1 Vancouver, B.C.
2 June 25, 1992.
3
4CORAM: Taggart, Lambert, Hutcheon, Macfarlane, Wallace, J.J.A.
5
6THE REGISTRAR: Order in court. In the Court of Appeal of
7 British Columbia, Thursday, June the 25th, 1992,
8 Delgamuukw versus Her Majesty the Queen at bar, my
9 lords.
10TAGGART, J.A.: Yes, Mr. Plant.
11MR. PLANT: Thank you, my lord. My lords, I will be speaking
12 today in support of the trial judge's finding that
13 aboriginal rights to land outside reserves were
14 extinguished in the Colony of British Columbia prior
15 to 1871. For the first part of my argument, and I
16 should say probably the largest part of my argument,
17 what your lordship's will need to have is a floppy
18 plastic yellow binder which contains what I have
19 described as speaking notes, although it's also
20 probably more properly described as an outline of
21 argument, and a reference binder labelled R&D-4 and on
22 the other label it says "Speaking Notes re Colonial
23 Extinguishment." Your lordship's will not require the
24 factum for the first part of my argument.
25TAGGART, J.A.: The reference book is?
26MR. PLANT: A solid yellow binder with the label R&D-4.
27TAGGART, J.A.: Okay.
28MR. PLANT: And the system that is followed in this binder is
29 one that is familiar to your lordship's by now. The
30 binder contains documentary references with tab
31 numbers. The tab numbers correspond to the paragraph
32 numbers in the speaking notes. I've tried to organize
33 this submission in a way that pulls from the factum
34 the various points which I think still need to be made
35 on this issue at this point of the proceedings and,
36 also, to make some points that have arisen as a result
37 of other parties' submissions that I think need to be
38 responded to. That's why I have organized my
39 submission in the form of these speaking notes.
40 As I point out in paragraph 2, if your lordships
41 have that now, of my speaking notes, for a complete
42 exposition of the colonial extinguishment argument
43 your lordships will have to refer to a number of
44 different parts of the factum of Amicus Curiae. I
45 just make the note that Appendices 2 and 3 consist of
46 substantially all of the factum of the respondent
47 province in the Alphonse and Dick appeals, which your

lordships heard me speak to in November of last year. I'm going to endeavour not to repeat what was said to you then, except to the extent that I consider it necessary to do so for the purpose of the continuity of my argument today.

I want to say at the outset, as I do in paragraph 3, I want to make a point of clarification. Your lordships have heard the phrase "blanket extinguishment" used on many occasions. If the implication from the use of that phrase is that the Chief Justice held that all aboriginal rights in British Columbia had been extinguished, the phrase is misleading because there was no such finding. Rather, what the trial judge said was this, and I quote at the top of page 2 from page 412 of the judgment where he said -- the Chief Justice said,

> "The colonial legislation must be taken to have extinguished aboriginal rights as they existed in the colony at the date of sovereignty except for Indian reserves."

So he has excluded Indian reserves from the purview of his extinguishment finding. And he goes on to say,

> "I pause to say that I do not intend the foregoing to extend beyond aboriginal rights to land. Specifically, I do not intend it to apply to fishing, as it was not suggested in argument that I should pronounce in any way on fishing rights and, of course, no claim was made in this case against the federal Crown.
>
> It follows, in my judgment, that when the colony united with Canada in 1871, the province obtained all of the Crown lands of the colony under s. 109 of the British North America Act, 1867, free of any trust or interests of Indians. The province was thereafter able to transfer title or other tenures to Crown guarantees."

Now, my lords, later in my submission I will be turning to both the legal requirements for extinguishment and also the application of those criteria to the Calder 13 and the other legislation that was before the Chief Justice. But before I do that, I wish to make some submissions in relation to

1 or in response to submissions which your lordships
2 have heard over the past few weeks about the
3 historical evidence. And in prefacing those
4 responsive submissions, I wish to remind your
5 lordships of the trial judge's finding of fact at page
6 411 of the judgment where the Chief Justice said in
7 the context of his discussion of extinguishment,
8 "There is, as described in," and that "Pt." is an
9 abbrevation for Part 11 of the judgment, that is to
10 say, pages 232 to 270 of the W.W.R. report,
11
12 "There is...a great deal of evidence
13 demonstrating that the Crown with full
14 knowledge of the local situation fully intended
15 to settle the colony and to grant titles and
16 tenures unburdened by any aboriginal interests.
17 The Crown must be taken to have known that it
18 could not free the land from this burden
19 without extinguishing these aboriginal
20 interests. This probably did not trouble the
21 Crown, because it also intended to allot
22 generous reserves, and to allow the Indians to
23 use vacant lands. The primary intention,
24 however, was obviously to settle the colony by
25 granting unburdened interests to settlers."
26
27 These findings, and others, to which your
28 lordships have already been referred, formed the basis
29 of the Chief Justice's decision in relation to the
30 extinguishment of land rights.
31 The material that was before the Chief Justice on
32 this aspect of the case alone was extensive and what
33 the trial judge said about his review of the evidence
34 generally is set out at page 119 and a passage which,
35 so far as I can recall, has not yet been read to your
36 lordships. Early in the judgment the Chief Justice
37 said this:
38
39 "...I am deeply conscious that the process of
40 summarizing such a vast body of material
41 requires me to omit much of what counsel and
42 the parties may think is important.
43 With the assistance of counsel I have tried
44 my very best to consider everything that is
45 relevant, even if it is not mentioned in these
46 reasons for judgment. As counsel will be quick
47 to notice, I have left out a great deal of the

1 information which they went to such trouble to
2 have admitted into evidence. As it turns out,
3 I find it unnecessary to include a great deal
4 of it in these reasons for judgment."
5
6 Now, I say that, in the context of the evidence
7 that was placed before the Chief Justice in relation
8 to the extinguishment finding, that it is significant
9 that neither the Appellants, nor the Province, nor the
10 Intervenor Coalition of First Nations, which is to say
11 those aboriginal groups on behalf of whom Mr. Berger
12 spoke, that all of whom seek to over turn the
13 extinguishment finding do not suggest that the trial
14 judge committed any palpable or overriding error in
15 his assessment of the evidence which bears on his
16 finding, particularly, for example, in relation to the
17 Crown's intention as I read to you from page 411 of
18 the judgment. Instead, what your lordships have heard
19 from these parties in argument is reliance on a
20 selection of extracts from the historical evidence to
21 support the proposition which each of these parties
22 has made, to one degree or another, that
23 extinguishment could not have taken place in the
24 colonial period because a variety of historical
25 actors, politicians and bishops and judges and so on,
26 made statements recognizing aboriginal title in
27 British Columbia before and after 1871.
28 It's to this that the next part of my submission
29 will be directed, but I make the point in paragraph 8
30 that selective extraction from the historical record
31 is a temptation which I say, with respect, must be
32 avoided if there is to be any prospect of
33 understanding the long and difficult history of the
34 Indian land question in British Columbia.
35 And I'm going to give your lordships now some
36 examples which, in my submission, will highlight the
37 problems that arise when events and statements are
38 taken or viewed in isolation, or when insufficient
39 care is taken to explain context.
40 The first example, and perhaps this is as good a
41 time as any to take your lordships to the reference
42 binder, is from the Appellants' Statement of Facts.
43 So if your lordships turn to the binder R&D-4 at tab
44 10 you'll see there at the first page an extract from
45 the Appellants' factum. I wish to direct your
46 lordships attention to paragraph 142 in which the
47 Appellants said this:

1 "In 1849, the Imperial Crown established the
2 Colony of Vancouver Island. The Hudson's Bay
3 Company was given a revocable grant to the land
4 of Vancouver Island, subject to the proviso,"
5
6 And then the proviso is set out.
7
8 "... that in parting with the land of the Island
9 Her Majesty parts only with her own right
10 therein and that whatever measures she was
11 bound to take in order to extinguish the Indian
12 title are equally obligatory on the Company."
13
14 Now, if your lordships were to read paragraph 142 as
15 if the quoted words were a proviso in the grant, which
16 I, myself, must say was the inference that I took from
17 the way that this paragraph was put, your lordships
18 would be in error. The language quoted is not found
19 in the grant to the Hudson's Bay Company. The grant
20 to the Hudson's Bay Company is set out beginning at
21 the second page of tab 10. I don't intend to refer
22 your lordships to it other than to say it's there, you
23 can read it, and you won't find the so-called proviso
24 upon which the Appellants place emphasis.
25 Now, if your lordships turn ahead to tab 11, page
26 2, what your lordships will see there is Exhibit
27 1039-16. This is a confidential memorandum, the
28 providence of which has never been altogether clearly
29 understood but it's a document that is found in the
30 public records of the Imperial Government in London
31 and it's a document that deals with Vancouver's
32 Island. If your lordships turn to, well, the third
33 page of the document itself, but it will be page 4 as
34 indicated by the numbers in the lower right-hand
35 corner which have been added in much the same way that
36 Mr. Willms told you about yesterday, you'll see that
37 starting in the last paragraph of his memorandum there
38 is a discussion about Indians, "With regard to the
39 Indians," and a discussion carries on over the page.
40 The end of the paragraph, which is to say about the
41 middle of the page, there is the language,
42
43 It must however be added that in parting with
44 the land of the island Her Majesty parts only
45 with her own right therein, and that whatever
46 measures she was bound to take,"
47

1 and so on. Now, those are the words. So the words
2 are not found in the grant, but they're found in a
3 confidential memorandum which -- I'm now looking at
4 paragraph 11 of my speaking notes -- the trial judge
5 described at page 236 of the judgment, which is set
6 out at the beginning of tab 11, as "an anonymous
7 document, perhaps a briefing paper ... probably
8 intended for the use of the Colonial Secretary, Lord
9 Grey, who had the responsibility of defending the
10 grant in the debate that took place in Parliament in
11 1848." It may be a political position paper. It's
12 not much more than that. It's certainly not a proviso
13 to the grant itself.
14 And if your lordships turn to the last page at
15 tab 11 of the reference binder you'll see that the
16 Appellants make reference to this proviso again. In
17 paragraph 198 of -- it's from page 92 of the
18 Appellants' Reply Factum, paragraph 198, responding to
19 some arguments that appear in the former respondent
20 Province's Factum, they say,
21
22 "Douglas negotiated eleven of the treaties,"
23
24 these are the Vancouver Island treaties,
25
26 "as Chief Factor and three as Governor of the
27 Colony."
28
29 I'm not going to pause to deal with that point now.
30
31 "Whether as Governor or Chief Factor, he acted
32 pursuant to the grant establishing the colony
33 and the confidential memorandum which directed
34 that '...[H]er Majesty parts only with her own
35 right therein,"
36
37 and so on. And I want to stop here to make two
38 points. First of all, a very small point, the
39 Appellants have misquoted the language of the
40 memorandum where the Appellants -- there are a number
41 of errors but where the Appellants say in the last
42 line of that paragraph in the quotation aboriginal
43 title the actual memo says the Indian title. But the
44 second and more significant point is that there is no
45 evidence that Douglas ever saw this confidential
46 memorandum. So to say that Douglas acted pursuant to
47 it is, in my respectful submission, a statement that

is unsupported by the evidence before the trial judge or before your lordships.

Now, that's an example, I say, of the difficulties which your lordships has been presented with by what I call selective extraction or careless treatment of the historical evidence. I want to now turn to another example and this comes from the Province's Factum. Here the point or points will be somewhat different.

Now, in paragraph 106 of its revised factum, which is set out at the first page of tab 12, your lordships will see that the Province relies on a despatch from Lytton to Douglas of July 31st, 1858, in support of the proposition that there could hardly said to be a clear and plain intention to extinguish aboriginal rights by reason of the recognition by Imperial and other officials of such rights prior to and since confederation. Now, I want to make some points about this despatch that are not necessarily directed to the Province's use of it, first of all, and then I'll come back to the Province's use of it.

First of all, if I could ask your lordships to turn to page 2 of tab 12 you'll see starting at the bottom of the page an extract from Exhibit 1142. Now, I'm going to pause just to give your lordships an indication of something in the evidence.

Exhibit 1142 is, at least in our copy, a binder that contains, among other things, the four parts of the papers relative to the affairs of British Columbia which were laid before the Imperial Parliament during the initial days of the colony. And this material was also reproduced in the initial documents relating to the Alphonse and Dick appeal. So I've made reference to this material before.

The passage which is always of interest when this despatch is referred to is paragraph number 3 of the despatch in which Lytton on the 31st of July, 1858 says,

> "I have to enjoin upon you to consider the best and most humane means of dealing with the Native Indians."

And at the top of the fourth page of the material at tab 12 Lytton says,

1 "At this distance, and with the imperfect means
2 of knowledge which I possess, I am reluctant to
3 offer, as yet, any suggestion as to the
4 prevention of affrays between the Indians and
5 the immigrants. This question is of so local a
6 character that it must be solved by your
7 knowledge and experience."
8
9 And I ask your lordships to pay attention to those
10 words because they are part of a theme which recurs
11 throughout the history of the creation of the Colony
12 of British Columbia that, so far as the Imperial
13 Government was concerned, questions with respect to
14 the treatment of Indians were of so local a character
15 that it had determined that Douglas, the man who had
16 been on the ground in New Caledonia for 35 years, was
17 the person best equipped to devise the policy and the
18 legal framework within which Indian interests were to
19 be considered.
20 Now, if I ask your lordships to turn now to the
21 fifth page of the tab, this is the point which I say
22 is not really responsive to what the Province was
23 doing, this is an extract from the judgment of Mr.
24 Justice Hall in the Calder case where he, before
25 quoting from that passage from the despatch, describes
26 it as further instructions. He says,
27
28 "Further Instructions were sent from time to
29 time by the Colonial Secretary in London,
30 including one dated July 31, 1858."
31
32 My point for your lordships' assistance in reading
33 this judgment of Mr. Justice Hall is to be sure that
34 your lordships know that if by further -- if by the
35 word further Mr. Justice Hall meant subsequent in time
36 to the Royal Instructions, then Mr. Justice Hall was
37 in error because the Royal Instructions were not
38 issued and dated until the 2nd of September, that is
39 to say, a month or so later. I make the point in
40 my -- well, I don't need to go back to the
41 submissions.
42 If your lordships turn to page 6 you'll see there
43 set out the Royal Instructions to Douglas and they are
44 dated the 2nd of September 1858. I make the point,
45 again, for your lordships' interest, I hope, in
46 respect of the analysis of the Calder judgment, that
47 we have here starting at page 10 of tab 12 the index

1 from the case on appeal in the Calder case. And there
2 your lordships will see what it was that that court
3 had before it in the way of historical material. And
4 it, if I may say so, it doesn't hold a candle to the
5 material which the Chief Justice had in the case at
6 bar.
7 The next point I make requires reference to tab
8 13 where I have extracted at the first page an
9 additional extract from the judgment of Mr. Justice
10 Hall in Calder where he says at the first full
11 paragraph,
12
13 "A further observation in respect of the Letter
14 of Instructions of July 31, 1858, must be
15 made,"
16
17 and by the Letter of Instructions he's again referring
18 to Lytton's despatch to Douglas of July 31st, 1858.
19 And in my speaking notes at paragraph 13 I say that
20 Mr. Justice Hall's characterization of this despatch
21 as a Letter of Instruction is not supported by the
22 full collection of despatches. What I mean by that is
23 that this despatch is no different in character than
24 the other many despatches which Douglas received from
25 the Colonial Office in London. There was much more
26 detailed memorandum or despatch that was sent to
27 Douglas on the 14th of August which I do want your
28 lordships to refer to.
29HUTCHEON, J.A.: I'm not quite with you. I'm just not quite
30 with you. Is this some criticism of Mr. Justice
31 Hall's treatment in calling them instructions?
32MR. PLANT: No, not in calling them instructions, in the sense
33 that Douglas always acted subject to instructions
34 which he received from the Colonial Office. My only
35 comment is to be sure that your lordships don't
36 elevate this particular despatch to an exalted
37 position in relation to the other despatches that
38 Douglas was sent.
39 At tab 13, page 2 is the despatch of the 14th of
40 August and I want your lordships to look, if I can ask
41 you to do so, this is at page 2 of tab 13, in
42 paragraph 2 Lytton writes,
43
44
45 "Her Majesty's Government feel that the
46 difficulties of your position are such as
47 courage, judgment, and familiarity with the

1 resources of the country and character of the
2 people can alone overcome."
3
4 I emphasize those words again for the purpose of
5 showing you the extent of the trust afforded in the
6 discretion and judgment of Governor Douglas on the
7 ground in British Columbia.
8TAGGART, J.A.: Paragraph?
9MR. PLANT: Number 2, the first sentence.
10TAGGART, J.A.: Okay.
11MR. PLANT: And in paragraph numbered 5 on the same page Lytton
12 says,
13
14 "I highly approve of the steps which you have
15 taken, as reported by yourself, with regard to
16 the Indians. It is in the execution of this
17 very delicate and important portion of your
18 duties that Her Majesty's Government especially
19 rely on your knowledge and experience, obtained
20 in your long sevice under the Hudson's Bay
21 Company. You may in turn rely on their support
22 in the execution of such reasonable measures as
23 you may devise,"
24
25 that is to say, as you Governor Douglas may devise,
26
27 "for the protection of the Natives, the
28 regulation of their intercourse with the
29 whites, and, whenever such a work may be
30 commenced, their civilization."
31
32 Now, I make some other comments about how it
33 is -- and now I'm referring back to paragraph 13 of my
34 speaking notes -- I have some other comments there
35 about how it is possible to reconcile what Lytton was
36 talking about with what Lytton was talking about and I
37 say in the context of these two -- this exchange of
38 despatches in the summer of 1858 when Douglas says in
39 the passage I have not taken you to but is in the
40 reference book, when he says that he will take care
41 that all of the civil and agrarian rights of the
42 Indians be protected, my submission is that he was
43 proceeding on the premise that if the Indians were
44 protected, they would have no need of the subsistence
45 in some other shape spoken of by Lytton. I say that
46 the best way to make sense of this exchange of
47 correspondence is to understand it on the basis that

