Indian
Self-Government
Community
Negotiations

Gitksan and Wet'suwet'en

Self-Government Negotiations

Backgrounder

April 23, 1991

Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

Canada

GITKSAN AND WET'SUWET'EN BACKGROUND PACKAGE

CONTENTS

GITKSAN AND WET'SUWET'EN SELF-GOVERNMENT PROJECT CHRONOLOGY

June 9, 1989	♦	The Gitksan and Wet'suwet'en framework proposal for self-government negotiations was submitted to the Minister by the Office of the Hereditary Chiefs.
June - August, 1989	♦	The discussion paper and community approval of proposals for negotiation were finalized.
August 23, 1989	♦	The purpose statement and level of financing in the contribution agreement were amended to include signing a framework agreement in fiscal year 1989/90.
September 18-19, 1989	♦	Presentation in Ottawa by the Gitksan and Wet'suwet'en to the IDSC and other DIAND programs regarding their proposal.
November 7, 1989	♦	Departmental programs review the Gitksan and Wet'suwet'en Framework Agreement package.
December 14, 1989	♦	The Interdepartmental Steering Committee on Self-Government approved the Framework Agreement package.
December 22, 1989	♦	The Gitksan and Wet'suwet'en signed the Framework Agreement.
January 8-11, 1990	♦	Substantive negotiations commence; Round 1.
January 13, 1990	♦	Formal signing ceremony in Kispiox, B.C. Minister Cadieux and representatives of the Office of the Hereditary Chiefs in attendance.
January 22, 1990	♦	(Letter from Sakamoto to Montgomery) Region requests indication of provinccila participation.
February 7, 1990	♦	Round two negotiations

March 19, 1990	♦	Round three negotiations
June 11, 1990	♣	Round four negotiations
August 20, 1990	♦	Round five Negotiations
September 7, 1990	♦	Sub agreements under negotiation: • Legal Status and Capacity • Membership • Lands and Land Management • Renewable Resources • Non-Renewable Resources • Structures and Procedures of Government • Environment • Fiscal Arrangements
Oct 22 to 26, 1990	♦	Round Negotiations
October 29 1990	♦	Master Funding Arrangement approved • $217,750
January 21-24, 1991	♦	Amendements to sub-agreement under negotiation: • Legal Status and Capacity • Membership • Lands and Land Management • Renewable Resources • Non-Renewable Resources • Structures and Procedures of Government • Environment • Fiscal Arrangements • Taxation
February 5 and 6	♦	Round negotiations
February 6, 1991	♦	Amendements to sub-agreement under negotiation: • Legal Status and Capacity • Membership • Lands and Land Management • Renewable Resources • Non-Renewable Resources • Structures and Procedures of Government • Fiscal Arrangements • Environment
February 19, 1991	♦	Draft sub-agreements forwarded to Interdepartmental Steering Committee Working Group for preliminary review and comment.
March 11-12, 1991	♦	Round of negotiations

March , 1991	♦	Meeting with H. Swain and Gitksan and Wet'suwet'en representatives re file progress.
March 28, 1991	♦	Letter from Swain to Gitksan and Wet'suwet'en with commentary on sub-agreements.
March 28, 1991	♦	Gitksan and Wet'suwet'en budget approved for $658,250 for fiscal year 1991-92. Funding arrangement signed.
April 22, 1991	♦	Negotiator: Bill Zaharoff Assistant: Bernadette McLeod Advisor: Rhoda Vergara
April 30, May 1 1991	♦	Workshop in Ottawa

WORKSHOP
MATERIALS

21 January 1991
Amended 24 January 1991
Amended 6 February 1991

SUB AGREEMENTS

OFFICE OF THE HEREDITARY CHIEFS OF THE GITKSAN AND WET'SUWET'EN PEOPLE - SELF GOVERNMENT NEGOTIATIONS

DRAFT SUB-AGREEMENT #1
LEGAL STATUS AND CAPACITY

1.1 Each House, as listed in Schedule "A" to this Act and as amended from time to time, is a legal entity with the powers and capacity of a natural person. Without restricting the generality of the foregoing, each House may:

(a) enter into contracts and agreements of any kind with any person, persons, government, or other organization;

(b) acquire, hold, or transfer personal or real property and any interest therein, including the receipt of bequests and gifts;

(c) hold, spend, invest, or borrow money and secure or guarantee the repayment of a financial instrument;

(d) issue negotiable instruments, including bonds and debentures;

(e) create, operate, and contribute to trusts;

(f) sue or be sued in its own name; and

(g) do such other things as may be conducive to the exercise of its rights, powers, and privileges.

1.2 For the purpose of administration or of interacting with external agencies, each House , acting on its own or in association with other Houses, has the power to create agencies which shall act wholly under the direction, instructions, and control of the House or Houses creating them.

1.3 An agency created pursuant to section 1.2 shall have the legal power and capacity to enter into contracts and agreements and to sue or be sued in its own name, but shall not exercise any other legal powers other than those expressly delegated by the House or Houses which created the agency.

1.4 An agency created pursuant to section 1.2 may be dissolved at any time by the House or Houses which created it, and upon dissolution the House or Houses which created the agency shall take any assets of the agency, and shall also assume any liabilities of the agency.

1.5 For the purposes of the receipt and re-conveyance of land pursuant to section 3.2,, and for the receipt and division of funds pursuant to section 8.7, there shall be recognition of:

creation of

(a) a collectivity of all Gitksan Houses, to be called the "Gitksan Houses";

(b) a collectivity of all Wet'suwet'en Houses, to be called the "Wet'suwet'en Houses"; and

(c) a collectivity of all Gitksan and Wet'suwet'en Houses, to be called the "Gitksan and Wet'suwet'en Houses".

21 January 1991
Amended 24 January 1991
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DRAFT SUB-AGREEMENT #2
CITIZENSHIP

2.1 A Gitksan citizen is a person who belongs to a House by reason of birth or custom.

2.2 A Wet'suwet'en citizen is a person who belongs to a House by reason of birth or custom.

2.3 The provisions of the Indian Act respecting band membership shall no longer apply as of the date that the Act becomes law.

2.4 The "Gitksan and Wet'suwet'en community" means:

(a) all Gitksan and Wet'suwet'en citizens;

(b) all persons resident within Gitksan and Wet'suwet'en lands who appear on the Indian Register maintained pursuant to the Indian Act, but who are not citizens of a Gitksan or Wet'suwet'en House; and

(c) all other persons resident on Gitksan and Wet'suwet'en lands.

2.5 Each House shall maintain a Register of its citizens which shall be available to the public.

21 January 1991
Amended 24 January 1991
Amended 6 February 1991

DRAFT SUB-AGREEMENT #3
LANDS AND LAND MANAGEMENT

3.1 "Gitksan and Wet'suwet'en lands" mean:

(a) lands transferred by the federal government to the Gitksan and Wet'suwet'en, in recognition of the fact that such lands are subject to existing aboriginal title in favour of the Gitksan and Wet'suwet'en;

(b) lands currently held by Her Majesty the Queen in Right of Canada on behalf of the Gitksan and Wet'suwet'en;

(c) lands acquired by the Gitksan and Wet'suwet'en through a specific land claim settlement either before or after the coming into force of the Act, and declared to be Gitksan and Wet'suwet'en lands in the settlement;

(d) any lands acquired by the Gitksan and Wet'suwet'en through a comprehensive land claim settlement either before or after the coming into force of the Act, and declared to be Gitksan and Wet'suwet'en lands in the settlement; and

(e) any other lands transferred to the Gitksan and Wet'suwet'en and declared to be Gitksan and Wet'suwet'en lands in the transfer.

3.2 The federal Crown shall transfer its existing interests in and responsibilities for Gitksan and Wet'suwet'en lands as defined by s. 3.1, including interests in renewable and non-renewable resources located on, within, above, or under such lands

(a) to the Gitksan Houses in Trust for the Gitksan people, in the case of lands declared by the Gitksan and Wet'suwet'en as exclusively Gitksan lands;

(b) to the Wet'suwet'en Houses in Trust for the Wet'suwet'en people, in the case of lands declared by the Gitksan and Wet'suwet'en as exclusively Wet'suwet'en lands; and

(c) to the Gitksan and Wet'suwet'en Houses in Trust in the case of lands declared by the Gitksan and

Wet'suwet'en as joint Gitksan and Wet'suwet'en lands

The absolute title to Gitksan and Wet'suwet'en lands transferred pursuant to s. 3.1(a) shall vest in the Gitksan Houses in Trust for the Gitksan people, the absolute title to Gitksan and Wet'suwet'en lands transferred pursuant to s. 3.1(b) shall vest in the Wet'suwet'en Houses in Trust for the Wet'suwet'en people, and the absolute title to Gitksan and Wet'suwet'en lands transferred pursuant to s. 3.1(c) shall vest in the Gitksan and Wet'suwet'en Houses in Trust for the Gitksan and Wet'suwet'en people. In each case, the Trustee shall have the power to re-convey the absolute title to the lands to the House or Houses which it declares as having the beneficial interest in the lands.

3.3 Gitksan and Wet'suwet'en lands as defined by s. 3.1 shall remain "lands reserved for Indians" pursuant to s. 91(24) of the Constitution Act, 1867, and shall receive the protection available pursuant to ss. 25 and 35 of the Constitution Act, 1982.

3.4 The transfer of land title pursuant to s. 3.2 shall be subject to existing third party rights and interests. Prior to the exercise of any renewal of a third party right or interest, the exercise of a right of first refusal for the purchase of a third party right or interest, or the transfer, by purchase or otherwise, of a third party right or interest, the right or interest will be subject to review by the House or Houses having jurisdiction over the lands on which the right or interest is situated. The third party right or interest will also be subject to review by the House or Houses having jurisdiction over the lands on which the right or interest is situated when a specific or comprehensive land claim is reached which encompasses the lands upon which the third party right or interest is situated.

3.5 Each House shall have the authority to legislate in respect of land management on House lands. Without restricting the generality of the foregoing, the authority to legislate includes the power to pass laws in relation to:

(a) land use and planning;
(b) access;
(c) residency; and
(d) the granting of various interests, including leases, licences, permits, and mortgages.

3.6 Notwithstanding any other provision of the Act, the consensus of all Gitksan and Wet'suwet'en Houses is required when any House proposes to dispose of House lands in fee simple.

3.7 Gitksan and Wet'suwet'en lands and interests in Gitksan and Wet'suwet'en lands shall be registered with the Gitksan and Wet'suwet'en Register of Territories. Each House is responsible for ensuring that the Register accurately reflects the lands and interests in lands over which that House has jurisdiction. The Register shall serve:

(a) as a legal record of lands and interests in lands, including the maintenance of territorial boundary records, registration of leases, records of individual allotments granted pursuant to the Indian Act, and all other interests created pursuant to the authority of the House and Houses pursuant to sections 3.5(d) and 3.6; and

(b) as a register of information for purposes such as integrated resource planning and land use and planning.

21 January 1991
Amended 6 February 1991

DRAFT SUB-AGREEMENT #4
RENEWABLE RESOURCES

4.1 Each House has the authority to make laws with respect to the ownership, protection, preservation, conservation, management, development, and disposition of all renewable resources located on, under, within, or above House lands. Without restricting the generality of the foregoing, the authority to legislate includes the power to pass laws in relation to:

(a) the preservation and management of the forestry resource;

(b) the protection, preservation, and management of wildlife, including game, birds, insects, reptiles, cryptozoological creatures, fur bearing animals, and fish;

(c) the protection, preservation, and management of the natural habitat of wildlife, including game, birds, insects, reptiles, cryptozoological creatures, fur bearing animals, and fish;

(d) the hunting, fishing, and trapping of wildlife; and

(e) the management, disposition, and control of domestic animals, crops, wild and cultivated plants, and any products of domestic animals, crops, and wild and cultivated plants.

4.2 No federal or provincial laws with respect to renewable resources shall apply on House lands unless expressly adopted by the House.

21 January 1991
Amended 6 February 1991

DRAFT SUB-AGREEMENT #5
NON-RENEWABLE RESOURCES

5.1 Each House has the authority to make laws with respect to the ownership, management, exploration, development, and disposition of all surface and subsurface resources situated on House lands, including minerals, oil, gas, gravel, clay, sand, soil, stone, and all other substances, whether they be metallic or non-metallic or otherwise.

5.2 Subject to section 3.4, each House has the authority to issue permits, leases, and licences regarding the development and disposition of non-renewable resources on House lands, and to regulate the conditions relating to the issuance, suspension, and revocation of such permits, leases, and licences.

5.3 Subject to section 3.4, each House has control over the administration of all non-renewable resources on House lands, and may dispose of any rights and interests in such resources in accordance with sections 3.5 and 3.6.

5.4 Each House is responsible for ensuring that the granting or disposition of any rights and interests in non-renewable resources on House lands is registered in accordance with s. 3.7.

5.5 No federal or provincial laws with respect to non-renewable resources shall apply on House lands unless expressly adopted by the House.

21 January 1991
Amended 24 January 1991
Amended 6 February 1991

DRAFT SUB-AGREEMENT #6
STRUCTURES AND PROCEDURES OF GOVERNMENT

6.1 The House is the sole Gitksan and Wet'suwet'en institution of government, and is vested with the authority to make laws

(a) for the peace, order, and good government of all matters falling within its jurisdiction; and

(b) for all matters under which it exercises jurisdiction pursuant to the Act.

6.2 A decision made in regard to a House matter is made through the consensus of the members of that House.

6.3 Where a decision of one House is perceived by one or more other Houses as possibly affecting the interests of those Houses, the consensus of the other affected Houses must also be obtained in order for the law to be valid, in accordance with Gitksan and Wet'suwet'en custom.

6.4 Selection and removal of House leaders shall be in accordance with Gitksan and Wet'suwet'en custom.

6.5 House leaders shall be accountable to their House to protect the interest of that House in respect of all of the areas in which the House has authority.

6.6.1 Each House is financially accountable to its members in accordance with Gitksan and Wet'suwet'en custom, which is equivalent to generally accepted accounting procedures.

6.6.2 Financial accountability for funding transfers between a House or Houses and an agency created pursuant to s. 1.2 shall be in accordance with generally accepted accounting procedures.

6.6.3 Financial accountability by an agency created pursuant to s. 1.2 for funding provided by any external agency shall be in accordance with generally accepted accounting procedures.

6.7 The right to appeal any decision of a House is guaranteed under Gitksan and Wet'suwet'en custom for all citizens, community members, third parties, and holders of third party rights or interests.

21 January 1991
Amended 6 February 1991

DRAFT SUB-AGREEMENT #7
ENVIRONMENT

7.1 Each House has the authority to make laws for the preservation, conservation, and protection of the environment, including land, water and air, on House lands.

7.2 Any laws passed by a House pursuant to section 7.1 shall impose standards for the preservation, conservation, and protection of the environment which are at least equivalent to those provided for by the Canadian Environmental Protection Act.

7.3 No federal or provincial laws with respect to environmental protection shall apply on House lands unless expressly adopted by the House.

21 January 1991
Amended 24 January 1991
Amended 6 February 1991

DRAFT SUB-AGREEMENT #8
FISCAL ARRANGEMENTS

8.1 Each House has the authority to levy and collect taxes from the Gitksan and Wet'suwet'en community resident on House lands, and to exempt any such member of the community from the levy and collection of taxes which it imposes.

8.2 Each House has the authority to levy and collect taxes from its House citizens regardless of their residence, and to exempt any House citizen from the levy and collection of taxes which it imposes.

8.3 The authority of the House to levy and collect taxes pursuant to sections 8.1 and 8.2 is exclusive and the federal and provincial governments shall not levy nor collect taxes on House lands, any interest in House lands, nor on House citizens resident on House lands after the Act comes into force.

8.4 All transfer payments between the federal and provincial governments made in respect of the Gitksan and Wet'suwet'en community shall be paid directly to an agency established pursuant to section 1.2 from and after the date that the Act comes into force.

8.5 Any monies derived from Gitksan and Wet'suwet'en House lands, resources, or interests, and collected by either of the provincial or federal governments shall be paid directly to an agency established pursuant to section 1.2, from and after the date that the Act comes into force.

8.6 All transfers of monies to the Gitksan and Wet'suwet'en community by either of the federal or provincial governments shall be paid to an agency established pursuant to section 1.2 upon the coming into force of the Act, according to levels and schedules to be negotiated on a fifteen year term, which levels and schedules shall be reviewed at the end of each fifteen year term. Either party may call for a review of financial transfers at any time within the fifteen year period, by giving the other party sixty (60) days' notice of the intention to review.

8.7 If no agency is created pursuant to section 1.2 at the time the Act comes into force, then monies required to

be paid pursuant to sections 8.4, 8.5, and 8.6 shall be paid directly to the Gitksan and Wet'suwet'en Houses.

8.8 Each House shall have the authority to make laws respecting games of chance, including lotteries and bingos, on House lands.

Rhode copy.

Office Of The Hereditary Chiefs Of The Gitksan And Wet'suwet'en People

BOX 229
HAZELTON, B.C. V0J 1Y0
TELEPHONE: (604) 842-6511
FAX: (604) 842-6828

January 29, 1991

Dr. R. Depew
Senior Negotiator
Community Negotiations Directorate
Department of Indian Affairs and Northern Development
10 Wellington Street
Hull, Quebec K1A 0H4

Your File:

Our File

Dear Bob:

We are in receipt of your letter of January 28. We thank you very much for your response and your thoughtful comments. We are also in agreement with you that it is absolutely essential for our mutual legal counsel to attend negotiations next week in Smithers, for we are now in the final position where we must agree on the policy and legal requirements to conclude an AIP.

In moving through your letter to address your concerns, allow us to make a few general comments in starting out. After that, your comments will be discussed in light of the new drafts of the sub-agreements that accompany this letter.

We appreciate your acknowledgement that the comments that occasionally come forth from the Department on this issue are perceived as ethnocentric. We do not wish to engage a debate on the tenets and flavour of ethnocentrism, or why some comments may qualify for this classification. It is more useful to state that while the Department's mandate and concerns extends to the practicality and workability of self-government arrangements, the community is in the best position to judge these factors: the Department is not. Let me reiterate that the Gitksan and Wet'suwet'en are not attempting to invent a system - the system is known, extant and ancient. We trust that the Department is not trying to second guess the Gitksan and Wet'suwet'en or question whether or not the people know or can operate their own system of government, but are instead just seeking clarity and certainty. In that light, we thank you for your concern.

In general reference to your specific comments, I point out that changes have been made to most sub-agreements for consistency and

clarity from the legal perspective. I ask you to go through them carefully and note the changes.

In your comment in reference to 3.1, you state that problems could arise in the application of this wording to the James Bay settlement. Notwithstanding the nature of that settlement, we can all correctly assume that upon final settlement of the claim, Gitksan and Wet'suwet'en lands will be clearly delineated in reference to the settlement and to this legislation.

In reference to the comment on Gitksan and Wet'suwet'en lands vs. House lands, we refer you to the policy of the Department of Justice in relation to Gitksan and Wet'suwet'en Houses and lands: the Department insists that the Gitksan and Wet'suwet'en are neither a society nor do they posses a system of land tenure. This comment is inconsistent with that stated position of the Department of Justice in court against us. Be that as it may, note in section 3 in the new draft that the title to that land will be received by the Houses in Trust. This should satisfy this issue. In relation to the claim settlement, I refer you back to the above comment and state that your own policy restricts the application of this legislation right now to "reserves", which remain, as yet, undefined by the Department.

In reference to your comment on "absolute title", this is know to us to be the descriptor for the nature of the title held by the federal crown. This is what we seek. In relation to 3.3, we note your comment. In relation to s.25 of the Constitution, our opinion is different than yours.

We appreciate your comments on the issue of outstanding interests: please note that this has been clarified in the new draft. It is a moot point what the province is likely to say or do in relation to whatever interest in may care to attempt to assert in relation to lands to be covered initially by this legislation.

In reference to s.3.5, please note that the language has been modified somewhat.

Again the issue of consensus and its definition arises. We again point out that the federal government cabinet operates on consensus and the Department has not asked that cabinet to define what this means for them. Consensus has meaning in Gitksan and Wet'suwet'en traditional law. In this section, the Gitksan and Wet'suwet'en are quite sure what is being referred to here. You may wish to discuss this further next week. For the sake of discussion, you might wish to consider this working definition of consensus: "...consensus is said to be reached where there is agreement among those attending that a mutually agreeable decision has been made..."

We have reiterated many times that a land registry system is indigenous and operating according to the principles of traditional

law. We appreciate your comments in this area, but however, since the registry is for internal purposes, we cannot see the need for detailed articulation of it in legislation. We have, however, added some points of clarification in the new draft, attached. The issue of regulations for administrative purposes has been considered in terms of implementation of self-government arrangements.

Your comments on section 6 in reference consensus are addressed above. Consensus follows a cultural model. In specific relation to your comment on 6.5, I refer you to 6.9 in the new draft.

Whether or not the government feels that it is appropriate to make reference to Gitksan and Wet'suwet'en law in new legislation, it must again be pointed out that this corpus of law exists. It exists in very much the same way as common law does and does not lend itself to codification in the Roman sense. These issue have been discussed at considerable length in the title action. It is problematic to suggest that we code an uncoded common law system, that is orally held, for the sake of administrative ease in Ottawa. We do appreciate your concerns inside of your mandate and duty, however. Let us be clear: the law is known and practised and for those unsure and unfamiliar, specialists can be consulted. This is open to all people who seek to live within or do business with the Gitksan and Wet'suwet'en community. The extent and application of this new legislation is clear so far, and like those unfamiliar with local customs and laws when travelling abroad, it is incumbent upon them to find out what they need to know.

In conclusion, we believe that the outstanding issues are minor ones and can be resolved very soon so that we can move to the AIP. Our legal council will attend next week in Smithers, so we shall see you all there. Until then, I remain,

Yours truly,

OFFICE OF THE HEREDITARY CHIEFS
OF THE GITKSAN AND WET'SUWET'EN PEOPLE

Mark J. Duiven
Intergovernmental Liaison

21 January 1991
Amended 24 January 1991

OFFICE OF THE HEREDITARY CHIEFS OF THE GITKSAN AND WET'SUWET'EN - SELF GOVERNMENT NEGOTIATIONS

DRAFT SUB-AGREEMENT #1
LEGAL STATUS AND CAPACITY

1.1 Each House is a legal entity with the powers and capacity of a natural person, and is vested with the authority to make laws for the peace, order and good government of all matters falling within its jurisdiction. Without restricting the generality of the foregoing, each House may:

(a) enter into contracts and agreements of any kind with any person, persons, government, or other organization;

(b) acquire, hold, or transfer personal or real property and any interest therein, including the receipt of bequests and gifts;

(c) hold, spend, invest, or borrow money and secure or guarantee the repayment of a financial instrument;

(d) issue negotiable instruments, including bonds, debentures, and lottery tickets;

(e) create, operate, and contribute to trusts;

(f) sue or be sued in its own name; and

(g) create agencies for the purpose of administration or of interacting with external agencies, such created agencies to have no authority, legal, political, or otherwise, other than that which is expressly delegated to each of them by the House.

How is "jurisdiction" to be defined? On basis of aor/legis? Or assumed by Houses?

||?

What about accountability?

21 January 1991
Amended 24 January 1991

DRAFT SUB-AGREEMENT #2
MEMBERSHIP

2.1 Each House has the authority to determine its membership.

2.2 The authority of the House pursuant to s. 2.1 will replace the Indian Act provisions respecting Band membership as of the date that this Act becomes law.

2.3 For the purposes of this Act, members of the Gitksan and Wet'suwet'en community are:

(a) all members of a Gitksan or Wet'suwet'en House;

(b) all persons resident within Gitksan and Wet'suwet'en lands who appear on the Indian Register but who are not members of a Gitksan or Wet'suwet'en House; and

(c) all other persons resident on Gitksan and Wet'suwet'en lands.

2.4 Each House shall maintain its own Membership Registry.

2.5 Appeals on membership decisions lie with the House which made the decision, in accordance with s. 6.9.

who are the members of a House?

Indians + non-Indians

what rights + obligations + membership entail?

do non-Indian residents have the right to attend the least partic. in decision-making?

lawfully + unlawfully?

will there be residency rules?

Re Annotated Feb 5 ... mtg. of mtg.

21 January 1991
Amended 24 January 1991

DRAFT SUB-AGREEMET #3
LANDS AND LAND MANAGEMENT

3.1 Gitksan and Wet'suwet'en lands are defined as:

(a) lands transferred by the federal government to the Gitksan and Wet'suwet'en, in recognition of the fact that such lands are subject to existing aboriginal title in favour of the Gitksan and Wet'suwet'en;

(b) lands declared by the Governor-in-Council to be Gitksan and Wet'suwet'en lands, including:

(i) lands currently held by Her Majesty the Queen in Right of Canada on behalf of the Gitksan and Wet'suwet'en; and

(ii) lands acquired by the Gitksan and Wet'suwet'en through a specific land claim settlement either before or after the coming into force of this Act;

(c) any lands acquired by the Gitksan and Wet'suwet'en through a comprehensive land claim settlement either before or after the coming into force of this Act.

3.2 The federal government shall transfer its existing interests in and responsibilities for Gitksan and Wet'suwet'en lands as defined by s. 3.1, including interests in renewable and non-renewable resources located on, within, above, or under such lands, to the Gitksan and Wet'suwet'en Houses in Trust. The absolute title to such lands shall vest in the Gitksan and Wet'suwet'en Houses in Trust.

3.3 Gitksan and Wet'suwet'en lands as defined by s. 3.1 shall remain "lands reserved for Indians" pursuant to s. 91(24) of the Constitution Act, 1867 and pursuant to ss. 25 and 35 of the Constitution Act, 1982.

3.4 The transfer of land title to the Gitksan and Wet'suwet'en Houses in Trust pursuant to s. 3.2 shall be subject to existing third party rights and interests. [Prior to the exercise of any right of renewal or right of first refusal for the purchase of such a third party right or interest, the right or interest will be subject to review by the Gitksan and Wet'suwet'en.* The third party right or interest will also be subject to review by the Gitksan and

Houses

drop this last part. ?

i.e. no underlying title in the Crown.

in trust for whom?

reviewed for what purposes + against what criteria ?

Wet'suwet'en when a specific or comprehensive land claim is reached which encompasses the lands upon which the right or interest is exercised.

3.5 Each House shall have the authority to legislate in respect of land management on its lands. Without restricting the generality of the foregoing, the authority to legislate includes the power to pass laws in relation to:

(a) land use and planning;
(b) access;
(c) disposition of lands; and
(d) the granting of various interests, including leases, licences, permits, and mortgages.

3.6 Notwithstanding the authority of each House to legislate in respect of disposition of lands pursuant to s. 3.5(c), the consensus of all Houses is required to effect a permanent disposition of Gitksan and Wet'suwet'en land to a third party.

3.7 Gitksan and Wet'suwet'en lands shall be registered with the Gitksan and Wet'suwet'en Register of Territories. Each House is responsible for ensuring that the Register accurately reflects the lands and interests in lands over which that House has jurisdiction. The Register shall serve:

(a) as a legal record of lands and interests in lands, including the maintenance of territorial boundary records, registration of leases, records of individual allotments granted pursuant to the Indian Act, and all other interests created pursuant to the authority of the House under s. 3.5(d); ~~and~~ and 3.6.

(b) as a register of information for purposes such as integrated resource planning and land use and planning.

21 January 1991

DRAFT SUB-AGREEMENT #4
RENEWABLE RESOURCES

4.1 Each House has the authority to make laws with respect to the ownership, protection, preservation, management, development, and disposition of all renewable resources located on, under, within, or above its respective lands. Without restricting the generality of the foregoing, the authority to legislate includes the power to pass laws in relation to:

(a) the preservation and management of the forestry resource;

(b) the protection, preservation, and management of wildlife, including game, birds, insects, reptiles, cryptozoological creatures, fur bearing animals, and fish;

(c) the protection, preservation, and management of the natural habitat of wildlife, including game, birds, insects, reptiles, cryptozoological creatures, fur bearing animals, and fish;

(d) the hunting, fishing, and trapping of wildlife; and

(e) the management, disposition, and control of domestic animals, crops, wild and cultivated plants, and any products of domestic animals, crops, and wild and cultivated plants.

4.2 No federal or provincial laws with respect to renewable resources shall apply on Gitksan and Wet'suwet'en lands unless expressly adopted by the House having jurisdiction over the lands.

21 January 1991

DRAFT SUB-AGREEMENT #5
NON-RENEWABLE RESOURCES

5.1 Each House has the authority to make laws with respect to the ownership, management, exploration, development, and disposition of all surface and subsurface resources situated on its lands, including minerals, oil, gas, gravel, clay, sand, soil, stone, and all other substances, whether they be metallic or non-metallic or otherwise.

5.2 Each House has the authority to issue permits, leases, and licences regarding the development and disposition of non-renewable resources and to regulate the conditions relating to the issuance, suspension, and revocation of such permits, leases, and licences.

right to collect revenues levy taxes, royalties etc?

5.3 Each House has control over the administration of all non-renewable resources on its lands, and may dispose of any rights and interests in such resources in accordance with sections 3.5 and 3.6.

5.4 Each House is responsible for ensuring that the granting or disposition of any rights and interests in any non-renewable resources on its lands is registered in accordance with s. 3.7.

penalties/remedies for failure to do so?

5.5 No federal or provincial laws with respect to non-renewable resources shall apply on Gitksan and Wet'suwet'en lands unless expressly adopted by the House having jurisdiction over the lands.

what about ~~off~~ extra-territorial effects of resource related activities?

21 January 1991
Amended 24 January 1991

DRAFT SUB-AGREEMENT #6
STRUCTURES AND PROCEDURES OF GOVERNMENT

6.1 The House is the sole Gitksan and Wet'suwet'en institution of government with legislative authority.

6.2 Each House has legislative authority on its respective lands, including but not limited to the authority to pass laws in relation to sections 1, 2, 3, 4, 5, 6, 7, 8, and 9 of this Act, as well as any other sections that may be added from time to time.

6.3 The Feast

(a) is a forum for the public witness and validation of the exercise of authority by the House pursuant to s. 6.2;

(b) ensures that the decisions of the House conform to Gitksan and Wet'suwet'en customary law; and

(c) is a forum for the public resolution of disputes in accordance with Gitksan and Wet'suwet'en customary law.

6.4 A decision made in regard to a House matter is made through the consensus of the members of that House, ~~except for those matters covered by s. 3.6~~.

6.5 Where a decision of one House is perceived by one or more other Houses as possibly affecting the interests of those Houses, the consensus of the other affected Houses must also be obtained, in accordance with Gitksan and Wet'suwet'en customary law.

6.6 Selection and removal of House leaders shall be in accordance with Gitksan and Wet'suwet'en customary law.

6.7 House leaders shall be accountable to their House to protect the interest of that House in respect of all of the areas in which the House has authority, as outlined in s. 6.2.

6.8.1 Each House is financially accountable to its members in accordance with Gitksan and Wet'suwet'en customary law, which is equivalent to generally accepted accounting procedures.

parts? sub-agreement

this agreement?

delete?

crim. + civil?

free process requirement of Charter

will admin. law apply to this forum + these functions?

what are roles, rights, responsibilities House leaders?

how is this term to be defined?

in non-Indian society?

6.8.2 Financial accountability for funding transfers between a House or Houses and an agency created pursuant to s. 1.1(q) shall be in accordance with generally accepted accounting procedures.

6.8.3 Financial accountability for funding provided to an agency created pursuant to s. 1.1(q) by any ~~other~~ external agency on behalf of a House or Houses shall be in accordance with generally accepted accounting procedures.

6.9 The right to appeal any decision of a House is guaranteed under Gitksan and Wet'suwet'en customary ~~law~~ for all members ~~of the Gitksan and Wet'suwet'en community as defined by s. 2.3~~.

refers to methods of setting out financial statements but doesn't address when, why, or to whom the fin. statement is made avail.

To whom are the appeals made? The original decision-makers? To what extent will rules of nat. justice apply?

21 January 1991

DRAFT SUB-AGREEMENT #7
ENVIRONMENT

7.1 Each Gitksan and Wet'suwet'en House has the authority and the responsibility for the preservation and protection of the environment, including land, water and air, on its lands.

7.2 Environmental regulations that will apply over all Gitksan and Wet'suwet'en lands shall be developed prior to the conclusion of a Final Agreement and shall be more rigorous than the federal Environmental Protection Act.

what constitutes the Final Agr?

7.3 No federal or provincial laws with respect to environmental protection shall apply on Gitksan and Wet'suwet'en lands unless expressly adopted by the House having jurisdiction over the lands.

Comments from LEGIS.

Annotated also Feb 6.

21 January 1991
Amended 24 January 1991

DRAFT SUB-AGREEMENT #8
FISCAL ARRANGEMENTS

8.1 Each House has the authority to levy and collect taxes from all members of the Gitksan and Wet'suwet'en community as defined by s. 2.3 who are resident on its lands, and to exempt any such member of the Gitksan and Wet'suwet'en community from the levy and collection of taxes.

criteria? fairness?

8.2 Each House has the authority to levy and collect taxes from its House members regardless of the residence of its members, and to exempt any House member from the levy and collection of taxes.

House lands & no

8.3 All monies paid to either the provincial or federal governments by ~~members of~~ the Gitksan and Wet'suwet'en community ~~as defined by s. 2.3 shall~~ be paid directly to an agency established pursuant to s. 1.1(g), as of the date that this Act comes into force.

GST? sales taxes?

when? is agency established

8.4 All monies transferred or paid to any federal or provincial administration on behalf of the Gitksan and Wet'suwet'en community ~~as defined by s. 2.3~~ shall be paid directly to an agency established pursuant to s. 1.1(g), as of the date that this Act comes into force.

8.5 Any monies derived from Gitksan and Wet'suwet'en House lands, resources, or interests and collected by either of the provincial or federal governments shall be paid directly to an agency established pursuant to s. 1.1(g), as of the date that this Act comes into force.

are these agencies to be established as of effective date of Act? what if they aren't? how will money be handled?

any rules on how these agencies are to be established, constituted etc? accountability? recourse?

8.6 All monies now paid to the Gitksan and Wet'suwet'en by either of the federal or provincial governments shall continue to be so paid upon the coming into force of this Act, according to levels and schedules to be negotiated.

8.7 All financial transfers between the parties shall be negotiated on a fifteen year term, and shall be reviewed at the end of each fifteen year term. Either party may call for a review of financial transfers at any time within the fifteen year period, by giving the other party sixty days' notice of the intention to review.

15 yrs!

24 January 1991

DRAFT SUB-AGREEMENT #9
TAXATION

9.1 The Gitksan and Wet'suwet'en community as defined by section 2.3 is exempt from all powers of taxation not expressly stated in or incorporated into this Act.

9.2 Each House will maintain full powers of taxation equivalent to those exercised by the federal government.

Office Of The Hereditary Chiefs
Of The Gitksan And Wet'suwet'en People

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DEC 6 8 53 AM '90

Your File:

Our File

November 30, 1990

Dr. R. Depew
Senior Negotiator
Self-Government Community Negotiations
DIAND
10 Wellington Street
Hull, Quebec K1A 0H4

Bob

Dear Bob:

Please find attached a revised version of draft sub-agreements 1 through 9, presented after careful review of the material you forwarded to us last week. I will move through the changes in each of the sub-agreements and provide some explanatory notes after a few general remarks. In total, we believe that we are approaching final versions and should soon be able to declare an AIP on these essential elements.

We appreciate the efforts of the self-government unit and legal services in your thoughtful responses to our requests. Let me, however, reiterate two points for the record. We appreciate that the self-government unit does consider self-government arrangements in terms of their practical workability once implemented, and can offer suggestions as to how things might be simplified. Indeed, for new self-government arrangements, this is a good position to take as it serves well the client group.

Though we recognise that the concepts and structures that we have presented over the last months are not isomorphic with that found in western society and may for that reason offer some difficulty in terms of comprehension, we are not describing a new or invented system. The system that is being reflected in these various sub-agreements is ancient and extant. It is not necessarily helpful for the unit to consider the system being described in terms of it apparent ease of administration or simplicity in application, from a western perspective. Though we appreciate the comments made, it must be born in mind that self-government, in the Gitksan and Wet'suwet'en case, is the legislative reflection of the indigenous socio-political system here. Our highest imperative is to the descriptional integrity of the system.

The other general issue to be raised is that any centralised administration is foreign to the indigenous system. We see the administrative necessity for it in relation to funding transfers, but will resist either the entrenchment or the hyper-bureaucratisation of either a central administration, or of the House. Again, it is important to us to maintain the integrity, as far as it is possible, of the system we are describing in legislation.

We have redrafted sub-agreement 3 in light of your suggestions of last month. Other than wording preference, the only changes to note are at 3.6 where leases and mortgages have been deleted to ease administration, and some additional details at 3.7.b.

We have reworked sub-agreement 6 somewhat. We have followed your lead but with some exceptions. 6.1.b. makes reference to the legislational prerogatives of the House. The list you provided looked to us like "Powers of the Band Council" and was rejected due to form. It is implicit that as the governing institution, the House can potentially legislate in a full spectrum of spheres, including education, social services as well as the issues relating to lands, resources, membership and taxation. We feel that a partial list of legislative prerogatives could follow a sub-agreement in explanatory notes, but such list would not be exhaustive (restrictive) nor should it appear in legislation. It is suggested that that which you compiled under this section in your submission could be of use to the legislative drafters.

At 6.2, we have added a general statement at "a" and have re-introduced the term "customary law". The latter is our compromise to the indigenous law issue. We have also removed reference here to appeal. The reason for this is that the whole issue and concept of appeals in terms of the feast attracted too much emphasis in review, and was tending to cloud understanding of the feast institution, pushing the descriptions (that which is to appear in legislation) to read closer to a tribunal/administrative bureaucracy than what it really is. So, for clarification, we have simplified all references to appeal mechanisms.

At 6.3, we have removed the issue of defining what any central organisation can do, and have referred back to sub-agreement 1. Again here, by making overt reference to the possibility of a central administrative agency, there seems a tendency for it to attract a myriad of functions that it has not been mandated to do (however, for the purposes of the legislative drafters, the list you folks compiled can serve as an example of what might be possible - or at least, it points toward the intent). As mentioned at the outset, this central agency cannot and will not be mandated through legislation. It is mandated through the Houses following indigenous practice. Further, we have recently decentralised the agency that we already have. So, we hope you can see why we don't

see an advantage to such listing in legislation.

At 6.4 we have refined the wording to cover off your concerns as to specificity. This equally applies to 6.5 as well. We hope this is satisfactory.

The issues you raise at 6.6 point back to a slight problem we have observed over some time. At one point detail is requested for contextual information; when we give it, it often returns as problematic, because there seems a tendency to try and incorporate it within sub-agreements. Here, we have returned, more or less to an earlier version.

Political accountability is required by Gitksan and Wet'suwet'en law. The nature of that accountability is furthered specified there. To cover this off, we have employed the term "prerogatives" and have defined what these are in relation to 6.1. As to whom is accountable for what, chiefs are accountable to their Houses to protect the House interest (in relation to land, resources, social standing, etc.) in all circumstances. For practical day to day concerns, is encompasses good management. In terms of major decisions, it ensures that consensus is obtain in all matters. If a House membership is not consulted, then the House can decide, through consensus, that its collective interests are not be looked after. This can precipitate action. What kind?...depends upon the House members themselves to use a remedy available to them through indigenous law.

We must assume that the nature of the questions presented to the rest of this section are for context. The only real issue here for legislative purposes is the nature of accountability between a central agency and funding sources: the rest is an internal matter. As we have developed this for an AFA, so we will for block funding transfers. A central agency will be accountable externally to agencies providing funding transfers according to the accountability provisions of those negotiated agreements.

Recall that we have stated that financial accountability within the House is demanded by law, and reaffirmed in the feast by public witnessing of accounts in relation to the business done there. While we are not saying that we will institute an 'audit feast' or some such thing, the structure that obligates the feast (indigenous law and the House system) carries on through to financial accountability. Remember that the house is corporate (in the sociological sense) and operates on a consensual model.

Accountability between a central administrative agency and Houses also follows GAAP. Given what has been said about consensus and corporateness within the House, a House will be responsible to reconcile the funds flowed to it with the expenditures that it makes.

The final issue is that of appeal. To be candid, you must understand that there is a system, universally accessible, that operates. It is possible for any person to appeal any decision at any level. They must have support and justification. We have said all this before, on several occasions. Do not make the mistake of taking this through illogical projections. Suffice it to say that appeal works more or less like it does in the greater Canadian context.

When have attempted to be more specific in the sub-agreement, we have run into the same problem as other sections - the detail causes more questions that it solves as people try and put this into a bureaucratic model. So, we have eliminated the detail in this sub-agreement and have instead guaranteed it, as the constitution does.

It is most important that we understand what each other is saying here. We do not want internal detail of the system or the exhaustive listing of responsibilities, etc. within the text of the legislation. We are prepared to provide what is required to move through the process. We are now very close to the end: this is why we are now moving to simplify the sub-agreements wherever we can. No worries, eh?

I look forward to our next meeting.

Yours truly,

OFFICE OF THE HEREDITARY CHIEFS
OF THE GITKSAN AND WET'SUWET'EN PEOPLE

Mark J. Duiven
Intergovernmental Liaison

GITKSAN AND WET'SUWET'EN LEGAL STATUS AND CAPACITY
DRAFT SUB-AGREEMENT # 1

1.1 The House is a legal entity with the powers and capacity of a natural person, including but not limited to the power to:

a) enter into contracts and agreements of any kind with any person, government or other organisation;

b) acquire, hold or transfer of property and any interest therein, including to receive bequests and gifts;

c) hold, spend, invest or borrow money and to secure or guarantee the repayment of a financial instrument such as a loan or mortgage;

d) issue negotiable instruments (bonds, debentures, lottery tickets, etc.);

e) create, operate or contribute to trusts;

f) sue or be sued in its own name or act in representative actions;

g) create agencies, bodies, etc., for the purpose of administration or interacting with external agencies (and where such created bodies will have no authority, political or otherwise, other than what is expressly mandated to it by Houses)

h) exercise such other powers as are conducive to the exercise of its rights, powers and privileges.

GITKSAN AND WET'SUWET'EN MEMBERSHIP
DRAFT SUB-AGREEMENT # 2

2.1 The House has authority to determine its membership;

2.2 This Act will replace the Indian Act for members of the Gitksan and Wet'suwet'en community.

2.3 For the purposes of this Act, members of the Gitksan and Wet'suwet'en community are:

a) all members of Gitksan and Wet'suwet'en Houses
b) all people resident within Gitksan and Wet'suwet'en communities who appear on the Indian Registry but who are not members of Gitksan and Wet'suwet'en Houses.

2.4 Each Gitksan and Wet'suwet'en House shall maintain its own membership registry;

2.5 Appeals lie with the House, pursuant to s.6.7.

GITKSAN AND WET'SUWET'EN LANDS AND LAND MANAGEMENT
DRAFT SUB-AGREEMENT # 3

Definition of Gitksan and Wet'suwet'en Lands

3.1 Gitksan and Wet'suwet'en lands are defined as:

a) lands transferred to the Gitksan and Wet'suwet'en Houses by the federal government;

b) lands owned by the Gitksan or Wet'suwet'en Houses which are declared by the Governor-in-Council to be Gitksan and Wet'suwet'en lands, including lands acquired through a specific land claim settlement;

c) any Gitksan or Wet'suwet'en lands established pursuant to a comprehensive land claim settlement before or after the coming into force of this Act.

Transfer of Land Title

3.2 The federal government will transfer its existing interests in and responsibilities for lands, including interests in renewable and non-renewable resources on, above or under these lands to the respective Gitksan and Wet'suwet'en Houses. The absolute title to such lands will be vested in the respective Gitksan and Wet'suwet'en Houses.

3.3 Gitksan and Wet'suwet'en lands are to remain "lands reserved for Indians" under s.91(24) of the Constitution Act, 1867, pursuant to s.25 of the Constitution Act, 1982.

3.4 The transfer of land title is to be subject to existing rights, interests and conditions, subject to review by the respective Gitksan and Wet'suwet'en Houses.

Powers of the Gitksan and Wet'suwet'en Houses in Relation to Land

3.5 Gitksan and Wet'suwet'en Houses shall have the authority to legislate in respect to land management on their respective lands, including:

a) land use and planning
b) access
c) disposition of lands
d) granting of leases
e) the granting of mortgages

3.6 In accordance with the provisions of 3.5 above, consensus of all Houses will be required to permanently dispose of Gitksan and Wet'suwet'en House interests in land to third parties;

Registration of Gitksan and Wet'suwet'en Lands

3.7 Gitksan and Wet'suwet'en lands shall be registered by Gitksan and Wet'suwet'en Houses with the Gitksan and Wet'suwet'en Registry of Territories. This registry shall function to maintain an accurate record of House lands for:

a) legal purposes such as territorial boundary records, registration of leases, certificates of possession, etc.;

b) integrated resource planning purposes

GITKSAN AND WET'SUWET'EN RENEWABLE RESOURCES
DRAFT SUB-AGREEMENT # 4

4.1 Each House has the legislative authority with respect to the protection, preservation, management, development and disposition of all renewable resources situated on, under or above its respective Gitksan and Wet'suwet'en lands, including the authority to:

a) make laws to preserve and manage the forest resource;

b) make laws to protect, preserve and manage wildlife, including game, birds, insects, reptiles, cryptozoological creatures, fur bearing animals, fish, and including their natural habitat;

c) make laws in respect of hunting, fishing and trapping of wildlife;

d) make laws regarding the management, disposition and control of domestic animals, crops, plants whether wild or cultivated, or their products.

GITKSAN AND WET'SUWET'EN NON-RENEWABLE RESOURCES
DRAFT SUB-AGREEMENT # 5

5.1 Each House has the legislative authority with respect to management, exploration, exploitation, development and disposition of all surface and sub-surface resources situated on its respective Gitksan and Wet'suwet'en lands, including:

a) minerals, oil and gas, gravel, clay, sand, soil, stone and other metallic and non-metallic substances;

5.2 The House has the authority to issue permits and leases regarding the development and disposition of non-renewable resources and to regulate the conditions relating to the issuance, suspension and revocation of permits.

5.3 The House has control over the administration of all non-renewable resources and may dispose of any rights and interests in these resources on Gitksan and Wet'suwet'en lands, in accordance with Sections 3.5, 3.6, 3.7.

Application of Laws in Respect to Resources

5.4 The Indian Oil and Gas Act
The Indian Oil and Gas Act shall not apply to Gitksan and Wet'suwet'en lands or to Gitksan and Wet'suwet'en Houses, their members or a Gitksan and Wet'suwet'en corporation in respect of Gitksan and Wet'suwet'en lands.

5.5 The Indian Reserve Mineral Resources Act
The Indian Reserve Mineral Resources Act shall not apply to Gitksan and Wet'suwet'en lands or to Gitksan and Wet'suwet'en Houses, their members or a Gitksan and Wet'suwet'en corporation in respect to Gitksan and Wet'suwet'en lands.

5.6 The B.C. Indian Reserve Mineral Resources Act
The B.C. Indian Reserves Mineral Resources Act shall not apply to Gitksan and Wet'suwet'en lands or to Gitksan and Wet'suwet'en Houses, their members or to a Gitksan and Wet'suwet'en corporation in respect to Gitksan and Wet'suwet'en lands.

GITKSAN AND WET'SUWET'EN STRUCTURES AND PROCEDURES OF GOVERNMENT
DRAFT SUB-AGREEMENT #6

6.1 Legislative Authorities of the House

a) The House is the sole Gitksan and Wet'suwet'en institution of government with legislative authority.

b) The House has legislative authority on its lands with respect to, but not limited to, the provisions of this Act under s.1, s.2, s.3, s.4, s.5, s.6, s.7, s.8, s.9, and any other sections that may be added from time to time.

6.2 The Feast Functions:

a) to affirm the prerogatives of the House in respect to its legislative and administrative authority as outlined in s.6.1.b;

b) to ensure that the decisions of the House conform to Gitksan and Wet'suwet'en customary law;

c) as a public forum for the resolution of disputes according to Gitksan and Wet'suwet'en customary law.

6.3 Administrative Agency

a) a centralised administrative agency may be established pursuant to s.1.1.g. of this Act.

6.4 Decision Making

For clarification:

a) a decision made in regard to a House matter is made through the consensus of the members of that House;

b) where a decision made by a House is seen by other Houses to affect their interests, then the consensus of those Houses perceiving the affect must be obtained, in accordance with Gitksan and Wet'suwet'en customary law.

6.5 Leadership Selection

a) selection of House leaders follows Gitksan and Wet'suwet'en customary law;

b) removal of leaders from each individual House follows Gitksan and Wet'suwet'en customary law.

6.6 Political and Financial Accountability

a) leaders are accountable to their respective Houses to protect the interests of their House in respect to all of its prerogatives (as outlined in s.6.1.b) in accordance with Gitksan and Wet'suwet'en customary law;

b) financial accountability within the House follows Gitksan and Wet'suwet'en customary law, which is equivalent to generally accepted accounting procedures

c) financial accountability for funding transfers made between the House and an administrative agency established pursuant to s.1.1.g follows generally accepted accounting principles;

d) financial accountability between an administrative agency established pursuant to s.1.1.g receiving funds on behalf of Gitksan and Wet'suwet'en Houses, and a government agency or any other agency transferring funds on behalf of Gitksan and Wet'suwet'en Houses, follows generally accepted accounting principles.

6.7 Appeals

a) the right to appeal is guaranteed under Gitksan and Wet'suwet'en customary law for all Gitksan and Wet'suwet'en House members, and all non-House members resident on Gitksan and Wet'suwet'en lands.

GITKSAN AND WET'SUWET'EN ENVIRONMENT
DRAFT SUB-AGREEMENT # 7

Authority

7.1 Gitksan and Wet'suwet'en Houses have the authority and responsibility for the preservation and protection of the environment (including land, water and air) on their respective House lands.

Gitksan & Wet'suwet'en Regulations

7.2 Environmental regulations that will blanketly apply to all Gitksan and Wet'suwet'en House lands will be developed prior to the concluding of a Final Agreement and will be more rigorous than the federal Environmental Protection Act.

Environmental Review

7.3 Gitksan and Wet'suwet'en Houses have the authority, under their own regulations, to call for a federal or provincial environmental impact review process.

Application of Laws

7.4 Consent of the Gitksan and Wet'suwet'en Houses will be required for provincial and federal environmental regulations to be of force on respective Gitksan and Wet'suwet'en House lands.

GITKSAN AND WET'SUWET'EN FISCAL ARRANGEMENTS
DRAFT SUB-AGREEMENT # 8

Authority

8.1 Gitksan and Wet'suwet'en Houses have the authority to directly collect or levy taxes within the boundaries of their respective House lands.

Transfers

8.2 a) All monies paid to either provincial or federal governments by Gitksan and Wet'suwet'en will be paid directly to the Gitksan and Wet'suwet'en;

b) All monies transferred or paid to any federal or provincial administration on behalf of the Gitksan and Wet'suwet'en will be paid directly to the Gitksan and Wet'suwet'en

c) Any monies collected by either provincial or federal governments deriving from Gitksan and Wet'suwet'en lands, resources or interests will be paid directly to the Gitksan and Wet'suwet'en Houses.

Receiver

8.3 All monies shall be received by a duly mandated body pursuant to s.1.1.g of this Act, on behalf of the Gitksan and Wet'suwet'en upon the coming into force of this Act.

Distribution

8.4 All monies will be distributed directly to Gitksan and Wet'suwet'en Houses by a duly mandated body pursuant to s.1.1.g of this Act, up its coming into force.

Financial Arrangements

8.5 All monies now paid to the Gitksan and Wet'suwet'en will continue to be so paid, according to negotiated levels and schedules, upon the coming into force of this Act.

Agreements and Renewals

8.6 All financial transfers will be agreed to by both parties, including schedules etc., through a negotiated 15 year agreement, subject to review at each renewal and from time to time.

GITKSAN AND WET'SUWET'EN IMPLEMENTATION
DRAFT SUB-AGREEMENT # 9

Preamble

We are aware that current policy guidelines entail specific detail for the implementation of self-government, that include provisions such as demonstration of capacity for each sector, costs etc. We see these all as issue to be discussed, but not necessary within the body of the enabling legislation.

Timeframe

9.1 Gitksan and Wet'suwet'en self-government will be fully implemented within three years of the establishment of the Final Agreement.

Costs

9.2 The costs of implementation will be included under the provisions of Financial Arrangements (Section 8).

Working Group

9.3 A joint working group of representatives from the Gitksan and Wet'suwet'en and from the federal government shall be struck to consider the costs and contingencies of the implementation of self-government and to find agreement to bear such costs.

FILE NUMBER: E-8895-3-2131

NOTE TO FILE

Meeting of February 5 & 6, 1991
Smithers, B.C.

Purpose: To review sub-agreements # 1 to 8 with particular focus on lands and resources and structures and procedures of government;

In Attendance:

Don Ryan, OHC
Marvin George, OHC
Chris Scott N, OHC legal counsel
Mark Duiven, OHC
Glen Williams, Kitwankool
Bob Depew, Community Negotiations
Rhoda Vergara, Community Negotiations
Janet Weir, B.C. Region
Alain Arcand, Policy Directorate
Andrew Beynon, Legal Counsel

* * *

February 5, 1991

Opening Remarks GW

In his opening remarks, Don Ryan reiterated his dissatisfaction with the self-government process (policy and pace); referred to the mandate to proceed given to the OHC by the Houses at the Annual Assembly held in November and reiterated at meeting of January 11 and expected at meeting of February 20, 1991.

Implementation as a matter for inclusion on the agenda was discussed. No change was made to the agenda.

Lands sub-agreement # 3

Issue: Sub-section 3.1

Discussion:

- it was noted that the wording in sub-section 3.1 (a) "in recognition of...." could create problems in getting sub-agreement through the system. Reference was

made to CN guidelines which specify that aboriginal and treaty rights are not dealt with. In addition, given section 35, aboriginal or treaty rights would not be affected by passage of this legislation in any case .

- comments made were noted by the OHC but no agreement was reached on an alternative wording.

Issue: sub-section 3.1 (b) & (c)

Discussion:

- OHC clarified that the purpose of the wording in these sub-sections was to ensure that all categories of land would be included in the transfer. Alternative wording was proposed and discussed.

- It was agreed that the sections would be re-organized and re-worded with the discussion in mind and the Gitksan and Wet'suwet'en would get back to us.

Issue: Categories of land under sub-section 3.1

Discussion:

- possible problems with the categories of land listed under sub-section (c) as worded were highlighted. It was clarified that there are different kinds of rights which would accrue to different categories of land. (examples given) It was pointed out that provision (c) wouldn't trigger the transfer of <u>all</u> lands; only a portion would be transferred. Alternative approaches were considered; it was agreed that the Gitksan and Wet'suwet'en would review the clauses and get back to us.

- The matter of how third parties would be dealt with was discussed. The OHC clarified its intention that third parties would have the opportunity to decide whether they wanted to adopt the Gitksan and Wet'suwet'en system or not. This would be an area for discussion under the claim.

- It was agreed to include sub-section (c) under (b) as new item (iv). It was agreed that this would provide the OHC with the flexibility to set up future land claims settlements as they wished.

- OHC legal counsel requested time to consider the implications of the proposed alternatives; would get back with final version.

Issue: Sub-section 3.2 "in Trust"

Discussion:

- The OHC clarified that the use of "in trust" was intended to give comfort to the Gitksan and Wet'suwet'en people. Because of the lack of correspondence between *Indian Act* reserve boundaries and House "territory" or location, it was difficult to find a convenient form of transfer of reserve lands to Houses.

- Difficulties with the above were discussed, in particular:
  - it would be necessary to identify in trust for whom: unless it could be said that it was "for all Gitksan and Wet'suwet'en people, the problem remains.
  - in transferring land to a House, exclusive legislative jurisdiction would be given to that House. The problem of lands which are "common territory" remains.
  - an aspect of the problem is that in some cases, in a band, half the members could be Gitksan and half could be Wet'suwet'en.

- It was suggested that a transfer to a collectivity would be preferable to a transfer to specific Houses. A further consideration is how this ties in with the issue of legal status and capacity.

- It was agreed that the Gitksan and Wet'suwet'en would review this clause with the above considerations in mind and get back to us.

