COURT OF APPEAL FOR BRITISH COLUMBIA

Citation No.: CA013770

Vancouver Registry:

Between

Delgamuukw, a.k.a. 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 one behalf of
members of thirty eight Gitksan Houses and twelve Wet'Suwet'En
Houses as shown in Schedule 1)

Plaintiffs
(Appellants)

and

Her Majesty The Queen in Right of the Province of British
Columbia and The Attorney General of Canada,

Defendants
(Respondents)

Before:

THE HONOURABLE MR. JUSTICE TAGGART
THE HONOURABLE MR. JUSTICE LAMBERT
THE HONOURABLE MR. JUSTICE HUTCHEON
THE HONOURABLE MR. JUSTICE MACFARLANE
THE HONOURABLE MR. JUSTICE WALLACE

Appearances:

Counsel for the Appellants:	Stuart Rush, Q.C Peter R. Grant Louise Mandell Michael A. Jackson Murray Adams

	David Paterson
Supporting Intervenors:	Marion R. Buller
Union of B.C. Indian Chiefs	Nancy H. Sandy
	Stephen Point
	R. Taylor
Coalition:	Thomas Berger, Q.C.
Coast Salish Nation	Harry A. Slade
Nuu-Chah Nulth Tribal Council	
Ktunana-Kinbasket Tribal Council	
Tsimpsean Tribal Council	
Okanagan Indian Band	
Carrier-Sekani Tribal Council	Arthur Pape
Massett Band and the Old Massett Village Council	Jack Woodward
National Indian Brotherhood/ Assembly of First Nations	Peter W. Hutchins Diane H. Soroka and Anjali Choksi (of the Quebec Bar)
Party Intervenors:	
N.T.C. Smokehouse Ltd.	David M. Rosenberg
Harry Thomas Dick	Hugh M.G. Braker
William Alphonse	Lewis F. Harvey
Allen Jacob Lewis	
Allen Frances Lewis & Jacob Kenneth Lewis	Harry Slade
Jerry Benjamin Nikal	Peter Grant
Dorothy Marie Van der Peet	Louise Mandell &

	Leslie Pinder
William & Donald Gladstone	Marvin R.V. Storrow, Q.C.
	Peter T. Burns, Q.C.
	Maria A. Morellato

Counsel for the Respondent:

Attorney General of British Columbia	Bryan Williams, Q.C.
	Joseph Arvay, Q.C.
	Robert Taylor
	Glen Bell
	Meredith Quartermain
	Jennifer Hocking
	Sharon Lindgren

Agents for the Respondent:

Attorney General of Canada	James Macaulay, Q.C.
	M. Marvyn Koenigsberg, Q.C.
	Loryl Russell
	Murray Wolf

Supporting Intervenors:	
Alcan Aluminium Limited	J. Edward Gouge Cecilia A. Low
Coalition: *The Mining Association of B.C.* *B.C. and Yukon Chamber of Mines* *Coal Association of Canada* *Mining Suppliers Contractors and Consultants Association of B.C.* *Council of Forest Industries* *Guide Outfitters Association of British Columbia* *Sports Fishing Institute of British Columbia* *Fisheries Council of British Columbia* *Pacific Fishermen's Alliance* *The Business Council of British Columbia* *The Northern Interior Lumber Sector of the Council of Forest Industries* *The Caribou Lumber Manufacturers Association* *B.C. Cattlemen's Association* *B.C. Chamber of Commerce*	J. Keith Lowes Paula S. Grahame
Amici Curiae:	Charles F. Willms P. Geoffrey Plant Thora A. Sigurdson
Place and Date of Hearing:	Vancouver, British Columbia May 4-8, May 11-15, May 25-29, June 22-26, June 29, 30 and July 2, 3, 1992
Place and Date of Judgment:	Vancouver, British Columbia June 25, 1993

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Reasons for Judgment of Mr. Justice Macfarlane

Concurred in by Mr. Justice Taggart

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PART 1

INTRODUCTION

[1] This appeal concerns a claim on behalf of aboriginal peoples to the ownership of and control over a large area of land and resources in central British Columbia.

[2] The appeal is from the order of Chief Justice McEachern sitting as a trial judge, who dismissed the plaintiffs' action. I will refer to him throughout these reasons as the "trial judge". The order was pronounced March 8, 1991, and the reasons are reported at [1991] 3 W.W.R. 97. All references to the reasons will be to the pages of that report.

[3] The trial judge said the plaintiffs had classified their claims under three heads, ownership, jurisdiction, and aboriginal rights (p.366) and had asserted those rights over 22,000 square miles (58,000 square kilometres) of territory.

[4] The trial judge held the plaintiffs had not made out their claims to ownership and jurisdiction. However, he found aboriginal rights for non-exclusive sustenance purposes had been established in a large portion of the territory (p.395). He defined that part of the territory by reference to map 5, which is attached to his reasons (pp.450-460).

[5] The trial judge then considered, and found in favour of the Province's plea that the plaintiffs' rights were extinguished by the operation of 13 Colonial Instruments enacted prior to the entry of British Columbia into Confederation in 1871 (p.425). On appeal the effect of this decision is referred to as "blanket extinguishment".

[6] Despite his conclusion on blanket extinguishment the trial judge held the Crown owed a fiduciary duty to permit aboriginal peoples, subject to the general law of the Province, to use any unoccupied or vacant Crown land for subsistence purposes until such time as the land is dedicated to another purpose.

[7] The trial judge summarized his conclusions at p.476:

> (1) The action against Canada is dismissed.
>
> (2) The plaintiffs' claims for ownership of and jurisdiction over the territory and for aboriginal rights in the territory are dismissed.
>
> (3) The plaintiffs, on behalf of the Gitksan and Wet'suwet'en people described in the statement of claim (except the Gitksan people of the Houses of the Kitwankool chiefs), are entitled to a declaration that, subject to the general law of the province, they have a continuing legal right to use unoccupied or vacant Crown land in the territory for aboriginal sustenance purposes as described in Pt.15 of these reasons for judgment.
>
> (4) The plaintiffs' claims for damages are dismissed.
>
> (5) The counterclaim of the province is dismissed.
>
> (6) In view of all the circumstances of this case, including the importance of the issues, the variable resources of the parties, the financial arrangements which have been made for the conduct of this case

(from which I have been largely insulated), and the divided success each party has achieved, there will not be any order for costs.

[8] The position of the plaintiffs on appeal may be summarized in this way:

They seek an order that they now have unextinguished aboriginal rights which include a right of ownership, or in the alternative a proprietary interest in the lands and resources within the claimed territory, and a right of self-regulation, with respect to such lands, resources and people.

[9] Briefly stated, the position of the Province is:

a) There has been no blanket extinguishment of aboriginal rights, pre- or post-confederation.

b) The trial judge's finding that the plaintiffs had failed to establish a right of ownership or a proprietary interest in lands in the territory ought not to be disturbed.

c) The plaintiffs have failed to establish a right of self-regulation with respect to lands and resources.

[10] No issues arise with respect to the validity of any provincial or federal law.

[11] Thus, the questions which must be decided include:

1. Whether the plaintiffs have established a right to ownership of and control over the lands and resources in the territory.

2. Whether the plaintiffs have established aboriginal rights, other than ownership or jurisdiction, and, if so, the nature, content and territorial extent of such rights.

3. Whether there has been a blanket extinguishment of all aboriginal rights in the Province.

[12] The style of cause shows that the parties to the appeal are the plaintiffs, the Province, and Canada. In fact, the plaintiffs claimed no relief against Canada, and no appeal has been taken against the dismissal of the action against Canada. The Province has abandoned its cross appeal against dismissal of the counterclaim which it made against Canada. Thus, the participation of the Attorney General of Canada on the appeal was more in the nature of an intervenor than of a party.

[13] A number of intervenors were heard, and their submissions were of great assistance. *Amici curiae* were appointed to assist the Court in resolving the extinguishment issue, the Province having abandoned its original position on that issue. They were also asked to make submissions on other questions.

PART II

NATURE OF THE CLAIM

[14] The action was brought by 51 hereditary chiefs who individually and on behalf of members of their Houses claim ownership and jurisdiction over one or more specific portions of a territory in central British Columbia, which encompasses about 22,000 square miles (58,000 square kilometres) (the "territory"). The action was not brought as a typical collective or communal claim. The plaintiffs claim ownership of 133 individual areas. The sum of the individual areas within the internal boundaries of each such area equals exactly the total land mass within the external boundary of the territory claimed by the plaintiffs. Of the 51 plaintiffs in the action 39 are hereditary Gitksan and 12 are hereditary Wet'suwet'en chiefs.

[15] The plaintiffs do not represent all of the Gitksan people because 12 chiefs of the Kitwancool houses of the Gitksan people have expressly declined to join in the action. In addition, there is some dispute between the plaintiffs and other aboriginal peoples involving alleged territorial overlaps. The Gitksan who now live in the territory number 4,000 -5,000 persons and the Wet'suwet'en number 1,500 - 2,000 persons.

[16] In their pleadings the plaintiffs made no claim against Canada. It was joined as a party at the behest of the Province.

[17] The relief sought by the plaintiffs against the Province is described in the statement of claim:

I. THE CONTENT OF ABORIGINAL RIGHTS

1. A declaration that the Plaintiffs have a right to ownership of and jurisdiction over the Territory.

2. A declaration that the Plaintiffs' ownership of and jurisdiction over the Territory existed and continues to exist and has never been lawfully extinguished or abandoned.

3. A declaration that the Plaintiffs' rights of ownership and jurisdiction within the Territory include the right to use, harvest, manage, conserve and transfer the lands and natural resources, and make decisions in relation thereto.

4. A declaration that the Plaintiffs' rights to jurisdiction include the right to govern the Territory, themselves, and the members of the Houses represented by the Plaintiffs in accordance with Gitksan and Wet'suwet'en laws, administered through Gitksan and Wet'suwet'en political, legal and social institutions as they exist and develop.

5. A declaration that the Plaintiffs' rights to ownership of and jurisdiction over the Territory include the right to ratify conditionally or otherwise refuse to ratify land titles or grants issued by the Defendant Province after October 22, 1984, and licences, leases

and permits issued by the Defendant Province at any time without the Plaintiffs' consent.

6. A declaration that the aboriginal rights of the plaintiffs including ownership of and jurisdiction over the territory are recognized and affirmed by section 35 of the ***Constitution Act, 1982***

II. RESTRICTIONS ON THE DEFENDANT, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

7. A declaration that the Defendant Province's ownership of lands, mines, minerals and royalties within the Plaintiffs' Territory is subject to the Plaintiffs' rights of ownership and jurisdiction pursuant to section 109 of the ***Constitution Act, 1867*****.**

8. A declaration that the Defendant Province's jurisdiction over the Territory, the Plaintiffs and members of the Houses represented by the plaintiffs is subject to the plaintiffs' right to ownership and jurisdiction.

9. A declaration that the Defendant Province is not entitled to interfere with the aboriginal rights and title, ownership and jurisdiction of the Plaintiffs.

10. A declaration that the Defendant Province cannot appropriate any part of the Territory through grants, licences, leases, permits or in any other manner whatsoever.

11. A declaration that the Defendant Province cannot issue or renew grants, licences, leases or permits authorizing the use of any resources within the Territory of the Plaintiffs by the Defendant Province, its agents or by third parties without the consent of the Plaintiffs.

III. DAMAGES

12. A declaration that the Plaintiffs are entitled to damages from the Defendant Province for the wrongful appropriation and use of the Territory by the Defendant Province or by its servants, agents or contractors without the Plaintiffs' consent.

IV. TRANSITIONAL RELIEF

13. A *lis pendens* against the Defendant Province over the Territory.

14. A declaration that this Honourable Court shall retain jurisdiction to resolve all outstanding disputes between the parties as to the implementation of the Declarations and Orders of this Honourable Court.

15. The costs of this action.

16. Such further and other relief as to this Court may seem just.

The claim to ownership.

[18] In their pleadings and submissions the plaintiffs admit the underlying title to the soil of the territory is in the Crown in Right of the Province of British Columbia. This is sometimes called the "allodial", "underlying", or "radical" title of the Crown. Subject only to this underlying title the chiefs claim they own, or are absolutely entitled to occupy and possess, the individual territories they claim. They contend their aboriginal right is for all purposes equivalent to ownership in fee simple.

The claim to jurisdiction.

[19] The plaintiffs claim their ownership of the territory entitles them to govern the territory by maintaining and developing their own institutions for the regulation of the harvesting, management and conservation of those lands and resources. They also claim an aboriginal right of self-government, but said during the course of the appeal their claim did not extend to challenging the validity of any particular provincial legislation.

[20] The plaintiffs did not challenge the validity of any federal law, or claim any relief against Canada in their pleadings, but at trial they asserted paramountcy of their aboriginal interest over the laws of Canada. The trial judge held the plaintiffs were not entitled to any relief against Canada and dismissed the action. (p.162) No appeal is taken against that finding.

[21] The plaintiffs do not claim to recover any privately owned lands within the territory, which were granted in fee simple prior to October 23, 1984 (para. 79, statement of claim). Instead, they claim compensation from the Province for the value of those lands within the territory. They claim the right to terminate all less than fee simple legal interests in the territory, such as logging, mining, and other leases or licences.

[22] Paragraph 12 of the relief claimed deals with the claim for damages (p.161). The allegation upon which that claim rests is that the Province, in making fee simple and other lesser grants of land and resources, wrongfully alienated Indian lands and resources. The plaintiffs contend the Province could not do so without the consent of the aboriginal peoples.

[23] Although the pleadings were confined to individual claims for declarations relating to ownership and jurisdiction the trial judge decided he would entertain a communal claim for aboriginal rights other than ownership and jurisdiction on behalf of the Gitksan and Wet'suwet'en people generally (p.120, 157).

[24] He dealt with that alternative claim at pp.157-8 of his reasons:

> In the early stages of the trial plaintiffs' counsel indicated that this case, unlike ***Calder*** was "all or nothing," that is, the claim was for ownership and jurisdiction, and the plaintiffs were not seeking any lesser relief. This position was wisely moderated later in the trial when Mr. Grant made it clear that the plaintiffs were also seeking a declaration of their aboriginal rights. He said that while ownership and jurisdiction were the plaintiffs' primary claims, they wished the court to grant them whatever other rights they may be entitled to.

> This statement was made on 12th February 1988 during the argument leading to unreported reasons for judgment on this and other questions dated 18th February 1988 in which I said:
>
> > In my view it is highly doubtful if the plaintiffs have sufficiently pleaded ***Calder*** type or other alternative claims to aboriginal rights additional to the claim to ownership and jurisdiction. Such claims are pleaded, if at all, obliquely such as in paras. 57 and 75 and by reference to aboriginal rights in paras. 74, 74(a) and in prayers to relief 6 and 9.
> >
> > It is not for me to suggest or require amendments and it may be that the course of the trial, including the clear statement made by Mr. Grant on 12th February 1988, will be sufficient to permit the plaintiffs to assert alternative claims additional to ownership and jurisdiction. I leave that question for the time being to counsel.
> >
> > Since that time we have heard a great deal of evidence and argument, and although there have been eight amended statements of claim, no amendment in this connection has been sought. Because of the course of the trial, and notwithstanding the consistent and firmly stated position of the province to the contrary, I find that a claim for aboriginal rights other than ownership and jurisdiction is also open to the plaintiffs in this action. (My emphasis.)

[25] It is to be noted that Mr. Grant, counsel for the plaintiffs, said: "they wished the court to grant them whatever other rights they may be entitled to". He did not define in an amendment the rights the plaintiffs seek. I have emphasized the order which the trial judge finally made. It was precise. He held he would entertain "a claim for aboriginal rights other than ownership and jurisdiction". He had earlier defined the term "aboriginal rights" (p.127):

> In this judgment I propose to use the term "aboriginal rights" to describe rights arising from ancient occupation or use of land, to hunt, fish, take game animals, wood, berries and other foods and materials for sustenance and generally to use the lands in the manner they say their ancestors used them. These are the kinds of "usufructuary rights" mentioned in ***St. Catherines Milling & Lumber Co. v. R.*** (1886), 13 S.C.R. 577, and which the plaintiffs claimed in ***Calder v. A.G.B.C.***, [1973] S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145. These kinds of rights were awarded, in part, in ***Baker Lake (Hamlet) v. Min. of Indian Affairs & Nor. Dev.***, [1980] 1 F.C. 518, [1980] 5 W.W.R. 193, 107 D.L.R. (3d) 513, [1979] 3 C.N.L.R. 17 (T.D.).
>
> There is no specific claim in the statement of claim in this action for a declaration respecting such rights although "aboriginal rights" are mentioned. Early in the trial, plaintiffs' counsel said that the plaintiffs' claim was for ownership and jurisdiction - "all or nothing" as I believe it

> was then described - but that position was later modified. This question of pleadings will be more fully discussed later in these reasons for judgment.

[26] Later, (pp.390-391; pp.393-394) he examined the nature of aboriginal rights, and held they were non-exclusive user rights. He specifically excluded from the alternative claim any right to ownership, which depended upon exclusive occupation and proof of specific boundaries. He also excluded from consideration any claim to jurisdiction (self-government), concluding later that it could not survive the exercise of sovereign legislative power. What was left for consideration was a *sui generic* interest.

[27] The plaintiffs have argued on appeal they were entitled to a declaration that they had aboriginal rights to the entire territory, including a right of ownership or a proprietary right, and a right to self-government, extending to land, resources and people. That was not the alternative claim addressed by the trial judge, or which the Province was called upon to meet. There were no amended pleadings to define such a broad claim. In those circumstances the claim must be taken to be the limited one referred to by the trial judge, and not a global claim which takes no account of the pleadings, and the position taken at trial. This is not a case in which the plaintiffs seek a declaration narrower in terms than those requested at trial. The claim at trial was first an "all or nothing" claim (a claim to ownership and to self-government), and alternatively a claim to user and sustenance rights. Thus, the plaintiffs sought both a broad and narrow claim. That should not now be converted into a global claim, which was not addressed by the parties or by the judge at trial.

PART III

CONCLUSIONS OF THE TRIAL JUDGE

[28] The trial judge provided a Summary of Findings and Conclusions at pp.109-116 of his reasons. The principal conclusions may be stated in this way:

(a) All aboriginal land rights in British Columbia were extinguished by colonial enactments passed prior to 1871. As a result:

(i) Since Confederation the Province has had: (a) title to the soil of the province; (b) the right to dispose of Crown lands unburdened by aboriginal title, and (c) the right, within its jurisdiction under s.92 of the ***Constitution Act, 1867*** to govern the province. All titles, leases, licences, permits and other dispositions emanating from the Imperial Crown during the colonial period or from the Crown in right of the Province since Confederation are valid insofar as aboriginal interests are concerned.

(ii) As the Crown has had all along the right to settle and develop the territory and to grant titles and tenures in the territory unburdened by aboriginal interests, the plaintiffs' claim for damages is dismissed.

(b) Even though aboriginal rights were extinguished in 1871 the Province has a continuing fiduciary duty to permit Indians to use vacant Crown land for aboriginal purposes. The honour of the Crown imposes an obligation of fair dealing in this respect upon the Province which is enforceable by law. The right of Indians to use unoccupied, vacant Crown land is not an exclusive right and it is subject to the general law of the Province. The right is shared with non-Indians who also have been allowed to use vacant Crown lands.

(c) If extinguishment had not occurred the plaintiffs had established an aboriginal right to live in their villages and to occupy adjacent lands for the purpose of gathering the products of the lands and waters for sustenance and ceremonial purposes. Such non-exclusive rights would have constituted a legally enforceable, continuing burden upon the title of the Crown in respect to the area outlined on Map 5. The claim for aboriginal rights would be allowed for the communal benefit of all the Gitksan and Wet'suwet'en peoples except the Gitksan peoples of the Kitwancool chiefs who did not join in the action.

(d) The counterclaim of the Province is dismissed; as is any claim against Canada.

[29] In reaching those conclusions the trial judge held the plaintiffs had failed to establish:

> (i) The internal boundaries of those parts of the territory claimed by each individual plaintiff.
>
> (ii) The ownership of the lands which they claimed (except as to village sites which were largely in reserves, and which he said he would not make the subject of any order).
>
> (iii) Jurisdiction or self-government.
>
> (iv) Aboriginal occupation and use of the far reaches of the territory.
>
> (v) The ***Royal Proclamation, 1763*** applied to or had any force in the colony or province of British Columbia or to the Indians living here.

[30] No appeal has been taken on the question of the internal boundaries. However, the plaintiffs contend the trial judge erred in finding against them on the question of ownership of and jurisdiction over the lands which they claimed. The plaintiffs challenge the findings of fact of the trial judge on the latter issues.

[31] In dismissing the plaintiffs' claim for damages, the trial judge said, at p.426:

> The plaintiffs, hunting for much larger game, did not directly attack any specific provincial legislation or regulation affecting aboriginal interests in the territory. Instead they sought declarations of ownership and jurisdiction to which I have added ongoing aboriginal rights. If the plaintiffs had succeeded in obtaining such declarations on their first three heads of claim, they would have contended they are entitled to damages for the consequences of all interference with the territory, although that would not follow automatically as the province advanced other defences which would then have to be considered.
>
> These broad issues were undoubtedly the ones the plaintiffs wished to have tried in this action, and I well understand why they advanced their claim in that way.

He then said:

> As the plaintiffs have failed on these issues, and as I have reached the opinion that the province has all along had the authority reasonably to terminate or diminish user rights in the territory, it follows that the plaintiffs' claims for communal damages must be dismissed.

[32] The trial judge declined to decide whether, since Confederation, the Province had the capacity to extinguish aboriginal interests. He said, at pp.397-398:

> It will be useful to mention that, because of the division of powers between Canada and the provinces at the time of Confederation (1871 for British Columbia), it has been convenient to consider these matters from

the perspective of colonial times. That is because Crown authority in those days was undivided. Thus no division of powers question can arise about the authority of the Crown to extinguish aboriginal rights in the colonial period.

It will not be necessary for me to trouble myself with the question of whether, since Confederation, the province has had the capacity to extinguish aboriginal interests. This is a vast legal and constitutional question which has not been fully explored, although it has been decided in a number of cases that some provincial legislation applies to Indians and can diminish their rights to engage in aboriginal activities.

PART IV

THE APPEAL

[33] The Province now takes a different position on extinguishment than it did at trial. It concedes that there has been no blanket extinguishment of aboriginal rights. But it submits that some aboriginal rights may have been extinguished or impaired as a result of the Province exercising its right to land (and resources) under s.109 of the ***Constitution Act, 1867*****.** It submits that where, when, and whether, that occurred are questions which can only be decided by reference to specific legislation, specific lands, and specific use of such lands; such facts are not in evidence in this case.

[34] The plaintiffs and the Province request the Court to decide some questions now and adjourn the appeal for two years to allow the parties to negotiate other issues. They ask the Court to retain jurisdiction over those other issues and, failing settlement, to hear and decide them. That request is dealt with under the heading "Remedies".

[35] While negotiations are to be encouraged, and ultimately may be the preferred way to finally resolve aboriginal issues, the role of the court is to deal with the issues arising directly from the judgment under appeal, and the evidence before the trial judge. The appeal process is not appropriate for an enquiry into the nature and effect of aboriginal rights generally. I agree with Wallace J.A. that it is not appropriate to decide the appeal on the basis of a claim not advanced below (see his reasons, paras. 308 and 309). I agree with the rejection by Wallace J.A. of the suggestion that the Province, by agreeing to negotiate certain issues, has waived its right to rely upon certain findings of fact made at trial (see his reasons, para. 503).

[36] No relief is claimed against Canada.

[37] The cross appeal of the Province from the dismissal of the counterclaim is abandoned.

The Positions of the Parties on the Appeal

The Plaintiffs

[38] Having chosen not to appeal the finding of the trial judge that they had failed to prove the internal boundaries upon which their claim to ownership and governance of individual areas was based (their primary plea), the plaintiffs contended on appeal:

a) The trial judge was wrong in holding that all of the plaintiffs' aboriginal rights had been extinguished by 1871 ("blanket extinguishment").

b) The trial judge ought to have found they have an unextinguished aboriginal right to ownership, or at least a proprietary interest in the lands and resources within the external boundary of the territory.

c) The trial judge ought to have found they have an unextinguished right to jurisdiction (self-government) in respect of the lands and

resources in the territory, and in respect of the people who use and occupy it.

d) The trial judge was wrong in his findings of fact in ignoring, rejecting, or failing to give effect to evidence which the plaintiffs say establishes aboriginal title (including ownership and jurisdiction) in respect of the whole of the lands and resources within the external boundaries of the territory.

e) The trial judge was wrong in characterizing the plaintiffs' aboriginal rights as *sui generic*, and limiting them to use and occupation.

The Province

[39] a) The trial judge erred in making a finding of "blanket extinguishment" on the basis of colonial instruments enacted prior to 1871.

b) The plaintiffs do not have a right to ownership of, or a proprietary interest in, the lands and resources which they claim. The plaintiffs' claim must fail because they did not prove exclusive use or occupation of the whole territory, nor the boundaries within which they exercised exclusive rights. Also it must fail because they failed to prove they had or maintained boundaries to the territory, the external boundary being the result of all the internal boundaries.

c) The plaintiffs do not have the right of self-government or jurisdiction as claimed in their prayer for relief. But it is understood that aboriginal peoples who lived in an organized society governed themselves by their own system of laws and customs. Certain rights or freedoms to self-government may continue to exist, but subject to the laws of Canada and of the Province.

I pause to observe that it never became clear, either from the submissions of the plaintiffs or of the Province, what specific rights or freedoms continue to exist. Apparently that is a matter for negotiation and possible agreement between those who claim such rights, and government.

d) The Province does not generally disagree with the factual findings of the trial judge on the question of ownership and jurisdiction. It agrees with the factual analysis at pp.372-373 of the trial judge's reasons.

The Province supports the finding of the trial judge's with respect to the effect to be given to the expert evidence, and to the Hudson Bay records, neither of which establishes that the plaintiffs' ancestors had exclusive possession of the territory claimed. It does not take the position the trial judge ignored or improperly rejected evidence. It supports the trial judge's conclusion as to the value of oral histories.

e) The trial judge was correct to characterize the plaintiffs' aboriginal rights as *sui generic*. But the precise location, scope, content, and consequences of the plaintiffs' aboriginal rights is a matter for negotiation, and further judicial consideration.

PART V

PROVING ABORIGINAL RIGHTS

[40] Aboriginal rights in respect of land arise from "the Indians' historic occupation and possession of their tribal lands": ***Guerin v. The Queen*****,** [1984] 2 S.C.R. 335 at 376. Thus, proof of presence amounting to occupation is a threshold question. The nature and content of an aboriginal right is determined by asking what the organized aboriginal society regarded as "an integral part of their distinctive culture": ***R. v. Sparrow*****,** [1990] 1 S.C.R. 1075 at 1099.

[41] A use need not have been exercised, or occupation established, since time immemorial to be regarded as an aboriginal right. All the evidence need show is that it had been in effect for a sufficient length of time to become integral to the aboriginal society: ***Ontario (A.G.) v. Bear Island Foundation*****,** [1991] 2 S.C.R. 570 at 575.

[42] Aboriginal rights arise by operation of law, and do not depend on a grant from the Crown: ***Calder et al v. Attorney-General of British Columbia*****,** [1973] S.C.R. 313. This was adopted by the trial judge at p.209. In ***Guerin*****,** at p.378, Indian title was described as an independent legal right pre-dating the ***Royal Proclamation of 1763*****.**

[43] The common law will give effect to those traditions regarded by an aboriginal society as integral to the distinctive culture, and existing at the date sovereignty was asserted. ***The Constitution Act, 1982*** protects those aboriginal rights which still existed in 1982.

[44] For the purposes of this litigation sovereignty was asserted in 1846, the year in which the ***Oregon Boundary Treaty, 1846*** was made.

[45] At the date of the assertion of sovereignty the underlying title to the lands in the Colony vested in the Crown: ***Sparrow*** at p.1103. The Crown title was burdened with aboriginal rights.

[46] In ***Mabo v. Queensland*****,** (1992), 107 A.L.R. 1 Brennan J. of the High Court of Australia summarised the situation in this way at p.51:

> (2) On acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to the land in that part.
>
> (3) Native title to land survived the Crown's acquisition of sovereignty and radical title. The rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.
>
> At pp.35-36, after referring to ***Amodu Tijani v. Southern Nigeria (Secretary)*****,** [1921] 2 A.C. 399 (P.C.) Brennan J. said:
>
> > Recognition of the radical title of the Crown is quite consistent with recognition of native title to land, for the radical title, without more,

> is merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory). Unless the sovereign power is exercised in one or other of those ways, there is no reason why land within the Crown's territory should not continue to be subject to native title. It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty.

[47] Wilson J. provided a summary of basic principles in ***Roberts v. Canada*** **,** [1989] 1 S.C.R. 322 at 340:

> ... In ***Calder v. Attorney-General of British Columbia*****,** [1973] S.C.R. 313, this Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands. As Dickson J. (as he then was) pointed out in ***Guerin*****,** *supra*, aboriginal title pre-dated colonization by the British and survived British claims of sovereignty. The Indians' right of occupation and possession continued as a "burden on the radical or final title of the Sovereign": *per* Viscount Haldane in ***Amodu Tijani v. Southern Nigeria (Secretary),*** [1921] 2 A.C. 399 (P.C.), at p.403.

[48] I pause to observe that not all practices in existence in 1846 were necessarily to be regarded as aboriginal rights. To be so regarded those practices must have been integral to the distinctive culture of the aboriginal society from which they are said to have arisen. A modernized form of such a practice would be no less an aboriginal right: see ***Sparrow*****.** A practice which had not been integral to the organized society and its distinctive culture, but which became prevalent as a result of European influences would not qualify for protection as an aboriginal right.

[49] Aboriginal rights were not regarded by common law as absolute. They were subject to regulation. They could be impaired, diminished or extinguished by a valid exercise of governmental power: ***Calder*** at pp.333-334 and 402-405. In that sense they were held at the pleasure of the Crown. That does not mean they are to be regarded as only personal in nature.

[50] Aboriginal rights in existence (unextinguished) as of 1982 were recognized and affirmed by s. 35(1) of the ***Constitution Act, 1982*** and now enjoy constitutional protection.

[51] Whether an aboriginal right was extinguished prior to 1982 depends upon whether a clear and plain intention to do so can be found in the instruments which are said to have had that effect.

[52] In my opinion two questions arise in deciding whether protection is to be afforded to an alleged aboriginal practice, and what, if any, remedy is to be provided:

1. Was the practice (even though now exercised in a more modern manner) integral to the distinctive culture of the aboriginal society in which some of the ancestors of the present plaintiffs were members?

2. Was the practice existing as an aboriginal right at the date when sovereignty was asserted and was it unextinguished in 1982?

PART VI

NATURE OF ABORIGINAL RIGHTS

[53] The courts have identified aboriginal rights as *sui generic.* Their unique nature has made them difficult, if not impossible, to describe in traditional property law terminology.

[54] The problem was addressed in this way in ***C.P. Ltd. v. Paul*****,** [1988] 2 S.C.R. 654 at 678:

> 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 generic*. 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 terminology.

[55] In ***Sparrow*****,** at p.1112, the court expressed this view:

> Courts must be careful ... to avoid the application of traditional common law concepts of property as they develop their understanding of ... the *"sui generis"* nature of aboriginal rights.

[56] The problem was addressed in this manner in ***Amodu Tijani*** at p.403:

> 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.

[57] In ***Mabo*****,** at p.152, Mr. Justice Toohey cited that passage and observed that "an inquiry as to whether it is "personal" or "proprietary" ultimately is fruitless and certainly is unnecessarily complex."

[58] Aboriginal rights are communal rights, although each member of the community has a personal right to exercise them: ***Pasco v. C.N.R. Co*****.,** (1989), 56 D.L.R. (4th) 404 at 410 (B.C.C.A.); ***Twinn v. Canada*****,** [1987] 2 F.C. 450 at 462 (F.C.T.D.).

[59] In ***Sparrow*** at p.1112, it was said:

> [Aboriginal] fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group.

[60] Another unique feature of aboriginal rights is that they cannot be alienated other than by surrender to the Crown: ***Catherine's Milling and Lumber Co. v. The Queen*** (1888), 14 App. Cas. 46 at 54 (P.C.); ***Smith v. The Queen,*** [1983] 1 S.C.R. 554 at 568-69.

[61] In the sense that aboriginal rights cannot be alienated other than to the Crown, the rights are personal. But that does not mean they are personal in all respects. It was put this way in ***C.P. Ltd.*** at p.677:

> Courts have generally taken as their starting point the case of ***St. Catharine's Milling and Lumber Co. v. The Queen*** (1888), 15 App. Cas. 46 (P.C.), in which Indian title was described at p.54 as a "personal and usufructuary right". This has at times been interpreted as meaning that Indian title is merely a personal right which cannot be elevated to the status of a proprietary interest so as to compete on an equal footing with other proprietary interests. However, we are of the opinion that the right was characterized as purely personal for the sole purpose of emphasizing its generally inalienable nature; it could not be transferred, sold or surrendered to anyone other than the Crown.

[62] Aboriginal rights have been characterized as a beneficial interest of some sort and as personal and usufructuary. In ***Guerin*** at p.382, Dickson J. (later C.J.C.) discussed that apparent inconsistency in authority. He said:

> It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it a personal, usufructuary right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has none the less arisen because in neither case is the categorization quite correct.
>
> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generic* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealing with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.

[63] The scope and content of aboriginal rights may vary from context to context in accordance with distinct patterns of historical occupancy and use of land. It was put this way in ***Kruger and Manuel v. The Queen*****,** [1978] 1 S.C.R. 104 at 109:

> If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis.

[64] In ***R. v. Taylor and Williams*** (1981), 62 C.C.C. (2d) 227 at 232 the Ontario Court of Appeal said:

> Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances ...

[65] The essential nature of an aboriginal right stems from occupation and use. The right attaches to land occupied and used by aboriginal peoples as their traditional home prior to the assertion of sovereignty. Rights of occupancy are usually exclusive. Other rights, like hunting or fishing, may be shared. What is an aboriginal use may vary from case to case. Aboriginal rights are fact and site specific. They are rights which are integral to the distinctive culture of an aboriginal society. The nature and content of the right, and the area within which the right was exercised are questions of fact.

[66] The precise bundle of rights that a particular aboriginal community can assert may depend upon a number of factors including the nature, kind and purpose of the use or occupancy of the land by the aboriginal community in question, and the extent to which such use or occupancy was exclusive or non-exclusive. Activities may be regarded as aboriginal if they formed an integral part of traditional Indian life prior to sovereignty.

[67] ***Baker Lake (Hamlet) v. Min. of Indian Affairs and Nor. Dev.*** (1980), 107 D.L.R. (3d) 513 (F.C.T.D.) illustrates the established common law approach to the proof of an aboriginal right. Mahoney J. held, at p.542, that the requirements for aboriginal rights are:

1. That they [the plaintiffs] and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert the aboriginal title.
3. That the occupation was to the exclusion of other organized societies.
4. That the occupation was an established fact at the time sovereignty was asserted by England.

[68] Mahoney J. held that specific aboriginal practices (hunting and fishing) were protected. Obviously he did not regard proof of occupation as encompassing a broad, unrestricted aboriginal title, extending to all possible uses of the land. Instead the focus was on specific traditional activities recognized by the aboriginal society as integral to its distinctive culture.

[69] Deane and Gaudron, JJ. took a similar view of aboriginal title in their judgment in ***Mabo*** at pp.65-66:

> The content of such a common law native title will, of course, vary according to the extent of the pre-existing interest of the relevant individual, group or community. It may be an entitlement of an individual, through his or her family, band or tribe, to a limited special use of land in a context where notions of property and land and distinctions between ownership, possession and use are all but unknown. [See ***Amodu Tijani.***] In contrast, it may be a community title which is practically "equivalent to full ownership". [See ***Geita Sebea v. Territory of Papua*** (1941), 67 C.L.R. at 557 and ***Amodu Tijani*****.**] Even where (from the practical point of view) common law native law approaches "full ownership", however, it is subject to three important limitations."

[70] Thus, native title does not have a single, generic form encompassing all activities. Its content is determined by traditional aboriginal enjoyment.

PART VII

OWNERSHIP

[71] I must emphasize at this point that the term "ownership", used to describe the interest claimed by the plaintiffs, is their word and not that of the trial judge. It may be that the use of this term was unfortunate; particularly in light of the binding authority of ***Guerin*** which has established that the aboriginal interest does not amount to beneficial ownership. Indeed, the Indian interest in ***Guerin*** was specifically held by the majority at p.349 to be incapable, once surrendered, of constituting the corpus of a trust.

[72] The plaintiffs' claim to ownership was assessed at trial on the basis that the plaintiffs must establish occupation to the exclusion of others, and that they must identify the land they claimed to own by establishing the boundaries of such land. Indeed, their case was pleaded and presented on that basis.

[73] I observe that ownership may be sole or joint. In this case the Gitksan people claimed ownership of specific areas, and the Wet’suwet’en peoples claimed other areas; the Gitksan in the north, and the Wet'suwet'en in the south. Ownership was claimed on behalf of specific Houses of both peoples. This is not a case of a joint claim to the whole territory.

[74] I think the trial judge properly applied correct legal principles in his consideration of the plaintiffs' claim to ownership, as framed in their pleadings. I am in agreement with his conclusion that an exclusive right to occupy land is required to support a claim akin to ownership.

[75] The plaintiffs themselves admit that to be an owner, one must have the right to exclude others. At para. 211 of their factum they say:

> ... when an aboriginal group has exclusive possession of land within defined boundaries, and can pass that land to other aboriginals by alienation or inheritance, then its interest in the land is properly characterized as ownership.

[76] Indeed, that was the conclusion of Mahoney J. in ***Baker Lake*** and of the trial judge. Each said exclusivity was an essential requirement for proving ownership and jurisdiction (p.388).

[77] This is in accord with a fundamental feature of ownership as defined in ***Jowitt's, Dictionary of English Law*****,** J. Burke, ed., 10th ed. (London: Sweet & Maxwell, 1977):

> , the most extensive right allowed by law to a person, of dealing with a thing to the exclusion of all other persons, or of all except one or more specified persons. ...

[78] The plaintiffs did not establish to the satisfaction of the trial judge they had the requisite exclusive possession of land to make out their claim for ownership except in locations already within reserves. As well, there was significant difficulty with the delineation of specific boundaries for the claim. It is clear that no one can own an

undefined non-specific parcel of land. In my view the trial judge applied the relevant law in dismissing the plaintiffs' claim.

[79] In asserting a claim to ownership the plaintiffs pleaded, in paragraph 56, that their ancestors and/or predecessors since time immemorial owned and exercised jurisdiction over the lands delineated by an external boundary shown in a certain exhibit.

[80] The claim was that each House owned and controlled a specific part or parts of the whole territory. To prove the claim each plaintiff sought to establish the boundary of the part of the territory to which his or her House laid claim. Such boundaries are referred to as the internal boundaries. The plaintiffs failed to prove those boundaries. No appeal is brought from that decision, but the plaintiffs seek to establish ownership of the land within the external boundary.

[81] At trial the plaintiffs put forward an original exhibit and then a number of amendments to it. These are described by the trial judge at pp.428-431 of his reasons. One reason for the failure to prove the internal boundaries and to establish ownership of the whole territory is stated by the trial judge at p.431:

> As the final external boundary is merely the result of all the internal boundaries, it is changed somewhat from the previous maps, the most significant change being the reinstatement of the Nii Kyap territory and other adjustments on the east border of the Gitksan territories.
>
> The foregoing is a very brief, incomplete and general description of the external boundaries advanced from time to time by the plaintiffs during the course of these proceedings. It is not at all surprising that there would be changes in the presentation of such a vast concept, but where the validity of the claim depends upon a reputation of title, or its equivalent, substantial changes raise serious questions about whether a reputation has been proven to the extent required by law.

[82] The Province supports the finding of the trial judge that the plaintiffs failed to prove their claim to ownership. The position of the Province was stated in speaking notes dated May 29, 1992:

> 9. The Appellants failed to prove the right of exclusive possession both in respect of the internal boundaries and the external boundaries.
>
> (a) The learned trial judge rejected the submissions of the Appellants with respect to internal boundaries in the Claim Area for four main reasons:
>
> - the territorial affidavits, sworn by the Appellants' witnesses, were not admissible as evidence of reputation of ownership (p.442);
> - various maps presented by the Appellants to show internal boundaries, had conflicting boundaries (pp.443-445);
> - claims by other tribes overlapped with claims to territory made by the Gitksan and Wet'suwet'en (pages 441-2);

- The Plaintiffs' evidence of internal boundaries is based largely on the trapline registration boundaries (***Reasons,*** p.434).

Reasons**,** pages 431, 434, 440-445

The Appellants do not challenge the ruling of the trial Judge with respect to the internal Boundaries (***Appellants' Factum*****,** Tab 6, paragraph 642). They say that his findings on the internal boundaries "do not alter the land proved to belong to the Gitksan and Wet'suwet'en within the external boundary, and distinct from that of their aboriginal neighbours." The Province disagrees that the trial Judge's findings on the issue of internal boundaries are as inconsequential as the Appellants suggest. It must be remembered the essence of the Appellants' claim to ownership is based on the House system. The Appellants claim that the House owns territories and fishing sites, and that the House chief has the authority over and responsibility for managing the land on behalf of the House members. (***Appellants' Factum*****,** Tab 4, paragraph 227). Having failed to prove that any House had or maintained boundaries, let alone exclusive boundaries to its territory, notwithstanding expending great time and effort in attempting to do so, the Appellants must be held to have failed to prove their claim of ownership.

(b) As the external boundary was but "the result of all the internal boundaries ..." (***Reasons*****,** 431), the failure to prove the internal boundaries seriously undermined any attempt to prove the external boundary, as much of the same evidence was used to prove both.

Indeed the trial Judge found that the Appellants failed to prove exclusive possession within the external boundary. At p.441 he said, correctly in our submission:

> It can hardly be said that the plaintiffs' claims are undisputed, particularly on the external boundaries, which are the subject of numerous overlapping claims by other Indian peoples. A claim to an exclusive interest in land against the Crown, based upon reputation for long time use, would require very strong evidence.
>
> ***Reasons,*** pages 441-442
>
> The trial Judge said that the evidence of <u>overlapping claims</u> disclosed:
>
> ... conflicting claims both along the external boundary, and indeed into the very heartland of the territories claimed by the Gitksan and Wet'suwet'en peoples in this action. These claims are advanced by Tsimshian, Nishga, Kitwankool, Tahltan/Stikine, Tsetsaut, Kaska-Dene, and Carrier-Sekanni peoples. It was not made clear to me what position the Babine people take with respect to this matter, but there seems to be much uncertainty about the Bear Lake area. The position of the Cheslatta bands is also uncertain, but they and

> the Babine Indians have many reserves in the southern part of the territory claimed by the Wet'suwet'en. The validity of these conflicting claims has not been proven, but the very fact that such claims have been made can not be overlooked in any discussion about a certain reputation for "undisputed" ownership or occupation of lands.

[83] I refer to this submission for two reasons. First, it refutes the suggestion that the Province by agreeing to negotiate certain issues has waived its right to rely upon findings made at trial. Second, it is a position with which I agree.

[84] The claim of ownership of the territory is not easily separated from proof of the internal boundaries of the specific parts of the territory which individual Houses claimed to own. The discussion by the trial judge of the evidence relating to the internal boundaries is relevant (pp.431-452).

[85] The trial judge says at the outset he found the treatment of the internal boundaries to be a very difficult part of the case. This difficulty stemmed primarily from the vast amount of material, received orally and from documents, used to delineate these internal boundaries. There was evidence about early traders in the territory including Mr. Brown and Mr. Ogden. The physical geography of the area and the location of natural products which were of interest to aboriginal society were analyzed. There were references to oral histories collected by Barbeau, Beynon and others. There was evidence given by natives themselves such as Art Mathews, Jr. (Tenimgyet) concerning the origins of family crests and symbols. There was evidence of well-established trails permitting visiting between villages. There was a large body of anthropological opinion including writings by Goldman, Steward, Kobrinski, Jenness, Robinson, Father Morris and testimony by Drs. MacDonald and Ray (p.434).

[86] At pp.437-39 the trial judge considered the territorial affidavits which were prepared by Neil Sterritt, a researcher for the plaintiffs who collected information by way of interviews, casual conversation with the plaintiff chiefs, and from materials prepared by a prior researcher named Chris Harris. A cartographer named Marvin George also played a crucial role in the preparation of the affidavits.

[87] The trial judge observed that these territorial affidavits likely represent the best efforts of the plaintiffs to prove a vast collection of facts. Nevertheless he discounted them considerably because of the process by which they were prepared: these affidavits incorporated the opinions of members of the plaintiffs' community which have been exposed over the years to heated and biased discussion about the land claims controversy. This cast doubt on their utility in establishing a reputation of the plaintiffs' use and ownership of the territory.

[88] At p.442 he noted that Mr. Shelford, a non-Indian resident in the territory since the 1920s, casts further doubt on the community reputation of an interest in the land such as that claimed by the plaintiffs. He observed:

> ... it is impossible to infer a community reputation for an interest in land when a prominent, life-long resident in the area like Mr. Shelford, a member of the legislature for many years, and a Cabinet minister for a

> time, who acknowledges hearing about general land claims for a long time, has never heard until very recently of claims of ownership or jurisdiction, or claims to specific lands, including his own, by chiefs whose family he has known personally for most of his life.

[89] Ultimately, at p.443, the trial judge concluded that the kind of community reputation the law requires as proof of the specific claims to the discrete territories separated by the internal boundaries had not been established by the plaintiffs.

[90] At p.435 the trial judge observed:

> While there are many differences between internal boundaries and trap line registrations, there are also so many similarities that I am driven to conclude, on this ground, as well as on other grounds, that the source of many internal boundaries was not indefinite, long use prior to European influences, but rather from fur trade user which began after the arrival of European influences in the territory. It cannot be said that the balance of probabilities on this issue favours the plaintiffs.

[91] The trial judge reached his conclusion at p.452:

> I do not think it necessary to explore further examples. The weight of evidence is overwhelmingly against the validity of these internal boundaries as definitions of discrete areas used just by the ancestors of the present members of the various Houses. As I have said, I think they more likely represent trapping areas which ancestors of the present claimants have probably used for trapping and aboriginal purposes for the past one hundred years or so.
>
> On balance, however, the evidence is not sufficiently specific and convincing to permit me to make a declaration or judgment that would award user rights to the present claimants to the exclusion of other Gitksan and Wet'suwet'en persons in preference to other Indian and non-Indian citizens.

[92] But the conclusion of the trial judge that the plaintiffs had failed to establish the internal boundaries was not the only reason for rejecting the claim to ownership of the territory. The conclusion was based on an assessment of all the evidence given by lay witnesses, experts, and in documentary form.

[93] Assessing the mass of evidence before him, to determine what specific areas had actually been used for aboriginal purposes, was a question of some difficulty.

[94] The plaintiffs challenged the findings of fact of the trial judge on the following bases:

1. The trial judge ignored, without reasons, the evidence of Gitksan pre-contact land ownership, social organization, and trade, as illustrated in plate 13 of the historical atlas of Canada.

2. The trial judge ignored or rejected, without reasons, the evidence of the Hudson's Bay records, and Professor Ray, with respect to pre-

contact Gitksan and Wet'suwet'en land ownership, self-government, and trade.

3. The trial judge rejected the entire corpus of the plaintiffs' oral histories as evidence of detailed history or land ownership, use or occupation, and said they could not provide direct evidence of the fact in issue except in a few cases where they could constitute the confirmatory proof of early presence in the territory.

4. The trial judge rejected the evidence of the anthropologists called by the plaintiffs: Dr. Daly, Dr. Mills, and Mr. Brody.

[95] The plaintiffs submit all of the above evidence was highly relevant to the nature, geographic extent, and antiquity of the systems of land ownership, self-government, and trade of the plaintiffs. They assert much of it is directly contrary to the factual findings of the trial judge on the question of aboriginal rights.

[96] In dealing with that submission it is necessary to look at the way in which the trial judge treated the evidence. I start at pp.172-205 of the reasons of the trial judge. The section is entitled "The History of the Gitksan and Wet'suwet'en people" and it discusses a number of kinds of evidence which were adduced in support of the plaintiffs' case.

[97] At p.173, the trial judge said this:

> In a nutshell, they sought first to establish both the present social organization of the Gitksan and Wet'suwet'en; secondly, that it exists today in the same or nearly the same form as at the time of contact; thirdly, that at that time, and since, the plaintiffs have used and occupied all of these separate and remote territories for aboriginal purposes; and fourthly, because of the way the plaintiffs have framed their case, they undertook also to prove the boundaries of these 133 separate territories and the distinct use made of them by the plaintiffs and their ancestors.

[98] At p.175, the trial judge referred to the ruling he made with respect to the admissibility of reputation evidence. The ruling is found at 15 B.C.L.R. (2d) at p.341.

[99] At p.177 of the trial judgment, the trial judge dealt with the evidence of the lay witnesses. This was evidence given by the plaintiffs, or their supporters. It was either *vive voce* or by affidavit and it related to the use of land by the witnesses' ancestors. It also related to the declarations of deceased persons, under the Rule dealing with reputation evidence.

[100] At p.177, the trial judge said:

> This evidence establishes, without question, that the plaintiffs' immediate ancestors, for the past 100 years or so, have been using land in the territory for aboriginal purposes.

[101] He went on to say:

> I am not persuaded the evidence is sufficiently precise and cogent, <u>when weighed against the cautions of the anthropologists</u>, to establish specific

> land use, as opposed to general land use, far enough back in time to permit the plaintiffs to succeed on issues such as internal boundaries. (My emphasis.)

[102] He went on to say, at p.178, that the evidence satisfied him most Gitksan and Wet'suwet'en people do not now live an aboriginal life and they do not seem to consider themselves tied to particular territories.

[103] At p.179 the trial judge considered, under a new heading, the ‘adaawk and kungax’. In discussing these oral histories he said, at p.180, he was not troubled with the admissibility of such evidence but he did have difficulties with the weight to be given to it. He said it did not satisfy him as being direct evidence of facts at issue but it could constitute confirmatory proof of early presence in the territory. At p.181 he gave three reasons for those conclusions. But at p.182 he said it did not matter whether he relied upon the adaawk and kungax because there was other evidence to support a finding that some ancestors of some of the plaintiffs had been present in the territory for a very long time. (My emphasis.)

[104] At p.182 the trial judge considered archaeological evidence. He said at p.184 this evidence established early human habitation at some of the sites with which the evidence dealt. He said it was helpful to the plaintiffs' case because it was evidence of habitation for a "long, long time" before the date of contact. He said the weakness of the evidence, however, was that it did not directly connect the plaintiffs to their ancestors.

[105] He then considered the weight to be attached to the Seeley Lake Medeek . In this section he dealt with the evidence about the adaawk and the House of Mary Johnson. He considered the evidence of two of the plaintiffs' experts, Dr. Gottesfeld and Dr. Mathewes (p.187). He said, at p.192, if the adaawk stood alone he could not infer much more than human presence at the site of the Seeley Lake landslide. But he said:

> As it turns out, however, I am able to infer Gitksan and Wet'suwet'en presence in that general area for the required time-depth on other evidence, particularly archaeological, linguistics and genealogy, without having to decide whether these adaawk actually describe a landslide.

Thus he gave effect to the evidence adduced by the plaintiffs with respect to Seeley Lake.

[106] At pp.192-194, the trial judge dealt with the genealogical evidence given by Ms. Harris. He had difficulties with the evidence but came to the conclusion it did not matter because of the general view he had of the case.

[107] At p.194 he considered the evidence of Ms. Marsden, who was a student in anthropology but had not graduated. He said he was not able to accept her theory because her qualifications were not adequate and her conclusions had not been published or subjected to academic or other learned scrutiny. He said she was an interested party and had ignored some verified facts. Furthermore, other learned opinions did not fit with her chronology.

[108] At pp.194-200 the trial judge dealt with linguistic evidence, and in particular the evidence of Dr. Rigsby and Dr. Kari. He concluded at p.200 the evidence of these language specialists supports Gitksan and Wet'suwet'en identity as distinct peoples for a long, long time. (My emphasis.)

[109] On p.200 he began to look at the question of historical geography and in doing so he discussed the evidence of Dr. Ray. Dr. Ray's evidence referred to the records of Mr. Brown of the Hudson's Bay Company.

[110] At p.201 the trial judge quoted an extract from the evidence of Dr. Ray based on the records of Trader Brown and said:

> The foregoing represents the strongest statement supporting the plaintiffs' basic position which is to be found in any of the independent evidence adduced at trial. It is worth noting that Dr. Ray believes the natives were located in villages, that they lived off the land, principally the fishery, and hunted in the surrounding lands which were partly controlled by nobles or chiefs, or on some more distant unidentified lands, and that they had established trade patterns or relations with other villages.

[111] At p.202 the trial judge concluded there was indeed a rudimentary form of social organization in the Babine area and it was reasonable to infer that similar levels of organization then existed in the territory. He weighed the evidence and stated, at pp.203-204:

> I find the weight of evidence supports the view that the fur trade materially changed aboriginal life before or around the time trader Brown was making his records at Fort Kilmauers. That does not prevent me from accepting Dr. Ray's opinion that Indian social organization did not all arise by reason of the fur trade. I think the evidence supports 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.

[112] In drawing his conclusions, at pp.204-205, he said:

> The scientific evidence, particularly the archaeological, linguistic and some historical evidence, persuades me that aboriginal people have probably been present in parts of the territory, if not from time immemorial, at least for an uncertain, long time before the commencement of the historical period. I base this conclusion mainly on the evidence of the archaeologists, particularly Drs. Ames and MacDonald, the linguists, Drs. Rigby and Dr. Kari, Ms. Harris' genealogical evidence, and trader Brown's records as explained by Professor Ray. (My emphasis)

[113] He said later, at p.204:

> ... it is reasonable to infer that some of the kinship relations Ms. Harris has identified would have extended back further in time to and a long time

> beyond the 1820s when I find that some of the plaintiffs' ancestors were present in the territory.

[114] And again at p.204:

> I therefore infer that the ancestors of a reasonable number of the plaintiffs were present in parts of the territory for a long, long time prior to sovereignty.

[115] The last paragraph of his conclusions, at p.205, reads:

> In a communal claim of this kind I do not consider it necessary for the plaintiffs to prove the connection of each member of the group to distant ancestors who used the lands in question before the assertion of sovereignty. It is enough for this phase of the case, subject to the other difficult questions I must consider, for the plaintiffs to prove, as they have, that a reasonable number of their ancestors were probably present in and near the villages of the territory for a long, long time.

[116] Thus the trial judge did not ignore the evidence to which the plaintiffs refer. He reached his conclusion after careful consideration and weighing of such evidence. He also used that evidence and other evidence adduced by the plaintiffs to find the long, long time test had been satisfied, a test much less onerous than the one which the plaintiffs had chosen to meet, namely proof of presence in the territory from time immemorial.

[117] The trial judge did not ignore the allegations of the plaintiffs, or disregard their evidence. An illustration is found at pp.372-373:

> It will be useful to refer to what the plaintiffs have alleged as the basis for their claims to jurisdiction and ownership, and to comment briefly on each of them. These allegations, from para. 57 of the statement of claim, are that the plaintiffs and their ancestors have:
>
> "(a) lived within the territory." This is a correct statement as to village sites but presence is only one aspect of aboriginal interests.
>
> "(b) harvested, managed and conserved the resources within the Territory." While there is no doubt the Indians harvested their subsistence requirements from parts of the territory, it is impossible to conclude from the evidence that these three activities, to the extent they were practised, were anything more than commonsense subsistence practices, and are entirely compatible with bare occupation for the purposes of subsistence. The evidence does not establish either a policy for management of the territory or concerted communal conservation.
>
> "(c) governed themselves according to their laws." I have no difficulty finding that the Gitksan and Wet'suwet'en people developed tribal customs and practices relating to chiefs, clans and marriage and things like that, but I am not persuaded their ancestors practised universal or even uniform customs relating to land outside the villages. They may well

have developed a priority system for their principal fishing sites at village locations.

"(d) governed the Territory according to their laws." I have covered this item in the previous paragraph.

"(e) exercised their spiritual beliefs within the territory." I expect that this is probably so, but the evidence does not establish that these beliefs were necessarily common to all the people or that they were universal practices. I suspect customs were probably more widely followed.

"(f) maintained their institutions and exercised their authority over the Territory through their institutions." The plaintiffs have indeed maintained institutions but I am not persuaded all their present institutions were recognized by their ancestors. The evidence in this connection was quite unsatisfactory because it was stated in such positive, universal terms which did correspond to actual practice. I do not accept the ancestors "on the ground" behaved as they did because of "institutions." Rather I find they more likely acted as they did because of survival instincts which varied from village to village.

"(g) protected and maintained the boundaries of the Territory." This is unproven. There seemed to be so many intrusions into the territory by other peoples that I cannot conclude the plaintiffs' ancestors actually maintained their boundaries or even their villages against invaders, although they usually resumed occupation of specific locations for obvious economic reasons. As recently as the 1890s Loring found Indians in defensive, winter locations away from their villages and I am uncertain the plaintiffs' ancestors maintained any boundaries.

"(h) expressed their ownership of the Territory through their regalia, adaawk, kun'gax and songs." I do not find these items sufficiently site specific to assist the plaintiffs to discharge their burden of proof.

"(i) confirmed their ownership of the Territory through their crests and totem poles." There is considerable doubt about the antiquity of crests and totem poles upon which I find it unnecessary to express any opinion.

"(j) asserted their ownership of the Territory by specific claim." This was not pressed in argument and does not assist the resolution of these issues.

"(k) confirmed their ownership of and jurisdiction over the Territory through the Feast system." I do not question the importance of the feast system in the social organization of present-day Gitksan and I have no doubt it evolved from earlier practices but I have considerable doubt about how important a role it had in the management and allocation of lands, particularly after the start of the fur trade. I think not much, for reasons which I have discussed in other parts of this judgement. Perhaps it will be

> sufficient to say that the evidence about feasting is at least equivocal about its role in the use or control of land outside the villages.

[118] A major attack was made on the decision of the trial judge not to put much weight on the evidence of Dr. Daly, Dr. Mills and Mr. Brodie. Their evidence is dealt with by the trial judge at pp.163-172.

[119] Thus, it cannot be said the trial judge ignored the expert evidence. He gave little weight to the evidence of Dr. Daly, Dr. Mills and Mr. Brodie. He held the evidence was admissible but gave careful reasons for placing little reliance upon it.

[120] A great deal of time was spent on the appeal in canvassing the evidence. The plaintiffs contended that on a proper view of that evidence their right to own and control the territory and its resources had been established. The thrust of their submission was that the trial judge was clearly wrong in his assessment of the evidence. The question is one of weight, not admissibility. The trial judge admitted most of the evidence adduced by the plaintiffs. In the end, he had to assess an immense body of evidence and put a value on it.

[121] As I understand the plaintiffs' position, the complaint is that the trial judge took a wrong view of the evidence, and did not give proper weight or importance to matters which the plaintiffs contend support their case. It is part of their submission that the trial judge erred in law in disregarding relevant evidence, and misinterpreting some of that evidence.

[122] The effect of the plaintiffs' submissions, however, is to require us to re-assess the evidence and give it the weight which they say should have been given to it by the trial judge. Undoubtedly there are areas of the evidence, when viewed in isolation from the rest of the evidence, that cause concern. For instance, it is not entirely clear what the trial judge meant when he said that the evidence of Mr. Brown was equivocal. It does not seem equivocal in the sense that what he wrote is ambiguous. But Brown's observations and conclusions may not, when viewed in the light of the whole of the evidence, give rise to the inferences which the plaintiffs would have us draw. The evidence may be equivocal in the sense that it does not necessarily support an inference of ownership and control of the whole territory. It may give rise only to an inference of some presence in part of the territory by the ancestors of the plaintiffs. But it may not give rise to an inference of sufficient use and occupation to establish the territorial rights which are asserted.

[123] In my opinion this is a case where the issues require an interpretation of the evidence as a whole: See ***Schreiber Bros. v. Currie Products Ltd.*****,** [1980] 2 S.C.R. 78 at 84-85; ***Lewis v. Todd*****,** [1980] 2 S.C.R. 694 at 699-701; ***Jaegli Enterprises v. Taylor*****,** [1981] 2 S.C.R. 2 at 4-5; ***Beaudoin-Daigneault v. Richard*****,** [1984] 1 S.C.R. 2 at 8-9.

[124] Given the length of the trial, the number and variety of witnesses, some lay and some expert, and the immense volume of evidence, I think it would be inappropriate (if not dangerous) for this court to intervene and substitute its opinions for those of the trial judge.

[125] The introductory part of the reasons reveals the immensity of the task the trial judge faced and adds weight to my conclusion. At pp.116-117 of his reasons, the trial judge said:

> This has been a long trial.
>
> After numerous pre-trial proceedings, including taking the commission evidence of many elderly plaintiffs, interlocutory applications and appeals, the trial began in Smithers on 11th May, 1987.
>
> After 318 days of evidence, mainly at Vancouver but partly at Smithers, the evidence was substantially completed on 7th February, 1990.
>
> Legal argument began in Smithers on 2nd April 1990 and continued there for 18 days. Argument continued in Vancouver for a further 38 days, and the trial ended there on 30th June 1990.
>
> A total of 61 witnesses gave evidence at trial, many using translators from their native Gitksan or Wet'suwet'en language; "word spellers" to assist the official reporters were required for many witnesses; a further 15 witnesses gave their evidence on commission; 53 territorial affidavits were filed; 30 deponents were cross-examined out of court; there are 23,503 pages of transcript evidence at trial; 5898 pages of transcript of argument; 3,039 pages of commission evidence and 2,553 pages of cross-examination on affidavits (all evidence and oral arguments are conveniently preserved in hard copy and on diskettes); about 9,200 exhibits were filed at trial comprising, I estimate, well over 50,000 pages; the plaintiffs' draft outline of argument comprises 3,250 pages, the province's 1,975 pages, and Canada's over 1,000 pages; there are 5,977 pages of transcript of argument in hard copy and on diskettes. All parties filed some excerpts from the exhibits they referred to in argument. The province alone submitted 28 huge binders of such documents. At least 15 binders of reply argument were left with me during that stage of the trial.
>
> The plaintiffs filed 23 large binders of authorities. The province supplemented this with eight additional volumes, and Canada added one volume along with several other recent authorities which had not then been reported.
>
> The evidence is intensely detailed, which is why, in part, this judgment is so inordinately long. I have had some difficulty with the spelling of some unusual words for which the material suggests there may be more than one correct version. For example, some writers such as Dr. Kari spell "Athabaskan" thusly, while others spell it with a "p". I have adopted Dr. Kari's spelling. With most difficult words I have attempted uniformity but I doubt if I have been completely successful.
>
> I visited many parts of the territory which is the principal subject of this case during a 3-day helicopter and highway "view" in June 1988 which is described in Sched. 1 to this judgment. I also took many automobile

> trips into the territory during many of the evenings of the nearly 50 days I sat in Smithers. These explorations were for the purpose of familiarizing myself, as best I could, with this beautiful, vast and almost empty part of the province.

[126] At p.119 the trial judge continued:

> The parties adduced such enormous quantities of evidence, introduced such a huge number of documents, and made so many complex arguments that I have sufficient information to fuel a Royal Commission. Although I assured counsel that was not my function, they apparently did not believe me.
>
> As I am not a Royal Commission, and as I have no staff to assist me, it will not be possible to mention all of the evidence which took so long to adduce, or to analyze all of the exhibits and experts' reports which were admitted into evidence, or to describe and respond to all the arguments of counsel. In these circumstances I must do what a computer cannot do, and that is to summarize. In this respect I have been brutal. I am deeply conscious that the process of summarizing such a vast body of material requires me to omit much of what counsel and the parties may think is important.

[127] One can understand why the reasons, although careful and detailed, cannot possibly disclose in full measure the analysis of particular areas of the evidence which the plaintiffs would like: for instance, what weight was given to the matters referred to in plate 13 of the Historical Atlas of Canada?; or, what inferences were drawn from each and every record of the Hudson's Bay Company? The oral histories were long and detailed. It would be unreasonable to expect an analysis of the effect to be given to each of those recollections.

[128] I am unable to give effect to the plaintiffs' submissions that the trial judge ignored evidence, was clearly wrong in his assessment of the evidence, or failed to have regard to relevant considerations. I would not interfere with his findings of fact.

PART VIII

PROPERTY RIGHTS

[129] An alternative submission of the plaintiffs in their amended claim for remedies is that if the right asserted is not found to be an ownership right then we should hold it to be a property right.

[130] The authorities which I have cited under the heading of "Proving Aboriginal Rights" indicate the futility of attempting to characterize aboriginal rights as proprietary or non-proprietary. I agree it is not correct to regard such rights as non-proprietary Because they are inalienable. They are personal in that sense but that does not end the inquiry. In the end, the aboriginal interest is a right of use and occupation of a special nature - best described as *sui generis* To stretch and strain property law concepts in an attempt to find a place for these unusual concepts which have arisen in a special context is, in my opinion, an unproductive task.

[131] Whatever protection is required to sustain the *sui generis* interest of the descendants of the aboriginal peoples is now afforded by the Constitution, and in my view we should struggle no more to find a place in English property law for that interest.

PART IX

ABORIGINAL RIGHTS

[132] The trial judge held that, subject to the question of blanket extinguishment, the plaintiffs had established aboriginal rights, other than ownership or jurisdiction (p.158). He held they were "user rights" which were not exclusive (pp.393-394) and that they were sustenance gathering rights (pp.390-391). In his view, residential rights were confined to village sites.

[133] Having stated his conclusions with respect to the question of internal boundaries he wrote this under the heading of "General aboriginal rights" at p.452:

> The foregoing leaves untouched the conclusion I expressed earlier that, subject to extinguishment, the plaintiffs were entitled to aboriginal rights to some parts of the territory for the benefit of all of these peoples. The external boundary is now artificial, but it fixes the outermost extent of the lands to which I could make a declaration of aboriginal rights in this case.
>
> I pause to say that if I were defining an area of aboriginal ownership or sovereignty it would be limited to the areas surrounding the villages I have mentioned. As no evidence or argument was advanced in this connection I do not propose to say anything further about that question. What follows relates to aboriginal rights.
>
> The question is where to draw the line.
>
> In this respect it will be necessary to be arbitrary. The most helpful evidence is geographical, particularly the great rivers and the location of the villages where the ancestors of the plaintiffs obviously lived and gathered the products they required for subsistence. There is hardly any objective evidence of early aboriginal presence based other than in the villages.

[134] The trial judge went on to consider three reasonable alternatives, found at pp.459-460 of the reasons. His conclusion was in favour of the third alternative. He decided the area shown on map 5, attached to the reasons, illustrated the approximate boundaries within which aboriginal rights could be exercised. He said, at p.460:

> The foregoing boundary creations are admittedly approximate. Perhaps counsel will prepare a better map, giving effect to what I have endeavoured to describe. If they agree, they could even draw a line across the territory with a ruler. I would not wish to be understood by any of the foregoing to be authenticating the internal or external boundaries in any way.
>
> In addition, as I do not regard exclusive use of the areas to be an essential requirement for aboriginal rights, I would not wish the foregoing reliance upon external boundaries finally or conclusively to settle any

> overlap questions between the plaintiffs and their aboriginal neighbours. Those are questions which may only be settled by negotiations between these peoples or by litigation between them.

[135] In considering the claim for aboriginal rights of a communal nature the trial judge said, at p.388:

> As already mentioned, the plaintiffs' claims for aboriginal rights must depend upon indefinite, long aboriginal use of specific territory before sovereignty.
>
> *(a) The requirements for aboriginal rights*
>
> It will be convenient to repeat the requirements for aboriginal rights described by Mahoney J. in the ***Baker Lake*** case at pp.557-58. They are:
>
> 1. That they [the plaintiffs] and their ancestors were members of an organized society.
> 2. That the organized society occupied the specific territory over which they assert the aboriginal title.
> 3. That the occupation was to the exclusion of other organized societies.
> 4. That the occupation was an established fact at the time sovereignty was asserted by England.
>
> I am uncertain about the requirement for exclusivity. Such would certainly be essential for ownership and jurisdiction but I suspect there are areas where more than one aboriginal group may have sustenance rights, such as in the areas between the closely related Wet'suwet'en and Babine peoples at Bear Lake and along the Babine River, and possibly in other peripheral areas. I cannot accept that two aboriginal peoples who both used land for sustenance would not each have aboriginal rights to continue doing so although they would not be exclusive rights.
>
> I also think a further requirement must be added to the tests formulated by Mahoney J. What the law protects is not bare presence or all activities, but rather aboriginal practices carried on within an aboriginal society in a specific territory for an indefinite or long, long time. This relates to what I have just said about commercial trapping.

[136] I think the trial judge was correct in applying the test derived from ***Baker Lake*** and in his comments about exclusivity. What the law protects is not bare presence or all activities, but those which were an integral part of and recognized by an aboriginal society prior to the assertion of sovereignty. The formidable task which the trial judge faced was to determine on an assessment of all the evidence whether the plaintiffs had established sufficient use and occupation to support a claim to aboriginal rights in the whole of the territory.

[137] The plaintiffs submit it was an error in law for the trial judge to hold (at pp.365-388) that the plaintiffs' claims for aboriginal rights must depend upon indefinite, long aboriginal use of specific territory before sovereignty.

[138] I think that that requirement was nothing more than one measurement of what was likely to be integral to the aboriginal society. As the trial judge observed in reviewing the ***Baker Lake*** case, at p.350 of his reasons:

> It is difficult to imagine a clearer case for aboriginal rights than ***Baker Lake*** because the plaintiffs' ancestors had exclusively used these lands for aboriginal purposes for a long, long time before contact or sovereignty.

[139] In short, if an aboriginal activity had been recognized for a long time it was likely to be integral.

