1 Vancouver, B.C.
2 July 21, 1989
3
4 (PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)
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6 THE REGISTRAR: In the Supreme Court of British Columbia. This
7 21st day of July, 1989. In the matter of Delgamuukw
8 versus Her Majesty the Queen, at bar, my lord.
9 THE COURT: Can I impose on counsel to take the morning break at
10 11 this morning instead of 11:15. Judge Prowse is
11 being sworn in in a private ceremony that I wish to
12 attend. It will only take about 15 minutes, I should
13 think, or less.
14 All right. Are counsel able to make a prediction
15 about January? It seems a long way off, but it isn't
16 that far away, I suspect.
17 MR. GOLDIE: I predict that January will follow December.
18 THE COURT: Yes.
19 MR. GOLDIE: But I don't wish to be held to anything beyond
20 that. The schedule which the Province is
21 contemplating would certainly appear to make it
22 possible to conclude the evidence in this case by
23 December. Would your lordship like me to outline the
24 schedule of the Province's case?
25 THE COURT: Yes. I'm sure we all would.
26 MR. GOLDIE: In the month of August we propose to provide for
27 cross-examination out of court of two deponents who
28 live in the Smithers area. Their affidavits have been
29 given to my friends. And I'll come back to that in a
30 minute, but it's obvious from the standpoint of
31 scheduling that that is an assumption that we are
32 making that those two witnesses can be dealt with out
33 of court. We would also like to see the
34 cross-examination on the balance of the custodial
35 affidavits which were served in 1987. And there are
36 four of those remaining. There were five originally
37 and one has been examined on. We would like to see
38 the cross-examination on the balance of those
39 affidavits concluded in the summer break. I'm
40 referring, my lord, to the alienation series of maps
41 and documents tendered by the defendant Province, and
42 which have been marked for identification. And when
43 we came to look at the schedule it appeared to be
44 appropriate to try and do that in the summer break.
45 There are other custodial affidavits in relation to
46 the alienation series which will be served on my
47 friends during August. And as to those, we would have

to leave it until September to determine when -- whether those could be examined on out of court.

When the case resumes on September 5th we intend to call two government employees to prove the trapline files which were marked as exhibits for identification during the cross-examination of Mr. Brody, and it would appear convenient at the same time to lead through them any additional evidence which is required to prove the trapline alienation exhibits which are the series beginning with 24A. Then we would propose that those of the custodial affidavits which could not be examined on out of court be completed in court. We would then propose to call a witness to prove the fishing permits as business records. Those fishing permits, your lordship may recall, were originally the subject matter of a notice to admit which my friends were unable to agree to. They were marked for identification at Mr. Morrell's cross-examination. And the witness to whom I have referred, and it may have to be more than one, would be called at that point to prove the fishing permits.

THE COURT: Do your friends know who that witness is?

MR. GOLDIE: I don't know who it is.

THE COURT: You don't know who it is.

MR. GOLDIE: I've asked for some information from the Federal defendant, and that is in hand, but I'm just giving the scheduling which we would propose.

The next witness would be Dr. Farley, who's a cartographer, and his evidence introduces the Royal Proclamation evidence. And just to give your lordship and my friends some sense of when that would be I have tentatively scheduled him for the 18th of September. He would be followed by Dr. Greenwood, and I've tentatively scheduled him for the 2nd of October. Then he would be followed by Mr. David Williams, and I've tentatively scheduled him for the 5th of October. Then we propose calling a witness to whom we have not referred so far, a Mr. Magwood, who has undertaken to transfer on to one map the evidence given by a number of the plaintiffs' witnesses in examination in chief and in cross-examination relating to the boundaries of other claims. By that I mean claims by other native groups. Essentially he offers only the opinion that he has been able to take that evidence and put it on a map.

THE COURT: These are overlapping claims?

MR. GOLDIE: Yes, that's correct, my lord. I do not

1 anticipate -- and he's been tentatively scheduled for
2 the 11th of October. The balance of the week -- and I
3 don't think he would take a week in his evidence. In
4 fact I'm sure of it -- would be taken up with filing
5 documents. October the 16th I have reserved for any
6 further lay witnesses. And there is another question
7 mark, and that is our decision with respect to Dr.
8 Robinson. And if all of these things fall into place,
9 and your lordship will bear in mind the tentative
10 nature of a number of the assumptions I'm making, it
11 would seem possible that the defendant could close its
12 case in the week of October 20th. I'm not sure
13 whether that's a week or whether that's --
14 THE REGISTRAR: October 20th is a Friday.
15 MR. GOLDIE: A Friday. Well, it would be probably the
16 succeeding Monday. Although, I'm not sure whether
17 that -- I don't have my calendar there. That may be
18 the end of a third week.
19 My lord, may I return to the first observation I
20 made, and that is with respect to the
21 cross-examination on the territorial affidavits of Mr.
22 Fletcher and Mr. Hobenshield. I have corresponded
23 with my friends on this, and I understand that in
24 principle they are in -- agree that the
25 cross-examination of these two witnesses on their
26 affidavits may take place in Smithers. Originally the
27 date of August 21st had been suggested, but it turns
28 out that that is not impossible -- that is not
29 possible. And my friends were advised yesterday that
30 we would propose that the cross-examinations take
31 place on August the 14th and 15th. One concern that
32 has been raised is that Mr. Fletcher's affidavit
33 contains evidence of a kind that was characterized as
34 hearsay by my friends in relation to Mr. Shelford's
35 evidence. It's the sort of thing my people came into
36 this valley in such and such a time, and my father
37 told me this and told me that, and for that reason I
38 understood my friends to take the position that Mr.
39 Fletcher should be examined in court. I would propose
40 that the -- the cross-examination take place as we
41 have scheduled, and I am quite prepared to assure my
42 friends that if the same objection is taken to the
43 same kind of evidence -- when I say same objection I'm
44 referring to the same objection as was taken in Mr.
45 Shelford's case, then, of course, your lordship's
46 ruling would be taken as applicable. But at this time
47 I tender as exhibits, following the practice of my

1 friends with respect to such witnesses, I tender as
2 exhibits, firstly, the affidavit of Mr. Fletcher, and,
3 secondly, the affidavit of Mr. Hobenshield and ask
4 they be allotted numbers.
5 THE COURT: Where did we hear Mr. Hobenshield's name before? Is
6 he a logger or lumber operator?
7 MR. GOLDIE: He is a logger. It may well be that his name has
8 turned up. He's more than a logger, he's in the
9 forestry business.
10 THE COURT: Yes, that's where we heard it. All right.
11 MR. GOLDIE: He has a mill in Kitwanga.
12 THE COURT: Yes, I think that's where I heard it. All right.
13 Mr. Rush.
14 MR. RUSH: We object to this procedure, and we object to the
15 affidavits and the contents of which is not in the
16 slightest of the same kind of where were you from,
17 when were you born type of evidence that we heard from
18 Mr. Shelford. It is of a much more grave form of
19 hearsay evidence. Especially in the case of Mr.
20 Fletcher. We take strong objection to it, and we've
21 advised our friends of that objection in respect of
22 Mr. Fletcher.
23 MR. GOLDIE: Well, my lord, I didn't understand that any
24 objection was taken to Mr. Hobenshield. In fact my
25 friend Mr. Grant was quite explicit. He said Mr.
26 Hobenshield we're quite prepared to cross-examine him
27 out of court. Mr. Fletcher the statement was he
28 was -- there was too much hearsay in his affidavit,
29 and my proposal is as I have stated. Now, if there is
30 difficulty with Mr. Fletcher's affidavit I am -- my
31 friends are not prepared to accept my statement that I
32 would accept as applicable your lordship's ruling if
33 an objection was taken then I propose we deal with the
34 objection right now so that when Mr. Fletcher is
35 cross-examined he will be cross-examined on an
36 affidavit which has been tendered, objected to, and in
37 my submission if there is hearsay which is to be
38 struck out it can be dealt with right here, but I do
39 emphasize, my lord, that it is desireable to have what
40 I call the same kind of affidavits, territorial
41 affidavits, dealt with as we have dealt with all of
42 them by examination out of court, especially in the
43 case of residence and the area.
44 THE COURT: Are you able to indicate, Mr. Rush, the specific
45 parts of the Fletcher affidavit to which objection is
46 taken?
47 MR. RUSH: Well, my lord, this all comes as a result of a letter

1 that our friend sent to us yesterday, so it's all
2 convenient for him to raise it this morning. And if
3 this -- if we had known we were going to be embarking
4 on this type of issue in this type of detail we would
5 have prepared ourselves for and delivered to him from
6 our analysis of the affidavit what specifics we take
7 objection to. But it's self-evident on the face of
8 the affidavit, my lord. I heard from so and so, and
9 so and so told me this. It's riddled with hearsay.
10 The point of our concern about particularity of Mr.
11 Fletcher's affidavit as being an appropriate affidavit
12 for cross-examination out of court is that it is of a
13 contentious nature. It's not -- we are not dealing
14 with the same degree of contentiousness with regard to
15 Mr. Hobenshield. And there is a considerable -- and
16 we have agreed -- I should remind my learned friend
17 that we have agreed that, yes, Mr. Hobenshield's
18 evidence may be tendered by way of affidavit, and
19 we'll cross-examine on the affidavit, and that can be
20 conveniently done by the plaintiffs outside of court
21 and in Smithers, but the date of August 14th and 15th,
22 it's news to us. We have received no letter to that
23 effect as yet.
24 MR. GOLDIE: I'm sorry. You received it yesterday.
25 MR. RUSH: Well, I did not receive it yesterday. It may have
26 been sent yesterday, but this is the first I have
27 heard that August 14th and 15th is a date that it
28 would be convenient to my friends. I don't know if
29 it's yet convenient to our counsel, but the point that
30 I'm making is, I think, the question of scheduling is
31 secondary or a collateral one to the issue that I'm
32 really speaking to, and that is is it appropriate for
33 a contentious affidavit containing, in our estimation,
34 a significant body of hearsay to be examined outside
35 of court. We have no difficulty with examining the
36 witness in court on his affidavit, but in my
37 submission, and this is our position vis-a-vis Mr.
38 Fletcher, it's our position that a contentious
39 affidavit in its entirety containing hearsay as it
40 does ought to be examined in court. And I want to
41 point out I'm not saying here that Mr. Hobenshield's
42 affidavit doesn't contain hearsay, in our view it
43 does, but that it's the type of hearsay which is of
44 not a grievous kind, in my submission, that appears in
45 the Fletcher affidavit. And we can deal with that,
46 and I think it can be dealt with properly by raising
47 those objections in the course of his

1 cross-examination. No, our proposal that we had
2 voiced to our friend was that the Fletcher material
3 be -- the offensive portions of it be excised, that
4 his affidavit be re-presented in an acceptable form,
5 which I take my friends to be now saying they're not
6 prepared to do that. If they are not prepared to do
7 that, in my submission, then it's appropriate the
8 examination be conducted before your lordship.
9 THE COURT: You don't wish to deal with the affidavit now and
10 obtain a ruling on what is and what is not
11 admissible -- what parts of the affidavit are
12 admissible?
13 MR. RUSH: Well, I don't want to deal with it right now. What
14 perhaps I could do is to -- is to look through this
15 affidavit and we could -- we could deal with the types
16 of hearsay that are outstanding later today or perhaps
17 sometime next week. I don't have any difficulty with
18 that. If there's some concern about timing, as there
19 seems to be with Mr. Goldie, then we can try to
20 expedite that, but we're not prepared to deal with it
21 right now.
22 THE COURT: All right. We'll deal with that matter later in the
23 day.
24 MR. GOLDIE: My lord, may not the Hobenshield affidavit be
25 marked?
26 THE COURT: Is there any difficulty with the Hobenshield
27 affidavit, Mr. Rush?
28 MR. RUSH: Just that subject to the reservation that we are
29 going to be making objections to hearsay content and
30 other objections relating to that.
31 THE COURT: Yes. Well, it's all subject to -- to all just
32 exceptions. What's the next exhibit number?
33 THE REGISTRAR: 1113, my lord.
34 THE COURT: How does one spell Hobenshield, please?
35 MR. GOLDIE: H-O-B-E-N-S-H-I-E-L-D, my lord.
36
37 (EXHIBIT 1113: Affidavit of Mr. Hobenshield)
38
39 THE COURT: Yes. What you want, I suppose, is it marked as an
40 exhibit subject to just exceptions, and an order for
41 cross-examination out of court.
42 MR. GOLDIE: Yes.
43 THE COURT: Yes. All right.
44 MR. GOLDIE: And I have to say while my friend Mr. Rush may not
45 have received the letter that was sent because it was
46 addressed to Mr. Grant, with whom we've been having
47 correspondence on this matter, but we proposed

1 yesterday it would be the 14th and the 15th. Your
2 lordship, I'll leave this now, but your lordship
3 will -- may recall that there were many objectionable
4 and contentious features about the plaintiffs'
5 territorial affidavits, and in fact at one time that
6 led us to urge upon your lordship to appoint a
7 commissioner who could rule upon objections, and that
8 was resolved by the compromise of your lordship being
9 good enough to say I'll be at the end of the
10 telephone. And I'm not suggesting that. What I am
11 suggesting is a -- is a species of that only to be
12 dealt with today, and I hope that it can be.
13 THE COURT: All right. You can bring it up again later in the
14 day if it's convenient to do so.
15 All right. Do you, Ms. Koenigsberg, or Mr. Rush,
16 wish to comment on anything else Mr. Goldie has said
17 about the proposed or tentative schedule?
18 MS. KOENIGSBERG: Well, I think that we haven't progressed
19 beyond recognizing that our case at this point has not
20 expanded. We hope to continue to contract, and we
21 estimate at this time it would take us no more than
22 four to five weeks of court time, and we're working on
23 contracting it.
24 THE COURT: Yes. All right. Mr. Rush, Mr. Grant, anything you
25 want to say about the schedule?
26 MR. RUSH: Yes, a number of things, my lord. Firstly, we would
27 like to know how many additional custodial affidavits
28 are being contemplated. That's the first thing. My
29 friend indicated in his opening that he could tell us
30 who the two government employees who will supposedly
31 prove the trapline files. We would like to know who
32 these witnesses are. And if my friend knows now I
33 think he should tell us. And how long is this
34 evidence is going to take. Are we talking about that
35 week, the first week of September, or is it going to
36 carry on.
37 I want to advise your lordship that we have just
38 received another document list which apparently
39 pertains to the evidence of Dr. Farley and Dr.
40 Greenwood.
41 MR. GOLDIE: Just Dr. Greenwood.
42 MR. RUSH: And these -- we'll be taking objections to those
43 documents, and I advise my friends of that.
44 THE COURT: Is it convenient to deal with these as we go along?
45 MR. RUSH: Well, those are presently my points, my lord. It's a
46 question of determining when -- when these witnesses
47 are going to be called, who are they, and how long

they will take. Basically I should think that if my friend is -- on September the 18th it's likely that Dr. Farley would be called. I think he should be able to tell us who will be called in the previous two weeks. Apparently Mr. Magwood is a person from whom an expert opinion will be sought on October the 11th. We have as yet no opinion from this person, and we don't have any map from this person. And, of course, we would like it -- that as soon as possible, and certainly within the 60 day period, which I would assume would be August the 11th.

