Vancouver, B.C.
June 24, 1988

THE REGISTRAR: Order in court. In the Supreme Court of British Columbia, this Friday, June 24, 1988. Calling Delgamuukw versus Her Majesty the Queen at bar. I caution the witness, you are still under oath.
THE COURT: I have to tell counsel that I will have to adjourn at 12:15 today. I am entertaining our graduating law clerks at lunch at about that time, so I have to adjourn at 12:15 today. Mr. Grant.
MR. GRANT: Yes, My Lord. I just have a few -- a couple of brief matters, one is Exhibit 31. I just want to note for the record, Exhibit 31 had been -- an additional mark was put on that exhibit in Stanley Williams' commission evidence. And when you read the transcript it will become apparent it was marked on Ms. Koenigsberg's copy, and Ms. Koenigsberg, Mr. Plant and I arranged to mark it on the exhibit. And it is a marking of a fishing site which is on the highway side of the Skeena River just upstream of the mouth of the creek known as Xsu gwin yookhl, that's X-S-U, one word, G-W-I-N, second word --
THE COURT: Sorry, X-S-U?
MR. GRANT: X-S-U, first word, G-W-I-N, second word, Y-O-O-K-H-L, third word. And it's been marked with, I believe it is a red circle on that, and that addition was from Stanley Williams' commission evidence.
THE COURT: All right.
MR. GRANT: The second matter I wish to raise, My Lord, is relating to the fall schedule and that is you raised the question of commencement on the 6th of September.
THE COURT: Yes.
MR. GRANT: It may well be -- it is anticipated that I will be leading the first witness in the fall session. And the assizes are set in Smithers and a trial that has been adjourned over because of no time is first on the list of which I am counsel. And it is set in Smithers for the 6th of September, so I would ask that our fall sitting commence the 12th of September if my friends have no objection to that. And the second point with respect --
THE COURT: Let's deal with that. Mr. Goldie?
MR. GOLDIE: Well, Mr. Plant is unfortunately going to be leaving us and he will be leaving on the 28th of

1 September. We count every day of his presence as
2 gold, so to speak. And I would hope that we might
3 get started off with somebody on the 12th for that
4 reason alone.
5 THE COURT: On the 12th?
6 MR. GOLDIE: I mean on the 6th.
7 THE COURT: Mr. Macaulay?
8 MR. MACAULAY: I am available on the 6th or the 12th.
9 THE COURT: Is the first witness likely to take from the 12th
10 to -- what is the date Mr. Plant is leaving?
11 MR. GRANT: No, the first witness would probably take one week.
12 But the next witness who probably go -- the
13 schedule, as I noted it, would be -- if we started
14 on the 12th it would complete on the 30th of
15 September if we went, as you proposed, three weeks.
16 THE COURT: Yes.
17 MR. GRANT: And go from the 12th to the 30th of September. But
18 I suspect that the witness following the first one
19 may well go into that time or we have estimated that
20 those witnesses would be done before then.
21 THE COURT: Is Mr. Plant's presence desired -- mainly desirable
22 because he will be taking that first witness or
23 generally?
24 MR. GOLDIE: Not necessarily. We had anticipated that we would
25 be getting into the experts.
26 THE COURT: Yes.
27 MR. GOLDIE: And I take it from what Mr. Grant says that the
28 first witness is a lay witness; is that correct?
29 MR. GRANT: Yes, at this time I am still meeting with our
30 clients, but I anticipate that that first witness
31 would be the last of the lay witnesses.
32 THE COURT: And it will take a week?
33 MR. GRANT: Yes, at this time I estimate that, maybe even
34 shorter.
35 THE COURT: It is a four-day week?
36 MR. GRANT: The 6th is a four-day week. I would anticipate the
37 four days.
38 MR. GOLDIE: If the next witness is an expert, I assume we will
39 be learning shortly who that is. That has a bearing
40 also on the question.
41 MR. GRANT: Well, the second arm that I have to deal with the
42 fall sitting may also have a bearing on this, My
43 Lord. And that is that the next witness, as I've
44 indicated, would be a lay witness and the witness
45 following him would be an expert witness. There are
46 a number of the expert witnesses who are in the
47 north. They reside in the area. And the following

1 witness, whomever that would be, would be one of
2 those witnesses.
3 And I would ask the court to consider also the
4 logistical questions that our clients are facing and
5 the cost questions that the court -- I would ask
6 that the court have that first sitting, that first
7 three-week sitting in Smithers for the completion of
8 the lay evidence and the calling of this first
9 witness.
10 THE COURT: Well --
11 MR. GRANT: And that would just be for one sitting.
12 THE COURT: Starting the fall term is a very difficult time, Mr.
13 Grant. I am not at all enthused about being away
14 during the week of September -- during the month of
15 September.
16 MR. GRANT: Well, I am emphasizing that, as Mr. Rush indicated
17 earlier this week, we may be asking your lordship to
18 consider it. And it would be -- of the sittings of
19 the balance of the Plaintiffs' case, it would be the
20 most appropriate and I appreciate what you are
21 saying. It may be somewhat mitigated if it was
22 started on the 12th, but the cost of -- it would
23 help to mitigate some of the cost problems as well
24 as allowing some of the Plaintiffs to attend the
25 court who are unable to attend because of the
26 distance. And the instructions I have and what I am
27 asking is only for that session and then we would
28 resume in the next session down here. And I would
29 ask your lordship to consider that.
30 THE COURT: Well, I will be glad to consider it. I am not sure
31 that any amount of consideration can solve my other
32 problems. I am just not sure that I can just say
33 that I won't be here at the opening of the fall term
34 with the difficulties that we are facing and the
35 extraordinary demands that we are facing every day.
36 MR. GRANT: Of course, that's why I say if there was a way that
37 you could find to do that.
38 THE COURT: I'm not sure there is. I can think about it, but
39 I'm not sure there is. There are certain things we
40 can do something about and certain things we can't.
41 MR. GRANT: Of course, there would not be -- the courtroom would
42 not be available in Smithers in that first week
43 either so it would be the second week.
44 THE COURT: Well, is it available the second week?
45 MR. GRANT: Well, the sitting that I have the rotas for -- I
46 have the rotas and there is sitting for Smithers for
47 the County Court are the week of the 6th of