[140] The trial judge applied the ***Baker Lake*** requirements at pp.389-390 of his reasons. His conclusions may be summarized in this way:

1. The ancestors of the plaintiffs have been present in the territory for a long, long time. (Not just in villages.)
2. There is evidence of occupation by the Indians in villages at important locations in the territories. But it may be inferred that they would have used surrounding lands (cultivated fields) and other lands further away as required.
3. While it does not appear that the plaintiffs were able to keep invaders or traders out of their territory, there was no reason to believe that other organized societies had established themselves in the heartland of the territory on a permanent basis, and therefore the test of exclusion of other organized societies was met in respect of the areas actually used.
4. The occupation by the plaintiffs at the time of the assertion of sovereignty was established. The plaintiffs had been present in their villages and occupied surrounding areas for aboriginal purposes for an uncertain long time before British sovereignty.

[141] The trial judge applied the "long time" requirement at pp.182, 192 and 200 (the relevant passages are emphasized earlier in these reasons). Each time he held that the plaintiffs had met the standard. At p.390 the trial judge referred again to long time aboriginal practices:

> This brings me to the additional test for aboriginal rights which I have added to those mentioned by Mahoney J. in ***Baker Lake.*** I have already discussed this generally, and I have concluded that the aboriginal activities recognized and protected by law are those which were carried on by the plaintiffs' ancestors at the time of contact or European influence and which were still being carried on at the date of sovereignty, although by then with modern techniques. I have already decided that trapping for the fur trade was not an aboriginal activity.

[142] The reference to "trapping for the fur trade" is to the reasons at p.371. At that page the trial judge addressed the question whether commercial trapping was an aboriginal practice. He held it was not since it resulted from European influences. He also said his decision that trapping on a commercial scale was not an aboriginal practice was a neutral fact in the definition of aboriginal lands habitually used by the plaintiffs' ancestors. He found they had used and occupied lands near and between villages and great rivers, and other lands farther away. He concluded ownership was limited to villages and adjacent areas, but when he considered the scope of aboriginal rights he said he was dealing with rights other than ownership and jurisdiction (p.157). In his view aboriginal rights were exercised not only in villages, which were used for residential purposes, but for other purposes farther afield. In the result he held that aboriginal rights were exercised in an area not yet accurately defined, but which he thought was represented, in an approximate way, on Map 5.

[143] I have one more observation with respect to the consideration of a time depth component in determining the existence of aboriginal rights.

[144] It has been said that the inclusion of the Métis in s.35 of the ***Constitution Act, 1982*** as one of the categories of persons benefiting from aboriginal rights guarantees must exclude any time depth consideration when proving aboriginal rights. But the Métis, although sharing a common constitutional basis for the protection of their rights, are unique. Certainly, they have a unique history and a different cultural makeup which sets them apart from other aboriginal groups. Their traditional ties to the land and each other are different. The Métis distinction is advanced with pride by the Métis people and should not be treated dismissively.

[145] The requirement that the plaintiffs' practices had to be traditional before qualifying for the protection of the common law as aboriginal rights may involve a time consideration which has no parallel in the determination of the aboriginal rights of the Métis.

[146] I should add that the application of the federal jurisdiction in s.91(24) to the Métis people may well also involve special considerations. At least, the manner in which this jurisdiction applies to the Métis remains a question to be decided in future cases.

[147] My conclusion, having in mind the evidence discussed under the heading of "ownership", and in particular the passages I have emphasized, is that the requirement as to indefinite, long aboriginal use did not adversely affect the trial judge's view of the territorial limits of the plaintiffs' claim to aboriginal rights. Instead, he seems to have applied the test to determine on the evidence whether a practice had been integral to the aboriginal society or whether it was a practice resulting only from European influences. The former would be an aboriginal practice, the latter would not unless it was a modernization of the way in which an aboriginal practice was exercised.

[148] As I have mentioned, in determining what specific territory has been used or occupied for aboriginal purposes, the requirement is sufficient use and occupation to support the inference that the area was the traditional homeland of the aboriginal people asserting the right: ***Bear Island*** at p.575. Under the heading of "ownership" I have referred to evidence that the trial judge considered on the question of the territorial limits of the plaintiffs' claim to aboriginal rights. I am not persuaded that he was clearly wrong

in his assessment of the evidence, or failed to have regard to relevant considerations. As I stated earlier, I think it would be inappropriate for this court to intervene and substitute its view for that of the trial judge with respect to the weight of the evidence.

[149] If the plaintiffs succeed on the extinguishment issues they have established aboriginal rights in that area which the trial judge has identified in an approximate way by referring to what is shown in Map 5. He has left it to the parties to give more specific definition to the area.

[150] Having regard to the wishes of the parties to negotiate the more precise boundaries of that claim, I think it appropriate to leave that matter to them.

PART X

JURISDICTION (SELF-GOVERNMENT)

[151] The plaintiffs' claim to jurisdiction (a right of self-government) is stated in paragraph 73 of the statement of claim, and is mentioned in several paragraphs of the relief claimed.

> 73. The laws of the Province of British Columbia are subject to the reservation of aboriginal title, ownership and jurisdiction by the Gitksan Chiefs and the Wet'suwet'en Chiefs and do not confer any jurisdiction over the Territory and resources thereon and therein claimed by the Plaintiffs.

[152] The extent of the plaintiffs' claim to jurisdiction is better understood by reference to the relief claimed under the heading, "The Content of Aboriginal Rights", set out in Part II. The claim involves an unextinguished right to control the lands and natural resources of the Territory, and to govern the Territory and the plaintiffs' people by Gitskan and Wet'suwet'en laws. The claim seeks to exclude the operation of the British Columbia laws in the Territory.

[153] At p.128 the trial judge discussed the claim:

> (a) *Jurisdiction over land.*
>
> The plaintiffs say that their ownership interest in the territory entitles them, or their Houses or members, at their option, to govern the territory free of provincial control in all matters where their aboriginal laws conflict with the general law. I understand the position taken by their counsel to be that, upon a judgment granting them ownership and jurisdiction over these lands, they, and not the government of British Columbia, may control all land-related activities in the territory.
>
> (b) *Jurisdiction over people.*
>
> As an examination of the transcript of my various exchanges with counsel during argument will disclose, I have encountered some difficulty understanding this claim. I shall discuss it in greater detail later but I now understand this claim relates not just to land but rather to partial self-government limited to those areas where traditional Gitksan or Wet'suwet'en "laws" conflict with laws enacted by British Columbia pursuant to s.92 of the Constitution of Canada.
>
> I do not understand the plaintiffs are seeking a judgment striking down or declaring inoperative against them any present British Columbia enactment or regulation. Instead, they wish the court to make a declaration that some agency of the Gitksan and Wet'suwet'en people, presumably their chiefs or some other aboriginal body (although its identity was not made clear), are entitled to govern Gitksan and Wet'suwet'en people in the territory.

> Then, their argument goes, they may decide which of the general laws of the province, such as laws relating to education, health, family matters and land use, etc., conflict with their own laws.
>
> They wish such a declaration so that, if they decide not to obey any general laws of the province and proceedings are brought to force compliance, they may plead their own laws and the declaration of this court in their defence.
>
> The plaintiffs argue that this right to jurisdiction over people is confined to Gitksan and Wet'suwet'en persons within the territory, and they say this is a right conferred upon them by the law. It appears, however, that the plaintiffs intend to require non©Gitksan or Wet'suwet'en persons within the territory to comply with aboriginal law relating to land.

[154] Members of this court also had some difficulty in understanding the claim. Finally, counsel for the plaintiffs submitted a draft of the new remedies they were claiming in this court. They withdrew it when members of the court questioned them. Later, they made further argument and submitted a final draft in which they asserted, in connection with a claim to ownership, a right to manage the lands and resources. They claimed that in order to determine their development and safeguard their integrity as aboriginal peoples they must have:

- a right to maintain and develop their own institutions for the regulation of the ownership, harvesting, management and conservation of those lands and resources;
- an inherent right of self-government exercisable through their own institutions, to preserve and enhance their social, political, cultural, linguistic and spiritual identity;

[155] They were asked whether they were now challenging the validity of any particular federal or provincial law, and said they were not. Nevertheless, their position is that their jurisdiction would take priority over provincial laws, and thus this claim does have important implications for the validity or operation of provincial laws in the future.

[156] The claim to control and manage the use of lands and resources in the territory is linked to the claim of ownership. It questions the right of the Province to legislate with respect to such things as forestry, mining, lands, and water resources within the territory.

[157] They also claim a general right to govern the people within the territory, and to decide whether the general laws of the Province apply to those people. Furthermore, they seek to govern people who are not parties to this litigation.

[158] There may be a third possible interpretation of the claim, which Mr. Justice Hutcheon describes in his reasons as a right of "self-regulation", a right to practice certain traditions. It would involve the consent of members of the Indian community to live by certain internal rules and to continue traditions which are not in conflict with the general laws of the Province or of Canada. Mr. Justice Hutcheon describes the area of self-regulation this way:

> The traditions of the Gitksan and Wet'suwet'en societies existed long before 1846 and continued thereafter. They included the right to names and titles, the use of masks and symbols in rituals, the use of ceremonial robes and the right to occupy or control places of economic importance. The traditions, in these kinship societies, also included the institution of the clans and of the Houses in which membership descended through the mother and of course the feast system. They regulated marriage and the relations with neighbouring societies.

[159] However, what specific system of laws and customs have continued was not made clear.

[160] If there is no conflict between certain traditions, and provincial or federal laws, then I see no reason why the Indian people cannot agree to continue or revive such traditions. I understand, however, that they seek to extend their regulatory power to other matters. In an addendum to their factum the plaintiffs stated it was beyond the scope of this litigation to determine whether there exists a developed body of laws which can be placed alongside provincial laws.

[161] The addendum concluded with these paragraphs:

> 64. The Appellants have, in fact, begun the process, which in some cases is quite developed, of articulating a contemporary legal framework for the management, harvesting and conservation of the resources. Particular examples of this are the fishery bylaws and the blanket trapline proposal which are both referred to in the evidence.
>
> 65. This is an ongoing process, and one likely to be spurred by the opening of real negotiations with the Provincial and Federal Respondents and, even more importantly, by this Court, through its declarations, providing the legal and constitutional space for the Appellants' laws.

[162] I think it was this ongoing process which the trial judge had in mind when he said, at p.378:

> It is apparent that on this issue the plaintiffs' thrust is directed not to historical practices and customs, but rather to undefined, unspecific forms of government which some of the chiefs are just beginning to think about.

[163] No declaration by this court is required to permit internal self-regulation in accordance with aboriginal traditions, if the people affected are in agreement. But if any conflict between the exercise of such aboriginal traditions and any law of the Province or Canada should arise the question can be litigated. No such specific issue is presented on this appeal.

[164] In any event, the declaration of jurisdiction/self-government sought by the plaintiffs is of a sort quite different from the self-regulation I have described above. In my view, the plaintiffs' claim for jurisdiction, relating to both people and to the territory, is for broader powers of government.

[165] Rights of self-government encompassing a power to make general laws governing the land and resources in the territory, and the people in that territory, can

only be described as legislative powers. They serve to limit provincial legislative jurisdiction in the territory and to allow the plaintiffs to establish a third order of government in Canada. Putting the proposition another way: the jurisdiction of the plaintiffs would diminish the provincial and federal share of the total distribution of legislative power in Canada.

[166] The trial judge concluded that aboriginal jurisdiction did not survive the assertion of British sovereignty. In particular, he said at pp.407-408:

> It is inconceivable, in my view, that another form of government could exist in the colony after the Crown imposed English law, appointed a Governor with power to legislate, took title to all the land of the colony and set up procedures to govern it by a Governor and Legislative Council under the authority of the Crown.
>
> In addition, in my view, the enactment of ***British North America Act, 1867*** adherence to it by the colony of British Columbia in 1871, which was accomplished by Imperial, Canadian and colonial legislation, confirmed the establishment of a federal nation with all legislative powers divided only between Canada and the province. This also clearly and plainly extinguished any residual aboriginal legislative or other jurisdiction, if any, which might have existed in the colonial period.
>
> Thus, he tied the extinguishment of any aboriginal law-making power to the imposition of English law in the colony of British Columbia in 1858.

[167] It was on the date that the legislative power of the Sovereign was imposed that any vestige of aboriginal law-making competence was superseded. This likely occurred when the mainland colony was founded and became a territory under the jurisdiction of the Imperial Parliament in 1858.

[168] Even if this view is inaccurate, a continuing aboriginal legislative power is inconsistent with the division of powers found in the ***Constitution Act, 1867*** and introduced into British Columbia in 1871. Sections 91 and 92 of that Act exhaustively distribute legislative power in Canada.

[169] Sections 91 and 92 were interpreted in ***Bank of Toronto v. Lambe*** (1887), 12 A.C. 575 at 588 (P.C.) as exhausting the whole range of legislative power in Canada. A more compelling and explicit interpretation is provided in ***A.G. Ont. v. A.G. Canada*** (the ***References Case***) [1912] A.C. 571 at 581, 584 (P.C.):

> Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada.
>
> . . .

> For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the ***British North America Act.*** [My emphasis]
>
> See also ***Reference re Agricultural Products Marketing Act (Canada),*** [1978] 2 S.C.R. 1198 at 1296, and ***Reference re Resolution to Amend the Constitution*****,** [1981] 1 S.C.R. 753 at 820.

[170] Any doubt that aboriginal people are subject to this distribution is eliminated by s. 91(24), which awards legislative competence in relation to Indians to Parliament.

[171] With respect, I think that the trial judge was correct in his view that when the Crown imposed English law on all the inhabitants of the colony and, in particular, when British Columbia entered Confederation, the Indians became subject to the legislative authorities in Canada and their laws. In 1871, two levels of government were established in British Columbia. The division of governmental powers between Canada and the Provinces left no room for a third order of government.

[172] Such a view is in accord with the definition of Parliamentary sovereignty provided by Professor Dicey in his ***Law of the Constitution*****,** 10th ed. (London: MacMillan & Co., 1959) at 40, quoted by the trial judge at p.385, the key part of which is in these words:

> There is no person or body of persons who can, under the English Constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the courts in contravention of an Act of Parliament.

[173] It is also in accord with the view expressed in ***Sparrow*** at p.1103:

> . . . there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown . . . .

[174] For these reasons, the claim to jurisdiction as pleaded, in both its aspects, must fail. Furthermore, the claim to the right to control and manage the use of lands and resources in the Territory cannot succeed because the plaintiffs failed to establish the necessary ownership needed to support such a jurisdiction.

[175] The establishment of some form of Indian self-government beyond the regulatory powers delegated by the ***Indian Act*** is ripe for negotiation and reconciliation. Undoubtedly, at the heart of all discussions will be the extent to which Indian self-regulation and other levels of government can co-exist. However, for the purposes of this litigation it is sufficient to repeat the views of the trial judge expressed at p.386:

> No court has authority to make grants of constitutional jurisdiction in the face of clear and comprehensive statutory and constitutional provisions.

PART XI

EXTINGUISHMENT

[176] The plaintiffs submit that they cannot be dispossessed of their traditional lands without consent. In making that submission they rely on the terms of, and the policy expressed in ***The Royal Proclamation, 1763*****,** and upon ***R. v. Sikyea*** (1964), 46 W.W.R. 65 (N.W.T.C.A.) aff'd. [1964] S.C.R. 642 and ***The Queen v. Symonds*** (1847), N.Z.P.C.C. 387.

i) The Royal Proclamation, 1763

[177] The plaintiffs submit that if the Proclamation applies to Indian lands in British Columbia, their Indian interest cannot be extinguished without their consent. Alternatively, they say the policy underlying the Proclamation stands as part of the common law of aboriginal rights in British Columbia. I adopt the reasons for judgment of the trial judge, and those given by Mr. Justice Wallace on this appeal, and conclude that neither the Proclamation nor the policy which gave rise to it apply to Indian lands in British Columbia.

[178] ***Sikyea*** and ***Symonds*** were both mentioned by Hall J. in ***Calder*** (***Sikyea*** at pp.397-8 and ***Symonds*** at pp.403-4). Nevertheless, he concluded that aboriginal rights could be extinguished by surrender or by express legislation (that is, by the unilateral act of the Crown). Consent would not be required for the latter. Hall J. did not say consent was required, nor did Judson J suggest that extinguishment depended upon the consent or agreement of the Indians.

[179] In ***Sparrow*****,** at p.1103, it was recognized that while British policy towards the aboriginal peoples was based on respect for their right to occupy traditional lands, nevertheless legislative power could be exercised to dispossess them.

[180] Although treaty making is the best way to respect Indian rights there is no doubt, based on the authorities, that the interest of aboriginal peoples in or in respect of land could, prior to 1982, be extinguished by a clear exercise of constitutionally valid sovereign power. This could be done without the consent of the Indians.

ii) Can the intention to extinguish be implied?

[181] The test laid down in ***Sparrow*****,** at p.1099, is that the sovereign's intention must be clear and plain if it is to extinguish an aboriginal right. That was said in the context of a case concerning alleged extinguishment by regulation. The Court did not say that express legislation was required.

[182] The Supreme Court of Canada has had several opportunities to say that extinguishment cannot be implied.

[183] In ***Simon v. The Queen*****,** [1985] 2 S.C.R. 387, the court declined to rule on whether a treaty right had been extinguished by necessary implication flowing from occupancy of the treaty lands by non-natives. At pp.405-406 Dickson C.J.C. said:

> Given the serious and far-reaching consequences of a finding that a treaty right has been extinguished, it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises. As Douglas J. said in ***United States v. Sante Fe Pacific R. Co*.,** supra, at p.354, "extinguishment cannot be lightly implied".

[184] At p.347 of ***U.S. v. Santa Fe Pacific R. Co*.** 314 U.S. 339 (1941) it was said extinguishment by the U.S. Congress could be accomplished "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise..."

[185] In ***C.P. Ltd*.** the railway had acquired a statutory right of way from the Crown over Indian lands. That was held to be sufficient to support the granting of a permanent injunction against the Indians with respect to the right of way. The question arose whether the Indian title had been extinguished and, if so, how had it been extinguished? It was said it was clearly arguable that the railway's right of way was inconsistent with a right of occupation continuing in the Band but, on the other hand, the question was posed whether the legislature's intention to extinguish the Band's interest in the underlying fee remaining in the Crown was "clear and plain". The court declined to answer the question or to say that express legislation was required to extinguish.

[186] In ***R. v. Horseman*,** [1990] 1 S.C.R. 901, a case decided about three weeks before ***Sparrow*,** Cory J. said, at p.930, referring to ***Simon*,** that:

> ... the onus of proving either express or implicit extinguishment lies upon the Crown.

[187] In my opinion express language such as "all aboriginal rights are hereby extinguished" is not required. The intent to extinguish aboriginal rights may be inferred from less explicit language.

[188] The clear and plain test, in relation to statutory interpretation, has its origins in the common law. It has been discussed in relation to the admission of evidence in order to construe deeds and statutes: ***Tilbury v. Silva*** (1890), 45 Ch.D. 98 at 120 (C.A.). The clear and plain test may be regarded as a re-affirmation of the literal rule of statutory construction. That doctrine is discussed by E.A. Driedger, ***The Construction of Statutes*,** (Toronto: Butterworths, 1974) at 63-4.

[189] The clear and plain test has also found its place in relation to canons of construction such as the presumption against interference with vested rights and the presumption that property rights will not be confiscated without compensation. The first presumption was stated in ***Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*,** [1933] S.C.R. 629 at 638 by Duff C.J. as follows:

> A legislative enactment is not to be read as prejudicially affecting accrued rights, or 'an existing status'... unless the language in which it is expressed requires such a construction. The rule is described by Coke as a 'law of Parliament' ... meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its

> intention expressly, **unless, at all events, that intention is plainly manifested by unavoidable inference.** (My emphasis.)

[190] The second presumption is discussed in ***A.G. of Canada v. Hallett & Carey Ltd.*****,** [1952] A.C. 427 (P.C.), where Lord Radcliffe said, at p.450:

> It is fair to say that there is a well-known general principle that statutes which encroach upon the rights of the subject, whether as regards person or property, are subject to a 'strict' construction. Most statutes can be shown to achieve such an encroachment in some form or another, and the general principle means no more than that, where the import of some enactment is inconclusive or ambiguous, the court may properly lean in favour of an interpretation that leaves private rights undisturbed.

[191] To summarize: in relation to traditional property rights, if the intention to disturb the rights is clear and plain, the presumptions against such a result will not apply. Such an intention may be declared expressly or manifested by unavoidable implication.

[192] In my view, the clear and plain test should be applied with as much vigour to aboriginal title as it is to traditional property rights. This approach stems from the special relationship between the Crown and aboriginal people which has existed since the assertion of sovereignty and which is particularly apparent in relation to Indian interests in land.

[193] Shortly after the arrival of European settlers, the Crown took upon itself the protection of the interests of Indians in land transactions with third parties. This was observed in ***Guerin*** at p.383; indeed, Dickson J. (later C.J.C.) found in ***Guerin*** at p.376 that the Crown's position as an intermediary between Indians and non-Indians formed the basis of a fiduciary duty:

> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.
>
> An Indian Band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the Band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. It is still recognized in the surrender provisions of the ***Indian Act***. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.

[194] The fiduciary role of the Crown was revisited by Dickson C.J.C. and La Forest J. in ***Sparrow*** at p.1108:

> In ***Guerin*****,** *supra,* the Musqueam Band surrendered reserved lands to the Crown for lease to a golf club. The terms obtained by the Crown were

> much less favourable than those approved by the band at the surrender meeting. This Court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, ***Guerin*** together with ***R. v. Taylor*** and ***Williams*** (1981), 34 O.R. (2d) 360 (C.A.), ground a general guiding principle for s. 35(1). That is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

[195] If the fiduciary obligation of the Crown to Indians in relation to the sale of their land provides a "guiding principle" for the application of s.35 of the ***Constitution Act, 1982,*** then surely it must bear on the proper test to be applied to legislation purporting to extinguish aboriginal title.

[196] In this, as in all dealings between aboriginal people and our government, the honour of the Crown is engaged. As was said in ***Sparrow,*** at p.1107:

> The honour of the Crown is involved in the interpretation of Indian treaties, and, as a consequence, fairness to the Indians is a governing consideration.

[197] In my view, the honour of the Crown, arising from its role as the historic protector of aboriginal lands, requires a clear and plain intention to extinguish aboriginal title that is express or manifested by unavoidable implication.

[198] Consequently, applying the clear and plain test to extinguishment of aboriginal rights, there can only be extinguishment by necessary implication if the only possible interpretation of the statute is that aboriginal rights were intended to be extinguished.

[199] The clear and plain test, whether applied to vested rights, property rights, or aboriginal rights, ensures respect for and protection of those special rights. Although aboriginal rights cannot be easily described in terms of English property law, they are to be regarded as unique and important. But, like vested rights and property rights, they may be impaired or extinguished with or without compensation by a clear and plain exercise of competent legislative power. However, the legislative intention to do so will be implied only if the interpretation of the statute permits no other result. ***Sparrow*** has made it clear that if the intention is only to limit the exercise of the right it should not be inferred that the right has been extinguished.

[200] It must be remembered that the Crown had power to impair or extinguish the Indian interest. Exercise of the power could be exercised in many ways: by conveyance of title; by lease; by a license to remove or control resources; by permits to hunt or to fish. Some involved impairment, others extinguishment.

[201] Whether the intention to extinguish an aboriginal right is clear and plain must of necessity depend upon the nature of the Indian interest affected by the grant, and the nature of the grant itself.

[202] Before concluding that it was intended that an aboriginal right be extinguished one must be satisfied that the intended consequences of the colonial legislation were such that the Indian interest in the land in question, and the interest authorized by the legislation, could not possibly co-exist. Again, if the consequence is only impairment of the exercise of the right it may follow that extinguishment ought not to be implied.

iii) Extinguishment in the colonial period: 1846 to 1871

[203] The trial judge held that all aboriginal rights in the Province had been extinguished by the time British Columbia entered confederation in 1871 but that there was a fiduciary duty to permit aboriginal peoples to continue to hunt over unoccupied Crown lands.

[204] Rights with respect to Indian reserves and fishing were not subject to that ruling.

[205] The focus of the extinguishment issue is on thirteen Colonial Instruments, enacted between 1858 and 1870. They include nine proclamations by James Douglas as Governor of the Colony of British Columbia and four ordinances. A convenient summary of these instruments is set forth by Judson J. in ***Calder,*** (at pp.331-333):

> The first [proclamation] is dated December 2, 1858, and it is stated to be a proclamation having the force of law to enable the Governor of British Columbia to have Crown lands sold within the said Colony. It authorized the Governor to grant any land belonging to the Crown in the Colony.
>
> The second proclamation is dated February 14, 1859. It declared that all lands in British Columbia and all mines and minerals thereunder belonged to the Crown in fee. It provided for the sale of these lands after surveys had been made and the lands were ready for sale, and that due notice should be given of such sales.
>
> The third proclamation is dated January 4, 1860. It provided for British subjects and aliens who take the oath of allegiance acquiring unoccupied and unreserved and unsurveyed Crown land, and for the subsequent recognition of the claim after the completion of the survey.
>
> The fourth proclamation is dated January 20, 1860. It provided for the sale of certain lands by private contract and authorized the Commissioner of Land and all Magistrates and Gold Commissioners to make these sales at certain prices.
>
> The fifth proclamation of January 19, 1861, dealt with further details of land sales.
>
> The sixth proclamation, dated January 19, 1861, reduced the price of land.
>
> The seventh proclamation, dated May 28, 1861, dealt with conditions of pre-emption and limited the right to 160 acres per person.

> The eighth proclamation, dated August 27, 1861, was a consolidation of the laws affecting the settlement of unsurveyed Crown lands in British Columbia.
>
> The ninth proclamation, dated May 27, 1863, dealt with the establishment of mining districts.
>
> Then follow four ordinances enacted by the Governor by and with the consent of the Legislative Council of British Columbia. The first is dated April 11, 1865. It repeats what the Proclamation had previously said, namely, that all lands in British Columbia and all mines and minerals therein, not otherwise lawfully appropriated, belong to the Crown in fee. It goes on to provide for the public sale of lands and the price; that unless otherwise specially announced at the time of the sale, the conveyance of the lands shall include all trees and all mines and minerals within and under the same (except mines of gold and silver). It also deals with rights of pre-emption of unoccupied, unsurveyed and unreserved Crown lands "not being the site of an existent or proposed town, or auriferous land or an Indian reserve or settlement under certain conditions".
>
> The next ordinance, dated March 31, 1866, restricts those who may acquire lands by pre-emption under the ordinance of April 11, 1865. British subjects or aliens who take the oath of allegiance have this right but it does not extend without special permission of the Governor to companies or "to any of the Aborigines of this Colony or the Territories neighbouring thereto".
>
> The third ordinance is dated March 10, 1869. It deals with the payment of purchase money for pre-emption claims.
>
> The last ordinance is dated June 1, 1870, and is one to amend and consolidate the laws affecting Crown lands in British Columbia.

[206] I proceed on the premise that all thirteen instruments were enacted by persons having legislative authority to do so, and need not consider whether Governor Douglas had the authority to extinguish aboriginal rights.

[207] The trial judge referred to the reasons for judgment in ***Calder*** at the trial and appellate level and in the Supreme Court of Canada. The view of seven judges was captured by Judson J. in this passage from p.344 of ***Calder***:

> In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.

[208] The trial judge referred to the reasons of Hall J., with whom Spence J. and Laskin J. agreed. Hall J. said at p.404:

> It would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on

the respondent and that intention must be "clear and plain". There is no such proof in the case at bar; no legislation to that effect.

[209] The trial judge applied the clear and plain test but held that intention to extinguish need not be express but may be implied at p.406:

> Thus, in my judgment, intention sufficient to establish extinguishment must be examined broadly and need not be confined to a specific act or decision at a particular moment in colonial history. Instead, intention may more properly be discerned from a course of conduct over the whole of the colonial period.
>
> I conclude that an intention to extinguish aboriginal rights can be clear and plain without being stated in express statutory language or even without mentioning aboriginal rights if such a clear and plain intention can be identified by necessary implication. An obvious example would be the grant of a fee simple interest in land to a third party, or the grant of a lease, licence, permit or other tenure inconsistent with continued aboriginal use. I shall consider this question again in a moment when I come to discuss extinguishment in relation to aboriginal rights. (My emphasis.)

[210] The trial judge said if he was wrong in holding the Indian interest was not akin to ownership that such a right was clearly and plainly extinguished, (p.408):

> As I understand the authorities, there is no jurisprudence binding on me which suggests the aboriginal interests of the plaintiffs' ancestors after the assertion of sovereignty constituted anything more than a user burden on the underlying title of the Crown.
>
> If that is not so, I find the evidence establishes beyond question that the Crown, in the colonial period, clearly and plainly intended to, and did, extinguish any aboriginal right of ownership which existed in the colony. I say this because the colonial legislation so clearly appropriated all the land of the colony to the Crown and made provision for its alienation firstly on the authority of the Governor according to English law and subsequently pursuant to legislation. That, in my judgment, is completely inconsistent with any continuing aboriginal ownership interest.
>
> As to intention, the dispatches passing between the Governor and the Colonial Secretaries in London, and legislative action taken, make it clear and plain first that the colony was to be thrown open for settlement; secondly that all the land of the colony belonged to the Crown in fee, and thirdly that only a grant from the Crown could create an ownership or proprietary land interest in the colony.
>
> I cannot imagine a [sic] any clearer statement of intention than the proclamation dated 14th February 1959 (***Calder II,*** Ex. 1185-10), in which it was declared, in s. 1:
>
> > 1. All the lands in British Columbia, and all Mines and Mineral therein, belong to the Crown in fee.

> After 1858 the Crown embarked upon numerous legislative arrangements and participated in innumerable transactions relating to the land of the province which clearly and plainly exclude any possibility of any other ownership regime. In fact, ***Calders III*** and ***XIII,*** enacted in 1860 and 1870 respectively, were comprehensive statements of the intention of the colonial Crown completely to control both the ownership and use of all the land in the colony. As I have said, the grant of fee simple or lesser interests are, by themselves, the clearest and plainest possible expressions of an intention to extinguish any other ownership interest, and there are many other examples.
>
> To put it in a nutshell, I find that legislation passed in the colony and by the Imperial Parliament that all the land in the colony belonged to the Crown in fee, apart altogether from many other enactments, extinguished any possible right of ownership on the part of the Indians.
>
> The question of whether the Crown's ownership was burdened with aboriginal rights is, of course, a separate question which I shall now turn to consider. (My emphasis.)

[211] With respect to the extinguishment of aboriginal rights, the trial judge said at pp.411-412:

> There is, as described in Pt. II, a great deal of evidence demonstrating that the Crown with full knowledge of the local situation fully intended to settle the colony and to grant titles and tenures unburdened by any aboriginal interests. The Crown must be taken to have known that it could not free the land from this burden without extinguishing these aboriginal interests. This probably did not trouble the Crown, because it also intended to allot generous reserves, and to allow the Indians to use vacant lands. The primary intention, however, was obviously to settle the colony by granting unburdened interests to settlers.
>
> In view of this history, I respectfully agree with the views of the seven judges who reached the same conclusion in ***Calder.*** I find the constitutional and legal arrangements put in place in the colony were totally inconsistent with aboriginal rights the continuation of which would have prevented the Crown from the settlement and development of the colony. As the intention of the Crown must be ascertained objectively from a consideration of all the circumstances in their historical setting, I find the Crown clearly and plainly intended to, and did, extinguish aboriginal rights in the colony by the arrangements it made for the development of the colony, including provision for conveying titles and tenures unencumbered by any aboriginal rights and by the other arrangements it made for Indians.
>
> I test this conclusion by reference to a hypothetical parcel of non-reserve land which, before the creation of the colony, had been used for a long time for aboriginal sustenance. After the enactment of even ***Calder I,*** and more so after all the ***Calder*** legislation, such parcel was subject to

> Crown grant, pre-emption or other disposition to third parties. Upon such disposition this parcel became the property of a stranger under circumstances which exclude the continuation of aboriginal use.
>
> On the authorities I have mentioned, I see no answer to the conclusion that the Crown in colonial times clearly and plainly intended not to recognize, and to extinguish, aboriginal rights which might otherwise have prevented it from transferring title to its settlers. This, of course, is completely consistent with the reality already mentioned that (except for village sites) aboriginal rights existed only at the pleasure of the Crown. I have no doubt the Crown's grantees during colonial times obtained title to or interests in land obtained from or through the Crown unburdened by aboriginal rights. (My emphasis.)

[212] The trial judge chose not to limit his judgment to the extinguishment of aboriginal rights to lands actually transferred to third parties (p.412), and not to decide whether, since Confederation, the Province had the capacity to extinguish aboriginal interests.

[213] It was assumed in ***Calder*** that the Colonial government had the power to extinguish aboriginal rights prior to Confederation. The issue was not discussed by the trial judge in this case.

[214] The question then is whether the thirteen Colonial Instruments, to which I have referred, give rise to the clear and plain, undoubted, implication that it was the intention of those who enacted the instruments to extinguish aboriginal rights. To put it another way, is there any reasonable inference other than that the intention was to extinguish the rights?

[215] The purpose of the legislation is an important consideration.

[216] It is clear that the mischief at which many of the Colonial Instruments was directed was the agitation in the colony attendant upon the influx and presence of miners seeking gold. Governor Douglas needed authority to stabilize the situation. A plan to attract permanent settlers, and establish them on the land was urgently required. The aboriginal peoples were not the problem. The acquisition of Indian lands was not the design, although attendant upon settlement was the need to reconcile the conflicting interests of the aboriginals and of the settlers. But the urgent question was settlement and the establishment of British authority in the colony. One should assume that the object was to achieve the desired result with as little disruption as possible, and without affecting accrued rights and existing status any more than was necessary.

[217] There was a need for reconciliation of the Indian interest (which had arisen from historic use and occupation of much of the land) and the interest of the Crown in settling the colony. In some parts of the country, though not in the mainland colony of British Columbia, the means of reconciliation was treaty making. I am not persuaded that settlement of the colony made it impossible for some sort of reconciliation to take place here. While the legislative framework for settlement was urgent, settlement could be a slow process. This would be obvious to those who enacted the legislation. The trial judge described the impact of the settlement policy on the Indians in this way at p.419:

> Compared with other jurisdictions where Indians were confined to reserves, or their rights were purchased for a pittance, British Columbia land policy in the territory did not usually interfere seriously with Indian land use. Settlement, which did not begin in the territory until the beginning of this century, was initially confined to the Bulkley and Kispiox valleys, where land cultivation had not been pursued vigorously by many Indians. There were no large railway land grants in the territory, and even the pre-emption of most agricultural land did not impinge seriously upon many aspects of aboriginal life.

[218] The question whether the Colonial Instruments were intended to extinguish all aboriginal rights in the colony must be considered in that context.

[219] The trial judge concluded that the intention to extinguish all aboriginal land rights was clear and plain by reference to the second and third proclamations and the thirteenth instrument enacted in 1870. In his opinion the effect of those instruments was to vest ownership of all land in the colony in the Crown, and to establish a comprehensive land settlement scheme giving the Crown the sole right to create other ownership or proprietary land interests. He concluded that the legislative scheme "extinguished any possible right of ownership on the part of the Indians." But he said that it did not answer the question whether the Crown's ownership was burdened with aboriginal rights. (p.409).

[220] In my opinion the second proclamation did no more than declare, perhaps for the benefit of those who would settle on the land, that only the Crown was competent to convey land interests to third parties. The situation which gave rise to that declaration may be described in this way. The Crown held the underlying title to all lands in the Province. The Indian interest was a burden on that title but was inalienable except to the Crown. Only the Crown could convey the Indian interest in the lands to third parties. Understood in that way it is not clear that the proclamation was intended to extinguish the aboriginal interest. Its purpose was to declare the existing situation.

[221] As to the general proposition that the introduction of a land settlement scheme was sufficient to extinguish all aboriginal interests in land, it is my opinion that a clear and plain intention to extinguish the Indian interest is not to be inferred from the Colonial Instruments. Their purpose was to facilitate an orderly settlement of the province, and to give the Crown control over grants to third parties. Putting in place such a statutory scheme did not necessarily mean that the aboriginal interest was to be disregarded, and that the Indians were denied any recourse in respect of that claim. The Colonial Instruments did not foreclose the possibility of treaties, or of co-existence of Indian interests and Crown interests.

[222] My conclusion is that all aboriginal interests in land were not extinguished by the Colonial Instruments.

iv) The validity of grants by the Province of fee simple or lesser interests in land

[223] No fee simple grants were made prior to 1871. Thus it is unnecessary to ask whether the effect of such a grant, made pursuant to the Colonial Instruments, would have been to extinguish an aboriginal interest.

[224] The validity of fee simple titles held by third parties is not being challenged in this litigation. The position of the plaintiffs is stated in paragraph 79 of the statement of claim:

> 79. Without conceding that the Defendant Province has the power to grant title in fee simple, or alienate lands within the territory, to third parties, the Plaintiffs confirm ownership in fee simple of lands within the territory which have been transferred to third parties and were held in fee simple by third parties as of October 23, 1984 and make no claim to those lands except for their claim for damages against the Defendant Province.

[225] The plaintiffs claim this relief against the Province:

> 10. A declaration that the Defendant Province cannot appropriate any part of the Territory through grants, licences, leases, permits or in any other manner whatsoever.
>
> 11. A declaration that the Defendant Province cannot issue or renew grants, licences, leases or permits authorizing the use of any resources within the Territory of the Plaintiffs by the Defendant Province, its agents or by third parties without the consent of the Plaintiffs.
>
> 12. A declaration that the Plaintiffs are entitled to damages from the Defendant Province for the wrongful appropriation and use of the Territory by the Defendant Province or by its servants, agents or contractors without the Plaintiffs' consent.

[226] Although most of the relief sought is linked to the claim for a declaration of ownership of the territory, and the question of the effect of the grants made by the Province upon aboriginal rights of a *sui generis* nature has not been raised or explored in these proceedings, I wish to make a few general comments.

[227] The diverse nature of grants in the Territory is reflected in the "alienations project" of the Province, referred to by the trial judge at p.396:

> All this documentation demonstrates colonial and provincial dominion over the territory before and since Confederation by such diverse governmental and administrative activities as surveying, grants of land, leases and other tenures, land registry, schools and hospitals, rights of way for highways, power and pipe lines, grants in fee simple, forestry, mining, and guide outfitting permits, various public works, the creation and governance of villages and municipalities, water and other placer rights and licences, trapline registration for all or almost all of the territory, fish and game regulation and conservation, and a host of other legislatively authorized intrusions into the life and geography of the territory. Some of

> this material, of course, related only to post-Confederation British Columbia.

[228] Whether the exercise of aboriginal rights has been affected by government grants or government utilization of lands and resources requires a detailed and complex analysis. The Province puts it this way in its factum:

> 205. Although the Province, in its Alienations Project, provided some evidence as to the extent of Crown grants in the Claim Area, the Appellants have not approached the case on the basis of entitlement to less than exclusive occupation of the land. The detailed and complex analysis required of the scope and extent of the Aboriginal Rights in issue and their relationship with various grants, executive and legislative action has not been applied by the trial judge. It would be inappropriate for this Court to conduct their analysis on first impression. Furthermore, and for the reasons set out in Issue No. 3, this Court should decline to do any more until the parties have endeavoured through negotiation to reconcile their competing interests.

[229] I agree with that view of the matter. The focal point of evidence and argument, both at trial and on appeal, has been on ownership and on extinguishment, although we have heard some very useful submissions with respect to the reconciliation of competing interests.

[230] A fee simple grant of land does not necessarily exclude aboriginal use. Uncultivated, unfenced, vacant land held in fee simple does not necessarily preclude the exercise of hunting rights: ***R. v. Bartleman*** (1984), 12 D.L.R. (4th) 73 (B.C.C.A.). On the other hand the building of a school on land usually occupied for aboriginal purposes will impair or suspend a right of occupation.

[231] Two or more interests in land less than fee simple can co-exist. A right of way for power lines may be reconciled with an aboriginal right to hunt over the same land, although a wildlife reserve might be incompatible with such a right. Setting aside land as a park may be compatible with the exercise of certain aboriginal customs: ***R. v. Sioui*****,** [1990] 1 S.C.R. 1025 at 1073.

[232] The ownership issue aside, logging in forest areas may or may not impair or interfere with an aboriginal interest. For instance, interference may occur in areas which are integral to the distinctive culture of the particular aboriginal people, e.g. an area of religious significance or where cultural pursuits are followed. In other areas there may be no interference.

[233] I think the Province is correct in asserting that these factors should be taken into account when determining whether an infringement has occurred:

(a) the nature and extent of the right being asserted;

(b) the location of the Aboriginal right asserted;

(c) the nature and extent of the governmental action;

(d) the terms of any instrument;

(e) the kind of use contemplated by the instrument;

(f) the nature and extent of the non-aboriginal use;

(g) the extent to which other users have a disproportionate share of the territory or resources of the territory;

(h) the extent to which the right would be restored if legislation affecting it were repealed.

[234] The record in this case and the submissions which have been made are not sufficiently specific to permit the detailed and complex analysis which is required. I think the parties are correct in saying that these issues are ripe for negotiation and reconciliation. But, in my view, if the competing interests cannot be reconciled, they are properly the subject of an action in which the parties whose interests may be affected are represented.

v) The Constitutional power of the Province to extinguish aboriginal rights after 1871

[235] The trial judge did not deal with the question whether the Province had the constitutional power after 1871 to extinguish aboriginal rights because the focus of his judgment was on extinguishment of aboriginal rights in the Colonial period. He said, at p.397:

> It will not be necessary for me to trouble myself with the question of whether, since Confederation, the province has had the capacity to extinguish aboriginal interests. This is a vast legal and constitutional question which has not been fully explored, although it has been decided in a number of cases that some provincial legislation applies to Indians and can diminish their rights to engage in aboriginal activities.

[236] In considering the effect of provincial laws upon aboriginal rights in respect of land, the most relevant constitutional provisions of the ***Constitution Act, 1867*** (the "Act") are s.91(24), s.92(5), s.92(13), s.109 and s.129. I do not intend to explore in any great detail the many interesting and difficult questions concerning the application of these provisions, but will make some general comments.

[237] After 1871, the exclusive power to legislate in relation to "Indians, and lands reserved for the Indians" was given to the Parliament of Canada by s.91(24) of the Act. The Province submits that aboriginal rights in land do not fall within this jurisdiction because they do not comprise a single class of subject matter within the meaning of either "Indians" or "lands reserved for the Indians". The Province takes the view that the power over Indians concerns only the status and capacity of Indians; and, that unreserved lands subject to aboriginal rights are not "lands reserved for the Indians". I think, however, such a narrow and rigidly disjunctive reading of the federal power is not warranted. First, judicial interpretation of the words "lands reserved for the Indians" has been broad and unequivocally supports the proposition that it is not restricted to lands actually designated by Parliament as a reserve. The case of ***St. Catherine's Milling*** is the leading authority on the meaning of "lands reserved for the Indians". In that case, Lord Watson said at p.59:

> ... the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation. It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority. (Emphasis added)

[238] The judgment of the Supreme Court of Canada in ***St. Catherines Milling v.The Queen*** (1886), 13 S.C.R. 577 is also instructive. Strong J., in his reasons at p.615, concluded that the jurisdiction in s.91(24) must include the right to control the surrender of Indian lands because:

> > If ... Parliament did not possess this power of absolute control over the Indians in respect of their dealings with their lands, the provisions of the 24th sub-section would be most incongruous and unreasonable, for in that case, whilst on the one hand Parliament would have to provide for the necessities of the Indians, on the other hand it would not have the means of restraining these wards of the Dominion Government from wasting the means of self support their hunting grounds afforded.
>
> Strong J. went on to say that the words "Lands reserved for the Indians" embrace" all territorial rights of Indians , as well as those in lands actually appropriated for reserves..." [Emphasis added].

[239] Secondly, it is a sensible result which places the power to block improvident dispositions, or outright expropriation, of Indian lands in the hands of the legislature which was made responsible for Indian welfare generally. Indeed, if the division of powers did not remove the power to extinguish aboriginal title from provincial hands, the federal government could find itself unable to protect this crucial native interest and forced to guarantee Indian welfare by other means. It would be an absurd result to find the provinces with the competence to make the federal obligation to Indians more onerous.

[240] I think the federal power found in s. 91(24) has several facets and may well embrace jurisdiction over all aboriginal rights. I am confirmed in this view by ***Roberts v. Canada*** in which Wilson J., for a unanimous five judge bench, held that the common law of aboriginal title underlying the fiduciary obligations of the Crown to Indian Bands comes within the term "laws of Canada" in s. 101 of the ***Constitution Act, 1867*****.** At the very least Parliament has exclusive jurisdiction over aboriginal rights in land and thus, after 1871, was the sole legislative authority with jurisdiction over aboriginal title in British Columbia.

vi) Can valid provincial legislation extinguish aboriginal rights in land by the incidental effect of a valid grant of an interest in land, including natural resources?

[241] The Province has full power to make laws with respect to the "Management and Sale of Public Lands and of the Timber and Wood thereon" (s.92(5)) and dispose of property interests in the Province (s.92(13)). That power extends to making grants of fee simple and lesser interests in lands and resources. I do not think the validity of

those grants, made before 1982, can now be questioned. Indeed, the plaintiffs have not questioned in this action the validity of fee simple grants. Those or lesser grants may or may not interfere with the exercise of aboriginal rights of *sui generis* nature. Such a finding is highly dependent upon the facts of a specific case of conflict between the two.

[242] It is established law that valid provincial legislation may apply to Indians, so long as it is a law of general application and not one that affects their Indianness, or their status, or their core values: ***Four B Manufacturing v. United Garment Workers*** [1980] 1 S.C.R. 1031; ***Natural Parents v. Superintendent of Child Welfare*** [1976] 2 S.C.R. 751; ***Dick v. The Queen*** [1985] 2 S.C.R. 309. This limitation on provincial laws touching Indians is one instance of the general doctrine which has developed to curtail provincial intrusion into federal jurisdiction by the incidental effect of valid provincial laws. For example, provincial legislation may not impair the status or essential powers of a federally incorporated company (***John Deere Plow Co. v. Wharton*****,** [1915] A.C. 330.); similarly, federal undertakings will be immune from provincial laws which affect "a vital part of the management and operation of the undertaking" ***Commission du Salaire Minimum v. Bell Telephone Co*** [1966] S.C.R. 767 at 774.

[243] That this test for federal immunity is related to the standard that applies to provincial laws affecting Indians was made clear by Beetz J. in ***Bell Canada v. Quebec*****,** [1988] 1 S.C.R. 749 at 762:

> ... works, such as federal railways, things, such as land reserved for Indians, and persons, such as Indians, who are within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, ... provided however that the application of these provincial laws does not bear upon those subjects in what makes them specifically of federal jurisdiction.

[244] The proposition that provincial laws could extinguish Indian title by incidental effect must be examined in light of an appropriate understanding of the federal immunity relating to Indians and of the aboriginal perspective. The traditional homelands of aboriginal people are integral to their traditional way of life and their self-concept. If the effect of provincial land legislation was to strip the aboriginal people of the use and occupation of their traditional homelands, it would be an impermissible intrusion into federal jurisdiction. Any provincial law purporting to extinguish aboriginal title would trench on the very core of the subject matter of s.91(24).

[245] This result finds a compelling analogy in the treatment accorded the federal power over navigation and shipping. In ***Friends of the Oldman River Society v. Canada*****,** [1992] 1 S.C.R. 3 at 53, La Forest J. speaking for himself and seven other judges described the law of navigation as having

> "two fundamental dimensions - the ancient common law public right of navigation and the constitutional authority over the subject matter of navigation - both of which are necessarily interrelated by virtue of s.91(10) of the ***Constitution Act, 1867*** which assigns exclusive legislative authority over navigation to Parliament.

[246] Similarly, it may be said that aboriginal law has at least these two aspects: rights as federal common law and the legislative authority over the subject matter of Indians and lands reserved for Indians. Consequently, the remarks of La Forest J. on the constitutional authority of the provinces in relation to navigation, as expressed in ***Friends of the Oldman River Society*****,** at pp.55-56 are apposite:

> ...another aspect of the paramountcy of the public right of navigation - that it can only be modified or extinguished by an authorizing statute, and as such a Crown grant of land itself does not and cannot confer a right to interfere with navigation; see also ***The Queen v. Fisher*** (1891), 2 Ex. C.R. 365...
>
> What is more, the provinces are constitutionally incapable of enacting legislation authorizing an interference with navigation, since s.91(10) of the ***Constitution Act, 1867*** gives Parliament exclusive jurisdiction to legislate respecting navigation.

[247] By analogy, the provincial legislatures have not, since Confederation, had the constitutional competence to extinguish common law aboriginal rights through the exercise of other jurisdiction - including the making of land grants.

[248] This conclusion may not apply to the result where valid provincial grants do not extinguish but infringe upon aboriginal rights. What, if any, remedy can be granted in that case is an extremely complex and fact sensitive question. A remedy may lie in damages, or in reading down a grant to the extent that it infringes upon an aboriginal. The plaintiffs have taken the practical position of seeking damages from the province on the basis that liability flows from a wrongful appropriation of an Indian interest. I think that was a wise course to take.

vii) Extinguishment by exercise of Adverse Dominion

[249] The Province submits that it had power, before and after Confederation, until 1982, to extinguish aboriginal rights by the exercise of adverse dominion. The position is asserted in its factum in this way:

> 181. Extinguishment of aboriginal rights may be accomplished "by the exercise of complete dominion adverse to the right of occupancy".
>
> 182. In ***U.S. v. Santa Fe Pacific Ry. Co.***, 314 U.S. 339 (1941); 86 L. Ed. 260, the Court stated at page 347 (L. Ed. 270):
>
> > Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. ***Buttz v. Northern Pacific Railroad*****,** 119 U.S. 55, 66, S. Ct. 100, 30 L. ed. 330. As stated by Chief Justice Marshall in ***Johnson v. M'Intosh*** [supra] at p.586. "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by

> treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the Courts. ***Beecher v. Wetherby*** (1877), 95, U.S. 517 at 525, 24 L. ed. 440 at 441.

183. The above principle was approved by both Hall J. and Judson J. in ***Calder*****.**

[250] The Province also takes comfort from the view expressed by Brennan J. in ***Mabo*****,** summarized at p.51:

> (4.) Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (e.g., authorities to prospect for minerals).

[251] Neither of those cases confronted the problem raised where adverse dominion is exercised by a government lacking the constitutional authority to extinguish aboriginal title. In my view, effective extinguishment by adverse dominion could only occur by acts of a government constitutionally competent to legislate with respect to aboriginal interests in land. Thus, in Canada, the power can be exercised by the Government of Canada, or by a Province authorized by Canada, in clear and plain legislative language, to do so. In my opinion, no such power has been granted to British Columbia, unless it be under s.88 of the ***Indian Act*****,** enacted in 1951 as s.87.

[252] S.88 provides:

> **88.** Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation, or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act. R.S., c. 149, s.87.

[253] The leading cases with respect to the application of s.88 of the ***Indian Act*** are the Supreme Court of Canada decisions in ***Kruger and Manuel*** and ***Dick*****.**

[254] In my opinion these propositions flow from those judgments:

1. Provincial laws of general application which apply throughout the Province to all residents, and which do not affect "Indians in their Indianness", "Indians *qua* Indians", or "Indians in relation to the core values of their society", or "the status and capacities of Indians", apply to Indians by their own force as valid provincial laws. They do not rely upon s.88 of the ***Indian Act*** for their application to Indians.

2. Provincial laws of general application which do affect Indians in the ways referred to above will not apply to Indians by their own force. Such laws depend upon s.88 of the ***Indian Act*****,** which gives them the force of federal law for their effectiveness in relation to Indians. Such federal incorporation is required because of the exclusive federal power over Indians which I have already described.

[255] In my opinion, for s.88 of the ***Indian Act*** to have the effect of giving provincial laws or acts of adverse dominion the authority to extinguish aboriginal right, it must show a clear and plain intention to do so. In my view, there is nothing in s.88, or its accompanying provisions which evinces the clear and plain intention of Parliament to authorize the extinguishment of aboriginal rights. It has not been submitted that Canada itself exerted dominion adverse to aboriginal land interests in the territory and, consequently, I offer no opinion on that point.

[256] Aboriginal rights fall within the ambit of the core values of Indians described above, and to which s.88 has been held to apply. Thus s.88, while not authorizing extinguishment of aboriginal rights, may authorize provincial interference with aboriginal rights; provincial laws may affect, regulate, diminish, impair or suspend the exercise of an aboriginal right. Of course, the operation of such incorporated laws is subject to s.35 of the ***Constitution Act, 1982.***

[257] In short, provincial land and resource laws affecting aboriginal rights may be given force as federal laws through the operation of s.88 of the ***Indian Act.***

[258] The questions of what aboriginal rights exist and what effect, if any, fee simple and lesser grants have on such rights cannot be decided in this case, and are ripe for negotiation. Additionally, the parties have asked us not to deal with the question of the right to and amount of compensation, if any. Accordingly, I leave questions of compensation to future proceedings.

viii) Extinguishment after 1982.

[259] The Province concedes that some laws, grants in fee simple and lesser grants that would have been valid prior to 1982 may well constitute a *prima facie* infringement of the aboriginal rights now protected by s.35(1) of the ***Constitution Act, 1982*****,** and may not meet the constitutional standards of justification required by s.35(1). Whether there is infringement and, if so, justification, must involve many of the specific factors referred to earlier in this part of my reasons. Thus I will say no more about the effect of s.35(1) on the aboriginal rights which the plaintiffs allege.

PART XII

REMEDIES SOUGHT

[260] The plaintiffs now ask for these orders:

1. The Appeal be allowed.

2. The Appellants have existing aboriginal rights which include:

    a. a right of ownership which extends to the enjoyment and possession of lands and resources within the claimed territory;

    b. a right to harvest, manage and conserve those lands and 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 co-operation with ministries and agencies of the Crown and with the private sector who may be affected by the exercise of the Appellants' rights;

    c. a right to maintain and develop their own institutions for the regulation of the ownership, harvesting, management and conservation of those lands and resources;

    d. an inherent right of self-government exercisable through their own institutions, to preserve and enhance their social, political, cultural, linguistic and spiritual identity;

    in order to determine their development and safeguard their integrity as aboriginal peoples within Canada.

3. In the alternative to 2, the Appellants have existing aboriginal rights which include:

    a. a proprietary interest in lands and resources within the claimed territory;

    b. a right to harvest, manage and conserve those lands and 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 co-operation with ministries and agencies of the Crown and with the private sector who may be affected by the exercise of the Appellants' rights;

c. a right to maintain and develop their institutions for the regulation of their proprietary interest and the harvesting, management and conservation of those lands and resources;

d. an inherent right of self-government exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity;

in order to determine their development and safeguard their integrity as aboriginal peoples within Canada.

4. The appeal be adjourned in part for a period of two years from the date of judgment or for such shorter period as the parties agree or as the Court may order and the Court retain jurisdiction over the identification and determination of:

a. the lands in respect of which the Appellants have aboriginal rights;

b. the scope of such rights on and to the said lands; and

c. the Appellants' entitlement to and quantum of damages.

5. In the alternative to 4, the identification and determination of:

a. the lands in respect of which the Appellants have aboriginal rights;

b. the scope of such rights on and to the said lands; and

c. the Appellants' entitlement to and quantum of damages

shall be remitted to the Supreme Court for determination.

6. Pending the determination of the scope of the proprietary rights of the Appellants, no grants of land, interests in land, or right to use land or resources in the territory shall be made by the Province without the consent of the Appellants or by court orders.

7. The Appellants shall have their costs in this Court and the Court below.

[261] The Province asks for these orders:

(a) a declaration that there are no pre- or post-confederation enactments or executive or administrative acts that extinguished all of the Appellants' Aboriginal Rights in the claim area, which rights are to be described as *sui generis* interests in respect of land;

(b) a declaration that the Appellants have existing Aboriginal Rights with respect to an undefined portion or portions of the territory in question;

(c) a declaration that a temporary period exists in the anticipation that the Appellants' claim will be resolved;

(d) allow the appeal in part, adjourn proceedings for a period of two years from the date of judgment or such other period as the parties may agree to, and retain jurisdiction over the matter in recognition that should agreement not be reached by the parties, the Court will proceed to address the precise location, scope, content and consequences of the Appellants' Aboriginal Rights.

2. In the alternative:

(a) a declaration that the Appellants' Aboriginal Rights have been extinguished by any pre-1982 grant in fee simple to a third party;

(b) a declaration that Aboriginal Rights have been extinguished by any pre-1982 grants of lesser interests and other Crown instruments which are completely inconsistent with the continued exercise of Aboriginal Rights;

(c) a declaration that the Appellants have no entitlement to damages for any extinguishment or interference with Aboriginal Rights prior to 1982;

(d) allow the appeal in part, adjourn proceedings for a period of two years from the date of judgment or such other period as the parties may agree to, and retain jurisdiction over the matter in recognition that should agreement not be reached, the Court will proceed to address the precise location, scope, content and consequences of the Appellants' Aboriginal Rights and any remaining issues relating to specific acts of extinguishment and appropriate remedies.

PART XIII

RELIEF ALLOWED

[262] 1. I would grant a declaration that the plaintiffs' aboriginal rights were not all extinguished by the Colonial Instruments enacted prior to British Columbia's entry into Confederation in 1871.

[263] 2. I would grant a declaration that the plaintiffs, being Gitksan and Wet'suwet'en persons, have unextinguished non-exclusive aboriginal rights which received the protection of the common law, and which now receive protection as existing aboriginal rights under s.35(1) of ***Constitution Act, 1982*****.** These rights are other than a right of ownership or property rights, and are located within the area indicated on Map 5, a copy of which is attached to these reasons. The rights may be described *sui generis* rights in respect of land. They are integral to a distinctive culture of an aboriginal society in existence at the date of the assertion of sovereignty. Their characteristics may vary depending upon the particular context in which the rights are said to exist, and having regard to specific fact situations.

[264] 3. I would not grant a declaration with respect to jurisdiction over land and resources or people within the territory. The question of the extent, if any, of self-regulation which does not conflict with valid federal or provincial legislation is a question which is ripe for negotiation, and is better suited to the reconciliation process which the parties seem disposed to pursue.

[265] 4. I would not interfere with the decision of the trial judge that the claim for damages must be dismissed. But I should emphasize that the plaintiffs claim, as pleaded, was for damages for the wrongful appropriation and use of the territory which they alleged that they owned and controlled. It was an "all or nothing" claim which failed when the plaintiffs failed to establish ownership of all of the land and resources in the territory.

[266] Once that claim was gone, then what remained was a claim to exercise undefined aboriginal rights within the area shown on Map 5. Any claim for compensation for interference with those rights needs fact and site specific consideration, not possible on the evidence in this case.

[267] 5. The parties wish to negotiate the precise location, scope, content and consequences of the aboriginal rights which the trial judge has held may be exercised in that part of the territory, the approximate area of which is illustrated on map 5. That arises naturally from the reasons, in which the trial judge invites counsel to reconsider his arbitrary assessment of the area. No order of this court is required to permit the parties to enter into such negotiations.

[268] 6. All questions having been decided which bear on the issues raised by the pleadings in this litigation, I would not adjourn the appeal. Questions left undecided at trial should be left to be determined in further trial proceedings

properly framed to deal with such issues, and in which all persons affected by such questions may be heard.

[269] 7. I would not give effect to the alternative declarations sought by the Province relating to the alleged extinguishment of aboriginal rights by grants of fee simple and of lesser interests in the period from 1871-1982. The Province did not have the power after 1871 to extinguish aboriginal rights. But some provincial land and resource laws affecting aboriginal rights may be given force as federal laws through the operation of s.88 of the ***Indian Act.*** The question of what effect, if any, fee simple and lesser grants have on the particular aboriginal rights exercised by the plaintiffs requires a detailed and complete analysis, which neither the record nor the submissions permit in this case.

[270] 8. I would dismiss the cross appeal as abandoned.

[271] 9. For the reasons given by the trial judge at p.476 there will not be any order for costs, here or below.

PART XIV

SUMMARY

[272] Before the Europeans came to British Columbia the Gitksan and Wet'suet'en people, who were the ancestors of the plaintiffs, used and occupied some of the Territory which the plaintiffs claim to own (the Territory).

[273] There is no question that the ancestral home of the Gitksan and Wet'suet'en was within the Territory. There is no question that the Gitksan and Wet'suet'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.

[274] There is no question that in 1846 when the British began to exercise sovereignty over British Columbia, and in particular the Territory, the underlying title to the land and its resources vested in the Crown, subject only to the unique interest of the Indian people. The problem is to identify the nature of that interest, and the specific lands which are subject to the Indian interest.

[275] Simply stated, the plaintiffs' claim is that they own the land and resources and are entitled to govern their use and the activities of people who use them. The claim is to an exclusive right to use, occupy and control the lands and resources.

[276] The trial judge held the evidence was not sufficient to prove that exclusive right, or what specific lands the plaintiffs' ancestors used and occupied. Thus the ownership claim failed.

[277] The trial judge's finding of fact was challenged on appeal but I have concluded the law does not permit this Court to interfere with the finding which involved an assessment of the whole of a great volume of evidence. I am not able to say that the finding is clearly wrong.

[278] The trial judge realized that the failure to prove the claim to ownership of and the use and occupation of the whole Territory did not end the inquiry. He accepted that the Gitksan and Wet'suet'en peoples had proven an aboriginal right to use and occupy part or parts of the Territory. He concluded the plaintiffs' ancestors had resided in villages, which are now part of established reserves, and that they had used surrounding lands for sustenance purposes. He described the nature of the right in general terms, as a right of use and occupation. He recognized the Indian interest was unique and was a burden on the underlying title of the Crown. I do not think that the evidence permitted a more specific definition of the Indian interest. While the right is not equivalent to ownership in the sense that the Indians have the right to exclude all others from using the land and resources, that is not to say the Indian interest is an unimportant one. Territorially it extends over a large area. It is of the approximate size shown on Map 5. The Crown title is subject to it. How that interest competes with other interests is to be decided on a case by case basis in each of which competing claims to a variety of interests in the Territory can be considered. In this case those who have interests in the Territory which may conflict with the interests of the aboriginal claimants were not parties in the trial proceedings. On the appeal we heard submissions from the

intervenors Alcan and The Business Coalition which give some indication of the numbers and kinds of conflicting interests which remain to be resolved.

[279] I do not think all aboriginal rights in respect of land were extinguished before 1871. They could not be extinguished by the Province after 1871. The trial judge held that legislation enacted between 1858 and 1871 providing for the settlement of the colony was completely inconsistent with the continued exercise of aboriginal rights, and that a clear and plain intention to extinguish aboriginal rights should be inferred from that legislation. I am not persuaded aboriginal rights could not co-exist with settlement, or that the Crown intended, by virtue of those legislative steps, to completely negate the Indian interest. Indeed, the British continued to recognize the Indian interest. The Crown promised to preserve and protect Indian settlements. The ***Terms of Union, 1871*** between British Columbia and Canada provided that lands would be set aside, and would be transferred to the Dominion for the use and benefit of the Indians, a process not completed until 1938. The courts have continued to give effect to claims in respect of aboriginal rights. For instance, they have recognized unextinguished fishing and hunting rights in places other than reserves, but having a connection with aboriginal lands. All of this lends support to the conclusion that the pre-Confederation legislation was not clearly and plainly intended to extinguish aboriginal rights.

[280] With respect to the question of self-government the plaintiffs say not only that they have an unextinguished aboriginal right in respect of land, but they have the right to govern the Territory. They assert such a right not only in respect of the use of lands and resources, but in respect of people who are in the claim area.

[281] I have said there is no question the Gitksan and Wet'suet'en people had an organized society. It is pointless to argue that such a society was without traditions, rules and regulations. Insofar as those continue to exist there is no reason why those traditions may not continue so long as members of the Indian community agree to adhere to them. But those traditions, rules, and regulations cannot operate if they are in conflict with the laws of the Province or of Canada. In 1871, when British Columbia joined Confederation, legislative power was divided between Canada and the provinces. The division exhausted the source of such power. Any form of Indian self-government, then existing, was superseded by the ***Constitution Act, 1867*****,** as adopted by the Province in 1871.

[282] During argument, counsel for the Indian plaintiffs were asked what precise rules and regulations in the Indian tradition ought to be regarded as prevailing over the general laws of British Columbia or Canada. No such precise laws were identified. But Indian leaders are in the process of formulating a system of laws which will be in keeping with Indian traditions and culture, and which may more adequately address problems within the Indian community. The development and recognition of a parallel system of Indian laws in certain areas is a matter for consultation and for legislative action.

[283] In this action, any form of aboriginal self-regulation that was not superseded in 1871, or before, was not precisely stated or claimed. Such precision is required for a proper determination of whether it can qualify as an aboriginal right. The claims to

jurisdiction that were made amounted to powers of government which are beyond the authority of this court to award.

[284] During the course of these proceedings it became apparent that there are two schools of thought. The first is an "all or nothing approach", which says that the Indian nations were here first, that they have exclusive ownership and control of all the land and resources and may deal with them as they see fit. The second is a co-existence approach, which says that the Indian interest and other interests can co-exist to a large extent, and that consultation and reconciliation is the process by which the Indian culture can be preserved and by which other Canadians may be assured that their interests, developed over 125 years of nationhood, can also be respected. The Indian plaintiffs have taken the first step in recognizing the importance of other vested interests by not making a claim to lands within the Territory held by others under a fee simple title.

[285] I favour the second approach.

[286] Adoption of the second approach in this case begins with a finding that the Gitksan and Wet'suet'en people have aboriginal rights in a large area of land, identified in an approximate way by reference to Map 5. These rights, along with land already in reserves, may provide a foundation for the preservation and development of an Indian community. Self-regulation and new economic opportunities for Indian communities may be secured in many ways yet to be negotiated.

[287] Those questions involve consultation about the nature of aboriginal rights and the form they should take in the 21st century.

[288] Legal questions will arise as to the extent to which aboriginal rights may have been diminished by provincial grants, leases, permits or licenses and the extent to which they may compete or co-exist with other interests. They were not raised in this case.

[289] Aboriginal rights need to be considered on the facts pertinent to particular people and specific land. Aboriginal rights can never be determined in a vacuum. The particular rights need to be defined, as the fishing and hunting rights of the Inuit plaintiffs were in the ***Baker Lake*** case. Once defined they must be considered in the light of surrounding circumstances. It is necessary to consider whether they are in conflict or can co-exist with other activities: for instance, mining as in ***Baker Lake*****;** parkland as in ***Sioui*****;** or railway rights of way, or timber licences as in cases yet to be heard. The remedies will vary depending upon the different fact situations which may be presented.

[290] The parties have expressed willingness to negotiate their differences. I would encourage such consultation and reconciliation, a process which may provide the only real hope of an early and satisfactory agreement which not only gives effect to the aspirations of the aboriginal peoples but recognizes there are many diverse cultures, communities and interests which must co-exist in Canada. A proper balancing of all those interests is a delicate and crucial matter.

PART XV

VARIATION OF ORDER

[291] I would vary the terms of the order made by the Honourable, the Chief Justice of British Columbia, on Friday, the 8th day of March, 1991. To give effect to my conclusions I would make the following order:

[292] All of the plaintiffs' aboriginal rights were not extinguished before 1871.

[293] The plaintiffs, being Gitksan and Wet'suwet'en persons, have unextinguished non-exclusive aboriginal rights, other than a right of ownership or a property right, in an area of the approximate size shown on Map 5, a copy of which is attached. Such rights are of a *sui generis* nature. The exact territorial limits within which such rights may be exercised, if not agreed to by the parties, shall be those designated by the trial judge in reference to Map 5. The scope, content and consequences of such non-exclusive aboriginal rights of use and occupation, including the effect of s.35 of the ***Constitution Act, 1982*** on grants or renewals of grants, licences, leases or permits respecting any resources within the area shown on Map 5, are left to be determined in trial proceedings properly framed to deal with such issues.

[294] The action against the Attorney General of Canada is dismissed without costs.

[295] The plaintiffs' claim for a declaration that they have a right of ownership of and jurisdiction (self-government) over the Territory, and all claims depending upon or said to be included in or subject to such a right of ownership and jurisdiction, are dismissed without costs.

[296] The plaintiffs claim a paramount right to govern the Territory and their people through Gitksan and Wet'suwet'en political, legal and social institutions as they exist and develop. Such a right would have Gitksan and Wet'suwet'en laws prevail over laws of general application enacted by the Province insofar as those laws conflict. That claim is dismissed without costs.

[297] The plaintiffs have not challenged the validity of any fee simple title, or of any federal or provincial law, but claim that the power of the Province to make grants, issue licences, leases and permits based on the Province's ownership of lands, mines, minerals and royalties within the Territory is subject to the plaintiffs' claim of ownership and jurisdiction. That claim is dismissed.

[298] The plaintiffs' claim for a declaration that they are entitled to damages from the defendant Province for the wrongful appropriation and use of the Territory by the defendant Province or by its servants, agents or contractors without the plaintiffs' consent is dismissed without costs.

[299] The cross appeal is dismissed as abandoned.

[300] There will be no order as to costs.

[301] The entered order at trial contained the following declaration:

> THIS COURT DECLARES that subject to the general law of the Province the Defendant Province shall permit the Plaintiffs to use unoccupied or vacant Crown lands within the Territory coloured brown on the map annexed hereto as Schedule "A" to enable them to obtain aboriginal sustenance from and to engage in cultural activities upon such lands until such lands or portions thereof are required for or dedicated to an adverse purpose by or with leave of the Provincial Defendant, and that the Defendant Province shall not arbitrarily limit this use.

The basis for this part of the order was the promise made by the Crown to aboriginal people permitting their use of vacant Crown land in British Columbia, coupled with the fiduciary duty of the Crown. The trial judge describes the effect of this promise and the Crown's fiduciary role in Part 15 of his reasons. No appeal was taken from this part of the order, nor was any argument presented in relation to it. Accordingly, I do not propose to express any opinion on this declaration.

“THE HONOURABLE MR. JUSTICE MACFARLANE”

I AGREE: “THE HONOURABLE MR. JUSTICE TAGGART”

Court of Appeal for British Columbia

Delgamuukw, et al.

- v. -

H.M.T.Q. in Right of B.C. et al.

Reasons for Judgment of the Honourable Mr. Justice Wallace

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PART I

INTRODUCTION

[302] Since preparing these reasons for judgment I have had the advantage of reading the reasons for judgment of my colleague Mr. Justice Macfarlane I agree with his reasons and the conclusions he has reached. I have approached the issues from a somewhat different perspective and I attach greater significance to certain factors which I consider pertinent to a review of the trial judgment. Accordingly, in my view, it is appropriate to set out my reasons for reaching the conclusions in which Mr. Justice Macfarlane and I concur.