Issue: Jurisdiction of the House

Discussion:

- In the above discussion, the problem of exclusive jurisdiction of each House over certain territories was isolated for discussion. Basically the federal concern is that if each House has exclusive jurisdiction over a particulary territory there could result a "patchwork" of legislation that would not be workable.

- The OHC gave reassurances that the Houses would work together to ensure consistent and compatible legislation. A practical example of the fishing by-laws was given where, although all major watersheds were covered, the same wording was adopted for all by-laws and, in addition, was coordinated with other Indian groups in the vicinity.

- It was agreed that legal counsel on both sides would look into the matter and propose appropriate wording.

Issue: Absolute title

Discussion:

- Discussion centred on the implications of using the term absolute title in lieu of fee simple. It was pointed out that under CN parameters, the federal government can only transfer what it has, i.e. not more than fee simple. Absolute title would also eliminate any possibility of expropriation; this could create a "sticky problem" from a policy perspective.

- The OHC clarified that it considered necessary to push the title beyond fee simple to create certainty. It " would be worth the fight".

- It was agreed that the existing wording would be left in the clause. Policy to

review implications of this.

Issue: Sub-section 3.3

Discussion:

- The intention of mentioning section 25 in this sub-section was discussed. At first glance, it had no purpose. The OHC clarified that its intention was to deal with possible situations in which an aboriginal right to the use of land might conflict with an individual's right. Then application of section 25 would be appropriate.

- It was agreed that this section would be redrafted to better reflect the intent of the OHC.

- Other points mentioned here include:
  - the possibility of rewording 3.2 to reflect the possibility that title "in trust" may guarantee 91(24) status.
  - the intent of Crombie's letter to the Sechelt: it was however noted that the letter was in the context of lands that were surrendered. Gitksan and Wet'suwet'en have no intention of selling lands to third parties.

- It was agreed that OHC legal counsel would review the reference to sub-sections 25 and 35 and adjust the cross-reference to sub-section 3.1

Issue: Sub-section 3.4

Discussion:

- Discussion centred on what the "review" would consist of and against what criteria it would take place. The OHC clarified that any interest in land with a renewal built in pursuant to the *Indian Act* would be subject to review by the House. It was further clarified that there would be no objective criteria and the second part (referring to land claims) would be "wide open". AB suggested that review criteria for the first part be specified. May also consider procedural interests.

- The intention of this provision was clarified by the OHC as being aimed at strengthening the authority of the Houses. It was noted that in the Cree-Naskapi Act, long term interests would be protected but not short term interests.

- The first part of the proposed provision protects third party rights; the purpose of the second part was to imply that interests created without Gitksan and Wet'suwet'en consent would be reviewed. These interests might then be renewed or extinguished depending on the situation.

- It was further clarified that OHC intention was to establish two "triggering

points" with respect to interests: a) upon renewal of an interest, and b) upon the settlement of the claim. Although it was pointed out that self-government legislation need not talk about claims, the Gitksan and Wet'suwet'en preferred to leave the reference in.

- AB suggested that there would be a need to establish the nature of the third party interest. In particular, whether there is an option for renewal of a right to renewal. The Gitksan and Wet'suwet'en see the issue as being that these interests or leases were entered into without House authority.

- It was agreed that this provision would be reviewed outside the context of the claim. The Gitksan and Wet'suwet'en will get back to us on this.

- Policy to review the implications of this clause and get back to group.

Issue: B.C. Order-in-Council 1036 as referred in Bob's letter of....

Discussion:

- It was clarified that, to the extent that OIC 1036 applies to reserves, then the province would be considered a third party interest; i.e., the 5% resumption. The intention of Bob's letter was to suggest that this matter would have to be handled with the province. The federal government doesn't have the authority to deal with matters such as power of resumption.

- Mention was made of the current litigation on OiC 1036 at the BC Court of Appeal testing whether the resumption power is still valid. Feds made reference to the Moses case which would have to guide the federal interpretation until other results are forthcoming from the courts.

Issue: Sub-section 3.5

Discussion:

- it was agreed that an additional sub-section (e) to include "residency" would be inserted.

Issue: Sub-section 3.6

Discussion:

- "permanent disposition" was clarified; it was agreed that the clause would be modified to reflect the GW intention.

Issue: Sub-section 3.7 Land registry

Discussion:

- Given that each House would be responsible for the registry of its lands, certain questions arise that should be addressed: in particular:
  - what provisions are there for interests not registered,

- consider the enforceability of the provision
- what happens if there's a mistake
- what are the consequences of not registering

- Following a brief discussion it was decided by the OHC that no changes would be made to 3.7 except adjustments to cross references.

  At the end of the revisions to this sub-agreement it was generally agreed that:
  - the Gitksan and Wet'suwet'en would do the minor rewording for the following day;
  - matters requiring substantive reworking would be dealt with by letter;
  - following an exchange of letters an agreed upon re-draft of the sub-agreement would be produced.

Sub-agreement # 6 Structures and Procedures of Government

Issue: Sub-section 6.3 The feast

Discussion:

- Following discussions on the functions of the Feast and its role, it was agreed that the whole section could be left out and the matter of appeals would be dealt with elsewhere. (for example: "the House could enact and appeal laws")

Issue: Sub-section 6.4 (new 6.2)

Discussion:

- Alternative wording for this sub-section was discussed and agreed upon.

Issue: Sub-section 6.5 (new 6.3)

Discussion:

- Discussion centred on when a law could be considered valid, given the consensus requirement in this provision.

- It was agreed that the Gitksan and Wet'suwet'en would re-word the clause to clarify this matter.

- It was also suggested that reference to customary law be replaced with "custom". The use of custom instead of customary law would not take much away from the meaning of the provision and could facilitate getting the sub-agreement through the system.

- No agreement on this was reached at the table.

Issue: Sub-section 6.6 (new 6.4)

Discussion:

- Little discussion was held on this and following provisions. The federal team

preferred to leave the provisions as worded until policy had the opportunity to review and comment.

- The OHC reiterated its preference that the provisions be as simple as possible with minimal detail.

Issue: Sub-section 6.8

Discussion:

- Proposed modifications to these clauses were made and accepted at the table

Issue: Sub-section 6.9 (new 6.7)

Discussion:

- it was suggested that the right to appeal provision be expanded to include third parties. Following a brief discussion this was agreed to.

* * *

February 6, 1991

Issue: Wording of Sub-agreements as agreed to date.

Discussion:

- Sub-agreements # 3 and # 6 were revisited; There was general agreement at the table that the hand written versions reflected the general intent of previous day's discussion. More substantive matters would be considered and dealt with by fax.

Issue: Sub-agreement #1 Legal Status and Capacity

Discussion:

- Following a general review on the sub-agreement the following points were agreed to:
  - Houses would be listed, possibly in a schedule to the Act, preferably not in the preamble;
  - House would have the power to create and dissolve a central agency created for the purposes of interacting with other governments
  - a provision specifying the legal power of the central agency would be included;
  - "lottery tickets" in section d) would best be included in a separate sub-agreement, possibly under taxation.

Issue: Sub-agreement # 2 Citizenship

Discussion:

- Extended discussion focused on the distinction between the terms member, Gitksan/Wet'suwet'en citizen and Gitksan and Wet'suwet'en community.

- The terms were clarified and it was agreed that the sub-agreement would be revised to reflect these new definitions.

- It was further agreed that:
  - provision would be made for the register to be available to the public;
  - band members/acquired rights would be accommodated;
  - provisions of the *Indian Act* regarding band membership would no longer apply;
  - the provision on appeals would be dropped from this sub-agreement and included in sub-agreement #6 (6.7?)

Issue: Sub-agreement # 4 Renewable Resources

Discussion:

- There was brief discussion on the general provisions of this sub-agreement. No comments from a policy perspective were provided at the time.

- It was agreed that the sub-agreement would be sent through the system; comments and feedback received would be brought to the attention of the OHC.

Issue: Sub-agreement # 5 Non-renewable resources

Discussion:

- No record of this discussion was made. I had to leave the room at 12:00 noon.

Issue: Sub-agreement #8 Fiscal Arrangements

Discussion:

- It was suggested that, as taxation was still under discussion in the Sawridge case, substantive comments would be reserved until the outcome of these discussions was available.

- The OHC highlighted a number of proposed changes in wording;

- It was pointed out that provisions 8.1 and 8.2 would likely create charter-type concerns; an addition 8.3 as reworded and 8.4 would also create some difficulties.

- It was agreed that:
  - a fallback provision to deal with the situation where no agency was created would be included in the sub-agreement; it was suggested that the "houses" in this case would have to be a collective body that would be defined for this and other purposes;

- section 8.3 would be replaced with a provision the exclusive authority of the House to levy and collect taxes (i.e. no provincial or federal);
- the term "transfer payment" would be used where appropriate (instead of monies transferred);

- It was also agreed that the sub-agreement on Taxation (#9) would be dropped. Provisions there would be incorporated into sub-agreement # 8.

- It was suggested (AB) that there may be the need for a new agreement on "enforcement of laws" which would cover matters such as enforcement, penalties and fines. No comment.

Issue: Workplan

Discussion:

- The remaining steps in the federal process were outlined. The OHC indicated its concern that the Gitksan and Wet'suwet'en initiative was losing momentum, the process was too long and there would be a need to address concerns at the political level.

- The OHC suggested that the workplan be modified so as to:
  - try for drafting of MC in summer of 1991,
  - allow for responses from the Interdepartmental SC (informal, to get a sense of responses forthcoming) by the end of February, 1991;

- The OHC further requested that the department clarify the difficulty that seems to exist with collapsing the AFA and the Self-Government payments into one.

- The OHC has set up an implementation working group and plan to exchange on implementation matters in March; proposed dates were March 13 and 14. The aim is to have an implementation plan by the end of March.

- The next negotiation session was set tentatively for March 11 and 12, 1991 in the Feast Hall in Kitwanga.

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FILE NUMBER: E-8895-3-2131

NOTE TO FILE

Gitksan and Wet'suwet'en Self-Government Negotiations
Meeting of October 23-25, 1990
Smithers, B.C.

Purpose: To finalize sub-agreements # 3 on Lands and Land Management and # 6 on Structures and Procedures of Government; to present federal guidelines on financial arrangements and implementation.

In Attendance:

Office of the Hereditary Chiefs

Don Ryan, OHC (Oct.25)
Marvin George, OHC
Herb George, OHC
Mark Duiven, OHC
Glen Williams, Kitwankool
Ardythe Wilson
Gordon Sebastian, Legal Counsel
Murray Miller, Legal Counsel

Federal Team

Bob Depew, Community Neg.
Rhoda Vergara, Community Neg
Gary Schaan, Policy Directorate
Andrew Beynon, Legal Counsel
Janet Weir, BC Region
Bill Clevette, Implementation

Observers
Wet'suwet'en Hereditary Chiefs
Elders
Other community members

* * *

October 23, 1990
Herb George chaired the morning session

Opening Remarks

Chiefs Alfred Joseph and Dan Michel made opening statements generally supportive of Wet'suwet'en participation in self-government negotiations.

Herb George introduced the negotiations by noting that this was the first negotiation session to be held on the territory of the Wet'suwet'en. He explained that the presence of Wet'suwet'en Hereditary Chiefs confirms the mandate of the OHC to negotiate community self-government arrangements on their behalf.

Twelve Wet'suwet'en Hereditary Chiefs were introduced including G. Holland, A. Juseph, D. Michelle, and S. Harris.

Bob Depew introduced the federal negotiating team and made general introductory remarks noting that the objective of these sessions was to recognize Wet'suwet'en and Gitksan government in Canadian legislation.

The Gitksan and Wet'suwet'en highlighted three points:

- **Legal Counsel at the table**
  The Gitksan and Wet'suwet'en stated their intention to have G. Sebastian or M. Miller (as legal counsel) present at the table as suggested by the federal government. However, in the Gitksan and Wet'suwet'en view, negotiations are not advanced enough and the presence of legal counsel could hinder progress at this time.

- **Final Agreement - Target Dates**
  The Gitksan and Wet'suwet'en restated their intention to proceed to a final agreement, noting the differences that existed and the limitations placed on the process by self-government policy. They reiterated their target date of January, 1991 for an agreement-in-principle and their aim to reach a final agreement by "March, April or May, 1991."

- **Federal Response time**
  The Gitksan and Wet'suwet'en requested that federal team provide responses more quickly than has been the case to date.

In response to these remarks, the federal team undertook to make every effort to meet the Gitksan and Wet'suwet'en expectations with regard to federal response time and target dates.

* * *

Implementation Plan

Bill Clevette made presentation: Self-Government Implementation Plan (attached handouts provide content of presentation.)

Self-Government Financial Arrangements

Bill Clevette made presentation on Financial Arrangements (attached handouts provide content)

- There were some clarification questions on the part of the Gitksan and Wet'suwet'en and brief discussion ensued. There appeared to be general

satisfaction with the content of both presentations. No decisions were reached.

* * *

October 24, 1990

Matter for discussion: Sub-Agreement # 3 on Lands and Land Management

Federal

- After reiterating the federal intention to reach an AIP as soon as possible, it was pointed out that issues of a constitutional nature could not be resolved at the table. The objective of the parties was to achieve federal legislation on Gitksan and Wet'suwet'en government.

- To tie in with the implementation presentation of the previous day, the federal team emphasized the need for Gitksan and Wet'suwet'en self-government arrangements to be practical/workable, both internally and in relation to other levels of government (federal, provincial and Indian). Thus the focus of discussions would be on the practical considerations.

- It was further stressed that the general federal perspective was to keep detail at a minimum but to have sufficient information in the sub-agreements to describe the Gitksan and Wet'suwet'en government accurately.

It was agreed that remarks and discussions on lands and land management would proceed on the basis of Depew's letter to Ryan of October 17, 1990, with reference to the existing sub-agreement where appropriate.

Following these initial remarks, the sub-agreement on lands was reviewed on a clause-by-clause basis. Specific questions and comments regarding each provision of the sub-agreement are attached at Annex A.

In the course of the discussions, the following matters were highlighted:

- definition of reserve:
- interpretation of 91(24)
- status of lands following transfer of title
- land registry

Details of these discussion are included in the attachment.

Following discussions, it was agreed that the Gitksan and Wet'suwet'en would review the sub-agreement on lands and land management following consultation with the Gitksan and Wet'suwet'en Chiefs and on the basis of federal comments and discussion.

P.M. SESSION (Chaired by Glen Williams of Kitwankool)

Glen Williams

- In his introductory remarks, Glen Williams confirmed that Kitwankool was a participant in current self-government negotiations.

Matter for Discussion: Structures and Procedures of Government - Sub-agreement #6

Federal

- By way of introduction, the federal team emphasized the central/core position of the arrangement on structures and procedures of government. Several general points were made regarding the sub-agreement in general including:
  - the need to ensure that all decision-making institutions appear in the sub-agreement,
  - how the institutions would be established,
  - their overall functions,
  - who sets them up and who they report to.

A clause-by-clause review of the sub-agreement followed. Specific comments and questions by the federal team are summarized in Annex B.

In general, discussions under this heading were aimed at clarifying what should be in the sub-agreement, the degree of detail necessary and the purpose of the questions being raised by the federal side:

- the federal Act (referring to this section) would describe a range of lawmaking powers. Thus focus would not be on the actual content of these laws but on which laws can be made, and who passes these laws;

- the intention was that the Gitksan and Wet'suwet'en government be recognized in the broader context of other governments, federal, provincial and other Indian governments as well as by businesses and individuals.

It was agreed that the principles expressed in the sub-agreement were acceptable to the federal government. The content and wording of each clause required more work.

October 25, 1990

Chaired by Glen Williams of Kitwankool

(Don Ryan attended having returned from meetings in Vancouver with Indian leaders in the province, Mulroney and Vander Zalm)

- The **Gitksan and Wet'suwet'en** indicated their interest in seeing a schedule put in place with a view to reaching an AIP by January, 1991.

- The **federal team** proposed that discussions on the structure and procedures of government be approached on the basis of the 5 W questions, i.e. who makes decisions, what decisions are made, etc.

- **Don Ryan** prefaced his remarks by noting he was speaking on behalf of Gitsegukla. He expressed his dissatisfaction with the degree of detail the federal government seemed to want in the course of reviewing the sub-agreements. He emphasized the Gitksan and Wet'suwet'en interest in having self-government legislation as simple as possible.

- The **federal team** clarified that the federal government only needed essential information on matters such as:
  - what is the law-making body,
  - who the federal government would be dealing with
  - the "W5" notion is to describe who makes the laws and what laws they can make, who implements the laws, and how they come into force.
- It was noted that these would be matters of concern to third parties as well.

- **Don Ryan** restated the Gitksan and Wet'suwet'en position that the exercise is to get to the drafting of the self-government legislation. He recommended that the parties "focus on the laws". Don Ryan continued by stating that the one main law-making institution is the "House group". To quote: "we want a law that says that the House is responsible for making laws; if the feds want details on how laws are introduced or applied, that's ok. [...] We want total jurisdiction, that is, all powers under 91 and 92. [...] we want a list of what the feds would give. [...] Or is it only the power to make by-laws such as those in s.81 of the Indian Act.

- The **federal team** responded that subject matters under discussion were not just the limited powers under the *Indian Act.* A partial list of subject matters for negotiation was provided. (see attached) In addition, it was stated that with regard to some areas such as taxation, jurisdiction over non-Indians and administration of justice, the federal government could discuss but the limits were still unclear. It was further clarified that some matters such as defence were not open for negotiation.

Further discussion on specific clauses followed. A summary is provided at Annex B.

By way of closing, the Gitksan and Wet'suwet'en noted several points:

a) the lands issue, i.e. that in Gitksan and Wet'suwet'en view, the lands in

question were not just reserves but "all the lands";

b) the note that the questions being dealt with at the table were the same questions raised in the Delgam Uukw court case.

c) the convention is planned for November 7, 8 and 9, 1990. The Office of the Hereditary Chiefs expects to receive a mandate from the House Groups to proceed with the Agreement-in-Principle.

Housekeeping:

- At the request of the Gitksan and Wet'suwet'en, the federal team agreed to provide a draft/sample sub-agreement on structures and procedures of government to illustrate the types of matters to be included. This draft would be provided by November 15th, 1990.

- It was agreed that the Gitksan and Wet'suwet'en would review sub-agreement on lands and land management on the basis of the previous day's discussion and would get back to the federal team by November 1, 1990.

- A tentative schedule to meet at the end of November was proposed and agreed to on condition that the above materials would be available.

GWSNN077.DVO
R. Vergara/SGN/994-7222
19 November 1990

ANNEX A
QUESTIONS AND COMMENTS ON LANDS AND LAND MANAGEMENT

Reviewed on the basis of Depew's letter to Ryan of October 17, 1990.

Clause 3.1 Definition of Gitksan and Wet'suwet'en Lands
Beynon

- noted the need for consistency in the use and definition of the term 'Gitksan and Wet'suwet'en lands';
- **b)** it was suggested that the wording in this subsection be changed to ensure flexibility;
- **c)** it was noted that lands pursuant to a land claim settlement involve a range of lands (different categories). Gitksan and Wet'suwet'en would have jurisdiction over certain categories of lands; the wording in this subsection should reflect this.

Clause 3.2 - Transfer of Title

- it was clarified that this provision refers to the transfer of federal interest in the lands, and was noted that the federal government can only transfer what it has.
- In response to a later question " what does 'can only transfer what we have' mean", it was clarified that some federal title is derived from the provincial crown; B.C. OC 1036, restricts the interests conveyed to Canada; the province has tried to retain certain interests on itself; therefore the Gitksan and Wet'suwet'en may have to deal with the province on aspects of this issue.

Clause 3.3 - Lands remain 91(24)
Beynon

- a general description of the content of sections 91 and 92 of the *Constitution Act, 1982* was provided as well as of subsection (24)
- it was acknowledged that the intention of this clause is that lands remain within the meaning of 91(24) i.e., not subject to provincial jurisdiction.
- it was noted however, that section 91 is a matter for interpretation by the courts; the federal government can't decide nor determine how 91 will be interpreted; and therefore can offer no guarantee. By way of elaboration, reference was made to correspondence exchanged between the federal government and the Sechelt.

George

- the Gitksan and Wet'suwet'en reminded the federal team that the Gitksan and Wet'suwet'en are still waiting for a definition of reserve;
- indicated that the Gitksan and Wet'suwet'en have their own interpretation of 91(24) and requested a federal legal opinion on this.

Beynon

- the Federal team suggested that such an interpretation would more appropriately be a matter for Indian lawyers;
- added that the purpose of the letter (to the Sechelt Band from the Minister) was to clarify the 91(24) reference; federal legislation (the Self-Government Act) can't dictate the meaning of what is in the constitution;
- regarding the requested advice on reserves, it was suggested that the Gitksan and Wet'suwet'en should consult their own advisors;
- reference to the term reserve in these discussions is what is defined under the *Indian Act;* the land in question is identified in the DIAND Indian Registry; it was proposed that any dispute as to the boundaries can be settled as an implementation issue.

H. George

- noted that the Gitksan and Wet'suwet'en had asked for a definition of reserve and had not gotten it; restated that the Gitksan and Wet'suwet'en had their own definition of lands.

Clause 3.4 - Subject to existing rights ...

Beynon

- the federal team noted that under, self-government policy, the status quo of third parties should not be interfered with in a transfer of title;
- it was suggested that the Gitksan and Wet'suwet'en should consider matters such as:
  - whether the clause might entail potential problems for the Gitksan and Wet'suwet'en?
  - whether it would be "subject to ...." forever?
- it was further suggested that the Gitksan and Wet'suwet'en should consider the need for flexibility; to ensure they are able to legislate in this area.

Clause 3.5 - Powers of the House in relation to Land

Beynon

- it was suggested that the Gitksan and Wet'suwet'en consider whether the provision represented a "full menu" of powers; it was proposed that the Gitksan and Wet'suwet'en consider an alternative wording such as: ..."shall have land management powers including a), b), etc."
- it was noted that the intention of the term "control" was unclear.

Clause 3.6 - Requirement for Consensus

Beynon

- the federal team noted that the provision contained in the clause might imposes restrictions on Gitksan and Wet'suwet'en; do they want this?

Herb

- the Gitksan and Wet'suwet'en acknowledged the need to clarify this internally and undertook to do so.

Clause 3.7 - Registration of Gitksan and Wet'suwet'en Lands

Beynon

- it was noted that the intent of this clause was unclear; the question would arise when the feds are dealing with the Gitksan and Wet'suwet'en government, what the legal purpose of the Registry would be. By way of example it was pointed out that the Torrens land titles system in B.C. and the DIAND registry are different and serve different purposes. The purpose of the provincial registry is to provide certainty regarding land title and interests.

- It was further noted that the proposed Gitksan and Wet'suwet'en registry may have to be very complex and could be quite costly; as an alternative, the Gitksan and Wet'suwet'en may consider partial registry in the provincial system.

- The federal team emphasized that there was no intention to suggest that the provincial system be used.

Schaan

- noted by way of further clarification, if the business at hand is internal to the Gitksan and Wet'suwet'en, then a Gitksan and Wet'suwet'en registry might be advantageous; in dealings with the outside then the provincial registry might be advantageous.

Duiven

- pointed out that the Gitksan and Wet'suwet'en system is based on their own system of landholding. The Gitksan and Wet'suwet'en system of registering territories is extant. In response to a federal question as to whether the intent is to describe a written registry, Mark responded that such a registry exists in affidavits.

Herb

- referred to the Sechelt and the relation with the provincial system. It was clarified that the problem for the Gitksan and Wet'suwet'en is due to restrictions of the Torrens system on the Gitksan and Wet'suwet'en. Torrens is incompatible and "places restrictions" on Gitksan and Wet'suwet'en laws.

Transfer of federal "responsibilities":

- It was clarified that "responsibilities" in clause 3.2 of the October 17, 1990 letter was intended to refer to *administrative* responsibilities such as registry, land planning, land use etc. If was agreed that the clause could be reworded to reflect this.

ANNEX B
FEDERAL QUESTIONS and REMARKS ON STRUCTURES AND PROCEDURES OF GOVERNMENT

Clause 6.1 -General

- it was noted that there was an overlap in a) and b);

Clause 6.2.a.iii ('having recognized political leadership')

- it was suggested that there would need to be evidence that the leadership is recognized (for example, in the event that the leadership should be questioned)

6.2.b

- it was noted that the distinction between the House and the Feast is unclear.
  For example:
  - does the Feast have a 'supervisory' role?
  - when are decisions valid? is it necessary to wait for the feast?

Clause 6.3 - Feast

- it was proposed that the Gitksan and Wet'suwet'en name the relevant bodies and identify their roles in decision making.
- example in **6.3.a** "feast open to all": what if only some show up? what constitutes a quorum?

6.3 c

- is assent necessary before a law is valid or is it an appeal type mechanism. what does consensus entail: unanimous or majority, etc..

- It was noted by way of clarification that the federal government has no interest in procedural matters that are internal to the Gitksan and Wet'suwet'en government. But where the decisions affect the federal government, the government must know how decisions were reached, i.e. whether or not there was consensus.

Clause 6.4 - Leadership Selection.

- It was noted that there was no difficulty in principle with the reference to custom in this provision. From a drafting perspective, however, it would be important to know, for example, if there is a dispute regarding leadership, who can prove and how can it be proved.

Clause 6.5.b) - Financial Accountability

- financial accountability: is of federal concern given ongoing relations between the two governments; therefore the mechanisms should be spelled out.

- the federal team requested clarification and clear definition of a central administrative body, the lines of authority, how its authority is derived;

- it was clarified that the nature of the policy requirement is that there be internal financial accountability; responsibility and authority for decisions on expenditures is in the Gitksan and Wet'suwet'en government; however the federal government is accountable to parliament for where the funds go.

Clause 6.6 - Decision Making

- The federal team noted that focus here is on a means of determining whether a decision is valid or invalid.

6.6b.

- Clarification was requested regarding who determines when a House decision has an impact on other Houses and on which houses.

Clause 6.7 - Appeal Mechanisms

- Several points needing clarification were noted:
  - whether House decisions are subject to overview by the Feast.
  - limits, ways in which appeals are taken? of which decisions? categories of decisions?
  - identify closely related houses and explain.

6.7b

- other questions asked by the federal team included
  - to whom are the appeal mechanisms available
  - where does a person complaining go: how does he know: has to be described. this is needed for the benefit of individuals involved.
  - the whole exercise is to describe the appellate bodies and the ways decisions are made.

  - procedural requirements look for a form of redress or appeal;
  - which decisions are appealable.

  - the Gitksan and Wet'suwet'en were reminded that they would have authority over non-Indians also;
  - is there a distinction of appeal mechanisms for Indians or non-Indians or is there a difference.
  - what about individual redress.

Questions and Comments from October 25, 1990

The similarity between clauses 6.1, 6.2, 6.3 was noted by the federal team. With regard to the legislative powers of the House, it was noted that several matters remained to be

stated, for example:

- whether the House can pass laws;
- when the law is enforceable;
- the difference between a law passed and a decision made;
- whether the house can pass any and all laws;
- how laws can be challenged;
- when there is a valid feast;

The Gitksan and Wet'suwet'en responded noting that:

- The House is the sole governing institution;;
- the law is in force when the House passes the law;
- some procedures are best defined as cultural practice and probably best left out of legislation;
- 2 Houses is the minimum number for a decision to be made; this constitutes a quorum;
-

The federal team clarified that, given the possibility of laws being challenged in the Feast, a clause such as the following might be considered:
" The quorum for a feast is determined according to custom..."

The Gitksan and Wet'suwet'en stated their reluctance to define customary law. The feds pointed out that federal legislation only has to recognize that customary law exists; the content does not have to be included.

Given that the Gitksan and Wet'suwet'en will also have jurisdiction over non Indians, the importance of written laws was emphasized. It was also suggested that on matters affecting third parties is would be advantageous to have a standardized procedure for recording decisions once made.

The Gitksan and Wet'suwet'en indicated their intention to write down any laws passed.

The Gitksan and Wet'suwet'en clarified their reluctance to provide for specific institutions in legislation suggesting that they don't want specific institutions frozen. The provision in 1.1g reflects the desires of the Gitksan and Wet'suwet'en in this regard.

Clause 6.7b
The federal team noted that the wording of the clause made interpretation difficult. for example:

- there is no clear indication of what decisions can be appealed and where.
- the wording would have to allow for grievance procedures being open to third parties, if this is the case.

The Gitksan and Wet'suwet'en indicated their preference for a general statement saying that the appeal process is available to all members and non-members.

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OCT 17 1990

Mr. Don Ryan
Speaker
Office of The Hereditary Chiefs of
The Gitksan and Wet'suwet'en People
P.O. Box 229
HAZELTON, British Columbia
V0J 1Y0

Dear Don:

Further to our meetings at Chipmunk Creek during August 19-24, 1990 and in Hull on September 25 and 26, 1990, I am writing to confirm our understanding of the main points discussed and to follow-up on the department's response to aspects of the draft sub-agreements now on the negotiation table.

1. In general, it was agreed that the Office of Hereditary Chiefs and the department will continue to negotiate new legislative arrangements for the Gitksan and Wet'suwet'en community under federal self-government policy, process and parameters. Notwithstanding the broader vision of self-government referred to in our framework agreement of January 13, 1990, it is recognized that the community negotiations process is limited to the negotiation of new legislative arrangements. It is not intended to resolve issues in the areas of aboriginal rights or land claims which may be the subject of litigation or other processes.

2. The principal objective of our continuing negotiations is to reach an agreement-in-principle (AIP) on the essential elements (legal status and capacity, membership, structures and procedures of government, renewable resources, non-renewable resources, application of federal and provincial laws, financial

.../2

arrangements and implementation). Both parties will make every effort to complete the draft sub-agreements on the essential elements and work towards the conclusion of an AIP. It is understood, however, that the OHC's proposed target date of January 13, 1991 for completion of an AIP is ambitious and does not represent a commitment by the department to conclude negotiation of an AIP by this date.

3. In order to expedite the community negotiations process, both parties agree to have legal representation at the table for the next round of negotiations which is to be held in Smithers, B.C., October 23-25, 1990. The topics on the agenda include implementation, financial arrangements and negotiation of the remaining draft sub-agreements. To facilitate overall advancement of the draft sub-agreements, it is agreed that the primary focus will be on the further development and completion of draft sub-agreements on lands and structures/procedures of government.

4. It is agreed that reserves under discussion in the community negotiations process include reserves pursuant to the Indian Act and as identified in DIAND's Indian Land Registry. Gitksan or Wet'suwet'en grievances regarding reserve boundaries are to be considered an implementation issue and will be dealt with accordingly in the implementation phase of the community negotiations process.

5. The following suggested revisions to sections 3.1 and 3.2 of draft sub-agreement #3 (dated September 7, 1990) are offered as a basis for further discussion at the negotiation table:

* 3.1 Gitksan and Wet'suwet'en lands are defined as:

a) lands transferred to the Gitksan and Wet'suwet'en Houses by the federal government;

b) lands owned by the Gitksan or Wet'suwet'en Houses which are declared by the Governor-in-Council to be Gitksan or Wet'suwet'en lands, including lands acquired through a specific land claim settlement;

.../3

include portions of

c) Any Gitksan or Wet'suwet'en lands established pursuant to a comprehensive land claim settlement, before or after the coming into force of this Act;

* 3.2 The federal government will transfer its existing interests in and responsibilities for lands, including interests in renewable and non-renewable resources on these lands, to the respective Gitksan and Wet'suwet'en Houses. The title to such lands will be vested in the respective Gitksan and Wet'suwet'en Houses.

As indicated at our previous meetings, the department is willing to consider a concept and mechanism of title transfer that accommodates the unique features of the Gitksan and Wet'suwet'en system of land holding. However, in order to advance the discussion of this item, we require identification of the defining characteristics or principles of this system.

6. It is acknowledged that departmental responses to several items in the draft sub-agreement on structures and procedures of government remain outstanding. It is our intention to address these matters in detail at the next negotiation session in Smithers, October 23-25, 1990 with the aim of completing this draft sub-agreement.

Should you have any questions regarding these or other matters prior to our negotiations in Smithers, do not hesitate to contact me at (819) 994-3435.

Yours sincerely,

Robert Depew

Robert Depew
Negotiator
Community Negotiations
and Implementation

R. Depew/SGD/994-3435
October 17, 1990/Bob/CV62

NOTE TO FILE

Negotiations with the Gitksan-Wet'suwet'en, August 19-24, 1990, Chipmunk Creek Camp, B.C.

In attendance:

Gitksan-Wet'suwet'en, Office of Hereditary Chiefs (OHC)

Don Ryan	-	Speaker/chief negotiator
Herb George	-	Negotiator
Marvin George	-	Negotiator
Ardythe Wilson	-	Negotiator
Mark Duiven	-	Intergovernmental liaison/negotiator
Robert Jackson	-	Chief, Gitksan
Ralph Michel	-	Chief, Wet'suwet'en
Vernon Joseph	-	Camp co-ordinator

DIAND , Self-Government

JoAnn Gagnon	-	Sr. policy advisor, Policy Directorate
Robert Depew	-	Negotiator, Community Negotiations Directorate

Purpose: To review and advance draft sub-agreements in the following areas: legal status and capacity, membership, lands, renewable and non-renewable resources, structures/procedures of government, environment, financial arrangements and implementation.

Introduction:

As indicated by the negotiations "Agenda" (copy attached) prepared by the Gitksan-Wet'suwet'en, it was the stated intention of the OHC to "finalize" a number of draft sub-agreements, including legal status and capacity, membership, lands, renewable and non-renewable resources, and structures/procedures of government. In addition, the OHC tabled three new draft sub-agreements in the areas of environment, financial arrangements and implementation.

In the early and later stages of discussion, it became clear that considerably more work would be required on draft sub-agreements #'s 1-6 before distributing them to DIAND programs or the inter-departmental working group for review. Similarly, the three new draft sub-agreements (#'s 7-9) were tabled as preliminary and exploratory documents subject to more detailed development.

In what follows, both general and particular aspects of the negotiation sessions are discussed with a view to identifying: (i) amendments to the August 13 and 14, 1990 drafts of the sub-agreements (copies attached); (ii) other suggested changes to these documents; (iii) areas where responses in writing/further re-working of proposals are required by the department or the Gitksan-Wet'suwet'en; and (iv) key issues which underly persisting difficulties in the process and substance of negotiations.

I Draft Sub-agreement #1 : legal status and capacity

1.1 (d): The OHC was asked to identify/clarify which classes or categories of negotiable instruments (other than those identified in 1.1 (c)) are under consideration. The OHC is to respond by including a list of such items in a revised draft of the sub-agreement.

1.1 (f): The question was raised by departmental officials if a capacity of all Gitksan and Wet'suwet'en Houses to sue or be sued as a collectivity would be a useful provision to consider. The OHC replied that collective action by the Houses exists in practice and "traditional" institutionalized activity and does not require entrenchment at the level of self-government legislation for any purpose.

II Draft Sub-agreement #2 : membership

2.2: It was suggested that this paragraph be re-written to present more clearly the categories of persons who qualify for membership. For example:

a) band members registered under the Indian Act prior to the coming into force of Gitksan-Wet'suwet'en self-government legislation;

b) membership in a Gitksan or Wet'suwet'en House.

2.3: The membership registry is to include the categories of persons identified in paragraph 2.2.

III Draft sub-agreement #3 : lands and land management

Lands and land management remains one of the most difficult subjects to cast in the form of a draft sub-agreement. Recent litigation/court decisions (eg. Gitksan-Wet'suwet'en title action, Sparrow, Nicole) continue to influence the OHC's approach to the negotiation of this subject area. While the OHC has agreed to pursue further refinement of this draft sub-agreement, it is acknowledged that there are major differences between the federal government and the Gitksan-Wet'suwet'en on some key issues. These, as well as suggested changes to the draft sub-agreement, are highlighted below.

3.1: Departmental officials emphasized again that self-government negotiations are reserve-based and that Gitksan-Wet'suwet'en lands include reserve lands as currently recognized by the federal government. The OHC disputes the current "federal definition" of (Gitksan-Wet'suwet'en) reserves and requests a "formal definition" of (Gitksan-Wet'suwet'en) reserves (which goes beyond the Indian Act) from the Department of Justice. Departmental officials indicated that a response to this request would be forthcoming.

3.1 (a): Departmental officials raised the question of provincial interests in the lands to be transferred, particularly those related to mineral resources, and the need for their recognition in the process of drafting sub-agreements. The OHC replied that provincial interests recognized under existing legislation are unconstitutional, citing the recent "Sparrow decision" as the prevailing authority. It was noted by departmental officials that this matter is far from clear and that in the community negotiations process the relevant provincial (and other) legislation will need to be addressed.

3.1 (b): It was suggested that the phrase "... that are acquired or ..." be deleted and the phrase " ... Gitksan and Wet'suwet'en lands ..." be replaced by "reserves". Again, the OHC requested a formal definition of "reserves".

3.1 (c): The brackets around "acquired" are to be deleted. It was pointed out that "any lands acquired by the Gitksan-Wet'suwet'en Houses" would have the same status as current reserve lands. Therefore, such lands would need to be declared by the Governor-in-Council to be reserves before any transfer of such lands to the Gitksan-Wet'suwet'en Houses could be initiated or concluded. It was also suggested that the phrase "or other arrangements" be deleted as it is too vague to be of any use in a sub-agreement.

3.2: The OHC will need to specify the nature of title to be transferred to the Gitksan and Wet'suwet'en Houses. In addition, given the place of Gitksan and Wet'suwet'en lands under the Indian Act, title would be transferred first to the bands, then to the respective Houses with interests in (current) reserve lands. Therefore, for the purposes of new self-government legislation, it may be useful to list those Gitksan and Wet.suwet'en Houses that have interests in reserve lands. *

The OHC has indicated that transfer of title in fee simple does not pose a problem per se. From the Gitksan-Wet'suwet'en point of view, the issue concerns the status of the land once the transfer is accomplished. "Title must be consistent with the Gitksan-Wet'suwet'en system of land holding". What remains to be articulated, therefore, is a concept of title that accommodates the Gitksan-Wet'suwet'en land holding system but does not entail the risk of provincial encroachment which may exist under fee simple. The Gitksan-Wet'suwet'en seek entrenchment of such a concept at the level of self-government legislation. *

3.4: It was suggested that, for the purposes of clarity, existing rights, interests and conditions be identified, at least by category. The OHC has agreed that this provision needs to be fleshed out and will discuss at the negotiation table at a later date.

3.5 (f): The term "seeking" is to be replaced by the term "granting".

3.6 (b), (c): These provisions require specification. The OHC is to review them with the community and get back to us.

3.7: It was suggested that the OHC clarify the purpose of the proposed Gitksan-Wet'suwet'en registry in order to determine the type of registry required. The phrase "...both internal and external..." is to be deleted from 3.7(a). In general, the OHC views the Indian Registry (DIAND) as irrelevant "since it deals with bands and reserves instead of Houses and territories"; the provincial land registry is not regarded by the OHC as a viable option. *

3.8 (b): When departmental officials questioned the length of time required for notification of expropriation, it was explained by the OHC that it takes this long to thoroughly consult with the Gitksan-Wet'suwet'en community on such issues.

3.8 (d): Departmental officials emphasized again that "consent of the Houses" is inconsistent with the concept and exercise of a federal power of expropriation. The OHC replied that the issue of consent must be approached in view of section 35 (1) of the Constitution Act, 1982 and the "Sparrow decision". Departmental officials replied that section 3.8 will require further consideration and re-working, including a new sub-heading. *

3.8 (f): This provision is essentially an extract from the "Sparrow decision" and adds no useful information to the draft sub-agreement. It is agreed that it be deleted.

IV Draft sub-agreement #4 : renewable resources

4.1: The paragraph is to be revised to read, "the House has the legislative authority... under or above its respective Gitksan or Wet'suwet'en lands...". The term "above" refers to air in the sense of environmental protection and air corridor. Departmental officials indicated that both Environment Canada and the Department of Defence would need to be involved in the discussions and that issues related to the air corridor will likely prove difficult to resolve to the OHC's satisfaction.

It was also noted that additional information will be required to clearly identify provincial interests in renewable resources. The OHC replied that in view of "Sparrow", "There are no provincial interests since provincial legislation with respect to renewable resources is unconstitutional". *

v Draft sub-agreement #5 : non-renewable resources

5.1: The paragraph is to be revised to read, "The House has the legislative authority... on its respective Gitksan or Wet'suwet'en lands..." Again, departmental officials stressed that the provincial government has interests, under existing legislation, in non-renewable resources and, in particular, precious metals. While the OHC agreed to a "situation update", it repeated its position that such legislation is unconstitutional. *

5.5: The preceding paragraph beginning "Neither federal nor provincial laws will apply..." is to be deleted since it is too broad in scope to be workable in the community negotiations process.

Notwithstanding the potential of oil and gas resources, the intention of section 5.5 is to prohibit third party interests.

5.6: The OHC noted that the Indian Reserve Mineral Resources Act is a federal act which gives effect to the B.C. Indian Reserve Mineral Resources Act. Departmental officials had indicated that it was a regulation under the Indian Act. At any rate, it was noted that issues related to the B.C. Indian Reserve Mineral Resources Act would have to be negotiated with provincial authorities.

VI Draft sub-agreement #6 : structures and procedures of government

There are three main issues that will need to be resolved if we are to advance this and related sub-agreements:

(i) There is a lack of clarity in the sub-agreement regarding "House or Gitksan and Wet'suwet'en lands". While the department has emphasized that the lands under discussion are lands currently recognized by the federal government as reserve lands, the OHC takes the position that "lands" refers to "traditional territories", the title to which is currently the subject of litigation. The OHC is reluctant to specify "reserve lands" in the sub-agreement since it is not satisfied with the federal government's definition of "reserve" in the Gitksan-Wet'suwet'en case. *

(ii) In addition to "reserve", there are other problematic terms. (see below).

(iii) While both parties agree on the principles of Gitksan-Wet'suwet'en structures/procedures of government that may be expressed in new self-government legislation, it is unclear to the OHC regarding the level of detail required to satisfy the department's policy and legal requirements. *

6.1 (a): Both parties have encountered difficulties in translating descriptive material provided by the OHC into terms that meet our policy and legal requirements. The OHC feels that draft sub-agreements 1 and 6 satisfy a definition of "House" in legal and political/administrative terms. The OHC is "bewildered" as to what a third point of articulation, if any, might be. The department is to respond with more specific questions regarding further information needs.

Departmental officials indicated that the term "customary practice" may be too broad for the purposes of a sub-agreement or self-government legislation. Other terms such as "cultural practice", "customary law" or "tradition" pose similar or related difficulties. The department is to consult with the Policy Directorate and Legal Services for further guidance in this matter.

6.1 (c): It was suggested that "Feast" be described either in a preamble to the proposed self-government legislation or at the beginning of the present draft sub-agreement. The department is to review previous descriptions of the Feast submitted by the OHC to determine their suitability for inclusion in this draft sub-agreement. In addition, it was suggested that the term "people" be replaced by the term "members" (or its equivalent; but see below) for the purposes of clarity.

6.1 (d): It is not clear if, or in what context, the term "citizen" (or "citizenship") may be used in either a draft sub-agreement, AIP or new self-government legislation. The department is to respond to the OHC regarding this question.

6.1 (e): This provision is unclear concerning the notion of "test". The idea or intent of the paragraph is to state that the consistency of House decisions (legal, policy, administrative) with Gitksan and Wet'suwet'en practice is reviewed at the level of the Feast and the decisions subsequently approved/disapproved. As a

result, this paragraph will require re-working by the OHC.

6.1 (f): This paragraph is currently under review by Legal Services. The department is to respond to the OHC when the review is completed.

6.1 (g): The phrase "mandate for action" requires specification regarding the actions encompassed, such as financial, legislative, administrative etc. It was also pointed out that mutual agreement between different levels of government would be required, along with respective processes of validation, before such agreements could be in force.

6.1 (i) See 6.1 (g) above. It was agreed that this paragraph be discussed more fully in the context of implementation.

Note: 6.1 (i) should be indexed as 6.1 (h).

6.2 (a): If the authority for selection of leaders is to be located at the level of law, then such laws should fall within the legislative authority of the proposed Gitksan and Wet'suwet'en government and be described accordingly. Otherwise, selection of leaders follows Gitksan and Wet'suwet'en "custom" or "cultural practice" (but see 6.1 (a), above). This matter is subject to further discussion.

6.2 (d): The phrase "... in relation to ..." is to be replaced by the phrase "...with respect to paragraphs...".

6.3 (d): The paragraph should read as follows: "financial accountability between a central administrative office and funding agencies..."

6.4 (b): The phrase "...the lands or resources of..." is to be deleted.

6.4 (c): This paragraph should be reconciled with paragraphs 6.1 (e) and 6.2 (d). It was suggested that the paragraph be fleshed out with regard to necessary procedures and options for action under situations of delay etc. It is also unclear if "Gitksan and Wet'suwet'en law" connotes laws passed by Gitksan-Wet'suwet'en government under proposed new legislative arrangements or Gitksan and Wet'suwet'en "custom" or "customary law".

6.5 (b): Community Negotiations Directorate is to re-write this paragraph in a more direct and simple format. It was suggested, however, that bodies to which appeals lie be identified along with the types of cases to be appealed to them.

VII Draft sub-agreement #7 : Environment

Departmental officials stated at the outset that environment is a complex subject area in terms of both jurisdictional and management issues. Considerable work will be required to identify specific areas of concern to the Gitksan-Wet'suwet'en which may then be developed through this sub-agreement. The OHC was asked to consult a report prepared by the Policy Directorate on "Gitksan-Wet'suwet'en Environment" in order to initiate more specific or focused proposals. Additional copies of this report are to be sent to the OHC.

7.1: With regard to "air" and "House lands", see paragraphs 4.1 and VI (i), above.

7.2: Departmental officials stated that Environment Canada will need to be involved in the discussions, especially as they relate to CEPA.

7.3: It is not clear under what situations etc. such an authority would apply. The OHC has indicated, however, that reference is to "Gitksan and Wet'suwet'en lands", which in the context of the present discussion may mean on-reserve and off-reserve. The OHC may also wish to

consider new federal legislation now in place which deals with environmental impact assessment.

7.4: From a practical point of view, the OHC may wish to consider identifying areas of environmental management and related issues first rather than broader jurisdictional powèrs as suggested here. It was pointed out that the more authority is localized, the greater the ability to exercise unfettered powers; on the other hand, the broader the authority sought, the more restricted the exercise of powers are likely to be. At any rate, given the scope and complexity of this subject area, many issues may be resolved in terms of local capacity and, therefore, be discussed more realistically in the context of implementation.

VIII Draft sub-agreement #8 : Financial Arrangements

The OHC indicated that the intention of this sub-agreement is to modify, through the negotiations process, the community's AFA which was put in place in April 1990. However, it was agreed that the content of the present draft sub-agreement relates primarily to taxation and, therefore, should be included and further developed in a taxation sub-agreement.

8.1: It was suggested that the proposed taxation authority is too broad and vague since it could include private business as well as provincial and federal revenues under the present wording. The meaning of "House lands" must also be clarified (see, in particular, VI (i) above).

8.2: The generality of this paragraph precludes identification of the type of transfer under consideration, how the monies would be transferred and when. Each type of transfer may have to be negotiated one-by-one. With regard to "citizens", see 6.1 (d) above.

8.3/8.4: Departmental officials noted that "Gitksan and Wet'suwet'en Government" appears to introduce a new

government body which remains to be defined or identified in any draft sub-agreement to date. The OHC is to redraft this section taking into consideration the preceding comment. It was also pointed out that for the purposes of implementation and implementation costs it will be critical to thoroughly describe what is being or will be done by the various bodies of government under new self-government legislation and what will be the associated costs.

8.5: Departmental officials informed the OHC that while the James Bay Cree, for example, may have a 10 year agreement under federal self-government policy dealing with financial arrangements, our guidelines specify 5 year agreements. Therefore, the proposed 15 year agreement will likely be difficult to negotiate. For the purposes of review "from time to time" it would be necessary to specify conditions under which such review of the agreement would take place. *

IX Draft sub-agreement #9 : Implementation

Departmental officials confirmed the OHC's general understanding of self-government implementation and added that an implementation plan, to be developed within the negotiations process, would accompany an AIP on new legislative arrangements.

9.1: According to the framework agreement signed on January 13, 1990, the Gitksan-Wet'suwet'en anticipate a 25-year implementation of Gitksan-Wet'suwet'en government will be coincidental with the complete settlement of their comprehensive land claim. The new proposal for a 3-year timeframe is integral to the OHC's current strategy to link self-government with comprehensive claims: i,e, the parameters of Gitksan-Wet'suwet'en authority would be worked out and then used as a framework for claims settlement. Departmental officials indicated that, "full" implementation of Gitksan-Wet'suwet'en government over a 3-year period may prove to be an ambitious exercise especially under these circumstances. *

9.2: It was suggested that determination of implementation costs be subject to a joint DIAND/OHC working group and that for the purposes of the present draft sub-agreement (as an exploratory document) such an intention be identified by an additional paragraph, 9.3.

Conclusions:

On September 7, 1990 the OHC submitted revised drafts of the nine sub-agreements (copies attached) discussed during the week of August 19-24, 1990. These new drafts incorporate some of the agreed-upon changes noted above. Some additional amendments based on departmental commitments are also forthcoming. However, draft sub-agreements 1-6 cannot be regarded as nearly "finalized" nor, in some cases, simply subject to further development before being finalized. As discussed above, critical issues, particularly in the area of land and land management, have not been resolved for the purposes of the community negotiations exercise. These in turn have significant implications for the status of all draft sub-agreements currently on the table and, consequently, impede further progress overall.

Where the issues are within our capacity (policy, process) to resolve, we require a more precise articulation of our policy and legal requirements and/or innovative responses to unique proposals. For its part, the OHC may wish to reconsider its self-government strategy within the context of our parameters if the community negotiations process is to be used in the best interests of the Gitksan-Wet'suwet'en community. *

Where the broader legal (or political) environment suggests that resolution of these issues is unlikely, at least in the short term, we may wish to review our options for negotiation with the Gitksan-Wet'suwet'en. * → recommendations.

These matters should be discussed with the Policy Directorate and Legal Services at the earliest opportunity.

Bob Depew

Bob Depew

Gitksan and Wet'suwet'en Sub-Agreements

Working Papers

25 April 1991

OFFICE OF THE HEREDITARY CHIEFS OF THE GITKSAN AND WET'SUWET'EN PEOPLE
SELF-GOVERNMENT NEGOTIATIONS
SUB-AGREEMENT # 1
LEGAL STATUS AND CAPACITY

Gitksan and Wet'suwet'en			Federal
1.1	Each House, as listed in schedule "A" to the *Act* and as amended from time to time, is a legal entity with the powers and capacity of a natural person. Without restricting the generality of the foregoing, each House may:		
	(a)	enter into contracts and agreements of any kind with any person, persons, government or other organization;	
	(b)	acquire, hold or transfer personal or real property and any interest therein, including the receipt of bequests and gifts;	
	(c)	hold, spend, invest or borrow money and secure or guarantee the repayment of a financial instrument;	
	(d)	issue negotiable instruments, including bonds and debentures;	The Gitksan and Wet'suwet'en need to clarify which negotiable instruments other than those identified above are under consideration.
	(e)	create, operate and contribute to trusts;	
	(f)	sue or be sued in its own name; and	
	(g)	do such other things as may be conducive to the exercise of its rights, powers and privileges.	
1.2	For the purposes of administration or of interacting with external agencies, each House, acting on its own or in association with other Houses, has the power to create agencies which shall act wholly under the direction, instructions and control of the House or Houses creating them.		
1.3	An agency created pursuant to section 1.2 shall have the legal power and capacity to enter into contracts and agreements and to sue or be sued in its own name, but shall not exercise any other legal powers other than those expressly delegated by the House or Houses which created the agency.		

Gitksan and Wet'suwet'en	Federal
1.4 An agency created pursuant to section 1.2 may be dissolved at any time by the House or Houses which created it, and upon dissolution, the House or Houses which created the agency shall take any assets of the agency and shall also assume any liabilities of the agency.	
1.5 For the purposes of the receipt and re-conveyance of land pursuant to ection 3.2, and for the receipt and division of funds pursuant to section ?, there shall be recognition of:	
(a) a collectivity of all Gitksan Houses, to be called the "Gitksan Houses";	
(b) a collectivity of all Wet'suwet'en Houses, to be called the "Wet'suwet'en Houses";	
(c) a collectivity of all Gitksan and Wet'suwet'en Houses, to be called the "Gitksan and Wet'suwet'en Houses".	

OFFICE OF THE HEREDITARY CHIEFS OF THE GITKSAN AND WET'SUWET'EN PEOPLE
SELF-GOVERNMENT NEGOTIATIONS
SUB-AGREEMENT # 2
CITIZENSHIP

	Gitksan and Wet'suwet'en	Federal
2.1	A Gitksan citizen is a person who belongs to a House by reason of birth or custom.	- need to clarify provincial interests, in particular precious metals.
2.2	A Wet'suwet'en citizen is a person who belongs to a House by reason of birth or custom.	
2.3	The provisions of the *Indian Act* respecting band membership shall no longer apply as of the date that the *Act* becomes law.	
2.4	The "Gitksan and Wet'suwet'en community means:	
	(a) all Gitksan and Wet'suwet'en citizens;	
	(b) all persons resident within Gitksan and Wet'suwet'en lands who appear on the Indian Register maintained pursuant to the *INdian Act*, but who are not citizens of a Gitksan or Wet'suwet'en House, and	
	(c) all other persons resident on Gitksan and Wet'suwet'en lands.	
2.5	Each House shall maintain a register of its citizens which shall be available to the public.	

OFFICE OF THE HEREDITARY CHIEFS OF THE GITKSAN AND WET'SUWET'EN PEOPLE
SELF-GOVERNMENT NEGOTIATIONS
SUB-AGREEMENT # 3
LANDS AND LAND MANAGEMENT

Gitksan and Wet'suwet'en			Federal
3.1	"Gitksan and Wet'suwet'en lands" mean:		- "Declared by whom" issue for all subsections below - Check with Gitksan and Wet'suwet'en re: wording
	(a)	lands transferred by the federal government to the Gitksan and Wet'suwet'en, in recognition of the fact that such lands are subject to existing aboriginal title in favour of the Gitksan and Wet'suwet'en;	- "... in recognition of ...": use of term questioned - given DelgamUukw, be gentle - need to deal with matter of provincial interests
	(b)	lands currently held by Her Majesty the Queen is Right of Canada on behalf of the Gitksan and Wet'suwet'en;	- O.K.
	(c)	lands acquired by the Gitksan and Wet'suwet'en through a specific land claim settlement either before or after the coming into force of the *Act*, and declared to be Gitksan and Wet'suwet'en lands in the settlement;	
	(d)	any lands acquired by the Gitksan and Wet'suwet'en through a comprehensive land claim settlement either before or after the coming into force of the *Act*, and declared to be Gitksan and Wet'suwet'en lands in the settlement; and	- comments made re comprehensive claims - how would third parties be dealt with?
	(e)	any other lands transferred to the Gitksan and Wet'suwet'en and declared to be and Wet'suwet'en lands in the transfer.	
	3.2	The federal Crown shall transfer its existing interests in and responsibilities for Gitksan and Wet'suwet'en lands as defined by section 3.1, including interests in renewable and non-renewable resources located on, within, above, or under such lands	- The Gitksan and Wet'suwet'en want wording to guarantee 91(24) status - Can the term "in trust" guarantee?
		(a) to the Gitksan Houses in Trust for the Gitksan people, in the case of lands declared by the Gitksan and Wet'suwet'en as exclusively Gitksan lands;	- Feds suggested that a transfer to a collectivity is preferable to a transfer to a specific House. - need to review legal status and capacity in light of the use of "collectivity" - Gitksan and Wet'suwet'en to review
		(b) to the Wet'suwet'en Houses in Trust for the Wet'suwet'en people, in the case of lands declared by the Gitksan and Wet'suwet'en as exclusively Wet'suwet'en lands; and	

	Gitksan and Wet'suwet'en	Federal
	(c) to the Gitksan and Wet'suwet'en Houses in Trust, in the case of lands declared by the Gitksan and Wet'suwet'en as joint Gitksan and Wet'suwet'en lands.	
	The absolute title to Gitksan and Wet'suwet'en lands transferred pursuant to section 3.1[a] shall vest in the Gitksan Houses in Trust for the Gitksan people, the absolute title to Gitksan and Wet'suwet'en lands transferred pursuant to section 3.1[b] shall vest in the Wet'suwet'en Houses in Trust for the Wet'suwet'en people and the absolute title to the Gitksan and Wet'suwet'en lands transferred pursuant to section 3.1[c] shall vest in the Gitksan and Wet'suwet'en Houses in Trust for the Gitksan and Wet'suwet'en people. In each case, the trustee shall have the power to re-convey the absolute title to the lands to the House or Houses which it declares as having the beneficial interest in the lands.	- Title: issue re: absolute title and fee simple title. - Reference NTF Feb 5.
3.3	Gitksan and Wet'suwet'en lands as defined by section 3.1 shall remain "lands reserved for the Indians" pursuant to section 91(24) of the *Constitution Act, 1867*, and shall receive the protection available pursuant to ss. 25 and 35 of the *Constitution Act, 1982*.	- Purpose of reference to s.25? -Gitksan and Wet'suwet'en: see reasoning behind this in NTF Feb. 5, 1991 - need to review implications of this clause and get back to Gitksan and Wet'suwet'en - ref NTF Feb 5
3.4	The transfer of land title pursuant to section 3.2 shall be subject to existing third party rights and interests. Prior to the exercise of any renewal of a third party right or interest, the exercise of a right of first refusal for the purchase of a third party right or interest, or the transfer, by purchase or otherwise, of a third party right or interest, the right or interest will be subject to review by the House or Houses having jurisdiction over the lands on which the right or interest is situated when a specific or comprehensive land claim is reached which encompasses the lands upon which the third party right or interest is situated.	- agreed to include subsection on residency. - for clarity, existing rights, interests, etc. should be clarified
3.5	Each House shall have the authority to legislate in respect of land management on House lands. Without restricting the generality of the foregoing, the authority to legislate includes the power to pass laws in relation to: (a) land use and planning; (b) access; (c) residency; and (d) the granting of various interests, including leases, licences, permits and mortgages.	