1 September, so it is only that one four-day week.
2 THE COURT: Do counsel have any submissions on the second branch
3 of what Mr. Grant has said?
4 MR. GOLDIE: Not for me, My Lord.
5 MR. MACAULAY: I have none, My Lord.
6 THE COURT: Well, I am terrribly disturbed by all of this. It
7 is an awkward problem. There are some things I am
8 not allowed to consider apparently and the other
9 things I am -- the ones that I am entitled to
10 consider create enormous difficulties and I will
11 have to see what I can do about it. I would
12 certainly be looking a lot more favourably on
13 hearing any evidence. I am not happy about hearing
14 any at all for a number of reasons which might be
15 better if I don't say, but I am far more perceptive
16 to the suggestion of October than September. I will
17 give it some thought. There are some certain limits
18 I am not prepared to go for. I have gone about as
19 far as I can go in some of these things and I do as
20 much as I can. I would deal with problems and I am
21 disquieted with the thought of being away for an
22 extended period of time. I will give it some
23 thought and I will let you know as soon as I can.
24 I think we should resolve the other problem.
25 I am rather disposed to accede to Mr. Grant's
26 suggestion to start out the 12th rather than the 6th
27 because at least if I am here it will help with that
28 term with the first week and every judge counts.
29 And I can perhaps relieve the burden that the bar is
30 so understandably upset about. It may be best if we
31 make that decision now. I think I am disposed to
32 say, yes, we will start on the 12th rather than the
33 6th. I am very uneasy about starting in Smithers in
34 September.
35 MR. GRANT: I will bring that up with my clients and we may
36 broach the subject again.
37 MR. GOLDIE: My Lord, may I summarize --
38 THE COURT: Yes.
39 MR. GOLDIE: -- the position that I took yesterday. And I have
40 found the authority that I was referring to in
41 connection with the proper function of an expert.
42 The general objection to the admissability of the
43 map which is based upon a metes and bounds
44 description described by Mr. Sterritt is he is the
45 source of the information used by the cartographer.
46 The particular objection is that in creating the
47 metes and bounds description, Mr. Sterritt is

offering an opinion on the evidence of those who claimed to have the knowledge that would enable them to testify directly.

I am not making any submission at this point on the question of hearsay. I made some remarks about that yesterday, but I want to put that to one side. I say that if Mr. Sterritt is qualified to offer that opinion then I ask that he be treated as an expert and subject to the rules that have been laid down with respect to experts and in respect of which the Plaintiffs identified him as an expert.

Now, may I state what my understanding of what an expert is supposed to do. And I am going to refer to the case of Kelliher, K-E-L-L-I-H-E-R, versus Smith, 1931, S.C.R. at page 683 where Mr. Justice Lamont for the majority of the court said this in commenting upon a trial judge's direction to the jury to disregard certain evidence. And this is his lordship's observation:

> "In effect what these witnesses were being asked was whether or not the plaintiff, in operating the extinguisher the way he did, had been guilty of negligence which contributed to his injuries. This was surely the province of the jury. It was contended that the testimony was admissible because the witnesses were experts. In Beven on Negligence, 4th ed., at page 141, the author says:
>
> 'To justify the admission of expert testimony two elements must co-exist.
>
> (1) The subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge.
>
> (2) The witness offering expert evidence must have gained his special knowledge by a course of study or previous habit which secures his habitual familiarity with the matter in hand.'"

We are not concerned with that. And his lordship continues:

"In my opinion, the jury were just as capable as the witnesses of forming a correct judgment as to the plaintiff's acts, and the evidence does not disclose that either of the witnesses had ever operated a similar fire extinguisher. The object of expert evidence is to explain the effect of facts of which otherwise no coherent rendering can be given."

And that is the Carter v. Boehm case. Now, I find that your lordship referred to that case in Sengbusch v. Priest, 1986 I think it was -- 1987, 14 B.C.L.R. (2d) at page 26. And at page 40 your lordship, after referring to the Kelliher case referred to R. v. Abbey, another judgment of the Supreme Court of Canada and quoted Mr. Justice Dickson, as he then was. And I quote, in part:

"With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate."