PART II

NATURE OF THE CLAIM

[303] We have been presented, over the 32 days of this appeal, with extensive submissions dealing specifically, and in broad general terms, with, *inter alia*, principles applicable to aboriginal rights, self-government, sovereignty, extinguishment, and remedies. In my opinion, to resolve the legal issues raised by this appeal it is necessary to commence with an examination of the specific claims advanced by the plaintiffs. The trial judge was required to consider and reach a conclusion upon the issues raised in the pleadings. As he noted, he was not conducting a Royal Commission. His decision, on the case as pleaded and presented at trial, is the subject matter of this appeal. It is reported at [1991] 3 W.W.R. 97.

[304] The claims for relief were brought by 51 Gitksan and Wet'suwet'en "Hereditary Chiefs", individually and on behalf of their "Houses" or their members with respect to one or more specifically designated discrete portions of the overall territory. The plaintiffs do not claim any collective or communal ownership interest in any of the Gitksan or Wet'suwet'en territories; each chief claims ownership of specific territory or territories, and none of them claim any interest in any other territory. There are 133 such individual territories within the overall external boundaries of the larger territory claimed. This overall territory is comprised of some 22,000 square miles situate in northwest British Columbia.

[305] The trial judge noted at p.120:

> All the Gitksan Houses are divided into four clans which seem to originate, or at least congregate, in different villages in the territory. The Wet'suwet'en Houses are also divided into four clans. There is no head chief of a clan but there is an order of precedence or seniority amongst the hereditary chiefs of the Houses of each clan in each village.
>
> No claim is advanced in this action on behalf of the clans. The plaintiffs' position is that the chiefs, Houses, or members of Houses own the individual territories.

[306] The relief sought is expressed in the statement of claim in the following form:

> **I. THE CONTENT OF ABORIGINAL RIGHTS**
>
> 1. A declaration that the Plaintiffs have a right to ownership of and jurisdiction over the territory.
>
> 2. A declaration that the Plaintiffs' ownership of and jurisdiction over the Territory existed and continues to exist and has never been lawfully extinguished or abandoned.

3. A declaration that the Plaintiffs' rights of ownership and jurisdiction within the Territory include the right to use, harvest, manage, conserve and transfer the lands and natural resources, and make decisions in relation thereto.

4. A declaration that the Plaintiff's rights to jurisdiction includes the right to govern the Territory, themselves, and the members of the Houses represented by the Plaintiffs in accordance with Gitksan and Wet'suwet'en laws, administered through Gitksan and Wet'suwet'en political, legal and social institutions as they exist and develop.

5. A declaration that the Plaintiffs' rights to ownership of and jurisdiction over the Territory include the right to ratify conditionally or otherwise refuse to ratify land titles or grants issued by the Defendant Province after October 22, 1984, and licences, leases and permits issued by the Defendant Province at any time without the Plaintiffs' consent.

6. A declaration that the aboriginal rights of the Plaintiffs including ownership of and jurisdiction over the Territory are recognized and affirmed by Section 35 of the ***Constitution Act, 1982*****.**

II. RESTRICTIONS ON THE DEFENDANT, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

7. A declaration that the Defendant Province's ownership of lands, mines, minerals and royalties within the Plaintiffs' Territory is subject to the Plaintiffs' rights of ownership and jurisdiction pursuant to Section 109 of the ***Constitution Act, 1967.***

8. A declaration that the Defendant Province's jurisdiction over the Territory, the Plaintiffs and members of the Houses represented by the Plaintiffs is subject to the Plaintiffs' right to ownership and jurisdiction.

9. A declaration that the Defendant Province is not entitled to interfere with the aboriginal rights and title, ownership and jurisdiction of the Plaintiffs.

10. A declaration that the Defendant Province cannot appropriate any part of the Territory through grants, licences, leases, permits or in any other manner whatsoever.

11. A declaration that the Defendant Province cannot issue or renew grants, licences, leases or permits authorizing the use of any resources within the territory of the Plaintiffs by the Defendant Province, its agents or by third parties without the consent of the Plaintiffs.

III. DAMAGES

12. A declaration that the Plaintiffs are entitled to damages from the Defendant Province for the wrongful appropriation and use of the Territory by the Defendant Province or by its servants, agents or contractors without the Plaintiffs' consent.

IV. TRANSITIONAL RELIEF

13. A lis pendens against the Defendant Province over the Territory described in Schedule 'A' and delineated in the map which is set out in Schedule 'B'.

14. A declaration that this Honourable Court shall retain jurisdiction to resolve all outstanding disputes between the parties as to the implementation of the Declarations and Orders of this Honourable Court.

15. The costs of this action.

16. Such further and other relief as to this Court may seem just. (Emphasis added.)

[307] It is with respect to those claims that the plaintiffs submit that the trial judge erred when he dismissed their claim for ownership and jurisdiction (self-government) over the territory (p.387-8), and in dismissing the claim for damages.

[308] I emphasize the claim as pleaded because in a case of this duration there may be an inclination for this Court to restructure the pleadings to justify the granting of remedies which the court may consider assist in resolving the social issues raised by the litigation – regardless of the fact the restructured case is not the case which was before the trial judge. Examples of such reconstruction could include:

(1) introducing a concept of "exclusive shared-occupancy" as the premise for a type of "aboriginal occupation and use", which was never claimed in the action and with respect to which no evidence was adduced;

(2) construing the claim of jurisdiction (self-government), which the pleadings specifically delineate, to be a claim for "self-regulation" – a status which was neither pleaded nor was the subject of evidence adduced at the trial;

(3) suggesting that the Province waived its position on the issues of the location, scope, content and consequences of the plaintiffs' "aboriginal title" or "aboriginal rights", even though "waiver" was neither pleaded nor advanced in counsels' submissions.

[309] While it was appropriate for the trial judge, in accord with the course of the trial, to construe the claim at the trial level as including a claim for "aboriginal rights other than ownership and jurisdiction", it is not appropriate, in the absence of an application to amend, for this Court to reconstruct the claim after the action has been presented and defended as pleaded.

Chronology

[310] For ease of reference I set out a brief chronology of the significant events pertinent to this litigation:

1846-	The ***Oregon Boundary Treaty*** fixed the 49th parallel as the boundary between British and American territory to the Pacific Coast with Vancouver Island remaining within British control.
1849-	The Colony of Vancouver Island was established by the British Crown.
1851-	James Douglas was appointed Governor of the Colony of Vancouver Island.
1858-	The Colony of British Columbia was established by the British Crown.
1858-64	James Douglas was appointed and served as Governor of the Colony of British Columbia with full executive powers.
1858-	The common law of England was introduced into British Columbia by proclamation.
1858-70	Thirteen Colonial Land Ordinances were enacted.
1866 -	The two Colonies were united into one Colony under the British Crown and under the name British Columbia.
1871-	British Columbia entered Confederation pursuant to the ***Terms of Union, 1871.***
1982-	Section 35 of ***Constitution Act, 1982*** recognized and affirmed existing aboriginal and treaty rights.

[311] The trial judge's comprehensive review of the relevant political history of British Columbia is found in Part 11 and 12 of his reasons for judgment (pp.232-337). There is no need to reproduce the material in these reasons.

PART III

THE TRIAL

[312] The trial in every aspect was unique in British Columbia's legal history. It commenced in the Village of Smithers on May 11, 1987, and, after 318 days of hearing evidence at Smithers and at Vancouver, the trial was adjourned on February 7, 1990, for the presentation of arguments. Legal arguments were addressed to the court for a further 56 days and the trial finally concluded on June 30, 1990. The trial judge was McEachern C.J.S.C. (as he then was).

[313] The reasons for judgment describe to some extent the complexity associated with presenting and considering such a broad claim to this vast territory at pp.116-119:

> A total of 61 witnesses gave evidence at trial, many using translators from their native Gitksan or Wet'suwet'en language; "word spellers" to assist the official reporters were required for many witnesses; a further 15 witnesses gave their evidence on commission; 53 territorial affidavits were filed; 30 deponents were cross-examined out of court; there are 23,503 pages of transcript evidence at trial; 5898 pages of transcript of argument; 3,039 pages of commission evidence and 2,553 pages of cross examination on affidavits (all evidence and oral arguments are conveniently preserved in hard copy and on diskettes); about 9,200 exhibits were filed at trial comprising, I estimate, well over 50,000 pages; the plaintiffs' draft outline of argument comprises 3,250 pages, the province's 1,975 pages, and Canada's over 1,000 pages; there are 5,977 pages of transcript of argument in hard copy and on diskettes. All parties filed some excerpts from the exhibits they referred to in argument. The province alone submitted 28 huge binders of such documents. At least 15 binders of reply argument were left with me during that stage of the trial.
>
> The plaintiffs filed 23 large binders of authorities. The province supplemented this with eight additional volumes, and Canada added one volume along with several other recent authorities which had not then been reported.
>
> The evidence is intensely detailed, which is why, in part, this judgment is so inordinately long....
>
> ***
>
> I [trial judge] visited many parts of the territory which is the principal subject of this case during a 3-day helicopter and highway "view" in June 1988 which is described in Schedule 1 to this judgment. I also took many automobile trips into the territory during many of the evenings of the nearly 50 days I sat in Smithers. These explorations were for the purpose of familiarizing myself, as best I could, with this beautiful, vast and almost empty part of the province.
>
> ***
>
> The parties adduced such enormous quantities of evidence, introduced such a huge number of documents, and made so many complex arguments that I have sufficient information to fuel a Royal Commission. Although I assured counsel that was not my function, they apparently did not believe me.
>
> As I am not a Royal Commission, and as I have no staff to assist me, it will not be possible to mention all of the evidence which

> took so long to adduce, or to analyze all of the exhibits and experts' reports which were admitted into evidence, or to describe and respond to all the arguments of counsel. In these circumstances I must do what a computer cannot do, and that is to summarize. In this respect I have been brutal. I am deeply conscious that the process of summarizing such a vast body of material requires me to omit much of what counsel and the parties may think is important.
>
> With the assistance of counsel I have tried my very best to consider everything that is relevant, even if it is not mentioned in these reasons for judgment....(Emphasis added.)

[314] In addition to dismissing the claims for ownership; self-government and damages, the trial judge found, at p.395:

> ... the plaintiffs have established, as of the date of British sovereignty, the requirements for continued residence in their villages, and for non-exclusive aboriginal sustenance rights within those portions of the territory I shall later define [Alternative 3, p.459]

[315] Except for these rights, he found that the plaintiffs' aboriginal rights in land, as they existed in the colony at the date of sovereignty, except those located within Indian reserves, were extinguished by Colonial legislation prior to the Colony uniting with Canada in 1871. (p.412).

[316] The trial judge ruled that the plaintiffs are entitled to a declaration that, subject to the general law of the Province, they have a continuing legal right to use unoccupied or vacant Crown land in the overall district for aboriginal sustenance purposes until it is required for adverse purposes. (p.425)

[317] Any claim against the federal Crown was dismissed and the counterclaim of the Province was also dismissed.

PART IV

THE APPEAL

[318] The plaintiffs appealed the decision of the trial judge. The appeal commenced in Vancouver on the 4th day of May, 1992, and continued for 34 days of hearings. It concluded on July 3, 1992.

[319] Shortly before the commencement of the appeal the Province retained new counsel who filed an amended factum abandoning the argument that pre-confederation colonial enactments had extinguished all aboriginal rights. Because of this last minute change of position by the Province the court appointed counsel to act as *amici curiae* to support those aspects of the trial judgment which were no longer supported by the Province.

[320] The rules of court governing the conduct of the appeal were suspended and extensive factums, replies and surrejoinders, reading notes and case references were filed and referred to by the parties and the intervenors.

[321] The cross appeal of the Province with respect to the dismissal of its counterclaim was abandoned.

[322] No appeal was taken against the dismissal of the plaintiffs' claim against Canada. The Attorney General for Canada, a party to the proceeding, appeared through counsel who made submissions setting out in detail the position of Canada on the issues raised on appeal. Intervenors also made representations supporting the plaintiffs' or the defendants' position as their respective interests dictated.

[323] No appeal was taken from the finding of the trial judge that the plaintiffs had failed to prove the internal boundaries of the territories within which each plaintiff claimed an exclusive entitlement on behalf of their respective House. (p.452)

PART V

PRINCIPLES APPLICABLE TO THIS COURT'S REVIEW OF THE TRIAL JUDGE'S FINDINGS OF FACT

[324] A vast volume of evidence, in the form of oral testimony, depositions, affidavits, records, expert reports, etc., was put before the trial judge during this 374 day trial with respect to which the trial judge made numerous findings of fact. In presenting the appeal, plaintiffs' counsel spent several days reviewing in depth the factual foundation of the case with the object of persuading the court to adopt a different view of the facts from that of the trial judge, as they related to the issues of aboriginal ownership, jurisdiction and other aboriginal rights. Because a major component of the appeal concerned the trial judge's findings respecting the nature and territorial scope of the plaintiffs' aboriginal rights, the court considered it appropriate to invite submissions on the legal principles which should govern this Court's review of the trial judge's finding of fact. The plaintiffs, the Province, *amici curiae*, and the intervenors, Alcan and Business Coalition, filed written submissions on the subject.

[325] Because the factual basis of the judgment is of such obvious importance to the outcome of the appeal I now embark upon an extensive, perhaps inordinate, analysis of the authorities which delineate the principles applicable to this Court's review of the trial judge's finding of fact.

[326] The plaintiffs advanced four propositions which they assert provide the proper guidelines for an appellate court's review of the trial judge's finding of fact. I will consider each in the order presented:

(a) Where credibility is not in question, this Court may intervene where it finds that the trial judge failed to appreciate, failed to direct himself to, disregarded, or misapprehended relevant evidence.

[327] I do not accept this proposition in the unrestricted form in which it is expressed. It would provide a purely subjective test justifying the substitution of the opinion of the Court of Appeal for that of the trial judge whenever the court felt that the trial judge had "misapprehended relevant evidence". It emphasises the trial judge's "failure to appreciate or direct himself to, or have proper regard to relevant evidence" as a reason for reversal.

[328] It should also be noted that the proposition does not refer to the onus on the Court of Appeal to specifically demonstrate that the trial judge's conclusions were in error and the reason why they constituted reversible error.

[329] In the recent decision of ***R v. Morin,*** [1992] 3 S.C.R. 286, the accused had been acquitted by the trial judge of charges of dangerous driving. The Court of Appeal allowed the Crown's appeal, disagreeing with the facts to which the trial judge directed himself and with the inferences that could be drawn from them. In

restoring the trial judge's decision, Sopinka J., speaking for the Supreme Court, stated, at p.295:

> Failure to appreciate the evidence cannot amount to an error of law unless the failure is based on a misapprehension of some legal principle.
>
> *(b) Where credibility is in issue the court may intervene where it is certain that its difference of opinion with the trial judge is the result of error by the latter or where the trial judge made a palpable and overriding error affecting his assessment of the facts.*

[330] Again the proposition refers to an Appeal Court concluding "its difference of opinion with the trial judge is the result of error by the latter". This is an invitation for the Court of Appeal to substitute its subjective assessment of the evidence for that of the trial judge. The applicable test is much more rigorous. In ***Stein v. The "Kathy K" (Storm Point)***, [1976] 2 S.C.R. 802 at 808, Ritchie J. observed:

> These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial.

See also ***Métevier v. Cadorette***, [1977] 1 S.C.R. 371 at 377-8.

[331] I am of the view that the "palpable and overriding" test is not restricted to those cases where credibility is in issue. In ***Doerner v. Bliss & Laughlin Industries Inc.***, [1980] 2 S.C.R. 865 at 875-6, McIntyre J. succinctly stated the applicable principle:

> The position of an appellate court with respect to findings of fact made at trial has been frequently stated in this Court, see for example: ***Stein v. The Ship "Kathy K"*** [1976] 2 S.C.R. 802 and authorities there considered. The trial judge must remain the judge of matters of fact where it can be shown that there was evidence before him on which he could base his findings and where it is not shown that he has proceeded on any false principle or made any palpable error.

[332] See ***Geffen v. Goodman Estate,*** [1991] 2 S.C.R. 353 at 388-9 where Wilson J. observed:

> Even where a finding of fact is not contingent upon credibility, this court has maintained a non-interventionist approach to the review of trial court findings.

***

> And even in those cases where a finding of fact is neither inextricably linked to the credibility of the testifying witness nor based on a misapprehension of the evidence, the rule remains that appellate review should be limited to those instances where a manifest error has been made. Hence in ***Schreiber Brothers Ltd. v. Currie Products Ltd.,*** [1980] 2 S.C.R. 78, this Court refused to overturn a trial judge's finding that certain goods were defective, stating at pp.84-85 that it is wrong for an appellate court to set aside a trial judgment where the only point at issue is the interpretation of the evidence as a whole (citing ***Métevier v. Cadorette and Gourde,*** [1977] 1 S.C.R. 371).

[333] Such "palpable and overriding error" will usually arise where there is no evidence to support the findings of fact of the trial judge or where the trial judge has overlooked uncontradicted evidence relevant to a material point in issue.

> *(c) Examples of "palpable and overriding" error include failure by the trial judge to state or to adequately support his finding with respect to credibility, failure to give clear or adequate reasons for fact findings, failure to address issues of credibility on a proper basis and failure to apply proper principles in determining the weight to be given to the evidence.*

[334] This proposition places an unwarranted burden upon the trial judge to demonstrate, in his reasons for judgment, the correctness and validity of those reasons. In my view, the onus is on the appellant to demonstrate the palpable and overriding error in the trial judge's finding of fact. While it might be helpful to a Court of Appeal to have a trial judge state all the reasons for his having found the facts as he did and for attributing the weight he attached to the evidence of the respective witnesses, it does not constitute "palpable and overriding" error if he has not done so. Rather error on the part of the trial judge must be clearly demonstrated by the plaintiffs showing there was no evidence from which, or based upon which, the trial judge could reasonably make the findings of fact he did or, alternatively, that there was no evidence contradicting the evidence of the appellants' credible witnesses on a material issue and the trial judge had wrongfully failed to consider the appellants' evidence.

[335] In ***Morin,*** Sopinka J. observed, at p.296:

> There is, however, no obligation in law on a trial judge to record all or any specific part of the process of deliberation on the facts. To apply ***Morin*****,** [[1988] 2 S.C.R. 345] as a basis of review of a trial judge's findings of fact whenever the reasons for judgment fail to deal with a particular piece of evidence, or the inference from such evidence would require a trial judge to record each piece of evidence and his or her assessment of it. This would be a misapplication of ***Morin*** to the trial process when the trial is by a judge alone. A trial judge must consider all of the evidence in relation to the ultimate issue but unless the reasons demonstrate that this was not done, the failure to record

> the fact of it having been done is not a proper basis for concluding that there was error in law in this respect.

[336] As the trial judge in the case at bar observed, it was an impossible task to comment on the many relevant issues and positions raised by the parties during the course of this 362 day trial. This absence of comment does not relieve a Court of Appeal from the responsibility of specifying the error into which it suggests the trial judge fell and the reason why such failure should be construed as an error which would justify reversing the trial judgment.

[337] In ***N.V. Bocimar S.A. v. Century Insurance Co. of Canada,*** [1987] 1 S.C.R. 1247 at 1249-50, Le Dain J. observed:

> With great respect, I am of the opinion that the appeal should be allowed on the first ground. The Court of Appeal took the position that because of the nature of the evidence in this case, which consisted of expert testimony and documentary evidence, the Court, to use its own words, was "almost in the position of conducting the trial *de novo* and making our own assessment of the evidence". I cannot agree. The limits to the scope of appellate review of the findings of fact by a trial court, which were affirmed by this Court in ***Stein v. The Ship "Kathy K",*** [1976] 2 S.C.R. 802, and other decisions, also apply in my opinion to the review of the findings of a trial court based on expert testimony, as indicated in ***Joseph Brant Memorial Hospital v. Koziol*****,** [1978] 1 S.C.R. 491; ***Schreiber Brothers Ltd. v. Currie Products Ltd.,*** [1980] 2 S.C.R. 78; and ***Joyce v. Yeomans*****,** [1981] 2 All E.R. 21 (C.A.)
>
> (Emphasis added.)

[338] The case of ***Bank of Montreal v. Bail Ltée.*****,** [1992] 2 S.C.R. 554, sets out a recent view of the Supreme Court of Canada respecting a Court of Appeal's interference with a trial judge's judgment of the facts. It was a construction case and "the dispute between the parties related primarily to the facts and the consequences to be drawn therefrom". The Court of Appeal differed with the conclusions reached by the trial judge with respect to issues relating to the assessment of the facts, the weight to be attributed to expert testimony, and the credibility of the witnesses.

[339] The Court of Appeal did not explain in what respect the trial judge may have been mistaken when he weighed the evidence before him and in particular it advanced no reasons why his findings as to credibility were patently erroneous.

[340] At p.572 of the reasons, Gonthier J., for the court, said:

> This Court has often had occasion in recent years to rule on the role of an appellate court, particularly with respect to findings of fact by the trial judge. These issues were very recently discussed in ***M. (M.E.) v. L.(P.),*** [1992] 1 S.C.R. 183, and ***Lapointe v. Hôpital Le Gardeur,*** [1992] 1 S.C.R. 351. I shall only quote the following passage from ***Beaudoin-Daigneault v. Richard*****,** [1984] 1 S.C.R. 2, at p.9, which provides a good summary of the approach that should be taken in decisions of appellate courts:

> ... an appellate court should not intervene unless it is certain that its difference of opinion with the trial judge is the result of an error by the latter. As he had the benefit of seeing and hearing the witnesses, such certainty will only be possible if the appellate court can identify the reason for this difference of opinion, in order to be certain that it results from an error and not from his privileged position as the trier of fact. If the appellate court cannot thus identify the critical error it must refrain from intervening, unless of course the finding of fact cannot be attributed to this advantage enjoyed by the trial judge, because nothing could have justified the judge's conclusion whatever he saw or heard; this latter category will be identified by the unreasonableness of the trial judge's finding ...
>
> It is therefore not sufficient for an appellate court to indicate its disagreement with the trial judge; it must also state its reasons. It is often said, with good reason, that the trial judge is the master of the facts. Thus when an appellate court is of the opinion that the trial judge has drawn erroneous conclusions from the evidence, it must provide good reasons for its decision, because in so doing it is taking issue with the results of direct observation of the testimony. (Emphasis added.)

[341] In the absence of an explanation for differing from the findings of a trial judge, one must conclude that a Court of Appeal has simply disagreed with the lower court's appreciation of the facts and substituted its own interpretation.

[342] In Part 7 (pp.163-172) of the reasons for judgment in the case at bar, the trial judge comments in detail on the problems associated with assessing the weight to be attributed to evidence based in large part on oral declarations and opinions from anthropologists and other experts who worked closely with the plaintiffs during the preparation of the case for trial.

[343] I would particularly note, with respect to the evidence of the archaeologists, anthropologists and historians called in support of or in opposition to the claims advanced, that many of the conclusions they expressed reflected their personal views formed as a result of their studies and research.

[344] When dealing with such general topics as aboriginal rights usually the validity of the expert conclusions expressed cannot be demonstrably refuted. All a counsel can do is call a reputable expert who holds a contrary opinion based generally on similar research and background. With each expert having attributed greater significance to some facts than to others in forming their respective opinion, a trial judge, considering such evidence, must determine what weight he or she attributes to the conclusions expressed by one or other of the witnesses called. This of course will turn upon the trial judge's exposure, especially in a case of this nature, to all the circumstances which have come to his attention during the course of the trial. The opinion of one expert witness, while not clearly erroneous, may be such that, in the trial judge's opinion, it does not reflect the appropriate conclusion to draw from the interpretation of the evidence as a whole. In such circumstances, it is sufficient in

my view for the trial judge, having heard and considered the evidence of the respective experts, to state that he or she attaches little or no weight to certain evidence or, alternatively, attaches considerable weight to other evidence.

[345] The remarks of de Grandpré J. in ***Métevier v. Cadorette*****,** at p.382, are in my view particularly apposite to the instant case. He said:

> In the case before this Court, the finding of the trial judge was set aside by the Court of Appeal in a case where the only point at issue was the interpretation of the evidence as a whole. In my view, that was a case where, applying the criteria established in ***Dorval*****,** such an intervention was an error. The reason for this is simple and is found in ***Prudential Trust Company Limited v. Forseth*****,** [1960] S.C.R. 210, in which, at p.217, Martland J. speaking for the whole Court cited the following extract from ***Powell v. Streatham Manor Nursing Home*****,** [1935] A.C. 243 at p.249:
>
> ... I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circum-stances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.
>
> Although in ***Forseth*** the question was one of credibility, the words I have emphasized also apply to the general interpretation of the testimony. (Emphasis added.)

[346] In ***Rainbow Industrial Caterers Ltd. v. C.N.R. Co.*** (1988), 54 D.L.R. (4th) 43 at 52 (B.C.C.A.), Esson, J.A. summarized the principles applicable to a review court in these words:

> For many years, this court has proceeded on the principle that the court will not interfere with findings of fact unless the court is satisfied that the trial judge was "clearly wrong": ***Claridge v. B.C. Elec.***

> ***R. Co.,*** 55 B.C.R. 462, [1940] 3 W.W.R. 677, [1941] 1 D.L.R. 78 (C.A.) – particularly where the findings of fact depend on the trial judge's assessment of credibility or the weight which he is going to attach to the testimony of the various witnesses. The Supreme Court has endorsed this view in many cases: ***Stein v. The "Kathy K",*** [1976] 2 S.C.R. 802, 62 D.L.R. (3d) 1, 6 N.R. 359 [Fed.]; ***Schreiber Bros. Ltd. v. Currie Prod. Ltd.*****,** [1980] 2 S.C.R. 78, 108 D.L.R. (3d) 1, 31 N.R. 335 [Ont.]; ***Lewis v. Todd*****,** [1980] 2 S.C.R. 694, 14 C.C.L.T. 294, 115 D.L.R. (3d) 257, 34 N.R. 1 [Ont.]; ***Jaegli Ent. Ltd. v. Taylor,***[1981] 2 S.C.R. 2, 124 D.L.R. (3d) 415. (Emphasis added.)

[347] This principle is particularly apt in a case where the issue is one of weighing the evidence and where many of the lay witnesses and experts retained by the parties have been involved in the day to day preparation of the claim and the respective opposing positions over a period of many years. (pp.168-9)

[348] In my view, the Court of Appeal should not interfere with the finding of the trial judge as to what is the appropriate weight to attribute to any particular witnesses' evidence unless the Court of Appeal can specifically demonstrate that, either there was no evidence which would support the trial judge's conclusion or that the trial judge's conclusion can not be supported as reasonable, regardless of what he heard or was exposed to during the course of the trial.

[349] In ***Woelk v. Halvorson*****,** [1980] 2 S.C.R. 430 at 436, McIntyre J. observed:

> Weighing and evaluating the evidence lies fully with the province of the trial judge and, where there is evidence to support a finding which he has made, the fact that a Court of Appeal would have preferred to accept other evidence to the contrary, leading to a different finding, will not justify a reversal of the trial judge's conclusion.

[350] To a similar effect are the comments of Sopinka J. in ***Morin*****,** at p.297:

> The trial judge referred to the evidence which in her opinion was important. This was part of the weighing process, and stressing one item over another was not the result of the misapplication of any legal principle. Finally, there is no basis for concluding that the trial judge failed to consider the evidence in its totality in arriving at the ultimate result. In summary, the majority of the Court of Appeal had a different theory of the facts and the inferences that could be drawn from those facts. While I might agree that the majority's view of the facts is preferable, this was a matter for the trial judge to determine and, absent an error of law, the Court of Appeal should not have interfered. (Emphasis added.)

[351] Counsel for the plaintiffs made the further submission that, where the trial judge's finding is a conclusion of mixed law and fact, the appellate court may reverse such a finding in the same manner as if it were a conclusion of law which they were considering.

[352] I disagree with that submission. In my view where the appellate court is faced with questions of mixed fact and law, the court is obliged to separate the facts from the legal rules to be applied to them and the "palpable and overriding error" test should be applied to the findings of fact. A separable legal proposition would of course be reviewable.

[353] There is of course no presumption of correctness about the trial judge's decisions on questions of law. Appellate courts in such instances are not reviewing a trial process. They are making law and it is important that they achieve universality and reasonable predictability in the law. This process would be destroyed if there was a presumption that the trial judge was correct in his legal conclusions.

(d) This Court's duties include undertaking a review of the record below and providing good reasons for its opinions that the trial judge has drawn erroneous conclusions from the evidence.

[354] I agree with this statement and would add that the "good reasons" must indicate that there was no evidence upon which the trial judge could reasonably reach the conclusions he did or, alternatively, that there was valid, uncontradicted evidence on a material issue which was both relevant and admissible and which was apparently, for some unknown reason, ignored by the trial judge.

[355] It should be noted that this last submission is the only one of the four points raised by the plaintiffs that places the onus on the Court of Appeal to justify interfering with or varying a trial judge's findings of fact.

[356] In this case the trial took approximately 3 years. There were some 318 days of evidence during which the trial judge saw all the expert and lay witnesses and had an opportunity to determine what weight should be given to their evidence. In such circumstances it was inevitable that the case would be decided, in the main, on the totality of the evidence to which the trial judge was exposed.

[357] In the present case there was a substantial conflict in the evidence of the expert witnesses, after a consideration of which the trial judge made certain findings and reached certain conclusions of fact. This is not a case, as in so many of the aboriginal claims cited to the court, such as ***Calder v. Attorney-General of British Columbia,*** [1973] S.C.R. 313, and ***Simon v. R.,*** [1985] 2 S.C.R. 387, where the basic facts were admitted and the Court of Appeal was concerned simply with applying the correct legal principle in reaching their conclusions.

[358] The Court of Appeal could not possibly, in a case of this nature, be exposed to all the nuances in the evidence or be in as good a position as the trial judge with respect to weighing the evidence of the witnesses and determining what should be accepted and what rejected. Furthermore, it would be manifestly impractical to require that the reasons for judgment set out in detail, for each witness, expert and lay, the rationale why the trial judge considered it appropriate, after weighing the evidence, to accept certain evidence and reject that of other witnesses. This would impose upon a trial judge an impossible and unreasonable burden.

Summary

[359] (1) The Court of Appeal may reverse findings of fact of the trial judge – even if they are based on credibility – if it is established that the trial judge made some "palpable and overriding error" which affected his assessment of the material facts.

[360] (2) Only in extraordinary cases should an appellate court find error on the part of the trial judge with respect to those aspects of the finding of facts which involve questions of credibility or weight to be given the evidence of a witness since the review court does not have the advantage the trial judge had of seeing and assessing the witnesses as they gave their evidence.

[361] (3) A "palpable and overriding error" exists: firstly, when it can be demonstrated there was no evidence to support a material finding of fact of the trial judge; secondly, when the trial judge wrongly overlooked admissible evidence relevant and material to the issue before the court; or thirdly, where the trial judge's finding of fact cannot be supported as reasonable, regardless of what the trial judge saw or heard during the course of the trial. An assessment of palpable error should be made on the totality of the evidence.

[362] (4) In reversing the trial judge for "palpable and overriding error" the Court of Appeal must designate the specific error and state why the nature of the error justifies reversing the trial judge's finding of fact.

Conclusion

[363] In my view, the above principles apply to the trial judge's determination of:

(a) the nature and territorial scope of the aboriginal cultural activities, customs, practices and the traditional way of life of the plaintiffs' ancestors and their use of the territory at the time of sovereignty.

(b) The degree and extent to which the plaintiffs' ancestors exercised jurisdiction and control, (self-government) over the territory claimed or any portion thereof.

(c) The weight to be attributed to the evidence of the respective witnesses – expert and non-expert – when considered in the light of the totality of the evidence.

PART VI

ABORIGINAL RIGHTS IN GENERAL

1. The Acquisition of Sovereignty

[364] The plaintiffs in the present case did not contest Canadian sovereignty over any part of the territory over which they claim aboriginal rights. To do so successfully would have been difficult since the certainty of Canadian sovereignty in British Columbia, which has as its root the sovereignty of the British Crown, was confirmed by the Supreme Court of Canada in ***R. v. Sparrow*****,** [1990] 1 S.C.R. 1075 at 1103:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown; see ***Johnson* v. *M'Intosh*** (1823) 8 Wheaton 543 (U.S.S.C.); see also the Royal Proclamation itself (R.S.C., 1985, App. II, No. 1, pp. 4-6); ***Calder*****,** *supra*, *per* Judson J. at p. 328, Hall J. at pp. 383, 402. (Emphasis added.)

[365] In any event, it is beyond the competence of a municipal court to question the validity of the acquisition of sovereignty over new territory which is an act of state: see ***Sobhuza II v. Miller*****,** [1926] A.C. 518 at 525 (P.C.), and ***Mabo v. Queensland*** (1992), 107 A.L.R. 1 at 20, 58 (H.C.), and at p.51 where Brennan J. stated:

> The Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court.

[366] This is the essence of the view of the trial judge expressed at p.387 of his reasons:

> They [aboriginal people] often refer to the fact they were never conquered by military force. With respect, that is not a relevant consideration at this late date, if it ever was. Similarly, the absence of treaties does not change the fact that Canadian and British Columbian sovereignty is a legal reality recognized both by the law of nations and by this court.

[367] The inhabitants of the newly discovered lands of Vancouver Island and British Columbia were not conquered nor did they cede the territory to European settlers by treaty. The territory in what is now British Columbia and Vancouver Island was acquired by peaceful annexation. Accordingly, British Columbia came under British sovereignty as a "settled colony".

2. Introduction of the Common Law to British Columbia and Vancouver Island.

[368] The fact that British Columbia was acquired as a settled colony has important implications for the introduction of English common law in British Columbia. Since the very beginning of British involvement in territory outside of England, the common law has distinguished between colonies acquired by conquest and those acquired by settlement. In colonies acquired by conquest or cession, the common law rule was that the indigenous system of law continued in the colony until altered by the Sovereign or Parliament. In contrast, the common law has long been held to automatically prevail as the system of law in a settled colony. One of the earliest cases treating this distinction is ***Blankard v. Galdy*** (1693), Holt, K.B. 341 in which the defendant's reliance on an English statute in an action in Jamaica raised the question of whether English law, or pre-conquest Spanish law, prevailed in Jamaica. In this connection it was held:

> In case of an uninhabited country newly found out by English subjects, all laws in force in England, are in force there: but Jamaica being conquered, and not pleaded to parcel of the kingdom of England, but part of the possession and revenue of the Crown of England; the laws of England did not take place there, 'till declared so by the conqueror or his successors.

[369] This distinction between settled and conquered colonies was confirmed in the case of ***Campbell v. Hall*** (1774), 98 E.R. 1045 (K.B.) as well as in the case of ***Freeman v. Fairlie*** (1828), 1 Moo. Ind. App. 305 (P.C.). Both of these cases were applied in ***Lyons v. East India Co.*** (1836), 1 Moo. P.C.C. 175 (P.C.) by Lord Brougham who said at p.272:

> It is agreed, on all hands, that a foreign settlement obtained in an inhabited country, by conquest, or by cession from another power, stands in a different relation to the present question, from a settlement made by colonizing, that is, peopling, an uninhabited country. (Emphasis added.)

[370] A further expression of the rule can be found in ***Cooper v. Stuart*** (1889), 14 App. Cas. 286 at 291 (P.C.) where Lord Watson said:

> There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class. <u>In the case of such a Colony the Crown may by ordinance, and the Imperial Parliament, or its own legislature when it comes to possess one, may by statute declare what parts of the common and statute law of England shall have effect within its limits.</u> (Emphasis added.)

[371] More recently in ***Sammut v. Strickland*****,** [1938] A.C. 678, the Privy Council made the following observations respecting the distinction between "conquered and settled colonies", at p.701:

> It seems right, therefore, to consider whether there is anything to support the respondent's contention on this point, based on the principle of constitutional law formulated in the general proposition that the Crown by virtue of the Royal Prerogative (apart from the effect of the British Settlements Act, 1887) is prima facie entitled to legislate for possessions acquired by conquest or cession, but is not so entitled in the case of Settlements. The line of distinction here has always been based on the circumstance that English settlers wherever they went carried with them the principles of English law, and that English common law necessarily applied in so far as such laws were applicable to the conditions of the new colony. The Crown clearly had no prerogative right to legislate in such a case. Where, however, the territory was acquired by cession or conquest, more particularly where there was an existing system of law, it has always been considered that there was an absolute power in the Crown, so far as was consistent with the terms of cession (if it was a case of that kind), to alter the existing system of law, though until such interference the laws remained as they were before the territory was acquired by the Crown.

[372] Thus, the settled - conquered distinction, and its implications for the introduction of the common law, is an established rule of law with an impressive pedigree. As a settled colony, the common law in British Columbia automatically came into force in 1846 when the ***Oregon Boundary Treaty*** established Britain's exclusive sovereignty north of the 49th parallel. It thereby superseded any indigenous system of laws.

[373] In ***Mabo*****,** Brennan J. observed, at p.25-6:

> Thus the Miriam people in 1879, like Australian Aboriginals in earlier times, became British subjects owing allegiance to the Imperial Sovereign entitled to such rights and privileges and subject to such liabilities as the common law and applicable statutes provided.

[374] The "Criminal and Civil laws of England" were also expressly introduced into British Columbia by proclamation on November 19, 1858. The current version of this law is now contained in the ***Law and Equity Act,*** R.S.B.C. 1979, c.224, s.2.

[375] The common law was introduced subject to qualification by the dictates of local circumstances. For example, in ***Mabo*****,** Justices Deane and Gaudron, at p.59, state:

> Where persons acting under the authority of the Crown established a new British Colony by settlement, they brought the common law with them. <u>The common law so introduced was adjusted in accordance with the principle that, in settled colonies, only so much of it was introduced as was "reasonably applicable to the circumstances of the</u>

> Colony". This left room for the continued operation of some local laws or customs among the native people and even the incorporation of some of those laws and customs as part of the common law. The adjusted common law was binding as the domestic law of the new Colony and, except to the extent authorized by statute, was not susceptible of being overridden or negatived by the Crown by the subsequent exercise of prerogative powers. (Emphasis added.)

[376] The application of the appropriately adjusted common law, as developed by the Canadian courts, has recognized that the acquisition of sovereignty by the British Crown did not, in itself, extinguish the right of the aboriginal people to continue their traditional customs, practices and use of the tribal land in a manner integral to that indigenous way of life. Rather, it recognized the historical aboriginal presence and title and served to protect aboriginal customs and practices and the traditional relationship the aboriginal people had with the lands they occupied and used. (See ***Baker Lake (Hamlet) v. Min. of Indian Affairs & Nor. Dev.*** (1980), 107 D.L.R. (3d) 513 at 559 (F.C.T.D.); ***St. Catherines Milling & Lumber v. The Queen*** (1887), 13 S.C.R. 577, at 612-3, 615-6; ***Guerin v. The Queen***, [1984] 2 S.C.R. 335 at 376).

[377] Any suggestion that the inhabitants of a conquered colony were afforded better treatment than those in a settled colony because the system of law in a conquered territory was presumed to continue until altered must be examined in light of the protection which aboriginal practices and uses of land received from the adjusted common law. Furthermore, the precarious position of conquered people, who were exposed to the whim of the royal prerogative power, must be considered. The implications of this prerogative power were expressed in ***Campbell v. Hall*****,** at p.1048:

> It is left by the Constitution to the King's authority to grant or refuse a capitulation: if he refuses, and puts the inhabitants to the sword or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection and grants them their property, he has a power to fix such terms and conditions as he thinks proper. He is intrusted with making the treaty of peace: he may yield up the conquest, or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the King might change part or the whole of the law or political form of government of a conquered dominion.

[378] This passage emphasizes the importance of the protection which settled colony status brought to any indigenous people there. The aboriginal people were entitled to the ordinary protection of the common law, which included the recognition of their right to pursue their traditional practices and uses of land. This entitlement could not be altered in a settled colony by an exercise of the royal prerogative. Only an Act of Parliament, or later, an Act of the local government, could disturb these rights.

[379] So that there can be no confusion on this point, I am compelled to state that this important protection given to aboriginal practices by the common law may only

be understood by the application of established principle as it has been developed in past cases. It cannot be altered and expanded by the use of such labels as the "doctrine of continuity". In making this observation, I can do no better than reiterate the remarks of Brennan J. at p.18 of ***Mabo:***

> In discharging its duty to declare the common law of Australia, this court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.

[380] The assertion of an all encompassing aboriginal right to an exclusive social and legal system – under the so-called "doctrine of continuity" – would result in the common law affording protection to a system which is both outside and independent of the common law and, at the same time, extend to the aboriginal community the benefits and protection afforded by the common law to all residents of the province. This would be inconsistent with, and a fundamental departure from the principle that, upon the exercise of sovereignty, the adjusted common law became the law of all subjects – native and non-native alike. Certainly it overturns the settled – conquered distinction which in British Columbia is a fundamental premise of our legal system.

3. What makes an aboriginal custom or practice a right?

[381] In my view, considerable confusion has arisen when analyzing aboriginal claims through the indiscriminate use of the term "right", particularly when the relevant legal relations being analyzed are created by, and arise as a consequence of the exercise of sovereignty and the introduction of the common law.

[382] In this case, in the pre-sovereignty period, the ancestors of the native claimants were members of an organized society which had regulated its affairs over an extended period of time – a sufficient period of time to constitute, from a European point of view, a "traditional way of life". This social system had developed its own rules, customs and practices to regulate the affairs of the community. The system included the roles played by the Chiefs and subsidiary Chiefs, the Houses, the Clans, the Feast, and provided for the devolution of property interests, etc. The community occupied certain lands and used them for sustenance purposes including hunting, fishing, and growing crops.

[383] Prior to the exercise of sovereignty and the introduction of the common law, the issue of aboriginal "rights" did not arise. For the aboriginal peoples to have the right, *vis-à-vis* European settlers, to engage in those traditional practices and uses of land which were integral to their aboriginal society there must be recognition of such a right by those outside the aboriginal community and some mechanism requiring them to respect such a "right". An enforceable right, as against European settlers, came only with the protection which was extended to aboriginal rights by the adjusted common law.

[384] Upon the exercise of sovereignty by the Crown, the adjusted common law recognized the aboriginal community's "right" – *vis-à-vis* the settlers – to engage in those practices and activities associated with the use of the land they occupied

which were traditional, integral and distinctive to the aboriginal society and way of life. The English common law imposed a correlative duty upon the Crown to protect from unjustifiable interference and impairment, the aboriginal community's right to engage in those aboriginal customs and practices traditionally associated with the lands they occupied and used. [Hohfeld: Fundamental Legal Conceptions As Applied In Judicial Reasoning, 1917 Yale Law Journal, p.710.)

[385] The authorities before this Court make clear that aboriginal rights take their force from the common law. For example, in ***Mabo,*** Mason C.J. and McHugh J. summarized the decision of the Australian High Court at p.7:

> In the result, six members of the court (Dawson J dissenting) are in agreement that the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants in accordance with their laws or customs, to their traditional lands .... (Emphasis added.)

[386] As a further example, Mahoney J. observed in ***Baker Lake*** at p. 547:

> An aboriginal title to that territory, carrying with it the right freely to move about and hunt and fish over it, vested at common law in the Inuit. (Emphasis added.)

[387] I observe that the six judges of the Supreme Court of Canada in ***Calder*** who found it necessary to deal with the substantive issues of aboriginal title agreed that aboriginal title existed at common law.

[388] In sum, the aboriginal rights with which we are concerned in this litigation, are rights at common law. These rights reflect the traditional practices which were integral to the native society occupying tribal lands when the common law was introduced. They are rights additional to those enjoyed by every Canadian citizen, native and non-native.

4. What distinguishes a right as "aboriginal"?

[389] As previously noted, aboriginal peoples are accorded by the adjusted common law additional or special aboriginal rights over and above the rights enjoyed by all citizens of Canada. What then makes these rights "aboriginal" and distinguishes them from the other rights which the aboriginal people enjoy along with other residents of British Columbia?

[390] Aboriginal rights, including aboriginal interests in tribal lands, have as their basis the historic occupation and use of land. In ***Calder,*** Judson J. (Martland and Ritchie JJ. concurring) said at p.328:

> ... the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means .... (Emphasis added.)

[391] In ***Guerin,*** Dickson J. (later C.J.C.) affirmed this view of ***Calder*** at p.376:

> In ***Calder*** ... this Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands.

[392] It is the traditional practices and ways of the aboriginal people associated with this occupation which attract common law protection. In ***Sparrow*** at p.1099, Dickson C.J. and La Forest J. said the protection of aboriginal rights extended to those practices which were "an integral part of their distinctive culture". This feature of aboriginal rights imports an historical dimension, which requires that the practices receiving protection be part and parcel of the pre-sovereignty aboriginal society. In ***Baker Lake*** at p.543, Mahoney J. observed:

> ... there appears no valid reason to demand proof of the existence of a society more elaborately structured than is necessary to demonstrate that there existed among the aborigines a recognition of the claimed rights, sufficiently defined to permit their recognition by the common law upon its advent in the territory. The thrust of all the authorities is not that the common law necessarily deprives aborigines of their enjoyment of the land in any particular but, rather, that it can give effect only to those incidents of that enjoyment that were, themselves, given effect by the regime that prevailed before: ***Amodu Tijani v. Secretary, Southern Nigeria,*** [1921] 2 A.C. 399. (Emphasis added.)

[393] Thus, aboriginal rights are intimately connected to pre-sovereignty aboriginal practices. They are site and activity specific and their existence turns on the particular facts of each case: ***Kruger and Manuel v. The Queen,*** [1978] 1 S.C.R. 104 at 109. For example, while the netting of fish in a certain location in a certain way might well constitute the exercise of an aboriginal right, the same activity under different circumstances might not be so characterized. The precise character of an aboriginal right turns on the nature of the activity, the site at which the activity takes place, and the activity's connection to the particular aboriginal community's traditional way of life.

[394] It has now become trite to say that common law property concepts cannot properly be applied to aboriginal rights which are, as was said in ***Guerin,*** *sui generis*. High authority has warned against the unwise adherence to Western law concepts in grappling with aboriginal title: see ***Amodu Tijani v. Southern Nigeria (Secretary),*** [1921] 2 A.C. 399 (P.C.). This, however, does not make each and every reference to familiar legal concepts dangerous and invidious. One must not be asked to drop all Western legal thought at the door in identifying aboriginal rights and characterizing their content and implications. They are unique. That does not mean that useful comparison and analogy is impossible. After all, these rights receive their recognition and protection through the common law and the Constitution which are, broadly speaking, Western in origin.

[395] In this light, one must consider the description of aboriginal title by Lord Watson in ***St. Catherine's Milling & Lumber Co. v. The Queen*** (1888), 14 App. Cas. 46 (P.C.) as a "personal and usufructuary" interest. While this description may not be perfect or complete, it is one that comes to us from high authority, and should

not be ignored. Lord Watson, in characterizing aboriginal title, purposely chose the term "usufructuary"; a property concept from the civil law tradition which he knew would be entirely familiar to Quebec jurists, and certainly comprehensible to their compatriots. It indicates, at least, the approximate bounds of what "aboriginal title" entails; it shows that interests in land and beneficial uses of land are the basic category of what was protected as aboriginal rights. This is a broad category indeed. In respect of land, it may range from an exclusive and plenary beneficial interest over certain parcels of land, to occasional presence for sustenance activities. A host of practices fall within the category including fishing, hunting and gathering.

[396] The description of aboriginal title in ***St. Catherine's Milling,*** and in other decisions such as ***Amodu Tijani*** ("native title") and ***Re Southern Rhodesia,*** [1919] A.C. 211 (P.C.) ("rights of property"), strongly suggest that only those aboriginal practices which relate to occupation and use of land were recognized and protected by the common law. Judicial powers or powers to legislate for instance are quite different from the concepts of "title" or "rights of property", or a "usufructuary interest".

[397] For my part, I agree with the observation of Toohey J. in ***Mabo,*** p.152, that it is not particularly fruitful when discussing aboriginal title or aboriginal rights to determine whether the "rights" are properly characterized as "proprietary" or "personal" or "something akin to proprietary".

[398] In my view where the plaintiffs' evidence discloses a pre-sovereignty aboriginal occupation and use of tribal land in a manner which is distinctive and integral to the native culture and traditional use of that land then, regardless of whether the activity is characterized as proprietary or personal, the activity constitutes an aboriginal right which receives the protection of the common law from unjustifiable encroachment or diminution. Accordingly, I see no necessity in further categorizing the plaintiffs' aboriginal title. Its nature and scope at the time of sovereignty is determined as a fact from the evidence adduced at the trial.

[399] It must be emphasized that aboriginal rights, although having an historic and traditional basis, may be exercised in a modern manner: see ***Sparrow*** at p.1099. The plaintiffs, in their submissions about the modern form of their aboriginal rights, contended the scope of aboriginal rights should not be limited to merely a modern version of the kind of activities actually engaged in by their ancestors. Instead, they contended their rights should be characterized more generally, and that their historic occupation, use and enjoyment of their tribal lands should found the right to use the lands for any purpose they see fit in order to satisfy their needs. Such uses might involve contemporary practices and activities not pursued by the Indian society before sovereignty, but would come within a broadly framed right to exploit the land and its resources to further the interests of the native society. They assert that aboriginal rights must be permitted to evolve to maintain contemporary relevance to the needs of the holders as those needs change in accord with the changes of overall society.

[400] Characterizing activities such as fishing, hunting and food-gathering as simply one mode of exercising a more general aboriginal right to occupation and use of tribal lands is not the common law approach to aboriginal rights. As reflected by the authorities, the aboriginal right to engage in a specific activity must be connected to traditional practices. The Supreme Court of Canada in ***Sparrow*** held that fishing for "food or ceremonial purposes" was the appellants' protected aboriginal entitlement. Thus, the Court adopted an approach which requires that the nature and scope of an aboriginal right be specified by referring to the character of the aboriginal practice which gave rise to it. In ***Sparrow,*** it so happened that this character was intimately tied to the purpose of the practice, but the traditional practices may have other features which help to delineate and give content to the aboriginal rights which are based upon them.

[401] It is crucial, in my view, to distinguish between the evolution or modernization of a right, and a modern manner of exercising a right. A "modern aboriginal right" is a contradiction in terms. It is the manner of exercising the right which may assume a contemporary or modern form: see ***Sparrow.*** In this connection, I must emphasize that the contemporary needs of native society cannot be used to define the scope of common law aboriginal rights any more than the needs of non-aboriginal Canadians can define their rights. Such needs are satisfied, or fail to be satisfied, by the same societal forces which confront us all. Aboriginal rights receive protection under section 35 of the ***Constitution Act, 1982.*** It would be absurd to contend that constitutionally entrenched aboriginal rights could be defined by the currently perceived needs of aboriginal peoples.

[402] The plaintiffs assert that aboriginal rights should not be characterized by the court as "the right of Indian people to renounce the contemporary world and revert to the life of their ancestors". I agree. There is no reason why any citizen – native or non-native – should "revert" to any former life unless they so desire. That is not the question with which we are faced in this litigation. The issue is one of determining the nature and scope of the aboriginal rights which are recognized by the common law as rights of the aboriginal peoples which are additional to the common law rights which every citizen of the Province enjoys.

[403] The respondents emphasized that aboriginal people enjoy the same rights as non-natives to participate in contemporary activities – particularly beneficial economic activities – in the Province. As an example, they referred to the considerable native participation in the licensed commercial fishing industry. Engaging in activities that are different in nature and scope from those integral to aboriginal society and traditional ways of life cannot be said to be the exercise of an aboriginal right. The fact that aboriginal peoples engage in a particular activity does not qualify such activity for the special protection afforded to aboriginal rights. To hold otherwise is to ignore the "aboriginal" dimension of aboriginal rights.

5. Requirements for recognition of aboriginal rights.

[404] In order to identify the criteria which must be satisfied for common law recognition of aboriginal rights, recourse must be had, as one might expect, to the common law itself. In ***Baker Lake,*** at p.542, Mahoney J. concluded:

> The elements which the plaintiffs must prove to establish an aboriginal title cognizable at common law are:
>
> 1. That they and their ancestors were members of an organized society.
> 2. That the organized society occupied the specific territory over which they assert the aboriginal title.
> 3. That the occupation was to the exclusion of other organized societies.
> 4. That the occupation was an established fact at the time sovereignty was asserted by England. (Emphasis added.)

[405] Mahoney J. fashioned these criteria from a review of a host of common law decisions including ***Calder, Johnson v. M'Intosh,*** 21 U.S. (8 Wheat.) 543 (1823), ***Worcester v. Georgia,*** 31 U.S. (6 Pet.) 515 (1832), ***Re Southern Rhodesia,*** and ***Amodu Tijani.*** It is clear that Mahoney J. synthesized these four requirements for the purpose of deciding the Inuit claim in the particular circumstances of that case. The claim was more narrow than the one advanced by the plaintiffs in this case; it was for a particular sort of title protecting their traditional, nomadic activities of fishing and caribou hunting. Hence he described at p.544:

> The aboriginal title here encompasses only the right to hunt and fish as their ancestors did.

And at p.560 he declared that the plaintiffs had established an aboriginal title such that the area was "subject to the aboriginal right and title of the Inuit to hunt and fish thereon." I do not think that in stating these four requirements he was attempting to be exhaustive, or should be taken as having denied the possibility of later refinement of the legal tests for aboriginal title in the case of a more complex claim to aboriginal title.

[406] In ***Baker Lake,*** Mahoney J. did not have a strict time depth requirement beyond the requirement that the plaintiffs must have been carrying on their activities under the aegis of an organized society at the date of British sovereignty. Nevertheless, Mahoney J. was of the view that only traditional activities can give rise to aboriginal rights.

[407] Indeed, the authorities consistently note that an essential element of an aboriginal right, in addition to the integral and distinctive aspect of the right, is its traditional or historic dimension. This is inherent in the law's protection of pre-sovereignty aboriginal occupation and use of the land.

[408] Judson J. stated in ***Calder,*** at p.328, that the claimants were asserting "that they had a right to continue to live on their lands as their forefathers had lived and that this right had never been lawfully extinguished". A number of judges in ***Mabo*** also averted to the traditional or time depth dimension of the connection between aboriginal people and the land in which they have title. Toohey J., at p.139, quoted from an Australian Law Reform Commission report describing aboriginal title as:

> ... a special collective right vested in an Aboriginal group by virtue of its long residence and communal use of land or its resources. (Emphasis added.)

[409] Toohey J. analyzed ***Baker Lake*** itself in ***Mabo*** at p.146:

> ***Hamlet of Baker Lake*** and like authority may be analysed in the following way. Ultimately, traditional title has a common law existence because the common law recognises the survival of traditional interests and operates to protect them. Proof of existence, therefore, is a threshold question. (Emphasis added.)

[410] In referring to the scope of aboriginal rights, he stated:

> The content of the interests protected is that which already exists traditionally; (Emphasis added.)

[411] Deane J. and Gaudron J., at p.64, of ***Mabo*** set out their understanding of the criteria the common law required in recognizing the aboriginal interest in land, in the following passage:

> What the common law required was that the interest under the local law or custom involve an established entitlement of an identified community, group or (rarely) individual to the occupation or use of particular land and that that entitlement to occupation or use be of sufficient significance to establish a locally recognized special relationship between the particular community, group or individual and that land.

[412] They added, at p.64, after referring to ***Amodu Tijani,*** that:

> ... it is clear that such a traditional interest could result from the established and recognized occupation and use by a tribe or clan of particular land for purposes such as the obtaining of food. (Emphasis added.)

6. The significance of aboriginal custom

[413] Before stating my general conclusions about aboriginal rights, I am compelled to state my views about aboriginal custom and its relationship to the common law aboriginal rights which are now entrenched in s.35 of the ***Constitution Act, 1982.*** As I have already indicated, the common law, when introduced into B.C., recognized and protected aboriginal practices and uses of land which the aborigines considered to be integral to their society. These practices can be loosely characterized as customary practices. Accordingly, I am of the view that customary practices existing at the time of sovereignty could give rise to aboriginal rights.

[414] However, while customary practices received the protection of the common law after its introduction into British Columbia, any aboriginal system of customary law did not. Accordingly, the post-sovereignty creation or alteration of aboriginal customs do not, and cannot have, the force of law; nor can they form the basis for new aboriginal rights. This, as I have explained, follows from the institution of the common law as the one system of law in British Columbia.

[415] Accordingly, with the greatest respect to those who take a contrary view, cases such as ***Eshugbayi Eleko v. Govt. of Nigeria (Officer Administering),*** [1931] A.C. 662 (P.C.), ***Oshodi v. Balogun,*** [1936] 2 All E.R. 1632 (P.C.), and ***Inasa v. Oshodi,*** [1934] A.C. 99 (P.C.) which arose in Lagos, a part of Nigeria acquired by cession, cannot be taken as authority for the creation, after the acquisition of sovereignty, of new and binding aboriginal rights based on custom in British Columbia. A further indication that these cases do not lend themselves to wider application is the fact that Nigerian courts were specifically directed to apply native customary law by s.20 of the Supreme Court Ordinance (***Laws of Nigeria,*** 1923, c. 3).

[416] I hasten to add that this is not to deny that the case of ***Amodu Tijani,*** which also arose in Lagos, is relevant to a discussion of aboriginal rights in British Columbia. In that case, Viscount Haldane's concern was the narrower question of native title. For instance, at p.407 he said:

> A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly.

[417] Earlier, at p.402-3, he had clearly indicated that his concern was native title:

> Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. (Emphasis added.)

[418] It is clear ***Amodu Tijani*** was not concerned with native systems of law; rather, because it treated the question of native rights in land, it is useful to an analysis of aboriginal land rights in Canada.

[419] Like the Nigerian custom cases mentioned above, cases from India describing the native immunity from English law under the imperial regime there do not describe the legal situation which has prevailed in British Columbia since 1846. The very different position of the Crown in India is described in the judgment of Sir Barnes Peacock reported in ***The Advocate-General of Bengal v. Dossee,*** (1863), 9 Moo. Ind. App. 391 (P.C.). at p.399:

> ... in the year 1726, and for many years afterwards, Calcutta was merely a Factory, established for the purposes of trade, by British subjects in a Foreign territory. It was not at that time part of the dominions of the Crown, although the Crown exercised jurisdiction over it as a Factory, in the same manner as the Government of England and other European Governments have done in many similar cases.

[420] Later, at p.401, Sir Barnes Peacock continued:

> The sovereignty has long since been vested in the Crown, and though it was at first recognized in terms by the legislature in 1813 ... it is equally certain, that for a long period of time after the first acquisition, no such rights were claimed, nor any acts of sovereignty

> exercised; and that during all that time no English authority existed there, which could affect the land or bind any but English subjects.
>
> (Emphasis added.)

[421] In affirming the holding of Sir Barnes Peacock on appeal, the Right Honourable Lord Kingsdown explained at p.428:

> ... not the nature of the first settlement made in India – it was a settlement made by a few foreigners for the purpose of trade in a very populous and highly civilized country, under the Government of a powerful Mahomedan ruler, with whose sovereignty the English Crown never attempted nor pretended to interfere for some centuries afterwards.

[422] In sum, while the native law systems which continued in certain parts of the British Empire may have retained the capacity to create new rights and customs which were justiciable in the courts, and binding upon all inhabitants in those colonies, this was not the case in British Columbia. Cases deciding such issues in those places have no application in this province.

7. Conclusions

[423] A review of the authorities dealing with aboriginal rights of occupation and use of land reveal the following principles:

(1) Aboriginal rights of occupation and use have, as their origin, the Indians' historic occupation and use of their tribal lands.

(2) The adjusted common law recognizes the aboriginal right of occupation and use and affords protection against unreasonable interference by others.

(3) The aboriginal right of occupation and use will vary according to the circumstances of the traditional occupation and use prevailing in the aboriginal society prior to sovereignty. The aboriginal rights may nearly constitute a title resembling a proprietary title like those in western property law; or, they may be restricted to certain uses of the land in common with others. Whatever form the traditional aboriginal occupation and use of land took, if that form was distinctive and integral to the native culture and traditional way of life prior to sovereignty, it was recognized by the common law as an aboriginal right deserving of protection.

(4) Whether land has been in the historic occupation and possession of the claimants, and the scope and nature of its traditional occupation and use, are questions of fact to be determined by the evidence.

[424] In light of these principles, I conclude that the common law requires claimants of aboriginal rights to establish that:

(1) they and their ancestors were members of an organized society;

(2) this organized society occupied the territory over which they claim aboriginal rights;

(3) the practices supporting the rights they claim were integral to the claimants' distinctive and traditional society or culture;

(4) the occupation and practices were facts at the time the adjusted common law was introduced by sovereignty; and, that

(5) if exclusive occupation and use is claimed, that the traditional occupation was to the exclusion of other organized societies.

PART VII

ANALYSIS OF THE PLAINTIFFS' CLAIM FOR ABORIGINAL RIGHTS

[425] In determining the plaintiffs' claim for aboriginal rights it is helpful to consider them under three separate categories, namely:

(a) Aboriginal ownership of land.

(b) Aboriginal rights of occupation and use – the cultural, ceremonial and sustenance activities associated with the aboriginal society's historic occupation and use of their traditional lands.

(c) Aboriginal rights of jurisdiction – self-government.

[426] The plaintiffs assert that those categories reflect different aspects of what comes within the overall bundle of "aboriginal rights" recognized by the common law.

[427] I set out again the pertinent paragraphs of the plaintiffs' claim for relief:

I. The Content of Aboriginal Rights

1. A declaration that the plaintiffs have a right to ownership of and jurisdiction over the territory.

***

3. A declaration that the plaintiffs' right of ownership and jurisdiction within the territory includes the right to use, harvest, manage, conserve and transfer the lands and natural resources, and make decisions in relation thereto.

4. A declaration that the plaintiffs' rights to jurisdiction includes the right to govern the territory, themselves, and the members of the Houses represented by the plaintiffs in accordance with Gitksan and Wet'suwet'en laws, administered through Gitksan and Wet'suwet'en political, legal and social institutions as they exist and develop.

***

7. A declaration that the defendant province's ownership of lands, mines, minerals and royalties within the plaintiffs' territory is subject to the plaintiffs' rights of ownership and jurisdiction pursuant to section 109 of the ***Constitution Act, 1967.***

8. A declaration that the defendant province's jurisdiction over the territory, the plaintiffs and members of the Houses represented by the plaintiffs is subject to the plaintiffs' right to ownership and jurisdiction. (Emphasis added.)

[428] It should be noted that all aspects of the aboriginal rights claimed are related to the traditional communal use and occupation of all lands within the external boundaries of the territory.

(a) Aboriginal right of ownership of land

[429] The pleadings make it crystal clear that the plaintiffs primary claim was for aboriginal rights analogous to "ownership" of the territory. There is no room for doubt or speculation on this point. Indeed counsel originally advised the trial judge that they were not seeking any lesser relief and that it was an "all or nothing" claim. Even after moderating their claim, "ownership" remained the primary interest they sought.

[430] It is an unprofitable exercise to suggest the plaintiffs should have pleaded their case differently. The responsibility for framing the pleadings to correctly reflect the plaintiffs' position is that of counsel. It is not for members of the Appeal Court to substitute their views of the pleading which they consider to be the correct one (particularly in a case of this nature where there were some eight amendments, none of which were directed at revising the claim for ownership). Counsel did not, before the trial judge or before this Court, request an amendment to redefine their claim.

[431] The "ownership" claimed was not imprecise. It was defined with exactitude in the paragraphs set out above and it obliged the court to consider and rule upon the claim within the parameters set out by the litigants in their pleadings.

[432] For these reasons it would be improper, in my view, to reconstruct the claim for "ownership" and treat it as a claim for a lesser variety of aboriginal title such as "occupation and use" and conclude the trial judge erred in law by considering and disposing of the claim in the form in which it was pleaded.

[433] The alternative claim of aboriginal rights of occupation and use was properly considered by the trial judge as a separate claim to that of ownership.

[434] The trial judge analyzed the claim to aboriginal ownership and the evidentiary basis for the claim. His findings are set out, at p.372-3, where he stated:

> ... I shall deal with aboriginal jurisdiction and ownership first, and return to aboriginal rights later.
>
> It will be useful to refer to what the plaintiffs have alleged as the basis for their claims to jurisdiction and ownership, and to comment briefly on each of them. These allegations, from para. 57 of the statement of claim, are that the plaintiffs and their ancestors have:
>
> "(a) lived within the territory." This is a correct statement as to village sites but presence is only one aspect of aboriginal interests.
>
> ***
>
> "(g) protected and maintained the boundaries of the Territory". This is unproven. There seemed to be so many intrusions into the territory by other peoples that I cannot conclude the plaintiffs'

ancestors actually maintained their boundaries or even their villages against invaders, although they usually resumed occupation of specific locations for obvious economic reasons. As recently as the 1890's Loring found Indians in defensive, winter locations away from their villages and I am uncertain the plaintiffs' ancestors maintained any boundaries.

"(h) expressed their ownership of the Territory through their regalia, adaawk, kun'gax and songs." I do not find these items sufficiently site specific to assist the plaintiffs to discharge their burden of proof.

"(i) confirmed their ownership of the Territory through their crests and totem poles". There is considerable doubt about the antiquity of crests and totem poles upon which I find it unnecessary to express any opinion.

"(j) asserted their ownership of the Territory by specific claim." This was not pressed in argument and does not assist the resolution of these issues.

"(k) confirmed their ownership of and jurisdiction over the Territory through the Feast system." I do not question the importance of the feast system in the social organization of present-day Gitksan and I have no doubt it evolved from earlier practices but I have considerable doubt about how important a role it had in the management and allocation of lands, particularly after the start of the fur trade. I think not much, for reasons which I have discussed in other parts of this judgement. Perhaps it will be sufficient to say that the evidence about feasting is at least equivocal about its role in the use or control of land outside the villages.

[435] At p.383 of his reasons, the trial judge observed:

> Apart from village sites ... I cannot infer from the evidence that the Indians possessed or controlled any part of the territory, other than for village sites and for aboriginal use in a way that would justify a declaration equivalent to ownership.

[436] Further, at p.384 of his reasons, the trial judge expressed the following conclusion:

> ... I am prepared to assume for the purposes of this part of my judgment that, in the legal and jurisdictional vacuum which existed prior to British sovereignty, the organization of these people was the only form of ownership and jurisdiction which existed in the areas of the villages. I would not make the same finding with respect to the rest of the territory, even to the areas over which I believe the ancestors of the plaintiffs roamed for sustenance purposes. (Emphasis added.)

[437] The trial judge after considering the evidence, concluded that the interest of the plaintiffs' ancestors at the time of British sovereignty was, except for village sites,

a non-exclusive use of a designated portion of the territory for aboriginal sustenance purposes (p.387). Since village sites were for the most part within the Indian Reserves and not subject to this litigation, the trial judge declined to make any specific order regarding them (p.383). Accordingly, he dismissed the plaintiffs' claim for "ownership" of the rest of the territory (p.388).

[438] The traditional aboriginal use of their tribal lands must be determined at the date of sovereignty as a question of fact upon a consideration of all of the evidence at trial. Accordingly, the previously enunciated principles governing the court's review of the trial judge's findings of fact are applicable.

[439] The plaintiffs submit that the trial judge, in determining the nature and extent of the plaintiffs' historic occupation and control of the territory, failed to appreciate or disregarded relevant evidence which supported their claim to "ownership" of the territory. In particular, they say the trial judge did not take into account the evidence of Dr. Ray (which was based on Hudson's Bay records and the diaries of trader Brown) and biophysical and other evidence that would support the plaintiffs' use of resources throughout the territory prior to contact.

[440] In my view, the plaintiffs cannot successfully maintain that the trial judge ignored or disregarded the evidence of Dr. Ray. His qualifications and testimony were discussed extensively at pp.200-204 of the judgment. Dr. Ray's view that the Indian social organization observed by trader Brown pre-dated the fur trade was specifically considered at p.201:

> It is worth noting that Dr. Ray believes the natives were located in villages, that they lived off the land, principally the fishery, and hunted in the surrounding lands which were partly controlled by nobles or chiefs or on some more distant unidentified lands, and that they had established trade patterns or relations with other villages.
>
> The foregoing must be considered in the context of the larger picture which emerged from the evidence. First, it would be incorrect to assume that the social organization which existed was a stable one. Warfare between neighbouring or distant tribes was constant and the people were hardly amenable to obedience to anything but the most rudimentary form of custom.

[441] At p.203, he says:

> I find the weight of evidence supports the view that the fur trade materially changed aboriginal life before or around the time trader Brown was making his records at Fort Kilmauers. That does not prevent me from accepting Dr. Ray's opinion that Indian social organization did not all arrive by reason of the fur trade. I think the evidence supports 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.

[442] The plaintiffs have not demonstrated that the trial judge's conclusions about the scope and nature of the aboriginal use and occupation of the territory prior to sovereignty cannot be supported as reasonable, regardless of what he saw or heard during the course of this 318 day trial. There was an abundance of evidence led in relation to the probable location and nature of the aboriginal traditional way of life prior to sovereignty upon which the trial judge could have based his conclusions. Dr. Robinson, for instance, gave important opinion evidence that was at variance with that of Dr. Ray. The trial judge considered the writings of a number of scholars in the field of anthropology such as Goldman, Stewart, Kobrinski, Jenness, and Father Morice. Much of this evidence sought to establish the nature and location of aboriginal exploitation of animal resources prior to contact.

[443] Mr. Justice Macfarlane, with whose reasons I concur, reviews in some detail the nature of the territorial claim of the plaintiffs and the evidence considered by the trial judge at paras. 71-122 of his reasons. No purpose is served by reviewing this material again in these reasons. It is sufficient to say that there is reasonable support for the trial judge's conclusions as to the nature and scope of the plaintiffs' interest in the territory.

[444] Ultimately, the plaintiffs are left with the contention that the trial judge "failed to appreciate" the evidence. They thereby invite the substitution of their own subjective appreciation of the evidence for that of the trial judge. Such a substitution would violate the principles applicable to appellate review of findings of fact which I previously discussed. No palpable and overriding error of fact has been disclosed in the trial judge's determination that the plaintiffs' ancestors did not control any part of the territory, other than village sites, in a way that would justify a declaration equivalent to ownership (p.383).

