VANCOUVER, B.C.
JULY 20, 1989

THE REGISTRAR: Order in court. In the Supreme Court of British Columbia, this 20th day of July, 1989. In the matter of Delgamuukw versus Her Majesty the Queen at bar, My Lord.
May I remind you, sir, you are still under oath.
THE WITNESS: Yes.
THE REGISTRAR: Would you state your name for the record please.
THE WITNESS: Mr. Shelford.
THE COURT: Before you begin, Mr. Grant, I wonder if I could request counsel to give some thought to long-term scheduling, and particularly whether they think that we will finish the evidence in December as previously discussed from time to time. There are some matters that I have to make some plans about during the week of January 21st and 25th, and I would not want to let them interfere with this trial, if we still will be going. Assuming we won't be, but I won't take any chances. Perhaps tomorrow counsel can give me an indication of whether we still think we will still be hearing the evidence in January, and if so, for how long. Thank you.
All right, Mr. Grant.

CONTINUATION OF CROSS-EXAMINATION BY MR. GRANT:

Q Mr. Shelford, I would just like to ask you about something you referred to the other day. This is when -- your experiences when you were young, Jimmy Andrew, and you mentioned, amongst other things, that Jimmy Andrew dried berries?
A That's true.
Q Did you observe the process that he used in drying berries?
A Well, the only process I have seen is where they put the berries on a mesh out of the -- so that rain doesn't get on them or anything, they put them in an area where the wind can flow through, so that would dry them. And that's the only method I have seen in the drying of mainly huckleberries up in that part of the country.
Q When you say that's the only method you have seen, was that Jimmy Andrew that did that?
A Yes, Jimmy Andrew that did it, and I have seen it in Fort St. James too.

THE COURT: What kind of a mesh?
THE WITNESS: Very fine mesh, like a mosquito mesh, screen door mesh, so the berries can't drop through, but the air can get through.
MR. GRANT:
Q Have you seen the use of leaves and covering them with leaves?
A No, I haven't. I am surprised, because I thought if you covered them with green leaves, then they would mold.
Q Okay. But you haven't seen the use of leaves for them?
A No.
Q Now, in those early days did you enquire of Jimmy Andrew as to any -- what was used before mesh? You don't --
A Dry leaves, not green leaves though.
Q Dry leaves were used?
A Yes.
Q Okay.
A Especially after -- cow parsnip as we call them.
Q Okay. You would agree with me that salmon was an important part of the diet of the Jimmy Andrews' family?
A Did your say salmon?
Q Yes.
A No, there was no salmon.
Q You are not aware that Jimmy Andrew went to Moricetown each year to get salmon?
A Well, if you went to Moricetown you would get salmon, but not at Ootsa Lake. And certainly in my experience I certainly never saw Jimmy Andrew ever come back with a load of salmon from Moricetown.
Q But they -- of course you were not always at the Andrews' place?
A No, but they had to go through our place if they brought them in by wagon from over the Buck Flats Road from Houston.
Q Okay. But they could have come in the other way through Owen Lake?
A No, they couldn't.
Q Okay.
A Because the Owen Lake Road wasn't open until a lot later than -- I presume the period we are speaking about in -- it wasn't open until after World War II. And they would still come through the ranch, because even if they come through Owen Lake, they hit the head

of Francois Lake, and they would still have to come over Nadina Road to our ranch in order to get down to his boat land and below our ranch, because there was no trail or road through from the Owen Lake Road to Jimmy Andrews' bay until into the late sixties.

Q Do you know Irene Dohm?

A No.

Q You knew that one of Jimmy's daughters was Irene?

A I'm sorry, I didn't recognize the --

Q I understand that. You don't recognize --

A I did know Irene Andrew.

Q You didn't recognize her married name Irene Dohm?

A No, I didn't.

Q Did you know -- just one thing. To go from Jimmy Andrews' place to Matthew Sam's, would they go through your place?

A Yes, if they used a wagon to go they would have to. The only other method would be by snowshoes across country.

Q And they could go by snowshoes across country?

A Yes. But they wouldn't carry an awful lot of salmon in by snowshoes.

Q Well, I am not suggesting that they carried salmon. I was just asking the route, Mr. Shelford. They could travel from Matthew Sams to Jimmy Andrews in the winter months by snowshoe?

A But not likely when we were trapping, because we would see their snowshoe tracks across the trails, because we went way out past where Jimmy Andrews' camp was, and he would have to take a big horseshoe to get around our trapline, if he did it, which I think is very very unlikely.

Q David Tibit that you mentioned yesterday, did you know he was also known as Burns Lake David?

A I never heard that term.

Q You never heard of Burns Lake David?

A No, I didn't.

Q Do you recall when you were young that there was an early Indian camp found at the site of the Ootsa Lake Stampede?

A I'm not surprised. We found the Indian -- the arrowheads on our ranch too when we were plowing.

Q Okay.

A Which is well-known, I think, by lots of people.

Q I am showing you -- before we go to this article, what would these arrowheads look like, Mr. Shelford, that you saw?

A They were just a pointy piece of flint that obviously had been pointed by some types of rough tools, I would think, chipped out 'til they came into a point, with a ring around the back opposite, so they could be tied onto a spear or whatever or bow and arrow.

Q Uh-huh. I am referring you to the article from the Interior News of August 19th, 1931, which is entitled "Found Early Indian Camp at Ootsa Lake". And I would just ask you if you would look at that, and if that refreshes your memory about that event.

A I'm afraid I can't read it, though, because it's so blurred.

Q I will assist you there. The sub-heading is:

> "Workmen Unearth Indications of Big Native Village at Ootsa Lake Stampede Grounds."

And then it starts:

> "In preparation for the Labour Day Stampede at Ootsa Lake ..."

If I may pause there. Do you recall the Labour Day Stampede at Ootsa Lake?

A Yes, but we never went to them.

Q But these were events in that area?

A Yes. Same as the 1st of July was at Streatham and 24th of May at Wistaria.

Q It then goes on to say:

> "The stampede and barbecue committees are working faster than either the federal or provincial governments, having established a relief camp on the prairie surrounding the lone grave containing some of the reputed ancestors and descendants of the famous (or infamous) but defunct Skin Tyhee."

And then the third paragraph states:

> "In the heavy growth of timber fringing the shore line just west of the grounds are many signs of the former existence of a large Indian village probably centuries ago, affording a most interesting study for the amateur archaeologist.
>
> At fairly regular intervals, many deep,

1 saucer-shaped depressions occur, from thirty to
2 forty feet in circumference. This is
3 undoubtedly the site of the lodges of a
4 generation of the distant past, as the timber
5 growing in some of these depressions clearly
6 indicates an age of over one hundred years,
7 while evidence of forest fires of even an older
8 date would invite the investigation of Mr.
9 Harlan I. Smith whose knowledge of Indian lore
10 is second to no one in the Dominion."
11
12 With reference to that, do you remember that find
13 or discussion --
14 A No. I can recall that there was a number of
15 discoveries in the general area, but not that one in
16 particular.
17 Q And they were discoveries of both individual
18 arrowheads and discoveries of village sites?
19 A I never heard about the village sites, no, but
20 discoveries of arrowheads were fairly common, I would
21 say.
22 Q Okay. Now, you say in the area. That included your
23 ranch you described?
24 A Yes.
25 Q And on your uncle's ranch as well?
26 A Never found any on my uncle's ranch.
27 Q Okay. You mentioned yesterday that you knew Richard
28 Morgan of Kitwanga?
29 A Yes.
30 Q And I believe you remembered Harold Sinclair?
31 A Yes, I recall the name.
32 Q Yes. Okay. Did you know John Robinson of Kitwancool?
33 A No, I didn't.
34 Q Or do you know the name Walter Douse of Kitwancool?
35 A No, I don't.
36 Q Steven Morgan of Kitwanga?
37 A Steven Morgan I heard of, yes, and I likely met him at
38 some time.
39 Q Arthur McDames of Kitwanga?
40 A No.
41 Q David Wells of Kitwanga?
42 A No.
43 Q Joe Bright of Kitwanga?
44 A No.
45 Q Richard Lattie of Kitwanga?
46 A I don't recall any of them.
47 Q George Moore of Kitwanga? Robert Harris?