Now, that's my understanding of what an expert is. The question here is whether the transformation of the statements of the people from whom Mr. Sterritt obtained information is such that unordinary people are unlikely to form a correct judgment of that information if unassisted by persons with special knowledge to explain the effect of the facts. To put this in more concrete terms, I am going to refer to Mr. Sterritt's affidavit which presumably he will come to in the course of his evidence. And it is under tab 69 of the second book before your lordship.

THE COURT: I'm sorry, what tab?

MR. GOLDIE: Tab 69, My Lord, book 2. And there on page 2 under paragraph 5 he says:

"The boundary of the Thutade Territory can be described as follows:"

And then:

> "Commencing at the northeast end of Thutade the boundary runs west along the north shore of Thutade to the west end of the lake. Here, the boundary runs west up the centre of Thutade creek to the height of land south of Hoy Lake."

That, broadly speaking, is a metes and bounds description and is comparable to the metes and bounds description which he provided the cartographer in the map to which I've taken objection. The same format is used with a little greater detail in the metes and bounds description that is provided to the cartographer. This is the boundary of one of Mr. David Gunanoot's territories and the information is based upon what Mr. Gunanoot told him as he says in paragraph 4:

> "I was instructed about the Thutade Territory and its boundary by the former 'Niikyap, Wolf Clan, who is now deceased."

Your lordship, of course, just recently saw a portion of Mr. Gunanoot's commission evidence and I assume it is -- I hope it is reasonably still fresh in your lordship's mind. I am not -- just to put another thing out of the way, I am not now talking about whether Mr. George's translation of this metes and bounds description on a map is accurate, that is something for Mr. George. I am talking about the transformation of the evidence of Mr. Gunanoot to that metes and bounds description and the evidence in respect of the external boundary of all the hereditary chiefs who provided information on that point.

Now, in Mr. Gunanoot's commission evidence, he has made a number of statements about the territory. For instance, in Volume 2 at page 167. Excuse me, My Lord, I think I have the wrong page number. I think I'm in volume one. Yes, at volume one, page 24, at line 17 in his examination in chief.

> "Q Now, I want to ask you about 'Niikyap's territory.

A Territory?
Q Yes. Where is 'Niikyap's territory located?
A It's kind of far, ten mile on the other side of Kisgagas.
Q The other side of Kisgagas?
A Yes.
Q What's it called?
A Canyon creek."

And he asks him for the Indian name. Line 33:

"Q How far down the river -- or going up the river is 'Niikyap's territory?
A Right about the creek which is --"

And then he gives an Indian name for that.

"Q As you go along the Babine River, how far does 'Niikyap's territory go?
A Gee, I don't know that. Quite a way up.
Q Can you tell me how many miles?
A Yes, right on top of the -- it's right at the -- some kind of timber line, right on top, goes down to what they call Xsimihlmihl, the little creek goes down that way."

And then he is asked again what is the little creek? He is asked a number of questions about migration. He is asked a question about a battle with the Stikines and again there is a reference to territory. There was a peace settlement, this is page 63 at line 20.

"Q Was that the end of the war between Stikines?
A Yes, that's why they're giving all those hides, and things like taht. When they got those painted poles like that, and there's the other one, and there's the line right there, and there's Hazelton, and Kispiox on that -- on this side. No more war."

And then he was asked:

"Q Where was the place where the skins were left?
A I don't know."

And he goes on to discuss that. At page 66 in volume 1 there is a further discussion of territory and he describes it in these terms line 26:

"Q Now, David, I just wanted to ask you about the territory around the big meadow. I think the name of that --"

And then there is an Indian name.

"Q Is that territory today in the house of 'Niikyap?
A That's right."

And then there are extended discussions about Bear Lake and people called Bear Lake Charlie and Black Hat Tom, about telling Gunanoot about Arrow Rock and the confrontation was from people at Tatla Lake and the territory that his mother had. And how Gayle owned land all over the place and the territory of other people. And then in volume two at page 167, I think this is Mr. Plant's cross-examination at line 13:

"Q Is there a may -- do you have a map of 'Niikyap's territory?
A No.
Q You don't have map of the territory of 'Niikyap?
A Follows the creeks around.
Q That's what?
A Same as me on my trap line..."

I could multiply those, but I think your lordship will recall that that is a reasonable example of Mr. Gunanoot's evidence. Now, when that's translated by Mr. Sterritt into metes and bounds description it becomes a continuous uninterrupted line. It fills in gaps. It expands the word "around". In my submission, it seeks to explain the effective facts of which otherwise no "coherent rendering" can be given. That's what it seeks to do. He has taken a

mass of material, and I am now addressing -- I am moving away from Mr. Gunanoot, but I am now addressing the metes and bounds description of the map that I have taken exception to. In this case he has assembled a mass of material accumulated over a decade, part and full-time labour. That requires the application of analysis and judgment, the organization of perhaps disjointed notes.

THE COURT: Mr. Goldie, I have assumed that the metes and bounds description was an external boundary, am I wrong in that?

MR. GOLDIE: There are metes and bounds description of external and internal.

THE COURT: Are we talking about both or what?

MR. GOLDIE: Well, I used the metes and bounds description which will be submitted to your lordship for Gunanoot's property because that was an example that I assumed would be fresh in your mind.

THE COURT: That was an internal boundary?

MR. GOLDIE: That was an internal boundary, but the process with respect to the external boundary is precisely the same.