[445] There remains, however, the possibility that the trial judge fell into error because he reached his conclusions from the evidence by applying an incorrect legal test. As Sopinka J. noted in ***Morin*** at p.199:

> Failure to appreciate the evidence cannot amount to an error of law unless the failure is based on a misapprehension of some legal principle.

[446] It has been suggested that the trial judge applied too stringent a test in evaluating the plaintiffs' claim for ownership. My colleague Hutcheon J.A. proposes that a more appropriate test for occupation is one put forward by Professor Kent McNeil in his text Common Law Aboriginal Title (Oxford: Clarendon Press, 1989) at 203-4. Professor McNeil is of the view that "occupation would include, all land within their habitual range, for occupation, once acquired, is not necessarily lost by temporary absence, so long as the intention and capacity to retain exclusive control and return to the land continue, and no one else occupies it in the meantime" (emphasis added). This test, it is submitted, would establish a standard of "sufficient occupation" to establish the plaintiffs' claim of ownership.

[447] In the view of the trial judge even this test was not met by the plaintiffs. At p.384, the trial judge said this about the intention of the ancestors of the plaintiffs to have exclusive control over 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 and Wet'suwet'en villages and no law known to me would have required them to depart.

[448] The trial judge insisted upon proof of exclusive use and occupation of land by the plaintiffs only in relation to claims of ownership rights. He said, at p.388, of his reasons:

> I am uncertain about the requirement for exclusivity. Such would certainly be essential for ownership and jurisdiction but I suspect there are areas where more than one aboriginal group may have sustenance rights... (Emphasis added.)

[449] This view is supported by the test articulated by Mahoney J. in ***Baker Lake*** where he referred, at p.545, to the necessity of exclusive occupation of the territory for an effective claim to exclusive aboriginal hunting rights:

> The occupation of the territory must have been to the exclusion of other organized societies. In the ***Santa Fe* case,** *supra,* at p.345, Mr. Justice Douglas, giving the opinion of the court, held:
>
> Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes) then the Walapais had "Indian title,"...(Emphasis added.)

[450] In evaluating the standard of occupation required to support their claim of ownership, the nature of the interest in land that the plaintiffs seek must be kept clearly in mind. The question of what ownership rights would entail was not in dispute; the incidents of the ownership claim were set out in the plaintiffs' prayer for relief: "the right to use, harvest, manage, conserve and transfer the lands and natural resources and make decisions in regard thereto." Exclusive control is the very essence of the ownership rights claimed. Whether the ***Baker Lake*** criterion of "exclusive occupation" or a criterion of "sufficient occupation" is applied (see ***Sparrow*** and ***Ontario (A.G.) v. Bear Island Foundation,*** [1991] 2 S.C.R. 570 at 575), exclusive control and possession of the territory by the claimants is an essential condition of aboriginal ownership of the nature claimed specifically in this action. Having found that the plaintiffs did not demonstrate such exclusive possession, the trial judge correctly dismissed their claim for "ownership".

(b) Aboriginal right of occupation and use of traditional lands – aboriginal title

[451] I have set out the claim contained in the pleadings which is essentially confined to a prayer for declarations respecting ownership and jurisdiction over the territory. That was the case that was presented originally to the court and which

defence counsel was required to meet. However the plaintiffs' position changed during the course of the trial.

[452] The trial judge noted:

> There is no specific claim in the statement of claim in this action for a declaration respecting such rights although "aboriginal rights" are mentioned. Early in the trial, plaintiffs' counsel said that the plaintiffs' claim was for ownership and jurisdiction – "all or nothing" as I believe it was then described – but that position was later modified. (p.127)

[453] At p.157, the trial judge noted that the "all or nothing" position of plaintiffs' counsel was later moderated when Mr. Grant made it clear that the plaintiffs were also seeking a declaration of their aboriginal rights:

> ... that while ownership and jurisdiction were the plaintiffs' primary claims they wished the court to grant them whatever other rights they may be entitled to.

[454] And later, at p.158, the trial judge said:

> I find that a claim for aboriginal rights other than ownership and jurisdiction is also open to the plaintiffs in this action. (Emphasis added)

[455] I would note, in passing, that a claim for "aboriginal rights other than ownership and jurisdiction" is not tantamount to a claim for "whatever rights one is entitled to". An adversarial system of litigation cannot, with any degree of fairness to the defence, entertain nebulous claims advanced mid-trial for "whatever remedies one may be entitled to". The trial judge did not do so in the instant case. He confined the issues to the plaintiffs' claim for "aboriginal rights".

[456] Since, in my opinion, the plaintiffs did not establish an aboriginal right of "ownership" in the sense that term is used in the statement of claim, one must ask what other aboriginal rights did the plaintiffs establish in relation to their occupation and use of the land within the territory? What was their nature and scope at the time of sovereignty?

[457] At p.127 of his reasons the trial judge, in discussing "aboriginal rights of occupation and use" of the plaintiffs, used the term to describe:

> ... rights arising from ancient occupation or use of land to hunt, fish, take game animals, wood, berries and other fruits and materials for sustenance and generally to use the lands in the manner they say their ancestors used them. These are the kinds of "usufructuary rights" mentioned in ***St. Catherine's Milling v. R.*** (1886) 13 S.C.R. 577 and which the plaintiffs claimed in ***Calder v. A.G.B.C.,*** [1973] S.C.R. 313. These kind of rights were awarded in part in ***Baker Lake***. . .

[458] Later, at p.391, the trial judge said:

> In my view, the aboriginal rights of the plaintiffs' ancestors included all those sustenance practices and the gathering of all those products of

> the land and waters of the territory I shall define which they practised and used before exposure to European civilization (or sovereignty) for subsistence or survival, including wood, food or clothing, and for their culture and ornamentation in short, what their ancestors obtained from the land and waters for their aboriginal life.

[459] In reaching his conclusion the trial judge considered the ***Baker Lake*** criteria and added the following comment, at p.388:

> I also think a further requirement must be added to the tests formulated by Mahoney J. What the law protects is not bare presence or all activities, but rather aboriginal practices carried on within an aboriginal society in a specific territory for an indefinite or long, long time.

[460] The trial judge's addition to the ***Baker Lake*** criteria of the requirement that, "the aboriginal practices need be carried on within the aboriginal society in a specific territory for an indefinite or long, long time", reflected his view that it is a requirement of the aboriginal aspect of aboriginal rights that the activities supporting them must have a historical element reflecting the native society's "traditional way of life" and use of the land at the time of sovereignty. In doing so, the trial judge, in my view, correctly took into consideration that aspect of the activity which attracted the special protection of the common law; namely, that the activity was an integral part of the traditional and historical way of life of the aboriginal society at the time of sovereignty. It would be difficult for the plaintiffs to claim the "aboriginal right" to engage in an activity, such as mining, in which they participated for the first time immediately prior to, or after, sovereignty. Accordingly the historical component of the particular activity is an important factor to consider in determining whether a practice was an aboriginal practice.

[461] The trial judge considered specific criteria and made the following findings at p.390:

> *(ii) The occupation of specific territory*
>
> I shall deal with this question in greater detail later but for the moment it will be sufficient to say that there is evidence of Indians living in villages at important locations in the territory. I infer they would have used surrounding lands, and other lands further away as may have been required. This is sufficient to satisfy this part of the test for the areas actually used.
>
> *iii) The exclusion of other organized societies*
>
> While I have the view that the Gitksan and Wet'suwet'en were unable to keep invaders or traders out of their territory, there is no reason to believe that other organized societies established themselves in the heartland of the territory along the great rivers on any permanent basis, and I think this requirement is satisfied for areas actually used.
>
> *(iv) Occupation established at time British sovereignty asserted*

> I have already decided there is no practical difference in this case between the date of contact and the date of sovereignty. For the purposes of this test, I find some Gitksan and Wet'suwet'en had been present in their villages and occupied surrounding areas for aboriginal purposes for an uncertain, long time before British sovereignty.
>
> *(v) Long-time aboriginal practices*
>
> This brings me to the additional test for aboriginal rights which I have added to those mentioned by Mahoney J. in ***Baker Lake.*** I have already discussed this generally, and I have concluded that the aboriginal activities recognized and protected by law are those which were carried on by the plaintiffs' ancestors at the time of contact or European influence and which were still being carried on at the date of sovereignty, although by then with modern techniques. I have already decided that trapping for the fur trade was not an aboriginal activity.

[462] The trial judge concluded that the plaintiffs had established, as of the date of sovereignty, the existence of "non-exclusive aboriginal sustenance rights" within those portions of the territory which he designated as alternative three outlined on Map 5 (395). This conclusion however was vitiated by the trial judge's further finding that the colonial legislation had extinguished the plaintiffs' aboriginal rights as they existed in the colony at the date of sovereignty except for Indian Reserves (p.412).

[463] I disagree with the trial judge's conclusions on the issue of extinguishment by colonial legislation (See Extinguishment in Part IX below) and accordingly, this analysis is confined to the trial judge's conclusion that aboriginal rights of the plaintiffs, other than ownership and jurisdiction, have been established.

[464] Having generally differentiated on a factual basis the territory which came within the criteria of "ownership" from the territory which came within the category of "non-exclusive possession and occupation", the only question remaining for the trial judge was to fix the specific territorial parameters of such traditional non-exclusive occupation and use for aboriginal sustenance purposes. The trial judge chose the third of three possible alternatives. (p.457-459).

[465] At p.460, the trial judge observed:

> I would not wish to be understood by any of the foregoing to be authenticating the internal or external boundaries in any way.
>
> In addition, as I do not regard exclusive use of the areas to be an essential requirement for aboriginal rights, I would not wish the foregoing reliance upon external boundaries finally or conclusively to settle any overlap questions between the plaintiffs and their aboriginal neighbours. Those are questions which may only be settled by negotiation between these peoples or by litigation between them.

[466] Further at p.460, the trial judge stated:

> The foregoing boundary creations are admittedly approximate. Perhaps counsel will prepare a better map, giving effect

> to what I have endeavoured to describe. If they agree they could even draw a line across the territory with a ruler.

[467] In the circumstances, this Court is not in a position to express an opinion on the specific territorial scope of the plaintiffs' aboriginal rights of non-exclusive occupation and use of the respective area. It should be the subject of negotiation by all interested parties. Two of the parties, the plaintiffs and the Province, have indicated a desire to resolve their conflicting interests through negotiation. The disposition by this Court of the issues raised in this appeal does not constitute any impediment to their doing so.

[468] Applying the principles of appellate review to the trial judge's findings of fact, I find the plaintiffs have not established the trial judge committed any manifest or palpable error in concluding that the plaintiffs had established a claim for aboriginal rights - other than ownership and jurisdiction - of continued residence in their villages and for non-exclusive aboriginal sustenance rights within the area he designated on Map 5.

[469] In the absence of agreement by the parties as to more appropriate boundaries the trial judge's determination of the area boundaries should stand.

(c) Aboriginal right to jurisdiction - self-government

[470] I repeat, for convenience, those portions of the prayer for relief that are particularly referable to the jurisdiction issue:

> 4. A declaration that the Plaintiff's rights to jurisdiction include the right to govern the Territory, themselves, and the members of the Houses represented by the Plaintiffs in accordance with Gitksan and Wet'suwet'en laws, administered through Gitksan and Wet'suwet'en political, legal and social institutions as they exist and develop.
>
> 5. A declaration that the Plaintiffs' rights to ownership of and jurisdiction over the Territory include the right to ratify conditionally or otherwise refuse to ratify land titles or grants issued by the Defendant Province after October 22, 1984, and licences, leases and permits issued by the Defendant Province at any time without the Plaintiffs' consent.
>
> ***
>
> 8. A declaration that the Defendant Province's jurisdiction over the Territory, the Plaintiffs and members of the Houses represented by the Plaintiffs is subject to the Plaintiffs' right to ownership and jurisdiction.
>
> ***
>
> 11. A declaration that the Defendant Province cannot issue or renew grants, licences, leases or permits authorizing the use of any resources within the territory of the Plaintiffs by the Defendant

> Province, its agents or by third parties without the consent of the Plaintiffs.

[471] This claim is explicit and leaves little latitude for interpretation. Paragraph 4 clearly contemplates absolute aboriginal jurisdiction over all aspects of the native and non-native occupation and use of the claimed territory, as well as jurisdiction over the members of the native society within the territory.

[472] Paragraph 8 contemplates that the jurisdiction of the Province is subject to the plaintiffs' right of jurisdiction over the territory.

[473] These positions were qualified to some extent in the revised order sought by the plaintiffs before this Court -- a matter about which I will comment when I deal with Remedies in these reasons. Nevertheless the above declarations are those which were before the trial judge and upon which he was required to rule and they constituted the case the defendants were required to meet.

[474] The trial judge equated the plaintiffs' claim to jurisdiction over land and people to aboriginal sovereignty (at p.369). He found that the thrust of their claim, at least as it was described by one of the Gitksan hereditary chiefs, Mr. Neil Sterrit, was for an undefined form of government (at p.378).

[475] On the basis of the evidence available the trial judge held at p.381:

> I conclude that prior to British sovereignty the ancestors of the plaintiffs lived in their villages at strategic locations alongside the Skeena and Bulkley Rivers and they probably organized themselves into clans and houses for social purposes, but they had little need for what we would call laws of general application. While peer pressure in the form of customs may have governed the villages, there was, in my judgment, no difference between aboriginal sovereignty or jurisdiction in the largely empty lands of the territory on one hand, and occupation or possession of the same empty lands for aboriginal sustenance on the other hand.

He added at p.384:

> 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.

[476] The trial judge then turned to consider the effect of British sovereignty upon any outstanding aboriginal rights of jurisdiction that may have existed in the territory notwithstanding these preliminary findings.

[477] I agree with the trial judge's characterization of the plaintiffs' claim for jurisdiction. The plaintiffs do acknowledge the sovereignty of Canada and British Columbia, and accept the consequential underlying radical title of the Crown to the land. However, the plaintiffs' position is that Crown sovereignty can and does co-exist with the pre-existing right of jurisdiction of the aboriginal people to govern

themselves and their territories. Moreover, they say that this right of jurisdiction must take priority over provincial laws in the territory where there is conflict between the two.

[478] In Sub-part 3 of Part 6 of my reasons, I examined what gives aboriginal rights their force as rights. I concluded that it is the common law which recognized and protected pre-sovereignty aboriginal activities and practices and gives them their force as aboriginal rights. Thus, any claim to aboriginal jurisdiction would require that rights of jurisdiction, that is, governmental powers such as legislative and judicial powers, were recognized and became enforceable by the common law. The circumstances of this case do not support any such recognition or protection of pre-existing aboriginal legislative or judicial powers.

[479] Jurisdiction, or self-government, includes both the power to pass laws which will be recognized by the community in question, and the ability to enforce such laws. Prior to the acquisition of sovereignty over British Columbia, the Indians exercised jurisdiction in the territory to the extent made possible by their social organization. However, once sovereignty was asserted, the Indians became subjects of the Crown and the common law applied throughout the territory and to all inhabitants. As was noted in ***Mabo,*** at p.24, "... sovereignty imports supreme legal authority. (See A. James, ***Sovereign Statehood,*** (1986), pp.3 & ff, 203-209)". Thus, with the acquisition of sovereignty, supreme legal authority vested with the British Crown. Of course, internal legal authority under the British Constitution rests entirely in Parliament. When British Columbia became a British territory the Imperial Parliament, complete with the doctrine of parliamentary sovereignty, became the supreme legal authority. The principle of Parliamentary sovereignty was cited by the trial judge who adopted the definition of Professor Dicey in his ***Law of the Constitution,*** 10th ed. (1959), at pp.39-40:

> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.
>
> A law may, for our present purpose, be defined "any rule which will be enforced by the courts". The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described; Any Act of Parliament or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the courts. The same principle looked at from its negative side, may be thus stated; There is no person or body of persons who can, under the English Constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the courts in contravention of an Act of Parliament.

[480] A claim of self-government of the nature which the plaintiffs advance; namely, a right to govern the territory, themselves and the members of their Houses in accordance with Gitksan, and Wet'suwet'en laws, and a declaration that the

Province's jurisdiction is subject to the plaintiffs' jurisdiction, is a claim which is incompatible with every principle of the parliamentary sovereignty which vested in the Imperial Parliament in 1846.

[481] Thus, upon the exercise of sovereignty, any powers of government of the indigenous people were superseded by the introduction of the common law and the jurisdiction of the Imperial Parliament. As Brennan J. stated in ***Mabo*** in relation to the aborigines in the colony of New South Wales at pp.25-26:

> The common law thus became the common law of all subjects within the Colony who were equally entitled to the law's protection as subjects of the Crown.
>
> ***
>
> Thus the Meriam people ... became British subjects owing allegiance to the Imperial Sovereign entitled to such rights and privileges and subject to such liabilities as the common law and applicable statutes provided. (Emphasis added.)

[482] Any possibility that aboriginal powers of self-government remained unextinguished was eliminated in 1871 by the exhaustive distribution of powers between the Province and the Government of Canada when British Columbia joined Confederation pursuant to the ***Terms of Union, 1871.*** Sections 91 and 92 of the ***Constitution Act, 1867*** which provide for this division of powers have been repeatedly interpreted as distributing all legislative jurisdiction between Parliament and the provincial legislatures.

[483] I agree with the conclusion of the trial judge that the plaintiffs, after 1846 and certainly after 1871, no longer retained any aboriginal right of self-government or jurisdiction over the territory nor any jurisdiction to govern the members of the Houses in accordance with Gitksan and Wet'suwet'en laws. As he observed at p.386:

> After that [the establishment of the separate colony of British Columbia in 1858] aboriginal customs to the extent they could be described as laws before the creation of the colony, became customs which depended upon the willingness of the community to live and abide by them, but they ceased to have any force as laws within the colony.
>
> Then, at the time of union of the colony with Canada in 1871, all legislative jurisdiction was divided between Canada and the province. And there was no room for aboriginal jurisdiction or sovereignty which would be recognized by the law or the courts.

[484] Section 35(1) of the ***Constitution Act, 1982*** cannot revive or entrench any self-government jurisdiction of the plaintiffs since it is confined to aboriginal rights which existed in 1982. As I have made clear, no aboriginal rights of government existed after 1871.

[485] As previously noted, the plaintiffs before this Court revised the remedy they sought from the trial judge and asked the Court to declare the plaintiffs' right to self-government in more restricted terms than previously asserted. Suffice it to say, for the reasons I have stated, I agree with the conclusions of the trial judge that the claim for self-government as originally asserted should be dismissed.

PART VIII

THE ROYAL PROCLAMATION, 1763

[486] The plaintiffs plead that the ***Royal Proclamation, 1763*** recognized and confirmed their aboriginal rights. They asserted that by virtue of the ***Royal Proclamation*** their rights in the territory could only be extinguished by voluntary surrender to the Crown.

[487] The trial judge comprehensively reviewed the evidence and arguments on this issue in his reasons (p.211-231) and concluded that the ***Royal Proclamation, 1763*** never applied to British Columbia. In part, his reasons for this conclusion are expressed at p.230, where he stated:

> The tenor of the Proclamation in its historical setting clearly relates to the practical problems facing the Crown in its then American colonies. Two of the Indian clauses of the Proclamation actually state that they are prescribed for "the present", and a fair reading of the document makes it clear that it relates to and applies for the use of the said Indians, who are those with whom the Crown was connected, etc., and over whom the Crown then exercised sovereignty.

[488] And, further, at p.231:

> I am further satisfied beyond any doubt that the Crown was not "connected" in any way with the Indians of the Canadian West in 1763. They did not live under the Crown's protection, and they owed the Crown no actual, legal or notional allegiance.
>
> There is nothing which persuades me that this Proclamation, either by its language or by the intention of the Crown, applies to the benefit of the plaintiffs or to the lands of present day British Columbia.

[489] I agree, for the reasons stated by the trial judge, with his conclusion that the ***Royal Proclamation, 1763*** has never applied directly to British Columbia.

[490] It was then argued that, if the Proclamation did not apply, it was a statement of policy which bound the Crown to recognize the principle that the Crown could not dispossess the Indians of their lands without their consent and without the payment of compensation and that the policy must be taken to have been in accordance with the common law as it was seen at that time and must be taken as a statement of the common law by the highest authority.

[491] The ***Royal Proclamation, 1763,*** as the title implies, was a Proclamation of the then King of Great Britain, His Majesty George III. As was later determined in ***Campbell v. Hall,*** this action of the King without Parliament was an exercise of Crown prerogative. In this sense, the Proclamation is a variety of Royal fiat.

[492] Although the Royal Proclamation was binding upon any subjects within the territories to which it applied, and may have been an expression of the policy of

Great Britain with respect to Indians in its North American territories, I doubt it reflects the common law existing at the time. A Royal fiat is hardly an appropriate judicial pronouncement on the state of the common law. Since the case of ***Prohibitions del Roy*** (1607), 12 Co. Rep. 63, 77 E.R. 1342, it has been established that the King has no prerogative power to dispense justice and determine the common law, such authority being reserved for his courts. Furthermore, if the common law had been in accord with the terms of the Proclamation, it would have been unnecessary as redundant. I conclude that the common law in British Columbia may well not have mirrored the provisions of the ***Royal Proclamation*** that deal with Indians.

[493] I share the doubts expressed by the trial judge on this issue. He stated, at p.231:

> With respect, I do not understand how the Proclamation, in areas beyond its reach, can be applied to displace the common law, which recognized the right of the Crown to create colonies and to settle them with its subjects.

[494] In my view, when the Crown acquired sovereignty over the territory and created the colonies of Vancouver Island, and later, British Columbia, Parliament acquired the power to give effect to policies considered beneficial to all the inhabitants. All of the inhabitants, native and non-native were protected by the common law which could be altered only through Parliament. Neither the Imperial Parliament, nor local institutions of government were restricted in this by the ***Royal Proclamation*** or any policy it might have reflected.

PART IX

EXTINGUISHMENT

[495] I turn now to consider the issue of extinguishment. I am in complete agreement with the reasons and conclusions expressed by Mr. Justice Macfarlane in his reasons on this issue. In particular, I find that the legal position relating to the extinguishment of aboriginal rights in Canada, prior to 1871, as expressed by the authorities dealing with this issue, is as follows:

(1) That extinguishment of aboriginal rights could be accomplished by the clear and plain intention of the legislature as expressed in the legislation.

(2) That extinguishment of aboriginal rights did not require the consent of the aboriginal people concerned. Extinguishment of aboriginal rights could be accomplished by the unilateral exercise of legislative authority if expressed clearly and plainly in the legislation.

(3) That extinguishment could be accomplished by necessary implication from the legislation in question if the interpretation of the statute will permit no other meaning or result.

(4) In the present case a clear and plain intention to extinguish aboriginal title is not to be inferred or implied from the thirteen Colonial instruments ***(Calder XIII)*** since a possible interpretation of that legislation would permit Indian interests in the land to co-exist with that of the Crown as a burden on the underlying Crown title.

PART X

DAMAGES

[496] The prayer for relief states a claim for damages in this form:

> Damages
>
> 12. A declaration that the plaintiffs are entitled to damages from the defendant Province for the wrongful appropriation and use of the territory by the defendant Province or by its servants, agents or contractors without the plaintiffs' consent.

[497] The claim for damages is based on the premise that the plaintiffs have a right of "ownership" of the territory not simply a right of non-exclusive use of the territory for aboriginal purposes. No attack was made on any specific Crown grant or other alienation of the lands or an interest therein.

[498] In view of the conclusion I have reached that the plaintiffs are not entitled to a declaration of "ownership" of the territory this request for a declaration that the plaintiffs are entitled to damages from the Province must be refused.

[499] It should be noted that I am not deciding whether the plaintiffs have sustained damages as a consequence of any wrongful appropriation or use of the designated territory which interfered with their non-exclusive aboriginal right of occupation or use of any portion thereof. That issue was not before the court. In dismissing the claim for damages, I am doing so solely on the basis of the claim for alleged wrongful appropriation or use of the territory by the Province or its servants without the consent of the plaintiffs which is premised on the plaintiffs' alleged right of ownership of the claimed territory.

PART XI

REMEDIES

[500] During the course of their oral submission on the appeal, counsel for the plaintiffs presented a revised order which they ask the court to grant. It takes the following form:

> **A. THE REVISED ORDER SOUGHT BY THE APPELLANTS**
>
> 2. The following order should be substituted for any other form of order identified either in the Appellants' Statement of Claim, Factum, or Speaking Notes of May 25th.
>
> 1. The Appeal be allowed.
>
> 2. The appellants have existing aboriginal rights which include:
>
> a. a right of ownership which extends to the enjoyment and possession of lands and resources within the claimed territory;
>
> b. a right to harvest manage and conserve those lands and 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 co-operation with ministries and agencies of the Crown and with the private sector who may be affected by the exercise of the Appellants' rights;
>
> c. a right to maintain and develop their own institutions for the regulation of the ownership, harvesting, management and conservation of those lands and resources;
>
> d. an inherent right of self-government exercisable through their own institutions, to preserve and enhance their social, political, cultural, linguistic and spiritual identity;
>
> in order to determine their development and safeguard their integrity as aboriginal peoples within Canada
>
> 3. In the alternative to 2, the Appellants have existing aboriginal rights which include:
>
> a. a proprietary interest in lands and resources within the claimed territory;

b. a right to harvest, manage and conserve those lands and 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 co-operation with ministries and agencies of the Crown and with the private sector who may be affected by the exercise of the Appellants' rights;

c. a right to maintain and develop their institutions for the regulation of their proprietary interest and the harvesting, management and conservation of those lands and resources;

d. an inherent right of self-government exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity; in order to determine their development and safeguard their integrity as aboriginal peoples within Canada.

4. The appeal be adjourned in part for a period of two years from the date of judgement or for such shorter period as the parties agree or as the Court may order and the Court retain jurisdiction over the identification and determination of:

a. the lands in respect of which the Appellants have aboriginal rights;

b. the scope of such rights on and to the said lands; and

c. the Appellants' entitlement to and quantum of damages

5. In the alternative to 4, the identification and determination of:

a. the lands in respect of which the Appellants have aboriginal rights;

b. the scope of such rights on and to the said lands; and

c. the Appellants' entitlement to and quantum of damages

shall be remitted to the Supreme Court for determination.

6. Pending the determination of the scope of the proprietary rights of the Appellants, no grants of land, interests in land, or right to use land or resources in the territory shall be made by the Province without the consent of the Appellants or by court orders.

7. The Appellants shall have their costs in this Court and the Court below. (Emphasis added.)

[501] An analysis of this revised form of order reveals that it requests, inter alia, immediate declarations concerning the issues of aboriginal "ownership" or alternatively "proprietary interest" in the land and the inherent right to self-government, and proposes that the court postpone making decisions on the following issues;

(1) the geographic parameters of the claimed territory;

(2) the scope of the rights on or to the lands

(3) the entitlement to and the quantum of damages, if any;

(4) the co-existence of the plaintiffs' rights with the Province's underlying title.

[502] This postponement would be for a period of 2 years during which time the parties would seek to reach agreement on the issue. The court would retain jurisdiction to determine the issues or refer them to the trial court if the parties failed to reach an accord.

[503] It has been suggested that in agreeing to such a proposal, the Province waived its position and abandoned its right to rely upon findings of fact made at trial with respect to the territorial scope and content of aboriginal rights. I would reject any such suggestion for the following reasons:

1. An arrangement to defer certain issues for negotiation and, failing agreement, to return to the court for adjudication of these issues is a reservation of the right to argue the issues. It is not a waiver of the issues.

2. The court declined at the outset to allow the parties to defer oral submissions on some issues. Instead, the court opted to hear the full argument and then consider the request. In the result, full argument was made, and there was no waiver.

3. Boundaries were at issue in the appeal. The plaintiffs claimed aboriginal rights within the external boundary. The trial judge found in fact that the area subject to such rights was not as extensive as claimed. He rejected two of three alternatives and selected the one most favourable to the plaintiffs: the area outlined in Map 5. What is left to be argued in another case may be the determination of the exact boundaries of that area, and the scope and content of the plaintiffs' rights. There was insufficient evidence and argument in this case upon which to decide such issues. Nevertheless, the findings of fact made by the trial judge on the boundary issue cannot be ignored.

[504] Various cases were referred to the court in support of the proposition that the court should make declarations and retain jurisdiction over the case while the parties negotiated settlement of certain issues. (See ***Mahe v. Alberta,*** [1990] 1 S.C.R. 342, particularly at 376 and 393; ***Reference Re Manitoba Language Rights,*** [1985] 1 S.C.R. 721). In these cases the court made a final declaratory order and directed that the parties work out how best to implement the court's order. Here, however,

the parties desire the court to declare their respective rights in broad, general terms, and leave to the parties the task of negotiating the specific nature and scope of such declared rights as they affect both land and self-government. They then envisage that the court would retain jurisdiction in the event the parties fail to agree. The negotiations would, of necessity, involve different factual considerations than were before the trial judge or this Court in these proceedings. Moreover, the interests of parties who are not represented in this litigation may well be involved. In such circumstances I would direct that any issues upon which the parties cannot reach agreement through negotiation should be referred to the trial court for resolution. This Court should not retain jurisdiction over outstanding issues.

[505] The revised form of order does not seek a declaration as to the nature and scope of the aboriginal right of non-exclusive occupation and use of the territory.

[506] The revised claim is for the right of self-government "exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity". This is not a claim for a right of "regulation" or a right to practice "traditional customs", rather it is a claim for powers of government which may or may not be exercised in a way which conflicts with Provincial or Federal authority. This would depend on the method and means adopted by the plaintiffs to attain what may well be desirable objectives. Until a specific claim is before the court it is impossible to declare whether a more restricted type of "self-government" is compatible with the current distribution of legislative power in Canada.

[507] As noted previously, the adjusted common law recognized and protected the right of the indigenous people to carry on those traditional customs, practices and activities which were integral to the native society's use and occupation of the tribal lands. It may well be that a type of communal regulation, which the plaintiffs consider as coming within the "preservation of their social, political, cultural, linguistic and spiritual identity", would constitute an aboriginal right recognized by the adjusted common law of the colony at the time of sovereignty. However there is no way of ascertaining this since the trial proceeded on the basis of a self-government claim tantamount to legislative jurisdiction.

[508] In view of the last minute presentation of this modified claim of "self-government", and the fact that it was never before the trial judge, and the fact defence counsel did not have the opportunity to inquire or cross-examine as to its scope or method of implementation, I do not consider this Court to be in a position to declare whether the plaintiffs have such an existing aboriginal right. It is a matter the parties may be well advised to include in their negotiations where the impact of such a proposal could be fully assessed. If they are unable to reach an accord, the claim, appropriately supported by evidence, could be the subject of an action in the trial court.

[509] When considering the request for the revised form of relief, this Court must not forget that its function is that of correcting error in the order made by the trial judge. It is generally not this Court's function to act as a court of first impression and decide issues that were never before the trial judge.

[510] It must also be kept in mind that the appeal is from the order made below. It is not an appeal from the reasons for judgment of the trial judge. See ***Cole v. Cole,*** [1943] 3 W.W.R. 532 at 536 (B.C.C.A.) (aff'd. [1944] S.C.R. 166) where McDonald C.J.B.C. observed that "appeals are taken against the effect of judgments, not against the reasons given for them." A trial judge may reach the right result and make the correct order for reasons which the Court of Appeal considers erroneous. In such cases, the order being the proper order, the appeal is dismissed and appropriate reasons for upholding the order - despite an error in the trial judge's reasons - are usually enunciated by the Court of Appeal.

[511] As indicated previously, I have found that the trial judge erred in concluding that the colonial enactments ***(Calder XIII)*** extinguished the plaintiffs' aboriginal title to the land they historically occupied and used. This rejection of the principle of "blanket extinguishment", however, does not affect the correctness of the original conclusion of the trial judge that the plaintiffs had not demonstrated their claim to aboriginal ownership and jurisdiction of the designated territory. I have concluded that the plaintiffs have not demonstrated the trial judge made a "palpable and overriding error" in dismissing the original claim for the aboriginal right to ownership and jurisdiction of the territory.

[512] Nor does the trial judge's ruling on extinguishment affect the correctness of his conclusion that the plaintiffs established a claim for aboriginal rights other than ownership and jurisdiction - which meet the requirements for the right to continued residence in their villages and for non-exclusive aboriginal sustenance rights within the area designated on Map 5.

[513] Whether one views the trial judge's conclusion (p.417) that "the Crown's obligation is to permit aboriginal people, but subject to the general law of the Province, to use any unoccupied or vacant land for subsistence purposes until such time as the land is dedicated to another purpose", as a right based on the fiduciary duty of the Crown or an unextinguished aboriginal right is of no practical significance in the present case. In either case the right was clearly established by the evidence and the trial judge's order in this respect should not be varied.

[514] I agree with the approach of counsel for the plaintiffs that many of the issues discussed in the case can and probably should be resolved by negotiation. However, in my view, the role of the Court of Appeal is not one of tailoring its judgment so as to facilitate settlement. This Court is restricted to declaring the legal status of the respective rights claimed. These rights must be established by specific trial evidence of the particular aboriginal occupation and use of the specific territories in question.

[515] The Court's task is to ascertain if the trial judge's judgment should, in law, be reversed or upheld. It is the responsibility of the parties to the litigation to negotiate, if at all possible, the resolution of the various disputes as they relate to specific lands and specific aboriginal rights and in particular the parameters of the area designated by the trial judge for non-exclusive aboriginal sustenance purposes. The parties have been free to do so, both before and since the trial judgment was handed down on March 8, 1991. They are still free to do so. Certainly, the trial judge encouraged

the parties to negotiate the resolution of their disputes and all counsel for the plaintiffs have indicated that the treaty making process is the "Indian way" of resolving issues. This approach has been whole-heartedly endorsed by counsel for the Province and, I understand, is being implemented at the present time. I wish the parties every success in their attempt to resolve these long standing disputes through conciliation and negotiation. I repeat these legal proceedings do not prevent or inhibit their doing so.

PART XII

SUMMARY OF CONCLUSIONS

[516] 1. The colonial instruments ***(Calder I-XIII)*** did not extinguish all the plaintiffs' aboriginal rights to the lands they traditionally occupied and used, i.e., there was no "blanket extinguishment".

[517] 2. The plaintiffs have not demonstrated that the trial judge made a "palpable and overriding error" in dismissing the plaintiffs' claim for the aboriginal right to "ownership and jurisdiction" of the territory.

[518] 3. After the exercise of sovereignty by the Crown the plaintiffs no longer retained the aboriginal right of self-government or jurisdiction over any part of the territory or the members of their Houses. Any rights of "self-regulation" must arise from agreement between the plaintiffs and the Provincial and Federal Crown or by decision of the trial court.

[519] 4. The plaintiffs have a non-exclusive aboriginal right of traditional occupation and use of that portion of the territory designated by the trial judge on Map 5. (The parties may, of course, by agreement, redefine the parameters of that area). The occupation and use of the land should reflect those uses of the land for sustenance purposes which were integral to the plaintiffs' native culture and their traditional way of life at the time of sovereignty. The plaintiffs have failed to demonstrate that, in determining the nature and territorial scope of the plaintiffs' aboriginal non-exclusive rights of occupation and use of the territory, the trial judge made a "palpable and overriding error" which would justify a reversal of this finding of fact.

[520] 5. ***The Royal Proclamation, 1763,*** does not apply to British Columbia.

[521] 6. The claim for damages, premised as it is on the plaintiffs' "ownership" of the territory, is dismissed.

PART XIII

ORDER

[522] I would vary the trial judge's order in accord with the terms set forth in the reasons of my colleague Mr. Justice Macfarlane, at paras. 291-301.

“The Honourable Mr. Justice Wallace”

REASONS FOR JUDGMENT OF MR. JUSTICE LAMBERT

PART I

INTRODUCTION

[523] There are 51 plaintiffs. They are all members of the Gitksan or Wet'suwet'en peoples and they are all chiefs of Houses. They brought an action claiming "ownership" and "jurisdiction" over 22,000 square miles in central British Columbia. After a long trial their action was substantially dismissed by Chief Justice McEachern, who was then Chief Justice of the Supreme Court of British Columbia. This appeal is brought by the plaintiffs from that decision. Chief Justice McEachern's reasons are reported at [1991] 3 W.W.R. 97. (In the remainder of these reasons I will refer to Chief Justice McEachern as the trial judge.)

[524] In these reasons I deal with the law governing the origin and nature of aboriginal title, the law governing aboriginal rights of self-government, and the law governing other aboriginal rights, particularly aboriginal fishing, hunting and gathering rights.

[525] I wish to emphasize that these reasons deal only with the law. They do not deal with the wrongs of the past or the opportunities for the future. They do not deal with the possibilities inherent in negotiation and mediation. And they do not deal with political, economic, or social solutions.

[526] The substance of the law is not created by me or by my colleagues. With the help of counsel, our function is to try to understand the law as it has already been settled by the judgments of our predecessors. Those predecessors include Lord Coke (***Calvin's Case*** (1608), 7 Co. Rep. 1a); Lord Holt (***Blankard v. Galdy*** (1693), 2 Salk. 411); Lord Mansfield (***Campbell v. Hall*** (1774), 1 Cowp. 204); Sir William Blackstone (quoted in ***Cooper v. Stuart*** (1889), 14 App. Cas. 286 at 291-292); and Chief Justice Marshall (***Worcester v. Georgia*** 31 U.S. (6 Pet.) 515 (1832), and other cases). We are fortunate also to have the benefit of the judgments of the Supreme Court of Canada in ***Guerin v. The Queen,*** [1984] 2 S.C.R. 335 and ***R. v. Sparrow,*** [1990] 1 S.C.R. 1075 and the judgment of the High Court of Australia in ***Mabo v. Queensland*** (1992), 107 A.L.R. 1. Those judgments reflect careful contemporary consideration of questions of aboriginal title or aboriginal rights by the highest courts in those parts of the Commonwealth where there are large indigenous populations remaining in the aftermath of British colonization. In that respect we have an advantage over the trial judge who was hearing argument when ***Sparrow*** was handed down and whose judgment was delivered before the reasons in ***Mabo*** became available.

[527] I have divided these reasons into Parts, (I, II, etc.), Divisions within Parts, (1., 2., etc.), and Sub-divisions within Divisions, ((a), (b), etc.).

[528] I have included a summary at the end of Part III (The Origin and Nature of Aboriginal Title and Aboriginal Rights), and at the end of Part IV (The

Extinguishment of Aboriginal Rights). I have also set out my conclusions with respect to Aboriginal Title, Aboriginal Self-Government and Self-Regulation, and Aboriginal Sustenance Rights in Part VII. I have included a synopsis of my entire reasons as Part X. I will not anticipate those summaries or conclusions or the synopsis here at the beginning.

[529] I will now set out the Parts, Divisions and Sub-divisions and the corresponding paragraph numbers.

PART II

THE PROCEEDINGS

1. The Gitksan And Wet'suwet'en Peoples

[530] The Gitksan people now live principally in the villages of Gitwangak, Gitseguecla, Glen Vowell, Kispiox and Gitenmaax (Hazelton) on the Skeena River. There are about 4,000 or 5,000 of them. Their language is classified as belonging to the Tshimshianic Group and is related to other Tshimshian languages spoken by peoples living on the coast of British Columbia. Their claims relate to the northern two thirds of the total area claimed in the litigation.

[531] The Wet'suwet'en people now live principally in the villages of Hagwilget and Hotset (Moricetown) on the Bulkley River. They number about 1,500 to 2,000. Their language is classified as belonging to the Athabaskan Group and is related to other Athabaskan languages spoken by peoples in central and eastern British Columbia, the Prairies, and as far south as the southwestern United States. Their claims relate to the southern one-third of the claimed territory.

[532] The Gitksan and the Wet'suwet'en have lived where they now live for hundreds, probably even thousands, of years. They have been neighbours throughout that period and, in spite of their different languages, many of their customs have, over time, become similar.

[533] Both the Gitksan and the Wet'suwet'en are divided into four Clans. Each Clan is in turn divided into a number of Houses. The Clan and House have been an important and fundamental part of the organization and structure of their society for as long as it is possible to determine.

[534] Both the Gitksan and the Wet'suwet'en must marry outside their own Clan. When a child is born the child becomes a member of the House and Clan of its mother. Succession to property is through the mother's line.

[535] Every member of the Gitksan and the Wet'suwet'en peoples is a member of a House. Each House has a chief who, on becoming chief, takes the name associated with the chieftainship of the House, usually the same name as the House. There may also be subsidiary chiefs within a House, each with a distinct name to which others may in time succeed.

[536] The lands occupied over many hundreds of years by the Gitksan and Wet'suwet'en peoples have been divided by them into separate territories. Each territory is associated with one particular House, though a House may have more than one territory. The boundaries of the territories are delineated by topographical features.

[537] There is a powerful linkage between the House and its territories. The recognition and honouring of this linkage is a major part of the ceremonies and institutions of the two cultures. Each Gitksan House has an "Adaawk" which is a ritualized collection of sacred oral reminiscences about the history, the ancestors

and the territories of the House. Each Wet'suwet'en House has a "Kungax" which is a spiritual song or songs or dance or performance which ties the members of the House to the territories of the House. Each House also has a distinctive crest and distinctive regalia which recognize and symbolize the linkage between the House and its territories.

[538] 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.

[539] In the words of the trial judge, at p.152:

> 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.

[540] Like the potlatch, the feast was banned for more than fifty years throughout the first half of this century. Sometimes the ban was vigorously and even cruelly enforced and sometimes the enforcement was less stringent. Nonetheless the feast continued. Marius Barbeau, a most eminent anthropologist, visited the territory in the 1920's and described a number of feasts which he attended over a period when the Indian agent believed that no feasts were being held. In 1951, when the ***Indian Act*** was substantially revised, the feast was permitted to resume and it has again taken its place as a central institution of Gitksan and Wet'suwet'en culture and society.

2. The Claim

[541] There are 51 plaintiffs, 39 Gitksan and 12 Wet'suwet'en. They are all hereditary chiefs of Houses. They all represent at least one House, and some of them represent more than one House. Among them they represent 71 Houses, the full number of Wet'suwet'en Houses and all but 12 of the Gitksan Houses. The 12 Gitksan Houses which are not represented may be called the "Kitwancool" Houses. Each House makes a specific claim to one or more specific territories. The 71 Houses represented by the 51 plaintiffs claim a total of 133 specific territories.

[542] The boundaries of each of the 133 territories are delineated in the claim. It is possible to draw a continuous line right around the overall outside boundary of all 133 territories. Within that outside boundary each territory claimed is separated from every other territory claimed, without any overlap, and there is no part of the area so

enclosed that does not form a part of a claimed territory. There are five maps at the end of the trial judge's judgment. The first four of them show the territories claimed and their relationship to the Province of British Columbia as a whole.

[543] The substance of the statement of claim is summarized by the trial judge at pp.158-160 of his reasons, and the petition for relief is set out in full at pp.160-162. The claim is for declarations relating to "ownership of and jurisdiction over ... the territory".

[544] The claim of "ownership" includes "the right to use, harvest, manage, conserve and transfer the lands and material resources", and to make decisions about those rights. The claim to "jurisdiction" involves "the right to govern the territory, themselves, and the members of the Houses represented by the plaintiffs in accordance with Gitksan and Wet'suwet'en laws, administered through Gitksan and Wet'suwet'en political, legal, and social institutions as they exist and develop."

[545] The trial judge also considered that the claim included a claim to "aboriginal rights" within the territory.

[546] The plaintiffs ask as well for a declaration that their aboriginal rights, including ownership of and jurisdiction over the territory, are recognized and affirmed by s.35 of the ***Constitution Act, 1982.***

[547] A number of corollary declarations are sought relating to limitations on the rights of the Province in recognition of the prior rights of the claimants. Damages are sought for past breaches of the rights which are asked to be declared in the action.

[548] The 39 Gitksan chiefs who are plaintiffs are not all the Gitksan chiefs. There are 12 other Gitksan chiefs, referred to collectively as the "Kitwancool" chiefs who are not plaintiffs and who are not parties to this action. The territories of their Houses are contiguous either to each other or to the claimed territories, but are outside the overall boundary of the territories claimed in the action.

[549] The 12 Wet'suwet'en chiefs who are plaintiffs are all the Wet'suwet'en chiefs.

[550] Since the plaintiffs are all suing on behalf of the members of their Houses as well as on their own behalfs and since the statement of claim does not clearly distinguish between the plaintiffs in their personal capacities and the plaintiffs in their representative capacities, I propose to regard the claims as collective claims made by representative Gitksan plaintiffs, on behalf of all the Gitksan people in the Houses described in the statement of claim, for aboriginal "ownership" rights, aboriginal "jurisdiction" rights and other "aboriginal rights" over the whole area claimed by all the Gitksan chiefs who are plaintiffs, and as a similar collective claim by the representative Wet'suwet'en plaintiffs, on behalf of all the Wet'suwet'en people who are members of the Wet'suwet'en Houses described in the statement of claim, over the full area claimed by all the Wet'suwet'en chiefs who are plaintiffs. I also propose to regard the claims as being, at the same time, claims by each chief on his or her own behalf and on behalf of his or her House members for "ownership", "jurisdiction", and "aboriginal rights" over the specific territory or territories claimed by them as plaintiffs for their respective Houses.

[551] As I have said, the 12 Kitwancool Gitksan chiefs and the members of their Houses are not parties to this action. Neither are the neighbouring Indian peoples, including the Carrier-Sekani people and the Nishga people, whose land claims overlap, to some extent, the territories claimed in this action. Neither are the 30,000 non-Indian people who live within the overall boundaries of the claimed area. Neither are the persons who claim to have interests in land or resources within the overall boundaries of the claimed area that were granted to them or their predecessors by the Federal or Provincial governments or by other entities carrying on public functions of government.

[552] A counterclaim was made by the Province. It claims a declaration that the plaintiffs have no right, title or interest in the claimed area or its resources or, alternatively, that any claim by the plaintiffs is a claim for compensation from the Federal Crown.

[553] On the application of the Provincial Crown, the Attorney General of Canada was joined as a defendant.

3. The Trial Judgment

[554] The trial occupied 374 sitting days between 11 May, 1987 and 30 June, 1990. Part of the trial took place at Smithers and part in Vancouver.

[555] The evidence included oral testimony of the plaintiffs and other members of the Gitksan and Wet'suwet'en peoples, oral histories, "Adaawk" and "Kungax", and evidence of many experts, including experts on archaeology, anthropology, linguistics, history, genealogy, ethnoarchaeology, and paleo-botany.

[556] The claim as pleaded was for "ownership" of and "jurisdiction" over the territory claimed. But at p.158 the trial judge set out a specific finding that a claim for aboriginal rights other than ownership or jurisdiction was open to the plaintiffs in the action and should be dealt with in the judgment.

[557] The trial judge started his reasons with a summary of his findings and conclusions, at pp. 109-116. I will restate in very compressed form, his principal conclusions:

i) Aboriginal interests arise:

   a) by occupation and use of specific lands for aboriginal purposes by communal people in an organized society for an indefinite, long period prior to British Sovereignty, or

   b) under the ***Royal Proclamation, 1763.***

ii) The ***Royal Proclamation of 1763*** has never applied to nor has it had any force in the colony or Province of British Columbia or to the Indians living here.

iii) The ancestors of the plaintiffs lived in or near villages on the Skeena, Babine and Bulkley Rivers. The villages were strategically located at canyons or river junctions where salmon, the mainstay of the people's diet, could most easily be

taken. Those early ancestors also used some other parts of the territory surrounding and between the villages and rivers, and further away as circumstances required, for hunting and gathering the products of the land and waters of the territory for subsistence and ceremonial purposes.

iv) Trapping for the commercial fur trade began in the years after the first Hudson's Bay posts west of the Rockies were established by Simon Fraser in 1805-1806 and was not an aboriginal practice and did not give rise to an aboriginal right.

v) Great Britain asserted Sovereignty in the territory not earlier than 1803, and not later than either the ***Oregon Boundary Treaty of 1846*** or the actual establishment of the Crown Colony of British Columbia in 1858.

vi) The aboriginal interests of the post-contact ancestors of the plaintiffs at the date of Sovereignty were those exercised by the more remote ancestors of the plaintiffs for an uncertain long time.

vii) Those aboriginal interests did not include ownership of or jurisdiction over the territory.

viii) But for the question of extinguishment, the plaintiffs' aboriginal sustenance rights would have constituted a legally enforceable, continuing burden upon the title of the Crown.

ix) Aboriginal rights exist at the "pleasure of the Crown" and may be extinguished when the intention of the Crown to do so is clear and plain.

x) The pre-Confederation Colonial enactments, considered in their historical setting, exhibit a clear and plain intention to extinguish aboriginal interests in order to give an unburdened title to settlers; and the Crown, by those enactments, did extinguish such rights with respect to all the lands of the colony.

xi) The Crown has a fiduciary obligation to the Indians; and the plaintiffs are entitled to a declaration, arising from that obligation, confirming their non-exclusive legal right to use vacant Crown land for aboriginal purposes, subject to the general law of the Province.

xii) If, contrary to the judgment, the aboriginal rights of the plaintiffs' ancestors or predecessors were not extinguished in the Colonial period, those rights would not be rights of the chiefs of the Houses to individual territories but would be collective rights to specific territories for the communal benefit of all the Gitksan and the Wet'suwet'en peoples, except the peoples adhering to the Kitwancool chiefs and their Houses, and would be aboriginal rights over the parts of the territory that were used by the

plaintiffs' ancestors and predecessors at the time of Sovereignty as determined in Part XVI of the trial judge's reasons and as set out on map 5.

xiii) The claims for aboriginal ownership, aboriginal jurisdiction and aboriginal rights were dismissed. A declaration was made about the plaintiffs' non-exclusive rights to use vacant Crown land for aboriginal subsistence purposes, subject to the general laws of the Province.

xiv) Any claim against the Federal Crown was dismissed.

xv) The counterclaim of the Province was dismissed.

4. The Appeal

[558] The plaintiffs have appealed from the judgment of the trial judge. The appeal is from the formal order in which the claim was dismissed. But in the course of the argument the plaintiffs have disputed every one of the trial judge's principal conclusions as I have set them out, except, of course, the dismissal of the counterclaim.

[559] Two or three months before the dates set for the hearing of this appeal, the Provincial Crown retained new counsel and made a number of changes in its legal position including one very significant change with respect to what has been referred to as "blanket extinguishment" by the Colonial enactments. The former counsel for the Provincial Crown had filed a factum on behalf of the Province asserting the same arguments which had been successfully made at trial. The new counsel for the Provincial Crown filed an amended factum in which the Provincial Crown no longer relied on the argument that the pre-Confederation Colonial enactments brought about a blanket extinguishment of all aboriginal rights. The Province conceded in its amended factum and in its argument that the plaintiffs had aboriginal rights in the territory claimed, or a part of it; that those rights had not been extinguished by any form of blanket extinguishment through the pre-Confederation Colonial enactments; that there may have been selective specific extinguishment of some rights in some areas; but that otherwise the aboriginal rights of the plaintiffs and of the Gitksan and Wet'suwet'en people were still in effect.

[560] After some consideration of the effect on the hearing of the appeal of the change in the Provincial Crown's position, the Court invited three of the former counsel for the Province, who had been associated with the case throughout the trial, to act as amici curiae and to argue those points in support of the trial judgment which were no longer being supported by the Provincial Crown.

[561] The Province cross-appealed with respect to the dismissal of its counterclaim. That cross-appeal was later abandoned.

[562] There was no appeal against the dismissal of the plaintiffs' claim against Canada. In the result, though the Attorney General of Canada was treated as a party and remained as a party throughout the appeal, the Attorney General of Canada had no risk that any order would be made against the Federal Crown and the Attorney General of Canada's interest in the appeal was therefore much the same as the interest of any of the intervenors.

5. Towards a Negotiated Settlement

[563] Several months before the date set for the hearing of the appeal, the Provincial Crown applied for an adjournment of the appeal for six months to permit negotiations to take place between the Province and the plaintiffs in the hope that a political and social solution could be agreed upon by the parties which would reflect the interests not only of all those involved in the litigation but also the interests of all the people who might be affected, now or in the future, by a decision on the rights being litigated. The appellants opposed the adjournment and, since it was their appeal, no adjournment was ordered.

[564] Five days before the hearing of the appeal was due to start, the plaintiffs and the Province applied jointly for an order that the argument on the appeal should be split; that some issues should be argued immediately and should be decided by the Court; that other issues should not be argued immediately but should be adjourned for two years or until one of the parties applied to have those issues brought before the Court for argument. The purpose of the application was to permit the issues to be argued which the appellants regarded as being legal points which would set the framework for the negotiations, but to allow those issues to be deferred which were particularly appropriate for accommodations to be arrived at through negotiations. Those accommodations might well take into account other matters than pure legal rights, for the benefit of all interested persons and not just for the parties to this litigation.

[565] The precise proposal put forward by the parties split the issues in this way:

1. Issues which the Appellants will argue on Appeal:

   (a) Aboriginal title is proprietary in nature;

   (b) Aboriginal rights are not rights of occupation and user;

   (c) Aboriginal title and rights were not and are not confined to village sites and the adjacent lands but were and are applicable over the whole of the territory;

   (d) Aboriginal title and rights are not held at the pleasure of the Crown;

   (e) Aboriginal rights as rights of ownership and jurisdiction are recognized by the common law;

   (f) The establishment of the mainland colony in 1858 and union with Canada in 1871, together with the division of powers in the constitution did not, separately or together, extinguish aboriginal jurisdiction;

   (g) Aboriginal rights cannot be limited to those practices engaged in by the Appellants' ancestors "a very long time before" the assertion of British Sovereignty;

   (h) The facts proved that the Appellants and their ancestors owned their lands, harvested, managed and conserved their resources and governed themselves by their institutions and were not "mere subsistence" societies;

   (i) The fur trade was not responsible for the presence of the Appellants and their ancestors in the "distant" territories;

   (j) The legal tests applicable to the determination of the geographic extent of the Appellants' territory;

   (k) Oral, reputation, anthropological and historical evidence were improperly excluded or not given proper weight by the trial judge;

(l) The Marshall decisions establish the fundamental principles of aboriginal rights at common law;

(m) Consent is a requirement for the taking of Indian lands in British Columbia;

(n) Treaty-making is relevant to British Columbia and is an obligation on the Crown;

(o) The test for extinguishment in ***Sparrow*** was misapplied;

(p) The pre-Confederation Colonial Instruments did not operate to extinguish aboriginal title in British Columbia;

(q) The Royal Proclamation applied prospectively to British Columbia;

(r) Governor Douglas had no power to extinguish.

2. Issues among others to be referred to negotiation:

(a) Whether the precise boundaries of the territory, subject to the aboriginal rights of the Appellants, are those in Ex.646-9A and 9B as argued in Tab 6 at Appendix G of the Appellants' Factum;

(b) The whole question of remedies including the precise location, scope, content and consequences of the Appellants' rights;

(c) Damages;

(d) Co-existence of the Appellants and the Province of British Columbia and Canada;

(e) Any and all issues regarding the concept of extinguishment other than the issue of blanket extinguishment which will be argued in the Court of Appeal.

[566] The Court reserved judgment on the application; ordered the argument of the appeal to go ahead on the dates set as if all issues raised by the parties in their factums were going to be dealt with by the Court; asked the parties to review in greater detail their arguments about splitting the issues in the course of their submissions on the appeal itself; and invited the amici curiae to make submissions on the powers of the Court to split the issues on the appeal and to hear some and defer some, and to make submissions on the consequences of doing so.

6. The Revised Form of Order Sought by the Respective Parties

[567] During the course of argument, the Court invited counsel for the plaintiffs to put forward a further revised form of order, having regard to their fully developed submissions, having regard to the possibility of settling a number of issues by negotiation, and having regard to some observations made by the Court about claims to jurisdiction and to self-government.

[568] In response to that invitation, counsel for the plaintiffs prepared this revised form of order, to which they directed a part of their argument:

1. The Appeal be allowed.
2. The Appellants have existing aboriginal rights which include:
    a. a right of ownership which extends to the enjoyment and possession of lands and resources within the claimed territory;
    b. a right to harvest, manage and conserve those lands and 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 co-operation with ministries and agencies of the Crown and with the private sector who may be affected by the exercise of the Appellants' rights;
    c. a right to maintain and develop their own institutions for the regulation of the ownership, harvesting, management and conservation of those lands and resources;
    d. an inherent right of self-government exercisable through their own institutions, to preserve and enhance their social, political, cultural, linguistic and spiritual identity;

    in order to determine their development and safeguard their integrity as aboriginal peoples within Canada.
3. In the alternative to 2, the Appellants have existing aboriginal rights which include:
    a. a proprietary interest in lands and resources within the claimed territory;
    b. a right to harvest, manage and conserve those lands and 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 the private sector

who may be affected by the exercise of the Appellants' rights;

c. a right to maintain and develop their institutions for the regulation of their proprietary interest and the harvesting, management and conservation of those lands and resources;

d. an inherent right of self-government exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity;

in order to determine their development and safeguard their integrity as aboriginal peoples within Canada.

4. The appeal be adjourned in part for a period of two years from the date of judgment or for such shorter period as the parties agree or as the Court may order and the Court retain jurisdiction over the identification and determination of:

a. the lands in respect of which the Appellants have aboriginal rights;

b. the scope of such rights on and to the said lands; and

c. the Appellants' entitlement to and quantum of damages.

5. In the alternative to 4, the identification and determination of:

a. the lands in respect of which the Appellants have aboriginal rights;

b. the scope of such rights on and to the said lands; and

c. the Appellants' entitlement to and quantum of damages

shall be remitted to the Supreme Court for determination.

6. Pending the determination of the scope of the proprietary rights of the Appellants, no grants of land, interests in land, or right to use land or resources in the territory shall be made by the Province without the consent of the Appellants or by court orders.

7. The Appellants shall have their costs in this Court and the Court below.

[569] Counsel for the Provincial Crown requested the Court to make an order in these terms:

The Respondent requests that this Court:

(a) declare that there was not a blanket extinguishment of the Appellants' Aboriginal Rights;

(b) declare that the Appellants have existing Aboriginal Rights with respect to an undefined portion of the territory in question;

(c) declare that a temporary transition period exists in the anticipation that the Appellants' claims will be resolved and the precise location, scope, content and consequences of their rights be further defined and implemented by the parties through negotiation;

(d) allow the appeal in part, adjourn proceedings *sine die*, and retain jurisdiction over the matter in recognition that should agreement not be reached by the parties on the precise location, scope, content and consequences of the Appellants' Aboriginal Rights, the Court will proceed to address these issues.

[570] Counsel for the Attorney General of Canada submitted "that the portions of the judgment of the learned trial judge in which he held that pre-Confederation Colonial enactments had the effect of extinguishing all the appellants' aboriginal rights or interests in land be varied". The Attorney General of Canada also argued that "as a general proposition, it cannot be said that all limited forms of dedications, resource tenures and other legislated uses ... can be taken to extinguish aboriginal rights". The argument is that some legislated uses may extinguish some rights, but other legislated uses which are in the same area as an area in which aboriginal rights exist may have no effect on those rights. The Attorney General's submission is that this Court has neither been presented with the evidence nor the argument to permit it to consider issues of specific extinguishment of precise aboriginal rights.

7. Splitting the Issues

[571] Both the plaintiffs and the Provincial Crown urged the Court to take a purposive approach to the question of remedies in this case. Both asked for declarations that the plaintiffs have certain aboriginal rights which have not been extinguished, but asked that the particular location, scope, content and consequences of those rights be permitted, following the making of the declarations that are requested, to be negotiated by the parties. Neither party asked for an order that the parties be compelled to negotiate. They asked only that declarations in general terms about the existence and nature of the plaintiffs' aboriginal rights be made by formal orders now, and that the remaining issues in the appeal be adjourned to permit the parties to use the general declarations that have been made as a framework for their negotiations. They wish then to negotiate the precise application of the plaintiffs' rights to the present circumstances and to the contemplated future circumstances of the plaintiffs and others interested in the claimed area in a way that will accommodate all the interests involved, many of which are not represented in this litigation, in an overall political, social, economic, legal and constitutional blueprint for a just and prosperous society within the claimed area and throughout British Columbia.

[572] I am sure that negotiation is a better way to resolve these overall political, social and economic questions than litigation. This Court has said so before. Indeed there has often been a sense of futility on the part of the parties, as well as on the part of the courts, in tackling legal issues in legal ways to provide legal

remedies, when those issues and those ways and those remedies can only reach a minor and possibly only symbolic aspect of the overall problem. In this case, some questions that are theoretically amenable to legal answers, such as the precise nature of aboriginal practices in certain areas at certain times, leading to a determination of the scope of some of the modern aboriginal rights in the same areas, can only be answered on the basis of the flimsiest and most elusive of evidence, and, in my opinion, should not be answered, for once and for all, unless there is no alternative. Furthermore, even purely legal questions about the precise inter-relationship between existing and future Crown-granted mineral rights, forest rights, railway rights, trapping rights, guiding and game rights and the like, on the one hand, and the plaintiffs' aboriginal rights, on the other, cannot be resolved on the evidence in this litigation which was not directed to the precise nature of that inter-relationship. Additionally, the aspects of those questions that relate to existing Crown-granted rights ought not to be resolved, in my opinion, without representations being made on behalf of the persons claiming to hold the rights. Finally, all questions in relation to the justification for an infringement of aboriginal rights under the ***Sparrow*** tests cannot be resolved in this litigation because those tests had not been enunciated when the evidence was being led in this case, and the evidence was not directed to those tests. See ***R. v. Sparrow,*** [1990] 1 S.C.R. 1075 at p.1112.

[573] In short, the parties themselves want us to decide those issues raised by the pleadings and evidence where a decision will assist their negotiations, and they want us to do so by final orders which will render the Court *functus* on those very issues and which will make those issues subject to rights of appeal in the same way and with the same time limitations as any other final orders; but the parties wish us to adjourn other issues raised by the pleadings and the evidence on which the parties prefer that the answers be supplied by negotiation, settlement, and treaty. In the context of such negotiations, other matters could also be dealt with, matters which are not raised by the pleadings and evidence between the parties in this litigation. The parties also want to retain their rights to bring back before this Court for decision in the appeal itself the issues which are adjourned, against the possibility that negotiations may fail.

[574] In ***The Queen v. Gamble,*** [1988] 2 S.C.R. 595 at 641, Madam Justice Wilson said that a purposive approach should be applied in the administration of Charter remedies as well as to the interpretation of Charter rights. A similar point was made by Mr. Justice Sopinka in ***Osborne v. Canada (Treasury Board),*** [1991] 2 S.C.R. 69 at p.104. Examples of cases where the courts have applied a purposive approach to remedies include ***Saskatchewan Human Rights Commission v. Kodellas*** (1989), 60 D.L.R. (4th) 143 (Sask.C.A.); ***Manitoba Language Reference,*** [1985] 1 S.C.R. 721; ***Mahe v. Alberta,*** [1990] 1 S.C.R. 342; ***Marchand v. Simcoe County Board of Education*** (1986), 55 O.R. (2d) 638 (Ont.H.C.); and ***Marchand v. Simcoe County Board of Education (No.2)*** (1987), 61 O.R. (2d) 651 (Ont.H.C.); ***Dixon v. B.C. (A.G.) (No.1)*** (1989), 59 D.L.R. (4th) 247 (B.C.S.C.); and ***Dixon v. B.C. (A.G.) (No.2)*** (1989), 60 D.L.R. (4th) 445 (B.C.S.C.). In the ***Manitoba Language*** case, the ***Mahe*** case, the ***Marchand*** case and the ***Dixon*** case, issues properly suitable for legal decision were split away from issues better suited for

legislative or administrative action, with the court retaining the power to deal with the unresolved issues, if necessary, or to work out more detailed orders on the issues that had been resolved. When the reserved issues returned to the court they did not simply return to the same judges. They returned to a differently composed bench. See particularly the ***Manitoba Language*** case and the ***Dixon*** case.

[575] The formal jurisdiction of this Court to make an order splitting the issues in the way I have described is amply conferred by s.9 of the ***Court of Appeal Act.*** It is common to split issues of liability from issues of damages both at trial and on appeal. And, under the Rules, it is common for issues of law to be dealt with as separate questions before the action ever takes place. See, for example, ***Donoghue v. Stevenson,*** [1932] A.C. 562.

[576] At the request of the Court, the *amici curiae* made arguments directed to a submission that the court did not have power to make the kind of order requested by the parties, or, if it did have the power, ought not to exercise it. The arguments were summarized by the *amici curiae* in this way:

(a) To the extent that the Province and Appellants agree on the relief sought, such agreement is a reason for not granting the relief - the court should be slow to act where there is no dispute and no true contradicter before it.

(b) The declarations sought will neither determine the rights of the parties, nor settle the issues between them. Rather than create certainty they will foster uncertainty.

(c) The Province's claim for a declaration "that there was not a blanket extinguishment of the Appellants' Aboriginal Rights" is otiose: the Appellants sought no such declaration, nor did the trial judge make any such finding.

(d) The declarations sought would affect the rights of persons not parties to the case and the court should not make such orders without giving those affected an opportunity to be heard.

(e) The question whether the Appellants have aboriginal rights which are protected by s.35(1) of the ***Constitution Act, 1982*** cannot be answered until the Court has engaged in the justificatory analysis required by ***Sparrow.*** A declaration of "existing aboriginal rights" has no practical or legal effect.

(f) Aboriginal rights under section 35 are not defined through negotiation. Therefore, an adjournment to allow the Appellants and the Province to negotiate the precise location, scope, content or consequences of the Appellants' aboriginal rights would have no practical or legal effect.

[577] I do not think it is necessary to address those arguments. Each of them has some sensible point to make. But none of them makes a true strike at the jurisdiction of the Court to split the issues.

[578] Perhaps I should add, however, in relation to point (f) and to s.35 of the ***Constitution Act, 1982,*** which I propose to set out in Sub-division IV (2) (d) of these reasons, that if the end result of negotiations is that a treaty or agreement is made which includes a land claims agreement then the rights confirmed or established by such an agreement must surely be rights acquired by the agreement within s-s.35(3) and as such must be regarded as constitutionally recognized and affirmed.

[579] As will become apparent in Parts V and VI of these Reasons, I have concluded that there are fundamental errors of both law and fact in the reasons of the trial judge. Accordingly, in my opinion the appeal ought to be allowed. I hope that negotiations will take place to resolve the claims of the Gitksan and Wet'suwet'en peoples. I hope that those negotiations lead to a satisfactory outcome. But whether they do or whether they do not, in my opinion this Court, no matter how it is composed, will never be in a position to make findings of fact in substitution for the flawed findings of fact of the trial judge. Without these findings the Court could never be in a position to deal with the legal issues which rest on them, such as the scope and content of rights and such as damages and compensation, until findings of fact are made by a trial judge who applies the correct law to the relevant questions and who has an opportunity to hear the witnesses and assess or re-assess their credibility.

[580] Accordingly, if negotiations do not resolve these claims then in my opinion the unresolved matters must be brought back for a new trial before a judge of the Supreme Court of British Columbia.

[581] So I would split the issues. I would deal with those issues which the parties argued fully. On the basis of my conclusions on those issues I would allow the appeal and order a new trial. I would not order that any issues not dealt with in the judgment of the Court at this stage should come back again to this Court except through a new trial and a new appeal.

PART III

THE ORIGIN AND NATURE OF ABORIGINAL TITLE AND ABORIGINAL RIGHTS

[582] I propose to divide this subject up into Divisions and Sub-divisions in this way:

1. **The Leading Cases**
   - (a) ***Campbell v. Hall***
   - (b) ***St. Catherine's Milling v. The Queen***
   - (c) ***In re Southern Rhodesia***
   - (d) ***Amodu Tijani v. Southern Nigeria***
   - (e) ***Calder v. A.G.B.C.***
   - (f) ***Baker Lake v. Minister of Indian Affairs***
   - (g) ***Guerin v. The Queen***
   - (h) ***Canadian Pacific Ltd. v. Paul***
   - (i) ***Roberts v. Canada***
   - (j) ***Pasco v. C.N.R.***
   - (k) ***R. v. Sparrow***
   - (l) ***Ontario (A.G.) v. Bear Island Foundation***
   - (m) **Mabo v. The State of Queensland**
2. **Some Conclusions from the Cases**
   - (a) The Recognition of Aboriginal Title and Rights by the Common Law: The Doctrine of Continuity
   - (b) What Makes an Aboriginal Right a Right, and What Makes it Aboriginal
   - (c) Proprietary or Personal
   - (d) Prescription and Custom
   - (e) The Date and Significance of Sovereignty
3. **Summary on Aboriginal Rights in British Columbia**

1. The Leading Cases

[583] I do not propose to discuss the background or formal decisions in these cases. I propose only to indicate the contributions they have made to an understanding of aboriginal rights in Canada. Some of the cases deal also with questions about extinguishment. I do not intend to discuss that aspect of those

cases now. I will come back to those cases when I reach the question of extinguishment.

(a) ***Campbell v. Hall*** (1774), 1 Cowp. 204; 98 E.R. 1045. (K.B.)

[584] Lord Mansfield, on behalf of the Court of King's Bench, stated six propositions, at pp. 208-209 (and at pp. 1047-1048 in the English Reports) in these terms:

> A great deal has been said, and many authorities cited relative to propositions, in which both sides seem to be perfectly agreed; and which, indeed are too clear to be controverted. The stating some of those propositions which we think quite clear, will lead us to see with greater perspicuity, what is the question upon the first point, and upon what hinge it turns. I will state the propositions at large, and the first is this:
>
> A country conquered by the British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain.
>
> The 2d is, that the conquered inhabitants once received under the King's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens.
>
> The 3d, that the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning.
>
> The 4th, that the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives.
>
> The 5th, that the laws of a conquered country continue in force, until they are altered by the conqueror: the absurd exception as to pagans, mentioned in ***Calvin's case,*** shews the universality and antiquity of the maxim. For that distinction could not exist before the Christian aera; and in all probability arose from the mad enthusiasm of the Croisades. In the present case the capitulation expressly provides and agrees, that they shall continue to be governed by their own laws, until His Majesty's further pleasure be known.
>
> The 6th, and last proposition is, that if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws

> of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put. (my emphasis)

[585] If the laws of a conquered territory remain in force following the conquest, how much more should the laws of an occupied, organized but unconquered territory remain in force when Sovereignty is asserted over the organized society already present in the territory?