THE COURT: Mr. Goldie.

MR. GOLDIE: I cannot tell my friend the number of custodial affidavits, because we are trying to see if we can have more than one exhibit dealt with by the same witness. The names of the government employees are Messrs. Steventon and Marshall.

THE COURT: Where are they located?

MR. GOLDIE: Smithers.

THE COURT: Both at Smithers.

MR. GOLDIE: Yes.

THE COURT: They're the ones that you mentioned that prove the fishing permits as business records.

MR. GOLDIE: Not the fishing permits, no, my lord. They will prove the trapline files that were marked on Mr. Brody's cross-examination.

THE COURT: Oh, it was the first --

MR. GOLDIE: It was the first item that I spoke to.

THE COURT: Yes. Thank you. All right.

MR. GOLDIE: The third point was how long. And all I can say is, my lord, that we see three items being the subject matter of lay witnesses from the 5th of September to approximately the 18th of September. How long Steventon and Marshall will be I can't say at the present time. I would be guessing. The number of custodial affidavits which are to be cross-examined in court will be the subject matter of discussion, I assume, during the month of August. The length of time that a witness or witnesses may have to be called in subpoena, upon a subpoena to prove the fishing permits as business records is something that we can not particularize so far as the length of time is concerned beyond the estimate that we have made, that the three matters would take up to approximately the 18th of September.

THE COURT: So in that period of about two weeks, I guess it's nine days, you'll be calling Steventon, Marshall --

1 MR. GOLDIE: X for the fishing permits.
2 THE COURT: Yes. And a number of the --
3 MR. GOLDIE: Of the people who swear the custodial affidavits.
4 Now, with respect to the custodial affidavits that
5 have not been served upon my friend my objective is to
6 ensure that those are served by the end of this month.
7 THE COURT: All right. I don't remember what Mr. Rush's other
8 point was.
9 MR. GOLDIE: Well, Mr. Rush was complaining about receiving a
10 list of documents relating to Dr. Greenwood's report.
11 THE COURT: No. There was something else. Oh, yes, what about
12 the map of Mr. Magwood?
13 MR. GOLDIE: Oh, that. And Mr. Magwood's report, I think, can
14 be delivered before the end of this month.
15 THE COURT: All right. That's including the map?
16 MR. GOLDIE: Yes.
17 THE COURT: Yes. All right. I'm not sure that any response is
18 expected about the most recent affidavit documents, or
19 maybe it is.
20 MR. GOLDIE: It is -- we're simply disclosing in a supplementary
21 list of documents a further set of documents that Dr.
22 Greenwood refers to in his report.
23 THE COURT: How long -- have your friends seen Mr. Greenwood's
24 report?
25 MR. GOLDIE: No. They have had a summary since 1986 and the
26 full report will be delivered today.
27 THE COURT: All right.
28 MR. RUSH: Well, needless to say, my lord, we didn't know about
29 those documents.
30 THE COURT: No.
31 MR. GOLDIE: Well, of course, you didn't.
32 MR. RUSH: Neither did Mr. Morrison.
33 MR. GOLDIE: Well, that's got nothing to do with it.
34 MR. RUSH: That's where we disagree.
35 THE COURT: Well, that's a matter that will have to be dealt
36 with after you've seen the documents -- seen the
37 report.
38 MR. GOLDIE: I'd like to know -- I'm sorry, my lord.
39 THE COURT: I'm sorry. No. I'm finished.
40 MR. GOLDIE: I say, I'd like to know on what basis a complaint
41 is being made or an objection is being made to the
42 disclosure of documents that the expert has forwarded
43 to us. In the case of Dr. Lane and Mr. -- Dr. Galois
44 and a number of others we were given books of
45 documents just before the witness went on the stand.
46 We're endeavoring to get out of the expert every
47 document that is -- is a primary document and upon

which he relies as a fact underlying his opinion.
THE COURT: All right. Well, your friend will have to read the report before he can articulate his objection, I suspect. We'll take your comments this morning, Mr. Rush, as notice.
MR. RUSH: My friend and I have had an energetic correspondence on the question. You'll no doubt hear more of that.
THE COURT: Oh, I can't wait. All right. Well, I think that completes the scheduling problem.
MR. RUSH: My lord, just one other problem. It may be a minor point, but it would be of assistance. When my friend says that Messrs. Steventon and Marshall will be called, will they be called in that order, and can we expect to deal with Mr. Steventon on the 5th of September?
MR. GOLDIE: Yes. And I expect to call him at 10:00 a.m. on the 5th.
THE COURT: That will be something we all look forward to.
MR. RUSH: Yes.
THE COURT: Thank you. All right. What else do counsel want to do next, or what do counsel want to do next?
MR. WILLMS: My lord, I have a number of matters, but I understand that my friend Mr. Grant advised yesterday that he or Mr. Rush wanted to deal with the objections to the expert reports, and I thought if my friends want to deal with that we should probably deal with that now. The sooner those objections are dealt with the better. You'll recall yesterday was primarily the objections to Ms. Albright, although the argument yesterday will affect the other reports. But there were other objections taken to the plaintiffs' expert reports as they were -- are marked, and they were marked subject to objection. And I understood that my friend had some submissions that he wished to make on those this morning, and I think that would be the most convenient thing to do next. That would be most useful for all.
MR. RUSH: I agree, but I don't think this is a situation as was the argument on the question of the general admissibility and the affect of archival documents and/or the argument that was addressed yesterday by Ms. Mandell. There are a number of objections which have been set out, some in greater and some are in lesser detail, and it's not clear from the statements made by my friends which objections they're continuing to maintain or they're abandoning or what they consider to be outstanding objections, so I think the

1 appropriate way to proceed now would be to start with
2 their objections if they consider them still to be
3 outstanding objections. In my view, many of them have
4 been dealt with by the reasons for judgment which your
5 lordship has already delivered with regard to
6 historical opinions and archival documents, and will
7 be dealt with in respect of the argument that was
8 addressed to you yesterday on the issue of textbook
9 references and treatises. So I think that in respect
10 of which ones that my friends now maintain they want
11 to raise before your lordship I think they should
12 state that and they should make the case they want to.
13 And we may as well start with Albright, because I
14 think that there is a chronological and sequential
15 dealing or treatment of many of these objections where
16 the one objection gets raised with one expert and is
17 dealt with apparently there and then it gets
18 resurfaced with the next, and so I suggest it be dealt
19 with that way.
20 THE COURT: I've said before that common law judges don't like
21 to cross bridges even when they come to them, and I'm
22 wondering, and I shall appreciate counsel's views on
23 this, whether it would be of assistance to counsel, or
24 put it another way, whether it would be sufficient for
25 counsel's purposes if I were to indicate, if I reach
26 this conclusion, that the matter that was argued
27 yesterday be deferred until the end of the case with
28 an interim ruling that the documents in question are
29 admissible on one or more grounds. Or put it another
30 way, that they are -- they are admissible for one or
31 more purposes, because it's my very preliminary view,
32 and I reach this conclusion until I've done some more
33 work on that, on the subject matter of the argument
34 yesterday, that the documents that the witnesses
35 mentioned in their bibliographies may be admissible,
36 if for no other reason at least to show consistency,
37 or a lack of consistency with other learned views, and
38 that it may not be necessary to go beyond that for the
39 purpose of determining the question of admissibility,
40 and that the argument on the further uses that may be
41 made of the documents is a matter that could be left
42 until final argument. Now, this is -- this is early
43 morning musing in the garden and is not in any way a
44 view that has even been elevated to the status of a
45 tentative or preliminary view, but I would like to
46 know whether counsel think that sort of a conclusion,
47 if I reach it, would be sufficient for their purposes

1 or for the purpose of admissibility at this time.
2 Now, I'm not sure that counsel want to respond to that
3 at this moment, because it's -- it wasn't discussed
4 yesterday excepting in a very oblique way, but I would
5 like to have counsel's comments if they think it's
6 convenient to reply to that.
7 MR. WILLMS: My lord, generally I think that would be an
8 appropriate method to deal with it subject to two, if
9 I can call them, minor exceptions. The first one is
10 in respect of such of the documents that contain
11 facts. And I argued this with respect to Ms.
12 Albright, and your lordship's suggestion, as I
13 understood it, would go to the opinions expressed by
14 the people who had written in the area. But you'll
15 recall that, for example, the excavations that were
16 done in different locations the actual items excavated
17 are used by Ms. Albright to draw certain comparisons
18 or to reject comparisons. In other words, she doesn't
19 use the opinions, she uses the facts that are set out,
20 accepts them as being true and then comes to opinions.
21 You'll recall that it was my suggestion that they go
22 in for the facts as prima-facie proof and that would
23 take care of that, but I didn't understand Ms. Mandell
24 wanted to advance it that far. That is one small
25 point which if your ruling at the end of the day is if
26 they don't go in for the facts then evidence that we
27 may lead, especially in respect of archeology which
28 will also use similar type of material underlying
29 factual material, we are going to be left in a
30 situation where maybe we should have done something
31 else. Maybe we should have called someone else to
32 prove that.
33 The second point, and I think it's a minor point
34 as well, but I take it from that, my lord, that your
35 preliminary or pre-preliminary view that it would not
36 be necessary to call a witness just to say I've read
37 Dr. MacDonald, he's learned in the field, and this is
38 his opinion and I accept it or I reject it, that those
39 are matters that go at the end of the day really to
40 weight. Because as I said with respect to facts if we
41 don't call a witness then -- and we have to call a
42 number, I suppose, in addition to Dr. Robinson who
43 we've already advised our friends of because she's in
44 the archeological discipline, but to get somebody to
45 say yes, this is the appropriate linguistic opinion
46 and it's well-known out there, and because the --
47 those opinions don't really meet the opinions of the

1 witnesses. The witnesses while they were giving viva
2 voce evidence brought in these references and
3 supplemented and added to their own opinions by
4 referring to Dyen and Aberle, for instance, only came
5 in because Dr. Kari referred to Dyen and Aberle. We
6 would like to be able to get the linguist to say
7 whether or not there are other views, other linguistic
8 views other than Dyen and Aberle. It wouldn't go
9 directly to Dr. Kari's opinion and Dr. Rigby's opinion
10 because they're there, but it would go to the
11 underlying basis of it.
12 We are content, as I suggested yesterday, to deal
13 with those issues, for example, on the basis of the
14 treatises that have been marked. But subject to those
15 small points, my lord, your proposal, I think, is
16 something that's acceptable in this case.
17 THE COURT: I'm not sure it's a very small point when you're
18 talking about the underlying facts.
19 MR. WILLMS: Well, I only --
20 THE COURT: I find it substantial.
21 MR. WILLMS: It's only a small point because that particular
22 point really only applies to Ms. Albright. The other
23 underlying facts -- and when we get into the arguments
24 the other underlying facts that were objected to on
25 the other opinion witnesses were the hearsay, the land
26 claims transcripts, for example, and the like.
27 THE COURT: Yes.
28 MR. WILLMS: Which are a different character. That's why I
29 should say it's a big point with Ms. Albright, but
30 it's a minor point generally.
31 THE COURT: I see. All right.
32 MS. KOENIGSBERG: I would welcome that sort of procedure,
33 because I think that the difficulty, at least I
34 perceived yesterday, in dealing with a general ruling
35 in the absence of identifying specific documents that
36 we are going to call treatises, the relationship of
37 the work to the witness and what they said about it,
38 and so on, left us with a grave difficulty. And, in
39 my submission, it would be of assistance to deal with
40 it in final argument. And if any of us should require
41 a ruling on a specific work because it impacts on a
42 particular course of action it would seem to me that
43 it would be appropriate to bring it up and to argue it
44 specifically in relation to that matter. And I would
45 submit that that can certainly go to the
46 admissibility, if you can put it that way, of or the
47 way in which we might deal with the expert opinion