Gitksan and Wet'suwet'en	Federal
3.6 Notwithstanding any other provisions of the *Act*, the consensus of all Gitksan and Wet'suwet'en Houses is required when any House proposes to dispose of House lands in fee simple.	
3.7 Gitksan and Wet'suwet'en lands and interests in Gitksan and Wet'suwet'en lands shall be registered with the Gitksan and Wet'suwet'en Register of Territories. Each House is responsible for ensuring that the Register accurately reflects the lands and interests in lands over which that House has jurisdiction. The Register shall serve:	- Require answers: • what provisions are there for interests not registered • consider the enforceability of the provision • what happen's if there's a mistake • what are the consequences of not registering - Gitksan and Wet'suwet'en reluctant to reword.
(a) as a legal record of lands and interests in lands, including the maintenance of territorial boundary records, registration of leases, records of individual allotments granted pursuant to the *Indian Act*, and all other interests created pursuant to sections 3.6[d] and 3.7;	
(b) as a register of information for purposes such as integrated resource planning and land use and planning.	
	- The clause on expropriation was removed

OFFICE OF THE HEREDITARY CHIEFS OF THE GITKSAN AND WET'SUWET'EN PEOPLE
SELF-GOVERNMENT NEGOTIATIONS
SUB-AGREEMENT # 4
RENEWABLE RESOURCES

Gitksan and Wet'suwet'en			Federal
4.1	Each House has the authority to make laws with respect to the ownership, protection, preservation, conservation, management, development and disposition of all renewable resources located on, under, within, or above House lands. Without restricting the generality of the foregoing, the authority to legislate includes the power to pass laws in relation to:		- "... or above ... - term refers to air in the sense of environmental protection and air corridor. Dept of Environment and Defense would need to be involved. (BOB NTF Aug. 19) - need to clearly identify provincial interests in renewable resources. Gitwet reply that since Sparrow, "there are no provincial interests since provincial legislation re renewable resources is unconstitutional".
	(a)	the preservation and management of the forestry resource;	
	(b)	the protection, preservation and management of wildlife, including game, birds, insects, reptiles, cryptozoological creatures, fur bearing animals, and fish;	
	(c)	the protection, preservation and management of the natural habitat of wildlife, including game, birds, insects, reptiles, cryptozoological creatures, fur bearing animals and fish;	
	(d)	the hunting, fishing and trapping of wildlife; and	
	(e)	the management, disposition, and control of domestic animals, crops, wild and cultivated plants, and any products of domestic animals, crops, and wild and cultivated plants.	
4.2	No federal or provincial laws with respect to renewable resources shall apply on House lands unless expressly adopted by the House.		

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SELF-GOVERNMENT NEGOTIATIONS
SUB-AGREEMENT # 5
NON-RENEWABLE RESOURCES

	Gitksan and Wet'suwet'en	Federal
5.1	Each House has the authority to make laws with respect to the ownership, management, exploration, development, and disposition of all surface and subsurface resources situated on House lands, including minerals, oil, gas, gravel, clay, sand, soil, stone, and all other substances, whether they be metallic or non-metallic or otherwise.	- need to clarify provincial interests, in particular precious metals.
5.2	Subject to section *** 3.4, 3.5, each House has the authority to issue permits, leases and licences regarding the development and disposition of non-renewable resources on House lands, and to regulate the conditions relating to the issuance, suspension and revocation of such permits, leases and licenses.	
5.3	Subject to section 3.4, 3.5, each House has control over the administration of all non-renewable resources on House lands, and may dispose of any rights and interests in such resources in accordance with sections 3.6 and 3.7.	
5.4	Each House is responsible for ensuring that the granting or disposition of any rights and interests in non-renewable resources on House lands is registered in accordance with 3.8.	
5.5	No federal or provincial laws with respect to non-renewable resources shall apply on House lands unless expressly adopted by the House.	- too broad in scope to be workable. - Gitksan and Wet'suwet'en reluctant to reword

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SELF-GOVERNMENT NEGOTIATIONS
SUB-AGREEMENT # 6
STRUCTURES AND PROCEDURES OF GOVERNMENT

Gitksan and Wet'suwet'en			Federal
6.1	The House is the sole Gitksan and Wet'suwet'en institution of government and is vested with the authority to make laws		
	(a)	for the peace, order, and good government of all matters falling within its jurisdiction; and	
	(b)	for all matters under which it exercises jurisdiction pursuant to the *Act.*	
6.2	A decision made in regard to a House matter is made through the consensus of the members of that House.		
6.3	Where a decision of one House is percieved by one or more other Houses as possibly affecting the interests of those Houses, the consensus of the other affected Houses must also be obtained in order for the law to be valid, in accordance with Gitksan and Wet'suwet'en custom.		
6.4	Selection and removal of House leaders shall be in accordance with Gitksan and Wet'suwet'en custom.		
6.5	House leaders shall be accountable to their House to protect the interest of that House in respect of all of the areas in which the House has authority.		
6.6			
	(a)	Each House is financially accountable to its members in accordance with Gitksan and Wet'suwet'en custom, which is equivalent to generally accepted accounting procedures;	
	(b)	Financial accountability for funding transfers between a House or Houses and an agency created persuant to section ? (1.2) shall be in accordance with generally accepted accounting procedures.	

Gitksan and Wet'suwet'en	Federal
(c) Financial accountability by an agencycreated pursuant to section ? (1.2) for funding provided by any external agency shall be in accordance with generally accepted accounting procedures.	
6.7 The right to appeal any decision of a House is guaranteed under Gitksan and Wet'suwet'en custom for all citizens, community members, third parties, and holders of third party rights or interests.	

OFFICE OF THE HEREDITARY CHIEFS OF THE GITKSAN AND WET'SUWET'EN PEOPLE
SELF-GOVERNMENT NEGOTIATIONS
SUB-AGREEMENT # 7
ENVIRONMENT

	Gitksan and Wet'suwet'en	**Federal**
7.1	Each House has the authority to make laws for the preservation, conservation, and protection of the environment, including land, water, and air, on House lands.	
7.2	Any laws passed by a House pursuant to section I shall impose standards for the preservation, conservation and protection of the environment which are at least equivalent to those provided for by the *Canadian Environmental Protection Act.*	
7.3	No federal or provincial laws with respect to environmental protection shall apply on House lands unless expressely adopted by the House.	

OFFICE OF THE HEREDITARY CHIEFS OF THE GITKSAN AND WET'SUWET'EN PEOPLE
SELF-GOVERNMENT NEGOTIATIONS
SUB-AGREEMENT # 8
FISCAL ARRANGEMENTS

	Gitksan and Wet'suwet'en	**Federal**
8.1	Each House has the authority to levy taxes from the Gitksan and Wet'suwet'en community resident on House lands, and to exempt any such member of the community from the levy and collection of taxes which it imposes.	
8.2	Each House has the authority to levy and collect taxes from its House citizens regardless of their residence and to exempt any House citizen from the levy and collection of taxes which it imposes.	
8.3	The authority of the House to levy and collect taxes pursuant to sections ? and ? is exclusive and the federal and provincial governments shall not levy nor collect taxes on House lands, any interest in House lands, nor on House citizens resident on House lands after the *Act* comes into force.	
8.4	All transfer payments between the federal and provincial government made in respect of the Gitksan and Wet'suwet'en community shall be paid directly to an agency established pursuant to section ? from and after the date that the *Act* comes into force.	
8.5	Any monies derived from Gitksan and Wet'suwet'en House lands, resources or interests and collected by either of the provincial or federal governments shall be paid directly to an agency established pursuant to section ?, from and after the date that the *Act* comes into force.	
8.6	All transfers of monies to the Gitksan and Wet'suwet'en community by either of the federal or provincial governments shall be paid to an agency established pursuant to section ? upon the coming into force of the *Act*, according to levels and schedules to be negotiated on a fifteen (15)(year term, which levels and schedules shall be reviewed at the end of each fifteen (15) year term. Either party may call for a review of financial transfers at any time within the fifteen year period, by giving the other party 60 days' notice of the intention to review.	
8.7	If no agency is created pursuant to section ? at the time the *Act* comes into force, then monies required to be paid pursuant to sections ?, ? and ? shall be paid directly to the Gitksan and Wet'suwet'en Houses.	
8.8	Each House shall have the authority to make laws respecting games of chance, including lotteries and bingos, on House lands.	

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MEMORANDUM/NOTE DE SERVICE

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IA6800-31
Date
February 8, 1990

TO/À: R. Depew, Negotiator, and R. Vergara, Senior Adviser, Self-Government Development Directorate.

FROM/DE: Andrew Beynon, Legal Services, DIAND.

SUBJECT/OBJET: **Gitksan and Wet'suwet'en Self-Government Proposal**

Comments/Remarques

In a recent memorandum, you requested that I comment on a number of points described in a note to file of January 16, 1990. In what follows, I will quote relevant portions of the issues raised and occasionally quote portions of the federal response to the issues.

In what follows, I comment several times on the court case of Delgam Uukw v. R.. To some extent, I may be repeating what you already know, but for our own protection (the Department of Justice and DIAND) it is necessary to maintain a consistent and clear position that matters raised in the court case cannot be talked about in self-government negotiations.

As detailed below, we are in court with the Gitksan and Wet'suwet'en precisely because we are in disagreement with them on land matters and traditional forms of government. The Gitksan and Wet'suwet'en views on land rights extending beyond reserves should not be discussed because this issue cannot be resolved in the context of self-government negotiations. Not only would discussion be fruitless, but it could be damaging to our position in court where we have argued that such extensive rights do not exist. The federal government's conduct must be consistent and to this end, the message from the Self-Government Branch must be that negotiations are reserve land based.

With respect to traditional forms of government, we are again in a disagreement which is being reviewed in the courts. In the self-government negotiations, the Gitksan and Wet'suwet'en can continue to maintain that they have extant institutions of self-government. We know that they take this view in court and there is no point in discussing whether or not this view is correct. However, we do not share their views of traditional government, but are willing to negotiate towards the creation of a traditional style of Indian government by way of self-government legislation, if this is possible. The signed Framework Agreement contains Cabinet approved parameters which dictate that we are not negotiating regarding aboriginal rights. We have also stated that we do not necessarily accept the legal positions asserted by the other side in the Framework Agreement.

The Gitksan and Wet'suwet'en are the only group of which I am aware which has suggested that legal advice can be sought after discussion of proposals. It is my view that this will slow down development of an agreement-in-principle. Negotiations involve only legal matters as negotiations deal only with the development of legislation. Not only does this approach cause problems in terms of the material presented, but it makes participation of the Department of Justice extremely difficult. I will not be able to attend any of the negotiation sessions when no lawyer is present to assist the other side. I would urge you to recommend that the Gitksan and Wet'suwet'en reconsider their position. The importance of independent legal advice is underscored in the recent correspondence of the B.C. Union of Indian Chiefs to Don Ryan. Personally, I do not share the view that signing a framework agreement is in itself damaging, but the steps from here onward should be carefully considered.

Issue (1): Other models of drafting guidelines for legislation.
Conclusion: Federal legislation "wording" can be developed on each sub-agreement.

It is perhaps worth emphasizing that sub-agreements in an agreement-in-principle are intended to function as an approximate draft of legislation. Although an agreement-in-principle will function as a set of drafting guidelines, an attempt should be made to create more than a mere listing of ideas or proposals. The legislative drafters' function should be limited where possible to correcting and clarifying the wording chosen.

I am including a selection of sub-agreements concluded with the Sawridge Band. These sub-agreements are still at a preliminary stage. However, it does give some indication of the fact that sub-agreements read roughly like a statute. After reviewing these documents, you may understand my concern with the papers initially tabled by the Gitksan and Wet'suwet'en which focus largely on statements of principle and ideas which are not intended to form part of legislation. It seems to me that a great deal of effort will be required to develop wording such as one might find in a sub-agreement and ultimately in a statute.

Issue (5): Does the AIP on each element go forward subject by subject or as a whole package and how do optional element sub-agreements proceed to an AIP?

The legislative drafters will only want to review a complete package. It would not be useful for them to comment on parts of a document without seeing how these fit together as a whole.

Depending on what you are able to arrange with Privy Council Office, it would seem that there are two procedures possible for dealing with this matter. Should Privy Council Office agree, it would be possible to provide them with an agreement-in-principle which deals with the seven essential

matters and any optional topics on which agreement has been achieved. Privy Council Office would then prepare a statute dealing with these matters. Later on, after developing a further agreement-in-principle on other optional matters, it would then be possible to amend the Act to cover these items. My strong suspicion is that the Privy Council Office will be reluctant to proceed in this manner and that the Self-Government Directorate would have to provide a convincing explanation of the need to proceed in this two-step fashion.

There may be some confusion as to the involvement of legislative drafters in this matter. Once again, the agreement-in-principle should function as much more than a listing of ideas for which legislative drafters provide the needed legal wording. An agreement-in-principle will only be concluded with the Gitksan and Wet'suwet'en when there is a clear identification of the ideas proposed by the Gitksan and Wet'suwet'en for legislation and there has been some development of draft legal wording for inclusion in sub-agreements.

Issue (6): In these round table negotiation sessions, what is the paper product we are here to produce?
Conclusion: Working towards guidelines on wording for sub-agreements.

As mentioned to you, it strikes me as unfortunate that we are developing guidelines for sub-agreements. Essentially, this amounts to developing guidelines for development of drafting guidelines. It seems to add an unnecessary step in the negotiations process. I must admit, however, that when faced with the papers initially delivered by the Gitksan and Wet'suwet'en (which do not focus on the matters to be included in legislation), it is probably necessary to proceed in this more cumbersome manner.

The above simply serves to underscore the importance of avoiding posturing and statements of principle in the documents presented by the Gitksan and Wet'suwet'en. As discussed below, I would hope that the Gitksan and Wet'suwet'en will choose to involve their legal advisers at an early stage in order that the papers presented to the federal side will be more focused on the development of legislation.

Issue (7): The term "citizenship" in self-government legislation

I am currently reviewing this question in consultation with the Native Law Section and expect to respond in the near future.

Issue (8): The phrase "Gitksan and Wet'suwet'en citizenship entails all of the powers of a natural person notwithstanding any other act of parliament or act of the legislature of any province".

I can recall briefly discussing this point when I attended the first negotiating session in Hazelton, British Columbia. I still take the position that this statement does not make sense, if I correctly understand the function of

citizenship. As I understand it, citizenship will only be open to natural persons. If this is the case, it does not make sense to confer upon natural persons the powers of natural persons. Reference is made in the Sechelt self-government legislation to the powers of a natural person. This is done in conferring legal status and capacity equivalent to a natural person on a non-natural body.

If it is only natural persons which are to be granted citizenship, then it would also not make sense to speak of conferring the powers of a natural person notwithstanding any federal or provincial legislation. The powers of a natural person in British Columbia are determined by the common law, provincial and federal law. It would seem most strange for natural persons who are Gitksan and Wet'suwet'en citizens to have different powers than other natural persons in British Columbia. If it is desired to confer upon citizens some powers or rights different from the powers or rights of ordinary residents of British Columbia, this should be detailed in the self-government legislation or perhaps in a community's constitution. Such specific powers or rights would then be able to operate notwithstanding general laws of the province and perhaps those of the federal government.

There was some vague suggestion while I was in Hazelton, British Columbia, that the Gitksan and Wet'suwet'en may consider it important to refer to natural persons because of the historical nature of their view of citizenship in the naming of individuals. I presume that citizens are somehow considered to be something other than natural persons, perhaps in a spiritual sense. If this is the case, I would recommend that the problem not be dealt with by way of legislation. The legislation would presumably specify, for example, that persons may become citizens in a prescribed manner. By using such terms, the legislation would be clear that natural persons are involved which implies that they will have the powers of a natural person. If the communities, for their own reasons, wish to make the matter clear, they can perhaps do so by way of constitution or in some form of non-legislative declaration.

Issue (9): Matrilineal inheritance determining House membership and thus citizenship for the Gitksan and Wet'suwet'en vis-a-vis discrimination within the Canadian Charter of Rights and Freedoms

I propose to comment on this complicated matter in a separate opinion. However, I will emphasize what has been said before. A matrilineal system for determining house membership would be similar to the patrilineal system for determining membership as used to exist under the Indian Act. By definition, either of these approaches are overtly discriminatory and, thus, would contravene section 15 of the Canadian Charter of Rights and Freedoms. It is necessary to consider whether there may be some avoidance of this problem under section 1 of the Charter or perhaps section 25 of the Charter. I suspect, however, that it will not be possible to predict with certainty whether such a system would be justifiable under either section of the Charter.

For this reason, I would suggest that there are only three approaches of which I am aware which might make it possible to deal with this matter which can be described as follows:

(a) The legislation could be silent on the question of the matrilineal system. The communities themselves could then adopt the matrilineal approach if all individuals affected should agree. This would not isolate the communities from discord with the possibility that individuals might challenge the system.

(b) The legislation might explicitly refer to matrilineal selection but only in discretionary fashion. There would be a discretion to choose which individuals may become members and a variety of factors could be listed for consideration including the fact that the mother of the individual is a member of the "House"; or

(c) If the matrilineal system is explicitly described and the conferral of membership is automatic through matrilineal inheritance, then it is my suspicion that it will be necessary to provide for some automatic inclusion of children whose only relationship to the community is through their father. Essentially, this approach would involve setting up a discriminatory matrilineal system and then in turn proceeding to deny or overcome the matrilineal system's effects.

I will be consulting with the Native Law Section of the Department of Justice on this important matter.

Issue (11): "territory" referred to in the Natural Resources documents. S. 91(24) lands to describe territory.

It would not be appropriate to describe the lands in issue in the self-government negotiations by reference to section 91(24) lands. As a general principle, it would not be appropriate to define the lands in question by reference to a constitutional term. Under this approach, the lands to which the self-government legislation would apply could only be determined by reference to the courts. It is for the courts, not DIAND nor the Gitksan and Wet'suwet'en community, to decide the extent of section 91(24) lands. In any event, section 91(24) lands are all of those lands across the country which are "lands reserved for the Indians" and not merely those which might be reserved for the Gitksan and Wet'suwet'en or the 9 bands which are linked to this group.

I would continue to suggest that you make it quite clear that the reference to lands must be made on the basis of the reserve land base described under the Indian Act. This description of land provides the necessary precision to make it clear what are the boundaries of jurisdiction of each level of government. If the reserve land base is not seen as adequate, this is not a matter to deal with in self-government negotiations.

Issue (12): definition of "reserve". The 1858 definition to include maps and the OC 1036

I do not believe that it would be appropriate to provide an opinion on this point. Wendy Gordon of the Lands Directorate is best able to advise what are the reserves of the bands affected by these negotiations. Her focus will be on the records of the Lands Directorate and the description maintained pursuant to the Indian Act. (I believe these lands will be described precisely in the Indian Lands Registry.)

I do not understand the reference to "the 1858 definition" but I doubt that all of the Indian Act reserves in question were created in this year. The reference to O.C. 1036 is also somewhat confusing. This is a British Columbia order-in-council which I believe deals with reserves on a general basis across the province and the obligations of the province arising after the report of the McKenna McBride Commission near the turn of the century. I would strongly recommend that you do not venture into discussions on these types of matters.

Issue (14): the term "spiritual" in legislation

This is not a matter on which I can provide an opinion in a vacuum. I can only provide detailed comments where there is a specific proposal to use such a term in a specific context.

It is necessary to consider the function of self-government legislation. Self-government legislation is used to overcome problems perceived by a community with the existing Indian Act. The idea is to set forth in self-government legislation, a clear description of governing bodies with a clearly described set of powers different from those found in the Indian Act.

The only function of a reference to spiritual matters would be to describe a law-making power on spiritual activities. Given that the function of law-making is to compel a certain form of conduct, the extent of law-making power with respect to spiritual matters can only be very limited because of the protection set forth in the Canadian Charter of Rights and Freedoms with regards to freedom of religion. I can only imagine a very limited power to legislate, for example, with respect to prevention of desecration of religious artifacts.

In my view, it is not appropriate during negotiations to review what may be the spiritual beliefs and practises of the Gitksan and Wet'suwet'en members. This same issue has come up for consideration in the context of negotiations regarding self-government with the Council for Yukon Indians. As I understand the latest discussions, it is recognized that a law-making power with respect to spiritual beliefs and practises will have to be confined in very narrow terms to deal with such matters as disturbance of religious artifacts,

so as not to offend the general protection of freedom of religion in the Charter.

Issue (16): Gitksan and Wet'suwet'en position on the description of "land" to include: Royal Proclamation, 1763; BNA Act, 1867, s. 91(24); Constitution Act, 1982, s. 25, s. 35, s. 37, s. 52.
Conclusion: An opinion to be provided.

An opinion should not be provided on these matters. There is a risk of damage to our position in litigation as this strays perilously close to the matters under consideration in the case of Delgam Uukw v. The Queen. It would not be appropriate to provide any opinion on matters which will probably be the subject of litigation for many years to come. Providing an opinion will serve no useful purpose as we are bound to disagree with the Gitksan and Wet'suwet'en with respect to their position on these issues. We are in court on these very issues precisely because we disagree with the Gitksan and Wet'suwet'en.

The self-government negotiations as detailed in the Framework Agreement are to be reserve based and you should maintain a steadfast position on this issue.

Issue (17): Gitksan and Wet'suwet'en independent legal counsel at the negotiations table; Conclusion: Gitksan and Wet'suwet'en will seek legal advice in response to Justice opinions

I would prefer that you not adopt the procedure described above. DIAND Legal Services provides advice to your offices and it is then up to you to decide what position to adopt having had this legal advice. It will then be open to you to table the DIAND position on a particular matter having had legal advice. The debate, if any, which may ensue is then between DIAND and the Gitksan and Wet'suwet'en with their legal advisors.

I leave it to you to decide whether you accept the approach suggested by the Gitksan and Wet'suwet'en. If the Gitksan and Wet'suwet'en do not have a legal adviser present at the negotiating table, I will not be able to be present at the negotiation table. I would suggest that if the Gitksan and Wet'suwet'en approach is accepted, we are placed in the position of responding to proposals which are not prepared by lawyers even though the proposals should be focusing on the purely legal issue of what should be specified in legislation. To speed things up and probably reduce the overall cost, I would suggest that the Gitksan and Wet'suwet'en should obtain legal advice from the outset. This is a matter for you to consider but perhaps it would be worthwhile consulting your colleagues involved with the Nisga self-government negotiations. Although these negotiations are at a more preliminary stage, I am under the impression that the involvement of a lawyer has resulted in a more practical focus to the negotiations.

Issue (18): optional element "Environment" to be considered an essential element for a AIP in self-government legislation.

I would simply note that the essential items described in the Framework Agreement are based on the Cabinet approved parameters for self-government negotiations. It will not be possible to change the listing of essential items at will although I have some vague indication that Roger Gagnon is considering returning to Cabinet on the issue of environment.

The identification of essential topics serves only a limited function of outlining what is the minimum necessary from the federal perspective. Environment can be identified as a vital or essential concern to the Gitksan and Wet'suwet'en and it is possible for DIAND to agree that legislation will not be developed until they are satisfied with a sub-agreement on this topic. This same matter has arisen for consideration in the Akwesasne self-government negotiations. The Mohawks of Akwesasne consider administration of justice to be essential to their community. Without having to change the list of essential topics for negotiation in the Cabinet approved parameters, it has been agreed that legislation will have to address the administration of justice issue.

Issue (23): copies of the Constitution Act;
Conclusion: The federal negotiator agreed to provide copies of the Constitution Act to the Gitksan and Wet'suwet'en

I would note simply that there are a series of Constitution Acts which have been passed over time. I suspect that you are dealing with the Constitution Act, 1982 in this case.

Issue (25): Getting to an AIP by May/June, 1990 on the essential elements

My personal view is that the timeframe described is unrealistic. I cannot imagine that the complexities of environmental issues and structures of government can be dealt with in such a short time period. In any event, I do not see in this schedule a reference to the "guidelines" mentioned elsewhere unless these guidelines are equated with "draft sub-agreements". If these two items are the same then I would suggest that it will take a long time to proceed from draft sub-agreements to the actual sub-agreements which will form part of the agreement-in-principle.

Issue (27): Getting bogged down on the definition of "reserve". Is it possible to then refer to the discussions which have occurred in court?

The answer must be blunt. No, it is not possible to refer to any court presentations. I cannot see any possible merit to DIAND discussing this matter. Not only is there no possible benefit to be gained, but there is a risk of substantial loss. We do not agree with the evidence presented by the

Gitksan and Wet'suwet'en in court. We are in court because we disagree and the disagreement will only be resolved, if at all, by court proceedings.

The message must come clearly, consistently and at an early stage: self-government negotiations are reserve based. If there is any problem with such a geographical area, the issue can only be considered by the Lands Directorate or the Comprehensive Claims Branch.

Issue (29): The term "corporations sole" to be used in legislation to describe the house landholding system

It is not possible for me to provide much commentary on this issue at this point in time. It would seem theoretically possible to develop a corporate model for landholdings but there are much more fundamental questions to be addressed. The fundamental questions which should be considered before adopting a particular model can be summarized as follows:

a) who owns the land;
b) who manages the land (usually the same as the owner);
c) who passes laws regarding the land;
d) what ownership or rights are granted to occupants of land?

In the framework agreement the proposal refers to "Houses" holding fee simple title. There is nothing in principle which would instead prevent development of a model in which a corporation holds fee simple title. For that matter, it might be possible to use (instead of a corporation), a partnership, a limited partnership, a cooperative, an association, or some administrative body such as a Commission or Board.

I am not sure why the idea has been developed of proposing that corporations would hold fee simple title. There is no magic in the use of the word "corporation". If the idea is that a corporation would hold something less than fee simple title, it would also seem possible for "Houses" to hold something less than fee simple title.

If a corporate model of ownership is to be adopted, it will be necessary to consider who is to own and control the corporation itself. Before venturing into a lengthy review of the law with respect to corporations, I would suggest that additional detail be provided as to why a corporate model is desired. It may be, depending on what reasons are proffered for considering use of a corporate model, that a different approach might actually be preferable. This is a very good example of a matter on which the Gitksan and Wet'suwet'en would likely be greatly assisted by having their own legal adviser consider the issue before presentation to the federal government. We could waste a great deal of energy if we review the law of corporations for several months, only to find that their legal advisors would never have recommended to the community consideration of this approach.

I trust these comments will be of assistance but would be pleased to answer any questions you may have at your convenience.

Andrew Beynon
Counsel

AB/mb

Department of Justice Canada / Ministère de la Justice Canada

R. Vergara

Security Classification – Cote de sécurité
Protected Legal Opinion
File number – numéro de dossier
IA6800-31
Date
March 2, 1990

MEMORANDUM/NOTE DE SERVICE

TO/À: R. Depew, Negotiator, and R. Vergara, Senior Advisor, Self-Government Development Directorate, 20th Floor.

FROM/DE: Andrew Beynon, Legal Services, DIAND.

SUBJECT/OBJET: **Gitksan and Wet'suwet'en Self-Government Proposal**

Comments/Remarques

In our recent discussions, you asked for comments on a number of particular issues. In what follows, I will attempt to respond to the questions raised. For ease of reference, I have set out each different issue under a separate title.

Title Transfer - Requirement for Surrender

The Gitksan and Wet'suwet'en have not yet made it clear whether they are seeking a transfer of title in fee simple or instead propose that the federal Crown should retain title while they obtain enhanced land management powers. You will recall that I have suggested that if there is to be a transfer of title to the reserve lands in question, there follows a requirement for a surrender vote by the communities affected. I understand that the Native Law Section of the Department of Justice is currently considering this question in the context of the Sawridge Indian Band proposal. I will be able to provide you with final comments once the opinion in respect of Sawridge is prepared. However, in what follows, I will provide a preliminary indication of the reasons for advocating caution.

when?

It may not be possible to transfer title by way of self-government legislation unaccompanied by a surrender. The self-government legislation could operate as an indication of Parliament's intent to dispense with surrender requirements under the Indian Act. However, the requirement for a surrender may not be limited to the legislative requirements imposed under the terms of the Indian Act.

As discussed with you, the well known case of Guerin et al v. R. and National Indian Brotherhood, [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481 (S.C.C.), can be cited as authority in this regard. Dickson J., as he then was, makes the following comments (at page 494 of W.W.R.):

> "In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land

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places upon the Crown an equitable obligation enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty, it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.

The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself gives rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that **the Indian interest in the land is inalienable except upon surrender to the Crown.**

An Indian band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the band's behalf. The Crown first took **this responsibility** upon itself in the Royal Proclamation of 1763 [see R.S.C. 1970, App. 1]. It **is still recognized in the surrender provisions of the Indian Act. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.**" (emphasis added)

Elsewhere in the judgment, Dickson J. commented as follows:

"It is true that the sui generis interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the **Crown's original purpose in declaring the Indian's interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indian's behalf when the interest is surrendered.**" (emphasis added)

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Notably, these comments were approved in a judgment of the British Columbia Court of Appeal dealing with a procedural aspect of the land claim advanced by the Gitksan and Wet'suwet'en in the case of Uukw et al v. The Queen. After filing their action against the provincial Crown asserting unextinguished aboriginal rights over approximately 22,000 square miles of land in northwestern British Columbia, the plaintiffs applied to register a certificate of lis pendens under the Land Title Act of British Columbia against 2,069 district lots in the Prince Rupert Land Title Office of British Columbia. The Registrar of the Prince Rupert Land Title District refused to register the lis pendens and this refusal was then considered by the courts. The British Columbia Court of Appeal in Uukw et al v. R. in Right of British Columbia and Registrar, Prince Rupert Land Title District, [1987] 6 W.W.R. 240 (B.C.C.A.), held that the Registrar of the Land Title Office was correct in refusing registration as the claims of the plaintiffs were not registerable in a Land Title Office.

Central to the finding that the claims of the plaintiffs could not be registered under the land title system of British Columbia was the finding that claims to unextinguished aboriginal title (if they can be established) are non-marketable as aboriginal title can only be dealt with by way of surrender to the federal Crown. This finding is based upon the comments of the Supreme Court of Canada in the Guerin case. The Court of Appeal cited with approval the view of the Supreme Court of Canada that Indian interests in land are inalienable except upon surrender to the Crown. Notably, in the context of the Prince Rupert land title litigation, the court did not have under consideration reserve lands. This would appear to emphasize that the requirements for surrender in dealing with lands in which Indians may have an interest extends beyond the legislative requirements of the Indian Act.

As discussed with you, the surrender process is not confined to dealings with reserve lands under the Indian Act. Surrenders are conducted in the case of comprehensive land claims under the Cabinet approved Comprehensive Land Claims Policy of 1986.

References to Citizenship as opposed to Membership

This issue is still under consideration in consultation with our colleagues at the Native Law Section.

B.C. Indian Reserves Mineral Resources Act

You requested that I provide you with a copy of the B.C. Indian Reserves Mineral Resources Agreement. As suggested to you, I have already provided you with a copy of the Agreement in my correspondence of November 23, 1989. In case you did not receive the same, I am enclosing a second copy of this correspondence which contains a brief discussion of the agreement and a copy of the agreement as published in the Revised Statutes of British Columbia, 1960.

Comments/Remarques

British Columbia Order-in-Council 1036

At your request, I am also enclosing a copy of this Order-in-Council together with an amendment dated May 12, 1969 passed by the Province of British Columbia.

I do not know in what context Order-in-Council 1036 has arisen for consideration, although I suspect that it may have been discussed in the context of expropriation. This is a very complex field which has been the subject of a number of court cases in British Columbia. If you have specific questions on expropriation issues, I would be pleased to comment. It is necessary, however, to advise the Gitksan and Wet'suwet'en that they must seek input from their legal advisors as to the effect of Order-in-Council 1036 if they are raising the issue for consideration.

I trust these comments will be of assistance.

Andrew Beynon
Counsel

Attachs.

c.c. - W. Gordon, Lands Directorate
- C. Webb, Native Law

AB/mb

Department of Justice Canada | Ministère de la Justice Canada

MEMORANDUM/NOTE DE SERVICE

Security Classification – Cote de sécurité
Protected

File number – numéro de dossier
IA6800-31

Date
March 20, 1990

TO/À: R. Depew, Negotiator, and R. Vergara, Senior Adviser, Self-Government Development Directorate, Room 2036.

FROM/DE: Andrew Beynon, Legal Services, DIAND

SUBJECT/OBJET: **Gitksan and Wet'suwet'en Self-Government Negotiations**

Comments/Remarques

In your letter of March 9, 1990 you requested comments on draft sub-agreements dealing with legal status and capacity; membership; lands and land management; as well as renewable and non-renewable resources. As detailed below, I have some significant concerns with inconsistencies in the documents.

Legal Status and Capacity

Paragraph 1.1(b) refers to a power to receive "requests". This should be a power to receive "bequests." Paragraph 1.1(b) also describes a power to act as executor and trustee of an estate. Natural persons are not able to act as an executor and trustee of anyone's estate until appointed to act as such. For this reason, I would suggest a modification to specify a power "to be appointed as an executor of an estate or trustee of an estate".

You will note that I have suggested separating executorship from trusteeship as one is not necessarily appointed to hold both capacities at the same time (although in practice it is rare to have an appointment to act only as executor). In addition, executorship has application only after death, whereas a person may be appointed a trustee of a person's estate prior to death (see the Patients Property Act, R.S.B.C. 1979 c.313 as amended).

Paragraph 1.1(c) describes a power to deal with money and identical powers in respect of any financial instrument. However, I doubt that the intent is to provide that a House can spend or borrow any financial instrument.

Paragraph 1.1(f) describes a power to act as a guardian. I believe that parents are automatically the guardians of their natural children. However, natural persons, even though they have legal status and capacity, do not have a general power to act as guardians. The power to act as a guardian of an infant, other than one's natural child, is conferred in accordance with strict legal procedures. Paragraph 1.1(f) should specify only a power to be appointed to act as a guardian.

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Paragraph 1.1(f) makes reference to a power to act as a trustee. If the formulation suggested above for paragraph 1.1(b) is accepted, this element can be deleted.

I presume that the reference to "person" in paragraph 1.1(f) is a typographical error.

Section 1.1 lists a number of powers and the intent is to confer all of the enumerated powers. To do this, subparagraph (f) should finish with an "and", so as to read:

(f) to be appointed as a guardian; and

(g) such other powers ...

Section 1.3 provides for a power to delegate, assign or confer "such powers" to various self-governing institutions. I presume that "such powers" are the powers described under section 1.1 arising from legal status and capacity. It does not make sense to delegate or assign legal status and capacity. Assignment or delegation would imply that the House has divested itself of legal status and capacity. It is not appropriate to create a power to confer legal status and capacity. This would entail much more than a law making power in favour of the Houses as institutions of self-government. The various bodies which are to have legal status and capacity should be described in the self-government legislation.

The Gitksan Wet'suwet'en may be under the impression that all of the institutions or bodies of government in the communities need to have legal status and capacity in order to function. Subordinate bodies may have no difficulty functioning if the legal status and capacity of the parent institution is clear. This may be illustrated by considering a simple example. Suppose that a House creates a "hospital board" which does not have legal status and capacity. If the hospital board wishes to enter a contract, the contract can be made with the approval of the House as a party to the contract. If litigation should ever occur with regards to the contract, the House could act as a party to the litigation.

Legal status and capacity is considered an essential topic for negotiation under self-government policy because of problems arising under the current Indian Act. The problem with the existing situation under the Indian Act in the above example, (putting aside for the moment the questionable authority to create a hospital board), is that the band council as parent institution has questionable legal status and capacity, with the result that there may be great difficulty in maintaining a lawsuit.

Comments/Remarques

Membership

This draft sub-agreement describes an appeal board without providing much detail. I presume that it will be left to another sub-agreement to create this appeal board and describe its function. I also assume that the Act will provide some indication of appeal procedures before this board.

Lands and Land Management

Although it is not a legal issue, I expect that the Lands Directorate may wish to comment on the implications of paragraph 3.1(b). It will be necessary for the federal Crown to devote resources to consideration of requests for additions to the land base. I suspect that the Lands Directorate, because of its expertise, will likely shoulder the burden of such requests.

Paragraph 3.1(c) also raise non legal considerations which may be important. Essentially, this provision is intended to dictate that any lands acquired through a specific or comprehensive claim will automatically be subject to the legislative jurisdiction created by way of self-government legislation. I would suggest that you review this aspect with the Specific Claims Branch and the Comprehensive Claims Branch as they might have objections to this procedure. I would note for instance that in many land claims, different categories of land are created, and it may be desired to maintain the flexibility to provide only limited authority over some of the lands.

Paragraph 3.1(c) raises a legal concern to the extent that it makes reference to lands acquired by "other arrangements". I suspect that this is a thinly veiled attempt to deal with lands which might be acquired in the Delgam Uukw litigation currently before the courts. The term "other arrangements" is not sufficiently precise for use in an agreement in principle.

Paragraph 3.4 deals with the transfer of certain lands to what is currently described as the "Gitksan Wet'suwet'en Government". This description includes both reserve lands and designated lands. I would ask that you review the definition of a reserve set forth in paragraph 2(1) of the Indian Act as it already encompasses designated lands in most cases. The proposal to transfer surrendered lands which have not yet been sold or transferred, raises complex procedural issues. If lands have been surrendered for the purpose of sale or transfer and the surrender does not contemplate a sale or transfer to the "Gitksan-Wet'suwet'en Government", I suspect that a new surrender, and therefore a new surrender vote, will be required. I suspect that Wendy Gordon of the Lands Directorate will wish to comment further on this procedural matter.

I have difficulty understanding paragraph 3.4(d) in which it is suggested that other interests in the lands including leases should form part of the transfer. Perhaps the intent is to specify that other interests of the federal Crown in the lands including its interest as lessor should be transferred. However, I

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am not quite sure that I understand the intent behind paragraph 3.4(d), particularly when it is specified in paragraph 3.5 that the transfer is subject to existing rights, interests and conditions.

Paragraph 3.6 sets forth various legislative powers . These legislative powers should refer to the "Gitksan-Wet'suwet'en lands" as defined. I do not understand paragraph 3.6(c) which specifies a law-making power to "control" the lands. It also seems to me that paragraph 3.6(e) which sets forth a law-making power with regards to "administration and management" is unnecessary. The power to administer and manage lands will flow from holding title.

Paragraph 3.7 is somewhat vague. One is left to wonder where the lands are to be registered. Are the lands to be registered in the Indian Lands Registry or in the British Columbia Land Titles System or somewhere else?

Paragraph 3.8 seems to be at odd with paragraphs 3.2 and 3.6. If the Gitksan-Wet'suwet'en Government is granted legal title and legislative authority over the disposition of lands under paragraphs 3.2 and 3.6, it seems unnecessary for anybody to delegate "full power to dispose of or encumber" the lands under paragraph 3.8. Paragraph 3.6(d) is inconsistent with the requirement that the government cannot transfer lands without the agreement of the Houses specified in paragraph 3.8.

Paragraph 3.9 seems to be subject to the same criticisms. If the intent is to qualify the general legislative power set forth in paragraph 3.6, then paragraph 3.9 should open with the words "Notwithstanding paragraph 3.6 above".

I have difficulty understanding how to link paragraphs 3.9(d) and 3.10. On the one hand, it specified that the government will have authority to grant leases, on the other hand, it is specified that the government has only a limited power to grant an interest for a term exceeding a number of years (the exact number of years has not yet been decided). I would note that a lease is usually an interest for a term exceeding one year.

Paragraphs 3.11 and 3.12 deal with expropriation. Paragraph 3.11 appears to be a reference to the continued operation of section 35 of the Indian Act. I assume that paragraph 3.12 is intended to operate notwithstanding paragraph 3.11 given that section 35 of the Indian Act deals in part with expropriation by the federal Crown. Paragraph 3.12(b) imposes a requirement for consent of the Gitksan-Wet'suwet'en Government in cases of expropriation by the federal government. The requirement for consent is inconsistent with the notion of expropriation. By definition, expropriation involves the taking of lands without consent. In my view, it would not be appropriate for the federal Crown to give up its power of expropriation as this would set an undesirable precedent. As a matter of policy, the federal government rarely uses its expropriation power. DIAND's Land Directorate will usually insist upon consent from a band council before agreeing to an

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expropriation by a province, municipal or local authority under the terms of section 35 of the Indian Act.

Renewable Resources

The powers described under this section are sweeping in nature and I suspect that this section raises policy concerns more so than legal concerns.

Once again, I would suggest that it is not appropriate to speak of a legislative authority with respect to management and administration. I also think that the term "control" is too vague.

I do not understand why there should be legislative authority with respect to "lands and natural resources situated on ... lands". Surely the intent is only to deal with natural resources situated on the lands.

In paragraph 4.1(b), it is suggested that there be a power to make regulations. I would suggest that the whole question of a regulation-making power be postponed until there is a study of the institutions and procedures of government.

Paragraph 4.1(c) dealing with hunting, fishing and trapping wildlife is said to be subject to the Fisheries Act, the Indian Act, section 81.0, and the Migratory Birds Convention Act. I believe that the reference is in fact intended to be to section 81(1)(o) of the Indian Act which deals with the by-law making power of the council of a band over furbearing animals, fish and other game on the reserve. However, in my view, it is not appropriate to limit the powers of the new self-government institution by requiring that they act in a manner consistent with the existing Indian Act. One of the very purposes of entering self-government negotiations is to overcome the limited confines of the law-making power set forth in section 81 of the Indian Act. I would suggest that you take up this point with Joanne Gagnon of the Policy Directorate.

I would note, however, if paragraph 4.1(c) is said to be subject to federal legislation, it would seem appropriate to make paragraph 4.1(d) subject to the same limits particularly as this provision deals with fish. Perhaps this should be reviewed with the Department of Fisheries and Oceans.

I have some difficulty with the law-making power described under paragraph 4.1(e). The federal government may not have a power to confer law-making authority with respect to the disposition of domestic animals, crops and plants to persons other than members of a Gitksan or Wet'suwet'en house. If a farmer is lawfully engaged in farming activity on Gitksan and Wet'suwet'en lands and chooses to sell a cow to a non-Indian person, it seems strange to specify that the sale of the cow is subject to a law different from that prevailing in respect of the sale of the same cow to an Indian person who is a member of a Gitksan or Wet'suwet'en house. Not only is the matter strange from a policy perspective but I suspect that

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such a law would be ultra vires. In creating self-government legislation, the federal Crown is only able to confer law-making powers derived from the federal government's legislative authority under section 91 of the Constitution Act, 1867. The subject of Indians and lands reserved for the Indians under section 91(24) of the Constitution Act, 1867 would not seem to encompass such a trivial matter as the sale of domestic animals. One can think of a great number of examples where paragraph 4.1(e) would appear to be an inappropriate intrusion upon the legislative authority of British Columbia with regards to property and civil rights in the province. For example, where a person wishes to sell a box of flowers grown in their backyard to a person who is not a member of a Gitksan or Wet'suwet'en house, paragraph 4.1(e) would suggest that there would be a need to comply with certain legislative requirements. Again, this strikes me as inappropriate.

Paragraph 4.1(f) details a law-making power with respect to the development of natural resources. I have some difficulty understanding the reference to development of natural resources "including land ... thereon". I would also suggest that the law-making power with respect to structures should perhaps be confined to a legislative authority to issue permits in respect of structures required for the development of natural resources.

Non-Renewable Resources

In regards to paragraph 5.1, I would echo my comments regarding a law-making authority with respect to management, administration and control as described above.

The proposal for powers regarding minerals, oil and gas and coal raise for consideration the B.C. Indian Mineral Reserves Agreement. I will be consulting with the Native Law Section on the application of this agreement and will correspond with you further on this point in future.

I trust these comments will be of assistance.

Andrew Beynon
Counsel

c.c. - C. Webb
- W. Gordon
- J. Gagnon

AB/mb

Department of Justice Canada / Ministère de la Justice Canada

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File number – numéro de dossier

IA6800-31

Date

June 28, 1990

MEMORANDUM NOTE DE SERVICE

TO/À: R. Depew, Negotiator,
Self-Government Development Directorate.

FROM/DE: Andrew Beynon,
Legal Services, DIAND.

SUBJECT/OBJET: **Gitksan and Wet'suwet'en Self-Government Negotiations**

Comments Remarques

In your letter of June 20, 1990 you requested that I develop a redraft of sections 3.6 to 3.11 of the draft sub-agreement on lands and land management. I am attaching for your consideration two redrafts of these provisions. The first redraft represents my attempt to decipher the intent behind the current wording of sections 3.6 to 3.11. The second redraft incorporates some of my suggestions for change discussed below. As discussed below, even where I have been able to decipher the intention behind the current wording, some of the provisions do not appear to have been well thought through, and hence the further changes set out in the second redraft.

My first difficulty in developing a redraft of the provisions in question relates to the fact that sections 3.6 to 3.11 of the current draft sub-agreement refer to powers of individual Houses over the entire Gitksan and Wet'suwet'en lands (GW lands). It does not make sense for any individual House to have a law-making power with respect to lands which should presumably be controlled by another House. For this reason, in the attached drafts I have suggested that the law-making power and control over the entire Gitksan Wet'suwet'en lands vest in a body to be described in the sub-agreement on structures and procedures of government. This explains the reference to the unknown body "X" having powers over land in the attached drafts.

Section 3.6 of the current draft describes certain law-making powers. Section 3.9 imposes the restriction of consensus of the Houses in respect of certain law-making activities. I have attempted to insert this restriction on alienability in section 3.9 directly into section 3.6. This overcomes the cumbersomeness of two separate provisions. In my redraft, consensus is only required for dispositions of the entire fee-simple interest in lands. I am not sure whether anyone has considered whether or not there should be a requirement for consensus in respect of the disposition of lesser interests in land such as long term leases. I doubt that the intent is to impose a requirement for consensus in respect of all transactions, however minor they

may be. I have removed the law-making power regarding "control" as I do not understand what this can mean. If there is a specific law-making power regarding disposition of interests in land accompanied by a law-making power of a municipal nature to impose usage restrictions (zoning and so on), I do not understand what "control" can entail. If the intent is to control people or the environment or something else, a specific provision to such effect should be inserted in the section.

Section 3.7 of the current draft sub-agreement imposes a requirement for registration without giving any indication of a reason for registration of lands. I do not believe that there has been much consideration of the functions of land registration in developing this draft of section 3.7. The current provision gives no indication that any consequences flow from failure to register. The current provision does not give any indication of the range of interests in land which are to be registered. Is the intention only to register the fee simple interest and let lesser interests be disposed of without any central record? I am not willing to expand upon this provision and provide for a complex and costly local registry, unless clear reasons are provided for the need for such a system. A true land registry system (such as the B.C. provincial land title system and, to a lesser extent, the Indian Land Registry) imposes consequences for failure to register and gives a clear indication of the interests conferred upon registration. Upon reading section 3.7, one is left to wonder why there is any land registration scheme at all if it does not function so as to provide certainty of title.

With these comments in mind, I have left this provision unchanged as it serves no useful purpose, but I would note that the failure to deal with land registration in comprehensive terms could work substantial harm. It is conceivable that the self government legislation could provide for the transfer of fee simple title to the GW without retaining the use of a complete land registration system. However, abandoning the Indian land Registry and ignoring the provincial land title system would likely carry heavy consequences. In the absence of a complete registration system, one can foresee many disputes arising over unregistered interests, without any efficient system for resolving disputes. The Torrens system of land registration was adopted in B.C. because of the chaos created by the existence of myriad unregistered interests and unregistered claims to land. It will be necessary to rework this provision substantially if you are ever able to determine the true intention regarding land registration.

The current wording of section 3.8 is exceedingly difficult to decipher. The sentences are long and cumbersome. The current provision allows for the delegation of power to "an adminstration body". One is left to wonder which "adminstration body" this might be. Without the benefit of a sub-agreement on structures and procedures of government, one can only guess. I have left the matter to be determined at a later date by reference to a body created in accordance with the as yet non-existent sub-agreement on structures and procedures of government (I have called this body the "Y"). In my view, it is bad drafting to repeat in this section the requirement for

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consensual agreement of the Houses to disposition of land. It is clear from the attached first draft that consensual agreement of the Houses will be required in respect of any disposition of land.

Having said the above, I have great difficulty with the current requirement for consensus. In my second redraft of section 3.8, I have removed the requirement for consensus decision making by Houses where there has been a delegation of authority to an administrative body created pursuant to the legislation. I cannot understand why the Houses would bother to confer upon an administrative body the authority to dispose of land if in reality the administrative body is paralysed by the requirement for a consensus decision from the Houses. I do not think that the division of authority between the Houses and this administrative body has been thought out carefully.

As suggested above, I have removed section 3.9 and incorporated its requirements into section 3.6 of the sub-agreement. Although section 3.9 does not make mention of section 3.10, I presume that the restriction on the granting of mortgages in section 3.9 is supposed to apply to section 3.10. I find it amazing that a consensus decision of the Houses will apparently be required for a 25 year mortgage of a parcel of land (as a result of section 3.9), but no such consensus seems to be required for a 999 year lease of land (under section 3.10). Once again, I do not think that there has been very lengthy consideration of the division of authority in respect of land transactions.

Section 3.11 imposes a requirement for consent to expropriation of land. This makes no sense. If the GW become the owners of the land in fee simple, a requirement for their consent to expropriation vitiates the whole notion of expropriation, which by definition involves the taking of land without consent. I have difficulty even with the requirement for consultation with the Houses. I am not sure that the federal Crown could accomplish consultation with all of the Houses with any hope of efficiency. Surely the only requirement should be to consult with the House which has title to the land. That House can in turn consult with whomever it wants, if it decides to consult anyone else at all. Even at this, I am not sure exactly what "consultation" entails. Perhaps the provision should dictate only that the federal Crown must notify the House of its intent to expropriate and provide for the opportunity to make presentations in respect of the contemplated expropriation. Exceptions to this procedure should exist in this case of emergency. I would not be surprised if these suggested changes are not welcomed by the GW negotiators, but the current provision is unacceptable as it negates an expropriation power and imposes what may be an impossibly cumbersome procedure.

As you are aware, I have in the past provided copies of my comments on land matters to Wendy Gordon of the Lands Directorate for her information. As Wendy has now taken a position elsewhere in the Department, I am providing a copy of these comments to Paul Salembier who also works on

Comments Remarques

policy matters in the Lands directorate. I am also providing a copy of these comments to Joanne Gagnon of your Policy Directorate.

I have briefly reviewed the rest of the sub-agreements forwarded in your letter of June 20, 1990 and have a number of difficulties with the contents of these sub-agreements. If you wish, I can provide detailed written comments on these matters. However, I propose to await the receipt of the draft sub-agreements on structures and procedures in government referred to in your letter of June 20, 1990. I trust these comments will be of assistance.

Andrew Beynon
Counsel

c.c. - P. Salembier
- J. Gagnon

Attach.

/AB

3.6 The X shall have the authority to make laws regarding:

(a) land use and planning on GW Lands;
(b) access to GW Lands;
(c) disposition of interests less than the fee simple in GW Lands; and
(d) disposition of the fee simple in GW Lands with the consensus of all Houses.

3.7 In accordance with laws made pursuant to section 3.6, the X shall have the authority to grant interests in GW Lands including the following:

(a) leases;
(b) licences;
(c) permits;
(d) easements;
(e) rights of way; and
(f) grants of fee simple

3.8 In accordance with laws made pursuant to section 3.6, the X shall have the authority to grant security, including a mortgage, in GW Lands with the consensus of all Houses.

3.9 The X may delegate the functions in sections 3.7 and 3.8 to a Y in accordance with the provisions of the sub-agreement on structures and procedures of government respecting Y's.

3.10 The X shall maintain a registry of GW Lands.

3.11 Her Majesty the Queen in Right of Canada retains the power to expropriate GW Lands. Except in the case of emergency, Her majesty the Queen in Right of Canada shall give Z week's notice of intent to expropriate any portion of GW Lands by registered mail addressed to the X and shall allow Z* weeks for the X to provide written comments on the expropriation.

3.6 The X shall have the authority to make laws regarding:

(a) land use and planning on GW Lands;
(b) access to GW Lands;
(c) disposition of interests less than the fee simple in GW Lands; and
(d) disposition of the fee simple in GW Lands with the consensus of all Houses.

3.7 In accordance with laws made pursuant to section 3.6, the X shall have authority to grant interests in the GW Lands, including grants of the fee simple interest in GW Lands.

3.8 In accordance with laws made pursuant to section 3.6, the X shall have the authority to grant security, including a mortgage, in GW Lands

3.9 The X may delegate the functions in sections 3.7 and 3.8 to a Y as contemplated under the sub-agreement on structures and procedures of government.

3.10 The X shall maintain a registry of GW Lands.

3.11 Her Majesty the Queen retains the power to expropriate any portion of the GW Lands.

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July 9, 1990

MEMORANDUM/NOTE DE SERVICE

TO/À: R. Depew, Negotiator, Self-Government Directorate

FROM/DE: Andrew Beynon, Legal Services DIAND

SUBJECT/OBJET: **Gitksan and Wet'suwet'en Self Government Proposal**

Comments/Remarques

You have asked for comments on the third draft of the proposed sub-agreement on structures and procedures of government in respect of the above self-government proposal. As far as I can determine the bodies provided for under this sub-agreement can be listed as follows:

the "House";
the "Feast";
the "closely related Houses"; and
the "agencies,etc. for administration, external relations"

The "House" is supposed to be "the sole governing institution" according to clause 6.1(a) of the sub-agreement. I have great difficulty understanding when the other bodies can interfere in the decisions of a single "House". Is the "House" able to legislate free from any requirement for approval or validation by the "Feast"? Under clause 6.1(f), the "Feast" seems to be confined to consideration of political rather than legislative decisions. I do not know what political decisions are. I would have thought that the selection of a political leader would be a political decision. Yet it is not clear whether leadership selection is effective when consensus is reached within a "House" as set forth in section 6.3 or only after validation by a "Feast" under section 6.1(f). The limitation to consideration of political decisions in section 6.1(f) seems to be contradicted by section 6.5(c) which seems to suggest a role in validating all decisions. To add to the confusion, section 6.5(c) describes a "Feast Hall" which might be something different from the "Feast" in section 6.1(f).

If the "Feast" serves no function beyond ceremony, it would perhaps be wise not to even refer to the matter in the sub-agreement.