A Robert Harris, I have heard of him.
Q Okay. And Fred Johnson?
A No.
Q Fred Johnson was in later life blind, and he was an elder in Kitwanga. Does that help you -- do you remember?
A Yes, I think I recall him coming to some of my meetings in Kitwanga.
Q Right. I believe you said you didn't really remember anybody except Richard Morgan at this meeting at Kitwanga that you described.
A Not to really say I know him. Richard I would know on the street if I met him. The others I wouldn't unfortunately.
Q But you don't remember the names of any of the other people at that meeting --
A No.
Q -- right now?
A No, I don't. I was more interested in what they had to say. That's true with any group I met.
Q And I believe you indicated yesterday that you would get letters from people -- or the other day you said as a constituent, and even -- because of your interest, I take it, in the gas, the oil pricing, you got more correspondence from persons outside your riding even than inside?
A That is correct.
Q Now --
A But not Indian people.
Q The outside your riding?
A Very few ever wrote to me, as I recall, from outside of the riding.
Q Okay.
A I am not saying there wasn't some, but there certainly wasn't many to my recollection.
Q Right. I take it that -- and I have requested my friends to produce this correspondence, and I understand, from what they have said, that you don't have any of it any more?
A No, I don't. Sometimes I wish I had.
Q Right. You do make some reference to some of the correspondence, one or two letters, I believe, in your books?
A Yes.
Q And did you have those letters?
A No. It was just one that made a tremendous impression on me, I guess, and I remember it.

Q Okay. So basically when you were even writing your book, you didn't have access to this correspondence, and --
A No, that's right.
Q And you have no knowledge of where it is today?
A I have a whole sheet of clippings there for every year, for every session I had kept clippings, and that's -- that was useful material, but not letters.
Q Now, when you kept clippings, did they make -- are those clippings with reference to things that you said in-house, for example, or --
A There would be certainly some of them.
Q What would the -- would the clippings cover -- be all of the coverage of the house sittings?
A No. No. But they, of course, are obtainable in the parlimentary library, no secret about that. But the ones I would be specially interested in was when I was on the Gasoline Inquiry, I was involved in bringing in of the Dental Technicians' Act, on all of those things, on those major issues, like the pavement of Highway 16, the building of dams and that type of stuff where I was having a say in the legislature. And being as there was no Hansard, I did keep clippings of those type of events. But just normal letters to individuals or such like, they didn't get into the scrap-books at all.
Q Okay. Well, I am going to show you a letter. This is Exhibit 56 in the commission evidence of Mr. Jeff Boys. It's not for your concern, just His Lordship.
THE COURT: Oh, Exhibit 56.
MR. GRANT: Exhibit 56 in the commission evidence of Mr. Boys, a witness of the Federal Crown. So obviously that commission hasn't been filed yet, but ultimately it will be an exhibit to that, just for cross-reference.
Q Now, just -- I'll just give you a minute to read the letter.
A What is the date of this letter?
Q I am instructed that -- I see it's clipped off. It may be '46 or '48.
A It's 40 something. I can see the 4.
Q I believe it's -- it's November 9th, '46. You can see the stamp. It's 1946.
A All right.
Q Have you had a chance to look at it now?
A Yes.
Q This is a letter, as you can see, from Mr. Harold Sinclair to J.V. Boys. And firstly I would like to

ask you, do you know that J.V. Boys was the Indian Agent in the Hazelton area?
A Yes, I have heard that. I think likely -- I am quite sure I have met him, but that's all.
Q He was around the time -- he was, I believe, the predecessor, if I recall correctly, to Mr. Jutras, who we have talked about yesterday?
A But certainly I wouldn't get copies of letters like this in those days.
Q In the late forties?
A Yes. Or later on too. I mean, I wouldn't get copies from someone in Kitwanga when I was a member in Omineca, not very likely, unless they sent it to all MLA's or something like this.
Q Well, as you can see, Mr. Sinclair, one of the matters he is raising here in his letter of concern is traplines. You appreciate that. Is that the kind of concern -- is this the kind of correspondence you got from Indian people about traplines, that is about their concerns about the trapline registration?
A Yes, should be letters such as this, and would be letters such as this from white trapline owners, of course, that were disputing trapline boundaries, trapline claims and their registration over the top of part of traplines. Yes, that would -- some correspondence would come in, but not from this area. It was mainly centered in the Babine area.
Q And that -- when you say the Babine area, just because the term Babine and Babine agency are used, are you talking about around Babine Lake?
A Yes. Mainly around the Topley Landing area, but some of the people in Topley Landing had trapping on the other side of Babine Lake, so that's why we refer to it as Babine Lake.
Q Right. Okay. Did you get any letters of concern regarding trapping grounds in the Perow area?
A I don't recall any.
Q It's P-E-R-O-W.
A It's east of Burns Lake.
Q That's one thing you said the other day. Perow is east of Burns Lake or west of Burns Lake?
A East of Burns Lake. Pawling is west of Burns Lake.
Q On Highway 16?
A Both on Highway 16. There really isn't anything at Perow any more. There isn't even a house that I am aware of now in the Perow area. That's one of those little places that sort of died as transportation got

1 better.
2 Q Well, just to be clear here, I understood that Perow
3 is just east of -- is some distance east of Houston,
4 but before -- but west of Burns Lake. Is that
5 possible?
6 A I think I am wrong. I think you are right.
7 Q I think --
8 A Yes.
9 Q It's before Topley?
10 A Yes. I was thinking of Priestly east of Burns Lake.
11 Q And the other day you mentioned Perow as east of Burns
12 Lake. I wanted to clarify that with you. But you
13 know where I am talking about now?
14 A I know where you are talking about now.
15 Q And did you get letters from around that area?
16 A Not that I recall, no.
17 Q Okay. It would be north of the --
18 A North of the highway.
19 Q Uh-huh. And there is houses in the Perow area?
20 A Oh, yes.
21 MR. GRANT: Now, I would like to -- My Lord, as this letter
22 will ultimately become an exhibit, I just ask that
23 this be marked as an exhibit for ID. That this is the
24 reference that he referred to, the types of
25 correspondence that he referred to this particular
26 letter.
27 THE COURT: All right.
28 THE REGISTRAR: Exhibit 1109 for Identification.
29 MR. GRANT: That's the November 7th, 1946 letter from Harold
30 Sinclair to J.V. Boys.
31
32 (EXHIBIT NO. 1109 FOR IDENTIFICATION -
33 NOVEMBER 7, 1946 LETTER FROM HAROLD SINCLAIR
34 TO J.V. BOYS)
35
36 Q One of the matters -- you remember the correspondence
37 I showed you yesterday, I believe your correspondence
38 to Mr. Jutras. You were going to meet with him, and I
39 think that was in 1955.
40 A Yes.
41 Q And you met with him either that year, or it might
42 have been the following year, but you did meet with
43 him?
44 A Yes.
45 Q Did you say you met with him on only one occasion, or
46 would it be more than one occasion?
47 A I would be surprised if I didn't meet him more than

once. I would be very surprised. It was later on the Indian Agent in Burns Lake, so I deal with him more, but it was also I deal with one in Vanderhoof area too.

Q I would like to show you a letter. This is Exhibit 6 in the Boys' commission evidence, and this is a letter from Mr. Gill, the game inspector. First of all did you know Mr. Gill?

A Yes, I did.

Q And he was a Game Inspector with the Games Commission. It was the Games Commission, I believe, at that time?

A Yes, and he was based in Prince George.

Q Right. And I just -- this is a letter of --

THE COURT: I'm sorry, this looks like an R.C.M.P. letter, is it?

MR. GRANT: No.

Q Mr. Gill was an inspector of the Games Division of the Game Commission?

A Yes.

Q Which later became the Fish and Wildlife Branch?

A Yes.

Q He was not an R.C.M.P. officer?

A No. I think had quite a lot of powers, but he wasn't R.C.M.P.

THE COURT: You are sure about that, are you? Sure looks like an R.C.M.P. letter.

THE WITNESS: I think it came under the R.C.M.P. at that particular time, before Game came under Recreation and Conservation. I know they were under the Attorney General's Department.