1 Lytton and Douglas were referring to the situation
2 that would arise if the Indians were deprived of their
3 villages and cultivated lands and, indeed, that is the
4 view that the Chief Justice took of this exchange of
5 correspondence at page 244 and 245 of the judgment.
6 But now I want to turn to a comment on the
7 Province's reliance upon this despatch. In paragraph
8 14 I say -- and by this despatch I mean the despatch
9 of July 31st which I began this little part of my
10 discussion with. I say in any event, coming in time
11 prior to the Imperial Act which created the Colony of
12 British Columbia, Lytton's despatch of the 31st of
13 July, 1858 is of little assistance in interpreting the
14 law and the policy of the colony as it developed
15 thereafter. To put that another way, since Lytton's
16 despatch precedes the creation of the colony, it can
17 hardly be tendered as evidence in respect of the
18 extinguishment of the aboriginal rights which arose by
19 operation of law in the colony after the colony was
20 constituted by Imperial Act.
21 Insofar as the existence of aboriginal rights as
22 opposed to the extinguishment of them is concerned, I
23 make the comment in paragraph 14 that nowhere in any
24 of the despatches, that I have seen at any rate, does
25 Lytton ever require Douglas to make treaties, and if
26 the Appellants' theory of the common law and the
27 constitutional convention of treaty making is correct,
28 then Lytton clearly ought to have told Douglas you
29 must make treaties. What Lytton does say --
30HUTCHEON, J.A.: Isn't that what he says?
31MR. PLANT: Beg your pardon?
32HUTCHEON, J.A.: Isn't that what he says in the July 31 -- he
33 says, "let me not admit to observe that it should be
34 an invariable condition that all bargains or treaties
35 for the cession of lands possessed by them."
36MR. PLANT: If you make them.
37HUTCHEON, J.A.: Oh.
38MR. PLANT: That's how I read those words, if you make them.
39HUTCHEON, J.A.: All right, okay.
40MR. PLANT: It would be easy for Sir Edward to have said you
41 must take treaties with the Indians. What he has said
42 is if you are going to make treaties, and this is my
43 submission, if he has made -- if you make treaties,
44 bargains or cessions, then you must supply subsistence
45 in some other shape. That's my submission with
46 respect to what Lytton meant. And my recollection is
47 that the Chief Justice does comment on this despatch

1 at pages 200 --
2HUTCHEON, J.A.: That's the unspoken premise that you don't have
3 to make them. I'm sorry, but I have difficulty
4 reading that.
5MR. PLANT: If I may say with respect, my lord, the premise you
6 read into it is equally unspoken. Both of us are
7 trying to read something into language which is not as
8 clear as either of us would like it to be. Your
9 lordship has suggested, and I can't dispute that it's
10 a possible interpretation, that Lytton has said, in
11 effect, you make treaties and when you make them you
12 also have to provide subsistence. I say that it's
13 equally possible to read Lytton's language the other
14 way, that is, if you make treaties, if that is the
15 procedure which you, in your discretion, intend to
16 follow, then you must make sure that you provide
17 subsistence in some other shape.
18HUTCHEON, J.A.: But you can take the land otherwise without
19 subsistence?
20MR. PLANT: Excuse me, my lord?
21HUTCHEON, J.A.: But you can take the land otherwise without
22 subsistence? That makes no sense to me. If you make
23 a bargain with them then you've got to give them
24 subsistence. If you don't make a bargain with them,
25 you don't have to give them anything. That makes no
26 sense to me.
27MR. PLANT: I'm sorry, that's not what Sir Edward Lytton was
28 saying.
29HUTCHEON, J.A.: No, I know he's not.
30MR. PLANT: Perhaps I could ask your lordships to look at the
31 bottom of page 14 of my speaking notes where I have
32 written --
33HUTCHEON, J.A.: Bottom of page 14?
34MR. PLANT: Sorry, paragraph 14, where I've extracted from the
35 comment of the Chief Justice where he says, and he's
36 talking about this and other despatches of this time,
37
38 "In view of these and other pronouncements from
39 both sides of the world, and in view of the
40 obvious intention of the Crown to encourage the
41 early settlement of the proposed new colony, I
42 conclude that these references must be
43 construed to refer to lands actually possessed
44 by the Indians."
45
46HUTCHEON, J.A.: I can see that. Lytton used the word possessed
47 by them. That's the word he used. And one can

construe that to mean as the Chief Justice did. But I cannot at the moment go with you to say that if you make a bargain then you've got to give them something, if you don't make a bargain you take it, you don't have to give them anything. That makes no sense.

MR. PLANT: Perhaps it was because the two of them thought that they were -- and perhaps I've overstated the other reading, because perhaps neither of them thought that Douglas would ever take the lands on which they lived without providing some subsistence.

HUTCHEON, J.A.: That's another matter. The land is quite another matter. "For the cession of lands possessed by them."

MR. PLANT: I should say that, in part, my concern with the reading, with one reading of this despatch is the assumption that by possession of lands Lytton may have meant the lands of the whole colony, and so part of my task is to try and leave with your lordship the suggestion, which I think you have, that the two people were here talking, Lytton in particular, was talking about something much narrower than the whole of the colony.

HUTCHEON, J.A.: I can understand that.

MR. PLANT: Well, having accomplished that, perhaps I should move on to paragraph 15. I now want to turn to another example of the use of the historical record and this requires reference to -- or it doesn't require reference but I'll make the point this way: At paragraph 90 of its revised factum the Province says that,

> "Another important purpose of the colonial proclamation was to notify all settlers that the land must be purchased from the Crown and not from aboriginal people."

Now, in support of that proposition the Province cites another despatch, this time the despatch which Douglas sent to Lytton in February of 1859, that's the support cited for the proposition. In referring to this despatch in oral argument, Mr. Williams noted that it is a document that was prepared, I think, within days of the Calder II document, which is the one that provides for the fee coming from the Crown to the Crown.

Well, I have three or so points I wish to make about that submission. Perhaps I could ask your

lordships to turn now to tab 15 of the reference book and you'll see at the first page I've quoted or, rather, reproduced that page from the Province's Factum where paragraph 90 appears. The next page in, page 2, is a copy of the actual despatch and the first point to make is that this is a despatch written by Governor Douglas as Governor of Vancouver Island, whereas, as your lordships know, Calder II was a proclamation of the government of the mainland colony. Now, what Douglas is talking about here is some correspondence with the House of Assembly on the public business of the Colony and in paragraph number 2 Douglas says,

> "The subjects referred to in that correspondence are not of an important nature with the exception of that marked letter, dated 5th February, 1859, which touches on the subject of land reserved near the town of Victoria for the benefit of the native Indian population."

This is the reserve for the Songhees Indians. And Douglas goes on in paragraph 3,

> "Attempts having been made by persons residing at this place to secure those lands for their own advantage by direct purchase from the Indians, and it being desirable and necessary to put a stop to such proceedings, I instructed the Crown Solicitor to insert a public notice in the Victoria Gazette to the effect that the land in question was the property of the Crown, the land in question being of course the reserve, and for that reason the Indians themselves were incapable of conveying a legal title to the same, and that any person holding such land would be summarily ejected."

And then he goes on to say that he hopes that what he has proposed to do about those reserved lands will meet with the approval of the Imperial government.

The next pages in my copy of the reference book contain another version of that despatch. And then if your lordships move on to page 6 you'll see the actual address that Douglas made or the letter that he sent to the House of Assembly on the 5th of February, 1859. And if your lordships go down to the fourth paragraph

1 just beside the marginal words "Indian rights,"
2 Douglas says this:
3
4 "When the settlement at Victoria was formed
5 certain reservations were made in favour of the
6 native tribes.
7 They were to be protected in their original
8 right of fishing on the coast and in the bays
9 of the Colony, and of hunting over all
10 unoccupied Crown lands; and they were also to
11 be secured in the enjoyment of their village
12 sites and cultivated fields. Those rights have
13 since been enjoyed in full, and the reserves of
14 land covering their village sites and
15 cultivated fields have all been distinctly
16 marked on the maps and surveys of the Colony,
17 and the faith of Government is pledged that
18 their occupation shall not be disturbed."
19
20 That is to say, the occupation of these particular
21 aboriginal peoples of the particular reserves at
22 Victoria.
23 Now, if I could then turn to page 7, the three
24 points that I make about the submission which your
25 lordships heard from the Province on this point. I
26 note, as I've already said in paragraph (a), that the
27 despatch which the Province relies on was written by
28 Douglas as Governor of Vancouver Island. Calder II
29 was a mainland proclamation. And the two colonies
30 were separately and differently governed until Union
31 in 1866. And I say, with respect, it's unwise to
32 confuse the actions of one government with that of the
33 other.
34 Secondly, the land which was the subject of the
35 despatch is the Songhees reserve about which there are
36 other documents in evidence. And thus the notice
37 which Douglas caused to be posted in the Gazette, a
38 copy of which is in the reference book, concerns the
39 purchase of reserve lands and had nothing to do either
40 with Calder II or the purchase of Crown lands
41 generally.
42 And I say that subsequent correspondence,
43 including Carnarvon's reply despatch of 11 April,
44 1859, which is reproduced in the material and which
45 the Province also relies on, and Douglas's despatch of
46 the 4th of July, 1859, all provides support for the
47 argument made in tab 4 of the factum and elsewhere

that so far as the colonial government of the day was concerned, measures of "liberality and justice" should be adopted for compensating Indians for the surrender of lands actually occupied by them, that is to say, their villages and adjacent agricultural lands.

Now, the next example that I wish to deal with comes from the appeal transcript, Volume 16, where counsel for the Province appears to suggest that Chief Justice Begbie's letter to Douglas of the 1st of December, 1858 relates to Calder II. Perhaps I should take your lordships to the transcript reference, which is in tab 16 of the reference binder, and the first page near the top you'll see that Mr. Williams begins his discussion of Calder II. And then turning over the page, having read from certain passages or certain parts of that proclamation, at line 25 counsel says this:

> "And so sometime prior to that, it's the 14th of February, 1859,"

now it being Calder II which is a proclamation dated. February 14, 1859,

> "just before that, which appears to be December of 1858, is a copy of a note from Mathew Begbie. It's a sub-closure, and the sub-closure says this:"

And then he reads, and I'm going to take your lordships to that in a minute, and makes the point that Calder II is part of the machinery to make available this property transfer. What I'm concerned about here, my lords, is the suggestion that Begbie's note to Douglas had something to do with Calder II.

If your lordships turn to page 4 of the material at tab 16 you'll see at the bottom a copy of a despatch from Governor Douglas to Lytton of December 4, 1858 in which he says,

> "I have the honour of forwarding herewith for your information copies of two Proclamations, issued respectively on the 2nd and 3rd days of December instant.
>
> The first relates to the conveyance of Crown lands, and it's object is explained in the accompanying note from Mr. Begbie."

1 If your lordships turn over the page, at the top is
2 Enclosure number 1 and that is the proclamation of the
3 2nd of December, which is Calder I, and that's the
4 proclamation to enable the Governor of British
5 Columbia to convey Crown lands sold within the said
6 colony. If your lordships then go down, you'll see
7 the next sub-closure is the note from Begbie to
8 Douglas and that's dated the 1st of December, so my
9 submission would be that what Begbie said on the 1st
10 of December related to Calder I, which he apparently
11 drafted and provided to Douglas for his approval.
12 LAMBERT, J.A.: Calder I is the one at the top of page 5 of tab
13 16?
14 MR. PLANT: Calder I, yes. My lord, another copy of Calder I
15 which bears the seal is at page 6. If you turn the
16 page over you'll see Calder I in the form which may be
17 more familiar to you.
18 I'll make this comment now, the second of the
19 reference binders, which I intend to take your
20 lordships to later, has the 13 Calder ordinances and
21 proclamations all in sequence, with some other
22 legislation. When we come to look at the legislation
23 I'll have a binder which has that all outlined.
24 LAMBERT, J.A.: All 13.
25 MR. PLANT: And the others which I think are particularly
26 important for today's submission. So your lordships
27 won't have to turn back here when I'm making that
28 argument.
29 LAMBERT, J.A.: What we're doing at the moment is you're
30 endeavouring to persuade us about the frailty of our
31 historical understanding because we're only catching
32 glimpses here and there, that's really the substance
33 of your point.
34 MR. PLANT: Yes. In keeping with that, my lord, I wish now to
35 turn to paragraph 17 where I want to identify a
36 concern with the Appellants' Statement of Facts, and
37 and I've already spoken about this point before, but
38 perhaps I do want to at least bring it to your
39 lordships' attention. Here at the beginning of tab 17
40 is another extract from the Appellants' Factum from
41 the Statement of Facts and here the Appellants say,
42
43 "Judge Matthew Begbie, who drafted two of the
44 Colonial Instruments, including the
45 Proclamation of January 4, 1860,"
46
47 which the Appellants call "Colonial Instrument III,"

1 and which I have referred to as Calder III,
2
3 "thought by the trial judge to be the most
4 important of the colonial land laws, said in a
5 Report to Governor Douglas in April, 1860,
6 about the Proclamation:
7 'I may also observe that the aboriginal
8 title [to the land of the mainland colony] is
9 by no means extinguished. Separate provision
10 must be made for it..."
11
12 and so on, is what Begbie says.
13 I want to make the following points here, my
14 lords, the first, that the Appellants have misquoted
15 Begbie who did not say aboriginal title but said
16 Indian title.
17 The second point is that the words in square
18 parentheses are not, in my submission, necessarily
19 what Begbie meant in speaking of Indian title. In
20 fact, one of the issues is what was it that Begbie was
21 referring to when he was referring to Indian title.
22 And I do not accept as given without comment the
23 proposition that Begbie intended to refer to all of
24 the land of the mainland colony. I say that this
25 extract, this two-line extract from a document which
26 occupies substantially the rest of tab 17 in typed
27 manuscript form must be read in the context of the
28 document as a whole and, in that regard, I refer your
29 lordships to the Chief Justice's comments about it at
30 pages 254 and 255 of the trial judgment. And I think
31 that those are the points that I wish to make about
32 this particular reference.
33 But I now, on page 10 of my speaking notes, I
34 want to indicate to your lordships that there are
35 other evidence in the records about what Chief Justice
36 Begbie considered and thought about Indian land
37 matters. Soon after British Columbia was admitted to
38 the Union in 1871, Canada's Minister of Public Works,
39 Hector Langevin, was sent out with the mission of
40 acquiring knowledge about the new province and its
41 requirements. He reported his findings and
42 recommendations in a Report which was printed as a
43 Sessional Paper of Parliament in 1872.
44 That report, which is reproduced at tab 19,
45 contains one section, and I should say it's not all of
46 the report but only those portions of it that relates
47 to Indians, the Indians section incorporates a lengthy

memorandum from Chief Justice Begbie describing his understanding of Indian land matters in the Province. And Begbie wrote, in part:

> "I am not aware of any treaty having been made with any tribe on the mainland. I believe that some sort of arrangement, as binding in honour as a treaty, has been made at different times, with different tribes in Vancouver Island. I am not aware that it has been reduced to writing; I believe it has generally (where it exists) been in the form of a declaration of intentions by the local government.
>
> Reserves have been laid out both here and on the mainland, in the vicinity of the tribal families, of land reserved for their use; but I am not aware of anything in the nature of a treaty. No general treaty would be possible, for there are a vast number of tribes, mutually more jealous and unintelligible than are the whites to them.
>
> They are in that state of powerlessness and respect for the superior power, numbers, and acquirements of the governing race, that any arrangements which that race would, consistently with self-respect and humanity, think proper, would readily be adopted by the native.
>
> Their chief anxiety always is about their reserves of land which, perhaps necessarily, have not always been made in accordance with their wishes..."

At the end of the memorandum, Chief Justice Begbie noted that, at least from his perspective, Indians in British Columbia were "exceedingly well disposed" to "the Government and to the authorities."

Now, of course, Begbie was mistaken in not knowing that the Hudson's Bay treaties had been written down, but I suggest that his ignorance of the Hudson's Bay Company written agreements with the Indians supports the suggestion that, so far as Begbie was concerned, there was no government policy to enter into treaties with the Indians.

And may I make this further point, that if Begbie in 1860 in his report to Douglas about the proclamation which was Calder III, if he then

1 considered, as it has been suggested, that there was
2 unfinished business in relation to the Indians of
3 British Columbia, the evidence suggests that he did
4 not hold that view in September of 1871. I want to
5 leave with your lordships the suggestion that so far
6 as Begbie was concerned -- yes?
7TAGGART, J.A.: Just let me have that again. You say if in 1860
8 when commenting on Calder III?
9MR. PLANT: Begbie was of the view that there was unfinished
10 business in relation to the Indians of British
11 Columbia. I say that the evidence, and I mean by that
12 this evidence that I've been referring to, suggests
13 that Begbie did not hold that view in September 1871
14 when he wrote this report. I therefore want to leave
15 with your lordships the suggestion --
16HUTCHEON, J.A.: How do you get that?
17MR. PLANT: Because Begbie did not say there is unfinished
18 business in British Columbia, there needs to be
19 extinguishment of aboriginal title.
20HUTCHEON, J.A.: "No general treaty would be possible."
21MR. PLANT: And I should say that by unfinished business I don't
22 mean to exclude the proposition that the reserve
23 allocation process was ongoing, and in that sense
24 there was unfinished business, but the unfinished
25 business was the provision of reserves which, when
26 provided, would be the protection of the Douglas
27 policy, the separate provision for the Indians of
28 British Columbia being the provision of reserves in
29 keeping with the Douglas policy which I've referred to
30 in November, which I'm going to refer to again a
31 little bit later.
32 Then still later in 1885 Chief Justice Begbie, and
33 then in 1886, decided two cases, the only record of
34 which we have is extracts from his bench book, which
35 were tendered and put into evidence. In the first of
36 these cases he made an injunction enjoining the entry
37 of contractors purportedly authorized by the Dominion
38 Government onto an Indian reserve to construct an
39 immigration shed.
40 In the second of these cases, which occurred at
41 Metlakatla a year later in 1886, there was a claim of
42 Indian title in a proprietory sense advanced in
43 respect of non-reserve lands and the Chief Justice had
44 no difficulty dispensing with the argument in support
45 of the claim of Indian title. What he said, at least
46 as it appears from his bench book, is this:
47

"No proposition respecting land anywhere or in any occupation could be more decisively or clearly or consistently established than this, that until a reserve had been duly established, the Indians (not being enfranchised) had no rights to the land, nor could acquire any rights much less transfer any rights."