Comments/Remarques

Even if some effort is made to sort out the responsibilities of individual "Houses" relative to other bodies in the draft sub-agreement, I have difficulty understanding the law making authority of a single "House". The "House" is said to be a governing institution of Gitksan and Wet'suwet'en society. At the same time, it is the sole legislative entity for its lands. I presume that its law making authority should extend only to its lands and to its members, but this is not clear. There appears to be a role for the "Feast" and for neighbouring or closely related "Houses" in some cases. It would be useful if the sub-agreement could set out in clear terms the matters for which a single "House" has exclusive authority.

In the definition of a "House", there is reference to a land holding unit "recognized as legally extant within the meaning of Gitksan and Wet'suwet'en law". It is not appropriate to provide for the recognition of bodies through self government legislation. Thus it is not appropriate to describe bodies claimed to be extant under Gitksan and Wet'suwet'en law.

In the draft sub-agreement, there is frequent reference to a requirement for consensus. It is still not clear to me what are the mechanics for achieving consensus. In section 6.1(f) which describes the "Feast", it is said that public witness is defined as consensual agreement. Unfortunately, because consensual agreement is not clearly defined, one is left without a clear understanding of either consensus or public witness.

Section 6.6 sets out in cursory fashion an appeal mechanism in respect of all decisions of a "House". I wonder first of all whether or not it is appropriate to provide for an appeal in respect of all decisions. Surely some matters are so minor that the appeal bodies would have little interest in considering their review. It is not clear what happens upon an appeal. Is the decision effective until overturned on appeal or is the decision suspended pending the outcome of the appeal?

Section 6.7 sets forth a power to create agencies and other bodies for administration. It seems to me that this power would be implied, even if not stated on explicit terms. However, there does not seem to be any problem with setting forth this matter in explicit terms. Section 6.7 also provides for the possibility that an agency could be created for the purpose of external relations. On a number of previous occasions, I have seen the suggestion made that there should be a central body established in order to allow the federal Crown (and others) the ability to deal with day to day concerns efficiently. Under the current wording of section 6.7, we will be lucky to have such administrative convenience if a decision happens to be made to create such a central authority. There is no requirement to do so. I presume that all Houses would have to agree before a central body could be established under the wording of section 6.7. Rather than risk the delays this would entail, why not provide for the requirement to establish a central agency directly in the sub-agreement? This would have advantages in the drafting of other sub-agreements.

Comments/Remarques

I will avoid commenting on typographical errors and internal inconsistencies at the moment as it seems to me that a number of major revisions will still be required to this draft sub-agreement.

Andrew Beynon,
Counsel

c.c. M. Freeman

Department of Justice Canada | Ministère de la Justice Canada

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July 23, 1990

MEMORANDUM/NOTE DE SERVICE

TO/À: R. Depew, Negotiator, R. Vergara, Senior Advisor
Self-Government Development Directorate

FROM/DE: Andrew Beynon, Legal Services, DIAND

SUBJECT/OBJET: **Gitksan and Wet'suwet'en Self Government Proposal**

Comments/Remarques

On Friday July 20, 1990 I met with Mark Duiven and Rhoda Vergara to consider revisions which Mark had made to the draft sub-agreement on lands as well as the draft sub-agreement on structures and procedures of government. A few questions arose for my consideration which I have noted on file. I would prefer not to comment on these matters until I am called upon to review the next complete drafts of these sub-agreements. As you know, I will be away from the office on vacation between July 23, 1990 and August 10, 1990. I expect to be able to provide comments upon any new material Mark may prepare shortly after my return and in time for your planned visit to the Office of Hereditary Chiefs in mid-August.

Mark suggested during our meeting that he would revise the two draft sub-agreements and then leave it to the lawyers to debate the intricacies of wording needed to complete the documents. This would allow Mark to consider drafting other sub-agreements. This is a procedural matter, but I am concerned about the possibility that this may be an attempt to avoid dealing with the difficult issues and instead spend time on what may be less controversial matters. We are not at the stage of considering minor tinkering over legal technicalities in respect of these two sub-agreements. I would recommend that you take the position that these two sub-agreements should be studied further before any new matters are considered. You may recall that I suggested some time ago that structures and procedures of government should be considered first in this case because it is not really possible to complete the drafting of other sub-agreements without an understanding of the basic structure of government which is proposed. I believe that this comment still holds true at this time.

I apologize for what may frequently seem negative comments on the drafting efforts made to date. However, as discussed with Rhoda after our meeting, I am hoping to avoid the risk of negotiating for two or three years only to be stuck on the fundamental issues we are grappling with at the present time. During my absence, please direct any enquiries you may have regarding this file to the attention of Michael Hudson of our office.

Andrew Beynon,
Counsel

c.c. M. Hudson
c.c. M. Freeman

Department of Justice Canada | Ministère de la Justice Canada

C8378 10 2107

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August 16, 1990

MEMORANDUM/NOTE DE SERVICE

TO/À: R. Depew, Negotiator, Community Negotiations & Implementation Branch, Self-Government Sector.

FROM/DE: Andrew Beynon, Legal Services, DIAND.

SUBJECT/OBJET: **Gitksan and Wet'suwet'en Self-Government Negotiations - Draft Sub-Agreements**

Comments/Remarques

You have provided me with a copy of new draft sub-agreements recently received from the Office of Hereditary Chiefs in British Columbia. As discussed with you, I will be away from the office at a conference between August 15-18, 1990 and I am only able to provide you with preliminary comments on the materials at this point in time.

Paragraph 2.2 of the sub-agreement on "Membership" is difficult to understand. Perhaps this section could be simplified by enumerating the various categories of persons who qualify for membership. Thus, one would have paragraph 2.2 with a series of sub-headings, a,b,c,d and so on.

We have on a few occasions reviewed difficulties with the draft sub-agreement on "Lands and Land Management" and particularly the split between the legislative authority of an individual House in respect of its own lands and the authority which may exist in respect of the wider area of Gitksan and Wet'suwet'en lands. This issue does not appear to be entirely resolved given the wording of paragraph 4.1 of the draft sub-agreement on "Renewable Resources". In this section, it is specified that a single House has legislative authority over the collective parcel of land known as "Gitksan and Wet'suwet'en lands". Again, I do not think that this is the true intention.

Paragraph 3.7 of the draft sub-agreement on "Lands and Land Management" describing a registry system is somewhat improved but I still have great difficulty understanding the function of the land registry system. According to paragraph 3.7(a), it is to have some "legal" purpose but these internal and external legal purposes are not described. I am also not sure whether the intention is to avoid entirely the Indian Land Registry and the B.C. Land Titles System. If so, this would have major financial consequences.

Paragraph 3.8 of the draft sub-agreement on "Lands and Land Management" is unacceptable. As you are aware, I have frequently commented on the inconsistency between expropriation and a requirement of consent. It strikes

me as well that the requirement for 109 weeks of notice is inappropriate. I also do not understand paragraph 3.8(f) in which there is some notion of infringement of aboriginal rights.

A major concern is the draft sub-agreement #5 with respect to "Non-Renewable Resources". This draft sub-agreement contains a curious sentence which states as follows:

> "Neither federal nor provincial laws will apply to Gitksan and Wet'suwet'en people nor on Gitksan and Wet'suwet'en lands without consent."

This is so broad as to dictate, for instance, that the Criminal Code will not apply to Gitksan and Wet'suwet'en people. Not only is this a problem but I do not know what the term "Gitksan and Wet'suwet'en people" means given that this phrase is not used in the draft sub-agreement #2 on "Membership".

Many of my previous criticisms of the draft sub-agreement #6 on "Structures and Procedures of Government" remain outstanding. In particular, I would refer to the definition of a House as an extant socio-political unit. The wording of this draft sub-agreement needs to be reviewed. For instance, there is now some additional detail in paragraph 6.1(g) of the function of a Feast but the practical day-to-day operations of government are still not clear. For instance, it is specified that for certain matters consensual assent from the Feast must be obtained before a mandate for action is valid. One is left to question what is a "mandate for action". One wonders, for instance, whether this term would encompass decisions of a House to pass a law, make financial expenditures, make membership decisions or make administrative decisions.

The wording of paragraph 6.2(a) is inappropriate. This statement in self-government legislation would provide no information whatsoever to the reader. Paragraph 6.2(c) describes a procedure for removal of political leaders. Paragraph 6.3(a) describes accountability of leaders. It is not clear to me whether leaders are accountable by removal from office or in some other manner.

Paragraph 6.5(b) is intended to describe a certain flexibility with regards to appeals. Unfortunately, this clause can be summarized as stating that appeal procedures will vary depending on the nature of the issue at stake. Given that appeals will be launched by persons who are dissatisfied with governmental decisions, it would seem necessary in the interest of those affected to provide for some greater degree of precision as is provided in paragraph 6.5(b) of the draft sub-agreement. Perhaps it would be useful to determine the variety of bodies to which an appeal may lie and then list the types of cases for which an appeal will lie to each body. By following this procedure, I would hope that a fairly simple appeal procedure would emerge. Presumably, the highest appelate bodies will only consider a narrow range of

Comments ..marques

issues. The vast majority of issues should probably only be appealed to one or two bodies.

I trust these preliminary comments will be of assistance. As discussed with you, when you provided me with the latest draft sub-agreements, I am concerned with the statement in the agenda for the proposed meeting set for August 19-24, 1990 that the meeting will serve the purpose of finalizing the "seven or so self-government draft sub-agreements". In my view, matters are far from final resolution. As I have suggested before, I would recommend that the focus remain on the basics to be set forth in the sub-agreement on "Structures and Procedures of Government". Without greater precision on this issue, it seems to me that further progress will not be possible.

I trust these comments will be of assistance. You might perhaps recall that I will be in touch with my office for messages during my absence at the Conference. If you have any questions or concerns regarding the above which you would like to discuss before Friday, August 17, 1990, please leave a message with my secretary, Mary Beekman, who can be reached at 994-1219.

Mary Beekman

for Andrew Beynon
Counsel

AB/mb

E 8895-16-2131

Department of Justice Canada / Ministère de la Justice Canada

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November 19, 1990

MEMORANDUM/NOTE DE SERVICE

TO/À: R. Depew, Negotiator,
Community Negotiations & Implementation Branch.

FROM/DE: Andrew Beynon,
Legal Services, DIAND.

SUBJECT/OBJET: **Gitksan and Wet'suwet'en Self-Government**

Comments/Remarques

Thank you for your letter of November 9, 1990 regarding the above matter in which you enclosed a draft sub-agreement on structures and procedures of government. I would like to offer the following comments on the latest draft.

It seems to me that clauses 6.1 and 6.4 serve essentially the same function. Each identifies the nature and role of a House. Presumably, it would be appropriate to combine these two in an expanded version of clause 6.1 so that there is one place to find the definition of a House. Clause 6.4 describes the legislative function of a House, something which I can well understand. It may be because I do not have enough knowledge of political science but I am not sure what is added by specifying that it is also an "executive institution".

In clause 6.2, there is a description of the Feast and its functions. I would recommend removal of the term "validation of Gitksan and Wet'suwet'en government law". First of all, the function of validation suggests to the outside observer that a House's decision is not effective until validated by the Feast. In our discussions with representatives of the Gitksan and Wet'suwet'en in Smithers, B.C., I understood that a House decision does not need to be validated, approved or affirmed before it is effective. The other reason for recommending deletion of this portion of clause 6.2 is because it seems to me that "Gitksan and Wet'suwet'en government law" might be something different from the laws passed by a House under clause 6.4. These same comments have application to the phrase "assent to the conformity of House decisions". Once again, this suggests that a House decision is not valid, approved or in effect until assented to by the Feast.

In clause 6.3, it is specified that the Gitksan and Wet'suwet'en Administrative Agency will be established by Houses. Perhaps it would be more appropriate to specify that this Administrative Agency will be established under the Act and operate under the authority of the Houses.

Comments/Remarques

In clause 6.3(b), it is specified that the Administrative Agency will provide "access to procedures for appeals by non-members". I have a number of comments on appeals by non-members which are set forth below in my discussion of clause 6.8.

Lastly, in clause 6.3(g), it is specified that the Administrative Agency will have other "capacities" or "functions" assigned by the Houses. Whilst it is useful to have the range of matters to be dealt with by the Administrative Agency open-ended, I would recommend removal of the term "capacities" and the insertion of a note to indicate that we wish to have details of the range of other functions which might be assigned to the Houses. For instance, I imagine that the Administrative Agency is not to have any law-making function.

In clause 6.4, it is said in part that the House is the sole legislative authority in respect of "its lands" and elsewhere in respect of "Gitksan and Wet'suwet'en lands". As repeated on many occasions, there must be a clear indication of the function of Houses as law-making authorities with respect to their particular portion of the lands in issue or with respect to the entire "Gitksan and Wet'suwet'en lands".

In clause 6.4(b), there is an enumeration of law-making powers. In part, there is a reference to "Indian monies". I am not sure what is the difference between a law-making power with regards to "financial administration" and a law-making power with regards to "Indian monies". I have some concerns regarding the law-making power over culture. This is an area which can very easily infringe upon the Charter protection of freedom of religion. If there are particular aspects of culture for which legislation is desired, some reference should be made to these aspects of culture. For instance, a law-making power with regards to conservation and archaeological management might be appropriate. I note the broad reference to a law-making power with regards to education. I presume this has been reviewed by Gary Schaan of the Policy Directorate. I am not quite sure what views have been expressed on a broad law-making power with regards to education, which would presumably include even post-secondary education.

As regards clause 6.5, it is stated that the clause is inserted for clarification. Unfortunately, it is typical of such clauses as it leads to less clarity. For instance, in clause 6.5(a), it is suggested that decisions by a House are arrived at through consensus of all House members. I am left to wonder whether the intention is to specify that the House can only pass a law if consensus of all House members is achieved or if the intent is to specify that other types of decisions are made when consensus is achieved. Just to emphasize the point, this phrase would suggest that there is nothing which a House can do through a committee or elder members or its leaders.

As you are aware, I have on many occasions criticized the clause in which it is specified that consensus must be obtained from Houses affected by the decision of one particular House. There is no identification of who is to

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decide whether a decision of a particular House has an effect on neighbouring Houses. I would suggest that this portion of the draft should be re-thought. Perhaps it should be specified that where one House has a complaint about another House's activities, that House is entitled to trigger a Feast which will then review and decide the matter. However, I am speculating on this point. In any event, it seems to me inappropriate to specify that consensus must be obtained from Houses affected where the decision of one House affects the "legislative authority" of another. If one refers to the delineation of legislative authority in paragraph 6.4(b), I cannot see how one House's decision would in any way limit or modify the law-making powers of another House.

I would recommend dropping clause 6.5(c) as suggested above. The suggestion that there is a requirement for "assent to conformity" appears to suggest that House decisions are not effective until approved or authorized or validated (or assented to) by the Feast.

drafting

Clauses 6.6(a) and 6.6(b) deal with the selection and removal of leaders respectively. I notice a slight difference in wording between the two clauses, as clause (a) specifies that selection "follows" custom, whilst removal "requires conformity to" custom. I am not sure if there is any distinction intended by this slight difference.

Clause 6.6(c), once again, suggests a need for assent to make effective a decision by a House. I am not sure what clause 6.6(c) is intended to add to the appeal procedures set forth in clause 6.8. If there is some special mechanism or appeal procedure to be followed in respect of leadership selection or removal, the procedure should be specified. Perhaps the intention under clause 6.6(c) is to specify that appeal procedures in respect of selection and removal follow custom.

Clause 6.7 describes "Political and Financial Accountability", but does not specify the nature of the accountability. In other words, one is left to wonder what leaders are supposed to do (or required to do) because of their accountability. I note that you have indicated the need for additional detail on the question of accountability. In order to get useful comments, I would suggest that you point out the difficulty which an individual member of the community or an outsider might have in understanding exactly what a leader is supposed to do or can be compelled to do to be accountable.

Clause 6.8 describes appellate procedures. It is specified that "decisions" made by a House may be appealed. As you are aware, I have in the past questioned the notion that each and every decision of a House seems to be open to the potential for appeal. If some effort is made to determine the range of decision-making activities in which a House may engage, it may then be possible to specify with greater accuracy the nature of appeal procedures. This reverts to my earlier comments about the function of a House as a law-making body and an "executive institution". I am not sure if the intent is to specify that persons can appeal in order to challenge the

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validity of laws passed by an individual House or if their ability to appeal extends to other forms of decision. If so, perhaps the appeal procedure should be different, depending on the nature of the matter in issue.

In clause 6.8(b), it is specified that appeals by non-members lie with the Feast. This strikes me as somewhat curious as it would suggest that virtually any person or corporation in Canada could choose to launch an appeal of a House decision. I am not sure but perhaps the intention is to specify that non-members who are resident on a House's lands have a right of appeal.

Lastly, it may be useful to specify the affect of an appeal. In some cases, it may be useful to stay the House decision pending the outcome of an appeal, whilst in others it may be appropriate to specify that the decision remains effective until the appeal is successful.

I trust these comments will be of assistance but would be pleased to discuss any of these issues in greater detail should you so require.

Andrew Beynon
Counsel

c.c. - M. LaForest

AB/mb

R. Depew

Department of Justice Canada | Ministère de la Justice Canada

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March 13, 1991

MEMORANDUM/NOTE DE SERVICE

TO/À: G. Da Pont, A/Director General, Community Negotiations & Implementation Branch; and L. Jamieson, Director, Policy Directorate

FROM/DE: Andrew Beynon, Legal Services, DIAND.

SUBJECT/OBJET: **Delgam Uukw v. The Queen**

Comments/Remarques

Please find enclosed for your information a copy of my briefing note of March 11, 1991 addressed to the Deputy Minister of Indian Affairs and Northern Development in the above case. I was able to provide Bob Depew with a copy of the judgment prior to his recent departure for the west coast. There are some references in the judgment to self-government which I have not drawn to the attention of the Deputy Minister, but which you may find to be of interest.

The Court rejects the Plaintiffs' claim that they have or had rights of self-government. In discussing the Plaintiffs' claim to ownership and jurisdiction, the Court reviews the claim that the Plaintiffs had "governed themselves according to their laws" and comments:

> "I have no difficulty finding that the Gitksan and Wet'suwet'en people developed tribal customs and practices relating to chiefs, clans and marriage and things like that, but I am not persuaded their ancestors practised universal or even uniform customs relating to land outside the villages. They may well have developed a priority system for their principal fishing sites at village locations." (page 213)

There follows a review of submissions that the Plaintiffs have an aboriginal right of self-government (pages 218, 219). This was rejected by the Chief Justice who held that:

> "Mr. Grant (Plaintiffs' counsel) was obviously describing a new theory of government -- a rationalization -- unrelated in any way to aboriginal practices. I have never heard of it before, and it is certainly not mentioned in any authorities binding upon this Court." (page 219)

Comments/Remarques

In Part 22, the Chief Justice appears to criticize the current Indian Act and suggest that there should be negotiations involving both levels of government and the Indians outside the context of land claims. It is also stated that:

> "This, however, should not be considered an endorsement for "self government" because details are required before any informed opinion can be given. Too often, catchy phrases gain quick recognition, momentum and even acceptance without a proper understanding of the real meaning and consequences of these sometimes superficial concepts. Also, different arrangements might be appropriate for different areas and the desired result may sometimes best be attained in stages." (page 300)

I trust that the above comments will be of assistance and I would be pleased to answer any specific questions you may have regarding the implications of the judgment for self-government negotiations. It should be recognized that the judgment will likely be appealed, although no formal announcement has yet been made to our knowledge.

Andrew Beynon
Counsel

c.c. - G. Schaan
- R. Depew

AB/mb

Department of Justice Canada | Ministère de la Justice Canada

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March 11, 1991

MEMORANDUM NOTE DE SERVICE

TO À: Deputy Minister of Indian Affairs and Northern Development (via Denis de Keruzec, A/Senior General Counsel)

FROM/DE: Andrew Beynon, Legal Services, DIAND.

SUBJECT/OBJET: Delgam Uukw v.The Queen

Comments Remarques

On March 8, 1991, Chief Justice MacEachern of the Supreme Court of British Columbia rendered his judgment in Delgam Uukw and rejected the claim of the Gitksan-Wet'suwet'en traditional chiefs to ownership and jurisdiction over a 22,000 square mile territory in British Columbia. The lengthy decision is divided into 22 parts, with several schedules and detailed maps. In this memorandum, we have briefly summarized salient points from the decision.

Background

The Plaintiffs' claimed that they were successors to the hereditary chiefs of the Gitksan and Wet'suwet'en people. They sought a declaration of ownership and jurisdiction over territory traditionally used and occupied by them, but did not seek to overturn the interests of third parties in the territory which arose prior to launching the claim in 1984. Instead, they claimed damages as compensation for wrongful alienation of portions of the territory.

The action was commenced against the Queen in right of British Columbia. The Province responded that the Plaintiffs never had the rights claimed over the territory, or alternatively pre-Confederation legislation and administrative action to open British Columbia to settlement extinguished such rights. In addition, British Columbia joined Canada as a party and filed a counterclaim seeking a declaration that any remedy awarded to the Plaintiffs lay against the federal Crown.

The federal government argued that the Plaintiffs' aboriginal rights did not apply to all of the territory, and did not include ownership or jurisdiction over the claimed lands. We were prepared to admit that the Plaintiffs had some aboriginal rights over portions of the territory, but that such rights are based upon traditional use and occupation of the lands (i.e. occupation of traditional village sites and traditional hunting, fishing, and gathering activities).

Comments Remarques

Decision

The Court's judgment (Part 21, page 297) can be summarized as follows:

(a) the Plaintiffs' claim to ownership and jurisdiction over the territory, or alternatively for aboriginal rights in the territory, was rejected;

(b) the Plaintiffs have a continuing legal right to use unoccupied or vacant Crown land in the territory for aboriginal sustenance purposes, subject to the general law of the province;

(c) the claim for damages for past losses of resource revenues from the territory was dismissed.

The Plaintiffs did not specifically seek a remedy against the federal Crown, though during the trial they alleged that their rights were paramount to the laws of Canada. The Court dismissed any claim against Canada (page 43) and the counterclaim by the province (page 295). Chief Justice MacEachern also commented on government policy towards Indians (Part 22).

(1) Findings of Fact

The first parts of the judgment are devoted to summarizing the nature of the claim and to reviewing the evidence presented at trial, including historical evidence, about the use of lands by the Plaintiffs' ancestors and the actions of the Crown and its agents.

Based on the evidence, the Chief Justice concludes that the ancestors of "a reasonable number" of the Plaintiffs were present in parts of the territory for a "long, long time" prior to the assertion of British sovereignty (page 75). The exact date of the assertion of British sovereignty is not defined precisely, but it is stated (page 101) that the relevant time period could be as early as the 1820's or as late as 1858 (when the colony of British Columbia was created).

The Court finds that the ancestors of the Plaintiffs were an organized society, though the Chief Justice comments that their social structure were less cohesive than suggested at trial. In particular, he questions whether there were any political structures beyond distinct villages (page 226), or that the ancestors customs could be described as a true legal system (page 219). He also concludes that there is no reason to believe that the ancestors could exclude other aboriginal groups from their traditional territory (page 227).

As discussed below, however, the Court concludes that the Plaintiffs established the existence of aboriginal rights over portions of the territory at the time of contact. The Chief Justice decided that use of the entire territory by the Indians only occurred with the arrival of the fur trade in the early 1800's

Comments Remarques

which caused the Plaintiffs' ancestors to hunt over a much larger area than previously.

The Court also deals with the effect of colonization of the Province and considers whether the exercise of aboriginal rights could be said to have been abandoned (Part 18). The Court concludes that the principle could exist in law, but that the evidence of abandonment was sufficiently uncertain that he should not reach a conclusion on the matter (page 292).

(2) Claim to Jurisdiction and Ownership

The Court clearly states that the assertion of sovereignty by the British Crown extinguished any jurisdiction or ownership which the Plaintiff's ancestors might have had. At page 81, the Court states,

> "...it is part of the law of nations, which has become part of the common law, that discovery and occupation of the lands of this continent by European nations, or occupation and settlement, gave rise to a right of sovereignty...Aboriginal persons and commentators often mention the fact that the Indians of this province were never conquered by force of arms, nor have they entered into treaties with the Crown. Unfair as it may seem to Indians or others on philosophical grounds, these are not relevant considerations. The events of the last 200 years are far more significant than any military conquest or treaties would have been. The reality of Crown ownership of the soil of all the lands of the province is not open to question and actual dominion for such a long period is far more pervasive than the outcome of a battle or a war could ever be. The law recognizes Crown ownership of the territory in a federal state now known as Canada pursuant to its Constitution and laws." (Similar comments at pages 223-225)

(3) Test for Aboriginal Rights

The Court rejects the Plaintiffs' contention that the Royal Proclamation of 1763 applied in British Columbia (pages 84-98). Based on his review of the text of the Proclamation and the historical record, Chief Justice MacEachern concludes that the Proclamation never applied north and west of the head of the Mississippi River (page 96), and was never intended to apply prospectively to new areas of North America discovered over time (page 97). The Chief Justice also comments that the Royal Proclamation had a limited and specific purpose for its time involving particular issues arising out of settlement of eastern Canada. Nevertheless, the Court went on to find the existence of aboriginal rights in British Columbia does not depend on the application of the Proclamation, but instead the rights arose by operation of the common law (page 98).

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Turning to the common law basis for aboriginal rights, the Chief Justice sets four criteria found in the Baker Lake case for proof of aboriginal rights i.e. the plaintiffs and their ancestors were members of an organized society which occupied the claimed territory to the exclusion of other organized societies when sovereignty was asserted by the Crown (pages 225-226). However, the Court adopts a "modified" Baker Lake test by commenting, at page 226

> "I cannot accept that two aboriginal peoples who both used land for sustenance would not each have aboriginal rights to continue doing so although they would not be exclusive rights."

The Chief Justice also adds that the aboriginal activity, in order to amount to an aboriginal right, must have been carried on in a specific territory for a "long, long time". This time period is not defined, but it appears that the activity must have been carried out for some time prior to contact with the Europeans in order to qualify as an aboriginal right.

Applying the above test, the Court concludes that the Plaintiffs' ancestors had "non-exclusive aboriginal sustenance rights" in portions of the claimed territory at the time of the assertion of British sovereignty (page 231). Beginning at page 274 and continuing until page 279, there is an analysis of the territorial extent and nature of aboriginal rights, resulting in the conclusion that the Plaintiffs' aboriginal rights extended only to a portion of the territory claimed (excluding much of the northern and southern areas - see map 5, page 281).

(4) Extinguishment of Aboriginal Rights

The Chief Justice finds that the Crown must demonstrate a clear and plain intention to extinguish aboriginal rights to argue successfully that they were extinguished. He proceeds to detail his interpretation of the "clear and plain test" at page 239:

> "...express statutory language is not a requirement for extinguishment....The unanimous decision of all the judges in Sparrow so long after these historical events to regard intention at a time of uncertain law and understanding as the governing factor in extinguishment persuades me that intention in this context must relate not to a specific, isolated intention on the part of historical actors, but rather to the consequences they intended. In other words, the question is not did the Crown through its officers specifically intend to extinguish aboriginal rights apart from their general intention, but rather did they plainly and clearly demonstrate an intention to create a legal regime from which it is necessary to infer that aboriginal interests were in fact extinguished."

The Court also states, at page 241:

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> "..an intention to extinguish aboriginal rights can be clear and plain without being stated in express statutory langauge or even without mentioning aboriginal rights if such a clear and plain intention can be identified by necessary implication. An obvious example would be the grant of a fee simple interest in land to a third party, or a grant of a lease, license, permit or other tenure inconsistent with continued aboriginal use."

In applying the test to the facts, the Court concludes, at pages 244-245,

> "....the Crown clearly and plainly intended to, and did, extinguish aboriginal rights in the colony by the arrangements it made for the development of the colony including provision for conveying titles and tenures unencumbered by any aboriginal rights and by the other arrangements it made for the Indians."

Extinguishment was effected through the general actions taken by the colonial authorities to open the Province for settlement, and did not have to await the actual grant of particular interests in land to third parties for purposes inconsistent with the continued exercise of aboriginal rights (page 245). The decision refers to thirteen specific pre-Confederation laws and ordinances dealing with land in the colony as the "Calder XIII".

Elsewhere in the judgment, the Court states that the Baker Lake case stands for the proposition that aboriginal rights and settlement can co-exist (page 199). The Court appears to state that, as a matter of law, aboriginal rights and settlement can co-exist, but that the factual situation in British Columbia shows that settlement was intended to take priority over and extinguish aboriginal rights. Notably, the Court states (page 245) that the findings on the effect of colonial actions to foster settlement apply only to aboriginal rights over land, since the Court was not asked to pronounce in any way on fishing rights.

(5) Existence of "Aboriginal Interests"

After finding that aboriginal rights to land were extinguished, the Court holds that the Plaintiffs have interests over unoccupied or vacant Crown lands in British Columbia. These interests are based on the measures taken prior to Confederation to protect the Indians whilst at the same time encouraging settlement and development.

The Court concludes on its review of history that the intent of the Colonial authorities was to permit settlement, but also to allot generous reserves and to allow the Indians to use vacant Crown lands. This policy is attributed primarily to Governor Douglas who, in making the Douglas Treaties, promised that the Indians of Vancouver Island would be allowed to enjoy rights of fishing as they had originally done and that they might freely hunt over all unoccupied Crown lands in the colony of British Columbia (pages 245-246).

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According to the Chief Justice, this promise was made not only through the formal Douglas treaties, but also in statements by Governor Douglas concerning all Indians in the colony. For instance, the Court quotes from a speech by Governor Douglas made in 1860 to Indians assembled at Cayoosh, at page 118

> "I also explained [to the Indians] that the magistrates had instructions to stake out, and reserve for their use and benefit, all their occupied village sites and cultivated fields and as much land in the vicinity of each as they could till, or was required for their support; and that they might freely exercise and enjoy the rights of fishing the lakes and rivers, and of hunting over all unoccupied Crown lands in the colony..."

The Court concludes that the *permitted* use of the fisheries and Crown lands was not limited to specific areas for specific Indian groups nor were any priorities established. Therefore, Indians from one part of the colony could use vacant land in other parts of the colony. Although the discussion of the sustenance interest suggests that it is exercisable on unoccupied Crown lands anywhere in the Province, the order is confined to the lands claimed by the plaintiffs (pages 254-297).

This permission to use Crown lands is not construed by the Court as an amended aboriginal right (page 246), since aboriginal rights do not depend upon the Crown for their creation and the permission to use vacant land was extended to both Indians and non-Indians (page 246). Furthermore, the lack of an identified or specific land base for the exercise of such sustenance interests is inconsistent with the exercise of aboriginal rights which are derived from historical use and occupation of a particular site (page 246).

Since the permission to use unoccupied Crown lands for sustenance purposes is not an aboriginal right, the Court concludes that section 35 of the Constitution Act, 1982 does not apply because it only recognizes and affirms aboriginal rights (page 247). Nevertheless, the Chief Justice also notes that "this kind of permission may more closely be related to the arrangements included in the Douglas treaties" (page 246).

(6) Fiduciary Obligation on Crown

The Court finds that the Crown bears a fiduciary obligation to the Indians of British Columbia (at page 248):

> "Keeping in mind the general obligation of the Crown towards Indians, and that "the categories of fiduciary, like those of negligence should not be considered closed," (Guerin, p. 384), it is my view that a unilateral extinguishment of a legal right,

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> accompanied by a promise, can hardly be less effective than a surrender as a basis of a fiduciary obligation."

It should be noted that this is the first time that a Canadian court has implied that the unilateral extinguishment of aboriginal rights can create an obligation akin to the duties on the Crown associated with the surrender of reserve lands. The Court qualifies its statement somewhat by stating that the obligation arises in this case since the extinguishment was accompanied by a promise.

In terms of the nature of the obligation, the Court states, at page 248:

> "The Crown's obligation...is to permit aboriginal people, but subject to the general law of the province, to use any occupied or vacant Crown land for subsistence purposes until such time as the land is dedicated to another purpose. The Crown would breach its fiduciary duty if it sought arbitrarily to limit aboriginal use of Crown land.
>
> As aboriginal rights were capable of modernization, so should the obligations and benefits of this duty be flexible to meet changing conditions. Land that is conveyed away, but later returned to the Crown, becomes again usable by Indians. Crown lands that are leased or licences, such as for clearcut logging to use an extreme example, become usable again after logging operations are completed or abandoned."

The Court then sets out a test for the application of this obligation (pages 252-3). The Court avoids establishing a detailed process for Indians and governments to follow, but it states certain propositions for the assistance of the parties. These points will have particular importance to the province of British Columbia as the principle owner of Crown lands in the province.

The Court states, at pages 252-3,

> "First, the federal and provincial Crown, each in its own jurisdiction, always keeping the honour of the Crown in mind, must be free to direct the development of the province and the management of its resources and economy in the best interests of both the Indians and the non-Indians.."
>
> "Secondly, the Minister of the province and their officers should always keep the aboriginal interests of the plaintiffs very much in mind in deciding what legislation to recommend to the legislature, and what policies to implement in the territory. There should be reasonable consultation so that the plaintiffs will know the extent to which their use might be terminated or disturbed. A right of consultation does not include a veto, or

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any requirement for consent or agreement, although such is much to be desired."

"Thirdly, the province should make genuine efforts to ensure that aboriginal sustenance from and cultural activities upon unoccupied Crown land are not impaired arbitrarily or unduly. If that should occur from time to time then suitable alternative arrangements should be made."

"Fourthly, whether any proposed or resulting interference offends unduly upon aboriginal activities and brings the honour of the Crown into question will in large measure depend upon the nature of the aboriginal activity sought to be protected and the extent it is ordinarily exercised..."

"Fifthly,...I would expect the province to provide some sustenance priority to Indians in the use of vacant land to the extend permitted by the Charter."

"Sixthly, while I would not purport to define what legal proceedings may be brought to challenge Crown activities authorize by provincial legislation, I am satisfied it would not have been the expectation of the Supreme Court of Canada, if it had dealt with this case, that Crown authorized activities in such a vast and almost empty territory would often give rise to legal proceedings."

There are striking similarities between the fiduciary obligation placed on the Crown as land owner in British Columbia, and the obligations placed on the Crown in the context of aboriginal rights by section 35 Constitution Act, 1982 by Sparrow. On one hand the Court has denied the Indians any aboriginal rights, but on the other hand found that their interests entail a heavy fiduciary obligation on the Crown. In the context of British Columbia, this duty will fall primarily on the provincial Crown.

The Court comments on the need for reconciliation between the interests of the Indians and the uses of Crown land for the benefit of all citizens. As described in the Summary, at page "x",

"Part 15 of this judgment describes the circumstances which the province and the Indians should take into consideration in deciding whether any proposed Crown action may constitute a breach of its fiduciary duty to Indians. Generally speaking, the operative word is "reconciliation" rather than "rights" or "justification".

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(7) Fishing Rights

As noted above, the Court takes pains to underscore that the Plaintiffs did not seek any declaration of their rights to fish within their traditional territory. As a result, the finding of extinguishment of land-related rights does not clearly include fishing rights. In this manner, he distinguishes his decision from the finding of the Supreme Court of Canada in R. v. Sparrow that the Musqueams have an aboriginal right to fish for food.

The Chief Justice also states:

> "I digress from this discussion of aboriginal rights to recognize that Sparrow was written in the context of tidal fishing, while the plaintiffs, particularly the Gitksan, are most anxious to establish what they call a commercial, inland fishery at Gitwangak, and possibly at other Skeena locations." (page 229)

It is unclear whether or not the Chief Justice intends to indicate that the colonial enactments and administrative measures which had the effect of extinguishing aboriginal rights also effected an extinguishment of rights in all non-tidal waters of the Province. Even if there was an intent to extinguish fishing rights in non-tidal waters, it is unclear whether this would encompass waters adjacent to village sites which now for reserves.

In addition, the Chief Justice seeks to distinguish his decision on the fiduciary obligation associated with the aboriginal interests on Crown land from the Sparrow case by suggesting that:

> "...as Sparrow was a case within federal jurisdiction (fishing), it mandates a reconciliation process which can be used as a guide to matters within provincial jurisdiction, but its rigid justification process can hardly be applied strictly to land use within such a huge territory or to an entire province." (page 208)

The Chief Justice offers his observations on the brief reference to commercial rights in the Sparrow case, and concludes that aboriginal rights are sustenance user rights practised for a very long time in a specific territory and do not include commercial activities, even those related to land or water resource gathering (page 229). Any arrangements for commercial harvesting of fish would have to be negotiated with the Crown (page 229).

(8) Obligation of Province in Future Land Claims

As noted above, British Columbia sought a counterclaim that any remedies awarded to the Plaintiffs should be sought against the federal government. The Chief Justice dismissed the counterclaim, primarily based on his finding that

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there were no aboriginal rights to land in this case. At the same time, the Chief Justice made several observations about the political history of provincial-federal relations on British Columbia Indian issues (Part 12).

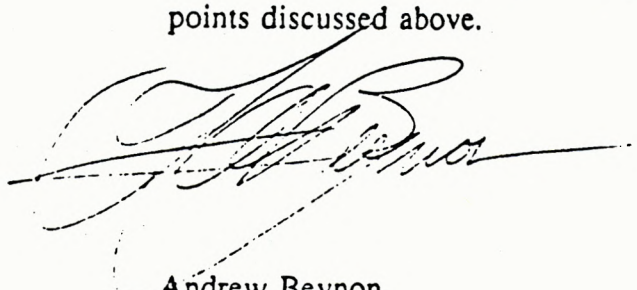
Of particular interest is his discussion of the arrangements between the federal Crown and the Province for settlement of issues associated with lands for the Indians after British Columbia joined Confederation. The Chief Justice reviews in detail the dispute between the two levels of government about Indian claims and the establishment of reserves which led to the creation of the McKenna-McBride Commission. He concludes that Canada eventually considered the dispute with the Province over the establishment of reserves and the settlement of Indian claims to be resolved:

> "After 1927, and probably from P.C. 1265 in 1924, Canada treated all questions as between British Columbia and itself as finally settled. This was demonstrated by the fact that Canada has actually purchased additional lands required for reserves from the province...[The 1927 Report of the Select Committee on Indian Claims] probably represents the position Canada has always taken on the ground, although Canada has not always asserted, and did not argue in this case that all aboriginal interests have ben extinguished...(pages 181-82)

The Chief Justice hastens, however, to note that his interpretation of historical events does not cast doubt on current government policy. At page 182, he comments,

> "I do not find it necessary to discuss various policy statements made by Canada since Calder reflecting a changing Federal attitude to Indian land claims, or indeed the recent statement made by the province in that connection. These are political matters which do not bear upon the resolution of the legal issues which arise in this case."

We would be pleased to provide you with additional information on any of the points discussed above.



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Smithers Registry

DELGAM UUKW

In the Supreme Court of British Columbia

Between:

DELGAMUUKW, also known as
KEN MULDOE, suing on his own behalf
and on behalf of all the members of the
HOUSE OF DELGAMUUKW, and others

Plaintiffs

And:

HER MAJESTY THE QUEEN IN RIGHT
OF THE PROVINCE OF BRITISH
COLUMBIA and THE ATTORNEY
GENERAL OF CANADA

Defendants

Reasons for Judgment of The Honourable Chief Justice Allan McEachern.

Dates of Trial: 374 Days between May 11, 1987 and June 30, 1990

Counsel:

Stuart Rush, Peter Grant, Louise Mandell, Michael Jackson, Murray Adams, Stanley Gunther, Leslie Pinder, Michael Fleming and David Paterson for the Plaintiffs

D.M.M. Goldie, Q.C., C.F. Willms, P.G. Plant, N.J. Prelypchan, J.M. Mackenzie, T.A. Sigurdson, L.A. Fenlon and D.J. O'Byrne for the Attorney General of British Columbia

J.A. Macaulay, Q.C., M. Marvyn Koenigsberg, Loryl D. Russell, Murray T. Wolf and Michael W. Frey for the Attorney General of Canada

Date: Friday, March 8, 1991.

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SUMMARY OF FINDINGS AND CONCLUSIONS

1. The last Great Ice Age, which lasted many thousands of years, covered nearly all of British Columbia. It ended about 10,000 years ago.

2. The origins of the Gitksan and Wet'suwet'en and other aboriginal peoples of the north-west part of the province are unknown. It is generally believed they migrated here from Asia.

3. There is archaeological evidence of human habitation in the territory as long as 3,000 to 6,000 years ago. This is limited to village sites both at the coast at Prince Rupert harbour and at a few locations alongside the Skeena and Bulkley Rivers. The evidence does not establish who those early inhabitants (or visitors) were.

4. The plaintiffs are 35 Gitksan and 13 Wet'suwet'en hereditary chiefs who have brought this action alleging that from time immemorial they and their ancestors have occupied and possessed approximately 22,000 square miles in north-west British Columbia ("the territory"), and that they or the Indian people they represent are entitled, as against the province of British Columbia, to a legal judgment declaring:

(a) that they own the territory;

(b) that they are entitled to govern the territory by aboriginal laws which are paramount to the laws of British Columbia;

(c) alternatively, that they have unspecified aboriginal rights to use the territory;

(d) damages for the loss of all lands and resources transferred to third parties or for resources removed from the territory since the establishment of the colony; and

(e) costs.

5. No relief is claimed by the plaintiffs in this action against Canada which was joined as a defendant for procedural reasons. The action against Canada is dismissed. In this Summary, "Crown" refers to the Crown in right of the Colony or Province of British Columbia except where the context indicates otherwise.

6. The plaintiffs allege the territory is divided into 133 separate territories (98 Gitksan, and 35 Wet'suwet'en), and each of these separate territories is claimed by an hereditary chief for his House or its members. Some chiefs claim several territories, and some chiefs claim territories for other chiefs who are not plaintiffs.

7. Map 1 on p. 6 of the judgment is a generalized map of the province showing the general location of the territory. Map 2 at p. 7 is a reduction of a detailed map of the territory. It shows the approximate external boundary of the territory. The individual

territories claimed by the Gitksan and Wet'suwet'en chiefs are shown on maps 3 and 4, at pp. 8 and 9.

8. Aboriginal interests arise (a) by occupation and use of specific lands for aboriginal purposes by a communal people in an organized society for an indefinite, long period prior to British sovereignty; or (b) under the **Royal Proclamation, 1763.**

9. Aboriginal rights under (a) above arise by operation of law and do not depend upon statue, proclamation or sovereign recognition. Such rights existing at the date of sovereignty exist and continue at the Crown's "pleasure." Unless surrendered or extinguished, aboriginal rights constitute a burden upon the Crown's title to the soil.

10. **The Royal Proclamation, 1763** has never applied to or had any force in the Colony or Province of British Columbia or to the Indians living here.

11. Linguistics, genealogy, history, and other evidence establish that some of the ancestors of some of the plaintiffs or the peoples they represent have been present in the territory for an indefinite, long time before British sovereignty.

12. These early ancestors lived mainly in or near several villages such as Gitanka'at, Gitwangak, Kitsegucla, Kispiox, Ksun, Old Kuldo, New Kuldo, Gitangasx and possibly at Gitenmaax (Hazelton) which are all on the Skeena River; at Kisgegas on the Babine River; and at Hagwilget and Moricetown on the Bulkley River. Each of these villages, six of which are now abandoned, were strategically located at canyons or river junctions where salmon, the mainstay of their diet, could most easily be taken. Further, these early ancestors also used some other parts of the territory surrounding and between their villages and rivers, and further away as circumstances required, for hunting and gathering the products of the lands and waters of the territory for subsistence and ceremonial purposes.

14. Prior to the commencement of the fur trade these early aboriginals took some animals by snares, dead falls and other means, but there was no reason for them to travel far from their villages or rivers for this purpose, or to take more animals than were needed for their aboriginal subsistence.

15. There may have been sparse incursions of European trade goods into the territory overland from the east or south, or from unknown seaborne sources (perhaps from Asia) before the arrival of Capt. Cook at Nootka on Vancouver Island in 1778. That date, however, or more particularly the start of the sea otter hunt on the north Pacific coast which started within the following 5 years, was the likely start of European influences in north-west North America.

16. The fur trade in the territory began not earlier than the establishment of the first Hudson's Bay posts west of the Rockies (but east of the territory), by Simon Fraser in 1805-06, and more probably a few years after that.

17. Trapping for the commercial fur trade was not an aboriginal practice. Apart from commercial trapping, there were no significant changes in aboriginal practices between first contact with European influences within a few years on either side of 1800 and the assertion of British sovereignty. The use of modern implements such as mechanical traps and guns since the time of contact does not change the nature of an aboriginal right.

18. The law of nations and the common law recognize the sovereignty of European nations which established settlements in North America.

19. Great Britain asserted sovereignty in the territory not earlier than 1803, and not later than either the **Oregon Boundary Treaty, 1846,** or the actual establishment of the

Crown Colony of British Columbia in 1858. For the purposes of this case it does not matter precisely when sovereignty was first asserted.

20. The title to the soil of the province became vested in the Imperial Crown (Great Britain) by operation of law at the time of sovereignty. The plaintiffs recognize this title, but argue that their claims constitute an interest which is a burden upon the title of the Crown.

21. The purpose of sovereignty and of creating the Colony of British Columbia in 1858 was to settle the colony with British settlers and to develop it for the benefit of the Crown and its subjects.

22. The aboriginal interests of the post-contact ancestors of the plaintiffs at the date of sovereignty were those exercised by their own more remote ancestors for an uncertain long time. Basically these were rights to live in their villages and to occupy adjacent lands for the purpose of gathering the products of the lands and waters for subsistence and ceremonial purposes.

23. These aboriginal interests did not include ownership of or jurisdiction over the territory. Those claims of the plaintiffs in this action are dismissed.

24. But for the question of extinguishment, the plaintiff's aboriginal sustenance rights would have constituted a legally enforceable, continuing burden upon the title of the Crown.

25. Upon the establishment of the colony, the Crown, both locally and in London, enacted a number of laws providing: (a) that all the lands of the colony belonged to the Crown (which would be the Imperial Crown at that time); (b) that the laws of England applied in the Colony; (c) giving the Governor and later a Legislative Council authority to grant the lands of the colony to settlers; and (d) authorizing the Crown through the Governor to make laws and exercise legal jurisdiction over the colony including the territory.

26. The policy of the Colony of British Columbia was (a) to allot lands to the Indians for their exclusive use, called reserves, comprising their village sites, cultivated fields and immediately adjacent hunting grounds; (b) to encourage settlement by making land available for agriculture and other purposes; and (c) to permit Indians, along with all other citizens, to use the vacant Crown lands of the colony.

27. Part (a) of this policy did not usually work as well as intended. Reserves were mainly allotted in the territory in the 1890's and they were "adjusted" by a Royal Commission in 1912-14. Although reserves in the territory included most occupied villages, they were very small because it was thought secure access to strategic fishing sites was more important than acreage. The evidence does not fully explain why the Indians of the territory did not receive strategic sites **and** acreage except that the Indians often failed or declined to participate in the allotment process.

28. It is the law that aboriginal rights exist at the "pleasure of the Crown," and they may be extinguished whenever the intention of the Crown to do so is clear and plain.

29. The pre-Confederation colonial enactments construed in their historic setting exhibit a clear and plain intention to extinguish aboriginal interests in order to give an unburdened title to settlers, and the Crown did extinguish such rights to all the lands of the colony. The plaintiffs' claims for aboriginal rights are accordingly dismissed.

30. At the same time, the Crown promised the Indians of the colony, which applies also to the territory, that they (along with all other residents), but subject to the general

law, could continue to use the unoccupied or vacant Crown land of the colony for purposes equivalent to aboriginal rights until such lands were required for an adverse purpose. Further, this promise extends to any alienated lands which are returned to the status of vacant Crown lands. Thus, lands leased or licensed for logging, for example, become usable again by Indians and others when such operations are completed.

31. The unilateral extinguishment of aboriginal interests accompanied by the Crown's promise and the general obligation of the Crown to care for its aboriginal peoples created a legally enforceable fiduciary, or trust-like duty or obligation upon the Crown to ensure there will be no arbitrary interference with aboriginal sustenance practices in the territory.

32. When the colony joined the Canadian Confederation in 1871 the charge of Indians and Indian lands was assumed by the Dominion (Canada); all colonial lands, subject to existing "interests," accrued to the province; and the province agreed to furnish whatever land was required for reserves. In 1924 Canada acknowledged that British Columbia had satisfied its obligations with respect to furnishing lands for Indian reserves.

33. The promise made and obligation assumed by the Crown in colonial times, while not an "Interest" to which Crown lands are subject, can only be discharged by the province and continues to the present time as a duty owed by the Crown subject to the terms mentioned above.

34. Since Confederation the province has had: (a) title to the soil of the province; (b) the right to dispose of Crown lands unburdened by aboriginal title; and (c) the right, within its jurisdiction under s. 92 of the Constitution, to govern the province. All titles, leases, licenses, permits and other dispositions emanating from the Imperial Crown during the colonial period or from the Crown in right of the province since Confederation are valid in so far as aboriginal interests are concerned. The province has a continuing fiduciary duty to permit Indians to use vacant Crown land for aboriginal purposes. The honour of the Crown imposes an obligation of fair dealing in this respect upon the province which is enforceable by law.

35. The plaintiffs, on behalf of the Gitksan and Wet'suwet'en people are accordingly entitled to a Declaration confirming their legal right to use vacant Crown land for aboriginal purposes subject to the general law of the province.

36. The orderly development of the territory including the settlement and development of non-reserve lands and the harvesting of resources does not ordinarily offend against the honour of the Crown. This is because the province has many other duties and obligations additional to those owed to Indians and because (a) the territory is so vast; (b) game and other resources are reasonably plentiful: and (c) most Indians in the territory are only marginally dependent upon sustenance activities.

37. The right of Indians to use unoccupied, vacant Crown land is an not an exclusive right and it is subject to the general law of the province. The Crown has always allowed non-Indians also to use vacant Crown lands.

38. For the reasons stated in the Reasons for Judgement, it is not advisable to specify the precise rules that would govern the relationship between the Indians and the Crown. Instead, that question should be left to the law relating to fiduciary duties which provides ample legal remedies.

39. Part 15 of this judgment describes the circumstances which the province and the Indians should take into consideration in deciding whether any proposed Crown action may constitute a breach of its fiduciary duty to Indians. Generally speaking, the operative word is "reconciliation" rather than "rights" or "justification."

40. As the Crown has all along had the right to settle and develop the territory and to grant titles and tenures in the territory unburdened by aboriginal interests, the plaintiffs' claim for damages is dismissed.

41. If I have erred on the question of extinguishment, and the plaintiffs aboriginal interests or any of them are not extinguished, the evidence does not establish the validity of individual territories claimed by Gitksan and Wet'suwet'en Chiefs. Instead, therefore, the claim for aboriginal rights in such circumstances would be allowed not for chiefs or Houses or members of Houses, but rather for the communal benefit of all the Gitksan and Wet'suwet'en peoples except the Gitksan peoples of the Kitwankool Chiefs who did not join in this action.

42. These aboriginal rights, if any, would attach not to the whole territory but only to the parts that were used by the plaintiffs' ancestors at the time of sovereignty. The parts so used by each of the plaintiff peoples are defined in Part 16, and they are shown on Map 5 at p. 281.

43. The Counter Claim of the province, which was brought for procedural reasons, is dismissed.

44. Because of the importance of the matter, the divided success the parties have achieved, and other reasons mentioned in the judgment, no order is made for costs.

45. The specific judgment of the Court is detailed in Part 21.

46. In Part 22 I have made some comments about Indian matters.

PART 13

THE AUTHORITIES, AND SOME COMMENTS

1. Introduction

The plaintiffs' claims are set out in their Statement of Claim. In addition to its primary defences that there never were any aboriginal interests in British Columbia or that they have been extinguished, the province pleads a number of constitutional and legal defences.

The province argues that, apart from extinguishment which I shall reach eventually, there cannot be valid aboriginal claims in British Columbia. The province says, further, even if there ever were such rights, they have been settled by the allocation of reserves I have already described in which Canada represented the Indians. Also, the province says that the plaintiffs, by accepting and using reserves and subsidies in lieu of a treaty, have released all aboriginal rights. The province also pleads and relies upon conventional defences such as limitation of actions, both for the land and damages claims, and the **Crown Proceeding Act,** R.S.B.C. 1979, c. 86. It was also argued that many aboriginal territories have been abandoned.

I propose to set aside for later attention all these conventional defences and I shall first struggle with the substantial questions of creation and extinguishment of aboriginal interests.

I do not think it is necessary to cite the various constitutional provisions, but the constitutional scheme is clearly that each of Canada and the provinces may legislate only with respect to the classes of subjects assigned to them by s. 91 and 92 of the **Constitution Act;** Canada has the charge of Indians and lands reserved for Indians; the fee in all ungranted, non-reserve lands belongs to the Crown in right of the province, subject to trusts and other interests existing at the date of Union in 1871; and aboriginal rights existing as of April 1, 1983 are recognized and confirmed by Sec. 35 of the **Constitution Act, 1982.**

Subject to what I shall later say about these lesser defences, I propose to continue my analysis on the basis that arrangements made between Canada and the province, such as P.C. 751 and P.C. 1265, do not directly affect whatever aboriginal claims the plaintiffs may have. Also, I do not propose, for now, to consider the conduct of the plaintiffs either in participating in or using reserve allocations or other benefits as legal releases or waivers of rights.

In other words, I propose to consider aboriginal interests in the historical setting I have described, after which I shall return to consider the other defences.

2. The Authorities

Learned counsel for the plaintiffs furnished 23 volumes of authorities and treatises; counsel for the province supplemented the plaintiffs' collection with 8 additional volumes of cases and statutes; counsel for Canada relied upon the foregoing, but added several additional authorities.

I do not propose to refer to very many cases. This is because, although this is a unique case, it is not one of first impression in so far as many of its issues are concerned. In fact, the law relating to many of these issues has carefully been considered in a number of judgments of the highest authority from which the governing principles may be extracted. These cases, and the decisions I shall make in conformance with these principles will lead me inevitably to some difficult new questions which have not previously been considered.

In fact, it is seldom that a case as important as this one has been preceded by such a remarkably similar case. I refer, of course to **Calder,** where some of the very same questions were actually considered by a number of learned judges at all three levels of the judicial hierarchy.

In that case Davey C.J.B.C. at (1970) W.W.R. 481 commented upon this question of authorities at p. 485 as follows.

> "I am aware that the Supreme Court of the United States has not so restricted the application of the Proclamation and has applied it in some degree to Western Indians. Moreover, that the Court has developed from the course of dealing with Indians and Indians lands in the eastern part of North America from the Proclamation and from the liberal political philosophy of the Revolution a body of law dealing with indian rights that incorporates as a matter of principle the practice that the Crown had followed as a matter of policy on the eastern part of the continent. In addition to the comment made by Lord Davey in **Nireaha Tamaki v. Baker,** [at p. 579] about the American cases, in my opinion the decisions of the Privy Council, by which we are bound until the Supreme Court of Canada speaks, have diverged from the principles laid down and applied by the Supreme Court of the United States to Western Indians. For these reasons the judgments of the Supreme Court of the United States have to be applied with caution to the claims of the British Columbia Indians to aboriginal rights in their ancient lands.

I too am dubious about the usefulness of American authorities because they arose in an historical context so different from this province. The early American cases were largely decided in the practical context of defensive treaties with warlike peoples on the frontier, and the **Royal Proclamation** figures in some of the important ones.

American authorities are also concerned largely with treaties which are absent here. Furthermore, and most importantly, some of the great decisions of Chief Justice Marshall's Court, upon which the plaintiffs rely so heavily, treated the Indian peoples with whom they were concerned as "diminished sovereign nations" or "domestic dependent nations." Whether that categorization was adopted in order to give jurisdiction to the United States Supreme Court or otherwise, is of no particular importance. The fact is that the law never granted aboriginals that status in this country or province.

The authority of American cases is also weakened by statutory provisions such as the **Act to Regulate Trade and Intercourse with the Indians, 1790,** and the statutory substitution of compensation for land claims. In a case such as this I am reluctant to rely

upon American cases except to the extent they have been adopted by binding authority in this country.

More importantly, however, is the fact already mentioned that these question have already been litigated and in some cases actually decided in this country, and it is largely unnecessary to refer to cases from other jurisdictions. I believe I should attempt to confine myself as much as possible to relevant Canadian authorities.