MR. GRANT:

Q Maybe you can help us, because you knew Mr. Gill. Was he an R.C.M.P. officer?

A I didn't think so. I knew he was under the R.C.M.P. and Attorney General, but I wasn't aware he was R.C.M.P.

Q Okay.

THE COURT: All right.

MR. GRANT:

Q Have you had a chance to look at the letter?

A No, I didn't.

Q Okay. Just go ahead. Have you had a chance now, Mr. Shelford?

A Yes, I have.

Q Was the statement in this letter in paragraph 2, the second section that you have now read?

A Yes.

Q Was that consistent with your understanding, when you were dealing with Mr. Jutras, as to how the trapline problems were being dealt with?
A Yes. And I would think some of my letters, some were on file where I was opposed to this kind of thing.
Q You were opposed to it?
A Because I thought traplines were -- I always believed that everyone should be equal as Canadians, no matter what race, and that traplines should belong to the Indian, not to -- through the -- or through the Indian Agent. They should be registered in the person's name.
Q Well, were you -- okay. Just to be clear, were you opposed to the protection of hereditary Indian traplines until they were registered --
A No, I certainly was not --
Q -- by the Indian Affairs Department?
A Yes.
Q You weren't opposed to that?
A It's the same as I was opposed to the land on reserves belonging to actually the federal government. I thought it should be in the name of the Indian himself in that particular area.
Q Okay. Now, who did you write your letters opposing some aspects of this policy to?
A Well, I would think I would write them to the Indian Agent, and likely a copy or another letter to the Attorney General or the Department of Indian Affairs in Ottawa.
Q Okay. The Indian Agent, and then you said the Attorney General you meant of British Columbia?
A Yes, because trapping came under the Attorney General Department at that particular time.
Q Right. Okay.
A Mind you, not all the Indians agreed with me.

MR. GRANT: Okay. Can -- again this will ultimately be an exhibit. I would ask they be marked for identification now.

THE COURT: Yes.

THE REGISTRAR: Exhibit 1110 for Identification.

(EXHIBIT NO. 1110 FOR IDENTIFICATION - LETTER TO BOYS FROM GILL - OCTOBER 27, 1947. GAME INSPECTOR RE TRAPLINES)

MR. GRANT:

Q I would like you to refer to another letter of March

6th, 1950, addressed to Mr. Boys by Mr. Sinclair. It's Exhibit 55 in the commission of Boys. Now, maybe you could just -- I would just like to refer you to the first paragraph of the first page of the letter initially, okay, before you go on. I just wanted to ask you, you knew about the Native Brotherhood?

A Yes.

Q It was a well-known Indian organization?

A Yes.

Q And you knew they had a head office in Vancouver?

A Yes.

Q And you subsequently learned that Harold Sinclair was a representative of the Native Brotherhood?

A I have heard of it, yes.

Q Okay. And in the first paragraph Mr. Sinclair says -- he's again talking about, in this case, the successor of Wilitzque, W-i-l-i-t-z-q-u-e, trapline of the Kitwancool band, and he says that:

> "Mr. John Robinson, who is the rightful successor."

Then he goes on also to say that:

> "Also of the recent letters received from Victoria, B.C. stating that we Native People of British Columbia may be well prepared to stand within the Rights of our Claims in connection with the Traplines, Hunting and Fishing Grounds."

Now, Mr. Shelford, did you -- this is on the first page. You follow where I was there?

A No, I didn't find where you were quoting from.

Q Okay. It's starting here also.

A Okay.

Q Okay. Did such correspondence come to your attention, that is correspondence from Victoria, from the provincial government, about trapping, traplines, hunting and fishing grounds of the Indian people?

A No, I was -- I don't think I had many letters to that effect that I can recall. I don't recall it being disputed that there was trapping rights in certain areas.

Q Okay. I already asked you -- I think I asked you about Walter Douse. You didn't remember that name, did you?

A I live over 200 miles from Kitwanga.
THE COURT: 200 miles?
THE WITNESS: A little better than 200 miles.
THE COURT: That's by road, I suppose?
THE WITNESS: Yes, by road.
MR. GRANT:
Q Now, I would like to move later on in your career. Now, I believe yesterday we talked about that you were -- you recommended the first citizens funds which you have at the top of your mind, even the figures and everything about it, when you were appointed or when the Premier offered you the Ministry of Agriculture in 1968, and you have recorded in your writings that he asked for your ideas, and very early on you recommended that?
A Yes.
Q And that was indicative, was it not, of your interest in Indian people?
A That's right.
Q And in 1969 do you recall the Premier -- Premier Bennett proposing an Indian Affairs committee that would have cabinet members on it?
A Yes.
Q It would be an informal cabinet committee?
A Yes.
Q And you were one of the people that he considered to put on that?
A The only committee, though, that really came out of it was First Citizens Committee, which was made up of several of the cabinet ministers, Dan Campbell, myself, Wes Black. I think there was two others.
Q Kiernan?
A Ken Kiernan.
Q Ken Kiernan, was he one of the ones?
A Yes, he was one there. I think there was five.
Q It was a small committee, considering the size of the committee even then?
A And the amount of money was comparatively small, when you compare the interest on $25-million each year, but it was a start. And of course the goal was to keep moving this 25 million up to 35, 50 million or whatever, so that there would be more money available for self-help Indian projects. That's --
Q And this was a problem, was it not, because the government at that day, the government at that time was taxing non-Indian users of Indian lands?
A Say that again.

1 Q Do you recall that?
2 A Say that again.
3 Q Well, there were a -- assessments were being made on
4 reserve of lands by the government at that time, tax
5 assessments by the provincial government?
6 A I wasn't aware of that, to tell you the truth. Or I
7 may have been at that time, but I don't recall it now.
8 I always thought Indian reserves didn't have any tax
9 on them. They certainly don't now, do they?
10 Q I don't know. Our Court of Appeal is considering that
11 issue. They are. But let me ask you this, Mr.
12 Shelford. Do you recall a name of a Professor
13 Stanbury and a report of Professor Stanbury that the
14 provincial government had around this period of time?
15 A I recall his name, yes.
16 Q And he was involved in a confidential report in which
17 he was dealing with the problems of taxation on
18 reserves; is that right?
19 A I am not aware of that.
20 Q You don't remember any of that?
21 A No, I don't.
22 Q Okay. Fair enough. But one of the reasons, and I am
23 not going to ask you about the details of what you did
24 right now, but one of the reasons that the premier put
25 you on this committee was because of your expressed
26 interest in matters concerning Indian people?
27 A Yes, and I was a northern member.
28 Q And you had a large number of Indian people in your
29 constituency?
30 A That's right.
31 Q Do you recall that some years earlier in 1961, while
32 you were an MLA, that the federal government had a
33 joint committee of the Senates and the House of
34 Commons taking evidence on matters affecting Indians
35 of Canada, and that that committee reported that --
36 recommended that an Indian claims commission be set up
37 to settle, amongst other things, the British Columbia
38 Indian land question? Do you remember that joint
39 committee?
40 A I know they had quite a number of committees in
41 Ottawa, but I wasn't particularly familiar with that
42 committee.
43 Q You were aware, of course, that the B.C. Indian land
44 question was a question of prominence at that time?
45 A What date are you referring to?
46 Q 1961.
47 A '61. At that time, no, I wasn't.