Now, there is another extract from the bench book, and I should say that the Chief Justice Begbie's handwriting is virtually unintelligible, but in each case at tabs 22 and 23 of the reference book there are photocopy extracts from the bench book preceded by typescripts which are an attempt to make legible that which is not. And I should say that the quote from paragraph 23 of my speaking notes, that quote appears at tab 22 page 5 at the top of the page, that's the rendition in typescript of Begbie's bench book. And then the passages from the Metlakatla dispute are at various places in the first three or four pages of tab 23 of the reference book.

Again, my purpose here is to try and place Chief Justice Begbie's comments in 1860 into a larger historical context, not to attribute any particular importance to any of them, for a reason that I will come to shortly.

Commencing at paragraph 26 of my speaking notes I make some observations with respect to the submissions that your lordships have heard concerning the exchange of official correspondence relating to the Vancouver Island House of Assembly petition to extinguish title in 1861. And I've given your lordships some references in the next few paragraphs to material which bears on what you've heard and, in particular, I've also given your lordships the reference to the transcript from the Alphonse and Dick appeal where there was an extensive submission by counsel for the Province attempting to put that whole series of exchanges into their proper context.

And perhaps I could just read to you from the trial judgment, as quoted at the top of page 14, who referred to these events and said this:

"While there are references in the correspondence written by officials in the Colonial Office to the question of extinguishing aboriginal interests in British

1 Columbia as well as on Vancouver Island,
2 Governor Douglas made no further mention of it
3 and there never was, so far as the evidence
4 shows, any expectation or intention to do so.
5 Agitation for treaties was limited to the
6 separate colony of Vancouver Island."
7
8 With that in mind, perhaps I could take your lordships
9 now to paragraph 30.
10 Paragraph 29, I have another comment about
11 submissions which you've heard from the Province's
12 counsel. Province's counsel read New Castle's October
13 19th, 1861 despatch, and that's the despatch in which
14 New Castle says we're not -- the Imperial Government
15 will not give you, the Colonial Government, the money
16 to purchase the native title in Vancouver Island. And
17 the submission that was made was this:
18
19 "But it seems to me in my submission then that
20 at this point in time the flow back and forth
21 was directed at the extinguishment of the
22 native title on Vancouver Island, which
23 according to the trial judge was already
24 extinguished by the Calder documents."
25
26 Well, putting to one side the question of what New
27 Castle meant by native title on Vancouver Island, I
28 want to make the obvious point that since union of the
29 two colonies did not occur until 1866, it's difficult
30 to see how the first eleven Calder enactments, all of
31 which were mainland legislation, could be said to have
32 extinguished aboriginal title on Vancouver Island.
33 In the next paragraph I refer to another occasion
34 in which counsel for the Province confuses the actions
35 of the two separate legislative bodies and the two
36 different colonies, and say that your lordships must
37 take care to separate those two bodies and what it was
38 they did.
39 Paragraph 31, I now turn to events after 1871.
40 And I'm only going to make brief reference to events
41 after 1871. And again, my purpose is to comment on
42 the submissions which your lordships have heard about
43 this material because it's been offered to you as
44 being somehow relevant to the question whether
45 aboriginal rights were extinguished during the
46 colonial period, in other words, the Province and the
47 Appellants and the Coast Salish Nation group of

1 intervenors have all put before you evidence of
2 statements made after 1871 as if that somehow bears on
3 or is evidence of the failure or the fact of
4 non-extinguishment during the colonial period.
5 In paragraph 32 I've given your lordships some
6 references to the documentary evidence containing much
7 of what the trial judge relied on in Part 12 of his
8 reasons. And say that while that material was
9 originally assembled for the purpose of the
10 counter-claim which is no longer being pursued, your
11 lordships will nonetheless have to refer to it in
12 order to see the various references which others have
13 made in their proper context.
14 I have really two examples of post-confederation
15 material to give your lordships. The first comes from
16 paragraph 90 of the Coalition of First Nations Factum.
17 And I begin this in paragraph 33 of my speaking notes.
18 The Coalition refers to and quotes extracts from
19 Hewitt Bernard's report of 19 January 1875 in which,
20 as Deputy Minister of Justice, Bernard recommended,
21 and the minister concurred, and in due course this
22 happened, disallowance of the Province's 1874 Crown
23 Lands Act. The federal government didn't like the
24 1874 Crown Lands Act because it didn't make adequate
25 or express provision for the creation of reserves.
26 And the Province relies on the same document as the
27 Appellants do, they all rely on this report as
28 evidence of post-1871 recognition of unextinguished
29 aboriginal title in British Columbia. I make a
30 comment there about the reference which Mr. Berger
31 made to the Senate Reference case, which I, frankly,
32 don't find to be of any assistance on this point, that
33 is to say, there is nothing in it which even relates
34 to a report of the character of the deputy minister's.
35 Now, at paragraph -- at page 33 of the reference
36 book I have set out the relevant pages, firstly, the
37 relevant pages from the Coast Salish factum and then I
38 have set out the two pages of the extracts of
39 Bernard's opinion from which -- and there is an
40 exhibit reference there if your lordships wish to
41 refer to the entire document, which is a lengthy
42 document, because it contains other documents besides
43 Mr. Bernard's report. But Bernard was defending the
44 view that this provincial statute should be
45 disallowed. He said this act is no good. The
46 Province can't be allowed to make this legislation.
47 Why? Well, among other things, to quote him now,

1 "There is not a shadow of doubt that from the
2 earliest times England has always felt it
3 imperative to meet the Indians in Council, and
4 to obtain surrender of tracts of Canada as from
5 time to time such were required for the
6 purposes of settlement."
7
8 Bernard then concludes it was unnecessary to determine
9 whether the Royal Proclamation of 1763 covered the
10 land now known as British Columbia, then went on to
11 say this:
12
13 "It is sufficient for the present purposes to
14 ascertain the policy of England in respect to
15 the acquisition of the Indian territorial
16 rights, and how entirely that policy has been
17 followed to the present time, except in the
18 instance of British Columbia."
19
20 British Columbia then is held out, as it frequently is
21 in the popular history of the province, as the pariah
22 of confederation as the exception, because only here
23 did the Imperial policy, the uniform unalterable
24 Imperial policy of treaty making not obtain.
25 Paragraph 34 I say why the Deputy Minister should
26 have asserted with such certainty that a policy of
27 acquiring Indian title by treaty had unfailingly been
28 followed in Canada is a mystery. There were not then,
29 and (except for Quebec) are not now, any land cession
30 treaties between the Crown -- either in the right of
31 Great Britain or in the right of Canada -- and Indians
32 in the Provinces of Quebec, Nova Scotia, New
33 Brunswick, and Prince Edward Island. Nor were there
34 any in Newfoundland and Labrador -- also part of
35 British North America.
36 Only in what is now the Province of Ontario had
37 there been any land cession agreements before 1871,
38 when negotiation of the "numbered" treaties began in
39 the former Hudson's Bay Company territories.
40 To suggest, then, that Bernard's statements, and
41 I may add there are others whose statements to similar
42 effect are in the evidence before you, including Lord
43 Dufferin, Governor General, to suggest that such
44 statements represent an informed understanding of
45 aboriginal land rights is to ignore the trial judge's
46 admonition that "Indians and officials could honestly
47 have been wrong, or even wrong-headed in some of the

1 statements they made while still having an honest
2 belief in what they said." In my respectful
3 submission, Bernard's opinions are evidence of little
4 more than his own ignorance of Imperial practice.
5 As the trial judge said at page 397, a passage
6 I've not made reference to here, the judge said,
7
8 "There is, in fact, no uniform history for all
9 of the regions of North America and none of
10 them had a history similar to British
11 Columbia."
12
13 I say with respect that is a singular finding or a
14 finding of singular importance to the disposition of
15 the extinguishment issue in this case, British
16 Columbia --
17TAGGART, J.A.: What was the page?
18MR. PLANT: 3997. And now, the second example, somewhat longer
19 example of difficulties with the submissions that your
20 lordships have heard of actions after 1871 begins with
21 a reference to what Mr. Berger said to you on the 26th
22 of May, 1992 at the top of page 19, he said,
23
24 "And could I also cite what was said by Sir John
25 A. Macdonald, and this was only handed to me
26 yesterday, but this is an article appearing in
27 Manitoba Studies and Native History, and I will
28 hand it in to the court with The Senate
29 Reference in due course. But in a debate in
30 the Commons,"
31
32 that is to say, the House of Commons,
33
34 "in 1881 -- Macdonald was out of office when the
35 Fornier,"
36
37 that is the Bernard,
38
39 "opinion had been prepared, but he was prime
40 minister again in 1881, and he was being
41 assailed by a liberal, Mr. Mills, who said that
42 aboriginal title had not been extinguished in
43 British Columbia. John A. Macdonald agreed
44 with Mills's description of the situation in
45 British Columbia, although he did not think, as
46 Mills did, that the Indians there had been
47 treated unfairly. John A. Macdonald claimed to

be, and these are his words:

> '... strongly of the opinion that if the government raised the question of the Indian title the courts of this country and the courts of England would maintain the right of the Indians and their title to the occupation of the soil until that right, whatever it might amount to, was extinguished.'

Well, that's a fascinating little historical insight but it shows how completely it was understood by the federal authorities at the time, that there was unfinished business here in British Columbia, that aboriginal title had not been extinguished."

Now, Sir John A. Macdonald did say what is quoted on page 252 of the article from which Mr. Berger read but, as may be seen from the extract of the actual debates, which I will take your lordships to momentarily, Macdonald's statement was made in the context of a debate, shouldn't call it a discussion because it really is more a debate, of the sufficiency and security of tenure of Indian reserves in British Columbia. And I will leave with your lordships the suggestion that it is at least arguable that Macdonald's reference to the Indian "title to the occupation of the soil" was a reference to the rights of Indians in respect of "their several reservations."

Now, it's at paragraph -- at tab 38 of the reference book that the extract from the debates is set out and the discussion which leads to the statement by Macdonald begins at the second page in on page 1347 of the Commons debates. In the left-hand column under where the number 162 appears, about two-thirds of the way down, "Indians (B.C.)" 42,000 and some odd dollars, Sir Richard Cartwright says,

> "I hope the Minister of the Interior," that is Sir John, "will give some detailed account of the state of things, as regards the Indians in British Columbia."

And then Sir John A. Macdonald begins a discussion of the activity of the reserve commissioners in British Columbia. And that discussion includes some interruptions and carries on until you see that on the

right-hand column Mr. Mills at the bottom of the page, the last full paragraph, says,

> "In British Columbia the Indian title was never extinguished."

And Mills then expresses his views about the question of Indian title in British Columbia. And his views go on at some length over the page and Mills refers to both the question of Indian title, by which, in my submission, there is no doubt Mr. Mills has in mind a larger interest than simply the reserve interest. That's clear from other things which Mr. Mills said on other occasions, evidence of which is before the court. But he also says at the bottom of the page about seven lines up, this is the bottom of page 1347,

> "I think that no arrangement made between the Ottawa and British Columbia governments will take away the Indian's right in the soil, if he has not already disposed of it. When I was Minister of the Interior, I was not disposed to raise the question, if the Government of British Columbia would deal fairly with the Indians. But it did not seem to me that they were disposed to recognize any right or title of the Indians, or grant them reserves large enough for their subsistence."

And he goes on to talk about his dissatisfaction, and reports of the dissatisfaction of others, with the reserve allocation process in British Columbia. And then ends, "I would like to know from the honourable gentlemen whether...the patents," this is to say patents of land that had been granted so far as Mills knew over reserve lands, which were given rise to complaints, have these patents been cancelled and the lands given back to the Indians? Sir John A. Macdonald says,

> "They have not, so far as I am advised. The honourable gentlemen has very accurately defined the difference between the status in which Canada found the Indians in British Columbia at the time of Union with that Province, and the status of the Indians in the other Provinces."

1 And Macdonald goes on to talk about the difference in
2 treatment between Ontario, where treaties were made,
3 and British Columbia, where they were not. And about
4 20 lines below where his name first appears is a line
5 that begins, well, it begins "was carried out. The
6 Indian title was never formally recognized."
7
8 "The Indian title was never formally recognized
9 by the Government, though I believe they were
10 very fairly treated as a rule. Still no treaty
11 has been made with them and no surrender of the
12 lands took place. The arrangements made by the
13 late Government were, I think very proper, in
14 the way of having reservations marked out by
15 the Commissioners; and as I understand it, the
16 Commissioners always consulted with the Indians
17 and obtained their assent to the restrictions
18 as being sufficient for their purposes.
19 Arrangements were also made so as to enable the
20 remainder of the country outside which were in
21 the possession of Indian bands, to be opened
22 for settlement."
23
24 He then goes on to comment more on the question of
25 whether the Indians should be consulted, which he says
26 they should be, in relation to the allocation and
27 alteration of the bounds of reserves.
28 And at the end of this discussion he says this,
29 and I'm now three lines up from the bottom of the
30 left-hand column, and these are the words which Mr.
31 Berger read,
32
33 "I am strongly of the opinion that if the
34 Government raised the question of the Indian
35 title, the Courts of this country and the
36 Courts of England, at all events, would
37 maintain the right of the Indians and their
38 title to the occupation of the soil until that
39 right whatever it might amount to was
40 extinguished. And as the Government is the
41 guardian of the Indians, if it was found that
42 the Government of British Columbia was acting
43 unjustly with the Indians -- which I do not, by
44 any means, expect -- or depriving them of their
45 reasonable rights,"
46
47 that is to say, not allocating adequate reserves,

1 "we might in such an event be obliged to assert
2 the rights of the Indians to a recognition of
3 their titles to the lands."
4
5 Now, I do not want to push strongly the point that
6 Macdonald was not responding to Mills on the question
7 of title at large, but I do wish to leave your
8 lordships, at least at this point before the break,
9 with the knowledge that the principal unfinished
10 business as reflected in this political debate, which
11 is simply that, it's just simply a debate, is the
12 completion of reserve, the completion of inadequacy of
13 reserve allotments in the province.
14 Perhaps after the adjournment I might then refer
15 your lordships to two or three other pieces of
16 evidence in which Sir John A. Macdonald's views about
17 Indian title are set out.
18TAGGART, J.A.: Thank you. We'll take the morning break then.
19THE REGISTRAR: Order in court. Court stands adjourned.
20
21 MORNING RECESS
22
23THE REGISTRAR: Order in court.
24TAGGART, J.A.: Yes, Mr. Plant.
25MR. PLANT: Thank you, my lord. I had reached the top of page
26 20 of my speaking notes and I had said that I might
27 make reference to other statements made by Sir John A.
28 Macdonald on other occasions. I think in the interest
29 of time I will just leave your lordships with
30 paragraphs 39 and 40 and the material which is
31 included in the reference binders, and perhaps,
32 although I'm going to go back to page 21, I should say
33 this about Sir John A. Macdonald's expression of his
34 views on the Indian land question, and for that
35 matter, all such political statements.
36 Paragraph 43 of my speaking notes on page 23 I
37 quote from a statement that the trial judge made,
38 which I respectfully suggest is correct. At page 310
39 of his judgment, having quoted from one of the
40 documents by Sir John A. Macdonald which I've made
41 reference to, the trial judge said this:
42
43 "... it seems to me, the issues of law arising
44 in this case cannot be decided by the opinions
45 of the Prime Minister, or anyone else."
46
47 Now, going back to pages 21 and 22, what I do

there, or attempt to do there, is to provide further explanatory context to answer the statement made by counsel for the Coast Salish Nation, which I quoted from in paragraph 41, his statement that it was "completely ... understood by the federal authorities at the time," that is 1881, "that there was unfinished business here in British Columbia, that aboriginal title had not been extinguished." And I say that that statement should be examined in light of the following facts, and I will just introduce your lordships to this issue, which is discussed at considerable length in the Amicus Factum in Appendix 7, section 4. The point is this:

Firstly, in 1881 when the Government of Canada enacted a federal statute respecting the Canadian Pacific Railway, clause 12 of the contract between the government and the C.P.R. which was scheduled to that act provided that,

> "The Government," that is the Dominion, "shall extinguish the Indian title affecting the lands herein appropriated and to be hereafter granted in aid of the railway."

Now, in 1883 the lands comprising the railway belt were transferred from British Columbia to Canada and the affect of that was stated by the privy council in a case of 1914,

> "the entire beneficial interest in everything [in the railway belt] that was transferred passed from the Province to the Dominion. There is no reservation of anything to the grantors. The whole solum of the belt lying between its extreme boundaries passed to the Dominion..."

