97000011

NO: 23799

#28

IN THE SUPREME COURT OF CANADA

(On Appeal from the British Columbia Court of Appeal)

BETWEEN:

DELGAMUUKW, also known as Earl Muldoe, suing on his own behalf and on behalf of all the members of the HOUSES OF DELGAMUUKW AND HAAXW (and others suing on their own behalf and on behalf of members of thirty-eight GITKSAN HOUSES and twelve WET'SUWET'EN HOUSES as shown in Schedule 1)

APPELLANTS
(Plaintiffs)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AND THE ATTORNEY GENERAL OF CANADA

RESPONDENTS
(Defendants)

FACTUM OF THE APPELLANTS, THE GITKSAN HEREDITARY CHIEFS

Solicitors for the Gitksan Appellants:

RUSH, CRANE, GUENTHER & ADAMS
#300 - 111 Water Street
Vancouver, B.C., V6B 1A7
Telephone: (604) 687-5611
Fax: (604) 681-0912
Stuart A. Rush, Q.C.

Ottawa Agents for the Solicitors for the Delgamuukw et al:

GOWLING, STRATHY & HENDERSON
160 Elgin Street
Ottawa, Ontario, K1P 1C3

Solicitors for the Wet'suwet'en Appellants:

BLAKE, CASSELS & GRAYDON
#1700 - 1030 West Georgia Street
Vancouver, B.C., V6E 2Y3
Telephone: (604) 631-3300
Fax: (604) 631-3309
Marvin R.V. Storrow, Q.C.

Ottawa Agents for the Solicitors for the Wet'suwet'en:

GOWLING, STRATHY & HENDERSON
160 Elgin Street
Ottawa, Ontario, K1P 1C3

Counsel for the Respondent Her Majesty the Queen in Right of the Province of British Columbia:

ARVAY FINLAY
#400 - 888 Fort Street
Victoria, B.C., V8W 1H8
Telephone: (604) 388-6868
Fax: (604) 388-4456
Joseph J. Arvay, Q.C.

Ottawa Agents for the Respondent Her Majesty the Queen in Right of the Province of British Columbia:

BURKE-ROBERTSON
70 Gloucester Street
Ottawa, Ontario, K2P 0A2

Counsel for the Respondent Attorney General of Canada:

THE DEPARTMENT OF JUSTICE CANADA
525 Justice Building
Ottawa, Ontario, K1A 0H8
Telephone: (613) 954-3750
Fax: (603) 941-2450
Graham Garton, Q.C.

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN:

DELGAMUUKW, also known as Earl Muldoe, suing on his own behalf and on behalf of all the members of the Houses of Delgamuukw and Haaxw

GISDAY WA, also known as Alfred Joseph, suing on his own behalf and on behalf of all the members of the House of Gisday Wa

NII KYAP, also known as Gerald Gunanoot, suing on his own behalf and on behalf of all the members of the House of Nii Kyap

LELT, also known as Lloyd Ryan, suing on his own behalf and on behalf of all the members of the Houses of Lelt and Haak'w

ANTGULILBIX, also known as Mary Johnson, suing on her own behalf and on behalf of all the members of the House of Antgulilbix

TENIMGYET, also known as Arthur Matthews, Jr., suing on his own behalf and on behalf of all the members of the House of Tenimgyet

GOOHLAHT, also known as Lucy Namox, suing on her own behalf and on behalf of all of the members of the Houses of Goohlaht and Samooh

KLIIYEM LAX HAA, also known as Eva Sampson, suing on her own behalf and on behalf of all the members of the Houses of Kliiyem Lax Haa and Wii'mugulsxw

GWIS GYEN, also known as Stanley Williams, suing on his own behalf and on behalf of all the members of the House of Gwis Gyen

KWEESE, also known as Florence Hall, suing on her own behalf and on behalf of all the members of the House of Kweese

DJOGASLEE, also known as Walter Wilson, suing on his own behalf and on behalf of all the members of the House of Djogaslee

GWAGL'LO, also known as Ernest Hyzims, suing on his own behalf and on behalf of all the members of the Houses of Gwagl'lo and Duubisxw

GYOLUGYET, also known as Mary McKenzie, suing on her own behalf and on behalf of all the members of the House of Gyolugyet

GYETM GALDOO, also known as Sylvester Green, suing on his own behalf and on behalf of all the members of the Houses of Gyetm Galdoo and Wii'Goob'l

HAAK ASXW, also known as Larry Wright, suing on his own behalf and on behalf of all the members of the House of Haak Asxw

GEEL, also known as Walter Harris, suing on his own behalf and on behalf of all the members of the House of Geel

HAALUS, also known as Billy Morrison, suing on his own behalf and on behalf of all the members of the House of Haalus

WII HLENGWAX, also known as Herbert Burke, suing on his own behalf and on behalf of all the members of the House of Wii Hlengwax

LUUTKUDZIIWUS, also known as Ben McKenzie, Sr., suing on his own behalf and on behalf of all the members of the House of Luutkudziiwus

MA'UUS, also known as Jeffrey Harris, Jr., suing on his own behalf and on behalf of all the members of the House of Ma'uus

MILUU LAK, also known as Alice Jeffery, suing on her own behalf and on behalf of all the members of the Houses of Miluu Lak and Haiwas

NIKA TEEN, also known as James Woods, suing on his own behalf and on behalf of all the members of the House of Nika Teen

SKIIK'M LAX HA, also known as John Wilson, suing on his own behalf and on behalf of all the members of the House of Skiik'm Lax Ha

WII MINOSIK, also known as Robert Stevens, suing on his own behalf and on behalf of all the members of the House of Wii Minosik

GWININ NITXW, also known as Solomon Jack, suing on his own behalf and on behalf of all the members of the House of Gwinin Nitxw

GWOIMT, also known as Kathleen Wale, suing on her own behalf, and on behalf of all the members of the Houses of Gwoimt and Tsabux

LUUS, also known as Jeffrey Harris, suing on his own behalf and on behalf of all the members of the House of Luus

NIIST, also known as David Blackwater, suing on his own behalf and on behalf of all the members of the Houses of Niist and Baskyelaxha

SPOOKW, also known as Steven Robinson, suing on his own behalf and on behalf of all the members of the Houses of Spookw and Yagosip

WII GAAK, also known as Neil Sterritt, Sr., suing on his own behalf and on behalf of all the members of the House of Wii Gaak

DAWAMUXW, also known as Charlie Clifford, suing on his own behalf and on behalf of all the members of the House of Dawamuxw

GITLUDAHL, also known as Peter Muldoe, suing on his own behalf and on behalf of all the members of the Houses of Gitludahl and Wiigyet

GUXSAN, also known as Herbert Wesley, suing on his own behalf and on behalf of all the members of the House of Guxsan

HANAMUXW, also known as Joan Ryan, suing on her own behalf and on behalf of all the members of the House of Hanamuxw

YAL, also known as George Turner, suing on his own behalf and on behalf of all the members of the House of Yal

GWIIYEEHL, also known as Chris Skulsh, suing on his own behalf and on behalf of all the members of the House of Gwiiyeehl

SAKXUM HIGOOKX, also known as Vernon Smith, suing on his own behalf and on behalf of all the members of the House of Sakxum Higookx

MA DEEK, also known as James Brown, suing on his own behalf and on behalf of all the members of the House of Ma Deek

WOOS, also known as Roy Morris, suing on his own behalf and on behalf of all the members of the House of Woos

KNEDEBEAS, also known as Sarah Layton, suing on her own behalf and on behalf of all the members of the House of Knedebeas

SMOGELGEM, also known as Leonard George, suing on his own behalf and on behalf of all the members of the House of Smogelgem

KLO UM KHUN, also known as Patrick Pierre, suing on his own behalf and on behalf of all the members of the House of Klo Um Khun

HAG WIL NEGH, also known as Ron Mitchell, suing on his own behalf and on behalf of all the members of the House of Hag Wil Negh

WAH TAH KEG'HT, also known as Henry Alfred, suing on his own behalf and on behalf of all the members of the House of Wah Tah Keg'ht

WAH TAH KWETS, also known as John Namox, suing on his own behalf and on behalf of all the members of the House of Wah Tah Kwets

WOOSIMLAXHA, also known as Victor Mowatt, suing on his own behalf and on behalf of all the members of the House of Gutginuxw

XSGOGIMLAXHA, also known as Vernon Milton suing on his own behalf and on behalf of all the members of the House of Xsgogimlaxha

WIIGYET, also known as Roy Wesley suing on his own behalf and on behalf of all the members of the House of Wiigyet

WII ELAAST, also known as Jim Angus, Jr., suing on his own behalf and on behalf of all the members of the Houses of Wii Elaast and Amagyet

GAXSBGABAXS, also known as Gertie Watson, suing on her own behalf and on behalf of all the members of the House of Gaxsbgabaxs

WIGETIMSCHOL, also known as Dan Michell, suing on his own behalf and on behalf of all the members of the House of Namox

APPELLANTS
(Plaintiffs)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AND THE ATTORNEY GENERAL OF CANADA

RESPONDENTS
(Defendants)

TABLE OF CONTENTS

PART I: STATEMENT OF FACTS

A. HISTORY OF THE PROCEEDINGS

1. These Appellants adopt the statement of the history of the proceedings set out at paragraphs 1-5 of the Wet'suwet'en appellants' factum ("Wet'suwet'en factum").

B. KEY FINDINGS OF THE COURTS BELOW

2. Macfarlane, J.A., speaking for himself and Taggart J.A., concurred in by Wallace, J.A., said:

> There is no question that the ancestral home of the Gitksan and Wet'suwet'en was within the [claimed] territory. There is no question that the Gitksan and Wet'suwet'en people had an organized society, and that **the use and occupation of land and certain products of the lands and water were integral to that society.**
>
> ...
>
> I have said there is no question the Gitksan and Wet'suwet'en people had an organized society. It is pointless to argue that such a society was without traditions, rules and regulations.
>
> Reasons for Judgment of the Court of Appeal [1993] 5 W.W.R. 97, per Macfarlane J.A. ("Macfarlane Reasons"); paras.273, 281, emphasis added; and Wallace J.A. ("Wallace Reasons), para.302

3. Lambert J. A. found at para. 1008:

> In my opinion the evidence in this case establishes that at the time of the British assertion of Sovereignty over what is now British Columbia, which I will assume occurred in 1846, the Gitksan and Wet'suwet'en peoples **occupied, possessed, used and enjoyed their traditional ancestral lands in accordance with their own customs, traditions and practices which were then an integral part of their distinctive culture.**

4. No other aboriginal peoples used the Gitksan territory before contact or at sovereignty.

> Reasons for Judgment of the Court of Appeal, per Lambert J.A. ("Lambert Reasons"), para.948

5. The trial judge held:

> 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 1820s 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 that this [organized society] requirement has been satisfied.
>
> Reasons for Judgment of McEachern C.J.B.C, [1991] 3 W.W.R. 97 ("Trial Reasons"), pp.389-390

C. THE GITKSAN APPELLANTS

6. The Appellants are 39 hereditary chiefs representing 4,000 - 5,000 people in 51 Houses and four clans being collectively all of the Gitksan people, except for the people of the Kitwancool Houses.

> Case on Appeal, pp.2-10; Trial Reasons, pp.120-121, 150, Ex.844, p.2-7, Tr.162, pp.10347-10348, Ex.844, pp.3-5 - 3-6, Tr.163, pp.10404-10406

7. The Gitksan were living in their territory 3,500 years ago by the independent dating of the Medeek oral history at Seeley Lake, located on the Skeena River about two miles downstream from the village of Hazelton. The oral history, told by Mary Johnson and referred to by the trial judge, describes a powerful and destructive force, an attack by a giant grizzly bear on the ancient Gitksan village of T'am Lax amit which caused the blockage of Chicago Creek (outlet of Seeley Lake).

> Trial Reasons, p.186; M. Johnson, Tr.11, pp.666-669; Ex.898, pp.21-28

8. Expert evidence scientifically carbon-dated a landslide at the location referred to in the oral history. This evidence was accepted by the trial judge. The dating of the landslide corroborated the oral history and confirmed Gitksan presence on the Skeena River at 3500 years ago.

> Trial Reasons, pp.187, 191-92

9. The Gitksan have a distinctive language associated with the Tsimshian language group. The linguistic evidence alone, accepted by the trial judge, showed that the Gitksan were on their lands for a minimum of 500 years and as early as 2,000 years ago.

> Rigsby, Ex.877, pp.40-41; Trial Reasons, pp.200, 204

D. INTEGRAL CONNECTION OF GITKSAN SOCIETY TO THE TERRITORY

1. House and Clan

10. Through matrilineal descent, every Gitksan is a member of a House and a clan. The House is the central social unit in Gitksan society whose members in the past would live under one roof in a longhouse. The House controls its own territories for use by its members for food, trade and ceremonial purposes according to a land tenure system. Heather Harris, whose evidence was accepted by the trial judge, described the central importance of the House:

> In the past, the building where a Gitksan's House was located, was always considered home, even if he was not born there and even if he had lived away for many years. This relationship between House members is still maintained today. House members continue to utilize their territories together for fishing, hunting, berry picking, trapping, and so on. Today, House members also function together outside their territories. They function together in the feast, of course, but a considerable degree of House solidarity is maintained through daily activities.
>
> Harris Report, Ex.854, pp.20, 23-24, 26, 34; Trial Reasons, pp.149, 150

11. The broadest Gitksan social grouping is the clan, which is comprised of several related Houses with common ancient origins. The four Gitksan clans are: Lax See'l or Ganeda (Frog Clan), Lax Gibuu (Wolf Clan), Giskaast (Fireweed Clan), Lax Skiik (Eagle Clan).

> Trial Reasons, pp.149, 150; Ex.854, p.26

12. Among the Gitksan, closely-related Houses in the same clan, (the "wilnadahl,") act together to decide succession to names of high chiefs and territory, and to resolve disputes within the House. The wilnadahl are related by histories showing common villages of ancient origin, migrations or divisions of one House into more than one House. These histories are often reflected in crests.

> Ex.854, pp.26-27, Ex.854A; O. Ryan, Tr.17, p.1098; H. Harris, Tr.92; pp.5889-5892, Tr.93, pp.5891-5892; S. Marsden, Tr.92-93, pp.5889-5892

13. Although a matrilineal society, the Gitksan social system places considerable importance on the father's House and clan. The evidence showed that children have certain rights of access to, as well as obligations in respect of, their father's territory and at the feast.

Trial Reasons, p. 149; A. Mathews Jr., Tr.73, pp.4538-9, pp.4543-4; M. McKenzie, Tr.7, p.383; Tr.3, pp.203-204; M. Johnson, Tr.11, p.655

14. Each House has a head chief and sub-chiefs. For example, Earl Muldoe is Delgamuukw, head chief of the House of Delgamuukw. The head chief has primary responsibility for, and authority in the House and a range of responsibilities in relation to the House territory, including the allocation and disposition of rights to use the territory among House and non-House members. The role of a chief is very important and chiefs begin training their successors from a young age. Successors are educated in the oral histories, House songs, crests, territorial boundaries, and the feast system. A House member becomes a chief by virtue of succeeding to the name held by the previous holder. Chiefly names carry the power of the House, called in Gitksan, "daxgyet". These names can be traced back over the centuries and in themselves call up the history of the Gitksan people. With the succession of the new chief, the crest, territory and authority is passed on.