1 evidence that other plaintiffs have led as well. All
2 of the arguments have been put forward, and your
3 lordship ruled in your reasons that all of those
4 opinions are in as exhibits subject to objections
5 which fall into your lordship's rulings. And that
6 may, as your lordship pointed out in your reasons, it
7 may very well be the subject of close argument on
8 which side of the line a particular opinion or
9 foundation is going to fall.
10 If it's of any assistance to my friends to know
11 the position we take with regard to the objections
12 that we made we stand by all of them, and we will be
13 prepared to argue at the end of the day our
14 interpretation of your lordship's rulings on what's
15 in, and what's permissible and impermissible opinion.
16 It is our submission that the reports and the evidence
17 of the experts to which we objected is closely
18 interwoven with what is permissible and impermissible,
19 and it will have to be left to argument, in my
20 submissions, to sort it out.
21 THE COURT: Thank you. Just a moment, please. Mr. Rush or Mr.
22 Grant.
23 MR. RUSH: My lord, the points raised by Mr. Willms are not
24 minor points. They strike at the heart of the
25 argument they raised yesterday, and his trying to
26 skate around the seriousness of his own points I don't
27 think he really deals with it. The fact is he
28 challenged very substantially the underlying facts
29 relied upon by Ms. Albright, in respect.
30 THE COURT: Mr. Rush, isn't what I have said almost what Ms.
31 Mandell contended yesterday?
32 MR. RUSH: It is, my lord, and that is what I was going to come
33 to. In my submission there should be a judgment,
34 there should be reasons issued, and it's not a matter
35 which should be deferred.
36 THE COURT: Well, I thought Ms. Mandell was really suggesting it
37 shouldn't be the subject of a judgment now.
38 MR. RUSH: I wasn't here all day yesterday, my lord, but I think
39 it's appropriate that reasons be issued and that we
40 have the guidance of the bench on the question. I
41 don't agree with my learned friend Ms. Koenigsberg
42 that she's going to maintain objections through to the
43 end of the argument of the day on the question of
44 issues of admissibility.
45 THE COURT: No, I didn't understand her to say that. She's -- I
46 understood her to say that -- that we separate
47 admissibility from the question of the proper use of

1 the documents, and that be deferred to final argument.
2 Have I misstated what you were saying, Ms.
3 Koenigsberg?
4 MS. KOENIGSBERG: Well, in truth I said both. And, in my
5 submission, it's such a close question that I don't
6 think one can separate it very easily. I'll just give
7 the illustration that objections were made, an example
8 dealing specifically for instance with the report --
9 the admissibility of the report of Antonia Mills. It
10 happened to go to her evidence in certain respects as
11 well. It was the submission of the Attorney General
12 of Canada, and I believe it was probably the
13 submission of the Provincial defendant as well, that
14 her report -- parts of her report were not admissible
15 to the extent that they relied upon participant
16 observation and interviews because of the litigation
17 process having been ongoing. As that was going on
18 your lordship made a ruling at the time, and your
19 ruling was that on the one hand you would have to
20 await the unfolding of the evidence and on the other
21 that it was your view that it would go to the question
22 of weight rather than admissibility, and you then
23 marked her opinion and heard her evidence subject to
24 the objections. In your reasons you again allude to
25 the great difficulty of this problem. On the one hand
26 one can characterize it as an admissibility problem,
27 but it seemed to me we had tried to deal with that in
28 a practical way. All of it's more or less admissible.
29 Your lordship has heard some objections, for instance
30 the objection of the Attorney General of Canada that
31 the evidence is on the one hand not admissible because
32 it's so fraught with lack of trustworthiness that it
33 shouldn't be admitted, was nevertheless heard, and it
34 will be our submission that it should be given no
35 weight.
36 Now, textbook writers have a lot of fun trying to
37 parse whether it's admissibility and weight. If it's
38 no weight it shouldn't be admitted. I think that we
39 are into a situation where we can't deal with the
40 thing generally and that we are going to have to take
41 what is in. And your lordship has admitted all of
42 this material in subject to objection, and you've
43 ruled in some respects with regard to objections, and
44 you've clearly said in some instances I don't accept
45 that objection. It clearly doesn't go to
46 admissiblility. As far I'm concerned it goes to
47 weight. In some you say what textbook writers would

1 say, both sides of the question. I may after I hear
2 it all give it no weight or I will mark it. I'll have
3 to hear it all and weigh it all and perhaps at the end
4 of the day it wouldn't be admissible. Whether these
5 objections go to admissibility or to weight, in my
6 submission, your lordship at this point is going to
7 have to weigh at the end of the day, and whether it
8 was admissible becomes an academic exercise. In
9 relation to expert opinion, and it is going to be a
10 question that we'll be arguing that your lordship,
11 should give no weight at the very least to certain
12 parts of the expert evidence. And that's the way, for
13 instance, Mills' report and her evidence was left.
14 And I'm content to leave it that way. And I'm content
15 only because, in my submission, I don't know how we
16 are going to deal with it in the abstract. It's
17 terribly tedious argument to try to deal with it let's
18 take them one at a time and argue it through and go
19 back through all the exhibits, and so on, when each
20 party will be marshalling the evidence and wanting to
21 argue it at the end of the day and those rulings can
22 be dealt with. I think the issue raised by Mr. Willms
23 of a problem with Ms. Albright's report and the
24 factual of the opinion is, in my submission, a
25 different problem. And I didn't understand him to be
26 saying that the report goes. It seems -- it seemed to
27 me that he seems to be contending that the facts are
28 in.
29 THE COURT: I'm not sure what's in the opinion. Whether it's
30 something that can be given any weight is a matter
31 that depends upon a consideration of the weight or
32 amount of weight or lack of weight upon the crucial
33 underlying facts. And while it's clearly approaching
34 the metaphysics, but it may be beyond metaphysics, if
35 we try to encompass all the various considerations
36 that go into this equation. But do I understand you
37 now, Ms. Koenigsberg, to be saying that apart from
38 this question Mr. Willms has raised about the
39 underlying facts used by Ms. Albright that a ruling on
40 admissibility at this point is sufficient?
41 MS. KOENIGSBERG: Yes, my lord. I think that you have set out
42 in your reasons, most recently issued on July 14th,
43 your view of the matter having regard to what's
44 admissible or inadmissible, and you state the
45 difficulty, extremely well, of course --
46 THE COURT: Thank you.
47 MS. KOENIGSBERG: -- That it's interwoven. That some's going to

1 be permissible and some's impermissible, and they're
2 all mixed up together. And we all knew that. And you
3 dealt with the specific problem of whether the reports
4 are marked as exhibits, and in that sense are in. And
5 I think your lordship again dealt with an extremely
6 difficult matter this morning, and I agree with your
7 lordship. Essentially almost all of the documents
8 that we have been, I might say fairly loosely calling
9 treatises yesterday, and again today, probably are --
10 well, they're all in for one reason or another, and
11 they may be in the group of things that are in and
12 fall into that category of things that are clearly in
13 for the truth of their contents. And in some cases
14 they were referred to, and it's going to be a matter
15 of weighing credibility, and so on, and so on. I have
16 no difficulty -- in fact I think practically we have
17 got no choice to leave it at the end of this point.
18 THE COURT: I'm going to take the adjournment now, and I'll be
19 glad to hear you. I want to hear you further, Mr.
20 Rush.
21 The late great Walter Williston once invented a
22 word that was better than interwoven. He said it was
23 interfluent. I was going to use it in my judgment.
24 And I'm not sure that these aren't interfluent
25 considerations or concepts. We'll hear about that in
26 a minute.
27 THE REGISTRAR: Order in court. Court stands adjourned for a
28 short recess.
29
30 (PROCEEDINGS ADJOURNED)
31
32 I hereby certify the foregoing to be
33 a true and accurate transcript of the
34 proceedings herein to the best of my
35 skill and ability.
36
37
38 _____
39 Peri McHale, Official Reporter
40 UNITED REPORTING SERVICE LTD.
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1 (PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)
2
3 THE REGISTRAR: Order in court.
4 THE COURT: Mr. Rush.
5 MR. RUSH: My lord, I want to try to deal with two points at
6 once. One is the specific question of whether or not
7 a ruling should be made by your lordship at this time
8 in a formal sense with regard to the textbooks and
9 treatises argument addressed to you yesterday, and
10 secondly, but interrelated, is the question of how to
11 proceed with the issue of dealing with the provincial
12 and defendant's objections outstanding as they
13 sometimes appear to the expert opinion reports of the
14 plaintiffs.
15 I can say in sum that it's our position that your
16 lordship should issue reasons dealing with the
17 judgment -- dealing with the argument yesterday and
18 issue judgment, and I think it would be of assistance
19 to all sides. It's not a matter, in my view, that
20 should be appropriately left to the end of the day and
21 I think that it's quite evident by the slipping back
22 and forth that Miss Koenigsberg evidences to me in her
23 argument between issues of admissibility, that is to
24 say, what constitutes evidence, and questions of
25 weight, and I don't -- I think that, however difficult
26 a task it might be at the end of the day to
27 differentiate between these tasks, there are points in
28 a trial where we can differentiate between them, and
29 the issues that are raised now are issues pertaining
30 to admissibility, that is, what material, what
31 information will come to your lordship and be part and
32 parcel of the corpus of evidence that you will take
33 into account and weigh at the end of the day.
34 Now, in relation to both of the questions I think
35 that your lordship should take these factors into
36 account: Firstly, it was at the urgings of Mr. Goldie
37 that there be an argument on the question of the
38 treatises and that was something that he advanced on
39 several occasions prior to today's date. Secondly, it
40 was on the urgings of Miss Koenigsberg that she
41 advised that there were some 12 reports which in her
42 mind were inadmissible, and as a result of that this
43 question was raised by myself in court and it was
44 raised on July the 10th in Volume 250 at page 18452,
45 to 53 and I said the following, my lord. I said this:
46
47 "My lord, I suppose I am addressing you on

1 this subject because at the end of Friday
2 reference was made to the expert opinion
3 report of Dr. Albright. I want to raise
4 again this question of what appears to be a
5 difference between parties as to the effect
6 of the filing and tendering of expert
7 opinion reports with what appears to be the
8 defendants' position that there are
9 outstanding objections in respect of those
10 expert opinion reports. And as I see the
11 plaintiffs' position, we say those are filed
12 and tendered and our evidence in the case.
13 My friends say those are filed and tendered
14 and evidence subject to their objections.
15 And that raises I think two pressing
16 issues in my mind. One is the way in which
17 these objections and the effect of the
18 filing of these reports is to deal with --
19 is to be dealt with. And, secondly, the
20 timing. And I here raise this more to deal
21 with the issue of process. I think it has
22 to be clear among us that the plaintiffs'
23 view is these are -- these reports are filed
24 and are evidence in the case. Yet, at the
25 same time, I can see that some of the
26 reports or some aspects of either the
27 reports or the documents on which those
28 reports rely were filed subject to
29 objection.
30 Now, from my perspective, my lord, it
31 should be clear that we have a process to
32 deal with these objections so that these
33 reports are part of the outstanding issues
34 to be filed as part of the plaintiffs' case
35 or that the objections are raised as part of
36 the arguments of my friends in the course of
37 their closing submissions. Now, I take it
38 that..."
39
40 THE COURT: What was that last sentence again, please?
41 MR. RUSH:
42
43 "Now, from my perspective, my lord, it
44 should be clear that we have a process to
45 deal with these objections so that these
46 reports are part of the outstanding issues
47 to be filed as part of the plaintiffs' case

1 or that the objections are raised as part of
2 the arguments of my friends in the course of
3 their closing submission.";
4
5 And if I may just pause and deviate from what I
6 said, I think that there what I was trying to do was
7 to articulate what I perceive at this point to be the
8 very issue raised by Miss Koenigsberg.
9
10 "Now I take it that there is not
11 necessarily", and I'm continuing, "I take it
12 there is not necessarily one way of dealing
13 with all of these so-called objections.
14 But what I do say, my lord, is that at
15 least I understand from Mr. Willms'
16 submission Friday and Mr. Goldie's today
17 that at least in regard to certain documents
18 of Miss Albright's report that they wish to
19 see an argument on those documents. I see
20 that there are some outstanding arguments
21 that need to be made vis-a-vis those reports
22 and those documents that underlie those
23 reports."
24
25 And if I may deviate, in my submission that was
26 precisely the majority of the focus of the argument
27 yesterday, but that doesn't mean to say that there may
28 not be other objections that would be raised with
29 regard to Miss Albright's report.
30 And continuing:
31
32 "And my recommendation, my lord, is that
33 you assist in giving some direction as to
34 the timing of these arguments if my friends
35 perceive that these are matters that are of
36 some urgency to their case. And, secondly,
37 to the determination of the issue of whether
38 these are to be -- intended to be left by
39 the court and by my friends to their closing
40 submissions. And if not, if that is not so
41 in terms of of my friends' understanding
42 then I would suggest that we establish some
43 sort of schedule by agreement to deal with
44 each of these documents in turn, and to
45 resolve those outstanding objections and to
46 make it clear that these objections, once
47 resolved, clarify and articulate for all of

1 us the status of the reports and the
2 underlying documents.
3 THE COURT: Is there a list of these outstanding
4 matters?
5 MR. RUSH: Well, we asked -- there is a
6 difference again between our friends and
7 ourselves on which are those documents that
8 they consider to have objections about. And
9 on the 7th of July we asked for a listing
10 from Ms. Koenigsberg concerning this. It
11 seems to me that that's the way to go. If
12 my friends have something in mind, and
13 certainly I can see by reference to some of
14 the transcript accounts of the course of
15 events that, yes, I can see that there are
16 arguments that need to be made. But I am
17 not sure that we are ad idem on all of these
18 reports. I feel that we need to have
19 clarified what is outstanding on these
20 reports and then deal with it in some way.
21 THE COURT: I agree with you, Mr. Rush. I agree
22 that these matters should be resolved. Do
23 defence counsel have anything to say in this
24 regard?
25 MR. GOLDIE: Any convenient time?
26 THE COURT: Yes.
27 MR. GOLDIE: But before we adjourn.
28 THE COURT: Yes. Well, I'm in counsels' hands."
29
30 And then we went off to deal with the matter of
31 witnesses and the scheduling.
32 Now, following that, my lord, on the 12th of July
33 Mr. Willms sent a letter to me and to counsel setting
34 out, in effect, those areas in general terms of the
35 objections which he intended to raise with regard to
36 Miss Albright, Dr. Daly, Dr. Mills, Mr. Morrell, and
37 Mr. George. And he also pointed out that he wished to
38 have an argument on the issue of treatises or texts.
39 Now, we had one comment, a letter from Miss
40 Koenigsberg, that focused on the issue of Mr. Brody's
41 report. Now, my lord, we were guided by the fact that
42 the defendants wished to raise for decision or
43 determination objections reserved as to admissibility
44 questions, and those were in part the ones addressed
45 yesterday by Miss Mandell on the question of the
46 treatises and texts. They are also in part the
47 documents underlying the reports and those reports

identified by Mr. Willms now in the letter of July the 12th. And to some extent I take Miss Koenigsberg to concur that those are the reports at issue and in addition that there may be an issue with regard to Mr. Brody.