So even though Canada was obliged by contract to extinguish the Indian title along the railway belt and had the power to do so without the Province of British Columbia holding up its hand and saying no, those are our lands you're giving away, that's always been the problem, that the Province has held up its hand and said no, you can't do that, those are our lands. Well, when the railway belt was transferred in 1883 those became the Dominion's lands. And the Dominion, therefore, had both the legislative and proprietory

complete interest in those lands and, therefore, if, as was suggested to you that it was completely understood by the federal government that there was unfinished business here in British Columbia, that aboriginal title had not been extinguished, I suggest to you that it is a fact of singular interest that at no time did the federal government ever make a treaty with the Indians in the railway belt.

There was no impediment, constitution or legislative, to the extinguishment of Indian title, if it existed, in those lands.

And despite the fact -- and here I'm now at the bottom of page 22 -- despite the fact that it was contractually bound to extinguish Indian title to lands appropriated and granted in aid of the C.P.R, Canada never did so in British Columbia. In fact, what Canada did, was just before the first attempt at transferring railway belt lands occurred in 1880, Canada repealed those parts of the Dominion Lands Act which appeared to suggest that Canada was obliged to do things with Indian title. So they repealed those sections so that the transfer could take place without bringing those lands within -- under the umbrella of the Indian title provisions. And I suggest to you that the explanation for Canada's conduct in this period, which was half a century, is quite simply this, that contrary to what was suggested to you by counsel for the Coast Salish Nations, so far as Canada was concerned, there was no aboriginal title in British Columbia.

And that really concludes this part of my argument in which I've been trying to give your lordships some examples of the difficulties that I see in the submissions that have been made to you thus far about the historical evidence.

Perhaps in concluding I could take your lordships to page 24 where I wish to read from a couple of paragraphs, actually three or four, from the Chief Justice's judgment which makes, I say, the point that is of most importance in relation to the review of this evidence.

The second paragraph from my quotation the Chief Justice says this:

> "The authorities make it clear that aboriginal land claims must be considered in their historical context. I conclude it would not be

safe to assume that confident statements made by Dominion officials about 'Indian title' should always be accepted as correct statements of law.

Similarly, the denial of the provincial officials cannot be so construed. These gentlemen were defending positions to which they were committed. I find their statements helpful because they create the historical context, but none of them are binding pronouncements of law."

And later in the judgment his lordship said this:

"It seems to me that their has always been much uncertainty about the true nature of 'Indian title' in the province. ...

As already mentioned, I do not consider myself bound by historical statements made either by Indians or Crown officials about questions of law. I am not persuaded any of them spoke with a complete understanding of either the law or the facts, and the law today is much different from what it was just a few years ago. For example, these men all spoke without the assistance of authorities such as Calder, Guerin and Sparrow. Also, Indians and officials could honestly have been wrong, or even wrong-headed, in some of the statements they made while still having an honest belief in what they said. I find no need to judge the conduct" and it may be "[or] the bona fides of any of the participants in this history.

My responsibility is to apply the present law to the facts as I understand them."

Now, that concludes that part of my argument.

In Part III of my argument what I've done is I've structured the Appellants' claims and the trial judge's disposition of them in a way which I don't think I need to take your lordships through because all of these points are quite clear to you by this stage of the proceedings.

And if I may then, I would go to page 28 of my notes, where I begin to talk about what I describe as the criteria for extinguishment of aboriginal rights.

1 Here my goal is not to repeat what has been said
2 already, but I'll see how far I achieve that goal.
3 There are three aspects to the question of how
4 aboriginal rights may be extinguished, the first is
5 the means by which they may be extinguished, the
6 second is the onus of proof on the party alleging
7 extinguishment, and the third is the standard of proof
8 which that party must bear. I say that one can
9 summarize the position in respect of each of these
10 three aspects of the question as follows:
11 Firstly, the selection of the means of
12 extinguishment is a governmental prerogative.
13 Extinguishment may be effected by a unilateral act or
14 acts of the Crown as sovereign without either notice
15 to or consent of the aboriginal peoples whose rights
16 are thereby affected. And for support I draw on
17 Calder, the Santa Fe case which was relied on by both
18 judges in Calder, and the Sparrow decision, and
19 because that point has been argued fairly fully I
20 don't intend to say anything more about it.
21 The second issue, the question of the onus of
22 proof, I do want to say something about.
23 And then in the third issue, which is to say, as
24 I put it here, where the choice of means is
25 extinguishment by unilateral act of the Crown, the
26 test is that "the sovereign's intention must be 'clear
27 and plain' if it is to extinguish an aboriginal
28 right."
29 Paragraph 54 I set out some of the places in the
30 Amicus Factum where submissions may be found on these
31 criteria. The first point I wish to make is about the
32 onus of proof and it's not a very large point but I'll
33 make it anyway. The trial judge's extinguishment
34 ruling, in my submission, must be taken as a finding
35 that the onus of proof has been discharged. So on
36 appeal from that finding I say that the onus is on the
37 Appellants, the onus is no longer on the Crown to
38 demonstrate that the trial judge erred. And I also
39 note that in this case the finding that the Crown had
40 the intention to extinguish was a finding of fact, a
41 finding made on evidence and, thus, the ordinary rules
42 relating to appellate review of findings of facts
43 apply. So I say that the result is that, if your
44 lordships find that the trial judge correctly directed
45 himself on the principles then, unless there was some
46 error in his assessment of the evidence, his finding
47 of extinguishment must be upheld now.

1 On the third proposition, which is to say the
2 Sparrow test, the sovereign's intention must be clear
3 and plain, I want to make three points, I'll state
4 them and then I will take your lordships to a number
5 of passages in the cases listed at the bottom of the
6 page where I wish to make emphasis.
7LAMBERT, J.A.: It's not self-evident to me that on (a), on
8 53(a) that it can be done by any means, that several
9 counsel have argued, I think that the Appellants have
10 argued and I think that Mr. Berger argued on behalf of
11 the Coalition, that it could only be a legislative
12 means, that there couldn't be administrative means for
13 extinguishment because only the legislature could
14 express the sovereign's clear and plain intention, so
15 you've rather skipped over, not skipped over but, do I
16 understand you're going to come back to this question
17 of means and make a submission contrary to that
18 position?
19MR. PLANT: Yes, in part. Now, I say that your lordship has
20 heard the answer to that submission. I say that the
21 fact that in Calder both Justices Hall and Judson
22 referred either to Santa Fe directly or to Lipan
23 Apache as an answer to that submission and I will take
24 your lordships to Lipan Apache and show why that is
25 so. So I guess the short answer to your lordship's
26 question is I will be coming to it.
27LAMBERT, J.A.: All right, good.
28MR. PLANT: And to introduce that process, there are three
29 points in paragraph 56 that are points that I hope to
30 demonstrate by reference to the authorities that are
31 listed thereunder. The first is that Mr. Justice
32 Hall's statement in Calder that extinguishment can
33 only take place by specific legislation is not
34 supported by the authorities on which his lordship
35 relied.
36 The second point is that there is no requirement
37 that the intention of the Crown may only be derived
38 from legislation.
39 And the third point is that intention may
40 therefore be correctly described, at least in some
41 cases, and in this case, as a question of fact.
42 Now, to elaborate on those points, I wish to ask
43 your lordships to refer tab 56 of my reference binder
44 where I've set out extracts from the cases that I want
45 to take your lordships to. The first is a two-page
46 extract from Sparrow itself and, in particular, or
47 that part of the judgment of the Supreme Court of

1 Canada which deals with the test for extinguishment.
2 May I say this point, which is not -- may I make first
3 this point: Insofar as the Appellants' argument
4 depends on an interpretation of the Supreme Court of
5 Canada's decision in this case, nowhere -- I make the
6 point that nowhere does the court in this case say
7 that the sovereign's intent can only be made known by
8 specific legislation. And I say it's difficult, it's
9 difficult, frankly, to imagine that in framing such an
10 important test the Supreme Court of Canada, if it had
11 concluded the specific legislation was required, would
12 have failed to say so. And they didn't say so. What
13 they said at page 410 was to pick up from a passage of
14 Mr. Justice Hall's judgment in Calder at page 210 the
15 words,
16
17 "...that the onus of proving that the Sovereign
18 intended to extinguish the Indian title lies on
19 the respondent and that intention must be
20 'clear and plain'."
21
22 They've quoted -- does your lordship have tab 56?
23 LAMBERT, J.A.: I do now.
24 MR. PLANT: And now I'm on the second page which would be an
25 extract from page 401 from the Sparrow judgment and
26 the reference to Mr. Justice Hall's judgment directly
27 across from letter "e", the reference is to page 210
28 of Calder, that's the page in which Mr. Justice Hall
29 said what is quoted to him, it's not the page where
30 Mr. Justice Hall said that the test could only be --
31 is charged by specific legislation, so the court has
32 taken us in support of what its saying to that part of
33 Mr. Justice Hall's judgment where he said the
34 intention must be clear and plain.
35 So if your lordships turn over to the next page,
36 you'll then see three pages from the judgment of Mr.
37 Justice Hall in Calder. They are the three pages in
38 which Mr. Justice Hall focuses on the issue of
39 extinguishment and the criteria for extinguishment.
40 At the top of page 208 beginning the discussion Mr.
41 Justice Hall says,
42
43 "This important question remains: were the
44 rights either at common law or under the
45 Proclamation extinguished?"
46
47 And he goes on and he cites a number of cases. In

1 none of these cases is there -- or I should put it
2 this way: None of these cases cited here by Mr.
3 Justice Hall supports the proposition that the
4 sovereign can only extinguish by specific legislation.
5 Let me pause to say this: I wish to take the
6 point of disagreement to be the question whether the
7 intent of the Crown can only be expressed in specific
8 legislation. I disagree with that proposition. I say
9 that the intention of the Crown can be ascertained by
10 reference to material other than, that is to say --
11 let me put it another way. The burden can be
12 discharged by reference to a statute which does not
13 specifically or expressly purport to extinguish
14 aboriginal title. But I do not consider it necessary
15 to take the point whether extinguishment can be
16 achieved by administrative act. I wish to ascertain
17 the intention of the Crown largely and broadly by
18 reference to the historic context, but the effective
19 extinguishment occurs by the effect of the legislation
20 itself. That's a distinction which, in my submission,
21 the Chief Justice through -- and it's also an
22 appropriate distinction. I'm going to come back to
23 this point also when I deal with the Province's test
24 and their application of the test for extinguishment.
25 But, in my submission, I do not, in order to support
26 the judmgent, need to find an extra legislative,
27 outside legislature statement to accomplish
28 extinguishment in this case. What I want to do is to
29 identify the historical context and the executive and
30 governmental context and policy which related to lands
31 and Indians and say that that is the framework. Now,
32 within that framework these land laws were enacted,
33 they had this effect. Even though the land laws
34 themselves did not specifically or expressly say
35 aboriginal title is hereby extinguished, that is the
36 effect which must be given to them in their historical
37 context. I'm going to have to come back to that
38 question.
39 Let me say now about Mr. Justice Hall's judgment
40 that the cases here cited by him are generally not
41 concerned with the criteria for extinguishment of
42 aboriginal title. Amodu Tijani, it's not principally
43 concerned with that issue, although your lordships
44 will see in the quotation from Amodu Tijani about five
45 lines up from the end of the quotation, actually it's
46 six or seven,
47

1 "The original native right was a communal right,
2 and it must be presumed to have continued to
3 exist unless the contrary is established by..."
4
5 By what? By specific legislation? No.
6
7 "...by the context or circumstances. There is,
8 in their Lordships' opinion, no evidence,"
9
10 And I say it's entirely appropriate to look at
11 evidence in considering the expression of
12 extinguishment.
13 If I can move on, over to the top of page 210
14 there is the place where Mr. Justice Hall immediately,
15 before his statement that the intention must be clear
16 and plain, refers to and quotes from the judgment of
17 Justice Davis in the Lipan Apache case. That is the
18 only one of these cases, in my submission, cited up to
19 this point by Justice Hall which wrestles with the
20 question of what are the criteria for extinguishment,
21 and I propose to go next to it and the Lipan Apache
22 case is set out, I believe, almost in its entirety
23 commencing at page 6. And this is a judgment of the
24 U.S. Court of Claims on appeal from the Indian Claims
25 Commission.
26 And if your lordships will turn to what is page 8
27 of the tab pages but is in the judgment pages 490 and
28 491 you'll see that Judge Davis delivering the opinion
29 of the court starts by observing that,
30
31 "The Lipan and Mescalero Apache tribes invoke
32 the Indian Claims Commission Act for
33 compensation for the loss of their ancestoral
34 lands within the State of Texas."
35
36 And over on the next page under "I",
37
38 "On this motion to dismiss we must accept the
39 factual allegation that the claimant tribes had
40 used and occupied designated lands in Texas to
41 the exclusion of other peoples for many years."
42
43 Over the page, page 492 in the second full paragraph
44 is the discussion from which Mr. Justice Hall quoted.
45 Judge Davis says this:
46
47

1 "The correct inquiry is, not whether the
2 Republic of Texas accorded or granted the
3 Indians any rights, but whether that sovereign
4 extinguished their pre-existing occupancy
5 rights. Extinguishment can take several forms;
6 it can be effected,"
7
8 and now the court judge is quoting from Santa Fe,
9
10 "by treaty, by the sword, by purchase, by the
11 exercise of complete dominion adverse to the
12 right of occupancy, or otherwise. While the
13 selection of a means is a governmental
14 prerogative, the actual act (or acts) of
15 extinguishment must be plain and unambiguous.
16 In the absence of a 'clear and plain
17 indication' in the public records that the
18 sovereign 'intended to extinguish all of the
19 [claimants'] rights' in their property, Indian
20 title continues."
21
22 Now, I say -- I'm going to go back to that, those last
23 two sentences and highlight a couple of things which,
24 I submit, were deliberately said.
25 In the line "the actual act (or acts)," so
26 extinguishment is not confined to an act, it may
27 consist in a number of acts. "The acts of
28 extinguishment must be plain and unambiguous. In the
29 absence of a clear indication in the public
30 records..." Now, clearly Judge Davis could have said
31 in the absence of a clear and plain indication in
32 statute, but he didn't say that, he said in the public
33 records, that is to say, the actions of government at
34 large. And "in the absence of such an indication in
35 the public records, Indian title continues," I say
36 what Judge Davis is looking for is evidence of
37 intention. So I say this judgment does not support
38 the proposition that extinguishment can only be
39 accomplished by specific legislation.
40 And I only rely on this judgment because Mr.
41 Justice Hall does and I say this judgment, to the
42 extent that Mr. Justice Hall and others have relied on
43 it, has become, therefore, the law in Canada. And,
44 indeed, I may say that insofar as the question of the
45 means and criteria of extinguishment are concerned,
46 Canadian law seems to have borrowed from the American
47 juris prudence extensively.

1 Now, the next case is the Santa Fe case and
2 that's set out in full, but I don't think I'm going to
3 take your lordships through it, because your lordships
4 have had most of it read to you at one point or
5 another, so I then wish to turn to what may be the
6 most recent expression of an American court, an
7 American appellate court on the issue of the test for
8 extinguishment, and that is the case of Vermont and
9 Elliott, which begins at page 33 of tab 56, and again,
10 I've reproduced all of the judgment of the Vermont
11 Supreme Court handed down June 12th, 1992. And, as I
12 recall, this judgment was handed up to your lordships
13 by my learned friend Miss Koenigsberg.
14 Just to set the context for this case, the first
15 page you see this is a criminal case, defendants are
16 individuals in a group of 36 people who were charged
17 with fishing without a license, and they moved to
18 dismiss the charge on the doctrine of aboriginal
19 rights. They said that the doctrine prohibited their
20 prosecution if they could establish that they were
21 members of a currently viable Indian tribe which had,
22 from time immemorial, continuously occupied the land
23 where the offences occurred. That's the context.
24 If I can take your lordships to page 6 of the
25 judgment, which is page 38 of the tab, this is
26 actually not at the beginning, at the beginning of the
27 extinguishment discussions is the preceding page under
28 the Roman numeral II, but for my purposes I wish to
29 begin on the seventh line where the court says this:
30 "Sovereign intent" -- this is the seventh line of page
31 6 of the judgment, page 38 of the tab:
32
33 "Sovereign intent to extinguish need not be
34 express, but there must be evidence that
35 demonstrates a 'plain and unambiguous' intent
36 to extinguish exclusive aboriginal rights."
37
38 Oneida is cited.
39
40 "Because of the federal policy to respect Indian
41 rights of occupancy, the intention to
42 extinguish Indian title will not be 'lightly
43 implied'."
44
45 "Lightly implied" is language which comes from Santa
46 Fe. It's difficult to see how the court would have
47 had occasion in Santa Fe to use the words "lightly

implied" if they had meant that extinguishment could only take place by express specific legislation.

Carrying on with the judgment of the Vermont court,

> "A historical event, although insufficient by itself to establish an extinguishment, may contribute to a finding of extinguishment when analysed together with other events."

Then reference to the Gemmill case, which they take to be authority for this proposition.

> "(ambiguity in single act of federal government is not fatal to claim of extinguishment when a series of subsequent acts resolves ambiguity to demonstrate extinguishment)"

Over the page, the top of page 7 the court says,

> "Moreover, a century-long course of conduct may demonstrate extinguishment, even though the exact date on which Indian title is extinguished is difficult to determine."

They're quoting from, I think it's the Ildefonso case.

> ("there are no fine spun or precise formulas for determining the end of aboriginal ownership").

And I pause to make the point that I don't need a century of conduct, I'm looking at the history of the colonial period, 1858 to 1871. This judgment suggests that I'm entitled to look at the entire colonial period. And even though I cannot find an exact date on which Indian title is extinguished, if I can look at the broad sweep of history through that period and say at the end of it Indian title could not have survived this, then I'm entitled to argue extinguishment.

