, at the bottom of that page, my lord, what we
3 say is that the underlying maps from which -- I'll
4 refer to them as 646-9-A and 9-B, or in even more
5 short form, 9-A and 9-B, were prepared, were drawn by
6 Marvin George, the cartographer who gave opinion
7 evidence. These maps were drawn from 25 Wet'suwet'en
8 and 29 Gitksan territorial affidavits, the oral
9 evidence of the witnesses who testified directly about
10 their territories and the territorial maps tendered in
11 the proceedings. It's important to note here that the
12 evidence of Mr. George was that he relied on all of
13 those aspects of the evidence called at trial. 9-A
14 and 9-B were founded on the sworn evidence of the
15 Gitksan and Wet'suwet'en people, mostly chiefs and
16 elders, and in some cases sons and daughters of those
17 chiefs. Although attacked, this evidence was never
18 undermined. And we say it ought to be accepted by the
19 court. And we say it's the factual foundation for the
20 opinion represented by the two overlays 9-A and 9-B
21 depicting the internal and external boundaries of the
22 Gitksan and Wet'suwet'en houses.

23 Now, we say further that the requirements
24 established by the Court and the authorities regarding
25 the proof of reputation of land ownership have been
26 met. And the legal argument on this will follow
27 shortly, my lord. I don't intend to make it here, but
28 simply to allude to the fact that knowledge of the
29 boundaries, geographical features and ownership of the
30 territories was passed to the witnesses from previous
31 chiefs or knowledgeable elders. The territory and its
32 ownership were spoken of publicly in the feast, and
33 this knowledge was common in the Gitksan and
34 Wet'suwet'en communities. In all cases the witness's
35 knowledge has been passed down, most often by the
36 matriline, from a deceased chief, and it originated
37 prior to the litigation.

38 Now, on 458, my lord, I respond to an attack
39 raised by the province. And this attack is that the
40 territorial affidavits are based on -- the territorial
41 affidavits is attacked on the basis that they do not
42 disclose whether the informants were living. What
43 flows from this, they say, is that the sources of the
44 territorial and boundary information in the affidavits
45 cannot be determined to be from deceased persons, and
46 therefore should be accorded little or no weight as a
47 statement of reputation not reliant on a deceased

1 informant. We say this attack has no basis.
2 The territorial witnesses, in the affidavits and
3 in the evidence, said who their informants were. They
4 were their deceased ancestors. In most cases previous
5 holders of the chiefs' name, for example, Thomas
6 George to Alfred Joseph, family members, in the case
7 of Rose Sam to her daughter, Mable Critch or
8 relatives, in the case of Simon Morrison, who held
9 Waiget to Pete Muldoe, who took the name of
10 Gitluudahl. There is no case where a witness said he
11 or she relied on the evidence of a living informant
12 for the boundary description of a territory. There is
13 a few examples where a witness said he talked to a
14 living informant about a place or place name. In
15 these cases it was never for the purpose of
16 determining the boundary or the ownership of the
17 territory. There were more -- they were more in the
18 line of exceptions.

19 And, my lord, I just like to add to this, not in
20 the text, that it would be highly surprising indeed if
21 the witness didn't talk to people who were living in
22 an oral culture, there would be and indeed was
23 discussion in the feast hall and on the land. The
24 source of the knowledge, however, the source relied
25 upon by the affiants, were the deceased ancestors of
26 the plaintiffs. And I think that's demonstrated by
27 the review of the territory by territory evidence that
28 we have just gone through.

29 We say further that the defendants were never
30 precluded from exploring in cross-examination who the
31 witness's informants were. Where they did, it was
32 made clear how the territorial information was passed
33 from deceased persons.

34 We say there is no basis to suggest that the
35 knowledge of the witness who speak about territory
36 came from sources other than identified knowledgeable
37 chiefs and elders who were the ancestors, or relatives
38 of ancestors of the witness.

39 Now, our proposition is, and our submission is
40 that 646-9-A and B together reliably depict the
41 territories of the Gitksan and Wet'suwet'en chiefs and
42 houses in this case. The Court should accept these
43 maps as depicting the delineation and identification
44 of ownership of the plaintiffs' territory.

45 Now, my lord, these two overlay maps together are
46 the product of an impressive gathering process of
47 information from the Gitksan and Wet'suwet'en

1 hereditary chiefs. They are the product of a decade
2 and-a-half process. And this process was predicated
3 on the fundamental assumption that the hereditary
4 chiefs knew their territories by reference to natural
5 features on the ground and by names in the Gitksan and
6 Wet'suwet'en languages. The task in mapping these
7 territories was to determine the physical features
8 known by the hereditary chiefs, to ascertain their
9 Gitksan or Wet'suwet'en names, to locate the features
10 on a NTS or government map, and to record the names,
11 places and owners on the map.

12 Mr. George summarized the process in his
13 examination. And the question was put to him:

14
15 "Q How was it that the hereditary chiefs told you
16 about the information concerning their
17 territories?"
18

19 And I'll just read part of his answer here, my
20 lord. He said:

21
22 "During the interviews with the hereditary
23 chiefs they would indicate to me a particular
24 feature where their boundary was on. They
25 would identify a feature as being a river or a
26 creek. They would give a name to it and I
27 would identify that particular feature on the
28 map, and they would tell me that 'my boundary
29 goes to this hill, and this particular hill has
30 a geograph -- has a name.' And they would give
31 me that particular name, and they would
32 indicate to me that 'I do not go over that.
33 Over there belongs to somebody else. You would
34 have to go to talk to him about that particular
35 area.' Then they would say 'We will go to this
36 particular feature.' I would identify that on
37 the map and if there was a name given to that
38 particular feature that would be labelled, and
39 they would identify those features to me and I
40 would identify those features on the map."
41

42 And he carries on. A little farther in his
43 examination he was asked:

44
45 "Q What other types of features would be the type
46 that would be mentioned to you?"
47

1 And he identifies rivers, creeks, lakes,
2 mountains, hills, ridges and on some occasions trails.
3 In testifying on his use of the territorial data
4 sheets, which were his means to record the
5 geographical information, Mr. Sterritt said of this
6 process, and I go to his answer located here, my lord:
7

8 "It was to connect topographic features of -- a
9 hereditary chief would refer to a place name
10 and a feature and it was to connect those
11 features with the house, the clan, the village
12 as much as possible and the type of feature,
13 and to provide a record of those features
14 throughout the Gitksan and Wet'suwet'en
15 territory."
16

17 This approach we say was the only way to know the
18 territories. The hereditary chiefs had a mental image
19 of their territories. That image was both a product
20 of the oral transmittal to them of names, histories
21 and crest data about the territory, as well as having
22 acquired firsthand contact with the land by being
23 there and working the resources on it. As Stanley
24 Williams said, "You have to have the dirt of that
25 territory under the soles of your shoes before you
26 tell me about the boundaries of the territory."
27

28 The intertwining characteristics of geographic
29 knowledge resident in the chiefs and the ancestors of
30 the Gitksan and Wet'suwet'en people were themselves
31 communicated in the oral tradition by interview and
32 re-interview and trips out onto the land. I there
33 make reference, my lord, to the interview notes of Mr.
34 George, the field notes of Mr. Sterritt, and the
35 interview record relied on by Drs. Mills and Daly, and
36 they, we say, speak eloquently of the process.

37 And I should point out, my lord, that this is to
38 mention but a few. There were notes of Alfred Joseph
39 and Leonard George, and as well of Glen Williams. My
40 lord, we say the system of investigation employed by
41 the researchers required determining the geographical
42 landmarks and ground features from the hereditary
43 chiefs. From this it followed that the more landmarks
44 and features that were known, the better the
45 information and the better the map. The accumulation
46 of detail about an area allowed Mr. George to
47 determine boundary as lines beyond which often the
ground activity did not go. Those boundaries

1 encircled the land owned by the house under the
2 stewardship of the chief. Those boundaries were
3 almost invariably the rivers, creeks, lakes,
4 mountains, ridges and heights of land. The task of
5 mapping therefore was to assemble and record as many
6 of those features as possible from the hereditary
7 chiefs, and to determine from the hereditary chiefs
8 which house and clan owned the territory.

9 Mr. George worked as a cartographer for the
10 hereditary chiefs through the Gitksan and Wet'suwet'en
11 Tribal Council from October, 1983. And, my lord, the
12 task that I have just outlined was the task that he
13 was charged with, as he indicated in his evidence.
14 And I ask you to refer to that, the top of 463.

15 In commencing his task Mr. George relied on
16 information which already had been collected from the
17 chiefs up to the time he began his cartographic work.
18 Maps of the Gitksan and Wet'suwet'en territory had
19 been previously drafted. These maps were drawn
20 relying on generalized and incomplete information
21 about the external boundary. One such early map was
22 hand drawn by Chris Harris who held the chief name of
23 Luus. It showed primarily the territories of some of
24 the Gitksan chiefs north of the village of Kispiox.
25 Mr. Sterritt became aware of this map in late 1974.
26 The map was on tracing paper, and it depicted
27 territories that had been traced by Mr. Harris; there
28 were features on the territory, some rivers, creeks
29 and lakes. Exhibit 22 prepared by Mr. Sterritt is a
30 tracing of Chris Harris's map with additional
31 information of his own on it. Mr. Harris died in late
32 1975, and Mr. Sterritt did the tracing from his map in
33 early 1976. The reason Mr. Sterritt gave for tracing
34 this map was given in his evidence. And what he said
35 was:

36
37 "The hereditary chiefs had asked me and others
38 to do some work on the boundaries of the
39 Gitksan, and this was the first representation
40 that I had seen of some of the territories of
41 the Gitksan, and I felt that it would be useful
42 to begin with what had already been done by
43 Chris Harris."

44
45 On Exhibit 22 Mr. Sterritt had added several
46 notations. And I just set a few of them out there, my
47 lord, particularly the "boundary per Billy Moat, T/L",

1 and I refer to a few others. To do this -- Mr.
2 Sterritt, in order to determine where Billy Moat was,
3 Mr. Sterritt used the linen trapline maps which had
4 been kept by the Department of Indian Affairs to
5 record Gitksan and Wet'suwet'en traplines registered
6 with the provincial government. Mr. Sterritt's reason
7 for doing so is set out in the next following quote.
8 And he said:

9
10 "The hereditary chiefs believed that trapline
11 maps in the care of the Department of Indian
12 Affairs represented the hereditary territory,
13 and they had passed a resolution in the summer
14 of 1975, directing that we do a map
15 representing their hereditary territories based
16 on the traplines - based on the traplines in
17 the care of the Department of Indian Affairs."
18

19 It was a belief among some of the hereditary
20 chiefs that their territories were described in the
21 trapline maps of the D.I.A. And this belief was
22 reflected in that 1975 resolution referred to by Mr.
23 Sterritt. It was this then that led him to the linen
24 maps. And Mr. Sterritt used Mr. Harris's tracing to
25 assist him to locate information, to locate hereditary
26 chiefs and their territories and to cross-reference it
27 to determine whether the person located on that area
28 was the proper hereditary chief within the system.
29 And he said he did that by consulting with other
30 hereditary chiefs.

31 And I note, my lord, that three of those linen
32 maps were examined by Mr. Sterritt and were marked in
33 the proceedings.

34 Mr. Sterritt gave evidence about the kind of
35 information depicted on the linen trapline maps, and
36 it is set out in the next passage, my lord. And I
37 just direct your particular attention to the example
38 given by Mr. Sterritt at the bottom of page 465. He
39 said:

40
41 "For example, a pencil line or a crayon line
42 might be drawn indicating a creek, and a
43 Gitksan name or a Wet'suwet'en name would
44 appear next to that in phonetics, or the
45 translation of the Gitksan or Wet'suwet'en
46 name, and square lines or straight lines
47 indicating that presumably were trapline

1 boundaries."

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For example, on Exhibit 718 the entirety of one of the rivers was marked Quinagese, and this river today goes by the name of Kwinageese. Elsewhere on the map in the lower half there appears the words "Ksimottis Kwit", and in brackets underneath the word in English "Milking". And Mr. Sterritt testified this referred to what is marked today as Milking Lake.

Now, how he used the maps is set out next. And he said that he used them as a general guide to determine whether or not the person who had a registered trapline in a given area was the hereditary chief, the proper person to hold the house territory.

"For example, I sat down with Luudkudziiwus, Ben MacKenzie, and I reviewed his trapline with him. And during that discussion he indicated to me that the boundaries as defined were wrong ... on the trapline maps. Because it did not include all of his house territory. And at a later date I sat down with Ben MacKenzie when he outlined his house territory to me."

Now, Mr. Sterritt learned from the hereditary chiefs that the trapline maps did not in reality depict the territories of the hereditary chiefs. And that, my lord, is set out in the next passage.

And I go over to 467. These maps were of assistance to Mr. Sterritt to the extent that they gave a general location for a place name. However, "it was never necessary to review that information with the hereditary chief and see exactly, or as close as possible, where that particular feature was, whether it was a creek or a mountain or a lake." And upon reviewing the information on the linen maps Mr. Sterritt realized geographic names he had been given were on the maps, and he cited the example of Xsi Luu Max Seexsit, a name given by Martha Haimadam.

Now, in the summer of 1977 the Gitksan external boundary was described more fully to Mr. Sterritt. There was a large meeting of the Gitksan hereditary chiefs in July of that year where the external boundary of the Gitksan territory was described in general terms in its entirety by the hereditary chiefs. Later that year in October or November there was a meeting of the Wet'suwet'en chiefs, who defined

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1 the Wet'suwet'en external boundary. As a result of
2 these meetings with the Gitksan and Wet'suwet'en
3 chiefs Mr. Sterritt drew a map that was presented to
4 the Honourable Hugh Faulkner on November 7, 1977,
5 which described the territories of the Gitksan and
6 Carrier Indians as part of the presentation to the
7 Government of Canada.

8 And, my lord, that is Exhibit 113. And I am just
9 going to pause here to ask you to make reference to
10 the plaintiffs' small desk size overlay series. And I
11 don't intend to refer you to it seriatim, my lord, but
12 only to draw your attention to the fact that the first
13 of those overlays is the depiction of the map that was
14 presented to the Honourable Hugh Faulkner in November
15 of 1977.

16 THE COURT: Which one is that?

17 MR. RUSH: That's the first one. It begins first in sequence, so
18 it will be the one closest to the background or base
19 map.

20 THE COURT: Yes.

21 MR. RUSH: Now, my lord, when asked in his examination, Mr.
22 George described this map as a crude attempt to
23 identify boundaries of the Gitksan and Wet'suwet'en.
24 But this was the first attempt to define the external
25 boundary of the Gitksan and Wet'suwet'en people.
26 Following that presentation, my lord, and I am on 468,
27 mid-paragraph, Mr. Sterritt engaged in a process of
28 systematically gathering information about the
29 geographical features, landmarks and territorial
30 ownership from the Gitksan hereditary chiefs. I note
31 in the next paragraph that Alfred Joseph and Leonard
32 George, two Wet'suwet'en chiefs, were also engaged
33 after 1978 in interviewing the Wet'suwet'en hereditary
34 chiefs identifying and labelling geographical
35 features. Mr. George relied on the information about
36 the Gitksan territories gathered and recorded by Mr.
37 Sterritt and Mr. Glen Williams. This information was
38 recorded primarily on what was described as
39 topographic survey data sheets and land use reference
40 summary sheets devised for this purpose. It was also
41 recorded in notebooks and on working maps kept and
42 used by the researchers in the field. Mr. Sterritt
43 described how he recorded the information gathered
44 from the hereditary chiefs.

45 Now, my lord, what follows, then, is Mr.
46 Sterritt's description, and he described the process
47 of moving from an informal method to a more formal

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1 information gathering process, and it's set out on 469
2 over to 470. And I just want to draw your attention
3 to a couple of his answers on page 469. Midway
4 through the page the question was put to him:

5
6 "What information did you take from the field
7 book and put on the topographic data sheets?"
8

9 And he said:

10
11 "Place names, Gitksan place names for mountains,
12 creeks, lakes; place names around a particular
13 Gitksan village ..."
14

15 And so on. And then further, my lord, he said:

16
17 "Well, I also located some of the features or
18 many of the features on a map, a 1 to 250,000
19 map, very much like the different maps that are
20 on here. I had a set of them, about six of
21 them. And I would locate as best I could place
22 names on those maps."
23

24 Those were entered as an exhibit.

25 My lord, how Mr. Sterritt identifies features from
26 the information provided to him is set out in the next
27 passage of his evidence. And I'll just read in part
28 what Mr. Sterritt said:

29
30 "As close as I could locate it to the feature
31 that was being identified to me by a hereditary
32 chief. I might -- hereditary chiefs were
33 talking to me all the time. I might run into
34 them on the street and they would identify a
35 feature; I would write it down and go back and
36 try to locate it."
37

38 Mr. Sterritt further testified how he attended
39 feasts, and was giving information during the course
40 of the feast about place names and territorial
41 ownership. And, my lord, what follows, then, are Mr.
42 Sterritt's responses to how he garnered information
43 from the hereditary chiefs during the course of the
44 feasts.

45 Over to 471. Mr. Sterritt testified about the
46 process in this way:
47

1 "Basically it was an information gathering time
2 for me. When Marvin George was hired, I turned
3 that information over to him. And apart from
4 the entries that I made on my own maps, I
5 turned over the data sheets, the summary
6 sheets, my field books, if it was necessary, or
7 if Marvin requested them, as well as the six
8 maps that contained whatever information I had
9 put on the map."