1 Q You weren't aware of it?
2 A I knew trapline claims and hunting grounds and that,
3 of course, had always been in dispute.
4 Q Right. You were aware of that from very early on, I
5 think you said?
6 A Yes.
7 Q Okay. Well, I would just like you to look at this
8 letter, and it's a letter to the Minister of Forests
9 of the day that Madam Registrar will give to you.
10 It's Exhibit 70 of the Boys' commission evidence.
11 It's a letter dated November 29th, 1961. Now, at this
12 time Mr. Boys is the Indian Commissioner for B.C., and
13 he is writing to the Minister of Lands and Forest, Ray
14 Williston, and he reports on the report of the Joint
15 Committee and the Senate and the House of Commons.
16 You can just take a moment to read it, Mr. Shelford.
17 Q Have you had a chance to look at it?
18 A Yes.
19 Q Did you in 1961 -- were you aware of the approaches of
20 the federal government to your government relating to
21 this commission?
22 A No, I wasn't.
23 Q In looking at this letter, does it refresh your memory
24 about the events at that time?
25 A Not really, no, it doesn't.
26 Q Okay. Would it be fair to say that at that stage of
27 your political career, unlike later, in 1968, when you
28 were involved in the First Citizens Fund, you were not
29 that interested or -- and I don't mean this in a
30 derogatory way, but your primary interests were not
31 Indian matters?
32 A Yes, letters coming to the Minister were not
33 necessarily shown to MLA's. In fact it's very rare.
34 Q And you didn't see this letter is what you're saying?
35 A No.
36 Q I want you to be very clear. Now, you have said you
37 haven't seen the letter, but was this discussed in
38 caucus meetings that you were involved in?
39 A No.
40 Q Was anything about Indian -- the Indian land question
41 discussed that you remember?
42 A No, there wasn't. I'm quite sure there wasn't any
43 discussion too.
44 Q Even though there was a joint federal parliamentary
45 committee that made a fairly major recommendation on
46 the Indian land question in B.C.
47 A Certainly no question in caucus that I recall.

1 Q Okay. Were you aware of any petitions being presented
2 to the cabinet in 1969 relating to the North American
3 Indian Brotherhood relating to Indian problems?
4 A No, I don't recall it at all. Which Minister was it
5 presented to?
6 Q Dan Campbell and to the government. You don't
7 remember any of that?
8 A No, I don't.
9 Q Okay. Would you have -- when you were the Minister in
10 the '68 to '72 period, did you attend every cabinet
11 meeting?
12 A No, not by a long way. It's very common -- you see,
13 you got responsibilities all over the province, and I
14 spent a lot of time in the Okanogan or ARDA projects
15 which developed irrigation systems and all of this
16 sort of thing. So it's very common that there will be
17 only three or four Ministers in some cabinets
18 meetings.
19 Q Okay. So there could have been, for example,
20 discussions at cabinet meetings, but you weren't
21 there?
22 A That's correct.
23 Q I see.
24 A I would be surprised, though, if there would be much
25 discussion that somebody wouldn't have mentioned it to
26 me, though.
27 Q Why would somebody have mentioned it to you?
28 A Because of my known interest in issues of Indian
29 problems, like trapping rights and hunting rights.
30 Q You were familiar with an organization known as the
31 Bakanzie at that time, were you not?
32 A I heard the name. I recall the name very well.
33 Q And the B.C. Association of Non-Status Indians?
34 A Yes.
35 Q In fact you dealt with many applications with the
36 Bakanzie --
37 A There was somebody on the Bakanzie organization I used
38 to know very well, but I don't recall his name.
39 Q While you were in cabinet in '68 and '69, was there a
40 government policy on Indian land claims in British
41 Columbia? '68 to '72 I should say.
42 A I would say no. It was recognized as a federal -- a
43 federal issue, and I'm quite sure most of the
44 discussions, if any, were between various ministers
45 and the federal government. And I know if any letter
46 would have come to me about it, I most likely would
47 have sent it to the federal minister and a copy to

whoever wrote.
Q Okay. I think you answered my question in part, but I am just going to be sure, because I think you maybe misunderstood part of my question. Was there -- I am not asking if it's necessarily in writing or any of this, but while you were in cabinet from '68 to '72 did your government, the government of which you were a member, have a policy relating to the Indian land claims in British Columbia?
A I would have to say no.
Q There was no policy whatsoever?
A No.
Q Okay.
THE COURT: Well, I have some trouble with that, Mr. Grant, because his previous answer says that it was regarded as a federal matter, which seems to me might be regarded as a policy. It's really a matter of definition.
MR. GRANT: Yes.
THE COURT: There is two answers, and they stand there, and if -- if you want to develop -- I would have regard -- unless I hear something else, I would have regarded the first answer as being a statement of a possible policy.
MR. GRANT: I appreciate your interjection.
Q Did the British Columbia government recognize while you were there as the minister, recognize or -- Indian land claims?
MR. WILLMS: I object. That is an issue that goes to the heart of this. The witness gave his answer about policy. Your Lordship's earlier ruling was about policy. This is a question that is so broad. Indian land claims. A letter was put to the witness that talked about use and control, which I suppose is Calder type. My friend's land claim, I think, is territory and jurisdiction. The witness has talked about claims about overlapping registered traplines. I think he should define, first of all, what he means by land claims when he puts the question to the witness. For example, was he aware of a claim for territory and jurisdiction, because that's the claim that the plaintiffs' advance here. Was he aware -- he's already said he's given evidence that he was aware of overlapping trapline registrations. Is that the land claim that my friend is talking about? z.
But I object to the question the way that my friend has framed it, because there is no way that any

1 kind of responsive answer or relevant answer could be
2 obtained by that question.
3 THE COURT: You will have to remind me, Mr. Willms, what was my
4 earlier ruling on policy.
5 MR. WILLMS: Well, the only ruling, My Lord, was my friend
6 sought minutes of the executive committee on either
7 Indian land claims policy, Indian questions or Indian
8 policy, I think that was Your Lordship's ruling. And
9 minutes and other documents have been looked for, and
10 my friends have been advised about the results of
11 that, but when -- and I understand what my friends
12 mean by that in the broadest sense, but this witness
13 has given evidence about certain kinds of claims. And
14 I really think that before that question can be
15 answered, my friend should say what he means by land
16 claim, so that the policy is reflective, if there was
17 one, land claim.
18 THE COURT: Mr. Grant, I think I agree with Mr. Willms on the
19 question of definition, but I think that subject to
20 that, if for no other reason Mr. Goldie's opening
21 talked about policy of the Government of British
22 Columbia, and for that reason I think it's a relevant
23 subject of cross-examination. But I certainly agree
24 that unless there is some definition, it's not going
25 to be an answer that I -- it's an answer that I have
26 to speculate about regarding its meaning.
27 MR. GRANT: Right. Yes. My friend -- I -- and to that extent
28 my friend was concerned about the definition I have,
29 and I can take that --
30 Q In the 1968, '69 period you remember that the Nishga
31 Indians brought a claim against the government in the
32 courts? Do you remember that?
33 A Yes.
34 Q And do you remember discussions while you were in
35 government relating to that claim?
36 A No, I don't.
37 Q Okay. To your knowledge -- okay. You have
38 subsequently spoken on land claims yourself, haven't
39 you?
40 A Yes. But I must say until recently I wasn't fully
41 aware that land claims included the right of
42 ownership, the right of all resources on everything
43 within the area. Now, trapping rights and hunting
44 rights are well-known for many years.
45 Q Just a second. They are well-known for many years as
46 what?
47 A As claims for trapping rights and hunting rights.

Q I see. Okay. Go on.
A But when you are dealing with a broad land claim, I must say I didn't know until nearly this year that they were as broad as they are. And I would say I have complete sympathy with the native Indians in dealing with trapline and hunting problems, and always have, but when you are asking the government to give away a vast territory of all resources, including timber, minerals, natural gas, oil, et cetera, et cetera, then I would say no government could accept such a claim without knowing the full cost of that claim of what it would mean to the treasury, because remember, governments don't have any money. They have to collect the money to pay for social programmes, and if they give away all the land and resources, there is no way. There is just simply no way they can pay for social programmes.

And this was never really clearly spelled out to the people of British Columbia, and still hasn't to the average person of British Columbia. I would say it should be advertised in every paper what it means to the average person. I feel very strongly on this issue, and I certainly wouldn't be party of any government that would give away large blocks of land of all resources, without a clear understanding of what it would mean to the average taxpayer of British Columbia. I'm sorry I'm so lengthy in my answer.
Q Okay. You said that it wasn't until almost this year that you learned --
A That is right.
Q -- about a claim for ownership -- land claim involving ownership of large blocks of land? How did you learn that?
A First I learned it by going to the Newcome Auditorium when Miles Richardson was giving a talk on Haida claims, and I asked a question, "When you are talking about a Haida nation, what do you really mean?"
Q When was that?
A That was late -- may have been late last year or early this year. I think it was around January, but might have been just last year. But anyway, I went with a friend to listen to it. I must say there was beautiful pictures, but when I asked a question what does it mean, I got very vague answers. And the newspapers have had nothing but vague answers in them. And so I said, "Well, okay, does it mean that only Haida's could vote in the Queen Charlotte Islands?"