Now, page 15 is the next part of this judgment that I want to refer your lordships to. Here is where the Court of Appeal responds to the trial judgment where the trial judge had acquitted the accused, as I recall, and the Appeal Court is overturning that decision. And they do so on this basis: "The trial

1 court," this is under "V",
2
3 "The trial court examined the events leading to
4 Vermont's statehood and concluded that no
5 single event constituted express or implied
6 termination of aboriginal rights. The court
7 declined to decide whether the grants were
8 within Wentworth's geographical jurisdiction,"
9
10 and so on. The court comments on particular aspects
11 of the evidence before and in that case.
12 And then over to page 16, just above the break in
13 the paragraph, the sentence begins,
14
15 "As a result, according to the trial court, the
16 State failed to satisfy its burden of showing,
17 by a preponderance of the evidence, a 'clear
18 and unambiguous intent to extinguish'
19 aboriginal rights. For the reasons that
20 follow, we disagree.
21 We differ with the trial court principally
22 in its application of the test for
23 extinguishment to discrete events in Vermont's
24 history, rather than to a cumulative effect of
25 many historical events. The legal standard
26 does not require that extinguishment spring
27 full blown from a single telling event.
28 Extinguishment may be established by the
29 increasing weight of history."
30
31 Now, I pause there to say that this goes far beyond
32 the question which my lord Mr. Justice Lambert asked
33 me whether extinguishment could only happen by
34 reference to specific legislation. This court says
35 not only do you not need to find specific legislation,
36 you don't need to confine the inquiry to any
37 particular act at all. You can look at the cumulative
38 effect of many historical events. And the trial judge
39 in the case at bar said much the same thing when, if
40 your lordships wish to make a note, at page 404,
41 having referred to the fact that the colonial period
42 was 13 years long he said it was unrealistic to think
43 that this question of extinguishment should focussed
44 narrowly upon single moments or isolated events. And
45 I say that's an entirely appropriate approach.
46LAMBERT, J.A.: But it's not the cumulative weight of history in
47 itself that effects the extinguishment, it's that the

1 cumulative weight of history demonstrates clear and
2 plain intention to extinguish.
3MR. PLANT: That's my point, yes, my lord.
4 The next case at page 57 is -- it's not a whole
5 case, it's a privy council decision which I made
6 reference to because of submission which the
7 Appellants made. The Appellants' comments about this
8 are made at page 62 of tab 56. So if your lordships
9 could just keep your fingers in at page 57 and flip
10 ahead five pages you'll see an extract from the
11 Appellants' Factum and at paragraph 1067 at the bottom
12 of the page --
13TAGGART, J.A.: The page again?
14MR. PLANT: Tab 56 at page 62 is where the Appellants' Factum
15 is. But hang on to page 57.
16TAGGART, J.A.: This is the Appellants' Factum?
17MR. PLANT: What the Appellants say is this,
18
19 "The trial judge's conclusion that the
20 extinguishment can be applied from the
21 consequence intended by a course of conduct
22 runs contrary to the Privy Council's decision
23 in Western Countries," it's actually, "Western
24 Counties Railway v. Windsor. In Western
25 Counties Railway the Privy Council held that it
26 is not enough to show that what is authorized
27 will take away the right; it must also be shown
28 that the Legislature specifically authorized
29 the thing to be done despite its interference
30 with existing rights."
31
32 Now, I would generally make the point that in the law
33 of extinguishment of aboriginal rights, in particular,
34 the principle adopted by the court in Sparrow as the
35 stand alone principle which -- in respect of which
36 it's not going to help your lordships much to look at
37 common law of interference with ordinary proprietory
38 rights, but what caught my attention here was the
39 suggestion that the privy council had said that the
40 legislature must specifically authorize the thing to
41 be done.
42 If you go back to page 57 in this case, the
43 extract that -- this had to do with a very complicated
44 series of exchanges involving which railway company
45 was entitled to operate and where and whether transfer
46 of a railway from one company to another took away the
47 earlier company's rights. But at page 58 of the tab,

which is the second page, the page immediately after the first page, there is a paragraph that begins "Neither in the Act," and I wish to read from the fourth line, the sentence that begins,

> "The canon of construction applicable to such a statute is that it must not be deemed to take away or extinguish the right of the respondent company, unless it appear, by express words, or by plain implication, that it was the intention of the Legislature to do so."

And as the court says at the bottom of the page,

> "The enunciation of the principle is, no doubt, much easier than its application. Thus far, however, the law appears to be plain -- that in order to take away the right it is not sufficient to show that the thing sanctioned by the Act, if done, will of sheer physical necessity put an end to the right, it must also be shown that the Legislature have authorized the thing to be done at all events, and irrespective of its possible interference with existing rights."

Well, I repeat the caution that I've already enunciated in looking at these cases in relation to the issue of extinguishment of aboriginal rights, but what is clear is that the right in this case could be extinguished either by express words or by plain implication. So this case, in my respectful submission, does not support the position of the Appellants.

Now, I wish to change the emphasis slightly to deal with another aspect of this submission about extinguishment by taking your lordships very briefly to Simon, which begins at page 60. This is the Nova Scotia Indian treaty case. And page 61 of the tab from page 405 of the judgment the court, which is a unanimous court, speaks about termination by extinguishment and the second paragraph under that heading says, "In my opinion," and this is on page 61 of the tab, "my opinion," this is Chief Justice Dickson writing for the court,

1 "it is not necessary to come to a final decision
2 on the respondent's argument. Given the
3 serious and far-reaching consequences of a
4 finding that a treaty right has been
5 extinguished, it seems appropriate to demand
6 strict proof of the fact of extinguishment in
7 each case where the issue arises. As Douglas
8 J. said in Santa Fe 'extinguishment cannot be
9 lightly implied'."
10
11 I draw some comfort from the fact that the Chief
12 Justice chose not to say it seems appropriate to
13 demand express legislation but, rather, said it seems
14 appropriate to demand strict proof of the fact of
15 extinguishment.
16 It's not the only source or authority I have for
17 the proposition that evidence is relevant, but because
18 I've taken your lordships already to Lipan Apache, and
19 there are other cases, particularly, American cases
20 where evidence is admitted all the time, including, of
21 course, the Vermont case.
22 The other case, and it's the last case on this
23 point -- sorry?
24HUTCHEON, J.A.: I've only read through it once but it was based
25 on statute, wasn't it?
26MR. PLANT: Which case?
27HUTCHEON, J.A.: Vermont.
28MR. PLANT: When you say it was based on statute --
29HUTCHEON, J.A.: The extinguishment spun from various
30 arrangements between Vermont and the other state?
31MR. PLANT: The extinguishment sprung from conveyances, from
32 grants, from historical arrangement, the arrangements
33 made at the time that Vermont declared its
34 independence and Vermont became a state. It was not
35 focussed on one particular statute but, my reading of
36 the case, on a series of events. The court did not
37 say, at the end of the discussion where they say this
38 happened because a broad set of historical
39 circumstances, the court didn't say, for example, in
40 particular, we can focus on this statute or this
41 event, they didn't do that, they just said you read
42 this whole series of events and from that you can
43 conclude that occupancy as a right, Indian occupancy
44 as a right could not have survived these events.
45 Perhaps just before the adjournment I might spend
46 a minute with the Court of Appeal judgment in the
47 Bear Island case, and this is set out in full

1 commencing at page 64 of the tab. And, of course, as
2 we know, an appeal was taken from this judgment and
3 the appeal was dismissed in the Supreme Court of
4 Canada in deciding the appeal, did not find it
5 necessary to pronounce on all of the issues that were
6 raised, but your lordships should know that in this
7 case it was argued that a treaty had extinguished
8 aboriginal rights. And there was a question about
9 whether the Indians had adhered to the treaty and one
10 of the arguments was that extinguishment could not
11 have taken place unless adhesion as a fact could have
12 been proven.
13 Another argument was that extinguishment did not
14 depend on proof of adhesion to the treaty because the
15 treaty expressed the sovereign's intent outside
16 legislation to extinguish aboriginal title.
17 And at page 124 of the judgment, which is to
18 say about seven pages in under the heading
19 D. Extinguishment of Rights, "This court," that is
20 the Court of Appeal,
21
22 "does not feel that it is necessary to deal with
23 every issue put to the trial judge. We are
24 satisfied that any aboriginal rights enjoyed by
25 the Temagami were extinguished by the
26 Robinson-Huron Treaty of 1850. The Temagami
27 were signatories to the treaty. Alternatively
28 they adhered to the treaty by receiving
29 annuities pursuant to it and later asking for a
30 reserve as was promised in the treaty and still
31 later receiving a reserve. Finally, their
32 rights were extinguished, even if they were not
33 signatories or adherents, because the treaty
34 was at least a unilateral act of extinguishment
35 by the sovereign authority."
36
37 While that point is not even mentioned in the Court of
38 Appeal in the Supreme Court of Canada's judgment, I
39 think it's important to bring it to your lordships'
40 attention as to the decision of an appellant court
41 that is clearly of the view that extinguishment can
42 take place outside legislative act. And there is more
43 discussion of that point later in the judgment but I
44 won't ask your lordships to read it now.
45 I wonder if it would be appropriate to adjourn.
46TAGGART, J.A.: All right, two o'clock.
47MR. PLANT: I'm sorry, my lords, before we do that, Mr. Gouge

had asked that I stop at 12:29 and I apologize to him.
MR. GOUGE: May I have one minute, my lords. My lords, I rise to apply for liberty to give your lordships a supplementary written submission, the text of which will be less than two pages in length and will refer to three additional authorities. The subject of my supplementary submission will be the jurisdiction of this court to review the evidence before the learned trial judge and to come to conclusions of fact which might differ from those of the learned trial judge. The leading case of course is Stein, but there are one or two judgments of the Supreme Court of Canada since that decision which have not been mentioned to your lordships and which, in my submission, your lordships should have.
TAGGART, J.A.: We'll give that some thought over the lunch hour and let you know at 2:00. We'll consider it over the lunch hour and let you have our answer at 2:00.
THE REGISTRAR: Order in court. Court stands adjourned for the lunch recess.

LUNCH RECESS

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

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3 TAGGART, J.A.: Mr. Plant, just before you begin, Mr. Gouge, we
4 have had an opportunity to discuss your request.
5 There are a number of matters that are outstanding on
6 some of which we owe a reply to one or more questions
7 raised by counsel during argument. We are going to
8 have a meeting tomorrow morning at 9:30 to canvass
9 these outstanding matters of which we have
10 recollection. In my case it's imperfect as best. We
11 will then advise counsel, I hope, at 10 o'clock
12 tomorrow morning what matters we think are -- remain
13 outstanding. Counsel will have the weekend to
14 consider that list and add to it next week and in
15 order that we may finally get back to counsel answers
16 to all the matters that have been raised from time to
17 time on which we have not given you answers. Yours
18 will be among them.
19 MR. GOUGE: Thank you, my lord.
20 MS. MANDELL: My lord, if I could rise and ask to put an issue
21 on the list. I was intending to raise this at the end
22 of the day today, but in light of your comments I
23 would ask for 30 seconds to raise a further issue
24 which has arisen from the appellant's side, and that
25 is in respect of the Province's surreply, and we've
26 been -- Mr. Pape has addressed your lordships now in
27 respect of his submissions on federal common law and
28 Section 109. The appellants have made their
29 submissions in their Factum, the Reply Factum on this
30 point, and had expected that we would have heard all
31 that the Province had to say on this before we sat
32 down in the course of our reply. And it now appears
33 as if that won't occur, but the Province still does
34 have from the appellant's all that we have to say on
35 the matter. We'll be speaking to it, but there is
36 nothing new to add, and Mr. Pape has now completed his
37 submissions and we were going to ask your lordships to
38 consider asking the Province to deliver to the
39 appellants at least a clear statement of what their
40 position is on these points perhaps no later than
41 Monday of next week, which would allow the appellants
42 to consider their position in the course of our reply
43 and hopefully address it to the best of our ability
44 before we sit down. And I was going to ask your
45 lordships to consider this and perhaps you could in
46 the course of your deliberations.
47 LAMBERT, J.A.: I wonder if you would just specify the points to

which this relates, the issues in the appeal to which you -- the submission you have just made relates.
MS. MANDELL: To the question of whether or not the Province after Confederation has the power to extinguish aboriginal title.
HUTCHEON, J.A.: In particular I understand Mr. Pape's point about there being a federal common law.
MS. MANDELL: That's right. And that hooks into the analysis of the division of powers at Confederation and what the significance of that is. The appellants have developed at length in our reply the division of powers at common law combined with the doctrine of federal common law preclude the Province from having power to extinguish after Confederation and Mr. Pape has made some further submissions to you in respect of that and it's on this point that we would like to know what the -- if the Province has something to say on that which they say they want to reserve for surreply, then what is their position.
LAMBERT, J.A.: They have got three issues reserved for surreply and this really is one aspect of one of the three. And your submission is limited to that one aspect of one of the three. Am I right?
MS. MANDELL: That is what we primarily are concerned about.
LAMBERT, J.A.: Yes. Thank you.
TAGGART, J.A.: And what you want us to do is to direct the Province to give you a written summary of what their position is with respect to that single aspect?
MS. MANDELL: Yes.
TAGGART, J.A.: And you want that when?
MS. MANDELL: We would like it by Monday, first thing Monday at the latest. It would give us the week as we're speaking -- we're going to be addressing the extinguishment issue on Monday.
TAGGART, J.A.: This is what I think Mr. Williams used the term adverse dominion.
MS. MANDELL: That's correct.
TAGGART, J.A.: And you have been using the term the power of the Province to extinguish after Confederation?
MS. MANDELL: There is -- they do wrap up into the same concept.
TAGGART, J.A.: Mr. Williams, what is your position with respect to providing this skeletan outline on what you call adverse dominion and what Miss Mandell calls your power to extinguish after Confederation.
MR. WILLIAMS: It would be easy for me to say it's okay for Monday because Mr. Taylor has to prepare it. He's not here. But I am afraid I do have a problem with that

1 commitment. As I understand it in a nutshell the
2 appellants insisted and would not agree to let us go
3 first on this -- let us go second on this issue. They
4 insisted we go first and they wanted the right to
5 respond and that was the term. We then said we need
6 the right to reply once we've heard what the
7 appellants have to say. The issue as we have
8 described it is adverse dominion, but it involves the
9 Constitutional issues. The whole of that territory
10 involves 91(24) and 109 and the federal common law.
11 Those are the issues. And then does the deed
12 extinguish, does the lease extinguish. Assuming the
13 Province has the power, what is it then that does
14 cause the extinguishment. We have argued that a deed
15 will; a lease might, etc. Lesser tenures may or may
16 not depending on the circumstances. That whole issue
17 we had to argue first. The Province will respond to.
18 And we asked for and obtained the right to reply to
19 that, just as they had the right to reply when we
20 respond. Now, if what my friend is asking for is an
21 outline on the federal common law aspect of that
22 argument, I think we could probably do that. Mr.
23 Taylor has nothing prepared to date, I know that,
24 because we met last night to discuss the remedies and
25 the Mabo case and that aspect. There is nothing that
26 has been prepared. I don't quite know what the
27 problem is, but I am certainly prepared to see if we
28 can prepare an outline on that federal common law
29 issue, if that's the problem.
30 TAGGART, J.A.: Why don't counsel discuss this between them.
31 MR. WILLIAMS: Very well.
32 TAGGART, J.A.: Get a solution if you can and if you can't,
33 speak to it tomorrow morning.
34 MR. WILLIAMS: Thank you, my lord.
35 LAMBERT, J.A.: Well, maybe I could just add something to that,
36 Mr. Williams. My understanding is that when Mr. Pape
37 made his submission yesterday, that was the first time
38 in this whole case that the concept of a federal
39 common law and that the federal common law dealt with
40 the whole of the common law of aboriginal title. It
41 had been raised in this -- in this case. And my
42 understanding of the Roberts case is that it reverses
43 four or five previous decisions over the last ten
44 years in the Supreme Court of Canada which have tended
45 to say that there is no such thing as federal common
46 law. So it's a very -- in that respect it's a very
47 important question. I mean it's -- Roberts as I

1 understand it is a five nothing decision of the
2 Supreme Court of Canada saying, quite clearly, that
3 there is -- the law of aboriginal title is federal
4 common law and so we really have to have everyone's
5 submission on this question which could be very much a
6 determinative question on issue in this appeal.
7 MR. WILLIAMS: Yes, my lord. I quite agree that the first time
8 it was raised, it was raised the other day by Mr.
9 Pape, and I am assuming that the appellants will be
10 responding to that, will be commenting on that next
11 week. And we propose to respond to it when our turn
12 comes on Friday. Now, I am talking about the federal
13 common law issue which was designed as I understand it
14 by the federal court cases, but in any event we are
15 prepared to comment and will be commenting on that on
16 Friday.
17 LAMBERT, J.A.: So I understand that you've now agreed, then, to
18 prepare a summary of your comments to have available
19 on Monday.
20 MR. WILLIAMS: Mr. Taylor has agreed to prepare the summary. I
21 am only reluctant to commit him to Monday and I'd
22 like, if we could, before committing us to anything to
23 have the opportunity of discussing it with counsel.
24 TAGGART, J.A.: Well, I think you should. You should discuss it
25 between yourselves, between you and Miss Mandell and
26 anybody else who wants to join in the melee to make
27 sure that you are responding in an appropriate way.
28 There are several facets of this thing and you may
29 want only one of them. You may want 20. I don't
30 know. But between counsel you can surely agree at
31 least on the scope of what it is you want. As to the
32 timing of this, it should be no later than the close
33 of business on Monday. That gives you the weekend
34 plus Monday to cope with that.
35 MR. WILLIAMS: I have no problem with that, my lord.
36 TAGGART, J.A.: All right. Mr. Taylor may. Yes, Mr. Plant.
37 MR. PLANT: Thank you, my lord. my lords, I am at page 31 of my
38 speaking notes. I there make reference to the
39 suggestion which has been made from time to time that
40 the question whether aboriginal land-based rights are
41 proprietary or non-proprietary is important because it
42 bears upon the ease with which such rights would be
43 extinguished. I wish to make only three points in
44 response to or as a comment on that suggestion. The
45 first is this, that the Sparrow requirement that "the
46 sovereign's intention must be 'clear and plain' if it
47 is to extinguish an aboriginal right' is, I say, a

"stand alone" test formulated specifically for the extinguishment of aboriginal rights. It neither springs from, nor is dependent upon the answer to the classification question whether aboriginal rights are proprietary or personal.