THE COURT: Yes. All right.

MR. GOLDIE: And your lordship will have in mind that there is the evidence of Mr. Sterritt in organizing notes taken on various occasions, formal and informal. I think he even mentioned the back of cigarette boxes. He has taken all of that and provided a single, apparently coherent, uninterrupted line. I may be wrong, but I have yet to find direct evidence, and by that I am talking about hereditary chiefs, which speaks to a boundary line. It speaks to features. It speaks to: That's mine, that's his. On the other side of that creek that's so and so. It is the evaluation and reconciliation, and I emphasize the word "reconciliation", of inconsistencies and disagreements into what is apparently, as I say, a single line spoken with a single voice.

Mr. Sterritt, so far as his summary that was provided us last year, had no doubt about his status. He said on page 22 of his summary:

> "In summary, my boundary mapping work shows that each Gitksan House and Wet'suwet'en Clan exclusively owns a precisely defined land territory."

And then he goes on to make a statement of his observations at feasts. And then he says:

> "These are the bases of my opinion that the area of land described in Appendix A of this report is accurately defined and is owned by the Gitksan and Wet'suwet'en Chiefs who are Plaintiffs in this case."

Now, that amended schedule in his summary was, as I understand it, the metes and bounds description of the external boundary, so I say he had no doubt that he was rendering an opinion.

Now, if your lordship finds that the continuous line represented by the metes and bounds description follows naturally from the evidence that I have read to you, and to which I've made reference, then there is no need for Mr. Sterritt's intervention between the witnesses and the map and his evidence ought to be rejected in that sense for the reason given in Smith as he is not tendered as the source of the primary evidence.

So my objection comes down to this, either he is treated as one who assists the court in the manner that I have described and therefore is qualified to offer his opinion, in which case I ask that he be treated as an expert as he was once tendered as or if he is -- or if your lordship's opinion is that his intervention is not required, then I ask that his evidence be rejected because it is not the primary evidence which is, at least in part, in the record already.

THE COURT: Thank you. Mr. Macaulay.

MR. MACAULAY: In the case of the metes and bounds, it seems to me, My Lord, that this is clearly an example of the expression of an expert opinion. May I illustrate that submission in this way: Mr. Sterritt in March provided the summary that Mr. Goldie had referred to. It was dated March 1987 and it had attached one of those very lengthy metes and bounds descriptions of the outer boundary which now is represented on map 6 of the series of maps. Within a few weeks, a month or not much more than a month, Mr. Sterritt -- presumably Mr. Sterritt, it might have been someone else -- revised almost every page of that metes and bounds description contained in his opinion, but in

a way that only an expert could address and I will use an example. On page 3 of his opinion, this is his expert's opinion, he refers towards the bottom of the page:

> "...thence in a south easterly direction along the center line of the Babine River to the confluence of an unnamed creek and the Babine River, said confluence being 30,290 metres north and 14,450 metres east of the northeast corner of lot 551."

A few weeks later he had apparently reconsidered the matter and a new Statement of Claim, including an Appendix A which was the metes and bounds, was delivered to us. And by that time, and you would have to see the two documents together and see the transcripts of my reading to understand the differences in detail, but it now reads:

> "...thence in a south easterly direction along the southern bank of the Babine River..."

It is no longer the center line of the Babine River. And they add the words:

> "...to the opposite bank of..."

And then they continue with the old text:

> "...the confluence of an unnamed creek of the Babine River...",

and add the words:

> "...crossing the river at this point."

Now, those are not things that you would see on a map, you are shifting from the center line to the south bank. That's clearly the hand of an expert making those fine adjustments. And I might say that there are maybe 20 or 30 changes of that kind. They may or may not have great significance. Who owns the whole river, I suppose, is the question. Does somebody -- these are external boundaries, so the question there would be does the neighbouring tribe

share the ownership of the river with the Gitksan chief in question or do the Gitksan own the whole river right to the far bank or own none of the river.

And I doubt very much -- we haven't heard any evidence of any chief giving that kind of information, detailed information. Maybe there was some detailed information, but it shows the hand of an expert making all those fine adjustments to a virtually incomprehensible piece of composition or easily comprehended only by an expert. And I could read more of them. There are changes in boundary. There are actual geographic changes or features. One in particular is included in one and excluded in the other. It would appear that those metes and bounds descriptions are -- could only be done by somebody with expertise, with a very considerable amount of expertise.

THE COURT: Thank you. Mr. Rush.

MR. RUSH: Well, I have a number of points in response, as you might gather, My Lord. The first is that the triggering item of evidence that led us into this discussion was the introduction of the map of the metes and bounds and Mr. Goldies' objection springs from that fact. And we now have it expanded into a more fully developed objection about the nature of Mr. Sterritt's evidence. Let me say firstly, as a matter of clarification, that the metes and bounds description that is -- and you will hear evidence of this, that is appended to Mr. Sterritt's report is not one that he drafted, but one that he approved. The evidence will be that Mr. Marvin George, the cartographer, is the person who drafted the metes and bounds description. And the evidence will be that Mr. Sterritt went over the metes and bounds description point by point and reviewed that and concluded that that was the boundary of the -- external boundary of the Gitksan and Wet'suwet'en chiefs and it accurately depicted their boundary. So that's the first point that I want to make.