Now, I would assume that the arguments addressed to your lordship yesterday on treatises and texts touched particularly on the subject of Mr. Brody's report, but I don't know if there is a separate issue to be raised there. But I say that these were all raised for the purposes of dealing with the question of what reservations there will be to what is going to be admitted as part of the plaintiffs' case, and that is what we sought to dispose of.

Now, there's no question that Miss Koenigsberg has a number of objections that relate not to admissibility, but to questions of how your lordship should evaluate or weigh this evidence at the end of the day, and no doubt there will be a lot of argument. We're going to go nose to nose on this subject. The point of the matter is though that I don't think we can do what Miss Koenigsberg is urging on you, and that is let the issues of admissibility and weight slip together.

And on many occasions in dealing with questions of qualification, questions of admissibility, your lordship has expressly dealt with objections on the basis that those objections go to questions of weight. And I'm going to cite just one example, my lord, and that is an objection that was raised by Mr. Mackenzie on the qualifications of Dr. Mills. Having heard the objection, what you said in part is this: You dealt with an objection that was raised to whether or not she could interpret the operation of Wet'suwet'en law and you said:

> "Aside from that," and I'm quoting, "the other objections that have been made to her qualifications both by Mr. Mackenzie and Miss Koenigsberg, in my view, go to the question of weight rather than admissibility, and for that reason I'm going to rule that she is qualified to give opinion evidence on the areas generally described by Mr. Rush at the commencement of today's proceedings."

1 If your lordship needs a reference it's at page 12871.
2 Now, my lord, I raise that only to exemplify my
3 point that you were called upon on many occasions to
4 decide on is the person offered as an expert
5 qualified, and to make the decision as to whether or
6 not we're dealing with evidence of -- questions of
7 admissibility in evidence or are we dealing with
8 questions of weight. And I say that where the
9 questions were reserved for decision or where
10 questions of admissibility were dealt with by your
11 lordship on the basis that the objections raised were
12 reserved as to admissibility, then we should deal with
13 those.
14 And one of the reasons I suggest to your lordship
15 this morning that we deal with the reports
16 chronologically is that as you dealt with the -- these
17 experts at least, commencing with Miss Albright at the
18 first of the year, the objections were raised again
19 and again and at points throughout the evidence of all
20 of these experts there were issues joined between the
21 parties and resolutions were arrived at in some cases
22 and in other cases perhaps they weren't. But the
23 point is that these objections should not stand as
24 objections to the admissibility of the plaintiffs'
25 evidence. These should be dealt with. And I say in
26 like manner so should the question of the treatises
27 and the texts. That should be dealt with and there
28 should be some clarity and certainty on that subject.
29 I'm not sure if Miss Koenigsberg is now taking the
30 position that she waives her objections as to
31 admissibility. She says on the one hand that all of
32 her objections stand, and yet her argument suggests
33 strongly to me that she waives those objections as to
34 admissibility and will argue the question of the
35 meaning or force of the evidence in terms of a
36 determination on weight. Now, it's not satisfactory,
37 in my submission, for my friend to ride the two
38 horses. We'll wait until the end of the day and argue
39 it as, well, maybe admissibility, but certainly its
40 weight, and at the same time say well, we're going to
41 preserve the right to retain our objections to the
42 plaintiffs' evidence. In my submission that leaves
43 things in a very unsatisfactory state and it should
44 not be allowed to stand.
45 Now, it's our position that these are for the most
46 part, as I review the objections that were taken, in
47 point of fact these are questions that really go to

1 weight and that the questions that my friends -- and
2 here I'm speaking in a global way, my lord, and I
3 don't propose that this is a desirable way to deal
4 with it, but as part of this issue it's clear that for
5 the most part, and I'm generalizing, that the
6 defendant's objections go to issues of weight and that
7 they will argue those at the end of the day no doubt.
8 And, in my submission, these should be dealt with now
9 for what they really are. And if they are objections
10 to weight or considerations of weight, then they
11 should be dealt with in the argument and they
12 shouldn't be dealt with as an objection to
13 admissibility so that it's clear what the corpus of
14 the evidentiary base of the plaintiffs' case is, and I
15 think that has to be clear.
16 THE COURT: But how are you going to be any better off or how is
17 that certainty to be advanced by a ruling at this
18 time? Surely the most I can do at this time is to
19 determine admissibility. The question of weight is
20 always at large.
21 MR. RUSH: I'm not asking your lordship to determine questions
22 of weight. That -- if I gave that impression then I
23 misspoke. What I want at this juncture, and what I
24 thought we were here to do, is to determine issues of
25 admissibility. And that's what I say, with respect,
26 my lord, is the issue that was joined yesterday on the
27 treatises argument. The objections were raised as to
28 questions of admissibility to the documents of the
29 plaintiffs.
30 THE COURT: But if I were to follow my pre-preliminary musings
31 and to rule that they are admissible, that is, the
32 reports and opinions which I've probably already dealt
33 with, and the -- now the other writings which were put
34 in either in chief or in cross-examination, if I were
35 to say with respect to those writings that they are
36 admissible at least to show consistency or
37 inconsistency with other learned opinions, then the
38 question of weight is still at large and you have the
39 certainty of admissibility. You have an
40 identification of the corpus of evidence for which
41 you're contending.
42 MR. RUSH: I have two points in response to that. One is that
43 Mr. Willms presses the argument that where Miss
44 Albright relies, for example, on Dr. Fladmark and an
45 opinion by Dr. Fladmark, that any -- excuse me, I
46 haven't completed what I have to say. That the facts
47 that Dr. Fladmark relies upon to make his opinion are

1 not facts which Miss Albright can rely upon for either
2 agreement with the opinion of Dr. Fladmark or the
3 making of her own opinion. And that's where I differ
4 with my friend. And that is where the nature of the
5 reservation on the reason for the admissibility of the
6 evidence is of importance, that your lordship, by your
7 own definition of how the documents would be admitted,
8 applies a qualification, that is, whether it is
9 inconsistent or consistent with writings in the field.
10 Well, I have no -- I have no difficulty with that, but
11 I want to be clear that if in the mind of my learned
12 friends there are other reservations which they hold
13 and will argue as to admissibility at the end of the
14 day, then I say that that is an intolerable position
15 that we are in now as to the determination of
16 admissibility.
17 THE COURT: But if I rule they're admissible, that is
18 foreclosed.
19 MR. RUSH: I accept that. I accept that, my lord, and if that
20 is -- if that is the determination, preliminary in its
21 nature, then I don't have a difficulty with that. I
22 do have a difficulty in terms of Mr. Willms'
23 outstanding, as he calls it, a minor point, but I
24 think it's a very major -- it's a major point for this
25 reason, and I think my friend and I are pretty clear
26 about the significance of this: When Miss Albright
27 finds a notched point and takes the notched point to a
28 photograph in Dr. Fladmark's book and she compares the
29 two, she has to accept Dr. Fladmark's findings that
30 the item that's in the photograph is in fact an item
31 that was found by him and, as well, his opinion that
32 that point is a lanceolated point. And it is of
33 crucial significance to the plaintiffs that there are
34 facts, where referred to and relied upon by our
35 experts, that have been accepted and form part of the
36 work of a reference that our experts have relied upon,
37 not only for the purposes of accepting other's
38 opinions, but for the purposes of forming opinions of
39 their own based on previous research work and factual
40 presentation of other experts.
41 THE COURT: Well, the straw that the drowning camel clutched
42 might be found in the St. John case where the
43 distinction was made between the underlying facts
44 which are not admissible and the opinion which is.
45 And is it not possibly a way through these woods to
46 say that it's not the underlying facts of Fladmark
47 that Miss Albright relies upon as the opinion of

1 Fladmark --
2 MR. RUSH: Yes.
3 THE COURT: -- the underlying facts are subsumed into his
4 opinion, but it's the opinion that she really relies
5 on?
6 MR. RUSH: Yes, it is. It's Fladmark's opinion that that is a
7 lanceolated point of a certain period, yes, and she
8 relies on that. And when she has her lanceolated
9 point and compares the two, she draws her opinion
10 based on Dr. Fladmark's opinion that that is a similar
11 or if not identical lanceolated point.
12 My lord, I suppose in the crystalization of this
13 argument it really turns on the nature of the
14 reservations that are understood by the court as to
15 what constitutes the admissibility of the evidence
16 that has been relied upon and led from the experts.
17 And it's for that underlying, I suppose, issue that I
18 feel that it's -- it would be of assistance to have
19 some certainty at this point because it, in my
20 submission, does not leave open for the defendants to
21 argue hopefully at the beginning of next April that
22 there are issues of admissibility that are yet
23 outstanding with regard to the plaintiffs' evidence.
24 And it is that which I think should be dealt with and
25 for which there should be certainty at this point.
26 Now, those are my submissions with regard to the
27 issue raised by your lordship at the opening of the
28 day.
29 THE COURT: All right. Thank you. Well, I think that -- well,
30 I'm sorry, perhaps Mr. Willms should be given a chance
31 to reply to that.
32 MR. WILLMS: Thank you, my lord, because I did want to draw --
33 the portions where, for example, Miss Albright adopts
34 Fladmark's opinion and therein takes in his underlying
35 facts is not really the concern. The concern is where
36 Miss Albright, for example, takes Dr. Ames' facts, but
37 rejects his opinion. You see, there all she takes is
38 his facts from the investigation -- from the
39 excavation. You'll recall that Dr. Ames did a dig at
40 Hagwilget and concluded that for a very very long time
41 light and sporadic occupation as a fishing village.
42 Now, Miss Albright said I read the same stuff that Dr.
43 Ames dug up completely differently. I don't read it
44 that way at all. So that is not a case where Miss
45 Albright takes Dr. Ames' opinion and with that opinion
46 the underlying facts. She needs the underlying facts
47 because she's going to reject the opinion.

1 Another example is Dr. McDonald and his work at
2 the Kitwanga Fort and the excavation there. Once
3 again, she takes the facts that Dr. McDonald
4 unearthed, but then rejects Dr. McDonald's conclusions
5 which are set out in "The Epic of Nekt" which was
6 marked by the plaintiffs. And so there are a number
7 of other instances. Those are the ones that just came
8 to mind when my friend drew the distinction that Miss
9 Mandell did not do yesterday, but there is a
10 distinction. They are not all being taken I accept
11 the opinion and therefore I accept the underlying
12 fact. In many many cases Miss Albright says I accept
13 the underlying facts, but the opinion's wrong.
14 THE COURT: But isn't that a matter of weighing than analysing?
15 Don't juries deal with those matters quite effectively
16 when they come to sort these things out? If it's as
17 bald as you've just described, then the jury would
18 have no difficulty in dealing with --
19 MR. WILLMS: If Dr. Ames' opinion is also in evidence, my lord,
20 as I think your lordship's pre-preliminary ruling
21 would have it, that would take care of it because then
22 it would be there, Dr. Ames' opinion, and you'd have
23 Miss Albright's opinion, and at the end of the day
24 your lordship could look at both of them. But I think
25 what my friends say is that whether or not the -- they
26 don't want Dr. Ames' opinion in, they just want the
27 underlying facts in. And I suppose if we want Dr.
28 Ames' opinion we should call Dr. Ames. And for Dr.
29 McDonald they want the underlying facts from Kitwanga
30 Fort in so that she can rely on them, but if we want
31 Dr. McDonald's opinion, which she rejects, we've got
32 to call Dr. McDonald.
33 Now, in my submission, my lord, with your
34 lordship's suggestion earlier this morning that it's
35 in if the opinion is in and then we can argue about
36 how we deal with it at the end of the day, then that
37 does take care of that particular issue. And it's
38 quite independent of St. John's, my lord, because I
39 made a submission earlier on what St. John's stood for
40 and, in my submission, St. John's doesn't stand for
41 being able to look to excavations at Prince Rupert
42 Harbour and take the underlying facts there and then
43 come to a conclusion somewhere else. I mean, what
44 it -- you may be able to say there have been 19
45 excavations that are called this kind of an excavation
46 and I went and dug this one and this is the same kind
47 of excavation, but when you get down into the