The second point concerns the Smith case and reference has been to made to that case a number of times. I wish only to remind your lordships that that case is a decision of the Supreme Court of Canada, unanimous decision as recent as 1983 in which the court said, and I am now going to ask your lordships to turn over to the next page of my submission and read the underlined words:

> "The release,"

that is the surrender in respect of reserved based rights,

> "therefore, is of a personal right which by law must disappear upon surrender by the person holding it: such an ephemeral right cannot be transferred to a grantee, be it the Crown or an individual."

And I make here only the point that when one speaks of the general inalienability of aboriginal title, inalienability doesn't quite capture it, because it's not alienable to the Crown either. All that -- all that can happen is that it can be surrendered to the Crown. It can't be transferred to a grantee, whether the grantee be the Crown or an individual.

The third point I wish to make is -- has to do with the decision of the Supreme Court of Canada in the Paul decision, which also is a unanimous -- a decision of a unanimous court. And I am going ask your lordships to turn to that, which is in tab 58 of the reference book, and it begins at page four of the tab. The first three pages are extracts from the portions of the Smith judgment that I made reference to a moment ago. In this case the question was whether Canadian Pacific Limited could get an injunction restraining a blockade of a right-of-way. The respondents were members of an Indian band who had a reserve and they were trying to block the C.P. right-of-way. The question was whether they had a right to do so. Now, if your lordships turn to page

499 of the judgment and that's page 16 of the reference. I wish your lordships to note this rather interesting passage in the judgment at the very top of the page: The court says this:

> "Although it is not strictly necessary for the disposition of this case to define the precise nature of the interest acquired by the Woodstock Railway Company,"

that is to say the predecessor of Canadian Pacific Limited,

> "we think it desirable to say something on the subject given the trial judge's finding that the Woodstock Railway Company acquired the fee simple to the eastern crossing. If the trial judge was wrong on this, the possibility of a residual Indian interest in the land may arise."

This passage suggests to me, although I concede that the point is not made very clearly, that if the Woodstock Railway Company had acquired the fee simple to the eastern crossing, then that would put an end to the issue of whether the band had any right at all. The fee simple would therefore have extinguished the -- the competing Indian interest. But that's not really the main point that I want to make here. Later on down the page in the second full paragraph on the page the court says:

> "It appears, in our opinion, that what the Woodstock Railway Company had, and what CP now has by virtue of its lease, is a statutory right-of-way, i.e. an easement."

So competition is between on the one hand a statutory right-of-way, an easement and the interest of the band. If your lordships turn to page 501 which is page 18 of the reference under the heading "Has the Band's Interest Been Extinguished." The court begins:

> "The issue in this case is whether a permanent injunction should be awarded against the respondents."

1 That is the band.
2
3 "CP, in our view, has either a leasehold
4 interest in the head lessor's right of way or
5 an absolute interest in the right-of-way if a
6 990-year lease can be viewed as tantamount to a
7 transfer. Generally speaking, an injunction
8 will issue to restrain an interference or
9 anticipated interference with a person's
10 rightful enjoyment of the use of his land."
11
12 And then over the top of the next page, having quoted
13 from the -- from Professor Sharpe's text book on
14 injunction, the court continues:
15
16 "However, if it is found that the Band also has
17 an interest in the land comprising the eastern
18 crossing, then a court may be more reluctant,
19 depending upon the nature of the Band's
20 interest, to grant a permanent injunction
21 against them."
22
23 Now, what you have, then, is a situation where the fee
24 simple to the land is held by the Crown, C.P. has a
25 statutory right-of-way, or easement, and the band has,
26 for purposes of the judgment, aboriginal title to
27 these lands.
28 You can turn over to -- well, for reference only
29 page 504. The court says, again:
30
31 "As indicated above, we have concluded that the
32 Crown retained the fee simple in the lands
33 comprising the eastern crossing. What the
34 Woodstock Railway Company acquired was an
35 easement or right of way. CP can claim no
36 greater interest."
37
38 And then the court goes on to advance the discussion
39 which your lordships have heard on a number occasions
40 in which they comment on the various characterizations
41 of aboriginal title. And over the page, having said
42 that the Indian interest in land is best characterized
43 as being truly sui generis, or generis, about halfway
44 down the page:
45
46 "How then is Indian title to land
47 extinguished?"

Well, the court having thereupon canvassing the tests and not deciding, it says about six lines down:

> "Did the Woodstock Railway Company's acquisition of an easement or right of way over the land extinguish the Band's interest in the underlying fee which continued to be held by the Crown? There seems to be no doubt, having regard to the fact that a right of way is itself a limited interest in land, that the Crown continued to hold the fee for the benefit of the Band unless it can be said that the Band's only interest was to the enjoyment and occupation. If its only interest was to the enjoyment and occupation, then it is clearly arguable that the Woodstock Railway's right of way was inconsistent with such an interest continuing in the Band. On the other hand, can it be said that the New Brunswick legislature's intention to extinguish the Band's interest in the underlying fee remaining in the Crown was 'clear and plain'? Fortunately, we don't have to answer this difficult question because it is enough for purposes of this appeal to find that CP has a valid easement or right of way over the eastern crossing sufficient to support the award of a permanent injunction."

Now, what I take from that, my lords, is this. If you have a contest between a statutory easement or right-of-way and aboriginal title, the statutory easement wins. You don't even need extinguishment to make that finding and that's part of the context which I say your lordships should -- it's part of the jurisprudential context which should bear on the question which your lordships have to determine whether the -- whether aboriginal title can be truly and fairly described as proprietary or an ownership interest.

Now, the next paragraph I wish to refer to in my outline is paragraph 59. I want here to make a few comments on the test which the Province's -- which the Province has put before your lordships and also its application, if I can put it that way. The Province's test, I say, is based on a misreading of Sante Fe. Although that may be putting it a bit higher than I

1 need to put it. But I want to start by reminding you
2 that in that case the U.S. Supreme Court said that
3 extinguishment of aboriginal title can be accomplished
4 "by the exercise of complete dominion adverse to the
5 right of occupancy." Now, in the material for this
6 tab there is some dictionary definitions of that word
7 dominion, and they include "sovereign or supreme
8 authority", "the power of right of governing and
9 controlling". Should be "the power or right of
10 governing and controlling", "sovereignty" and so on.
11 What I say is the relevant contest is the contest
12 between the exercise of sovereign authority on the one
13 hand and the right as opposed to the fact of
14 occupancy. Thus I would say that the test for
15 extinguishment is not "operational conflict" but
16 rather "necessary inconsistency of entitlement." In
17 other words, where you have conflicting rights that is
18 a situation where extinguishment can take place. It's
19 not necessary to go and ask the later question whether
20 the factual exercise of such rights on the ground is
21 operationally in conflict.
22 HUTCHEON, J.A.: You are going to come to it no doubt, but
23 that's contrary to what Mr. Justice Brennan said in
24 Mabo, isn't it?
25 MR. PLANT: I beg your pardon?
26 TAGGART, J.A.: That's contrary to what Mr. Justice Brennan said
27 in Mabo. But you are going to come to that I think,
28 aren't you?
29 MR. PLANT: Well --
30 HUTCHEON, J.A.: He said it has to be on the ground --
31 MR. PLANT: Right.
32 HUTCHEON, J.A.: -- the court house has to be built.
33 MR. PLANT: That's right. And I don't dispute the proposition
34 that a grant of Crown -- a Crown grant in fee simple
35 will extinguish aboriginal title. But I do wish and I
36 am compelled to investigate the question whether the
37 intention to extinguish can be successfully manifested
38 at a higher level. That is to say at the level -- at
39 the level of the land legislation itself.
40 HUTCHEON, J.A.: As I say that's contrary to what Mr. Justice
41 Brennan held. Now, he's talking now not about grant
42 but he's talking about public use and he said it's not
43 enough to say that something is devoted to public use.
44 It's to be used.
45 MR. PLANT: Well --
46 HUTCHEON, J.A.: That was his --
47 MR. PLANT: Well, then could I ask your lordship to hold on to

1 that until we get to the Mabo case?
2 HUTCHEON, J.A.: Yes. I understand you will be dealing with it.
3 MR. PLANT: And because we will be coming to it in a few
4 minutes, not too very long from now. Let me
5 elaborate, though, if I may on what I -- a few more
6 comments about the way the Province's test -- well, on
7 the Province's test. The Province's application of
8 the test for extinguishment relies solely on effect,
9 that is to say that the necessary effect of a Crown
10 grant, if it is consistent with the continued
11 aboriginal right, is to extinguish the right. They
12 therefore impute intention from the grant even though
13 the making of the grant may not have been accompanied
14 by an active intention to extinguish. What I want to
15 persuade your lordships of is that a legislative
16 regime which provides for the disposition of land
17 interests may be a regime, depending on the particular
18 facts of the particular legislation and its particular
19 historical context which will itself displace the
20 competing aboriginal interest. In other words, it's
21 the law, the legal rights encompassed within the legal
22 regime that extinguish the competing legal rights and
23 legal regime rather than the grant itself. Although
24 the grant -- I'm certainly not disputing that the
25 grant would do it too. I think that you don't need to
26 look at the grants, because in the case of this
27 legislation and this jurisdiction and this history the
28 legislative regime alone taken in its historical
29 context will do it notwithstanding the fact that the
30 Australian High Court interpretting its legislation in
31 its historical context decided that that legislation
32 didn't do it.
33 Now, I say that this general point about the
34 ability of a legislative regime to extinguish is
35 particularly true where you have, as here, a
36 legislative regime which has made specific provision
37 for the protection of aboriginal interests. In other
38 words, I am here referring to the provisions in the
39 pre-emption laws that say you can pre-empt unsurveyed
40 Crown lands except Indian reserves and settlements.
41 So the legislature has made specific provision for the
42 protection of aboriginal interests in at least the
43 case of the colony of British Columbia. So the land
44 legislation in British Columbia, in the colony anyway,
45 did not in my submission simply create the machinery
46 for making grants of land. Rather, it made provision
47 for particular aboriginal interests while at the same

time providing for the disposition of a variety of interests in all other lands and I say that the two taken together necessarily displace all competing interests in all other lands. And as your lordships will recall from the historical context, this would include not only Indian interests but the concerns that the government of the day had with respect to miners and squatters who were flooding into the colony. Douglas had to do something about this. And I say that the regime which he created amounted to an assertion of dominion over all Crown lands adverse not to the fact of occupancy, but to the right of occupancy. And I say that if you can put that legislative regime, as you must do, into the context of the colonial government as a whole in which Douglas who as legislator enacted Calder III and as executive head of the government bound the Crown to the promise that hunting and fishing could continue on Crown lands, unoccupied Crown lands, then you can say that the intention of the Crown combining both the legislature and the executive is clear and plain.

I am going to return to that again, but before I get to that I wanted to spend a minute or so reminding your lordships of some of the important aspects of the history of colonial land and Indian policy which I spent some time with when I was on my feet in the Alphonse and Dick appeal in November. Now -- and that requires going to page 34 of my speaking notes. And as we note, Douglas was appointed the second governor of the Colony of Vancouver Island in 1851. The discovery of gold on the mainland gave rise to what Douglas described as a "mania." He wrote at some length about this. And if you turn over the page to page 35, extracting from a despatch of June 10, 1858, Douglas was writing here as governor of Vancouver Island wondering just what was going to be done about this, these events on the mainland. He said:

> "... the question arises as to the course of policy in respect of Fraser's River which Her Majesty's Government may deem it advisable in those circumstances to follow.
>
> My own opinion is, that the stream of immigration is setting so powerfully towards Fraser's River that it is impossible to arrest its course, and that the population thus formed

> will occupy the land as squatters, if they cannot obtain title by legal means.
>
> I think it therefore a measure of obvious necessity that the whole country be immediately thrown open for settlement, and that the land be surveyed, and sold at fixed rate, not -- "

And so on.

> "By that means, together with the imposition of a Custom's duty on imports, a duty on licences to miners, and other taxes, a large revenue might be collected for the service of government."

And paragraph 23:

> "Either that plan, or some other better calculated to maintain the rights of the Crown and the authority of the laws, should, in my opinion, be adopted with as little delay as possible, otherwise the country will be filled with lawless crowds, the public lands unlawfully occupied with squatters of every description, and the authority of Government will ultimately be set at naught."

The government in London responded to this by enacting the statute which created the Colony of British Columbia. And as I've told your lordships before, this statute temporarily and extraordinarily conferred upon the governor complete power to legislate as well as to administer the new colony. Douglas was appointed governor. And this process was described by the Privy Council in the Deadman's Island case in the terms that I have set out in the quote at the bottom of page 36. And I think I will just start with the second paragraph:

> "Accordingly Sir James Douglas was in 1858 appointed governor by letters patent, and an Order in Council was made defining his powers and duties. As to his powers, it may be said at once that they were absolutely autocratic; he represented the Crown in every particular, and was, in fact, the law. At the same time

> careful despatches were sent to him by the Colonial Minister of the day laying down in explicit terms the methods of administration which it was desired he should follow."

And as we have seen in respect of Indians matters, the methods of administration which were made known to Governor Douglas essentially left this to his discretion. And I say, mindful of what my lord Mr. Justice Hutcheon has already said about the despatch of July 31, 1858, that in none of these despatches, nor in the Letters Patent appointing him Governor, nor in the Royal Instructions, nor in the instructions to subsequent governors of the mainland colony was Douglas or any of his successors ever expressly directed either to formally recognize, purchase, or extinguish aboriginal title. He was left to devise his own policy. But he did so in the knowledge that the objective of the Imperial government was clear as set out in the extract on page 37, Lytton writing to Douglas:

> "All claims and interests must be subordinated to that policy which is to be found in the peopling and opening up of the new country, with the intention of consolidating it is an integral and important part of the British Empire."

Now, we know that by 1858, the summer of 1858, Douglas had made it up to Hill's Bar near Fort Yale where he cautioned the Indians "against taking the law into their own hands, and seeking justice according to their own barbarous customs," another unfortunate adjective that seems to pervade the correspondence of the day. And then in 1859, at least by 1859, Douglas had conceived and begun to implement the reserve policy which is summarized in his despatch to Lytton of 14 March 1859 in which he said, in part:

> "Anticipatory reserves of land for the benefit and support of the Indian races will be made ... in all the districts of British Columbia inhabited by native tribes. Those reserves should in all cases include their cultivated fields and village sites, for which they from

> habit and association invariably conceive a strong attachment and prize more, for that reason, than for the extent or value of the land."

So Douglas was here formulating and beginning to implement a policy to set aside reserves of land for the benefit and support of the Indian races. The Colonial office responded to this despatch by saying:

> "I am glad to find that your sentiments respecting the treatment of the native races are so much in accordance with my own, and I trust that your endeavors to conciliate and promote the welfare of the Indians will be followed by all persons whom circumstances may bring into contact with them. But whilst making ample provision under the arrangements proposed for the future sustenance",

that is to say the reserve policy,

> "for the future sustenance and improvement of the native tribes, you will, I am persuaded, bear in mind the importance of exercising due care in laying out and defining the several reserves, so as to avoid checking at a future day the progress of the white colonists."

So even in the implementation of his reserve policy, Douglas was instructed do this carefully because our primary objective is to ensure that the land can be settled. And I say there was no suggestion here that what the appellants characterize as a constitutional imperative of treaty making was the prerequisite to the pursuit of Douglas' stated policies.

Now, concerning Douglas' Indian policy, there are two other significant despatches to which I referred your lordships before, and these are the despatches of the fall of 1860 where Douglas reports at length of a trip that he took to the interior of the colony, the mainland, and just to remind your lordships of the text of these, I think what I perhaps can do best is to ask your lordships to turn, if I may, to page 255 of the judgment, of the reasons of Chief Justice McEachern. And this is 255 of the Western Weekly text. And here the Chief Justice -- about the second

full paragraph down it refers to Douglas' tour of the interior, and in his despatch of the 9th of October 1860 Douglas described a visit to the Lillooet area where he noted an Indian reserve had been established. He received an address, Cayoosh, near Lillooet, the object of which was to urge the early sale of town lots, a protection of the Chinese miners and the removal of stake nets and all obstructions preventing the ascent of salmon. He then -- Douglas also said this:

> "I had an opportunity of communicating personally with the native Indian tribes, who assembled in great numbers at Cayoosh during my stay. I made them clearly under that Her Majesty's Government felt deeply interested in their welfare, and had sent instructions that they should be treated in all respects as Her Majesty's other subjects; and that the local magistrates would attend to their complaints, and guard them from wrong, provided they abandoned their own barbarous modes of retaliation, and appealed in all cases to the laws for relief and protection. I also forcibly impressed upon their minds that the same laws would not fail to punish offenses committed by them against the persons or property of others.
>
> I also explained to them that the magistrates had instructions to stake out, and reserve for their use and benefit, all their occupied village sites and cultivated fields and as much land in the vicinity of each as they could till, or was required for their support; and that they might freely exercise and enjoy the rights of fishing the lakes and rivers, and of hunting over all unoccupied Crown lands in the colony."

And so on.