1 Q This is at the meeting with Miles Richard?
2 A At the meeting.
3 Q Yes.
4 A And again I didn't get a clear answer until I repeated
5 the question. I said it was very important to know
6 who would get a vote if these large territories were
7 granted as I might say a separate nation. And finally
8 he answered -- he was annoyed -- and he finally said,
9 "Of course only the Haidas would get a vote." Now
10 that was the first I realized it was so broad, far in
11 excess of anything I or anyone else said about our
12 sympathy for trapping rights, hunting rights, et
13 cetera, et cetera. It's quite a different picture,
14 and it's not clear today to the average person of
15 British Columbia.
16 Q Okay. Now, were you further informed of this by Mr.
17 McKenzie, or about what the nature of the claim was?
18 A No. I have got parts of what you are claiming, where
19 you presented your case. And to me, if I am wrong
20 tell me so, but in reading your case, I take it you
21 are claiming land, the right of land, resources, which
22 includes forestry and all other resources. Am I right
23 or wrong?
24 Q Okay. Who provided you with that information?
25 A I don't know where I got it from, but I know I got it.
26 Q Did you get it from counsel for the province before --
27 while your evidence --
28 A I don't know. I would have to look that up where I
29 got it.
30 Q Okay. Other than -- other than your discussion or
31 your questioning of Miles Richardson at this one
32 meeting and providing a review of the claim in this
33 court action, is that -- did you get any other sources
34 of information as to the nature of land claims?
35 A The Haida claims were fairly clear in the early days,
36 but I wasn't aware they were anywhere as broad as
37 this.
38 Q I am talking about recently. You just said in the
39 last year. These are the two sources of what you have
40 now learned about.
41 A There has been bits and pieces in the paper from time
42 to time from people up at Hazelton, especially the
43 Interior News of what the claim was, and it's only
44 quite recently that the people have had an opportunity
45 to know what you are really asking for.
46 Q In 1968 to 1972, while you were in the government and
47 while the Calder case was being presented, you have

1 indicated that provincial government basically took
2 the position that this was a matter to be dealt with
3 by the federal government. You have explained that?
4 A Yes.
5 Q Was there any other policy of the provincial
6 government with respect to a claim such as the claims
7 made by the Nishga in the Calder case?
8 A I would say no.
9 Q Okay.
10 A Not that I am aware of.
11 Q Okay. Were there any concerns expressed while you
12 were in the government with respect to the impact of
13 the Calder case?
14 THE COURT: Mr. Grant, aren't you getting very far afield? This
15 has crept into the language -- didn't creep in, it
16 came in like a hurricane, but I think it was only
17 invented recently, but to ask whether any concerns
18 were expressed --
19 MR. GRANT: I appreciate that.
20 THE COURT: Heavens above, that could include everything from
21 Haida chatter to gossip, serious discussion, anything.
22 MR. GRANT: Right. I will not use that term, My Lord.
23 Q Was there any discussion to your knowledge or
24 recollection about the Calder case in the '69, '72
25 period amongst yourselves and the cabinet minister?
26 A I have to say no. And the reason the answer would be
27 no is because until the court case is resolved and the
28 government knows what the verdict is, there is no
29 point in having a lot of discussion about ifs and buts
30 and what might happen.
31 Q Right. Well, in that case actually in October of 1969
32 you were in the cabinet, right?
33 A '69, yes.
34 Q And that case, a decision of the British Columbia
35 Supreme Court, came down in October of '69 in that
36 case. Do you remember any discussion after the trial
37 judge's decision with respect to the Calder case and
38 the claims made there?
39 A No, I don't.
40 Q That case -- you were in the cabinet in May of 1970?
41 A Yes.
42 Q And in May of 1970 the B.C. Court of Appeal decision
43 came down in the Calder case. Do you recall any
44 discussion after the B.C. Court of Appeal decision
45 with respect to --
46 A No, I don't. And I would expect the sole discussion
47 would be between the Attorney General's Department and

the federal government.
Q That's a hypothesis you don't know?
A That's right.
Q Okay. Do you remember an organization known as the Union of B.C. Indians Chiefs?
A I know the name quite well, yes.
Q And were you aware of that organization while you were in the government between 1968 and '72?
A Yes. I don't think I ever met with them, as I recall.
Q Okay. You did meet with the Bankanzies?
A Yes. Just with individuals, not as an organized meeting.
Q Well, you did make one presentation to the Bakanzies just before the election in '72, didn't you?
A Not that I recall. What sort of a presentation are you referring to?
Q Do you not recall before the election that you went down to a meeting in Vancouver, and Gardie Gardum was present at the meeting and Allen Williams?
A But that wasn't organized by just the Bakanzies. It was many groups. It was so political that I wouldn't call it a Bakanzie meeting. I would call it a political meeting. Maybe they were prominent in organizing it.
Q This was a meeting in which you were there on behalf of the government, and you were -- I mean, you were severely criticized by the Indian people. It was a meeting of --
A I remember the criticism I got, but I am quite sure it wasn't just the Bakanzie that were criticizing me. It was likely a hundred others too that were criticizing me at that time. It was mainly because the position of the provincial government they were criticizing me for.
Q It was a meeting of Indian organizations. It may have been the Bakanzie and others, I think, is what you were saying?
A Yes, I am sure there was a very wide group of people there.
Q Indian people?
A Not all Indians. I would say half the crowd was whites.
Q Okay. You said the criticism was with respect to the government's position. Was this regarding the government's position regarding --
A Or the lack of position, whatever.
Q Government position with respect to Indians?

A They wanted a clear statement, I presume is what they would look for, but there wasn't any, because it was considered a national problem.
Q Do you remember around -- within months of that the Prime Minister of Canada, Pierre Trudeau, and Jean Cretien coming to a meeting in Vancouver of Indian leaders?
A No, I don't recall it.
Q I'm sorry, I miss -- I'm sorry. Do you remember a -- the Union of B.C. Indian Chiefs attending a widely publicized meeting, open session with the Prime Minister and Minister of Indian Affairs, at the time Jean Cretien in Ottawa? This would have been just before -- I believe the election in '72 was in August?
A Yes, it was.
Q So it would have been just before the election. Do you remember that?
A No, I don't.
MR. WILLMS: Before we carry on on this vein, I understand the cross-examination should be wide ranging, but this cross-examination, he's gone past the policy questions. He got the policy answers, and we are now in a wide ranging travel to who knows where, and --
MR. GRANT: I am not asking any more questions in this area relating to this meeting. I don't know why my friend is standing up.
MR. WILLMS: It's not the meeting, My Lord. "Did you know that some federal cabinet ministers met in Prince Edward Island on a particular date?"
MR. GRANT: I never said that.
MR. WILLMS: Or Ottawa or wherever it was.
THE COURT: I think the problem is solved, Mr. Willms. Mr. Grant is moving onto another question, another subject rather.
MR. GRANT: Yes. And I have a document that I do not have copied, and I think that I would -- do want to copy it before I put it to the witness.
THE COURT: Want to take the morning adjournment now?
MR. GRANT: Yes.
THE COURT: All right.
THE REGISTRAR: Order in court. Court stands adjourned for a short recess.

(PROCEEDINGS ADJOURNED FOR RECESS)
(PROCEEDINGS RECONVENED)

THE REGISTRAR: Order in court.