Trial Reasons, p.150; G. Williams, Tr.105, pp.6680-6681, pp.6651-6653; M. McKenzie, Tr.3, p.184; F. Johnson, Ex.69A, p.43; S. Williams, Ex.446A, pp.19-24; G. Williams, Tr.105, pp.6647-6648, 6654-6655; H. Harris, Ex.854, p.63, pp.71-72; J. Morrison, Tr.82, p.5129

2. Feast

15. The feast is the central institution of the Gitksan and is at the core of their social and land-holding system. The feast is at one and the same time political, legal, economic and ceremonial. The feast is the forum for the public witnessing of the succession of chiefs' names, changes in legal status (such as, adoption, marriage and divorce), validation of changes in the ownership of territories and of decisions regarding territories (such as access rights) and the ratification of dispute resolutions. Holding a feast allows a House to settle its affairs, repay its debts and publicly present its history, land boundaries and succession to title for ratification by other Houses.

M. McKenzie, Tr.4, p.244-250, Tr.5, pp.332-334, Tr.6, pp.368-378; S. Williams, Ex.446E, pp.313-315; G. Willaims, Tr.106, pp.6687-6689; M. Johnson, Tr.10. p.621, Tr.12, p.759; O. Ryan, Tr.17, pp.1121-1134; Daly, Ex.844-2, pp.462-65

16. During the feast, the host House presents the dramatic performances of the House's crests and history, called "nax nox". Crests of the House are displayed on regalia and through these performances the House shows its connection to its territory.

G. Williams, Tr.105, pp.6672-6673; M. McKenzie, Tr.5, p.296

17. The relationship between feasting and the territory is demonstrated through material and symbolic exchanges. Gifts of food and goods are distributed to the clans. Food from the territories - moose, bear, beaver, salmon and berries - is announced and served to the guests. The hosting House at a succession feast announces the House's successor to the name of the deceased chief and the House territory is described. At a feast to raise a totem pole, the oral history of the House is told and the relationship of the House crests on the pole to the territory is described. At the conclusion of the feast, the witnessing chiefs, on behalf of their Houses, ratify and validate the decisions and declarations of the host House, such as the selection of a successor, or the boundary of the House territory.

M. McKenzie, Tr.3, pp.189-90; Tr.5, pp.294-295, 299-300, 301-307, .321; A. Mathews, Tr.73, pp.4561-4577, Tr.74, p.4607; J. Morrison, Tr.82, p.5129; Tr.83, pp.5166-72; S. Willaims, Ex.446A, pp.53-55; K. Muldoe, Tr.155, p.9970; R. Daly, Ex.884-1, pp.165-68; S. Williams, Ex.446AS, pp.35-44; M. Johnson, Tr.14, pp.884-85

18. The oral histories are taught within the House and are told publicly at the feast on important occasions. The formal telling of the oral histories along with the display of crests and the performance of songs at the feast, confirms the House's rights to its territory and the legitimacy of its authority over the territory.

M. Johnson, Tr.11, pp.699, l.37-700, l.26; M. McKenzie, Tr.3, pp.189-90; Tr.4, p.221, Tr.9, p.536, A. Mathews, Tr.73, pp.4561-4577

19. In 1826, William Brown, the first European to meet the Gitksan, recorded the main features of a feast, including regalia with crests on them, songs and a nax nox performance.

Ex.964-14, pp.7-9

20. The trial judge recognized the special connection of the feast to the territories of the Gitksan:

> The spiritual connection of the Houses with their territory is most noticeably maintained in the feast hall, where, by telling and re-telling their stories, and by identifying their territories, and by providing food or other contributions to the feast from their territories, they remind themselves over and over again of the sacred connection that they have with their lands.

Trial Reasons, pp.152

21. About the feast and its connection to the territories, Lambert J. A. found:

> The feast dealt with confirmation of inheritance and with succession to rank and property...**Most importantly, the relationship between each House and its territories was confirmed and the boundaries of each territory were recognized.**
>
> Lambert Reasons, para.538, emphasis added; See too: Trial Reasons, pp.442-3

3. Crests, Poles and Oral Histories

22. The connection of the Gitksan to their territory is also reflected in the oral histories and crests. The social organization of the Houses is related through common ancient histories. Houses possess specific crests which are linked to territories and to chieftainships. Houses are identified by their crests which are a visual image and record of the oral history of the House commemorating the House's origins, migrations and the major historical events from the House's history. Crest images in the oral histories are evoked by songs. Crests are materially represented on totem poles, parts of dwellings and regalia. Glen Williams testified that the crest identifies the chief and his authority over his land:

> ...the ayuks [crest] clearly identifies who you are, which House group you belong to. It clearly defines how much land you have, how much power do you have, and it defines that you have ownership -- you own a particular piece of land, and that you have authority over that piece of land. ... Ours [crest] -- our House is the grizzly bear with the two baby bear cubs on the ears. That identifies who I am...
>
> Tr.105, pp.6672-3; Trial Reasons, p.152; M. McKenzie, Tr.4, p.228, Exs.29-6, 7, 9, 10, 15-18; 353, 355

23. The Gitksan crests and totem poles are memory devices which are like a map. Their existence on the blankets, House fronts and totem poles call up the history, the rights and the authority of the chief and his or her House. They evidence, metaphorically and physically, the root of title of the House.

> R. Daly, Ex. 884-1, p.179; P. Muldoe, Tr.97, p.6109-6111; J. Morrison, Tr.84, pp.5253-5257, 5263; S. Marsden, Tr.93, pp.5921-22, Tr.94, pp.5963-64; J. Ryan, Tr.80, pp.5017, 5026; Ryan, Tr.17, p.1078; J. Morrison, Tr.82, pp.5134-35, p.5128

24. Joan Ryan, Chief Hanamuxw, in response to a question about the significance of a raising of a pole for the House of Hanamuxw, responded:

> It's like a history book of your House, it's evidence that Hanamuxw's House did exist, does exist and will continue to exist. So maintaining your

> poles is really important...It's a way of maintaining the heritage from our grandfathers...It's a way of reaffirming and confirming the daxgyet of Hanamuxw. It's a way of establishing the property of Hanamuxw has not been abandoned nor will it be in the future. It's a way of telling the other chiefs that the House is as strong as it was before, and that it will continue to exist.
>
> J. Ryan, Tr.80, pp.5017-8, p.5026

25. Olive Ryan, Chief Gwaans, identified an amhalayt (headpiece) and an apron which survived the Kitsegukla fire in 1872. Hanamuxw, her daughter, wore this regalia to display the crests of the House when she succeeded to the name in 1966.

> O. Ryan, Tr.19, pp.1269-70, Ex.34, Tabs 3, 5, 6, 7, Ex.29, Tabs 6-9

26. Paralleling the crests and crest poles, the oral histories trace the origins of rights to ancient territories, the course of migrations to new territories and any subsequent major changes in the territories or fortune of the House. The Gitksan know their history and their origins from their oral histories. These histories ("adaawk") are memorialized accounts and songs of historical events in the territory. They associate the House with the House territory and the power of the House.

> G. Williams, Tr.105, p.6673; M. McKenzie, Tr.3, pp.189-90, Tr.4, p.235; Tr.4, p.221, Tr.9, p.536; M. Johnson, Tr.11, pp.669-700

27. For example, Solomon Marsden, Chief Gamlaxyeltxw, explained the ancient origin of the crests on his totem pole:

> There is this village, this village is called -- is known as Gitangasx and it was situated at the head waters of the Skeena. It is clear to our people that Gitangasx was the first village of the Gitksan people. This was when Sindihl was still living in Gitangasx they found this stone figure in the water...and they had a hard time dragging the stone figures out of the water, and when they did finally drag it out it looked like a totem pole but was made out of stone. Sindihl wanted to erect this stone figure, so what he did is he invited the surrounding villages, the villages that are around his own village. While Sindihl was out inviting the surrounding villages this stone figure disappeared. After Sindihl came back he found out that the rock had disappeared, so what he did is he carved -- he remembered the figures that was on the rock and he carved them onto the wood before the guests arrived. After this pole was carved it was erected.
>
> ...
>
> The Ayuks (crests) is always acquired from the territory ... .

S. Marsden, Tr.93, pp.5894, 5922; O. Ryan, Tr.19, pp.1269-70, Ex.34, Tabs 3, 5, 6, 7

28. The oral histories of the Gitksan also proved that the ancestors of the Gitksan were living in many different places in the territories. They refer to boundary markers and place names throughout the territories.

A. Mathews, Jr., Tr.73, pp.4581-4585, Tr.74, pp.4586-4597, Tr.75, pp.4682-4685, Ex.349 - Maps, Ex.351-17 and 19

E. GITKSAN LAND TENURE SYSTEM

29. The Gitksan land tenure system is integrally related to the essential elements of Gitksan society; the House, chiefly authority, feasts and crests. The House has rights to specific territories. The House Chief has authority over and responsibility for managing the land, on behalf of the House members. In each generation, the task of renewing House authority and responsibility over property is transferred with the chiefly name. Joan Ryan, Chief Hanamuxw, explained what was passed to her when she inherited the name Hanamuxw:

> [Y]ou are the one that has been selected to take the land that was your inheritance, to hold it, and to take care of it.... **That means the land that your forefathers had, that includes the regalia, that includes the adaawk, that includes the pole, that includes the resources on the land, that includes the name Hanamuxw, and the right to use that name within the Gitksan territory.** That means the right to use the authority of the chief. ...It means preserving the history of the House. It means taking care of the present, and always with the idea that you link it with the future....
> [T]he property is not given to you directly. In other words, it's not your personal property, but rather you are designated as the person to manage the property not just for yourself but for all the members of your House.
>
> J. Ryan, Tr.80, pp.5006-08, emphasis added; M. Brown, Ex.68-C, p.5; A. Mathews, Ex.352-A, pp.10-11; O. Ryan, Tr.21, p.1411; P. Muldoe, Tr.100, p.6309; M. McKenzie, Tr.3, p.186

30. House territories have known boundaries with named geographical, physical and historical features. Daniel Harmon, the first trader in the area, observed in 1812:

> The people of every village have a certain extent of country, which they consider their own, and in which they may hunt and fish; but they may not transcend these bounds without purchasing the privilege of those who claim the lands. Mountains and rivers serve them as boundaries, and they are not often broken over.
>
> Harmon, Ex. 913, p.250

31. House authority over the territory is enforced by Gitksan laws of trespass. Mary McKenzie, Chief Gyolugyet, testified:

> It's Gitksan law...that no one goes on anyone's territory without getting permission from the head chief of the House of the territory, even if it's your husband, your wife or your children.
>
> Tr.6, p.361; See also: S.Marsden, Tr.94, pp.5935, 5937-5938; J. Morrison, Tr. 82, p.5133; O. Ryan, Tr. 22, p.1490; A. Mathews, Tr. 77, pp.4769-70; M. Brown, Ex.68D, pp.101-2

32. House chiefs regulate access to territories in accordance with established laws. House members have rights of access to the House territory. Access rights are also granted to children whose fathers are House members (in Gitksan "amnigwootxw"), and to a spouse to use his wife's or her husband's territory (in Gitksan "andimanuk"). Thus, a Gitksan normally has access to the territories of three Houses; one's own House territory; one's father's House territory; and the House territory of one's spouse. In this way a scarcity of resources in one territory is balanced by using the more abundant resources of another.

> S. Marsden, Tr. 93, p.5908, Tr. 94, pp.5935, 5939-5941, 5948; S. Williams, Ex. 446B, pp.122, 127; Ex. 446D, p.232; M. McKenzie, Tr. 5, pp.321-2, Tr. 7, pp.423-4; M. Brown, Ex.68C, pp.37-8; G. Williams, Tr. 105, pp.6646-7; D. Wilson-Kenni, Tr.68, pp.4183-4

33. Under Gitksan law, persons granted access to another House's territories acknowledge the rights of that House by providing payment to the House chief. Often the payment involves contribution of part of the animals or fish harvested from the territory. Such payments are announced at a feast, thereby affirming the rights of the House over the territory.

> M. McKenzie, Tr. 7, p. 424; D. Wilson-Kenni, Tr. 68, pp.4183-4

34. Rights to the land are transmitted by inheritance from one holder of a chiefly name to another, resulting in perpetual succession. This system of succession connects the present generation of Gitksan legally and spiritually to their ancestors. This is reflected in the Gitksan phrase, "ee Dim Uma Yess" which means "walk slowly on the breath of your ancestors."

> M. McKenzie, Tr. 5, p.334; See also: H. Harris, Ex. 854, pp.71-72; S. Marsden, Tr. 93, pp.5910-11, 5917-18

35. The way in which present and past generations are bound together through the land was evocatively described by James Morrison:

> You have to go out there...you have to be out there, to be out on the rivers or lakes, whenever you are going to sit yourself and feel you can hear the creeks and rivers to remind you what happened in the past...and you can feel the presence of the creator... the reflection of this of your territory and yourself.
>
> J. Morrison, Tr.82, p.5135

F. LAWS AND SELF-GOVERNMENT IN RELATION TO THE LAND

36. Gitksan witnesses described their laws governing their land tenure system, social relationships and dispute resolution. While the trial judge characterized these as "a most uncertain and highly flexible set of customs" and as "rules [which] are so flexible and uncertain that they cannot be classified as laws," two judges of the Court of Appeal found the Gitksan laws sufficient to found aboriginal title and aboriginal rights of self-government.

> Trial Reasons, pp.379-380; Lambert Reasons, para.1073; Hutcheon Reasons, para.1177

37. Self-government through the feast is exercised in a number of areas, including the determination of House membership, maintenance of the House system, the regulation of family relations, education, harvesting, management and conservation of House territories and their resources, dispute resolution and relations with other peoples.

> M. McKenzie, Tr.3, pp.198-200, Tr.8, pp.379-81, 497; R. Daly, Ex.884-2, pp.522-525; G. Williams, Tr.107, pp.6811-6812

38. For the Gitksan, the laws were, and are, integral to Gitksan society. Stanley Williams, Chief Gwis Gyen, testified:

> When we have a feast and we sit on the seat of our grandfathers, it's...just like a knife being stuck in and not ever moved. This is how our law is. It's just like thick steel....It's just also like an ancient tree that's been standing there and the roots have been embedded deeper and deeper into the ground, and this is how it is.
>
> S. Williams, Ex.446C, p.184; S. Marsden, Tr.92, pp.5874, 5578; O. Ryan, Tr.17, p.1132

39. Gitksan witnesses described laws which were developed to ensure successful harvesting of resources and a healthy ecosystem, underpinned by principles of respect for the animals and fish upon which the people relied.

> A. Mathew Jr., Tr. 75, pp.4668-72; S. Williams, Ex. 446A. pp.11-18, Ex. 446B, pp.98-9, 101; O. Ryan, Tr.19, pp.1242-43; J. Ryan, Tr.80, pp.5026-27

40. There are Gitksan laws relating to dispute resolution and settlement. In accordance with principles of restorative justice, settlement could involve the transfer of lands and the payment of compensation for wrongs. Martha Brown, Chief Kliiyemlaxha, described how Gitksan law regulated a settlement feast at which territory was passed to the Gitksan from the Stikine, their northern neighbours.