[586] ***Campbell v. Hall*** has one further relevant aspect. The issue in the case is related to the application of the ***Royal Proclamation of 1763*** to Grenada, one of the four territories referred to directly in the Proclamation. Just eleven years after the making of the Proclamation, Lord Mansfield was interpreting it in its context in the common law and in the Law of Nations and as reflecting those laws.

(b) ***St. Catherine's Milling v. The Queen*** (1888), 14 App. Cas. 46. (J.C.P.C.)

[587] This decision turned on the interpretation and application of the ***Royal Proclamation of 1763*** to lands which had been the hunting grounds of Ojibway Indians, but which had been surrendered by them to the Crown under a treaty made in 1873.

[588] Lord Watson, at pp. 54-55, said this:

> Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the Sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. <u>That inference is, however, *at variance with the terms of the instrument,* which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign.</u> The lands reserved are expressly stated to be "parts of Our dominions and territories;" and it is declared to be the will and pleasure of the Sovereign that, "for the present," they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. <u>There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon that point</u>. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished. (my emphasis)

[589] It is important to understand that the ***St. Catherine's*** case is about the interpretation of the ***Royal Proclamation of 1763.*** The question of aboriginal title or aboriginal rights apart from the ***Royal Proclamation of 1763*** was not dealt with. The interest of the Indians in the land in question was thought to depend on the Proclamation made in England in 1763. We now know that aboriginal rights do not depend on the Proclamation, although other rights could be conferred by the Proclamation and aboriginal rights could be confirmed by the Proclamation.

[590] The conclusion that the "tenure" of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign, is derived entirely from "the terms of the instrument", that is, the ***Royal Proclamation of 1763,*** and it is the instrument and the instrument alone which is used to defeat the argument that unless the lands in question had been ceded to or purchased by the Crown, the entire property of the land remained with the Indians. So the ***St. Catherine's*** case does not relate to and does not decide anything at all about aboriginal rights generally. It relates to and decides only about the interpretation of the ***Royal Proclamation of 1763.***

[591] As Viscount Haldane said in ***Amodu Tijani,*** [1921] A.C. 399 (J.C.P.C.) at pp. 402-403, and Chief Justice Dickson said in ***Guerin,*** [1984] 2 S.C.R. 335 (S.C.C.) at p.382, the use of common law land tenure concepts tends to obscure rather than assist an understanding of Indian title. It seems to me, even more so, that the use of the usufructuary concept, derived from Roman law, with which common law lawyers are usually entirely unfamiliar, does not provide any insight into aboriginal title and is indeed both inaccurate and misunderstood.

(c) In ***Re Southern Rhodesia,*** [1919] A.C. 211. (J.C.P.C.)

[592] This case concerns the conquest of the territory occupied by King Lobengula and the Matabele and Mashona nations by the British South Africa Company. Lord Sumner said this, at pp. 233-4:

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor "richer than all his tribe." On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law. (my emphasis)

[593] The description by Lord Sumner for the Judicial Committee in 1919 of the rights of a conquered people to retain their laws and their title to their lands is almost exactly the same as the description of those rights by Lord Mansfield in ***Campbell v.***

Hall in 1774. If a conquered people maintain those rights, how much more so would an unconquered people retain their laws and their title to their lands, following an assertion of Sovereignty by the Crown?

(d) ***Amodu Tijani v. Southern Nigeria,*** [1921] 2 A.C. 399. (J.C.P.C.)

[594] This case related to the origin and nature of the aboriginal title to land in Nigeria. Viscount Haldane, on behalf of the Judicial Committee of the Privy Council, said this at pp. 402-403:

> Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. 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. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full Division between property and possession as English lawyers are familiar with. (my emphasis)

[595] At pp. 403-404:

> The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned *a priori* are of but little assistance, and are as often as not misleading. (my emphasis)

[596] And at pp. 409-410:

> Their Lordships think that the learned Chief Justice in the judgment thus summarised, which virtually excludes the legal reality of the community usufruct, has failed to recognize the real character of the title to land occupied by a native community. That title, as they have pointed out, is prima facie based, not on such individual ownership as English law has made familiar, but on a communal usufructuary occupation, which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference. (my emphasis)

[597] There are two important points to note. The first is that one must free oneself from common law property law concepts when one is considering the nature of the interest of indigenous people in their land. It may be wholly unlike any common law

estate or tenure. There is no need to use comparisons to the common law. Such comparisons may well be misleading. In particular, it may be misleading to separate title into property and possession and to equate title and ownership with property and not possession. The second is that the initial exercise of Sovereignty by the Crown need not carry with it the radical title to the land, and even if it does, the radical title may not carry beneficial ownership. If the radical title becomes vested in the Crown, nonetheless, unless the aboriginal titles and aboriginal rights of the indigenous peoples are clearly and plainly taken away, those titles and rights remain, and may be so complete as to reduce any radical title or right in the Sovereign to one of administration only.

(e) ***Calder v. A.G.B.C.,*** [1973] S.C.R. 313.

[598] This case is in many respects closely similar to the present appeal. Mr. Calder was a Nishga representative. The Nishga are neighbours to the west of the Gitksan. The action was for a declaration that the aboriginal title to the Nishga lands had never been extinguished.

[599] Mr. Justice Judson, on behalf of himself, Mr. Justice Martland and Mr. Justice Ritchie, decided that the ***Royal Proclamation of 1763*** did not apply because it referred to Indians who lived under British protection, and the Nishgas did not live under British protection in 1763. He decided also that the Nishgas had held an aboriginal title to their ancestral lands in 1858, quite apart from any question about the application of the ***Royal Proclamation of 1763.*** He said this, at p.328:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. (my emphasis)

[600] Mr. Justice Judson then summarized the Colonial enactments and said this, at p.344:

> In my opinion, in the present case, the Sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.

[601] Mr. Justice Hall, on behalf of himself, Mr. Justice Spence and Mr. Justice Laskin, decided that the ***Royal Proclamation of 1763*** applied to the Nishgas through being a part of the law of England, which followed the flag, and which, on the assertion of Sovereignty, and the general introduction of English law over the whole Province, became the law of British Columbia. Mr. Justice Hall also decided that the Nishgas had aboriginal title to the lands independently of the ***Royal***

Proclamation. Mr. Justice Hall described their claim to aboriginal title in this way, at pp. 352-353:

> Their position is that they possess a right of occupation against the world except the Crown and that the Crown has not to date lawfully extinguished that right. The essence of the action is that such rights as the Nishgas possessed in 1858 continue to this date. Accordingly, the declaratory judgment asked for implies that the *status quo* continues and this means that if the right is to be extinguished it must be done by specific legislation in accordance with the law.
>
> The right to possession claimed is not prescriptive in origin because a prescriptive right presupposes a prior right in some other person or authority. Since it is admitted that the Nishgas have been in possession since time immemorial, that fact negatives that anyone ever had or claimed prior possession.
>
> The Nishgas do not claim to be able to sell or alienate their right to possession except to the Crown. They claim the right to remain in possession themselves and to enjoy the fruits of that possession. (my emphasis)

[602] In my opinion, the key sentences in that passage are those that I have underlined. While it was admitted that the Nishgas had been in possession since time immemorial, it was not the rights since time immemorial that were claimed, but the rights as they existed in 1858, the date taken by Mr. Justice Hall as the date of Sovereignty, and certainly the date of the reception of English law into British Columbia. The right is not prescriptive in nature. It does not depend on adverse possession for a long period. There is no one against whom it could be adversely possessed. It rests on established possession, exclusive or shared. And the right is a continuation to the present of the right that existed in 1858.

[603] Mr. Justice Hall decided that the rights as claimed had been proven to exist in fact, and that they had not been extinguished by Colonial Proclamations, Ordinances or enactments between 1858 and 1871, when British Columbia joined Confederation. Even if the Proclamations made by James Douglas, the Governor of the Colony, before a Legislative Council was established in 1864, could be thought capable, in their terms, of extinguishing aboriginal title, James Douglas, by the terms of his commission, did not have the power to make a Proclamation having such an effect.

[604] Mr. Justice Pigeon did not decide any of the issues I have described. He decided that the Indians could not proceed with their claim without a fiat. That conclusion was also reached by Mr. Justice Judson, Mr. Justice Martland and Mr. Justice Ritchie. The result was that the action was dismissed on a purely procedural ground. The questions of law relating to the aboriginal title of the Nishgas, and whether any such title had been extinguished, remained undecided.

(f) ***Baker Lake v. Ministry of Indian Affairs,*** [1980] 1 F.C. 518. (F.C.T.D.)

[605] This was a judgment of Mr. Justice Mahoney, sitting as a trial judge in the Federal Court. It related to a claim of a number of Inuit and their representatives for a declaration of an aboriginal title to a portion of the land of the Northwest Territories surrounding the Hamlet of Baker Lake. Mr. Justice Mahoney decided that the ***Calder*** case rendered untenable the argument that no aboriginal title exists in a settled as distinct from a conquered or ceded colony; and he rejected the argument that there is no aboriginal title unless it has been recognized by statute or prerogative Act of the Crown, or by laws having statutory effect.

[606] At pp. 557-558, Mr. Justice Mahoney said this:

> The elements which the plaintiffs must prove to establish an aboriginal title cognizable at common law are:
>
> 1. That they and their ancestors were members of an organized society.
>
> 2. That the organized society occupied the specific territory over which they assert the aboriginal title.
>
> 3. That the occupation was to the exclusion of other organized societies.
>
> 4. That the occupation was an established fact at the time Sovereignty was asserted by England.
>
> Decisions supporting these propositions include those of the Supreme court of Canada in ***Kruger v. The Queen*** and the ***Calder*** case and those of the United States Supreme Court in ***Johnson v. M'Intosh, Worcester v. The State of Georgia (supra)*** and ***United States of America v. Santa Fe Pacific Railroad Company***.
>
> Proof that the plaintiffs and their ancestors were members of an organized society is required by the authorities. In quoting Mr. Justice Judson's ***Calder*** judgment, I emphasized the phrase "organized in societies" and I repeated the emphasis Mr. Justice Hall had included in quoting the passage from ***Worcester v. The State of Georgia:*** "having institutions of their own, and governing themselves by their own laws".

[607] Mr. Justice Mahoney referred to ***In re Southern Rhodesia*** and then said at p.559:

> The fact is that the aboriginal Inuit had an organized society. It was not a society with very elaborate institutions but it was a society organized to exploit the resources available on the barrens and essential to sustain human life there. That was about all they could do: hunt and fish and survive. <u>The aboriginal title asserted here encompasses only the right to hunt and fish as their ancestors did.</u> (my emphasis)

[608] And at p.563, Mr. Justice Mahoney continued:

> In the result, I find, on a balance of probabilities on the evidence before me, that, at the time England asserted Sovereignty over the barren lands west of Hudson Bay, the Inuit were the exclusive occupants of a portion of the barren lands… An aboriginal title to that territory, carrying with it the right freely to move about and hunt and fish over it, vested at common law in the Inuit.

[609] Mr. Justice Mahoney, in my opinion, in adopting his four tests, which by being enumerated, of course, have come to have the usual extra force that seems to follow from enumeration, correctly concluded that there must be an organized society in occupation of specific territory, though the occupation may be nomadic, at the time of the assertion of British Sovereignty. The reason why there must be an organized society is that it is only in such a society that the practices of the people reveal that there are recognized rights which underlie the practices.

[610] Mr. Justice Mahoney, in my opinion, also correctly concluded that the occupation of the land and the exercise of the practices and rights of the indigenous peoples from time immemorial was not a part of the tests for the existence of aboriginal rights at the time of Sovereignty. Aboriginal rights are not prescriptive rights but are rather those rights which are established and recognized within the organized society of the indigenous people at the time of the assertion of Sovereignty by the Crown. I propose to return to this point in Sub-division (d), "Prescription and Custom".

[611] I am in some disagreement with Mr. Justice Mahoney about the third test, namely that the occupation had to be to the exclusion of other organized societies. 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 such 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 in ***Turtle Mountain Band v. U.S.,*** 490 F. 2d 935 (1974) at p.944; ***U.S. v. Pueblo of San Ildefonso,*** 513 F. 2d 1383 (1975) at pp. 1394-5; and ***Strong v. U.S.,*** 518 F. 2d 556 (1975) at pp. 561-2.

(g) ***Guerin v. The Queen,*** [1984] 2 S.C.R. 335.

[612] This case dealt with Indian reserve lands and particularly with the fiduciary obligations of the Crown to the Indians on the surrender of reserve lands.

[613] Mr. Justice Dickson discussed the nature of aboriginal title which he considered to be the same on reserve lands as on non-reserve lands.

[614] Mr. Justice Dickson, under the heading "The Existence of Indian Title", said this, at p.378:

> The principle that a change in Sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants was approved by the Privy Council in ***Amodu Tijani v. Southern Nigeria (Secretary),*** [1921] 2 A.C. 399. That principle supports the assumption implicit in ***Calder*** that Indian title is an independent legal right which, although recognized by the ***Royal Proclamation of 1763,*** nonetheless predates it. (my emphasis)

[615] Under the heading "The Nature of Indian Title" Mr. Justice Dickson said this at p.382:

> It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it a personal, usufructuary right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has nonetheless arisen because in neither case is the categorization quite accurate.
>
> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading. (my emphasis)

[616] Of course, when Mr. Justice Dickson said that any description of Indian title which goes beyond the feature of inalienability and the feature of giving rise to a fiduciary obligation on the part of the Crown when it is surrendered is unnecessary and potentially misleading, he was referring only to the issues being considered in the ***Guerin*** case. Other issues such as the conflict between aboriginal title and Crown-granted tenures will in many cases require a more detailed examination of the characteristics of aboriginal title.

(h) ***Canadian Pacific Railway Ltd. v. Paul,*** [1988] 2 S.C.R. 654.

[617] This case dealt with lands conveyed by a former owner to the Crown for the use of a tribe of Indians.

[618] In reasons "for the Court" the Supreme Court of Canada said, at p.677:

> Courts have generally taken as their starting point the case of ***St. Catherine's Milling and Lumber Co. v. The Queen*** (1888), 14 App. Cas. 46 (P.C.), in which Indian title was described at p. 54 as a "personal and usufructuary right". This has at times been interpreted as meaning that Indian title is merely a personal right which cannot be elevated to the status of a proprietary interest so as to compete on an equal footing with other proprietary interests. However, we are of the opinion that the right was characterized as purely personal for the sole purpose of emphasizing its generally inalienable nature; it could not be transferred, sold or surrendered to anyone other than the Crown. (my emphasis)

[619] And the Court said at p.678:

> 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. (my emphasis)

(i) ***Roberts v. Canada,*** [1989] 1 S.C.R. 322.

[620] This case concerned a dispute between two Indian bands about which of them was entitled to exclusive use and occupancy of a reserve near Campbell River. In reasons for the Court, Madam Justice Wilson said, at pp. 339-340:

> However, I think that the existence of "Federal common law" in some areas is expressly recognized by Laskin C.J.C. and the question for us, therefore, is whether the law of aboriginal title is Federal common law.
>
> I believe that it is. In ***Calder v. A.G.B.C.,*** [1973] S.C.R. 313 this Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands. As Dickson J. (as he then was) pointed out in ***Guerin,*** *supra*, aboriginal title pre-dated colonization by the British and survived British claims of Sovereignty. The Indians' right of occupation and possession continued as a "burden on the radical or final title of the Sovereign": per Viscount Haldane in ***Amodu Tijani v. South. Nigeria (Secretary),*** [1921] 2 A.C. 399 at 403 (P.C.). (my emphasis)

(j) ***Pasco v. C.N.R.*** (1989), 56 D.L.R. (4th) 404. (B.C.C.A.)

[621] This was an appeal heard by this Court sitting in a Division comprised of Mr. Justice Carrothers, Mr. Justice Macfarlane and Mr. Justice Wallace. The appeal

raised questions about aboriginal title and aboriginal rights in relation to capacity to bring a representative action.

[622] Mr. Justice Macfarlane, in reasons for the Court, at p.411, adopted the four part test in relation to the elements which must be proven by the plaintiffs in order to establish an aboriginal title or aboriginal right, as those four elements were put forward by Mr. Justice Mahoney in the ***Baker Lake*** case, namely:

1. That they and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert the aboriginal title.
3. That the occupation was to the exclusion of other organized societies.
4. That the occupation was an established fact at the time Sovereignty was asserted by England.

[623] Then at p.412, after further reference to the reasons of Mr. Justice Mahoney in ***Baker Lake,*** Mr. Justice Macfarlane said this:

> In my opinion, the date at which it must be shown that there was an organized society occupying the specific territory over which the plaintiffs, as descendants of the members of that society, now assert aboriginal title is the date at which Sovereignty was asserted by the Europeans. (my emphasis)

[624] So long as one accepts that the vesting of radical title in the Crown and the successful assertion of Sovereignty occurred simultaneously, I agree with that conclusion. It was not argued otherwise in this case. Subject to that caution, the conclusion is amply supported by the authorities to which I have already referred, and as far as I am aware, there is no authority to the contrary. So I propose to accept that conclusion for the purposes of this case. But it may have to be re-examined in relation to a consideration of the nature of the aboriginal title, if any, of Métis people, and to similar questions about the acquisition of aboriginal rights after Sovereignty.

(k) ***R. v. Sparrow,*** [1990] 1 S.C.R. 1075.

[625] This case related to whether Mr. Sparrow was entitled to fish for salmon in the exercise of an aboriginal right to do so using a larger drift-net than was permitted under the ***Fisheries Act*** Regulatory Scheme.

[626] The judgment of the Supreme Court of Canada was delivered as a joint judgment of Chief Justice Dickson and Mr. Justice La Forest. They said this, at p.1094:

> The evidence reveals that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day. (my emphasis)

[627] Chief Justice Dickson and Mr. Justice La Forest said this, at p.1099:

> In our opinion, the Court of Appeal made no mistake in holding that the Indians have an existing aboriginal right to fish in the area where Mr. Sparrow was fishing at the time of the charge. This approach is consistent with ensuring that an aboriginal right should not be defined by incorporating the ways in which it has been regulated in the past.
>
> The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. As we stated earlier, the right to do so may be exercised in a contemporary manner. (my emphasis)

[628] In my opinion, the first passage that I have quoted is significant in its reference to living in the area as an organized society. In my opinion, the second passage is significant in establishing, first, that an aboriginal right should not be defined by incorporating ways it has been regulated in the past by the settling society, and, second, that an aboriginal right may be exercised in a contemporary manner.

(l) ***Ontario (Attorney General) v. Bear Island Foundation,*** [1991] 2 S.C.R. 570.

[629] This case concerned a claim to aboriginal rights over land in Ontario by members of the Temagami Band of Indians. The trial judge found that the claimants had no aboriginal rights to the land and that even if they had such rights, those rights had been extinguished by the ***Robinson-Huron Treaty of 1850.*** The Ontario Court of Appeal made, for the purposes of the appeal, an assumption that an aboriginal right existed, but found that it had been extinguished by the treaty.

[630] In reasons "for the Court", the Supreme Court of Canada at p.574 quoted one passage from the reasons of the trial judge, Mr. Justice Steele. This was the passage:

> I will deal with the entitlement of the defendants to aboriginal rights in the Land Claim Area. I find that the defendants have failed to prove that their ancestors were an organized band level of society in 1763; that, as an organized society, they had exclusive occupation of the Land Claim Area in 1763; or that, as an organized society, they continued to exclusively occupy and make aboriginal use of the Land Claim Area from 1763 or the time of coming of settlement to the date the action was commenced.

[631] Then, in a short set of reasons, the Supreme Court of Canada said this at pp. 574-75:

> We do not take issue with the numerous specific findings of fact in the courts below, and it is, therefore, not necessary to recapitulate them here.
>
> It does not necessarily follow, however, that we agree with all the legal findings based on those facts. In particular, we find that on the facts found by the trial judge the Indians exercised sufficient occupation of the lands in question throughout the relevant period to establish an aboriginal right: see, in this context, ***Simon v. The Queen,*** [1985] 2 S.C.R. 387; 62 N.R. 366; 71 N.S.R. (2d) 15; 171 A.P.R. 15; ***R. v. Sparrow,*** [1990] 1 S.C.R. 1075; 111 N.R. 241. In our view, the trial judge was misled by the considerations which appear in the passage from his reasons quoted earlier. (my emphasis)

[632] However, the Court concluded that if the aboriginal rights were not extinguished by the Treaty they were surrendered by events following the Treaty.

[633] I conclude from the ***Bear Island*** case that the tests expressed by Mr. Justice Mahoney in the ***Baker Lake*** case, and applied by Mr. Justice Steele in the quoted passage in the ***Bear Island*** case, may not express accurately the necessary preconditions to the establishment of aboriginal title, or at least that they should not be applied as if they were four rigid technical tests, but rather as guides to a single composite test relating to use of the land in an organized way by a socially cohesive society.

[634] I do not believe that the "organized" concept should be taken to have been abandoned by the Supreme Court of Canada since it was expressly referred to in ***Sparrow*** and was not directly overruled in the ***Bear Island Foundation*** case.

(m) ***Mabo v. The State of Queensland*** (1992), 107 A.L.R. 1. (H.C.A.)

[635] Judgment in the ***Mabo*** case was handed down in the High Court of Australia during the argument on this appeal. We had some oral submissions on the ***Mabo*** decision and we invited and received further written submissions. ***Mabo*** is an important case in relation to the recognition of aboriginal title and aboriginal rights under the common law.

[636] A majority judgment was delivered by Mr. Justice Brennan, with whom Chief Justice Mason, and Mr. Justice McHugh agreed. A concurring joint majority judgment was delivered by Mr. Justice Deane and Madam Justice Gaudron, and a concurring majority judgment was delivered by Mr. Justice Toohey. Mr. Justice Dawson dissented.

[637] All the members of the Court agreed that the result of the judgment was that six members of the Court were in agreement "that the common law of [Australia] recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that, subject to the effect of

some particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland.", as was said by Chief Justice Mason and Mr. Justice McHugh at p.7.

[638] Of the majority, three concluded that the native title was proprietary, two concluded that it was personal, and one concluded that it did not matter. Three decided that extinguishment of native title by inconsistent grant was wrongful and gave rise to a claim for compensatory damages. Three decided that extinguishment by inconsistent grant did not give rise to a claim for compensatory damages. Taking into account the dissent of Mr. Justice Dawson, a majority of four to three decided that extinguishment by inconsistent grant did not give rise to a claim for compensatory damages. I will be returning to the ***Mabo*** case on the issue of extinguishment. But I would like to refer to one or two helpful passages (out of many) on the origin and nature of aboriginal title and aboriginal rights.

[639] Mr. Justice Brennan said these things:

[640] at p.18:

> In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian law is not only the historical successor of, but is an organic development from, the law of England. Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies.

[641] at p.28:

> If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.

[642] at p.28:

> The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country.

[643] at p.29:

> A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.

[644] at p.31:

> It was only by fastening on the notion that a settled colony was *terra nullius* that it was possible to predicate of the Crown the acquisition of ownership of land in a colony already occupied by indigenous inhabitants. It was only on the hypothesis that there was nobody in occupation that it could be said that the Crown was the owner because there was no other.

[645] at pp. 35-36:

> Recognition of the radical title of the Crown is quite consistent with recognition of native title to land, for the radical title, without more, is merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its Sovereign Power to grant an interest in land) and to support the plenary title of the Crown (when the Crown has exercised its Sovereign Power to appropriate to itself ownership of parcels of land within the Crown's territory). Unless the Sovereign Power is exercised in one or another of those ways, there is no reason why land within the Crown's territory should not continue to be subject to native title. It is only the fallacy of equating Sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of Sovereignty.
>
> If it be necessary to categorize an interest in land as proprietary in order that it survive a change in Sovereignty, the interest possessed by a community that is in exclusive possession of land falls into that category. Whether or not land is owned by individual members of a community, a community which asserts and asserts effectively that none but its members has any right to occupy or use the land has an interest in the land that must be proprietary in nature: there is no other proprietor. It would be wrong, in my opinion, to point to the inalienability of land by that community and, by importing definitions of "property" which require alienability under the municipal laws of our society, to deny that the indigenous people owned their land. The ownership of land within a territory in the exclusive occupation of a people must be vested in that people: land is susceptible of ownership, and there are no other owners. True it is that land in exclusive possession of an indigenous people is not, in any private law sense, alienable property for the laws and customs of an indigenous people do not generally contemplate the alienation of people's traditional land. But the common law has asserted that, if the Crown should acquire Sovereignty over that land, the new Sovereign may extinguish the indigenous people's interest in the land and create proprietary rights in its place and it would be curious if, in place of interests that were classified as non-proprietary, proprietary rights could be created. Where a proprietary title capable of recognition by the common law is found to have been possessed by a community in occupation of a territory, there is no reason why that title should not be

recognized as a burden on the Crown's radical title when the Crown acquires Sovereignty over that territory. The fact that individual members of the community, like the individual plaintiff Aborigines in *Milirrpum,* enjoy only usufructuary rights that are not proprietary in nature is no impediment to the recognition of a proprietary community title. Indeed, it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title. There may be difficulties of proof of boundaries or of membership of the community or of representatives of the community which was in exclusive possession, but those difficulties afford no reason for denying the existence of a proprietary community title capable of recognition by the common law. That being so, there is no impediment to the recognition of individual non-proprietary rights that are derived from the community's laws and customs and are dependent on the community title. A fortiori, there can be no impediment to the recognition of individual proprietary rights.

[646] at p.41:

In ***Calder v. Attorney General of British Columbia*** Hall J. rejected as "wholly wrong" "the proposition that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer."

The preferable rule, supported by the authorities cited, is that a mere change in Sovereignty does not extinguish native title to land. (The term "native title" conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.) The preferable rule equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land and recognizes in the indigenous inhabitants of a settled colony the rights and interests recognized by the Privy Council in ***In re Southern Rhodesia*** as surviving to the benefit of the residents of a conquered colony.

[647] at p.42:

Native title, though recognised by the common law, is not an institution of the common law and is not alienable by the common law. Its alienability is dependent on the laws from which it is derived.

[648] at p.42:

Native title has its origin in and is given content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory.

[649] at p.44:

> [N]ative title, being recognized by the common law (though not as a common law tenure) may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence, whether proprietary or personal and usufructuary in nature and whether possessed by a community, a group or an individual. The incidents of a particular native title relating to inheritance, the transmission or acquisition of rights and interests on death or marriage, the transfer of rights and interests in land and the grouping of persons to possess rights and interests in land are matters to be determined by the laws and customs of the indigenous inhabitants, provided those laws and customs are not so repugnant to natural justice, equity and good conscience that judicial sanctions under the new regime must be withheld: ***Idewu Inasa v. Oshodi.*** Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed.

[650] and at p.51:

> Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land. It is immaterial that the laws and customs have undergone some change since the Crown acquired Sovereignty provided the general nature of the connection between the indigenous people and the land remains. Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people. (my emphasis throughout)

[651] The reasons of the other judges of the High Court of Australia in ***Mabo v. Queensland*** are equally thoughtful and helpful. The decision makes a major contribution to an understanding of the Doctrine of Continuity and to other aspects of aboriginal title and aboriginal rights, including rights of self-government. It is generally consistent with the decisions of the Supreme Court of Canada in ***Guerin*** and ***Sparrow*** though it touches on areas not covered in those decisions. ***Amodu Tijani, Guerin, Sparrow*** and ***Mabo*** are the four cornerstones to an understanding of aboriginal title and aboriginal rights.

2. Some Conclusions from the Cases

(a) The Recognition of Aboriginal Title and Rights by the Common Law: The Doctrine of Continuity.

[652] I believe that there is now a significant and incontestable body of authority in Canada and throughout the Commonwealth, as reflected in the cases to which I have referred, with respect to the origin of aboriginal title and aboriginal rights, and their recognition and protection by the common law.

[653] If an indigenous people occupied an area of land and, if necessary, asserted their right of occupancy against other indigenous people before the arrival of any outside settlers, and if that indigenous people lived in a society which was organized in a way which respected, protected and controlled the resource utilization practices and the social practices of the community as a whole, or of sub-units of the community, or individual members of the community, and if later the territory was settled by settlers from common law jurisdictions then those settlers would carry with them, as amongst themselves, their common law relationships, but the rights and title of the indigenous people, and the social system of those indigenous people, would remain within the exclusive control of the indigenous people themselves. (See ***Lyons v. East India Co.*** (1836), 1 Moo. P.C. 175; 12 E.R. 782, ***Campbell v. Hall, Eleko v. Government of Nigeria,*** [1931] A.C. 662 (J.C.P.C.) and ***Mabo v. Queensland.***

[654] If, either before or after the beginning of the process of settlement, Sovereignty was asserted by the Crown, that Sovereignty would carry with it the power to make just laws for all the inhabitants of the land over which Sovereignty was asserted, but Sovereignty itself would not displace the existing rights and social system of the indigenous people. (See ***Campbell v. Hall, Amodu Tijani,*** and ***Guerin v. The Queen***).

[655] If Sovereignty was asserted by the Crown, and either then or later the Crown adopted the common law as the law of the territory over which Sovereignty was claimed, then the common law itself recognized, adopted and affirmed the rights and titles of the indigenous people in relation to land and in relation to their own customs and practices for control of land and for control of their other rights, except to the extent that their rights were inconsistent with the concept of Sovereignty itself, or inconsistent with laws clearly made applicable to the whole territory and all of its inhabitants, or with the principles of fundamental justice. That recognition, adoption and affirmation made those rights themselves part of the common law, carrying with those rights all the remedies and protection of the common law. (See ***Blankard v. Galdy, Campbell v. Hall, Lyons v. East India Co., Amodu Tijani, Eleko v. Nigeria, Inasa v. Oshodi,*** [1934] A.C. 99 (J.C.P.C.) and ***Mabo v. Queensland).***

[656] I propose to describe the legal principle which provides for the continuation of indigenous practices, customs and traditions, following British occupation, colonization and settlement, as the common law Doctrine of Continuity. This is the phrase used to describe the principle by Professor Slattery in "The Land Rights of Indigenous Canadian Peoples" (D.Phil. Thesis, Oxford, 1979) at pp. 50-59 and by Professor McNeil in "Common Law Aboriginal Title" (Oxford, Clarendon Press, 1989, at pp. 161-162 and pp. 171-179). The choice of this phrase to describe the principle

is given judicial stimulus by Viscount Haldane in ***Amodu Tijani*** at p.410 ("The original native right was a communal right, and it must be presumed to have continued to exist unless the contrary is established by the context or circumstances." (my emphasis)) and by Chief Justice Dickson in ***Guerin*** at pp. 377-378 ("In ***Johnson v. McIntosh*** Marshall C.J. [concluded] that the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to Sovereignty made by ... European nations ...." (my emphasis)).

[657] The phrase "Doctrine of Continuity" accurately expresses the origin of aboriginal rights in aboriginal practices, customs and traditions as they existed before Sovereignty, and the nature of aboriginal rights in the recognition and protection given to those rights by the common law through their embodiment as a part of that law.

[658] Professor Slattery, in "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727 at p.738, concludes his analysis and his statement of the Doctrine of Continuity in this way:

> This consideration provides the theoretical basis for the survival of native customary law in Canada, a phenomenon long recognized (but not always well understood) in our courts. When the Crown gained Sovereignty over [a North] American territory, colonial law dictated that the local customs of the native peoples would presumptively continue in force and be recognizable in the courts, except insofar as they were unconscionable or incompatible with the Crown's assertion of Sovereignty. In this respect, the rule resembles that applied in conquered or ceded colonies, where the local law is held to remain in force in the absence of acts to the contrary. But the rule respecting native custom applies regardless of whether the territory is deemed to have been acquired by conquest, cession, peaceful settlement, or in some other way. (my emphasis)

[659] The early cases drew a distinction between a conquered or ceded colony, on the one hand, and a settled colony, on the other. But the distinction that was being made through the use of that terminology was really between a land being occupied, where sovereignty over the pre-existing organized society was being asserted by the colonizing power, and a land being occupied, where there was no pre-existing organized society, either because there were no people at all, or because the people were so primitive that they could not be regarded as an organized self-regulating society. The latter type of land being occupied was referred to as *"terra nullius"*. In ***Blankard v. Galdy*** and in ***Lyons v. East India Co.*** such a land was described as "uninhabitated"; and in ***Cooper v. Stuart*** as "unoccupied, without settled inhabitants or settled law". The settlement of a colony where the inhabitants formed an organized society, or a number of organized societies, but where there was little or no armed resistance to the settlement because of the peaceable nature of the occupants, was considered, within the distinction made in those older cases, as the settlement of ceded territory, though the cession was by the lack of armed opposition, rather than by agreement.

[660] In my opinion the true distinction is between colonized lands where there was an organized society with its own customs having the force of laws before colonization, and colonized lands where there was no organized society and no customs having the force of laws before colonization. In the former case the customs having the force of laws were recognized by the colonizing power as continuing until changed by the colonizing power. In the latter case the laws of the colonizing power accompanied the settlers into the empty land.

[661] In my opinion the decision of the High Court of Australia in ***Mabo v. Queensland*** decides this point in the same way as I have decided it and in the way first referred to by Professor Slattery as the Doctrine of Continuity. In my opinion the area in central British Columbia claimed in this case was no more "*terra nullius*" when the first colonizers arrived in that part of British Columbia than the Murray Islands were when the first colonizers arrived there.

[662] It is important to characterize correctly the way aboriginal rights became embodied in the common law in British Columbia because the manner of embodiment affects the time of embodiment and the time of embodiment may affect the nature of the rights that were embodied.

(b) What Makes an "Aboriginal Right" a "Right" and What Makes it "Aboriginal"?

[663] During the course of argument there was a good deal of reference to the extensive evidence about specific practices, traditions and customs of the Gitksan people and the Wet'suwet'en people. It was difficult, at times, to be clear about whether those specific practices, traditions and customs were themselves to be regarded as encompassing in each case a particular aboriginal right, which must be regarded as having been brought forward in a modern form, or whether those specific practices, traditions and customs were, in pre-Sovereignty times, examples of the exercise of more general rights, and it was those more general rights which were to be regarded as having been brought forward in a modern form.

[664] For example, is evidence about an aboriginal practice of canoe-building to be taken as evidence demonstrating an aboriginal right to build canoes, which in its modern form, would encompass small boat-building of all kinds? Is such a right enshrined in the Constitution and can it only be regulated in accordance with the justificatory tests set out in ***Sparrow***? I will not multiply examples. But the fact that many of the Canadian cases are criminal cases in which the question is whether shooting a goose or catching a fish on a particular date at a particular place in a particular way was an act done in the exercise of an aboriginal right, has tended to make the focus for consideration of aboriginal rights a specific and particular focus rather than a general and comprehensive focus.

[665] As a result of concerns about this problem, counsel were asked, during the course of argument, to assist the Court in its understanding of the problem. As a result of the helpful and spirited submissions of counsel, I am satisfied that a jurisprudential analysis of the concepts underlying "rights" in common law or western legal thought is of little or no help in understanding the rights now held by aboriginal peoples and now recognized and affirmed by the common law and by the

Constitution. Questions about whether aboriginal rights are proprietary or non-proprietary, *in rem* or *in personam*, or quasi-criminal or quasi-civil in their remedial aspects, now seem to me to be entirely beside the point. The same is true about whether the rights have corresponding or correlative duties, whether they are rights or freedoms, or whether they ought, in strict common law terminology, to be classified as rights, or as privileges, or as powers, or as immunities. In short, it is not only aboriginal title to land that is *sui generis*, all aboriginal rights are *sui generis*. And it is not only in relation to aboriginal title that trying to describe the title in the terminology of common law tenures is both unnecessary and misleading: trying to describe aboriginal rights in terms of rigorous western jurisprudential analysis may well be equally unnecessary and misleading.

[666] Accordingly, I think that a different approach is required; an approach that tries to characterize aboriginal rights in terms of aboriginal society rather than western society. It would be a mistake to try for a definition. But I propose to set out six considerations, each of which, in my opinion, helps to provide the overall frame of reference for determining whether an aboriginal right existed in the past or exists today.

[667] The first consideration is that aboriginal rights have now been recognized and affirmed in the Constitution by s.35 of the ***Constitution Act, 1982:***

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> * * *
>
> (4) Notwithstanding any other provisions of this Act, the aboriginal and treaty rights referred to in s-s. (1) are guaranteed equally to male and female persons. (my emphasis)

[668] Not only have aboriginal rights been "recognized" and "affirmed", they have been "guaranteed". "Guarantee" is also the very word used in section 1 of the ***Charter*** to describe the protection given to the enumerated human rights in the ***Canadian Charter of Rights and Freedoms.*** Just as ***Charter*** rights must be given a purposive construction, so too must aboriginal rights. Just as human rights and their legal protection preceded the ***Charter*** so too did aboriginal rights precede s.35. So, just as a purposive construction can give new vigour to ***Charter*** rights over the rights that were protected by law before the ***Charter,*** so too can a purposive construction give new vigour to the aboriginal rights "guaranteed" by s.35. The necessity to give a purposive construction to s.35 was set out clearly by Chief Justice Dickson and Mr. Justice La Forest, for the Supreme Court of Canada, in ***Sparrow*** at p.1106:

> The approach to be taken with respect to interpreting the meaning of s.35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself.
>
> * * *

> The nature of s.35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. (my emphasis)

[669] 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.

[670] The contemporary quality of the constitutionally guaranteed rights, from an economic point of view, is mentioned in a number of passages in ***Sparrow*** of which this is an example, at p.1110:

> By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. (my emphasis)

[671] The second consideration is that what are protected are rights and not habits. To be recognized, affirmed, and guaranteed by the Constitution, aboriginal rights must be capable of description, legal protection if challenged or infringed, and legal enforcement under the common law as it applies in British Columbia. But while, in this sense, they are rights for the purposes of the common law, they may be unlike any other common law right in every respect but one: they must be considered, by the aboriginal people who claim them, to be so important to their society, so fundamental to their basic beliefs and relationships, so much a part of the significant and distinctive characteristics of their Indianness, that they serve to define what makes an Indian an Indian, what makes a Gitksan a Gitksan, and what makes a Wet'suwet'en a Wet'suwet'en.

[672] I am encouraged in stating this consideration by the fact that the concept of fundamental, significant and distinctive characteristics that define Indianness is not new to this field of law, but has already been applied in substantially the same way

for the purposes of the division of constitutional powers in cases like ***Natural Parents v. Superintendent of Child Welfare,*** [1976] 2 S.C.R. 751, and ***Dick v. The Queen,*** [1985] 2 S.C.R. 309.

[673] The applicability of the concept of rights being delineated by fundamental, significant and distinctive characteristics of an aboriginal culture was referred to in ***Sparrow*** at p.1099:

> The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. As we stated earlier, the right to do so may be exercised in a contemporary manner. my emphasis)

[674] A similar concept, reflecting the aboriginal point of view, was referred to in this passage from ***Sparrow*** at p.1112:

> While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. For example, it would be artificial to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised. (my emphasis)

[675] In order to maintain a consistent terminology I propose, in common with my colleagues, to adopt the phrase "an integral part of their distinctive culture" to describe the differentiation between a practice, custom or tradition that is sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people as to command recognition as an aboriginal right, on the one hand, and a practice or habit that was merely an incident in the lives of the people in this group, on the other. The phrase is taken from the joint reasons of Chief Justice Dickson and Mr. Justice La Forest in the passage from ***Sparrow*** which I have quoted. In adopting that phrase I hope to avoid a great deal of cumbersome repetition, but it is important to understand that the phrase is a "short form" only. Its precise wording is neither an all-encompassing description nor a definition.

[676] I turn now to the third consideration. Indian people in Canada, now and belatedly, have all the same rights as the settling peoples under the Canadian legal system. Aboriginal rights are additional rights which only the aboriginal peoples have. Those additional rights originate through aboriginal occupation, possession, use and enjoyment of land, and through the institutions of aboriginal society. They became part of the common law at the time of Sovereignty. In their modern form, they are rights which Indian people have, which no one else has. The recognition, affirmation and guarantee of aboriginal rights under s.35 of the ***Constitution Act,***

1982 does not take away from indigenous people the common law rights enjoyed by every Canadian. (See ***Mabo v. Queensland*** per Brennan, J. at pp. 25-30).

[677] The fourth consideration is that the existing aboriginal rights which are protected by the Constitution are contemporary aboriginal rights. Those rights must have their origin in a custom, tradition or practice of the aboriginal society which preceded settlement and Sovereignty and which formed an integral part of their distinctive culture. But their contemporary exercise may well involve modernization of the right as it stood at the time of Sovereignty. The right, as it stood at the time of Sovereignty, may be carried out in a modern way with modern tools and for modern purposes. A right to the exclusive occupancy, possession, use and enjoyment of land would have encompassed the right to kill deer on the land, and that may well have been done at the time of Sovereignty by deadfall traps. It may now be done by rifle, as part of the exercise of the aboriginal right. And if the aboriginal right at the time of Sovereignty was treated by the aboriginal people at the time of Sovereignty as being the right, subject to conservation, to kill all the deer that they wished, for whatever purpose they wished, then the contemporary exercise of that right, subject to the modern formulation of the conservation priority outlined in ***Sparrow,*** would still be to kill all the deer they wished, for whatever purpose they wished.

[678] Aboriginal rights are like rights based on custom and are treated similarly by the common law. In ***City of London v. Vanacre*** (1699), 12 Mod. Rep. 269; 88 E.R. 1314, Lord Holt said this, at p.271:

> General customs may be extended to new things which are within the reason of those customs.

[679] In ***R. v. Horseman,*** [1990] 1 S.C.R. 901, Mr. Justice Cory, for the Court, said at p.928:

> The economy of the Indian population at the time of the Treaty had clearly evolved to such a degree that hunting and fishing for commercial purposes was an integral part of the way of life.

[680] So aboriginal rights are evolving rights. They are not frozen at the time of Sovereignty or at any other time. The evolution which occurred before Sovereignty and the evolution which occurred after Sovereignty are both relevant to an understanding of the rights.

[681] The fifth consideration is related to the fourth. If the aboriginal right that is established is an encompassing and general right, such as a right of exclusive occupation, possession, use and enjoyment of land, and the right carries with it, as it would be expected to do, the right to enjoy the fruits of the land including the game, the fact that the taking of game was done in a particular way for a particular purpose before Sovereignty would not limit the way game may be taken nowadays. Because taking game is not the right in question. Taking game is just a way of exercising a broader right to the exclusive occupation, possession, use, and enjoyment of land. The situation would be different if the aboriginal practice was to hunt game on land to which no exclusive occupation was claimed. If the aboriginal right was limited to a particular season, and a particular purpose, then the contemporary

exercise of that right could be limited also in the same way, even though modern tools could be used in the exercise of the right.

[682] So a claim may be made that the installation of a sanitary landfill site or a waste recycling depot on an Indian reserve is done in the exercise of an aboriginal right to exclusive occupation, possession, use and enjoyment of the reserve land, and not as a modernization of a more specific aboriginal right to create middens.

[683] The sixth and final consideration is that aboriginal rights may be collective rights but they need not be. If the aboriginal society treated particular rights as collective rights and other rights as individual rights or small group rights, then the contemporary entitlement to exercise those rights would be held in the same way. This point was put in this way by Mr. Justice Brennan in ***Mabo,*** at p.36:

> The fact that individual members of the community, like the individual plaintiff Aborigines in ***Milirrpum,*** enjoy only usufructuary rights that are not proprietary in nature is no impediment to the recognition of a proprietary community title.

[684] Those six considerations flow from the common law, but use an aboriginal point of view as a reference point rather than a view of rights based on western legal theory. But they are not the only relevant considerations. They are examples of the more important ones as represented in the decided cases.

(c) Proprietary or Personal

[685] In ***St. Catherine's Milling,*** Lord Watson said that the rights of the Ojibway Indians under the ***Royal Proclamation of 1763,*** were, under the terms of the Proclamation itself, personal and usufructuary rights. Since then, the question of whether aboriginal rights, under the Proclamation or otherwise, were personal or proprietary, has bedeviled the cases just as much as has the question of what a usufructuary right is in the common law. Happily, I think that both questions can now be put behind us. Both of them are legacies from trying to describe aboriginal title as if it were a common law tenure. Viscount Haldane, in ***Amodu Tijani*** at pp. 402-403, and Chief Justice Dickson in ***Guerin,*** at p.382, have observed that it is misleading to do so. Accordingly, I would stop doing so.

[686] The reason why the question of whether aboriginal title is personal or proprietary keeps recurring is not because it means anything in itself. It is the consequence under the common law system of land tenures that is meaningful. If, at common law, the Crown as holder of the radical title granted a fee simple title to A and his heirs, then the grant extinguished all merely personal rights of anyone other than A against the Crown exercisable in relation to the land. If the holder of a fee simple title grants the land to a purchaser then again the grant extinguishes all merely personal rights against the grantor exercisable in relation to the land, and none arise against the grantee. It is because of that result under the common law tenure system that the opponents of aboriginal title insist that the right is personal and not proprietary. Because, they say, if it ever existed, then it is merely personal and has been extinguished by the creation of fee simple titles and other tenures. There is also an argument, I suppose, that there is at common law a more

powerful legal inference of a right to compensation on the taking of a proprietary interest than there is on the taking of a personal interest.

[687] In ***Guerin v. The Queen,*** Chief Justice Dickson, at p.382, said that the aboriginal title was *sui generis*. And this was reaffirmed in ***Canadian Pacific Ltd. v. Paul*** and ***Roberts v. Canada.*** Chief Justice Dickson said that the *sui generis* title of the indigenous people was more than a mere personal right, though it lacked one quality of absolute ownership at common law, namely alienability.

[688] In ***Mabo v. Queensland,*** Mr. Justice Brennan, at p.36, said that the right of each member of the community claiming aboriginal rights and title in land might well be personal, whereas the rights of the community might well be proprietary. Mr. Justice Toohey, at p.152, said that the question of whether the aboriginal title was proprietary or personal was ultimately fruitless and unnecessarily complex.

[689] In my opinion the authorities in Canada lead to the conclusion that aboriginal title is *sui generis* and that it is neither entirely personal nor entirely proprietary. The meaning of *sui generis* is that the thing so described is in a class or category of its own. It does not mean that the class or category is in any respect inferior to or lesser than any other class or category. The solution to further problems in relation to aboriginal title should be sought in a deeper understanding of the nature of the aboriginal title itself, in aboriginal terms, and not in attributing consequences under the common law on the basis that those consequences flow from a common law classification for tenure purposes of the aboriginal title or right as either proprietary or personal.

(d) Prescription and Custom

[690] I propose to make four principal points under this heading. I will number them. I conclude this Sub-division with a reference to s.35 of the ***Constitution Act, 1982,*** which, by referring to the aboriginal rights of Métis people, demonstrates that aboriginal rights need not have arisen before contact.

[691] (i) The common law principle enunciated in the cases to which I have referred is that aboriginal title to occupation, possession, use and enjoyment of land is recognized, affirmed and protected by the common law by adoption into the common law at the time of the assertion of Sovereignty and at the time of the first general application of the common law to the territory, as that title existed at that time under the customs, traditions, and practices of the aboriginal peoples themselves.

[692] There is nothing in that principle about adverse possession from time immemorial. There may have been no one capable of claiming a higher title against whom possession could be said to have been adverse. There is nothing in that principle about the aboriginal occupation, possession, use and enjoyment having to have been in place for a long, long time, a very long time, or even a long time. Of course, as a matter of evidence of an aboriginal custom, practice or tradition, it may be helpful to show that the occupation has been in effect for some time, and that throughout that period it has been controlled and managed by the organized society. But that is a question of proof. If the aboriginal title is proven to have

existed at the time when the common law absorbed aboriginal customs, practices and traditions, then that is enough to give common law protection to the aboriginal title.

[693] (ii) Under the Doctrine of Continuity, aboriginal title and aboriginal rights are based on the customs, traditions and practices of the aboriginal people to the extent that those customs, traditions and practices were an integral part of their distinctive culture. But there is nothing unfamiliar to the common law in the concept of customs forming the basis of rights and of laws. In "Law and Justice in a New Land" Louis A. Knafla, ed.; (Toronto: Carswell, 1986) at p.60, this quotation from Sir John Davies, "Les Reports des Cases & Matters en Ley" (London 1674), at iii-iv, appears:

> The common law of England is nothing else but the Common Custom of the Realm.... It can be recorded and registered no-where but in the memory of the people. For a Custom taketh beginning and groweth to perfection...when a reasonable act once done is found to be good and beneficial to the people, and agreeable to their nature and disposition, then do they use it and practise it again and again, and so by often iteration time out of mind, it obtaineth the force of a Law. And this Customary Law is the most perfect and most excellent, and without comparison the best, to make and preserve a Commonwealth.

[694] In modern times, custom still forms a part of the common law. It is, in effect, a local common law. And it is recognized and protected by the general principles of the common law towards customary law. See ***Hammerton v. Honey*** (1876), 24 W.R. 603, per Jessel M.R. and ***New Windsor Corporation v. Mellor,*** [1975] 1 Ch. 380.

[695] Custom may evolve and be modified. ***Halsbury's Laws of England*** 4th Ed., (1975), Vol. 12, at par. 425 says this:

> The nature of the right enjoyed, and also the extent of the land over which it is exercised, are capable of reasonable modification and extension. Thus, in the case of a custom to carry on a trade, the nature of the trade may vary with the advent of improved methods, or, in the case of a custom to play games on a close of land, the nature of the games played may vary with the prevailing fashion.

[696] And in ***City of London v. Vanacre*** (1699), 12 Mod. Rep. 269 at p.271, Lord Holt said:

> General customs may be extended to new things which are within the reasons of those customs.

[697] Another area in which custom becomes recognized and protected by the common law, and as such a part of the common law, is in the field of public international law. In the ***Asylum*** case, ***(Columbia v. Peru),*** [1950] I.C.J. Rep. 266 at pp. 276-277, the International Court of Justice decided that a customary rule must be "in accordance with a constant and uniform usage practised by the states in question". And in the ***North Sea Continental Shelf Cases, (Germany v. Denmark;***

Germany v. Netherlands), [1969] I.C.J. Rep. 3 at p.43 the Court said that a "passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law."

[698] So, in my opinion, there are many parallels between the Doctrine of Continuity in relation to aboriginal rights and the absorption of both local custom and international custom into the common law by an extension of the common law's recognition and protection.

[699] I conclude this point on custom by saying that the recognition and protection of aboriginal rights by the common law is like the recognition and protection of other customary rights. But it is not like the acquisition of title by prescription. In ***Halsbury's Laws of England,*** 4th Ed. (1975), Vol. 12, at para. 404 the distinction is made in these terms:

> ...a claim by prescription is personal, that is it is always made in the name of a certain person and his ancestors or those whose estate he has, or made in the name of a body corporate and its predecessors, whereas custom, being local, is not attached to any particular persons but to a particular locality and affects the property of the indeterminate number of persons for the time being connected with or being members of a particular class in that locality. A claim by custom is, therefore, often available for those who cannot prescribe in their own name or in the name of any certain person.
>
> The term "prescription" has sometimes been used in a sense embracing all titles to incorporeal hereditaments and rights on another's land based upon a long usage. Such a meaning of the word includes title under a custom as well as title by prescription in its strict sense.

[700] (iii) In Common Law Aboriginal Title, Professor Kent McNeil put forward an alternative theory of aboriginal title. It is that the common law recognizes a person as having a fee simple title to land if he and his predecessors had held possession of the land for a long period, perhaps from time immemorial or notional time immemorial. The fee simple title so established arises from a legal inference that if there were an adverse claimant to the fee simple title, that person or his predecessors would have asserted that adverse claim in the long period. No claimant having done so, the absence of an adverse claim to title can be legally presumed. I am not attracted to that theory because I believe that the legal inference or presumption on which it rests has no application where there is no fee simple title in any one and there is no possibility of any person claiming a fee simple title against the aboriginal inhabitants. I may not be doing this theory justice, but it was not argued by counsel and I propose to say no more about it.

[701] (iv) The trial judge in this case, at p.388, adds a fifth requirement to the four enumerated tests of Mr. Justice Mahoney in ***Baker Lake*** (which may now themselves be subject to some modification following the reasons of the Supreme Court of Canada in ***Bear Island***). The trial judge's fifth test is that the aboriginal practice on which the title or right depends must have been carried on within an

aboriginal society for an indefinite or long, long time. The trial judge gave no authority for that fifth requirement. I have seen references in the cases to the aboriginal practice having been carried on for lengthy periods of time, but it seems to me that the whole concept of the recognition of aboriginal rights by the common law in the form in which those rights were recognized by the aboriginal society when the customs, traditions and practices of the aboriginal society first met the common law is inconsistent with the existence of any requirement that the aboriginal rights, to be recognized by the common law, must have been recognized by the aboriginal society for a long, long time. If it is clear that the aboriginal society regarded those rights as an integral part of their distinctive culture, then that recognition by the aboriginal society at the relevant time is enough. In some cases, clarity with respect to the recognition of the right can only be reached by tracing the recognition of the right for a considerable period. But that is a matter of proof, not a characteristic of aboriginal title or aboriginal rights.

[702] The long-time user test seems in my opinion to depict aboriginal societies as societies frozen in their development. In ***Sparrow,*** however, the frozen rights theory was rejected and in ***Guerin,*** in ***Calder,*** and in ***Amodu Tijani,*** we have been warned against the dangers of cultural preconceptions in considering aboriginal rights. The longtime user test embodies a static view of aboriginal culture. I do not believe those societies to have been static or frozen before the advent of Europeans in North America and in British Columbia. On the facts of this case, the Gitksan and Wet'suwet'en peoples were two distinct peoples with distinct languages and cultures. These distinct people settled next to one another and, over time, grew to have similar customs and traditions. This, in my opinion, demonstrates the fallacy in a notion that aboriginal societies were societies incapable of change or societies in a state of "arrested development". Once it is recognized that aboriginal societies were societies capable of change, the notion that there is an "aboriginal" use which can be discovered only on the basis of evidence of long-time user must be rejected.

[703] In my opinion, the indefinite or long, long user test, requiring a period dating back to before contact, is conclusively rebutted by the inclusion of Métis in s.35 of the ***Constitution Act, 1982,*** not as Indians but as a distinct aboriginal people. Métis, of course, did not exist before contact between Indians and people of French origin. Métis' aboriginal rights must rest on Métis customs, traditions and practices which formed an integral part of their distinctive culture. They can not rest on Indian aboriginal rights because if they did they would be Indian aboriginal rights held by Métis and not Métis aboriginal rights. That would surely introduce too much complexity into the already difficult questions of biology and genealogy governing questions of entitlement to aboriginal rights. Métis rights could not have existed before contact and could not meet the long, long time test used by the trial judge to reject post-contact practices. So the long, long time test can not be correct.

(e) The Date and Significance of Sovereignty

[704] First the Date of Sovereignty.

[705] In accordance with the Doctrine of Continuity as enunciated and exemplified in the cases to which I have referred, from ***Campbell v. Hall,*** through ***Amodu Tijani,***

to ***Guerin*** and to ***Mabo,*** the date when aboriginal rights recognized by the aboriginal society, became rights recognized, affirmed and protected by the common law, is the date when British Sovereignty is first exercised over the aboriginal territory and aboriginal community and the protection of the common law is extended to the territory and the community.

[706] The trial judge dealt with fixing of the date of British Sovereignty throughout British Columbia at pp. 233-234 and elsewhere in his reasons. At the bottom of p.233, the trial judge said that, "Because of the 1818 and 1827 standstill agreements, it must be recognized that Great Britain did not have exclusive Sovereignty over Southern British Columbia until the ***Oregon Boundary Treaty of 1846."*** That Treaty drew a dividing line along the 49th parallel, west of the Rockies, and recognized British control and colonization rights north of the 49th parallel and on Vancouver Island. The United States was recognized as having colonization rights south of the 49th parallel. The trial judge also referred to ***Reference Re Ownership of the Bed of the Strait of Georgia,*** [1984] 1 S.C.R. 388 at pp. 402-406 as establishing that British Sovereignty existed throughout British Columbia on the conclusion of the T***reaty of Oregon*** in 1846, though, in his summary at p.112, the trial judge concluded only that the establishment of British Sovereignty occurred not earlier than 1803 and not later than either 1846 or 1858.

[707] Sovereignty, of course, does not occur when the first sea captain steps ashore with a flag and claims the land for the British Crown. Cook did that in 1778. Sovereignty involves both a measure of settled occupation and a measure of administrative control.

[708] Throughout this appeal, all counsel seemed content to treat 1846 as the date of British Sovereignty in British Columbia. I propose to do so too. I do not think that any of the issues are affected by adopting that date rather than any other date before 1858.

[709] Now the Significance of Sovereignty.

[710] Before the first contact between the Gitksan and the Wet'suwet'en, on the one hand, and any British subject, on the other, the Gitksan and the Wet'suwet'en organized their social system in accordance with their own customs, traditions and practices. Those customs, traditions and practices produced an orderly society capable of managing its own affairs. The arrival of the first British subject did not change that. The first British subject to arrive and take up residence in the claimed territory seems to have been William Brown, a trader with the Hudson's Bay Company. He arrived in 1822. At that time, Brown, himself, like all Hudson's Bay traders, would have been governed by English common law in all the fundamental aspects of that law that could be thought to be applicable to him in the territory. But the Gitksan and the Wet'suwet'en were not governed by any newly arrived English common law. The Hudson's Bay traders did not spread English common law to everyone with whom they came in contact. It governed them and other Britons, but that is all.

[711] In the period before contact the Gitksan and Wet'suwet'en customs, traditions and practices applied to the Gitksan and Wet'suwet'en peoples. There was no

change to that situation in the period between contact and Sovereignty. The Gitksan and Wet'suwet'en customs, traditions and practices continued to apply to them. Throughout that period those customs, traditions and practices were entirely outside the common law system. But a change came about at the time of Sovereignty. At that time the Gitksan and Wet'suwet'en customs, traditions and practices, to the extent that they related to an integral part of the distinctive culture of the Gitksan and Wet'suwet'en peoples, became incorporated into the common law which became applicable throughout the territory, in so far as it was appropriate. The Gitksan and Wet'suwet'en practices, customs and traditions continued with the same practical results as before, but now they became, in those integral parts of their distinctive culture, a part of the common law and protected by its remedies and its means of enforcement.

[712] Another change occurred at the time of Sovereignty. After that date the Imperial Crown could, in the appropriate way, modify the laws in force in British Columbia. I understand, from the nature of Sovereignty, and from cases like ***Campbell v. Hall, In re Southern Rhodesia,*** and ***Amodu Tijani*** that the power to change the law in the period after Sovereignty would include a power to abrogate or alter the Gitksan and Wet'suwet'en customs, traditions and practices even in those integral parts of their distinctive culture which had become embodied in the common law, under the Doctrine of Continuity, on assertion of Sovereignty. Such an overriding change would only occur if it were brought about by a clear and plain intention to do so.

[713] So, after the assertion of Sovereignty, Gitksan and Wet'suwet'en customary laws survived and may relate to general British Columbia law in any number of ways. Sometimes general British Columbia laws will apply to the Gitksan and Wet'suwet'en people without interfering with the operation of Gitksan and Wet'suwet'en customary laws. An example of such a law would be the regulation of highway traffic: ***Francis v. The Queen,*** [1988] 1 S.C.R. 1025. Sometimes, the two laws might operate concurrently. For instance, a person recognized as a Shaman according to Gitksan and Wet'suwet'en custom would not be qualified to practise as a medical doctor, nor would a medical doctor be able to practise as a Shaman. A Gitksan or Wet'suwet'en marriage may be valid, under Gitksan or Wet'suwet'en customary law for the purposes of that law, as would a marriage according to British Columbia law be valid for the purposes of that law. Sometimes, Gitksan and Wet'suwet'en laws and customs would be in conflict with English law. The exercise of a Gitksan or Wet'suwet'en right to fish according to Gitksan or Wet'suwet'en customs in the face of Federal laws governing such a right might or might not be valid, according to the ***Sparrow*** justification test and the particular circumstances of the case. The Gitksan or Wet'suwet'en right to make war upon the Nishga or the Carrier-Sekani, however, was lost upon the assertion of British Sovereignty, as repugnant to that Sovereignty. From this I conclude that Gitksan and Wet'suwet'en customs in relation to internal matters survived subject to any overriding change; that English law might apply to fill any gaps in affairs internal to Gitksan or Wet'suwet'en people; and that upon the assertion of Sovereignty the laws and customs of the Gitksan and Wet'suwet'en in relation to affairs external to the Gitksan and Wet'suwet'en peoples were abrogated.

[714] Subject to any such overriding change, Gitksan and Wet'suwet'en customs, traditions and practices, forming an integral part of their distinctive culture, would continue as a part of the common law, and be protected by the common law, up until the present time. Those customs, traditions and practices, so protected, may undergo modifications. They were not frozen in 1846. Those modified forms will receive the same common law protection as the forms which the customs, practices and traditions received in 1846.

[715] When Governor Douglas proclaimed 19 November, 1858 as the cut-off date for the introduction of English laws into the colony of British Columbia, "... so far as they are not from local circumstances inapplicable", the effect of the Proclamation was not to start the common law of England applying in British Columbia, since it had been applying to British subjects (and other Europeans) since they first arrived, but rather to stop it from applying, and to establish in its place a separate law of British Columbia, grounded on English common and statute law as it existed on 19 November, 1858 but thereafter developing independently as British Columbia law. That new British Columbia law, in accordance with the principles of the English common law as of 19 November, 1858, would protect all the aboriginal rights and titles as they existed at that time and permit them to maintain contemporary relevance into the future.

[716] The conclusions I have just set out are supported by an ample and long line of authority, including ***Calvin's*** case, Lord Coke; ***Blankard and Galdy,*** Lord Holt; ***Campbell v. Hall,*** Lord Mansfield; ***Cooper v. Stuart*** quoting Sir William Blackstone at pp. 291-292; ***Amodu Tijani; Guerin;*** and ***Mabo.***

3. Summary on Aboriginal Rights in British Columbia

[717] I propose to set out the principal conclusions I have reached and, I hope, explained, in the first and second Divisions of this Part III.

[718] (a) Aboriginal Title and Aboriginal Rights are *sui generis*. They are not fully explicable in terms of ordinary western jurisprudential analysis or common law concepts. ***(Guerin; Amodu Tijani; C.P.R. Ltd. v. Paul; Roberts v. Canada).***

[719] (b) Aboriginal title is one aspect of aboriginal rights and when s.35 of the ***Constitution Act, 1982*** speaks of aboriginal rights it includes aboriginal title as well as all other aboriginal rights which have their origin in the aboriginal society which existed before the first Europeans arrived. ***(Guerin; Sparrow).***

[720] (c) Aboriginal rights arise from customs, practices and traditions of an aboriginal people so long as those customs, practices and traditions form an integral part of the distinctive culture of the aboriginal people, and have been nurtured and protected by their culture and society. ***(Sparrow).***

[721] (d) Aboriginal rights were part of the social fabric of the aboriginal society at the time of the arrival of the first Europeans, and were protected by the institutions of the aboriginal society. At the same time, the European arrivals were protected, as among themselves, by the laws which they brought with them. (In British Columbia the common law of England.) The aboriginal rights continued to exist in the aboriginal society and the British common law rights existed in the British settlers'

society as two concurrent streams after contact until Sovereignty. (***Calder; Blankard v. Galdy; Freeman v. Fairlie*** (1828), 1 Moo. Ind. App. 306; 18 E.R. 117; ***Lyons v. East India Co..***)

[722] (e) Aboriginal rights as part of the social fabric of the aboriginal society continued after the assertion of Sovereignty by the Imperial Crown, but they were no longer limited in the institutions which protected those rights to the institutions of the aboriginal society. When those aboriginal rights, in accordance with the Doctrine of Continuity, continued as a part of the social fabric of the aboriginal society after Sovereignty, then, in addition to being protected by the institutions of the aboriginal society, they were also recognized and protected by the common law. ***(Guerin; Sparrow).***

[723] (f) Aboriginal rights, under the protection of the common law, and having their root in aboriginal customs, traditions and practices, must be permitted to maintain contemporary relevance in relation to the needs of the holders of the rights as those needs change in accordance with changes in the overall society in British Columbia. (***Sparrow; Eleko v. Nigeria,*** [1931] A.C. 662 at p.672; ***Oshodi v. Balogun,*** [1936] 2 All E.R. 1632 at p.1634).

[724] (g) Aboriginal rights may be individual or collective according to whether they were and are treated by the aboriginal people as being individual or collective. ***(Amodu Tijani; Mabo v. Queensland).***

[725] (h) Aboriginal rights under the common law do not come from immemorial aboriginal practice. They come, under the Doctrine of Continuity, from the customs, traditions and practices of the aboriginal people as those customs, traditions and practices existed and were protected and nurtured by the aboriginal people at the time of Sovereignty as an integral part of their distinctive culture. ***(Amodu Tijani; Guerin).*** Of course, proof of how the customs, traditions and practices existed at the time of Sovereignty may be made more powerfully if the evidence were to show that the customs, practices and traditions had endured over a considerable period of time before Sovereignty. ***(Hammerton v. Honey***; ***New Windsor Corporation v. Mellor,*** [1975] 1 Ch.380).

[726] (i) Aboriginal rights are not abrogated by the fact that similar rights may be held by non-aboriginal people. The aboriginal people would hold both the aboriginal right and the similar non-aboriginal right. (***Mabo v. Queensland*** at pp. 25-30).

[727] (j) Aboriginal rights are not abrogated merely because the holders of the rights "admit participation in the wage or cash economy". (See the trial judgment at p.178.) Aboriginal rights are not the rights of Indian people to revert to the life their ancestors lived in 1500, 1778, 1820 or 1846. A right to occupy, possess, use and enjoy land to the exclusion of all others does not mean that the occupation, possession, use and enjoyment must be confined to activities carried on in 1846, or that its exercise requires a renunciation of the contemporary world. ***(Sparrow).***

[728] (k) If the aboriginal right, in 1846, was a right to take all the fish that the holders of the right wanted to take, subject to the needs of conservation, then the

aboriginal right in 1993 is a right to take all the fish that the holders of the right want to take, subject again only to the needs of conservation. So fish could be caught for sale, and the money used to put a roof over the rightholders' heads and hamburger on their tables. But if the aboriginal right was a right to take only so many fish as the fisher and his or her individual dependents would eat in the course of a season, then perhaps the modern version of the right as so defined would be limited to permitting the rightholder to catch only so many fish as would be eaten within his or her family over the course of the season. So a good deal may depend on an accurate characterization of the scope of the right in 1846 in terms of the generality or specificity of the manner in which the right is described, and also in terms of the perspective from which the right is viewed. But it is the evidence with respect to the aboriginal peoples' own description of the right which should control the way it is expressed, not the description selected by the settlers' society to meet the needs of the settlers' society by making all aboriginal rights as narrow as possible. (***Sparrow,*** at p.1112)

[729] The eleven conclusions I have set out in this Division under the heading: "Summary on Aboriginal Rights in British Columbia" are not intended as an exhaustive statement of principles. They represent only the principal conclusions that are relevant to this case.

PART IV

THE EXTINGUISHMENT OF ABORIGINAL RIGHTS

[730] The trial judgment turned to a significant extent on the issue of extinguishment. The trial judge decided that the aboriginal title and rights of the Gitksan and Wet'suwet'en peoples had been extinguished in the Colonial period from the assertion of Sovereignty in 1846 to 1871, when British Columbia joined the Confederation of Canada. That is a principal *ratio decidendi* of the trial judgment. Accordingly, a primary focus of the appellants in this appeal was to argue that that decision was wrong.

[731] The original factum filed by the Province as respondent sought to uphold the decision of the trial judge on extinguishment. But about three months before the hearing of the appeal, the Province made changes in its position and filed a new factum. The principal change was that the Province no longer argued that the trial judge's decision on "blanket extinguishment" in the Colonial period was correct but, indeed, argued that it was wrong.

[732] It was against that background that the Court appointed three of the former counsel of the Province, who had been counsel throughout the trial and who had prepared the first Provincial factum, to assist the Court, as *amici curiae*, to make the argument in favour of the *ratio decidendi* of the trial judgment on extinguishment.

[733] I propose to divide this Part on "The Extinguishment of Aboriginal Rights" into the following Divisions and Sub-divisions:

1. **The Principles of Extinguishment**
    - (a) Clear and Plain Intention: The ***Calder*** Case
    - (b) Clear and Plain Intention: The ***Sparrow*** Case
    - (c) Clear and Plain Intention: The ***Nowegijick*** and ***Mitchell*** Cases
    - (d) Clear and Plain Intention: Whose Intention
    - (e) Implicit Extinguishment: The ***Horseman*** Case
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2. **Extinguishment in British Columbia**
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3. **Abandonment**

4. **Summary on the Extinguishment of Aboriginal Rights in British Columbia**

1. The Principles of Extinguishment

(a) Clear and Plain Intention: The *Calder* Case:

[734] The prayer for relief in the ***Calder*** case was for a declaration that the aboriginal rights of the Nishga people over their ancestral lands had never been extinguished. The argument related to the very same Colonial Proclamations and Ordinances as are in issue in this case and to many of the same subsidiary documents. The subsidiary documents were even more fully presented in this case than in the ***Calder*** case, but I would not regard the extra documents as pointing to any clear conclusion that was left opaque by the documents presented in the ***Calder*** case itself. So the issue on which the trial judgment in this case turned was the very issue in the ***Calder*** case.

[735] In the ***Calder*** case, Mr. Justice Judson, with whom Mr. Justice Martland and Mr. Justice Ritchie concurred, reviewed the nine Proclamations made by Governor Douglas between 2 December, 1858 and 27 May, 1863, and the four Ordinances enacted by his successor Governors between 11 April 1865 and 1 June, 1870, all relating to the purchase and pre-emption of land by settlers. Mr. Justice Judson referred also to a number of subsidiary documents. After referring to three United States cases, Mr. Justice Judson expressed his conclusions in these words, at p.344:

> In my opinion, in the present case, the Sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.

[736] Mr. Justice Hall, with whom Mr. Justice Spence and Mr. Justice Laskin concurred, dealt with the same material as Mr. Justice Judson. He expressed his conclusions in these words, at p.404:

> It would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be "clear and plain". There is no such proof in the case at bar; no legislation to that effect.