THE COURT: Well, does that make any difference if a person doesn't actually write the words but examines and approves what someone else has done? The weight to be given to his evidence, if it is to have any weight at all, must carry with it the implication that the eventually he did the same thing himself, although by a different process. He satisfied

1 himself that he was correct -- he has to satisfy
2 himself it is correct and he has got to do it in a
3 different form.
4 MR. RUSH: I don't think there is any necessary distinction
5 between the two, but I think it is an important
6 point to make that it was not Mr. Sterritt's hand
7 who drafted the metes and bounds description.
8 THE COURT: But that also leads me to ask this, then: Is this
9 evidence going to go through Mr. George or be
10 admissible through Mr. George, if you choose to make
11 it admissible through Mr. George, and that being so
12 the only reason to adduce it through Mr. Sterritt is
13 to buttrice what Mr. George will later say?
14 MR. RUSH: Well, that is exactly it. Mr. George will be
15 called. He will speak to the metes and bounds of
16 the external boundaries and he will speak to -- he
17 will speak to what he has done and he will be
18 tendered as an expert.
19 However, My Lord, the issue, in my submission,
20 that my friends raise is not really one that
21 pertains to that description or from that particular
22 map that flows from the description. The question
23 that I hear my learned friends saying is that any
24 reconciliation, as it is suggested, of information
25 past from the hereditary chiefs to Mr. Sterritt and
26 any either passing of the information from
27 discussion with Mr. George amounts to the making of
28 an opinion separate from the opinion that will be
29 offered by Mr. George. And for that reason, they
30 say -- they argue that the evidence presumably that
31 has been led and is being led now contains
32 inferences of Mr. Sterritt which are akin to or are
33 expert inferences about which your lordship could
34 not do without in order to understand the evidence.
35 Firstly, I must say that the responses I have
36 are these: In my submission there will be
37 affidavits of the evidence of the hereditary chiefs
38 tendered in total. You have the Gitksan affidavits
39 now. Mr. George, his evidence will bear on and
40 relate to those affidavits. And in my submission,
41 the affidavits themselves form the underlying
42 factual basis upon which Mr. George's evidence in
43 relation to what we will be tendering as the
44 external -- the final external boundary map of the
45 Gitksan/Wet'suwet'en hereditary chiefs and that map
46 will be based on that affidavit evidence.
47 Now, in my submission, My Lord, Mr. Sterritt's

evidence now is little more than describing a process by which he was involved in interviewing hereditary chiefs, obtaining their knowledge and with that knowledge passing it along to Mr. Marvin George. And you will hear evidence about his participation in the drafting of affidavits as well.

Now, in my submission the process that Mr. Sterritt is involved in here may involve inferences, but in the context of the nature of the inferences that he is engaged in making are those that you might expect of a lay witness who perceives facts, who is knowledgeable of a society, who is knowledgeable of the language of description of that society and tenders that language of description in a number of forms that you are going to hear about through field books, through the placement on topographical summary sheets. And in my submission, although my learned friend tried to draw in absolute poles, an expert who must assist the decision-maker with drawing of inferences that the decision-maker could not draw for himself or herself on the one hand. And then the other hand, the pole of: Well, the police officer at an accident site who draws certain conclusions about the length of a skid mark or the length of a vehicle. And in my submission, there is a range, an understandable range that is spoken of in the text that I drew from Sopinka and Lederman, evidence in civil cases on the opinion of lay witnesses in which inferences have been permitted and indeed are expected to be made of witnesses in certain contexts because it would be an absurdity to make a distinction between the fact, the absolute statement of the fact, and a necessary inference that flows from the statement of the fact.

Now, I do say, and the evidence will be, that the drawing of the line and the making of the metes and bounds description by Marvin George is in fact an opinion. That is an opinion for him to make. That is not what Mr. Sterritt did. And my submission is that where there are inferences, and I have to say that I think there are some inferences that are involved in the gathering of the facts, but I say that these inferences logically can join to those facts and that to do without them, I think, would be an absurdity to the court because it would break the very descriptive narrative about the information-gathering process that was involved

here.

And, My Lord, I just cite in terms of -- I did not go deeply into the subject independently of referring to a secondary source, but at page 301 of Sopinka, the author states:

> "In Canada, it has been held that with respect to matters of common experience, a lay witness will be allowed to express an opinion if he possesses personal knowledge of the facts upon which that opinion is based."

THE COURT: But doesn't that relate to things such as expressing opinion that a person who is staggering and falling down and whose eyes are bloodshot and speech is slurred is drunk?

MR. RUSH: Well, that's right, it does. But what I say to your lordship is that it is indicative of the spectrum of permissible inferences that can be drawn from facts. And I say that Mr. Sterritt's evidence falls into that category when perceived in the context of the fact gathering process that he was engaged in and the fact of his being a member of the Gitksan/Wet'suwet'en society.

And as well, I think you must see his evidence contextually from the evidence that you heard from some 20 chiefs about the nature of that society. And in addition, My Lord, to the fact that many of these chiefs, and I refer firstly and just by example Gitludahl or Pete Muldoe who has testified about the boundary of I think some 17 territories and described those in an affidavit and was cross-examined on them. And I think your lordship must view Mr. Sterritt's evidence contextually with regard to Mr. Pete Muldoe, Mr. Stanley Williams and a number of other chiefs who have attested about the nature of where boundaries are found to be, that is in relation to creeks and rivers and heights of lands and valley floors and that type of thing as facts which I say are common within the culture.