10
11 Now, my lord, the land use reference or summary
12 sheets in the topographical survey sheets were given
13 to Mr. George for mapping. And what I have done is
14 just to set them out there. And what I've -- I have
15 attempted to do, my lord, was to indicate that at this
16 stage what the references were and what the sources
17 were. And you will see that I have gone through the
18 sheets that were -- that were the product of Mr.
19 George's, Mr. Joseph's, Mr. Sterritt's work, and the
20 number of references indicated on the sheets. And
21 those sheets, I might add, my lord, were cross
22 referred to NTS maps. And that point is made on page
23 472.

24 Accompanying these topographic data sheets were
25 the working maps onto which the geographical names and
26 features, recorded in the summary and data sheets,
27 were labelled. The reference numbers were transferred
28 to working or field maps by Leonard George, Mr.
29 Joseph, Mr. Sterritt and Mr. Williams. The number on
30 the data or summary sheet corresponded with the same
31 number placed on the topographic NTS maps. The
32 different colours on the maps and numbers was an
33 attempt to differentiate between the clans. And Mr.
34 George explained this process in his evidence. And he
35 summarized the relationship of the data sheets to the
36 maps in this way. And I am just going to refer you to
37 Mr. George's first response, my lord. He said:

38
39 "Number 1 on this work map is situated on Morris
40 Lake and that number 1 would correspond to the
41 number 1 that is in the land use reference data
42 sheet, and the number 1 would identify what
43 that feature is and what type of feature it was
44 and would identify the chief and the clan and
45 the village."

46
47 Now, my lord, the working maps of the researchers

1 were also exhibited. And I enumerate them starting at
2 the bottom of 472, running to the top of 473, and they
3 are there set out with their appropriate exhibit
4 numbers.

5 With the data in hand, Mr. George then prepared
6 for himself a Gitksan and Wet'suwet'en composite
7 working map. From the topographical data and summary
8 sheets and from the working maps that were labelled he
9 then transferred the numbered references onto his
10 composite map. For the Wet'suwet'en composite map, he
11 testified:

12
13 "This would be the combination of the
14 information that would have been in the Leonard
15 George data sheets and the Alfred Joseph data
16 sheets."

17
18 The numbers on the working maps were combined and
19 appeared on the composite map. Mr. George explained
20 the colour code on the Wet'suwet'en map. And I there
21 recommend his explanation to you, my lord.

22 On 474. A similar procedure was followed by him
23 in respect of the recording, labelling and mapping of
24 the Gitksan geographical features. In this case,
25 however, a composite working map was assembled by Mr.
26 George and Glen Williams, and they transferred to it
27 the geographical information which had been supplied
28 by the hereditary chiefs on the topographic and
29 summary data sheets and working maps.

30 Now, my lord, moving to the next paragraph, I set
31 out there a number of field trips that were taken by
32 Mr. Sterritt. Mr. Sterritt, among others who were
33 gathering information, took a number of field trips,
34 and those are as set out by reference to the exhibit
35 numbers.

36 On those trips Mr. Sterritt assembled an
37 impressive five volume set of photographs of
38 geographical features in the territories of the
39 hereditary chiefs. And I just give the numbers there
40 by reference to exhibit. The purpose of that record,
41 according to Mr. Sterritt, was to put Gitksan names to
42 physical features in the chiefs' territories. The
43 photographs show mountains, ridges, creeks, rivers and
44 lakes labelled by their Gitksan names, and where
45 possible, cross-labelled to their English names
46 according to government maps. And I there indicate
47 that there is a cross-referenceing index.

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1 I then indicate, my lord, that Alfred Joseph and
2 Leonard George similarly went on several field trips,
3 and I there indicate the trips that were taken, and I
4 make reference to the fact that we were -- a video of
5 Mr. Johnny David, Exhibit 67, was shown in court, and
6 demonstrates the process by which Mr. Joseph gathered
7 information from him.

8 What follows, my lord, is a sampling of other
9 trips that Mr. Joseph took at the bottom of 475.

10 Now, my lord, the composite maps were a repository
11 of accumulated information. As such, they represented
12 the state of knowledge as at that time. As new
13 information about places or names was given to Mr.
14 George, he added it to the data sheets and to the
15 composite maps. And that's set out there.

16 Now, my lord, I simply want to draw your attention
17 to the fact that an obviously well used composite map
18 was filed as an exhibit in the proceedings, and a copy
19 was made, I believe, by the province. And what it
20 indicates is a visual depiction of this process of
21 taking the numbered labelled feature and placing it by
22 reference to another number on the map. And I simply
23 ask your lordship at some point to make reference to
24 that, and I think a quick visual review of a portion
25 of that map will demonstrate how the features got
26 marked and labelled on the territories.

27 THE COURT: This is Exhibit 1008?

28 MR. RUSH: That's correct. Your lordship has the copy. The
29 original demonstrates this much more vividly, in the
30 sense that the original is marked in colour.

31 THE COURT: I'm not sure if I have got it upsidedown or not.
32 No, I don't think so.

33 MR. RUSH: Your lordship can see the numbers circled and placed
34 as against various land features, which would be shown
35 by the contour lines.

36 THE COURT: Yes. And this runs from just south of Houston in
37 the south?

38 MR. RUSH: Probably runs to the headwaters of the Nass and
39 Skeena in the north, my lord, judging from the NTS
40 sheets that were cut and pasted together.

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

42 MR. RUSH: My lord, I'm on 476. And I want to draw your
43 lordship's attention to the fact that there were
44 difficulties attended with the information gathering
45 process. And I address some of these difficulties in
46 the few pages that follow. There was first the
47 problem of language, and Mr. Sterritt addressed that

1 point, and it was a question of understanding what was
2 being said by the hereditary chief in his language or
3 her language.

4 Secondly, there was the question of correctly
5 identifying topographic features. And in the passage
6 that follows, Mr. Sterritt points out that the feature
7 of Stekyoodenhl by reference to the mountain of Roche
8 de Boule just outside of New Hazelton, did not fully
9 describe all of the names given to that mountain mass,
10 and he points out in the second paragraph from the
11 bottom of the page that there were actually four
12 different names that were given to that mountain, and
13 he describes them.

14 He points out the difficulty in linking the
15 identified feature with the actual geographical
16 feature on the ground, and he says the efforts that he
17 undertook in order to overcome that difficulty.

18 And 479, my lord, he makes the point that with
19 regard to Stenstrom Creek, which flows into Kiteen
20 River, and he says that over the length of the 15
21 miles of that creek there were some three different
22 names for the water course.

23 In the middle of 479, my lord, I draw your
24 attention to the fact that Art Mathews Jr. also
25 described how the chiefs described their territories
26 to other chiefs who knew them, and how error could
27 result if a person didn't know the chiefs' methods of
28 explaining the territorial boundary. Mr. Mathews was
29 cross-examined on the approximate boundaries of his
30 territories, as indicated in a response to the
31 question 59-C of the interrogatories, and he was asked
32 if there was uncertainty as of February, '87 on the
33 location. And he explained how the chiefs
34 territories -- how the chiefs described their
35 territories, and how other chiefs knew the territory
36 that was being referred to from the description. And
37 I insert the passage there, my lord, and I draw your
38 particular attention to Mr. Mathews comments partway
39 through.

40
41 "You would go directly to where it was described
42 simply because the description ..."

43
44 THE COURT: "Wouldn't go directly".

45 MR. RUSH:

46
47 "You wouldn't go directly to where it was

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1 described simply because the description chiefs
2 use is -- and a lot of them is going to, going
3 away from, just going sideways, over it, or
4 these types of things, and so that's how these
5 errors came to be, yes, so we correct them
6 according to our descriptions."
7

8 And he went on to describe that the errors were
9 corrected by physically going on the territories and
10 looking at them. And he makes that point with regard
11 to his grandfather Wallace Morgan.

12 Next, my lord --

13 THE COURT: Mr. Rush, I think we'll take about a five-minute
14 break.

15 MR. RUSH: Thank you.

16 THE REGISTRAR: Order in court. Court stands adjourned.

17

18 (PROCEEDINGS ADJOURNED)

19 (PROCEEDINGS RECONVENED)

20

21 THE REGISTRAR: Order in court.

22 THE COURT: Thank you, Mr. Rush.

23 MR. RUSH: Thank you, my lord. My lord, at the bottom of 480 I
24 wanted to draw your attention to a fourth difficulty
25 encountered in the process I have been describing, and
26 that was an almost universal inability of the
27 hereditary chiefs to read maps. That was noted by Mr.
28 Sterritt in his evidence. And on 481 I can advise
29 your lordship that it was a bone of contention in the
30 cross-examination of Mr. Sterritt with regard to Mr.
31 Blackwater. Mr. Sterritt's evidence is set out there
32 with regard to that.

33 As another example of this difficulty I refer to
34 the cross-examination of Mr. Hyzims. He appeared to
35 be able to read maps on cross-examination, but on
36 re-examination it was apparent he could not find
37 locations on the map.

38 And 482, my lord, Mr. Sterritt expressed in his
39 evidence the difficulty that was encountered, and that
40 was again repeated by Mr. George in the middle of 482.
41 This was not something that was particularly new, my
42 lord. Mr. Boys, who testified as a witness called by
43 Canada, observed on the top of 483 that the Indian
44 people in the Babine agency where he was the agent
45 were "never very skilled in interpreting a position on
46 the map, experience unusual difficulty in this area."

47 Now, my lord, a fifth difficulty encountered was

1 the naming of features, and Mr. Sterritt makes
2 reference to that. And I draw your attention to the
3 reference to the feature called Na'ahl Taada, and the
4 meaning of that, and how he came to determine where
5 that feature was located.

6 On 484 I draw your lordship's attention to the
7 evident difficulty encountered in age, difficulties of
8 recall. I also draw your lordship's attention to the
9 problems encountered in language, and the terms that
10 were utilized.

11 I ask you to turn to 485, my lord, where Mr.
12 Joseph testified about the differences in meaning
13 between the land, the word "the land" and "the
14 registered trapline". And he said the land was Yenta
15 in Wet'suwet'en.

16 Mr. Joseph was cross-examined about that, and he
17 replied:

18
19 "We say, in our language, their land, Yin Tah,
20 that's the only thing they talked about. We
21 just pointed it out to them."
22

23 And finally, my lord, I draw your lordship's
24 attention to the confusion that occurred over the
25 boundaries of territories as created by the
26 intervention of the Department of Indian Affairs and
27 the Fish & Wildlife Department and their attempts to
28 render the boundaries of the hereditary chiefs. And I
29 cite Mr. Morrison's, James Morrison's experience in
30 this regard, and I also draw your attention to Walter
31 Wilson at 486, Chief Djogaslee, and the difficulties
32 between the D.I.A. mapping and the traditional
33 boundaries of the hereditary chiefs.

34 And, my lord, how the confusion was created by the
35 Department of Indian Affairs and the Fish & Wildlife
36 branch was made clear in the evidence of Mr. Boys, who
37 was the Indian Agent in the Babine agency from '46 to
38 '51, and he explained in his cross-examination how,
39 despite the descriptions given by the hereditary
40 chiefs to him and the tracing that he endeavoured to
41 make on the maps. And I note that they were outdated
42 and conceded by Mr. Boys to that effect when the Fish
43 & Wildlife Branch invariably and unilaterally redrew
44 the descriptions and made their own maps. Neither the
45 chiefs nor Mr. Boys were consulted or involved in this
46 process. And clearly what emerges, my lord, is a
47 picture of the Fish & Wildlife Branch making a

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1 description and a map to suit their administrative
2 needs, and not to reflect the territorial boundaries
3 given to them by the hereditary chiefs.
4 And I give the citation there, my lord. And what
5 I have done here is to include the full text of the
6 cross-examination of Mr. Boys at the end of this
7 portion of the argument, and how the Fish & Wildlife
8 Department proceeded about their mapping, and why
9 their maps were unreliable depictions. And I don't --
10 I simply included for your lordship's reference --
11 and, my lord, I am going to ask you to make a note of
12 the cross-examination that's appended here, and I will
13 give you the pages. Page 300 --
14 THE COURT: Stopping there. If it's important, at the bottom
15 one eighth of page 300 is blocked out by -- somebody's
16 put a yellow slip and written something on it. I'm
17 sorry, Mr. Rush, I can find it, the original, as
18 easily as you can.
19 MR. RUSH: My lord, that wasn't intended to be there.
20 THE COURT: But you needn't trouble yourself with it. I can
21 find it.
22 MR. RUSH: My lord, page 300, 302.
23 THE COURT: Just a minute. I should make these notes on page
24 487?
25 MR. RUSH: Yes, on the bottom of page 486 just to cross-refer to
26 Mr. Boys' cross-examination. Pages 300, 302, 304 and
27 305. Of course I recommend your lordship reading the
28 whole of that, but I recognize our time constraints
29 all the way around.
30 THE COURT: Yes.
31 MR. RUSH: My Lord, 487. The boundaries drawn by Mr. George on
32 the map filed with the Statement of Claim in October,
33 1984 was the first depiction of the external
34 boundaries of the Gitksan and Wet'suwet'en hereditary
35 chiefs based upon the feature - identification
36 gathering process. And I there set out upon what
37 information Mr. George drafted that map.
38 And I go to the bottom of the page, my lord.
39 Mr. George prepared a draft map showing the internal
40 house boundaries on October 17, 1985. And this became
41 Exhibit 102, and it's overlay number 4 in the overlay
42 series.
43 Now, what's significant about this, my lord, is
44 that it was drafted on a planimetric base. The base
45 showed only natural features and not topographic ones.
46 The house and clan territories were coded and depicted
47 on the base. And this was the first attempt to show

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1 the internal house territorial boundaries based on the
2 geographical reference labelling that had been reached
3 to that point.

4 THE COURT: Now, that's number 4 in your series?

5 MR. RUSH: That's correct, my lord, yes.

6 THE COURT: Yes.

7 MR. RUSH: The draft map showed the state of knowledge which had
8 been acquired by Mr. George based on the interview and
9 field work conducted as of that time. And the purpose
10 of the map was to act as a guide for the lawyers in
11 identifying the location of the house territories of
12 the chief. Since it did not contain contour lines, it
13 was not intended to be a final statement of the house
14 boundaries and their ownership.

15 Mr. George testified regarding the source of the
16 information on Exhibit 102, and he testified as to the
17 purpose of this map at the bottom of the page 488.
18 Mr. Sterritt also testified as to how Exhibit 102 or
19 overlay 4 was to be used.

20 My lord, at the same time as Mr. George was
21 engaged in the preparation of 102, he was involved in
22 an ongoing process of producing individual house
23 territory maps on mylar or plastic bases. And these
24 ranged in scale of 1 to 10,000 to 1 to 100,000.

25 Now, moving to the next paragraph, my lord. These
26 individual house base maps were drafts, and they were
27 prepared in reliance on the information taken from the
28 1:250,000 scale working composite maps. Mr. George
29 described the procedure of incorporating new maps onto
30 these mylar bases, and he sets out there the procedure
31 that he undertook to deal with the individual maps.

32 And, my lord, I will just pause there to remind
33 you that this was an attempt by Mr. George to
34 individually map each of the separate house
35 territories. And they were placed on these mylar
36 bases.

37 Now, as I point out on page 490, this was a
38 building process. The bases were changing constantly
39 as more information came in. And Mr. George's work of
40 incorporating the new information onto these mylars
41 often lagged behind the presentation of the
42 information to him, so that the maps were not in step
43 with the most up-to-date knowledge.

44 And that is apparent by Mr. Sterritt's testimony,
45 which is then set out in the next paragraph, and the
46 example that he gives of the territory of Wii Gaak and
47 and the interrogatory response. And Mr. Sterritt says

1 in respect of that at the bottom of 490:

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10 Now, my lord, moving to the middle of 491. Many
11 copies of these mylar bases were attached as
12 interrogatory answers. And how this occurred was
13 explained by Mr. Sterritt.

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in respect of that at the bottom of 490:

"This is a situation where Marvin George had certain information and was working with it, and I had updated information, but it hadn't gotten through the process of Marvin onto the maps."

Now, my lord, moving to the middle of 491. Many copies of these mylar bases were attached as interrogatory answers. And how this occurred was explained by Mr. Sterritt.

"The base maps that were attached with some of the interrogatories were prepared for the use of the -- at the instructions and for the use of the lawyers, and for the use with the hereditary chiefs, and were never meant to be used in court. Pressures of court and the time pressures resulted in their being used to help -- to try to help in the demands that were coming through with the interrogatories."

Mr. George explained what he intended when he marked these base maps as "draft".

"I was also aware that none of these bases would be thought to be final until the time that the chiefs had reviewed them extensively and had identified them as being the final maps."

Now, my lord, over to 492. Simply put, the draft interrogatory maps were considered to be incomplete. Mr. George did not intend for them to be tendered as evidence. This point was made in Mr. Sterritt's evidence when he compared the interrogatory maps of the Gitksan with Exhibit 646-9-A. And he explains in his answer with regard to the Wii Minosik interrogatory response how those bases were incomplete.

Now, I take you over to 493, my lord. It was a process of checking and cross-checking and verifying information which led to a more exact understanding of the territorial boundaries, the geographical features on those boundaries and the ownership.