1 minutiae, and that's like the opinion on what the
2 land's worth, but I don't think I need to get into
3 that right now. So that to that extent, my lord, that
4 it is important and your pre-preliminary ruling or
5 musing I think you called it would take care of that,
6 that problem, because then the facts would go in,
7 notwithstanding that Miss Albright doesn't adopt the
8 facts through the opinion. She just takes the facts
9 and rejects the opinion. But at the end of the day
10 your lordship will have the opportunity to review all
11 of it with the assistance of argument. But I say my
12 friends cannot put in an opinion and then argue that
13 your lordship has to ignore the opinion of Dr. Ames,
14 but the witness can look at the facts. In my
15 submission that can't be the case. That deals with
16 that part.
17 On the other part, my lord -- and in fact that
18 deals with the admissibility objections to Miss
19 Albright. There are no other admissibility objections
20 to Miss Albright's report save for that. On the other
21 witnesses, as I stated to my friend earlier, there are
22 admissibility objections and I agree that the
23 admissibility objections should be dealt with. I'm
24 prepared to restate the objections, they're not long,
25 in respect of the particular witnesses that go to
26 admissibility and not weight. And I agree with my
27 friend that he shouldn't wait while we tell him that
28 we made an admissibility objection and we're going to
29 make it again. He's entitled to have it ruled on, in
30 my submission, and I'm prepared to deal with each of
31 the witnesses that I wrote to my friend about
32 setting -- telling him where I made the objection in
33 the transcript. I'm prepared to deal with that today.
34 But, as I said, the submissions yesterday and the
35 submissions that we've made this morning dispose of
36 Miss Albright.
37 THE COURT: All right. Well, you are impelled to speak again?
38 MR. RUSH: I'm always compelled to speak again.
39 THE COURT: No, no, it was impelled. There's no compulsion
40 here.
41 MR. RUSH: Just that I do think that Mr. Willms, perhaps for the
42 first time to my ears but I'm sure not to Miss
43 Mandell's, has joined issue on the very essence of the
44 argument of yesterday's date. And I don't want to
45 recapitulate that, but I do think, my lord, that if
46 you adopt the proposition that you can accept the
47 underpinnings of the facts of an opinion, you can also

1 reject the opinion and comment on the facts or accept
2 the facts. The question is all in what the expert
3 does with it, and I don't wish to state it any further
4 than that because I think that would be just
5 entrenching on Miss Mandell's argument, but I do think
6 that that is a point too.
7 THE COURT: All right. Well, I'm going to give this matter some
8 more thought. I'm not at the moment persuaded that
9 counsel are entitled to anything more than a ruling on
10 admissibility. If I can go further than that I will
11 do so. I have an uneasiness, however, about
12 foreclosing a better consideration of the fine points
13 of evidence which may be possible later and after I've
14 heard counsel's submissions on the evidence which will
15 bring it together I'm sure in better form and order
16 than I'm presently able to command. But I will give
17 it some more thought and I will certainly give counsel
18 my conclusions in written form so they may consider
19 them and if thought necessary advance further
20 arguments from that platform, the security of which I
21 will not presently warrant, but counsel can see what I
22 have to say and make such further arguments as they
23 think necessary.
24 THE COURT: All right. Mr. Rush, do you want your friend to go
25 through his list of objections to evidence as the next
26 order of business or do you want to do something else?
27 MR. RUSH: Yes, I think that's what we should do.
28 THE COURT: Yes. All right.
29 MR. WILLMS: Perhaps what we could do is deal with them one
30 witness at a time.
31 THE COURT: Just a moment. Now, just let me have it again as to
32 what precisely it is you're going to be doing now.
33 MR. WILLMS: The witnesses.
34 THE COURT: This is a list?
35 MR. WILLMS: This will be a restatement for my friend of the
36 objections that were taken at the time the witnesses'
37 opinions were tendered which go to admissibility, in
38 my submission.
39 THE COURT: Well -- and these are the residue of what's left
40 over after my previous ruling or are they something
41 different?
42 MR. WILLMS: Well, this is something different because in my
43 view your lordship's ruling dealt with Doctors Ray,
44 Galois, Lane, Morrison, and Brody.
45 THE COURT: Yes.
46 MR. WILLMS: Because that's the historical evidence. So this is
47 the non-historical and I think, as I called it the

1 other day, the more scientific.
2 THE COURT: Yes. All right. Well, are you going to be asking
3 me -- asking your friend to respond to what you're
4 going to say now and asking me to rule on it?
5 MR. WILLMS: Well, I understood -- we've told our friends where
6 the objection is in the transcript.
7 THE COURT: Yes.
8 MR. WILLMS: So they've had a chance to read it. I thought that
9 my friend -- I thought the objections were clear, but
10 I'm prepared to restate my objection to the
11 admissibility of the opinion evidence of each of the
12 other opinion witnesses, the non-historical opinion
13 witnesses.
14 THE COURT: Well, I'm happy to have you do that. I don't see
15 much point in it, however, if you've given your friend
16 written notice of what they are and if he's not ready
17 to respond to them. I don't know.
18 MR. RUSH: Well, the difficulty, my lord, is that what my friend
19 has done is simply set out a number of pages in the
20 transcript with relation to Miss Albright, for
21 example.
22 THE COURT: Yes.
23 MR. RUSH: And the pages that he's referred to in the transcript
24 he's withdrawn an objection with regard to those and
25 he is maintaining the questions part and parcel of the
26 treatises and textbook arguments. Now, these are
27 framed in such broad language I don't know if my
28 friends are maintaining all of these objections, and
29 that's what I wanted some articulation about. There's
30 no question that in the places in the transcript that
31 my friend has isolated that there are there set out a
32 number of objections and they were dealt with in
33 different ways. And it's -- I think that my friend,
34 to assist the court, should state, well, what's he
35 maintaining and what objections is he going to press.
36 THE COURT: Well, let's take the first one then and use it as a
37 pathfinder.
38 MR. WILLMS: All right. Well, as I said this morning, I didn't
39 withdraw the objection to Miss Albright, I made it
40 yesterday, my lord, and your lordship is going to give
41 a memorandum on that, but Miss Albright's opinion
42 evidence, the admissibility of that, turns on how the
43 treatises are dealt with, that is, the factual matters
44 in the treatise. And I think you --
45 THE COURT: Turns on the treatise treatment.
46 MR. WILLMS: Turns on the treatise treatment, yes, and I think
47 that's been resolved.

1 Now, with respect to -- and I can put Dr. Daly and
2 Dr. Mills together because the objection to
3 admissibility is the same. The first objection is
4 that participant observation anthropology, where the
5 participant observation takes place wholly after the
6 commencement of litigation, is inadmissible because it
7 is impossible to duplicate. And that goes to both Dr.
8 Daly and Dr. Mills, and your lordship may recall that
9 in the authorities respecting opinion evidence the --
10 there is a tab 16 with an extract entitled "The Expert
11 in Court" which was an article in the Law Quarterly
12 Review which sets out four, and I submitted four,
13 tests for the admissibility of expert opinion. And
14 one of the tests was is it possible to duplicate.
15 It's not necessary to be able to duplicate it, but is
16 it possible to duplicate the work that was done. And
17 it was my submission, and it is still my submission,
18 that it is impossible once a lawsuit has commenced to
19 duplicate participant observation anthropology. So
20 there's no method of meeting the evidence by contrary
21 expert evidence.
22 THE COURT: Can you give me the volume and page where the
23 objection is made and where I avoided making a ruling?
24 MR. WILLMS: The objection -- the note that I have in my letter
25 for Dr. Daly is Volume 184 February 20th, 1989, page
26 11857.
27 THE COURT: 11587?
28 MR. WILLMS: 11857.
29 THE COURT: 11 -- I'm sorry, 11 --
30 MR. WILLMS: Oh, apparently I begin on 55.
31 THE COURT: 11855?
32 MR. WILLMS: 55 to 11857.
33 THE COURT: Yes.
34 MR. WILLMS: And the report, the marking of the report is at
35 Volume 190, page -- and I just have two pages, 12397,
36 to 12398.
37 THE COURT: The ruling I made was at page 11587 was it?
38 MR. WILLMS: 11 -- no, 12397.
39 THE COURT: All right.
40 MR. WILLMS: 12398. And for Dr. Mills I have the ruling, but my
41 friend Miss Koenigsberg -- I don't have the --
42 MS. KOENIGSBERG: I have both.
43 MR. WILLMS: You have them.
44 MS. KOENIGSBERG: Yes. Volume 196, and the submissions I guess I
45 happen to make on admissibility are at page 12870.
46 THE COURT: 12 --
47 MS. KOENIGSBERG: -- 870.

1 THE COURT: Yes.
2 MS. KOENIGSBERG: And your lordship's ruling is on 12871.
3 MR. RUSH: That should be made clear that that's on
4 qualifications. That issue is on qualifications.
5 MR. WILLMS: Well --
6 MR. RUSH: Well, it makes a difference because there was a
7 separate argument --
8 MS. KOENIGSBERG: Well, I was just going to get to that.
9 MR. RUSH: -- on the question of admissibility.
10 MS. KOENIGSBERG: The submission that I made which I was
11 submitting went to admissibility was at 12871 and then
12 in Volume 199 there was a ruling through the marking
13 of the report as an exhibit at page 13092.
14 THE COURT: Thank you.
15 MS. KOENIGSBERG: It was there marked subject to objection.
16 MR. WILLMS: Now, if I could just complete on the second
17 objection to both Dr. Daly and Dr. Mills is the
18 reliance on interview notes where the evidence was not
19 given by a witness in this proceeding and also the
20 reliance on land claims transcripts where the evidence
21 was not given by whoever was being interviewed in the
22 transcript in this proceeding. And in fact, my lord,
23 in respect of some of the land claims transcripts
24 referred to I don't think they've even been tendered
25 by my friends. Some of them have and some of them
26 haven't, but those are the two objections to
27 admissibility made by this defendant for both Dr. Daly
28 and Dr. Mills. Now, I don't know whether I should
29 highlight each of the following ones or whether we
30 should deal with them one at a time.
31 THE COURT: Well, speaking for myself I don't think I would want
32 to hear argument on this until I've looked at these
33 and familiarized myself with them. I just don't think
34 I would be in a position to absorb the full flavour of
35 the submission at this time without looking at those
36 passages and reminding myself of them. I don't know
37 if that's a convenient way to proceed, but I would
38 much prefer to have those matters in closer recall
39 than they are now before I get into a further
40 adversarial interaction. Is it convenient for Mr.
41 Willms just to give me this kind of information and
42 have the argument some other time?
43 MR. RUSH: I don't have a problem with that, my lord. It's just
44 that I think that Mr. Willms is perhaps desiredly
45 truncating somewhat the references. There are some
46 other references there which I think you could be
47 assisted by --

THE COURT: Oh, I'd be glad to --
MR. WILLMS: My lord, I didn't purport to set out my friend's submissions at the same time. I mean, they're in and around the same pages, but I just -- my friend wanted to know where we objected and what we said and so I let him know.
THE COURT: All right.
MR. WILLMS: But there may be surrounding references.
THE COURT: Well, I'd be glad to have them from you now or by a memo, Mr. Rush, if that's convenient.
MR. GRANT: My lord, I can speak on Dr. Daly. In terms of the proposal you raised, that's fine. I was going to be prepared to argue about Dr. Daly, but I think what's very important here for you to appreciate here is that, and I want my friend to be clear, that he is now saying that these two objections that he has set out here are his sole objections on the admissibility of Dr. Daly's report because when you look at the transcript -- this is the difficulty with his letter. He had -- he raised a whole series of different objections and we didn't know until this moment, so I take it these are the only two objections on admissibility and any of the others that are in the transcript he is not now proceeding upon on admissibility.
MR. WILLMS: That is correct, my lord, for Dr. Daly and Dr. Mills these are the two. I mean, there are many things that have happened during the course of the trial either during the evidence of each particular witness or subsequently that have dealt with some of the other objections.
THE COURT: Those references I was given, I have a feeling that they're all related to Dr. Daly. Was I given any references to Dr. Mills?
MR. WILLMS: I think the references Miss Koenigsberg gave were Dr. Mills'.
THE COURT: Volumes 196 and 199?
MS. KOENIGSBERG: Yes.
THE COURT: All right. Thank you.
MR. RUSH: My lord, I'd just like to add to that I think you would be benefited by the reference at 12883 through to 12891. That's where Mr. Mackenzie raises similar objections that were raised by Mr. Willms in the course of Dr. Daly's evidence, but these were repeated in Dr. Mills'.
THE COURT: What volume is that in, please?
MR. RUSH: I think it was 196.

THE COURT: Yes.
MR. RUSH: I think it's 196, my lord.
THE COURT: All right.
MS. KOENIGSBERG: I'll just check.
THE COURT: All right.
MR. GRANT: And regarding Dr. Daly references I don't believe my friend referred to pages 11821 through to 11825. Now, these include certain other arguments, but include the argument on this.
THE COURT: And that's also Dr. Daly?
MR. GRANT: That's Dr. Daly.
THE COURT: All right. Thank you. All right. What's your next point, Mr. Willms?
MR. WILLMS: My friend Miss Koenigsberg reminded me that I also made the Emil Anderson argument on this is really argument and not expert opinion, but in my submission in that respect because of rulings that have taken place in this case, your lordship can disregard that as a matter of weight at the end of the day rather than as a matter of admissibility. I did raise that and I take my friend's point that he wants to know the narrow ones and that particular -- and I did make that argument with respect to each witness, my lord, but there's no question that each witness expresses opinions, true opinions, rather than just argument disguised as opinion. We can deal with all of that in final argument.
THE COURT: All right.
MR. WILLMS: Now, I did point out to my friends the portions of Mr. Morrell's report where your lordship did make rulings and I only pointed that out not to revisit them because the rulings have been made, but only because it was left. I think that my friends may wish to revise the report or do something to retender it. I don't think -- I didn't know whether they were planning on doing that or not. If they're not planning on doing that, then Mr. Morrell is dealt with.
THE COURT: You say nothing required at this time.
MR. WILLMS: I say nothing required with respect to Mr. Morrell. The next witness that I made a note of was Mr. George, and the objection to Mr. George's -- and it was an objection that went through a number of different maps, my lord -- was that the Marvin George working maps were maps that were prepared by four people, Mr. Sterritt, Mr. Williams, Mr. Marvin George and I believe Mr. Leonard George, and what they did

was they apparently went around and talked to elders and got names of peaks and transferred those names on to these large maps, and then from these maps then Mr. George started preparing his other maps. And I objected to all of the maps all the way from the working maps to the final product on the basis that inadmissible hearsay formed -- that all of the maps had as their foundation inadmissible hearsay.

THE COURT: You say that inadmissible hearsay is at the root of all of the working maps?