THE COURT: Mr. Grant.
MR. GRANT: Thank you.
Q I may have already asked you about a few of these people, but I am just going to -- I don't think I asked you about all of them, so just a few names I want to ask you about. These are people -- Wet'suwet'en people from Moricetown and the area east. In other words, some of them may reside further east or been there for part of the time. Do you remember Charlie Comie?
A No, I don't.
Q George Naziel?
A I have heard the name, but I don't know him. I am quite sure I don't.
Q David Dennis?
A No.
Q What about Alec Tiljoe?
A I don't recall it.
Q Do you remember the Tiljoe name?
A No, I don't.
Q I think you already said about Jack Joseph. Did you know him?
A I don't.
Q Jimmy Morris?
A Jimmy Morris I certainly met.
Q That's right. And Jimmy Michell I think you mentioned?
A I met him too.
Q And Herbert Tait?
A Hugh or Herbert.
Q Well, the note I have is Herb, but it may have been --
A I am pretty sure I met him, yes.
MR. GRANT: Okay. I would like to show you a photograph. My Lord, in the time I have not had this reproduced on a regular size, and it's a very large photograph. I will be asking leave to not enter this, because it was borrowed.
Q I would like this -- this photograph I am instructed was taken around 1937, and what I would like you to do is to look at it very carefully and see if you recognize any of the gentlemen in this picture.
A No, I don't, but 1937, that is a long way back.
Q Well, yes. You mentioned Jimmy Morris?
A I wouldn't --
Q And I would just -- I am instructed that this was Jimmy Morris?
A Was it?

1 Q Do you remember him?
2 A No --
3 THE COURT: Second from the right.
4 MR. GRANT:
5 Q Second from the right.
6 A I may have met him, but no, I wouldn't --
7 Q And Jimmy Michell senior. Do you remember him?
8 A I heard the name, but no, I wouldn't recognize that.
9 THE COURT: That's extreme right.
10 MR. GRANT: That's the extreme right, yes.
11 A Where was this taken? Moricetown Tribe. Yes.
12 Q The picture has the heading Moricetown Tribe. I
13 believe it was taken either in Smithers or in Telkwa
14 during a community event.
15 A Looks a little bit like the Moricetown Hall here
16 though.
17 Q Yes. I think it was -- I don't think they needed the
18 sign Moricetown Tribe, if they were Moricetown. I
19 think it was a sign because they were part of a larger
20 event.
21 A I'm afraid I don't recognize.
22 Q You have seen persons in regalia, such as the regalia
23 in this picture?
24 A I saw it at Fort St. James, and I'm quite sure they
25 had it at Ksan too, but I have to think I have seen it
26 elsewhere.
27 Q Right. When you were -- the events when you were
28 younger, was regalia used that you remember?
29 A I never went to one -- certainly not before I went
30 into the Army.
31 Q Okay. And when I say the regalia, I am referring, for
32 example, to the head-dresses of these four gentlemen
33 here.
34 A Yes.
35 Q And the aprons with the deer skin -- the deer horns,
36 have you seen that?
37 A Yes.
38 Q Okay.
39 A Quite a gun he's got there too.
40 Q A flint lock. You have seen those?
41 A I have seen them, yes.
42 MR. GRANT: I would be reserving the next number for that to be
43 marked as an exhibit for identification, and I will
44 arrange for --
45 THE COURT: Why? He didn't recognize anything in it. Well, I
46 suppose you can. He recognizes the regalia --
47 MR. GRANT: He did indicate that he knew some of the people that

I am instructed are in the photograph, although he didn't recognize them in the photograph.
THE COURT: Well, for the purpose of the regalia, I think is enough to make it --
MR. GRANT: And the regalia.
THE COURT: -- markable.
THE REGISTRAR: 1111, My Lord.
THE COURT: Yes. All right.

(EXHIBIT NO. 1111 FOR IDENTIFICATION - LARGE PHOTOGRAPH)

THE REGISTRAR: Are you going to provide copies, Mr. Grant, or am I going to mark that one?
MR. GRANT: I will provide a reduced copy. I have raised that with my friends, and they don't object to it, and I will provide it to --
MR. WILLMS: That depends on how small my friend is going to shrink it.
MR. GRANT: I presume my friend's copy would be very small, but I think I can get a slide of it for them photocopied. Eight and-a-half by eleven, I assume.
Q Oh, yes. You mentioned the ARDA grant for Rim Sawmill. Do you remember that?
A Yes.
Q And that was one of the things that you did in -- and the people that were involved in that sawmill, that is those who got the money, were not Indian people that set up the company, but one of the conditions, as I understand your evidence, one of the conditions of getting the money was they hire native people?
A That was the idea of the plan in the first place.
Q And if that -- if they hadn't agreed to that, they were not going to get the grant so far as you were concerned?
A Yes. There was also a clause which should be in all agreements, such as that if the people that owned it sold it, they had to pay all of the money back to the government. And that's a condition, of course, that would be desirable in most of these type of contracts.
Q You know they did sell it?
A Yes, I did, but I wasn't there.
Q So you don't know if the condition was ever complied with?
A No, I don't. I would be very curious though.
Q It would be very interesting to know. And it was subsequently bought by Westar, and you are aware that

that mill is shut down?
A Yes. That was due to a timber problem.
THE COURT: Where is this mill?
MR. GRANT: This is the mill that's at south Hazelton. This is a mill that the helicopter landed at.
THE COURT: I didn't know it by the name Rim.
MR. GRANT: Yes, that's right. It was Westar Rim.
Q You agree it's the one at south Hazelton?
A Yes.
Q Yes. I'm sorry, My Lord, just one moment. Referring you to the Hansard in 1976, April 5th, 1976, and page 570.
A Yes.
Q And the Hansard reports your statement as being -- on page 570:

> "I was again very pleased to see the Minister of Labour take a special interest in Indian land claims. Certainly this is well overdue because, certainly, the Indians throughout the years have been getting more frustrated all the time in listening to promises by governments - especially at election time - that negotiations will start. Then, of course, after the election was over, nothing happened. So I think this is certainly something we have to work on very hard to try and reach an agreement.
>
> Now I don't think anyone should kid themselves that agreements are going to be easy, because they are not. But certainly one of the most important issues facing Canadians today, not just in British Columbia, is what will happen on these land sclaims and the final settlements that are reached. It could very well affect many of our social and educational programmes because it could develop into a mighty expensive settlement."

Now, first of all that is an accurate record of your statement?
A That's right.
Q And that was your belief at that time?
A Yes.
Q And some of it, of course, is your opinions, but there are facts set out there, and those facts as far as you know are true? You were accurately saying what you

knew at that time?
A Yes.
MR. GRANT: I would ask that -- there is two excerpts there, My Lord. The second one I am not going to refer to. It's a different date. I just ask that that first one be marked as the next exhibit.
THE COURT: All right. 1112.
THE REGISTRAR: Yes, My Lord.

(EXHIBIT NO. 1112 - DEBATE - LEGISLATIVE ASSEMBLY - APRIL 5, 1976)

Q Do you remember Jimmy's brother Alec Andrew?
A Not really.
Q Or his sister Harriet Andrew?
A Not really, no.
Q Would it assist if I connected that Harriet Andrew was married to Jimmy Michell? Do you know a Harriet married to Jimmy Michell?
A Not really, no.
Q And did you recall Jimmy's mother as being Betsy?
A I never met Jimmy's mother.
Q No, but from what Jimmy told you --
A I believe that's right.
MR. GRANT: Okay. My Lord, I had requested earlier for production of a review of the material Mr. Shelford's indicated was left in the Ministry's files, and my friend indicated in correspondence -- or he indicated on the record the other day that he was pursuing that, and I would ask for a response and production of those.

I also have requested my friend to provide copies of any agendas in the period of time that this man was cabinet minister relating to his -- relating to Indian land claims policies, and I would renew that request.
Q And before I just sit down, when you were in cabinet in '78 and 79, were there minutes of executive meetings kept at that time?
A I am quite sure there wasn't.
Q Okay. Do you remember any discussion, or do you remember what policy -- do you remember any discussions relating to Indian land claims as you had referred to in the Hansard?
A Not in cabinet. Just in individual conversations that it was still policy, that it was the federal government that had to take the lead in this area. But of course -- and I want to make myself very very

clear that the talk of land claims weren't clear in those days like they are today.
Q Okay. Yes, you have explained that.
A Yes.
MR. GRANT: I would -- those are all my questions, subject to -- yes, subject to the production of these agendas in both periods of time by my friends. And I did note in the letter that my friend produced to you, he said the person in charge of this material, he said in the time alloted, and I made it clear to my friend to make sure there was a complete search.
THE COURT: Mr. Willms, can you respond to that?
MR. WILLMS: I can respond to that right now. I have another letter. In light of what my friend said, I asked for a check to be done again, and this Miss Newby again went through the cabinet and cabinet committee files for the period '68 to '72, '78 to '79 for information concerning Indian policy or Indian land claims issues, and was unable to locate any reference to these issues in the files. The search included a review of agendas, minutes or notes and any supporting cabinet submissions or documentation. So I think I can say to my friend everything he can think of, there is nothing there.