I recognize that many Canadian cases, including decisions of the Supreme Court of Canada, have often referred to decisions from other countries. I regard those cases unhelpful to the extent they rely upon treaties, statutes, proclamations or recognization of Indian peoples as sovereign or semi-sovereign nations. I shall, of course, extract from them what I think is relevant or persuasive, but I consider myself bound only by the ratio of binding authorities or dicta of the Supreme Court of Canada or the Privy Council in Canadian appeals.

I turn to a consideration of the leading cases from which I believe it is possible to extract the principles which govern this case.

1. R. v. St. Catherine's Milling and Lumber Company (1885) 10 O.R. 196; aff'd. 13 Ont. App. R. 148; aff'd (1886) 13 S.C.R. 577: Aff'd (1888) 14 H. L. 47, (J.C.P.C.).

In 1873 the Salteaux tribe of Ojibbway Indians released and surrendered to Canada all their rights to upwards of 50,000 sq. miles of country of which approximately 32,000 sq. miles were in Ontario. This surrender was subject to the right of the Indians to hunt and fish throughout the surrendered territory except those portions taken up for settlement, mining, lumbering or other purposes.

Acting upon the assumption that the beneficial interest in these lands had passed to Canada, it granted a licence to the St. Catherines company to cut and carry away one million feet of timber from a specified part of such territory. When the company sought to do this it was sued by Ontario for an injunction and damages.

The case to a large extent turns upon the terms of the **Royal Proclamation, 1763,** and ss. 91 (24), 109 and 117 of the **British North America Act, 1867,** which provide:

> "91. It shall be lawful [for Canada] to make laws . . . [within classes of subjects], that is to say; . . .
>
> (24) Indians and lands reserved for the Indians . . .
>
> 109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same . . .
>
> 117. The several Provinces shall retain all their respective public property not otherwise disposed of in this act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country."

Ontario was successful throughout.

The appeal to the Supreme Court of Canada was heard by 6 judges who divided 4 to 2 in favour of Ontario, with Strong and Gwynne JJ. dissenting. It is only necessary to

consider the conflicting judgments of Strong J. (dissenting) and Taschereau J., who sided with the majority in the Supreme Court of Canada before I refer to the opinion of the Privy Council.

Strong J. who reached the same dissenting conclusion as Gwynne J. referred extensively to United States authorities and concluded at p. 612:

> "It thus appears, that in the United States a traditional policy, derived from colonial times, relative to the Indians and their lands has ripened into well established rules of law, and that the result is that the lands in the possession of the Indians are, until surrendered, treated as their rightful though inalienable property, so far as the possession and enjoyment are concerned; in other words, that the **dominium utile** is recognized as belonging to or reserved for the Indians, though the **dominium directum** is considered to be in the United States. Then, if this is so as regards Indian lands in the United States, which have been preserved to the Indians by the constant observance of a particular rule of policy acknowledged by the United States Courts to have been originally enforced by the Crown of Great Britain, how is it possible to suppose that the law can, or rather could have been, at the date of confederation, in a state any less favourable to the Indians whose lands were situated within the dominion of the British Crown, the original author of this beneficent doctrine so carefully adhered to in the United States from the days of the colonial governments? Therefore, when we consider that with reference to Canada the uniform practice has always been to recognize the Indian title as one which could only be dealt with by surrender to the Crown, I maintain that if there had been an entire absence of any written legislative act ordaining this rule as an express positive law, we ought, just as the United States Courts have done, to hold that it nevertheless existed as a rule of the unwritten common law, which the Courts were found to enforce as such, and consequently, that the 24th subsection of section 91, as well as the 109th section and the 5th sub-section of section 92 of the British North America Act, must all be read and construed upon the assumption that these territorial rights of the Indians were strictly legal rights which had to be taken into account and dealt with in that distribution of property and proprietary rights made upon confederation between the federal and provincial governments . . .
>
> To summarize these arguments, which appear to me to possess great force, we find, that at the date of confederation the Indians, by the constant usage and practice of the Crown, were considered to possess a certain proprietary interest in the unsurrendered lands which they occupied as hunting grounds; that this usage had either ripened into a rule of the common law as applicable to the American Colonies, or that such a rule had been derived from the law of nations and had in this way been imported into the Colonial law as applied to Indian Nations . . . ,"

At p. 623 Strong J. turned to the **Royal Proclamation, 1763,** which he relied upon as furnishing an even stronger argument in favour of the company's grant from Canada. He regarded the Proclamation as a "legislative act" assuring to the Indians the right and title to possess and enjoy these lands until they thought fit of their own free will to cede or surrender them to the Crown. He said the Proclamation operated at the time of confedera-

tion as an express legislative appropriation of the land for the use and benefit of the Indians by the designation of "lands reserved to the Indians," in the Proclamation which brought them within s. 91 (24).

Taschereau J., who gave one of the majority judgments, clearly disagreed with the views of Strong J., believing the United States' practice of treating with the Indians arose because the settlers or the King himself ". . . deemed it cheaper or wiser to buy their rights than fight them, but that was never construed as a recognition of their right to any legal title whatsoever. The fee and the legal possession were in the King or his grantees."

At p. 647 Taschereau J. said:

> "Did the sovereign thereby divest himself of the ownership of this territory? I cannot adopt that conclusion, nor can I see anything in that Proclamation that gives to the Indians forever the right in law to the possession of any lands as against the Crown. Their occupancy under that document has been one by sufferance only. Their possession has been, in law, the possession of the Crown. At any time before confederation the Crown could have granted these lands, or any of them, by letters patent, and the grant would have transferred to the grantee the **plenum et utile dominium,** with the right to maintain trespass, without entry, against the Indians. A grant of land by the Crown is tantamount to conveyance with livery of seisin. This Proclamation of 1763 has not, consequently, in my opinion, created a legal Indian title . . .
>
> It was further argued for the appellants that the principles which have always guided the Crown since the cession in its dealing with the Indians amount to a recognition of their title to a beneficiary interest in the soil. There is, in my opinion, no foundation for this contention. For obvious political reasons, and motives of humanity and benevolence, it has, no doubt, been the general policy of the Crown, as it had been at the times of the French authorities, to respect the claims of the Indians. But this, though it unquestionably gives them a title to the favourable consideration of the Government, does not give them any title in law, any title that a Court of justice can recognize as against the Crown. If the numerous quotations on the subject furnished to us by appellants from philosophers, publicists, economists and historians, and from official reports and despatches, must be interpreted as recognizing a legal Indian title as against the Crown, all I can say of these opinions is, that a careful consideration of the question has led me to a different conclusion.
>
> The necessary deduction from such a doctrine would be, that all progress of civilization and development in this country is and always has been at the mercy of the Indian race. Some of the writers cited by the appellants, influenced by sentimental and philanthropic considerations, do not hesitate to go as far. But legal and constitutional principles are in direct antagonism with their theories. The Indians must in the future, every one concedes it, be treated with the same consideration for their just claims and demands that they have received in the past, but, as in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation, in the execution of which the state must be free from judicial control." (pp. 647-9)

As a result, Taschereau, J. and the other majority judges concluded that these were Crown lands at the time of Confederation and belonged to Ontario under s. 109 and 117 of the **British North America Act, 1867.**

It is significant that the views of Strong J., which largely parallel the arguments of the plaintiff in this case, and the contrary views of Taschereau J., were so clearly before the Judicial Committee in the appeal which followed.

In the Privy Council the judgment was given by Lord Watson. At p. 52 he said the case related exclusively to the right of Canada to dispose of the timber, but added that it necessarily involved the determination of the larger question between the governments with respect to the legal consequences of the Treaty of 1873. After reciting several portions of the Royal Proclamation, Lord Watson said the territory in dispute had been in Indian occupation from 1763. I assume this means the Indians had been there before 1763. In any event, it is obvious Lord Watson chose to relate the Indian interest in the lands only to the Proclamation. At p. 54 he said:

> "Their [Indian] possession such as it was, can only be ascribed to the Royal Proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown."

As was later pointed out in **Calder,** this does not mean the Proclamation was the only source of title, only that Lord Watson chose to rely upon it exclusively.

In a passage most often cited, Lord Watson at p. 55 said that under the terms of the Proclamation:

> ". . . [the] tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be 'parts of Our dominions and territories;' and it is declared to be the will and pleasure of the sovereign that, 'for the present,' they shall be reserved for the use of the Indians. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a **plenum dominium** whenever that title was surrendered or otherwise extinguished."

His Lordship then turned to s. 109 which he said was:

> ". . . sufficient to give to each province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown." (p. 57)

It was pointed out that if the Indians had the fee at the time of the treaty, which came after Confederation, Ontario could have obtained no benefit. It was, however, judicially determined that:

> "The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to 'an interest (the Indians) other than of the Province in the same' within the meaning of s. 109; and must now belong to Ontario . . ." (p. 58)

Canada argued in **St. Catherine's Milling** that its exclusive jurisdiction under s. 91(24), that is, "Indians, and lands reserved for the Indians," carried with it any "patrimonial interest" of the Crown in these lands. Their Lordships held against this on the basis of the statutory language which, despite legislative control, did not deprive the province of its beneficial interest in these lands when they became disencumbered of the Indian title.

As a consequence it was held that even though Canada had exclusive power to regulate the Indians' privilege of hunting and fishing, that right did not confer upon Canada the power to alienate, the beneficial interest in the timber having passed to Ontario at Confederation subject to the "Interest" of the Indians which had been released.

Comment

The **St. Catherine's Milling** case is of fundamental importance. It is one of the few Canadian appellate cases which makes any comment upon the nature of aboriginal rights. The extreme views of Strong and Gwynne JJ. were fully argued by counsel for Canada but not accepted in the Privy Council. Instead Lord Watson expressed himself in terms far closer to the views of Taschereau J., particularly the passage on p. 54 that "the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign."

Although Lord Watson expressly stated that it was not necessary to express any opinion upon the precise quality of "the Indian right," the description of being a "burden" on the Crown's title is hardly descriptive of a proprietary interest in the Indians. Standing alone, **St. Catherine's Milling** is authority against aboriginal ownership and jurisdiction and it establishes that aboriginal rights exist "at the pleasure of the Crown." Those are judicial pronouncements of fundamental importance.

Lord Watson's language has been commented upon in some subsequent cases. In **Calder,** Judson J. said it did not help to refer to Indian rights as "personal or usufructuary." Instead, he referred to the right of Indians to occupy or live on their lands as their forefathers had done which, translated to this case, relates at least to village sites and surrounding areas, and a right of possession or occupancy for use of a larger area. Judson J. added, however, "There can be no question that this right was "dependent on the goodwill of the Sovereign" which is the same expression used by Lord Watson.

Lord Watson's language has often been approved by the Privy Council as in **Attorney-General for Quebec v. Attorney-General for Canada,** [1921] 1 A.C. 401 and it was expressly approved by the Supreme Court of Canada as recently as **Smith v. the Queen,** [1983] 1 S.C.R. 554, and by Wilson J. in **Guerin,** at p. 349. In the latter case Dickson J., in obiter at p. 379, suggests there may be a distinction where, as in **Guerin,** there was no constitutional issue, but even then he quoted Chief Justice Marshall in **Johnson v. M'Intosh,** at p. 588, that: "All our institutions recognize the absolute title of the Crown subject to the Indian right of occupancy" which that learned judge later found were subject to extinguishment.

While **St. Catherine's Milling** was a case of rights arising under the Royal Proclamation, I have no doubt that the plaintiffs' aboriginal rights, if any, could not be any greater than they would have been under the Proclamation. I do not believe it was suggested otherwise in argument. The principles this case states are too well established for me to challenge or question at this late date.

I can only conclude on the existing authorities, that **St. Catherine's Milling** is powerful authority, binding on me, that aboriginal rights, arising by operation of law, are non-

proprietary rights of occupation for residence and aboriginal user which are extinguishable at the pleasure of the Sovereign.

2. Calder v. Attorney General of British Columbia [1973] S.C.R. 313

The plaintiffs were members and officers of the Nishga Nation or its Tribal Council. They sued for a declaration:

> "That the aboriginal title, otherwise known as the Indian Title, of the Plaintiffs to their ancient tribal territory, hereinbefore described, has never been lawfully extinguished."

Although some evidence was called, the case was largely tried on admissions. For the purposes of the case the Attorney General admitted that the territory in question, consisting of 1,000 square miles in and around the Nass River Valley, Observatory Inlet, Portland Inlet and Portland Canal, had been inhabited from time immemorial by the plaintiffs' ancestors where they" . . . hunted, fished and roamed".

The plaintiffs claimed their title arose out of aboriginal occupation and is not dependent upon treaty, executive order or legislative enactment. Alternatively, the plaintiffs argued that if executive or legislative recognition was required, it could be found in the **Royal Proclamation, 1763.**

The Defendant relied entirely upon colonial enactments **(the Calder XIII)** and related documents in support of its defence that aboriginal rights never arose in the province without express Crown recognition, or alternatively, that such rights, if any, had been extinguished by colonial enactments.

The trial judge found aboriginal rights never arose in this province, and further that, if they did, they had been extinguished. The Court of Appeal (Davey C.J.B.C., Tysoe and McLean JJA.) reached the same conclusions.

The agreements and admissions made in **Calder** made it unnecessary for the Court to try all the factual issues that I have struggled with in this case.

In the Supreme Court of Canada, Judson J., with whom Martland and Ritchie JJ. agreed, found that the Royal Proclamation had no bearing upon the question of Indian title in British Columbia. He based this finding upon the language of the Proclamation, the definition of its geographical limits and the history of the province. He specifically found that the ". . .

> Nishga bands . . . were not any of the several nations or tribes of Indians who lived under British protection and were outside the scope of the Proclamation."

After adverting briefly to the history of the colony, Judson J. said at p. 328:

> "Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal or usufructuary right'. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was 'dependent on the goodwill of the Sovereign'.

This passage, with which I respectfully agree, satisfies me that the plaintiffs' position at law in British Columbia cannot be greater than it would be if the Royal Proclamation applied in this province except perhaps with respect to village sites.

Judson J. did not find it necessary to deal with the first ground of decision which found favour with the Court of Appeal. Relying upon the agreements of counsel and the admissions of fact, he went right to the question of extinguishment. With regard to the Calder XIII enactments, Judson J. agreed with the conclusion of the trial judge which were quoted (in **Calder**) at p. 325:

> "'The various pieces of legislation referred to above are connected, and in many instances contain references **inter se,** especially XIII. They extend back well prior to November 19, 1866, the date by which, as a certainty, the delineated lands were all within the boundaries of the Colony of British Columbia, and thus embraced in the land legislation of the Colony, where the words were appropriate. All thirteen reveal a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to "aboriginal title, otherwise known as the Indian title", to quote the statement of claim. The legislation prior to November 19, 1866, is included to show the intention of the successor and connected legislation after that date, which latter legislation certainly included the delineated lands.'"

Judson J. also quoted with approval the following passage from the judgment in **U.S. v. Santa Fe Ry. Co.** (1941) 314 U.S. 339 at 347:

> "'Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in **Cramer v. U.S.** (1922), 261 U.S. 219 at 229, 43 S. Ct. 342, 67 L. ed. 626, "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive."
>
> Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. **Buttz v. Northern Pacific Railroad,** 119 U.S. 55, 66 S. Ct. 100, 30 L. ed. 330. As stated by Chief Justice Marshall in **Johnson v. McIntosh** [supra] at p. 586, "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the Courts. **Beecher v. Wetherby** (1877), 95 U.S. 517 at 525, 24 L. ed. 440 at 441.'"

Judson J. then referred to the Terms of Union between British Columbia and Canada and the legislation passed consequent upon the McKenna-McBride Commission and Report and concluded that in adjusting reserves, including those set aside for Nishga Indians, the federal authority "... did act under its powers under s. 91(24) of the **B.N.A. Act**" and "agreed, on behalf of the Indians, with the policy of establishing these reserves."

He also commented upon the establishment of the Railway Belt which he said was inconsistent with the recognition and continued existence of Indian title. He found the

14 Vancouver Island treaties and Treaty 8 had nothing to do with the question of whether any Indian title was extinguished in the colonial period.

The **ratio** of Judson J.'s judgment is found at p. 344 where he said:

> "In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation."

It is apparent that Judson J. did not think a express statutory statement of an intention to extinguish was required. Inconsistency in his view was sufficient.

He accordingly would have dismissed the appeal on the ground of extinguishment, but he also agreed with the judgment of Pigeon J., which I shall mention in a moment.

In a long judgment in which Spence and Laskin JJ. concurred, Hall J. reached different conclusions. He briefly touched on the nature of aboriginal rights at p. 352, but found it unnecessary precisely to state their exact nature and extent as he considered the real issue was whether such rights were extinguished by the **Calder XIII** enactments.

Hall J. dealt extensively with the test for extinguishment, suggesting that:

> "... if the right is to be extinguished it must be done by specific legislation in accordance with the law." (p. 353)

and at p. 393 he quoted with approval a pronouncement in **Lipan Apache Tribe vs. U.S.** (1967) 180 Ct. Cl. 487:

> "'While the selection of a means is a governmental prerogative, the actual act (or acts) of extinguishment must be plain and unambiguous. In the absence of a "clear and plain indication" in the public records that the sovereign "intended to extinguish all of the [claimants'] rights" in their property, Indian title continues."

Hall J. found that the Royal Proclamation, did apply to the benefit of the Nishga Indians in British Columbia. But at p. 401 Hall J. recognized that his finding about the operation of the Royal Proclamation did not assist in answering the question of extinguishment.

In the view of Hall J. the burden of establishing extinguishment falls on the government. He found there was no evidence of a "clear and plain indication" to extinguish the Indian title. At p. 404 he said: "There is no such proof in the case at bar; no legislation to that effect." He then proceeded to discuss the powers of Governors Douglas and Seymour and their councils in which he quoted extensively from some of the historical material I have discussed and concluded at p. 413 that:

> "... if any attempt was made to extinguish the title it was beyond the power of the Governor or of the Council to do so, and, therefore, **ultra vires.**"

For these and other reasons Hall J. allowed the plaintiffs' action in full.

Pigeon J., however, with whom Judson, Martland and Ritchie JJ. agreed, concluded that the absence of a fiat deprived the trial Court of jurisdiction to adjudicate. As a result, the action was dismissed leaving all question more or less at large but with much useful instruction.

Comment

While there are many exceedingly interesting passages in both judgments, the case went off on a technical point which is unfortunate because it dealt with precisely the same issue of extinguishment which arises again in this case.

The case is instructive on another point. Notwithstanding their disagreement on the application of the Royal Proclamation, both judgments assume a right of the Crown to extinguish aboriginal interests which supports the conclusions of the **St. Catherine's** case that aboriginal rights are subject to the pleasure of the Crown.

Because of the importance of **Calder,** I shall discuss it further when I come to consider extinguishment in due course.

3. The Hamlet of Baker Lake v. Minister of Indian Affairs, and Northern Development [1980] 1 F.C 518 (F.C.C.).

The plaintiff Inuits, or their representatives, brought this action in the Federal Court of Canada asserting "aboriginal title" over an undefined portion of the Northwest Territories including approximately 78,000 sq. km. surrounding the community of Baker Lake in the District of Keewatin. The plaintiffs claimed relief under several heads additional to aboriginal title, particularly injunctions restraining the Crown from issuing land use permits, and mining companies from mining, and a declaration that the claimed lands are not public or territorial lands.

The defendants were representatives of the Crown in right of Canada and certain mining companies carrying on operations in the area, which operations were alleged by the Inuit to be in breach of their aboriginal rights.

The Inuit obtained an interim injunction restraining the defendants, pending the trial, from exploration or other activities inconsistent with their aboriginal rights.

The Baker Lake area is within what are called the "barren lands" lying north and east of the tree line which meanders from Hudson Bay north of Churchill to the Mackenzie River delta north of Inuvik. The Hamlet of Baker Lake is on the north shore of the lake a few kilometres from the mouth of the Thelon River in about the centre of these Barren Lands. While there are other food resources, survival of the plaintiffs' ancestors depended upon the availability of caribou.

The Baker Lake area was part of Rupert's Land granted to the Hudson's Bay Company in 1670 and was a settled colony, rather than a conquered or ceded colony, and was admitted into Canada in 1870. Inuit persons were observed in the area as early as 1762 but there was no white settlement at Baker Lake until the Company established itself there in 1914.

While the plaintiffs' ancestors lived a nomadic existence off the land for a long, long time, starvation became so serious in the 1950's that the Inuit were actively encouraged by the government to settle in the Hamlet which, at the time of trial, was a fairly modern community of about 1,000 Inuit, an increase from 150-200 in 1960. It was found, however, that notwithstanding this resettlement, the Inuit continued to range far and wide over their traditional pre-settlement territory hunting caribou as they always had but now by snowmobile.

Mahoney J., (as he then was), found the **Royal Proclamation, 1763,** never applied to the barrens. He concluded, however, on the authority of **Calder,** that aboriginal rights arise as well at common law. He then held that the elements which must be proven to establish "an aboriginal title cognizable at common law" are:

> "1. That they and their ancestors were members of an organized society.
>
> 2. That the organized society occupied the specific territory over which they assert the aboriginal title.
>
> 3. That the occupation was to the exclusion of other organized societies.
>
> 4. That the occupation was an established fact at the time sovereignty was asserted by England."

Relying upon a number of authorities, Mahoney J. held that the required level of social organization depends upon the needs of its members, and that the Inuit society, while primitive, did not change significantly from well before 1610 when Henry Hudson claimed sovereignty for Britain. He held that their primitive social organization was sufficient in the circumstances.

There was no real dispute about most of the territory which the Inuit had always roamed over without competition from other societies, except in the south-west which Mahoney J. concluded was not Inuit territory.

As a result, Mahoney J. had no difficulty concluding that the plaintiffs had a common law "aboriginal title to that territory, carrying with it the right freely to move about and hunt and fish over it."

He then turned to the question of extinguishment. It was argued that the plaintiffs' aboriginal "title" was extinguished by the Royal Charter of 1670 granting the barren lands to the Company. This argument was rejected on the ground that the Company's ownership was notional, analogous to that of the Crown, and that there was no inconsistency between an aboriginal right superimposed upon the radical title of the Crown.

Mahoney J. also rejected the further argument that the plaintiffs' right had been extinguished since the admission of Rupert's Land into Canada by land legislation said to be inconsistent with aboriginal rights. He concluded that the clear and plain intention of the Crown to extinguish aboriginal rights had not been shown, particularly as the said right was found not to be proprietary or equivalent to surface rights. At p. 576 he held:

> "With the exception of a number of parcels in the hamlet itself, I am entirely satisfied that the entire territory in issue remains "territorial lands' within the meaning of the **Territorial Lands Act** and 'public lands' within the meaning of the **Public Lands Grants Act.** They are subject to the **Canada Mining Regulations.** To the extent that their aboriginal rights are diminished by those laws, the Inuit may or may not be entitled to compensation. That is not sought in this action. There can, however, be no doubt as to the effect of competent legislation and that, to the extent it does diminish the rights comprised in an aboriginal title, it prevails."

In the final result, the Inuit were granted a declaration that the specified lands were "... subject to the aboriginal right and title of the Inuit to hunt and fish thereon," but their other claims were dismissed and the injunction granted to the Indians against the mining companies was dissolved.

Comment

It is difficult to imagine a clearer case for aboriginal rights than **Baker Lake** because the plaintiffs' ancestors had exclusively used these lands for aboriginal purposes for a long, long time before contact or sovereignty.

While the plaintiffs did not claim ownership or sovereignty, they made claims at least equivalent to ownership which were all dismissed. The mining companies were permitted to continue their operations on the same lands under legislative authority. That clearly diminished the exclusivity of the aboriginal interests of the Inuit. This suggests a reconciliation which also appears in subsequent cases.

The case is significant because it suggests there is room for both aboriginal rights and settlement or development.

4. Guerin v. the Queen, [1984] 2 S.C.R. 335.

The Musqueam Band, on the advice of the Department of Indian Affairs, surrendered 162 valuable acres in their reserve to the Crown ". . . forever in trust to lease . . . upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people."

This surrender followed a series of meetings at which the proposed terms of lease were discussed with the band members, but the trial judge found the terms of the lease ultimately entered into bore little resemblance to what was discussed and approved by the Band at the surrender meeting. He also found the Indians would not have surrendered their land on the basis contained in the lease. He found liability against the Crown and assessed damages at $10 million.

Wilson J., speaking for herself, Ritchie and McIntyre JJ., said the Crown did not hold the land in trust for the bands. Although the Indians had no fee in the lands their limited interest gave rise to a fiduciary obligation of which s. 18 of the Indian Act is a statutory acknowledgement. She then concluded that there had been a breach of that fiduciary duty. Her judgment is based entirely on that concept. The only reference she makes to the nature of Indian rights generally is at p. 349 where she said:

> "While I am in agreement that s. 18 does not **per se** create a fiduciary obligation in the Crown with respect to Indian reserves, I believe that it recognizes the existence of such an obligation. The obligation has its roots in the aboriginal title of Canada's Indians as discussed in **Calder v. Attorney General of British Columbia,** [1973] S.C.R. 313. In that case the Court did not find it necessary to define the precise nature of Indian title because the issue was whether or not it had been extinguished. However, in **St. Catherine's Milling and Lumber Co. v. The Queen** (1888), 14 App. Cas. 46, Lord Watson, speaking for the Privy Council, had stated at p. 54 that 'the tenure of the Indians . . . [is] a personal and usufructuary right'. That description of the Indian's interest in reserve lands was approved by this Court most recently in **Smith v. The Queen,** [1983] 1 S.C.R. 554."

Dickson J., as he then was, speaking for himself and three other judges, noted that a surrender may be absolute or qualified, conditional or unconditional, and he found a breach of an equitable obligation or fiduciary duty. In his judgment, however, he explored "the basis of aboriginal title and the nature of the interest in land which it represents."

He then briefly reviewed a number of Canadian, American and Commonwealth decisions and concluded at p. 378 that a change in sovereignty over a particular territory does not in general affect the "presumptive title" of the inhabitants, and that:

> "That principle supports the assumption implicit in **Calder** that Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it . . .
>
> It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with recognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases: see **Attorney-General for Quebec v. Attorney-General for Canada,** [1921] 1 A.C. 401, at pp. 410-11 (the **Star Chrome** case). It is worth noting, however, that the reserve in question here was created out of the ancient tribal territory of the Musqueam Band by the unilateral action of the Colony of British Columbia, prior to Confederation." (pp. 378-9)

As can be seen from the above, the authority relied upon is the **Star Chrome** case, where the Privy Council fell into the error of thinking the lands in question were subject to the Royal Proclamation, when they were not. In any event, a conditional surrender of interests in either class of lands would impose the same quality of obligation or duty upon the Crown.

Dickson J. then went on to express a number of views about the nature of Indian title, suggesting the **St. Catherines** terminology is not useful although it had been accepted in the unanimous decision in **Smith** in the previous year. His last paragraph on page 382 causes me some difficulty. He said:

> "Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the **sui generis** interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealing with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading."

As **Guerin** was a case about a breach of duty in the negotiations for a lease of a portion of an established reserve, the "certain lands" quoted in the above passage probably refers to reserve lands, particularly when the cases cited, except **Calder,** were cases about reserves. This view gains some strength from the reference to the "Crown's original purpose in declaring the Indians' interest to be inalienable," because apart from the Royal

Proclamation, which I have found inapplicable in British Columbia, the Crown has made no "declaration" of inalienability except with respect to reserves.

I also have some difficulty with the suggestion that, upon the surrender of "a pure aboriginal right", the Crown would nevertheless be required to deal with it for the benefit of the Indians. I can only conclude that Dickson J. was saying that the principles dealing with breaches of duties owed to aboriginals would be the same whether the lands in question were reserve lands or other lands charged with unextinguished aboriginal rights.

Dickson J. then went on to agree that the Crown's obligation to the Indians was not a trust but rather a fiduciary duty which was breached by entering into a lease upon less favourable terms than were approved by the Indians.

Estey J., the eighth judge (as Laskin C.J.C. took no part in the judgment), declined to "resort" to what he called the ". . . technical and far-reaching doctrines of the law of trusts and to concomitant law attaching to the fiduciary." He decided the case favourably to the Indians on the law of agency.

Comment

Guerin is not a case about common law aboriginal interests, but rather about a breach of a fiduciary duty relating to reserve lands and it is not a case about extinguishment. It clearly supports the view that aboriginal interests arise at law and do not depend upon statutory enactment or Executive recognition. The province was not a party.

5. R. v. Sioui (1990), 70 D.L.R. (4th) 427 (S.C.C.)

Indians of the Lorette Indian Reserve were convicted of the offenses of cutting down trees, camping and making fires in places not designated for such purposes in Parc de la Jacques-Cartier contrary to ss. 9 and 37 of the **Regulation respecting the Parc de la Jacques-Cartier,** which had been adopted pursuant to the **Quebec Parks Act.** They admitted committing the acts of which they were charged in the park outside the boundaries of their reserve, but defended on the ground that they were practising certain ancestral customs and religious rites which are the subject of a treaty dated September 5, 1760 between the Hurons and the British. The treaty is in these terms:

> "THESE are to certify that the CHIEF of the HURON tribe of Indians, having come to me in the name of His Nation, to submit to His BRITANNIC MAJESTY, and make Peace, has been received under my Protection, with his whole Tribe; and henceforth no English Officer or party is to molest, or interrupt them in returning to their Settlement at LORETTE; and they are received upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English: — recommending it to the Officers commanding the Posts, to treat them kindly.
>
> Given under my hand at Longueil, this 5th day of September, 1760.
>
> By the Genl's Command, JOHN COSNAN, Adjut. Genl.
>
> JA. MURRAY."

At that date in 1760, 3 days before the surrender of Montreal, the Hurons were settled at Lorette and made regular use of the territory which is now the said park. The Court of Appeal found that the 1760 document was a treaty, and that the customary activities or religious rites practised by the Hurons in the park were protected by the treaty. Section 88

of the **Indian Act** was found to make the accused immune from this prosecution. Section 88 provides:

> "88. **Subject to the terms of any treaty** and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act." (my emphasis)

The appeal came to the Supreme Court of Canada for decisions on constitutional questions, namely whether the document is a treaty, whether it was still in force and, if so, whether the said regulations are unenforceable with respect to the accused. The Indians based their whole case upon the treaty and "... have at no time based their argument on the existence of aboriginal rights protecting the activities with which they are charged."

Lamer J. (now C.J.C.) gave the judgment of the Court.

After an extensive historical analysis, and applying liberal principles of construction, Lamer J. determined that the 1760 document was indeed a treaty which "must in turn be given a just, broad and liberal construction." He also concluded that the treaty had not been extinguished.

The importance of the case, for the purposes of this case, is the part dealing with the interaction of treaty protection with provincial regulations.

The Indians argued that they were entitled to carry on their customs and religion in the park because it is part of a larger territory frequented by the Hurons in 1760, while the Crown alleged the operation of the treaty was limited to the definable Lorette territory which is mentioned in the treaty. In any event, the Crown argued, these rights should be limited in accordance with the legislation designed to protect the park and its users.

Counsel for Canada, an intervenor, argued that the Indians' claim was really a territorial one and that they would have to establish a connection between the rights claimed and their exercise of these rights in a given territory. At p. 49 Lamer J. said:

> "... the problems raised by the territorial question should be briefly stated. There are two rights in opposition here: the provincial Crown's right of ownership over the territory of the park and the Hurons' right to exercise their religion and ancestral customs on this land. The ownership right suggests that ordinarily the Crown can do whatever it likes with its land. On the other hand, a very special importance seems to attach to territories traditionally frequented by the Hurons so that their traditional religious rites and ancestral customs will have their full meaning. Further, the Hurons are trying to protect the possibility of carrying on these rites and customs near Lorette on territory which they feel is suited to such purposes."

Lamer J. disagreed with the majority of the Court of Appeal that the only territorial limitation should be the area the Hurons frequented in 1760 because that might include a vast territory and it would permit trees to be cut and fires to be started on private property. He said:

> "... Even a generous interpretation of the document ... must be realistic and reflect the intention of both parties, not just that of the Hurons. The Court must choose from among the various possible

> interpretations of the common intention the one which best reconciles the Hurons' interests and those of the conqueror.
>
> The interpretation which I think is called for when we give the historical context its full meaning is that Murray and the Hurons contemplated that the rights guaranteed by the treaty could be exercised over the entire territory frequented by the Hurons at the time, so long as the carrying on of the customs and rites is not incompatible with the particular use made by the Crown of this territory."

Lamer J. then undertook an analysis of the competing interests of the Indians and the British in 1760. He mentions that the British were not likely to have intended to grant rights which might paralyse the Crown's use of its newly conquered territories, and he assumed the parties:

> "... intended to reconcile the Hurons' need to protect the exercise of their customs and the desire of the British conquerors to expand. Protecting the exercise of the customs in all parts of the territory frequented when it is not incompatible with its occupancy is in my opinion the most reasonable way of reconciling the competing interests ... This gave the English the necessary flexibility to be able to respond in due course to the increasing need to use Canada's resources ... The Hurons, for their part, were protecting their customs wherever their exercise would not be prejudicial to the use to which the territory concerned would be put. The Hurons could not reasonably expect that the use would forever remain what it was in 1760 ... The Hurons were only asking to be permitted to continue to carry on their customs on the lands frequented to the extent that those customs did not interfere with enjoyment of the lands by their occupier ... I cannot believe that the Hurons ever believed that the treaty gave them the right to cut down trees in the garden of a house as part of their right to carry on their customs."

In conclusion, therefore, Lamer J. found that the park was occupied by the Crown since its establishment by legislation, but he thought the important question was whether the Crown's type of occupancy was incompatible with the exercise of the Indians' customs. He found that some limitation of the exercise of rights protected by the treaty must be assumed since 1760, but although the Crown called evidence on the question he was not persuaded that the exercise of the rites and customs was incompatible with the Crown's rights.

The appeal was accordingly dismissed.

Comment

This case is about a treaty, not about aboriginal rights, but it suggests an approach not different from what was employed in **Baker Lake.** This approach seeks to reconcile conflicting rights so that they may operate together sometimes by limiting one or both rights reasonably. This approach is also seen in a different context in **Sparrow,** which follows next.

6. R. v. Sparrow, [1990] 4 W.W.R. 410 (S.C.C.)

Mr. Sparrow, a Musqueam Indian, was charged under the **Fisheries Act** R.S.C. 1970, c. F-14 for fishing with a drift net longer than permitted by the terms of his Band's food

fishing licence. He admitted the facts alleged to constitute the offence but defended on the ground he was exercising an existing aboriginal right to fish and that the net length restriction was invalid because it was inconsistent with **s. 35(1)** of the Constitution.

This impugned fishing took place in Canoe Pass within the area of the Musqueam band's food licence and within an area of the Fraser River where the Musqueam and other bands of Indians have fished from time immemorial. The licence restricted drift nets to 25 fathoms in length. Mr Sparrow was using a 45 fathom net.

Mr. Sparrow was convicted at trial. The Court of Appeal found Mr. Sparrow was fishing in the ancient tribal territory where his ancestors had always fished, but concluded that Parliament retained the power to regulate fishing and to control Indian lands under ss. 91(12) and (24) of the **Constitution Act, 1867.** The Court concluded however, that the facts found at trial were not sufficient to support a defence based upon the **Constitution** and dismissed the appeal.

Both Mr. Sparrow and the Crown appealed to the Supreme Court of Canada and a constitutional question was stated:

> "Is the net length restriction contained in the Musqueam Indian Band Indian Food Fishing Licence dated March 30, 1984, issued pursuant to the **British Columbia Fishery (General) Regulations** and the **Fisheries Act,** R.S.C. 1970, c. F-14, inconsistent with s. 35(1) of the **Constitution Act, 1982?"**

Generally speaking, the **Fisheries Act** gives the Governor in Council power to make regulations for the proper management of the coastal and inland fisheries, conservation, commercial and Indian food fishing, gear and equipment, and licensing.

Under these powers the Governor in Council enacted the Regulations mentioned in the question, under which the Musqueam Band was on March 31st issued an Indian food fishing licence, as it had each year since 1978, "to fish for salmon for food for themselves and their family" in the specified areas where the alleged offence occurred. The licence contained time restrictions as well as the type of gear to be used, notably, "One drift net twenty-five (25) fathoms in length."

The judgment of the Court was delivered by Dickson C.J.C. and LaForest J. with whom all the other member of the Court concurred. The judgment includes a discussion of the operation of s. 35 (1) of the **Constitution Act, 1982** which provides:

> **"Rights of the Aboriginal Peoples of Canada"**
>
> 35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed . . ."

The Court first considered the word "existing" and concluded that such rights are those that were in existence when the **Constitution Act,** 1982 came into force, and this must be interpreted flexibly ". . . so as to permit their evolution over time." "Existing rights," the Court held, are "affirmed in a contemporary form rather than in their primeval simplicity and vigour." The Court rejected the concept of "frozen" rights which, for example, might have limited present-day Indians to fishing by aboriginal methods, and without modern gear.

The Court then turned to the aboriginal right in question, and accepted the correctness of the Court of Appeal's finding that:

> "... Mr. Sparrow was fishing in ancient tribal territory where his ancestors had fished from time immemorial in that part of the mouth of the Fraser River."

The Court noted the gradual increased stringency of the Indian right to fish starting in 1878 until 1977 when, except for those holding a commercial licence, as many did, they could only fish for food under a special licence. This stringent regulation, the Crown argued, constituted extinguishment. The Court rejected that argument, suggesting it confused regulation with extinguishment. The Court added:

> "The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right."

The Crown, having only relied upon past regulation as evidence of extinguishment, was found to have failed to discharge its burden of proving extinguishment.

The scope of the existing Musqueam aboriginal right to fish, however, was limited to the right to fish for food, or for ceremonial and social occasions, their case at trial not having been presented on an evolving aboriginal right to fish for commercial or livelihood purposes. The ingredients of the plaintiffs' aboriginal rights were not further discussed.

For example, there is no discussion of the important question of exclusivity mentioned in **Baker Lake**, even though there was evidence mentioned by the Court that upwards of 20,000 Indians (compared with only 640 Musqueam), comprising 91 other tribes, obtain their food fish from the Fraser River, "... some or all of [whom] may have an aboriginal right to fish there." I conclude, therefore, that the Court did not intend its comments in this case to represent a final, comprehensive pronouncement on the ingredients of aboriginal rights. This must, of course, be so as the Court was only dealing with the regulation of tidal fishing which is relatively easy to regulate compared with multiple land use which I have to consider in this case.

The Court expressly limited its judgment when it adopted the Court of Appeal's characterization of the right "for the purpose of this case," and said it would confine its reasons to the meaning of s. 35 recognition and affirmation of an existing right "to fish for food and social and ceremonial purposes," and the impact of s. 35 on the regulatory power of Parliament.

The Indians' position on s. 35 was simply that almost any regulation of their participation in the fishery would be "inconsistent" with their right, and a contravention of s. 52(1) of the Constitution. They argued their right should be subject only to exceptional circumstances (the onus of which would be on the Crown) to preserve the aboriginal right for future generations whenever restricting fishing by others would not suffice, and when the aboriginal users were unwilling to implement necessary conservation measures.

Without expressly saying so, the Court rejected this extreme view, but concluded that, "... over the years the rights of Indians were often honoured in the breach". In addition, the Court contrasted the differing federal policies stated in 1969 and 1973, the latter being described as an "expression of acknowledged responsibility," which included the federal government's willingness to negotiate regarding claims of "aboriginal title," specifically in British Columbia, Northern Quebec and the Territories without regard to formal supporting documents. The Court quoted the federal government's 1973 statement, saying it:

> "... is now ready to negotiate with authorized representatives of these native peoples on the basis that where their traditional interest in the

> lands concerned can be established, an agreed form of compensation or benefit will be provided to native peoples in return for their interest."

I suppose the federal government stated its position as it did, implying a surrender of aboriginal rights in exchange for "compensation or benefit" because the federal government has no jurisdiction in matters such as land assigned exclusively by the Constitution to the provinces and the federal authority could not offer more than compensation.

Returning to **Sparrow,** the Court, after referring to the **Nowegijick** principle, quoted with approval the language of MacKinnon A.C.J.O. in **R. v. Taylor and Williams** (1981), 34 O.R. (2d) 360 (Ont. C.A.), quoted by Blair J.A. in **R. v. Agawa,** (1988), 28 O.A.C. 201 at 215-16, as follows:

> "The second principle was enunciated by the late Associate Chief Justice MacKinnon in **R. v. Taylor and Williams** (1981), 34 O.R. (2d) 360. He emphasized the importance of Indian history and traditions as well as the perceived effect of a treaty at the time of its execution. He also cautioned against determining Indian right "in a vacuum." The honour of the Crown is involved in the interpretation of Indian treaties and, as a consequence, fairness to the Indians is a governing consideration. He said at p. 367:
>
> > "The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned."
>
> This view is reflected in recent judicial decisions which have emphasized the responsibility of Government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation: see **Guerin v. the Queen,** [1984] 2 S.C.R. 335; 55 N.R. 161; 13 D.L.R. (4th) 321.'" (pp. 23-4)

The Court (in **Sparrow**) said the general guiding principle for s. 35(1), is that:

> "... the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."

But, the Court also said that every law or regulation that affects an aboriginal right is not automatically of no force or effect. Rather, "Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a [recognized] right ..."

The Court said, "Rights that are recognized and affirmed are not absolute. Federal legislative powers continue..." but they must now be read together with s. 35(1). The Court also said:

> "In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in **Nowegijick,** supra, and the concept of

> holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by **Guerin**...
>
> The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35 (1)." (pp. 25-26)

In furnishing an analysis of the s. 35(1) process for food fishing regulation, the Court suggested two stages, first to determine if there is interference, and secondly whether such interference can be justified by reference to the legislative purpose of the law or regulation, such as conservation. If the purpose is permissible it is necessary to go to the second stage of the justification question which relates to the honour of the Crown which "... must be the first consideration in determining whether the legislation or action in question can be justified." On this basis the Court held that first priority, after proper conservation measures have been taken, must be in satisfaction of aboriginal food requirements.

The Court then added further factors to this justification inquiry, as follows:

> "... whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries."

Finally, the Court turned to the question of the net length in this case and concluded there was not sufficient evidence to permit a s. 35(1) analysis, so a new trial was ordered at which Mr. Sparrow would have the onus of proving the net restriction was a **prima facie** infringement of a collective aboriginal right to fish for food, and if so, the Crown would have to demonstrate the regulation is justifiable.

Comment

Sparrow is obviously a very important case which was delivered during argument in this case. This gave counsel limited time to prepare their submissions although they all rose to the occasion and each claimed to find it helpful. As the most recent pronouncement of our highest Court on aboriginal rights, albeit fishing rights under federal jurisdiction and regulation, and on the impact of s. 35(1), **Sparrow** is really about the permissible limits of government regulation. It builds on the "honour of the Crown" contained in **Guerin** and introduces the important question of priority.

Clearly **Sparrow** adds dimensions to the concept of aboriginal rights but it follows the trend started in **Baker Lake** and **Sioui** that limits conflicting rights reasonably by a reconciling process. The full implications of **Sparrow** cannot be understood until it has been tested in a number of different factual contexts. It adds substantially to the jurisprudence, settles the test for extinguishment, and provides much useful guidance.

What is lacking in **Sparrow**, because it was not necessary for the decision, is any discussion about the interaction of competing historic principles such as the right of the Crown to extinguish aboriginal rights "at its pleasure" and aboriginal user rights of land.

3. Summary of Authorities

I apologize to counsel for dealing so briefly with the many authorities to which they referred in their excellent arguments. However, I do not find it necessary to analyze more than those I have just discussed and those already or later mentioned in this judgment.

Amongst the wisest dicta ever delivered was that of the judge (unknown to me) who said every case depends upon its particular facts. With that wisdom in mind, I nevertheless propose to attempt the dangerous task of summarizing the basic law. What follows is not intended to be exhaustive.

The above cases provide authoritative answers to some, but not all of the questions which arise in this case. This case raises subtle issues not discussed in any of them. The authorities deal with the test for extinguishment, but not with the application of that test in specific circumstances. Further, as **Sparrow** was a case within federal jurisdiction (fishing), it mandates a reconciliation process which can be used as a guide to matters within provincial jurisdiction, but its rigid justification process can hardly be applied strictly to land use within such a huge territory or to an entire province.

1. Aboriginal interests arise out of occupation or use of specific land for aboriginal purposes for an indefinite or long, long time before the assertion of sovereignty.

2. Aboriginal interests are communal, consisting of subsistence activities and are not proprietary.

3. Common law aboriginal rights exist at the pleasure of the Crown and may be extinguished when the intention of the Crown is clear and plain. This power reposed with the Imperial Crown during the colonial period. Upon Confederation the province obtained title to all Crown land in the province subject to the "Interests" of the Indians. A central question in this case is whether the plaintiffs' aboriginal rights were extinguished during the colonial period.

4. Unextinguished aboriginal rights are not absolute. Crown action and aboriginal rights may in proper circumstances be reconciled. Generally speaking, aboriginal rights:

(a) may be regulated by the Crown only when

(b) such regulation operates to interfere with aboriginal rights pursuant to:

(i) legitimate Crown objectives which can honourably be justified; without

(ii) undue interference with such rights; and

(iii) with appropriate priority over competing, inconsistent activities.

The foregoing is, of course the briefest possible summary of my understanding of the authorities and it does not include every aspect of aboriginal rights. I shall now attempt to apply them to the facts of this case. Additional concepts must also be considered which arise out of the authorities. If there are conflicts between this summary and what follows then the latter must prevail.

PART 14

THE PLAINTIFFS' SPECIFIC CLAIMS FOR ABORIGINAL INTERESTS

The plaintiffs have conveniently classified their claims under three heads, ownership, jurisdiction (sovereignty) and aboriginal rights and I shall deal with them on that basis although, as will be seen, the first two require quite different treatment from the third. In this Part of my judgment I shall make a number of findings for the assistance of the parties and the appeal courts even though some of these findings may turn out to be unnecessary for the final decisions I shall eventually reach in this case.

Claims for aboriginal interests must be unique — **sui generis** — to particular Indians in relation to specific territory in their historical, social, legal, and political context. I repeat what Dickson J. said in **Kruger and Manuel v. The Queen** (1978) I S.C.R. 104 (S.C.C.)

> "Claims to aboriginal title are woven with history, legend, politics and moral obligations."

It is the law and the evidence with which these concepts must be woven and I understand the foregoing includes not just Indian history and politics. What has happened both in the territory and in the province before and since the time of contact must also be considered. Two hundred years of history cannot be ignored.

Before I consider these claims I must first deal with an important question of status.

1. The Status of the Plaintiffs in this Action

I have attempted to organize this judgment so that I shall deal with the substantive questions of aboriginal interests before I consider the lands which could be subject to such interests. Anticipating the conclusion I have expressed in Part 17 that the plaintiffs have not established their internal boundaries, it will be convenient now to consider the nature of the aboriginal interest to which they would be entitled but for the question of extinguishment.

I have already described the form of this action where some of the hereditary chiefs are advancing these claims for aboriginal interests on behalf of themselves or on behalf of their Houses or members.

The authorities satisfy me that a claim for an aboriginal interest is a communal claim. Counsel for the Nishga in **Calder** (at p. 352) described it as "a tribal interest" and Hall J. (at pp. 401-402) said it was a "communal right." In **Sparrow** there are references to a collective rather than an individual, or sub-group interest. Although **Sparrow** was a prosecution which can only be a personal proceeding, most of these cases are brought on behalf of peoples, bands or tribes: see **Martin v. R. in Right of B.C.** (1986) 3 B.C.L.R. (2nd), 60 B.C.S.C.). The Crown's "promise" of fair dealing must be classified as a

communal or collective promise rather than separate or divided promises to a variety of individuals or sub-groups.

While no claim may be defeated by misjoinder or non-joinder of parties, the question is an important one because it bears directly upon the identity of the Indians who may participate in the enjoyment of what, in my view, can only be a communal right. While a claim by a chief for himself could not, and a claim by a Chief for the members of his House could, be viewed as a communal claim, the law cannot conveniently recognize discrete claims by small or sub groups within an aboriginal community.

The plaintiffs' case as pleaded, if established, could result in some Gitksan and Wet'suwet'en persons being treated substantially differently from other members of the larger aboriginal collective. The absence of the Kitwankool people must also be noted in the formal judgment of the Court.

In addition, the exercise of any aboriginal right by an individual or sub-group, including the rights of children not separately represented in this action, could be defeated by arbitrary or artificial socio-political arrangements by which, as the evidence shows, non-members have been able to gain control of Houses with substantial territorial claims through processes which, although permitted by aboriginal custom, would make the performance of the Crown's promise almost impossible.

Notwithstanding the failure of the plaintiffs to prove their internal boundaries, as hereafter explained, there is no reason why the named plaintiffs should not represent the Gitksan and Wet'suwet'en people on whose behalf this action has been brought. But any judgment to which they are entitled must be for the benefit of these peoples generally, and not piecemeal for the Hereditary Chiefs, their Houses, or their members. It will be for the parties to consider whether any amendment is required in order to make the pleadings conform with the evidence, the Courts findings, and the law as I understand it. As presently advised, I would consider it sufficient to make the named plaintiffs' representation "clear and plain" by recitals in the formal judgment of the Court. I shall leave that question to counsel.

There is no reason, of course, why an aboriginal people cannot agree among themselves to allocate the exercise of aboriginal benefits or practices in any way they wish. That must be a matter of consent which may or may not be enforceable in the Court depending upon how it is done and how other interests are protected. Such agreements would not, of course, bind either the Crown or anyone not a party to such an arrangement.

2. Aboriginal Jurisdiction and Ownership

With respect, it is difficult to find much legal merit in these parts of the plaintiffs' claims because success seems to be foreclosed by powerful pronouncements of high authority. As to aboriginal sovereignty, there is a clear statement by Dickson C.J.C. and LaForest J., speaking for a unanimous Supreme Court of Canada, in **Sparrow,** at p. 1103 that:

> "... there was from the outset never any doubt that **sovereignty and legislative power,** and indeed the underlying title to such lands vested in the Crown."

The text of the above suggests the Court was speaking as of the date of British sovereignty but I shall nevertheless consider the aboriginal position prior to that time.

As to ownership, there is binding legal authority, particularly the **St. Catherine's Milling** case that seems to be directly against the plaintiffs on this issue. In that case the Privy Council at p. 54 made it clear that even under the Royal Proclamation:

> "... the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories:' and it is declared to be the will and pleasure of the sovereign that, "for the present" they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion ..."

This statement, also by its terms relates to the period after British sovereignty, and it makes it clear that aboriginal interests, if any, are not proprietary. As I have stated elsewhere, I do not understand it to be contended that the plaintiffs aboriginal interests could be greater than they would be under the Royal Proclamation.

As mentioned earlier, a number of judges have commented upon and even restated the above language of the Privy Council but they have not suggested that aboriginal interests are proprietary.

I must say, with respect, that in my judgment these authorities are conclusively against the plaintiffs' claims for sovereignty and ownership. As with jurisdiction, I shall consider the nature of the ownership, if any, of the plaintiffs' ancestors prior to British sovereignty.

It will be convenient to deal with these two classes of claims together in the first instance although I shall later discuss them in greater detail separately. In this context I equate jurisdiction to aboriginal sovereignty. In their argument, plaintiffs' counsel tended to refer to it as "jurisdiction."

It is obvious that British sovereignty could not have been earlier than, say, 1803 when criminal jurisdiction was extended over the so called "Indian Territories." There are later, more likely possibilities such as 1805-06 when Simon Fraser established forts to the east of the territory, or 1822, when Fort Kilmaurs was opened on Babine Lake, or 1846 when the **Oregon Boundary Treaty** was completed, or 1858 when the Mainland Colony of British Columbia was established. I have concluded that it does not really make any difference which date is chosen. I shall next explain why I have that view.

(a) The Relevant Date

The plaintiffs' claims for aboriginal interests must depend upon indefinite, long aboriginal use of specific territory.

I have found some of the ancestors of some of the plaintiffs have used some of the territory in an aboriginal setting for a long, long time. I shall discuss the true nature of this "presence" shortly, but the foregoing satisfies the threshold "time-depth" requirement for aboriginal interests.

Prior to the arrival of European influences in the territory, aboriginal practices were probably confined reasonably close to village sites where salmon could most easily be obtained, and probably included trapping some animals by snares and deadfall traps and other means. There was no reason for them to travel other than between the villages or far from the great rivers for these or other aboriginal purposes, or to take more animals than were needed for subsistence although it is also reasonable to assume they would have travelled as far as was necessary for such purposes. I consider it highly significant that there is no evidence of village sites in the territory north of Gitengasx or south of Moricetown as I would have expected if those areas were populated before contact.

I find that the aboriginal practices of the plaintiffs' ancestors were, first residence, and secondly subsistence — the gathering of the products of the lands and waters of the territory for that purpose and also for ceremonial purposes. These both predated the historic period for a long, long time, and continued into the historic period (with new

techniques) up to the time of sovereignty and since that time but with decreasing frequency.

I doubt if the commencement of European influence in the territory was earlier than Cook's landfall in 1778 and it was more probably around or after the turn of the century. There may have been isolated intrusions of trade goods from unknown directions at a slightly earlier period but not in any significant quantity.

I also doubt if commercial trapping started in the territory before the 1805 or 1806 and probably a few years later than that time. Then, with the introduction of metal or mechanical traps and a market for excess furs, I believe some of the ancestors of the plaintiffs found it advantageous to spread out from their villages into distant territories for the purpose of commercial trapping. Apart from this, and the gradual accommodation of Indians to European trade goods and civilization (which did not change the nature of aboriginal activities), I doubt whether anything relevant to this action occurred in the territory between early European influences and the assertion of British sovereignty whenever that may have been.

Thus I find that the plaintiff's ancestors probably lived an aboriginal lifestyle mainly in the vicinity of and during travel between their villages and this continued until sovereignty. Without doubt, however, those lands were also used after contact for commercial trapping.

In my view, commercial trapping was not an aboriginal practice prior to contact with European influences and it did not become an aboriginal practice after that time even if lands habitually used for aboriginal purposes were also used for commercial trapping after contact. No question of abandonment of aboriginal rights would arise so long as those lands were also used for sustenance, as I am sure they were, although with modern techniques. For these reasons, commercial trapping is a neutral fact in the definition of aboriginal lands habitually used by the plaintiffs' ancestors, that is lands near and between villages and great rivers.

With regard to new lands used after contact for commercial trapping, particularly in the far north and south extremities of the territory, it is my view that such would not be an aboriginal use and those new lands would not be aboriginal lands even if they were also used for sustenance after contact. This is because, firstly, commercial trapping is not an aboriginal practice, and secondly because the use of these new lands, even partly for aboriginal purposes under European influences after contact, does not constitute the kind of indefinite long time use which is required for aboriginal rights. In such matters a user period of 20 to 50 years or so is of no importance.

Since the only significant development between first contact with European influences and the date of sovereignty was the commencement and spread of commercial trapping, and as that is a neutral fact for the reasons I have just stated, I do not believe there is any material difference, for the purposes of this case, between the date of contact and the date of sovereignty. In other words, it is only the lands used for a long time for aboriginal purposes at the time of sovereignty that qualify as aboriginal lands. Lands first used for any purpose, such as in the far north and south, after the date of contact, but before British sovereignty would not be aboriginal lands because they had not been used for the requisite long time prior to sovereignty.

(b) Aboriginal Jurisdiction and Ownership Before British Sovereignty

It is obvious that these two legal concepts were subject to profound change at the time of British sovereignty while aboriginal rights could more easily survive sovereignty. In addition, the principle of extinguishment may operate differently upon aboriginal owner-

ship and jurisdiction on the one hand and aboriginal rights on the other hand. Thus I shall deal with aboriginal jurisdiction and ownership first, and return to aboriginal rights later.

It will be useful to refer to what the plaintiffs have alleged as the basis for their claims to jurisdiction and ownership, and to comment briefly on each of them. These allegations, from par. 57 of the Statement of Claim, are that the plaintiffs and their ancestors have:

"(a) lived within the territory." This is a correct statement as to village sites but presence is only one aspect of aboriginal interests.

"(b) harvested, managed and conserved the resources within the Territory." While there is no doubt the Indians harvested their subsistence requirements from parts of the territory, it is impossible to conclude from the evidence that these three activities, to the extent they were practised, were anything more than common sense subsistence practices, and are entirely compatible with bare occupation for the purposes of subsistence. The evidence does not establish either a policy for management of the territory or concerted communal conservation.