M. Brown, Ex.68B, pp.21-27; M. Morrison, Tr.84, pp.5252-5258; R. Daly, Ex.884-1, p.237; O. Ryan, Tr.19, pp.1251-52; M. Johnson, Tr.13, p.800

41. The Gitksan people, like their ancestors, harvest the resources on their territories in accordance with a management system and rules of conservation requiring selective harvesting and the rotation of harvesting areas. Evidence of selective harvesting was given in relation to the fishery, mountain goats, bears, moose, fur-bearing animals and berries.

G. Williams, Tr.107, p.6812; M. Brown, Ex.68C, pp.15-16; J. Ryan, Tr. 80, p.5006; D. Wilson-Kenni, Tr. 67, pp.4169-4171

42. When a chief properly manages the territory and fulfils the obligations of the House on the land, the wealth of the territory will be distributed at the feast, enhancing the name of the chief and benefiting the whole community.

G. Williams, Tr.107, pp.6818-6819; R. Daly, Ex.884-1, pp.250,270-272; A. Mathews, Tr. 75, pp.4668-72

G. GITKSAN TERRITORY

43. The Gitksan social and land tenure system extends throughout territory which is shown on Map 3.

Territorial Affidavits: Exs. 592-613, 661E, 352, 376, Exs.377, 654, 655, 656 and 487 (extracts in references); K. Muldoe, Tr.155, p.9976, p.9981; P. Muldoe, Tr.99, pp.6276, 6282, 6248-9, Ex.486 (map), pp.6240-6242, Tr.98, p.672, Ex.478, Tr.100, p.6313; M. Johnson, Tr.13, pp.799, 800-801; W. Wilson, Ex.602A, pp.28, 30; D. Gunanoot, Ex.728, pp.97-98, 102, 105; J. Sterritt, Ex.70A, pp.7-8; G. Gunanoot, Ex.604A, pp.27, 29; Ex.70H (Skawill Map); W. Blackwater, Ex.605A, pp.14, 49, 60; A. Sampson, Ex.600A, p. 17; S. Morrison, Ex.599A, pp. 6, 26; J. Morrison, Tr.82, pp.5182, 5129, 5134-5; pp.5086-88, 5090, pp.5716-7, 5124; R. Jackson, Tr. 159, pp.1050-52; S. Williams, Ex.446A, pp.53-55; F. Johnson, Ex.59A, p.19; A. Mathews, Tr.74, pp.4606-7, Tr.73, pp.4583-84, Ex.349

44. The trial judge limited the Gitksan territory to Map 5, thereby excluding a large part of the territory.

Trial Reasons, Map3, Ex.646-9A (Gitksan Territories); and pp.457-9

45. The Skeena, Kispiox and Babine Rivers form the major valleys in the Gitksan territory. In these valleys, the Gitksan had access to the rich forests: the birch, spruce and the important red cedar, which was used in house building, weaving, storage containers, canoes, crest poles, weapons, tools, baskets, mats and capes.

R. Daly, Ex.884-1, p.315; S. Haeussler, Tr.150, pp.9585-9586 (forest); Ex.358-2 (map)

46. There are seven major villages of the Gitksan located in the river valleys: Kispiox, Glen Vowell, Gitanmaax (Hazelton), Gitsegucla, Gitwangak and Kisgegas. Pre-contact and historic villages of the Gitksan include Gitangasx, Kuldoe, Old Kuldoe and Gitanga'at.

Trial Reasons, p.123; Lambert Reasons, para.530

47. The Gitksan used and occupied the land throughout their traditional territory. They made, and continue to make, extensive use of the fish, mammals, berries, plants, timber and mineral resources for domestic consumption and for the fulfillment of ceremonial and social obligations and trade. Resources were harvested, processed, (such as the smoke drying of salmon and meat) and stored. The territory was well suited for human habitation and was capable of supporting a large population.

Trial Reasons, p.123; Lambert Reasons, paras.995-6; Hutcheon Reasons, para.1117, Ex.358-2; M. Brown, Ex.964-11, pp.68-76; Historical Atlas, Plate 13, M. Brown, Ex.68C, pp.14-15; R. Daly, Ex.884-1, pp.339-345; P. Muldoe, Tr.98, p.6181 (moose); M. Johnson, Tr.13, pp.814-15; M. Johnson, Tr.15, pp.948-49; O. Ryan, Tr.17, p.1136; R. Daly, Ex.884-1, pp.270-1, 314-324, Ex.913, p.242, 247-48, Ex.358-21, Ex.358-21; M. Morrell, Tr.208, p.13998, (salmon), Ex.358-20, Exs. 358-3 - 358-10 (berries); M. Johnson, Tr.12, p.776-779, Tr.13, pp.814-815 (berries); M. Brown, Ex.68C, pp.14-15 (berries, burns); M. Johnson, Tr.15, pp.948-949 (smoke drying); O. Ryan, Tr.17, p.1136, 1138-41 (berries); A. Mathews, Tr.74, pp.4658-59, (salmon, hunting), Ex.884-2 (fish), pp.392-393 (salmon, berries, medicinal plants); A. Mathews, Tr.76, p.4714, p.4716 (berries), Exs. 358-11 to 358-19 (wildlife, hunted, trapped and used); D. Hatler, Tr.148, pp.9433-9443 (caribou); Ex.964-9, p.106 (hunting); Allaire, Ex.1190, at pp.19-50: 37-38 & 45-50, Ex.884-1, pp.336-339 (obsidian), Ex.884-2, pp.346-348 (hunting, trapping, interregional trade), Exs. 358-12 and 358-15 (mountain goat and hoary marmot); D. Hatler, Tr.148, pp.9446-9447 (goat); P. Muldoe, Tr.98, pp.6175-76 (marten, lynx); M. McKenzie, Tr.5, pp.298-300 (fur bearers)

48. The historical evidence at contact in the 1820's showed the reach of the recorded hunting activity of the Gitksan outside one of their villages, Kisgegas. The Gitksan travelled eleven days from Kisgegas on the Babine River north to their places for hunting, on Bear River northwest of Bear Lake.

Ex.964-14, p.9, Ex.964-12, p.9

49. The post-contact history recorded the extent of the lands belonging to the Gitksan. On October 10, 1884, the Gitwangak chiefs asserted ownership to the land from Andemane [Andimaul] "some 2 1/2 to 3 miles above our village [Gitwangak] on the Skeena River to a creek called Skequin-khaat," about two miles below Lorne Creek:

> We claim the ground on both sides of the river, as well as the river within these limits, and as all our hunting, fruit gathering and fishing operations are carried on in this district, **we can truly say we are occupying it.**
>
> Ex.1035-105, p.284; emphasis added

50. In 1924, the Kispiox chiefs, supported by other Gitksan chiefs, sent a petition to Prime Minister McKenzie King, demanding on behalf of the Kispiox and Glen Vowell people clear title to:

> a strip of land watered by the Kispiox and Skeena Rivers; said strip of land to extend from the Kispiox Sawmill --- approximately eighty miles north --- [and embracing] the territory fifteen miles to the east and fifteen miles to the west of the Kispiox River, thus including the mountain ranges on both sides of the Kispiox Valley.
>
> Ex.1035-451

51. A part of the land described by the Kispiox chiefs was excluded by the trial judge in Map 5.

52. Places and physical features throughout the entire Gitksan territory were identified by over 1,000 Gitksan names. These names show the extent of territory occupied by the Gitksan. The names and topographic features were introduced into evidence through the territorial affidavits and the viva voce testimony at trial. The place names were mapped and many of the named features were photographed. The names and features and the meaning of some of the Gitksan words were confirmed in the territorial affidavits.

> Ex.1008, Ex.1009; Territorial Affidavits: Exs. 592-613, 661E, 352, 376, Exs.377, 654, 655, 656 and 487 (extracts in references); List of Gitksan Place Names from the Evidence

H. GITKSAN SOCIETY AT CONTACT - 1811-1826

53. Dr. Arthur Ray, whose opinions were accepted by the trial judge, said:

> Of major importance, the observations of the Hudson's Bay traders...clearly indicated that **access to resources was regulated by a land tenure system in which tracts of land were managed by "men of property", the lineage**

> **(House) heads. These men also controlled access to trails that traversed their House's territory...**
>
> In these fundamental ways it appears that the socio-economic system of the Babine and Wet'suwet'en was much like that reported at a later period for the Gitksan.
>
> Ray, Tr.203, p.13428-13429, emphasis added; Ex.960, pp.27-28

54. The trial judge found that the evidence supports the conclusion that:

> ...by 1822 the Indians of the Babine Lake region had a structure of nobles or chiefs, commoners, kinship arrangements of some kind and priority relating to the trapping of beaver in the vicinity of the villages.
>
> There is no reason to believe the neighbouring Indians of the territory had any lesser degree of social organization at the same time.
>
> Trial Reasons, p.204

55. In his 1826 journal, Brown recorded a "voyage to the country of the Atnahs [Gitksan]", identifying them as a nation and identifying the names, chiefs, size and location of more than eight Gitksan villages.

> Ex.964-14, pp.9-10 and pp.14-16

56. The Gitksan had a regional trading network pre-dating contact. Dr. Ray stated:

> [t]here is good evidence that the trade pre-dates European presence either in the area of New Caledonia or on the coast.
>
> Tr. 203, p.13484, Ex.849-18: McDonald & Inglis, "Skeena River Pre-history;"; Ex.847-27: Roy L. Carlson, "Pre-History of the Northwest Coast", p.22; Albright, Ex.1188-2, pp.39-51, Tr.164, p.10463

I. POST-CONTACT RELATIONS

57. No treaties were entered into with the Gitksan in respect of their aboriginal title and rights.

58. There were no alienations in Gitksan territory prior to 1871. The first farmers settled in Gitksan territory after 1900. The first reserves were created in Gitksan territory in 1891. In total, Gitksan reserves are less than 45 square miles.

> Trial Reasons, pp.145-146, 269, 474

59. At the McKenna-McBride Royal Commission hearings in the territory the chiefs of the Gitksan told the commissioners that they wanted their aboriginal lands and rights respected.

They were ignored. William Holland, Chief Haalus, father of Mary McKenzie the first witness at the hearing in Gitanmax on April 21st, 1915 told the Commissioners:

> You heard what the chief said a while ago - We don't want no Reserve at all - - we want to get our own land back....We are not mistaken when we ask for our own. We are born citizens in this country - we were born in this place - we were born here and we own this land and we want to get it back.
>
> Galois, Tr.227, pp.16589-16600

60. Despite the promise of the federal government to refer the question of aboriginal title to the Privy Council in 1914, the Province refused to participate. No court reference was ever instituted.

Trial Reasons, pp.326-328

61. In 1977, the Gitksan and Wet'suwet'en formally submitted their claim of aboriginal title to the Government of Canada for negotiation. No negotiations occurred until after the decision of the Court of Appeal. Negotiations with the Province and Canada started on June 13, 1994. The Province unilaterally broke off negotiations with the Gitksan on February 1, 1996 and there have been no negotiations since.

62. In this action, the Gitksan do not seek recovery of privately-owned fee simple lands within Gitksan territory owned before the Writ of Summons was filed in 1984.

PART II: POINTS IN ISSUE

63. The Court of Appeal erred in holding that the pleadings did not support a claim to a declaration of aboriginal title.

64. The Court below erred in failing to consider and apply the correct test for aboriginal title.

65. The Court below erred as to the geographical scope of occupation of the territory .

66. The Court below erred in holding that the right of self-government of the Gitksan had been extinguished in 1858 or in 1871.

PART III: ARGUMENT

A. PLEADINGS DO NOT PRECLUDE FINDING OF ABORIGINAL TITLE

67. Macfarlane J.A. characterized the claim of the Gitksan as an all-or-nothing claim to ownership supplemented by an alternate claim to "user and sustenance rights". Having found the claims to ownership unproven, he held that he was bound by the pleadings to reject a claim to an interest in land other than ownership and proceeded to address the sustenance rights of the Gitksan, as found by the trial judge, which he found to be unextinguished. Wallace J.A. undertook a similar analysis and reached similar conclusions. Lambert J.A., dissenting, considered that a claim was properly before the court for declaratory relief "for an exclusive or a shared exclusive right to the possession, occupation, use and enjoyment of an area of land". Hutcheon J.A. did not address this question but held that the Gitksan had "aboriginal rights to land . . . of such a nature as to compete on an equal footing with proprietary interests".

> Macfarlane Reasons, para.27; Wallace Reasons, paras.307-309; Lambert Reasons, para.876; Hutcheon Reasons, para.1143

68. The characterization of the pleadings by the majority is in error. The Gitksan did not advance "alternative" claims to ownership and to sustenance rights in their pleadings or at trial. The Gitksan claimed an interest in land equivalent to ownership and made extensive submissions as to the incidents of their aboriginal title to and its similarity with common law ownership.

> Case on Appeal, pp.18, 19, 21-22

69. The Gitksan stated at trial that their claim to ownership, if not fully established, included a claim for "whatever other rights they may be entitled to". Macfarlane J.A. noted that the trial judge held that "a claim for aboriginal rights other than ownership and jurisdiction is also open to the Gitksan in this action" on the basis of the pleadings. There was no appeal from this holding.

> Macfarlane Reasons, paras.24-25; Lambert Reasons, paras.868, 870; Trial Reasons, pp.197-8

70. As noted by Lambert J.A., the "true parties to the appeal" neither took issue with the findings of the trial judge on this issue (in the case of the Province or the *amici curiae*) nor defended these findings (in the case of the Gitksan). Accordingly, the matter was not properly or fully argued before the Court of Appeal and

> ...it would be improper [for the Court of Appeal] to take any different position in this Court than the position taken by the trial judge, namely, that the plaintiffs' claims encompassed a claim to "ownership", a claim to "jurisdiction" and a claim to "whatever other rights [the plaintiffs] may be entitled to".
>
> Lambert Reasons, paras.871-873

71. The Court of Appeal erred in failing to consider the whole of the pleadings in the case. The Province in its counterclaim sought a declaration that the Gitksan had no right, title or interest in the land or the claim area generally. Clearly the pleadings contemplated, and the parties fully argued, the nature and scope of aboriginal rights including aboriginal title and the issue of extinguishment of this title.

72. The trial judge concluded that there was no such thing as aboriginal title *per se* and that the only matter which could be in issue, apart from the plaintiffs' claim for ownership, was a collection of non-exclusive use rights or privileges. The trial judge considered that:

> Indian title is commonly used interchangeably with aboriginal rights as I have attempted to define them.

He considered that earlier Supreme Court of Canada decisions, such as *Calder,* which discussed aboriginal title did not determine this issue since the question of the nature of title was not there in issue. He did, however, consider the pleadings to be sufficiently broad to support a finding of a lesser included claim of aboriginal rights. Such a claim includes a claim to aboriginal title.