In respect of the Ministry's files, I have asked for a search to be done, and similarly this witness has already described what happened to his files in '68 to '72, that they went to the next minister. We haven't been able to locate what the next minister did with them, and there are no files falling within my friend's request for the Ministry for '78 and '79.
THE COURT: All right. Well, I think I will have to repeat what I said before, that in the face of this informal response to a somewhat informal application, I don't think I should pursue the matter further beyond saying that counsel are of course entitled to bring a formal motion, and I'll deal with it at the time.
MR. GRANT: And of course I indicated we reserved that position, and I don't want --
THE COURT: You don't have to reserve that position. You have got that right.
MR. GRANT: I anticipate that we will be bringing on a formal application after further investigations.
THE COURT: All right. Thank you. Mr. Willms.

RE-EXAMINTION IN CHIEF BY MR. WILLMS:
Q Mr. Shelford, my friend asked you yesterday about a

shoot dispute between the Skins and Eakins over traplines, and in your answer you mentioned an overlap or a trapline overlap. And do you recall anything more about that, whether it related to someone trapping on somebody else's line or what?

A No, I am afraid I don't. We live quite a long way from there, and we might see him once a year, the Eakins. But there was so many -- of course with all those disputes, even grazing land disputes, trapline disputes really you didn't take as much notice of them as maybe we should have done. They were very common. Usually more involvement white against white than it was native I would say.

Q Now, my friend also asked you about traplines, whether you were aware of the utilization before the registration system of the Indian people of trapping in a particular area prior to the registration system. Were you aware of the utilization for trapping of non-native people in areas prior to the registration system?

A Certainly. But that was trapping before the registration system came in.

Q And where did he trap before as compared to after?

A Same area.

MR. GRANT: Well, I think that was dealt with on direct.

MR. WILLMS:

Q I wonder if exhibit -- no, it wasn't marked. I am putting before you a copy of the document my friend put before you, a record of the hearing on applications by the Aluminum Company of Canada for water licence on the Nechako and Nanika River, and you will recall that my friend asked you, and it's at page 102 --

A Yes.

Q He read the portion in the middle of the page that your uncle --

THE COURT: Just a moment. I haven't found it.

MR. WILLMS: The last page is 103 and 104, and I think my friend said that he would get me better copies of those.

Q But he put the portion on wild land to you?

A Yes.

Q And if you turn back, and your recollection that it was non-owners or absentee owners?

A Yes.

Q And if you could turn back in the transcript to the beginning to page three.

A Yes.

Q You will see at the bottom a note:

"Mr. Shelford was deputed by the farmers of the area to speak for them, and he made certain submissions. I am hoping to get a copy of that from Mr. Shelford but, in the meantime, in summary, Mr. Shelford's points were as follows: first, they did not want to be flooded out. I think you mentioned that already. Second, they would like to stop the whole thing but they believed it was too big for them to stop. Third, they believed that they would have an agreement on compensation."

THE COURT: "They should have".
MR. WILLMS: Sorry.

"They should have an agreement on compensation before the water licence was granted. Four, they are most concerned about the people who live here and not about the absentee owners."

Just stopping there. Does that help you in what your uncle's referring to about wild -- the man who just owned wild land?
A Yes. I am sure what he meant was like Crown land that they had bought and done no improvements on it whatsoever, and he didn't have much sympathy for the speculator.
Q Now, the other concerns at this particular hearing -- first you were involved in the Wistaria hearing?
A Yes, I was there.
Q But were not in Victoria?
A Right.
Q But you know that your -- you can see here that your uncle has taken those concerns down to Victoria with him?
A Yes.
MR. GRANT: Well, My Lord, my friend at my request produced a summary of the Wistaria meeting, which is the only meeting at which this witness indicates he was present. I put one statement of Mr. Shelford senior, Arthur Shelford to the witness to determine whether -- what his focus was. My friend has connected this -- to that statement that it's related, then I don't object to that. My friend is now going onto other concerns raised by Mr. Shelford senior. This document

was in the provincial archives. My friend had possession of it and could have had it produced and dealt with it on direct. He didn't do that. I say he cannot now go and do whatever he wants with the entire document. He can only relate to the issue that I raised. The rest of it is not relevant.

THE COURT: What do you say to that, Mr. Willms?

MR. WILLMS: Well, My Lord, every document in the archives is in the possession of every person in the province who wants to go get them. It's not in the possession of the government any more than it's in the possession of the plaintiffs. The archives are open. And the evidence that was led in chief, My Lord, did not turn on what Mr. Shelford said in Victoria. My friend raised what Mr. Shelford said in Victoria. It's in these transcripts. I don't need to ask any further questions. I'll just mark the document, My Lord, and I can move onto something else.

MR. GRANT: I object. He can mark the title page, the page he referred to, and the page that I referred to, and that's all. The document itself, I object, cannot go in.

MR. WILLMS: Well --

THE COURT: Well, he did remark upon this subject in chief, didn't he Mr. Willms? He talked about these hearings and where they were.

MR. WILLMS: Wistaria, because that's where the witness was. My friend embarked on Victoria, not me.

THE COURT: You say he didn't ask anything in chief about what happened in Victoria?

MR. WILLMS: My recollection is he did not, My Lord, because the witness wasn't there, and I had firmly in mind my friend's objection to hearsay. In light of my friend's objection, I could not have led this evidence.

THE COURT: No, it would have been hearsay. Isn't it still hearsay?

MR. WILLMS: My Lord, insofar as this evidence explains -- and you have to read the whole transcript. Mr. Shelford is throughout the transcript here and there -- certainly just the parts referred to by Mr. Shelford. I can pull everything else out, if my friend objects to that, but my friend has asked about something that Mr. Shelford said, and he made a suggestion about what Mr. Shelford meant about that, and the witness gave an answer, and in my submission I am entitled to file the material that explains the answer.

THE COURT: Well, is the transcript a verbatim account, or does it purport to be a verbatim account of what Mr. Shelford said? Not this one, but what his uncle said in Victoria.
MR. WILLMS: On the front page -- and I thought that was the basis upon what my friend put it to Mr. Shelford. On the very front page at the bottom:

> "This copy was made from an original transcript kindly leaned from the Aluminum Company of Canada."

I thought my friend was putting this forward as a transcript, that is as a verbatim --
THE COURT: Where is the passage that --
MR. GRANT: That I referred to? Page 102, My Lord, just about 10 lines under Mr. Shelford. And that is the only -- that is the only point I say that I raised with this witness. This witness cannot confirm or verify anything else in this, and I --
THE COURT: Which Mr. Shelford is this speaking?
MR. GRANT: This is the uncle of Mr. -- of the witness here, and I asked him if he had discussions with his uncle, and if his -- the reason I raised this was just to introduce what this witness did, in terms of his negotiations, and he explained what he understood that was about, and that's all. It was just this particular point.
THE COURT: Mr. Willms, what do you want to put in addition to what's on page 102?
MR. WILLMS: Well, I wanted to put in pages three through four to set out the beginning, what Mr. Shelford's position was, and explains the wild land, item four, that is people who didn't live there, the speculators, and then I wanted to put page five in where it refers to --
THE COURT: Well, on page three, which Mr. Shelford is referred to at the beginning of the last paragraph on that page --
THE WITNESS: Mr. Arthur Shelford.
MR. WILLMS: The uncle. This was the only --
THE COURT: This is a recapitulation by the chairman, the water commissioner, isn't it? Is he the water commissioner?
MR. GRANT: Controller.
THE COURT: Water controller. Isn't this just a recapitulation of what the water controller said Mr. Arthur Shelford said, and isn't that too far removed from the usual

kind of evidence we hear in these cases, even in these cases?

MR. WILLMS: Well, My Lord, the question was put, and you can see throughout the transcript Mr. Shelford's explaining his concerns. I mean, they are the same concerns that are mentioned on page three and four, the same concerns that are in the Wistaria transcript that I gave my friends which they didn't mark about hunting and fishing and furbearing animals. My friend was the one that raised this. I suppose he thought it was relevant. And if he thinks it's relevant, so do I.