> "In short,"

A couple of lines down,

> "I strove to make them conscious that they were recognized members of the commonwealth, and

> that by good conduct they would acquire a certain status, and become respectful members of society. They were delighted with the idea, and expresed their gratitude in the warmest terms, assuring me of their boundless devotion and attachment to Her Majesty's person and crown, and their readiness to take up arms at any moment in defence of Her Majesty's dominion and rights."

It is here, my lords, and in the despatch which is quoted on the next page, that Chief Justice finds the core of what he considers to be the promise that gives rise to the fiduciary obligation. The fiduciary obligation which arises as a result of the extinguishment of aboriginal land rights.

Now, that's a brief summary of an awful lot of evidence, some other parts of which I referred to this morning. What I want to say is in the paragraph small roman numeral X on page 39 is summary. I say that the historical evidence, which I summarized here and have reviewed more extensively in the Alphonse and Dick Factum, provides the necessary historical context for an understanding of the land and the related legislation enacted by the Colony of British Columbia, which I won't turn to next, but this evidence has additional significance. Because at least until 1863 or 4 when the Order-in-Council that gave him the specific and special powers was revoked and Douglas was required to -- there was a Legislative Assembly elected. For that five year period Douglas constituted in his person both the executive and the legislative government. So I say that his intention, as manifested both by his legislative acts, that is to say the proclamations, and also by the implementation of the executive policy, which is to say the reserve policy and the statements made at Cayoosh and elsewhere, his intention was the intention of the Crown in right of the colony. As the Privy Council said, Douglas represented the Crown in every particular and he was, in fact, the law. From Douglas' perspective, I say the protection of aboriginal people in their villages and their cultivated lands and the promise of free exercise of fishing the lakes and rivers and of hunting over all unoccupied lands along with all others was viewed as a generous discharge of the Crown's obligations, whether

they be legal, moral or political, to its Indian subjects. The corollary, though, was that the Crown's ability to alienate the unoccupied lands of the colony was unimpaired by any competing notion of Indian land rights. So the legislation which implements the Crown's land policy itself and in its historical context clearly and plainly thereby necessarily puts an end to such rights.

I wish now to turn to Calder II as the means of making some submissions about the Mabo or the Mabo case. Now, I have finished, therefore, I think for all time with the reference by R&D 4 and I now would ask your lordships to take the smaller reference binder which is R&D 5 and if you don't already have it, the Mabo case. My friend Miss Mandell informs me that she doesn't have a copy. Oh, no, I am sorry, of Mabo. I want to begin -- I should explain how this works. This binder, this R&D 5 reference binder, the first 13 tabs have the -- are the proclamations and Ordinances which are described in the trial judgment in Calder case with Roman numerals and have since become known as the Calder XIII. Then if your lordships will see there is tabs 14 and 15, and tabs 14 and 15 are the two additional land Ordinances of 1817 which are really part of the package of land legislation that your lordships should have. After the material at tab 15 there should be a large tab X. That tab X indicates tab 10 of the Amicus Factum, which I will be going to after the discussion of the Mabo case. And the paragraph references in tab 10 of the Amicus Factum correspond to the tab numbers in the balance of this book. So that the first tab 36 will take you to paragraph 36 of tab 10 of the Amicus Factum. That tab 10 is where the colonial extinguishment argument, the first part of that argument is made. If I could ask your lordships to turn to tab two to see Calder II, your lordships have seen those words before, but I will read them again in section one:

> "All the lands in British Columbia, and all the Mines and Minerals therein, belong to the Crown in fee."

The question is: What does that mean? What do the words "belong to the Crown in fee" mean? In my submission the Mabo case, at least -- well, the

1 judgment of Judge Brennan, in particular, gives us the
2 answer to that, and so that's why I now want to turn
3 to the Mabo or the Mabo case, and I want first of all
4 to summarize what I take it that this case says. The
5 case concerns the Murray Islands off the Coast of
6 Queensland in Australia and the Murray Islands were
7 annexed to Queensland in 1879. The question was
8 whether the annexation, that is to say the assertion
9 of British sovereignty over those islands, necessarily
10 put an end to aboriginal land rights. Did the
11 assertion of sovereignty by itself put an end to
12 aboriginal land rights? The court said no,
13 sovereignty did not extinguish native title. That
14 native title arises by operation of law even in
15 settled colonies, which is Queensland and Australia,
16 New South Wales as it began, was, and that aboriginal
17 title does not depend on legislative or executive
18 recognition. The notion that aboriginal title arises
19 by operation of law, that is automatically, is a
20 notion that I say became part of Canadian law with the
21 Calder case. In a sense what the Mabo case does is it
22 brings Australian law at least up to the point that
23 Canadian law was at the time of Calder. And your
24 lordships may or may not recall that there is a very
25 brief passage in Chief Justice McEachern's judgment
26 where he talks about the Province's preliminary
27 position, and the Province's preliminary position at
28 trial was that aboriginal title only came into
29 existence when it was recognized by enactment or by
30 some other means. And the Chief Justice dismissed
31 that position without much hesitation. This is the
32 same thing that the High Court of Australia has done,
33 although they have taken 218 pages to do it. I don't
34 think it's possible to read the Mabo case without
35 knowing or bearing in mind a few essential points
36 about the context. The case concerned nine square
37 kilometres of land which had been reserved for
38 aboriginal occupation by, it appeared, as early as
39 1882. There had never been any permanent
40 immigration -- immigrant population on the island.
41 That is stated by Justice Brennan whose judgment was
42 concurred in by two other judges, Chief Justice Mason
43 and Judge McHugh. And that particular finding is at
44 page two of the judgment of Judge Brennan. The
45 other -- well, perhaps it might be appropriate before
46 I get too far underway to take the afternoon
47 adjournment now, but I am in your lordship's hands.

TAGGART, J.A.: All right. We will take a brief recess.

AFTERNOON RECESS

TAGGART, J.A.: Mr. Plant.
MR. PLANT: My lord, may I ask you to turn to page seven of the judgment of Judge Brennan, and having told you that, the land in question in this litigation consisted of islands that had been reserved for aboriginal inhabitation that had never had any permanent immigrant, that is to say white population. I want your lordships also to be mindful of these comments at I guess the second full paragraph of the page where his honour says:

> "The 'most dominant' of the purposes for which the Torres Strait islands,"

the Murray Islands,

> "were annexed were found by Moynihan J. to have been:
>
> '(a) command of Torres Strait and the sea lane to India;
> (b) control of the fishery industry in Torres Strait including the pearl-shell industry;
> (c) the protection of shipping;
> (d) the extension of jurisdiction to non-British subjects and the native inhabitants of the islands;
> (e) the protection of the native inhabitants of the islands.'"

Nowhere is it suggested that the purpose for which the Murray Islands became part of the British Empire was settlement by British colonists. In that respect the Murray Islands bear no resemblance to the Province or Colony of British Columbia.

Now, that's part of the context. As I said the issue was whether aboriginal title survived -- at least one of the issues was whether aboriginal title survived the assertion of sovereignty. In order to approach that issue, Judge Brennan identified a distinction between on the one hand the allodial title which the Crown acquires upon the assertion of

sovereignty in a settled colony. The Crown acquires the allodial title, that's the radical title, which is different from the beneficial ownership of the land so acquired. So upon the assertion of Crown sovereignty in a settled colony the Crown acquires the allodial title, but the Crown does not acquire, at least not automatically, beneficial ownership. However, and I am going to take your lordships to some passages to demonstrate this, it is open to the Crown as an incident of its sovereignty to acquire beneficial ownership of lands.

Now, starting, if I may, at page 36 of his honour's judgment, the last paragraph on the page. Actually, just above that there is a sentence:

> "It is far too late in the day to contemplate an allodial or other system of land ownership."

By that Judge Brennan means that the tenure system of land holding came to Australia as part of the assertion of sovereignty and cannot now be disregarded. So that people who own land in Australia, just as in British Columbia, just as in England, do not own land allodially; they hold land of the Crown. The Crown is the allodial title holder. The allodial title is not the everything title. The allodial title is the root of title, it is the root from which title is granted. Now, here's --

LAMBERT, J.A.: I am sorry, you said page 37 and then you said above that.

MR. PLANT: Page 36 is where I wanted to be and I'm not reading -- I was making a comment from the sentence in the middle of the page where Judge Brennan says:

> "It is far too late in the day to contemplate an allodial."

TAGGART, J.A.: Sorry. I couldn't find it. Now I have got it now.

MR. PLANT: And then his honour says:

> "Accepting the doctrine of tenure, it was an essential postulate that the Crown have such a title to land as would invest the Sovereign with the character of Paramount Lord in respect of a tenure created by grant and would attract incidents appropriate to the tenure, especially

1 the Crown's right to escheat. The Crown was
2 invested with the character of Paramount Lord
3 in the colonies by attributing to the Crown a
4 title, adapted from feudal theory, that was
5 called a radical, ultimate or final title. ...
6 The Crown was treated as having a radical title
7 to all the land in the territory over which the
8 Crown acquired sovereignty. The radical title
9 is a postulate of the doctrine of tenure and a
10 concomitant of sovereignty. As a sovereign
11 enjoys supreme legal authority in and over a
12 territory, the sovereign has power to prescribe
13 what parcels of land and what interests in
14 those parcels should be enjoyed by others and
15 what parcels of land -- "
16
17 and I emphasize this from the point that I'm going to
18 be making in relation to Calder II,
19
20 "-- and what parcels of right land should be
21 kept as the sovereign's beneficial demesne.
22 By attributing to the Crown a radical title
23 to all land within a territory over which the
24 Crown has assumed sovereignty, the common law
25 enabled the Crown, in exercise of its sovereign
26 power, to grant an interest in land to be held
27 of the Crown or to acquire land for the Crown's
28 demesne. The notion of radical title enabled
29 the Crown to become Paramount Lord of all who
30 hold a tenure granted by the Crown and to
31 become absolute beneficial owner of
32 unalientated land required for the Crown's
33 purposes. But it is not a corollary of the
34 Crown's acquisition of a radical title to land
35 in an occupied territory that the Crown
36 acquired absolute beneficial ownership of that
37 land to the exclusion of the indigenous
38 inhabitants."
39
40 So the Crown gets -- pausing there. The Crown gets
41 the allodial title, but it doesn't necessarily get the
42 absolute beneficial ownership of that land, unless the
43 Crown decides what parcels of land should be kept as
44 the sovereign's beneficial demesne. Carrying on:
45
46 "If the land were desert and uninhabited, truly
47 a terra nullius, the Crown would take an

1 absolute beneficial title to the land for the
2 reason given"
3
4 in the Brown case, that is:
5
6 "there would be no other proprietor. But if
7 the land were occupied by the indigenous
8 inhabitants and their rights and interests in
9 the alnd are recognized by the common law, the
10 radical title which is acquired with the
11 acquisition of sovereignty cannot itself be
12 taken to confer an absolute beneficial title to
13 the occupied land."
14
15 If I could ask your lordships to go to paragraph 39 --
16 or page 39. Carrying on now at the bottom of the page
17 his honour says:
18
19 "Recognition of the radical title of the Crown
20 is quite consistent with recognition of native
21 title to land, for the radical title, without
22 more, is merely a logical postulate required to
23 support the doctrine of tenure (when the Crown
24 has exercised its sovereign power to grant an
25 interest in land)"
26
27 And again, pausing to emphasize these words:
28
29 "and to support the plenary title of the Crown
30 (when the Crown has exercised its sovereign
31 power to appropriate to itself ownership of
32 parcels of land within the Crown's territory).
33 Unless the sovereign power is exercised in one
34 or other of those ways, there is no reason why
35 land within the Crown's territory should not
36 continue to be subject to native title. It is
37 only the fallacy of equating sovereignty and
38 beneficial ownership of land that gives rise to
39 the notion that native title is extinguished by
40 the acquisition of sovereignty."
41
42 Now, if I could ask your lordships now to move ahead
43 to page 58 of this judgment which is close to the end
44 of Judge Brennan's -- Justice Brennan's decision. At
45 the bottom of the page his honour states in a summary
46 form what he holds to be the common law of Australia.
47 MACFARLANE, J.A.: I am sorry, page what again?

MR. PLANT: This is page 58.
MACFARLANE, J.A.: Thank you.
MR. PLANT:

> "1. The Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australia municipal court.
> 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."

Paragraph four, in a paragraph that the Province will take comfort from I am sure:

> "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."

And so on. Then paragraph five:

> "Where the Crown has validly and effectively appropriated land to itself and the appropriation 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 to parcels of the waste lands of the Crown that have been validly appropriated for use (whether by dedication, setting aside, reservation or other valid means) and used for roads, railways, post offices, and other permanent public works which

1 preclude the continuing concurrent enjoyment of
2 native title. Native title continues where the
3 waste lands of the Crown have not been so
4 appropriated or used or where the appropriation
5 and use is consistent with the continuing
6 concurrent enjoyment of native title over the
7 land (e.g. land set aside as a national park)."
8
9 One would think that they have the Sioui case in mind
10 in making -- that Judge Brennan may have had that in
11 mind in making that example. Now, I want to pause at
12 this point and say that the distinction between
13 allodial title and beneficial ownership explains I
14 suggest section one of Calder II. This is the
15 Ordinance for Proclamation of the 14th of February,
16 1859. What we know is that the colonial government
17 was erected in British Columbia in 1858. British
18 Columbia was a settled colony. That's established in
19 among other places the preamble to the 1858 Act. The
20 common law thereupon became the law of the colony.
21 The common law of England. Allodial title vested in
22 the Crown by means of the doctrine of tenure. The
23 Crown did not automatically acquire beneficial
24 ownership. But by section one of Calder II the Crown
25 asserted such ownership, because that is what the
26 words in fee mean in section one of Calder II. The
27 words in fee mean beneficial ownership. Fee is fee
28 simple, is the highest estate in land, is the absolute
29 beneficial ownership of the land. By proclaiming that
30 all the lands in British Columbia and all the mines
31 and minerals therein belong to the Crown in fee,
32 Douglas, as governor, did what Brennan said he could
33 do. He appropriated to the Crown the beneficial
34 ownership of all of the lands in British Columbia. So
35 what is the significance or the consequence of that?
36 Well, the assertion of beneficial ownership is
37 necessarily inconsistent with a competing right of
38 beneficial ownership. And I would therefore say that
39 Chief Justice McEachern's decision that Calder II
40 extinguished the appellants' claim to ownership is
41 correct and that the judgment of Mabo, the High Court
42 in Mabo could be cited as authority in support of that
43 proposition. But the assertion of beneficial
44 ownership did not by itself extinguish aboriginal user
45 or occupation rights, because we know both from the
46 Paul case but more importantly from the Guerin case,
47 that fee simple in the Crown can co-exist with

aboriginal land rights. The fee simple of all Indian reserves in British Columbia is owned by the Crown federal, yet aboriginal title or land rights exist in respect of such reserves. The inconsistency which extinguishes aboriginal title is the inconsistency between aboriginal title and fee simple held by a third party. But where the fee simple is held by the Crown it's not necessary to infer extinguishment. So --

HUTCHEON, J.A.: Could I just be clear. Do you say that the trial judge found in Calder II did what you say?

MR. PLANT: Yes. Your lordship may remember the passage where he says, "I cannot imagine anything clearer than Calder II".

HUTCHEON, J.A.: I am not talking about extinguishing all right, all land rights. Well, could you just --

MR. PLANT: Yes. Page 408. In fact, could I ask your lordship to start at page 407, because this is -- what the judge does is, he says:

> "As the plaintiffs have advanced three separate classes of aboriginal claims, ownership, jurisdiction and aboriginal rights, I shall deal with extinguishment in relation to each of them."

And he deals first with the jurisdiction claim, which he finds is just beyond constitutional comprehension, particularly having regard to the Sparrow decision, although he doesn't refer to it there. He has referred to it earlier. And then he deals with aboriginal ownership. And near the bottom of the page he says:

> "I cannot imagine an any clearer statement of intention than the proclamation dated 14th February 1859 -- "

it should be,

> "-- in which it was declared in s. 1."