"(c) governed themselves according to their laws." I have no difficulty finding that the Gitksan and Wet'suwet'en people developed tribal customs and practices relating to chiefs, clans and marriage and things like that, but I am not persuaded their ancestors practised universal or even uniform customs relating to land outside the villages. They may well have developed a priority system for their principal fishing sites at village locations.

"(d) governed the Territory according to their laws." I have covered this item in the previous paragraph.

"(e) exercised their spiritual beliefs within the territory." I expect that this is probably so, but the evidence does not establish that these beliefs were necessarily common to all the people or that they were universal practices. I suspect customs were probably more widely followed.

"(f) maintained their institutions and exercised their authority over the Territory through their institutions." The plaintiffs have indeed maintained institutions but I am not persuaded all their present institutions were recognized by their ancestors. The evidence in this connection was quite unsatisfactory because it was stated in such positive, universal terms which did correspond to actual practice. I do not accept the ancestors "on the ground" behaved as they did because of "institutions." Rather I find they more likely acted as they did because of survival instincts which varied from village to village.

"(g) protected and maintained the boundaries of the Territory." This is unproven. There seemed to be so many intrusions into the territory by other peoples that I cannot conclude the plaintiffs' ancestors actually maintained their boundaries or even their villages against invaders, although they usually resumed occupation of specific locations for obvious economic reasons. As recently as the 1890's Loring found Indians in defensive, winter locations away from their villages and I am uncertain the plaintiffs' ancestors maintained any boundaries.

"(h) expressed their ownership of the Territory through their regalia, adaawk, kun'gax and songs." I do not find these items sufficiently site specific to assist the plaintiffs to discharge their burden of proof.

"(i) confirmed their ownership of the Territory through their crests and totem poles." There is considerable doubt about the antiquity of crests and totem poles upon which I find it unnecessary to express any opinion.

"(j) asserted their ownership of the Territory by specific claim. This was not pressed in argument and does not assist the resolution of these issues.

"(k) confirmed their ownership of and jurisdiction over the Territory through the Feast system." I do not question the importance of the feast system in the social organization of present-day Gitksan and I have no doubt it evolved from earlier practices but I have considerable doubt about how important a role it had in the management and allocation of lands, particularly after the start of the fur trade. I think not much, for reasons which I have discussed in other parts of this judgement. Perhaps it will be sufficient to say that the evidence about feasting is at least equivocal about its role in the use or control of land outside the villages.

(i) *Aboriginal Jurisdiction or Sovereignty*

The plaintiffs adduced a great deal of evidence directed towards establishing actual control of the territory. This evidence consisted largely of historical reminiscences by elders of events in their lifetime, and the recitation of the declarations of their immediate, deceased ancestors. The plaintiffs ask me to infer that the practices they describe were a continuation of long standing, pre-existing aboriginal ownership of and jurisdiction over territory.

In fact, however, the plaintiffs seemed to have considerable difficulty with this claim for aboriginal sovereignty. Mr. Neil J. Sterritt is a Gitksan hereditary chief and a former President of the Gitksan-Wet'suwet'en Tribal Council. He is perhaps the most knowledgeable of the Gitksan chiefs on their claim in this action as he was, until 1988, involved directly with the preparation of the case for several years.

In a brief submitted to the Penner Commission in 1983, Mr. Sterritt submitted:

> "Now, I want to talk to you about the Indian government of the past . . . So I can give you something maybe you can relate to . . . to understand what Indian government was for us in 1850 or even more recently . . .
>
> I want to tell you that the feast hall was our seat of government. It filled a legislative and judiciary function. It taught us how and why to govern . . .
>
> The feast filled many functions. One of the functions was settling disputes. It was a place to do something about succession, passing on what was being done, passing on property, passing on title . . .
>
> Remember, the feast hall is an oral tradition, not written. So how do you record the official events to be sure there is truth in the event and that the community understands it? You call a feast . . ."

Brown's reports in the 1820's and Mr. Loring's reports, starting in about 1890, hardly mention the feast, particularly as a legislative body. In fact, one of Loring's principal functions seemed to have been the settlement of disputes, and the evidence strongly suggests that it was he who "governed" the territory. I do not suggest the Indians have not always participated in feasting practices, and I accept that it has played, and still plays, a crucial role in the social organization of these people. I am not persuaded that the feast has ever operated as a legislative institution in the regulation of land. There are simply too many instances of prominent Chiefs who have conducted themselves other than in accordance with the land law system for which the plaintiffs contend. I shall discuss these inconsistencies when I come to deal with internal boundaries in Part 17.

The plaintiffs' position on jurisdiction was described at trial, somewhat tortuously, by Mr. Sterritt. Under crossexamination, he was asked about jurisdiction. He gave the following evidence at vol. 134. p. 8282:

> MR. GOLDIE:
> Q: Mr. Sterritt, I'll put the question that I put to you a minute ago, and with the assistance of my friend's concern, you can answer it as best you see fit and then we can go from there. Do the plaintiffs claim that such laws, that is to say the laws and customs of the Gitksan, supersede the laws of the province if the two are in conflict?
>
> A: I don't know.
>
> Q: Is it your understanding that the plaintiffs claim that such laws supersede the laws of the province if the two are in conflict?
>
> A: I don't know.
>
> Q: Do you, as a plaintiff, assert that the laws of the Gitksan supersede the laws of the province if the two are in conflict?
>
> A: That's fairly complex, and I'm unable to answer that question.
>
> Q: You have no opinion or you have not given any consideration to that at all?
>
> A: No, not — no, I haven't. Not detailed consideration.
>
> Q :Well, whether detailed or otherwise, have you given it sufficient consideration to answer the question whether it is your position as a plaintiff in this case that the laws of the Gitksan and the customs of the Gitksan supersede the laws of the Province of British Columbia if the two are in conflict?
>
> A: No, I haven't.

In Re-examination by Mr. Rush, Mr. Sterritt was asked this:

> Q: "Mr. Sterritt, you answered this, that you did not know if the laws and customs of the Gitksan supersede the laws of the province if the two are in conflict. Now, my question to you is what is your understanding of the extent of the application of Gitksan and Wet'suwet'en laws?"

This led to an objection and some argument, but finally the re-examination continued at Volume 142, p. 8987 L. 16:

> MR. RUSH:
> Q: All right. Just let me reframe the question again for you Mr. Sterritt. You indicated in your evidence that you hadn't thought about the question of whether the province could make laws in respect of the resources of the Gitksan people, and then, as you have just heard me relate, you indicated that Canada and British Columbia do not have sovereignty in the Gitksan and Wet'suwet'en area. My question is can you explain what you meant by the two statements?
>
> A: The Gitksan and the Wet'suwet'en have sovereignty within that territory, within their territories. The Gitksan-Wet'suwet'en have their laws within those territories and the power to make laws within those territories. And the —excuse me — the Gitksan and Wet'suwet'en laws

prevail over the laws of the province within that territory — within the territories.

Q: Is that what you meant by sovereignty or is that what you mean by sovereignty?

A: Yes.

THE Court: Well, Mr. Sterritt, what do you want me to understand you mean when you say that the Gitksan and Wet'suwet'en have sovereignty and the power to make laws for the territories? Who makes the laws, the chiefs, the Houses, the clans, the tribal council, band councils, who?

THE WITNESS: The hereditary chiefs.

THE Court: Each for his own territory?

THE WITNESS: On behalf of the Houses.

THE Court: But by that answer do you presuppose the possibility of 50 or 60 different laws within — separate laws for each territory?

THE WITNESS: No, there are — based on the past there have been — laws have evolved over time for the Gitksan and Wet'suwet'en, and they — they are similar laws from one House to the next. They apply throughout the territory. And in a similar way laws passed by the Gitksan and Wet'suwet'en would be common throughout the territory. And there may be unusual circumstances in a given area or situation, but those would have to be dealt with as they arise, but the laws would apply throughout the territory.

THE Court: Well, what is the mechanism that you foresee for the making of these laws? Just hereditary chiefs?

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

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

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

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

THE WITNESS: Well, no.

THE Court: Other than the tribal council?

THE WITNESS: The closest we come to it is the staff of the tribal council. But there — there is a recognition of a need for such a group, and what form that takes officially or otherwise is — you know — has not been discussed in detail, but it is

such a — there is a necessity based on all of the information coming in to — that affects a given goal or direction or circumstance, that there is a need for this information and advice to come to the hereditary chiefs for them to weigh in terms of their own positions and their own — their own authority and in relation to their Houses?

THE Court: Mr. Sterritt, so there will be no unnecessary misunderstanding, when you say the staff of the tribal council, do you exclude the elected members when you say staff? Some people might say staff means the paid employees. Others might say it includes the elected members. What did you intend by saying staff?

THE WITNESS: Well, I should point out, I guess, to a certain extent how it worked while I was president. The hereditary chiefs may have had an issue or a problem that they were working on, and they outlined what they wanted done, and then as president either I or the executive director took that to the people that were available to us within the tribal council staff and worked out information, took that information back to the hereditary chiefs, and they reviewed it and — but it doesn't mean that there would be a tribal council. There could be a secretariat of some other form that would fulfil that function in a — in a way to be defined yet. But that would be the objective of that secretariat.

THE Court: All right. Thank you.

Q: Now, Mr. Sterritt, in what you have just described,in the view that you have just expressed, the secretariat, what relationship would that have, if any, to the feast?

A. The — well, there are feasts right now for a number of purposes, and we've talked about what they are. There are also feasts in which the hereditary chiefs could meet as similar to meeting in — in parliament, where they would — it would not be a feast necessarily put on by a House. It could be a feast put on by a number of hereditary chiefs to lay out this direction, to lay out what it is they're concerned about and how it would go forward. The Houses themselves who are directly affected, if it was their territory in their area, would have input into that and advise the hereditary chiefs about their concerns and their needs, and then they would set out a direction that would go to a secretariat. It would then go back through the same process and probably through the House to the hereditary chiefs where they gather. Those — that's a possibility. It's not something that's fixed, but it's one consideration that we've given. But the House that is directly affected in a given area would play an important role in terms of how they see the future of their territory and how it relates to the other territories . .

THE WITNESS: Maybe I should, just before we do break, go back to one thing on that other. If a law was applied by Canada or the province in that area, say, then the House and — I don't know whether I should use the word assembly of chiefs, but where the chiefs meet would have a veto power over any other laws that may be applied or considered. They could stop that because of the decisions that the hereditary chiefs and their goals for that given House territory in a given area.

THE Court: When you say laws of Canada, you mean laws of Canada or British Columbia or just Canada?

THE WITNESS: Yes, either or both . . . ,

It is apparent that on this issue the plaintiffs' thrust is directed not to historical practices and customs, but rather to undefined, unspecific forms of government which some of the chiefs are just beginning to think about. With respect, they have put the cart before the horse. This remedy could only be based on precontact practices, not upon the political wishes of a people seeking to establish a new form of government.

In argument Mr. Grant put the plaintiffs' case on jurisdiction as follows at vol. 337, p.p. 26421-26425:

> "Now, we are saying that the provincial laws do not apply to the plaintiffs and their land only insofar as they are inconsistent or repugnant with the ownership and jurisdiction of the plaintiffs. The laws of the Province do apply to non-Indians within the territory insofar as they are not inconsistent with the plaintiffs' ownership and jurisdiction.
>
> And I'm going to in the course of that articulation I'll come back to that, but in my argument when we deal with the jurisdiction as it relates to issues not connected to land and resources I'm coming to, the second arm of it though was a question raised whether the provincial laws have application to Gitksan and Wet'suwet'en people who are residing outside the boundaries. And, yes, they do. The provincial laws would apply outside the boundaries to Gitksan and Wet'suwet'en people. And the declarations aim only at the application of provincial laws within the territorial boundaries . . .
>
> THE Court: Well, what you're really saying is you want jurisdiction over matters of a local or private nature, civil rights and matters of a private nature within the territories. You want the same rights within the territory the Province has under Section 92, don't you?
>
> MR. GRANT: Vis-a-vis the plaintiffs, not vis-a-vis nonIndian people in the territory. The provincial laws would still apply to non-Indians. But let me — I'd like to —
>
> THE Court: Well, then you say what I have just stated is far too broad?
>
> MR. GRANT: Well, if you say what I'm seeking is — what we are seeking is jurisdiction — is to move the Section 92 from the Province to the plaintiffs for all purposes within the territory for anybody that happens to be there, yes, that is broader than what we're seeking . . .
>
> Now, the intent of the declaration of the right is intended to restrict the conduct of the provincial defendant from impeding the aboriginal right to govern themselves . . .
>
> A further example with respect to the education system could be considered if a Gitksan or Wet'suwet'en House, and I say House or House member. It could be a member of a House. Okay. It doesn't have to be the whole House, of course. Decided to withdraw their children from the school and educate them on the territory. They decided this was the appropriate way consistent with traditional training to take them out of school. Such a situation would be in conflict with the requirement that the children must attend school for a certain number of days of the year. The effect of the order of a declaration of self-government made by this Court would be that if the provincial defendant prosecuted that family or those families for violation of the School Act they could raise a defence they were educating their

> children in accordance with their aboriginal right of selfdetermination regarding education . . .
>
> The onus in such an application by the Gitksan would be to establish the right to educate their children outside the school system was part of the aboriginal selfgovernment. That issue would have to be decided on a specific basis with the specific facts.
>
> But the effect of the order we're asking your lordship to make would be that the declaration of the recognition of self-government as one of the aboriginal rights of the Gitksan and Wet'suwet'en, leads to the result that the plaintiffs or petitioners once they demonstrated that the alternative education formed an aspect of self-government in particular circumstances, the provincial law would not prevail. Once they overcame that hurdle on the particular facts on the particular case then the implication of the order we're seeking from this Court would apply.
>
> But this is the important point. Until the Gitksan and Wet'suwet'en exercise their authority in relation to education in a manner which conflicts with the provincial School Act, that act continues to apply. In other words, there is no point in theorizing about multiple challenges when there is no conflict . . .
>
> Just as the Province has been constrained from passing legislation contrary to the Charter of Rights and Freedoms, so is the Province constrained from passing legislation contrary to the aboriginal rights of the Gitksan and Wet'suwet'en to govern themselves and their people. I've already reiterated that the context of each — analysis of each legislation and consideration they contravene the rights of the plaintiffs is an issue that can only be considered in the context of that particular piece of legislation. In fact, my lord, it would still not resolve the issue if every section of every statute of the Province in existence today was analyzed and said this conflicts, this doesn't conflict."

Mr. Grant was obviously describing a new theory of government — a rationalization — unrelated in any way to aboriginal practices. I have never heard of it before, and it is certainly not mentioned in any authorities binding upon this Court.

It became obvious during the course of the trial that what the Gitksan and Wet'suwet'en witness describe as law is really a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves. I heard many instances of prominent Chiefs conducting themselves other than in accordance with these rules, such as logging or trapping on another chiefs territory although there always seemed to be an aboriginal exception which made almost any departure from aboriginal rules permissable. In my judgment, these rules are so flexible and uncertain that they cannot be classified as laws.

For example, I was furnished with an analysis of the evidence of a number of witnesses who gave different versions of the "law" alleged to govern the use of a father's House territory. This was called "amnigwootxw" by the Gitksan and "neg'edeld'es" by the Wet'suwet'en. This is what some of the witnesses said about this alleged "law:"

> (a) "Amnigwootxw is when the son travels with his father on the territory, he will be with his father until his father dies. But after his father dies he does not say he owns this territory. He leaves and if he wants to go back there he has to get permission from the head

chief of that territory before he goes back on to the territory where him and his father were before": Solomon Marsden, Tr.94, p. 5948, 11. 22-29.

(b) Neg'edeld'es rights extend to grandchildren: Henry Alfred, Tr.51, p. 3130, 1.45 to p. 3131, 1.7.

(c) Neg'edeld'es rights last during the lifetime of the father only: Henry Alfred, Tr.51, p. 130, 11. 39-44.

(d) Neg'edeld'es rights last forever: Elsie Quaw, Ex. 673A, p. 19, 11.9-17.

(e) Neg'edeld'es rights can be extended beyond the life of the father but only with permission: Alfred Joseph, Tr.24, p. 1597, 1.29 to p. 1598, 1.7.

(f) Neg'edeld'es can be extended without permission, at least until the "name is taken up": Warner Williams, Ex. 677A, p. 36, 11.31-42.

(g) It is the son's privilege to trap on his father's land, even where the son did not ask permission: Vernon Smith, Tr.91, p. 5800, 1.46 to p. 5801, 1.11 and p. 5813, 11.35-41. (h) Amnigwootxw can only be extended by permission, but permission cannot be denied. "... this person could not be refused if he goes to the chief and asks permission. He would not be refused, because when his father dies all the deceased person's children are taken by the Wil' na t'ahl as their own children and this is why they don't refuse them to go on to the territory": Solomon Marsden, Tr.94, p. 5948, 11.39-44. See also Art Mathews Jr., Tr.77, p. 4777, 11.27-32.

(i) Sarah Layton (Knedebeas) and her grandmother refused to give Roy Morris permission to trap on Knedebeas' territory. (But Mr. Morris continued to trap there).

(j) Neg'edeld'es rights can be acquired to the mother-in-law's territory: Stanley Morris, Ex. 669-1-A, p. 5,1.43 to p. 6, 1.11.

(k) Neg'edeld'es gives one rights to use a spouse's territory: Elsie Quaw, Ex. 673A, p. 18, 1.46 to p. 19, 1.8.

(l) Neg'edeld'es rights are limited: "... like my children would be allowed to go there as Neg'edeld'es, but they don't inherit the territory like on the mother's side": Dan Mitchell, Tr.60, p. 3644, 11.43-46.

(m) Neg'edeld'es rights are quite extensive. Johnny David claimed the rights were equivalent to caretaker rights, and accordingly he had the right to choose the successor (Tr.156, p. 10009, 11.8-32 and Ex. 74-D, p. 44) and to challenge the head chief's (according to Ex. 646-9B) authority over the territory. "Leonard George is Smogelgem and also I can't agree with him taking the territory, but he can utilize it." (Tr.156, p. 10009, 11.43-45)

(n) The right may extend to the territory of the father's house or clan: Henry Alfred, Tr.51, p. 3130, 11.39-44.

It is my conclusion that Gitksan and Wet'suwet'en laws and customs are not sufficiently certain to permit a finding that they or their ancestors governed the territory according to aboriginal laws even though some Indians may well have chosen to follow local customs when it was convenient to do so.

Doing the best I can with this evidence, and I have tried to take into consideration all that I heard, I conclude that prior to British sovereignty the ancestors of the plaintiffs lived in their villages at strategic locations alongside the Skeena and Bulkley Rivers and they probably organized themselves into clans and houses for social purposes, but they had little need for what we would call laws of general application. While peer pressure in the form of customs may have governed the villages, there was, in my judgment, no difference between aboriginal sovereignty or jurisdiction in the largely empty lands of the territory on one hand, and occupation or possession of the same empty lands for aboriginal sustenance on the other hand.

I also incorporate into this section the conclusions I expressed earlier regarding the relationship between land use and fur trapping which only started after contact. Before that time there was no reason for the plaintiffs' ancestors, individually or communally, to purport to govern the wilderness beyond the areas surrounding their villages even though they may have used such areas from time to time for aboriginal purposes.

(ii) *Aboriginal Ownership*

I digress to discuss the question of village sites.

The distinction between village sites and other lands was recognized in one form or another in the Report of the Parliamentary Committee inquiring into New Zealand, by Herman Merivale, Governor Douglas, Begbie J. and even Mr. Trutch. In fact, the legislation of the Colony exempted village sites or settlements from pre-emption and they were protected from all other intrusions. This distinction was probably the reason for the creation of reserves.

In both the colony and province of British Columbia it was intended that village sites would be included within reserves and permanently set apart for the use of Indians. I know of no occupied village in the territory that was not included within a reserve except Gitanka'at and Gitangasx which are now abandoned, and may have been abandoned at the time reserves were established. I recall no evidence of when they were deserted. There are small reserves in the area of Gitanka'at. Both of these locations should have been designated as reserves in the 1890's if they were then occupied as villages.

I do not think it is necessary to enquire into the legal status of Indian reserves. Indian interest in reserves is now statutory and I have no jurisdiction to adjust reserves. In fact, it was not argued that I should.

It seems clear that some hunting grounds adjacent to villages were not included in reserves notwithstanding the instructions given to the reserve commissioners both in colonial and provincial times. It is regrettable that this question was not resolved at the time of the McKenna-McBride Commission which did have jurisdiction to adjust reserves. It is equally regrettable that the Indians themselves did not take more effective steps to secure larger reserves if they really wished to have larger tracts of land allotted to them.

Even if I had jurisdiction to adjust reserves, the parties advanced no evidence or argument for special status for any specific lands surrounding Indian villages although it seems obvious some reserves should be larger than they are. It was mentioned at trial that all Indian reserves in the territory total only about 45 square miles although it is significant

that many of them are strategically located, and most of the fishing sites identified by the plaintiffs are within reserves.

I do not, therefore, propose to make any special order regarding village sites, or surrounding hunting lands. They are either already included in Indian reserves or they must be considered on the same footing as the other lands of the territory. No doubt the province will wish to correct this historical anomaly, but not necessarily by "adjusting" reserves. I say this because there may be better ways to adjust this grievance.

In my judgement, what happened on the ground before British sovereignty was equally consistent with many forms of occupation or possession for aboriginal use as for ownership. It is true that trader Brown referred to some Indians as men of property and other similar terms but that is equivocal. He also suggested exclusive use of some undefined land was restricted to trapping for beaver.

In this century, long-time settlers such as Mr. Shelford were, until very recently, unaware of any claim to aboriginal ownership or control of the territory or of any claim to an interest inconsistent with the activities of himself and other white settlers. When there were disputes with settlers or governments, of which there were not many, the Indians often accepted solutions which denied aboriginal ownership. Apart from village sites, and political statements which have frequently been repeated by Indians, I cannot infer from the evidence that the Indians possessed or controlled any part of the territory, other than for village sites and for aboriginal use in a way that would justify a declaration equivalent to ownership. Further, I find that, except for occasional political statements, the plaintiffs in the post sovereignty period seldom conducted themselves as if they believed they were owners of such vast areas.

I was also treated to extensive arguments about the legal ingredients of ownership. Most of these authorities were American cases which were decided in a totally different legal and factual context from the situation in British Columbia and they do not overcome the binding authority of **St. Catherine's Milling** about the nature of non-proprietary aboriginal interests. It seems to me, with respect, that the Privy Council got it right when it described the aboriginal interests as a personal right rather than a proprietary one.

In this respect, I note the Privy Council had an opportunity to comment on this question again in 1921, more than 30 years after **St. Catherine's Milling,** in **Amodu Tijani v. The Secretary, Southern Nigeria,** [1921] 2 A.C. 399, particularly at p. 404 where their Lordships continued to refer to "native title" as a "possessory title" and as a "usufruct" with variable customs in different countries.

I am satisfied that at the date of British sovereignty the plaintiffs ancestors were living in their villages on the great rivers in a form of communal society, occupying or using fishing sites and adjacent lands as their ancestors had done for the purpose of hunting and gathering whatever they required for sustenance. They governed themselves in their villages and immediately surrounding areas to the extent necessary for communal living, but it cannot be said that they owned or governed such vast and almost inaccessible tracts of land in any sense that would be recognized by the law. In no sense could it be said that Gitksan or Wet'suwet'en law or title followed (or governed) these people except possibly in a social sense to the far reaches of the territory.

To put it differently, I have no doubt that another people, such as the Nishga or Talthan, if they wished, could have settled at some location away from the Gitksan or Wet'suwet'en villages and no law known to me would have required them to depart.

While these are my findings, I am prepared to assume for the purposes of this part of my judgment that, in the legal and jurisdictional vacuum which existed prior to British

sovereignty, the organization of these people was the only form of ownership and jurisdiction which existed in the areas of the villages. I would not make the same finding with respect to the rest of the territory, even to the areas over which I believe the ancestors of the plaintiffs roamed for sustenance purposes.

3. The Effect of British Sovereignty

Upon the Crown through the Imperial Parliament establishing the Colony of British Columbia in 1858, it authorized the appointment of a Governor, made arrangements for a Legislative Council, imposed English law, and embarked upon the construction of a legal regime for the ownership and governance of the Colony. This, in my view, is what sovereignty is all about, but Professor Dicey has a more complete definition in his **Law of the Constitution,** (10th edition), 1959 at p. 39:

> "The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."
>
> A law may, for our present purpose, be defined "any rule which will be enforced by the courts". The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described: Any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the courts. The same principle, looked at from its negative side, may be thus stated: **There is no person or body of persons who can, under the English Constitution, make rules which override or derogate from an Act of Parliament or which (to express the same thing in other words) will be enforced by the courts in contravention of an Act of Parliament.** (my emphasis)

This, in my view, is what the Court meant in **Sparrow** when it said, as quoted above:

> "... there was from the outset never any doubt that sovereignty and legislative power and indeed the underlying title to such lands vested in the Crown ..."

Although not binding upon me but deserving deference, is the opinion of the Privy Council in **Re Southern Rhodesia,** [1919] A.C. 211, at p. 224:

> "... According to the argument the natives before 1893 were owners of the whole of these vast regions in such a sense that, without their permission or that of their King and trustee, no traveller, still less a settler, could so much as enter without committing a trespass. If so, the maintenance of their rights was fatally inconsistent with white settlement of the country, and yet white settlement was the object of the whole forward movement, pioneered by the Company and controlled by the Crown, and that object was successfully accomplished, with the result that the aboriginal system gave place to another prescribed by the Order in Council."

That, in my view, is what happened in the territory, that is the aboriginal system, to the extent it constituted aboriginal jurisdiction of sovereignty, or ownership apart from occupation for residence and use, gave way to a new colonial form of government which the law recognizes to the exclusion of all other systems. This process was described in

Attorney General for British Columbia v. Attorney General for Canada, [1906] A.C. 552, (J.C.P.C.), (the Deadman's Island Case), where it was suggested that matters had begun in the colony:

> "... by the indiscriminate squatting of adventurous settlers in a wild country. The initiation of the reign of law may be taken to date from the advent of Governor Douglas in 1858. By an Act of Parliament passed in that year British Columbia was erected into a separate territory, and power was given to Her Majesty by Order in Council to appoint a governor and make such provisions for the laws and administration of the new Colony as to her should seem fit.
>
> "Accordingly Sir James Douglas was in 1858 appointed governor by letters patent, and an Order in Council was made defining his powers and duties. As to his powers, it may be said at once that they were absolutely autocratic; he represented the Crown in every particular, and was, in fact, the law. At the same time careful despatches were sent to him by the Colonial minister of the day laying down in explicit terms the methods of administration which it was desired he should follow."

After that, aboriginal customs, to the extent they could be described as laws before the creation of the colony became customs which depended upon the willingness of the community to live and abide by them, but they ceased to have any force, as laws, within the colony.

Then, at the time of Union of the colony with Canada in 1871, all legislative jurisdiction was divided between Canada and the province and there was no room for aboriginal jurisdiction or sovereignty which would be recognized by the law or the courts. In 1888 the Privy Council in **St. Catherine's Milling,** decided that aboriginal interests in Ontario existed only at the pleasure of the Crown, and the same was recognized for British Columbia in **Calder.** Rights which are subject to extinguishment can hardly be absolute, as jurisdiction and ownership would be expected to be.

Even after the addition of s. 35 of the **Constitution Act, 1982,** which recognized aboriginal rights, it was held in **Sparrow,** at p. 1109 that:

> "... We find that the words 'recognition and affirmation' incorporate the fiduciary relationship referred to earlier and so import some restraint upon the exercise of sovereign power. **Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91 (24) ..."**
> (my emphasis)

If there was aboriginal sovereignty it would be valid against Federal as well as provincial jurisdiction, but it clearly is not.

4. Conclusions on Jurisdiction and Ownership

After much consideration, I am driven to find that jurisdiction and sovereignty are such absolute concepts that there is no half-way house. No Court has authority to make grants of constitutional jurisdiction in the face of such clear and comprehensive statutory and constitutional provisions. The very fact that the plaintiffs recognize the underlying title of the Crown precludes them from denying the sovereignty that created such title.

I fully understand the plaintiffs' wishful belief that their distinctive history entitles them to demand some form of constitutional independence from British Columbia. But neither this nor any Court has the jurisdiction to undo the establishment of the Colony, Confederation, or the constitutional arrangements which are now in place. Separate sovereignty or legislative authority, as a matter of law, is beyond the authority of any Court to award.

I also understand the reasons why some aboriginal persons have spoken in strident and exaggerated terms about aboriginal ownership and sovereignty, and why they have asserted exemption from the laws of Canada and the province.

They often refer to the fact they were never conquered by military force. With respect, that is not a relevant consideration at this late date if it ever was. Similarly, the absence of treaties does not change the fact that Canadian and British Columbian sovereignty is a legal reality recognized both by the law of nations and by this Court.

The plaintiffs must understand that Canada and the provinces, as a matter of law, are sovereign, each in their own jurisdictions, which makes it impossible for aboriginal peoples unilaterally to achieve the independent or separate status some of them seek. In the language of the street, and in the contemplation of the law, the plaintiffs are subject to the same law and the same Constitution as everyone else. The Constitution can only be changed in the manner provided by the Constitution itself.

This is not to say that some form of self-government for aboriginal persons cannot be arranged. That, however, is possible only with the agreement of both levels of government under appropriate, lawful legislation. It cannot be achieved by litigation.

In view of the foregoing, it is not necessary for me to say anything about the absence of representation by Gitksan or Wet'suwet'en persons (or children or persons under legal disability) who may not wish to have aboriginal jurisdiction and authority imposed upon them.

As to ownership, I have concluded that the interest of the plaintiffs' ancestors, at the time of British sovereignty, except for village sites, was nothing more than the right to use the land for aboriginal purposes and I shall consider that question more fully in this next section of this Part.

It follows, therefore, that the plaintiffs' claims for aboriginal jurisdiction or sovereignty over, and ownership of, the territory must be dismissed.

5. Aboriginal Rights

As already mentioned, the plaintiffs' claims for aboriginal rights must depend upon indefinite, long aboriginal use of specific territory before sovereignty.

(a) The Requirements for Aboriginal Rights

It will be convenient to repeat the requirements for aboriginal rights described by Mahoney J. in the Baker Lake case at pp. 557-558. They are:

> "1. That they [plaintiffs] and their ancestors were members of an organized society.
>
> 2. That the organized society occupied the specific territory over which they assert the aboriginal title.

> 3. That the occupation was to the exclusion of other organized societies.
>
> 4. That the occupation was an established fact at the time sovereignty was asserted by England."

I am uncertain about the requirement for exclusivity. Such would certainly be essential for ownership and jurisdiction but I suspect there are areas where more than one aboriginal group may have sustenance rights, such as in the areas between the closely related Wet'suwet'en and Babine peoples at Bear Lake and along the Babine River, and possibly in other peripheral areas. I cannot accept that two aboriginal peoples who both used land for sustenance would not each have aboriginal rights to continue doing so although they would not be exclusive rights.

I also think a further requirement must be added to the tests formulated by Mahoney J. What the law protects is not bare presence or all activities, but rather aboriginal practices carried on within an aboriginal society in a specific territory for an indefinite or long, long time. This relates to what I have just said about commercial trapping.

Subject to the above and to the other considerations mentioned in this judgment, I am satisfied that the tests stated by Mahoney J. accord generally with the authorities and I am content to adopt them. I shall discuss them individually, and I shall add some further comments.

(i) *Ancestors in an Organized Society*

I suspect the requirement of social organization comes from dicta in cases such as **Calder** where Judson J. referred to the Nishga as "organized in societies and occupying the land as their forefathers had done for centuries . . ."

If it were necessary to find that the Gitksan and Wet'suwet'en, as aboriginal peoples rather than villagers had institutions and governed themselves, then I doubt if this requirement has been satisfied. I have already discussed this earlier in this Part.

I think, however, there is much wisdom in the dictum of the Privy Council in **Re Southern Rhodesia,** [1919] A.C. 211 at pp. 233-234,

> "The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor 'richer than all his tribe.' On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law. Between the two there is a wide tract of much ethnological interest, but the position of the natives of Southern Rhodesia within it is very uncertain; clearly they approximate rather to the lower than to the higher limit."

I am quite unable to say that there was much in the way of pre-contact social organization among the Gitksan or Wet'suwet'en simply because there is so little reliable evidence. Based upon **Re Southern Rhodesia,** however, I find that no particular level of sophistication should be required. I adopt the view of Mahoney J. at p. 559 of **Baker Lake** that:

> "... the relative sophistication of the organization of any society will be a function of the needs of its members, [and] the demands they make of it."

Assuming Gitksan and Wet'suwet'en village customs furnished whatever social organization the law requires, I accept the opinion of Professor Ray that the minimal social organization described by trader Brown at Babine Lake in the 1820's could not have been borrowed or developed just since contact. This, and the further facts that there were villages in the vicinity of Kisgegas and reports of larger Skeena villages to the west, and the probability I have already expressed that some of the ancestors of the plaintiffs have been present in the territory for a long, long time, persuade me this requirement has been satisfied.

(ii) *The Occupation of Specific Territory*

I shall deal with this question in greater detail later but for the moment it will be sufficient to say that there is evidence of Indians living in villages at important locations in the territory. I infer they would have used surrounding lands, and other lands further away as may have been required. This is sufficient to satisfy this part of the test for the areas actually used.

(iii) *The Exclusion of Other Organized Societies*

While I have the view that the Gitksan and Wet'suwet'en were unable to keep invaders or traders out of their territory, there is no reason to believe that other organized societies established themselves in the heartland of the territory along the great rivers on any permanent basis, and I think this requirement is satisfied for areas actually used.

(iv) *Occupation Established at Time British Sovereignty Asserted*

I have already decided there is no practical difference in this case between the date of contact and the date of sovereignty. For the purposes of this test, I find some Gitksan and Wet'suwet'en had been present in their villages and occupied surrounding areas for aboriginal purposes for an uncertain, long time before British Sovereignty.

(v) *Long Time Aboriginal Practices*

This brings me to the additional test for aboriginal rights which I have added to those mentioned by Mahoney J. in **Baker Lake.** I have already discussed this generally, and I have concluded that the aboriginal activities recognized and protected by law are those which were carried on by the plaintiffs' ancestors at the time of contact or European influence and which were still being carried on at the date of sovereignty, although by then with modern techniques. I have already decided that trapping for the fur trade was not an aboriginal activity.

(b) The Nature of Aboriginal Rights

(i) *Generally*

Having decided that aboriginal rights are residential and sustenance gathering rights, it is unnecessary and probably unwise, to attempt a precise definition. This was attempted

in **Attorney-General of Ontario v. Bear Island Foundation** (1984) 15 D.L.R. (4th) 321 where Steel J., for the purposes of that case, offered the following at p. 360:

> "Bearing in mind the decisions in the **Calder** and **Smith** cases, I find that the aboriginal rights in these lands existing at the relevant date are as follows: To hunt all animals for food, clothing, personal use and adornment, to exclusively trap fur bearers, which right was enjoyed by the individual family, and to sell the furs, to fish, use herbs, berries, maple sugar and other natural products for food, medicines and dyes, to use ochre and vermilion for dyes, to use turp, quartzite for tools and other implements but not extensive mining, to use clay for pottery, pipes and ornaments, to use trees, bark and furs for housing but not lumbering, and to use trees and bark for fires, canoes, sleighs and snowshoes. All of the above are traditional uses for basic survival and personal ornamentation existing as of 1763."

I quote the foregoing only as an example of what was held to be included as generic "aboriginal rights" in that case. I do not accept such definition except as an example, firstly because 1763 is not an appropriate date for determining what was an aboriginal right in this case, and because I respectfully disagree that trapping fur bearing animals for the sale of furs was ever an aboriginal activity in the territory.

In my view, the aboriginal rights of the plaintiffs' ancestors included all those sustenance practices and the gathering of all those products of the land and waters of the territory I shall define which they practised and used before exposure to European civilization (or sovereignty) for subsistence or survival, including wood, food and clothing, and for their culture or ornamentation — in short, what their ancestors obtained from the land and waters for their aboriginal life.

As I have said, the date of British sovereignty for this purpose is equivalent to the date of contact because although modern techniques must clearly be recognized, the nature and extent of aboriginal rights did not change in that period.

(ii) *Commercial Activities*

This requires me to consider the comments of the Supreme Court of Canada on this question in **Sparrow** where the Court declined to discuss the question of commercial aboriginal rights. At p. 20 it said:

> "In the Courts below, the case at bar was not presented on the footing of an aboriginal right to fish for commercial or livelihood purposes. Rather, the focus was and continues to be on the validity of a net length restriction affecting the appellant's food fishing licence. We therefore adopt the Court of Appeal's characterization of the right for the purpose of this appeal, and confine our reasons to the meaning of the constitutional recognition and affirmation of the existing aboriginal right to fish for food and social and ceremonial purposes."

While the Supreme Court of Canada will ultimately be called upon finally to settle this important question, I am not able to avoid expressing an early judicial opinion. In my view the purpose of aboriginal rights was to sustain existence in an aboriginal society, that is to hunt and fish and collect the products of the land and waters for the survival of the communal group. There would undoubtedly be some bartering but that would be in sustenance products likewise obtained by aboriginal practices.

As I understand the authorities, subject to what I shall say later in this judgment, and subject to the requirements I have already described, the law has protected the right of aboriginal groups to continue to use "traditional" lands for these purposes.

In my view, using fishing as an example, it would be contrary to the rational evolution of aboriginal rights, and contrary to principle, to enhance an aboriginal right by providing priority over all other users (after justified conservation), and then to enlarge or extend the prioritized aboriginal right to commercial activities when many aboriginals are already employed in this industry. It would be foolish to suggest, for example, that the prioritized aboriginal rights of an Indian participating in the commercial fishing industry would be exempt from the regulations which govern non-Indian licensees.

I digress from this discussion of aboriginal rights to recognize that **Sparrow** was written in the context of tidal fishing, while the plaintiffs, particularly the Gitksan, are most anxious to establish what they call a commercial, inland fishery at Gitwangak, and possibly at other Skeena locations.

As I understand the evidence, particularly that of Mr. Glen Williams, salmon stocks have risen to levels not seen since the early years of this century. This is because of salmon spawning enhancement programs in the Babine system. As a result, Mr. Williams says upwards of one million salmon are unable some years to enter the spawning streams. Some of the plaintiffs wish to take quantities of salmon from the Skeena River at Gitwangak or other locations for commercial purposes in order to raise much needed funds for Band purposes.

Not having heard the other side of this question from the officials of the Department of Oceans and Fisheries (Canada), I am unable to express any views on the merits of this proposal. In my view, however, such an enterprise could not be conducted as an aboriginal right and would have to be arranged, if at all, by agreement with the Crown.

There is another reason for my conclusion that land-based commercial enterprise cannot be regarded as an aboriginal right. From the beginning of the colony, Indians have had equal rights with everyone else to use the unoccupied land of the Crown. This user right has not been restricted to "traditional" lands either for aboriginal sustenance or for commercial purposes pursuant to the general law. Now, as pointed out in **Sparrow,** we live in a society which is becoming "increasingly more complex, interdependent and sophisticated."

Many aboriginals are directly engaged in the wage economy, and a few — not enough, but some — participate as entrepreneurs. Mr. Pete Muldoe, a prominent Gitksan hereditary chief, has engaged in logging and sawmilling in the territory, as has the Moricetown Band Council. The aboriginal communities, like the provincial community, have their economic successes and failures.

Notwithstanding the complexity of mixed land use in the province, I think aboriginal rights, to the extent recognized by law, have always been sustenance user rights practised for a very long time in a specific territory. These rights do not include commercial activities, even those related to land or water resource gathering, except in compliance with the general law of the province.

(iii) *Exclusivity*

Aboriginal rights have never been absolute. As long ago as **Johnson v. M'Intosh,** and as confirmed by the Privy Council in **St. Catherine's Milling Co.,** in the absence of contract or treaty, such rights have been recognized to exist merely at the Crown's pleasure. In **Sparrow,** aboriginal rights were expressly stated not to be absolute.

The aboriginal right to fish for food discussed in **Sparrow** was clearly not exclusive to the Musqueam. As Dr. Suttle (a witness) said in **Sparrow:**

> "No tribe was wholly self-sufficient or occupied its territory to the complete exclusion of others" (at p. 1094).

In addition to the Musqueam, many other Indians and non-Indians share the Fraser River fishery. The evidence in this case shows parts of the territory are shared with other Indians, particularly the Babine people at Bear Lake, along the Babine River, and in the south.

The question whether an aboriginal right, when established, is exclusive as against the Crown and others has not been decided authoritatively because it was not until quite recently that a claim for such rights has ever been maintained against the Crown.

The law is clear that both Canada and the province, in the exercise of their undoubted sovereignty, may enact legislation which affects Indians and lands reserved for Indians. Canada, within its jurisdiction, may legislate directly, while British Columbia's laws of general application may in many circumstances vitally affect Indians. In this respect, Martland J. speaking for the majority said in **Cardinal v. Attorney General of Alberta,** [1974] 2 S.C.R. 695 at 703:

> "A Provincial Legislature could not enact legislation in relation to Indians, or in relation to Indian Reserves, but this is far from saying that the effect of s. 91(24) of the British North America Act, 1867, was to create enclaves within a Province within the boundaries of which Provincial legislation could have no application. In my opinion, the test as to the application of Provincial legislation within a Reserve is the same as with respect to its application within the Province and that is that it must be within the authority of s. 92 and must not be in relation to a subject-matter assigned exclusively to the Canadian Parliament under s. 91. Two of those subjects are Indians and Indian Reserves, but if Provincial legislation within the limits of s. 92 is not construed as being legislation in relation to those classes of subjects (or any other subject under s. 91) it is applicable anywhere in the Province including Indian Reserves, even though Indians or Indian Reserves might be affected by it. My point is that s. 91(24) enumerates classes of subjects over which the Federal Parliament has the exclusive power to legislate, but it does not purport to define areas within a Province within which the power of a Province to enact legislation, otherwise within its powers, is to be excluded."

It goes without saying that the foregoing, relating to reserves, must apply with at least equal force to non-reserve lands which are subject to an aboriginal sustenance right. Many cases such as **Cardinal, Dick v. the Queen,** (1985) 22 C.C.C. (3d) 129 (S.C.C.); and **R. v. George,** [1966] S.C.R. 267 have found provincial laws regulating such basic aboriginal practices as hunting for moose, deer and migratory birds to be valid.

In the face of this, and in view of the fact that Indians have always had access to all vacant Crown land, it is difficult to understand how, apart from the question of priorities, an aboriginal sustenance right in such a remote land could be an exclusive right. If it was exclusive originally, it has been changed throughout history in the same way the Fraser River fishery is no longer exclusively an aboriginal fishery.

The question of exclusivity is, of course, subject to the principles discussed in **Sparrow** regarding reconciliation and priorities etc. which I need not discuss at this time.

6. Conclusions on Aboriginal Rights

Subject to what follows, the plaintiffs have established, as of the date of British sovereignty, the requirements for continued residence in their villages, and for non-exclusive aboriginal sustenance rights within those portions of the territory I shall later define. These aboriginal rights do not include commercial practices.

PART 15

EXTINGUISHMENT AND FIDUCIARY DUTIES

1. General Principles

In its Statement of Defence the province pleads the plaintiffs' aboriginal rights or "title", if any, was extinguished by the operation of the **"Calder XIII"** enactments passed during the colonial period and by many other colonial regulations, proclamations, ordinances and enactments (included in Ex. 1200-1 and 1200-2) as well as "administrative actions pursuant to [the] statutes and statutory instruments." These were all introduced into evidence.

In addition the province, by its "alienations project," introduced a large collection of documents which together with the earlier documents mentioned record pervasive colonial and provincial Crown presence in the territory up the date of the writ.

All this documentation demonstrates colonial and provincial dominion over the territory before and since Confederation by such diverse governmental and administrative activities as surveying, grants of land, leases and other tenures, land registry, schools and hospitals, rights of way for highways, power and pipe lines, grants in fee simple, forestry, mining, and guide outfitting permits, various public works, the creation and governance of villages and municipalities, water and other placer rights and licences, trapline registration for all or almost all of the territory, fish and game regulation and conservation, and a host of other legislatively authorized intrusions into the life and geography of the territory. Some of this material, of course, related only to post-confederation British Columbia.

The province also established by documentary evidence that most of the **Calder XIII** legislation was actually enacted not just in the colony, but also by the Imperial Parliament.

For its part, Canada also adduced extensive evidence of the federal presence in the territory, including the right of way and installations for the main line of the Grand Trunk Pacific Railway (now the northern branch of the C.N.R.), airports, fishery and police establishments and, of course, Indian reserves.

A sampling of this volume of documents and other exhibits demonstrates that the evidence in this case goes far beyond the **Calder XIII** enactments which were more or less the extent of the extinguishment evidence which was before the Court in that case. It seems unlikely that the enactment of the **Calder XIII** Ordinances by the Imperial parliament was proven in that case because Hall J. said he doubted the jurisdiction of the colony to pass enactments that could extinguish aboriginal rights. He appears not to have been aware that some of this legislation had also been enacted by the Imperial Parliament.

The province argues that it cannot rationally be asserted that, standing alongside this all-embracing governmental structure, there are many parallel aboriginal governments and separate systems of ownership or rights to use a substantial portion of the province by what

is now such a small segment of the population. The plaintiffs counter that their rights are unchanged from what they were at the date of sovereignty.

The underlying purpose of exploration, discovery and occupation of the new world, and of sovereignty, was the spread of European civilization through settlement. For that reason, the law never recognized that the settlement of new lands depended upon the consent of the Indians. However, as mentioned by Taschereau J. in **St. Catherine's Milling,** and by others, many of the original North American colonies, for reasons of practicality or necessity, entered into treaties with their sometimes unfriendly aboriginal neighbours. That situation did not arise in this province except briefly in the Colony of Vancouver Island.

Even the language of the **Royal Proclamation, 1763** makes it plain that the Crown did not consider it necessary to obtain the consent of the Indians to exclude their interests. Although the Crown set aside vast areas for hunting grounds at the Crown's "pleasure," the lands east of the Alleghenies, the old province of Quebec and Rupert's Land were all excluded from the Proclamation and these regions were all appropriated to different regimes, although some of such lands may have been the subject of a treaty. Rupert's Land later became the subject of the numbered treaties under a completely different regime because of a completely different history from British Columbia. There were a number of different experiences in various parts of what is now the United States. There is, in fact, no uniform history for all of the regions of North America, and none of them had a history similar to British Columbia.

It will be useful to mention that, because of the division of powers between Canada and the provinces at the time of Confederation (1871 for British Columbia), it has been convenient to consider these matters from the perspective of Colonial times. That is because Crown authority in those days was undivided. Thus no division of powers question can arise about the authority of the Crown to extinguish aboriginal rights in the colonial period.

It will not be necessary for me to trouble myself with the question of whether, since Confederation, the province has had the capacity to extinguish aboriginal interests. This is a vast legal and constitutional question which has not been fully explored, although it has been decided in a number of cases that some provincial legislation applies to Indians and can diminish their rights to engage in aboriginal activities.

It will also be unnecessary for me to consider the full meaning and effect of s. 35 of the **Constitution Act, 1982** although there is language in the judgment of the Supreme Court of Canada in **Sparrow** from which it might be argued that aboriginal interests which could be extinguished before 1982 may also be extinguished after that date.

The reason I do not have to consider those questions is because of the conclusions I shall express in this Part about the effect of pre-Confederation colonial legislation.

The right of the Imperial Crown to proceed with the settlement and development of North America without aboriginal concurrence was confirmed by the Privy Council in the **St. Catherine's Milling** case. This was expressed in practical terms by stating that "Indian title" existed at the pleasure of the Crown.

I have already described the considerations which governed the thinking of those responsible for the establishment of the Colony of British Columbia, and it would certainly have come as a surprise to Governor Douglas and his colleagues, and to the Colonial Secretaries and the Imperial Privy Councillors if it had been suggested to them that the consent of the Indians was required before the settlement of any part of the colony could be undertaken. Some of them thought the so-called "Indian title" (which I equate to

aboriginal rights), except with respect to village sites, "should" be extinguished by treaty, but they obviously did not believe that was a pre-condition to the settlement of the colony.

It would be wrong to attribute legal understanding to these men on the basis that they were familiar with the law relating to aboriginal rights as we know it today from cases such as **Calder, Guerin** and **Sparrow.** Even **St. Catherine's Milling** was 30 years into the future. The proceedings of the Parliamentary Committee on New Zealand would more likely be the authority they would have in mind.

Possibly because of experiences in Ontario some of them believed "Indian title" should be extinguished by treaty and the payment of annuities, but even on Vancouver Island where some treaties had been arranged, the colonial officers obviously considered themselves under no obligation to do so. There was much settlement there without treaties. No treaties of any kind were arranged on the mainland.

It would not be accurate to assume the colonial officials, or their masters in London, chose wilfully to ignore aboriginal interests. As the evidence shows, their intention was to allot generous reserves, and to satisfy the requirements of the Indians in that way, and to allow Indians to use vacant Crown land.

Their policy, which was the Crown's policy, was clearly expressed. It was that village sites, cultivated fields and reasonable surrounding hunting grounds would be secured to the Indians by reserves, but the rest of the colony belonged to the Crown and would be made available for settlement.

I have no reason to find these colonial officials, both on the ground here in British Columbia and in London, did not believe the Indians should be treated fairly in a way consistent with the settlement of the colony. The writings of Governor Douglas on this question clearly disclose not just an intention, but also instruction to his officers, that reserves were to be allotted generously.

At the same time, it is obvious none of these colonial officers believed the settlement of the colony depended in any way upon Indian consent. Neither did they believe Indian presence on non-reserve land precluded settlement. In fact, they believed that in most cases the Indians would secure the lands they wished in the form of reserves and that they would not be harmed by settlement.

While the foregoing describes the state of mind of colonial officials at the start of the colonial period, the social disadvantage of the Indians was ongoing and largely but not entirely unrecognized. For this reason it is difficult, but necessary, to keep the difference between legal rights and social wrongs very much in mind. However much one may regret the failure of the colonists to recognize or react to the differences between the two communities, the legal consequences arising from the rights of the parties must be determined objectively from the constitutional and legal measures taken in that period rather from social and economic failures.

It was in this context that the **Calder XIII** and other legislation was enacted by the colony and in some cases by the Imperial Parliament.

I now propose to discuss the law relating to the question of extinguishment of aboriginal interests. After that I shall attempt to apply this law to the plaintiffs' claims in this action.

I must start with the proposition that the plaintiffs' aboriginal rights in the territory at the time of sovereignty existed during the "pleasure of the Crown." That, in my view, is established by binding Privy Council and Canadian jurisprudence of which **St. Catherine's Milling** is the leading authority. It is possible the officers of the Crown did not have that

precise language in mind in the 1850's and 1860's but that seems to have been the law, as it was then understood, and as it was later stated to be in **St. Catherine's Milling.**

This brings me to **Calder,** which was the principal authority on extinguishment until **Sparrow.** As I have said, **Calder** was an unusual case because of the way it was argued. Counsel agreed to facts from which an entitlement to common law aboriginal rights to over 1,000 square miles in the lower Nass valley could be inferred. The principal issue considered by all the judges of the Supreme Court of Canada (except Pigeon J.) was whether the **Calder XIII** and other enactments extinguished all those rights.

There was another issue which was considered at the trial in **Calder** and on the appeal to the Court of Appeal. It related to the question of whether there could be aboriginal rights without a Crown grant or recognition. The Crown's argument on that question found favour with both the trial judge and all three members of the Court of Appeal but it was not accepted in the Supreme Court of Canada. Since that time it has been decided by **Guerin** and other authorities that aboriginal rights arise by operation of law from indefinite, long time use of specific lands for aboriginal purposes. I have accepted that and I do not propose to consider it further.

The trial judge and all three judges of the Court of Appeal in **Calder** also dealt with the question of extinguishment as did six of the seven judges who heard the appeal in the Supreme Court of Canada.

At (1969) 8 D.L.R. (3rd) 59, the trial judge, Gould J. said at p. 82:

> "All **(Calder)** thirteen reveal a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to "aboriginal title, otherwise known as the Indian title", to quote the statement of claim."

In the Court of Appeal, Tysoe J.A. with whom the Chief Justice agreed, gave the majority judgment. On the question of extinguishment he referred to many of the same dispatches I have mentioned and from that source he extracted the policy of the Crown to open the colony for settlement. At (1970) 74 W.W.R. 481, at p. 500, he said that such policy "... necessarily involved the extinguishment of Indian title."

Then, after reciting the colonial enactments, and some of the dispatches which I have already cited, Tysoe J.A. said at p. 518:

> "... The remainder of the unoccupied lands were thrown open for settlement. Thus complete dominion over the whole of the lands in the Colony of British Columbia adverse to any tenure of the Indians under Indian title was exercised. The fact is that the white settlement of the lands which was the object of the Crown was inconsistent with the maintenance of whatever rights the Indians thought they had."

At p. 533, Maclean J.A. said:

> "It is not disputed that the old Colony of British Columbia had complete legislative jurisdiction to extinguish the so-called "Indian title", if in fact any such "title" ever existed.
>
> To use the words of Douglas J. of the United States Supreme Court in **U.S. v. Sante Fe Pac. Ry,** supra, at p. 347, the title of the Indians, if it ever existed, was extinguished when the pre-Confederation govern-

> ments of British Columbia exercised "complete dominion adverse to the right of occupancy" of the Indians . . ."

I turn now to the judgments in the Supreme Court of Canada.

There is nothing in the judgment of Judson J. in the Supreme Court of Canada suggesting that extinguishment depended upon the consent or agreement of the Indians. Hall J. seems to agree that aboriginal rights were extinguishable but he suggested at p. 402 that this could only be accomplished by surrender or express legislation. I observe that consent would not be required for the latter.

Judson J., speaking for himself and two other judges, found the **Calder XIII** enactments did indeed extinguish the aboriginal rights of the Nishga. At p. 333 he agreed with the passage I have quoted above from the summary of the trial judge

Then, at pp 334-335 Judson J. quoted from **U.S. v. Santa Fe Pacific Ry. Co.,** (1941), 314 U.S. 339 at p. 347:

> "'Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. **Buttz v. Northern Pacific Railroad,** 119 U.S. 55, 66 S. Ct. 100, 30 L. ed. 330. As stated by Chief Justice Marshall in **Johnson v. M'Intosh** [supra] at p. 586, "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, **by the exercise of complete dominion adverse to the right of occupancy, or otherwise,** its justness is not open to inquiry in the Courts. **Beecher v. Wetherby** (1877), 95 U.S. 517 at 525, 24 L. ed. 440 at 441.'" (my emphasis)

Judson J. also referred to **Re Southern Rhodesia,** [1919] A.C. 221 (J.C.P.C.), which he said was to the same effect.

The view of Judson J. is best captured in the following passages from his judgment at p. 344 where he quoted from the American case **Tee-Hit-Ton Indians v. U.S.,** (1955) 348 U.S. 272 (U.S.S.C.) as follows:

> "'This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.'"

Judson J. then continued with his own conclusion at the same page:

> "In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation."

Hall J. reached a different conclusion. He first decided that aboriginal rights arose either by operation of law or by reason of the **Royal Proclamation, 1763,** (which he found to apply to British Columbia), and secondly he considered the test to be applied for the extinguishment of such rights. He concluded that the onus of establishing extinguishment

rested upon the Crown, and then, citing **Lipan Apache Tribe v. U.S.** (1967) 180 Ct. Cl. 487 (Court of Claims) that:

> "... in the absence of a 'clear and plain indication' in the public records that the sovereign 'intended to extinguish **all** of the [claimants'] rights' in their property, Indian title continues ..." (my emphasis)

Hall J. at p. 404 found:

> "... There is no such proof in the case at bar; no legislation to that effect."

Thus the judgment of Judson J. for himself, Martland and Ritchie JJ. allowed "inconsistency" between the claimed Indian rights and the expression of sovereign intent to be sufficient. They did not insist upon "clear and plain" language. For example, Judson J. found:

> "... the establishment of the railway belt under the Terms of Union is inconsistent with the recognition and continued existence of Indian title."