> Trial Reasons, p.127, pp.157-158

73. Macfarlane J.A., relying on the fact that the trial judge defined as a matter of law aboriginal rights as confined to user and sustenance rights, concluded that a claim for aboriginal rights did not comprehend a claim to aboriginal title which could not, therefore, be considered. The reasoning of Wallace J.A. is similar.

Macfarlane Reasons, paras.25-27; Wallace Reasons, paras.431-432

74. Neither the trial judge nor the Court of Appeal had the benefit of the recent decisions of this Court in *Van der Peet* and *Adams*, the latter of which clarified that "aboriginal title is simply one manifestation of the doctrine of aboriginal rights".

R. v. Van der Peet, (1996) 137 D.L.R. (4th) 289 (S.C.C.); *Adams v. The Queen*, (unreported), 3 October, 1996 (S.C.C.) per Lamer C.J.C., paras.26, 30

75. This Court has now addressed the relationship between aboriginal rights and aboriginal title to the land. In *Van der Peet*, Lamer C.J.C. stated:

> . . . aboriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land....

Van der Peet, para.74; See also *Adams*, para.26

76. The Court of Appeal erred in considering that the Gitksan pleadings were confined by the erroneous view of the trial judge that aboriginal rights could not, as a matter of law, be so broad as to include aboriginal title. The Gitksan claim to "aboriginal rights" is sufficient to support a claim to aboriginal title. These are not, as Macfarlane J.A. erroneously considered, "alternative" claims, but rather, as held by Lambert J.A., the claim to aboriginal title is included in a general claim for a declaration as to the extent of an aboriginal right.

Lambert Reasons, para.875

77. It remains open to the Court as a matter of law to issue a declaration in terms less substantial than that which has been sought, provided that the substance of the matter has been aired before the Court. In the present case, the issue of aboriginal title, included in a claim for aboriginal rights, was fully canvassed at trial and the decision by the Court of Appeal that a declaration as to aboriginal title could not be considered is in error.

Law and Equity Act, R.S.B.C. 1979, c. 224, s. 10; *British Columbia Supreme Court Rules*, r. 5(22); Hanson v. *Radcliffe Urban Council*, [1922] 2 Ch. 490 (C.A.); *Attorney General v. Merthyr Tydfil Union*, [1900] 1 Ch. 516 (C.A.)

B. ABORIGINAL TITLE

78. In this appeal, the Gitksan seek declarations that they have an unextinguished aboriginal title to their territories and an unextinguished right to self government, as existing aboriginal rights within the meaning of section 35(1) of the *Constitution Act, 1982*, as set out in the order requested.

79. Many of the issues of this appeal are of first instance. This Court has not decided the test to prove aboriginal title nor has it fully determined the content of such title. This Court has also not yet addressed the issue of aboriginal self-government.

80. The Gitksan do not seek to impugn any particular federal or provincial legislation nor is the Court being asked to determine the extent to which the federal or provincial interference with aboriginal title or the aboriginal right to self-government is justified. These are issues to be determined in other litigation on a case by case analysis.

C. THE TEST TO PROVE ABORGINAL TITLE

81. The first question raised in this appeal is the test for establishing aboriginal title.

82. To prove aboriginal title, the Gitksan must establish their continuity with a society which, at contact, occupied the land over which the aboriginal title is asserted. **The society will have established occupation sufficient to prove aboriginal title where they can show that their society's connection to the land in question was integral to their distinctive culture.** An integral connection to the land will be proved by reference to the laws of the aboriginal society, and to their spiritual, historical, social and economic relationship to the land.

83. This test is consistent with the principles set out in *Van der Peet*. This Court built upon previous jurisprudence which established that aboriginal rights are based upon the **historic occupation of tribal lands** prior to the advent of European colonization. The Court referred to *Calder* and *Guerin*:

> Aboriginal title is the aspect of aboriginal rights related specifically to aboriginal claims to land; it is the way in which the common law recognizes aboriginal land rights....Both aboriginal title and aboriginal rights arise from the existence of distinctive aboriginal communities occupying "the lands as their forefathers had done for centuries."
>
> The basis of aboriginal title articulated in *Calder* was affirmed in *Guerin v. The Queen*...Dickson, J...in holding that such title existed, relied on *Calder* for the proposition that "aboriginal title is a legal right **derived from the Indians' historic occupation and possession of their tribal land.**"
>
> *Van der Peet*, per Lamer C.J.C., paras.33-34, emphasis in original

84. The Court also relied on the decisions of the U.S. Supreme Court for the principle that aboriginal title is based upon "the prior occupation of North America by distinctive aboriginal societies":

> **The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial,...**
>
> *Van der Peet*, per Lamer C.J.C., paras.35, 37, quoting *Worcester v. Georgia*, (1832) 31 U.S. (6 Pet.) 515 at 557, 8 L.Ed. 483 at 500, emphasis in original

85. Possession and occupation must be considered in the context of distinctive aboriginal societies. In *Mitchel*, a related decision of the U.S. Supreme Court, the Court stated:

> **Indian possession or occupation was considered with reference to their habits and modes of life**; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected...**it is enough to consider it as a settled principle that their right of occupancy is considered as sacred as the fee-simple of the whites.**
>
> *Mitchel et al. v. The United States*, 34 U.S. (9 Pet.) 711 (1834), at 746, 9 L.Ed. 283, at 296, emphasis added

86. In *Mabo*, Toohey J., relying upon U.S. and Canadian authorities, stated:

> Presence would be insufficient to establish title if it was coincidental only or truly random, **having no connection with or meaning in relation to a society's economic, cultural or religious life. It is presence amounting to occupancy which is the foundation of the title and which attracts protection,** and it is that which must be proved to establish title. Thus traditional title is rooted in physical presence. That the use of the land was

> meaningful must be proved but it is to be understood from the point of view of the members of the society.
>
> ...Presence on land need not amount to possession at common law in order to amount to occupancy. United States and Canadian cases have required proof of occupancy by reference to the demands on the land and society in question "in accordance with the way of life, habits, customs, and usages of the [indigenous people] who are its users and occupiers."
>
> *Mabo v. Queensland*, (1993) 107 A.L.R. 1, (H.C.) per Toohey J. at 146-7, emphasis added

87. Occupation need not be exclusive. However, the evidence must establish occupation beyond the indiscriminate ranging over a particular territory. Nor does a society need to show that they are the sole occupiers of land - the land may be shared and the test will still be met.

88. In *Baker Lake,* Mahoney J. stated that proof of aboriginal title required that the occupation be exclusive of other aboriginal societies. He derived this proposition from the decision of the U.S. Supreme Court in *Santa Fe.* However, in that case the Court distinguished "territory occupied exclusively" from "lands wandered over by many tribes."

> *Baker Lake (Hamlet) v. Min. of Indian Affairs and Nor. Dev.*, (1979) 107 D.L.R. (3d) 513; *United States v. Santa Fe Pacific Railway Co.* 314 U.S. 339 (1941) at 359, 86 L.Ed. 260

89. In *Mabo,* Toohey J. in referring to the concept of exclusivity stated:

> This principle of exclusive possession is justified in so far as it precludes indiscriminate ranging over land but it is difficult to see the basis for the rule if it precludes title merely on the ground that more than one group utilizes land.
>
> *Mabo*, per Toohey J. at 148

90. Lambert J.A. accepted that occupation can be exclusive or shared:

> If the right that is asserted in modern times is a right to exclusive occupation then, of course, exclusive occupation must be shown at the time of sovereignty and earlier. But if the right that is asserted in modern times is a right to occupation that is shared by two or three separate organized societies of indigenous people, who shared occupancy at the time of sovereignty and earlier, and who, in each of their societies, recognized or controlled the exercise of the shared rights by their own societies then I do not see why there should not be an aboriginal right to shared occupancy.

> Such a right of shared occupancy between two tribes of Indians but to the exclusion of others has been recognized in the United States....
>
> Lambert Reasons, para.611; Slattery, Brian, "Understanding Aboriginal Rights", (1987) 66 Canadian Bar Review 727 at 758

91. A second part of the legal foundation for defining aboriginal rights identified in *Van der Peet* flows from the purposive approach which this Court has taken to section 35(1):

> [W]hat section 35(1) does is to provide a constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown.
>
> *Van der Peet*, per Lamer C.J.C., para.31

92. Lamer C.J.C. cited with approval Professor Slattery's observation that the law of aboriginal rights is neither British nor aboriginal in origin. It is a form of intersocietal law. As such, it draws upon both aboriginal and non-aboriginal legal traditions.

93. Over the last century, the courts have wrestled with the appropriate regard which must be paid to aboriginal and non-aboriginal legal sources to define aboriginal rights, since each legal source reflects different spiritual, political, and social customs and conventions derived from different histories and social organizations. A line of cases has discounted the idea that First Nations' laws and prior occupation should define rights. These cases have paid great attention to non-aboriginal legal sources which considered that aboriginal rights emanated from the Crown. In these cases, aboriginal rights were defined by analogy or by reference to other common law property rights such as a personal usufruct. In many of these cases, courts had wrongly assumed that aboriginal peoples and their laws were inferior to European laws and societies.

> *St. Catherine's Milling and Lumber Co. v. The Queen* (1888) 14 App. Cas. 46; affg 13 S.C.R. 577; *B.C. (A.G.) v. Canada (A.G.)* [1906] A.C. 552 at 554-555 (P.C.); *Tee-Hit-Ton Indians v. U.S.*; 348 U.S. 272 (1955); *Milirrpum v. Nabalco Pty Ltd.*, [1972 and 1973] A.L.R. 65 (N.T. Sup.Ct.); *R. v. Syliboy*, [1929] 1 D.L.R. 307 at 313 (N.S. Co. Ct.); Borrows, John "With or Without You: First Nations Law in Canada," (1996) 41 *McGill Law Journal*, 629

94. This Court has now concluded that it is necessary to have regard to aboriginal legal conceptions and aboriginal perspectives on the rights at stake, in "terms cognizable to the Canadian legal and constitutional structure".

Van der Peet, per Lamer C.J.C., para.49; See also: *Sparrow*, [1990] 1 S.C.R. 1075 at 1112

95. It is submitted that the proposed test to prove aboriginal title borrows from both common law and aboriginal legal sources and traditions. The test requires occupation. The meaning of occupation is not, however, to be found within the common law precedents of the conveyancer. Defining occupation with reference to aboriginal peoples' laws and customs, and their spiritual, social and economic connection to their tribal lands, provides the legal bridge between the common law and aboriginal law, and for the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

96. *Mabo,* in a passage cited with approval in *Van der Peet,* affirmed the critical importance of aboriginal law in determining the nature and scope of aboriginal title:

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.

Van der Peet per Lamer C.J.C., citing *Mabo*, para.40; See also per McLachlin J. at para.247

97. Aboriginal title from an aboriginal perspective includes a cluster of rights and responsibilities which are woven into the spiritual, social and economic relationships which aboriginal peoples have to their lands. The precise composition of that fabric will not be the same for all aboriginal peoples, nor indeed for every part of the land to which a claim of aboriginal title is made. The special and defining relationship between aboriginal people and their lands may arise in some cases from the intensity of economic utilization of particular lands; in the case of other lands because they are the fulcrum of social and ceremonial life; in other cases, the special relationship may arise from lands being the site of historical or spiritual events of significance to the lives of the aboriginal people. It is for the court to find out what was **in fact** in place when the settlers arrived. On this basis, the court can determine the extent to which the particular aboriginal society's occupation was integral to their distinctive culture, without constraining the enquiry by requiring proof of non-native concepts of property. The following observation of the Privy Council in *Amodu Tijani* remains relevant:

> There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.
>
> *Amodu Tijani v. Southern Nigeria (Secretary)* [1921] 2 A.C. 399 at pp.402 and 403 (P.C.)

98. In pronouncing the "integral" test in *Van der Peet*, Lamer C.J.C. relied on a passage in *Sparrow* where the Musqueam right to salmon fishing was stated to "have always constituted an integral part of their distinctive culture" (*Sparrow*, at 1099). In the same paragraph, the *Sparrow* Court stated that the Musqueam "always fished for reasons connected to their cultural and physical survival" and noted that "the right to do so may be exercised in a contemporary manner". A contemporary exercise of rights necessary for physical and cultural survival are important factors to consider when the integral test is applied to aboriginal title.

99. This Court also established that the relevant time period in identifying whether an aboriginal right is integral to an aboriginal society is the time prior to contact between aboriginal and European societies (*Van der Peet* para.61); and that there should be some continuity between the practices, customs and traditions pre-contact with those which are asserted as the basis for constitutional protection today (para.63). The Court cautioned that the concept of continuity had to be applied with flexibility and did not require evidence of an unbroken continuity between pre-contact and contemporary practices. As this Court noted in *Sparrow*, "for many years, the rights of the Indians to their aboriginal lands - certainly as **legal** rights - were virtually ignored" (*Sparrow*, at 1103). This Court should not require aboriginal peoples to demonstrate continuity between pre-contact and contemporary utilization of their territories as a pre-requisite to the recognition of aboriginal title, where discontinuity has been caused directly or indirectly, through governmental interference with the exercise of that title, in disregard of both the lawful rights of aboriginal people and its own fiduciary obligations. Such a requirement would amount to judicial condonation of the injustice of that interference. The test of continuity must have appropriate regard to the historical pattern of disregard of aboriginal title in

British Columbia and the patterns of governmental policy which, in design or effect, have undermined Gitksan laws and culture.

D. THE CONTENT OF ABORIGINAL TITLE

100. The authorities are consistent with the conclusion that aboriginal title is a compendious expression of the common law's recognition of aboriginal people's distinctive spiritual, historical, social and economic relationship to their lands. Aboriginal title embraces a right of full beneficial enjoyment of the territory, as well as rights of governance to manage the collective interest in land.

101. In discussing aboriginal rights and title this Court has often cited with approval the following passage from *Johnson v. M'Intosh*:

> **They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion.** (emphasis added in *Van der Peet*)
>
> *Johnson v. M'Intosh 21* U.S. (8 Wheaton) 543 (1823) at 573-4; *Van der Peet* para.36

102. Other authorities include a description of the content of aboriginal title:

> The inescapable conclusion from the court's analysis of Indian title up to this point is that the Indian interest **in land** is truly *sui generis*. It is **more than the right to enjoyment and occupancy** although, as Dickson J. pointed out in *Guerin*, it is difficult to describe what more in traditional property law terminology. (emphasis added)
>
> *C.P. Ltd. v. Paul.*, [1988] 2 S.C.R. 654 at 678; See also: *R. v. Sioui* [1990] 1 S.C.R. 1025 at 1055; *Sparrow* at 1103

103. The "what more", in our submission, is aboriginal people's right to maintain and develop their spiritual, historical, social and economic connection to their lands in accordance with their laws.

104. In British Columbia, aboriginal title was long ignored as lands and resources were alienated to third parties. While the Gitksan clearly suffered the effects of dispossession, they nonetheless kept alive their title by maintaining their system of land tenure through the feast hall and in their territories. This Court in *Sparrow* interpreted section 35(1) as a

constitutional provision designed to stem the tide of historical disregard of aboriginal rights and to infuse with legal and constitutional significance the honour of the Crown in its relationships and dealings with aboriginal peoples and their legal (and since 1982, constitutional) rights.