MR. WILLMS: It's at the root of all of the working maps because it is what Leonard George and Marvin George were told by elders when they went around and marked the maps up and what I believe is Mr. Sterritt and Mr. Williams were told for the Gitksan territories. And those, my lord -- and because there were a number of maps that were objected to, if you -- and this was the best that I could do because it came up again and again. It's in Volume 216 starting at about page 15704, but every time a new map was tendered I think I stood up and said something like "same objection", and your lordship noted that, and each of the maps was marked on the same basis.

And then going to Volume 217, pages 15759 --

THE COURT: I'm sorry, 15759?

MR. WILLMS: 15759 all the way through to 15798 and, once again, it's not that that is an objection through that whole transcript, but every time a document was marked, and I think at some point I -- and I can't recall exactly where it is, suggests that it -- perhaps I wouldn't need to object on each one because the objection was the same. And your lordship may have said subject to that objection at the time of the marking.

THE COURT: Yes.

MR. WILLMS: But that's the objection. Then Mr. George's report was marked subject to objection, Volume 218, at page 158 --

THE COURT: I'm sorry -- oh, sorry, volume?

MR. WILLMS: Sorry, 218.

THE COURT: Yes.

MR. WILLMS: Page 15843.

THE COURT: Do you have an exhibit number for the report? Oh, it doesn't matter. I can find it.

MR. WILLMS: And there, my lord, the two objections were -- of course the first objection is the continuing objection to the underlying information from the working maps on up.

THE COURT: Yes.
MR. WILLMS: And then I also made an objection as to argument and beyond the scope of Mr. George's expertise and in that respect my recollection is that your lordship dealt with that objection.
THE COURT: I made a ruling.
MR. WILLMS: Your lordship, if I can -- yes, Mr. George's report is Exhibit 998, and I think it's for identification. My note is that it's --
MR. RUSH: I thought it was 998 for the -- subject to reservations that had been raised about it.
MR. WILLMS: That's right, my lord. The objections were made at 15842 which all relate to the underlying hearsay objection, and then I also made an objection which -- that one through five usurped your lordship's function and in that respect, I mean, that can be argued at the end of the day. That doesn't need to be argued now.
For example, when Mr. George gives the opinion that those are the external boundaries of the Gitksan and the Wet'suwet'en, that of course is a matter solely for your lordship. I mean, certainly Mr. George can say that he took some information and plotted it on a map, but he can't say that that's the external boundary of the Gitksan-Wet'suwet'en. And that, in my submission, can be left for final argument. It doesn't really go to admissibility. It really goes to what your lordship can take from the report.
THE COURT: All right. Do you have a page reference where you say I made a ruling?
MR. WILLMS: Yes. Your ruling is at 15843 -- sorry, starts at 15842.
THE COURT: All right.
MR. WILLMS: Over to 15843.
THE COURT: All right. Thank you.
MR. WILLMS: Now, I do understand and I -- that in respect of Mr. Brody that my friend Miss Koenigsberg has sent some references and my position with respect to Mr. Brody is that he didn't express any anthropological opinions really. He was just a historian and that's covered by your lordship's earlier ruling.
THE COURT: All right.
MS. KOENIGSBERG: I can give your lordship the citations for the submissions that we said go to admissibility and we say still do. There were submissions and a ruling on the issue of bias. Those are found at Volume 210, pages 142 -- I can't read the writing. Just a sec.,

1 14215 --
2 THE COURT: Yes.
3 MS. KOENIGSBERG: -- to 14226. Then there were submissions
4 which were lengthy on the issue of relevance and that
5 it was based on inadmissible hearsay, et cetera, which
6 are all set out again in Volume 210 and pages 14233
7 through 14239, and then in Volume 211 at pages 14241
8 to 14251, and your lordship marked -- made a ruling on
9 the marking of the report in Volume 211 at pages 14251
10 and over to 52.
11 THE COURT: Thank you. Is that it?
12 MR. WILLMS: In respect of this matter, yes, my lord, and I
13 don't know whether my friends want to say anything.
14 There are a number of other things that could be done,
15 but it would be more useful for the next items that we
16 wish to deal with to start them at two o'clock.
17 THE COURT: Yes. All right.
18 MR. RUSH: Just we should be aware of what these items are, my
19 lord, because it might be that we're not in a position
20 to deal with some of these. But --
21 THE COURT: You mean these here?
22 MR. RUSH: No, no, not the ones we've just discussed, but rather
23 the ones that are upcoming that are suggested by my
24 friends, and I -- yes, perhaps I should have an
25 indication from your lordship as to what time frame
26 you would be thinking of with regard to dealing with
27 these objections.
28 THE COURT: Oh, I assumed we'd be all day, but I can sit later
29 today if we have to.
30 MR. RUSH: Well, this was my confusion. Is your lordship going
31 to now go and read these?
32 THE COURT: Oh, no.
33 MR. RUSH: These will be done on a separate day? That's what I'm
34 interested in.
35 THE COURT: Yes. That will have to be so. I have something
36 else I have to do --
37 MR. RUSH: Then --
38 THE COURT: -- in addition to eating lunch. Are you suggesting
39 we don't need to come back this afternoon, Mr. Rush?
40 MR. RUSH: No, I'm not suggesting that, my lord. I don't know
41 if we'll have to come back this afternoon, but I would
42 like to know what in my friend's agenda they see
43 dealing with this afternoon because there were some
44 things that were being done by other counsel this
45 morning.
46 THE COURT: I see.
47 MR. RUSH: And we will have to determine if that has been

1 achieved.
2 THE COURT: You want Mr. Willms to outline what he wants to do
3 this afternoon?
4 MR. RUSH: Yes. It took me a long time to get to that.
5 MR. WILLMS: My lord, there is the Fletcher affidavit, which my
6 friend wanted to consider; there is the letter that we
7 sent a couple of -- maybe in last week, but certainly
8 very early this week about listing exhibits for
9 identification which we want to tender as exhibits
10 proper, and they've got a list of those, and we want
11 to formally tender them as exhibits proper this
12 afternoon, and I mentioned that yesterday. The other
13 matter is the alienation series which have been --
14 most of them have either been marked for
15 identification or some of them have been marked
16 subject -- marked for a limited purpose like the
17 trapline map.
18 THE COURT: Doesn't that depend on some more cross-examination?
19 MR. WILLMS: Well, no, my lord, it will be my submission -- what
20 I will be tendering this afternoon are the five
21 custodial affidavits and seeking to have them marked,
22 and then my friends have already cross-examined on
23 one, they can cross-examine on the other four, and I
24 will be asking that the identification be removed from
25 the five related maps, and if my friends have an
26 objection to that, I will hear that objection to doing
27 that. And that's what we propose to do this
28 afternoon.
29 THE COURT: All right.
30 MR. GRANT: My lord, I'd advised Miss Sigurdson yesterday that we
31 were not in a position to deal with these exhibits for
32 identification because of the scheduling that counsel
33 for the plaintiffs were in this week, except for she
34 wished to tender cross-examinations of -- on the
35 territorial affidavits, and that we can deal with
36 that, but the others we were not in a position to deal
37 with, either the plaintiffs' or defendant's exhibits
38 for identification, today and I advised counsel of
39 that yesterday.
40 THE COURT: All right. Well, I'm going to adjourn until two
41 o'clock then. There's something we can do this
42 afternoon, so we'll come back and do that much anyhow.
43 THE REGISTRAR: Order in court. Court stands adjourned until two
44 o'clock.
45
46
47

(PROCEEDINGS ADJOURNED FOR LUNCH RECESS)

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

_____
Tanita S. French
Official Reporter

(PROCEEDINGS RESUMED PURSUANT TO LUNCHEON RECESS)

THE COURT: Right. Who's next?

MR. WILLMS: My lord, I know my friends said before the break, before the luncheon adjournment, that the list that was sent over on exhibits for identification which we wanted to tender as exhibits proper they weren't prepared to deal with them yet, but I note from reading the list that all save three or four are Neil Sterritt's notes, two -- one of them is a document that's been admitted in, a notice to admit, another two are articles which are covered by -- are covered by rulings on authenticity of documents, two of them, 450 and 451, are ancient documents, and another one is an interview of a plaintiff transcribed. So I would like to know -- I understand my friends can't deal with that. I would like to know when they will be able to deal with it, because it's certainly not contentious.

MR. GRANT: Well, my lord, my friend -- I don't think we need to spend any time on this. Quite simply, my lord, this letter, if I recall correctly, came at the beginning of this week, and counsel in dealing with this matter has been in court. It may have been on Friday.

MR. WILLMS: Yeah, it was a week ago, my lord.

MR. GRANT: Yes, it was Friday. I was in transit. I was trying to deal with it. I was in transit here. Some of our exhibits on cross-examinations were in my offices. I brought those down. Some are in Mr. Rush's office. Some of them are in our room here. It's a matter of just getting the time to verify what the exhibits are. If it's all as uncontentious as my friend considers, and the one I did have an opportunity to look at seemed to be completely uncontentious, I think we can deal with it in about three minutes, but we have to verify that. There are many, many exhibits for identification that have to be dealt with. We want an opportunity to verify that. I haven't had the time this week because I was involved with Mr. Shelford.

THE COURT: I'm not enthusiastically disposed of forcing people to deal with matters today if they say they're not ready to deal with them. I always found that to be a futile process and a time wasteful one. So, I think, Mr. Willms, we'll pass on that one.

MR. WILLMS: No. All I wanted, my lord, is -- the unfortunate position it puts us in is my friends stand up and they don't object, they don't admit, they just said we're

not ready, in a week they're not ready, and six months they're not ready. It doesn't get done.

MR. GRANT: That's not correct, my lord. I got this letter last Friday. I explained the background. If it's all uncontentious I'm sure we can deal with it. We are dealing with a whole series of these matters, as your lordship knows, outstanding matters of the plaintiffs' case. We are not endeavoring to delay this, it's just counsel needs time.

THE COURT: All right. What's next?

MR. WILLMS: Next, my lord, it's an affidavit. There were five affidavits respecting the underlying documents, my lord, which were filed in July of 1987, five custodial affidavits. Cross-examination has taken place on one of them, and I would like to tender each one now and have them marked as exhibits proper. The first one is the affidavit of Percy J. Vandy --

MR. RUSH: Well, I don't think any of these should be marked until the cross-examinations have occurred, my lord.

MR. WILLMS: Well, my lord.

THE COURT: I don't think the plaintiffs' territorial affidavits were marked until after the cross-examination.

MR. WILLMS: They were marked, my lord. Some of the plaintiffs' territorial affidavits bear exhibits 213, number 213 or early numbers. They were all marked. Many of them or most of them were marked prior to any cross-examination on the affidavit.

THE COURT: I don't recall that, but --

MR. WILLMS: Well, if I'm wrong I'm sure my friends will stand up right now and correct me.

THE COURT: I made an order that there be a cross-examination on affidavits, but I don't remember that -- that they were filed in advance, but --

MR. WILLMS: Well, in point, my lord, except for one or two exceptions I don't think any of the cross-examinations on the territorial affidavits have been filed yet, but all of the territorial affidavits have been marked as exhibits in this proceeding.

THE COURT: The cross-examinations haven't been filed, I don't think.

MR. GRANT: Some --

THE COURT: Some have.

MR. RUSH: Yeah, sure.

MR. WILLMS: One or two. But, my lord, this procedure, the custodial affidavit procedure, in my submission, coming as a result of your lordship's ruling on how to deal with this, the cross-examination, doesn't render

1 the affidavit admissible or inadmissible. The
2 cross-examination is the cross-examination. But we
3 would like to mark -- mark them as exhibits at this
4 time, the five that have been delivered to my friends.
5 THE COURT: Well, I'm -- I don't think there's any magic in
6 this. I think that the affidavits don't have to be
7 marked now, but if you want to identify them, and
8 subject to what your friends said, I'll make an order
9 there be cross-examination on those affidavits.
10 MR. WILLMS: I think that's already been done.
11 THE COURT: Has it?
12 MR. WILLMS: There has already been an order that this evidence
13 be led on the custodial affidavit and that my friends
14 cross-examine on it.
15 THE COURT: I don't know if you want them marked, Mr. Willms,
16 because your friend doesn't want them marked, or your
17 friend doesn't want them marked because you do. It
18 doesn't seem to me to make any difference.
19 MR. WILLMS: I want them marked because I'm going to ask the
20 other documents be marked.
21 THE COURT: What other documents?
22 MR. WILLMS: The documents these go to. For example, this
23 custodial affidavit is in respect of Exhibit 24B which
24 has been marked for identification, and I am going to
25 be submitting once this affidavit is marked that
26 Exhibit 24B should be an exhibit proper at this trial,
27 and then I'll going to be submitting that Exhibit 24B
28 should be an exhibit proper at this trial.
29 MR. RUSH: Isn't that the very problem, my lord. There's
30 nothing magic in the affidavit, but a lot of magic in
31 these maps, and they're all, in my submission, it's a
32 function of the cross-examination as to whether or not
33 these maps have any utility at all in their form.
34 THE COURT: Just a moment. Why should underlying documents be
35 marked until the affidavit -- the cross-examination
36 takes place. Surely that's the point of the
37 cross-examination for your friends to argue that the
38 maps should not be marked, or the underlying documents
39 should not be marked.
40 MR. WILLMS: Well, my lord, there would be in respect of
41 procedure if that was the concern of my friends. That
42 is that the -- there are some problems with the
43 custodial affidavits and there, you know, my friends
44 may explore what they may. But throughout this trial
45 starting with Mr. Rush early in the trial talking
46 about having his cartographer look at the base maps
47 through to my cross-examination of Marvin George to