Art Mathews, and I have relied on his evidence here to essentially make the same point I make in

1 respect of Mr. Sterritt's evidence, he was
2 cross-examined on the difference between the
3 interrogatory map of Tsihl Gwellii territory in
4 Exhibit 349. And three inconsistencies were put to
5 him, and Mr. Mathews explained how those came to be,
6 and what he considered to be -- how the mix-up
7 occurred, and what he considered the correct
8 statements of his evidence was. He also refers to the
9 boundary that was drawn at Sand Lake, and how the
10 discrepancy arose there.

11 At the bottom of 494, my lord, Mr. Mathews
12 referred to the area between Sand Lake and Haahl
13 Dakakhl, and that means going alongside. And this is
14 along the side he testified, and he pointed out you
15 can distinguish the marks on the boundaries, however,
16 the descriptions are pretty hard to follow.

17 Now, not only were the base maps attached as
18 interrogatory responses in various stages of
19 completeness, but also in many cases no draft copy was
20 attached to an interrogatory response, because there
21 were either blank mylars; that is to say mylars with
22 no chiefs' information labelled on them, or no mylars
23 of the territory at all.

24 Now, my lord, it's clear that the mylar bases
25 prepared by Mr. George were in the process of being
26 worked on. The state of information contained on them
27 was incomplete. They were viewed and treated as
28 drafts. The decision to append these maps was made in
29 haste under pressure from the court schedule. And it
30 is significant that the maps were on a planimetric
31 base. They required topographic information to be
32 drawn on them to make sense of the boundary and
33 landmark data dependent upon heights of land. A
34 visual review of these maps demonstrates that most
35 contained few topographic labels, mixed word spellings
36 and tentative geographical determinations. Since
37 these maps were individual house territorial maps made
38 to scale ranging from -- differing scales, the areas
39 depicted on them are out of context to the larger
40 surrounding geographic area. It is hard to locate
41 oneself by means of the limited geographic areas shown
42 on these planimetric bases. And I say these factors
43 underscore the draft character of these maps.

44 My lord, what I then set out is Mr. George's
45 evidence regarding the interrogatory maps and the
46 interrogatory responses, and I don't intend to go
47 through them, but I set them out for your reference.

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1 THE COURT: These aren't all of the interrogatory maps that were
2 filed, though, are they?

3 MR. RUSH: No, because some of them were directed -- directly in
4 evidence, and these are Mr. George's. I gave three
5 examples, I believe, of the Gitksan, and those have
6 preceded these.

7 THE COURT: All right.

8 MR. RUSH: Relative to the Wet'suwet'en, in the middle of the
9 page Alfred Joseph explained the difference between
10 the map of Gisdaywa's territory dated May 12, 1987,
11 and his interrogatory map, and how the differences
12 arose between them. And I think it exemplifies a
13 common state of affairs, my lord. He testified:

14
15 "It's one of the differences was when we told
16 Marvin to draw the boundary. Showed him where
17 to draw the boundary. But one area was left
18 out. He followed Houston Tommy Creek for a
19 ways, and then swung back up north, but left
20 out an area, a plateau that was not used for
21 trapping. The only thing that was used for was
22 for hunting goats or caribou. It was hardly
23 any trees on it. But that's included, it was
24 included as Gisdaywa's territory."
25

26 The fact that the whole of the territory was not
27 used for trapping in no way reflected on the
28 fundamental ownership of that territory and the
29 multi-faceted activities going on there.

30 My lord, the differences which subsequently became
31 apparent between the draft maps appended as
32 interrogatory responses and the evidence of the chiefs
33 on their boundaries speaks much about the problems
34 arising from the incomplete state of the information
35 on the maps and the pressure of the court timetable.
36 The draft interrogatory maps did not purport to, nor
37 did they necessarily accurately represent the label,
38 location or spelling of geographical features on the
39 territories, nor were they in any sense determinative
40 of house ownership in the areas marked. These maps
41 illustrate the evolutionary process in the
42 cartographer's understanding and mapping of the
43 information from the hereditary chiefs about their
44 territories. The mapping weaknesses say nothing about
45 the knowledge of the chiefs or their territories. The
46 care with which new information was sought and
47 incorporated, and errors were corrected, speaks both

Submissions by Mr. Rush

1 to the extent of the chiefs' knowledge, and the
2 importance they attach to ownership of their
3 territories.

4 Now, my lord, I ask you to go over to 499, and I
5 make reference to the fact that Mr. George drafted
6 another map in April of 1986, and that's overlay
7 number 5, and this was drawn from the same base as
8 Exhibit 102, and so it was a planimetric map.

9 I draw your lordship's attention to a map Mr.
10 George drew in March of '87, to a scale of 1 to
11 250,000. And this one, my lord, is on a topographic
12 base. And that was designed to show the external
13 boundary of the Gitksan and Wet'suwet'en territory
14 based on the information which he had received to that
15 date.

16 THE COURT: That's overlay 6?

17 MR. RUSH: That's overlay 6. What I try to do, my lord, is to
18 give the map exhibit number, and then the exhibit
19 where the overlay is located.

20 THE COURT: Thank you.

21 MR. RUSH: My lord, on page 500 I draw your lordship's attention
22 to the intensive review of the external boundaries
23 that Mr. Sterritt was then involved in, and how
24 information which came to Mr. Sterritt passed onto Mr.
25 George and was incorporated on that March, '87 map,
26 overlay 6.

27 And midway through page 500 I draw your attention
28 to the fact that Mr. Sterritt conducted a detailed
29 review of those house territories on the external
30 boundaries, starting December of '86, and the process
31 by which the information was passed onto Mr. Sterritt.
32 I then -- excuse me, Mr. George.

33 Now, my lord, I draw your attention to Mr.
34 Sterritt's comments at the bottom of page 500. And on
35 501 Mr. Sterritt in that particular case was
36 testifying about the boundary change at the headwaters
37 of the Skeena and Nass Rivers. And on the basis of
38 the information that he received from Martha Brown,
39 Walter Blackwater and his uncle, Percy Sterritt, he
40 concluded that the boundary should be moved "based on
41 the more accurate information they had, and it was
42 partly based on a field trip as well that I made to
43 the area with Walter Blackwater" on September 6th,
44 1986. I say that this example is typical of the
45 process of obtaining more detail and therefore more
46 accurate information about the boundaries.

47 My lord, that point again is made by reference to

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1 Mr. Sterritt's evidence in the mid-paragraph and the
2 last paragraph on 501.

3 I then take you to 502, and I draw your lordship's
4 attention to the fact that the information provided to
5 Mr. George was recorded in loose-leaf notes of Mr.
6 Sterritt. And in respect of the information he
7 gathered as a result of those interviews, my lord, Mr.
8 Sterritt identified in his evidence changes to the
9 boundaries which were located at the 12 points I have
10 there identified. And those were reflected on
11 Exhibit -- overlay 646-6.

12 Now, my lord, events overcame --

13 THE COURT: Those changes were made before overlay 6 was
14 prepared.

15 MR. GRANT: No. They were made and reflected in overlay 6, but
16 yes, they were -- the information came to Mr. Sterritt
17 prior to that.

18 THE COURT: Thank you.

19 MR. RUSH: Now, my lord, the events of Mr. Sterritt continuing
20 were to gather geographic work -- were to gather
21 hereditary information from the hereditary chiefs
22 overcame the process. And I note that on the bottom
23 of 502.

24 And on 503 I draw your lordship's attention to the
25 fact that while he continued his work, Mr. Sterritt's
26 evidence disclosed that with the -- as a result of his
27 continuing work, the hereditary chiefs and the
28 clarification of eastern boundary resulting from the
29 Wet'suwet'en chiefs meeting after the All Clans feast
30 in April, information was forthcoming which
31 necessitated further changes to the external boundary.

32 The evidence of Mr. George indicated that in this
33 period he was using a working map to incorporate the
34 new information which was being passed to him from Mr.
35 Sterritt, and on which he made the changes to the
36 boundary. And this was another drafted composite map
37 of the Gitksan territory, and this map depicted the
38 changes to the boundaries after April 9, '87. And
39 that was marked Exhibit 1009. My lord, I don't wish
40 to do anything more than to just simply say that your
41 lordship can by reference to this get a feel for the
42 working nature of the information that Mr. George was
43 trying to put together in reference to this map.
44 That's Exhibit 1009.

45 I am over to 504, my lord.

46 Now, I am now referring to the map that was
47 tendered as Exhibit 681 in the trial, and became

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1 647-7. It was the map attached to the amended
2 Statement of Claim of May the 11th, '87.

3 THE COURT: Overlay number 7.

4 MR. GRANT: That's right. In this map Mr. George showed the
5 changes on the external boundary. The map was
6 entitled "The map of the external Gitksan and
7 Wet'suwet'en boundary", and dated May 2, and the
8 changes are there enumerated.

9 The internal boundaries which were drafted onto
10 the working map were drawn onto the map which became
11 Exhibit 5 in the proceedings. And this map was
12 labelled "external boundaries". Now, Mr. George
13 considered this to be a draft map, and was intended to
14 show the internal boundaries of the Gitksan and
15 Wet'suwet'en territories in draft form. And the
16 reason that he said that appears at 505. And he said:

17
18 "All maps would be drafts until the time they
19 were extensively reviewed with the hereditary
20 chiefs, and they had decided that the
21 information that they had given us was properly
22 transferred to the map and identified the
23 geographic features that they had given us and
24 identified the external boundaries that they
25 had given us, this wasn't done at this time."

26
27 Now, my lord, the procedure by which the
28 territorial information was gathered from and verified
29 by the hereditary chiefs altered in the summer of '87.
30 The evidence of Mr. George and Mr. Sterritt was that
31 as a result of an objection taken to the hearsay
32 character of the territorial information, a
33 recommendation was made and accepted by the court that
34 affidavit evidence was a useful means to introduce the
35 territorial and boundary evidence of the house chiefs.
36 And Mr. George testified as to how the affidavit
37 process was instituted. Here he then describes how it
38 was instituted, and how it was decided that he would
39 use a territorial affidavit.

40 I point out, my lord, that your lordship directed
41 on October 23rd that the Court -- that the plaintiffs
42 could adduce affidavit evidence of facts or documents
43 relating to location, boundaries and geographic
44 landmarks of the territories claimed by the plaintiffs
45 and their houses.

46 The work of interviewing Gitksan and Wet'suwet'en
47 hereditary chiefs and the drafting of the territorial

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1 affidavits commenced in the summer of '87, and, my
2 lord, I set out Mr. George's role in that respect, and
3 Mr. Sterritt's role. And I simply ask your lordship
4 to make reference to Mr. George's role, and the
5 affidavits which he relied on for the purposes of
6 drawing Exhibit 646-9-A. That's the Gitksan
7 territorial boundaries.

8 Over to 507, my lord. I want to draw your --
9 THE COURT: 646-9-A is the Gitksan?

10 MR. RUSH: External and internal territorial boundaries, yes.

11 THE COURT: Yes.

12 MR. RUSH: And I perhaps should emphasize the point at 506, that
13 Mr. George relied on the maps -- he relied not only on
14 the territorial affidavits, but he relied on maps
15 identified by the territorial witnesses in court. For
16 example, Mr. Stanley Williams, in respect of the
17 territories of Mary Johnson and one of the territories
18 of Hanamuxw, Mr. George relied on the territory -- the
19 chief's evidence, and he relied on the evidence of Mr.
20 Benson. He was also present during the evidence given
21 in cross-examination by Mr. Walter Blackwater.

22 Now, the opinion of Mr. George is set out at 507,
23 that Exhibit 646-9-A accurately reflected the internal
24 boundaries of the Gitksan hereditary chiefs subject to
25 four minor drafting corrections to which he noted.

26 Now, Mr. George was directly involved in the
27 drafting of the Wet'suwet'en territorial affidavits.
28 He conducted interviews with the Wet'suwet'en
29 hereditary chiefs and elders, with the assistance of
30 Wet'suwet'en interpreters. In preparing these
31 affidavits Mr. George utilized the existing
32 information about the house territories gathered from
33 hereditary chiefs. This included the records of the
34 names of the geographical features and the draft and
35 the draft maps, and with this information Mr. George
36 described how he prepared the affidavit. And it's
37 there set out, my lord, and I direct your attention to
38 the second full answer on page 508. And I ask you to
39 refer to all of this, my lord, but I -- with
40 reference, will direct you specifically to 509. And
41 this is what Mr. George said:

42
43 "And what I would do is I was explaining, 'this
44 is our understanding of the boundary is as we
45 have it. Now is this correct? Does your
46 boundary go along this particular creek or to
47 the height of land of this particular creek?

1 Are these features all within your territory?
2 Are there more -- is there more information
3 that you could give me regarding the
4 geographical features within this territory?'
5 And many occasions there was more information;
6 they would identify more geographical features.
7 And on some occasion the geographical features
8 were already identified but would be in the
9 wrong locations and they would correct me on
10 that, and then they would be properly
11 identified and properly labelled. And all
12 this -- most of this information would go onto
13 the working map that I had."
14

15 And then carry onto the bottom of the page, my
16 lord. Mr. George said:

17
18 "Next step was to take this information back to
19 the office and do a draft affidavit based on
20 the information that they had given us. The
21 draft affidavit would identify who this person
22 was, if he was Wet'suwet'en, what the chief
23 name was and where he was from what clan, who
24 his chief was, where he was from. The draft
25 affidavit would also indicate the source of
26 this person's knowledge. The draft affidavit
27 will also include the revised boundaries where
28 revisions were required, and would also include
29 the geographical features as they were
30 identified for us, and whether or not this
31 particular territory was described in the feast
32 or not."
33

34 And then, my lord, he says:

35
36 "Another meeting would be arranged with this
37 particular informant, and then again with the
38 help of a translator, we would go back and I
39 would have my working copies and I would
40 explain to them that the information they
41 have -- have given me is now incorporated into
42 this affidavit, and I would explain where all
43 the changes were and the geographical features
44 that they may have been identified."
45

46 And so on. Now, my lord, Mr. George took notes
47 during the interviews with the chiefs, and these were

1 marked as an exhibit. A similar process was used by
2 Mr. Sterritt, and Mr. Sterritt's description is set
3 out at the top of the page.

4 In most all cases Mr. Sterritt made and retained
5 notes of his interviews. Only the notes of deceased
6 chiefs were exhibited in the proceedings by the
7 plaintiffs because of objection to notes of interviews
8 about the territories from living informants. Mr.
9 George testified that he relied on the Wet'suwet'en
10 territorial affidavits in order to prepare the map
11 showing the internal boundaries of the Wet'suwet'en
12 House territories. And he gives there, my lord, the
13 affidavits relied on, the information that he relied
14 on in order to draw his conclusion, which is on the
15 top of page 512, that in respect of the Wet'suwet'en
16 territory that overlay Exhibit 4 -- 646-9-B reflected
17 the territory of the Wet'suwet'en hereditary chiefs.

18 He further stated in 512 that 9-A and 9-B together
19 reflected the external and internal boundaries of the
20 Gitksan and Wet'suwet'en, subject to the changes which
21 he testified to.

22 My lord, I am going to pause there for a moment
23 just to refer your lordship to the fact that I have
24 also included a passage of Mr. Sterritt's
25 cross-examination by Mr. Goldie. And this deals with
26 the sources of the information. And I include this
27 for your reference, because in the course of the
28 examination -- in the examination a question was
29 raised about the sources of the information, and Mr.
30 Sterritt at page 8674 says unequivocally "the
31 hereditary chief, if they knew the name of a mountain
32 along the boundary, they provided the source of that
33 information, not me."

34 THE COURT: Where is that?

35 MR. RUSH: This is line 7 on 8674.

36 THE COURT: Thank you.

37 MR. RUSH: Now, my lord, you may just make a reference to that,
38 perhaps, at the top of page 511 of my argument.

39 Now, if I just, my lord, may proceed here with
40 these points in the middle of 512.

41 My lord, the evidence of the chiefs and elders
42 concerning territory was not unblemished. As I have
43 argued earlier, some of the chiefs on
44 cross-examination placed feature names in the wrong
45 place, could not recall if certain features (usually
46 named in English) were in their territory, were vague
47 about specific points on the boundaries or confused

Submissions by Mr. Rush

1 house ownership with government trapline ownership.
2 What I have done here, my lord, is made reference to
3 the Elizabeth Jack example, and I have already
4 addressed your lordship on that, and I simply draw
5 your lordship's attention to the plaintiffs' argument,
6 which I set out on this point in the second to last
7 paragraph on 513.

8 I will also give as another example the testimony
9 of Mrs. Lucy Bazil, and I have also addressed your
10 lordship on that point, and I don't intend to speak to
11 that again.

12 On 514 I just ask your lordship to note that in
13 addition to the submissions made here, we further
14 submitted on this point at the location I have
15 indicated in the transcript -- or in my argument.

16 Now, my lord, going to the bottom of the page.

17 THE COURT: 514?

18 MR. RUSH: Yes. The nature of the process for gathering
19 information about the house territories required that
20 interviews be conducted with knowledgeable persons,
21 chiefs and other house members. Many of the people
22 who were the initial informants also swore the
23 territorial affidavits. And I there list as examples
24 many of those persons.