105. This Court further stated that "existing aboriginal rights must be interpreted flexibly so as to permit their evolution over time" and "that rights are affirmed in a contemporary form". The Court also described s.35 as "a promise to aboriginal people", and as "provid[ing] a solid constitutional base upon which subsequent negotiations can take place".

Sparrow at 1083, 1093, 1105

106. In *Van der Peet* this Court stated that the definition of the rights in section 35(1) must be directed to the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

107. Lambert J. A. in the present case articulated a principled approach to the reconciliation and accommodation embedded in section 35 which the Gitksan adopt:

> The purpose of s.35, when it was prepared in 1982, cannot have been to protect the rights of Indians to live as they lived in 1778, the date of the first certain contact between the Indians and people of European origin in what is now British Columbia. No constitution could accomplish that. **Its purpose must have been to secure to Indian people, without any further erosion, a modern unfolding of the rights** flowing from the fact that, before the settlers with their new Sovereignty arrived, the Indians occupied the land, possessed its resources, and used and enjoyed both the land and the resources through a social system which they controlled through their own institutions. That modern unfolding must come not only in legal rights, but, more importantly, in the reflection of those rights in a **social organization and in an economic structure which will permit the Indian peoples to manage their affairs with both some independence from the remainder of Canadian society and also with honourable interdependence between all parts of the Canadian social fabric.**
>
> Lambert Reasons, at para.669, emphasis added

108. Aboriginal title does not translate simply into the contemporary expression of discrete pre-contact practices, customs and traditions. Nor is it limited to those lands used intensively, such as village sites and occupied fields. Nor is it tied to any particular use of the land.

The title carries with it a right to beneficial enjoyment of the land and resources, so as to give contemporary expression to aboriginal peoples' societal relationship to that land. Aboriginal title also carries with it a right to maintain their stewardship over, and their spiritual and material relationship with those lands.

109. In *Van der Peet,* Lamer, C.J.C. after citing from *Worcester v. Georgia,* commented on Chief Justice Marshall's "essential insight that the claims of the Cherokee must be analysed in light of their pre-existing occupation and use of the land - their 'undisputed' possession of soil 'from time immemorial'" and that this insight was "as relevant for the identification of the interests section 35(1) was intended to protect as it was for the adjudication of Worcester's claim" (*Van der Peet* para.37) Embedded in Chief Justice Marshall's analysis in *Worcester* is the further insight that aboriginal title, based upon pre-existing tribal occupancy, gives rise to a broad right of beneficial enjoyment and does not limit the use to which the lands can be put.

110. In *Worcester v. Georgia,* Marshall, C.J. found that the treaties there in issue reflected pre-existing aboriginal rights and were not the source of the rights. He rejected the argument that because the treaty referred to the Cherokee territory as their "hunting grounds", this meant that they were limited and restricted to that single use.

> Hunting was at that time the principle occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed that any intention existed of restricting the full use of the land they reserved.
>
> *Worcester v. Georgia,* at 552

111. Any suggestion that the full beneficial enjoyment of their lands was limited to the precontact economy is repudiated by the history of the Cherokee Nation over the two centuries prior to their signing treaties with the United States. Political and economic changes in the life of the Cherokee Nation accelerated in the first decades of the 19th century, and was reflected in an expansion of agricultural production, the development of schools, an elaboration of Cherokee executive, legislative, judicial and administrative structures, culminating in a new constitution of 1827. In developing their political

institutions and laws, the Cherokee built upon their customary laws with an overlay of European styled institutions and common law concepts. In many respects what the Cherokee experienced during this time was an example of an Indian Nation in the midst of immense change, exercising their aboriginal title to bring about a bridge of accommodation between their pre-existing rights and the sovereignty of the United States.

> McLoughlin, W., "Cherokee Renascence in the New Republic" (1986); Ex.1250 pp.4-6; pp.227-284

112. Nowhere in Marshall, C.J.'s judgment in *Worcester* is it suggested that the developments in the Cherokee Nation's society, economy, laws and institutions, which they had undertaken to maintain and strengthen their integral relationship to their tribal lands to preserve the distinctive character of the Cherokee Nation, was anything other than an essential element of their aboriginal title to those lands.

113. The Gitksan, no less than the Cherokee Nation, see their aboriginal title as the basis to develop and strengthen their relationship with their lands in a contemporary economy and develop their own political institutions and laws in ways which build upon their customary laws and institutions.

114. The recognition in *Worcester v. Georgia* that aboriginal title carried with it the right of beneficial enjoyment was reinforced by the subsequent decision in *Mitchel v. US* (para. 85 *supra*). It is also a proposition that later U.S. Supreme Court decisions have confirmed. In *US v. Shoshone Tribe,* a case dealing with the appropriate basis for valuation of part of tribal lands taken out of a reservation without tribal consent, the Court held that this included timber and mineral resources even though they were not part of the tribe's traditional economy. The Supreme Court related the nature of the right to the reservation to the pre-existing rights which the tribe had in the absence of any treaty.

> Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation...that right is as sacred and as securely safeguarded as fee simple absolute title. *Cherokee Nation v. Georgia, Worcester v. Georgia.* Subject to the conditions imposed by the treaty, the Shoshone Tribe had the right that has always been **understood to belong to Indians, undisturbed possession of the soil from time immemorial.**

US v. Shoshone Tribe 304 US 111 (1938) at 117, 82 L.Ed. 121, emphasis added;
See also *US v. Klamath Indians* 304 US 119 (1938)

115. Further support for defining aboriginal title as embracing a right to beneficial enjoyment of a territory is to be found in the history of Indian-Crown relations dealing with the recognition of aboriginal title in the context of treaty making in Canada.

116. From the earliest period of colonization, the Crown recognized broad aboriginal title, broad in the sense that aboriginal title extended to all lands traditionally occupied by aboriginal peoples for whatever purpose. Governments also protected through a reserve policy, village sites, occupied fields, burials, and fisheries, which would be set aside for the exclusive use and benefit of aboriginal people.

Royal Proclamation of 1763

117. The combined features of Crown recognition of a broad title to traditional lands, and the implementation of a reserve policy are evidenced in the Douglas Treaties in B.C., and the Numbered Treaties, which provided, from the non-aboriginal perspective, that aboriginal people ceded their aboriginal title, reserved land for their exclusive use and benefit, and retained aboriginal rights to hunt, fish and trap on the ceded lands. These latter rights became Treaty rights and are similar to the unextinguished aboriginal rights which this Court affirmed in *Van der Peet*. There is no reason for holding that prior to making Treaties, the Indians with whom the Crown has treated, enjoyed land rights that the Gitksan did not.

118. Contrast this broad definition of aboriginal title with the state of affairs existing today. Without the benefit of a Treaty, the Gitksan are now confined to their reserve lands, and must prove rights to continue practices integral to their culture outside the reserve, while the Province continues to grant the resources of their territory to others, without benefit to the Gitksan, and over their objections.

P. Muldoe, Tr.99, pp.6272-74, Exs.486, 488A, 490, 491

119. However convenient it might be to define aboriginal title narrowly to accommodate the existing status quo, it is submitted that to do so is wholly at odds with the promise of s.35.

The result would be perverse: the dispossession of the Gitksan would be given protection, rather than the rights of the Gitksan to maintain their integral relationship to their lands.

120. While reconciliation between aboriginal and non-aboriginal interests is a goal of s.35(1), this Court ought not to import reconciliation principles into the definition of the right so as to convert aboriginal title from a right of beneficial enjoyment to the land with attendant governance rights, into a diminished right. Reconciliation principles are already sufficiently in place without further eroding the right.

121. The right as defined in the order requested embodies principles which enable reconciliation with Crown sovereignty. The right is to be exercised having regard to the preservation and enhancement of the quality and productivity of the natural environment. This parallels the principle of conservation articulated in *Sparrow*. In the exercise of their right to lands and resources, the Appellants consider themselves bound by a responsibility, which is trust-like, to ensure that those lands and resources are available for the benefit not only of the present generation but of future generations. The land and resources are valued not only for their economic but also for their spiritual, cultural and social significance which links present and future generations with those who have gone before. The definition identifies the importance of consultation and cooperation with ministries and agencies of the Crown and with third parties who may be affected by the exercise of the Appellants' rights. This reflects the commitment of the Gitksan to reconciliation, which has its contemporary reflection in their affirmation in this court case of the fee simple grants which have been made to those who have made their homes within Gitksan territory.

122. Reconciliation requires that each party to a relationship concedes something to the other. Aboriginal people have already been required to concede a great deal in order to reconcile British sovereignty with their aboriginal title. The effect of British sovereignty has threatened the existence of aboriginal societies, as the last century of dispossession bears witness. Now, in addition to the power to extinguish title, governments have been given broad powers to justify interference with aboriginal rights in accordance with the *Sparrow*

principles. In *Gladstone*, this Court widened the government's power to interfere with certain aboriginal rights of sale, in holding that a justifiable legislative objective might include "the pursuit of economic and regional fairness, and the recognition of the reliance upon, and participation in, the fishery by non-aboriginal groups".

R. v. Gladstone (1996) 137 D.L.R. (4th) 648, para.75 (S.C.C.)

123. To define aboriginal title as something less than the right of beneficial enjoyment to the territory to which the Gitksan have proved a spiritual, historical, social and economic connection does violence to the aboriginal perspective not only of the rights at stake but also to the Gitksan concept of justice. In 1884 the Gitksan chiefs of Kitwangak told the Government of B.C.:

> We would liken this district to an animal, and our village, which is situated in it, to its heart, Lorne Creek, which is almost at one end of it may be likened to one of the animal's feet....We know that an animal may live without one foot, or even without both feet, but we also know that every such loss renders him more helpless, and we have no wish to remain inactive until we are almost or quite helpless....We hold these lands by the best of all titles...And we believe that we cannot be deprived of them by anything short of direct injustice.
>
> Ex.1035-105, pp. 284-5

E. ABORIGINAL TITLE HAS BEEN PROVED

124. On the evidence, the Gitksan have proved that they have aboriginal title to the Gitksan territory. The evidence proved that they were a society at the time of contact occupying a territory outside the villages through a social and land tenure system and that their connection to their territory was integral to their distinctive society.

125. All judges at the Court of Appeal and the trial judge found that at the time of contact the Gitksan had been the original inhabitants of the land organized in a society for hundreds, if not thousands of years. The Gitksan lived in permanent villages along the Skeena river from its lower reaches to its headwaters. The name for the Skeena river is Ksan. It is the backbone of Gitksan lands. The Gitksan were, and are, tied together by a common language, kinship, ceremonial obligations and economic relations.

Statement of Facts ("Facts"), paras.2, 3, 5-9; Lambert Reasons, paras.530-539

126. It was, and is, through a social and land tenure system based upon the House, chief, feast and crests, that the Gitksan occupied their territory. At the heart of this system was the feast. The feast confirmed the authority of chiefs over the House territory. At the feast the distribution of food and other products from the House territory to the witnessing guests from other clans, both materially and symbolically affirmed the connection between the House and its territory and strengthened the historical, social and economic relationships between the Houses of the Gitksan. The telling of oral histories, the display of crests and the performance of songs confirmed the House's possession of its territory and the legitimacy of its authority.

Facts, paras.10- 28

127. Gitksan laws determined the succession from generation to generation of the authority over the territory, regulated access to the territories and established principles of stewardship upon which the harvesting of resources took place.

Facts, paras.29- 42

128. The Gitksan used the resources from the lands which belonged to their Houses. The first contact record, the post-contact history and the evidence of the people showed that the Gitksan were out on the land in the distant reaches of the territories taking a multitude of resources for food, clothing, medicine and tools. The products of the land were also used in trade, both internal and between the Gitksan and their neighbours and for ceremonial purposes in the feast. The Gitksan harvested resources from all over the territories and far from the villages. The people spoke eloquently of their relationship to the land, of how they take what they need from the land but also of how they show respect for the land and all living things.

Facts, paras.43-52

129. The Gitksan witnesses and the pre-contact record confirmed what was observed at contact by the Bay Traders, that the Gitksan were using lands far from their villages for reasons unrelated to the fur trade. The Gitksan took the salmon in the summer, dried and stored it. In the winter, they travelled the ice highways to access the far-flung territories for game.

Facts, paras.53-56

130. The Gitksan were dependent on their lands not only for the basic requirements of food, clothing, medicine and tools. Their connection to the land was much more deeply founded. From the land came the wealth for distribution at the feast which in turn fed the stature and authority to the chiefs. From the land came the oral histories of the migrations, battles and events which identified claims to certain lands. From the lands came the House crests which represented and marked the chief's authority over the land. Interwoven with these were the laws of the Gitksan which managed and regulated access to the land.

Facts, paras.47, 22-28, 15-21, and paras. infra. 165-169

131. The integral relationship between the Gitksan and their territory was expressed by the Appellant, Delgamuukw, in his opening statement at trial:

> For us, the ownership of territory is a marriage of the Chief and the land. Each Chief has an ancestor who encountered and acknowledged the life of the land. From such encounters come power. The land, the plants, the animals and the people all have spirit - they all must be shown respect. That is the basis of our law.
>
> The Chief is responsible for ensuring that all the people in his House respect the spirit in the land and in all living things. When a Chief directs his House properly and the laws are followed, then that original power can be recreated. That is the source of the Chief's authority.
>
> My power is carried in my House's histories, songs, dances and crests. It is recreated at the Feast when the histories are told, the songs and the dances performed, and the crests displayed. With the wealth that comes from respectful use of the territory, the House feeds the name of the Chief in the Feast Hall. In this way, the law, the Chief, the territory and the Feast become one.

Opening Statement of the Hereditary Chiefs, Tr.Vol.2, pp.65-66

F. ERRORS OF THE COURTS REGARDING PROOF OF OCCUPATION

132. The majority of the Court of Appeal found that the trial judge's findings of fact prevented them from inteferring with his conclusions about the nature of aboriginal rights and title because, on the whole of the evidence, his findings did not show palpable and overriding errors. The dissenting judges found errors of law and fact. The majority erred by accepting erroneous findings of the trial judge and by failing to give legal effect to the

favourable findings which he made. The trial judge erred by failing to give effect to his favourable findings because:

- He erred in rejecting the legal possibility that the Gitksan could have aboriginal title as opposed to sustenance user rights.
- He erred in failing to apply the correct legal test for proving aboriginal title.
- He erred in treating the test of occupation as being whether there was a law which would have required a trespasser to depart.
- He erred in failing to take into account the uncontradicted historical evidence which showed the essential elements of the Gitksan's social and land tenure system at contact.
- He erred in finding that the Gitksan's social and land tenure system were limited to the villages and adjacent lands.
- He erred in failing to take into account pre-contact trade as evidence of occupation of land beyond the villages.
- He erred in finding that Gitksan presence in lands beyond the villages was because of the influence of the fur trade, and not evidence of occupation.
- He erred in failing to take into account, as proof of occupation, the historical record, the post-contact documentary record, and the evidence of the lay witnesses, of Gitksan presence in the territory beyond the villages and adjacent lands at contact and after.

133. The trial judge also failed to take proper account of the Gitksan perspective, failed to apply the applicable evidentiary rules in aboriginal rights cases and disregarded the expert anthropological evidence. We adopt the argument at paragraphs 63-81 of the Wet'suwet'en factum.