1 show he did not look at the plaintiffs' alienation
2 series through to my examination of Mr. Skoda, the
3 plaintiffs' cartographer, we now showing he didn't
4 look at the topographic material as a basis, it's my
5 submission that if I tender the document now that I'm
6 entitled, in my submission, to my friends complete
7 objections. Not just the objection that there's
8 cross-examination that they need to do on the
9 underlying documents, but if my friends say that they
10 object to, for example, the transfer of the underlying
11 material cartographically to the map, or if my friends
12 say that they object to the cartographic information
13 that is on the map that, in my submission, by
14 tendering it now I'm entitled to have all of my
15 friends' objections placed on the records so that we
16 may deal with all of them. What I fear, my lord, is
17 that we'll have cross-examinations on the affidavits,
18 we'll come in, solve all of my friends' concerns about
19 custody and about business records, and then have an
20 objection at that time to some cartographic inaccuracy
21 or insufficiency of either the map itself or the
22 transfer from the underlying document to the map.
23 Now, I've asked my friend a number of times in court,
24 and especially during the cross-examination of Marvin
25 George, and during the cross-examination of Lou Skoda,
26 if there is any cartographic problem that the
27 plaintiffs have with these maps, and I've been met
28 with stoney silence. And, in my submission, this is
29 an appropriate way to have my friends state for the
30 record what his objections are. And if his objections
31 just go to the underlying documents, either they're
32 not business records or the custodial affidavits are
33 insufficient to prove them, so be it. Then we'll deal
34 with it on that basis, but if he has additional
35 objections, my lord, in my submission, those should be
36 set out on the record as part of the objection to me
37 tendering this material, otherwise great unfairness,
38 in my submission, will take place if at a later time
39 in October my friend says after we've satisfied the
40 business records exception to the hearsay rule, after
41 we've satisfied the custodial issues my friend then
42 says: Oh, well, this is all inaccurate. My own
43 cartographer says that you've done it all wrong and
44 therefore you better prove it, because I want to
45 cross-examine on that. Now, in my submission, my
46 lord, the way for us, the defence, to know what it is
47 that we need to meet is appropriate to tender the

1 document now and have my friend state for the record
2 what his objections are. All of them.
3 THE COURT: Well, I think that is a different matter. I think
4 you are tendering the documents and your friend says
5 it isn't timely to have them marked. I'm not going to
6 get very excited whether they're marked or not. I
7 think there may be some fairness-substance in wanting
8 to know what the objections are, and I think your
9 friend should at an early date give you a clear
10 statement of what his objections are and why they
11 shouldn't be marked. And it seems to me it's a
12 question of fixing a time within which that might be
13 done. Are you in a position to respond to that, Mr.
14 Rush?
15 MR. RUSH: Well, stoney silence my friend talks about. I might
16 read the letter I sent to Mr. Mackenzie on April 23,
17 1989 with regard to what we were prepared to do with
18 regard to the alienation maps. The point of
19 cross-examination is to probe the reliability or the
20 confidence that we can place in the underlying
21 information which was said to have been transferred
22 from these underlying facts onto the map. And in at
23 least the one cross-examination that has been
24 conducted, frankly, I don't have much confidence in
25 the underlying or the information that that witness
26 had about the underlying information. However, that
27 may change. There is, in my submission, information
28 on the maps that's -- that has become apparent in the
29 presentation of the defendant's witnesses now that is
30 certainly not up to date, so what I can say is that I
31 think it is the function of the cross-examinations
32 about to happen, which my friend didn't advise you
33 that we had agreed that we were open to having these
34 cross-examinations, that was convenient for counsel,
35 in Victoria as suggested by my friend in the month of
36 August, and we suggested a date. It's not as though
37 there's nothing happening on this side, as my friend
38 would suggest. And, in my submission, my lord,
39 what -- when we have completed these
40 cross-examinations it seems to me that's the time when
41 my friend might have a reasonable request to make of
42 us, and that is do you have any other objections. And
43 what we're trying to do is look at the material and
44 clear up what we think are the difficulties with this
45 process, because we think essentially it is not a very
46 convenient way to amass a huge volume of essentially
47 opinion material and place it on a map.

1 THE COURT: Well, it's over two years ago that Mr. Goldie
2 interrupted plaintiffs' case in Smithers to make his
3 application to have the alienation documents admitted
4 into evidence, and I suppose cross-examination was
5 ordered at that time. Although, I don't think the
6 affidavits were then extant, but I notice that this
7 one is filed July 14th, 1987. And I think that the
8 time has come when there should be some -- some
9 finality to that. And I take that to be maybe what
10 Mr. Willms is seeking so that he will have an early
11 appreciation of where -- or not early, but a timely
12 appreciation of what difficulties there are, and for
13 that reason it seems to me that we ought to have the
14 formal argument on these matters early in September.
15 And I'll leave that to counsel to schedule. I expect
16 it's included in Mr. Goldie's schedule already. I
17 think I heard about this this morning, and I think
18 what we need now is probably a time within -- within
19 which the cross-examination will have to be
20 undertaken. Is the end of August a reasonable time to
21 fix for the completion of the cross-examinations? You
22 have the affidavits now.
23 MR. RUSH: We have one set of affidavits, and that set we've had
24 discussion -- discussions about, and I thought some
25 measure of agreement. Certainly in my letter to Mr.
26 Mackenzie I told him we were ready to go ahead with
27 those cross-examinations, four of them, in the month
28 of August in Victoria.
29 THE COURT: Yeah. What other affidavits are there?
30 MR. RUSH: Well, today Mr. Goldie advised the court that there
31 will be another set of custodial affidavits which we
32 do not yet have which he promises by the end of the
33 month, which presumably we'll be -- desire affidavits
34 on those cross-examinations if they're like the kind
35 we already have. Now, if those can be produced in a
36 timely way then presumably we can try again to
37 schedule another set of cross-examinations for those
38 affidavits. And there was -- Mr. Grant reminds me
39 that there was some comment by Mr. Goldie that perhaps
40 that would be done in court in September. Now, for my
41 part that's not necessary to do it in court, but it
42 may reflect what Mr. Goldie's view is of the
43 scheduling of these things and how we can fit them in,
44 but I would think to answer your lordship's earlier
45 question that to schedule to completion by the end of
46 August might be somewhat early. I think it certainly
47 could be done by the middle of September.

1 THE COURT: Well, I think that's a little bit late if Mr. Goldie
2 is going to anticipate closing the defendant's case in
3 late October. If there's something that has to be
4 done that resulted from the cross-examination there
5 has to be time to do it. Maybe I can ask Mr. Goldie
6 how many more affidavits do you expect to be tendering
7 in this area?
8 MR. GOLDIE: I mentioned this morning, my lord, I couldn't give
9 that number because we are trying to have one person
10 swear to as many of the custodial aspects of a number
11 of exhibits as possible.
12 THE COURT: And is there a special reason why you propose to
13 having this cross-examination in court rather than out
14 of court?
15 MR. GOLDIE: No, I put it this way, at least I believe I put it
16 this way, that in my schedule I said those custodial
17 affidavits which could not be examined out of court
18 would have to be examined in court. My suggestion is
19 that if my friends are not -- do not feel that they
20 can argue to state the objections other than on the
21 custodial aspect at the present time that we have an
22 argument with submissions on objections to the
23 alienation series at the conclusion of the evidence of
24 Messrs. Steventon and Marshall. That meets the
25 concern of Mr. Rush that at the end of August would be
26 too late. It would, I hope, have got a good deal of
27 the underlying material out of the way. And I
28 continue to hope that perhaps my friends might
29 reconsider the point that Mr. Willms made, which is
30 the transfer of the material from A to B. The map is
31 done in an unexceptional way.
32 THE COURT: All right. Well, I think that I will content myself
33 by giving leave, if it's required, to cross-examine on
34 these affidavits filed and to be filed, and I think
35 that it -- I think the affidavits to be filed should
36 be filed before the end of this month. And I think
37 the cross-examination should all take place before the
38 end of the evidence of the witnesses who have been
39 mentioned. I have their names here somewhere.
40 MR. GOLDIE: Steventon and Marshall, my lord.
41 THE COURT: Steventon and Marshall. Yes. Sounds like a
42 department store. And if not then we'll have to see
43 whether there is time to have the cross-examinations
44 in court or after court or when. I do not think it is
45 necessary that the affidavits and the underlying
46 documents be marked at this time. I think -- I think
47 the course of wisdom is not to mark them in case

1 something dramatic is developed in the
2 cross-examinations, which is what the
3 cross-examinations are for is to determine if there's
4 any reason not to have them marked. It would be
5 premature, I think, to mark them now. I think the
6 desire of the defendant to have the objections clearly
7 delineated is satisfied by the course that I have just
8 outlined, and I don't think we can initially do
9 much -- usefully do more about it at this time.
10 MR. GOLDIE: My lord, may I raise again the affidavit of Mr.
11 Fletcher and ask if my friends have had an opportunity
12 of reading that affidavit, because if they still have
13 a concern about it, having regard to what I have said
14 in light of your lordship's ruling made at the time
15 Mr. Shelford gave his evidence, then what I would
16 propose doing is taking his affidavit and indicating
17 to your lordship and to my friends the areas that I
18 consider in his affidavit would be subject to the
19 Shelford type of objection if made. In that way -- if
20 my friends say yes, we make that objection in that way
21 we can have this affidavit dealt with as if the
22 witness was in the stand, the questions were being put
23 to him and objections taken, and we can get on with
24 the job of examining him and get that out of the way.
25 And subject to your lordship's directions that's what
26 I would wish to do at this point.
27 THE COURT: Have you had a chance to read the affidavit, Mr.
28 Rush.
29 MR. RUSH: Yes, I think we can go ahead.
30 MR. GRANT: I can deal with this. I take -- the plaintiffs take
31 exception to the reading in of any part or the
32 tendering of this affidavit. My lord, I've just in a
33 brief time copied the amendments to the Supreme Court
34 Rules that deal with this.
35 MR. GOLDIE: May I have a copy, please?
36 MR. GRANT: I just have one copy. It's Rule 42. I'll read out
37 the relevant section. This, of course, is the April
38 19th, 1989 rule. And it's Rule 42 that says:
39
40 "The evidence of a witness..."
41
42 It's on the second page, my lord.
43
44 "May be given by affidavit if a copy of the
45 affidavit is furnished to every party of record
46 by the party tendering the affidavit at least
47 30 days before the affidavit is given in

1 evidence."
2
3 Rule 43 -- sub rule 43.
4
5 "The deponent of an affidavit under sub rule 42
6 may only state, would be permitted to state if
7 the evidence to be given orally."
8
9 And then there's provisions for cross-examination.
10 Rule 40 sub 48 sets out:
11
12 "The court may on the application of a party
13 furnished with an affidavit under sub rule 42
14 order that the evidence contained in the
15 affidavit be given orally where the court
16 considers;
17 A) that the evidence contained in the evidence
18 is controversial, or;
19 B) there is some other good reason why the
20 evidence should be given orally."
21
22 Now, with respect to this witness, or this
23 affidavit, my lord, the affidavit is 19 paragraphs
24 long. Paragraphs 3, 4, 6, 12, 13, 14, 17, 18.
25 MR. GOLDIE: Just -- can you just do that a little more slowly.
26 MR. GRANT: I'm sorry.
27 MR. GOLDIE: 3, 4, 6?
28 MR. GRANT: 3, 4, 6.
29 MR. GOLDIE: Yes.
30 MR. GRANT: 12, 13, 14, 17, 18 and 19.
31 MR. GOLDIE: Yes.
32 MR. GRANT: Contain inadmissible hearsay. That's the first
33 problem. So, in other words, nine out of 17
34 paragraphs, and, of course, I've excluded a paragraph
35 1 which is the I have personal knowledge paragraph and
36 paragraph 2 that says there's a map here that I'm
37 going to refer to. I've excluded those two, so nine
38 out of 17 paragraphs are in our submission entirely
39 inadmissible.
40 Now, the second point is this, the rule, my lord,
41 says that the court may on application of a party or
42 the evidence contained in the affidavit be given
43 orally where the court considers A, that the evidence
44 contained in the affidavit is controversial. In this
45 affidavit paragraphs 4, 6, 12, 13, 14 --
46 MS. KOENIGSBERG: Slower.
47 MR. GRANT: 17, 18 and 19 all contain controversial material.