25 And going to the -- including James Morrison, Sam
26 Morrison, Stanley Williams, Pete Muldoe and so on.
27 Information was acquired from other chiefs living and
28 deceased, but not relied upon by the affiant. This
29 information was passed to Mr. George, Mr. Joseph, Mr.
30 Sterritt, Mr. Williams, and Mr. George in the process
31 that has been described, and that information by this
32 process was, of course, hearsay. The fact that
33 hearsay information may have been the basis in some
34 cases for the drafting of the early maps and for the
35 first draft of the territorial affidavits in no way
36 detracts from the direct evidence of the territorial
37 affiants who spoke directly to the same territories
38 and geographic features based on independent, their
39 sources of information.

40 The information shown on the maps and reflected in
41 the boundaries was the end product of gathering more
42 detailed and exact information about the hereditary
43 chiefs about their territories. The more information
44 that was gathered and understood by the researchers,
45 the more certain the maps became. It was, however,
46 the checking and cross-checking of information that
47 began in December, 1986 and followed through to the

1 drafting of the last affidavit which resulted in
2 finalized boundary descriptions and maps.

3 And I say something, my lord, at the top of 516
4 about the evolutionary process inherently involved in
5 mapping. And then I go to the bottom of 516, and I
6 note, my lord, that Mr. George and Mr. Sterritt knew
7 the geography of the territory and the features being
8 referred to on the ground. Because of that they could
9 map and label the features given to them on
10 topographical maps containing no English names for the
11 features. Mr. George could map the Gitksan and
12 Wet'suwet'en names on the maps and know that they
13 referred to the ground site. And I refer to Mr.
14 George's evidence in that respect.

15 Now, my lord, how else could this information have
16 been gathered in an oral culture with interwoven
17 community connections and a centralizing feast
18 institution? We say it was a truly remarkable and
19 unprecedented task to record, label, verify the names
20 and boundary locations in an area the size of New
21 Brunswick. And it could only have been achieved by
22 the method used in this case. The affidavit means of
23 proof was a reliable and expeditious way to take the
24 evidence out of its hearsay character and put it
25 before the Court in a direct way.

26 Mr. George also testified that he went on a number
27 of field trips in aid of his preparation work on the
28 territorial affidavits. And I there set out where Mr.
29 George went on his field trips.

30 Mr. George also accompanied your lordship on the
31 view, and I make that reference on page 518.

32 Now, my lord, I take you to the bottom of 518, and
33 I make this submission. What do the maps, 646-9-A and
34 646-9-B, represent? The maps speak to the truth of
35 the location of the boundary of the house territories
36 as drawn on the map and as existing on the ground.
37 The boundaries were contiguous, without gaps. The
38 labelling of chief and house names to an area on the
39 map correctly shows the ownership of that area on the
40 ground. The external boundaries of the Gitksan and
41 Wet'suwet'en territories together correctly show
42 where, on the ground, the dividing line is between the
43 Gitksan and Wet'suwet'en people and their neighbours.

44 And the final paragraph, my lord, are the
45 underlying facts founding Mr. George's opinion
46 reliable? We say yes, without doubt. The affidavits
47 of the hereditary chiefs and knowledgeable elders

1 represent the body of evidence proving the boundaries
2 and territorial ownership. That evidence was tested
3 and its reliability is unshaken. The witnesses who
4 testified about house territories had direct on the
5 ground knowledge of the land, its geographical
6 features, its boundaries and ownership, and this
7 knowledge was passed to them from previous, now
8 deceased, holders of the house names and other
9 knowledgeable elders who themselves had knowledge of
10 the territory.

11 And I think, my lord, that the plaintiffs' review
12 of the 133 Gitksan and Wet'suwet'en territories speaks
13 eloquently to that fact.

14 Now, my lord, I said that I would go to 5:00
15 o'clock, and I'm going to keep to my word here. I
16 have a further section to address you on, and if
17 you'll allow me, I don't intend to argue it. I am
18 simply going to, if I may direct you to it, and point
19 out what the argument is.

20 My lord, beginning at 520 is what we call other
21 claims to the territory not proved. And this is the
22 suggestion by the defendants that there is an overlap,
23 and that that overlap somehow detracts from the proof
24 of the ownership of the Gitksan/Wet'suwet'en
25 territories. And I invite your lordship to read this,
26 and I set out the reasons why this is a completely
27 untenable argument. And I simply say that what they
28 rely on are claims, the claims are unsupported in the
29 evidence.

30 At 521 the claims are bald assertions. The
31 mapping of these claims by Mr. Magwood demonstrates
32 how specious these claims really are. And I detail
33 Mr. Magwood's evidence in this respect. And you will
34 recall that he was essentially given the claims of the
35 neighbouring peoples and asked to draw them to the
36 best that he could. And I think that his evidence
37 makes it very clear just how unsupported those claims
38 are.

39 I also refer to Mrs. Ladouceur's evidence at 523,
40 and I direct your lordship to 524. And I say that the
41 documents that Mrs. Ladouceur referred us to do not
42 show proof of any other ownership interest in the
43 Gitksan and Wet'suwet'en territory either in terms of
44 the common law land tenure principles or by the
45 evidence and law, and I should say standards of that
46 law established by the Gitksan and Wet'suwet'en
47 people.

1 My lord, I just direct your attention to Exhibit
2 101, and Mr. George's, Mr. Sterritt's evidence on
3 that. I also direct your lordship's attention at page
4 525, directly to Mr. Sterritt's response about the
5 Nishga claim. And you will see that Mr. Sterritt's
6 evidence is that they resiled from much of what they
7 had asserted on previous claims.

8 My lord, I direct your attention to the bottom of
9 526, where Mr. Sterritt drew the court's attention to
10 the inter-societal mixing around Bear Lake, and the
11 fact that the Gitksan did not exclude the Stikene or
12 the Sekani relatives from those areas, but that did
13 not mean that there was any giving up or loss of
14 Gitksan or Wet'suwet'en ownership.

15 My lord, I direct your attention to the bottom of
16 527, that in fact the areas where there were Sekani
17 relatives located, that there were also areas of
18 proved ownership in the Gitksan/Wet'suwet'en people.

19 Over to 528 I refer to Mr. Joseph's evidence about
20 confusion that was compounded by the introduction of
21 the mapping and D.I.A. administrative systems, and Mr.
22 Joseph's and Miss Dora Wilson-Kennie's evidence in
23 that respect.

24 My lord, our conclusion is that the evidence of
25 the Gitksan and Wet'suwet'en people demonstrates that
26 they are the owners of the territories in this
27 lawsuit, and their evidence more than satisfies the
28 test in Baker Lake of dominion over their land.

29 And finally, my lord, I simply refer you to the
30 last section, 530 to 532, which is a short section on
31 mapping of the fishing sites. Mr. Grant has already
32 addressed you on this point, and I ask your lordship
33 to be mindful while reading this particular portion of
34 our argument of Mr. Grant's earlier submissions to you
35 with regard to mapping -- the mapping the fishing
36 sites and fisheries of the Gitksan and Wet'suwet'en
37 people.

38 Now, that concludes the plaintiffs' submissions
39 with regard to mapping of the territory, my lord, and
40 I would ask you, of course, even though perhaps I
41 touched briefly on certain portions of our written
42 argument, that that by no means lessens our -- the
43 importance of other portions that I didn't touch on.

44 I can advise your lordship that if the Court and
45 the Court Reporters and the staff and every one else
46 is willing to be here at 7:00, my lord, we would like
47 to pursue the plaintiffs' argument at that time.

Submissions by Mr. Rush

1 THE COURT: Yes. Arrangements have been made for us all to be
 2 here. Look forward to seeing someone at that time.
 3 MR. RUSH: Thank you very much.
 4 THE COURT: All right. Thank you.
 5 THE REGISTRAR: Order in court. Court stands adjourned until
 6 7:00 o'clock.
 7

8 (PROCEEDINGS ADJOURNED AT 5:10 P.M. TO 7:00 P.M.)
 9

10 I HEREBY CERTIFY THE FOREGOING TO
 11 BE A TRUE AND ACCURATE TRANSCRIPT OF
 12 THE PROCEEDINGS HEREIN TO THE BEST OF
 13 MY SKILL AND ABILITY.
 14

15 _____
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 17 OFFICIAL REPORTER
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Submissions by Mr. Jackson

1 (PROCEEDINGS RESUMED AT 7:05)

2

3 THE REGISTRAR: Order in court.

4 THE COURT: Mr. Jackson.

5 MR. JACKSON: My lord.

6 THE COURT: I understand that we're going to have two
7 approximately one-hour sessions this evening with a
8 ten- to fifteen-minute break between.

9 MR. JACKSON: Yes, my lord.

10 THE COURT: All right, thank you.

11 MR. JACKSON: The material that's been handed up to you is a
12 section which will go into the Plaintiffs' submissions
13 as volume 5 at the back under tab 2. I trust there's
14 still room in the binder.

15 THE COURT: Yes. I squeezed it in.

16 MR. JACKSON: The first section of this part of the argument, my
17 lord, deals with a number of issues relating to the
18 Plaintiffs' asserted right to ownership and
19 jurisdiction which arise out of questions your
20 lordship posed to counsel in the last week in
21 Smithers. And the issues raised by your lordship's
22 questions fall into two categories: The first one,
23 the issue of jurisdiction as it relates to land and
24 resources; and secondly, the issue of jurisdiction as
25 it relates to matters other than lands and resources.
26 And I'm addressing myself to the first of those issues
27 on page 1, and I have set out there the nature of the
28 interrogatory your lordship has posed on this issue,
29 and it's most succinctly stated at page 1 in the first
30 passage:

31

32 "But if the House owns the territory why do you
33 have to prove anything about jurisdiction if
34 you own the territory?"
35

36 And on page 2, my lord, you see the passage I have set
37 out there in which you have taken the position that
38 ownership of land and resources subsumes jurisdiction
39 or authority over that land and resources, and I've
40 set out a passage there which reflects that. In
41 relation to this matter, my lord, at page 3, the
42 Plaintiffs have a number of submissions, the first one
43 of which is as follows: If your lordship accepts the
44 Plaintiffs' submission that the nature of the
45 Plaintiffs' aboriginal rights in land and resources is
46 properly characterized as ownership -- and I'm at page
47 3, my lord.

Submissions by Mr. Jackson

1 THE COURT: Yes.

2 MR. JACKSON: And adopts the further proposition that one of the
3 essential elements of that ownership is the authority
4 to harvest, manage and conserve the land and
5 resources, then it is not necessary for your lordship
6 to go any further and to make any separate ruling on
7 the issue of jurisdiction over those lands and
8 resources. And there is judicial support, my lord,
9 for that proposition, which I have set out at page 3
10 and 4, in the judgment of the Privy Council in the
11 Attorney General of British Columbia and the Attorney
12 General of Canada.

13 THE COURT: Well, can I just stop you there, Mr. Jackson, and
14 just say that I think your paragraph number 1 on page
15 3 raises a serious legal difficulty for me, and one
16 which I have been grappling with and I have no very
17 firm view on it, but you see what -- the second branch
18 of your proposition there, that is if the court adopts
19 the further proposition, one of the essential elements
20 of that ownership is the authority to harvest, manage
21 and conserve the land and resources, then it is not
22 necessary -- well, that raises the fundamental
23 question as to whether that authority is an incident
24 of ownership or whether it's regulated or controlled
25 in some way by the general or other law of the
26 province.

27 MR. JACKSON: Yes, my lord, I appreciate these are separate
28 points, and Miss Mandell will be addressing you
29 separately on this issue, because it is a point of
30 great difference between my friends and I. They say
31 that whatever rights which the plaintiffs have, be
32 they characterized as aboriginal title or some other
33 interest, they are subject to regulation by the
34 province through the vehicle of Section 88 of the
35 Indian Act, and that is the straight argument, my
36 lord, and something which we will be grappling with
37 later in the week.

38 THE COURT: All right, I'll look forward to hearing from you
39 then.

40 MR. JACKSON: And the Privy Council decision, my lord, dealt
41 with the competence of the Province of British
42 Columbia to grant exclusive fishing rights in both
43 tidal and non-tidal rivers. So far as non-tidal
44 rivers were concerned, my lord, in which there was no
45 public right to fish, and where the fishery is an
46 incident of the ownership of the bed of the river,
47 because these particular lands were within the railway

Submissions by Mr. Jackson

1 belt, the bed of the river was within the proprietary
2 domain of the federal government, and Lord Haldane, in
3 the course of his judgment, said:
4
5 In the present case, therefore, their Lordships
6 entertain no doubt that the title to the solum
7 and the water rights in the Fraser and other
8 rivers and the lakes so far as within the belt
9 are at present held by the Crown in right of
10 the Dominion, and that this title extends to
11 the exclusive management of the land and to the
12 appropriation of its territorial revenues."
13
14 And that, my lord, reflects the subsuming, as it were,
15 of a regulatory managerial authority within the
16 general rubric of ownership.
17 THE COURT: But that's not the way it worked, is it?
18 MR. JACKSON: The Province always collected a royalty on the
19 appropriation of the territorial revenues in terms of
20 the railway belt.
21 THE COURT: Yes. Well, I'm not sure which railway belt you're
22 talking about, but let's talk about the Crows Nest.
23 MR. JACKSON: No -- we're talking about the -- the great reserve
24 established as a result of the terms of union.
25 THE COURT: The main line?
26 MR. JACKSON: Yes.
27 THE COURT: You say the Province didn't collect a royalty on the
28 timber and the coal and everything that's extracted
29 from it?
30 MR. JACKSON: I think that was pursuant to particular
31 arrangements rather than as a necessary incident of
32 any ownership. I think those royalties and other
33 arrangements were as a result of special arrangements.
34 THE COURT: All right. So you say I should take it, at the
35 moment, at least, that statement is face value?
36 MR. JACKSON: In support of your lordship's proposition of
37 ownership subsuming a jurisdictional management
38 component.
39 THE COURT: All right.
40 MR. JACKSON: Your lordship in volume 328 stated what in effect
41 is a proposition which would reflect Lord Haldane's
42 views, where you put in what you viewed what the
43 Plaintiffs' position was highest:
44
45 "I have assumed...that at the end of the day
46 what I would say, if I accepted all your
47 submissions, would be that the Plaintiffs are

1 entitled to judgment, that they have an
2 interest in the following lands, followed by a
3 description of them in some way...And that the
4 form of such interest is as follows, and it
5 would say it's a right to enjoy and possess and
6 to manage and harvest its fruits and
7 benefits...it seems to me that that's the form
8 of order that would be the most you could
9 expect to receive on this case, and that's why
10 I'm having serious difficulty with this
11 question of jurisdiction."
12

13 My lord, if your lordship does take the position that
14 harvest, manage, conserve is within the rubric of
15 concept of ownership, we would accept that statement
16 of your lordship's, subject to a qualification which
17 I've set out at the bottom of page 4, that the right
18 to enjoy and possess would be an exclusive right to
19 enjoy and possess. And, my lord, this could be your
20 lordship's proposition we are prepared to
21 reverentially incorporate, as it were, in our previous
22 submissions, and I have referred you to volume 3 of
23 our previous submissions. And your lordship may
24 remember on a previous occasion I sought to answer
25 some other questions your lordship had regarding
26 whether the Plaintiffs' rights were in the nature of
27 fee simple, or what was the precise nature or quality
28 of the interest we were seeking. And that proposition
29 is set out at the top of page 5 with the additional
30 element of right to harvest, manage and conserve. So
31 that the Plaintiffs' interest extends to the full
32 exclusive possession of the territory and all of its
33 resources, including the right to harvest, manage and
34 conserve its fruits and benefits.

35 My lord, that is, as I say, on the first
36 assumption that ownership does subsume jurisdiction.
37 And while there is judicial support for that broad
38 characterization of ownership, the plaintiffs have
39 not, out of some sense of perversity, pleaded
40 ownership and jurisdiction, they have pleaded
41 ownership and jurisdiction because within Canadian law
42 there is also a broad spectrum of authority which does
43 characterize and divide the relationship to property
44 as between ownership and jurisdiction. And that
45 distinction, my lord, is set out in a passage I have
46 taken from Dr. Dorsey, McPhee, and Mr. Sydneysmith's
47 book, which seeks to explain the rather complex

1 relationship between federal and provincial rights in
2 the area of resource regulation and environmental
3 protection. And in the last part of that passage you
4 will see the authors say:

5
6 "The federal and provincial governments, as
7 proprietors of public lands, can accordingly
8 regulate the use of these resources much in the
9 same manner as a private owner would. In
10 addition, many aspects of resource
11 administration come within the grants of
12 legislative jurisdiction made to the respective
13 levels of government in the B.N.A. Act. This
14 jurisdiction is distinct from the rights and
15 powers that devolve upon a government through
16 its ownership of a resource, and may either
17 complement or conflict with them."

18
19 And that relationship, that potential conflict between
20 ownership on the one hand and jurisdiction on the
21 other, is also made manifest somewhat paradoxically in
22 the same case I have just referred your lordship to,
23 where Lord Haldane, in referring to a previous
24 decision of the Privy Council in 1898, the Attorney
25 General of Canada, the Attorney General of the
26 Provinces, dealing with the relationship between the
27 provinces' proprietary interest in a fishery in a
28 non-tidal water in an area outside of the railway belt
29 contrasted its relationship to the federal
30 government's jurisdiction under Section 91(12) over
31 seacoast and inland fisheries, and in the passage I've
32 set out at page 6, Lord Haldane, in referring to that
33 earlier decision, stated:

34
35 "It recognized that the province retains a right
36 to dispose of any fisheries to the property in
37 which the province has a legal title, so far as
38 the mode of such disposal is consistent with
39 the Dominion right or regulation, but it held
40 that, even in the case where proprietary rights
41 remain with the province, the subject matter
42 may be of such a character that the exclusive
43 power of the Dominion to legislate in regard to
44 fisheries may restrict the free exercise of
45 provincial rights."

