

Vancouver, B.C.

June 24, 1988

1  
2  
3  
4 THE REGISTRAR: Order in court. In the Supreme Court of British  
5 Columbia, this Friday, June 24, 1988. Calling  
6 Delgamuukw versus Her Majesty the Queen at bar. I  
7 caution the witness, you are still under oath.  
8 THE COURT: I have to tell counsel that I will have to adjourn  
9 at 12:15 today. I am entertaining our graduating  
10 law clerks at lunch at about that time, so I have to  
11 adjourn at 12:15 today. Mr. Grant.  
12 MR. GRANT: Yes, My Lord. I just have a few -- a couple of  
13 brief matters, one is Exhibit 31. I just want to  
14 note for the record, Exhibit 31 had been -- an  
15 additional mark was put on that exhibit in Stanley  
16 Williams' commission evidence. And when you read  
17 the transcript it will become apparent it was marked  
18 on Ms. Koenigsberg's copy, and Ms. Koenigsberg, Mr.  
19 Plant and I arranged to mark it on the exhibit. And  
20 it is a marking of a fishing site which is on the  
21 highway side of the Skeena River just upstream of  
22 the mouth of the creek known as Xsu gwin yookhl,  
23 that's X-S-U, one word, G-W-I-N, second word --  
24 THE COURT: Sorry, X-S-U?  
25 MR. GRANT: X-S-U, first word, G-W-I-N, second word,  
26 Y-O-O-K-H-L, third word. And it's been marked with,  
27 I believe it is a red circle on that, and that  
28 addition was from Stanley Williams' commission  
29 evidence.  
30 THE COURT: All right.  
31 MR. GRANT: The second matter I wish to raise, My Lord, is  
32 relating to the fall schedule and that is you raised  
33 the question of commencement on the 6th of  
34 September.  
35 THE COURT: Yes.  
36 MR. GRANT: It may well be -- it is anticipated that I will be  
37 leading the first witness in the fall session. And  
38 the assizes are set in Smithers and a trial that has  
39 been adjourned over because of no time is first on  
40 the list of which I am counsel. And it is set in  
41 Smithers for the 6th of September, so I would ask  
42 that our fall sitting commence the 12th of September  
43 if my friends have no objection to that. And the  
44 second point with respect --  
45 THE COURT: Let's deal with that. Mr. Goldie?  
46 MR. GOLDIE: Well, Mr. Plant is unfortunately going to be  
47 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 terribly 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

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

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

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

20  
21 "In effect what these witnesses were being  
22 asked was whether or not the plaintiff, in  
23 operating the extinguisher the way he did,  
24 had been guilty of negligence which  
25 contributed to his injuries. This was  
26 surely the province of the jury. It was  
27 contended that the testimony was admissible  
28 because the witnesses were experts. In  
29 Beven on Negligence, 4th ed., at page 141,  
30 the author says:

31 'To justify the admission  
32 of expert testimony two elements must  
33 co-exist.

- 34 (1) The subject-matter of the inquiry  
35 must be such that ordinary people  
36 are unlikely to form a correct  
37 judgment about it, if unassisted by  
38 persons with special knowledge.  
39 (2) The witness offering expert  
40 evidence must have gained his  
41 special knowledge by a course of  
42 study or previous habit which  
43 secures his habitual familiarity  
44 with the matter in hand.'

45  
46 We are not concerned with that. And his lordship  
47 continues:

1  
2 "In my opinion, the jury were just as  
3 capable as the witnesses of forming a  
4 correct judgment as to the plaintiff's  
5 acts, and the evidence does not disclose  
6 that either of the witnesses had ever  
7 operated a similar fire extinguisher. The  
8 object of expert evidence is to explain the  
9 effect of facts of which otherwise no  
10 coherent rendering can be given."  
11

12 And that is the Carter v. Boehm case. Now, I find  
13 that your lordship referred to that case in  
14 Sengbusch v. Priest, 1986 I think it was -- 1987, 14  
15 B.C.L.R. (2d) at page 26. And at page 40 your  
16 lordship, after referring to the Kelliher case  
17 referred to R. v. Abbey, another judgment of the  
18 Supreme Court of Canada and quoted Mr. Justice  
19 Dickson, as he then was. And I quote, in part:  
20