On the other hand, Hall J. for himself, Spence and Laskin JJ. found that the Sovereign's intention to extinguish must be made "clear and plain," and I have already mentioned his other comment about a requirement for either surrender or express legislation.

In **Canadian Pacific Limited v. Paul,** (1988) 2 S.C.R. 654, the Supreme Court of Canada seems to accept the proposition that a grant of a fee simple interest in land without mention of aboriginal rights would extinguish those rights, and that grants of lesser interests, such as a right of way, might not extinguish those rights but would nevertheless create a valid interest.

On the question of express statutory language I note the recent finding of Cory J., speaking for the majority in **Horseman v. the Queen,** (1990) 1 S.C.R. that:

> "... the onus of proving either **express or implicit** extinguishment lies upon the Crown." (my emphasis)

This question of extinguishment was considered again in a unanimous judgement of the Supreme Court of Canada in **Sparrow** which is the most recent authoritative statement on the question. At p. 1109 the Court recognized the power of the Crown to extinguish aboriginal rights. Speaking of tidal fishing the Court said:

> "There is nothing in the **Fisheries Act** or its detailed regulation that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual basis rather than a communal basis in no way shows a clear intention to extinguish. These permits were merely a way of controlling the fisheries, not defining underlying rights."

I conclude from this passage that the aboriginal right to fish for food would indeed be extinguished if the legislation showed a clear and plain intention to do so.

At the same page, the Court settled the test for extinguishment when it said:

> "The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right."

It is significant, in my judgment, that the Court made this pronouncement regarding the test for extinguishment in the context of a discussion of **Calder,** which was concerned with the colonial period, and also that the Court did not include express statutory language as a part of its test. I therefore conclude that express statutory language is not a requirement for extinguishment.

The unanimous decision of all the judges (in **Sparrow**) so long after these historical events to regard intention at a time of uncertain law and understanding as the governing factor in extinguishment persuades me that intention in this context must relate not to a specific, isolated intention on the part of the historical actors, but rather to the consequences they intended. In other words, the question is not did the Crown through its officers specifically intend to extinguish aboriginal rights apart from their general intention, but rather did they plainly and clearly demonstrate an intention to create a legal regime from which it is necessary to infer that aboriginal interests were in fact extinguished.

There are two further reasons why I have reached the conclusion just expressed. First, the governing intention is that of the Crown in the 1850's and 1860's. It surely cannot be the intention of Her Majesty that is relevant, but rather that of her Ministers, Governors, and other officers, in short, an amalgam of thought, belief, planning and intention on the part of a number of officials who may all have had different knowledge, understanding and priorities. Intention, in this context, must be a matter of implication.

Secondly, the colonial period lasted for nearly 13 years, from 1858 to 1871. Those were busy times in the Colony and it would be unrealistic to think that this question of extinguishment should be focused narrowly upon single moments or isolated events.

For example, the last of the **Calder XIII,** (Ex. 1186, Tab 80) is dated June 1st, 1870, near the end of the colonial period. It is entitled **An Ordinance to amend and consolidate the Laws affecting Crown Lands in British Columbia.** It repeals, consolidates and re-enacts most of the earlier **Calder** enactments, and it is a comprehensive restatement of the land law of the colony.

Prior to the enactment of this Ordinance, the Attorney General wrote to the Governor, on April 27, 1870, for his information, explaining this new measure in which it was described as "... one uniform or rather general Crown land system over the entire Colony." The Attorney explained that there were different systems in force on the Mainland and on the Island, and it was explained, in great detail, how these matters were to be managed in a uniform system. One cannot read this report, (Ex. 1186, Tab 81), which contains no mention of Indians except in the prohibition against pre-emption, without concluding that there was indeed an intention to manage Crown land throughout the colony by a system that was inconsistent with continuing aboriginal rights.

In closing his Report, the Attorney General said:

> "The vital importance of the subject — the necessity of having one system of land laws for the Colony, after the Country has suffered for so many years from the loose diversity, discordant, offtimes antagonistic legislation that has taken place in different sections of the Colony before Union on the subject — the anxious care which has been

> bestowed upon the measure — to introduce no innovation or alteration which experience has not justified, compel the expression of an earnest hope that the Ordinance in its present shape may ere long receive that confirmation at the hands of her Majesty which will establish it as a permanent consolidated law for the regulation and settlement of the Crown Lands of British Columbia."

The Ordinance provides in s. III:

> "From and after the date of the proclamation in this Colony of Her Majesty's assent to this Ordinance, any Male person being a British Subject, of the age of eighteen years or over, may acquire the right to pre-empt any tract of unoccupied, unsurveyed, and unreserved Crown Lands (not being an Indian settlement), not exceeding Three Hundred and Twenty Acres in extent in that portion of the Colony situated to the Northward and Eastward of the Cascade or Coast Range of Mountains, and One Hundred and Sixty Acres in extent in the rest of the Colony. Provided that such rights of pre-emption shall not be held to extend to any of the Aborigines of this Continent, except to which as shall have obtained the governor's special permission in writing to that effect."

This was not an entirely new provision as similar but less detailed provisions for pre-emption, but with different acreages, had been enacted as early as 1859. Also, and as mentioned earlier, the prohibition against aboriginal pre-emption was first enacted in 1866. This was, however, a comprehensive land ordinance which, when it came into force, confirmed again that a separate system of land interests could not stand alongside this one in any part of the colony.

This 1870 Ordinance comprised 55 sections, and made provision not just for a comprehensive system of pre-emption, but also for leases for pastoral, hay and timber lands, actions for ejectment (by jury trial if requested), appeals, Crown reserves and surveys, water privileges, Free Miners licenses, Crown Grants "for the encouragement of Immigration", and other matters.

On May 11, 1870 the Attorney General wrote a very long report to the Governor (Ex. 1189, Tab 81) explaining the operation not just of this Ordinance, but also two other Ordinances passed by the Legislative Council that year entitled **"An Ordinance to assimilate the Law relating to the Transfer of Real Estate and to provide for the Registration of Titles to Land throughout the Colony of British Columbia"** and **"The Crown Grants Ordinance, 1870.** I mention these other 2 measures, even though they have not been accorded **"Calder"** status, because they compliment the 1870 Land Ordinance, and because the description given to them by the Attorney General is a useful description of the complete land system of the colony which again does not mention Indians. It is so thorough and comprehensive that it illustrates the pervasive intrusion of the Crown into the land law of the Colony.

Also, notice of Royal approval for these three measures was given in one communication from the Colonial Secretary, Lord Kimberley on Sept. 5, 1870 whose letter (Ex. 1186, Tab 85), shows they were carefully considered in London, and a suggestion was made that the Land Registration statute be amended by adding provisions for compensating parties wrongfully deprived of land from erroneous registration.

I think I should mention that I am not presently satisfied that each of the **Calder XIII** were all enacted by the Imperial Parliament, as I first thought. I believe most of them were, and there was no challenge to this in counsel's arguments, but I am not sure "Her Majesty's

gracious confirmation and Allowance," as for the 1870 Land Ordinance necessarily indicates Parliamentary enactment. Confirmation and Allowance may be just a diplomatic way of confirming the approval of the Colonial Office, and its Secretary, but in a colonial milieu it adds credibility to the formal Proclamation of the Ordinance in the colony which appears in Ex. 1186, Tab 86, dated October 20, 1870.

Thus, in my judgment, intention sufficient to establish extinguishment must be examined broadly and need not be confined to a specific act or decision at a particular moment in colonial history. Instead, intention may more properly be discerned from a course of conduct over the whole of the colonial period.

I conclude that an intention to extinguish aboriginal rights can be clear and plain without being stated in express statutory language or even without mentioning aboriginal rights if such a clear and plain intention can be identified by necessary implication. An obvious example would be the grant of a fee simple interest in land to a third party, or the grant of a lease, license, permit or other tenure inconsistent with continued aboriginal use. I shall consider this question again in a moment when I come to discuss extinguishment in relation to aboriginal rights.

The unanimous judicial decision of all the judges (in **Sparrow**) so long after these historical events to regard intention at a time of uncertain law and understanding as the governing factor in extinguishment persuades me that intention in this context must relate not to a specific or precise state of mind on the part of the historical actors, but rather to the consequences they intended for their actions. In other words, the question is not did the Crown through its officers specifically address the question of aboriginal rights, but rather did they clearly and plainly intend to create a legal regime from which is necessary to infer that aboriginal interests were in fact extinguished.

As the plaintiffs have advanced three separate classes of aboriginal claims, ownership, jurisdiction and aboriginal rights, I shall deal with extinguishment in relation to each of them.

2. Extinguishment of Aboriginal Rights of Jurisdiction and Ownership

(a) Aboriginal Jurisdiction

I discussed this claim in Part 14 of this judgment and I concluded that aboriginal sovereignty did not survive the assertion of British sovereignty. I do not find it necessary to consider or decide whether the establishment of the Colony of British Columbia, for example, should be classified as a displacement of one sovereignty by a different one which the law recognizes, or whether the legal arrangements which were put in place during the colonial period amounted to an extinguishment of the earlier sovereignty.

I tend to think the former more correctly describes the historical reality, but if I am wrong in that regard, then it would be my judgment that the Crown clearly and plainly intended, in the sense I have mentioned, to extinguish any aboriginal jurisdiction or sovereignty which survived the assertion of British sovereignty. This, of course, was accomplished by the governmental arrangements the Crown put in place during the colonial period which were clearly intended to apply throughout the colony and to bind everyone who lived there. It is inconceivable in my view, that another form of government could exist in the colony after the Crown imposed English law, appointed a Governor with power to legislate, took title to all the land of the colony and set up procedures to govern it by a Governor and Legislative Council under the authority of the Crown.

In addition, in my view, the enactment of the **British North America Act, 1867** and adherence to it by the Colony of British Columbia in 1871, which was accomplished by

Imperial, Canadian and Colonial legislation confirmed the establishment of a federal nation with all legislative powers divided only between Canada and the province. This also clearly and plainly extinguished any residual aboriginal legislative or other jurisdiction, if any, which might have existed in the colonial period.

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(b) Aboriginal Ownership of Land

If I have erred in the conclusion I have already stated about aboriginal ownership, and if such an interest, or anything equivalent to it (additional to aboriginal rights), survived the assertion of British sovereignty then I must deal with that question at this time. My judgment is that any aboriginal interests in land that survived sovereignty were included within the rubric of aboriginal rights which I shall consider in a moment. As I understand the authorities, there is no jurisprudence binding on me which suggests the aboriginal interests of the plaintiffs' ancestors after the assertion of sovereignty constituted anything more than a user burden on the underlying title of the Crown.

If that is not so, I find the evidence establishes beyond question that the Crown, in the colonial period, clearly and plainly intended to, and did, extinguish any aboriginal right of ownership which existed in the colony. I say this because the colonial legislation so clearly appropriated all the land of the colony to the Crown and made provision for its alienation firstly on the authority of the Governor according to English law and subsequently pursuant to legislation. That, in my judgment, is completely inconsistent with any continuing aboriginal ownership interest.

As to intention, the dispatches passing between the Governor and the Colonial Secretaries in London, and legislative action taken, make it clear and plain first that the colony was to be thrown open for settlement; secondly that all the land of the colony belonged to the Crown in fee, and thirdly that only a grant from the Crown could create an ownership or proprietary land interest in the colony.

I cannot imagine a any clearer statement of intention than the Proclamation dated February 14, 1959, **(Calder II, Ex. 1185-10),** in which it was declared, in s. 1:

> "1. All the lands in British Columbia, and all the Mines and Mineral therein, belong to the Crown in fee."

After 1858 the Crown embarked upon numerous legislative arrangements and participated in innumerable transactions relating to the land of the province which clearly and plainly exclude any possibility of any other ownership regime. In fact, **Calders III and XIII** enacted in 1860 and 1870 respectively were comprehensive statements of the intention of the colonial Crown completely to control both the ownership and use of all the land in the colony. As I have said, the grant of fee simple or lesser interests are, by themselves, the clearest and plainest possible expressions of an intention to extinguish any other ownership interest, and there are many other examples.

To put it in a nutshell, I find that legislation passed in the colony and by the Imperial Parliament that all the land in the colony belonged to the Crown in fee, apart altogether from many other enactments, extinguished any possible right of ownership on the part of the Indians.

The question of whether the Crown's ownership was burdened with aboriginal rights is, of course, a separate question which I shall now turn to consider.

3. Extinguishment of Aboriginal Rights

After the Queen's Ministers clearly expressed their intention to create a new colony on the Mainland, the Imperial Parliament, by the statute dated Aug. 2nd, 1858, established the Colony of British Columbia and authorized the Crown to appoint a Governor:

> "... to make provision for the administration of justice [therein] and generally to make, ordain, and establish all such laws, institutions, and ordinances as may be necessary for the peace, order, and good government of Her Majesty's subjects and others therein; ..."

Then the Crown appointed James Douglas as Governor. There can be no doubt about his intention or that of his Imperial masters. On July 1, 1858 Lord Lytton wrote to Douglas:

> "... All claims and interests must be subordinated to that policy which is to be found in peopling and opening up of the new country with the intention of consolidating it as an integral and important part of the British Empire."

In reply, on Oct. 12, 1858, Douglas wrote:

> "Having just ascertained, from your Dispatch of the 1st of July last, that it was the wish of Her Majesties Government to colonize the country and develop its resources, I propose ..."

In reference to **Calder III**, the Governor on January 12, 1860 said:

> "The object of the measure is solely to encourage and induce the settlement of the country: occupation is, therefore, made the test of title, and no pre-emption title can be perfected without a compliance with that imperative condition ..."
>
> The Act distinctly reserves, for the benefit of the Crown, all town sites, auriferous land, **Indian Settlements ...**, and public rights whatsoever; the emigrant will, therefore, on the one hand, enjoy a perfect freedom of choice with respect to unappropriated land, as well as the advantage, which is perhaps of more real importance to him, of being allowed to choose for himself and enter at once into possession of land without expense or delay; while the rights of the Crown are, on the other hand, fully protected, as the land will not be alienated nor title granted until after payment is received.
>
> Other good effects are expected to result from the operation of the Act; there is, for example, every reason to believe that it will lead to the more rapid colonization of the country, and to greater economy in its survey, which can be effected hereafter, when roads are made, at a much smaller cost for travelling and conveyance than at the present time." (My emphasis). (Ex. 1187-13).

There are, in addition, innumerable other references to the clear and plain intention of the Crown, represented by its Ministers and other officials, to settle the colony.

Immediately upon his appointment, Governor Douglas proclaimed the laws of England to be in force in the colony. He also issued a Proclamation (which is the way he legislated), authorizing the Governor of the colony from time to time to grant to any person any land belonging to the Crown. This is the scheme that was implemented in **Calder I**, which was enhanced and refined in the subsequent colonial legislation most of which was duly

re-enacted by the Imperial Parliament. This policy was supplemented by many other statutory instruments passed during colonial times.

The Crown also proceeded to have surveys completed and land sales were undertaken. The Crown also embarked upon the development of the province in many other ways besides straight-forward grants of land, some of which have already been described.

The process leading to the enactment of **Calder III** is particularly instructive. It will be recalled that a question had been raised by Capt. Clark about "aboriginal title" and Begbie J. had expressed an opinion that it had not been extinguished. I am satisfied he was referring to treaty extinguishment, and he was not addressing himself to the question I am considering. This opinion and all other material was sent forward to London where it was considered for some months and the legislation was then enacted. The province summarizes the chronology in its summary of argument as follows:

> "a. The sole purpose of the Proclamation was to provide a means whereby title to land could be vested in a Crown grantee.
>
> b. The Proclamation was under consideration by the Colonial Office from March 5, 1860 until December 6, 1860 when the Queen's sanction was recorded in a dispatch of that date.
>
> c. The question of aboriginal title had been expressly raised in October 1859 by Captain Clarke in his elaborate scheme for the disposition of Crown lands in British Columbia on the assumption that Indian title ". . . had been extinguished or separate provision made for them . . ."
>
> d. The scheme was forwarded to Douglas for comment on January 7, 1860 but, more importantly, he was later told that approval of his land proclamation would be withheld until his comments were received. This was done in May, 1860.
>
> e. Douglas' comments were forwarded in August 1860 (Ex. 1142-29) and under separate cover of the same date he sent those of Begbie, J., who expressly denied Clarke's assumption that Indian title had been extinguished and that ". . . Separate provision must be made for it, and soon . . ."
>
> f. These dispatches were received October 8, 1860. The Emigration Board saw nothing in Begbie J.'s paper to overrule the recommendations of Douglas — that the Proclamation **(Calder III)** be allowed to operate . . ."

There is, as described in Part 11, a great deal of evidence demonstrating that the Crown with full knowledge of the local situation fully intended to settle the colony and to grant titles and tenures unburdened by any aboriginal interests. The Crown must be taken to have known that it could not free the land from this burden without extinguishing these aboriginal interests. This probably did not trouble the Crown because it also intended to allot generous reserves, and to allow the Indians to use vacant lands. The primary intention however, was obviously to settle the colony by granting unburdened interests to settlers.

In view of this history, I respectfully agree with the views of the seven judges who reached the same conclusion in **Calder.** I find the constitutional and legal arrangements put in place in the colony were totally inconsistent with aboriginal rights the continuation of which would have prevented the Crown from the settlement and development of the colony. As the intention of the Crown must be ascertained objectively from a consideration of all the circumstances in their historical setting, I find the Crown clearly and plainly

intended to, and did, extinguish aboriginal rights in the colony by the arrangements it made for the development of the colony including provision for conveying titles and tenures unencumbered by any aboriginal rights and by the other arrangements it made for Indians.

I test this conclusion by reference to a hypothetical parcel of non-reserve land which, before the creation of the colony, had been used for a long time for aboriginal sustenance. After the enactment of even **Calder I,** and more so after all the **Calder** legislation, such parcel was subject to Crown grant, pre-emption or other disposition to third parties. Upon such disposition this parcel became the property of a stranger under circumstances which exclude the continuation of aboriginal use.

On the authorities I have mentioned, I see no answer to the conclusion that the Crown in colonial times clearly and plainly intended not to recognize, and to extinguish, aboriginal rights which might otherwise have prevented it from transferring title to its settlers. This, of course, is completely consistent with the reality already mentioned that (except for village sites), aboriginal rights existed only at the pleasure of the Crown. I have no doubt the Crown's grantees during colonial times obtained title to or interests in land obtained from or through the Crown unburdened by aboriginal rights.

I have also considered whether the intention of the Crown to extinguish aboriginal rights could be limited just to the lands it actually transferred to third parties, but I reject that as did all of the seven judges who reached the same conclusion in **Calder.** I find that was not the intention of the Crown. This is shown in many different ways, including the fact that the Crown took title to all the land in the Colony and enacted comprehensive land law legislation for that very purpose. The Crown's intention was clearly ongoing with Indian interests looked after by reserves and the right to use vacant land and all the rest of the colony thrown open for settlement. The colonial legislation must be taken to have extinguished aboriginal rights as they existed in the colony at the date of sovereignty except for Indian reserves.

I pause to say that I do not intend the foregoing to extend beyond aboriginal rights to land. Specifically, I do not intend it to apply to fishing as it was not suggested in argument that I should pronounce in any way on fishing rights and, of course, no claim was made in this case against the federal Crown.

It follows, in my judgment, that when the Colony united with Canada in 1871, the province obtained all of the Crown lands of the colony under s. 109 of the **British North America Act, 1867,** free of any Trust or Interests of Indians. The province was thereafter able to transfer title or other tenures to Crown grantees.

In addition to extinguishing aboriginal rights, however, the Crown also intended that the Indians would be furnished with "generous" reserves, and legislative arrangements were made for that purpose. I have already expressed my views on that process.

4. Fiduciary Duties

During colonial times, and subsequently, the Crown also agreed, for the time being, that the Indians and every other person in the colony could use or continue to use vacant Crown lands for lawful purposes. For example, on February 5, 1859 Governor Douglas informed the House of Assembly that the Indians:

> "...were to be protected in their original right of fishing On the coasts and in the Bays of the Colony, and of hunting over all unoccupied Crown lands; and they were also to be secured in the enjoyment of their village sites and cultivated fields.

In a dispatch dated October 9, 1860 Governor Douglas wrote:

> "... I also explained to them that the magistrates had instructions to stake out, and reserve for their use and benefit, all their occupied village sites and cultivated fields and as much land in the vicinity of each as they could till, or was required for their support; **and that they might freely exercise and enjoy the rights of fishing the lakes and rivers, and of hunting over all unoccupied Crown lands in the colony;"** (my emphasis)

This promise was often repeated both during colonial and provincial times. This permitted use, apart from reserves, was not limited to specific areas for specific Indians, nor were any priorities established. Thus Indians from one part of the colony were entitled to use vacant land in any other part of the colony.

I have considered whether this permitted use should be construed as an amended aboriginal right. I have concluded that this would not be proper: firstly, that is not how aboriginal rights are created; secondly, the "permission" was extended to both Indians and non-Indians which is not an aboriginal right; and thirdly, the lack of identified or specific lands is inconsistent with aboriginal rights. In this last-mentioned connection, I have held that aboriginal rights are not necessarily exclusive where more than one Indian people have used the same land, but aboriginal rights attach only to the specific lands which aboriginal ancestors have used for an indefinite long time.

Rather, I find that this kind of permission may more closely be related to the arrangements included in the Douglas treaties, one of which I quoted in Part 11. Included in some of those treaties was the assurance given to the Indians:

> "... it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly...."

I do not recall any argument on the construction of this language, but it is clear from the historical context that the permitted use was limited to the time the particular land remained vacant. Such was the conclusion expressed by Lambert J.A. in **R. v Bartleman,** (1984) 55 B.C.L.R. 78 @ p. 97. (B.C.C.A.) with which I respectfully agree.

Doing the best I can to characterize the agreement or permission of the Crown to its aboriginal peoples, I conclude that it amounted at least to a promise that vacant lands could be used for aboriginal purposes, subject to the general law, so long as such lands were not dedicated to an adverse purpose. This was a valuable right because it was never the intention of the Crown that the Indians would be required to live or stay on their reserves.

Attorney-General Walkem said as much about the colonial period in his 1875 Report:

> "... Under [Colonial] policy the Natives were invited and encouraged to mingle with and live amongst the white population ..." (Ex. 1182, p.2)

As I understand the history, the Indians of the colony and province have indeed used vacant Crown land and are continuing to do so. This leaves me with the question whether the Crown's promise has any legal effect at this time. While no specific argument was addressed to this question at trial, the arguments of counsel were so comprehensive about duties and obligations that I consider it open to me to consider. Certainly I was furnished with all the authorities I require for this purpose, and counsels' excellent submissions dealt extensively with all the principles upon which I propose to rely. As in other matters mentioned earlier, I shall leave it to counsel to consider whether an amendment is required.

In my judgment, s. 35 of the **Constitution Act, 1982,** does not apply to the question I am now considering because it only recognizes and affirms aboriginal rights which I have excluded in this case.

The relationship between the Crown and Indians is, however, an emerging area of law which is only now starting to be explored, and several recent cases have established that special duties and obligations arise out such relationships. I need only mention that, prior to extinguishment, the Indians of the territory had aboriginal rights to parts of the territory. Until extinguished, these were legal rights which could have been enforced in the courts although that might not have been recognized at that time.

Prior to extinguishment the Crown had already recognized its comprehensive obligation regarding the welfare of the Indians. The dispatches include many such references. When the Crown extinguished these legal rights it made the promise I have already described. How should the law classify that promise?

Guerin is a difficult case to apply in the circumstances of this case because its facts were so completely different. As already mentioned, it was concerned with a surrender under the **Indian Act,** and the duty found in that case arose from a surrendered interest in a reserve. Nevertheless, the judgments provide useful instruction.

Wilson J., at p. 348-49 in **Guerin,** found that s. 18 of the **Indian Act** does not expressly impose a fiduciary obligation on the Crown, but she thought the section **recognized** the existence of such a [fiduciary] obligation which had its "... roots in the aboriginal title of Canada's Indians..."

Dickson J. at p. 376 expressed the same view about the root of the Crown's duty, but he went on to describe the nature of the obligation owed by the Crown. At p. 375, after finding that the Crown's obligation could not be regarded as a trust he said:

> "... That does not, however, mean that the Crown owes no enforceable duty to the Indians in the way in which it deals with Indian land.

In **Guerin,** Indian interests in the subject land were not extinguished. Instead some reserve land was surrendered for the intended benefit of the Indians. In this case, aboriginal rights were extinguished for the purpose of becoming available for settlers, and a different remedy is required, perhaps by the same route.

Then, on p. 376 Dickson J. went on to confirm that the statutory scheme [of the **Indian Act**] "... places upon the Crown an equitable obligation, enforceable by the courts to deal with the land for the benefit of the Indians." He also said this obligation did not amount to a trust, but rather a fiduciary duty.

He then adverted to the Royal Proclamation which he said is recognized in the surrender provisions of the **Indian Act** and he added, at p. 376:

> "The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians."

Then, after discussing aboriginal rights generally, based largely upon the assumed application of the Royal Proclamation, Dickson J. said at p. 385"

> "Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship ... The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. The Crown's obligation to the

> Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this **sui generis** relationship, it is not improper to regard the Crown as a fiduciary...
>
> "...When, as here, an Indian Band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indian's behalf.

It is often dangerous to apply principles found in one case to the facts of a different case, but there are similarities between **Guerin** and this case. In both cases the Indians had a legal right, both with their roots in aboriginal rights. In both cases they lost that right, in **Guerin** by surrender, and in this case by extinguishment. In the former, the Court imposed a fiduciary duty upon the Crown; in this case the Crown promised the Indians they could use the land of the colony and province for aboriginal purposes until it was required for other purposes. Keeping in mind the general obligation of the Crown towards Indians, and that "the categories of fiduciary, like those of negligence should not be considered closed," (**Guerin**, p. 384), it is my view that a unilateral extinguishment of a legal right, accompanied by a promise, can hardly be less effective than a surrender as a basis for a fiduciary obligation.

While the document in question in **Sioui** was found to be a treaty, it was hardly more than a permit in writing to conduct aboriginal activities and it was enforced with qualifications which recognized competing Crown interests.

In **Sparrow**, the Court at p. 1108 referred to **Guerin**, and **R. v. Taylor and Williams**, and said:

> "...the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

The foregoing passage from **Sparrow** must be limited by its context as the Court was considering an alleged interference with an unextinguished, fairly obvious existing aboriginal right. Further, this statement cannot be used to impose a general comprehensive fiduciary duty in every situation. In a case such as this, however, where a general obligation has been recognized, a promise made and acted upon for well over 100 years is sufficient to support an enforceable, fiduciary or trust-like obligation upon the Crown.

The Crown's obligation, in my judgment, is to permit aboriginal people, but subject to the general law of the province, to use any unoccupied or vacant Crown land for subsistence purposes until such time as the land is dedicated to another purpose. The Crown would breach its fiduciary duty if it sought arbitrarily to limit aboriginal use of vacant Crown land.

As aboriginal rights were capable of modernization, so should the obligations and benefits of this duty be flexible to meet changing conditions. Land that is conveyed away, but later returned to the Crown, becomes again usable by Indians. Crown lands that are leased or licensed, such as for clearcut logging to use an extreme example, become usable again after logging operations are completed or abandoned.

I have also considered whether, by analogy to **Sparrow**, I should mandate a justification process in order to provide a formula for the settlement of disputes arising out of the foregoing. I have decided I should not, both for the reasons which follow and because the fiduciary duty the Crown assumed upon the extinguishment of aboriginal rights is not a constitutionally recognized or affirmed right and is therefore subject to the general law of the province.

Sparrow was a case where the constitutionality of a specific net length regulation was challenged in the context of a closely regulated industry. The issues were enviably narrow ones: whether food fishing was an aboriginal right (the Court of Appeal and Supreme Court of Canada found that it was), and whether, in the federal Crown's regulation of this annual fishery, a restriction of net length to 25 fathoms interfered unconstitutionally with aboriginal rights (regular gill nets are 200 fathoms).

The Court found it could not answer the second question because of a lack of evidence and a new trial was ordered. I have already mentioned that the justification process mandated by the Court for the reconciliation of the Crown's power of regulation with the aboriginal right required, amongst other things, legitimate Crown objectives, minimal interference with aboriginal rights, consultation, and priorities for Indians in the fishery subject to conservation measures. It must be remembered, however, that the **Fisheries Act** and regulations already recognized Indian priorities.

In this case I am dealing with a situation where the province, in the ordinary discharge of its s. 92 powers, has been lawfully and necessarily making Crown grants of land and issuing licenses etc., and therefore diminishing user opportunities, on an ongoing basis since Confederation. If **Sparrow** is the model then reconciliation in this case must be more of a two way street than it was in that case.

The new trial Court (in **Sparrow**), will have to determine whether this particular net length survives the particular justification process described in the judgment. If it does, subject to other defences, Mr. Sparrow will presumably be convicted. If it does not, then Mr. Sparrow will be acquitted and the Crown will either prescribe a different net length or adopt a different form of regulation, or abandon regulation entirely. Having regard to the other Indian and non-Indian interests in this fishery, it is unlikely all such regulation will be abandoned.

Whatever net length the Crown decides upon (and presumably all its other regulations), can be challenged under the justification process, possibly serially, and one or more Courts may have to measure the constitutionality of successive net length and other regulations against the specific justification process and possibly also measure the constitutionality of the priorities fixed for each aboriginal group engaged in the fishery.

This is an awkward, possibly endless, process but one which should eventually provide an answer and fishing will continue under current regulations while their constitutionality is being debated because, with good management, the fish will return each year. I doubt if the same may be said for multiple land use in the territory where there are so many regulated and unregulated activities and the growing cycle is so much longer even though usuable regeneration is usually measured in years rather than decades. I do not think all these activities can be measured and remeasured by a specific test against relatively limited hunting, fishing, berry picking and other aboriginal gathering activities at countless locations at all times of the year.

Considering the many opportunities which exist for conflict in the territory, it is not possible to do much more than state the principles which should govern the Crown's duty. What follows is intended to assist the parties to understand the kind of reconciliation I

believe the law expects. I shall not presume to describe my efforts in this connection as a justification process because I cannot be nearly as specific as was attempted in **Sparrow.** What follows would be the framework for a justification and reconciliation process I would specify if I found the plaintiffs had continuing aboriginal interests.

As counsel will explain to the parties, the Court speaks only through a formal written Order or Judgment which should leave no doubt about its meaning. It is not possible to define a complex and multi-dimensional relationship either in Reasons for Judgment or in a formal Judgment of the Court, or to impose such a relationship upon the parties. Nor is it generally a judicial function to specify the terms of an ongoing complex relationship. After the Court has identified the principles, the parties must honourably work out their differences as best they can.

In considering what the law expects in the circumstances of this case, it is necessary to remember what has really happened in the territory and what is happening now. I do not pretend that I have precisely captured all the social and economic dynamics which are operating within the Gitksan, Wet'suwet'en and non-Indian communities, nor do I expect that every observer would necessarily reach the same conclusions as I do. I also recognize that a trial may not always be the best way to investigate these matters, but the evidence is the only information I have.

In British Columbia the responsibility of the Crown has always been a difficult one to discharge with actual conflicts between settlers and Indians not as obvious as in other parts of North America even though the potential for conflict was always present because of limited agricultural land. Compared with other jurisdictions where Indians were confined to reserves, or their rights were purchased for a pittance, British Columbia land policy in the territory did not usually interfere seriously with Indian land use. Settlement, which did not begin in the territory until the beginning of this century, was initially confined to the Bulkley and Kispiox valleys where land cultivation had not been pursued vigorously by many Indians. There were no large railway land grants in the territory, and even the pre-emption of most agricultural land did not impinge seriously upon many aspects of aboriginal life.

Yet there were some dispossessions and almost from the beginning of the colony, and from the time of settlement in the territory, it must have been obvious that the Indian population was falling into disadvantage when compared with the then white non-Indian community. The condition of the Indians in the territory throughout the entire history of their association with the European settlers has been an unhappy one with alcohol abuse, disease, infant mortality, poverty, and a lack of many of the benefits of civilization, particularly health, education and economic opportunities, and the ubiquitous dependence being usually the most serious social problems.

Indian misfortune, or at least disadvantage comparable to present day conditions, and probably much worse, was described by early visitors to the territory such as Brown and Ogden in the 1820's and 30's and by Loring in the 1890's. Disease and other misfortune arrived in the territory 70 years or so before the settlers or the railway.

The evidence suggests the land was seldom able to provide the Indians with anything more than a primitive existence. There was no massive physical interference with Indian access to non-reserve land sustenance in the territory, and there was no forced or encouraged migration away from the land towards the villages. Migration away from the land has been an Indian initiative and it started before there was any substantial settlement in the territory.

The introduction of alcohol, disastrous epidemics and limited economic opportunities did not result from a lack of access to land. Loring's reports, starting about 1890 before settlement began, describe much hardship when the Indians were still living "on the land" even though by that time they had access to many European trade goods which must have made life to some degree more bearable. The acquisition of firearms, for example, made hunting a far less random and hazardous exercise than it had always been.

This is not to say that European influences upon Indian life were not pervasive, but when I consider the effects of disease, alcohol and other social insults upon the Indian community, it is apparent that interference with aboriginal uses of land, except for actual dispossessions, was not a principal cause of Indian misfortune.

Further, I believe the Indians of the territory are probably much more united and cohesive as peoples, and they are more culturally sensitive to their aboriginal birthright than they were when life was so harsh and communication so difficult. I cannot find lack of access to aboriginal land has seriously harmed the identity of these peoples.

There is a further dimension to this question, however, which must also be considered. I refer to the obvious spiritual connection some Indians have with the land. I accept this as a real concern to the plaintiffs worthy of as much consideration as actual sustenance use. At the same time, this important feature cannot completely be separated from sustenance because the products of the land and waters of the territory are an integral part of that spiritual attachment.

Except in rare cases, there should be no difficulty obtaining sufficient fish, game and other products from most areas of the territory not just for desired levels of sustenance but also for spiritual purposes. In this respect I pause to mention that the salmon of the great rivers pass right alongside the principal villages and one need not travel far from the villages to reach wilderness areas where game can usually be taken. There is much wood left in the territory and it can be obtained far more easily with chain saws, snowmobiles and 4 x 4's than in earlier days. Anyone can now travel with much greater ease to whatever parts of the territory he or she may wish for the purpose of gathering what is required for sustenance or ceremonial purposes.

I appreciate that it may be difficult or impossible to obtain game and other resources at every exact place from where they were formerly obtained, particularly in built-up areas such as New Hazelton, Smithers, Houston and Burns Lake which are occupied principally by non-Indians and which were not prominently the sites of native villages. This is unfortunate, but the same applies, I am sure, near the Indian's own villages particularly as Indian populations increase. Fortunately, it is a very large country with enormous wilderness areas.

What has been lost, perhaps, is the spiritual connection not with land, but with control or belief in ownership of land. I say this because access to land has usually been available to the Indians, and much of it still is, or will be again. For this purpose, the loss of ownership or belief in ownership includes the spiritual connection these peoples have with the land. This loss occurred at the time of sovereignty. For the reasons I have already given, it is not a matter for which the Court can provide a remedy. It is, however, a matter the Crown should take into consideration in deciding how it will proceed with the development of the province and its resources.

I recognize that some Indians greatly regret that they no longer live off the land. Most of them, however, particularly the young people, no longer wish to do that. When the price of furs dropped in 1950 those still on the land moved to the villages. Most Indian sustenance and ceremonial requirements are almost as conveniently available as they ever

were. In addition, they have access to a great many advantages which were not formerly available to them.

The plaintiffs are also troubled because they have not progressed equally with some of the "newcomers," and because they have not been able, for many real and intangible reasons, to share the opportunities they think they should have to the commercial use of the land and to the prosperity they think should accrue to them from the land they truly believe is their own. There is evidence which satisfies me the plaintiffs, if completely successful in this action, would seek to exploit the resources of the territory for their own account. They say they would do this better than it is presently being done but I cannot express any opinion on that question. There is a relentless correlation between economics and environmental sensitivity and one must have all the factors of the equation before any opinion can be expressed on that difficult question. It was not an easy decision, I am sure, when the Moricetown Band was advised to clear cut its timber lands in order to provide economic employment for its members.

These understandable aspirations to control the development of the territory do not fall within the rubric of the plaintiffs' continuing use of the territory as might have been the case if they had succeeded on the issues of ownership and jurisdiction. At the same time, the Indians must realize the importance of creating public wealth from the territory as they, like so many members of the non-Indian community, are heavily dependent upon public funding for every day sustenance.

Having stated some of the factors I would have included in a justification process, I propose to state some propositions for the assistance of the parties considering their positions on the fiduciary duty I have identified.

First, the federal and provincial Crown, each in its own jurisdiction, always keeping the honour of the Crown in mind, must be free to direct the development of the province and the management of its resources and economy in the best interests of both the Indians and non-Indians of the territory and of the province. I reach this conclusion because firstly, it states no more than I have already established as a principle that the province has the legal right to alienate interests in the territory; and secondly because even in the case of a continuing aboriginal right the Court in **Sparrow** specifically stated that the objective of the justification process:

> "... is not to undermine [the Crown's] ability and responsibility with respect to creating and administering overall conservation and **management** plans regarding the salmon fishery." (my emphasis)

It would seriously undermine the ability of the Crown to manage the resources of the territory if, subject to what follows, it did not have the ongoing right to develop or alienate the land and resources of the province.

Secondly, the Ministers of the province and their officers should always keep the aboriginal interests of the plaintiffs very much in mind in deciding what legislation to recommend to the legislature, and what policies to implement in the territory. There should be reasonable consultation so that the plaintiffs will know the extent to which their use might be terminated or disturbed. A right of consultation does not include a veto, or any requirement for consent or agreement, although such is much to be desired.

Thirdly, the province should make genuine efforts to ensure that aboriginal sustenance from and cultural activities upon unoccupied Crown land are not impaired arbitrarily or unduly. If that should occur from time to time then suitable alternative arrangements should be made. It must be assumed there will often be interference because the most likely tension will be between forestry operations and sustenance rights. Most of

such interference should not be permanent in any particular area of the territory and these competing interests must be reconciled.

I do not suggest these are the only tensions which will arise for there are also conservation and environmental questions. Those are matters in which the plaintiffs along with the rest of the public have a vital interest. The plaintiffs' conservation and environmental concerns are not sufficiently distinct from their subsistence activities to make it necessary for me to deal with them separately. I wish unequivocally to state that I do not regard general conservation and environmental matters to be in issue in this case, and I do not wish to be taken to be pronouncing upon them in any way.

Fourthly, whether any proposed or resulting interference offends unduly upon aboriginal activities and brings the honour of the Crown into question will in large measure depend upon the nature of the aboriginal activity sought to be protected and the extent it is ordinarily exercised; the reasonable alternatives available to all parties; the nature and extent of the interference; its duration; and a fair weighing of advantages and disadvantages both to the Crown representing all the citizens and to the Indians. While the Court in **Sparrow** gave the Crown a clear message that it must take aboriginal rights seriously, (which admonition, translated to user rights, should also be read into this judgment), the plaintiffs' aboriginal activities in the territory, which they have exercised only marginally for many years, will seldom be the only responsibility the Crown has to discharge.

In this connection, I must respectfully depart from what was said in **Sparrow** about the public interest. Food fishing for salmon is critical to aboriginal sustenance and in such a narrow area of activity the Court considered that the public interest was either too uncertain, or it was necessarily sublimated to the particular aboriginal interest the Court was defining. This case is quite different because of the multi-dimensional activities operating in the territory and their breadth, both in area, time and range of activities is so much greater than the operation of a seasonal, localized fishery.

Fifthly, notwithstanding what I have just said, I would expect the province to provide some sustenance priority to Indians in the use of vacant land to the extent permitted by The **Charter.** Perhaps it already does. This will become most important if shortages of game arise not just in specific areas, but in the area generally. If that should occur then Indians should have priority for such game and other sustenance items over non-Indians after the requirements of reasonable conservation have been satisfied. This is not to say the plaintiffs will always have priority over other Crown authorized activities in the territory. Those kinds of conflicts may well arise from time to time, and they must be resolved honourably and reasonably. A reasonable decision is usually an honourable decision.

Sixthly, while I would not purport to define what legal proceedings may be brought to challenge Crown activities authorized by provincial legislation, I am satisfied it would not have been the expectation of the Supreme Court of Canada, if it had dealt with this case, that Crown authorized activities in such a vast and almost empty territory would often give rise to legal proceedings.

In fact, unlike **Sparrow** which dealt only with a single issue in a regulated fishery, challenges regarding conflicts between Indian use and competing activities should be confined to issues which call the honour of the Crown into question with respect to the territory as a whole. Local operating decisions such as to log a block here, or build a road there, should surely not call for judicial intervention.

This is because it is not the law, or common sense, nor is it in the interest of the people of the province or of the plaintiffs that the development, business and economy of the province and its citizens should constantly be burdened by litigation or be injunctioned into

abeyance by endless or successive legal proceedings. Proper planning and appropriate consultation with, or disclosure to, the plaintiffs or their advisors and reasonable accommodations on all sides, should make the difficulties I have just mentioned unnecessary.

Because of all the foregoing, I do not think it will be wise for me to construct a justification process. In my judgment the range of potential competition is too vast for a pre-determined procedure. I believe the law relating to fiduciary duties is better able to resolve these questions than any specification I could devise. The operating word must be reconciliation, rather than justification.

5. Conclusions

(1) In my judgment the plaintiffs' aboriginal interests in the territory were lawfully extinguished by the Crown during the colonial period.

(2) It follows that non-reserve Crown lands, titles and tenures granted by the Crown in the territory since the creation of the Colony of British Columbia in 1858 are unencumbered by any claim to aboriginal interests.

(3) The plaintiffs are entitled to a declaration that the Gitksan and Wet'suwet'en peoples are entitled, as against the Crown but subject to the general law, to use unoccupied, vacant Crown lands within the territory for aboriginal sustenance activities until it is required for an adverse purpose. I limit this declaration to the territory because that is the only land which is in issue in this action but I see no reason why it should not apply to the province generally.

PART 16

DAMAGES

The plaintiffs, hunting for much larger game, did not directly attack any specific provincial legislation or regulation affecting aboriginal interests in the territory. Instead they sought declarations of ownership and jurisdiction to which I have added ongoing aboriginal rights. If the plaintiffs had succeeded in obtaining such declarations on their first three heads of claim they would have contended they are entitled to damages for the consequences of all interference with the territory although that would not follow automatically as the province advanced other defences which would then have to be considered.

These broad issues were undoubtedly the ones the plaintiffs wished to have tried in this action, and I well understand why they advanced their claim in that way.

As the plaintiffs have failed on these issues, and as I have reached the opinion that the province has all along had the authority reasonably to terminate or diminish user rights in the territory, it follows that the plaintiffs' claims for communal damages must be dismissed.

Although this claim for damages is a communal claim, it has been brought by individuals and personal claims could be included although they are not specifically pleaded. I do not recall any individual claims other than general complaints about reduced hunting and fishing opportunities and some dispossessions in the early years of this century. The plaintiffs did not press these claims in argument and I understand the rights asserted against the Indians arose under what I must assume was valid Canadian or British Columbia legislation. I am satisfied the plaintiffs have not established any claims for damages in this action.

It is accordingly unnecessary to deal with the defences raised by the province under the **Crown Proceeding Act,** 1974, S.B.C. c. 24 (which would have precluded recovery for damages incurred prior to the effective date of that enactment on Aug. 1, 1974), or under the **Limitation Act,** 1979, B.S.B.C. c.236 (which would have precluded damages except perhaps those incurred within 2 years of the date of the Writ in 1984 of which there is no specific evidence.

Although it was not argued, I have considered whether any compensation should be payable to plaintiffs either for reduced reserves, or for interference with Indian use of vacant Crown land. With regard to the former, I am aware of many aboriginal complaints throughout the province about reductions in reserves, but no such claims were advanced in this case. Instead, I refer to the failure to allot larger reserves. Again, no such claims were pleaded, and no evidence or argument was directed to that question.

The evidence is that reserves were allotted and furnished by the province pursuant to its obligation under the 13th of the Terms of Union with Canada, and Canada has acknowledged that British Columbia has satisfied its obligations in that connection. Apart from that, there is no evidence that any particular reserve should have been allotted or

increased in size, and no basis has been shown upon which I could make an award of damages.

I have already offered the comment that larger reserves should have been allotted, but I have also commented that the Indians did not always help their own cause. The evidence does not permit me to make an award in this matter. It is my view, as I have no jurisdiction to create reserves, that the plaintiffs' claims for larger reserves or compensation in their place is a matter for the Crown, and not for the Courts. There is no legal basis upon which I can assist the plaintiffs in this connection.

With regard to interference with aboriginal life, the evidence is similarly sparse. There were dispossessions, and interferences, such as when beaver dams were destroyed in the Bulkley Valley, and there were other incidents. The evidence does not disclose, however, whether such interference was by the Crown or by private citizens, or under statutory authority, nor was any arbitrary interference as I have defined it established by evidence. Apart altogether from the strictly legal defences, there is insufficient evidence to conclude that the plaintiffs have established a cause of action for damages or compensation.

I am satisfied that it would not be proper to make any award of damages in this case and that claim is dismissed. Whether the plaintiffs should be compensated for any of the matters mentioned in the evidence is a matter for the Crown, not for the Court.

PART 17

THE LANDS SUBJECT TO ABORIGINAL RIGHTS AT THE DATE OF BRITISH SOVEREIGNTY

1. General

It is now necessary to delineate the areas within the territory which were subject to aboriginal rights at the date of British sovereignty and prior to extinguishment. This is necessary in case I am wrong in the conclusions I have expressed in Part 15 of this judgment.

2. The External Boundary

In their original Statement of Claim dated October 23, 1984, the plaintiffs alleged:

> "56. The Plaintiffs have owned and exercised jurisdiction over the lands described in Schedule "A" and set out on the map attached as Schedule "B" (hereinafter referred to as "the Territory").

Schedule "A" to the original Statement of claim was a 19 page single spaced metes and bounds description of the external boundary as the plaintiffs then believed it to be. The description of the territory was changed several times before and during the trial. The metes and bounds description was changed once or twice during the pre-trial period, but I do not believe it was changed with every subsequent alteration of the external boundary. I do not propose to comment further upon the metes and bounds description as nothing turns on it and the amended maps exhibited at trial more conveniently explain the subject matter of plaintiffs' para. 56. allegations.

Before I describe the various amendments to Schedule B, I should mention that prior to this action, the Gitksan-Carrier Tribal Council made a submission to the Honourable Hugh Faulkner, Minister of Indian Affairs, dated November 7, 1977, to which was attached a map showing the alleged external boundary of the lands they claimed including the lands alleged in this action to belong to the Kitwankool chiefs. This map is Ex. 113, and Ex. 646-1. It generally conforms to the later maps but is different in detail. For example, the south external boundary is north of Ootsa Lake and Tahtsa Reach.

Schedule "B" to the Statement of Claim was prepared from information collected by Mr. Neil B. Sterritt and others. On the basis of this information Mr. Marvin George, a qualified and competent cartographer, actually prepared the Schedule "B" map. It showed only the then alleged external boundary of the territory and it excluded the Kitwankool lands.

Schedule "B" was generally conformable to the outline of the 1977 map, except for many adjustments and the two boundaries hardly coincide except in the north-east and north-west. Substantially less land is claimed in the coast mountains of the south-west, and substantially more is claimed in the south and south-east. As mentioned, the 1977 boundary

ran north of Ootsa Lake and Tahtsa Reach and it only included the west half of Francois Lake. The Schedule "B" boundary was at the height of land south of Ootsa Lake and included nearly all of Francois Lake. As will appear later, there are many inconsistencies in the plaintiff's territorial evidence. I would not have thought there would ever have been any doubt about the question of whether Wet'suwet'en lands included such prominent and enormous features as Ootsa and Francois Lakes.

Also, there was a substantial adjustment in the Bear Lake area which had been partly excluded from the 1977 territory but was included in Schedule "B." Bear Lake is another extremely prominent geographical feature.

Neither of these two maps purported to show internal boundaries.

On April 1, 1985, the plaintiffs amended Schedule "B" by producing a fresh map which generally conformed to the original Schedule "B" but with many minor adjustments. The most substantial difference was the inclusion of a large enclave claimed by Geel on the northern boundary which had been excluded in the earlier two maps. This change was satisfactorily explained on the basis that Geel was unable to get instructions from House members in Vancouver in time to join in the earlier claims. This map showed no internal boundaries.

There is another map dated October 17, 1985, which became Ex. 646-4 which showed some internal boundaries.

In 1986 Mr. Marvin George prepared a large map (Ex. 101, adapted from Ex. 100) which purported to show overlaps in the lands claimed by the plaintiffs and by the Carrier-Sekanni Tribal Council. This was for the purposes of an All Clans feast at Moricetown on April 6, 1986. The Wet'suwet'en chiefs relied upon this map as an accurate representation of their territories. It shows substantial overlap claims alleged on behalf of the Carrier-Sekanni, including much of the southern territory claimed by the Wet'suwet'en chiefs in this case as well as other disputed areas along the north-east boundary of the territory, particularly at Chapman and Bear Lakes, and further north.

During the pre-trial period the province delivered interrogatories to all or a great many plaintiffs requiring a description of the lands claimed by the plaintiff to whom the Interrogatory was delivered. Many of the plaintiffs answered such question under oath by reference to sketches marked "Draft," attached to their answers. Neil Sterritt testified that in 1987 he believed these interrogatory sketches accurately described internal boundaries.

Few, if any, of these sketch maps accorded closely to the evidence adduced by or on behalf of these plaintiffs at trial, and some were markedly different. The plaintiff's explanation was that these were preliminary drafts prepared before detailed research was completed.

In March, 1987 Mr. Sterritt caused a further map to be prepared which became Ex. 646-6 at the trial. It shows internal boundaries and, (a) substantially reduced land claims on the north boundary; (b) an addition in the Kwinageese area on the north-west boundary; and (c) a deletion at Chapman Lake apparently agreed upon at the All Clans Feast. Many of these internal boundaries were later amended. This map was not tendered as an amended Schedule B.

At the opening of the trial the plaintiffs tendered an amended Schedule "B" which became Ex. 681. It confirmed the changes shown on Ex. 647-6 just mentioned, and also deleted a large area, know as Nii Kyap's territory at the north-east corner of the territory. It also adjusted the central easterly boundary by adding a small area just north of the Chapman Lake deletion. The plaintiffs also produced a colour coded draft map of the

individual territories claimed by the plaintiffs, which were later substantially changed. This map, originally designated as Ex. 5 for identification, became Ex. 646-8 in the plaintiff's collection of maps which were admitted into evidence at trial. Although the plaintiffs believed it accurately described their internal boundaries at the commencement of the trial, it was stated to be a draft and these internal boundaries underwent substantial revision as the trial progressed. The plaintiffs say it should be considered only as a draft.

Shortly after the commencement of the trial, when it became obvious that it would take almost forever for the plaintiffs to prove all their internal boundaries by oral testimony, although some witnesses had attempted to do so, the plaintiff's sensibly proposed that they would adduce most of their internal boundary evidence by what became known as Territorial Affidavits sworn by chiefs respecting their own territories or territories with which they were familiar. This was done and 53 of these affidavits were filed some of which sought to establish the boundaries of several individual territories. 30 of these deponents were cross-examined out of Court. Several more were cross-examined in Court. Finally, after the completion of their territorial affidavit project the plaintiffs filed Exs. 646-9A and 646-9B which purport to describe the final internal and external boundaries of the Gitksan and Wet'suwet'en chiefs respectively. The Statement of Claim was also amended to substitute these 2 maps for Schedule "B."

As the final external boundary is merely the result of all the internal boundaries, it is changed somewhat from the previous maps, the most significant change being the re-instatement of the Nii Kyap territory and other adjustments on the east border of the Gitksan territories.

The foregoing is a very brief, incomplete and general description of the external boundaries advanced from time to time by the plaintiffs during the course of these proceedings. It is not at all surprising that there would be changes in the presentation of such a vast concept, but where the validity of the claim depends upon a reputation of title, or its equivalent, substantial changes raise serious questions about whether a reputation has been proven to the extent required by law.

3. The Internal Boundaries

Internal boundaries, as shown of Exs. 646-9A and 9B, are far more significant. With them, as well, there have been significant changes which I must now proceed to consider in much greater detail.

I find this a most difficult part of this case. This is because, in addition to considering counsel's analyses, I have had to consider not just the details, where legal truth may usually be found, but also the broad sweep of the evidence. At the end of the process I am left in a state of much uncertainty.

(a) General Discussion

As I have said, the plaintiff's final position on their internal boundaries is depicted on Exs. 646-9A and 9B, which are reproduced earlier in this judgment (Maps 3 and 4). It can readily be seen that this patchwork covers every square foot of the territory. This result was obtained by a long and tortuous process which I shall detail in a moment.

As I have mentioned earlier, there is evidence that Brown, Ogden and other early traders in the territory found or heard about Indians living in villages on the great rivers. These probably included, with reasonable but not absolute certainty, the Skeena villages of Kitwangak, Kitseguecla, Kispiox, Kisgegas (or nearby villages), Old and New Kuldo, and the Bulkley villages of Hagwilget and Moricetown.

There is less certainty about Gitanka'at, Gitenmaax (Hazelton), K'sun and Gitangasx. Temlaxan and Dizkle, which feature so prominently in Gitksan and Wet'suwet'en oral histories, were not proven to have existed. They had disappeared by the time the early traders arrived in the territory and archaeologists have found no convincing evidence about them.

I believe Indian villages once existed at all these sites except Temlaxan and Dizkle. I have seen the clearings where Gitangasx, and Old and New Kuldo were located, and Loring's reports demonstrate the existence of K'sun in the 1890's. Equivocal, undated archaeological findings (mostly cache pits) have been made at or near several of these sites including Gitanka'at and Gitangasx. There is no reliable evidence of any other substantial villages and practically no evidence of villages except Hagwilget and Moricetown in Wet'suwet'en territory.

I am not able on the evidence to find when these locations became village sites or precisely when some of them were abandoned. Certainly there were villages in the vicinity of Kisgagas in the 1820's, but that name, Kisgagas, does not appear in Brown's reports. He heard of villages up river of the Babine-Skeena forks, probably the Kuldos or possibly the more distant Gitangasx. He also heard reports about larger villages to the west which could have been Kispiox, Kitseguecla and Gitwangaak. Certainly those villages existed in the mid 1800's and I suspect long before that. There are few reliable references to Hazelton until the mid 1800's.

Apart from Kitseguecla, where fishing seems to be good, the other villages are strategically located at canyons where fishing is easiest, or at important river forks. There seems to be good reasons for villages to be situated at these locations.

I am constrained to conclude that there probably were villages at most of these sites for a long, long time before the arrival of European influences in the territory but I wish to make a few comments. First, I do not find it necessary to review the conflicting evidence about Hazelton. It is so close to the canyon at Hagwilget that Indians may well have preferred the latter as a fishing site. Its proximity to such a proven location makes a specific finding unnecessary.

Secondly, it appears that the main reasons for these villages, except possibly for defensive or strategic reasons, was probably easy access to a principal food resource which was salmon. Neither people were particularly fond of game animals for food, and beaver was not plentiful. Every village is situated within a territory alleged to belong to a specific chief or House. For example Hagwilget is within the territory of Spooke; Kisgegas is in the territory of Tsa Bux; and Moricetown is in the territory of Wah Tah Keg'ht. These and the other villages are also within Indian reserves. These reserves sometimes includes portions of territories allegedly owned not just by the village chief, but also by one or more other chiefs or Houses. I find it incomprehensible that these reserves could have been established, and reviewed by the McKenna-McBride Commission without, so far as I can ascertain, it ever being suggested that these lands were the private preserve of just a few of these peoples.

Thirdly, there are some references in the oral histories collected by Barbeau, Baynon and others, which, in the plaintiff's submissions, suggest long time use and occupation of specific lands. Sometimes this includes associations with crests and other circumstantial connections with land. The evidence of Art Mathews Jr. (Tenimgyet) about the bears in his House crest is an example of this and there are others. In my view these are not sufficiently precise as to location to found a conclusion of specific long time occupation. In

many cases what is described in these histories could have occurred almost anywhere in the territory.