46
47 And so there, my lord, you have that characterization

1 of ownership and jurisdiction, not as one subsuming
2 the other, but as ones which may in certain
3 circumstances conflict one with the other, and I've
4 set out in the following pages at the bottom of page
5 6, top of page 7, a statement again of Dr. Dorsey and
6 his associates on the relationship between federal and
7 provincial proprietary interests and jurisdictional
8 rights. And I would say, my lord, that the discussion
9 in these passages, of course, is all made outside of
10 the context of any discussion of aboriginal rights.

11 THE COURT: Yes.

12 MR. JACKSON: That was not an issue in any of these cases.

13 THE COURT: They had the easy problems.

14 MR. JACKSON: Although in terms of how easy it was, I should
15 note that Lord Haldane in this case made the point
16 that he and his colleagues were not a little upset at
17 all these references being made to the Privy Council
18 on issues which they found enormously difficult to
19 resolve in the abstract. No doubt a similar problem
20 which caused the Chief Justice Dixon to issue his
21 caveat that aboriginal rights ought not to be resolved
22 in a factual vacuum. The distinction, my lord,
23 between ownership and jurisdiction is made even more
24 explicit in some of the modern comprehensive land
25 claims agreements, and I've set out at page 7 some
26 provisions from the Inuvialuit Final Agreement, which
27 is earlier referred to in volume 1 of the Plaintiffs'
28 submissions, where the Inuvialuit, under the
29 agreement, are granted a fee simple title in certain
30 lands, and notwithstanding the grant of that fee
31 simple title, the agreement specifically -- and you
32 will see at paragraph 7, subparagraph 85, the
33 agreement says:

34
35 "Notwithstanding Inuvialuit ownership of beds of
36 rivers, lakes and other water bodies,

37 (a) Canada shall retain the right to manage
38 and control waters, waterways" --

39
40 For certain particular purposes. And so under the
41 agreement, ownership and jurisdiction are split, the
42 one is not subsumed within the other. It is the
43 Plaintiffs' submission that in the absence of a treaty
44 or a modern land claims agreement, the aboriginal
45 rights of the Plaintiffs, at least so far as the
46 Provincial defendant is concerned, embraces both a
47 proprietary interest in the lands and resources, its

Submissions by Mr. Jackson

1 ownership and authority to harvest, manage and
2 conserve the lands and resources in its jurisdiction.
3 And, my lord, I would --

4 THE COURT: You would say then that that is ownership free of
5 all provincial regulatory or other resource -- or
6 other legislation, including Land Act, Land Titles
7 Act, and all those other provincial legislative
8 enactments that relate to the land within the
9 territory found to be subject to this aboriginal
10 right?

11 MR. JACKSON: Yes, my lord.

12 THE COURT: Yes.

13 MR. JACKSON: At pages 8 to 14, my lord, and I'm not going to go
14 over them with you, but I would refer your lordship to
15 them, I set out some of the areas of conflict between
16 the provincial and the Plaintiffs' jurisdictional
17 schemes.

18 THE COURT: I'm sorry, page 14?

19 MR. JACKSON: Page 9 to 14.

20 THE COURT: Oh, 9 to 14, and --

21 MR. JACKSON: And I will be coming back to that in a later area.
22 The second issue which your lordship raised in
23 questions was the issue of jurisdiction as it relates
24 to issues not connected with land and resources. And
25 I've set that out at page 14. And your lordship will
26 recall that with the benefit of reflection your
27 lordship, in a preliminary way, formulated for the
28 benefit of counsel some views on how your lordship saw
29 the relevance of the evidence in the submissions which
30 counsel were addressing to you on matters of
31 jurisdiction which related to areas other than land.

32 THE COURT: Yes.

33 MR. JACKSON: And I've set out that passage at page 15.

34 THE COURT: Well, I'm sure you understand that these are all
35 very tentative.

36 MR. JACKSON: Yes, my lord. We've approached this with that in
37 mind to, as it were, provide food for thought, and to
38 try and prompt the Plaintiffs into being as precise as
39 to the nature of the interest being claimed and to
40 articulate why these submissions are urged upon your
41 lordship. And your lordship characterized the issue
42 in the cases as being one of a conflict between lore
43 and culture, and you expressed the view that your
44 lordship felt that this court could not make any order
45 which would impose a cultural authority or a
46 jurisdiction upon individual Gitksan and Wet'suwet'en
47 who were not parties to this action, particularly in

1 relation to minors, and that your lordship was
2 concerned that orders of this court might convert what
3 at the present moment was a voluntary jurisdiction in
4 the sense of one where people were free to adhere to
5 or not, into something of a wholly different character
6 which could raise a number of issues. And what we say
7 in relation to those thoughts, my lord, is that, first
8 of all, that the characterizing the case as a clash
9 between lore and culture we say does not do full
10 justice to the nature of the relationships between the
11 Plaintiffs and the Province. Nor do we say does it do
12 full justice to the nature of the evidence. And at
13 page 16 to 18, my lord, I have suggested that a number
14 of those heads of evidence and heads of submissions
15 based upon them bespeak something which the rubric
16 culture does not reflect in the fullness of those --
17 of that evidence. We say, my lord, for example, while
18 the ancient histories of Gitksan and Wet'suwet'en
19 houses are certainly part of their culture, the laws
20 which determine membership in a house and the
21 enforcement in those laws through birth and adoption
22 are rules taught and followed by the Gitksan and
23 Wet'suwet'en within the central institutions within
24 the feast in the house. While song recording past
25 trespasses may be part of the culture, the law
26 prohibiting trespass and the sanctions which are
27 imposed demonstrate the system of land holding among
28 the community of people where clearly defined
29 boundaries are intensely important and where people
30 can expect that sanctions will result if trespass
31 continues.

32 And at page 18, my lord, we say that when Stanley
33 Williams picked up the bear which he killed, about
34 which you have heard much, and sang the song of the
35 bear; and put the bear on his shoulders and walked to
36 the village and again sang the song, his actions of
37 course can be described properly as cultural, but at
38 the same time he is reaffirming the obvious
39 long-standing spiritual connection between the people,
40 the lands and the animals, reflecting harvesting laws
41 which in the rigor of their training and the antiquity
42 of their practice can hardly be described only as
43 cultural.

44 THE COURT: But it was voluntary.

45 MR. JACKSON: Voluntary?

46 THE COURT: On his part.

47 MR. JACKSON: Yes, my lord. The point I'm seeking to make is

Submissions by Mr. Jackson

1 that within the context of the Gitksan and
2 Wet'suwet'en system, the fact that something is
3 voluntary does not mean that it does not have a
4 character of something which is more than simply
5 culture as compared to our law.
6 THE COURT: Stanley Williams didn't say everytime he shot and
7 killed a bear he did this.
8 MR. JACKSON: No, my lord. The fact that he did this on this
9 particular occasion was symptomatic or symbolic of a
10 relationship both to his territory, to the animals,
11 and to his place in the community, and his
12 relationship to that community.
13 THE COURT: Well, take an even more graphic illustration. When
14 Pete Muldoe acquired fee simple titles of land within
15 another chief's alleged territories and boundaries, he
16 was clearly not -- he clearly did not consider himself
17 at that moment bound by Gitksan law.
18 MR. JACKSON: My lord, that kind of example, which of course is
19 repeated in the evidence on more than one occasion, is
20 something I will be addressing.
21 THE COURT: All right.
22 MR. JACKSON: Specifically in relation to some arguments made by
23 my friends as to the continued viability of the
24 Plaintiffs' system of authority. My lord, in terms of
25 the juxtaposition of a conflict between lore and
26 culture, it is our submission that the concept of
27 aboriginal rights, properly understood in its
28 historical context, and I'm reading here from page 18,
29 my lord, contains both the principles and the process
30 for cultural and economic accommodation. The
31 treaty-making process and its modern equivalent, the
32 comprehensive land claims agreements, are built upon a
33 recognition of aboriginal rights as legal concepts
34 imbedded in the law. In this way these agreements are
35 designed to provide the framework for accommodation
36 and not conflict between aboriginal organized
37 societies and other Canadians. It is our submission
38 that the conflict to which your lordship referred is
39 the consequence of the provincial government acting in
40 violation of the legal rights of the Plaintiffs.
41 THE COURT: Can't you put it the other way just as easily,
42 though, and say that the comprehensive land claims
43 agreements are a combination designed to avoid the
44 conflict I have identified, and that it can't be said
45 with absolute certainty that the rights that were
46 recognized in the comprehensive land claims were
47 admitted to be legally enforceable, that they dealt

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1 practically and, I suppose, kindly and generous, and
2 in an accommodating way with the problem that they
3 wanted to resolve. But can you say that it -- can you
4 argue that -- I must assume that the -- I guess it's
5 the federal government who agreed to those claims,
6 recognized that these were enforceable rights that
7 they were conceding by way of agreement, and even if
8 they do, even if they were, how does that bind anyone
9 else?

10 MR. JACKSON: It doesn't, my lord. What we say about those
11 agreements is that if your lordship was faced with
12 those agreements, as it were, out of context, then
13 those agreements could be fairly characterized in the
14 way your lordship has expressed. What we say,
15 however, is that when you look back to the practice of
16 the Crown over some 400 years in various parts of
17 North America, that the modern land claims agreements
18 are part of a chain of continuity of recognition of
19 rights.

20 THE COURT: Doesn't this whole argument come right up against
21 Chief Justice Dixon's dictum that each of these claims
22 is to be treated as *suigenuris*.

23 MR. JACKSON: I don't think so, my lord, because what Chief
24 Justice Dixon was saying, I think, was that these
25 cases ought not to be viewed as legal abstractions,
26 and I -- and of course in the Amodu Tejani(?) case the
27 Privy Council made exactly the same point. Your
28 lordship has said as much using the language that we
29 have to be on the ground in relation to these matters.
30 I don't think Chief Justice Dixon was saying that the
31 *suigenuris* nature of the rights means that the court
32 cannot look for and find guidance in consistent and
33 persistent practices of the Crown, particularly when,
34 as we say, those practices bespeak legal obligations
35 which are imbedded in the common law, the practice and
36 the continuity there is something which your lordship
37 can take and should take into account in deciding
38 whether or not in British Columbia, as part of the
39 common-law pre-existing rights of aboriginal peoples,
40 exist as a matter of law and not as a matter of
41 sovereign grace, dependent upon the particular
42 practices observed by the British Columbia colonial
43 authorities in this part of the world. And that is
44 exactly the point on which Mr. Rush will be addressing
45 your lordship tomorrow morning.

46 THE COURT: Well, I understand your point, I'm just troubled by
47 whether I can accept it and give effect to it without

Submissions by Mr. Jackson

1 trying all the claims individually and seeing why they
2 reached the conclusions they reached, because I have
3 intended in this case to treat the language of Chief
4 Justice Dixon both in Guerin and in Krueger and Manuel
5 he talks about site specific and these sort of things
6 as meaning that each claim stands on its own, and I am
7 having some difficulty with the quantum leap that
8 you're asking me to take here to say that because
9 these things were done with relation to those Indians
10 in those circumstances, that that means that that was
11 in recognition of a legal right.

12 MR. JACKSON: Well, my lord, our position, and it is at the
13 heart of our position, is that I think this is the
14 point of great difference between our position and my
15 friends'. It is our position that using the words of
16 Mr. Justice Stronges(?) in St. Catherine's Milling,
17 that the practice of the Crown, as reflected in the
18 bilateral consensual treaty-making which took place
19 over several hundred years, that those practices
20 ripened into rules of the common law, and your
21 lordship will recall --

22 THE COURT: Well, I understand that argument, and you've made
23 that argument, and if I might say so, made it very
24 well. I have no difficulty with that argument as it
25 raises a legal problem that all these matters seem to
26 end up as is a question of difficult choices between
27 pretty well circumscribed options, and I have no
28 difficulty with that one. I am still having a lot of
29 difficulty with the question of jurisdiction. It
30 seems to me that at the end of the day I still come
31 down to a question of defining the nature of the
32 ownership, and once you do that you have subsumed -- I
33 think you have subsumed jurisdiction.

34 MR. JACKSON: As I say, my lord, we have no problem with that
35 subsuming of jurisdiction, so far as in relation to
36 lands, and if your lordship feels that that is a way
37 which is more comfortable in terms of the precedence,
38 more consistent with the precedents, of course the
39 precedents I've given your lordship point in both
40 directions. What I am dressing at this point, though,
41 is the issue of jurisdiction as it relates to the
42 issue which most troubled your lordship in the
43 non-land resources area.

44 THE COURT: Well, can I ask you what I asked Miss Mandell, what
45 you are asking for in a way of an order that would
46 give effect to that part of your submission?

47 MR. JACKSON: My lord, the paragraph 4 of the prayer for relief

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1 seeks a declaration, and I've set this out on the top
2 of page 19, the right to govern themselves, the
3 members of the houses represented by the Plaintiffs in
4 accordance with Gitksan and Wet'suwet'en law,
5 administered through Gitksan and Wet'suwet'en
6 political, legal and social institutions as they exist
7 and develop. That was the general tenure of that
8 paragraph. And we say, my lord, in response to your
9 lordship's concern about this court imposing a
10 cultural jurisdictional authority upon people not
11 before the court, that a declaration in those terms
12 does not impose a cultural authority upon individual
13 Gitksan and Wet'suwet'en.

14 THE COURT: Well, you would be asking me to make a declaration
15 that would impose this matrilineal concept upon every
16 Gitksan, whether he subscribes to it or otherwise.

17 MR. JACKSON: No, my lord. What we say is that the Plaintiffs'
18 jurisdiction is exercised within the framework of a
19 kinship society and is non-coercive. Any declaration
20 of this court, therefore, is exactly what it would
21 imply, it is declaratory of an existing state of
22 affairs and would not impose anything different upon
23 individual Gitksan and Wet'suwet'en. And a
24 declaration of this court, therefore, in the form of
25 paragraph 4 of the prayer for relief would not subject
26 individual Gitksan and Wet'suwet'en to any legal
27 sanctions such as those that might flow from
28 disobedience to an order of this court requiring them
29 to pay taxes. The order of this court does not
30 convert the legal imperatives of observing the
31 obligations of a kinship society into the legal
32 imperatives of obeying the laws of a state society
33 such as Canada, backed as it is with the authority of
34 police officers, a Criminal Code which authorizes
35 fines and imprisonment, and the power of the judiciary
36 to commit for contempt of court, and therefore your
37 lordship in declaring a right of jurisdiction would
38 not subject those individuals to an authoritarian
39 regime or require them to act in ways different from
40 that which they are prepared to act by virtue of the
41 forces which bear upon them or don't bear upon them,
42 depending upon the degree of their commitment to the
43 kinship society of the Gitksan and Wet'suwet'en. And,
44 my lord --

45 THE COURT: I'm having a lot of difficulty with this, Mr.
46 Jackson. Perhaps I can put it in terms that I can
47 understand. What do you say about the general law of

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1 the province as every child must attend school until
2 he's 15 years of age, subject to certain objections.
3 You say that I would have to strike that down as to
4 whom --
5 MR. JACKSON: No, my lord, we're not asking you to strike that
6 door down.
7 THE COURT: You wouldn't strike that down?
8 MR. JACKSON: No. We're not asking you to.
9 THE COURT: What about all the health regulations and pure foods
10 and environment and all those things.
11 MR. JACKSON: In setting out, as we have, certain heads of
12 jurisdiction, which we did in our submissions, your
13 lordship will see we did not deal with a variety of
14 issues which the Plaintiffs have not sought specific
15 authority in relation to, nor do they seek to exclude
16 provincial laws pertaining thereto. And your
17 lordship, in fact, will recall that that was part of
18 your lordship's concern, that some of the heads of
19 jurisdiction which were claimed, such as the right to
20 regulate the internal affairs of the house to
21 determine house membership, to conduct feasts, were
22 areas which were not subject to federal or provincial
23 laws conflicting therewith, and your lordship wanted
24 to know why that raises a justiciable issue, given
25 that the Plaintiffs can exercise those kind of rights
26 without the orders of the court. What we say, my
27 lord, in relation to that, is that those areas of
28 jurisdiction were led not only to illustrate the
29 overall structure or framework of the Plaintiffs'
30 jurisdiction in other areas, particularly in relation
31 to lands and resources. In other words, the
32 jurisdiction in relation to lands and resources was
33 not, as it were, an ad hoc body of authority, it was a
34 body of authority which was reflected in other areas
35 through the institutions of the house, through
36 institutions of houses acting collectively, so that
37 your lordship could see that the jurisdiction in
38 relation to proprietary interests was something
39 consistent with the way the chiefs in the houses
40 exercised jurisdiction in other areas. But over and
41 above its evidentiary importance, we also say, my
42 lord, that those heads of jurisdiction -- and that's a
43 point which I make at page 20, my lord -- that those
44 heads of jurisdiction bespeak what we say is the
45 pre-existing right of the Plaintiffs to govern
46 themselves, and that is a right, my lord, which the
47 federal and provincial governments do not at this time

1 recognize, and it is a right which if it is declared
2 in your lordship's judgment is not simply something of
3 symbolic importance, it is of practical effect and
4 would be something which would bear directly, my lord,
5 in relation to any negotiations which will be
6 consequent upon any order of this court. And of
7 course the Court of Appeal has made it very clear the
8 expectation of everyone is that these matters
9 ultimately will be resolved by negotiation and not by
10 the fiat of the court. So that a declaration in
11 relation to those matters, which does not, in terms of
12 its specificity, seek to exclude educational laws or
13 health laws, is something which we say your lordship
14 can and should grant.