[737] The difference between the two approaches seems to be this. Mr. Justice Judson considered that the pattern of conduct over a period of twenty years by the Colonial administration, which promoted settlement by European settlers and which confined the protection granted by the State to the Indians to exclusive occupancy rights by the Indians of village sites, coupled with hunting over unoccupied land and fishing as formerly, was an exercise of complete dominion over the Nishga lands and all other lands in British Columbia; that it was adverse to the Indian right of occupancy; and consequently, or so it seemed to Mr. Justice Judson, the Indian right

of occupancy must be regarded as having been extinguished, as it were, by the Crown doing something to signify that its pleasure had run out with respect to lands and hunting grounds held "at the pleasure of the Crown" or "dependent on the good will of the Sovereign". This last phrase seems to be a key element in Mr. Justice Judson's judgment at pp.328-329.

[738] Mr. Justice Hall, on the other hand, considered that before extinguishment could occur there must have been an act of extinguishment so that the extinguishment could be seen to be clear and plain, and not merely a supposition derived from a pattern of behaviour that might be regarded as inconsistent with the continuation of aboriginal title and rights. Mr. Justice Hall also seems to have concluded that the act of extinguishment must be a legislative act.

[739] Since Mr. Justice Pigeon would have dismissed the action because a fiat from the Attorney General was, in his opinion, required before the action could be brought, and none was obtained, the ***Calder*** case did not resolve the issues of extinguishment which divided the other six members of the Court, three to three.

[740] In my opinion, the reasoning of Mr. Justice Judson reflects what can now be seen, as a result of the cases decided since ***Calder,*** as a clearly incorrect view of the vulnerability of aboriginal title and aboriginal rights to extinguishment. When the Victorian cases speak of rights being held "at the pleasure of the Crown" and "dependant upon the good will of the Sovereign" they are expressing thought processes in language appropriate to the highest style of Imperial glory. Those words may well have meant in those days that the Sovereign could only extinguish aboriginal title and aboriginal rights by expressing the Sovereign's intention through an action which demonstrated a clear and plain intention to bring about an extinguishment, but the language of those two phrases is inappropriate to that concept. Employing such language in a contemporary decision as a reason for denying aboriginal rights seems to me to be permitting the worst aspects of a discredited Imperial and Colonial approach to indigenous peoples to persist into the present day. I have already referred to the passages from the reasons of Mr. Justice Brennan in ***Mabo*** which warn against that danger.

(b) **Clear and Plain Intention: The *Sparrow* Case**

[741] I refer to this passage from ***Sparrow,*** at pp. 1098-1099, which was not referred to in full by the trial judge:

> In the context of aboriginal rights, it could be argued that, before 1982, an aboriginal right was automatically extinguished to the extent that it was inconsistent with a statute.
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> * * *
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> That in Judson J.'s view was what had occurred in ***Calder,*** *supra*, where, as he saw it, a series of statutes evinced a unity of intention to exercise a Sovereignty inconsistent with any conflicting interest, including aboriginal title. But Hall J. in that case stated (at p.404) that "the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention

> must be 'clear and plain'" (emphasis added by Chief Justice Dickson and Mr. Justice La Forest.) The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right. (my emphasis)

[742] In my opinion, no other conclusion may properly be drawn from this passage than that Mr. Justice Judson's view that a series of statutes evincing a unity of intention to exercise a Sovereignty inconsistent with any conflicting interest, including aboriginal title, may result in extinguishment, is not correct in principle, because it does not meet the test enunciated by Mr. Justice Hall that a clear and plain intention on the part of the Sovereign is necessary before an aboriginal right can be extinguished.

[743] On the basis of that conclusion on the question of principle, I consider that the Supreme Court of Canada, in a unanimous decision of six judges in ***Sparrow,*** must be taken to have said that Mr. Justice Hall's decision was right in ***Calder*** and that Mr. Justice Judson's decision was wrong, since the extinguishment opinions in ***Calder*** turned on the very principle on which Mr. Justice Judson and Mr. Justice Hall differed, and on which, in ***Sparrow,*** the Supreme Court of Canada preferred the principle adopted by Mr. Justice Hall and rejected the principle adopted by Mr. Justice Judson.

[744] The actual decision in ***Sparrow*** was that the argument by the Federal Crown that the ***Fisheries Act*** and its Regulations contained a complete code inconsistent with the continued exercise of the aboriginal rights of Mr. Sparrow, a member of the Musqueam people, to fish in Ladner Reach and Canoe Passage was rejected. Inconsistency was not enough. Clear and plain intention was required.

(c) Clear and Plain Intention: The *Nowegijick* and *Mitchell* Cases

[745] The decisions of the Supreme Court of Canada in ***Nowegijick v. the Queen,*** [1983] 1 S.C.R. 29 and ***Mitchell v. Peguis Indian Band,*** [1990] 2 S.C.R. 85 establish that treaties and statutes which apply to Indians, particularly those which apply to Indians as Indians, or in a different way than they apply to everyone else, should be interpreted in such a way that any doubts about construction of those treaties and statutes should be resolved in favour of the Indians.

[746] In his reasons in ***Mitchell,*** Chief Justice Dickson referred to his own reasons, for the Court, in ***Nowegijick*** in this passage, at pp.98-99:

[747] In ***Nowegijick,*** the Court had the following to say:

> It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption. In ***Jones v. Meehan,*** 175 U.S. 1 (1899), it was held that Indian treaties "must ... be construed, not according to the technical meaning of [their] words ...

> but in the sense in which they would naturally be understood by the Indians."
>
> Two elements of liberal interpretation can be found in this passage: (1) ambiguities in the interpretation of treaties and statutes relating to Indians are to be resolved in favour of the Indians, and (2) aboriginal understandings of words and corresponding legal concepts in Indian treaties are to be preferred over more legalistic and technical constructions. In some cases, the two elements are indistinguishable, but in other cases the interpreter will only be able to perceive that there is an ambiguity by first invoking the second element.
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> *.*.*
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> The ***Nowegijick*** principles must be understood in the context of this Court's sensitivity to the historical and continuing status of aboriginal peoples in Canadian society. The above-quoted statement is clearly concerned with interpreting a statute or treaty with respect to the persons who are its subjects - Indians - not with interpreting a statute in favour of Indians simply because it is the State that is the other interested party. It is Canadian society at large which bears the historical burden of the current situation of native peoples and, as a result, the liberal interpretive approach applies to any statute relating to Indians, even if the relationship thereby affected is a private one. Underlying ***Nowegijick*** is an appreciation of social responsibility, and a concern with remedying disadvantage, if only in the somewhat marginal context of treaty and statutory interpretation.

[748] Also in ***Mitchell,*** Mr. Justice La Forest said this, at p.143:

> As already stated, it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the ***Indian Act,*** it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them.

[749] Chief Justice Dickson was dissenting in the result in ***Mitchell,*** though he was writing for the Court in ***Nowegijick.*** The difference in ***Mitchell*** did not arise in relation to the passages I have set out.

[750] In my opinion the clear and plain intention to extinguish aboriginal title or aboriginal rights must be the intention of the Sovereign Power acting legislatively. Accordingly, the principles which I have set out from the ***Nowegijick*** and ***Mitchell*** cases would apply to the interpretation of the legislation which is said to extinguish the title or rights. Not only must the legislation be clear and plain, but any doubt whatsoever about whether it is clear and plain must be resolved against extinguishment.

(d) **Clear and Plain Intention: Whose Intention**

[751] In order for extinguishment of aboriginal title or aboriginal rights to occur, there must be a clear and plain intention to extinguish the title or the rights.

[752] Whose intention? Clearly it must be the intention of the Sovereign Power. See ***Sparrow*** at p.1099.

[753] How is that intention to be expressed? In my opinion it must nowadays be done by legislation in which the intention to extinguish is the intention of the Crown in Parliament or a Legislature. I do not think that subordinate legislation can be said to express the intention of the Sovereign Power unless the power to make regulations that have the effect of extinguishing aboriginal title or aboriginal rights is expressly given by the enabling legislation in a way that shows that the Crown in Parliament or a Legislature has formed the specific intention of permitting such extinguishment.

[754] The mechanics of government in the colony of British Columbia between 1848 and 1871 were somewhat different than they have become in a Sovereign British Columbia within a Sovereign Canada today.

[755] In 1858, the Imperial Parliament in London, by 21 and 22 Vict. (1858), c.99, authorized the Crown in London to appoint a governor who could, without consulting a council or establishing a representative assembly, make laws for the peace, order and good government of the colony of British Columbia, within the terms of the authorization given by the Crown. The first nine of the thirteen relevant Colonial instruments were made by Governor Douglas as Proclamations in that way. Section 2 of the ***Imperial Act of 1858*** required that laws made by the Governor be laid before the Imperial Parliament, which had a power of disallowance. In addition, all laws made by Governor Douglas had to be sent to the Colonial Office and were subject to being disallowed by the Privy Council on reference to the Privy Council by the Colonial Office.

[756] In 1863, by Order in Council made on 11 June, 1863 at Windsor, the Imperial Privy Council established a Legislative Council for British Columbia. Thereafter laws were made not by Proclamation but by Ordinances passed by the Governor sitting with the Legislative Council. Again those Ordinances were to be sent to the Colonial Office and again they could be referred to the Imperial Privy Council by the Secretary of State for the Colonies and could be disallowed by the Imperial Privy Council. They continued to be subject to disallowance by the Imperial Parliament.

[757] In 1865, the ***Colonial Laws Validity Act,*** 28 and 29 Vict. c.63, was enacted by the Imperial Parliament. It established that only those laws directly repugnant to an Imperial statute that applied in the colony would be subject to disallowance.

[758] In 1866, by the ***British Columbia Act, 1866,*** 29 and 30 Vict. c.67 the powers of the Governor and Legislative Council were confirmed. They extended over Vancouver Island. The powers of the Privy Council in relation to disallowance were also confirmed.

[759] In my opinion, the Proclamations made by Governor Douglas between 1858 and 1863, that is, the first nine of the thirteen Colonial instruments principally relied on by Mr. Justice Judson in ***Calder,*** would have required the clear and plain intention of Governor Douglas to have effected an extinguishment of aboriginal title and aboriginal rights and that clear and plain intention would have to have been

expressed sufficiently clearly on the face of the Proclamations themselves that the Imperial Parliament, the Secretary of State for the Colonies, and the Imperial Privy Council, all of whom had functions to perform in relation to disallowing or not disallowing those nine instruments, and so also in relation to the formation and expression of the intention of the Sovereign, would have clearly understood from the face of the instrument that it was extinguishing aboriginal title or rights.

[760] The last four of the thirteen Colonial instruments relied on by Mr. Justice Judson would have required the clear and plain intention of the Governor and also of his Legislative Council. Again the clear and plain intention would have to have been expressed sufficiently clearly on the face of the four Ordinances themselves that the Secretary of State for the Colonies and the Imperial Privy Council, each of whom had functions to perform in relation to disallowance, and so also in relation to the formation and expression of the intention of the Sovereign, would have clearly understood from the face of the instrument that it was extinguishing aboriginal title or rights.

[761] Of course, the required intention is always a formalized and conceptual intention, like a legislative intention, and not a personal or subjective intention of each participant in the process or each of the participants who is a guiding force in the process.

(e) Implicit Extinguishment: The Horseman Case

[762] In ***R. v. Horseman,*** [1990] 1 S.C.R. 901 the Supreme Court of Canada divided 4-3. The case related to an Indian who killed a grizzly bear in self defence after he had shot a moose. A year later he bought a grizzly bear hunting licence and sold the hide on the pretext that the bear had been shot in accordance with the licence. His treaty rights in ***Treaty 8*** were considered to have been modified by the legislatively and constitutionally endorsed ***Natural Resources Transfer Agreement, 1930,*** with the result that the unlawful unlicensed trafficking in bear, which was an offence under the ***Wildlife Act,*** whether the bear had been killed in self defence or not, could not be justified as the exercise of an aboriginal right.

[763] In the course of his majority reasons, Mr. Justice Cory started a passage on the effect of the 1930 ***Transfer Agreement*** in this way, at p.930:

> At the outset two established principles must be borne in mind. First, the onus of proving either express or implicit extinguishment lies upon the Crown. (my emphasis)

[764] That passage has been cited as authority for the proposition that extinguishment may be implicit.

[765] I do not wish to take the position that extinguishment may not be implicit. But since the intention to extinguish must be clear and plain, I would be very reluctant to reach the conclusion that there had been implicit extinguishment in any particular case unless no other conclusion were possible because the intention was so clear and plain.

[766] I would also make these three observations about the passage I have set out. First, the reference to implicit extinguishment occurs in a sentence directed not

to that question but to the question of onus. Second, any conclusion that extinguishment could be implicit was not a part of the reasoning in the ***Horseman*** case, which turned on the interpretation of para.12 of the 1930 statutorily and constitutionally endorsed ***Transfer Agreement*** as effecting a modification, not of aboriginal rights, but of treaty rights. Third, the decision in the ***Horseman*** case was handed down one month before the decision in ***Sparrow.*** They must be read together. If there can be implicit extinguishment then the intent to bring about that extinguishment must be clear and plain. As I have said, I do not think that implicit extinguishment is compatible with the clear and plain intention test unless no other conclusion than implicit extinguishment is possible.

[767] At this stage I propose to mention a point of terminology.

[768] Express (or explicit) extinguishment is extinguishment brought about by the Sovereign Power acting legislatively in an enactment which provides on its face and in its terms for extinguishment, either on the coming into force of the enactment or on the happening of an event described in the enactment.

[769] Implicit extinguishment is extinguishment brought about by the Sovereign Power acting legislatively in an enactment which does not provide in its terms for extinguishment but which brings into operation a legislative scheme which is not only inconsistent with aboriginal title or aboriginal rights but which makes it clear and plain by necessary implication that, to the extent governed by the existence of the inconsistency, the legislative scheme was to prevail and the aboriginal title and aboriginal rights were to be extinguished.

[770] In the case of implicit extinguishment the extinguishment brought about by the clear and plain intention demonstrated by the necessary implication may be brought about by the enactment of the legislation itself, because the necessity for extinguishment may occur at that point (which I will call implied extinguishment), or it may be brought about by the administrative or executive actions authorized by the legislation, because the necessity for extinguishment may occur only when the administrative or executive action occurs (which, because this term has been used already in the cases and not because it is perfectly descriptive, I will call extinguishment by adverse dominion.)

[771] It is important to note that even though express extinguishment may occur on the happening of an administrative or executive act, and even though extinguishment by adverse dominion, by my definition, only occurs on the happening of an administrative or executive act, nonetheless the clear and plain intention to extinguish by the administrative or executive act, whether that intention is express or implied, remains the intention of the Sovereign Power, acting legislatively, and is not merely the intention of the person carrying out the authorized administrative or executive act.

(f) Extinguishment by Adverse Dominion: The Santa Fe Case

[772] The authority principally relied on by the Province in support of the argument in favour of specific extinguishment over specific parcels of land by the granting of tenures by the Crown that confer a right to use the land in a way inconsistent with

the simultaneous exercise of the rights which go with aboriginal title or other aboriginal rights independent of title ("Extinguishment by Adverse Dominion") is not a Canadian case but a United States case, ***U.S. v. Santa Fe Pacific Railway Company*** 314 U.S. 339 (1941). In the course of his reasons in that case, Mr. Justice Douglas, who delivered the opinion of the Supreme Court of United States, said at p.347:

> As stated by Chief Justice Marshall in ***Johnson v. M'Intosh,*** *supra* (8 Wheat.(21 US) p.586, 5 L.ed. 691), "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. (my emphasis)

[773] It is noteworthy that extinguishment by adverse dominion was not among the issues in the ***Santa Fe*** case.

[774] I know of no Canadian case which has decided that aboriginal title or aboriginal rights can be extinguished by the exercise of adverse dominion. I do not believe that there is one. Nor do I think that the Canadian law supports the concept of extinguishment by adverse dominion unless the adverse dominion is exercised under a statute in which it is made clear that the intention of the Sovereign in Parliament is to set up a system whereby aboriginal title and aboriginal rights will be extinguished when adverse dominion is exercised by an administrative or executive act under the authority of the statute.

[775] I note that in the United States the extinguishment of Indian Title can only be brought about by Congress, that is, by the Sovereign Power acting legislatively. See the ***Santa Fe*** case itself.

[776] In short, I do not consider that the Sovereign Power's clear and plain intention to extinguish aboriginal title and rights can be demonstrated in any other way than by legislation passed by the Sovereign in Parliament. The fact that there is an inconsistency between the exercise of powers granted by legislation and the exercise of aboriginal rights does not extinguish the aboriginal rights to the extent of the inconsistency, nor does it necessarily suspend them, unless it is clear and plain from the legislation itself that those consequences had been made the subject of clear, plain and considered legislative intention. What the inconsistency means, short of such a clear and plain intention, is that there is a problem of priorities which must be settled on the basis of principle. I suppose that the first title in time would have some claim to priority unless there was some other basis in principle for reaching a contrary conclusion.

[777] The fact that an Indian people have an aboriginal title to the occupancy, possession, use and enjoyment of a parcel of land is not necessarily inconsistent with the holding of a fee simple title to the same land by some one else, unless either party decides to try to exclude the other. Hunting under the ***Wildlife Act*** and mineral exploration under the Mineral Act can both take place lawfully by one person on land in which the fee simple title is owned by another person, without that other

person's consent. In ***R. v. Bartleman*** (1984), 55 B.C.L.R. 78, this Court decided that a right to hunt over unoccupied land as formerly, confirmed by one of the Douglas Treaties on the south end of Vancouver Island, could be exercised over land held by some one else in fee simple, as long as the land remained unoccupied in fact. So even if the theory of extinguishment by adverse dominion were to be applicable, and I do not think it should be applicable except in accordance with a clear and plain legislative intention test, the extinguishment should only occur to the extent of the permanent inconsistency. That is, if priority were to be given to a fee simple title over an aboriginal title, by the application of an appropriate legal principle about priorities, then the fee simple title may extinguish the aboriginal title of exclusive occupancy in the same land, but may not extinguish the aboriginal rights of hunting or gathering on the land, depending, perhaps, on the use that the holder of the fee simple title is making of the land.

[778] So, in order for there to be extinguishment by adverse dominion, these three conditions, at least, must be fulfilled. First, there must be a clear and plain expression of intention to bring about such extinguishment, by administrative or executive act, legislatively expressed by the Sovereign in Parliament or a Legislature. Second, there must be an act authorized by the legislation which demonstrates the exercise of permanent adverse dominion as contemplated by the legislation. Third, unless the legislation provides that the extinguishment arises on the creation of a tenure which might be inconsistent with an aboriginal right, there must be an actual use made of the land by the holder of the tenure, which is permanently inconsistent with the continued existence of the aboriginal title or right, and does not merely bring about a temporary suspension. If those three conditions are fulfilled, then there could be extinguishment by adverse dominion, but only to the extent of the actual permitted inconsistency.

[779] The question of extinguishment by adverse dominion was dealt with in ***Mabo.*** At pp. 49-50, Mr. Justice Brennan said this:

> A Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title. The extinguishing of native title does not depend on the actual intention of the Governor in Council (who may not have adverted to the rights and interests of the indigenous inhabitants or their descendants), but on the effect which the grant has on the right to enjoy the native title. If a lease be granted, the lessee acquires possession and the Crown acquires the reversion expectant on the expiry of the term. The Crown's title is thus expanded from the mere radical title and, on the expiry of the term, becomes a plenum dominium. Where the Crown grants land in trust or reserves and dedicates land for a public purpose, the question whether the Crown has revealed a clear and plain intention to extinguish native title will sometimes be a question of fact, sometimes a question of law and sometimes a mixed question of fact and law. Thus, if a reservation is made for a public purpose other than for the benefit of the indigenous inhabitants, a right to continued

> enjoyment of native title may be consistent with the specified purpose - at least for a time - and native title will not be extinguished. But if the land is used and occupied for the public purpose and the manner of occupation is inconsistent with the continued enjoyment of native title, native title will be extinguished. A reservation of land for future use as a school, a courthouse or a public office will not by itself extinguish native title: construction of the building, however, would be inconsistent with the continued enjoyment of native title which would thereby be extinguished. But where the Crown has not granted interests in land or reserved and dedicated land inconsistently with the right to continued enjoyment of native title by the indigenous inhabitants, native title survives and is legally enforceable.

[780] I do not entirely agree with this passage. I do not think that there is any basis in principle for saying that inconsistency between the grant and native title necessarily means that it is the native title that must give way. If the point were addressed in the legislation itself and a clear and plain intention to extinguish, should there be an inconsistency, were shown, then extinguishment would be the result. But if the clear and plain intention to extinguish in the event of an inconsistency were not shown, then I do not understand the nature of the rule of law or principle which would decree that the new grant should prevail over the long standing aboriginal title. I do not think that the effect of a grant should determine the test of legislative intention, unless it is clear and plain from that effect that the intention to extinguish is clear and plain. I should also add that Mr. Justice Brennan's proposition that the effect of the grant is enough to extinguish aboriginal title and rights even if the intention is not clear and plain, is contrary to the test enunciated in ***Sparrow*** at p.1099.

[781] I do not propose to consider the question of extinguishment by adverse dominion any further. I have set out my views of the broad principles which must govern such an extinguishment. Any precise examination of the extent to which particular uses under particular tenures would be necessarily inconsistent with particular aboriginal titles or rights, ought to be considered only in terms of the particular legislation and particular tenures and particular uses in fact. Most importantly, in my opinion, no decision should be made against the holder of a particular tenure unless the holder of the tenure was represented in the proceedings leading to the adjudication about that particular extinguishment.

[782] One other reason why I do not propose to consider the question of extinguishment by adverse dominion any further is that there were no tenures granted over the claimed area in the period before 1871, and there was no power in the British Columbia Legislature to pass legislation which could have the effect of extinguishing by adverse dominion after 1871, so extinguishment by adverse dominion could not have occurred in this case as a result of legislation of the British Columbia Legislature.

(g) Extinguishment of Aboriginal Rights of Self-Government

[783] A part of the claim in this case is a claim for "jurisdiction" or, in other words, for rights of self-government or self-regulation. I will be discussing that claim in Division 2 of Part VI and in Division 2 of Part VII of these reasons. But at this stage I wish to say only that the principles I have discussed in relation to the extinguishment of aboriginal rights would, in my opinion, apply just as straightforwardly to the extinguishment of aboriginal rights of self-government and self-regulation as they do to the extinguishment of aboriginal title and aboriginal hunting, fishing and gathering rights.

[784] In particular I refer again to the discussion of terminology in Sub-division (e) of this part. Rights of self-government could have been extinguished expressly or implicitly. In either case the extinguishment could be brought about by the mere enactment and coming into force of the legislation or by an administrative or executive act authorized by the legislation, depending on what is contemplated by the legislation as bringing about the extinguishment. If it is an administrative or executive act which brings about the extinguishment of a particular right of self-government or self-regulation under the legislation then that type of extinguishment is a form of extinguishment by adverse dominion. If the legislation does the extinguishment, without the need for any action under the legislation, but does it implicitly, then that is what I have called implied extinguishment.

[785] Whatever form of extinguishment of aboriginal rights of self-government or self-regulation is being considered, the same principles apply. The intention to extinguish must be clear and plain; it must be the intention of the Sovereign Power; it must be legislatively brought about; and, if it is implicit, the implication must not simply be probable, it must be necessary.

2. Extinguishment in British Columbia

(a) Extinguishment in the Colonial Period: 1846 to 1871

[786] The judgment in the ***Calder*** case related entirely to extinguishment in this period, namely 1846 to 1871. It was conceded by the Provincial Crown in the ***Calder*** case that events after 1871 did not bring about any extinguishment.

[787] As I have said, Mr. Justice Judson in ***Calder*** considered that the pattern of events between 1858 and 1871, including the nine Proclamations by Governor Douglas and the four Ordinances of the succeeding governors acting with the advice and consent of a Legislative Council, which together comprise the thirteen Colonial instruments, evinced a unity of intention to exercise a Sovereignty inconsistent with any competing interests, including aboriginal title. Mr. Justice Hall, on the other hand, considered that there could only have been extinguishment if the Sovereign intention were expressed legislatively and in clear and plain language, and that the Colonial instruments did not clearly and plainly extinguish aboriginal title.

[788] As I have said also, I think that the passage at p.1099 in ***Sparrow*** indicates that Chief Justice Dickson and Mr. Justice La Forest, for the Supreme Court of Canada, adopted the test preferred by Mr. Justice Hall over the test preferred by Mr. Justice Judson, and, I would suppose, adopted also the application of Mr. Justice Hall's test which followed naturally from his selection of that test.

[789] I therefore conclude that the reasons of Mr. Justice Hall in ***Calder*** are to be preferred to the reasons of Mr. Justice Judson. That conclusion is entirely consistent with what I have said about extinguishment by adverse dominion and supports the view that I have taken that extinguishment by adverse dominion only occurs when there is a clear and plain intention of the Sovereign Power expressed by the Sovereign acting in a legislative capacity.

[790] Having regard to that conclusion, I do not think that it is necessary for me to go through the thirteen Colonial instruments. They are described by Mr. Justice Judson in summary at pp.329-333, and by Mr. Justice Hall at pp. 410-413. I propose rather than dealing with them one by one to make eight points with respect to extinguishment under those Colonial instruments.

[791] The first point is that at least one of the Proclamations, that of 14 February, 1859, and one of the Ordinances, that of 11 April, 1865, deal with the vesting of fee simple title to the land of British Columbia in the Crown. The Proclamation of 14 February, 1859 provided that all lands in British Columbia and all mines and minerals belonged to the Crown in fee. Presumably, then, in 1859 there had been no previous acquisition of land or interests in land by settlers on the mainland of British Columbia. The Ordinance of 11 April, 1865 again applied only to the mainland. It provided that all lands in British Columbia and all mines and minerals, not otherwise lawfully appropriated, belonged to the Crown in fee. The phrase "not otherwise lawfully appropriated" tends to indicate that there may have been lawful acquisitions of land or interests in land on the mainland between 1859 and 1865.

[792] “Fee simple" is a description of an estate. It means that the land is held, unconditionally and without restraint on alienation, either directly or indirectly from the holder of the radical, allodial or root title. The concept that the Crown in right of British Columbia could hold an estate in fee simple from the Crown Imperial is both incorrect constitutionally and incorrect in terms of estates in land. The Crown's title is paramount and not held of any superior lord who could impose restraints on it. The title remains an allodial title and its nature was not changed by the imposition of a statutory scheme, though for the purposes of administration of the statutory scheme the Crown may be said to hold land in fee simple. The concept in English common law that Sovereignty may carry with it the root title may not have been well understood, and the concept of fee simple title may have been much better understood in British Columbia at the relevant times. So it was provided by the Proclamation, and the Ordinance, that the Crown held the land "in fee simple" meaning without restraint on alienation, and with a power to make grants in accordance with the legislation, and meaning that no one in British Columbia could in future acquire any rights in land in British Columbia without complying with the statute. The person to whom the Crown granted any interests in the land would be able to take the land in fee simple or in accordance with the terms of a subordinate interest.

[793] Each of the thirteen Colonial instruments deal with land and the purchase, pre-emption and settlement of land. The provisions relating to fee simple title must be understood in the context of setting up an orderly system of purchase, pre-emption and settlement. That system may well have had in contemplation the free

surrender of aboriginal title and aboriginal rights over certain lands through purchase by the Crown and surrender by the Indians.

[794] But in ***Amodu Tijani,*** at p.403, it was said that the aboriginal title continued as a "burden on the radical or final title of the Sovereign" and that proposition was approved by Madam Justice Wilson, for the Supreme Court of Canada, in ***Roberts v. Canada*** at p.340. If aboriginal title is a burden on the radical title of the Sovereign, and if the radical title is acquired on the assertion of Sovereignty, then there is nothing in the taking of fee simple title by the Crown which would free either the radical title or the subordinate fee simple estate from the burden constituted by the aboriginal title.

[795] The second point is that there is nothing in the thirteen Colonial instruments which makes clear that it was not the intention of the Crown to eliminate possible inconsistent interests by arranging for the purchase and surrender, by consent, of the aboriginal interests in the land before any conflict in uses arose. The fact that the Colonial instruments contemplated settlement of the land does not mean that they contemplated that the settlement of the land would be made where there could be inconsistent uses of the land. And in those cases where there were clearly going to be inconsistent uses of the land if the Indian interest continued, then it may well have been contemplated that the interest would be purchased and surrendered with the consent of the Indians.

[796] Related to this second point and to what will be my third point is an immensely revealing letter of opinion from Sir Matthew Baillie Begbie, the first Chief Justice of British Columbia, and the draftsman of the third Proclamation of 4 January, 1860, and probably of some of the other Colonial instruments. Chief Justice Begbie's opinion is dated 30 April, 1860, by which date four of the Colonial instruments had been proclaimed. He said:

> I may also observe that the Indian title is by no means extinguished. Separate provision must be made for it, and soon: though how this is to be done will require some consideration. From the friendly intercourse with the natives however, no real difficulty is to be apprehended. (my emphasis)

[797] In the same opinion, Chief Justice Begbie said:

> The absolute right of the crown in all these lands is perfectly recognized, and I am happy to say that great confidence in the honour of the Government is shewn by all parties.

[798] As the appellants said in their factum: "taking these two statements together we have a clear expression that the mischief not addressed by the January 4, 1860 Proclamation was the implied extinguishment of aboriginal title. Begbie clearly stated that Crown title and Indian title co-exist."

[799] The *amici curiae* dealt with Begbie's opinion and with his other writings and opinions in their factum and argument. On some points of fact Chief Justice Begbie seems to have been less than fully informed. On points of law, the way he expresses a point in one situation may not be exactly the way he expresses the

same point in another situation. But there is nothing which persuades me that Chief Justice Begbie regarded aboriginal occupation rights and other aboriginal rights as being confined to reserves or as having been extinguished.

[800] The third point is that in the Colonial period in British Columbia, as is apparent from the many documents in evidence in this appeal, there were some people who believed that the Indians held an aboriginal title to the land which they occupied and used that was recognized by the common law, and there were other people, perhaps unfamiliar with the judgments of Chief Justice Marshall in the United States, who did not. Throughout the Colonial period, people holding each of these views were involved in the Sovereign decision making. Those who believed in the existence of aboriginal title did not consider that it was being extinguished and had no intention to extinguish it or participate in the exercise of the Sovereign Power to extinguish it in the Colonial period. Those who did not believe in the existence of aboriginal title and did not consider that it was necessary to extinguish it could not have had the intention to extinguish it nor have participated in the formation of the intention of the Sovereign Power to extinguish aboriginal title through the Colonial instruments. In the result, neither group could have participated in the formation of a clear and plain intention to extinguish aboriginal title. I do not believe that there is any evidence of a third group who believed that aboriginal title might exist and who formed a clear and plain intention to participate in the exercise of the Sovereign Power to extinguish aboriginal title, should it exist.

[801] Non-recognition of an aboriginal title by those who considered it did not exist could not amount to an extinguishment of that title.

[802] The fourth point is that extinguishment by the effect of legislation rather than its purpose has been ruled out by the decision in ***Sparrow,*** as set out at p.1099, unless there is an absolutely inescapable (that is, necessary, clear and plain) inference of purpose from the effect. In this case, there was no such inescapable inference.

[803] The fifth point is that there is nothing inconsistent between the reference to lands reserved for the Indians in the Colonial instruments and the non-extinguishment of aboriginal title over lands outside those reserved lands. The land referred to as being reserved for the Indians tended to be land where the Indians' actual houses and fishing stations were located. Clearly those were inviolable. But over the remainder of the land there was a possibility that, for some land that might be settled, no aboriginal peoples had any aboriginal title or aboriginal rights. And there was also a possibility that even if there was aboriginal title it might be held on the basis of uses or enjoyment by the Indians that were not highly valued by them so that voluntary surrender might be inexpensively achieved. Accordingly, reference to lands reserved for the Indians in the Colonial instruments does not mean that those lands must be the only lands on which there was an aboriginal title to consider.

[804] The sixth point is that if the Colonial instruments extinguished aboriginal title by the act of vesting the fee simple title in the Crown, then the effect would have been, in one fell swoop, to turn the Indian peoples from being peoples occupying

their ancestral territories as they had done for generations, into trespassers in their own villages and in their own hunting territories.

[805] The seventh point that I wish to note is that the powers of the Governor, either acting alone or acting with the advice and consent of the Legislative Council, were limited throughout the Colonial period. The limitation was a limitation expressed in the instruments providing for the appointment of a Governor or in the instruments actually appointing the Governor. In the course of argument, counsel took us through those instruments in support of an argument that the instruments did not confer upon the Governor the power to take from the indigenous people of British Columbia their aboriginal title and aboriginal rights other than with their consent. To deal with that argument properly would require setting out and analyzing the instruments which conferred legislative and executive powers on the Governor. Since such an analysis is unnecessary for my decision in this appeal, I do not propose to undertake it, but the point is noteworthy, and extinguishment in the Colonial period could not be upheld unless it were adequately addressed. This point was noted and dealt with by Mr. Justice Hall in his reasons in ***Calder*** at pp. 406-408.

[806] The eighth and final point is to note that the Indian peoples in the North East of British Columbia were parties to ***Treaty 8 of 1898.*** Under that Treaty they surrendered their aboriginal title and aboriginal rights. If their aboriginal title and aboriginal rights had already been extinguished in the Colonial period there would have been nothing for them to surrender. This point was noted by Mr. Justice Hall in his reasons in the ***Calder*** case at p.394.

[807] On the basis of these eight points I have come to the following conclusions about the extinguishment of aboriginal title, aboriginal hunting, fishing, gathering and similar rights, and aboriginal rights of self-government and self-regulation in the Colonial Period from 1846 to 1871.

[808] I would reject the concept of "blanket extinguishment" of aboriginal title throughout British Columbia in the Colonial period.

[809] I would reject also the concept of implicit extinguishment of aboriginal title or of aboriginal hunting, fishing, gathering and similar rights, by adverse dominion or directly, in the Colonial period, for two reasons. The first is that there was no clear and plain intention to carry out such extinguishment on the part of the Sovereign Power acting legislatively. The second is that there is no evidence whatsoever of any grant of any tenure in the claimed area in the period between 1846 and 1871.

[810] With respect to implicit extinguishment of aboriginal rights of self-government and self-regulation in the Colonial period,

(a) by the Proclamation of 19 November 1858 making the Civil and Criminal laws of England, as far as they were not from local circumstances inapplicable, the law in force in all parts of British Columbia, or

(b) by other Proclamations or Ordinances of the Governor or Governor-in-Council of British Columbia before British Columbia joined Confederation in 1871,

[811] I do not think that any other approach is possible but to examine the precise aboriginal right that is being relied on in a particular instance, and to examine the precise law or enactment which is said to bring about an implicit but specific extinguishment of the precise aboriginal right and then, in that confined context, to decide whether the precise law or enactment necessarily, clearly and plainly, extinguished the precise aboriginal right. No such examination has been made in this case.

(b) **Extinguishment in the Confederation Period: 1871 to 1951**

[812] In 1871, British Columbia joined Confederation. It became subject to the ***British North America Act, 1867,*** now called the ***Constitution Act, 1867.*** Then, as now, head (24) of s.91 of the Act conferred on the Parliament of Canada exclusive legislative power with respect to:

> (24) Indians, and lands reserved for the Indians.

[813] Section 109 dealt with the ownership of lands within the Province. It read then, as now:

> 109. All lands, mines, minerals, and royalties belonging to the several Provinces of Canada... shall belong to the several Provinces... in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

[814] We now know that the Indian interest in the form of aboriginal title and rights over land in the Province is an interest other than the interest of the Province in those lands, and was such in 1871, quite apart from any question of trust existing in respect of the land affected by the aboriginal title and aboriginal rights. See ***St. Catherine's Milling*** and ***Guerin.***

[815] Returning to s.91(24) we now know from ***Dick v. The Queen,*** and from ***Bell Canada v. Commission de la Sante,*** [1988] 1 S.C.R. 749, that the power to make laws that affect Indians may be expressed in this way:

[816] (a) Parliament has the exclusive power to make laws which are directed particularly to Indians, wherever those Indians may be within Canada.

[817] (b) Parliament has the exclusive power to make laws directed particularly to lands reserved for the Indians, whether those laws affect Indians or non-Indians in relation to those lands.

[818] (c) The Provinces have power to make laws of general application which regulate Indians in the same way as they regulate other people within the Province.

[819] (d) If a Provincial law is a law of general application then the fact that it affects Indians more frequently and more restrictively than non-Indians does not, in itself, make the law a law other than a law of general application.

[820] (e) If a Provincial law, even if it is a law of general application, affects Indians in relation to the specific Federal nature of the legislative power assigned to Parliament, then there is an interjurisdictional legislative immunity in respect of such

a matter and the provincial legislation will not affect Indians on the basis of its own power. (The specific Federal nature of the legislative power of Canada in relation to Indians which gives rise to the interjurisdictional legislative immunity has been called the making of laws affecting Indians qua Indians, the making of laws dealing with Indians in their Indianness, and the making of laws relating to the core values which distinguish Indians as Indians and differentiate them from non-Indians. I will use the terminology "Indians in their Indianness" to describe this interjurisdictional immunity concept, while I will continue to use the terminology "An integral part of their distinctive culture" to describe the entirely different concept of what makes an aboriginal practice, custom or tradition an aboriginal right.)

[821] Against the legal background I have described, it seems clear that explicit extinguishment of aboriginal title and of aboriginal hunting, fishing, gathering and similar rights in the period from 1871 to 1951 could only have been done by the Parliament of Canada. It is not suggested that there was any such explicit legislation.

[822] I next come to implicit extinguishment of aboriginal title or of aboriginal hunting, fishing, gathering and similar rights. Within implicit extinguishment I include extinguishment by adverse dominion. As I have said, I see no reason why, if there are two inconsistent titles, it is the aboriginal title that must give way, unless there is a clear and plain intention on the part of the Sovereign Power enacting the legislation in Parliament to bring about such an extinguishment of the aboriginal title whenever there is an inconsistency. In this case we were not referred to any Federal legislation which could fulfil those characteristics. However, that does not mean that some other person, perhaps the holder of some Federally-granted tenure, could not refer to legislation which fulfilled those characteristics. Decisions on specific questions of that nature must await the time when the precise issues are raised.

[823] Finally, in relation to the extinguishment powers of Parliament in the period from 1871 to 1951, I turn to implicit extinguishment of aboriginal rights of self-government and self-regulation by Parliament. In my opinion the same principles apply as the principles discussed in the previous paragraph. The question is whether the Federal statute necessarily, clearly and plainly extinguished the particular right of self-government or self-regulation. Again we were not referred to any particular legislation. Consideration of any such form of extinguishment must be examined in relation to the precise right and the precise legislation. It can not be done in this appeal.

[824] Provincial laws of general application could not, in my opinion, in the period between 1871 and 1951, bring about either explicit or implicit extinguishment of aboriginal title or aboriginal rights, including aboriginal rights of self-government, because those laws would lack the clear and plain Sovereign intention to extinguish, by clearly necessary implication, the aboriginal title or aboriginal rights, or, if they contained such an intention they would be unconstitutional, at least as far as the extinguishment was concerned. That is so because in my opinion aboriginal title, aboriginal rights of hunting, fishing, gathering and similar rights, and aboriginal rights of self-government are all categorized as such because they constitute or have

constituted an integral part of the distinctive culture of the particular Indians and, as such, must be matters which affect those particular Indians in their Indianness and so must engage the principle of interjurisdictional immunity which constitutionally prevents the Provinces from enacting legislation which has the effect of extinguishing that aboriginal title or those aboriginal rights.

(c) **Extinguishment in the *Indian Act* Period: 1951 to 1982**

[825] The principles which govern the question of extinguishment in the period from 1871 to 1951 would continue to apply in the period from 1951 to 1982, but one additional factor must also be taken into account.

[826] In 1951 the Parliament of Canada enacted a new ***Indian Act.*** That Act contained a new provision for incorporating some Provincial statutes as Federal legislation as if those Provincial statutes had also been enacted by the Parliament of Canada, subject to four potential exceptions. The new provision was then s.87 but is now s.88 of the ***Indian Act.***

[827] The purpose of s.88, when it was enacted in 1951, was to benefit Indians on reserves who, under the enclave theory later disposed of in ***Cardinal v. A.G. Alberta,*** [1974] S.C.R. 695, were then thought to be left out of generally applicable provincial legislative schemes ameliorating the lot of all the people within a province, such as the laws relating to credit, or insurance, or family matters, or the acquisition of goods.

[828] Section 88 reads in this way:

> **88.** Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

[829] Sometime after s.88 was enacted, the law unfolded to reveal that provincial laws of general application applied to Indians *ex proprio vigore,* or, in other words, from the laws' own provincial competence. There was no need for s.88 in relation to such laws. In ***Natural Parents v. Superintendent of Child Welfare,*** Chief Justice Laskin, in his dissenting reasons said this, at p.763:

> When s.88 refers to "all laws of general application from time to time in force in any province" it cannot be assumed to have legislated a nullity but, rather, to have in mind provincial legislation which, per se, would not apply to Indians under the ***Indian Act*** unless given force by Federal reference.

[830] Chief Justice Laskin's view was adopted by Mr. Justice Beetz in reasons for the Court in ***Dick v. The Queen.*** So we now know that, perhaps contrary to what seems to have been the legislative scheme when it was enacted, s.88 of the ***Indian Act*** has the effect of giving force to provincial laws of general application which nonetheless affect Indians in their core values and so bring into force the specific

Federal nature of the legislative powers confided to Parliament, by referentially incorporating the Provincial laws as Federal laws.

[831] I do not understand there to have been any express extinguishment of any form of aboriginal title or aboriginal rights, including rights of self-government, by either Federal or Provincial legislation in the period from 1951 to 1982.

[832] The question of implicit extinguishment or extinguishment of any form of aboriginal title or aboriginal rights, including rights of self-government, in the period from 1951 to 1982, to the extent that it might be thought to differ from the same question in the period from 1871 to 1951 turns on s.88 of the ***Indian Act.***

[833] In my opinion, there can be no extinguishment, express or implicit, through the use of s.88. The reason is that the clear and plain intention that is necessary to effect an extinguishment must be the clear and plain intention of the Sovereign Power enacting the legislation validly and effectively. So the relevant Sovereign Power is the Sovereign Power of the Crown in the Federal Parliament. There may be an additional requirement in such an extinguishment that the clear and plain intention must also be present on the part of the Sovereign Power enacting the Provincial legislation in which the relevant law of general application is contained. But a clear and plain intention on the part of the Sovereign in the Province to extinguish aboriginal title may, in any case, be beyond the competence of the Provincial Sovereign Power to formulate and if expressed or implied in Provincial legislation may make the legislation a law that is not a law of general application for the purposes of s.88. It is not necessary for me to decide those questions in this appeal.

[834] There was no clear and plain extinguishing intention under s.88 when that section was enacted in 1951. In support of that conclusion it is not necessary to go behind the ***Indian Act*** itself and its 1951 amendments, in their context. But it is instructive to read what was said by the Honourable W.E. Harris, Minister of Citizenship and Immigration, and Minister Responsible for Indian Affairs, on second reading of the amending bill in 1951:

> Heretofore we have thought of enfranchisement as being the ultimate role of Indian policy, and let us say frankly that we rather expected that the Indian would want to become enfranchised in order to be like one of us. Nothing can be further from the truth, Mr. Speaker. The Indian has no desire to become as one of us, and all his representations have said: I hope you are not going to take away from me the right to be an Indian. Of course there is no such intention. Except in rare cases the Indian has every intention to retain his connection with his reserve and with his band, and while he wants some of the advantages of our society he wants them on such terms that he can retain his old connections.
>
> I think, sir, that our policy should be to extend self-government to all the reserves as soon as possible. It might be argued that this would give to band councils on the reserves greater powers than are now held and exercised by municipal authorities in our form of

> government, but if that would be the result surely we can impose safeguards to see that a band council does not exercise authority greater than a municipal council unless it is in the interests of the band. I think perhaps we can discuss that better in the committee stage.

(See Commons Debates (1951) 1352).

[835] There is one further case to which it is necessary to refer in relation to this subject. It is ***Roberts v. Canada*** which relates to the competing interests of two Indian bands in a reserve near Campbell River. Madam Justice Wilson gave the reasons of the Supreme Court of Canada, sitting in a Division of five judges composed of Chief Justice Dickson, Mr. Justice Beetz, Mr. Justice Lamer, Madam Justice Wilson and Mr. Justice Le Dain, who did not take part in the judgment. Madam Justice Wilson decided that the Federal Court had jurisdiction to hear the case because the law applicable to the claim consisted of the ***Indian Act,*** the actions of the Federal executive in setting out the reserve, and the common law of aboriginal title, which Madam Justice Wilson described as "Federal common law". Madam Justice Wilson at p.336 approved the decision of Mr. Justice Hugessen in the Federal Court of Appeal who, in turn, relied on s.91(24) of the ***Constitution Act, 1867*** and on ***Derrickson v. Derrickson,*** [1986] 1 S.C.R. 285 for his statement that: "It cannot be seriously argued that the law of aboriginal title is today anything other than existing Federal law."

[836] An alternative argument to the argument that s.88 was not sufficiently clear and plain in its intention to bring about an implicit extinguishment, including an extinguishment by adverse dominion, by referentially incorporating British Columbia enactments as Federal enactments was raised by counsel for the appellants. It is that the Federal common law of aboriginal title and aboriginal rights is paramount over Provincial statutes. ***Roberts v. Canada*** establishes that the law of aboriginal title and aboriginal rights is Federal common law (though perhaps it may also be Provincial common law). Mr. Justice Beetz said in ***Bisaillon v. Keable,*** [1983] 2 S.C.R. 60 at p.108:

> To the best of my recollection, I recall no case where the non-legislative "Federal law" has been given paramountcy over provincial laws. However, I do not see why the Federal Parliament is under an obligation to codify legal rules if it wishes to ensure that they have paramountcy over provincial laws, <u>at least where some of those legal rules fall under its exclusive jurisdiction</u>...(my emphasis)

[837] Aboriginal title, falling within the exclusive jurisdiction of the Federal Parliament under head 24 of Section 91 of the ***Constitution Act, 1867,*** need not be statutorily protected in order to be paramount over Provincial statutes in conflict with it. And s. 88 cannot have the effect of removing or diminishing Federal jurisdiction. I do not have to deal with this alternative argument since my conclusions are supported on other grounds, and I do not propose to do so.

[838] I note also that there remains a question about whether or not s. 88 is broad enough in scope to bring about a referential incorporation of Provincial laws of general application affecting Indians in relation to their lands, which would include aboriginal title, or whether s. 88 is confined to "Indians" as a subject matter, to the exclusion of "Lands reserved for the Indians" as a subject matter. In ***Derrickson v. Derrickson***, at pp. 297-299, Mr. Justice Chouinard reviewed but did not decide the question. I need not decide that question now and I do not propose to do so.

[839] Finally I note that an argument was made that s. 88 of the ***Indian Act*** was unconstitutional as providing a vehicle by which, arguably, Provincial legislation which could not, of its own force, touch aboriginal rights could be made to acquire Federal force and so infringe on s. 35 of the ***Constitution Act,*** to which I will refer in the next Sub-division. This argument was discussed by Professor Slattery in his article entitled "First Nations and the Constitution: A Question of Trust" (1992), 71 Can. Bar Rev. 261 at p. 286. Since I consider that in order to bring about an extinguishment of aboriginal rights by provincial legislation which is given Federal force by s.88 there would have to be a clear and plain intention demonstrated in s. 88 itself, and since in my opinion there is not, it is unnecessary again for me to deal with this argument in this appeal. The argument attains more relevance in relation to questions of regulation and control of aboriginal rights. Those questions are not raised in this appeal. But I should add that in my opinion a Provincial enactment which affects, regulates, diminishes, impairs, or suspends the exercise of an aboriginal right could not be a law of general application within the meaning of s. 88 of the ***Indian Act*** since its application to the holders of the aboriginal right must necessarily be different in relation to that right than it is with respect to those members of society who do not hold the aboriginal right, even if the way the conduct of both aboriginals and non-aboriginals is governed is the same for everyone. In other words, if a law regulating conduct generally regulates non-aboriginal rights for everyone but also regulates aboriginal rights for aboriginal people, then that law does not apply generally to everyone but applies in a different way to the rights of aboriginal people than it does to the rights of non-aboriginal people and is, accordingly, in my opinion, not a law of general application.

[840] That brings me back to the position that legislation of the Parliament of Canada is required to bring about an extinguishment of aboriginal title or aboriginal rights, including rights of self-government. So my conclusions about extinguishment are the same for the period from 1951 to 1982 as they are for the period from 1871 to 1951.

[841] I do not consider that there was any explicit extinguishment of the aboriginal title or aboriginal hunting, fishing, gathering and similar rights of the Gitksan people or the Wet'suwet'en people between 1951 and 1982 by the Parliament of Canada.

[842] With respect to implicit extinguishment of aboriginal title or aboriginal hunting, fishing, gathering and similar rights, or with respect to aboriginal rights of self-government and self-regulation, in the period between 1951 and 1982, by legislation of the Parliament of Canada, I do not think that any other approach is possible but to examine the precise aboriginal right that is being relied on in a particular instance and to examine the precise law or enactment of the Parliament of Canada which is

said to bring about an extinguishment of the precise aboriginal right and then, in that confined context, to decide whether the precise law or enactment necessarily, clearly and plainly extinguished the precise aboriginal right.

(d) **Extinguishment in the Constitutionalization Period: 1982 and Later**

[843] Section 35 of the ***Constitution Act, 1982,*** reads like this:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[844] The effect of this provision is dealt with in the ***Sparrow*** case, which I have already discussed. I propose at this point only to summarize what I understand to be the interpretation given by the Supreme Court of Canada to s.35 in ***Sparrow.***

[845] Existing aboriginal rights, including aboriginal title and aboriginal rights of self-government and self-regulation, are those that were not extinguished before 1982. Rights that were dormant, suspended, or regulated, but still in existence in 1982, together with those rights which were in full force and vigour in 1982, received the constitutional protection given by s.35.

[846] That constitutional protection means that an aboriginal right can no longer be extinguished in its entirety though, of course, it could be surrendered or otherwise dealt with by treaty. The reason why an aboriginal right can not be extinguished in its entirety is because such an extinguishment would not meet the minimum impairment test in ***Sparrow.***

[847] So in my opinion s.35 of the ***Constitution Act, 1982*** prevents the extinguishment of aboriginal rights. Legislation extinguishing aboriginal rights is now unconstitutional whether it is enacted by Parliament or by a Provincial Legislature. The regulation of aboriginal rights in accordance with the principles set out in ***Sparrow*** is a different question from the extinguishment question. It is not necessary for me to deal with the regulation question here.

3. Abandonment

[848] Whether aboriginal title or aboriginal rights, including rights of self-government, can be abandoned is a question which was not argued in the appeal. The trial judge had not found that there had been any abandonment.

[849] However, the trial judge dealt with the question at pp. 460-474 and I wish to make one point though, of course, I do not propose to reach any decision on an issue that was not argued.

[850] My point is that I do not think that there is a theoretical basis for the view that "a right which is not used can be treated as abandoned" after 1846.

[851] Before 1846 the title or right rested on aboriginal custom, tradition and practice. In that period, if the title entirely ceased to be asserted or the right ceased to be exercised then I think that after some time the title or right could be considered to have been abandoned.

[852] On the assertion of Sovereignty in 1846 the aboriginal title and right became a title or right recognized as such by the common law. In my opinion, the absorption of aboriginal title and rights into the common law under the Doctrine of Continuity has a close parallel with the absorption of local custom into the common law. Once absorbed into the common law, either as local custom or as aboriginal title or rights, the local custom or aboriginal custom can no more cease to be part of the common law by abandonment than any other part of the common law could cease to be part of the common law by abandonment. The only way the custom can cease to be part of the common law, once it is recognized, absorbed and protected is by statutory repeal, just as is the case for any other part of the common law. In this connection see ***Hammerton v. Honey, New Windsor Corporation v. Mellor,*** and ***Wyld v. Silver,*** [1963] Ch. 243 (Eng. C.A.) at pp. 255-256.

4. Summary on the Extinguishment of Aboriginal Rights in British Columbia

[853] I propose to summarize. For simplicity I will use the phrase "aboriginal rights" to encompass aboriginal title, aboriginal hunting, fishing, gathering and similar rights, and aboriginal rights of self-government and self-regulation.

[854] (a) Aboriginal rights can only be extinguished by clear and plain intention.

[855] (b) The clear and plain intention to extinguish aboriginal rights is the clear and plain intention of the Sovereign Power.

[856] (c) The clear and plain intention of the Sovereign Power to extinguish aboriginal rights must be legislatively expressed by Parliament or by a Provincial Legislature and not by administrative or executive action or by subordinate legislation though, if the Sovereign's clear and plain intention is formed and legislatively expressed by Parliament or in a Legislature, the actual extinguishment can be brought about by the legislation itself or by the administrative or executive action or by the subordinate legislation.

[857] (d) Extinguishment may be either express or implicit.

[858] (e) Implicit extinguishment can only occur if the implication is a necessary one and the result of the implication is to make the extinguishing intention clear and plain.

[859] (f) Implicit extinguishment may be brought about either by the legislation itself, in Parliament or in a Legislature (what I have called implied

extinguishment) or by administrative or executive action authorized by the legislation, in its clear and plain intention, to bring about an extinguishment by that action (what I have called extinguishment by adverse dominion).

[860] (g) In the period from Sovereignty in 1846 until British Columbia joined Confederation in 1871, there was no blanket extinguishment of aboriginal title or aboriginal rights by the Colonial Proclamations or Ordinances designed to open up land in British Columbia for Colonial settlement.

[861] (h) In the period from 1871 to the present there could be no extinguishment, express or implicit, of aboriginal rights of any kind brought about by or under Provincial legislation acting of its own force. Extinguishment reaches into the exclusive Federal nature of head 91(24) of the ***Constitution Act, 1867,*** "Indians, and lands reserved for the Indians", and the principle of interjurisdictional immunity prevents Provincial legislation from having any constitutional force in this exclusive Federal area.

[862] (i) In the period from 1951 to the present, Provincial legislation purporting to bring about extinguishment of aboriginal rights of any kind could not be given the constitutional force which it lacked in its own Provincial enactment by s.88 of the Federal ***Indian Act*** which incorporates some Provincial legislation as Federal legislation by reference. The reason is that the extinguishing force, if any, is conferred by the Federal enactment of s.88 and the enactment lacked any clear and plain intention, by necessary implication or otherwise, to extinguish any aboriginal right of any kind.

[863] (j) In the period since the enactment of the ***Constitution Act, 1982,*** section 35 of the ***Constitution Act, 1982*** has recognized, affirmed and guaranteed all aboriginal rights of any kind which had not been extinguished before 1982 and which therefore existed on that date. That recognition, affirmation and guarantee was of the rights in the full vigour of those rights and not merely in a form to which their exercise might by then have been restricted by regulation and control.

[864] (k) It follows that any aboriginal custom, tradition or practice which was an integral part of the distinctive culture of an aboriginal people in 1846 and so became at that time, by the Doctrine of Continuity, an aboriginal right which was a part of the common law and was recognized, affirmed and protected by the common law could only have been extinguished after that date by Colonial Proclamations or Ordinances of the Sovereign Power in British Columbia in the period from 1846 to 1871 or by legislation of the Sovereign Power in Parliament in the period from 1871 to 1982. Thereafter the aboriginal right became constitutionally protected and could not be extinguished.

[865] (l) The only issues about actual extinguishment as an accomplished fact rather than as an extinguishment principle which were argued in this case were issues about blanket extinguishment of aboriginal title and aboriginal hunting, fishing, gathering and similar rights and blanket extinguishment of

aboriginal self-government or self-regulation rights. I propose to deal with those issues in Part VII of these reasons.

PART V

CONSIDERING THE TRIAL JUDGMENT

1. The Claims Encompassed by the Pleadings and the Declarations Claimed

[866] The essence of the claim is contained in these paragraphs of the statement of claim:

> 56. The Gitksan Chiefs, their ancestors and/or predecessors since time immemorial have owned and exercised jurisdiction over the lands delineated by the external boundary on Exhibit 646-9A.
>
> 56.(A) The Wet'suwet'en Chiefs, their ancestors, and/or predecessors since time immemorial have owned and exercised jurisdiction over the lands delineated by the external boundary on Exhibit 646-9B. The lands delineated by the external boundary on Exhibits 646-9A and 646-9B together are hereinafter referred to as "the Territory".
>
> 57. Without restricting the generality of paragraphs 56 and 56.(A) since time immemorial the Plaintiffs, their ancestors and/or predecessors have:
>
> a) lived within the Territory;
>
> b) harvested, managed and conserved the resources within the Territory;
>
> c) governed themselves according to their laws;
>
> d) governed the Territory according to their laws and spiritual beliefs and practices;
>
> e) exercised their spiritual beliefs within the Territory;
>
> f) maintained their institutions and exercised their authority over the Territory through their institutions;
>
> g) protected and maintained the boundaries of the Territory;
>
> h) expressed their ownership of the Territory through their regalia, adaawk, kun'ga and songs;
>
> i) confirmed their ownership of the Territory through their crests and totem poles;
>
> j) asserted their ownership of the Territory by specific claim;
>
> k) confirmed their ownership of and jurisdiction over the Territory through the Feast System.

58. The Plaintiffs continue to own and exercise jurisdiction over the Territory to the present time.

59. The right to own and exercise jurisdiction over the Territory of the Gitksan Chiefs and the resources thereon and therein was at all material times a right enjoyed by the Gitksan Chiefs and the members of their Houses.

60. The right to own and exercise jurisdiction over the Territory of the Wet'suwet'en Chiefs and the resources thereon and therein was at all material times a right enjoyed by the Wet'suwet'en Chiefs and the members of their Houses.

61. The Plaintiffs and their ancestors and/or predecessors exercised jurisdiction over the Territory as against other aboriginal peoples.

62. The Plaintiffs continue to own and exercise jurisdiction over all lands within the Territory in accordance with Gitksan and Wet'suwet'en laws.

63. The Plaintiffs continue to own and exercise jurisdiction over the resources on, under and over all lands within the Territory in accordance with Gitksan and Wet'suwet'en laws.

[867] The corresponding terms of the prayer for relief are these:

1. A declaration that the Plaintiffs have a right to ownership of and jurisdiction over the Territory.

2. A declaration that the Plaintiffs' ownership of and jurisdiction over the Territory existed and continues to exist and has never been lawfully extinguished or abandoned.

3. A declaration that the Plaintiffs' rights of ownership and jurisdiction within the Territory include the right to use, harvest, manage, conserve and transfer the lands and natural resources, and make decisions in relation thereto.

4. A declaration that the Plaintiffs' rights to jurisdiction include the right to govern the Territory, themselves, and the members of the Houses represented by the Plaintiffs in accordance with Gitksan and Wet'suwet'en laws, administered through Gitksan and Wet'suwet'en political, legal and social institutions as they exist and develop.

5. A declaration that the Plaintiffs' rights to ownership of and jurisdiction over the Territory include the right to ratify conditionally or otherwise refuse to ratify land titles or grants issued by the Defendant Province after October 22, 1984, and licences, leases and permits issued by the Defendant Province at any time without the Plaintiffs' consent.

> 6. A declaration that the aboriginal rights of the Plaintiffs including ownership of and jurisdiction over the Territory are recognized and affirmed by Section 35 of the ***Constitution Act, 1982.***

[868] The trial judge decided that in addition to the pleadings and claims in relation to "ownership" and "jurisdiction", the pleadings and claims should be taken to encompass a claim for "aboriginal rights". The relevant passage in the trial judge's reasons appears at pp. 157-158:

> In the early stages of the trial plaintiffs' counsel indicated that this case, unlike ***Calder,*** was "all or nothing", that is, the claim was for ownership and jurisdiction, and the plaintiffs were not seeking any lesser relief. This position was wisely moderated later in the trial when Mr. Grant made it clear that the plaintiffs were also seeking a declaration of their aboriginal rights. He said that while ownership and jurisdiction were the plaintiffs' primary claims, they wished the court to grant them whatever other rights they may be entitled to.
>
> This statement was made on 12th February 1988 during the argument leading to reasons for judgment on this and other questions dated 18th February 1988, [1988] B.C.J. No. 273, in which I said:
>
> In my view it is highly doubtful if the plaintiffs have sufficiently pleaded ***Calder*** type or other alternative claims to aboriginal rights additional to the claim to ownership and jurisdiction. Such claims are pleaded, if at all, obliquely such as in paras. 57 and 75 and by reference to aboriginal rights in paras. 74, 74(a) and in prayers to relief 6 and 9.
>
> It is not for me to suggest or require amendments and it may be that the course of the trial, including the clear statement made by Mr. Grant on 12th February 1988, will be sufficient to permit the plaintiffs to assert alternative claims additional to ownership and jurisdiction. I leave that question for the time being to counsel.
>
> Since that time we have heard a great deal of evidence and argument, and although there have been eight amended statements of claim, no amendment in this connection has been sought. Because of the course of the trial, and notwithstanding the consistent and firmly stated position of the province to the contrary, I find that a claim for aboriginal rights other than ownership and jurisdiction is also open to the plaintiffs in this action. (my emphasis)

[869] (I note that the claim in ***Calder*** was for a declaration "that the aboriginal title, otherwise known as the Indian Title, of the plaintiffs ... has never been lawfully extinguished.)

[870] This trial occupied 374 hearing days between 11 May, 1987 and 30 June, 1990. The evidence covered all the customs, traditions and practices of the Gitksan and Wet'suwet'en peoples which could be thought to constitute integral parts of their distinctive cultures. Arguments were made on behalf of the Province to the trial

judge that the claim should be confined strictly to "ownership" and "jurisdiction". Those arguments were not accepted by the trial judge. He understood that the plaintiffs were claiming "whatever other rights they were entitled to". For convenience of reference he called those rights "aboriginal rights other than ownership and jurisdiction". Accordingly, in my opinion, no matter how the rights are classified, all the aboriginal rights of the plaintiffs were treated by the trial judge as being encompassed by the claim.

[871] In this appeal no issue was raised on behalf of the Province to the effect that the claims of the plaintiffs with respect to their aboriginal rights were limited to only some of their rights. Counsel for the Province directed no argument to that question. The *amici curiae* were not asked by the Court to make any argument on that question and did not do so. The Federal Crown and the Intervenors were not in a position where it would have been proper for them to raise issues which were not raised by the true parties to the appeal. The plaintiffs did not direct any argument to that issue. In those circumstances I am satisfied that it would be improper 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".

[872] In short, the claim is for declarations of the existing aboriginal rights of the plaintiffs, without limitation, in terms suitable for declarations, that is, with a degree of generality appropriate for statements of the existence of general rights rather than the degree of precision appropriate for judgments relating to compensation for specific wrongs. The power to make such declaratory orders is contained in Rule 5(22) of the ***Supreme Court Rules.*** And, of course, it is self-evident that if the prayer for relief asks for a declaration of rights in wider terms than the Court considers justified by the evidence, then the Court can make a declaration of rights in narrower terms than those requested. For examples, if examples were necessary, see ***Attorney-General v. Merthyr Tydfil Union,*** [1900] 1 Ch.516 (Eng.C.A.), particularly at pp. 550-551, and ***Regina v. Bales; Ex parte Meaford General Hospital*** (1970), 17 D.L.R. (3d) 641 (Ont.H.C.).

[873] Indeed a court may grant a declaration, even if no declaration is requested in the statement of claim. If a court has that power, then clearly a court can grant a declaration in narrower terms than those requested. See ***Hulton v. Hulton,*** [1916] 2 K.B. 642, at pp. 656-657; ***Loudon v. Ryder (No.2),*** [1953] 1 Ch. 423, at p.429; and ***Harrison-Broadley and Others v. Smith,*** [1964] 1 All E.R. 867, at p.873 (Eng.C.A.).

[874] Finally, in relation to the Court's powers and obligations to grant remedies in respect of the claims properly brought forward by the plaintiffs, I refer to s.10 of the ***Law and Equity Act,*** which is in these terms:

> 10. The court, in the exercise of its jurisdiction in any cause or matter before it, shall grant, either absolutely or on reasonable conditions that to it seem just, all remedies any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far

> as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of the matters avoided.

[875] In summary, and in specific terms in relation to this litigation, when a claim is made in a law suit based on a specified right and seeking specified declaratory relief, the court has power to determine that a right which is less than the right which is claimed, but which is entirely encompassed within the right which is claimed, has been established, and to make a declaration of that lesser right in that law suit. In doing so a court is not restructuring the law suit, nor is it adjudicating on a claim which was not pleaded and on which evidence may not have been led. So when ownership of specific land is claimed in this case it is, in my opinion, the correct course and the only correct course to consider that claim as encompassing the wholly included claim to a right to exclusive occupation, possession, use and enjoyment of that land or some lesser area of included land. And when jurisdiction over a territory is claimed in this case it is again, in my opinion, the correct course and the only correct course to consider that claim as encompassing the wholly included claim to a right to self-government and self-regulation, short of sovereignty, and short of law-making power over that territory.

[876] Having concluded that the claim must be treated as being for declarations of whatever aboriginal rights the plaintiffs may be entitled to, it seems to me to be convenient to treat the claims in three parts: First, a claim for a declaration in relation to "ownership", which I propose to regard as encompassing a claim for aboriginal title which, in turn, is a claim for an exclusive or a shared exclusive right to the possession, occupation, use and enjoyment of an area of land; Second, a declaration in relation to "jurisdiction" which I propose to regard as encompassing a claim for rights of self-government and self-regulation short of complete Sovereignty (the ultimate Sovereignty of the Crown over the whole of British Columbia having been conceded); and, Third, a declaration in relation to "other aboriginal rights" which I propose to regard as encompassing hunting, fishing, gathering and similar rights which are separated from aboriginal title because they do not rest on exclusive or shared exclusive rights to possession, occupation, use and enjoyment of land, but rest instead on customs, traditions and practices with respect to areas of land where those customs, traditions and practices were, at the time of Sovereignty, an integral part of the distinctive culture of the Gitksan or the Wet'suwet'en peoples. (Such an "other aboriginal right" may arise either because there was never an exclusive right to use the area and only a custom of using the area, or, alternatively, because aboriginal title as an exclusive right has been extinguished, perhaps by adverse dominion, but the hunting, fishing, gathering, and similar rights still remain because they have not been extinguished by necessary implication and clear and plain intention.)

2. Examining the Findings of the Trial Judge

[877] Many of the findings of the trial judge represent conclusions of mixed fact and law. For example, at p.384, the trial judge said this about Gitksan and Wet'suwet'en law (self-government) and title (aboriginal title):

> 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. (my emphasis)

[878] The trial judge said that in no sense, except a social sense, could it be said that Gitksan or Wet'suwet'en law or title followed the Gitksan and Wet'suwet'en people to the far reaches of the territory. If the Gitksan and Wet'suwet'en law and custom followed the people in a social sense to the far reaches of the territory, I would have thought that would be sufficient. After all, customary law comes from what people do socially together. If the people were self-governing and self-regulating in a social sense, surely that would be enough to entitle them to an aboriginal right of self-government and self-regulation to the extent that they governed themselves and regulated themselves at the time of Sovereignty and before in that social sense. In excluding self-government and self-regulation in a social sense from consideration, in my opinion, the trial judge adopted an incorrect legal test for the existence of rights of self-government and self-regulation.

[879] Similarly, to find that aboriginal title, and aboriginal rights of self-government could not exist at any location away from the villages, because no law known to the trial judge would have required another people, such as the Nishga, to depart, if they had settled in the territory, embodies in my opinion a misconception about the nature of the self-regulating social organization that must exist in an aboriginal people to entitle them to recognition of their rights of self-government and self-regulation.

[880] I have given these two examples from two consecutive sentences in the trial judgement. But there are many such instances throughout the trial judgment which, in my opinion, indicate incorrect conceptions of the legal tests to be applied to the facts in order to find the existence of aboriginal rights. I propose to deal with a number of instances in the next part of these reasons, that is Part VI, under the Divisions of "ownership", "jurisdiction" and "aboriginal rights". In each case I consider that the trial judge applied incorrect legal tests in reaching his findings, and for that reason the findings cannot stand.

[881] Be that as it may, the Court invited supplementary submissions on whether findings of historical fact should be treated in any respect differently than other findings of fact. In response to that invitation, but without reference to any particular finding in the trial judgment, it was argued on behalf of the Province that those questions of fact are subject to the same strictures which govern a court of appeal on any other consideration of questions of fact. We were referred to these often cited decisions of the Supreme Court of Canada: ***Schreiber Bros. Ltd. v. Currie Products Ltd.,*** [1980] 2 S.C.R. 78; ***Beaudoin-Daigneault v. Richard,*** [1984] 1 S.C.R. 2; ***Metivier v. Cadorette,*** [1977] 1 S.C.R. 371; ***Stein v. the Ship "Kathy K",*** [1976] 2 S.C.R. 802; ***Harper v. The Queen,*** [1982] 1 S.C.R. 2; ***Goodman Estate v.***

Geffen, [1991] 2 S.C.R. 353; and ***Bank of Montreal v. Bail Ltee,*** [1992] 2 S.C.R. 554.

[882] The thrust of those cases is straightforward. The trial judge saw and heard the witnesses. A Court of Appeal should not substitute its view for the view of the trial judge on the conclusions the trial judge reached that were influenced by a weighing of the evidence in the light of the way it was given and by whom. But, of course, if the Court of Appeal considers that quite clearly something went wrong, then the Court of Appeal is not bound to stand aside and permit a miscarriage of justice. However, it should never attempt to do what only the trial judge can do and that is to resolve conflicts in the evidence on the basis of an assessment of the witnesses.

[883] I have stated what I regard as the thrust of those cases, without refinement, because I do not think that any refinement is needed in the present case. That is particularly so because, in my opinion, the findings in dispute were not primary findings of pure fact but secondary findings of mixed fact and law on which the legal aspect was misapplied, leaving a flawed secondary finding.

[884] However, I would like to make three observations about the findings of the trial judge in a case such as this.