Fourthly, although the Gitksan and Wet'suwet'en had well established trails permitting visiting with other villages and people, as evidenced by the trail maps marked in evidence, there was little reason for the Gitksan to stray far from their villages or principal rivers in the Skeena, Kispiox and Babine River Valleys except to visit other villages and for journeys along the grease trail through the Kispiox or Cranberry Valleys to the Nass to get oolichan oil.

Similarly, the Wet'suwet'en also had contacts with adjoining people in all directions, particularly the Babine, but they were known as the people of the Morice and lower Bulkley Rivers. There was little reason for them to stray far from their canyon fisheries at Hagwilget, (which they only occupied in the early 1820's), or Moricetown which was then called Kyah Wiget. It is just as likely the Babine would visit them where fish was more plentiful. There is a singular lack of any reliable evidence of pre or proto-historic Wet'suwet'en living in or occupying sites in the southerly part of the territory and no particular reason for them to have done so. There is evidence of occupation at places like Pack Lake, and Sam Goosley Lake in the early years of this century, but no objective evidence of when such occupation commenced. There was, in fact, little reason for the Wet'suwet'en to have lived far from the Bulkley villages with which they all seemed to have connections. There is anthropological evidence that the Wet'suwet'en were a "one village people", presumably at Moricetown.

Fifthly, as I have already mentioned, there is a strong but not unanimous body of anthropological opinion including Goldman, Steward, Kobrinski, Jenness, Robinson and Father Morice that the social and economic organization of these peoples was likely a response to the fur trade which I have already discussed. Earlier, I mentioned the opinion of Dr. McDonald that there was much destabilization in the area in the 1700's. Even Dr. Ray at one time agreed with these experts but changed his opinion because of the information he gained from the Hudson's Bay Company records. That there are differing opinions is not surprising.

While I am happy to leave these fascinating questions to the academic community, I conclude the evidence raises serious doubts about the time-depth of particular Indian presence in distant territories, that is away from the villages. It is unlikely that the plaintiffs' ancestors, prior to the fur trade, would occupy territories so far from the villages, particularly in fierce Canadian winters.

This theory is well supported by a large number of reputable experts and casts doubts upon the plaintiff's position that many of the far north and far south territories claimed by many chiefs were used for as long as they allege.

Sixthly, there is evidence that at an early stage of the preparation of their boundary evidence the plaintiffs themselves decided to base their claims upon trapline information. An examination of the trapline boundaries, such as those shown on Ex. 1243-G, and other trapline information, of which Tsabux Namox-Goosely Lake, Kweese-Burnie Lake, Gisdaywa-Owen Lake, Antegiliubx North-Upper Kispiox River, Wiigyet-Chipmunk Creek, Nii Kyap-Malloch Creek, Samooh-Tahtsa Lake, Knedebas, and others show a remarkable correlation with trapline boundaries.

I appreciate that the trapline information is taken from metes and bounds descriptions, and lacks some precision, but I am satisfied the efforts to translate these descriptions onto maps is sufficiently accurate to demonstrate striking similarities between internal boundaries and trapline registrations.

It is true that trapline registrations only began in 1926 when Indians were encouraged to register the traplines they were using so as to avoid the fur trade equivalent of claim jumping. Mr. Sterritt, in Ex. 384 concedes this correlation, stating that "... Gitksan traplines became a sort of official provincial register of the Gitksan hereditary system of land ownership that exist to this day." It is far more probable, in my view, that the internal boundaries advanced in this case arose from the traplines rather than the other way around. The existence of so many non-Indian owned traplines in the area, and the failure, until recently, of some Indians to retain these traplines for their Houses raises serious questions about the claims of Houses to specific lands.

While there are many differences between internal boundaries and trapline registrations, there are also so many similarities that I am driven to conclude, on this ground, as well as on other grounds, that the source of many internal boundaries was not indefinite, long use prior to European influences, but rather from fur trade user which began after the arrival of European influences in the territory. It cannot be said that the balance of probabilities on this issue favours the plaintiffs.

Lastly, in this series of observations about the internal boundaries, I listened with the greatest possible care to the evidence and arguments of counsel but when I look at Exs. 646-9A and 9B, I am unable to accept that such a complete and intricate Balkinization of this vast area could probably be accurate. There was no reason, until the fur trade, for these people to have any boundaries, and the unusual shape of some of the territories leads me to doubt their authenticity. As examples, I need only mention the Wiigyet-Kuldo and Deep Canoe Creek Territory in the north central part of the territory, and Goohlaht in the south-west. They and many others appear to be excessively gerrymandered or artificial which seems inappropriate for an aboriginal society.

Further, I am troubled by the fact that so many chiefs claim so many different, widely scattered territories. Gyologyet's 3 territories span over 80 miles in a north-south direction but at least they are adjacent. Wiigyet claims 5 territories; Wii Minosik claims 4 widely scattered territories; Miluulak claims 4 territories; Hagwinlegh claims 5 territories stretching from west of Smithers to south of Burns Lake; and Ghoohlaht's 3 territories almost cross the southern part of the territory, a distance in excess of over 100 miles and he also claims one territory east of Moricetown.

It would not be fair for me to conclude that the above is inconsistent with Indian custom or practice for there is no evidence to that effect, and I must not see with uncultured eyes what may not be there. Viewed with judicial eyes, however, these considerations alert me to be cautious, and to scrutinize the evidence with great care. I am left, as I have said, with much uncertainty about these internal boundaries, particularly when the process in which they were prepared has not been objective.

I turn to another series of arguments which also lead me to conclude that the internal boundaries are not reliable indicators of aboriginal use. First, however I wish to mention the great emphasis placed by the plaintiffs upon the importance of these internal boundaries and the steps taken by the plaintiffs to collect the evidence necessary for the proof of these boundaries.

In his opening, Mr. Rush stressed the detailed knowledge of the chiefs about their individual territories. He said,

> "In order for Chiefs to perform their role as witnesses to this distinctive form of public acknowledgement of land title, they are trained by their predecessors in the boundaries of their own House's territories, and the

> boundaries of the territories of their neighbours, and those with whom they are socially closest."

On this basis it would be reasonable to assume that the evidence necessary for this case, although voluminous, could be assembled without undue uncertainty.

What happened is that, beginning in 1973, following the **Calder** case, the plaintiffs began thinking about their boundaries, and they employed Mr. Sterritt to start collecting information by looking at maps prepared by Chris Harris (who died in 1975), and by talking to chiefs, and making notes of their evidence.

Gradually, information was collected from interviews and casual conversation, (without regard, I am sure, to the hearsay rule of evidence), and by numerous field trips. This information was transferred to Marvin George, a skilled cartographer, who prepared most of the maps I have already mentioned and a great many others.

This process eventually led to the preparation of the internal and external boundary maps presented or disclosed prior to the commencement of the trial.

The trial started in May of 1987 in Smithers and continued there for 6 weeks ending in June, 1987. It was then adjourned to be continued in Vancouver. During the time in Smithers the plaintiffs were only able to complete the evidence of 3 principal witnesses, Mary MacKenzie (Gyolugyt), Mary Johnson (Antgulilbix), and Olive Ryan (Gwaans, of the House of Hanamaxw). In addition, during that 6 week period, some of the evidence in chief of Alfred Joseph (Gisdaywa), was taken, but his evidence could not be completed before the end of June.

Each of these 4 witnesses gave detailed evidence about the internal boundaries of their territories, or the territories of their Houses even though some of them had little personal knowledge, but it was apparent, if the internal boundaries of all of the territories of all of the Houses were to be proven by viva voce evidence, that the trial would be much longer than was then anticipated. The estimated length of the entire trial was then estimated to be 13 months.

For this reason, and as mentioned above, the plaintiffs responsibly agreed to prepare Territorial Affidavits for most of the Chiefs which is a process authorized by Rule 40 (44).

It will be useful to quote the precise order made in this connection, dated Oct. 23, 1987"

> "THIS Court FURTHER ORDERS that the Plaintiffs be at liberty to adduce, by affidavit, evidence of facts or documents relating to the location, boundaries and geographic landmarks of the territories claimed by the Plaintiffs and their Houses, but that the Plaintiffs not be precluded from arguing from such facts, or based upon such facts, that an inference of ownership be drawn.
>
> THIS Court FURTHER ORDERS that the deponents be available for cross-examination at trial or on commission, as may be agreed upon, or as may be ordered in due course."

The defendants did cross-examine some territorial deponents on their affidavits. I have no doubt this process saved a great deal of time at trial. The plaintiffs reserved the right to adduce internal boundary evidence from some witnesses and they did so in some cases.

(b) The Preparation of Territorial Affidavits

These Territorial Affidavits were prepared under the direction of Neil Sterritt, Marvin George and other researchers. They are largely in the same form. An example is Schedule 5, a photo copy of Ex. 605, which is the Territorial Affidavit of Walter Blackwater, (Diisxw). It describes 8 territories claimed by 7 different chiefs who, for convenience, did not submit separate affidavits or give evidence at trial. I believe Ex. 446 the Territorial Affidavit of Stanley Williams (Gwis Gyen), which covers 24 territories claimed by 11 different chiefs, is the most comprehensive of all of the Territorial Affidavits.

I have no doubt the Territorial Affidavits represent the best efforts of the plaintiffs to prove a vast collection of facts from which they argue I should infer exclusive long time use by individual Houses of the specific lands described in the affidavits and depicted on Exs. 646-9A and 9B. I accept that the plaintiffs have done their very best in this endeavour, and that these affidavits constitute the best evidence they could adduce on this question of internal boundaries.

Unfortunately, the task seems to have been too much for them. In the analysis which follows I shall not find it necessary to refer to all of the many arguments advanced by all the parties or to discuss them in nearly the same detail as they did.

(c) Discussion

Firstly, the defendants attack the process by which these affidavits were prepared. The plaintiffs purport to rely heavily upon declarations made by deceased persons, yet it is obvious that Mr. Sterritt and others had been engaged for over 10 years collecting information from a mixture of witnesses some deceased and some still alive at the time of the affidavit project. During this process, there has been much intense discussion within the Indian communities about the collection of this information for land claim purposes. This deprives the process of the objectivity which would have added confidence to it.

As mentioned, many maps and draft interrogatory sketches were prepared before the affidavit project began. Many of these documents are markedly at variance with the later maps and it is impossible to be confident the affidavits are all based upon information obtained only from personal knowledge or deceased declarants. Further, of course, the credibility of later alleged reputations is seriously weakened by earlier, different assertions of ownership or use.

Thus Antgulilbix, in her Interrogatory Sketch, and in all the maps prepared before the start of the trial, alleged her House was the owner of territory near Kispiox while at trial she agreed a part of it was owned by a different chief, and there are many similar instances of changed reputations.

Also, it is obvious that living witnesses cannot prove long time use from personal knowledge. It accordingly became necessary for the plaintiffs to rely upon the reputation exception to the hearsay rule to prove a reputation for long time use or occupation by declarations made by deceased persons.

The defendants attack this process by reference to the fact that most deceased declarants known to living witnesses could not likely prove a reputation for long time use of specific territory far enough back in time to establish the plaintiff's case. In this respect the defendants rely upon the evidence of anthropologists who tend to doubt knowledge of genealogy, let alone specific land use, beyond 100 years or so.

An example of the difficulty in this connection is Ex. 605, the Territorial Affidavit of Walter Blackwater (Diisxw), of the House of Niist, relating to the Galaanhl Giist territory,

known as Slamgeesh River, in the north central portion of the Gitksan territory. According to Mr. Blackwater, he was told about this territory and its boundaries by his grandfather, the late Moses Stevens (Dawamuxw), by his grandmother Esther Stevens (Asgii), by his mother Mary Blackwater (Diisxw), and by several others. They all told him "... this territory belongs to Gwinin Nitxw." I overlook for the moment that this is not reputation evidence. This and other affidavits go on to describe the various territories by reference to prominent geographical features, and each section of an affidavit dealing with a specific territory ends with the following or equivalent statement:

> "43. The boundary of the Galaanhl Giist territory described above has remained the same through my lifetime and the persons mentioned in Paragraph 39 told me that it has remained the same since long before the arrival of European people here. They told me that the members of the House of Gwinin Nitxw had owned, harvested and looked after the Galaanhl Giist territory from generation to generation.
>
> "44. I have heard the Galaanhl Giist territory described in the Gitksan feast as being owned by the House of Gwinin Nitxw."

The format of all the Territorial Affidavits is more or less the same. In some affidavits, the format is changed slightly, such as in the same affidavit, with respect to the territory of the Dam Tuutswwhl territory claimed by Wii Minosik, where it is also said that the deponent's informants also told him the information about that particular territory had been passed on to them by the former Wii Minosik, "who is now deceased." Similar language appears in many affidavits. So far as I can ascertain, nothing turns on different language in any of the affidavits and I do not recall any arguments being advanced on that basis.

Returning to Mr. Blackwater's affidavit, Moses Stevens was born in 1861, and he died in 1971. Walter Blackwater was born in 1923 but we do not know when the declaration was made. It must have been made between, say, 1928 and 1971. I do not know what Moses Stevens, or any of the declarants said. The plaintiffs case, of course, is that if this territory belonged to Gwinin Nitxw at any time then it must have been in his House for a very long time. The affidavits could have been more explicit. Unless they state what the declarants actually said it may represent a conclusion based upon belief rather than upon the fact of reputation or other knowledge. I discussed all this in my earlier judgment.

One of the plaintiff's maps of internal boundaries, dated October 17, 1985 (Ex. 646-4) shows part of this territory was claimed by Dawamuxw, and others, while Ex. 647-9A, based upon Territorial Affidavits, attributes it to Gwinin Nitxw.

This poses a serious difficulty for the plaintiffs, as it is impossible to conclude that a reputation of long time use of this specific territory exists in favour of Gwinin Nitxw when as recently as 1985 it was attributed to others. The plaintiffs assert mistake or misunderstanding.

Thirdly, the defendants question the reputation upon which the plaintiffs rely. The reputation alleged by the plaintiffs is confined to the community of the plaintiffs themselves. The plaintiff's aboriginal neighbours have been excluded from this process although they have an interest in some of these areas where there are overlapping claims, and inconsistent land claim disputes still exist even after numerous efforts to arrange settlements. Chapman and Bear Lakes areas are specific examples of this, and the overlap claim of the Carrier-Sekanni, as recently as 1987, includes almost one-half of the territory claimed by the Wet'suwet'en.

Even within the plaintiff's community, details of boundaries were not widely known. Alfred Joseph said chiefs are very reluctant to talk to other Wet'suwet'en about their territory; Art Mathews Jr. said it is hard to follow a chief's boundary descriptions because "they have a language unique of their own" (sic); and several witnesses said they had seldom, if ever, heard their own boundaries described in the feast hall. There has been no reputation proven in the non-Indian community.

Fourthly, the plaintiffs and their ancestors have been actively discussing land claims for many years, long before the McKenna-McBride Commission in 1914. This has been a very current issue with the plaintiffs for a very long time. The collection of evidence in such a climate deprives it of the independence and objectivity expected for reputation evidence. It may even render the declarations inadmissible for the authorities suggest the declaration, not just the reputation, must have been made before the controversy in question arose: **Phipson,** (13th ed.) para 24-28.

In the **Berkley Peerage Case,** (1811) 4 Camp, 401; 171 E.R. 128, Chief Justice Mansfield at p.135 (E.R.) stated:

> "General rights are naturally talked of in the neighbourhood . . . Therefore, what is thus dropped in conversation upon such subjects, may be presumed to be true. But after a dispute has arisen, the presumption in favour of declarations fails; and to admit them, would lead to the most dangerous consequences. Accordingly, I know of no rule better established in practice than this, that such declarations shall be excluded. . . .
>
> I have now only to notice the observation, that to exclude declarations you must show that the **lis mota** was known to the person who made them. There is no such rule. The line of distinction is — the origin of the controversy, and not the commencement of the suit. After the controversy has originated, all declarations are to be excluded, whether it was or was not known to the witness." (p.136, (E.R.))

This is a particularly significant limitation on the value of reputation evidence as an exception to the hearsay prohibition against out of Court declarations particularly when those asserting such reputation and their ancestors have so thoroughly convinced themselves about the absolute correctness of their beliefs during over 100 years of dialogue.

Fifthly, the authorities suggest the reputation which is the subject of the declaration must be undisputed, that is a settled public consensus, after the sifting of claims and counterclaims; **Wigmore,** vol. 5, paras 1583, 1588.

It can hardly be said that the plaintiffs claims are undisputed, particularly on the external boundaries which are the subject of numerous overlapping claims by other Indian peoples. A claim to an exclusive interest in land against the Crown, based upon reputation for long time use would require very strong evidence.

With regard to overlapping claims by other Indian peoples, the evidence discloses conflicting claims both along the external boundary, and indeed into the very heartland of the territories claimed by the Gitksan and Wet'suwet'en peoples in this action. These claims are advanced by Tsimshian, Nishga, Kitwankool, Tahltan/Stikine, Tsetsaut, Kaska-Dene, and Carrier-Sekanni peoples. It was not made clear to me what position the Babine people take with respect to this matter but there seems to be much uncertainty about the Bear Lake area. The position of the Cheslatta Bands is also uncertain, but they and the Babine Indians have many reserves in the southern part of the territory claimed by the Wet'suwet'en. The validity of these conflicting claims has not been proven, but the very

fact such claims have been made cannot be overlooked in any discussion about a certain reputation for "undisputed" ownership or occupation of lands.

As for non-Indians, Mr. Shelford, for example, has been living near the west end of Francois Lake since the 1920's. Much of this area is known as the Shelford Hills. He did not know until recently that the few Indians in his neighbourhood, with whom he was always on friendly terms, claimed to be the owners of both his trapline as well as their own and all the other lands in the area. This seriously questions the existence of an undisputed, settled reputation sufficient to found a declaration of any kind of interest in land.

Again it is impossible to infer a community reputation for an interest in land when a prominent, life long resident in the area like Mr. Shelford, a Member of the Legislature for many years, and a Cabinet Minister for a time, who acknowledges hearing about general land claims for a long time, has never heard until very recently of claims of ownership or jurisdiction, or claims to specific lands, including his own, by Chiefs whose families he has known personally for most of his life.

I do not say the Territorial Affidavits are not admissible, for they contain much that is properly receivable as evidence. What is inadmissible, according to the authorities, are the declarations of ownership or use which would have been inadmissible whether given orally in court or by affidavit. I regret this finding greatly because the affidavits probably represent the best the plaintiffs can do in this connection. It does not appear to me, however, that the Supreme Court of Canada has decided that the ordinary rules of evidence do not apply to this kind of case. I do not understand the authorities to permit a court to suspend the laws of evidence even in a special, difficult case like this one.

Applying the same principle I mentioned earlier, that witnesses do not take easily to the concept of reputation evidence, I believe it is open to me to treat these inadmissible statements as the deponent's description of a reputation in the feast hall. I believe that is what was intended, and to that limited extent I have taken these affidavits into consideration. That, however, does not get over the hurdle that reputation is just the reputation of the feast hall and is not the reputation of the community. The community in question is surely much more that those who attend feasts.

On this basis, it is my conclusion that the plaintiffs have not established the kind of reputation the law requires as proof of this ingredient of their case. As I see the matter, however, there is a much more serious problem with the proof of this part of the plaintiffs' case.

4. Uncertainties

Apart from the foregoing, the plaintiffs would still fail on this issue of internal boundaries.

This is because, after making what I believe are substantial and appropriate discounts for the difficult task the plaintiffs have undertaken, and due allowances for human frailty, faulty memories, imperfect communication, erroneous assumptions, incorrect inferences and other error-inducing processes, I have concluded there are far too many inconsistencies in the plaintiff's evidence to permit me to conclude that individual chiefs or Houses have discrete aboriginal rights or interests in the various territories defined by the internal boundaries.

To put it another way, it has not been established that the internal boundaries represent valid subdivisions of Gitksan and Wet'suwet'en aboriginal lands accruing just to chiefs or Houses. To make this finding, it has been necessary to consider all the evidence in

great detail. Fortunately, counsel have assisted me greatly in this connection by useful summaries of the evidence relating to the individual territories claimed by the plaintiffs.

5. Evidence about Discrete Territories

In their Summary of Argument the plaintiffs furnished a synopsis of the evidence relating to each of the 133 territories. This is found in Vol VI of the plaintiff's outline, and comprises about 489 pages. The note I made at the conclusion of their submissions on this question, records plaintiff's counsel submitting that the evidence demonstrates:

1. knowledge by the people of land and House Territories;

2. knowledge of names and places by which their lands are known;

3. knowledge of lands came from their ancestors and is known in the community and passed along:

4. the connection of chiefs and House members to their history and crests and to their names and territories;

5. the use of the territories and resources such as moose, bear, etc. as well as berries, trees and all resources;

6. management by chiefs and Houses of resources and harvesting of them;

7. in short, plaintiff's counsel submitted the evidence supports their claims to ownership as claimed.

The province, on the other hand, submitted the evidence falls far short of establishing the credibility of the internal boundaries. The province attacked the admissibility, form and content of the plaintiff's evidence, particularly the Territorial Affidavits, and embarked upon a detailed analysis of the evidence regarding 5 specific territories said to be representative of all the territories. The province's Summary, preceding such analysis is in these terms:

A. Gyolugyt

Map 9A conflicts with the Benson territorial affidavit and with other maps identified by Mary McKenzie as showing the correct boundaries. The territorial affidavit contains false statements and conflicts with the affiant's evidence on cross-examination.

B. Antegiliubx South

Map 9A conflicts with other maps identified by Mary Johnson as showing the correct boundaries. There is no evidentiary basis for much, if not all, of the boundaries on Map 9A.

C. Gwinin Nitxw — Slamgeesh

Map 9A conflicts with several other maps in evidence. There is considerable evidence that until 1988 most of the territory was attributed to Dawamuxw or possibly Niist.

D. Samooh — Tahtsa Lake

There is much evidence that this is Cheslatta territory which should not be included in the Claim Area.

E. Madik (Kanoots) — Buck Creek

> On cross-examination, the affiant testified that the territorial boundary description was false. There is no basis in the evidence for the precise western boundary shown on Map 9B.

There followed, a 94 page analysis of these 5 territories demonstrating many inconsistencies. The province alleged the same exercise could be done for each House territory, but submitted on the "house of cards" theory that the plaintiffs must fail on all territories if they failed on these 5 territories. In other words, the province submitted that the integrity of the network of internal boundaries shown on Maps 9A and 9B depends upon the validity of each of its parts.

It may have been something I said about doubting the house of cards theory that led the province then to submit a Table of Inconsistencies relating to the evidence of 69 further territories and a detailed analysis of 3 further Gitksan territories (Spookw, Wiigyet — Skayanst, and Wii Minosik — Gwindak (Shedin Watershed), and 2 Wet'suwet'en territories (Wah Tah Keght and Hagwilnegh).

Counsel for the province asserted, correctly I think, in so far as Gitksan and some Wet'suwet'en territories are concerned, that if these analyses are accepted in any substantial way, the plaintiff's network of internal boundaries would indeed collapse as the boundaries of many adjacent territory would likewise be inaccurate.

In Part IX of its Summary of Argument Canada furnished a 298 page analysis of the plaintiff's territories which is largely dedicated to a review of the evidence of use of the territories showing in many cases the absence or minimal use of many of the territories for many years.

In Reply, the plaintiffs submitted a 12 page response to the province's analyses of the first five territories, alleging in the main that the evidence about common boundaries of adjacent territories answered the criticism's of the province. The plaintiffs also replied to Canada's submission on territories (46 pages), but does not seem to have furnished a written Reply to the analyses of the 69 and 5 territories furnished by the province.

All these summaries and analyses of territorial evidence were, of course, the subjects of intense oral submissions during argument.

6. The Details

It has not been necessary for me to undertake a further detailed analysis of all the evidence. Counsel have done that admirably, and I would be walking over well ploughed ground if I were to do it again. But it is not a question of choosing one analysis over another, for broad judicial judgment is also required in this exercise. This is because in the case of most territories there is some evidence or testimony to support the separate claim of some chief, House or sub group. But this evidence is so intermixed with and subsumed by trapping practices, anecdotal history and wishful belief that counsel's detailed arguments become mainly useful as references to evidence. This evidence, in total, is so contradictory and inconsistent that it would not be safe to make a declaration of exclusive interest for any of these many territories. That this is so is demonstrated by the extracts of argument which I have included in Schedule 6.

I believe reference to some of the evidence about a few individual territories will support the conclusion I have reached on internal boundaries. I do not intend these examples will necessarily be completely representative as each territory is sufficiently unique that they must all be considered individually. I have tried to do that, and what

follows is intended, as I have said, merely to illustrate the basis upon which I have reached my conclusions.

In this respect I have not confined myself to territories within the area to which I believe aboriginal rights attached before sovereignty because I am presently considering the reliability of the the plaintiffs' process.

I do not pretend that I have checked each reference to evidence in the summaries, but I have sampled enough of them, and I have examined references to related territories sufficiently to satisfy myself that the internal boundaries are not reliable bases for declarations of chief or House rights to individual territories. It is mainly the uncertainties and inconsistencies in all of the evidence, viewed together with all of the facts and circumstances of the case, that persuades me to that conclusion. The examples I have chosen and the extracts from Counsel's arguments illustrate the magnitude and difficulty of this exercise.

There are serious inconsistencies about so many territories that the process is unreliable. This leads me to conclude that this part of the plaintiffs' case is not proven.

I do not question that some of the plaintiffs, and some of their immediate ancestors had associations with many of areas they now claim. In a general way I accept that proposition as to most of these areas. It is the nature of that association and the details of precise boundaries that precludes me from accepting the internal boundaries as proven facts in this case.

(a) Galaanhl Giist (Slamgeesh River) Territory

This territory is claimed by Solomon Jack, (Gwinin Nitxw), who claims 2 specific territories on either side of the Skeena River. It is the northerly Gwinin Nitxw territory located in the northcentral Skeena area near the ancient, now deserted Indian village of Gitangasx. On our view of the territories in 1988 we had lunch on this territory which is on the old telegraph trail leading to the Yukon. Mr. Blackwater was with us and the trail could be seen when he pointed it out. The plaintiffs say this is the most intensely investigated territory in the analysis of the province.

The plaintiffs sought to establish the details of this territory, in part, by the Territorial Affidavit of David Blackwater, Ex. 605, Sec. E, which is Schedule 5 to these Reasons for Judgment. This territory was much discussed in the evidence of several witnesses.

I have attached as Schedule 6 (Part 1, (a), (b) and (c)), the written submissions of the parties regarding this territory which were fully supplemented by oral argument.

It is apparent there is much confusion about the reputation of this territory. The plaintiffs argue that all this difficulty arises over a misunderstanding about the basis upon which Moses Stevens used the territory in this century, but even if that is so, the plaintiff's evidence of a special interest in the territory of Gwinin Nitxw, or its boundaries, falls far short of proof which would support a declaration of exclusive aboriginal rights either against the Crown, other interests, or even other Indians.

(b) Gyolugyt, (Mary McKenzie)

Mary McKenzie is the current holder of the name of Gyoluugyt and on behalf of her House she claims a very large area in the north-east portion of the territory. It is one of the largest territories claimed by a Gitksan chief, and includes 3 distinct territories. Mrs. McKenzie, who was 68 years when she gave her evidence in 1987, said that her family originated in the "Wild Rice" village of Gitangasx but moved to Kuldo and later to Kispiox, "hundreds or thousands of years ago." The pole of her House is said to be at Kuldo which

is now deserted. She has never been on the territories of her House, although she said her husband and others have trapped there with her permission.

I have set out in Schedule 6 (Part 2, (a), (b) and (c)), the written submissions of the 3 parties on these territories.

The evidence falls far short of establishing long time use of much of this territory before the arrival of European influences. It establishes that in the believed history of these people they migrated from a village considerably east of the Gyolugyt territories to Kuldo which is closer to the territories, but then moved further south, away from the vicinity of these territories at some unknown date before the birth of her mother. Neither Mrs. McKenzie nor her son have been to Kuldo, although she said her husband went there in 1947 or 1948 and trapped on her territory. Much of Mrs. McKenzie's information about these territories has been acquired quite recently, no doubt in connection with this action.

What little use has been made of this territory was by others, and it is obvious Mrs. McKenzie does not have any precise understanding of the boundaries of the territory she claims. It fell to Richard Benson, a member of the House of Luus, to swear the Territorial Affidavit for her House, and he, also, was unsure of its boundaries. He admitted parts of his affidavit were not correct.

The discrete claim of this House to this territory was not established in the evidence.

(c) Antgulilbix — South, (Mary Johnson)

This Gitksan territory is one of 2 claimed by this Chief and House, and is located in the Date Creek area near Kispiox where Mrs. Johnson was born and still resides. She was 80 years when she gave her evidence, but seemed reasonably alert for a woman of such age.

There is no Territorial Affidavit for this territory. Instead, the plaintiffs rely upon evidence at trial, including evidence about surrounding territories.

I have set out in Schedule 6 (Part 3, (a), (b) and (c)) the written submissions of the parties on this territory which were, of course, fully argued at trial.

I regard it highly significant that Mrs. Johnson, who was born and lived all her life in Kispiox, in the immediate vicinity of this territory, did not have an understanding of her alleged boundaries. I have already mentioned her age, but I do not attribute her misconceptions to her age.

It is obvious that the boundaries of her territory, as shown on Map Ex 646-9A, were reconciled prior to and during the litigation. The final result is more an accommodation to views contrary to her own than to the kind of oral history for which the plaintiff's contend. I find it incomprehensible she would not earlier have been aware of the boundaries of her territory if there was any reputation in that connection and if the feast system had been functioning in this respect as the plaintiffs allege.

(d) Gisdaywa — Bewennii Ben (Owen Lake), Alfred Joseph

This large, irregular shaped Wet'suwet'en territory is in the south central part of the territory south of the non-Indian village of Houston. Mr. Alfred Joseph (Gisdaywa) is chief of the House of Kaiyexweniits (about 30 members), and he recited its boundaries from memory in his evidence, but he has had very little connection with the territory. He was born in 1927 and he remembers being on the territory when he was a small boy, but his family moved to Hagwilget in 1931, and he had little association with the territory even after he took the name Gisdaywa and became chief of his House in 1974.

He continued to reside in Hagwilget, where he has been a long serving and distinguished Chief Band Councillor. Apart from occasional visits, he has spent little time on the

territory. He said he was always aware that some members of his family were trapping on the territory particularly his cousins who had a trapline in the south west part of the territory. It is from these cousins that he has learned a great deal about the territory. He adds, however, that he also learned a great deal about the territory from his parents and grandparents.

Mr. Joseph has been the most visible of all the Wet'suwet'en chiefs in the preparation of evidence for this case, having been employed full time, or almost full time, on the case for the past several years.

Probably because there is no discernable difference in the Interrogatory sketch, internal boundary map (Ex. 5) and map 9B, the province has not advanced a detailed analysis of the evidence about this territory. I have set out in Schedule 6, (Parts (a) and (b)) the detailed submissions of the plaintiffs and Canada.

The province instead relied mainly upon the unlikelihood of the whole scenario portrayed by Mr. Joseph, which was really that of an absentee becoming chief of a territory with which members of his family had been associated in the early years of this century, applying for pre-emption, Indian Reserve lands, and traplines, and substantially abandoning it in the early 1930's.

It was pointed out that when he as asked to estimate the size of his territory he replied 40 sq. miles when it is actually 315 sq. miles. The explanation was that he was referring to the area used for trapping which I regard as confirmatory of the view that traplines are often equated to territories. A neighbouring Wet'suwet'en chief, Christine Holland (Knedebeas), had a trapline on his territory under circumstances he could not explain, except perhaps that some arrangement had been made with an earlier chief.

During recent years the territory has been partly logged, and subdivided probably in connection with the growth of the nearby village of Houston. When asked about the areas where his grandmother picked berries he said:

> "A I have not seen it lately. But the areas that my grandmother picked are all today subdivided and towns are — there are buildings on it and some commercial building on that area so it's — so if one is going to pick those berries you have to go quite a ways out."

There is no real evidence about when the ancestors of the members of this House first started to use this territory. There is only the evidence of what Mr. Joseph's grandparents, parents and uncles told him about use of the territory which is vague as to boundaries. Even the poles or poles of his House are located at Hubert, near Telkwa, 30 or so miles northwest of the territory at the home of his uncle Thomas George who was a former Gisdaywa.

I consider it significant that when his ancestors were allotted an Indian Reserve at Owen Lake, it was attributed either to the Ominica or Broman Lake Bands, confirming the conclusion I have reached that in many of these matters the Wet'suwet'en and Babine peoples are indistinguishable.

The evidence is not sufficient to support a discrete and exclusive right to this territory by just the members of this House.

(e) Spookw — Stekyawdenhl, or Rocher de Boule

Steve Robinson (Spookw) is the chief of the House of Spookw. He has been a caretaker chief for many years even though he is a member of the House of Yogosip, and a chief of both that House and of the House of Guuhaadk. For the House of Spookw, he claims a territory which includes the forks of the Skeena and Bulkley Rivers, the villages of

Hazelton (Old and New), as well as the magnificent Rocher de Boule, also known as Hagwilget Peak or Stekyawdenhl.

Basically, the province asserts discrepancies regarding the boundaries of this territory in various maps and other documents including Mr. Robinson's Interrogatory Sketch and various maps including Exs. 5, 102, 335, 336 and 646-9A.

I have set out in Schedule 6, (Part 5 (a), (b) and (c)), the written submissions of the parties on this territory.

I am particularly impressed by the submission that this territory is in the very heartland of Gitksan country. I would not have though that there would have been any doubt about its boundaries having regard to the tremendous importance the plaintiffs have attached to that question.

I am left in the position where I simply cannot say whether the members of the House of Spookw have the sole right to the use of this territory to the exclusion of all other Indian and non-Indian persons.

(f) Hagwilnegh — Keel Weniits (McDonell Lake — Telkwa River)

This immense Wet'suwet'en territory is one of 5 separate territories claimed by the chief and House of Hagwilgenegh. These 5 territories are situated at various locations between Smithers and Burns Lake, a distance in excess of 100 miles.

I consider this Keel Weeniits territory significant because its eastern boundary is only about 5 miles west of the town of Smithers which the largest non-Indian settlement in the territory. This territory is also close to the edge of the Smithers ski and recreation area on Hudson's Bay Mountain which towers over Smithers. As with Spookw, I would have thought there would be no uncertainty about the ownership and boundaries of such a large territory located so close to a major population centre.

I have included in Schedule 6, (Parts (a), (b) and (c)) the written submissions of the parties which disclose that until quite recently it was suggested that at least part of this territory was owned by another Wet'suwet'en chief.

I am not persuaded the chief or House has an exclusive right to the use of this territory.

(g) Samooh, Tsee Cul Dleez Ben (Tahtsa Lake) Territory.

This mountainous territory near the south-west corner of the territory is about 100 miles south of Moricetown. It is not understandable that it was not included in the plaintiff's early maps. This claim was in progress of preparation for so long I would have thought the Wet'suwet'en chiefs, would have known from the very beginning of the process whether the people of associated Houses and clans occupied lands so far south as this territory. This territory was not claimed on the 1977 map.

But the evidence, as set out in the arguments of counsel, which I have included in Schedule 6, (Part 6 (a), (b), and (c)) persuade me this land is just as likely Cheslatta as Wet'suwet'en territory. Mrs. Jack, who swore the Territorial Affidavit was herself a member of a Cheslatta Clan as was her father. There is no reality to the plaintiff's claim to this territory.

7. Conclusions on Internal Boundaries

I do not think it necessary to explore further examples. The weight of evidence is overwhelmingly against the validity of these internal boundaries as definitions of discreet areas used just by the ancestors of the present members of the various Houses. As I have

said, I think they more likely represent trapping areas which ancestors of the present claimants have probably used for trapping and aboriginal purposes for the past one hundred years or so.

On balance, however, the evidence is not sufficiently specific and convincing to permit me to make a declaration or judgment that would award user rights to the present claimants to the exclusion of other Gitksan and Wet'suwet'en persons in preference to other Indian and non-Indian citizens.

8. General Aboriginal Rights

The foregoing leaves untouched the conclusion I expressed earlier that, subject to extinguishment, the plaintiffs were entitled to aboriginal rights to some parts of the territory for the benefit of all of these peoples. The external boundary is now artificial, but it fixes the outermost extent of the lands to which I could make a declaration of aboriginal rights in this case.

I pause to say that if I were defining an area of aboriginal ownership or sovereignty it would be limited to the areas surrounding the villages I have mentioned. As no evidence or argument was advanced in this connection I do not propose to say anything further about that question. What follows relates to aboriginal rights.

The question is where to draw the line.

In this respect it will be necessary to be arbitrary. The most helpful evidence is geographical, particularly the great rivers and the location of the villages where the ancestors of the plaintiffs obviously lived and gathered the products they required for subsistence. There is hardly any objective evidence of early aboriginal presence based other than in the villages.

I start with the certainty that aboriginals have lived for a very long time at or near present day Hagwilget and Moricetown, as they probably also lived at Kitsilus Canyon (outside the territory), and at or near Ksun, Kisgegas and the Kuldos inside the territory. The reason, of course is that geographical features, such as canyons or other river conditions were advantageous for salmon fishing.

I am not so certain about Gitanka'at, Kitwangak, Kitseguecla, Kispiox and Gitangasx, but as villages were found by the early explorers at most of those locations, it is likely there were villages there in pre-European times.

Next, it is likely, in my view, that the Indians in those early times would have searched for food and other products in the vicinity of their villages. There was no need for them to go very far for such purposes, and I know of no reason to suppose they did.

It is likely that they visited, or made war with each other or with other peoples, using both the trails shown in some of the sketches adduced at trial, and by way of the great rivers both in summer and winter although there is little evidence they possessed boats. They must have had a way to cross rivers which would have been a formidable undertaking. I am sure they used some of the frozen rivers as cold weather sidewalks. It seems likely these early aboriginals would also have used the lands alongside the great rivers, between their villages, for aboriginal purposes.

I do not question that some of these ancestors may well have lived and survived considerable distances from the villages and great rivers but they would be hardy, generational recluses whose personal preference to absent themselves from villages even for their lifetimes would not create aboriginal rights based upon indefinite, long time use.

It seems to me there are three reasonable alternatives:

(a) Alternative No. 1

Having regard to the difficulties of pre-contact travel in the territory it might be argued (I do not believe it was), that both the Gitksan and Wet'suwet'en would not have used lands and waters any great distance from their villages. Perhaps an area of 20 or 25 miles around their principal villages would be appropriate for this alternative.

I reject this alternative because it does not give proper weight to the evidence of trails between villages and throughout the territory, and the evidence is that both plaintiff groups are peoples with common clans, languages, and customs. I cannot assume they would not travel between villages and use the land in between. Applying this formula to the Wet'suwet'en, of course, would limit their zone to an area around present day Moricetown, for there is no evidence of any other Wet'suwet'en village.

(b) Alternative No. 2

(i) *Gitksan*

In this alternative I have assumed the lands and waters which the plaintiffs used for aboriginal purposes would be defined by reference to a reasonable distance from their villages, and from their principal rivers which, together, constitute the heartland of their aboriginal territories. These areas must be within the territory.

It is easy, when being arbitrary, to draw a line on a map. I prefer to relate my conclusions to the evidence as much as possible. Mr. James Morrison (Txaax Wok) mentioned that, when he was a boy, the chiefs established a common hunting area at Kisgegas measured by two hours walking distance from the village. On level ground this might be between 8 and 10 miles but probably less than that in the Kisgegas area.

On the other hand, a hunter in reasonable country could comfortably walk 20 or 25 miles in a day. In this territory I think 20 miles would be reasonable and I doubt if many Indians would have found it necessary to travel that far from their villages or rivers to obtain what they required for subsistence.

On this basis it would be reasonable to define an aboriginal rights area measuring, say, 20 miles from the centre of each of the villages mentioned above and also on each side of the Skeena south of Gitangasx; on each side of the Kispiox and Babine Rivers within the territory; and on the south or west sides of the Sustat and Bear Rivers.

Such a definition might not be completely practical because there would be substantial overlaps and it might omit some likely used areas. It would also exclude some very large areas:

(a) the north-west, generally in the watersheds of the Nass and Bell Irving Rivers. I do not recall evidence about Indian villages in all of these vast areas and I know of no reason for Gitksan ancestors to use such lands on a permanent or even semi-permanent basis prior to the beginning of the fur trade;

I believe some Gitksan moved into these areas after the start of the fur trade, or later, particularly in the last 150 years when there was a reason to be there, but as we have seen since 1950, when the reason to be in a location disappeared then the land quickly became empty. If the land is substantially empty now, as I believe it is except for non aboriginal purposes such as commercial trapping, mining or logging, then I believe it was also empty for aboriginal purposes at the time of contact;

(b) The north-east and east side of the area claimed by the Gitksan. What I have said about the north-west applies also for the north-east. In addition the Nii Kyap corner is doubtfully Gitksan. Further, I am not persuaded the heavily mountained areas of the

Tatlatui and Slamgeesh Ranges were likely used for the long periods necessary for aboriginal purposes.

(c) This definition would exclude some areas south of Gitangasx, including many mountainous areas where mountain goat may have been hunted, and I am aware that part of the Babine Trail from Hagwilget to Babine Lake might be excluded. It is not possible to achieve perfection in an arbitrary award.

(ii) *Wet'suwet'en*

The situation with respect to the Wet'suwet'en is much more difficult. As mentioned, there was periodic, pre-historic habitation of some kind at Hagwilget and Moricetown, but the former was only occupied by the Wet'suwet'en in the 1820's. This would not qualify for Wet'suwet'en aboriginal interests even though it has become one of their principal centres. Hagwilget, however, would be within the Gitksan area I have defined.

It seems apparent the Bulkley River did not attract villages as did the Skeena. This is probably because it was not the great salmon river the Skeena has always been. I have searched for evidence of Wet'suwet'en villages other than Hagwilget, Moricetown, the Babine River villages (which are alleged in this case to be Gitksan), and in the Francois — Ootsa Lake areas. A search of the written outlines of all the parties identifies only Lhe Tait and Barrett Lake near Moricetown and mention of settlements of families living on land in the Bulkley Valley from which they were dispossessed in this century.

Although I believe it likely that ancestors of some present Wet'suwet'en lived in the area, I am left in a state of much uncertainty about where they were located either at the start of the fur trade or at the time of sovereignty. The evidence is that they were not nomadic. Most of the genealogies take us back only 3 or 4 generations, which is not much more that 100 years.

It is true there are now numerous settlements along the Bulkley transportation corridor, but there is no evidence of when they were first populated, and they are likely a function of the facilities which have all been built in this century. Similarly, I am uncertain when the villages in the Francois and Ootsa Lakes areas became inhabited by Wet'suwet'en if that has ever occurred.

The Hudson's Bay Company never established a post in this part of the territory. I suspect this was because it was largely an empty country. As it is empty now, it was probably empty both at the time of contact and, except possibly for some limited commercial trapping, at the time of sovereignty.

Indian reserves in this area are not helpful indicators of Wet'suwet'en habitation because there are so few of them apart from Hagwilget and Moricetown. Actual reserves are shown on Ex. 1243-D and on the map exhibited earlier in this judgment. Felix George No. 7 reserve, on the territory claimed by Gisdawya was established in this century by request of one of his immediate ancestors not because of long time use, but as a second choice when he learned that his first choice in the south was not available. There seem to be only 2 small reserves in the central area of the Wet'suwet'en territory. On the other hand there are a great many reserves in the south-east portion of the territory which are administered by non-Wet'suwet'en Bands.

Moricetown and Hagwilget are the centres these people turned to in this century when they left the land, but in the 1920's and 30's there seemed to be as many non-Indians as Indians on the land. There are Cheslatta people around the southern lakes now but some of them were moved there because of the flooding of their own land by the Kenny Dam which was built in the 1950's.

Over hanging the Wet'suwet'en claim is the Carrier-Sekanni claim to at least one half of this country (and some of the northeast corner of the Gitksan territories), as shown on Ex. 101. I am much impressed by the apparent similarity of the Wet'suwet'en with the Babine and I doubt if there was any real difference between these two peoples at the time of contact or sovereignty. They are both Athabaskan peoples who speak the same distinctive language. Until quite recently, it was the Carrier (which includes the Babine), rather than the Wet'suwet'en who were joined with the Gitksan in this land claim.

Mr. Joseph (Gisdaywa) said the Wet'suwet'en people are those who lived in the area of the Morice and lower Bulkley Rivers. This accords with the impression I have that the Wet'suwet'en homeland is more in the north and west than in the south and east of the south half of the territory. The latter areas, in my view, are just as likely to be Babine or Cheslatta as Wet'suwet'en areas.

I do not for a moment suggest that many Wet'suwet'en families such as the Hollands, Laytons, Alfreds, Michaels, Josephs and others were not on the land they now claim during the last part of the 1800's and the early years of this century. What is lacking is sufficiently precise evidence to permit me, other than arbitrarily, to define which areas of this vast territory should be charged with Wet'suwet'en aboriginal interests.

I am also reluctant to create a legal boundary when it is likely, in my view, that there was no fixed boundary in aboriginal times. I believe there were grey areas between groups of people, particularly the Wet'suwet'en and Babine, upon which aboriginal interests were probably exercised by more than one people or family. I have already pointed out that I do not accept the view that absolute exclusivity is an essential ingredient required for aboriginal user rights.

Doing the best I can in this alternative, and accepting the evidence of Mr. Joseph on this question, I think a 20 mile zone on each side of Morice Lake and the Morice River north-east to its forks with the Bulkley River, and thence northerly on each side of that river to its confluence with the Skeena River captures the heartland of the Wet'suwet'en people.

(c) Alternative No. 3.

(i) *Gitksan*

The second alternative, although arbitrary, is based upon inferences from evidence, and complies with the well known judicial dictum that in many situations, where the evidence and inferences do not furnish a completely satisfactory answer, the judge must do the best he can. The foregoing probably represents a substantial extension of the principle expressed in cases such as **Chapman v. Hicks,** [1911] 2 K.B. 786 (C.A.) but sometimes the law affords no other process.

This alternative paints with a much broader brush and concludes that some of the ancestors of some of the plaintiffs sometimes used lands for aboriginal purposes more distant from the villages and great rivers than one would think at this time. On this basis, it becomes necessary to draw a line on a map which, as I suggested in an earlier procedural judgment, seems hardly a judicial function: something more appropriate for the Senate in Rome.

The evidence does not persuade me that the areas described above in the north-west and north-east, north of Gitangasx were probably used for aboriginal purposes by the ancestors of the plaintiffs at the relevant time.

I would fix the north boundary of the lands over which the Gitksan have aboriginal rights by drawing a line across the territory through the centre of the Skeena River where

it flows past the village of Gitangasx, the Gitksan's most northerly village. This line would be extended westerly from the point where the Skeena turns south (near the outfall from Canyon Lake) and I would project the line more or less along the heights of land between the Nass-Kispiox and Nass — Skeena drainages to the external boundary in about the centre of the Kwinageese territory claimed by Delgamuukw. The line would be extended easterly from Gitangasx along the Skeena to its junction with the Sustut River, and along the Sustat to the external boundary.

If I stopped there the aboriginal area would not extend north of the Skeena at Gitangasx. To be consistent, however, I must assume some of the villagers at that location would have used some of the lands around their village, and I particularly noted the village site was on the north side of the river. I would therefore add an area north of the river within a radius of 20 miles from the village. The boundary of this area will intersect the line I previously designated. In an attempt to be tidy, I would not include any area east of the Skeena and north of the Sustat Rivers.

I would use the agreed boundary between the Gitksan and Wet'suwet'en, as shown on Exs. 646-9A and 9B, as the southern boundary of the Gitksan aboriginal lands.

(ii) *Wet'suwet'en*

I have, in the previous paragraph, already fixed the north boundary of the Wet'suwet'en aboriginal lands.

The Wet'suwet'en southern boundary is much more difficult to create, and it must be even more arbitrary. Using internal boundaries only for convenience and because they generally follow heights of land or other natural features, I would draw the line along boundaries shown in Ex 646-9B as follows. Starting on the south-westerly external boundary opposite the west end of Morice Lake, the extended line would run easterly along the south boundary of the Lootdzes Ben (McBride Lake) territory of Woos; then along the south boundary of the Bewenii Ben (Owen Lake) territory of Gisdaywa; then north-east along the west boundary of the territory claimed by Namox; then along the south boundary of Hagwilnegh's northern territory (at this location), the south boundary of Samooh; the south and east boundary of Satsan; and the south boundary of Hagwilnegh's "Topley" territory to the external boundary.

9. Conclusion

Making a choice between these 2nd and 3rd alternatives must necessarily be a matter of judgment based upon the best consideration I am able to give to all of the facts and circumstances of this case. For reasons which I am not able to articulate with much confidence, I have the view that the Wet'suwet'en were less concentrated in the great river valleys than the Gitksan, and more spread out in the relatively gentler country in the Bulkley valley than the Gitksan in the Skeena watershed.

This leads me to conclude that unfairness might result from the adoption of the 2nd alternative for the Wet'suwet'en. I do not have quite the same misgivings about the Gitksan because they have more village reference points. It is not essential that I choose the same alternative for both peoples.

But the Gitksan have always been much more numerous than the Wet'suwet'en, and there may have been more of them living away from villages and rivers than might be inferred from the evidence. I am also concerned that these are people without a written history and some of the unspecific references in the anthropologist's collections may well refer to events further away from the villages than I have suggested.

I believe there is a greater risk of unfairness for both Gitksan and Wet'suwet'en under the 2nd alternative. I would apply the 3rd alternative for both Gitksan and Wet'suwet'en peoples.

At the end of this Part is another copy of Mr. Macaulay's map upon which I have crudely endeavoured to describe the aboriginal areas I have attempted to define in the 3rd Alternative.

It will be obvious from the foregoing that I do not have confidence in early Gitksan and Wet'suwet'en presence north and south of the lines I established. They will understand, subject to the general law, that they are free to use the other lands of the territory along with every other citizen of the province. I am not, of course, validating or extinguishing any trapline registrations.

The foregoing boundary creations are admittedly approximate. Perhaps counsel will prepare a better map, giving effect to what I have endeavoured to describe. If they agree, they could even draw a line across the territory with a ruler. I would not wish to be understood by any of the foregoing to be authenticating the internal or external boundaries in any way.

In addition, as I do not regard exclusive use of the areas to be an essential requirement for aboriginal rights, I would not wish the foregoing reliance upon external boundaries finally or conclusively to settle any overlap questions between the plaintiffs and their aboriginal neighbours. Those are questions which may only be settled by negotiation between these peoples or by litigation between them.

If I have erred in my disposition of the questions of jurisdiction, ownership or aboriginal rights, any declaration to which the plaintiffs would be entitled would be against the province only. I do not purport in this judgment to affect the aboriginal or other rights of any person not a party to this action.

PART 21

THE JUDGMENT IN THIS CASE

The foregoing answers the legal issues arising for decision in this case. It remains only to state my conclusions in more precise form and to add some comments. Nothing I have said applies in any way to any lands set aside as Indian reserves.

(1) The action against Canada is dismissed.

(2) The plaintiffs' claims for ownership of and jurisdiction over the territory, and for aboriginal rights in the territory are dismissed.

(3) The plaintiffs, on behalf of the Gitksan and Wet'suwet'en people described in the Statement of Claim (except the Gitksan people of the Houses of the Kitwankool chiefs), are entitled to a Declaration that, subject to the general law of the province, they have a continuing legal right to use unoccupied or vacant Crown land in the territory for aboriginal sustenance purposes as described in Part 15 of these Reasons for Judgment.

(4) The plaintiffs' claims for damages are dismissed.

(5) The Counterclaim of the province is dismissed.

(6) In view of all the circumstances of this case, including the importance of the issues, the variable resources of the parties, the financial arrangements which have been made for the conduct of this case (from which I have been largely insulated), and the divided success each party has achieved, there will not be any order for costs.

PART 22

SOME COMMENTS

Having spent nearly four years considering these important questions I hope I may be forgiven for adding these brief comments.

I have already said that I do not expect my judgment to be the last word on this case. I expect it to be appealed and I do not presume to suggest what course the parties should follow from this point forward.

Assuming that discussions between both governments and the Indians will continue, I respectfully offer the following for their consideration.

The parties have concentrated for too long on legal and constitutional questions such as ownership, sovereignty, and "rights," which are fascinating legal concepts. Important as these questions are, answers to legal questions will not solve the underlying social and economic problems which have disadvantaged Indian peoples from the earliest times.

Indians have had many opportunities to join mainstream Canadian economic and social life. Some Indians do not wish to join, but many cannot. They are sometimes criticized for remaining Indian, and some of them in turn have become highly critical of the non-Indian community.

This increasingly cacophonous dialogue about legal rights and social wrongs has created a positional attitude with many exaggerated allegations and arguments, and a serious lack of reality. Surely it must be obvious that there have been failings on both sides. The Indians have remained dependent for too long. Even a national annual payment of billions of dollars on Indian problems, which undoubtedly ameliorates some hardship, will not likely break this debilitating cycle of dependence.

It is my conclusion, reached upon a consideration of the evidence which is not conveniently available to many, that the difficulties facing the Indian populations of the territory, and probably throughout Canada, will not be solved in the context of legal rights. Legal proceedings have been useful in raising awareness levels about a serious national problem. New initiatives, which may extend for years or generations, and directed at reducing and eliminating the social and economic disadvantages of Indians are now required. It must always be remembered, however, that it is for elected officials, not judges, to establish priorities for the amelioration of disadvantaged members of society.

Some Indians say they cannot live under the paternalism and regulation of the **Indian Act**, but neither can many of them live without the benefits it provides. Some Indians object to the imposed Band structure created by the **Act** but it would be foolish to discard it until something acceptable to a majority of the Indians has been fashioned to take its place.

Clearly a new arrangement is required which should be discussed between both levels of government with the Indians other than in the context of land claims. The first priority

should be for the two communities to find out what they expect of each other. In a successful, ongoing relationship, there must be performance on both sides.

This, however, should not be considered an endorsement for "self government" because details are required before any informed opinion may be given. Too often, catchy phrases gain quick recognition, momentum and even acceptance without a proper understanding of the real meaning or consequences of these sometimes superficial concepts. Also, different arrangements might be appropriate for different areas and the desired result may sometimes best be attained in stages.

Compared with many Indian Bands in the province, the Gitksan and Wet'suwet'en peoples have already achieved a relatively high level of social organization . They have a number of promising leaders, a sense of purpose and a likely ability to move away from dependence if they get the additional assistance they require. I cannot, of course, speak with confidence about other Indian peoples because I have not studied them. I am impressed that the Gitksan and Wet'suwet'en are ready for an intelligent new arrangement with both levels of government.

I am not persuaded that the answers to the problems facing the Indians will be found in the reserve system which has created fishing footholds, and ethnic enclaves. Some of these reserves in the territory are so minuscule, or abandoned, that they are of little or no use or value. On the other hand, it is obvious that some village reserves should have been larger but there is no profit in trying to assign blame for this. The solution to problems facing Indians will not be solved by another attempt to adjust reserves because that system has been tried and it has failed, and there are other ways to correct that historical failure.

It must be recognized, however, that most of the reserves in the territory are not economic units and it is not likely that they can be made so without serious disruption to the entire area which would not be in the best interest of anyone, including the Indians. Eventually, the Indians must decide how best they can combine the advantages the reserves afford them with the opportunities they have to share and participate in the larger economy, but it is obvious they must make their way off the reserves. Whether they chose to continue living on the reserves is for them to decide. Care must always be taken to ensure that the good things of communal life are not sacrificed just on economic grounds. As Mr. Sproat predicted in 1876, it may still be necessary to "... persevere, if need be, through a succession of failures."

In any new arrangement, some failures must be expected but we should at least be able to identify them. The worst thing that has happened to our Indian people was our joint inability to react to failure and to make adjustments when things were not going well. As social improvement can only be measured in generations, the answer to these social questions, ultimately, will be found in the good health and education of young Indian people, and the removal of the conditions that have made poverty and dependence upon public funding their normal way of life.

There must, of course, be an accommodation on land use which is an ongoing matter on which it will not be appropriate for me to offer any comment except to say again that the difficulties of adapting to changing circumstances, not limited land use, is the principal cause of Indian misfortune.

Lastly, I wish to emphasize that while much remains to be done, a reasonable accommodation is not impossible. After the last appeal, however, the remaining problems will not be legal ones. Rather they will remain, as they have always been, social and economic ones.

Smithers, and
Vancouver, B.C.
March 8, 1991.