134. Further, the trial judge erred in law by holding that much of the testimony of the Gitksan witnesses were mere "beliefs" and "cultural" facts, not evidence. This error led him to find, first, that he could not apply the evidence back in time beyond one generation and, second, that he could not rely upon Gitksan evidence to determine the nature of pre-contact Gitksan society and Gitksan occupation of their territory.

> Trial Reasons, pp.167-8, 176; *Van der Peet* per Lamer C.J.C., para.86; *R.v. Simon*, [1985] 2 S.C.R. 387, 407-8

135. These errors constitute either an error in law or a palpable and overriding error of fact which, individually or taken together affected his assessment of the facts. This Court may reassess these findings on the basis of the evidentiary record. The common legal thread in the errors which will be considered below, is that the trial judge and the majority of the Court of Appeal disregarded evidence of occupation, sufficient to prove aboriginal title. As a further legal consequence the geographical scope of the Gitksan territory, over which that evidence established occupation, was unjustifiably constricted. This resulted in the trial judge's Map 5 which excluded large areas of the Gitksan territory.

1. No Requirement of a Trespass Law

136. The trial judge, having found there was occupation in fact, erred in law in treating the test for occupation as being whether there was a law which would have required a trespasser to depart.

> 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.

Trial Reasons, p.384

137. In response to this, Lambert, J.A. said:

> There is evidence of Gitksan and Wet'suwet'en possession and occupation of their traditional territories. There was, in the *Calder* case, an acceptance of the occupation by the Nishga of the traditional Nishga territory. There is no evidence whatsoever in this case of occupation of any part of the claimed territory by Nishga or Talthan, except perhaps in the very fringes of the territory. In those circumstances I consider that it is completely speculative to suggest that the occupation and possession by the Gitksan or Wet'suwet'en was not true occupation or possession. **But, in any case, the test of occupation and possession is whether there was occupation and possession in fact, under the organized society of the Gitksan or Wet'suwet'en, and not whether there existed a specific and enforceable tribal or inter-tribal law which compelled trespassers to depart.**
>
> Lambert Reasons, para.934, emphasis added

138. As was said by Toohey J. in *Mabo*, at 148:

> If occupation by an indigenous people is an established fact at the time of annexation, why should more be required?

139. The trial judge went on to say about occupation of the territory claimed by the Gitksan:

> *The occupation of specific territory*
>
> [T]here 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 justify this part of the test **for the areas actually used.**
>
> *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.
>
> Trial Reasons, p.390, emphasis added

140. The very facts found by the trial judge to support a finding of aboriginal sustenance rights over the territory in Map 5 are themselves sufficient to establish aboriginal title over the same area. The trial judge's finding that there were aboriginal sustenance rights over Map 5

was based upon his determination that the Gitksan actually used and enjoyed all of the resources of that area. No other people used and enjoyed the same territory.

2. Disregard of the Social and Land Tenure System at Contact

141. The Bay record of the Gitksan society at contact described a social and land tenure system of chiefly authority, Houses, territories and feasting, all of which the trial judge described as "equivocal". Two of the Appeal Court Judges reviewed this record and found that the trial judge erred in law in making this finding.

Lambert Reasons, para. 928; Hutcheon Reasons, paras.1151-62

142. The Gitksan called Professor Arthur Ray, an eminent historical geographer and expert on the Hudson's Bay Company and its records ("the Bay record"), to explain and interpret the records, and to draw inferences about pre-contact Gitksan and Wet'suwet'en societies from those records. The trial judge accepted Professor Ray's "excellent qualifications", "independent evidence", and "wide experience in these matters".

Trial Reasons, pp.200-01

143. Dr. Ray described the Bay record as:

> the only solid description existing of Gitksan, Babine, Wet'suwet'en social, political, territorial organization, the earliest complete description that we have...

Ray, Tr. 204, pp.13536-37

144. The trial judge found these records "a rich source of historical information", and said he had "no hesitation accepting the information contained in them". However, he also disposed of the entire historical record of social organization and territories in a single sentence:

> It is true that trader Brown referred to some Indians as men of property and other similar terms **but that is equivocal.**

Trial Reasons, p.201, p.383, emphasis added

145. Professor Ray summed up the Bay record on the Gitksan:

> what is abundantly clear from Brown is that **you have a fully-articulated feasting system with House territories, family heads**...

Ray, Tr. 204, pp 13536-37, emphasis added

146. Professor Ray said that for both the Gitksan and Wet'suwet'en:

> **access to resources was regulated by a land tenure system in which tracts of land were managed by "men of property", the lineage (House) heads.**
>
> Ray, Tr. 203, pp.13428-30, emphasis added

147. Professor Ray concluded on the basis of the Bay record:

> **[I]t indicates to me a very well established rank society here. First of all ... we've got 67 family heads who own territories. In addition there are another 20 ranked chiefs who would also hold territories, and these are finally ranked from 1 to 20 in the order that they sit around the -- in their place in the feast. So the whole feast complex structure is laid out here**, which is really quite extraordinary. And again ... it's my opinion that his attention to this kind of detail relates to his concern about the tenure system and the importance of that in both the amount of fur that could come off a land and where that fur was directed. So the name of the game here was to get these men on your side if you want the trade.
>
> Ray, Tr. 203, p.13424, emphasis added

> [T]he problem Brown is having, is that **these possessors of lands who are regulating access to the lands**, and I must say when I read these for the first time I was quite struck by this. I've looked at Bay records for what was Northern Quebec, Northern Ontario, all through the west, and **this is the first instance where I ran across Bay traders talking like this about men of property and possessors of lands, which struck me straight away that they're dealing with a very different system here than they were used to dealing with** ... .
>
> Ray, Tr. 202, p.13387, emphasis added

> **They're heads of families who control territories of those families and regulate the use of those lands, hence the term "men of property".** Now, he is looking at that of course from a European perspective, and one of the things that strikes you about the Brown record when you read it is that his very first district report, for example, focuses very heavily on the system, and ... the company is trying to increase the fur returns in this area, and **they run into a system that precludes that because the output of the territory are controlled by these chiefs.** ... [T]here is clearly, if you go through these records and you look at the fact that **the chiefs are ranked, all the men of property -- all the heads of family are men of property, and the men of property regulate access to those properties,**

and that, I would argue in the context of these reports, explains why we get so much about this in the Brown material.

Ray, Tr. 202, pp.13382-83, emphasis added

148. For the trial judge to conclude that the Gitksan before European contact were not bound to specific lands, and maintained no boundaries, required him to reject the Bay record and the conclusions which Professor Ray drew from it.

Trial Reasons, pp.177, 435; Facts, para.54

149. Macfarlane J.A. acknowledged that Brown's evidence caused him concern, but that, viewed in "light of the whole of the evidence" would not give rise to the inferences of sufficient use and occupation to establish the territorial rights which are asserted.

Macfarlane Reasons, para.122

150. With respect, there was no other direct evidence of Gitksan society at first contact except that of Harmon, the Bay record and Dr. Ray. The trial judge rejected the evidence of the anthropologists as adding "little to the important questions that must be decided in this case." He rejected the evidence of the lay witnesses as "beliefs" or "matters of faith", or as not rising to the standards required by the rules of evidence. There was no other evidence that the trial judge referred to in discounting Dr. Ray's opinion and he gave no reason for doing so. The only reasonable inferences to draw from the first contact evidence were those put forward by the appellants.

Trial Reasons, p.172, pp.168-169

151. The uncontradicted evidence at **first contact** with the Gitksan proved a "rank society" with a system of "possessors of lands who [were] regulating access to the lands". This evidence is remarkable in that Brown described a system of land tenure unlike any that had been recorded by Hudson Bay traders in that there was **at first contact,** "men in the society with authority already". This evidence led Lambert and Hutcheon, JJ.A. to conclude that the Gitksan met the test for occupation sufficient to establish aboriginal title.

Lambert Reasons, para.928, Hutcheon Reasons, paras.1151-1161

152. The trial judge found that the Gitksan had rights only within Map 5, a finding not disturbed by the Court below. The following section addresses this error, having regard to the

evidence of the extent of the land tenure system, precontact trade, the effect of the fur trade, place names and oral histories, and Gitksan presence on the territory.

3. Disregard of the Land Tenure System Extending Beyond The Villages

153. On the trial judge's finding, the evidence was sufficient to establish that the Gitksan feast was integral to their social organization and proved its essential role in respect of the occupation of land at contact. There was no doubt about the role of the feast within the villages and adjacent lands. The trial judge considered the evidence about feasting as equivocal **only** about its role in the use or control of lands **outside the villages** and **after contact**. The trial judge here made a palpable error by disregarding or ignoring, without giving reasons for so doing, the evidence about the essential role of the Gitksan feast in determining use and control of House territories in lands which were far beyond village sites and beyond Map 5.

154. The trial judge acknowledged the centrality and importance of the feast:

> I do not question the importance of the feast in the social organization of the 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 judgment. 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 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.
>
> Trial Reasons, pp.373, 374, emphasis added; see too: p.152

155. The vital role of the feast in Gitksan society was recognized by Lambert, J.A.:

> The central social institution in both the Gitksan culture and the Wet'suwet'en culture is the feast. Until late in the 19th century, and for many years before that, the feast was the institution through which the people governed themselves. It was at the feast that rules of conduct were settled and disputes were resolved. The feast dealt with confirmation of inheritance and with succession to rank and property. There was time for celebration, for nourishment, for worship, and for dramatic and sacred performance.

> Traditions were confirmed, and customs were observed and honoured. **Most importantly, the relationship between each House and its territories was confirmed and the boundaries of each territory were recognized.**
>
> Lambert Reasons, para.538; emphasis added

156. The Bay record, the post-contact documentary record and the evidence of the people showed that the feast was integrally related to confirming House territories and recognizing territorial boundaries **throughout Gitksan territory** and **beyond Map 5.**

157. William Brown in 1826 reported on a feast held by Quo em [Gwoimt], a Gitksan chief which occurred at a Gitksan village on the Babine River. At this time Brown met two other Gitksan chiefs, Niigyap and Tsabux who travelled eleven (11) days over land to hunt ground hog and thirty (31) days by ice to Bears River in the northeastern part of the territory.

> Ex. 964-14, pp.7-10, Ex.964-12, p.17

158. Feasting activities were frequently reported upon by the Bay traders. The 1825 Journal for the Babine Post (Fort Kilmaurs) recorded the use of a feast as a means of keeping peace between the Gitksan, Wet'suwet'en and Babine. Dr. Ray concluded that at contact the feast was an institution that bound together the Gitksan from widely diverse locations within their territory and was utilized to settle conflicts throughout the Gitksan territory:

> When the Hudson's Bay Company moved into the area in 1822, Brown discovered that the regional economy was a delicately balanced system in which villagers were linked together by kinship ties, trade, gambling **and feasting activities.**
>
> A. Ray, Ex. 960, p.40; A. Ray, Tr.203, pp.13443-44, emphasis added; See too: Ex.964-10, pp. 47-53, Ex.964-12, p.17; A. Ray, Tr.205, p. 13723; Harmon, Ex.913, p.253, Ex.964-5, pp.88-89/2-3/printed 2A-3, Ex.964-14, pp.23-26

159. The Gitksan described many examples of the central role of feasting in relation to the House territories of the Gitksan **throughout Gitksan territory**, including House ownership of territory and fishing sites; approval and public confirmation of grants of access rights to non-House members; settlement of boundary disputes; settlement of disputes, including trespass to land.

> S. Williams, Ex.446E, pp.313-15; G. Williams, Tr.106, pp.6687-89; M. McKenzie, Tr.5, pp.321-22; S. Williams, Ex.446C, pp.141-43, 160-68; M. McKenzie, Tr.4, p.249; O. Ryan, Tr.19, pp.1249-53; M. Johnson, Tr.12, pp.748-50

160. The trial judge's evaluation of the evidence of feasting as an element of the Gitksan's integral relationship to the territory was coloured by the fact that he was "not persuaded that the feast has ever operated as a legislative institution in the regulation of the land."

Trial Reasons, p.374

161. It was an error of law for the trial judge to require that a feast measure up to the standard of a legislative body before accepting it as an institution for control and use of the land. Lambert J.A. correctly identified the nature of this error:

> First of all, the need for a legislative institution, as opposed to a dispute resolution mechanism, to make advance statements about rights in general terms, is not, in my opinion, an essential requirement of a right of self-government and self-regulation. One would certainly think that customs, traditions and practices would have set out rules which the people could look to in determining their future conduct.

Lambert Reasons, para.982.

162. In this manner the trial judge misdirected himself as a matter of law in his appreciation of the evidence. The trial judge was reviewing the evidence not with a view to making findings of fact as to the nature of the occupation by the Gitksan of their territories, nor their manner of social organization and governance, but rather with a view to comparing their social infrastructure with a non-aboriginal model. Thus, the role of the feast as an institution relating to control of land was dismissed because the feast could not be analogized to a legislature. In the same way, as the appellants have shown, evidence of exclusive occupation was dismissed as inconsequential because he could find no "law of general application" in respect of trespass.

163. If the search for European institutions of governance and property is discounted, uncontradicted evidence, considered credible by the trial judge, shows that the Gitksan occupied, to the exclusion of all others, a considerable territory, including territory beyond Map 5. The territory was held by Houses led by chiefs who were "men of property". Property entitlement was determined and governance perpetuated through the feast.

164. The Gitksan appellants also placed before the trial judge a body of evidence to prove that they confirmed their title to the territory through their oral histories, crests and totem

poles. The trial judge dismissed this evidence, stating:

> I do not find these items sufficiently site specific to assist the Plaintiffs to discharge their burden of proof....
>
> There is considerable doubt about the antiquity of crests and totem poles upon which I find it unnecessary to express any opinion.
>
> Trial Reasons, p.373; Facts, paras.22-28

165. This conclusion is not supported by the evidence of the oral histories recounted by several of the witnesses which were sufficiently specific to permit the delineation of places and territories referred in them to be located on a map. The adaawk related by Art Mathews Jr. (Tenimgyet) demonstrates his House's long-time possession of specific territories with defined boundaries. Stanley Williams related the adaawk of how the western part of the Gitksan territory, at Little Oliver Creek, was acquired by the Gitksan chief, Luulak. Contrary to the trial judge's finding that "the descriptions of the adaawk were extremely vague and lacking in the particularity which later appeared in the affidavits" (Trial Reasons, p.179) and were "seriously lacking in detail about the specific lands to which they are said to relate" (Trial Reasons, p.181), this adaawk identified Little Oliver Creek (located on maps west of Doreen) as the place where this event occurred. It identified by name, Galdii Ess, a place on Little Oliver Creek, and it identified the two main Gitksan chiefs, Luulak and Dax Juxw, who helped bury the Kitselas chief Gubihl gan. The Gitksan chiefs are of the Frog Clan in Gitwangak, and Luulak is the present chief with authority over of this territory.