[885] My first observation is that if a finding of fact is necessary to the decision in the case, that is, if it is a finding on which the decision actually turns, then it should be given more deference than if it is not necessary to the decision but merely made in the course of the decision and made only as part of the narrative or for some other incidental reason. There is a middle ground in relation to those facts which are not necessary to the decision but which were treated as potentially essential to a particular decision at the trial and which might have become necessary to a decision at the trial and may still become necessary to a decision in the Court of Appeal. But if the trial judge is making findings about those kind of facts after a conclusion that they are not necessary to the decision has already been reached, then the lack of adverse consequences from any incorrect finding may affect the deference which should be given to those findings of fact. I do not think that trial judges can bring the same intensity of concern or devotion to impartiality to findings of fact that are not necessary to their decision as they can bring to findings of fact that are.

[886] My second observation is that findings of historical fact based on historical or anthropological evidence given by historians and anthropologists should, in my opinion, be given only the kind of weight that other historians or anthropologists might give to them. There are some historical facts on which all historians agree. But there are many others on which historians disagree about the historical facts or about the interpretation of the events which brought about or followed from generally accepted historical facts. It is a strange situation indeed if a trial judge, in a case such as this, can make a finding on a question of historical fact on the basis of the evidence of one or two historians or anthropologists, particularly if he does not believe one or more of them, with the result that the historical facts would become frozen for ever as the basis for any legal decision about entitlement to rights. Historians and anthropologists and other social scientists do not always

agree with each other. Circumstances change and new raw material is discovered and interpreted. The tide of historical and anthropological scholarship could, in a few years, leave a trial judge's findings of fact stranded as forever wrong.

[887] I can think of no way around the problems in relation to historical and anthropological evidence except to try to avoid those problems by settling the existence and scope of rights by a process of negotiation, including the use of resources of mediation and commissions of inquiry.

[888] My third observation rests on this passage from the reasons of Chief Justice Dickson, for the Supreme Court of Canada, in ***Simon v. The Queen,*** [1985] 2 S.C.R. 387 at pp.407-408:

> This evidence alone, in my view, is sufficient to prove the appellant's connection to the tribe originally covered by the Treaty. True, this evidence is not conclusive proof that the appellant is a direct descendant of the Micmac Indians covered by the Treaty of 1752. It must, however, be sufficient, for otherwise no Micmac Indian would be able to establish descendancy. The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this Treaty.

[889] It is important to examine evidence given orally, where the memory of the community is an oral memory, in the context of the fact that other forms of evidence are unlikely to be available. The oral evidence should be weighed, like all evidence, against the weight of countervailing evidence and not against an absolute standard, so long as it is enough to support an air of reality.

3. The Position of the Parties on the Findings of Fact

[890] The true parties to this appeal are the Gitksan and Wet'suwet'en plaintiffs and the Attorney General of British Columbia on behalf of the Crown in Right of British Columbia as defendant. There was no issue in the appeal that related to any order that might be made against or in favour of the Crown in Right of Canada. So in that sense the Federal Crown had an interest in the issues but only in the same way as any other Intervenor.

[891] Following the election of a New Democratic Party government in British Columbia in 1991, the Province reconsidered the legal stance it was taking in this case. It decided to make a number of changes in its position. It changed counsel. The new counsel obtained leave to file an amended factum, and as a term of that leave, agreed to file a "Position Paper" setting out its new position. The Position Paper was in these terms:

POSITION PAPER

[892] The Province of British Columbia will revise its factum to reflect its position with respect to the key issues on Appeal as follows:

1. The Appellants are not entitled to succeed in their claim for ownership of the lands in question.

2. The Royal Proclamation of 1763 does not apply to the areas claimed by the Appellants.

3. The Appellants enjoy certain rights to self-government but subject to the laws of Canada and the laws of general application of the Province of British Columbia.

4. The aboriginal rights of the Appellants which do exist may be described as an interest in respect of land *sui generis*.

5. A blanket extinguishment of aboriginal rights throughout the Province did not occur at any time.

6. The Court will be asked to declare that the precise location, scope, content and consequences of these aboriginal rights including whether there has been any extinguishment or diminution of aboriginal rights throughout the territory of the claim, be referred to the parties to form the basis of a negotiated solution. The Court should retain jurisdiction over those issues so that any party may bring the matter to the Court in the event that negotiations should fail.

7. The Province will submit in the strongest terms that a remedy declaring the existence of aboriginal rights, but requiring the parties to attempt to negotiate the content and consequence of those rights, accords with the historical approach to the resolution of aboriginal claims, the aboriginal rights provision in the Constitution, the interests those rights were meant to protect and is also in accordance with sound legal principles.

8. If, and only if, the Court should reject the Province's submission set forth above, the Province will be required to argue its alternative position which is similar to the position set forth in the factum of the Attorney General for Canada in paragraphs 327 to 380 with certain modifications and possible amendments, additions and deletions. (my emphasis)

[893] It is important to note that in paragraph 4 of the Position Paper, the aboriginal rights of the plaintiffs are described as "an interest in respect of land *sui generis*". So when the Province talks of aboriginal rights it is talking about an interest in land. It is also important to note that the Province did not want this Court to decide "the precise location, scope, content and consequences" of the plaintiffs' aboriginal rights.

[894] Two days before the hearing of the appeal was due to begin, the Province and the plaintiffs, the true parties to this appeal, filed with the Court the terms of an agreement that they had reached on which issues they both wanted to have considered, and which issues they both wanted to have deferred. I have set out the text of that agreement in Part II, division 5 of these reasons, which is headed "Towards A Negotiated Settlement". For convenience, I will repeat the part of the agreement which relates to the issues which the parties wished to have deferred, pending negotiations:

> (a) Whether the precise boundaries of the territory subject to the aboriginal rights of the Appellants, are those in Ex.646-9A and 9B as argued in Tab 6 at Appendix G of the Appellants' Factum;
>
> (b) The whole question of remedies including the precise location, scope, content and consequences of the Appellants' rights;
>
> (c) Damages;
>
> (d) Co-existence of the Appellants and the Province of British Columbia and Canada;
>
> (e) Any and all issues regarding the concept of extinguishment other than the issue of blanket extinguishment which will be argued in the Court of Appeal. (my emphasis)

[895] Though the Court did not order that those issues be deferred, or that they not be argued, the parties did not argue any of them except some general extinguishment issues, such as the principles involved in extinguishment by adverse dominion. Particular extinguishment issues such as the precise extinguishment of a precise right in a precise area by adverse dominion, were not argued.

[896] The factum of the Province contains these submissions:

> 72. The Attorney General therefore concedes that the Gitksan and Wet'suwet'en people, at the time of British sovereignty, enjoyed Aboriginal Rights in relation to at least some of the territory claimed by the Appellants.
>
> 73. At the time of contact and the assertion of crown sovereignty, the nature and extent of occupation and use of the claimed territory by the Appellants, and therefore the nature and scope of the Appellants' Aboriginal Rights, no doubt varied from place to place and from community to community. In some parts of the territory, the Appellants may be able to claim a relatively extensive set of rights with respect to a particular area. In other parts of the territory, the Appellants may only be able to assert a highly use-specific, location specific, non-exclusive, temporarily-sporadic right to engage in a particular activity.
>
> * * *
>
> 77. As the Respondent Province now admits that the Appellants have unspecified non-exclusive Aboriginal Rights in the claimed territory yet to be located, it is submitted that the distinction between

> rights in village sites and cultivated fields and rights in other lands is no longer in issue.
>
> 78. The location of the boundaries within which Aboriginal Rights are exercised is best decided on a site by site basis, a time-consuming process which is better left to negotiation between the aboriginal people and the Provincial Government.
>
> 79. This is particularly appropriate because the external boundary established by the trial Judge was arbitrary and artificial.
>
> * * *
>
> 81. Beyond declaring in general form that the ancestors of the Appellants had Aboriginal Rights, at the time of contact and the assertion of British sovereignty, within the territory claimed, this Court should not take on the task of attempting to delineate the precise nature and scope of the Appellants' Aboriginal Rights. Determinations of this sort must address such factors as the type of use, the exclusivity of use, and the intensity of use that an Aboriginal community made of a particular parcel of land or resource when sovereignty was asserted by the Crown. Questions of this kind involve a complex mix of policy factors and competing interests of other interested parties as well as political determinations of the public interest of the Province. Such determinations ought to be initially left to the parties themselves through a form of supervised negotiation. (my emphasis)

[897] In my opinion, there can be no doubt that neither the Province nor any of the intervenors argued that, because the trial judge had made a finding that the plaintiffs had not established the boundaries of the individual House territories or the precise perimeter of the entire territory claimed, or because the trial judge had made a finding that the plaintiffs had not established their occupation of parts of the territory, those findings could not be interfered with and, accordingly, the appeal must be dismissed.

[898] Indeed, in my opinion, not only did the Province not argue that those findings must stand, it argued that they ought to be open for negotiation. It is true that the Province maintained its right to come back to Court if negotiations failed and to argue the points which it had wanted to have reserved for negotiation. But the Province wished to negotiate the precise boundaries of the territory and it wished to negotiate the precise location, scope, content and consequences of the plaintiffs' rights. So, if those negotiations failed, the Province wished to be able to come back to the Court to argue those questions, but surely not to argue the point that it could have argued at the outset, namely, that this Court was bound by the findings of the trial judge on the very points that the Province wished to negotiate.

[899] If the Province wished to maintain the point that this Court and the parties were all bound by the findings of the trial judge, then in my opinion it was required to make that argument at the outset in the first hearing before this Court, or not at all. It

could not keep that argument in its back pocket and then wave it around during the negotiation process on the basis that if it did not get its way in the negotiations, it would come back to Court and argue at that stage that the findings of the trial judge, to the effect that the claim must fail because the boundaries had not been established, and that the claim must fail because occupation in the farther reaches of the territory had not been established, must themselves stand and could not be interfered with by this Court.

[900] It follows, in my opinion, that the findings of the trial judge on all matters that were argued must be treated with the usual deference and in accordance with the settled principles with respect to the findings of trial judges, but that the findings of the trial judge on those matters that the true parties to these proceedings, namely the plaintiffs and the Province, wished to have deferred for negotiation, must be regarded as freed from the usual strictures in relation to findings, because the Province, which is the party with an interest in upholding the findings, has declined to argue them, and because the only appropriate time for doing so has occurred and gone by. The arguments that the usual strictures apply to those findings must, in my opinion, be regarded as having been waived and abandoned.

[901] In short, it is my opinion that when the Province declined to rely on the findings of the trial judge on matters that it wished to negotiate, it abandoned its right to do so, and since such a point would be a fundamental issue in the appeal and not merely an argument on an issue, it would be improper for this Court to rely on those findings when none of the parties wishes us to do so. Of course, that does not make it any easier for this Court to make findings of its own. But if the findings of fact are not being relied on by the parties, and indeed if the argument that they should be relied on has been abandoned, then, if this Court cannot make findings of fact, the issues arising with respect to findings of fact must be referred back to the Supreme Court of British Columbia for a new trial.

[902] It is my opinion that to base a decision in this case on findings that have not been relied on by the Province, and which have been effectively abandoned by the Province, is to prevent the Province from changing its legal position in this appeal following the election of a new government and the adoption by that government of new policies, and to insist that this appeal must be decided, not on the new Provincial position, but in accordance with the legal position adopted by counsel for the former government on the instructions of the former government.

[903] I propose to restate this point in summary. The trial judge decided that the precise external boundaries of the claimed territory had not been established to the standard of a balance of probabilities; and he decided that exclusive occupancy of any part of the claimed territory beyond village sites had not been established to the standard of a balance of probabilities. So it was open to the Crown to argue on this appeal that those findings were findings of fact and that on the customary principles with respect to the powers of a court of appeal in relation to findings of fact this Court could not interfere with those findings and was bound by them. But the Crown did not make that argument. Instead it conceded that the plaintiffs had existing aboriginal rights to an unspecified but significant part of the claimed territory, and the Crown did not argue that those rights could not be, in some areas at least, rights of

exclusive occupancy. The Crown invited the Court to confirm the existence of aboriginal rights of unspecified content over unspecified areas and to permit the parties to negotiate the precise content and the precise areas. It is, in my opinion, entirely inconsistent with such a course and with such a negotiation for the Crown to maintain the position, either as a reserve position or at all, that if the negotiations do not go the way the Crown wishes them to go then the Crown will come back to Court and rely on the binding quality of the trial judge's two significant findings of fact in relation to the content and geographical scope of aboriginal rights as I have described them. So, in my opinion, by adopting the position that it wished to negotiate the content and territorial scope of aboriginal rights, the Crown must be taken to have waived the argument that the findings of the trial judge must stand and that any aboriginal rights held by the Gitksan and Wet'suwet'en peoples must be confined to non-exclusive sustenance rights over the area covered by Map 5. In short, reliance on the findings of fact of the trial judge is entirely inconsistent with negotiation. The decision to negotiate and the argument that the court should not make any decisions inconsistent with the full negotiation of the content and scope of aboriginal rights must therefore constitute a waiver of the right to rely on the findings of fact. Of course, the Crown's position is not an acknowledgement that the findings of fact are wrong. But it is a waiver of the right to insist that the findings of fact must for ever and for all purposes of this claim be taken to be right. I add that, of course, this point has nothing to do with the pleadings. The waiver arises entirely in relation to the way the arguments in the appeal were presented.

[904] I make this point in order to indicate my precise disagreement with those who would decide the outcome of this appeal by acceptance of the findings of the trial judge, on the ground that this Court is bound by legal principle to do so, and on the ground that the trial judge had the advantage of hearing the witnesses, which we do not. But, for myself, as I will indicate in more detail in Part VI of these reasons, the findings of fact with respect to boundaries and with respect to the scope and content of aboriginal rights, including both rights in land and rights of self-government, cannot stand even in accordance with the usual principles governing the consideration of findings of fact, because, in my opinion, they are flawed by errors in relation to the applicable law.

PART VI

THE CLAIMS IN THESE PROCEEDINGS: THE TRIAL JUDGMENT

1. The Claim to "Ownership": Aboriginal Title

[905] The trial judge considered the claims under three topic headings which he called: "Ownership", "Jurisdiction" and "Aboriginal Rights". He said that he was dealing with whatever rights the Indians might be entitled to. (See pp. 157-158.) The trial judge did not deal with a claim to aboriginal title under the heading "Aboriginal Rights" and, in my opinion, the trial judge's treatment of "Ownership" permitted the proper claim to "Aboriginal Title" to become confused by concerns which relate only to the common law concept of ownership.

[906] I propose to treat the claim which the plaintiffs described as "Ownership" as encompassing a claim to aboriginal title. It makes no difference in the end where I deal with it as long as I do so. I do not think that the trial judge ever did deal with it as such.

[907] In my opinion, the trial judge made a number of errors in law in the course of his treatment of "Ownership". Those errors in law led, in my opinion, to the trial judge's conclusion that aboriginal title never did exist outside the village sites of the Gitksan and Wet'suwet'en peoples, or that, if it did exist, that it had been extinguished. In my opinion the errors that the trial judge made are errors in law though they may also have led to incorrect findings of mixed fact and law. I will try to deal with each one separately.

[908] (a) The plaintiffs called their claim to an interest in land a claim to "ownership". Ownership is not a precise term in the law, and, even if it were, we know from ***Amodu Tijani, Guerin*** and other cases that it is a mistake to try to understand aboriginal title in terms of common law concepts. In my opinion the plaintiffs should have treated their claim as a claim to aboriginal title throughout.

[909] In ***Calder,*** the claim, as quoted by Mr. Justice Hall at p.345, was for a declaration "that the aboriginal title, otherwise known as the Indian title, of the Plaintiffs .... has never been lawfully extinguished." (my emphasis).

[910] In ***Guerin,*** Mr. Justice Dickson said at p.376:

> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title.
>
> * * *
>
> In ***Calder v. Attorney General of British Columbia,*** [1973] S.C.R. 313, this court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands. (my emphasis)

[911] There are many other references in ***Guerin*** to aboriginal title.

[912] In ***Mabo v. Queensland,*** Mr. Justice Brennan, at p.41 defined "native title" in this way:

> The preferable rule, supported by the authorities cited, is that a mere change in Sovereignty does not extinguish native title to land. (The term "native title" conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.)

[913] The formal order in ***Mabo v. Queensland,*** in its second part, at p.170 reads like this:

> (2) Putting to one side the Islands of Dauer and Waier and the parcel of land leased to the Trustees of the Australian Board of Missions and those parcels of land (if any) which have validly been appropriated for use for administrative purposes the use of which is inconsistent with the continued enjoyment of the rights and privileges of the Meriam people under native title, declare that the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands;. . . (my emphasis)

[914] I consider that this passage correctly treats "native title", or as we now usually call it in Canada "aboriginal title", as an entitlement "as against the whole world to possession, occupation, use and enjoyment" of the lands to which the aboriginal title relates.

[915] I consider that the plaintiffs' invitation to the trial judge to treat this claim under the heading of "ownership" had the effect of leading the trial judge to deal with the claim to an interest in land on an incorrect basis and by incorrect legal standards.

[916] (b) I think that the trial judge erred in treating the claim to aboriginal title as a claim to a proprietary interest in land and then, on the basis of authorities which state that the aboriginal interest is not proprietary, dismissing the claim. As I have said, in my opinion the question of whether aboriginal title is proprietary or non-proprietary is fruitless and should not give rise to any legal consequences. Aboriginal title is *sui generis*. Again, that error may have been induced by the plaintiffs' terminology.

[917] At pp.368-369, the trial judge said this:

> 2. ABORIGINAL JURISDICTION AND OWNERSHIP
>
> With respect, it is difficult to find much legal merit in these parts of the plaintiffs' claims because success seems to be foreclosed by powerful pronouncements of high authority. As to aboriginal Sovereignty, there is a clear statement by Dickson C.J.C. and La Forest J., speaking for a unanimous Supreme Court of Canada, in ***Sparrow,*** at p.1103, that:

> . . . there was from the outset never any doubt that Sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown ...[emphasis added]

* * *

As to ownership, there is binding legal authority, particularly the ***St. Catharines Milling*** case, that seems to be directly against the plaintiffs on this issue. In that case the Privy Council at pp. 54-55 made it clear that even under the Royal Proclamation:

> . . . the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories;" and it is declared to be the will and pleasure of the sovereign that, "for the present," they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion.

[918] That passage seems to me to incorporate these errors:

(i) it treats the question of whether aboriginal title is proprietary or personal as a significant question which determines whether it exists or not;

(ii) it treats the ***St. Catherine's Milling*** case as authority for the proposition that aboriginal title is personal and not proprietary, though the ***St. Catherine's Milling*** case related only to the ***Royal Proclamation of 1763*** and not at all to aboriginal rights, separate from the Proclamation; and the ***St. Catherine's Milling*** case decides the question in that case entirely by interpretation of the wording of the Proclamation itself;

(iii) it does not treat the aboriginal title as *sui generis*.

[919] (c) I think that the trial judge erred in adding a fifth test to the four tests enunciated by Mr. Justice Mahoney in ***Baker Lake.*** In summarizing the authorities, the trial judge started his summary in this way at p.365:

> 1. Aboriginal interests arise out of occupation or use of specific land for aboriginal purposes for an indefinite or long, long time before the assertion of Sovereignty.

[920] The trial judge cited no authority for the proposition that aboriginal rights do not arise unless there has been aboriginal occupation and use "for an indefinite or long, long time before the assertion of Sovereignty". I do not think that this test is correct in law. It moves the focus away from the correct test which is: Was there an aboriginal custom, tradition or practice in effect and forming an integral part of the distinctive culture of the aboriginal society and being protected and recognized as part of the social organization of that society at the time (usually the assertion of Sovereignty) when that aboriginal custom, tradition or practice became absorbed

into the common law and received additional recognition and protection as part of the common law?

[921] Of course, most customs, traditions and practices would have been in effect for a considerable time. But as I indicated earlier the indefinite long, long user test cannot accord with the inclusion of Métis as aboriginal peoples in s.35 of the ***Constitution Act, 1982.***

[922] In my opinion, the incorrect conception and application of this test was the reason why the trial judge rejected the evidence in relation to trapping customs, traditions and practices. While the evidence was plentiful that those customs, traditions and practices were in effect for at least forty years before Sovereignty, the evidence did not go back before contact except, of course, in the evidence of the Indians themselves, and that was not given sufficient weight to establish the extent of the customs, traditions and practices in the far reaches of the territory.

[923] (d) I think that the trial judge erred in treating evidence about Indian commercial interaction with the first European arrivals, namely Hudson Bay traders, as not being evidence of aboriginal customs, traditions or practices.

[924] At p.371, the trial judge said this:

> In my view, commercial trapping was not an aboriginal practice prior to contact with European influences and it did not become an aboriginal practice after that time, even if lands habitually used for aboriginal purposes were also used for commercial trapping after contact. No question of abandonment of aboriginal rights would arise so long as those lands were also used for sustenance, as I am sure they were, although with modern techniques. For these reasons, commercial trapping is a neutral fact in the definition of aboriginal lands habitually used by the plaintiffs' ancestors, that is, lands near and between villages and great rivers.
>
> With regard to new lands used after contact for commercial trapping, particularly in the far north and south extremities of the territory, it is my view that such would not be an aboriginal use and those new lands would not be aboriginal lands even if they were also used for sustenance after contact. This is because, firstly, commercial trapping is not an aboriginal practice, and secondly, because the use of these new lands, even partly for aboriginal purposes under European influences after contact, does not constitute the kind of indefinite long-time use which is required for aboriginal rights. In such matters a user period of 20-50 years or so is of no importance.

[925] In my opinion, it is a misclassification of the aboriginal custom to classify it as commercial trapping. The aboriginal custom with which we are concerned in relation to aboriginal title is the custom of possession, occupation, use and enjoyment of land. The purpose of the use and enjoyment is not relevant to whether there is a right to the use and enjoyment. In my opinion, to classify the aboriginal custom,

tradition or practice as a custom of commercial trapping is to adopt the settlers' point of view to the classification of aboriginal title rather than the aboriginals' point of view.

[926] (e) I think that the trial judge erred in a related way in treating a particular form of use and enjoyment, at a particular period, in a particular area, namely trapping for trade with the Hudson's Bay traders, as being a specific use and enjoyment which delineated the totality of aboriginal use and enjoyment in that area. That point of view is merely an example of the frozen rights theory described in ***Sparrow.*** If the Indians used land in 1820 in accordance with their aboriginal title but the use was a new one in 1820, then the important point is that at that time, namely 1820, the aboriginal right represented by the aboriginal title was taking on an 1820 contemporary form. We now know from ***Sparrow*** that aboriginal rights are not to be regarded as frozen rights. I think that means that they should not be regarded as frozen at any time. The rights were evolving very rapidly after contact with European influences. But aboriginal rights have always been evolving. For example, the Gitksan and Wet'suwet'en peoples grew alike in time despite their disparate origins. It is important to look through the contemporary manifestation of the right at any particular time to the true substance of the right. In this case, the true substance of the right was the occupation, possession, use and enjoyment of land, not commercial trapping, which was only a particular mode of exercising the true right.

[927] (f) I think that the trial judge also erred in a related way with reference to trapping for trade with the Hudson's Bay Company in treating the exercise of the rights to trap as being the exercise of rights other than aboriginal rights. The Hudson Bay traders were not given rights to the animals in the Canadian wilderness. They were not given rights to trap those animals. They were not given the power to confer rights on the Indians to trap those animals. Under their charters and by virtue of licences issued under ***An Act for Regulating the Fur Trade*** (1821) the Hudson's Bay Company and the Northwest Company were given only monopoly rights to trade with the Indians. Where then did the rights of the Gitksan and Wet'suwet'en to trap beaver in the further reaches of the territory come from when those rights were exercised by them in 1820 or in 1846? In my opinion there was no other source for those rights than the aboriginal title and aboriginal rights of the plaintiffs' ancestors.

[928] (g) I think that the trial judge erred in law and in fact when he rejected and did not explain his rejection of the evidence of Dr. Ray, a historical geographer, whose field of specialization was the early Hudson Bay Company contacts with the Indian inhabitants. Dr. Ray discussed the diaries of William Brown. Mr. Brown was the first trader in the claimed territory, in about 1820. The error to which I am referring has been dealt with by Mr. Justice Hutcheon in his reasons in this appeal under the heading "C2 <u>The territory was not limited to their villages and adjacent lands</u>." Mr. Justice Hutcheon

sets out important extracts from the evidence of Dr. Ray and from the journals of William Brown. I adopt the reasons and conclusions of Mr. Justice Hutcheon in that part of his reasons. In my opinion this error is within the principle which permits a court to interfere with the conclusions of fact of the trial judge. It was important and uncontradicted evidence which was ignored without explanation.

[929] (h) I think that the trial judge erred in the way in which he rejected evidence about commercial trapping. The trial judge said that evidence of trapping beaver to trade to the Hudson's Bay traders should be ignored because use of a territory for such a purpose was not an aboriginal use and such a use was brought into being by the Hudson's Bay traders and not by the Indians. However, there is powerful evidence from William Brown's journals of 1826 that the land occupied, possessed, used and enjoyed by a particular chief, namely Gwoimt, was said by that chief to contain no beaver at all. Evidence that on Gwoimt's land there were no beaver cannot be evidence about a use and enjoyment of land having been brought into being by commercial trapping. Yet it is powerful evidence that lands in the far reaches of the territory belonged to Gwoimt. The passage from William Brown's diary in 1826 which says that Gwoimt had no beaver on his lands has been set out by Mr. Justice Hutcheon but I will also reproduce it:

> 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 -- Needchip and Sojick on the contrary said that there were a great many small Lakes and Rivers in the Lands belonging to them -- where Beaver were abundant, but that they did not know how to work them -- That there are Beaver in their Country seems very probable, it being higher up the River adjoining the Lands of the Siccanies and Babine, where the Mountains are not near so high nor rocky - And all the Rivulets and Vallies which appear from the Main River, are in general wooded with small Poplar -- (my emphasis)

[930] Gwoimt can scarcely be thought to have moved into an outlying area of the territory to take beaver he knew were not there. And that evidence was not brought into being by commercial trapping. It should have been given significant weight by the trial judge but instead it was rejected as being evidence about practices brought into existence by the commercial fur trade.

[931] (i) I think that the trial judge erred in considering that the customs, traditions and practices which demonstrated occupation, possession, use and enjoyment of land and so determined aboriginal title to the land, did not demonstrate the existence of aboriginal title, because the occupation or use was occupation or use only in a social sense. The relevant passage from the trial judge's reasons is in these terms at p.384:

> 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. (my emphasis)

[932] In my opinion possession, occupation, use and enjoyment in a social sense is sufficient possession, occupation, use and enjoyment to establish aboriginal title.

[933] (j) I think that the trial judge erred in treating the test of possession and occupation as being whether there was a law which would have required a trespasser to depart. Immediately following the passage in the previous quotation in my previous paragraph, this paragraph appears in the trial judgment, at p.384:

> 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.

[934] 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.

[935] (k) I think it is an error to consider that aboriginal rights cannot be held jointly by more than one people. There is nothing that seems conceptually strange to me about two aboriginal peoples having rights to occupy, possess, use and enjoy the same area of land and yet, together or separately, to exclude any other aboriginal people from the area, or at least without any other aboriginal peoples occupying the area. If that is so, then the two aboriginal peoples could well, in my view, have a shared aboriginal title to the area, consisting of joint and several rights to occupy, possess, use and enjoy the area and its resources.

[936] And if aboriginal customs, traditions and practices accorded occupancy, possession, use and enjoyment of a certain area to one people alone, but those people in their customs, traditions and practices allowed other people to exercise rights to hunt particular game in the area, for example, then I see nothing conceptually strange in recognizing and protecting the occupancy rights of one people and the hunting rights of another people over the same area in accordance with the customs, practices and traditions recognized and protected by both peoples at the time of Sovereignty.

[937] Shared occupancy between separate aboriginal peoples giving rise to shared aboriginal rights of possession, occupation, use and enjoyment has been recognized in the United States. See ***Turtle Mountain Band v. U.S.; U.S. v. Pueblo of San Ildefonso; and Strong v. U.S.*** So the existence of a settlement of Nishga or Talthan resulting in shared occupation, possession, use and enjoyment of the land and its resources would not necessarily defeat a claim to aboriginal title by the Gitksan or Wet'suwet'en people. It might mean only that the aboriginal title was shared by two peoples.

[938] (l) I think that the trial judge erred in not concluding that aboriginal title could rest on occupation, possession, use and enjoyment of land even though that occupation may have diminished in the period after contact. At p.146 of his reasons the trial judge said this:

> During all this period the Indians were leaving the distant areas of the territory to live in the villages in the transportation corridor.

[939] I think the period being referred to is from the arrival of Captain Cook in 1778 to 1891, which is the period discussed in the preceding passages.

[940] At p.183, the trial judge said this:

> There is convincing evidence of a not very gradual movement of aboriginal people out of the distant parts of the territory towards the larger villages in the main river corridors.

[941] In my opinion, habitation of the distant parts of the territory, away from the larger villages in the main river corridors, must be taken as yet further evidence of the occupation, possession, use and enjoyment by the Gitksan and Wet'suwet'en peoples of the distant parts of the territory.

[942] As I said in relation to abandonment in Part IV, Division 3 of these reasons, I do not consider that aboriginal title or aboriginal rights can be lost by abandonment once they have become part of the common law. There is no evidence in this case, as far as I am aware, that the movements of the Gitksan and Wet'suwet'en peoples in the period after contact and before Sovereignty could be regarded as an abandonment of their long-standing aboriginal title or aboriginal rights.

[943] (m) I think that the trial judge erred in his treatment of blanket extinguishment of aboriginal title, and that his treatment showed a misconception of the nature of aboriginal title. That misconception underlay the trial judge's conclusion that aboriginal title had not been established.

[944] The trial judge regarded the Colonial instruments, and particularly the two instruments conferring fee simple title to all the land in the Province on the Crown, as being necessarily inconsistent with the continuation of aboriginal title and as such gave rise to an implicit extinguishment. I have said already that, in my opinion, this represented a misunderstanding of the decision of the Supreme Court of Canada in ***Sparrow,*** where the views of Mr. Justice Hall in ***Calder*** were preferred and adopted, and the views of Mr. Justice Judson on implicit extinguishment were rejected. Both ***Amodu Tijani*** and ***Roberts*** confirm that the aboriginal title of the Indian peoples is a

burden on the allodial or root title of the Crown. If that is so, then the aboriginal title would not be repudiated by the vesting of a subordinate title to the root title, namely a fee simple title, in the Crown.

[945] The error on the part of the trial judge in this respect, in my opinion, was to consider that there is an inconsistency between the co-existence of aboriginal title and fee simple title. The aboriginal title is a burden on the fee simple title just as it is a burden on the allodial title. The resolution of those competing interests presents problems, but the existence of those problems does not deny aboriginal title.

[946] (n) The trial judge concluded not only that aboriginal title had been extinguished but that all aboriginal rights had been extinguished by the Colonial instruments. But he said that if he was wrong in that conclusion then he would have decided that the Gitksan and Wet'suwet'en had aboriginal "sustenance" rights, that is, rights of hunting, fishing, gathering and similar rights in the middle third or so of the territory, which he outlined on Map 5 attached to his reasons. He said that those sustenance rights were non-exclusive.

[947] I have already said that in my opinion no blanket extinguishment of any aboriginal title or rights was brought about by the Colonial instruments. Neither the Attorney General of British Columbia, nor the Attorney General of Canada sought in this appeal to sustain the conclusion that the Colonial instruments brought about a blanket extinguishment. I am not persuaded by the arguments addressed to us, at our behest, by the *amici curiae* that there was a blanket extinguishment.

[948] So I return to the point that the trial judge has found the existence of non-exclusive sustenance rights throughout a major part of the territory. It is my understanding of the evidence that apart from a few small areas around the edges of the territory, there was no concurrent use of any part of the territory for sustenance purposes by other Indian people before contact and Sovereignty. The actual use of the whole area was in fact an exclusive use by the Gitksan and Wet'suwet'en. If there was evidence to the contrary, the trial judge did not refer to it. So I presume that the trial judge's conclusion that sustenance rights were shared must be based on a view that if any other Indian people had wanted to use the territory for sustenance purposes they could have done so and that no law known to the trial judge would have prevented them from doing so.

[949] But, as I have said, I do not think that is the point. The true point is whether the Gitksan and the Wet'suwet'en, the exclusive users, regarded themselves as having the right to the exclusive use of the territory for sustenance purposes by custom, tradition and practice. If so, and if the exclusive use was exclusive use in fact, then surely the aboriginal sustenance right itself must be an exclusive right to hunting, fishing, gathering and similar activities in the territory covered by Map 5, and, because of the trial judge's misunderstandings with respect to living, hunting, and trapping in the further reaches of the territory, well beyond the Map 5 area.

[950] Even if Nishga or Talthan shared the use of the territory or a part of it for their own sustenance purposes, there is no reason why there should not be aboriginal title and aboriginal sustenance rights shared by those peoples who actually used the

territory. The only question is whether the customs, traditions, and practices of all those peoples who actually used the territory regarded those shared rights as an integral part of their distinctive cultures.

[951] (o) If the trial judge correctly found that there were aboriginal sustenance rights over the territory included in Map 5, and if those rights were determined by use and enjoyment of the resources of the area within Map 5, and if in fact no other people used and enjoyed the territory, or if they did use it, they did so on a shared basis, then I do not see what in the evidence prevents those very facts of use and enjoyment for sustenance from being sufficient to establish aboriginal title. I do not understand that the occupation, possession, use and enjoyment of land by an aboriginal society for their sustenance, if it is thought by them to be exclusive or shared exclusive, would be sufficient for aboriginal sustenance rights but not sufficient for aboriginal title. In my opinion there are only two reasons why that would not be so. The first would be if the aboriginal people themselves thought of themselves as only having hunting, fishing, gathering and sustenance rights and did not regard themselves as having occupancy rights. The other basis for separating aboriginal hunting, fishing, gathering and similar rights from aboriginal title and recognizing only the sustenance rights, would arise if there had been an extinguishment of aboriginal title, either express, implicit, implied or by adverse dominion, which extinguished the aboriginal title but did not extinguish the sustenance rights.

[952] In short, if there were rights regarded by the Gitksan and Wet'suwet'en peoples as rights to the use and enjoyment of the territory for sustenance purposes, and if they regarded those rights as exclusive or shared exclusive, and if those rights were in fact exclusive or shared exclusive, and if the Gitksan and the Wet'suwet'en peoples thought of themselves as occupying the territory, then those facts are sufficient to establish aboriginal title to the territory and not merely aboriginal sustenance rights.

[953] In this connection it must be noted that the trial judge himself seems to have regarded the use and enjoyment of the territory for sustenance purposes as amounting to occupation and possession, because, at p.381, the trial judge said this:

> While peer pressure in the form of customs may have governed the villages, there was, in my judgment, no difference between aboriginal Sovereignty or jurisdiction in the largely empty lands of the territory on one hand, and occupation or possession of the same empty lands for aboriginal sustenance on the other hand. (my emphasis)

[954] I note also that the trial judge said this, at p.383:

> Apart from village sites, and political statements which have frequently been repeated by Indians, I cannot infer from the evidence that the Indians possessed or controlled any part of the territory, other than for

> village sites and for aboriginal use in a way that would justify a declaration equivalent to ownership. (my emphasis)

[955] That passage seems to indicate that the Gitksan and Wet'suwet'en peoples possessed or controlled at least part of the territory, other than village sites, for aboriginal uses, though the trial judge did not think that such possession or control would justify a declaration equivalent to ownership.

[956] And I note that the trial judge said this, at p.390:

> (ii) *The occupation of specific territory*
>
> I shall deal with this question in greater detail later but for the moment it will be sufficient to say that there is evidence of Indians living in villages at important locations in the territory. I infer they would have used surrounding lands, and other lands further away as may have been required. This is sufficient to satisfy this part of the test for the areas actually used.
>
> (iii) *The exclusion of other organized societies*
>
> While I have the view that the Gitksan and Wet'suwet'en were unable to keep invaders or traders out of their territory, there is no reason to believe that other organized societies established themselves in the heartland of the territory along the great rivers on any permanent basis, and I think this requirement is satisfied for areas actually used. (my emphasis)

[957] So the trial judge concluded that the requirement of the exclusion of other organized societies was satisfied for the areas actually used. Then the trial judge in the end concluded that the areas actually used included the areas covered by Map 5.

[958] It seems to me, in the result, that the trial judge, in those passages, found that the Gitksan and Wet'suwet'en peoples exercised exclusive use of the areas covered by Map 5, even though in the end the trial judge treated the sustenance rights over the area covered by Map 5 as non-exclusive rights.

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[959] I have dealt with fifteen points on which I consider the errors on the part of the trial judge led, singly or together, to an incorrect conclusion on the part of the trial judge about the existence of aboriginal title. Each of the errors is an error in law. On some of them there may also be a factual component. But on none of them is the error such as to be within the principles which prevent this Court from reconsidering the findings of the trial judge.

[960] With respect, I disagree with the view that aboriginal title cannot be regarded as proven because the trial judge made findings of fact that the boundaries had not been established on a balance of probabilities, or that exclusive occupation had not been established on the balance of probabilities.

[961] First of all, I say that I agree with Mr. Justice Brennan that aboriginal title should not be denied because of difficulties in the establishment of boundaries. Boundary questions can in the end be worked out between the right parties and on the basis of the competing contentions when all parties are represented. Mr. Justice Brennan, in ***Mabo v. Queensland,*** put the point this way at p.36:

> There may be difficulties of proof of boundaries or of membership of the community or of representatives of the community which was in exclusive possession, but those difficulties afford no reason for denying the existence of a proprietary community title capable of recognition by the common law. (my emphasis)

[962] Second, and perhaps more importantly, the true parties in this case, namely the plaintiffs and the Attorney General of British Columbia, both requested that all questions about boundaries, and all questions about the scope and content of aboriginal title and aboriginal rights be deferred for negotiation. Those questions were not argued. In my opinion arguments based on the failure to prove boundaries or the failure to prove sufficient occupation for title, though sufficient for sustenance, must be regarded as having been waived and abandoned by the Attorney General of British Columbia in this appeal, and in those circumstances cannot be regarded as having been retained by the intervenors, none of whom argued them in any event.

2. The Claim to "Jurisdiction": Aboriginal Self-Government

[963] The trial judge dealt with the claim to "Aboriginal Jurisdiction or Sovereignty" at pp. 374-382 of the trial judgment. I think he made a number of errors:

[964] (a) The plaintiffs claimed "jurisdiction". They conceded that Sovereignty over the whole of British Columbia rested with the Crown. They conceded that the allodial or root title to the land in British Columbia rested also with the Crown, but they said that it was subject to the burden of the aboriginal title. I think that it is a misconception to think of the claim to "jurisdiction" as being a claim to Sovereignty. It is unfortunate, in my view, that such an equivocal word was used to describe this claim. What they are asking for is surely a right to exercise control over themselves as a community, and over their own land and institutions in that community. In other contexts the claim has been called a claim to a right of self-government and, during the course of argument in this appeal, as a right of self-regulation of themselves and their institutions.

[965] Some of the passages in the trial judge's reasons which indicate to me that the trial judge did not consider rights of self-government or self-regulation at a level at which they should properly be considered are these:

[966] at p.368:

2. ABORIGINAL JURISDICTION AND OWNERSHIP

With respect, it is difficult to find much legal merit in these parts of the plaintiffs' claims because success seems to be foreclosed by powerful pronouncements of high authority. As to aboriginal Sovereignty, there is a clear statement by Dickson C.J.C. and La Forest J., speaking for a unanimous Supreme Court of Canada, in ***Sparrow,*** at p.1103, that:

> . . . there was from the outset never any doubt that *Sovereignty and legislative power*, and indeed the underlying title, to such lands vested in the Crown . . . [emphasis added by the trial judge]

[967] at p.369:

> It will be convenient to deal with these two classes of claims together in the first instance, although I shall later discuss them in greater detail separately. In this context I equate jurisdiction to aboriginal sovereignty. In their argument, plaintiffs' counsel tended to refer to it as "jurisdiction."

[968] at p.381:

> It is my conclusion that Gitksan and Wet'suwet'en laws and customs are not sufficiently certain to permit a finding that they or their ancestors governed the territory according to aboriginal laws even though some Indians may well have chosen to follow local customs when it was convenient to do so.
>
> Doing the best I can with this evidence, and I have tried to take into consideration all that I heard, I conclude that prior to British Sovereignty the ancestors of the plaintiffs lived in their villages at strategic locations alongside the Skeena and Bulkley Rivers and they probably organized themselves into clans and houses for social purposes, but they had little need for what we would call laws of general application. While peer pressure in the form of customs may have governed the villages, there was, in my judgment, no difference between aboriginal Sovereignty or jurisdiction in the largely empty lands of the territory on one hand, and occupation or possession of the same empty lands for aboriginal sustenance on the other hand. (my emphasis)

[969] at p.382:

> I also incorporate into this section the conclusions I expressed earlier regarding the relationship between land use and fur trapping, which only started after contact. Before that time there was no reason for the plaintiffs' ancestors, individually or communally, to purport to govern the wilderness beyond the areas surrounding their villages, even though they may have used such areas from time to time for aboriginal purposes. (my emphasis)

[970] In my opinion, this claim is not about governing the land or the territory or the "wilderness" in the sense that such a form of government would apply to all people when they entered the land. The claim is about the right of self-government and self-regulation of a community of people through their own institutions in order to regulate their own conduct towards each other and their conduct towards others, particularly as related to the existence of their aboriginal title and aboriginal sustenance rights, but also in relation to their social organization. I do not think that this claim can properly relate to regulating the conduct of others towards them, which must be regulated by the general common law.

[971] In short, the Gitksan and Wet'suwet'en plaintiffs are not asserting a claim to Sovereignty over the territory, and 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.

[972] I do not think that the trial judge approached the claim to jurisdiction in that way and, in treating it as a claim to govern territory and assert Sovereignty over the territory, in my opinion he misconstrued the claim or at least failed to consider those aspects of the claim that I have set out in the previous paragraph.

[973] (b) I think that the trial judge was in error in trying to define the plaintiffs' point on jurisdiction in terms of the cross-examination and re-examination of Mr. Sterritt as the trial judge set it out at pp. 375-378 and on the argument of counsel in relation to that cross-examination and re-examination as the trial judge set it out at pp. 378-379. That cross-examination and re-examination related to a series of very difficult questions about the interaction of aboriginal rights relating to self-government and self-regulation, on the one hand, and Federal and Provincial laws on the other hand. The answers to those questions do not define the plaintiffs' position on self-government and self-regulation. And the fact that the questions are difficult to answer does not mean that the aboriginal right of self-government does not exist. All it means is that this world contains many questions that are difficult to answer.

[974] The fact that it is difficult to answer some questions about the interaction of Federal and Provincial law does not mean that the rights of either Canada or British Columbia to make laws must be suspect.

[975] No doubt, once aboriginal rights of self-government and self-regulation were recognized, affirmed and guaranteed by s.35 of the ***Constitution Act, 1982*** a process started towards a fuller and more widely understood appreciation of those rights, and the very questions that were asked of Mr. Sterritt will start to be resolved. But the fact that Mr. Sterritt did not have all the answers does not mean anything at all, in my opinion. No one had the answers at that time, or, for that matter, has them now. The approach of saying that if Mr. Sterritt did not have the

answers then aboriginal self-government cannot exist as an aboriginal right seems to me to rest on a legal misunderstanding of the nature of the aboriginal right of self-government and self-regulation.

[976] (c) I consider that the trial judge was in error when he concluded that the claim to "jurisdiction" must fail because the nature of aboriginal self-government and self-regulation was such that it does not produce a set of binding and enforceable "laws". Aboriginal rights of self-government and self-regulation do not rest on "laws". They rest on the customs, traditions, and practices of the aboriginal people to the extent that those customs, traditions and practices formed and form an integral part of their distinctive culture. If a measure of inconsistency and flexibility is what the aboriginal customs, traditions and practices demand, then the existence of inconsistency and flexibility tend to demonstrate the existence of the aboriginal rights of self-government and self-regulation and not the reverse.

[977] In my opinion, the trial judge was in error in imposing standards from the common law on the aboriginal rights of self-government and self-regulation. The aboriginal rights of self-government and self-regulation are *sui generis*, just as the aboriginal title is *sui generis*.

[978] Somewhere in the evidence, I think from the evidence as reproduced in the factums, I came across the statement that the Gitksan and the Wet'suwet'en custom in relation to dispute resolution is that once the dispute has been resolved neither the parties nor anyone else may ever speak of the dispute again. This seems to me to be the precise converse of the doctrine of precedent which dominates the common law. It also seems to me to have many advantages over the doctrine of precedent. It serves to introduce a measure of flexibility into dispute resolution and at the same time to prevent anyone from claiming that the dispute resolver is not meeting out equal justice to all.

[979] The error which I have mentioned in this segment is demonstrated, in my view, at pp. 380-381 of the trial judge's reasons. There the trial judge quotes from answers given by a number of Indian witnesses to questions about their custom, called by the trial judge, "the alleged 'law'" relating to the use of a father's House territory. The custom is called "amnigwootxw" by the Gitksan and "neg'edeld'es" by the Wet'suwet'en. There is some inconsistency between the answers, and the trial judge, at p.381, draws this conclusion:

> It is my conclusion that Gitksan and Wet'suwet'en laws and customs are not sufficiently certain to permit a finding that they or their ancestors governed the territory according to aboriginal laws even though some Indians may well have chosen to follow local customs when it was convenient to do so.

[980] As I have said, I think the concept of "governing the territory" represents a misunderstanding of this claim, or at least an incomplete understanding of this claim. But, setting that point aside, I think that it is quite wrong to conclude that there are no aboriginal rights of self-government or self-regulation just because the

customs, traditions or practices of the Gitksan or Wet'suwet'en people were seen to be flexible or were seen to be open to a number of varying interpretations. Many examples could be given of areas of the common law where judges might well give different answers and where the answers of laymen would be full of the same type of inconsistency. Economic loss for tort injury and wills variation come instantly to mind. That does not mean that there is no law on these subjects. It just means that the law is not well or universally understood.

[981] (d) I think that the trial judge was in error when he considered that the existence of a legislative institution is an essential part of the existence of an aboriginal right to self-government or self-regulation. At p.374 of his reasons the trial judge said this:

> I do not suggest the Indians have not always participated in feasting practices, and I accept that it has played, and still plays, a crucial role in the social organization of these people. I am not persuaded that the feast has ever operated as a legislative institution in the regulation of land. There are simply too many instances of prominent chiefs who have conducted themselves other than in accordance with the land law system for which the plaintiffs contend.

[982] 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. But a general rule-making body with a purpose of determining what changes to make to customs, traditions and practices is not, in my opinion, necessary to a right of self-government and self-regulation. That is not to say that I consider that there was no such power in the feast system. I have not tried to make up my own mind, independently, about that question. All I say is that a legislative function is not a necessary element of aboriginal self-government.

[983] I also say this. Evidence of prominent chiefs ignoring the old customs, traditions and practices of self-government and self-regulation in a period after Sovereignty does nothing to demonstrate that the aboriginal rights of self-government and self-regulation do not exist now and did not exist at the time of Sovereignty. If the evidence is that prominent chiefs did not conform to the customs, traditions and practices of the people at the time of Sovereignty or before, that might indicate either that those customs, traditions and practices did not exist, or it might indicate flexibility in the customs, traditions and practices, or it might indicate that those chiefs were not amenable to the customs on self-government and self-regulation. But I doubt if the evidence referred to by the trial judge was evidence of what occurred before Sovereignty. I suspect that the evidence related to the failure of prominent chiefs to follow customs, traditions and practices in relation to self-government and self-regulation in this century. I do not think that would show anything at all about the nature of the right of self-government or self-regulation except that the community was presented with many difficulties in sustaining these rights in the face of unrelenting pressure from the settlers and the settlers' own forms

of government and administration. In this connection, see my comments under the heading "The Weight of History" in Part VIII, Division 2 of these reasons.

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[984] Because of those errors or misconceptions on the part of the trial judge, as I have set them out, caused in large measure, I believe, by the plaintiffs and the trial judge choosing to describe the aboriginal right of self-government or self-regulation by the misleading title of "Jurisdiction", I would not adopt the trial judge's conclusions in relation to self-government and self-regulation. I think those conclusions are wrong. But the errors of the trial judge are not, in my opinion, errors of fact. They are errors of law in considering the nature of the claim and errors in law in considering the nature of the aboriginal right of self-government and self-regulation. Accordingly, there is no restriction on the powers of this Court to interfere with the trial judge's conclusions with respect to self-government and self-regulation.

3. The Claim to Aboriginal Rights

[985] The trial judge considered aboriginal hunting, fishing, gathering and similar rights at pp.388-395 of his reasons. He stated his conclusion, at p.395, in these terms:

> 6. CONCLUSIONS ON ABORIGINAL RIGHTS
>
> Subject to what follows, the plaintiffs have established, as of the date of British Sovereignty, the requirements for continued residence in their villages, and for non-exclusive aboriginal sustenance rights within those portions of the territory I shall later define. These aboriginal rights do not include commercial practices.

[986] The reference to "what follows" was a reference to the trial judge's decision that all aboriginal rights of the Gitksan and Wet'suwet'en peoples had been extinguished in the Colonial period from 1846 to 1871.

[987] Even in relation to aboriginal sustenance rights it is my opinion that the trial judge applied incorrect legal tests to the facts and so reached incorrect conclusions. I propose to set out some examples of what are, in my opinion, incorrect legal tests applied by the trial judge.

[988] (a) For the reasons I have given under Divisions 1 and 2 of this Part, I consider that the trial judge erred in not treating the evidence of occupation, possession, use and enjoyment of the territory in an organized way by the Gitksan and Wet'suwet'en societies for all their purposes, but particularly for sustenance, as being sufficient to establish aboriginal title to much of the land within the territory.

[989] In my opinion, if aboriginal sustenance customs, traditions and practices existed before and at the time of Sovereignty, and in that period formed an integral part of the distinctive society of an organized aboriginal people, then they would give rise to aboriginal title in the form of a right to occupy, possess, use and enjoy the land and its resources, unless:

[990] (i) the aboriginal peoples themselves did not treat their rights as rights to occupy, possess, use and enjoy the land and its resources in the period before Sovereignty, or

[991] (ii) the evidence shows that the use of the land for sustenance customs, traditions and practices was so widely shared that it cannot be treated as an exclusive right or as a shared exclusive right, or

[992] (iii) since the time of Sovereignty the aboriginal title has been extinguished, but the terms of extinguishment have not extended to the aboriginal sustenance rights.

[993] Being of that opinion, I consider that the trial judge erred in not treating his acceptance of aboriginal sustenance rights as establishing aboriginal title over the area in which he considered that the sustenance rights existed. And I would say, because of my treatment of the evidence from the far reaches of the territory, that the trial judge's error affects a much larger area than the area shown on Map 5.

[994] (b) For the reasons I have given in Division 1 of this Part, I think that the trial judge erred in separating commercial practices of aboriginal people from other practices and then saying that commercial practices were not aboriginal practices because they were generated by trade with settlers and particularly the Hudson's Bay traders.

[995] The problem lies in the level of generality which is used to categorize an aboriginal custom, tradition or practice. I think, first of all, that the trading of beaver or other pelts is evidence of aboriginal occupation, possession, use and enjoyment of the land which was used to take the beaver and other animals for their pelts. So the level of generality at which the particular trading practices should be considered is a level of generality of aboriginal title or aboriginal sustenance rights and not at the level which would be called "the aboriginal right to trap beaver" or "the aboriginal right to trade beaver pelts for other goods".

[996] (c) Even if commercial practices were to be regarded as properly separated from other practices by a purpose test rather than what I think is the proper test, namely, a use and enjoyment test, there is, in my opinion, sufficient evidence of trading practices with neighbouring peoples to establish an aboriginal trading custom, practice, or tradition which was an integral part of the distinctive culture of the Gitksan and Wet'suwet'en peoples before contact and which existed at the time of Sovereignty. The Grease Trail brought a trade in Oolichan oil to the Gitksan and Wet'suwet'en peoples who had salmon, berries, goat fur and other animal products which they gathered from the far reaches of their territory and used for the purposes of trading for the oil.

[997] (d) In my opinion the trial judge erred in his treatment of the question of exclusivity in relation to both aboriginal title and aboriginal sustenance rights. I have discussed exclusivity in Division 1 of this Part in relation to aboriginal title and I will confine my consideration of exclusivity in this paragraph to aboriginal sustenance rights.

[998] At p.390, the trial judge said this:

> (iii) *The exclusion of other organized societies*
>
> While I have the view that the Gitksan and Wet'suwet'en were unable to keep invaders or traders out of their territory, there is no reason to believe that other organized societies established themselves in the heartland of the territory along the great rivers on any permanent basis, and I think this requirement is satisfied for areas actually used.

[999] To the extent that the trial judge is considering that in the areas of Gitksan and Wet'suwet'en occupation, possession, use and enjoyment, where no other organized society established itself, there would exist aboriginal sustenance rights, I agree. The first question is whether there was a custom, tradition, or practice that formed an integral part of the distinctive culture of the Gitksan and Wet'suwet'en people to use and enjoy the land in an area and its resources. If so, that aboriginal custom, tradition or practice gave rise to an aboriginal right. If no other people had the custom, tradition or practice of using the same land area, then in my opinion the aboriginal right would be an exclusive aboriginal right (or, of course, exclusive aboriginal title).

[1000] I do not consider there to be any evidence of use of the claimed territory by any other people than the Gitksan and Wet'suwet'en people except to a limited extent in some of the outlying or border areas of the territory. It is only in those areas that the aboriginal rights of the Gitksan and Wet'suwet'en people would not be exclusive. And in those areas the rights would not be non-exclusive unless the custom, tradition or practice was for all comers to be able to use and enjoy the land and its resources. Rather the aboriginal right of the Gitksan and Wet'suwet'en peoples would be a shared exclusive sustenance right.

[1001] (e) I think that the trial judge erred when he discussed exclusivity at pp.393-395 of his reasons. The trial judge referred to Dr. Suttles, who was a witness in ***Sparrow,*** and who said in the ***Sparrow*** case, as reported at p.1094:

> No tribe was wholly self-sufficient or occupied its territory to the complete exclusion of others.

[1002] The trial judge in this case then said that in addition to the Musqueam, many other Indians and non-Indians shared the Fraser River fishery. Then, at the top of p.395, the trial judge said this:

> Many cases . . . have found provincial laws regulating such basic aboriginal practices as hunting for moose, deer and migratory birds to be valid.
>
> In the face of this, and in view of the fact that Indians have always had access to all vacant Crown land, it is difficult to understand how, apart from the question of priorities, an aboriginal sustenance right in such a remote land could be an exclusive right. If it was exclusive originally, it has been changed throughout history in the

> same way the Fraser River fishery is no longer exclusively an aboriginal fishery.

[1003] In my opinion the trial judge has adopted a "Weight of History" argument to diminish aboriginal rights. I will discuss the "Weight of History" argument in Part VIII, Division 2 of these reasons. In my opinion it has no place in the law of Canada or British Columbia.

[1004] The question is whether the aboriginal sustenance rights were exclusive rights in their treatment by the customs, traditions, and practices of an aboriginal people at the time of Sovereignty and before. Whether the exclusive exercise of those rights has been regulated since that time is another question altogether. And as Chief Justice Dickson and Mr. Justice La Forest said in ***Sparrow,*** the recognition and affirmation of aboriginal rights given by s.35 of the ***Constitution Act, 1982*** is not limited to rights that are defined by the diminished form in which they have been shaped in modern times by modern regulation. The constitutionally protected right is the right in its full vigour, exercisable by the use of modern means, resting on the customs, traditions and practices that were an integral part of the distinctive culture of the aboriginal peoples at the time of Sovereignty.

[1005] (f) At p.178 of his reasons, the trial judge said:

> Witness after witness admitted participation in the wage or cash economy.

[1006] What does such an "admission" mean? In my view it means nothing at all in relation to the existence of aboriginal title or other aboriginal rights in 1993. Again this phrase suggests an incorrect approach to the law on the part of the trial judge in relation to the continued existence and exercise of aboriginal title and aboriginal rights.

[1007] I think that the points which I have mentioned in relation to aboriginal sustenance rights in this Division 3 all relate to what, in my opinion, were errors on the part of the trial judge which were all errors in law or errors of mixed fact and law brought about by errors in law. Accordingly, in my opinion, there is no restriction on the powers of this Court to interfere with the conclusions of the trial judge which rest on those errors or were influenced by those errors.

PART VII

THE CLAIMS IN THESE PROCEEDINGS: CONCLUSIONS

1. Aboriginal Title

[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. Those traditional ancestral lands extended throughout much of the claimed territory, including areas in the furthest reaches of the territory and areas much beyond the area delineated for aboriginal sustenance rights by the trial judge in his Map 5. Throughout much of that area no other aboriginal people claimed to hold rights to occupation, possession, use and enjoyment of the area. In those areas where there were no conflicting claims to user rights, the aboriginal rights of the Gitksan and Wet'suwet'en people should be categorized as aboriginal title. In some other areas the occupation, possession, use and enjoyment of the Gitksan and Wet'suwet'en peoples may have been shared with each other or with one or more other Indian peoples. In those areas of shared occupation, possession, use and enjoyment where the customs, traditions and practices of both the Gitksan and Wet'suwet'en on the one hand, and the other Indian peoples on the other hand, recognized the shared occupation, possession, use and enjoyment, and regarded it as an integral part of their distinct cultures, the Gitksan and Wet'suwet'en title would be shared-exclusive aboriginal title. There may be other areas within the claimed territory where neither the Gitksan nor the Wet'suwet'en peoples occupied, possessed, used and enjoyed the land and its resources or did not consider that their occupation, possession, use and enjoyment was an integral part of their distinctive culture. In those areas the Gitksan and the Wet'suwet'en peoples would not have had aboriginal title, though they might have had aboriginal sustenance rights.

[1009] The aboriginal title which the Gitksan and the Wet'suwet'en peoples held over their traditional ancestral lands in 1846 was not extinguished by any form of comprehensive ("blanket") extinguishment in the Colonial period, either by the assertion of sovereignty, or by the Colonial instruments consisting of Proclamations and Ordinances in relation to land, or in any other way. Only the clear and plain intention of the Sovereign Power expressed legislatively by the Parliament of Canada could have brought about any form of extinguishment of aboriginal title between 1871 and 1982. There is a legal possibility that precise legislation of the Parliament of Canada enacted between 1871 and 1982, relating to a precise area, may have extinguished aboriginal title in that precise area in accordance with the clear and plain intention of the Sovereign Power expressed legislatively in the Parliament of Canada. No such specific extinguishment was considered in the argument in this appeal. Since 1982 the existing aboriginal title of the Gitksan and

Wet'suwet'en peoples has been recognized, affirmed, and guaranteed by the ***Constitution Act, 1982*** which forms a part of the Constitution of Canada.

[1010] The geographical areas covered by the exclusive aboriginal title, and the geographical areas covered by the shared-exclusive aboriginal title of the Gitksan and Wet'suwet'en peoples, and other matters relating to the content of aboriginal title to possession, occupation, use and enjoyment of land and its resources, are matters which both of the true parties to this appeal, namely the plaintiffs and the Attorney General of British Columbia on behalf of the Provincial Crown, have requested be left for negotiation. To the extent that such negotiation does not conclude a determination of those matters, either party may initiate the process for a new trial directed to those matters and to any other matters encompassed by the pleadings and issues which confronted the trial judge, and which remain unresolved by this appeal and by the process of negotiation.

2. Aboriginal Self-Government and Self-Regulation

[1011] It is important to understand that if the plaintiffs' claim to jurisdiction could ever have been considered a claim to govern the territory, and everything within it, as a form of Sovereign Government, that was certainly not the position of the plaintiffs on this appeal.

[1012] On this appeal, one aspect of the claim to self-government and self-regulation was put in two alternative ways, one relating to self-government under a concept of ownership of land and one relating to self-government resting on a proprietary interest in land. I have decided that the plaintiffs' interest need not be regarded as an ownership interest in the full sense of the common law derived from England, and I have decided that the question of whether it is a proprietary or a personal interest is a fruitless question. The interests of the plaintiffs in the lands and resources of the claimed territory are best described as aboriginal title and as aboriginal sustenance rights. The former I have dealt with in Division 1 of this Part and the latter I will deal with in Division 3.

[1013] If the plaintiffs' statement of their claim in this appeal had the words "aboriginal title" substituted for the words "ownership" or "proprietary interest", and if the necessary grammatical changes were made, then the plaintiffs' statement of their claim would read like this:

a. aboriginal title to exclusive possession and occupation of lands and the use and enjoyment of the resources of those lands within the claimed territory;

b. a right to harvest, manage and conserve those lands and 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 Plaintiffs and their future generations; and

iii. consultation and cooperation with ministries and agencies of the Crown and with the private sector who may be affected by the exercise of the Plaintiffs' rights;

c. a right to maintain and develop their institutions for the regulation of their aboriginal title and for the harvesting, management and conservation of the lands and resources;

d. an inherent right of self-government exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity;

[1014] I do not regard those claims as claims to govern the territory. I regard them as a claim to govern themselves, consisting of a claim to govern the exercise of their own rights in relation to their own aboriginal title, and a claim to govern themselves through their own institutions in relation to the preservation of the integral parts of their distinctive cultures.

[1015] I repeat, I regard the claim to self-government and self-regulation, as it was ultimately advanced in the appeal, as a claim by the Gitksan and Wet'suwet'en peoples, first, to manage and control the exercise of their rights in relation to the use of land and resources encompassed within their collective aboriginal title and within their other collective aboriginal rights, and, second, to regulate the internal relationships within their own society and culture in accordance with their own customs, traditions and practices. I do not regard the claim that was ultimately advanced as a claim to sovereignty over the territory; or as a claim to control by law all legal aspects of whatever happens within the territory; or as a claim to ultimate legislative power in relation to the laws applicable within the territory; or as a claim to exclude the operation of all British Columbia law in the territory; or as a claim that in all circumstances Gitksan and Wet'suwet'en customary law must prevail over any contrary British Columbia law. Accordingly, in my opinion, arguments dealing with the division of legislative powers in Canada under the ***Constitution Act, 1867,*** to which British Columbia adhered in 1871, including whatever may be thought to flow from the decision of the Privy Council in ***A.G. Ontario v. A.G. Canada,*** [1912] A.C. 571 (J.C.P.C.), have no relevance to the claim which was ultimately advanced in this appeal. Plenary and overriding law-making power is not a part of the claim.

[1016] Without seeking to limit the claims in any way, it may be helpful to compare aboriginal self-government and self-regulation to the self-government and self-regulation practised by a forest company or a ranching company or a Hutterite community in relation to their own land and the resources on their land, and to the ordering of their internal affairs. Such self-government and self-regulation is not in opposition to the Sovereign Power, it is an aid to the Sovereign Power and a necessary adjunct to the realization and exercise of communal rights.

[1017] So that is the claim that I will address in this Division of these reasons.

[1018] I think aboriginal rights of self-government and self-regulation are, in their origin and nature, the same as other aboriginal rights. They rest on the customs,

traditions, and practices which formed an integral part of the distinctive culture of the aboriginal people in question as an organized society at the time of Sovereignty. At that time those customs, traditions and practices became not only protected and nurtured by the aboriginal society, but they also became recognized, adopted and protected by the common law and, on the assertion of Sovereignty, came to be a part of the common law.

[1019] In my opinion the rights of self-government and self-regulation of the Gitksan and Wet'suwet'en peoples in 1846 were the rights of self-government and self-regulation that their customs, traditions, and practices recognized as being an integral part of their distinctive culture at that time. I would certainly consider that the rights of self-government and self-regulation in their organized society in 1846 and earlier would have included all the rights of self-government and self-regulation set out in the claim as presented in this appeal as I have amended it above.

[1020] Whatever the self-government and self-regulation rights of the Gitksan and Wet'suwet'en peoples were in 1846, a number of events have occurred since then which might serve to diminish those rights:

[1021] (a) The assertion of British Sovereignty over the whole geographic extent of British Columbia, (taken in this appeal to have occurred in 1846) would have had the following potential diminishing consequences quite apart from the enlarging consequence of protecting all aboriginal rights by absorbing them as part of the common law.

[1022] (i) Those rights which should properly be considered to be inconsistent with British Sovereignty would have been implicitly extinguished by the assertion of British Sovereignty. That would include the right to make war and the right to impose their own customs on the settlers who were themselves protected by British Sovereignty and by the common law.

[1023] (ii) Those rights which were so entirely repugnant to natural justice, equity, and good conscience that they could not, without modification, ever be a part of the common law would never have been absorbed by the common law or have been recognized and protected by it, at least not until such a modification occurred. (See ***Mabo v. Queensland*** at p.44 and ***Inasa v. Oshodi*** at p.105.)

[1024] (iii) The common law, to the extent that it was not from local circumstances inapplicable, would apply throughout the territory and if it was inconsistent with specific aboriginal rights of self-government and self-regulation, and if the common law, in those parts of it that were inconsistent with the Gitksan and Wet'suwet'en rights of self-government and self-regulation, was not from local circumstances inapplicable, then the common law might have brought about an implicit extinguishment of those aspects of the Gitksan and Wet'suwet'en rights of self-government and self-regulation on which the inconsistency occurred. In my opinion there would have been very little of the civil side of the common law, which, in its potential

application to the Gitksan and Wet'suwet'en peoples in their area of the Province, (where no settlers or administrators had arrived in 1846), would not have been "from local circumstances inapplicable". This view is the view adopted by Blackstone in relation to the American colonies, as quoted in ***Mabo v. Queensland*** at pp. 22-23.

[1025] (b) Those aspects of the common law which were from local circumstances inapplicable to the Gitksan and Wet'suwet'en peoples in 1846 might have become applicable to them by 18 November, 1858 when the common law of England was proclaimed to apply throughout British Columbia, though after that, in its application in British Columbia, it became British Columbia common law and no longer English common law. I do not think it likely that such a change occurred, though it is possible.

[1026] (c) Between 1858 and 1871, there may have been Proclamations or Ordinances of the Sovereign Power, acting legislatively, which might have extinguished, by clear and plain intention, aspects of the rights of self-government or self-regulation of the Gitksan or Wet'suwet'en peoples. We were not referred in the course of this appeal to any such Proclamation or Ordinance.

[1027] (d) Between 1871 and 1982 there may have been enacted by the Sovereign Power acting legislatively in the Parliament of Canada an enactment which might have extinguished, by clear and plain intention, aspects of the rights of self-government or self-regulation of the Gitksan and Wet'suwet'en peoples. We were not referred in this appeal to any such enactments.

[1028] Apart from the diminution of rights brought about by extinguishment in one of the four ways I have described in paragraphs (a), (b), (c) and (d) above, it is my opinion that the aboriginal rights of self-government and self-regulation of the Gitksan and Wet'suwet'en peoples based on their customs, traditions, and practices in 1846 and earlier, to the extent that those customs, traditions and practices formed an integral part of their distinctive culture, became rights recognized, affirmed, and protected by the common law in 1846 and have been carried forward to 1982 when they received constitutional protection under s.35 of the ***Constitution Act, 1982.*** Those rights now exist in modern form, based on their 1846 form, but expressed in modern terms and with modern usages.

[1029] I propose to summarize. The Gitksan and Wet'suwet'en peoples had rights of self-government and self-regulation in 1846, at the time of sovereignty. Those rights rested on the customs, traditions and practices of those peoples to the extent that they formed an integral part of their distinctive cultures. The assertion of British Sovereignty only took away such rights as were inconsistent with the concept of British Sovereignty. The introduction of English Law into British Columbia was only an introduction of such laws as were not from local circumstances inapplicable. The existence of a body of Gitksan and Wet'suwet'en customary law would be expected to render much of the newly introduced English Law inapplicable to the Gitksan and Wet'suwet'en peoples, particularly since none of the institutions of English Law were

available to them in their territory, so that their local circumstances would tend to have required the continuation of their own laws. The division of powers brought about when British Columbia entered confederation in 1871 would not, in my opinion, have made any difference to Gitksan and Wet'suwet'en customary laws. Since 1871, Provincial laws of general application would apply to the Gitksan and Wet'suwet'en people, and Federal laws, particularly the ***Indian Act,*** would also have applied to them. But to the extent that Gitksan and Wet'suwet'en customary law lay at the core of their Indianness, that law would not be abrogated by Provincial laws of general application nor by Federal laws, unless those Federal laws demonstrated a clear and plain intention of the Sovereign power in Parliament to abrogate the Gitksan or Wet'suwet'en customary laws. Subject to those over-riding considerations, Gitksan and Wet'suwet'en customary laws of self-government and self-regulation have continued to the present day and are now constitutionally protected by s.35 of the ***Constitution Act, 1982.***

[1030] The true parties to this litigation, namely the plaintiffs and the Attorney General of British Columbia, have asked that questions about the precise scope and content of the aboriginal rights of self-government and self-regulation of the Gitksan and Wet'suwet'en peoples should be left for negotiation. Those questions will include many problems relating to conflicts between the common law and statute law of British Columbia and Canada, on the one hand, and Gitksan and Wet'suwet'en customary law of self-government and self-regulation through their own institutions, on the other. Failing resolution by negotiation there should be a new trial, at the initiative of either of these parties, directed to those questions, or alternatively, those questions should await resolution until they arise in specific cases.

3. Aboriginal Sustenance Rights

[1031] In my opinion, aboriginal hunting, fishing, gathering and similar rights, which the trial judge called aboriginal sustenance rights, are entirely encompassed within aboriginal title in those areas where Gitksan or Wet'suwet'en aboriginal title exists. Gitksan and Wet'suwet'en aboriginal sustenance rights outside that area would have existed in 1846 over the area where the Gitksan and Wet'suwet'en peoples exercised those rights but where, in accordance with their customs, traditions and practices, they did not regard those rights as rights of possession, occupation, use and enjoyment of the land and its resources, or, though I think that this is unlikely, regarded their customs, traditions and practices relating to hunting, fishing, gathering and similar activities as an integral part of their distinctive culture but did not regard possession, occupation, use or enjoyment of the land over which the activity took place as an integral part of their distinctive culture. A situation where the rights were confined to hunting, fishing, gathering and similar rights might also have arisen in areas where the land was shared by a number of peoples, none of whom regarded their rights as being rights to exclusive or shared-exclusive occupation, possession, use and enjoyment, but each of whom regarded their rights as being limited to specific sustenance activities.