15 THE COURT: Well, I'm sorry, I thought you said a moment ago
16 you're not seeking to strike down laws of general
17 application. Now I think you're saying that you are.

18 MR. JACKSON: My lord, the Plaintiffs are not specifying the
19 particular areas of jurisdiction which they -- over
20 which they exercise and govern themselves. They have
21 articulated a number of particular heads of
22 jurisdiction upon which we have asked this court to
23 make declatory rulings.

24 THE COURT: Then the note I made a moment ago, Plaintiffs do not
25 seek an order striking down the general laws of the
26 province, now you tell me now that is not an accurate
27 note of your --

28 MR. JACKSON: I was referring, my lord, to your reference to
29 land, education and health.

30 THE COURT: Public health, yes. What about traffic?

31 MR. JACKSON: In relation to lands outside of reserves, I don't
32 think the Plaintiffs have ever voiced an objection to
33 the traffic laws of the province, my lord.

34 THE COURT: So the province can continue to regulate the use of
35 the highways and can continue to impose roadside
36 suspensions and all those other things that go with
37 the regulation of traffic?

38 MR. JACKSON: I don't believe the Plaintiffs have suggested that
39 that would be any different, my lord.

40 THE COURT: So that -- well, is there a happy little bundle of
41 rights that you can -- that I can add to my note after
42 the "but"?

43 MR. JACKSON: We can try to provide your lordship with something
44 which clarifies this a little bit more. The point of
45 trying to articulate, as I said, the areas of
46 jurisdiction in our submissions was to give your
47 lordship, as it were, a short list of the particular

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1 jurisdiction which the Plaintiffs are claiming outside
2 the area of lands and resources.

3 THE COURT: You say the Plaintiffs are not seeking an order from
4 this court which would permit another Canadian court
5 to adjudicate disputes or breaches of law internal to
6 the Gitksan and Wet'suwet'en system. What other
7 Canadian court would you have in mind there, the
8 federal court or the provincial courts or what?

9 MR. JACKSON: No, my lord. That was meant to be a general
10 statement that we are not seeking from this court an
11 order which would permit any other court, whether it
12 be this court, a provincial court, a federal court, to
13 intervene in the internal affairs of the Gitksan.
14 This was in relation to your lordship's concern that
15 any judgment that your lordship made would impose some
16 cultural authority which hitherto had been voluntary.
17 The point we're trying to make in that passage is this
18 would not --

19 THE COURT: Then would it be more accurate, if I might be
20 forgiven by putting it that way, that what you're
21 really saying is that the Plaintiffs are seeking an
22 order from this court which would prevent any Canadian
23 court from adjudicating disputes or breach of law
24 internal with the Gitksan and Wet'suwet'en system?

25 MR. JACKSON: I think that would be putting it too highly in the
26 sense that we're not seeking a preclusive ruling from
27 your lordship, we're saying the nature of the Gitksan
28 and Wet'suwet'en society and its rule-making is such
29 that the intervention of an outside body such as a
30 court would in fact be inconsistent with the nature of
31 the kinship obligations.

32 THE COURT: All right. Now, your next sentence:

33
34 "The Plaintiffs are seeking from this court
35 recognition that their laws and institutions
36 exist and must be respected by the governments
37 of Canada."

38
39 So you're asking for a declaration that the feast
40 system is alive and well in Gitksan country, and that
41 it must not be impaired by any enactment of any
42 Canadian legislative body.

43 MR. JACKSON: I don't think we're seeking a declaration in that
44 kind of specificity, my lord. Paragraph 4 of the
45 prayer for relief is left in the form it is in order
46 to, as it were, give space for accommodation. One of
47 the points which the Plaintiffs have struggled with is

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1 to seek declarations which do in fact provide the
2 basis upon which real negotiations can take place.
3 They have some content to them, but they do not
4 confine or limit the possibility of accommodation
5 between the Plaintiffs and either the federal or the
6 provincial governments to a point where those
7 negotiations would not in fact be productive or
8 fruitful.

9 THE COURT: I take it you have no concern with the -- with what
10 troubled me as expressed to Miss Mandell, that there's
11 no one here representing persons under disabilities,
12 and that I shouldn't be concerned about making an
13 order that might affect the right of unrepresented
14 persons, such as a child, to opt out of this whole
15 cultural mosaic that you and your colleagues have
16 painted.

17 MR. JACKSON: I don't think that is a concern your lordship
18 should have, given the nature of the declaration your
19 lordship would be making.

20 THE COURT: That's why I'm having trouble seeing how I could
21 frame the kind of declaration you are seeking without
22 it possibly affecting the rights of other
23 unrepresented third parties.

24 MR. JACKSON: It's not clear to me, my lord, what rights of
25 unrepresented third parties would be negatively
26 affected by the order of the court.

27 THE COURT: Well, let's take the case of a young Gitksan person
28 who received a gift by will from a non-native of land
29 within the claim territory. Is she required as a
30 Gitksan person to submit to the laws and institutions
31 of the Gitksan, or is she entitled to say no, this is
32 a private right that I have.

33 MR. JACKSON: I would have thought even under the effect of your
34 lordship's declaration she would be able to make that
35 individual choice, and the consequences of that would
36 be something as between her and the chief or members
37 of the house to which she belonged and would not be
38 the subject of any negative sanctions or consequence
39 which would flow from this court's declaration. In
40 other words, this court's declaration would not change
41 that particular situation in any way or shape,
42 vis-a-vis her relationship or rights as a Gitksan
43 person.

44 THE COURT: But I take it you would say that if a dispute arose
45 as to who should be the hereditary chief of a house,
46 that this court would have no jurisdiction?

47 MR. JACKSON: No, my lord. And it would not have any greater

1 jurisdiction than it does today arising from the fact
2 that this court has declared in effect that the
3 Gitksan have a pre-existing right to govern
4 themselves, the precise contours of which and the
5 precise details of which are not defined but are left
6 for further definition.

7 THE COURT: Mr. Jackson, I don't think I should take up so much
8 of your time, but I think you can see that I'm
9 troubled, and what I would like you to do for me is to
10 give me a draft of what you say I should -- or what is
11 the declaration you say I should make, because you see
12 that it troubles me because I do not foresee all the
13 possible consequences, and that is a scary thing to
14 ask a judge, trial judge to do, is to do something for
15 the first time, never been done before, and I would be
16 very interested in seeing what language you say should
17 reflect the court's judgment on that part of your
18 prayer for relief.

19 MR. JACKSON: My lord, I will -- we will provide your lordship
20 with that draft.

21 THE COURT: Thank you. And I wish you all the luck in the world
22 in drafting it.

23 MR. JACKSON: My lord, at page 20 and 21 I've set out some
24 further submissions regarding why we say a declaration
25 in relation to what I've broadly characterized as a
26 right to self-government in terms of areas outside of
27 lands and resources is of significance and why the
28 plaintiffs have requested it. We will in fact amplify
29 that in relation to your lordship's concerns. My
30 lord, starting at page 21, the argument turns to the
31 legal foundations for the Plaintiffs' right to
32 jurisdiction, and the first part of that, my lord, is
33 at page 23, the concept of aboriginal jurisdiction as
34 part of the common law of aboriginal rights. And this
35 in large measure, my lord, is something I have already
36 addressed your lordship on at some length in terms of
37 dealing with the strand of the common law which has
38 developed in the American cases, building upon the
39 foundation block of Worcester and Georgia, and I say
40 at page 23, my lord, that -- and your lordship is
41 correct in terms of identifying this as an issue of
42 first impression in the Canadian court in that the
43 issue of aboriginal jurisdiction, as the Plaintiffs
44 have articulated, has not come before a Canadian court
45 in the way it has come before your lordship, and
46 certainly has not been addressed on the basis of an
47 evidentiary foundation such as has been placed before

1 your lordship. The issue has, however, been the
2 subject of litigation, although that litigation has
3 usually been resolved on other grounds, and at page 24
4 and page 26, my lord, I have provided for your
5 lordship a short summary of how that litigation has
6 come about, and interestingly enough, in the same way
7 as some of the modern litigation in the United States
8 in relation to land rights and whether or not
9 aboriginal title is properly characterized as being at
10 the sufferance of the Crown in the way of the
11 Teehiton(phonetics) characterization, or as a
12 pre-existing legal right in the manner of the original
13 Worcester -- the original Marshall decisions. So too
14 the issue of jurisdiction has arisen in the context of
15 the Six Nations, the Iroquois confederacy, and I've
16 set out at page 24 and 26 the resume of that
17 litigation. And your lordship will see from that that
18 the Six Nations, after their crossing of the American
19 border into Canada, have in their relationships with
20 government taken the position that the Covenant Chain
21 which characterized their relationships originally
22 with the Crown is something of continuing significance
23 in the twentieth century. And your lordship will see
24 at page 25 and 26 how the Six Nations addressed the
25 parliamentary committee on Indian self-government
26 using a discourse with which your lordship has become
27 familiar from the eighteenth century Covenant Chain
28 treaties. The issue which has arisen in the courts,
29 however, has arisen in the context of a dispute
30 between the band council system established under the
31 Indian Act and the hereditary chiefs, and the Indian
32 Act system of election of band councils and band
33 chiefs was not applied to the Six Nations until well
34 after its first introduction in 1876 until 1924, and
35 the litigation which ensued was as to the competence
36 of the federal government to impose upon the
37 hereditary system a system of elected band councils.
38 And so in terms of the nature of the dispute, this
39 litigation was designed to get from the court a ruling
40 as to the pre-existing rights of the Iroquois.

41 Now, of course, my lord, you may recall that the
42 Iroquois, when they came to Canada, did not settle on
43 their own lands. Lands were bought from the
44 Missassauga Indians by the Crown, and those lands were
45 then granted to the Six Nations, as it were, as
46 compensation or as a recognition of the -- their
47 alliance with the British Crown in the American War of

1 Independence. And therefore, the Six Nations'
2 relationship to those lands and their rights on those
3 lands are not analagous to the rights of the
4 Plaintiffs in what has always been their homelands.
5 The litigation which ensued, however, my lord, was
6 resolved on a much narrower issue, and in the case of
7 Logan and Styres in 1959 Mr. Justice King, and I set
8 this out at page 28, limited his examination as to
9 whether or not the Indian Act could be legally applied
10 to the Six Nations. He limited his analysis to the
11 original deeds under which lands were granted to the
12 Six Nations, and he concluded at the bottom of page
13 28:

14
15 "In my opinion, those of the Six Nation Indians
16 so settling on such lands, together with their
17 posterity, by accepting the protection of the
18 Crown then owed allegiance to the Crown and
19 thus became subjects of the Crown....
20 ...While it might be unjust or unfair under the
21 circumstances for the Parliament of Canada to
22 interfere with their system of internal
23 government by hereditary chiefs, I am of the
24 opinion that Parliament has the authority to
25 provide for the surrender of Reserve land, as
26 has been done herein."

27
28 And we say, my lord, that Mr. Justice King's judgment
29 is limited to the proposition that so far as reserve
30 lands are concerned, the hereditary system of
31 government is subject to parliamentary, that is
32 federal modification. It is submitted that Mr.
33 Justice King's statements do not support the wider
34 proposition that the acceptance of Crown protection
35 necessarily involves a surrender of pre-existing
36 rights of self-government. And we say, my lord, that
37 because the Marshall decisions are the clearest
38 refutation of that proposition, that by accepting
39 protection the Indian nation so doing gives up its
40 rights to self-government. That was a proposition
41 which was specifically addressed and rejected in
42 Worcester and Georgia. We've also pointed out, my
43 lord, that in the American development of this strand
44 of the common law the fact that American Indians are
45 citizens of the United States and have the right to
46 vote, is not seen in any way as being inconsistent
47 with a continuing right of internal jurisdiction, the

1 right to govern their own affairs within the
2 parameters of the American jurisprudence. This issue,
3 my lord, as to conflict between the hereditary chiefs
4 and the band councils is one which has continued to be
5 the focus of litigation in which the Six Nations have
6 tried to have the courts address the issue of the
7 legitimacy of their pre-existing traditional form of
8 hereditary chiefs, and it's come before the court on
9 several occasions. At pages 29 to 32 I've set out
10 some of those cases. I'm not going to take your
11 lordship to them, because in the event all of them
12 have been determined on very narrow grounds in which
13 the courts, as it were, have side-stepped the issue,
14 which the Six Nations have sought to raise, so those
15 cases do not provide your lordship with much guidance
16 beyond knowing that underlying this litigation is an
17 issue which is very much seen by the Six Nations as a
18 live one, in the same way as it is seen by the
19 Plaintiffs as a live issue. And the question of the
20 relationship between the hereditary chiefs and the
21 band councils is something that I will shortly
22 address.

23 The next case I want to refer your lordship to is
24 the case of Connolly and Woolrich, which I have set
25 out at page 32. Would this be a proper place to take
26 the break, my lord?

27 THE COURT: We'll take about 15 minutes.

28 THE REGISTRAR: Order in court. Court stands adjourned for 15
29 minutes.

30

31 (PROCEEDINGS ADJOURNED AT 8:00 p.m.)

32

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

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Graham D. Parker
Official Reporter
United Reporting Service Ltd.

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Submissions by Mr. Jackson

1 (PROCEEDINGS RESUMED PURSUANT TO AN ADJOURNMENT)
2
3 THE REGISTRAR: Order in court.
4 THE COURT: Thank you. Mr. Jackson.
5 MR. JACKSON: My lord, Connolly and Woolrich was decided by
6 Quebec Superior Court just nine days after
7 confederation. It is a case much beloved by conflict
8 of laws professors.
9 THE COURT: Should that be 1869?
10 MR. JACKSON: 1867, my lord.
11 THE COURT: 1867.
12 MR. JACKSON: Yes. Yes, I think you are looking at page 33, are
13 you, my lord?
14 THE COURT: Yes.
15 MR. JACKSON: That's the case I think -- I see, yes. I think
16 it -- I will have to check that. It is certainly not
17 1969, that's for sure.
18 THE COURT: How many days after confederation?
19 MR. JACKSON: Nine.
20 THE COURT: Sounds like about July 9 then of that year.
21 MR. JACKSON: And I was checking out books of authorities, my
22 lord, and unless we have placed it under somewhere
23 else, I didn't find it in our books of authorities so
24 I will be providing our friends and your lordship with
25 a copy of that case.
26 The issue in that case, my lord, was whether the
27 law of lower Canada would recognize a marriage between
28 a clerk of the northwest company and a Cree Indian
29 woman entered into 1803 in the Athabaska district in
30 accordance with Cree customary law. Under the Common
31 Law conflict of law rules, a foreign marriage would be
32 recognized if it was valid under the law of the place
33 in which it was celebrated and if the marriage had
34 certain basic characteristics. And the issue
35 therefore for his lordship was what was the law of the
36 place where the marriage was celebrated, and Mr.
37 Justice Monk determined that the law of the place was
38 the Cree laws as they were in force at that time. And
39 what is of significance in his judgment is that, in
40 deciding the question of could there be such a thing
41 as laws in a territory occupied by aboriginal peoples,
42 his lordship reviewed the same juris prudence which we
43 have urged upon your lordship as being the foundation
44 cases for determining the nature of aboriginal rights
45 at common law, and he reviewed the Marshall decisions
46 and in the passage I set out on page 33, he applied
47 the doctrine of continuity, as we have called it, the

1 idea that upon the assumption of sovereignty over an
2 area the pre-existing rights of aboriginal peoples are
3 not affected, and he held that the assertion of Crown
4 sovereignty in the Athabaska district did not affect
5 either the pre-existing territorial rights of the
6 Cree, of course which was not an issue before him, but
7 nor did it affect the pre-existing customary law of
8 the Cree Nation. And in the passage I have set out at
9 page 33 and over on to page 34, he held -- and I will
10 just refer your lordship to the last paragraph on page
11 34 at the top:

12
13 "I have no hesitation saying that, adopting
14 these views of the question under
15 consideration..."

16
17 That is the Marshall doctrines:

18
19 "...the Indian political and territorial rights,
20 laws, and usages remained in full force - both
21 at Athabaska and in the Hudson Bay region
22 previous to the Charter of 1670..."

23
24 And that should be:

25
26 "...and even after that date as will appear
27 hereafter."