> A. Mathews Jr., Tr.73, pp.4581-4585; Ex.349; S. Williams, Ex.446-A, pp.72-73, Ex.446-4

166. Most significantly, the Gitksan oral histories established their presence **far from the villages**. For example, Mary McKenzie, Chief Gyolugyet, narrated the Suuwigus adaawk and described the migration of her House from the village of Gitangasx to Old Kuldo. This adaawk connected the members of the House to the ancient migration of the ancestors of Gyolugyet.

> M. McKenzie, Tr.4, pp.231-37, Ex.358-1; See too: Ex.68B, pp.20-27; J. Morrison, Tr.84, p.5257, 5261, Ex.381

167. Martha Brown, Chief Kliiyemlaha, born in 1900, told the adaawk of how the northern

territory of Miin Lax Mihl, was acquired from the Stikine by the Gitksan in a peace settlement with the Stikine after a sister of a former Kliiyemlaxha was killed while hunting groundhog. This adaawk described Gitksan possession of territory on the far north of the Gitksan territory. **This territory was excluded by the trial judge.**

M. Brown, Ex.68B, pp.21-27

168. The Barbeau-Beynon record of the Gitksan adaawk contains a great number of references to territories and place names and corroborates adaawk references recounted by the witnesses. The oral history told by the former Chief Gwiiyeehl, John Brown, in 1920 to Beynon described the Miluulak territory south of Thutade Lake, in the far northeast of the area claimed by the Gitksan, **beyond Map 5 and excluded** by the trial judge:

> At five walks from Bear Lake another territory belonged to Maluleq, the name of which was `Willegushaeturh [Wisan Skit]. He went there accompanied by his relatives and by Kidzap, another LarhKibu [Wolf]. They camped there and stayed some time.

Ex.1048-83, p.1; W. Duff, Ex.1044; Exs.1046-1049 (extracts); Duff, Ex.1045A; Ex.1042-5

169. The oral histories establish that the Gitksan and Wet'suwet'en were on the land. Not only do they speak of known territories as belonging to chiefs, usually by reference to crests, but they also identify geographic locations. The precision required by the trial judge as a test for proof of territorial occupation is contrary to the test for the proof of aboriginal rights established by this Court in *Van der Peet.* His standard was more appropriate to the precision of the Torrens system than to the exigencies of an oral culture.

170. The trial judge erred in not considering the crests and totem poles as evidence of Gitksan occupation of their territories. The antiquity and significance of the crests and poles are matters which bear directly on the existence of the appellants' aboriginal title as demonstrating their integral connection to their territory

Facts, paras.22-28

171. The crests and poles existed before the assertion of British sovereignty, before contact, and indeed before any European influence in the territory. Two eminent ethnologists, Philip

Drucker and Wilson Duff, analyzed the evidence on poles and concluded "that totem poles were therefore a well-established feature of the precontact culture of the Northwest Coast."

Ex.901-30, p.91; P. Drucker, Ex.901-29, pp.390-97; R. Daly, Ex.884-1, p.184

4. Disregard of Pre-Contact Trade Proving Occupation Beyond the Villages

172. The trial judge in dealing with the evidence of trade at contact found that "there would be some bartering but that would be in sustenance products." In so finding, he failed to take into account the evidence that there were ancient and well-established trade routes throughout the Gitksan territory prior to contact and prior to the fur trade and that Gitksan trade was an important part of the pre-contact economy demonstrating occupation of land and resources in all areas of Gitksan territory, including those far from the villages and beyond Map 5.

Trial Reasons, p.392

173. At the time of contact, there was a considerable trade among the Indian peoples of the coast and interior in furs, dressed skins, leather, fish, fish oil, blankets, shell beads and other products, both primary and manufactured. The *Historical Atlas of Canada*, which the trial judge found was "compiled by many of Canada's leading historians and geographers," documents the extensive pre-contact trade routes between the Gitksan and their neighbours.

Ex.893, *Historical Atlas of Canada,* Plate 13; Trial Reasons, p.228

174. Professor Ray testified regarding Plate 13:

> [w]hat MacDonald makes clear on this map is that there was an extensive trading network up and down the Skeena that seems to, by best estimates of archaeologists, to go back well into the pre-contact period. ... **[T]he trade with the coast in the historical period that we see was not a phenomena that only occurred in the historical period, but there is good evidence that the trade pre-dates European presence either in the area of New Caledonia or on the coast.**

Ray, Tr.203, pp.13484, emphasis added; Ex.893, Plate 13

175. The plate Professor Ray referred to says of the Tsimshian, including the Gitksan, that about 1750:

> The Tsimshian depended on the intensive exploitation of salmon supplemented by other fishing and by hunting and gathering. For at least part of the year they lived in villages, and **their economies relied on regular, seasonal migrations to other locations for specific resources....The system was financed by the corporate (kinship-group) production [of] surplus goods that could be exchanged or traded over long distances.**
>
> Ex.893, Plate 13, emphasis added

176. There were interlinking trails into and through the Gitksan and Wet'suwet'en territories. Professor Ray concluded:

> The various villages were linked into a regional exchange network. Indigenous commodities and European trade goods circulated within and between villages by feasting, trading and gambling activities.
>
> Ray, Tr.203, p.13478; W. Brown, Ex.960, pp.55-56

177. Harmon's observations of the Stuart's Lake, Babine Lake Carrier about 1810 included a detailed description of the well-established trading system connecting the Gitksan with the Indians at the coast.

> Ex.913, p.244, Ex.964-14, p.9

178. Oolichan grease was highly prized by both coastal and interior peoples and the subject of extensive trade before contact. The "grease trails" were the routes by which oolichan and other sea products were carried inland and inland products coastward. Chismore's account of the "grease trail" from the Nass to the Skeena and beyond in 1870 contains evidence of the high level of organization, and the antiquity of the trade in oolichan oil:

> [page 450] ...Along [the Nass'] banks, within the first few miles, lie the hereditary fishing domains of the Nasscar[Nishga], Hydah, Cimp-se-an, [Tsimshian, including the Gitksan] and Tongass tribes. In February of each year, the Indians gather here to make camp, cut fuel, and prepare to the run of the oolachans or candle-fish ... **Here it is that the bulk of the fish grease is made, the distribution of which forms, probably, the best example of an inter-tribal commerce -- prosecuted long before the advent of the whites, and still in existence, substantially unchanged -- that can be found upon this continent.**
>
> Bridges span the wider streams; one, a suspension crossing the Har-keen, has a clear span of ninety-two feet. ... [page 457] ... **In one place the trail leads**

> **over the top of a hill denuded of soil, and is worn deeply into the solid granite by the feet of succeeding generations.** ...
>
> Drucker, Ex.997-24; Macdonald, Ex.1191-36; Ex.1035-29, pp.450-57, emphasis added

5. Disregard of Gitksan Presence Beyond the Villages Because of Fur Trade

179. The trial judge erred in concluding that the Gitksan moved into their more distant territories only after 1806 in response to the European fur trade and therefore their presence was not relevent as evidence of proof of occupation. The trial judge found that European influence commenced in the territory around or after the turn of the nineteenth century. He said that until that time "aboriginal practices were probably confined reasonably close to village sites", and that only with the start of commercial trapping in the years after 1806 did the Gitksan ancestors "spread out from their villages into distant territories":

> [T]he 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.**
>
> Trial Reasons, p.453, emphasis added; Also: p.370

180. The Bay record and the evidence of Dr. Ray articulated a land tenure system but it also showed that Gitksan territoriality, feasting and commerce were not the result of the European fur trade, but were well-established in Gitksan society in the distant reaches of their territory. The evidence is that for a very long time prior to the assertion of British sovereignty, the Gitksan ancestors had to feed and clothe themselves, make tools, equipment, regalia and weapons, and accumulate a surplus of primary and manufactured products for feasting and trade. The need to "go very far" from their villages was manifest, and there is **every** reason to "suppose they did".

181. In the face of the evidence which he accepted as reliable, the trial judge concluded that the fur trade had "converted" and "materially changed" (Trial Reasons, p.203) the life of the Gitksan in the short time between the advent of European influence and the start of Brown's observations in 1822. Professor Ray rejected the thesis that Gitksan socio-political systems developed in response to the European fur trade:

> [T]he coastal fur trade had a small impact on this area prior to 1800, and I doubt very much sufficient time had lapsed for the whole elaborate social-political territorial feasting system that we've seen in place, to have been put in place in such a short period of time. And in fact, even if we allow the alternative point of view and say, well, since the maritime fur trade began, I still would submit that even 40 years is probably premature or is not long enough, given what we are talking about. We are not just talking about little cultural details; the adoption of a pot or a gun or a knife. We are talking about fundamental social-political organization.
>
> Ray, Tr.205, p.13723

182. Professor Ray elaborated why the social-political system of the Gitksan could not have come into being by virtue of the direct or indirect fur trade:

> [T]he Upper Skeena region remained of marginal importance to the Hudson's Bay Company in the 1820s largely because **the traders were unable to overturn the native tenure and resource management systems or to reorient their exchange networks.** In fact, it appears that the Hudson's Bay Company merely became part of a much older trading system by displacing eastern native groups as the principal suppliers of scarce moose hides.
>
> ...
>
> **There is no doubt that the Babine, Gitksan and Wet'suwet'en had sufficient reason to develop a land tenure system for the regulation of the hunting and trapping of certain animals long before the establishment of the European fur trade.** ... [I]t is risky to suppose that the fur trade was the force that shaped the Gitksan-Wet'suwet'en land tenure system that Europeans observed in the early post-contact period.
>
> Ex.963, pp.16-17, emphasis added; See also: Ray, Tr.204, pp.13536-37

183. Professor Ray commented on both the relative dearth of European goods as observed by Brown, and the relative independence of the Gitksan and Wet'suwet'en from reliance on such goods for subsistence:

> [T]hese people who are trading with coastal groups are not well equipped, i.e., in European tools for hunting and trapping, which suggests that all the trade is with the coast. These natives are neither dependent on the company for European goods, nor have they become dependent on coastal groups for European goods, because he makes it clear that they have relatively few of them.
>
> Ray, Tr.203, p.13452

> They avoided becoming dependent on the Hudson's Bay Company for credit and welfare. In this important respect the experience of the Babine, Gitksan and Wet'suwet'en differed from that of many other Indian groups elsewhere in Canada. **By avoiding this trap, the Gitksan and Wet'suwet'en were able to retain control over their local resources.**
>
> Ray, Tr.203, pp.13479-81, emphasis added; Tr.204, p.13504

184. Despite finding that there were not significant intrusions of European trade goods into the territory until around or after the turn of the century, the trial judge found that the trade in European goods for Indian furs had an extraordinary and immediate impact on the Gitksan societies and economies. The trial judge erred in law and in fact in reaching this conclusion.

> Trial Reasons, p.370; Lambert Reasons, paras.923-30

185. The trial judge also erred in law and in fact by ignoring powerful evidence of pre-contact presence in the far reaches of the Gitksan territory which was not based on trapping or trade with the Hudson's Bay Company.

> Lambert Reasons, para.929

186. The trial judge said that evidence of trapping beaver to trade to the Bay traders should be ignored because use of a territory for such a purpose was not an aboriginal use and such a use originated with the Hudson's Bay Company and not with the Gitksan. Brown recorded in 1826 that the land occupied by the Gitksan Chief, Gwoimt, contained no beaver at all. Brown wrote in his diary:

> From my own observations and the different questions I put to them, I do not think there are many Beaver in their Country - it being in my opinion too Mountainous - Quo em [Gwoimt] acknowledged that on his Lands, there were few or no beaver.
>
> Ex.964-12, p.18

187. As Mr. Justice Lambert pointed out, if there were no beaver in Gwoimt's land then this fact cannot be evidence that the occupation of his land was brought into being by commercial trapping in beaver. Gwoimt would not have moved into an outlying area of the territory to take beaver he knew were not there. Yet, the passage from Brown's diary is evidence that lands in the far reaches of the territory belonged to Gwoimt despite the absence of trapping

for beaver for trade. The trial judge rejected this evidence as proof of occupation, as a practice brought into existence by the commercial fur trade. In this, he erred.

Lambert Reasons, paras.929-930

188. Gwoimt, a Gitksan Chief, was a "man of property", grounded in a social and land tenure system which pre-dated the fur trade, who occupied his territory as his forefathers had done for centuries. That occupation is evidence of Gitksan aboriginal title.

6. Disregard of Gitksan Presence Beyond the Villages

189. The trial judge erred in law and in fact by failing to take into account, without giving reasons for failing to do so, the evidence of the Bay record, the post-contact documentary record and the evidence of the lay witnesses of Gitksan presence of their territories beyond their villages at contact and after.

190. Brown reported that the Gitksan made an 11-day march north of Kisgegas to hunt groundhog to make clothing:

> From Sojick's Village [on the Babine River] over land to Chus ta too, **where they go to hunt the Sifflus [groundhog] is a March of eleven days**, the road winds through a Valley formed by two chains of high mountains, and is tolerable good -- **From the entrance of Bears River to the Lake is a March of thirty one days – following the River on the Ice**
>
> Ex.964-14, p.9, emphasis added
>
> They [the Gitksan] having in general good **siffleux Robes and Leggins of Carribeau skin**.
>
> Ex.964-12, p.17

191. Contrary to what Brown wrote in the above passage of the Gitksan making a thirty-one day march on the frozen river, the trial judge speculated that:

> 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.
>
> Trial Reasons, p.434

192. These hunts on distant mountain territories were not for beaver, but for groundhog, goat and caribou, and not for the European fur trade, but to make clothing and blankets for their own use, for ceremonial purposes and for trade.

Harmon, Ex.913, p.150; W. Brown, Ex.964-8, p.55; Ex.969-1A, pp.3-4; Ex.964-9, p.106

193. The post-contact documentary record establishes that the Gitksan people were taking animal, berry, mineral and plant resources on their territory and living on a seasonal basis in their territory far from the villages and in **Gitksan territory beyond Map 5 and excluded by the trial judge**.

194. In a series of reports, Loring, the Indian Agent, reported that the Gitksan of Kisgegas were hunting and trapping in territory at the headwaters of the Skeena, at the northern edges of the Gitksan territory.

Ex.1209-A-6, Ex.1209-B-83, Ex.1209-A-8, Ex.1209-A-55, Ex.1209-A-58

195. In his 1911 report, Ashdown Green, the land surveyor who surveyed Gitksan reserves, said of his visit to Kispiox:

> The Indians tell me there were many other hunting lodges from 70 to 100 miles up the Kispaiax River.
>
> ...
>
> **[A]ll these places were formerly used by the Indians in the winter when trapping, and that they are really part of the hunting territories and berry picking mountains to which they still lay claim....**
>
> [A]t the first place I came to [above Kispiox] I was waited on by a deputation of Indians who told me they did not want any small places surveyed, but if I gave them their hunting grounds on both sides of the valley from the river to the summit of the mountains they were willing to accept them. This would virtually give them the whole country and as that was impossible, and I was entirely dependent on them for transport, I had to compromise as best I could...
>
> On my return to Kispaiax village I met the Indians. They all reiterated their demands that the whole country be handed back to them.

Ex.1035-347, emphasis added

196. The area encompassed by this description includes the territories claimed by all of the leading chiefs and Houses of Kispiox today, beginning with territories included, and moving into territories excluded by the trial judge in his definition of Gitksan territory.