And I think that there is a sufficient body of evidence for your lordship to -- from people who have -- who are not, if you will, in the dual capacity that Mr. Sterritt found himself in of one being immersed in the culture as well as one who is gathering from the culture. He has received that

information directly from people who are the Gitksan and who are the Wet'suwet'en society, and I think for that reason your lordship can take, where those inferences emerge, take it from -- take those inferences as informations of a lay person operating intimately within that society.

With respect to the comments made by Mr. Sterritt in terms of Mr. David Gunanoot's evidence, Mr. Gunanoot's examination occurred on March 1, 1986. The first passage referred to -- referred to a territory, a fishing territory called Gwitselasgwit by David Gunanoot and other territories were referred to in general terms. You will hear evidence from Mr. Sterritt that the -- following that discovery Mr. Sterritt had further and more intensive discussions with Mr. David Gunanoot and that led to a finer description, a more refined description of the territories that are territories of the House of 'Niikyap. Furthermore, that you will hear evidence about the fact that there are other subchiefs of the house of 'Niikyap that -- who are the reservoires of more detailed information that was the basis for the information relied upon by Mr. Sterritt, one such chief being Haimadam.

I want to point out to your lordship that the evidence of Mr. Sterritt with respect to his status, this evidence -- the nature of Mr. Sterritt's status is a function of counsel's determination. And I have to agree with Mr. Goldie that Mr. Sterritt in the eyes of counsel is an expert. But that's neither here nor there, it is the Plaintiffs' choice -- counsel's choice to tender Mr. Sterritt in whatever way we choose in recognizing the limitations, and I have already commented on what I see to be the real limitations. And with respect, I don't consider them to be very -- to be reasonable limitations or expensive ones in respect of his testimony. But in my submission, it is counsel's determination as to his particular status.

Now, having said all of that, counsel, Mr. Grant and I, have considered the comments made by your lordship and the discussion that has been raised by my learned friends and we are going to review the status of Mr. Sterritt. We are going to look at this afresh to determine whether or not there is merit in this submission. At the present

time, I am of the view there is no merit to it and that is the reason for my submission. But we gave this matter some considerable thought last night and we intend to give it some more thought on the weekend.

But at the present time, our view is that Mr. Sterritt is tendered as a lay person to speak about knowledgeable facts that he has. But at the same time, we recognize that there is a very delicate line here about which we want no mistake about the nature of Mr. Sterritt's evidence. We are going to review and think about the decision we make on the weekend, and I think we would be in a better position on Monday morning about whether or not there is any necessity to change the basis upon which Mr. Sterritt has been tendering his evidence. Whether or not Mr. Sterritt is tendered as an expert, in my submission, in no way creates an objection that Mr. Goldie hints at as to his evidence being evidence that is created as some form of intervention between the drawing of a line by the expert Mr. George and the generation of the knowledge from the hereditary chiefs.

In my submission, My Lord, you heard quite exstensive evidence from Alfred Joseph to hear what role he played in this. In fact, you saw a videotape late one afternoon of Alfred Joseph and Johnny David and Max Lax Lex in which that process was visually described. In my submission, it is an integral part of the case of the Plaintiffs to demonstrate the progress -- the process and the progression of understanding of those persons who gather the information from the hereditary chiefs and to pass that information to you. And from that, as you will hear in the evidence, the line of the external boundaries and eventually the internal boundary during this period lines were drafted. And we do say that the process of drafting that line on the metes and bounds, of course, is that function, a proper function for someone of cartographic skills. Nonetheless, in my submission, it no way detracts in the slightest from the integral role that Mr. Sterritt and Mr. Joseph and Mr. Glen Williams have played in terms of gathering and transmitting that information to Mr. George.

So in sum, My Lord, I say that our position at the moment is there is nothing barring Mr. Sterritt

1 from proceeding with the giving of his evidence as
2 it's been accepted. And having said that, My Lord,
3 we, counsel, will review Mr. Sterritt's status and
4 determine whether or not we will alter that status
5 and make a submission to you on Monday on that
6 point.
7 THE COURT: What are you suggesting, Mr. Rush, that I give
8 judgment on the objection now so that you will have
9 the benefit of that, if I can use that term
10 descriptively, while you are carrying out your
11 reconsideration or do you suggest that the matter be
12 stood over generally and we go on with some other
13 evidence in the meantime?
14 MR. RUSH: Well, My Lord, it is my view that the history of the
15 decision in respect of the determination of Mr.
16 Sterritt's status goes back to last summer where
17 counsel made a decision to proffer territorial
18 affidavits of the chiefs themselves. And that had a
19 very substantial important -- it was an important
20 turning point in terms of the presentation of
21 certain evidence and our desire to try and find a
22 summary and a convenient way of presenting evidence
23 without calling a host of chiefs to speak directly
24 to their territories. And so following from that,
25 decisions were made. Of course, that resulted from
26 interaction among counsel and with the bench and so
27 I --
28 MR. GOLDIE: I hope my friend is not suggesting that counsel for
29 the Defendants was involved in the process he is
30 talking about.
31 THE COURT: I don't think so. Unless you people have been -- --
32 MR. RUSH: There are other ways I might engage counsel for the
33 defendant, but that isn't one of them. I am sure he
34 wouldn't want to be involved in that anyway. But I
35 say, My Lord, that in respect of the position
36 that -- the options which you pose now, in my
37 submission there is little value proceeding along
38 the line of leading of evidence if your lordship is
39 swayed by the arguments or sympathetic to the
40 arguments raised by the defendants. And in my
41 submission, counsel would be assisted by your
42 determination of this issue. And for that reason, I
43 think your lordship should make a determination on
44 this objection and we can proceed from there.
45 THE COURT: All right. Thank you.
46 MR. MACAULAY: My Lord, if there is to be a ruling made on Mr.
47 Goldie's submission, his objection, I should tell