1 What my friend purports to do in this affidavit -- my
2 friends purport to do in this affidavit, my lord, is
3 to directly contradict a substantial amount of
4 evidence that you have heard in this trial by way of
5 an affidavit and then have the witness away from the
6 court being cross-examined. The issue, my lord, will
7 involve an issue of credibility. It is, I submit,
8 entirely inappropriate in this case for this type of
9 evidence to be given by way of affidavit. There
10 are -- and I submit that where you have that kind of a
11 problem that the use of affidavit evidence is not
12 appropriate. And that is not the purpose of the rule.
13 It is certainly not the intent of the rule to have
14 substantially, and as I say substantially inadmissible
15 evidence in an affidavit which my friend says we'll
16 deal with that as objections as they come up. I had
17 proposed to my friend if you prepare an affidavit that
18 has got none -- an affidavit of Mr. Fletcher that does
19 not contain objectionable evidence we would be happy
20 to reconsider our position, and I have got no response
21 to that. My friend mentions this letter. I have not
22 seen a response to that I should say, because he may
23 have responded to it in the letter he referred to this
24 morning, but there has certainly not been an amended
25 affidavit prepared. Oh, yes, there is a letter, but
26 where my friend sets out his position that he would --
27 the -- that he has raised in court here, and he
28 suggests that Mr. Fletcher be scheduled for August
29 22nd. This morning he suggested something about 14th
30 and 15th of August, which I may say to my friends
31 those dates are not going to be possible for the
32 plaintiffs' counsel. I determined that over the lunch
33 hour. But, in any event, this is not the type of
34 evidence that is intended by the rule, my lord, to be
35 done by affidavit. This is evidence that is clearly
36 tendered to directly contradict the oral evidence
37 you've heard before your lordship. And if this is all
38 of the evidence that my friend wishes to call we're
39 not talking about extreme extension of trial time.
40 This is generically the same kind of thing that we've
41 already heard, and these witnesses are relatively
42 short, but this is -- there are two problems here, my
43 lord. One is the hearsay, and the evidence is so full
44 of hearsay that the affidavit should not be filed as
45 it is. I mean, my friend says well, we can object as
46 though the witness is in the stand, but when the
47 witness is in the stand and the objection is taken --

1 THE COURT: Where is the hearsay in paragraph 12?
2 MR. GRANT: I'm sorry, my lord. Just a moment. I never
3 heard -- the second paragraph, my lord, second
4 sentence, "I never heard anything from from them about
5 Indians hunting or roaming around the Alpine areas."
6 THE COURT: Yeah. That's not hearsay.
7 MR. GRANT: Well, presumably -- presumably he talked to them.
8 Maybe he didn't. I understand because it's negative
9 maybe --
10 THE COURT: Yeah, but it proves nothing more than what it
11 states, that I never heard anything from old time
12 prospectors about Indians having roaming around the
13 Alpine area. You might say so what to that, but it's
14 not hearsay.
15 MR. GRANT: Well, that --
16 THE COURT: 13 is a little bit different.
17 MR. GRANT: Yes.
18 THE COURT: Although it could easily be edited so it was
19 inobjectionable.
20 MR. GRANT: But, my lord, what I'm saying is that even if we
21 edited out the hearsay here what we have proposed here
22 is to the defendants to call evidence in this manner
23 that is highly controversial and is in issue --
24 THE COURT: I'm sorry. I'm only up to paragraph 14. I don't
25 see anything very controversial in any of this. This
26 is all evidence he could easily give in the witness
27 box.
28 MR. GRANT: Wait a minute. What I'm saying, my lord, is it's
29 controversial. There's two points here. One is it's
30 -- it contradicts evidence that you have heard. It's
31 an issue between the parties. You're going to have to
32 weigh this evidence up between the two parties. And
33 you're going have to weigh it up on the transcript of
34 this witness as opposed to the oral evidence of the
35 plaintiffs' witness. And Rule 48 suggests, I would
36 say, that it makes -- 48(a) of the rules that --
37 THE COURT: Well, I think that controversial has to be given a
38 reasonable definition. It may be controversial in the
39 sense that it isn't what the plaintiff would like him
40 to say, but if there isn't much likelihood that he's
41 going to be shaken on cross-examination then that risk
42 can be taken by having him cross-examined out of
43 court. But in paragraph 14 he says I never saw any
44 Indians in the Silver King Mountain Cronin Mountain
45 area during the entire time I was packing, hunting,
46 trapping and guiding through that area. I think it
47 highly unlikely that in cross-examination he's going

1 to be shaken as on television and say yes, I saw all
2 kinds of Indians in this area. That doesn't happen in
3 litigation, only on television.
4 MR. GRANT: I appreciate that, my lord, only too well.
5 THE COURT: It's controversial and different from what other
6 witnesses have said, but not necessarily different.
7 He says if they were there I didn't see them.
8 MR. GRANT: But what I'm saying, my lord, is at the end of the
9 day you're going to be asked to weigh the evidence of
10 this witness as opposed to the evidence of the others.
11 THE COURT: Yes.
12 MR. GRANT: And certainly -- and certainly --
13 THE COURT: That's a problem we have -- we've learned to deal
14 with that ever since we -- parties were allowed to
15 file medical reports. One files a medical report the
16 other calls the doctor. They both say something
17 completely different. One says you'll never work
18 again and the other one says there's nothing wrong
19 with it. That happens all the time. Judges weigh
20 those things. That's not the kind of controversial
21 evidence that I think the rule would require or would
22 expect a witness to be brought to prove things of this
23 kind. I don't think that's what controversial says in
24 this sense. I've only got as far as page 14. Maybe I
25 better read the rest of it.
26 MR. GRANT: Well, I've referred you to paragraph 17 with respect
27 to controversial areas. And the point of 17, 18 and
28 19 -- just a moment. Oh, okay. I'm sorry, my lord,
29 my note was -- I did say this and I -- my note
30 reference was with respect to hearsay 17, 18 and 19 do
31 not contain hearsay.
32 THE COURT: No, I don't think they do.
33 MR. GRANT: No. I just -- I in discussions with my colleague
34 there was -- I had seen another notation, but no, they
35 don't.
36 THE COURT: Well, in the context of this case, Mr. Grant --
37 MR. GRANT: Can I just --
38 THE COURT: I'm sorry. Go ahead.
39 MR. GRANT: Just raise one more point. My lord, I had proposed
40 a compromise to my friend. I didn't think it was a
41 very difficult one. And that compromise was proposed
42 when I had raised the issue of the objection I
43 ultimately raised with Mr. Shelford, and which you
44 ruled on. It was for him to file an admissible
45 affidavit of this man. I do not see unless we use the
46 black out approach, which I think is not -- shouldn't
47 be necessary, why my friends cannot amend, and if they

are going to proceed by this method, tender an affidavit that is admissible and then there is no dispute or debate in the future as to what was the evidence and what was not. There's been no suggestion in -- there's been no suggestion whatsoever since I made that proposal to my friends and since we agreed to Mr. Hobenshield going ahead, there has been no response in that to saying well, yes, we can do it or no we can't, Mr. Fletcher has gone to Europe to the 14th of August, or something like that. I mean, there's been no suggestion why that can't be done. And I say if we are going to proceed by affidavits my friends put -- redo the affidavit and clean it up -- it's not a big problem -- and tender a proper affidavit. And I even left it open that once we saw that that we would reconsider our position regarding the cross-examination of him out of court. But, my lord, there's been nothing been done. I should just say on the Hobenshield affidavit that paragraphs 8 and 17, which is the one that was tendered as Exhibit 1113, paragraphs 8 and 17 --

THE COURT: I don't have it.

MR. GRANT: -- Contain inadmissible hearsay.

THE COURT: As far as I can see the only hearsay in this affidavit that I've noticed is paragraph 3 and in the first two sentences of paragraph 4.

MR. GRANT: 3 and 4. The last -- the paragraph 13.

THE COURT: Paragraph 13.

MR. GRANT: Yes, you'd noted that. 3, 4 and 13.

THE COURT: Oh, yes, 13. Oh, pardon me. First sentence of 13.

MR. GRANT: Well, you see.

THE COURT: Part of the second sentence if that's what he means. He said I know that there have always been deer throughout the Bulkley Valley. I would take that to mean there has always been deer in the Bulkley Valley in his life time.

MR. GRANT: Well, it's unclear.

THE COURT: That's pretty clear if it's limited to personal knowledge that he didn't know there were deer throughout the Bulkley Valley before he was born.

MR. GRANT: That's right. And then he forms this opinion.

THE COURT: I don't -- except for those things I don't find anything objectionable in that affidavit at all. While if this was a motor vehicle accident case where there was a plaintiff and a defendant and they were the only two witnesses it might be that for credibility purposes you would want to see them both,

1 but in a case of this kind it seems to me that this is
2 the reasonable way to deal with this problem. I don't
3 think you should bring the witness to Vancouver to say
4 those things.
5 MR. GRANT: Well, as I've said, and I want this to be very
6 clear, my lord, I had proposed over a week ago when my
7 friend was anxious to get a response that my friend --
8 that there was a way to resolve it.
9 THE COURT: Your friend probably thought you were saying there
10 was hearsay in paragraphs 3, 4, 6, 17, 18 and 19. I
11 don't know if --
12 MR. GRANT: No, I had just said that there was inadmissible
13 hearsay in the affidavit and that if he amended it to
14 clean up the hearsay that we would be happy to
15 reconsider our position, but that we didn't think that
16 this affidavit which contains this inadmissible
17 evidence -- I mean, my friend makes the parallel, as I
18 say, of the objection. Well, the answer of the
19 witness couldn't go in.
20 THE COURT: When is it proposed to have this cross-examination?
21 MR. GRANT: Well, I had proposed Mr. Hobenshield on the 21st.
22 My friends letter of yesterday, which I had received,
23 suggested that Mr. Fletcher be scheduled for August
24 22nd, and my friend had indicated this morning he had
25 proposed August 14th and 15th.
26 THE COURT: I don't care what date it is. There's lots of time
27 to revise the affidavit along the lines that I've
28 mentioned. I don't see why that shouldn't be done.
29 MR. GRANT: And if that's done then we can deal with it
30 appropriately.
31 THE COURT: Yes.
32 MR. GOLDIE: Well, all right. My lord --
33 THE COURT: If there is no problem in cleaning up the affidavit
34 inartistically as --
35 MR. GOLDIE: Well, my friend's letter objecting to it as so full
36 of hearsay, and when I'm invited to redo an affidavit
37 that is so full of hearsay that it is entirely
38 inadmissible I'm really at a loss to begin. The
39 only -- the only areas I can see any objection to, my
40 lord, is the first two sentences of paragraph 3.
41 That's number one. I've got 3 points. That's number
42 one. Unless my friend is also objecting to the
43 witness saying that he was born in 1918.
44 MR. GRANT: We dealt with that, my lord, and although I said
45 that, we weren't objecting to that.
46 THE COURT: I'm going to weigh the hearsay rule on that.
47 MR. GRANT: The position I took on Mr. Shelford would apply

1 there.
2 MR. GOLDIE: All right. The next one is the first 3 sentences
3 of paragraph 4 consisting of the first 4 lines.
4 MR. GRANT: That's correct, in paragraph 4.
5 MR. GOLDIE: And if my friend makes the objection that he took
6 to Mr. Shelford I told him that I would agree with
7 that ruling, that the ruling your lordship made
8 applied to that statement.
9 THE COURT: Yes.
10 MR. GOLDIE: The only other place is paragraph 13.
11 THE COURT: Yes.
12 MR. GOLDIE: The first 3 lines, the first sentence, and the
13 words "I understood from him and".
14 THE COURT: Yes.
15 MR. GOLDIE: And then from then on. And, my lord, I'm unable to
16 see any other hearsay in the rest of this document.
17 Now, as to cleaning up the affidavit my friend has
18 omitted to say that my reply to his suggestion that we
19 file a new affidavit was to make precisely the
20 statement that I have made, that if my friend took the
21 objections, and I anticipated that he would be
22 objecting to a whole series of paragraphs, those 3
23 that I've now mentioned I would agree were covered by
24 your lordship's ruling.
25 THE COURT: I think you can make those amendments then. There
26 may be cross-examination on that affidavit.
27 MR. GOLDIE: The next concern that I have, my lord, is that I --
28 if I can do that, and Mr. Fletcher, of course, lives
29 in Smithers, and we have the mails to to take care of,
30 and he's not a young man. I still want to do this in
31 August. I do not want to be met with the objection
32 that the affidavit isn't delivered in a timely
33 fashion, or anything of that order.
34 MR. GRANT: Well, I had -- in my letter I had invited that.
35 THE COURT: The affidavit --
36 MR. GRANT: I had invited my friend that we would do it. I had
37 assumed if we could come to an agreeable date for Mr.
38 Hobenshield that we'll deal with Mr. Hobenshield and
39 Mr. Fletcher at the same time. I believe counsel are
40 endeavoring to schedule that in August.
41 THE COURT: I'm not going to make an order, because things do
42 happen. I think there should be no reason why those
43 cross-examinations couldn't take place by the end of
44 August. I think they should be corrected before then.
45 MR. GRANT: That's what our objective is unless my friend puts
46 in some entirely unexpected material that I have no
47 idea of.

MR. GOLDIE: Let's meet that right now, my lord, and cross out the lines that I read in that affidavit.
THE COURT: It's been recorded. I don't think you have to do that.
MR. GOLDIE: Well, in that case, my lord, I feel no necessity of filing a new affidavit. Those lines are crossed out. My friend has made the objection. I've acceded to them. The affidavit is there to be cross-examined on with the lines crossed out. Now, that takes care of that, in my submission.
MR. GRANT: Well, I raised the objection two weeks ago. I asked my friend to deal with it as I suggested, my lord. I see no point in going on with this.
THE COURT: I'll tell what you I'll do. I'll have my secretary type the affidavit if that's the problem. I don't know if there is a problem amending the affidavit to exclude hearsay. I'll have it typed.
MR. GRANT: Oh, well, I'd be happy to have it typed in my office.
THE COURT: In view of the objection where there is a hearsay I think there should be a new affidavit. Who types it I don't really care. All right.
MR. GOLDIE: I just wanted to say, my lord, that the letter that was delivered to my friend's office last night with respect to the dates was that Mr. Hobenshield is not going to be in the country as we learned on the 21st -- on August the 21st. We wanted to schedule Mr. Fletcher at the same time. If my friends are not prepared to go ahead until the 21st well, we'll have Mr. Flethcer's cross-examination then and we'll have to struggle and find a date for Mr. Hobenshield when he's available.
THE COURT: All right. There must be something else.
MR. WILLMS: I don't have anything further, my lord.
THE COURT: All right.
MR. RUSH: Nothing further from the plaintiffs.
THE COURT: Thank you. You're not going to let us down, are you, Ms. Koenigsberg?
MS. KOENIGSBERG: I'm sorry. I should have stood. I have nothing.
THE COURT: All right. Well, then we'll adjourn until the 5th of September. If there are matters that counsel need my assistance on I will be available on reasonably short notice, and I look forward to seeing you all in September and wish you all a pleasant interim, unless I see you before then. Thank you.
THE REGISTRAR: Order in court. This court stands adjourned.

1 (PROCEEDINGS ADJOURNED)
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3 I hereby certify the foregoing to be
4 a true and accurate transcript of the
5 proceedings herein to the best of my
6 skill and ability.
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8 _____
9 Peri McHale, Official Reporter
10 UNITED REPORTING SERVICE LTD.
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