Ex.610, p.3, Ex.485, pp.12 & 14, Ex.485, p.20, Exs. 485, pp.2-4 & 486, Exs. 485, pp.22-25 & 486, Ex.606, pp.2-3, Ex.486; P. Muldoe, Tr.99, pp.6246-56, Ex. 485, pp. 18-20, Ex.486, Ex.602, pp.2-3, Exs.604, pp.2-3 & 604A

197. The evidence of the chiefs showed that they were, and are, present in their territories, using the land and its resources. For example, Neil Sterritt Sr., (Wii Gaak), regularly hunted on Wii Gaak's territory at the Sustut River and at An Gil Gilanous, located along the Shelagyot, Sicintine, Squingula, Sustut and Skeena Rivers north of Kisgegas Village. In his evidence he described the trail used to get to the territory and the places he hunted north of the Sustut River. Sam Morrison explained how he and his father used the Gitksan territory north of the junction of the Bear and Skeena Rivers to obtain clothing, berries and medicine, and for trapping.

N. Sterritt, Ex.601A(a), pp.26-27, Tr.82, pp.5116-17, 5161; S. Morrison, Ex.599-a, pp.10-12; M. Brown, Ex.68C, pp.9-10; R. Benson, Ex.661, pp.23-26; D. Gunanoot, Ex.72A, pp.1-10, 14

198. The final body of evidence disregarded by the trial judge was the Gitksan names for places and topographical features throughout the whole of their territory. This evidence was proof that the Gitksan occupied their lands and that this land extended far beyond the villages and adjacent areas. The trial judge erred in disregarding it. It was precisely the kind of evidence which a court should consider to decide what territory is the subject of aboriginal title in an oral society. Where the names are, so were the people. There are over 1000 Gitksan names for features and places in the Gitksan lands, including the area, beyond Map 5, excluded by the trial judge. The names are the maps and footprints of the Gitksan who occupied these lands.

List of Gitksan Place Names from the evidence

199. Gitksan place names were mapped throughout the territory. These sites were known to the Gitksan and to their ancestors by these names. The place names mark and describe activities, events, or physical features on the ground. In many cases, these names describe a geographical feature in an oral history. In other cases, they describe a physical feature, like a

river crossing, by reference to a ground characteristic. Scores of rivers, lakes and mountains on present-day maps are named by Gitksan names or anglicizations of Gitksan names. Scores more are named after Gitksan people who occupied the lands.

Ex.1008 - Composite map of Gitksan territory; Ex.1009 - Working Map of Gitksan territory

200. The names and the topographic features were also recorded in the territorial affidavits. And identified in five volumes of photographs of the actual mountains, ridges, heights of land, rivers, or streams in the territory.

Exs. 592-613, 661E, 352, 376, 446-2, Photographs: Exs.377, 654, 655, 656, and 487 (extracts); N. Sterritt, Tr.118, pp.7347-7361

201. Some place names relate to characteristics of the land. Mary Johnson described Miinhl Antselda, the name given to a small mountain on her House territory, near the Village of Kispiox. The very thin stones on the side of the mountain were called "saadlda'm loo'op" [smooth stones]. The mountain is named after those stones. Physical features were named after events which occurred on the territory and recorded in the oral histories. On the northern territory of Mary Johnson, Antgulilbix, on the Upper Kispiox River, there is a ridge known as Xsagangaxda where the murder of Chief Yal took place in pre-historic times. The ridge was given that name because of the murder. The upper end of this territory was cut off by the trial judge's arbitrary northern map line (see: Map 5).

M. Johnson, Tr.12, p.773, Tr.13, pp.22-44; See also: M. Johnson, Tr.15, p.945; N.J. Sterritt, Tr.119, pp.7410, p.7426, Tr.120, pp.7496, 7497, pp.7522-7523,; J. Morrison, Tr.84, p.5248; M. McKenzie, Tr.7, p.415

202. The place names appear frequently in the oral histories. They are evidence of the fact that the Gitksan were present in these so-called "distant" territories long enough to become familiar with the topography, to name the geographic features in their own language and to pass the names down to the next generation.

O. Ryan, Tr.17, pp.1131-32; S. Williams, Ex.446B, p.80

203. Richard Benson identified the chief mounterain landmark in the territory at Sallysout Creek as, "Naa 'Oogil". He testified that there is an adaawk about that mountain (Ex.661 E, p.28). Even though the most prominent feature of this territory goes by a Gitksan name, and the creek which runs through the territory, Sallysout Creek, is an anglicization of the Gitksan

name, "Xsa Galliixwit", for the same creek (Exs.661-2; 661E, p.29). It was eliminated from the territory in the trial judge's Map 5.

R. Benson, Exs.661E, pp.2-3

204. The Gitksan names marked linguistic trails throughout Gitksan territory. Like the trade trails which were "worn deeply into the solid granite by the feet of succeeding generations", the names, together with the other bodies of evidence considered in this section, constituted evidence of occupation by the Gitksan of their territory. The trial judge, in disregarding these bodies of evidence, committed an overriding and palpable error.

G. The Aboriginal Right to Self-Government

205. The authorities relied upon in *Van der Peet* for grounding aboriginal rights in the pre-existing occupation of North America by aboriginal people recognize, not only aboriginal title, but also the right of self-government as a pre-existing right which survived the assertion of Crown sovereignty. In *Worcester v Georgia*, Marshall C.J. drawing upon the British colonial experience, and the law of nations, recognized that a pre-existing right of self-government, co-existing and therefore reconcilable with the sovereignty of the Crown, had become an entrenched principle governing the legal relationship between Indian Nations and the Crown. He stated:

> Certain it is, that our history furnishes no example, from the first settlement of our country, **of any attempt on the part of the Crown to interfere with the internal affairs of the Indians,** farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. **He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interferred with their self-government, so far as respected themselves only....**
>
> The settled doctrine of the law of nations, is, that a weaker power does not surrender its independences - **its right to self government** - by associating with a stronger and taking its protection....The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights.

Worcester v. Georgia, at 559-60;

206. In *Connolly v. Woolrich*, Monk J. adopted these passages from *Worcester* in concluding that "the Indian political and territorial right, laws, and usages remained in full force" in the Canadian North West. That decision correctly portrays aboriginal peoples as autonomous nations living under the protection of the Crown, retaining their territorial rights, political organizations, and laws. No less than the Cherokee, whose rights were in issue in *Worcester*, and the Cree whose marriage laws were in issue in *Connolly*, the Gitksan have retained their rights to self-government.

> *Connolly v. Woolrich*, (1867) 11 C.N.L.C. 70; Report of the Royal Commission on Aboriginal Peoples (1996) Vol. 2, Part 1, pp.186-192; P. Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government (1995) 21 *Queen's Law Journal*, 173

207. In *R. v. Sioui*, Lamer C.J.C. cited the following passage from *Worcester* as reflecting the historical and legal foundations of the right to self-government:

> Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted; **she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.**"
>
> *R. v. Sioui* [1990] 1 S.C.R. 1025, 1054(emphasis added)

208. In *Van der Peet* Lamer C.J.C. identified aboriginal rights as being those which were "integral to distinctive aboriginal societies." The means and exercise of self-government within an aboriginal society is a characteristic of such society no less integral to its distinctive culture than its language, spirituality, resource use or ancestral homelands.

209. The evidence demonstrates that the Gitksan have a fully-articulated land tenure system, as well as laws governing all aspects of their society. The Gitksan exercised self-government in relation to the determination of membership of the House, maintenance of the House system, regulation of family relations, education and health, harvesting management and conservation of House territories and their resources, dispute resolution, and the conduct of political and economic relations with other aboriginal nations. The

Gitksan had no written constitution and their self-governance was woven throughout the fabric of their society. These areas therefore exemplify the Gitksan right of self-government, but are not exhaustive.

Facts, paras.15, 37

210. However, we do not invite this court to draw up lists or heads of jurisdiction, as if it were writing a constitution. Section 35 already recognizes aboriginal rights in broad terms. The order sought in relation to self-government befits the foundation for recognition of aboriginal rights in the Constitution, which is to enable aboriginal people to maintain and develop their distinctive societies within Canada.

Royal Commission on Aboriginal Peoples, (1996) Vol. 2, Part 2, at 213-225

211. The majority in the court below found that the rights of self-government sought were:

> legislative powers . . . [which] serve to limit provincial legislative jurisdiction in the territory and to allow the plaintiffs to establish a third order of government in Canada.

Macfarlane Reasons, para.165

212. No claim to sovereignty was advanced in this case. As noted by Lambert J.A.,

> ...they are not asserting a claim to govern everyone within the geographical boundaries of the territory. They are claiming the right to manage and control the exercise of the community rights of possession, occupation, use and enjoyment of the land and its resources which constitutes their aboriginal title; and they are claiming the right to organize their social system on those matters that are an integral part of their distinctive culture in accordance with their own customs, traditions, and practices, which define their culture.

Lambert Reasons, para.971; see also paras.1011, 1014

213. The Gitksan have acknowledged that their rights of self-government, no less than their title to land, co-exist with the sovereignty of the Crown. What is in issue here is whether the self-government of the Gitksan peoples was limited either by the fact of the assertion of sovereignty by the Crown, or by subsequent acts of the sovereign to extinguish certain attributes of such self-government.

214. The majority in the Court below held that "any vestige of aboriginal law-making competence was superseded" when the legislative power of the Sovereign was imposed, either in 1858 or in 1871.

Macfarlane Reasons, paras.167-168

215. This, with respect, is in error. The events of 1858 (formation of the legislature of British Columbia) and 1871 (confederation of British Columbia with Canada) were both acts of the Imperial Sovereign by which the manner of the exercise of sovereign power was altered. The transfer of certain decision-making authority from the Colonial Office to the colonial legislature, and the division of powers between the federal and provincial governments were actions entirely internal to the exercise of Crown sovereignty. They did not consider, address, or limit such exercise of self-government as survived the assertion of sovereignty in 1846.

216. The power or authority of the legislature after 1858 did not exceed the power or the authority of the Imperial Sovereign prior to that date. Nothing in that transfer of power limited or was intended to limit the rights or powers exerciseable prior to that date by First Nations in general and the Gitksan in particular. Similarly, the decision, at Confederation, to exhaustively divide the exercise of sovereign powers between provincial and federal governments did not expand the powers of the Sovereign nor extinguish the rights of the Gitksan.

Lambert Reasons, para.1015

217. Lambert J.A. would have held that the assertion of British sovereignty took away only such rights of self-government as were inconsistent with Crown sovereignty. In his view, Gitksan and Wet'suwet'en customary laws of self-government were not inconsistent with British sovereignty, and have continued to the present day. Both principle and authority support this view.

Lambert Reasons, paras.1028-1029

218. The finding of the majority of the Court of Appeal that rights of self-government were "superseded" cannot be supported. Nothing is gained by using this term in place of the more conventional term, "extinguishment". The same test which this Court advanced in

Calder and confirmed in *Sparrow*, that the intention of the Sovereign to extinguish an aboriginal right must be clear and plain, must still be applied, whether such extinguishment was express or, as the term "superseded" suggests, to be implied.

Sparrow, at 1098-99

219. The Court of Appeal correctly held that the enactment of general land legislation in the province which enabled the making of Crown grants of land was insufficient, of itself, to support a finding of a clear and plain intention to extinguish aboriginal rights to the lands of the Province. They reversed the findings of the trial judge on this point.

220. No less strict a view must be taken of the proposition that the enactment of general legislation empowering colonial, provincial or federal governments to legislate in respect of certain matters evidences a clear and plain intention to extinguish self-government rights of aboriginal peoples in general and the Gitksan in particular.

221. The Court of Appeal unanimously followed the *Sparrow* test in respect of the trial judge's finding of implied extinguishment of aboriginal rights to lands and resources. The majority appears to have assumed, however, that this test applies only in the case of land and resource rights, but does not apply in the case of self-government rights.

222. The finding by the majority of the Court of Appeal that the self-government rights of the Gitksan were extinguished by the assertion of sovereignty, the creation of a colonial government in the colony, or the division of legislative powers between the province and the dominion, is no less than an attempt to segregate aboriginal self-government rights from land and resource rights, and to say that the test of extinguishment need not apply to the former. The Court, having rejected the trial judge's finding of comprehensive extinguishment of all aboriginal rights because of a presumed intent of the sovereign to appropriate all land-based rights to itself, makes precisely that finding in respect of self-government rights.

223. The Gitksan appellants submit that the right of self-government of aboriginal people was incorporated into the common law at the time of the assertion of European sovereignty,

and is an existing aboriginal right within s.35 of the *Constitution Act, 1982*. The division of powers **of the Sovereign** is complete between the federal and provincial levels of government. Aboriginal self-government, however, is not derived from the powers of the Sovereign and is unaffected by this arrangement. The grant of a power to legislate does not, by itself, extinguish the pre-existing aboriginal rights which continue as a matter of federal common law.

Roberts v. Canada, [1989] 1 S.C.R. 322 at 340

224. Because of their findings concerning the extinguishment of self-government rights, both the trial judge and the majority on appeal failed to make findings as to the scope and extent of these rights.

225. In view of this, these appellants seek the declaration set out at paragraphs 225(c), (d) and (f) of the Order Requested. The Gitksan do not claim a right to govern the territory. As Lambert J.A. correctly characterized it, they claim a right to govern themselves through their own institutions in relation to the preservation and enhancement of the integral parts of their distinctive society.

Lambert Reasons, para.1014

PART IV: NATURE OF ORDER REQUESTED

226. These Appellants seek the following orders:

(a) An order declaring that the Gitksan have aboriginal title to occupy, possess, use and enjoy their territory and the resources of that territory;

(b) An order declaring that the Gitksan have a right to harvest, manage and conserve the territory and its resources, having regard to:

(i) the preservation and enhancement of the quality and productivity of the natural environment;

(ii) the immediate and long term economic, social and cultural benefits that may accrue to the Appellants and their future generations; and

(iii) consultation and cooperation with ministries and agencies of the Crown and with third parties who may be affected by the exercise of the Appellants' rights;

(c) An order declaring that the Gitksan have a right to maintain and develop their institutions for the regulation of their aboriginal title and for the harvesting, management and conservation of the territory and resources;

(d) An order declaring that the Gitksan have a right of self-government within the territory through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity;

(e) An order that the geographical scope of Gitksan territory be remitted to the British Columbia Supreme Court for decision in accordance with the direction of this Court;

(f) In the alternative, a declaration that the Gitksan right of self-government has not been extinguished;

(g) An order that the issues of entitlement to, and the quantum of, damages or compensation for wrongfully alienated lands within the territory and damages or compensation for wrongful interference with these Appellants' aboriginal rights be remitted to the British Columbia Supreme Court; and

(h) Costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5th DAY OF DECEMBER, 1996.

Stuart Rush, Q.C. Peter Grant Michael Jackson

Louise Mandell David Paterson

NOTICE TO THE RESPONDENT: Pursuant to subsection 44(1) of the *Rules of the Supreme Court of Canada*, this appeal will be inscribed by the Registrar for hearing after the respondent's factum has been filed or on the expiration of the time period set out in paragraph 38(3)(b) of the said rules, or as the case may be.

PART V: LIST OF AUTHORITIES