[1032] As I have indicated, I also think it is possible for aboriginal sustenance rights to survive in an area where aboriginal title has been extinguished by the clear and plain intention of the Sovereign Power acting legislatively in Parliament, but where

the intention of the Sovereign Power which clearly and plainly extinguishes aboriginal title is not clear and plain in relation to extinguishing aboriginal sustenance rights.

[1033] My conclusions with respect to comprehensive extinguishment, special and particular extinguishment, and the constitutionalization of rights as set out in Division 1 of this Part in relation to aboriginal title apply equally to my conclusions about aboriginal sustenance rights. So too do my conclusions about the geographical areas where the rights exist, the precise scope and content of the rights, and the processes for dealing with those matters by negotiation as the parties wish, or by a new trial, should such a trial be required in relation to the matters encompassed by the claim raised by the pleadings, the evidence and the trial judgment in this litigation.

PART VIII

OTHER ISSUES

1. The Royal Proclamation of 1763

[1034] The ***Royal Proclamation of 1763*** was issued by King George III with the advice of his Privy Council.

[1035] The Proclamation was issued nine months after the ***Treaty of Paris*** settled the conflicting claims of Great Britain and France in North America. The Proclamation is divided into five parts dealing, respectively, first, with the boundaries of four new colonies, Quebec, East Florida, West Florida and Grenada; second, with the government of the four new colonies; third, with grants of land in the new colonies to soldiers; fourth, with the reservation of lands for the Indians; and fifth, with the apprehension of persons charged with criminal offences. The text of the Proclamation is set out from p.486 to p. 491 of the trial judge's reasons. Part IV of the Proclamation, dealing with Indians, starts half way down p.489 and goes to the bottom of p.490.

[1036] The preamble to Part IV reads (at p. 489):

> And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds; . . . .

[1037] The remainder of Part IV is divided into four sub-parts and they are numbered in the text as set out by the trial judge.

[1038] The first paragraph prohibits the Governors and Commanders in Chief of Quebec, East Florida, West Florida and all other North American colonies or plantations from granting warrants of survey or patents for lands

> . . . beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North-West, or upon any Lands whatever, which, not having been ceded to, or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

[1039] The second paragraph reads like this (at pp. 489-90):

> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under Our Sovereignty, Protection, and Dominion, for the Use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to

> the Westward of the Sources of the Rivers which fall into the Sea from the West and North West, as aforesaid; and We do hereby strictly forbid, on Pain of Our Displeasure, all Our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without Our especial Leave and Licence for the Purpose first obtained.

[1040] The third paragraph requires people who have settled themselves on the lands described as reserved for the Indians to remove themselves.

[1041] The first clause of the fourth paragraph reads like this (at p. 490):

> And whereas great Frauds and Abuses have been committed in the purchasing Lands of the Indians, to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians; in order therefore to prevent such Irregularities for the future, and to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement; but that if, at any time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some public Meeting or Assembly of the said Indians to be held for the Purpose by the Governor or Commander in Chief of Our Colonies respectively, within which they shall lie: and in case they shall lie within the Limits of any Proprietary Government, they shall be purchased only for the Use and in the Name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose:

[1042] The second clause of the fourth paragraph of Part IV of the Proclamation deals with the issuance of licences to British subjects to trade with the Indians.

[1043] The trial judge decided that the Proclamation did not apply when it was made, in 1763, to the territory covered by the claim in this case or to the Indians in that territory. In reaching that conclusion, the trial nature and other evidence which he classified as historical in nature and he relied on an analysis of the wording of the Proclamation in its historical and geographical context.

[1044] The trial judge also concluded, at p.230, that, contrary to what have become the usual rules of statutory construction, the ***Royal Proclamation*** should not be treated as if it were always speaking or, at least, if it should be treated as always speaking, then it should be treated as if it were always speaking only about the very things that were precisely in contemplation in 1763, and not about the things that might be thought to have been generally in contemplation at that time. In short, he decided that the Proclamation could not support a prospective construction so that its provisions would apply to Indians who later became connected with the Crown and under its protection, or to the lands which they occupied and used as their

hunting grounds. Finally, the trial judge decided, at p.231, that the ***Royal Proclamation,*** as a statement of the policy of the Crown, could not, in calling for liberal and generous treatment of the Indians, displace the common law, which the trial judge understood permitted wholesale settlement without regard to Indian occupation, except in relation to village sites, and except so as to permit Indians to make use of Crown lands as long as the lands remained vacant.

[1045] In this appeal, counsel for the appellants argued that each of those conclusions of the trial judge as I have set them out in the proceeding paragraph, was wrong.

[1046] I do not see how the Proclamation could have any direct effect as positive law if it has never extended, in its terms, to the territory claimed in this case or to the Indians living in that territory. On the other hand, I do not see how the ***Royal Proclamation*** could be treated as anything other than a reflection of the policy of the Colonial administration of Great Britain in 1763 towards the Indians and towards the relationship between Great Britain and its settling subjects, on the one hand, and the indigenous peoples of the territories that were becoming open for settlement, on the other. That policy must be taken to have been in accordance with the common law as it was seen at that time and must be taken as a statement of the common law by the highest authority. The policy seems to me to have been, for its time, both wise and humane. But there is every indication that the conduct of the settlers, or at least of many of them, was neither.

[1047] There are three principal arguments that can be advanced if the ***Royal Proclamation*** applies, through prospective application, to the claimed territory.

[1048] The first argument, and the one most vigorously relied on by the appellants is that the consent of the Gitksan people and the Wet'suwet'en people would have been necessary before their aboriginal rights were ceded, surrendered, extinguished or dealt with in any way contrary to their interests. That argument is said to rest on the terms of the Proclamation that relate to the surrender or purchase of land by the Crown from the Indians, which, so the appellants argue, are set out in the Proclamation as a matter of substance and not merely as a matter of procedure.

[1049] The second argument, if the ***Royal Proclamation*** applies, is that the whole of the claimed territory would be land reserved for the Indians within the meaning of the ***Royal Proclamation,*** within the meaning of the ***St. Catherine's Milling*** case, and within the meaning of s.91(24) of the ***Constitution Act, 1867,*** with the possible result, but perhaps not the necessary result, that when British Columbia joined Confederation in 1871 it lost all power to make laws in relation to the land within the Province and that power has remained sterile in British Columbia ever since. (Or at least until 1951 when s.88 of the ***Indian Act*** was enacted, assuming that s.88 applies to lands reserved for the Indians and not just to the Indians themselves.)

[1050] The third argument is that the ***Royal Proclamation*** supersedes all Colonial enactments and all Provincial legislation which might be said to be contrary to it. This argument relies on the relationship between Imperial enactments and Colonial enactments and rests, in part at least, on the ***Colonial Laws Validity Act, 1865,*** an Act of the Imperial Parliament.

[1051] There are a number of other arguments arising from any conclusion that the ***Royal Proclamation of 1763,*** in its terms, applied before 1871 or between 1871 and 1982, to the claimed territory.

[1052] The question of the application of the ***Royal Proclamation of 1763*** within British Columbia was considered by the Supreme Court of Canada in the ***Calder*** case. Three judges decided that its provisions applied in the relevant period before 1871: Mr. Justice Hall, Mr. Justice Spence and Mr. Justice Laskin; three judges decided that its provisions did not apply in British Columbia before 1871: Mr. Justice Judson, Mr. Justice Martland and Mr. Justice Ritchie; and Mr. Justice Pigeon did not decide the point. The question has not been settled by the Supreme Court of Canada since that time.

[1053] In view of the conclusions I have reached on the origin and the nature of aboriginal title, aboriginal self-government and aboriginal rights, and in view of the conclusion I have reached on the questions about extinguishment, no conclusion I might reach on the applicability or the effect of the ***Royal Proclamation of 1763*** would make any difference to my proposal for the disposition of this appeal at this stage. In the light of that fact and having regard to the equal division of views in the Supreme Court of Canada in the ***Calder*** case, it seems to me to be preferable that I should express no views at this time either on the application or on the effect of the ***Royal Proclamation of 1763*** in the claimed territory or on its inhabitants. It is unnecessary for me to do so.

2. The Weight of History

[1054] In ***Vermont v. Elliott,*** 616 A. 2d 210 (1992), the Supreme Court of the State of Vermont decided that events had overtaken the Indian claim in that case and that the weight of history had crushed and obliterated the claim because it could not stand, and it would be improper to let it stand, in modern times.

[1055] Whatever the merits of that argument in the ***Vermont*** case, it cannot apply in this case.

[1056] In 1884 the Gitksan chiefs of Gitwangak, in a petition to the Provincial government protesting the influx of miners within the territory without their consent, said this:

> In making this claim, we would appeal to your sense of justice and right...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...Would it be right for our Chiefs to give licenses to members of the tribe to go to the district of Victoria to measure out, occupy, and build upon lands in that district now held by white men as grazing or pasture land? Would the white men now in possession permit it, even if we told them that as we were going to make a more profitable use of the land they had no right to interfere? Would the Government permit it? Would they not at once interfere and drive us out? If it would not be right for us so to act, how can it be right for the white man to act so to us?

[1057] In 1910, representatives of the Indians in British Columbia were pressing for a judicial decision on their land claims. Mr. Newcombe, then Deputy Minister of Justice, wrote a memorandum to the Prime Minister recommending that such a judicial determination should be made. Mr. Newcombe's memorandum is dated 16 June 1910. The Federal government supported a judicial determination but the Provincial government would not consent to its taking place and it never occurred.

[1058] In 1951, The Honourable Walter Harris, then the Federal minister responsible for Indian affairs, on the second reading of the bill to amend the ***Indian Act,*** referred to the policies of the Federal government for many years before that date, of trying to encourage Indians to cease to be Indians and become instead like the settlers, at that time predominantly European in origin. That policy had proven to be unacceptable to the Indians. So Mr. Harris said that it was to be largely abandoned.

[1059] Consequently, in 1951, a wider form of self-regulation on the reserves came into effect under the ***Indian Act.*** It was no longer a criminal offence, as it had been for many years, to seek the financial support required to bring a land claim to the courts on behalf of an Indian people or to encourage such land claim litigation. The feast and the potlatch, the principal social, cultural and regulatory institutions of the Indians in British Columbia were permitted to resume. But for many years before 1951 the Indians had been denied those rights.

[1060] In 1960 Indians were permitted to vote in elections in Canada.

[1061] And one must not forget that the *ratio decidendi* of the decision of the Supreme Court of Canada in ***Calder*** was that no claim could be made for a declaration that aboriginal rights had not been extinguished, in an action against the Crown in right of the Province of British Columbia, unless the Attorney General consented to the litigation being brought, and granted his fiat to that effect. So no claim could even be advanced by an Indian people for declarations of aboriginal title or aboriginal rights unless the government consented. And, as I have noted, in 1910 the British Columbia government withheld its consent.

[1062] In all those circumstances, when the history shows that the Indian people were formally and legislatively prevented from asserting their rights, though they gave many indications that they wished to do so, it would, in my opinion, be thoroughly unjust and improper to say that the passage of time and the weight of history has eliminated those rights. As Chief Justice Dickson said in ***Mitchell v. Peguis Band,*** the burden of history must be shared by all Canadians, not by the Indians alone.

[1063] The extinguishment or elimination of aboriginal title and aboriginal rights by the passage of time or the weight of history, as discussed and applied in ***Vermont v. Elliott,*** is not part of the law of British Columbia and should be resolutely rejected.

3. The De Facto Doctrine

[1064] The applicability of the *de facto* doctrine was raised in the factums of the parties and of the *amici curiae*. The argument starts by supposing the proposition that the granting of tenures by the Provincial Crown which conflict with aboriginal title or aboriginal rights constitutes an infringement or denial of aboriginal rights which

cannot be justified under the justificatory tests outlined in ***Sparrow.*** If the *de facto* doctrine applies it would permit the infringement or denial to continue nonetheless, at least for a transition period.

[1065] As I have indicated in relation to the arguments about implicit extinguishment, extinguishment by adverse dominion, and extinguishment by Crown grant, I do not think that a conflict between Provincial legislation and aboriginal title or rights necessarily means that Provincial legislation and grants must prevail over aboriginal title and rights. And, having regard to the justificatory tests in ***Sparrow,*** there is no necessary conclusion that the aboriginal title and aboriginal rights must prevail over Provincial legislation and grants. Each specific infringement or denial must be examined on its own facts in relation to the specific infringement or denial, the specific circumstances, and the specific legislation in question.

[1066] I have said that it does not seem that the evidence in this case permits a consideration of any specific issue of infringement or denial. It is probable also that all the parties are not before the Court who would be required for specific determinations of the application of the de facto doctrine so as to permit unjustified infringement or denial to continue for some period on the basis that it has already been in effect for some period, and to allow the necessary adjustments to be made.

[1067] Accordingly, it is not necessary for me to deal further with the *de facto* doctrine in these reasons.

PART IX

DISPOSITION

[1068] I would make the following orders and declarations:

[1069] 1. I would allow the appeal.

[1070] 2. I would declare that the Gitksan and Wet'suwet'en peoples had, at the time of the assertion of British Sovereignty, in 1846, aboriginal title to occupy, possess, use and enjoy all or some of the land within the claimed territory. The land covered by aboriginal title at that time extended far beyond village sites and the immediate areas surrounding village sites.

[1071] 3. I would declare that the Gitksan and Wet'suwet'en peoples may have had, at the time of the assertion of British Sovereignty, in 1846, aboriginal sustenance rights of hunting, fishing, gathering and similar rights over those parts of the land within the claimed territory to which aboriginal title did not extend, if any.

[1072] 4. I would declare that the aboriginal title and the aboriginal sustenance rights I have described may have been exclusive to the Gitksan in some areas and exclusive to the Wet'suwet'en in some areas, but in other areas they may have been shared with each other or with other aboriginal peoples on the basis of shared-exclusivity, and in yet other areas, it is possible that the aboriginal sustenance rights, though not the aboriginal title, were not exclusive at all.

[1073] 5. I would declare that the Gitksan and Wet'suwet'en peoples had, at the time of sovereignty, in 1846, aboriginal rights of self-government and self-regulation relating to their own organized society, its members, its institutions and its interests, including its aboriginal title and aboriginal sustenance rights.

[1074] 6. I would declare that the aboriginal title, aboriginal rights of self-government and self-regulation, and aboriginal sustenance rights of the Gitksan and Wet'suwet'en peoples, at the time of Sovereignty, in 1846, were the title (being the exclusive or shared-exclusive right to the possession, occupation, use and enjoyment of land and its resources), the rights of self-government and self-regulation, and the sustenance rights which were a part of the customs, traditions and practices of the Gitksan and Wet'suwet'en people and formed, at that time, an integral part of their distinctive culture.

[1075] 7. I would declare that the aboriginal title and aboriginal sustenance rights I have described were recognized by, incorporated into, and protected by, the common law after the assertion of British Sovereignty in 1846; that they have not been extinguished by any comprehensive (blanket) extinguishment; and, accordingly, subject only to specific extinguishment

of the specific title or specific sustenance right in a specific area, they exist now in a modern form suitable to the cultures and societies of the Gitksan and Wet'suwet'en peoples as their cultures and societies now exist as components of the whole of contemporary Canadian culture and society.

[1076] 8. I would declare that the aboriginal rights of self-government and self-regulation of the Gitksan and Wet'suwet'en peoples, at the time of sovereignty, in 1846, except for:

(a) any of those rights which related to Sovereignty and so were inconsistent with British Sovereignty over the territory;

(b) any of those rights which would at that time have been repugnant to natural justice, equity, and good conscience, and have not since then so modified themselves as to overcome that repugnancy; and

(c) any of those rights which were contrary to the part of the common law that was not from local circumstances inapplicable to the territory and to the Gitksan and Wet'suwet'en peoples and their institutions,

were recognized by, incorporated into, and protected by, the common law after 1846; that they have not been extinguished by any comprehensive (blanket) extinguishment; and, accordingly, subject only to specific extinguishment of specific rights of self-government and self-regulation, they exist in a modern form suitable to the culture and society of the Gitksan and Wet'suwet'en peoples as their culture and society now exist as components of the whole of contemporary Canadian culture and society.

[1077] 9. I would declare that the aboriginal title, aboriginal rights of self-government and self-regulation, and aboriginal sustenance rights of the Gitksan and Wet'suwet'en peoples, as they existed at the time of Sovereignty, in 1846, may have been subject after that to specific extinguishment of specific rights by the clear and plain extinguishing intention of the Sovereign Power, legislatively expressed, either in the Colonial Proclamations and Ordinances for the period from 1846 to 1871, or in legislation of the Parliament of Canada from 1871 to 1982, but not otherwise. Any specific extinguishment of specific rights might have been express or implicit, and, if implicit, it may have been brought about by the legislation itself (implied extinguishment) or by acts authorized by the legislation (extinguishment by adverse dominion), provided the intention to extinguish was contained within the legislative expression and was clear and plain. (Issues about specific extinguishment of specific rights by specific legislative enactments were not raised in this appeal. In relation to specific extinguishment, this

appeal was confined to the general principles of the law of extinguishment.)

[1078] 10. I would declare that the present aboriginal rights of self-government and self-regulation of the Gitksan and Wet'suwet'en peoples, exercisable in relation to their aboriginal title, would include the specific rights claimed in this appeal by the plaintiffs in relation to aboriginal title, namely:

(a) a right to harvest, manage and conserve the lands and their 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 plaintiffs and their future generations; and

(iii) consultation and cooperation with ministries and agencies of the Crown and with the private sector who may be affected by the exercise of the plaintiffs' rights;

(b) a right to maintain and develop their institutions for the regulation of their aboriginal title and for the harvesting, management and conservation of the lands and their resources;

[1079] 11. I would declare that the present aboriginal rights of self-government and self-regulation of the Gitksan and Wet'suwet'en peoples, would include rights of self-government and self-regulation exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity;

[1080] 12. I would declare that the declaratory orders which I would make are final orders and final declarations in this appeal.

[1081] 13. I would remit all issues properly raised by the pleadings, the evidence, the trial judgment and the appeal material, but not decided in these reasons, to the Supreme Court of British Columbia for a new trial. Those issues would include:

(a) the lands in respect of which the plaintiffs have aboriginal title, and their boundaries;

(b) the lands in respect of which the plaintiffs have aboriginal sustenance rights, and their boundaries;

(c) whether the aboriginal title of the plaintiffs is exclusive or shared-exclusive in each particular area of the lands over which the Gitksan and Wet'suwet'en peoples have aboriginal title;

(d) whether the aboriginal sustenance rights are exclusive, shared-exclusive, or non-exclusive over the parts of the lands in which the Gitksan and Wet'suwet'en people have aboriginal sustenance rights;

(e) the scope and content of the aboriginal sustenance rights of the Gitksan and Wet'suwet'en peoples in each area over which those rights extend;

(f) the scope and content of the aboriginal rights of the Gitksan and Wet'suwet'en peoples to self-government and self-regulation;

(g) all questions relating to the plaintiffs' entitlement to damages and the quantum of damages;

[1082] 14. The cross-appeal having been abandoned, I would dismiss the cross-appeal; and I would dismiss the counterclaim.

[1083] 15. I would award the plaintiffs their costs in this Court. I would also Court of British Columbia in relation to the proceedings to the present time.

PART X

SYNOPSIS

[1084] The plaintiffs claimed "ownership" of 22,000 square miles in central British Columbia, and "jurisdiction" over that territory. In the course of the trial the plaintiffs said that they wished the Court to grant them whatever other rights they might be entitled to. The trial judge decided that a claim for aboriginal rights other than ownership and jurisdiction was open to the plaintiffs. The Province did not argue otherwise on this appeal.

[1085] All aboriginal rights have their origin in aboriginal customs, traditions and practices which were nurtured and protected by the aboriginal society and formed an integral part of their distinctive culture. On the assertion of British sovereignty over British Columbia in 1846 the protection of the common law was extended to the aboriginal rights of the Gitksan and Wet'suwet'en peoples and those rights were absorbed into the common law and became recognized and protected as part of the body of the common law and as common law aboriginal rights. Unless those rights have been extinguished by the Sovereign Power acting legislatively through a clear and plain enactment, those rights of the Gitksan and Wet'suwet'en peoples, as they existed in 1846, have been carried forward in a continuously contemporary form to the present time, as a part of the common law of British Columbia. The contemporary form of those aboriginal rights is now recognized, affirmed, and guaranteed by s.35 of the ***Constitution Act, 1982*** with the result that the aboriginal rights of the Gitksan and Wet'suwet'en peoples are now constitutionally protected.

[1086] The trial judge treated the claim to "ownership" as a claim to a proprietary interest of the sort regarded as ownership by the common law. By doing so he immediately excluded the claim from consideration. The authorities all say that the interest of aboriginal peoples in their land is not proprietary in the common law sense but is, instead, in a category of its own.

[1087] A Court may grant a declaration of entitlement to rights that are less than those claimed. The trial judge decided to consider a claim for aboriginal rights other than ownership. Having decided that "ownership" meant a proprietary interest like ownership at common law, and having excluded that claim, the trial judge should have gone on to consider the included claim to aboriginal title, consisting of the communal right to exclusive possession, occupation, use and enjoyment of land within the territory. In my opinion, he only did so in the context of a claim to "ownership", which he had already decided to disallow. His consideration of this subject rested on a basic misconception of the nature of aboriginal title and, in consequence, it contains many instances where incorrect legal principles were applied to basic evidence to produce incorrect conclusions. Those flawed conclusions cannot stand. It would be an error in law for this Court to decide that because the trial judge heard the witnesses this Court must accept his conclusions, when those conclusions rest on a misunderstanding of the nature of aboriginal title.

[1088] In my opinion the claim to aboriginal title over much of the territory has been established by the evidence and I would overturn the conclusion of the trial judge with respect to the nature of the plaintiffs' interest in their ancestral lands. I would make a declaration that the plaintiffs, on behalf of the Gitksan and the Wet'suwet'en peoples, have a communal aboriginal title over much of the territory to which the claim relates. That aboriginal title is a burden on the root title of the Crown and constituted such a burden when the first fee simple titles were granted to Crown land within the territory. The plaintiffs have said that they do not wish to disturb fee simple titles to land within the territory. But they claim damages for loss of the rights to exercise their aboriginal title to the lands held in fee simple. I would defer questions about damages to a new trial. I would leave questions about the priorities between aboriginal title and Crown-granted tenures to cases where those priorities are specifically raised and the affected parties are before the Court.

[1089] The trial judge was not satisfied that the plaintiffs had established occupation and use of specific territories by specific heads of Houses with the result that he was not satisfied about the placement of the perimeter of the entire territory claimed. Counsel for the Province joined counsel for the plaintiffs in asking that all questions in relation to boundaries be deferred to permit negotiations between the Province and the plaintiffs. In my opinion, by doing so, the Province specifically abandoned any right it might have had to argue that because the precise boundaries of the area subject to aboriginal possession, occupation, use and enjoyment were not sufficiently established the whole claim to aboriginal title over land within the territory had not been established. In my opinion that argument is one that must be made in the course of this first hearing of the appeal or not at all. It is entirely inconsistent with a request that negotiations be permitted on the content and the boundaries of the plaintiffs' claim to aboriginal title. Because of that inconsistency it is inappropriate to regard that argument as having been reserved for use at some later proceeding, including a resumption of the appeal. Because of that inconsistency that argument must, in my opinion, be regarded as having been conclusively waived and abandoned.

[1090] The trial judge treated the claim to "jurisdiction" as a claim to complete sovereignty. He then disallowed that claim as being inconsistent with the sovereignty of the Crown over the whole of British Columbia. I do not think that the claim to "jurisdiction" was ever intended to be a claim to sovereignty. Rather, it was a claim to a measure of self-government and self-regulation. It was a claim resting, like all the claims, on aboriginal rights. As such, it should have been considered by the trial judge who had decided to consider the plaintiffs' claims to all the rights to which they were entitled. But what happened was that again the trial judge put the claim on the most extreme basis possible, relied on the authorities to disallow it on that basis, and failed to consider the included claim to simple rights of self-government and self-regulation at all. By treating this claim as a claim to sovereignty and as a claim to govern the territory and everyone and everything within it, the trial judge misconceived the law applicable to questions of aboriginal self-government and self-regulation. When he applied the incorrect law to the basic evidence, he reached the wrong conclusions on the subject. Those conclusions cannot stand and do not bind this Court.

[1091] In my opinion the Gitksan and Wet'suwet'en peoples have aboriginal rights of self-government and self-regulation which they may employ to control the exercise of their aboriginal title to the possession, occupation, use and enjoyment of land within the territory and to the resources of that land. Further, in my opinion, the Gitksan and Wet'suwet'en peoples have rights of self-government and self-regulation, exercisable through their own institutions, to preserve and enhance their social, political, cultural, linguistic and spiritual identity. These aboriginal rights of self-government and self-regulation will in large measure be supplementary to and entirely consistent with the overall government functions carried out by Canada and British Columbia, just like the rights of self-government and self-regulation of a forest company over itself and its forests, a cattle company over itself and its grazing land, or a Hutterite community over the social and religious life of its members. However, there may be other functions of self-government and self-regulation, resting on aboriginal practices, traditions and customs which Form a part of the distinctive culture of the Gitksan and Wet'suwet'en peoples, which supplant and prevail over general laws which are inconsistent with those practices, traditions and customs and which were brought into effect without any clear and plain intention to extinguish those practices, traditions and customs. Consideration of such questions must await the time when they are specifically raised.

[1092] The trial judge dealt with a claim to "aboriginal sustenance rights" and decided that, but for his conclusion that all aboriginal rights had been comprehensively extinguished, the Gitksan and Wet'suwet'en peoples would still have had non-exclusive rights to exercise their traditional sustenance practices in modern ways throughout the area covered by Map 5.

[1093] In my opinion, the Gitksan and Wet'suwet'en peoples have aboriginal title over the area covered by Map 5 and more of the territory besides. But even excluding the question of aboriginal title, it is my opinion that the trial judge's conclusions on aboriginal sustenance rights are wrong in a number of respects. The two most significant respects are, first, that the trial judge applied the wrong legal test to determine whether the plaintiffs' ancestors had exclusive occupancy of the territory, namely whether there was some law which would have compelled an intruder on their ancestral lands to leave, and second, that the trial judge applied the wrong legal test to the assessment of aboriginal customs, traditions, and practices and to their duration, particularly in excluding commercial trapping from consideration, and so he failed to give proper weight to extensive and very reliable evidence of Hudson Bay traders, who made the first contact with the Gitksan and Wet'suwet'en peoples, and he failed to give proper weight to the very reliable evidence of scholars who commented on the documents of the early traders.

[1094] In my opinion, the Gitksan and Wet'suwet'en peoples have aboriginal sustenance rights which are at least co-extensive with their aboriginal title and to that extent are absorbed into it, but which may be wider in geographical extent than the area covered by the aboriginal title.

[1095] The trial judge considered that all aboriginal rights in British Columbia had been comprehensively extinguished in the Colonial period between 1846 and 1871. None of the parties to this appeal supported that conclusion and this Court

appointed counsel to argue in support of it. After considering that argument, it is my opinion that the conclusion that there had been comprehensive extinguishment of aboriginal rights in British Columbia in the Colonial period is wrong.

[1096] The aboriginal title, aboriginal rights of self-government and self-regulation, and aboriginal sustenance rights of the Gitksan and Wet'suwet'en peoples may have been subject in specific areas to specific extinguishment by specific Colonial legislation and by specific legislation of the Parliament of Canada before 1982 (when those aboriginal rights were granted constitutional protection), but such specific extinguishment was not dealt with in this case. The exercise of the rights embodied in aboriginal title, aboriginal self-government and self-regulation and aboriginal sustenance may also be subject to regulation in accordance with the principles outlined in the ***Sparrow*** case or similar principles, but questions of regulation in that way were not dealt with either.

[1097] I wish to add a word about the context of this litigation. The plaintiffs have asserted legal rights to ownership and jurisdiction over 22,000 square miles of territory in central British Columbia. Other aboriginal peoples have asserted or are asserting similar claims to other territory. Those claims in total cover all or almost all of British Columbia including all of the major cities. All of those claims encompass assertions of aboriginal title, aboriginal rights of self-government and self-regulation, and aboriginal sustenance rights such as I have decided properly exist as a matter of law. All of those titles and rights have their origins in the customs, traditions and practices of the aboriginal peoples as those customs, traditions and practices are integral and distinctive to the aboriginal cultures and societies. Those aboriginal titles and aboriginal rights are now recognized, affirmed and protected by the common law and by the constitutional amendment adopted by the Canadian people in 1982. The plaintiffs in this case, and the Indian peoples on whose behalf similar claims have been made are entitled to have their claims determined in accordance with law. Considerations about whether the Indian claims are "all or nothing", or about whether the claims can be determined on the basis of a "co-existence" approach are not, in my opinion, relevant considerations in determining the entitlements of the Indian peoples as a matter of law. But political sovereignty, and its associated rights, within British Columbia and throughout Canada are in the hands of the entire British Columbian and Canadian communities, Indian and non-Indian alike. That is not disputed by the plaintiffs in this case and in my opinion could never be successfully disputed. So, in the end, the legal rights of the Indian people will have to be accommodated within our total society by political compromises and accommodations based in the first instance on negotiation and agreement and ultimately in accordance with the sovereign will of the community as a whole. The legal rights of the Gitksan and Wet'suwet'en peoples, to which this law suit is confined, and which allow no room for any approach other than the application of the law itself, and the legal rights of all aboriginal peoples throughout British Columbia, form only one factor in the ultimate determination of what kind of community we are going to have in British Columbia and throughout Canada in the years ahead. In my view, the failure to recognize the true legal scope of aboriginal rights at common law, and under the Constitution, will only perpetuate the problems connected with finding the honourable place for the Indian peoples within the British

Columbian and Canadian communities to which their legal rights and their ancient cultures entitle them.

[1098] I would allow the appeal and order a new trial on the basis of the principles adopted in my reasons. I would prefer to see questions about the geographical extent, scope and content of aboriginal title, aboriginal rights of self-government and self-regulation, and aboriginal sustenance rights settled by negotiation, and by political accommodation.

"THE HONOURABLE MR. JUSTICE LAMBERT"

REASONS FOR JUDGMENT OF MR. JUSTICE HUTCHEON

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PART 1

INTRODUCTION

[1099] The plaintiffs in this action and the appellants on this appeal are 51 hereditary chiefs, 39 Gitksan and 12 Wet'suwet'en, who brought the action on behalf of themselves and the members of their Houses. In total, they represent members of 71 Houses consisting of all the Gitksan and Wet'suwet'en people, 5,500 to 7,000 in number, except for the people in the Houses of the Kitwancool chiefs. The principal relief sought was a series of declarations of rights of ownership over their territory of some 22,000 square miles in central British Columbia and rights of jurisdiction in the form of authority over their land and their people.

[1100] In reasons for judgment dated March 8, 1991, (reported [1991] 3 W.W.R. 97) the trial judge, Chief Justice McEachern, dismissed the action except for the grant of a declaration that the plaintiffs, on behalf of the Gitksan and Wet'suwet'en people, have a continuing legal right to use unoccupied Crown land in a territory outlined by him for aboriginal sustenance purposes. This result came about, in the main, from the conclusion of the trial judge, at p.411, that aboriginal title to land had been extinguished in the Colony of British Columbia "by the arrangements [the Crown] made for the development of the colony, including provision for conveying titles and tenures unencumbered by any aboriginal rights and by the other arrangements it made for Indians". (p. 411)

[1101] The reference to "arrangements for the development of the colony" was a reference to proclamations and ordinances issued between 1858 and 1870, by Governor Douglas and his successors. They were described by the appellants as the "Colonial Instruments" and by others as the "Calder XIII laws".

[1102] After the trial and before this appeal began on 4 May 1992 an election took place in British Columbia with the New Democratic Party the victors over the incumbent Social Credit Party. Thereupon the new government replaced its trial counsel and gave fresh instructions to its counsel on appeal, the most important of which was the instruction to abandon the previous position of the Province that the Crown, by means of the Colonial Instruments, had extinguished aboriginal title to lands. The Province's position on the appeal is that the appellants continue to enjoy some aboriginal rights to some portion of the claim area.

[1103] At the suggestion of the Province, the Court was invited to appoint *amici curiae* to submit argument in support of the conclusion of the trial judge for extinguishment. After a hearing, the Court, on 29 April 1992, appointed three of the former counsel for the Province as *amici curiae* on the issue of extinguishment and certain other issues including the nature of the order now sought by the Province and by the appellants.

[1104] Briefly and incompletely stated, this Court has now been asked by the Province to allow the appeal in part by a declaration that the appellants have existing aboriginal rights with respect to an undefined portion or portions of the territory; then

to adjourn proceedings for a period of two years from the date of the judgment to allow the Province and the appellants to negotiate the precise location, scope, content and consequence of the existing aboriginal rights.

[1105] As I understand this proposal, this Court could limit itself at this stage of the appeal to the general issues of extinguishment, ownership, and the inherent right to self- government and leave to another day, and perhaps to other tribunals, the particulars of those issues.

[1106] I say "to other tribunals" because I think that the proper order, if one is to adopt the proposal, would be to refer the particulars to the Supreme Court to the extent the parties are unable to reach agreement. This course would seem preferable to the difficulty created by the finality of an order allowing the appeal in part and by the certainty of a change in the next two years in the composition of the present division of the Court hearing the appeal. I shall return later to this subject when I spell out the form of order I propose to make.

[1107] For the reasons that follow I have reached certain conclusions:

A. RIGHTS TO LAND

[1108] 1. Aboriginal rights to land existed before 1846, the date of the exercise of British sovereignty in the colony.

[1109] 2. (a) The ***Royal Proclamation, 1763,*** did not apply to British Columbia.

(b) The ***Royal Proclamation, 1763,*** reflected the British policy of acceptance of aboriginal rights to land.

[1110] 3. The Colonial Instruments did not extinguish the aboriginal rights to land.

B. NATURE OF THE RIGHTS

[1111] 1. The aboriginal rights to land were of such a nature as to compete on an equal footing with proprietary interests.

[1112] 2. The aboriginal rights to land were communal, that is to say House rights, not alienable except by way of surrender to the Crown.

C. TERRITORY

[1113] 1. Some of the territory claimed by the appellants was occupied or controlled by their ancestors.

[1114] 2. The territory was not limited to their villages and adjacent lands.

D. SELF REGULATION

[1115] 1. The Gitksan and Wet'suwet'en people have not lost the right to self-regulation.

[1116] 2. That right has been very much affected by the ***Indian Act*** and by provincial laws.

PART 11

RIGHTS TO LAND

A. Aboriginal rights to land existed before 1846, the date of the exercise of British Sovereignty in the colony.

[1117] There is no dispute that the ancestors of the appellants were present in parts of the territory for a long, long time prior to sovereignty; the territory includes a good deal of land in the areas of the Skeena, Bulkley, Babine and Morice Rivers; the many villages, lands and fishing sites were used for many purposes including hunting, trapping, fishing, berry-picking and spiritual and cultural reasons.

[1118] On these undisputed facts, the common law recognized that "the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty". I have just quoted the description by Mr. Justice Dickson in ***Guerin v. The Queen,*** [1984] 2 S.C.R. 335 at 377 and 378 of the opinion of Chief Justice Marshall in ***Johnson v. M'Intosh,*** 21 U.S. (8 Wheat.) 543 (1832). Mr. Justice Dickson went on to say:

> The principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants was approved by the Privy Council in ***Amodu Tijani v. Southern Nigeria (Secretary),*** [1921] 2 A.C. 399. That principle supports the assumption implicit in ***Calder*** that Indian title is an independent legal right which, although recognized by the ***Royal Proclamation of 1763,*** nonetheless predates it.

[1119] For other Supreme Court of Canada pronouncements on this point see ***Calder v. Attorney-General of British Columbia,*** [1973] S.C.R. 313 per Judson J. at pp. 320-328, ***Roberts v. Canada,*** [1989] 1 S.C.R. 322 at 340 and ***R. v. Sioui,*** [1990] 1 S.C.R. 1025 at 1055.

[1120] The trial judge, to some extent, made the point at p.365:

> 1. Aboriginal interests arise out of occupation or use of specific land for aboriginal purposes for an indefinite or long, long time before the assertion of sovereignty.

[1121] I note that in the recent decision of the High Court of Australia in ***Mabo v. Queensland*** (1992), 107 A.L.R. 1 Mr. Justice Brennan, in rejecting the proposition that the indigenous inhabitants of a "settled" colony had no proprietary interest in the land, stated at p.26:

> It would be a curious doctrine to propound today that, when the benefit of the common law was first extended to Her Majesty's indigenous subjects in the Antipodes, its first fruits were to strip them of their right to occupy their ancestral lands.

B. The Royal Proclamation, 1763

(i) The Royal Proclamation, 1763 did not apply to British Columbia

[1122] I agree with the conclusion of the trial judge (p.228) that the language of the Royal Proclamation applied only to the benefit of certain lands and specified Indians: the language did not extend to the lands and people totally unknown to the drafters of the Proclamation. As the trial judge pointed out geographical maps of the period indicated uncertainty whether the present Province of British Columbia was land or water.

(ii) The Royal Proclamation, 1763, reflected British policy of acceptance of aboriginal rights to land

[1123] In ***R. v. Sparrow,*** [1990] 1 S.C.R. 1075 Chief Justice Dickson and Mr. Justice La Forest said at p.1103:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the ***Royal Proclamation of 1763*** bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown: see ***Johnson v. M'Intosh*** (1823), 8 Wheaton 453 (U.S.S.C.); see also the ***Royal Proclamation*** itself (R.S.C., 1985, App. II, No. 1, pp. 4-6); ***Calder,*** supra, per Judson J. at p. 328, Hall J. at pp. 383 and 402.

[1124] And at p.1104:

> In the light of its reassessment of Indian claims following ***Calder,*** the federal Government on August 8, 1973, issued "a statement of policy" regarding Indian lands. By it, it sought to "signify the Government's recognition and acceptance of its continuing responsibility under the British North America Act for Indians and lands reserved for Indians", which it regarded "as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people's interests in land in this country". (Emphasis added.) **See statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People,** August 8, 1973.

[1125] The implementation of the British policy as reflected in the ***Royal Proclamation, 1763,*** is summarized in the 1844 Report of the Royal Commission appointed in 1842 by the Provincial Government of Canada under the title "Report on the Affairs of the Indians in Canada". I quote these extracts:

> The spirit of the British Government towards the Aborigines of this Continent, was at an early date characterized by the same forbearance and kindness which still continues to be extended to them.

* * *

> The subsequent Proclamation of His Majesty George III. issued in 1763, furnished them with a fresh guarantee for the possession of their hunting grounds and the protection of the Crown. This document, the Indians look upon as their Charter. They have preserved a copy of it to the present time, and have referred to it on several occasions in their representations to the Government.
>
> Since 1763 the Government, adhering to the Royal Proclamation of that year, have not considered themselves entitled to dispossess the Indians of their lands without entering into an agreement with them, and rendering them some compensation.

[1126] The Report goes on to consider the complaints on behalf of the Indians of the very inadequate compensation for the lands surrendered. However, the important point that emerges is the principle of voluntary surrender in return for compensation.

[1127] That is the policy then of the British Government reflected in the ***Royal Proclamation, 1763,*** and in the conduct of the British Government to the time of the Report in 1844.

C. The Colonial Instruments did not extinguish the aboriginal rights to land

[1128] In the ***Calder*** case the Supreme Court of Canada had before it the very same Colonial Instruments that the trial judge relied upon in the present case in reaching his conclusion (p.425) that the aboriginal interests in the territory were lawfully extinguished by the Crown during the colonial period.

[1129] In the ***Calder*** case three of the judges of the Supreme Court held that the Colonial Instruments did not extinguish the aboriginal rights; another three judges held that the series of instruments did extinguish the aboriginal rights. But in ***Sparrow*** the Supreme Court of Canada said at pp.1098-99:

> In the context of aboriginal rights, it could be argued that, before 1982, an aboriginal right was automatically extinguished to the extent that it was inconsistent with a statute. As Mahoney J. stated in ***Baker Lake***, *supra*, at 551:
>
> Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. That is as true of an aboriginal title as of any other common law right.
>
> See also ***Ontario (Attorney General) v. Bear Island Foundation,*** *supra*, at pp. 439-40. That in Judson J.'s view was what had occurred in ***Calder,*** *supra*, where, as he saw it, a series of statutes evinced a unity of intention to exercise a sovereignty inconsistent with any conflicting interest, including aboriginal title. But Hall J. in that case stated (at p. 404) that "the onus of proving that the Sovereign

> intended to extinguish the Indian title lies on the respondent and that intention must be 'clear and plain'" (Emphasis added). The test of extinguishment to be adopted in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.

[1130] By "clear and plain" I take the words to mean "free from doubt". With respect, the Colonial Instruments may have been passed in anticipation of settlement to the exclusion of the Indian title but I cannot find it free from doubt that any one of the thirteen instruments extinguished that title without actual use by settlers.

[1131] I have read the draft reasons of Mr. Justice Lambert and I agree with his treatment of the subject under the heading "Extinguishment in the Colonial Period 1846-1871". I have also read the draft reasons of Mr. Justice Macfarlane and I agree with his treatment of the subject under the headings; "Can the Intention to Extinguish Be Implied?", "Extinguishment in the Colonial Period: 1846 to 1871", and "Can valid provincial legislation extinguish aboriginal rights etc.?"

[1132] I would add that we must remember that by 1871 very little settlement, if any, had taken place in the area in question. Without actual use by settlers, I think the law is that expressed in ***Mabo*** by Mr. Justice Brennan at p.50:

> A reservation of land for future use as a school, a courthouse or a public office will not by itself extinguish native title: construction of the building, however, would be inconsistent with the continued enjoyment of native title which would thereby be extinguished. But where the Crown has not granted interests in land or reserved and dedicated land inconsistently with the right to continued enjoyment of native title by the indigenous inhabitants, native title survives and is legally enforceable.

[1133] Whether the Indian title is extinguished by grant in fee simple is a question that need not be decided at this state of the proceeding. Likewise, the entitlement to compensation need not be decided.

PART III

NATURE OF THE RIGHT

A. The aboriginal rights to land are of such a nature as to compete on an equal footing with proprietary interests.

[1134] I observe that the territory was not the subject of settlement by the Europeans before the Terms of Union of 1871. In other words when by the Terms of Union in 1871 "lands reserved for Indians" passed from the Colony of British Columbia to Canada little penetration by settlers, if any, had taken place. The appellants in their factum make this Statement of Fact:

> 151. There were no alienations, letters patent, or pre-emptions for any land in the territory of the appellants' ancestors prior to union in 1871. No treaties were entered into with the Gitksan and Wet'suwet'en in respect of their title and rights.

[1135] The trial judge described the activities of the Europeans in the area in this way at p.303:

> As mentioned earlier, trade goods began to flow into the territory from both the east and the west perhaps as early as 1800 but probably later than that. Trader Brown of the Hudson's Bay Company established Fort Kilmaurs on Babine Lake outside the territory in 1822, and he actually made one or more visits towards the forks of the Skeena and Babine, but no further; Peter Skene Ogden travelled overland from the Company's establishments in the east to Moricetown in 1836; the Collins Overland Telegraph Company reached Fort Stager just north of Kispiox in 1866; the Hudson's Bay Company opened a post, briefly, at what is now Old Hazelton at the forks of the Skeena and Bulkley Rivers in 1866; and there was undoubtedly some, though not much, "European" traffic through the main river valleys, which were largely the preserve of the Indian traders such as the legendary Legaik and his successors, who more or less controlled the middle Skeena up to at least mid-century.
>
> All that started to change at that time, partly because of the Omineca gold rush, which provided employment for the Indians as packers at which they had become proficient even though horses were unknown in the territory until telegraph construction in 1865.

[1136] At p.346 the trial judge set out the following conclusion of law:

> I can only conclude on the existing authorities that ***St. Catherine's Milling*** [***v. The Queen*** (1888), 14 App. Cas. 46 (P.C.)] is powerful authority, binding on me, that aboriginal rights, arising by operation of law, are non-proprietary rights of occupation for residence

> and aboriginal user which are extinguishable at the pleasure of the Sovereign.

[1137] I have already concluded that aboriginal rights to land existed prior to 1846, the date of British sovereignty over the territory. In decisions subsequent to ***St. Catharine's Milling*** the Supreme Court of Canada has explained that aboriginal rights to land are *sui generis*.

[1138] In ***Calder*****,** Mr. Justice Judson at p.328 treated aboriginal title as the interest of the Indian people in their homeland:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.

[1139] This description was given by Mr. Justice Dickson in ***Guerin*** at p.382:

> It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it a personal, usufructuary right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has none the less arisen because in neither case is the categorization quite accurate.
>
> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.

[1140] Again in ***C.P. Ltd. v. Paul*****,** [1988] 2 S.C.R. 654 at 678 the Supreme Court of Canada emphasizes the uniqueness of the aboriginal title to land:

> 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.

[1141] Finally in ***Sparrow*****,** the Supreme Court of Canada repeated its warning against the use of traditional concepts at p.1112:

> Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in ***Guerin*****,** *supra*, at p. 382, referred to as the "*sui generis*" nature of aboriginal rights. See also Little Bear, "A Concept of Native Title", [1982] ***5 Can. Legal Aid Bul. 99***

[1142] With respect I agree with the observation of Mr. Justice Toohey of the High Court of Australia in ***Mabo*** in this passage at p.152:

> As long ago as 1921 the Privy Council cautioned against attempting to define aboriginal rights to land by reference to the English law notion of estates. In ***Amodu Tijani*** [1921] 2 A.C. 399 at 403 (P.C.) Viscount Haldane said:
>
> > "There is a tendency, operating at times unconsciously, to render [native] 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."
> >
> > As discussed earlier, the specific nature of such a title can be understood only by reference to the traditional system of rules. An inquiry as to whether it is "personal" or "proprietary" ultimately is fruitless and certainly is unnecessarily complex.

[1143] I find it sufficient to say that aboriginal rights to land are of such a nature as to compete on an equal footing with proprietary interests.

B. Communal Rights

[1144] Other incidents of aboriginal rights to land have been settled and are not in dispute:

(a) The rights are inalienable except to the Crown;

(b) The rights are collective, shared by all members of the House with the rights vested in the chief on behalf of the whole kinship group.

(c) The rights extend to the traditional territory of the particular people.

PART IV

TERRITORY

A. Some of the territory claimed by the appellants was occupied or controlled by their ancestors.

[1145] The trial judge at p.384 found that ancestors of the plaintiffs were living in their villages on the great rivers in the form of a communal society. No one on this appeal disputes that finding. The dispute is over the restriction by the trial judge to "adjacent lands" or "immediately surrounding areas" of their villages.

[1146] The findings are in this passage:

> I am satisfied that at the date of British sovereignty the plaintiffs' ancestors were living in their villages on the great rivers in a form of communal society, occupying or using fishing sites and adjacent lands as their ancestors had done for the purpose of hunting and gathering whatever they required for sustenance. They governed themselves in their villages and immediately surrounding areas to the extent necessary for communal living, but it cannot be said that they owned or governed such vast and almost inaccessible tracts of land in any sense that would be recognized by the law. In no sense could it be said that Gitksan or Wet'suwet'en law or title followed (or governed) these people except possibly in a social sense to the far reaches of the territory.
>
> To put it differently, I have no doubt that another people, such as the Nishga or Talthan, if they wished, could have settled at some location away from the Gitksan or Wet'suwet'en villages and no law known to me would have required them to depart.
>
> While these are my findings, I am prepared to assume for the purposes of this part of my judgment that, in the legal and jurisdictional vacuum which existed prior to British sovereignty, the organization of these people was the only form of ownership and jurisdiction which existed in the areas of the villages. I would not make the same finding with respect to the rest of the territory, even to the areas over which I believe the ancestors of the plaintiffs roamed for sustenance purposes.

[1147] With respect, I think that the test implicit in this passage is far too strict and is not in accordance with the authorities.

[1148] I refer firstly to the decision of the Supreme Court of Canada in ***Ontario (Attorney General) v. Bear Island Foundation,*** [1991] 2 S.C.R. 570. The trial judge in that case had refused to find that the Indians had established an aboriginal right for these reasons:

> I will deal with the entitlement of the defendants to aboriginal rights in the Land Claim Area. I find that the defendants have failed to

> prove that their ancestors were an organized band level of society in 1763; that, as an organized society, they had exclusive occupation of the Land Claim Area in 1763; or that, as an organized society, they continued to exclusively occupy and make aboriginal use of the Land Claim Area from 1763 or the time of coming of settlement to the date the action was commenced.

[1149] At pp.574-5 the Court stated:

> We have undertaken a detailed examination of the facts on this basis. We do not take issue with the numerous specific findings of fact in the courts below, and it is, therefore, not necessary to recapitulate them here.
>
> It does not necessarily follow, however, that we agree with all the legal findings based on those facts. In particular, we find that on the facts found by the trial judge the Indians exercised sufficient occupation of the lands in question throughout the relevant period to establish an aboriginal right; see, in this context, ***Simon v. The Queen*****,** [1985] 2 S.C.R. 387, and ***R. v. Sparrow*****,** [1990] 1 S.C.R. 1075. In our view, the trial judge was misled by the considerations which appear in the passage from his reasons quoted earlier.

[1150] Secondly, in ***Simon v. R.*****,** [1985] 2 S.C.R. 387 the trial judge assumed that Simon was a direct descendant of the Micmac Indians, parties to the treaty upon which he relied in his defence to charges of unlawful possession of a rifle. The Nova Scotia Supreme Court, Appellate Division, held that Simon had not established any connection "by 'descent or otherwise' with the original group of Micmac Indians". At pp.407-8, Chief Justice Dickson, after a brief review of the evidence stated:

> This evidence alone, in my view, is sufficient to prove the appellant's connection to the tribe originally covered by the Treaty. True, this evidence is not conclusive proof that the appellant is a direct descendant of the Micmac Indians covered by the Treaty of 1752. It must, however, be sufficient, for otherwise no Micmac Indian would be able to establish descendancy. The Micmacs did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present-day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this Treaty.

B. The territory was not limited to their villages and adjacent lands.

[1151] The uncontradicted evidence in the Hudson Bay records for 1810 to 1826 demonstrates that the territory occupied or controlled by the Kitksan and Wet'suwet'en people extended far beyond their villages. In his book, ***Common Law Aboriginal Title*** (Oxford: Clarendon Press, 1989), Professor Kent McNeil summarizes his view of the test in this passage at pp. 203-204:

> Applying the criteria for occupation outlined above, there can be little doubt that a group of hunter-gatherers who habitually and exclusively ranged over a definite tract of land, visiting religious sites and exploiting natural resources in accordance with their own interests and way of life, would have been in occupation of that land. Where others were allowed access upon request, the very fact that permission was asked for and given would be further evidence of the group's exclusive control. Isolated acts of 'trespass', on the other hand, would not interfere with the group's occupation, particularly if unnoticed or not worth preventing. As to the extent of their occupation, it would include not just land in actual use by them at any given moment, but all land within their habitual range, for occupation, once acquired, is not necessarily lost by temporary absence (particularly if seasonal), so long as the intention and capacity to retain exclusive control and return to the land continue, and no one else occupies it in the mean time.

[1152] I have omitted the lengthy footnotes from the quotation. Apart from the qualification that the control may be exclusive in some areas and shared in others, in my view the test described in the quotation meets the requirements of "sufficient" proof of occupation and control by the Gitksan and Wet'suwet'en people of their territory.

[1153] In the present case, evidence of territorial occupation and control found in particular in the journals of the Hudson's Bay Company disclosed all of the elements of the test. The trial judge appeared to have accepted the evidence of Professor Arthur Ray, a historical geographer, but not to the full extent. Thus Professor Ray's conclusion in this passage does not comport with the trial judge's conclusions of "villages and adjacent areas":

> Of major importance, the observations of the Hudson's Bay Company traders discussed above clearly indicate 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. The lineage heads had first claim to certain resources. In addition, these "nobles" received additional output from their fellow kinsmen in the form of gifts, by trade, and through gambling activity. In these fundamental ways it appears that the socioeconomic system of the Babine and Wet'suwet'en was much like that reported at a later period for the Gitksan.

[1154] Thus William Brown, the first trader of the Hudson's Bay Company in the area, writing in 1823 observed:

> The Indians of this place, like the other Carriers of New Caledonia, have certain tracks (sic) of country, which they claim an exclusive right to and will not allow any other person to hunt upon them. This though an excellent regulation for preserving the beaver, is

> very detrimental to the trade, as many Indians who would hunt have no lands to hunt upon.

[1155] In 1826 Brown described a Wet'suwet'en village:

> The Village of Hotset [Moricetown] situated on the Banks of the Ochil cho or Simpson's river, is about eighty miles to the south west of our Establishment - and is the most populous of all the Babine Villages, it being the principal resort of all the Indians of that quarter - Judging from my own observations, and the different accounts I have had of these people I do not suppose that their numbers can be less than seven hundred and fifty, including all ages and sexes - Of these I should imagine two hundred are capable of hunting -- They reckon twenty Chiefs of different gradations, and sixty seven married men whom they denominate respectable, as being heads of families and possessors of Lands. (my emphasis)

[1156] Earlier, in 1823, Brown wrote of the Wet'suwet'en chiefs of Hotset:

> There are twenty chiefs of different gradations and sixty-seven married men whom they denominate as being heads of families and possessors of lands. The following is a list of the chiefs according to their rank and as they are placed at their feasts. (my emphasis)

[1157] In his evidence (Tr. 202 pp.13424) Professor Ray commented on these passages, among others from Brown:

> [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.

[1158] Earlier in his evidence, (Tr. 202, pp.13382-83) Professor Ray said:

> 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. (my emphasis)

[1159] As to the Gitksan people we have this reference by Brown in 1826:

> From my own observations and the different question 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 -- Needchip and Sojick on the contrary said that there were a great many small Lakes and Rivers in the Lands belonging to them -- Where Beaver were abundant, but that they did not know how to work them -- That there are Beaver in their Country seems very probable, it being higher up the River adjoining the Lands of the Siccanies and Babine, where the Mountains are not near so high nor rocky - And all the Rivulets and Vallies which appear from the Main River, are in general wooded with small Poplar --

[1160] From this passage it is apparent, as the plaintiffs claim, that the Gitksan territories were large enough to contain "a great many small lakes and rivers" and that they had boundaries adjoining the neighbouring nations.

[1161] The independent evidence, a portion of which I have quoted, demonstrates, as I have said, that the territory occupied or controlled by the Gitksan and Wet'suwet'en people extended far beyond their villages.

[1162] In these circumstances, I would accept the proposal of the Province and declare that the Appellants have existing aboriginal rights with respect to an undefined portion of the territory in question.

PART V

SELF-REGULATION

A. The Gitksan and Wet'suwet'en people have not lost the right to self-regulation

[1163] For my part, I think the phrase "right to self-government" refers, in the main, to the traditions of an aboriginal society considered by its members to be binding on them. I would avoid reference to "aboriginal laws" because the word "laws" carries with it the notion that the traditions were enforceable by some state authority. For the same reason I have used "self-regulation" in preference to self-government.

[1164] The traditions of the Gitksan and Wet'suwet'en societies existed long before 1846 and continued thereafter. They included the right to names and titles, the use of masks and symbols in rituals, the use of ceremonial robes and the right to occupy or control places of economic importance. The traditions, in these kinship societies, also included the institution of the clans and of the Houses in which membership descended through the mother and, of course, the Feast system. They regulated marriage and the relations with neighbouring societies.

[1165] When was the right to practice these traditions lost? Certainly not before 1871 because the evidence is clear that the penetration by the European society had barely commenced. Indeed the provincial Attorney General, the Honourable A. Davie, in his written instructions to the Superintendent of Provincial Police on July 16, 1888, acknowledged that "hitherto only the tribal laws of the Indians have prevailed".

> . . . You will proceed together with your constables, with all possible despatch to Hazelton on the Skeena River for the relief of the white people at that place. Should your progress to that point be obstructed by Indians, you will call upon the Militia for assistance.
>
> * * *
>
> You will use your discretion whether or not to investigate by Magistrate's proceedings other homicides which have occurred among the Indians. My view is that they are best let alone in a country in which hitherto only the tribal laws of the Indians have prevailed. . . .

[1166] At a meeting on Tuesday, August 8, 1888, the Indian chiefs present were told of the terms for the future they were to live, in obedience with "the law":

> After the chiefs had seated themselves, the chiefs of each tribe sitting together, Capt. Fitzstubbs, S.M. spoke as follows to them:-
>
> We have called you here today to tell you why we have been sent here, of our duties and yours, and to inform you of the terms on which for the future we are to live, and in order that you may understand fully my words you must give them your best attention so

> that you may carry away with you a recollection of them and thus keep them for ever preserved in your minds. First then, the past and continued misconduct of the Indians on the Skeena generally and of those of the Kitarmax in particular, determined the Government to send amongst you one in whom is vested the authority to enquire into all branches of the law and to deal with them according to the law. And that law is the British law not the Indian law. . . . (Ex. 1179-60d)

[1167] The Feast is but one example of a tradition practised before 1846 and continued to the present day. Despite the legislative prohibition of the Feasts commencing in 1885 the Gitksan and Wet'suwet'en Feasts remained a significant feature of their culture. The evidence is that the ancestors for the appellants celebrated their Feasts in the face of the legal prohibition, sometimes strictly enforced by the authorities and sometimes ignored by them.

[1168] The legislative ban was lifted in 1951 and no one could argue thereafter that the tradition represented by the Feast had been extinguished. That applies to other traditions of these two societies.

B. The right of self-regulation has been very much affected by the *Indian Act* and by provincial laws

[1169] In the Report of the British Columbia Claims Task Force of June 28, 1991, this summary appears:

> To date, both federal and provincial governments have exercised powers affecting First Nations' interests, often without consultation or consent. When British Columbia joined Confederation in 1871, the federal government assumed legal responsibility over "Indians and lands reserved for Indians". Recent initiatives have marginally increased First Nations' responsibility for programs on reserves. In 1985, the federal government began negotiating agreements which would delegate more administrative responsibility. However, legal authority continues to rest with the federal government.

[1170] n their "Revised Position on Remedies" of June 12, 1992, the appellants make these points:

> 51. In the division of powers the federal government was assigned exclusive legislative authority over Indians and lands reserved for Indians under s.91(24).
>
> 52. S.91(24) contains two separate and distinct areas of federal legislative authority: Indians; and lands reserved for Indians. The discussion below is concerned with the federal power with respect to Indians.
>
> 53. As the federal government has exclusive legislative authority over Indians, the common law right of self-government is subject to control by the federal government under s.91(24). Federal power in this area has been exercised over the last 120 years in the enactment

> of the ***Indian Acts.*** The ***Indian Acts*** have regulated such subjects as membership, Indian governments and other matters relating to their own internal and local affairs, including education, religion, culture, health, housing, social welfare, internal taxation.
>
> 54. While the ***Indian Acts*** have regulated the right of self-government, in no instance has that right, or any aspect of it, been clearly and plainly extinguished.
>
> ***R. v. Sparrow*** (A-1, 22)
>
> 55. The enactment of Section 35 brought about changes in respect of the exercise of aboriginal rights within Canadian Confederation. The Appellants' common law aboriginal right to self-government is now protected under the Constitution.
>
> 56. There is, however, no indication that Section 35 was intended to supersede the established head of federal power under s.91 (24).
>
> 57. As the aboriginal right to self-government is now both subject to federal jurisdiction under s.91(24) and also is an "existing aboriginal right" within s.35, aboriginal governments and the federal government have concurrent powers to make laws regarding the subject matter of the right (ie. the preservation and enhancement of Appellants' political, social, cultural, linguistic and spiritual identity).

[1171] Save for what follows, I agree with that position. In respect of the assertion in paragraph 57 of concurrent jurisdiction, Mr. Justice Macfarlane pointed out during argument that this was not an issue on the appeal, that it had not been raised in the pleadings and it was not before the trial judge. I agree with that observation. I also agree with the proposal of the appellants that "negotiations will define with greater specificity the areas and terms under which the Appellants and the federal and provincial governments will exercise jurisdiction in respect of the Appellants, their institutions and laws."

[1172] The appellants accept that provincial laws of general application validly apply to aboriginal people subject, of course, to the test arising under s.88 of the ***Indian Act.***

[1173] It is not necessary at this stage to decide, in a final way, the validity of any specific provincial statute.

PART VI

DISPOSITION

[1174] I would allow the appeal and make the following declarations and orders:

[1175] 1. All of the aboriginal rights of the appellants were not extinguished before 1871.

[1176] 2. The appellants continue to have existing aboriginal rights to undefined portions of land within the claimed territory.

[1177] 3. The appellants have a right of self-regulation exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity.

[1178] 4. The outstanding matters be remitted to the Supreme Court of British Columbia and proceedings stayed for a period of two years from the date of the judgment or such shorter or longer period as the parties agree for the determination of:

(a) the lands in respect of which the appellants have aboriginal rights;

(b) the scope of such rights on and to such lands;

(c) the scope of the right to self-regulation;

(d) the appellants' entitlement to and quantum of damages.

[1179] 5. The appellants shall have their costs in this Court and the Court below.

THE HONOURABLE MR. JUSTICE HUTCHEON

SCHEDULE 1

FURTHER AMENDED STATEMENT OF CLAIM

DESCRIPTION OF PLAINTIFFS, FROM AMENDED STATEMENT OF CLAIM

1. The Plaintiff, DELGAMUUKW, is the hereditary Chief of the House of DELGAMUUKW, and is bringing this action on behalf of himself and the members of the Houses of DELGAMUUKW and HAAXW.

2. The Plaintiff, GISDAY WA. is the hereditary Chief of the House of GISDAY WA, and is bringing this action on behalf of himself and the members of the House of GISDAY WA.

3. The Plaintiff, NII KYAP in the hereditary Chief of the House of NII KYAP, and is bringing this action on behalf of himself and the members of the House of NII KYAP.

4. The Plaintiff, LELT, is the hereditary Chief of the house of LELT, and is bringing this action on behalf of himself and the members of the Houses of LELT and HAAK'W.

5. The Plaintiff, ANTGULILBIX, is the hereditary Chief of the House of ANTGULILBIX, and is bringing this action on behalf of herself and the members of the House of ANTGULILBIX.

6. The Plaintiff, TENIMCYET, is the hereditary Chief of the House of TENIMGYET, and is bringing this action on behalf of himself and the members of the House of TENIMGYET.

7. The Plaintiff, GOOHLAHT, is the hereditary Chief of the House of GOOHLAHT, and is bringing this action on behalf of herself and the members of the Houses of GOOHLAHT and SAMOOH.

8. The Plaintiff, KLIIYEM LAX HAA, is the hereditary Chief of the House of KLIIYEM LAX HAA, and is bringing this action on behalf of herself and the members of the Houses of KLIIYEM LAX HAA and WII'MUGULSXW.

9. The Plaintiff, GWIS GYEN, is the hereditary Chief of the House of GWIS GYEY and is bringing this action on behalf of himself and the members of the House of GWIS GYEN.

10. The Plaintiff, KWEESE, is the hereditary Chief of the House of KWEESE, and is bringing this action on behalf of herself and the members of the House of KWEESE.

11. The Plaintiff, DJOGASLEE, is the hereditary Chief of the House of DJOGASLEE, and is bringing this action on behalf of himself and the members of the House of DJOGASLEE.

12. The Plaintiff, GWAGL'LO, is the hereditary Chief of the House of GWAGL'LO, and is bringing this action on behalf of himself and the members of the House of GWAGL'LO and DUUBISXW.

13. The Plaintiff, GYOLUGYET, is the hereditary Chief of the House of GYOLUGYET, and is bringing this action on behalf of herself and the members of the House of GYOLUGYET.

14. The Plaintiff, GYETM GALDOO, is the hereditary Chief of the House of GYETM GALDOO, and is bringing this action on behalf of himself and the members of the houses of GYETM GALDOO and WII'GOOB'L.

15. The Plaintiff, HAAK ASXW, is the hereditary Chief of the House of HAAK ASXW, and is bringing this action on behalf of himself and the members of the House of HAAK ASWX.

16. The Plaintiff, GEEL, is the hereditary Chief of the House of GEEL, and is bringing this action on behalf of himself and the members of the House of GEEL.

17. The Plaintiff, HAALUS, is the hereditary Chief of the House of HAALUS, and is bringing this action on behalf of himself and the members of the House of HAALUS.

18. The Plaintiff, WII HLENGWAX, is the hereditary Chief of the House of WII HLENGWAX, and is bringing this action on behalf of himself and the members of the House of WII HLENGWAX.

19. The Plaintiff, LUUTKUDZIIWUS, is the hereditary Chief of the House of LUUTKUDZIIWUS, and is bringing this action on behalf of himself and the members of the House of LUUTKUDZIIWUS.

20. The Plaintiff, MA'UUS, is the hereditary Chief of the House of MA'UUS, and is bringing this action on behalf of himself and the members of the House of MA'UUS.

21. The Plaintiff, MILUU LAK, is the hereditary Chief of the House of MILUU LAK, and is bringing this action on behalf of herself and the members of the Houses of MILUU LAK and HAIWAS.

22. The Plaintiff, NIKA TEEN, is the hereditary Chief of the House of NIKA TEEN, and is bringing this action on behalf of himself and the members of the House of NIKA TEEN.

23. The Plaintiff, SKIIK'M LAX HA, is the hereditary Chief of the House of SKIIK'M LAX HA, and is bringing this action on behalf of himself and the members of the House of SKIIK'M LAX HA.

24. The Plaintiff, WII MINOSIK, is the hereditary Chief of the House of WII MINOSIK, and is bringing this action on behalf of himself and the members of the House of WII MINOSIK.

25. The Plaintiff, GWININ NITXW is the hereditary Chief of the House of GWININ NITXW, and is bringing this action on behalf of himself and the members of the House of GWININ NITXW.

26. The Plaintiff, GWOIMT, is the hereditary Chief of the House of GWOIMT, and is bringing this action on behalf of herself and the members of the Houses of GWOIMT and TSABUX.

27. The Plaintiff, LUUS, is the hereditary Chief of the House of LUUS, and is bringing this action on behalf of himself and the members of the House of LUUS.

28. The Plaintiff, NIIST, is the hereditary Chief of the House of NIIST, and is bringing this action on behalf of himself and the members of the Houses of NIIST and BASKYELAXHA.

29. The Plaintiff, SPOOKW, is the hereditary Chief of the House of SPOOKW, and is bringing this action on behalf of himself and the members of the Houses of SPOOKW and YAGOSIP.

30. The Plaintiff, WII GAAK, is the hereditary Chief of the House of WII GAAK, and is bringing this action on behalf of himself and the members of the House of WII GAAK.

31. The Plaintiff, DAWAMUXW, is the hereditary Chief of the House of DAWAMUXW, and is bringing this action on behalf of himself and the members of the House of DAWAMUXW.

32. The Plaintiff, GITLUDAHL, is the hereditary Chief of the House of GITUDAHL, and is bringing this action on behalf of himself and the members of the Houses of GITLUDAHL and WIIGYET.

33. The Plaintiff, GUXSAN, is the hereditary Chief of the House of GUXSAN, and is bringing this action on behalf of himself and the members of the House of GUXSAN.

34. The Plaintiff, HANAMUXW, is the hereditary Chief of the House of HANAMUXW, and is bringing this action on behalf of herself and the members of the House of HANAMUXW.

35. The Plaintiff, YAL, is the hereditary Chief of the House of YAL, and is bringing this action on behalf of himself and the members of the House of YAL.

36. The Plaintiff, GWIIYEEHL, is the hereditary Chief of the House of GWIIYEEHL, and is bringing this action on behalf of himself and the members of the House of GWIIYEEHL.

37. The Plaintiff, SAKXUM HIGOOKX, is the hereditary Chief of the House of SAKXUM HIGOOKX, and is bringing this action on behalf of himself and the members of the House of SAKXUM HIGOOKX.

38. The Plaintiff, MA DEEK, is the hereditary Chief of the House of MA DEEK, and is bringing this action on behalf of himself and the members of the House of MA DEEK.

39. The Plaintiff, WOOS, is the hereditary Chief of the House of WOOS, and is bringing this action on behalf of himself and the members of the House of WOOS.

40. The Plaintiff, KNEDEBEAS, is the hereditary Chief of the House of KNEDEBEAS, and is bringing this action on behalf of herself and the members of the House of KNEDEBEAS.

41. The Plaintiff, SMOGELGEM, is the hereditary Chief of the House of SMOGELGEM, and is bringing this action on behalf of himself and the members of the House of SMOGELGEM.

42. The Plaintiff, KLO UM KHUN, is the hereditary Chief of the House of KLO UM KHUN, and is bringing this action on behalf of himself and the members of the House of KLO UM KHUN.

43. The Plaintiff, HAG WIL NEGH, is the hereditary Chief of the House of HAG WIL NEGH, and is bringing this action on behalf of himself and the members of the House of HAG WIL NEGH.

44. The Plaintiff, WAH TAH KEG'HT, is the hereditary Chief of the House of WAH TAH KEG'HT, and is bringing this action on behalf of himself and the members of the House of WAH TAH KEG'HT.

45. The Plaintiff, WAH TAH KWETS, is the hereditary Chief of the House of WAH TAH KWETS, and is bringing this action on behalf of himself and the members of the House of WAH TAH KWETS.

46. The Plaintiff, WOOSIMLAXHA, is the hereditary Chief of the House of WOOSIMLAXHA, and is bringing this action on behalf of himself and the members of the House of GUTGINUXW.

47. The Plaintiff, XSGOGIMLAXHA, is the hereditary Chief of the House of XSGOGIMLAXHA, and is bringing this action on behalf of himself and the members of the House of XSGOGIMLAXHA.

48. The Plaintiff, WIIGYET, is the hereditary Chief of the House of WIIGYET, and is bringing this action on behalf of himself and the members of the House of WIIGYET.

49. (A) The Plaintiff, WII ELAAST, is the hereditary Chief of the House of WII ELAAST, and is bringing this action on behalf of himself and the members of the Houses of WII ELAAST and AMAGYET.

49. (B) The Plaintiff, GAXSBGABAXS, is the hereditary Chief of the House of GAXSBGABAXS, and is bringing this action on behalf of herself and the members of the House of GAXSBGABAXS.

49. (C) The Plaintiff, WIGETIMSCHOL, is the hereditary Chief of he House of NAMOX and is bringing this action on behalf of himself and the members of the House of NAMOX.