your lordship that there had been a misunderstanding about the authorship of the metes and bounds. Clearly from my earlier submission, I had assumed and I had understood that Mr. Sterritt was the author, but it depends on how you define authorship. The Plaintiffs provided us with an affidavit in connection with the second last -- their application for the second last Statement of Claim, the amendment to the Statement of Claim which is included in Appendix A. And it is the affidavit of Shirley Meldon which in paragraph 14 goes on as follows:

> "I have been informed by Peter Grant that prior to the last pre-trial conference, he had requested Marvin George to prepare an updated map showing the external boundaries of the territory as determined by Neil Sterritt. Marvin George has been unable to prepare that map as he has been waiting for topographical base maps from the Lands Branch of the Province of British Columbia, which were ordered in early March. I have been informed by Peter Grant that as soon as those maps are received, Marvin George will be able to prepare a base map and have that map drafted, at which time it shall form part of the application to amend as a new Schedule B to the Statement of Claim. The amended Schedule A of the Statement of Claim has already been delivered to both Defendants as appendix to the opinion report of Neil Sterritt."

He is either the author or he is the person who determined the boundaries of the territory, I don't think there is much difference between them. Those are the Plaintiffs' descriptions, characterization of Mr. Sterritt's involvement.

THE COURT: Yes.

MR. GOLDIE: My Lord, I just have a few statements in reply. My friend stated that this is just really a matter of clarification, that he didn't prepare the metes and bounds report but in some way he is able to clarify them, and I say if he is not an expert his approval is irrelevant. If there are no inferences to be drawn that he is drawing, then the evidence is

1 wholly unnecessary. Again my friend referred to the
2 affidavits. If they form the underlying evidence
3 for Mr. George, then Mr. Sterritt's evidence is
4 wholly unnecessary.
5 My friend made a submission that Mr. Sterritt
6 is in the position of a layman who may draw
7 inferences. He is not in that position. He is
8 seeking to persuade your lordship and he and only he
9 can draw inferences which are, in effect, the very
10 things that your lordship are being asked to decide
11 in this case. The boundaries are an integral part
12 of the claim to ownership and jurisdiction. And Mr.
13 Sterritt is saying: There are the boundaries. Now,
14 he has made it clear time after time that he is not
15 a repository of original fact, he is a collector.
16 Now, I was surprised to hear my friend say it
17 is for counsel to determine status. It is for the
18 court to determine whether the evidence is
19 admissible as the opinion of an expert or whether it
20 is to be rejected as not being within the personal
21 knowledge of the witness.
22 THE COURT: Thank you.
23 I am dealing at the moment with a narrow
24 question of whether Mr. Sterritt, not having been
25 tendered, although in part qualified as an expert in
26 the art or skill of making maps, may give evidence
27 of the preparation by himself or alternatively the
28 approval by him of what someone else has done in
29 that regard. It, in my view, makes no difference
30 whether he made the metes and bounds descriptions or
31 he applied his intellectual powers and skill in
32 reaching the judgment necessary to approve it.
33 I am satisfied that from the data furnished to
34 the court by viva voce and by affidavit which was
35 largely collected by Mr. Sterritt that I would not
36 be able without expert assistance to translate that
37 data into a boundary or either external or dividing
38 line between territories of adjacent houses. I
39 think the preparation of a metes and bounds
40 description or of a map showing boundaries from this
41 raw data can only be given in evidence by an expert
42 witness. I think in this area that -- in this
43 narrow area, I am satisfied that Mr. Goldie's
44 objection is valid and I do not think that I could
45 allow a person not qualified as an expert to give
46 evidence about the preparation of or validity of a
47 metes and bounds description or of a map showing

boundaries in the particular circumstances of this case. I'm heartened to know that this evidence is going to be adduced and is going to be available to assist me in the subsequent expert evidence of Mr. George, if counsel carry through on their stated present intention of adducing that evidence through Mr. George, assuming, of course, that he will be qualified.

It follows, in my view, that the only difficulty I have here is that counsel have chosen not to tender Mr. Sterritt as an expert witness, although, as I have said, he has been at least partly qualified in that connection. I think that I do need expert evidence, as I've said, to understand and make meaningful use of the data that he has largely collected. And for all those reasons, it is my conclusion that I cannot hear Mr. Sterritt in his role as a non-expert, but that I could hear it and be glad to have that evidence if the highly technical impediment that I had mentioned is removed which is in the power of the Plaintiffs to remove. I am not able to cast or project myself forward into the evidence to know whether what I have just said applies to a lot of the future evidence of Mr. Sterritt in chief or whether it is defined to this narrow question, but I think I must give effect -- I must accede to the objection. I do not think this evidence can be given by a non-expert for what I will call, for want of a better expression, the art of map making. It is time for the morning adjournment and I will adjourn for the usual morning break so that counsel may consider the consequences of what I have just said.