21 "With respect to matters calling for  
22 special knowledge, an expert in the field  
23 may draw inferences and state his opinion.  
24 An expert's function is precisely this: to  
25 provide the judge and jury with a  
26 ready-made inference which the judge and  
27 jury, due to the technical nature of the  
28 facts, are unable to formulate."  
29

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

42 THE COURT: I'm sorry, what tab?

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

45  
46 "The boundary of the Thutade Territory can  
47 be described as follows:"

1  
2 And then:  
3

4 "Commencing at the northeast end of Thutade  
5 the boundary runs west along the north shore  
6 of Thutade to the west end of the lake. Here,  
7 the boundary runs west up the centre of  
8 Thutade creek to the height of land south of  
9 Hoy Lake."

10  
11 That, broadly speaking, is a metes and bounds  
12 description and is comparable to the metes and  
13 bounds description which he provided the  
14 cartographer in the map to which I've taken  
15 objection. The same format is used with a little  
16 greater detail in the metes and bounds description  
17 that is provided to the cartographer. This is the  
18 boundary of one of Mr. David Gunanoot's territories  
19 and the information is based upon what Mr. Gunanoot  
20 told him as he says in paragraph 4:

21  
22 "I was instructed about the Thutade  
23 Territory and its boundary by the former  
24 'Niikyap, Wolf Clan, who is now deceased."  
25

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

39 Now, in Mr. Gunanoot's commission evidence, he  
40 has made a number of statements about the territory.  
41 For instance, in Volume 2 at page 167. Excuse me,  
42 My Lord, I think I have the wrong page number. I  
43 think I'm in volume one. Yes, at volume one, page  
44 24, at line 17 in his examination in chief.  
45

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

1 A Territory?  
2 Q Yes. Where is 'Niikyap's territory  
3 located?  
4 A It's kind of far, ten mile on the other  
5 side of Kisgagas.  
6 Q The other side of Kisgagas?  
7 A Yes.  
8 Q What's it called?  
9 A Canyon creek."

10  
11 And he asks him for the Indian name. Line 33:

12  
13 "Q How far down the river -- or going up  
14 the river is 'Niikyap's territory?  
15 A Right about the creek which is --"

16  
17 And then he gives an Indian name for that.

18  
19 "Q As you go along the Babine River, how  
20 far does 'Niikyap's territory go?  
21 A Gee, I don't know that. Quite a way  
22 up.  
23 Q Can you tell me how many miles?  
24 A Yes, right on top of the -- it's right  
25 at the -- some kind of timber line,  
26 right on top, goes down to what they  
27 call Xsimihlmihl, the little creek goes  
28 down that way."

29  
30 And then he is asked again what is the little creek?  
31 He is asked a number of questions about migration.  
32 He is asked a question about a battle with the  
33 Stikines and again there is a reference to  
34 territory. There was a peace settlement, this is  
35 page 63 at line 20.

36  
37 "Q Was that the end of the war between  
38 Stikines?  
39 A Yes, that's why they're giving all  
40 those hides, and things like taht.  
41 When they got those painted poles like  
42 that, and there's the other one, and  
43 there's the line right there, and  
44 there's Hazelton, and Kispiox on  
45 that -- on this side. No more war."

46  
47 And then he was asked:



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

"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

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

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

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

14 THE COURT: Are we talking about both or what?

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

19 THE COURT: That was an internal boundary?

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

23 THE COURT: Yes. All right.

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

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

42

43 "In summary, my boundary mapping work shows  
44 that each Gitksan House and Wet'suwet'en  
45 Clan exclusively owns a precisely defined  
46 land territory."  
47

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

3  
4 "These are the bases of my opinion that the  
5 area of land described in Appendix A of  
6 this report is accurately defined and is  
7 owned by the Gitksan and Wet'suwet'en  
8 Chiefs who are Plaintiffs in this case."  
9

10 Now, that amended schedule in his summary was, as I  
11 understand it, the metes and bounds description of  
12 the external boundary, so I say he had no doubt that  
13 he was rendering an opinion.  
14