28
29 And his lordship then looked at the question of the
30 argument which was made against the application of
31 Cree customary marriage laws as being the law of the
32 place, that argument being that this was an area
33 within the bound of the Hudson's Bay territory and
34 therefore the grant of the Charter and the reception
35 of Common Law would have had the effect of eclipsing
36 the pre-existing customary law, and his lordship said
37 in a passage half-way down that second quote on page
38 34:

39
40 "It is easy to conceive, in the case of joint
41 occupation of extensive countries by Europeans
42 and native nations or tribes, that two
43 different systems of civil and even criminal
44 law may prevail. History is full of instances,
45 and the dominions of the British Crown exhibit
46 cases of that kind. That Charter..."

47

1 That is the Hudson's Bay Charter:

2
3 "...did introduce the English law, but did not,
4 at the same time, make it applicable generally
5 or indiscriminately - it did not abrogate the
6 Indian laws and usages. The Crown had not done
7 so. Their laws of marriage existed and exist
8 under the sanction and protection of the Crown
9 of England and Mr. Connolly might bind himself
10 as well by that law, as by the Common Law of
11 England."

12
13 In some ways, my lord, that is not that dissimilar
14 to what Chief Justice Marshall said in Johnson and
15 McIntosh when, as one of the bases upon which he ruled
16 that the conveyance made by the Illinois Indians to
17 Mr. Johnson could not be sustained, was that he had in
18 fact made an agreement under the customary law, the
19 land tenure system of the Illinois Indians, they in
20 fact had changed the arrangements, sold the land to
21 someone else, and he could not be heard to complain of
22 that having in fact incorporated as it were himself
23 into their laws. The central point however here is,
24 my lord, what Mr. Justice Monk recognized was that
25 there was a pre-existing system and that the reception
26 of the Common Law was not such as to be inconsistent
27 with nor did it necessarily abrogate that customary
28 law of the Cree. His lordship went on to find that
29 the Royal Proclamation in his view did nothing to
30 interfere with the continuing existence of the
31 customary laws of the Cree as respected themselves.

32 THE COURT: But does this get you anywhere, because surely under
33 English Law and therefore at least in 1859 British
34 Columbia Law, common law would recognize the law of a
35 marriage that's celebrated.

36 MR. JACKSON: My lord, the sole point for referring to the
37 Connolly case is that it is in a Canadian context a
38 recognition of a strand of juris prudence which
39 reflects a recognition of an indigenous system of law
40 which regulates vis-a-vis the indigenous peoples,
41 their relationships between each other.

42 THE COURT: I can see that. Let me trouble you with one other
43 thought that's crossing my mind that you will want to
44 deal with and that is whether I can use any of the
45 Marshall juris prudence in this area by reason of the
46 fact that it seems to me, I say this without careful
47 thought or study, that he was saying you people have

1 exclusive possession of those lands let's say beyond
2 the Appalachians beyond which we claim no
3 jurisdiction, and therefore you are in those areas of
4 sovereign people, and we can make treaties with you or
5 we can buy your land but we are not interfering with
6 your self-governments. Can you make the same -- can
7 you make the same claim here subsequent to the claims
8 of sovereignty where at least since 1846, is it,
9 sovereignty over British Columbia was claimed putting
10 it in a different factual situation from what Chief
11 Justice Marshall was dealing with?

12 MR. JACKSON: I don't think so, my lord, for this reason: That
13 the Marshall decisions are all premised upon the
14 Crown's assertion of sovereignty over North America by
15 virtue of the doctrine of discovery. I don't think
16 Chief Justice Marshall would ever have conceded that
17 the Crown or its successor in title, in terms of the
18 underlying title, the states and the Federal
19 Government of the United States did not have
20 sovereignty over the territorial United States. His
21 point was that, consistent with that assertion of
22 sovereignty, consistent with the underlying title and
23 the sovereignty that goes with the doctrine of
24 discovery, was a pre-existing legal regime which
25 comprised both of rights to land, the rights he
26 characterizes as the rights to possession, and also a
27 jurisdiction whereby the Indian nations could govern
28 themselves, and that was consistent with the assertion
29 of sovereignty. So in that sense, my lord, the fact
30 that the Crown asserted sovereignty in British
31 Columbia we say in no way contradicts -- in many ways
32 it is the point at which the Marshall principles kick
33 in as it were prior to the assertion of sovereignty.
34 There is no room for the common law recognizing any
35 rights. There is no common law there. It's only at
36 the point where the Crown asserts sovereignty that the
37 doctrine of Common Law aboriginal rights begins to
38 apply, and we say at that point, whether that point is
39 the Treaty of Oregon or whether that point is the
40 formation of the mainland colony of British Columbia
41 or whatever that point is, that is the point at which
42 the Common Law does provide and did provide
43 recognition of the aboriginal rights of the
44 plaintiffs, and we say that those aboriginal rights
45 comprise the package, rather inelegant word, but I
46 will use it anyway, the package of rights which we say
47 properly characterizes ownership and jurisdiction.

Submissions by Mr. Jackson

1 THE COURT: Running also through my mind is a problem with
2 Campbell and Hall, I haven't read it for some years,
3 but sometime you might want to tell me whether you
4 think the assertion of sovereignty and the exercise of
5 sovereignty falls within the principles of Campbell
6 and Hall, the great case of Campbell and Hall as Chief
7 Justice Marshall called it, which seems to suggest
8 that when there is -- of course he was talking about
9 conquest.

10 MR. JACKSON: Yes, my lord, in that case.

11 THE COURT: And it may be limited to conquest but, if it isn't,
12 is he saying when the new regime takes over it can
13 create new laws or -- and, if it doesn't, the old ones
14 remain?

15 MR. JACKSON: My lord, Campbell and Hall I think at this point
16 is in Mr. Rush's bailiwick and I may --

17 THE COURT: -- leave it to him.

18 MR. JACKSON: -- give that question to him.

19 THE COURT: All right, thank you.

20 MR. JACKSON: Page 36, my lord. I note that in a series of
21 cases decided by the late Mr. Justice Sissons and Mr.
22 Justice Morrow, Connolly and Woolrich has been applied
23 to recognize both customary Indian and Inuit marriages
24 and customary adoptions even after the dates of the
25 reception of the English law into the territory. The
26 issue, my lord, of the validity of these marriages, I
27 have addressed that issue at page 36. Although much
28 evidence has been placed before your lordship
29 regarding the laws of the Gitksan and Wet'suwet'en
30 dealing with marriage, adoption and succession, this
31 evidence is not directed, nor do the plaintiffs seek,
32 my lord, any declaration relating to the validity of
33 any particular marriage, adoption or succession,
34 rather, that evidence is to demonstrate that the
35 plaintiffs as part of their organized society had and
36 continue to have a system for regulating these
37 important areas of their everyday lives. They are
38 evidence, in other words, of their pre-existing and
39 continuing jurisdiction. It is submitted that in the
40 same way the Connolly and Woolrich line of cases
41 recognizing customary marriages and adoptions
42 implicitly and in some cases explicitly recognizes a
43 pre-existing and continuing aboriginal jurisdiction.

44 This issue, my lord, of Indian jurisdiction was
45 one which Mr. Justice Steele addressed and rejected in
46 the course of his judgment in the Bear Island case and
47 I have set out at page 37 what his lordship had to

1 say.

2
3 "The Constitution Act 1867 allocated
4 jurisdiction over all matters respecting Canada
5 to the federal and provincial governments. It
6 did not leave Indian bands with any direct
7 jurisdiction over themselves. It was submitted
8 by the defendants that, because the Act did not
9 specifically take away internal self-government
10 from the Indians, therefore the Indians had the
11 right to self-determination within their own
12 areas, subject only to the overall sovereignty
13 of the Crown. I disagree.

14
15 The Act clearly provided, under s. 91(24) that
16 Indians and land reserved for the Indians were
17 under federal jurisdiction, just as municipal
18 institutions in the province were clearly under
19 provincial jurisdiction, by virtue of s. 92(8).
20 There was no residue left to the independent
21 jurisdiction of Indian bands or nations."

22
23 And that characterization of the exclusive
24 allocation of competence so far as jurisdiction is
25 concerned as between the Federal and Provincial
26 Governments is reflected in paragraph 34 -- 33 of the
27 Provincial Defendant's Statement of Claim and it is
28 also an argument which the Federal Defendant urges
29 upon your lordship in their summary of argument.

30 The response of the plaintiffs to that argument,
31 my lord, is set out at the bottom of page 37 and over
32 to page 38, and it is by reference to the American
33 situation, my lord, in the United States that
34 Constitution also allocates competences as between
35 federal and state jurisdictions. The Worcester and
36 Georgia case, my lord, is premised upon the fact that
37 the Federal Government has as done the Federal
38 Government in Canada, exclusive jurisdiction to deal
39 with Indian nations in that case by virtue of the
40 treaty power and the commerce power. It has never
41 been said however, my lord, that the fact that the
42 Federal Government has that exclusive power and that
43 the states have other powers not allocated to the
44 Federal Government that that excludes the idea of
45 inherent Indian jurisdiction as it was articulated in
46 Worcester and Georgia. I shouldn't have said that it
47 has never been suggested because in the late 19th

1 century, and your lordship will remember when I went
2 through some of those cases, one of which I have
3 referred to at page 38, the United States Supreme
4 Court in the Kagama case did in fact under the
5 influence of certain of the revisions of the Marshall
6 principles which took place in the late 19th century
7 did in fact say pursuant to the plenary power doctrine
8 that within the United States there are but two
9 sovereigns, the States and the Federal Government.
10 And that doctrine however, my lord, was we submit
11 aberration and in fact the United States Supreme Court
12 has now in its most recent juris prudence, and I refer
13 your lordship to the Wheeler case which I have already
14 dealt with as an earlier point, has recognized that
15 within the United States even though federal and state
16 jurisdictions are the only jurisdictions which are
17 referred to in the Constitution that the Common Law
18 had recognized as pre-existing the concept of an
19 Indian jurisdiction and that that can live alongside
20 with, compatible with a relationship between, on the
21 one hand, the Federal and, on the other hand, State
22 jurisdictions. And so we say, my lord, that the
23 concept of Common Law jurisdiction is not inconsistent
24 with the pattern of allocation of legislative
25 competences as it is set out in the British North
26 America Act.

27 The last case I would refer your lordship to, and
28 I am not going to spend any time on it, is a recent
29 decision of the Provincial Court, arising under the
30 James Bay Agreement, my lord, and it was -- it related
31 to the question of whether or not a curfew was in fact
32 delegated legislation and therefore was subject to the
33 kinds of restrictions which those exercising delegated
34 powers are subject to, and the court, relying
35 principally upon the fact that the James Bay Agreement
36 has the status of a land claims agreement protected by
37 s. 35(3) of the Constitution Act of 1982, held that in
38 fact the curfew was not the exercise of a delegated
39 power, but what is of importance to the plaintiffs'
40 submission was the passage which I quoted at page 40
41 and underlined at the bottom of the page that the
42 judge, referring to the idea of an inherent
43 sovereignty as that term is used in the American
44 cases, held that his analysis squared with the idea:

45
46 "...that the Crees hold some sort of residual
47 sovereignty as regards their local

1 governments."

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And so, my lord, what we say is that there are these strands in the Common Law which are somewhat embryonic so far as Canada is concerned but, so far as they have been developed in the United States, have recognized that the Common Law does give effect to a distinctive jurisdiction of Indian nations and aboriginal peoples and we urge your lordship to affirm that proposition in the declarations that your lordship issues.

What doesn't exist in any other case, my lord, including Worcester and Georgia, is an evidentiary record such as your lordship has had in which the plaintiffs have sought to describe the nature of their authority, how it is exercised, in the areas it is exercised, so that your lordship is not asked to make declarations as it were in the air, but consistent with the Court's directions in the Supreme Court something which does reflect what exists on the ground.

The next section, my lord, deals with a second strand of legal foundation as it were for a jurisdictional component to aboriginal rights and that is that the Royal Proclamation we say properly understood in its historical matrix against the backdrop of the covenant chain treaty making does acknowledge the continuing jurisdiction or internal self-government of Indian nations. And we say, my lord, that the Proclamation, in guaranteeing that the Indian nations with whom the Crown is connected and live under the Crown's protection, that they should not be molested or disturbed, that was a guarantee of a fundamental freedom or liberty, the liberty of non-interference and non-interference we say implies the continuity of pre-existing powers of self-regulation or self-government.

And, my lord, that interpretation of the Proclamation was one which Mr. Justice Monk in Connolly and Woolrich adopted.

Page 42, my lord, we say that further support for the idea that inherent in the Common Law in addition to the proprietary interest in lands is the recognition of a right of internal self-government is supported by the way in which the Treaty of Waitangi has been interpreted by the Waitangi Tribunal, and I've set out Article 2 at the bottom of page 42. It

1 is an article which I have previously referred to in
2 greater detail but, as you see, the article talks
3 about the full exclusive and undisturbed possession of
4 the Maoris' lands and estates, forests and fisheries,
5 and the Treaty of the Tribunal -- Waitangi Tribunal in
6 the report which I have set out at page 43 has taken
7 the position that Article 2 is a guarantee "not only
8 of the possession of their lands but in the mana
9 (authority) to control them in accordance with their
10 own customs and having regard to their cultural
11 preferences...The tribes are entitled to develop their
12 own tribal authorities without undue circumscription".

13 We have said, my lord, in our previous arguments
14 that the Treaty of Waitangi in many ways is the most
15 explicit and detailed description of the nature of the
16 pre-existing aboriginal rights of indigenous peoples
17 and we say that the Orakei Report and the findings of
18 the tribunal therein parallel what the plaintiffs
19 assert are their pre-existing rights and the terms in
20 which they seek to character relief in paragraph 4 of
21 the prayer for relief, and we say that this
22 parallelism is not happenstance. The Treaty of
23 Waitangi and the aboriginal rights asserted in the
24 Statement of Claim embody the fundamental principles
25 of the Common Law.

26 The last section of this argument, my lord, deals
27 with a third component of recognition of jurisdiction
28 and it is in the form of treaty making. And again, my
29 lord, in relation to your lordship's previous comments
30 we say that the treaty making is of relevance insofar
31 as it bespeaks a pattern and a recognition of
32 pre-existing rights in other parts of the dominions
33 and possessions of the British Crown. And in my
34 previous submissions I described and went through a
35 number of treaties, my lord, in which the right of
36 self-government was described explicitly and clearly
37 as part of the consensual arrangements between the
38 Crown and at various Indian nations over the course of
39 some 200 years. The Canadian treaties, my lord,
40 negotiated particularly in the 19th century, the ones
41 in which I spent some time on, are not as explicit in
42 terms of dealing with self-government. As your
43 lordship will recall those treaties deal principally
44 with the surrender of lands, the establishment of
45 reserves and the provision of particular forms of
46 economic assistance and certain guarantees of hunting
47 and fishing rights. However, as I also related to

1 your lordship, those treaties were not negotiated in a
2 vacuum and that, in the course of treaty making,
3 various assurances and oral guarantees were made by
4 the treaty commissioners which we say are relevant in
5 understanding what the treaty commissioners understood
6 to be the rights of the Indians prior to treaty
7 making, and I've, at page 45, my lord, set out and I
8 am not going to repeat them, I have set out some of
9 those provisions, some of the statements made on the
10 one hand by the Indians spokespersons at the treaty
11 making and on the other hand by the Crown's treaty
12 commissioners which we say coalesce around the concept
13 that the Indians had a right to govern themselves and
14 that the making of treaties with Canada was not
15 designed to interfere with that pre-existing right.
16 And we say, my lord, that applies to Treaty Number 8
17 as well as the other treaties.

18 The bottom of page 45 I set out the statements
19 made by Treaty Commissioner Ross at the beginning in
20 which in trying to encourage those who were reluctant
21 to enter into treaty said:

22
23 "As all the rights you now have will not be
24 interfered with, therefore anything you get in
25 addition must be clear gain...Indians are fond
26 of a free life, and we do not wish to interfere
27 with it. When reserves are offered you there
28 is no intention to make you live on them if you
29 do not want to."

30
31 My lord, at page 46 through to page 49 I have set
32 out, and I am not going to go into it, some of the
33 academic discourse which has taken place as to whether
34 or not certain provisions in the numbered treaties are
35 inconsistent with a right to internal self-government,
36 and it is my submission that those provisions are not
37 inconsistent with a continuation of the right to
38 self-government and your lordship will see why I say
39 that and the way in which applying the Marshall
40 decisions to those arguments and looking at some
41 specific examples of treaty making in the 18th century
42 those arguments in fact are not well-founded, and I
43 will leave your lordship to grapple with those issues.

44 The next section, my lord, is a section which
45 tries to deal with some of the thorny problems which
46 have arisen in the context of the evidence relating to
47 how in fact the plaintiffs have sought to exercise

1 their jurisdiction in the face of the competing
2 assertions of jurisdiction by the Provincial
3 Government in particular, and we say, my lord, that
4 while the assertion of authority by government over
5 the Gitksan and Wet'suwet'en peoples has certainly
6 challenged the authorities of the hereditary system of
7 houses and chiefs, it has never supplanted it.