And then there is the section one. And then he followed the analysis over the page after saying:

> "To put it in a nutshell, I find that legislation passed in the colony ... apart

1 altogether from many other enactments,
2 extinguished any possible right of ownership on
3 the part of the Indians."
4
5 Now the question is was the Crown's ownership burdened
6 with aboriginal rights. And then he goes on to decide
7 that issue. I am not sure if that answers your
8 lordship's question.
9 HUTCHEON, J.A.: Yes, it does. Thank you very much.
10 MR. PLANT: So what I say happens or what flows at this point
11 from Calder II is that it remained necessary for the
12 Crown to make its intention known with respect to
13 Indian interests, because we know that section one of
14 Calder did not simply by appropriating the fee under
15 the Crown necessarily extinguish all aboriginal land
16 rights, conventional aboriginal land rights, the user
17 and occupational land rights as opposed to the
18 ownership rights which the appellants have claimed in
19 this case. What I say is that the Crown made that
20 intention known by doing these things, and your
21 lordships have heard me say this before. The Crown
22 formulated an Indian policy which contained three
23 essential elements: village sites -- the first one
24 being village sites and cultivated fields and
25 immediately adjacent lands necessary for subsistence
26 would be secured to the Indians by reserves, and
27 indeed this was reflected not only in the policy of
28 the executive, but also in the legislation that
29 followed the second Calder Ordinance. In fact it's
30 reflected in the third proclamation, the pre-emption
31 proclamation, and thereafter it was always the case
32 from that point on that you could not pre-empt or
33 purchase Indian reserves or settlements. The second
34 element of the Indian policy is that unoccupied lands
35 were to be available for hunting and fishing purposes
36 in common with the other citizens of the province and
37 that, I say, is Douglas' promise, an executive act.
38 And then the third aspect of the Crown's Indian policy
39 was that Indians were to be subject to and also
40 entitled to the protection of the general laws of the
41 colony, and that is reflected in, among other things,
42 a number of the Ordinances that are included in the
43 second half of this binder. To carry on, I say that
44 having protected Indian interests in this way the
45 Crown then made all lands other than reserves
46 available for settlement, thereby displacing all of
47 the prior claims and interests in respect of such

1 lands, whether they be the claims of the American
2 miners, the aboriginal people or for that matter the
3 Hudson's Bay Company which lost its exclusive licence
4 to trade with the Indians when the colony was created
5 in 1858. And the result was the extinguishment of
6 aboriginal land rights outside reserves.
7 Now, that is really the first half of what I want
8 to say about the Mabo case. The second half is a few
9 comments about what they say about extinguishment. I
10 haven't already said this, but there were -- the court
11 sat as a court of seven, and six of the seven judges
12 held that there was a subsisting aboriginal title in
13 respect of at least part of the Murray Islands.
14 Again, one would think in the Canadian context not a
15 terribly astounding proposition that there exists
16 aboriginal title in aboriginal reserves, lands
17 reserved for the aboriginal people. Now, six of the
18 judges, the six of the majority held, and I think your
19 lordship, my lord Mr. Justice Hutcheon alerted to this
20 earlier, that a Crown grant was capable of
21 extinguishing aboriginal title. I should point out
22 that there is a division among the majority on the
23 question whether the extinguishment of aboriginal
24 title gives rise to a right of compensation. The
25 three judges who all signed Judge Brennan's judgment,
26 that is Brennan and the Chief Justice and Judge
27 McHugh, all held that extinguishment even by Crown
28 grant was not compensible. Three other judges held
29 that extinguishment would be compensible, but in
30 saying so I wish your lordships -- and in reading what
31 they say about that, I wish your lordships to be
32 mindful of the fact that section 51 of the Australian
33 Constitution appears to afford constitutional
34 protection, at least some protection in respect of the
35 acquisition of property, providing that you don't
36 acquire property, that the commonwealth at least
37 cannot acquire property without just terms. We don't
38 have similar constitutional right in Canada.
39 Now, I am going to make a few comments more about
40 what they say about extinguishment and perhaps I can
41 start by asking your lordships to turn to the last
42 judgment, which is the judgment of Judge Toohey and
43 pages 195 and 196 and Judge Toohey is the judge who --
44 he's one of the group of three judges who said that
45 while a Crown grant could extinguish, compensation
46 would be payable. At page 195 the judge says in this
47 first full paragraph:

"As I have said, the plaintiffs did not contest the Crown's power to extinguish traditional title by clear and plain legislation. That concession was properly made, subject to a consideration of the implications that arise in the case of extinguishment without the consent of the titleholders."

The implications being, I suggest, primarily the question of compensation.

"Where the legislation reveals a clear and plain intention to extinguish traditional title, it is effective to do so."

Jumping down to the next full paragraph:

"It need hardly be said that where an executive act is relied upon to extinguish aboriginal title, the intention of the legislature that executive power should extend this far must likewise appear plainly and appear with clarity.

It follows that traditional title may not be extinguished by legislation that does no more than provide in general terms for the alienation of the waste lands of the colony or Crown land. That is not to say that the legislature must identify with specificity particular interests to be extinguished if the legislative intention is otherwise clear. Even if a law deals specifically with land the subject of traditional title, it may take the form of a reservation or grant to trustees for the benefit of indigenous people and so be consistent with the continuance of title."

In other words, you can make a reservation, you can reserve lands for aboriginal people, but that's not inconsistent with their continued title, as we know is the case in the authorities which bind your lordships, including Guerin. This is the important sentence.

"These are all questions, the answers to which depend upon the terms of the legislation and

any relevant circumstances."

I entirely agree and I say that when your lordships examine the terms of the legislation and the relevant circumstances in the colony of British Columbia, the conclusion which did not follow in Australia does follow in British Columbia, namely aboriginal land rights were extinguished, and that it's not correct or complete to describe the land legislation of the colony in British Columbia as doing nothing more than providing in general terms for the alienation of the waste lands of the colony. Because as we've seen the legislation itself provided for disposition of Crown land by means of grant, by means of pre-emption and if your lordships examine the Ordinances you will see provision for pasture leases, mining rights and forestry rights, that the legislation also expressly provided for the protection -- the legislation in British Columbia also expressly provided for the protection of Indian people in their reserves and settlements. And in the Indian Reserve Ordinance of 1869, which I hope to have time to turn to for a minute, the government said that Indians had the right of ejectment in respect of trespassers on reserve lands. The Crown did not extend that right to Indians in respect of lands outside reserves. The implication is obvious. Indians did not have land rights outside reserves. The Indian Reserve Ordinance is part and parcel of the whole legislative package and consistent with the proposition that the Crown intended to protect and preserve Indians in their settlements and villages and denied them rights other than, of course, the important rights conferred pursuant to Douglas' promise on lands outside reserves.

TAGGART, J.A.: What was the name of that statute or Ordinance?

MR. PLANT: 1869. And the Ordinance will be found, my lord, at tab 36, in the fourth part of tab 36 of the binder R&D 5.

TAGGART, J.A.: Indian Reserve Ordinance No. 24.

MR. PLANT: Perhaps I could -- without asking your lordships to put the Mabo case since -- away, since I've mentioned this reserve Ordinance, could I ask your lordships to take out the binder R&D 5 and to turn to tab 36 and the very last page of that tab.

TAGGART, J.A.: Tab 36.

MR. PLANT: Very last page immediately --

TAGGART, J.A.:

MR. PLANT: I beg your pardon?
TAGGART, J.A.: Oh, I am just muttering about numerals. Arabic and Roman.
MR. PLANT: This is the Ordinance respecting Indian reserve, the preamble to which reads:

> "Whereas it is expedient for the avoidance of disputes among Indians and Settlers, as to the right to lands used by Indians, to provide a more speedy means than now obtains for the settlement of all such questions."

Then the legislation goes on.

> "In case of any dispute arising between or among any Indian or Indians, and any other person or persons as to the right to enter into, or occupy, or as to any damage done to, any Crown lands in the Colony, being Indian Reserves or Settlements, or to the improvements, crops, or cattle thereon, it shall be lawful for the Stipendiary Magistrate of the District within which the land in dispute is situated, upon any complaint made to him thereon, or upon view of the premises, to hear and determine all such questions and disputes, as and when the same shall arise, and thereupon, or in any case, to make such order or orders in the premises, and from time to time to amend and vary the same as to such Magistrate shall seem just and reasonable; and in case of wilful injury or trespass upon such Crown lands, being Indian Reserves, or Settlements, or Gardens, by any person or persons whomsoever as aforesaid, it shall be lawful for such Magistrate,"

so on,

> "to award damages."

And then in the next section it says:

> "It shall also be lawful for... (the) Magistrate in any such case... to remove any person or persons from off the land, or any portion thereof."

Now, I say that this is part of the legislative package which both protects the Indian rights and reserves and denies, puts an end to aboriginal land rights outside reserves.

Now, the next of the Mabo -- well, perhaps -- I will come back to Mabo, but perhaps while we have this binder, I should ask your lordships to look at two or three other Ordinances, proclamations. If I could ask your lordships to go back to tab 10, the Calder X, this is -- but by this proclamation, actually or Ordinance, because there is now a Legislative Assembly, the government has repealed and replaced the previous pre-emption legislation and if your lordships look first of all at section 3 you'll see:

> "All the lands in British Columbia, and all the mines and minerals therein, not otherwise lawfully appropriated belong to the Crown in fee."

Those words "not otherwise lawfully appropriated" are new, and that's to reflect the fact that between 1859 and 1865 the Crown has made grants of land and other dispositions of land in the colony and no longer, therefore, claims a fee in respect of those lands. The other thing which is interesting about this is that this is an expansion beyond land legislation, and if your lordships turn ahead up to section 51, which is page 6, you'll see that there is now provision being made in respect of leases of land for pastoral purposes, that's in section 51, and in section 53 there is provision made for leases for timber cutting, for cutting the spars timber or lumber. And then there is provision in section 55 for the governor to make free grants of unoccupied Crown lands for the encouragement of immigration. And so that's X. Calder XI, about which I have already said something in the Alphonse and Dick appeal, is the proclamation or Ordinance, rather, which says that aboriginal people can no longer pre-empt land unless they have the special permission of the governor in writing and there is an explanation for why that restriction was made, and I wish your lordships -- and your lordships may wish to make a note of this. The explanation is found in a report concerning this Ordinance which is Exhibit 1186-19, which will explain the mischief

1 behind this particular Ordinance.
2 TAGGART, J.A.: 1186 --
3 MR. PLANT: 1186-19.
4 TAGGART, J.A.: One nine.
5 MR. PLANT: One nine. And your lordships may also wish to make
6 a note that Exhibit 996 is a binder of documents
7 containing Indian or Gitksan primarily, I think, there
8 may be one Wet'suwet'en. A number of Wet'suwet'en.
9 Containing pre-emptions by Gitksan and Wet'suwet'en
10 people of lands in the claim area, in and around the
11 1920s I think. Of course, by that time this
12 proclamation or Ordinance was long since history, but
13 the legislation then in force had, as I recall, the
14 same restriction. So the point was not to prevent all
15 aboriginal people from pre-empting land, but to impose
16 the requirement that special permission be granted.
17 That requirement later evolved into a requirement for
18 an Order-in-Council. And in the binder tab -- Exhibit
19 996 your lordships will see copies of some
20 Orders-in-Council granting permission for aboriginal
21 land pre-emption in the claim area.
22 The last of the Ordinances that I wish to make
23 specific reference to in my oral submissions is the
24 very last Ordinance in the book and that's at tab 71.
25 And this is an Ordinance to encourage the construction
26 of a line of telegraph connecting the telegraphs of
27 British Columbia with the telegraph lines of Russia,
28 the United States and other countries, and this was
29 enacted in 1865, and this Ordinance provided for the
30 construction of a telegraph line that traversed the
31 whole colony or the intention was to traverse the
32 whole colony from Alaska to the southern border of the
33 United States.
34 TAGGART, J.A.: Excuse me, which tab is this?
35 MR. PLANT: Excuse me?
36 TAGGART, J.A.: Which tab are we --
37 MR. PLANT: The very last tab of the binder, my lord. I have
38 jumped ahead to the very end.
39 TAGGART, J.A.: Yes.
40 MR. PLANT: So this is the Collins Overland Telegraph Ordinance.
41 And your lordships may wish to make a note, that at
42 page 303 of the judgment the trial judge said this.
43 303 the judge said this:
44
45 "The Collins Overland Telegraph reached Fort
46 Stager just north of Kispiox in 1866."
47

And one of the alienations maps I believe has the location of the Collins Overland Trail depicted on it. And I bring this to your lordships attention in the context of a statement which the appellants make in their statement of facts when they say there is no evidence of alienations in the claim area prior to 1871. Now, this is not a Crown grant of land, but this is as effective an alienation as I think one could get. The specific provision having been made for these people to take all unappropriated and unoccupied Crown lands for the purposes of building this -- building a telegraph line. I wish then now to return to the Mabo case and to the question of extinguishment and I apologize for having done this out of sequence. Justices Deane and Graudron, and I hope I have got their names pronounced properly, discuss the question of -- who wrote a judgment together, discuss the question of extinguishment at pages 101 and 102. At the bottom of the page they say this:

> "The personal rights conferred by common law native title -- "

I should pause to point out that --

TAGGART, J.A.: 102, is it?

MR. PLANT: Page 101.

TAGGART, J.A.: 101. All right.

MR. PLANT: The first sentence of the preceding paragraph which is the second to last paragraph, the judges say that:

> "The rights of an Aboriginal tribe or clan entitled to the benefit of a common law native title are personal only."

And that was their view. Others -- Judge Brennan expressed a different view. Judge Brennan thought that in effect the rights could be described as proprietary, although he was the judge who expressed the view that the extinguishment of such rights did not give rise to compensation. Anyway, carrying on:

> "The personal rights conferred by common law native title do not constitute an estate or interest in the land itself. They are extinguished by an unqualified grant of an inconsistent estate in the land by the Crown,

> such as a grant in fee or a lease conferring the right to exclusive possession."

Again, comfort from the Province.

> "They can also be terminated by other inconsistent dealings with the land by the Crown, such as appropriation, dedication or reservation for an inconsistent public purpose or use, in circumstances giving rise to third party rights or assumed acquiescence. The personal rights of use and occupation conferred by common law native title are not, however, illusory. They are legal rights which are infringed if they are extinguished against the wishes of the native title-holders, by inconsistent grant, dedication or reservation and which, subject only to their susceptibility to being wrongfully so extinguished, are binding on the Crown and a burden on its title."

They go on to speak about legislative powers with respect to common law native title and say this:

> "Like other legal rights, including rights of property, the rights conferred by common law native title and title itself can be dealt with, expropriated or extinguished by valid Commonwealth, State or Territorial legislation operating within the State or Territory in which the land in question is situated. To put the matter differently, the rights are not entrenched in the sense that they are, by reason of their nature, beyond the reach of legislative power."

I pause here to point out that aboriginal title in Australian law is a common law right. It does not enjoy the protection which is afforded to existing aboriginal rights by section 35 of the constitution.

> "The ordinary rules of statutory interpretation require, however, that clear and unambiguous words be used before there will be imputed to the legislature an intent to expropriate or extinguish valuable rights relating to property

1 without fair compensation. Thus, general waste
2 lands (or Crown lands) legislation is not to be
3 construed, in the absence of clear and
4 unambiguous words, as intended to apply in a
5 way which will extinguish or diminish rights
6 under common law native title. If lands in
7 relation to which such title exists are clearly
8 included within the ambit of such legislation,
9 the legislative provisions conferring executive
10 powers will, in the absence of clear and
11 unambiguous words, be construed so as not to
12 increase the capacity of the Crown to
13 extinguish or diminish the native title. That
14 is to say, the power of the Crown wrongfully to
15 extinguish the native title by inconsistent
16 grant will remain but any liability of the
17 Crown to pay compensatory damages for such
18 wrongful extinguishment will be unaffected."
19
20 And go to say the same thing about executive acts.
21 Now, I make the point -- a number points here.
22 Firstly, that this can only be a judgment in relation
23 to the general waste lands or Crown lands legislation
24 of Australia and cannot be taken as a judgment that
25 speaks to the question of whether the legislation in
26 the colony of British Columbia, clearly an
27 unambiguously extinguished aboriginal land rights.
28 But I also make the point that reading this passage
29 seems to me that the judges here are more concerned
30 with the question of whether -- not whether
31 extinguishment takes place by the enactment of
32 particular legislation, but whether the Crown has gone
33 the additional step of ensuring that compensation will
34 not be payable for that extinguishment. Because the
35 judges here speak of increasing the capacity of the
36 Crown to extinguish or diminish the native title. By
37 that meaning increasing the ordinary power, that is to
38 say these people have legal rights, there may be
39 constitutionally protected rights in Australia in the
40 sense that there appears to be some protection for
41 property rights, but that may not bear on the -- on
42 this point. But the real question is not whether the
43 Crown by enacting laws can extinguish, but rather
44 whether the Crown can immunize itself from a claim of
45 compensation. And general land law, general
46 legislation will not do that. Now, my lord, I note
47 hour. I will be about ten or 15 minutes tomorrow

1 morning. I have Mr. Willms' permission to take those
2 ten or 15 minutes from him and I am in your lordship's
3 hands, but before turning --
4 HUTCHEON, J.A: Mr. Willms is here. You better be careful.
5 TAGGART, J.A.: He has a smile on his face --
6 MR. PLANT: I had his assurance.
7 TAGGART, J.A.: -- so I assume it's all right with him. Just
8 before we break, throughout these judgments the term
9 waste lands is used and here we have for instance on
10 page 102 the sentence "thus general waste lands (or
11 Crown lands)." Crown lands I understand -- I assume
12 has the same meaning as we give it. Waste lands I am
13 not so certain of.
14 MR. PLANT: Well, perhaps I could impose on your lordships to
15 look at that question over the evening and then I'll
16 begin by attempting to answer that.
17 TAGGART, J.A.: I don't think there is any significance, but --
18 HUTCHEON, J.A.: Yes. I think as I understood what you are
19 saying is that the legislation relating to the waste
20 land would not be equivalent of land titles
21 legislation. Land titles. Isn't that your point,
22 that the -- it wouldn't be equivalent to the Calder
23 XIII.
24 MR. PLANT: Right.
25 HUTCHEON, J.A.: That's the point.
26 MR. PLANT: Yes.
27 HUTCHEON, J.A.: It may have to do with grazing fees or
28 something. Grazing permits. I don't know. But
29 that's what I understood you to be saying.
30 MR. PLANT: That is my point, my lord.
31 LAMBERT, J.A.: I have an altogether separate point and I would
32 like to mention it in the hope that it might save some
33 work or might help counsel. The Roberts case was --
34 was followed and applied by a decision in this court
35 to the extent that the Roberts case was taken to have
36 established that there was a federal common law. It
37 was a case actually to do with executions, but I
38 thought I would mention its name. It's Deputy
39 Sheriff Holmes v. The Queen in Right of Canada and
40 the Royal Bank of Canada, and it's number V01053,
41 Victoria Registry, and the judgment was handed down on
42 the 10th of April, 1992. I don't expect it's reported
43 yet.
44 TAGGART, J.A.: Deputy Sherrif Holmes?
45 LAMBERT, J.A.: H-o-l-m-e-s.
46 TAGGART, J.A.: All right. We will adjourn until 10:00 a.m.
47 tomorrow.

(PROCEEDINGS ADJOURNED UNTIL JUNE 25, 1992 AT 10:00 A.M.)

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

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Laara Yardley,
Official Reporter,
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