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

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

34 THE COURT: Thank you. Mr. Macaulay.

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

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

5  
6 "...thence in a south easterly direction  
7 along the center line of the Babine River  
8 to the confluence of an unnamed creek and  
9 the Babine River, said confluence being  
10 30,290 metres north and 14,450 metres east  
11 of the northeast corner of lot 551."  
12

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

20  
21 "...thence in a south easterly direction  
22 along the southern bank of the Babine  
23 River..."  
24

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

27 "...to the opposite bank of..."  
28  
29

30 And then they continue with the old text:

31  
32 "...the confluence of an unnamed creek of  
33 the Babine River..."  
34

35 and add the words:

36  
37 "...crossing the river at this point."  
38

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

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

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

19 THE COURT: Thank you. Mr. Rush.

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

41 THE COURT: Well, does that make any difference if a person  
42 doesn't actually write the words but examines and  
43 approves what someone else has done? The weight to  
44 be given to his evidence, if it is to have any  
45 weight at all, must carry with it the implication  
46 that the eventually he did the same thing himself,  
47 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 buttrise 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

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

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

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

1 here.

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

6  
7 "In Canada, it has been held that with  
8 respect to matters of common experience, a  
9 lay witness will be allowed to express an  
10 opinion if he possesses personal knowledge  
11 of the facts upon which that opinion is  
12 based."  
13

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

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

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

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



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

7 With respect to the comments made by Mr.  
8 Sterritt in terms of Mr. David Gunanoot's evidence,  
9 Mr. Gunanoot's examination occurred on March 1,  
10 1986. The first passage referred to -- referred to  
11 a territory, a fishing territory called  
12 Gwitselasgwit by David Gunanoot and other  
13 territories were referred to in general terms. You  
14 will hear evidence from Mr. Sterritt that the --  
15 following that discovery Mr. Sterritt had further  
16 and more intensive discussions with Mr. David  
17 Gunanoot and that led to a finer description, a more  
18 refined description of the territories that are  
19 territories of the House of 'Niikyap. Furthermore,  
20 that you will hear evidence about the fact that  
21 there are other subchiefs of the house of 'Niikyap  
22 that -- who are the reservoirs of more detailed  
23 information that was the basis for the information  
24 relied upon by Mr. Sterritt, one such chief being  
25 Haimadam.

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

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

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

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

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

46 So in sum, My Lord, I say that our position at  
47 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

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

13  
14 "I have been informed by Peter Grant that  
15 prior to the last pre-trial conference, he  
16 had requested Marvin George to prepare an  
17 updated map showing the external boundaries  
18 of the territory as determined by Neil  
19 Sterritt. Marvin George has been unable to  
20 prepare that map as he has been waiting for  
21 topographical base maps from the Lands  
22 Branch of the Province of British Columbia,  
23 which were ordered in early March. I have  
24 been informed by Peter Grant that as soon  
25 as those maps are received, Marvin George  
26 will be able to prepare a base map and have  
27 that map drafted, at which time it shall  
28 form part of the application to amend as a  
29 new Schedule B to the Statement of Claim.  
30 The amended Schedule A of the Statement of  
31 Claim has already been delivered to both  
32 Defendants as appendix to the opinion  
33 report of Neil Sterritt."

34  
35 He is either the author or he is the person who  
36 determined the boundaries of the territory, I don't  
37 think there is much difference between them. Those  
38 are the Plaintiffs' descriptions, characterization  
39 of Mr. Sterritt's involvement.

40 THE COURT: Yes.

41 MR. GOLDIE: My Lord, I just have a few statements in reply. My  
42 friend stated that this is just really a matter of  
43 clarification, that he didn't prepare the metes and  
44 bounds report but in some way he is able to clarify  
45 them, and I say if he is not an expert his approval  
46 is irrelevant. If there are no inferences to be  
47 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

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

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

34 THE REGISTRAR: Order in court. Court will recess.  
35 (PROCEEDINGS ADJOURNED AND RESUMED PURSUANT TO MORNING RECESS)

36  
37  
38 I hereby certify the foregoing to  
39 be a true and accurate transcript  
40 of the proceedings herein  
41 transcribed to the best of the  
42 skill and ability.

43  
44  
45 LISA REID, OFFICIAL REPORTER  
46 UNITED REPORTING SERVICE LTD.  
47

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

(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.