8 My lord, at page 50 I've set out some of the dire
9 predictions of doom and gloom which were made by
10 various missionaries and anthropologists into the 19th
11 and into the 20th century that the Gitksan traditional
12 system, the hereditary system, along with the other
13 bailiwicks of their distinctive society were doomed to
14 extinction. The defendants, my lord, acknowledge in
15 fact, of course those predictions have not come to
16 pass, but they recharacterized the argument in the
17 sense of saying that the Gitksan and Wet'suwet'en may
18 have survived but their systems of authority have not;
19 that they in fact have succumbed to the authority of
20 Provincial and Federal Governments and that they
21 exist, if they exist at all, as very pale images,
22 something which is not capable of being the subject of
23 judicial relief, either in terms of the concept of
24 jurisdiction as a matter of law or as a matter of
25 facts when you look at what has happened over the last
26 century. And we say, my lord, that the conflict
27 between the kinship form of ownership at page 51 and
28 jurisdiction and that of the Canadian state by which I
29 refer to both the Federal Provincial Governments has
30 been a pervasive theme in the social and political
31 lives of the Gitksan and Wet'suwet'en people
32 throughout the present century. The intensity of the
33 friction between these two radically different systems
34 of authority has ebbed and flowed from one generation
35 to the next. These fluctuations have occurred in
36 relation to the political, social and cultural
37 initiatives taken, on the one hand by government, on
38 the other, by House groups and their respective chiefs
39 and elders.

40 From the perspective of the plaintiffs, the
41 challenge to their jurisdiction is mounted each time
42 one or other of the levels of government ignores the
43 system of authority of the Gitksan and Wet'suwet'en
44 peoples and thereby violates the ownership of the
45 house groups. This has been a particularly painful
46 experience for the Gitksan and Wet'suwet'en in
47 relation to government-authorized use and alteration

1 of house lands, and the attempted expression of the
2 Gitksan and Wet'suwet'en institutions, economic
3 activities, cultural practices, languages and values.

4 At each step in the development of the national
5 and provincial economy, the Gitksan and Wet'suwet'en
6 system of authority has found itself facing a new
7 level of pressure - from the early incursions into the
8 territories for transportation, communication and
9 prospecting activities; to land-clearing and
10 settlement for agriculture and urban centres; to
11 limitations upon age-old harvesting and managing
12 pursuits like hunting, trapping, fishing and the
13 gathering of plant-stuffs; to the alienation of
14 forests for selective logging and sawmill production;
15 to tourism and recreational hunting and fishing; and
16 to the large-scale contemporary resource extraction
17 and use, such as mammoth hydro-electric inundations of
18 valley bottom land, open-pit and other mining, and
19 clearcut logging practices.

20 At each of these stages of economic change and
21 development in the wider society the Gitksan and
22 Wet'suwet'en system of authority has been confronted
23 with renewed assertions of governmental jurisdiction.
24 We say, my lord, that the Gitksan and Wet'suwet'en
25 have simultaneously tried to respond to the changing
26 political and economic system and have sought to do so
27 within the goals and within the sanctions of their
28 aboriginal system of authority. And the rest of this
29 section, my lord, is an attempt to explain the
30 evidence and some of the contradictions in the
31 evidence by a reference to this tension and clash
32 which has occurred between the assertion of
33 governmental authority over the Gitksan and
34 Wet'suwet'en and their territory and the ways in which
35 the Gitksan and Wet'suwet'en have sought using their
36 indigenous systems and seeking as it were to adapt and
37 accommodate this competing system have sought to
38 struggle with and maintain and have maintained their
39 system as a viable, dynamic part of their lives.

40 The first section, my lord, deals with an example
41 at the individual level of how this has come about and
42 we say at the level of the individual the Gitksan and
43 Wet'suwet'en person has been faced with the task of
44 picking his or her way through the complexities of the
45 competing jurisdictions in which he or she is
46 enmeshed. In many situations a family will heed the
47 sanctions of its people's system of authority, while

1 at the same time it is the sanctions of fines and
2 government, the jurisdictional strictures of
3 government which are instrumental in individual
4 Gitksan and Wet'suwet'en decision making. It is clear
5 that the choices which individual Gitksan and
6 Wet'suwet'en make in the contemporary world are
7 dramatically affected by the reality of the sanctions
8 of the two opposing systems.

9 And we say a case in point, my lord, is to be
10 found in the evidence of Emma Michell, Chief Lilloos
11 in the House of Namox in the Tsayu Clan of the
12 Wet'suwet'en. In the course of explaining her family
13 history, Mrs. Michell repeatedly asserted the
14 Wet'suwet'en system of authority and narrated
15 incidents where her relatives had suffered government
16 sanctioned appropriation of land, pastures, cabins and
17 equipment during the non-Native settlement of the
18 Bulkley Valley. At the same time, against this
19 background, Mrs. Michell explained that she and her
20 husband had acceded to the demands of government
21 authority in the course of pole-camp contract work in
22 the 1940s.

23 She testified that her grandfather's relatives,
24 Canyon Creek Marry and her son, Jimmy Thomas, were
25 dispossessed of their land at Canyon Creek:

26
27 "...and that land at Canyon Creek was taken away
28 by the white people. They chased them out;
29 they never paid nothing for the land."
30

31 Later, in cross-examination, she discussed the
32 dispute she had with her husband who -- she and her
33 husband had with the provincial land tax assessment
34 relating to a trapline cabin. And in that same
35 cross-examination she admitted to having complied with
36 regulations pertaining to federal and provincial
37 jurisdiction, that she took out forest permits in
38 order to cut poles for the small business she
39 operated, she filed tax returns, and she also paid
40 stumpage.

41 Page 55, my lord, we try and place this in some
42 kind of context. I mean, is this an acceding to the
43 jurisdiction, a withering of the existing authority of
44 the Gitksan and Wet'suwet'en? And what we say is, my
45 lord, is that the human drama of this, Mrs. Michell
46 and her husband complied with jurisdictional rules of
47 the same government which earlier had dispossessed her

Submissions by Mr. Jackson

1 relatives from their land. She and her husband
2 complied with the government regulations pertaining to
3 pole-cutting in order to obtain work and support their
4 family. It is submitted that they did so with the
5 knowledge and fear of the potential power of
6 government to violate Wet'suwet'en ownership and
7 jurisdiction, as evidenced by the witness' statements
8 of relatives having been dispossessed from their
9 hunting territories, and having herself experienced
10 the loss and destruction of trapping and domestic
11 equipment and goods. And so, my lord, what that is,
12 and of course there have been many examples of it --

13 THE COURT: Not many, not very many.

14 MR. JACKSON: Well, there's been others, my lord, of ways in
15 which people have tried in fact to maintain their own
16 system, but facing the inevitability that the
17 government has certain power over their lives de
18 facto, and that they have to live within those
19 strictures.

20 THE COURT: But accepting that every dispossession was an
21 intolerable affront to justice, does that provide the
22 answer to the legal problem? I mean, I don't know who
23 stole their camp equipment, I don't recall
24 specifically what evidence there was about that, but I
25 don't think there is any evidence that would say that
26 that was a government policy or a government direction
27 but some of the dispossessions were said to be -- but
28 is there enough here to generalize -- to say that that
29 is a matter that can be redressed by -- can individual
30 matters form the basis for a blanket claim to
31 aboriginal rights of the kind that's being advanced
32 here?

33 MR. JACKSON: My lord, the Emma Michell is not offered to your
34 lordship as a platform upon which your lordship should
35 build a concept of aboriginal rights. It's offered
36 rather as a rejoinder to the arguments which my
37 friends have made and your lordship will be hearing
38 that these kinds of actions of taking out licences, of
39 complying with a competing system of authority, are in
40 fact a recognition not only that there is a competing
41 system or authority but in fact a recognition of the
42 demise and the failure of their own system and the
43 fact that it is no longer a reality such that it can
44 be reflected in any judgment of this court. So it's
45 not -- it's offered for a different proposition than
46 your lordship may have seen it.

47 THE COURT: Well, I am not stopping you; I am just troubled by

Submissions by Mr. Jackson

1 the -- well, you don't think this is something you
2 should save for reply?

3 MR. JACKSON: I think I have lost that opportunity, my lord.

4 THE COURT: Well, maybe, yes. All right.

5 MR. JACKSON: Would this be a convenient time?

6 THE COURT: Oh, I think we will carry on until -- we adjourned
7 at 8:00 and we came back at 8:15, so we'll go to 9:15.

8 MR. JACKSON: The next section, my lord, looks at the manner in
9 which the hereditary system of authority has sought to
10 deal with the federal and provincial jurisdiction. We
11 say that the response of Gitksan and Wet'suwet'en
12 House members over the past century to features of
13 governmental assertions of jurisdiction has been a
14 mixture of political resistance, cultural persistence
15 and cautious accommodation. Throughout the past
16 century the peoples' own political representatives
17 have sought federal and provincial recognition of
18 Gitksan and Wet'suwet'en land title and jurisdiction
19 as the sound basis for social and economic growth and
20 development in the region. While various actions have
21 been carried out in the political arena to this end,
22 the individual Gitksan and Wet'suwet'en families have
23 lived under a hereditary system of authority that is
24 constantly in collision and conflict with governmental
25 agencies and policies.

26 We do not seek, my lord, in this part of the
27 argument nor anywhere else to chronicle the resistance
28 of the Gitksan and Wet'suwet'en to the negative
29 sanctions and dire social and economic effects of
30 governmental authority but some examples of the
31 conflict faced by the people over the past century are
32 in order in terms of your lordship's attention and we
33 have provided some examples, my lord, to illustrate
34 the ongoing nature of the hereditary system of
35 authority especially under 20th century conditions of
36 conflict that have arisen between the system of
37 House-owning kin groups and the state system of the
38 Federal and Provincial Governments.

39 And the first section, my lord, deals with a
40 number of points dealing with game regulations and
41 trapline registration, and I would take your lordship
42 to page 58 and use the trapline registration as an
43 example of an apparent way in which the provincial
44 system has been imposed, and the plaintiffs have
45 co-operated within that system apparently in ways
46 which are not consistent with their traditional system
47 of authority, and this was an issue which was

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1 addressed at some length by Mr. Brody through a review
2 he undertook of documents relating to the initiation
3 of the trapline registration system and the ways in
4 which it was advertised to aboriginal peoples and the
5 perceptions which they brought to bear on the
6 registration of their hunting territories. And Mr.
7 Brody addressed the question of trapline registration
8 through a number of documents, one of which was the
9 report by Mr. Pragnell, the inspector of Indian
10 Agencies for British Columbia in 1923, just two years
11 before the initiation of the trapline registration,
12 and Mr. Pragnell, in talking about the various models
13 which the province could adopt for trapline
14 registration, said at page 59 at the top as one of
15 the --

16 THE COURT: I have read that.

17 MR. JACKSON: Yes, my lord, and what Mr. Brody urged upon your
18 lordship was that this approach to trapline
19 registration was a way and was perceived by government
20 officials as a way to accommodate the hereditary
21 system of family-owned hunting territories so that
22 trapline registration would as it were build upon
23 rather than seek to undermine the existing indigenous
24 pattern of conservation and management of territories.
25 That being also the avowed purpose of trapline
26 registration to develop a system which would avoid the
27 abuses which white trappers had introduced by
28 over-harvesting and moving from area to area depleting
29 the game. And what Mr. Brody sought to do was to show
30 how, while initially this was seen as being an
31 accommodation and while aboriginal peoples,
32 particularly the Gitksan and Wet'suwet'en, saw it as a
33 way in which they could register and protect their
34 rights, in fact the way the system was administered
35 through a patrilineal section through permitting
36 individual alienation and also the idea of registering
37 an individual to a trapline, those were ways which
38 were inconsistent with the indigenous system and yet
39 the fact of the matter was that this system was
40 originally conceived as one of accommodation, the
41 Indians perceived it to be one of accommodation, and
42 what you have had since is this uneasy attention
43 between trapline registration from the provincial
44 point of view whereby it's seen as their system and
45 the registration from the aboriginal peoples' point of
46 view whereby they saw it as a way in which by
47 registering they could protect their rights from

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1 outsiders.

2 THE COURT: Was there any way I can conclude that the trapline
3 registration system has been a disadvantage in over
4 being an advantage to the Indians? It seems to me
5 it's probably worked both ways, hasn't it?

6 MR. JACKSON: My lord, I don't think we are seeking from your
7 lordship any opinion that it is in fact -- that
8 it's -- it has net advantages or disadvantages in the
9 abstract. What we are suggesting here, my lord, is
10 that trapline registration should not be seen as
11 evidence of the abrogation of an existing aboriginal
12 jurisdiction to harvest, manage and conserve
13 resources. The Indian people have sought to use it in
14 a way which compliments their existing system even
15 though in many ways that is very difficult to do, but
16 the extent to which the trapline registration system
17 is capable of protecting aboriginal interests I would
18 say is reflected in the fact that the Gitksan and
19 Wet'suwet'en sought to return to the original idea of
20 Inspector Pragnell by seeking a blanket trapline in
21 which all of the hunting territories of the Gitksan as
22 it were would be protected so that the provincial
23 system would operate as a protected device for
24 aboriginal interests until such time as those
25 interests could be protected either through
26 declarations of this court or more realistically in
27 the long term through the negotiation of a
28 comprehensive settlement.

29 THE COURT: Well, I don't have any difficulty understanding what
30 you are saying. I have difficulty in trying to reach
31 a conclusion that that would help or hurt anybody in
32 this lawsuit with respect to trapline registrations.
33 It seems to me that it's an axe with two blades.

34 MR. JACKSON: My lord, we are seeking to the extent that the
35 Provincial Defendants point to trapline registration
36 and the laws which underpin it as being an example of
37 the abrogation of an Indian jurisdiction to harvest,
38 manage and resource --

39 THE COURT: I see that as a different question, but you can
40 persuade me otherwise. At the moment I see it as
41 being put forward by the Province as an indicia of the
42 exercise of a jurisdiction and I see it from the
43 plaintiffs' point of view as being a facility that was
44 created other than by our participation and our
45 passive acceptance at best and that it has been used
46 by some Native people for their advantage, and I don't
47 see very many examples of where it was to their

1 disadvantage. There may well have been a few examples
2 of disputes between whites and Indians over trapline
3 ownership but I don't recall very many of those, and a
4 few disputes between Indians about them, and the
5 result of that doesn't seem to me to hurt the
6 plaintiffs in any way at all. So I am -- at the
7 moment I am pretty neutral about trapline
8 registrations. I see what the plaintiffs are putting
9 it forward for and I have stated that but, apart from
10 that, it doesn't seem to me to be something that
11 weighs very heavily on either side of the scales.

12 MR. JACKSON: My lord, I think I am going to allow Mr. Grant,
13 not at this point but in the course of his further
14 submissions, to deal with this issue.

15 THE COURT: I will be glad to have any help I can get.

16 MR. JACKSON: My lord, I want to move to page 75 of the
17 argument.

18 THE COURT: 75?

19 MR. JACKSON: 75. And just to indicate to your lordship the
20 previous passages which I have leaped over deal with
21 some further examples of the kinds of pressures upon
22 individuals Gitksan and Wet'suwet'en which have caused
23 them to register traplines, some of the concerns they
24 have expressed in the course of this trial in terms of
25 the manner in which the Provincial Government has
26 managed resources which they themselves have nurtured,
27 and I would perhaps refer your lordship particularly
28 to the statement of Alfred Joseph at page 70 and 71
29 where, during the course of cross-examination by Mr.
30 Goldie, he explained how the results, the benefits,
31 the fruits of the wise husbandry of Gyolugyet was in
32 fact being drawn off by what the Wet'suwet'en saw as
33 being in fact the practices of the Provincial
34 Government in harvesting timber which was not
35 consistent with the Gitksan and Wet'suwet'en
36 harvesting laws. And I just refer your lordship to
37 that at page 70 and 71. The material also deals with
38 a matter which your lordship just referred to, how in
39 fact Gitksan and Wet'suwet'en have from time to time
40 sought to invoke provincial officials in the business
41 of adjudicating disputes where in fact they were
42 allegations of trespass so that in addition to using
43 the feast hall there have been other efforts in
44 certain cases to use as it were outside arbitration,
45 and that is only brought to your lordship's attention
46 for the purpose of making the argument that that
47 should not be taken as being an acquiescence in the

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1 provincial jurisdiction and a recognition of the
2 demise of their own.
3 Gitksan and Wet'suwet'en have sought to resolve
4 disputes in many different ways and they have not in
5 particular cases refrained from invoking outside
6 officials who they believe have a certain knowledge
7 and a certain ability to break a deadlock. And of
8 course, my lord, the fact that I have skipped over it
9 is not an indication that -- of anything except the
10 lateness of the hour.
11 THE COURT: Yes, all right. Do you think you should start
12 another section tonight?
13 MR. JACKSON: Unless your lordship wants to go a little bit
14 longer.
15 THE COURT: Well, I have used up some of your time. If you want
16 to stay a few minutes longer, I think you are entitled
17 to that.
18 MR. JACKSON: I think this might be an appropriate point to
19 take, and we are starting tomorrow at nine, my lord.
20 THE COURT: Yes, from nine to four, and then from about 5:30 to
21 about 7:00 or thereabouts. Yes, thank you.
22 THE REGISTRAR: Order in court.
23 THE COURT: Thank you, madam reporter.
24 THE REGISTRAR: This court stands adjourned until nine o'clock
25 tomorrow morning.

26
27 (PROCEEDINGS ADJOURNED AT 9:15 p.m.)
28

29 I hereby certify the foregoing to
30 be a true and accurate transcript
31 of the proceedings transcribed to
32 the best of my skill and ability.
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35
36
37

38 _____
39 Tannis DeFoe,
40 Official Reporter,
41 UNITED REPORTING SERVICE LTD.
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