THE REGISTRAR: Order in court. Court will recess.

(PROCEEDINGS ADJOURNED AND RESUMED PURSUANT TO MORNING RECESS)

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

LISA REID, OFFICIAL REPORTER
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(PROCEEDINGS RESUMED PURSUANT TO AN ADJOURNMENT)

THE REGISTRAR: Order in court.
THE COURT: Mr. Grant -- I am sorry. Mr. Rush?
MR. RUSH: My lord, the 15 minutes at the break wasn't really enough time to consider all of the considerations that I think have to be made and especially in relation to the instructions that I think we need from our clients and, so given that, we are of the mind at the moment that we should allow the weekend to pass before we make our next judgment because I really feel that there isn't a lot of point in my directing Mr. Sterritt on what could be considered colloquially as non-expert evidence if our real intention is to proceed with Mr. Sterritt as an expert. So it is our recommendation that you consider deferring the matter -- adjourning the matter until Monday morning and hopefully I will be in a better position to advise your lordship at that time how we intend to proceed with this evidence.
THE COURT: All right. Mr. Goldie and Mr. Macaulay, any objection? It is Friday.
MR. GOLDIE: Well, I can only repeat that if Mr. Sterritt is tendered as an expert, I expect him to be tendered in the same way as any other expert is in this particular case.

1 THE COURT: I am not sure I understand what that means.
2 MR. GOLDIE: I will expect a report and I will --
3 THE COURT: I thought you had received a report.
4 MR. GOLDIE: No. We received a summary of a report which is
5 incomplete and I, for instance, if I am going to
6 deal with Mr. Sterritt as an expert, I am going to
7 deal with him far differently than I was prepared to
8 deal with him as a layman.
9 THE COURT: Well, does the Evidence Act call for a report, or is
10 there some rule, some order that I made at a
11 pretrial conference?
12 MR. GOLDIE: You made an order. There have been a couple of
13 orders.
14 THE COURT: What do they say?
15 MR. GOLDIE: That there will be a report --
16 MR. RUSH: No, that's not what it says. A summary or a report.
17 MR. GOLDIE: But the report would be filed 60 days before the
18 expert is called. That was done in Smithers last
19 year.
20 THE COURT: When was the summary delivered?
21 MR. RUSH: March of 1987.
22 MR. GOLDIE: But maybe the report will turn out to be just the
23 same as the summary, I don't know. But my concern
24 is that, for instance, I do not have a cartographer
25 available to me because I didn't anticipate that I
26 would have to examine Mr. Sterritt in his capacity,
27 I forget how he framed it in his summary, and this
28 was why I was so concerned to know whether he was
29 being presented in the way he was. He talks about
30 using methods to more precisely define the
31 boundaries; my boundary mapping work shows A, B, and
32 C, and that isn't the way I was going to treat Mr.
33 Sterritt. To put it a little more accurately, it
34 wasn't in the nature of the cross-examination that I
35 anticipated. Maybe we can deal with it this way:
36 Depending on what my friends do, we may be able to
37 have them lead whatever evidence they want to lead
38 and I will make a submission if I require time at
39 the conclusion of his evidence.
40 THE COURT: Well, that's of course always open to counsel to
41 make --
42 MR. GOLDIE: Well --
43 THE COURT: -- such a submission.
44 MR. GOLDIE: I am reluctant however until I hear what their
45 submission is. I am reluctant to waive the -- not
46 the advantage, but the ability to organize the time
47 that your lordship's ruling provides.

THE COURT: Well, all right. My present view is -- but I speak without having examined Mr. Sterritt's summary, is that if Mr. Rush said, all right, now I am tendering Mr. Sterritt as an expert in map-making, subject to any objection arising out of the form of the summary, I would say that he is, subject to the qualification -- subject to cross-examination, if any, I would say that I think he can proceed with the evidence right now. But that may be simplistic.

MR. GOLDIE: I do want to cross-examine him on his qualifications.

THE COURT: That's the qualifications I had as well. Because I don't think one needs a Phd. in cartography, if there is such a thing, to be of assistance to the court in this area. A career in mining technology of the kind that Mr. Sterritt described in my present view would be sufficient but that may prove to be unduly simplistic, so I won't presume to prejudge that issue.

I must say however that that has been my reaction to what I have heard to date, that if he was tendered, subject to cross-examination, we can just carry on, and I hope that's what turns out to be the case. Should we adjourn -- I haven't heard from you, Mr. Macaulay?

MR. MACAULAY: I have no submission.

THE COURT: All right. Ten o'clock Monday morning then.

MR. RUSH: Thank you, my lord.

THE REGISTRAR: Order in court. Court will adjourn until ten o'clock Monday.

(PROCEEDINGS ADJOURNED AT 11:40 A.M. TO MONDAY, JUNE 27, 1988, AT 10:00 A.M.)

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

TANNIS DEFOE, Official Reporter
United Reporting Service Ltd.