THE COURT: I think we have enough of the document in already, Mr. Willms. I don't think we need to go any further. I don't think the document should go in. The parts that have gone in -- the parts that Mr. Grant referred to have been read in, and the parts that you referred to have been read in. Surely this document doesn't need to be added now to what I suppose would be a large enough record, even for his purposes. I don't think so Mr. Willms.

MR. GRANT: From reading the part that my friend read in, it correctly characterized a recapitulation. First I thought it was a quote, but it certainly was a recapitulation.

THE COURT: All right. Mr. Willms.

MR. WILLMS: Of the Wistaria hearing that the witness was at.

THE COURT: And the witness has adopted that.

MR. WILLMS: Yes.

Q Now, could Exhibit 1110 for Identification be put to the witness. That is the letter from Mr. Gill to Mr. Boys dated October 27th, 1947. My friend asked you about the second paragraph and the concerns mentioned in that paragraph, and in your answer you said that you didn't agree. You thought the trapline should be registered in the native's name rather than the Department of Indian Affairs' name, and you said that your view was that reserves should be registered in the natives Indian's name rather than the Department of Indian Affairs' name, and that was your view at the time, correct?

A That's right.

Q And then you said that not all Indians agreed with your position. Can you explain that, please, what you mean by that?

A Some of the native Indians wanted what they felt protection of the Indian Affairs Department, where

other Indians agreed with my position that if the land was transferred to individual people in the reserve, then if they wanted to build a house, they could get -- they could mortgage the land they owned. But they couldn't mortgage the land they owned because they didn't own it. The Indian Affairs Department owned it. And I thought it was a very unfair system.

Q But there were some natives who didn't agree with you?

A That's right.

Q I wonder if Exhibit 1112, the extracts from Hansard, could be put to the witness. And the two paragraphs from April 5th, 1976 were read to you about Indian land claims, and you also -- you said here in the quote that my friend read to you:

> "The Indians throughout the years have been getting more frustrated all the time and listening to promises by government especially at election time that negotiations will start."

What were you referring to there?

A I was referring to various negotiations that had taken place with the national government, that they weren't moving ahead as quickly as I wanted to see them move ahead, and I was urging the Minister of Labour to discuss it with the national government when he went down there. It's basically what I was driving at.

MR. WILLMS: Those are all the questions that I have in re-examination, My Lord.

THE COURT: All right. Well, Mr. Shelford, there is a problem that I want to ask you about. This morning you said it wasn't disputed there were trapping rights in certain areas.

THE WITNESS: Would you repeat that, Your Honour.

THE COURT: The note I made was, and it was just earlier this morning, it wasn't disputed that there were trapping rights in certain areas. Can you tell me what you were referring to there?

THE WITNESS: I think I was trying to say that there was many trapping disputes in areas, whites included, whites and Indians and whites against whites. It wasn't uncommon, because some areas was overlaps, and the maps weren't too accurate in the early days.

THE COURT: All right. Anything arising out of that?

MR. WILLMS: Nothing, My Lord.

MR. GRANT: No, My Lord.

THE COURT: All right. Thank you, Mr. Shelford. You are

1 excused from further attendance if you wish.
2
3 (WITNESS EXCUSED)
4
5 THE COURT: What do we do next?
6 MR. WILLMS: My Lord, as I suggested earlier this week, we would
7 like to follow the evidence of Mr. Shelford, and I
8 believe we discussed that perhaps as early as this
9 afternoon having the argument or the submissions in
10 respect of treatises. Also submissions, and I don't
11 know whether my friends -- how many of the opinion
12 reports my friends want to deal with, but we did
13 discuss the opinion reports that had been marked for
14 identification. But certainly I would think that the
15 next convenient thing to do would be the treatises,
16 because I suspect this would be the longest
17 submission.
18 And then after that there are a number of loose
19 ends I mentioned yesterday, My Lord, such as exhibits
20 for identification where my friends said they wanted
21 some time to look at the exhibit earlier in the case.
22 We would like to mark them as exhibits proper, and we
23 have given my friend a list. We were waiting for my
24 friends' list, but we could certainly do that if my
25 friends got us their list.
26 And then the other item which has come to mind,
27 which has come up in the evidence both in the evidence
28 and in the submissions, is the alienation series of
29 maps. A Notice to Admit has been sent, and we would
30 propose either having our friends confirm that their
31 concern is the underlying documents and not the
32 mechanical placing of the information on the maps and
33 how we get that, whether it's by formally tendering
34 the maps to be marked there and having my friends
35 state the objection on the record so that we can deal
36 with it. What we are trying to avoid is having to
37 call all the cartographers or the cartographer that
38 took the document, you know, the information and put
39 it on. We are still waiting for my friend on that
40 one, and we thought that either my friend could advise
41 us their position or we can formally tender them and
42 get all the objections down, so we know what
43 objections there are that we have to meet to get over
44 and prove them.
45 THE COURT: When do you suggest we start the argument on these
46 various matters?
47 MR. WILLMS: I would like to start it at 2:00, My Lord. We

1 talked about that earlier this week, and I think that
2 Mr. Rush thought it was possible -- he proposed
3 tomorrow morning, but Your Lordship suggested maybe
4 Thursday afternoon, if we were complete by then. And
5 we are, and we would propose to go ahead to make sure
6 we can deal with as much objections and loose ends as
7 possible before the close of court tomorrow. I have a
8 note. There's been an exchange of correspondence on
9 the alienation maps, not a Notice to Admit.
10 THE COURT: Mr. Grant?
11 MR. GRANT: Yes, My Lord. We would like to check with -- I
12 would like to check with Ms. Mandell to be sure, but
13 our objective was to commence at 2:00 p.m. with
14 respect to this argument on textbooks that my friends
15 have a concern over. There has been extensive
16 correspondence on it. I want to be clear, we don't
17 take the position -- we think that this argument
18 should not be dealt with now, but my friends, it's
19 their issue, they are raising it, so they can raise
20 it.
21 THE COURT: So should we adjourn 'til 2:00 o'clock?
22 MR. GRANT: We should adjourn 'til 2:00, and then what we
23 propose to do after that is to -- when there is time,
24 to deal with the reports of Ms. Albright, the
25 objections, I should say, on Albright and Mills, and
26 the question of identification of documents, we'll see
27 how that goes in terms of time. We may not be in a
28 position to deal with that today and tomorrow, but
29 we'll see how time goes.
30 THE COURT: All right. I am entertaining the Chief Justice of
31 Hong Kong for lunch, so could we make it 2:15?
32 MR. GRANT: As far as we are concerned, 2:30 would be fine.
33 THE COURT: I do want to use up the time that's available, if
34 possible. And I am reminded also that Ms. Thompson
35 tells me that unless we adjourn very early tomorrow,
36 she would prefer if the time required to clean your
37 material out of the court room could be fixed for
38 Monday rather than tomorrow afternoon. If counsel can
39 indicate what time on Monday, so she can be here to
40 make sure that it's properly supervised. All right.
41 2:15 then.
42 MR. WILLMS: It would be for my submission, I handed a brief of
43 authorities up to Your Lordship. I will be referring
44 to those again in my submission.
45 THE COURT: Is that --
46 MR. WILLMS: It should be about a 15 tab -- it was the one on
47 admissibility of documents, My Lord.

THE COURT: Authorities respecting opinion evidence?
MR. WILLMS: Yes. I hope -- that may be the first volume, My Lord. The first tab is a case called Phillion and The Queen. You may have the very first -- there is another black three ring binder, but if Your Lordship -- hopefully it should be black.
THE COURT: We'll see if we can find it. All right. 2:15 please.
THE REGISTRAR: Order in court. Court stands adjourned 'til 2:15.

(PROCEEDINGS ADJOURNED AT 12:10 P.M.)

I HEREBY CERTIFY THE FOREGOING TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE PROCEEDINGS HEREIN TO THE BEST OF MY SKILL AND ABILITY.

_____
LORI OXLEY
OFFICIAL REPORTER
UNITED REPORTING SERVICE LTD.

1 (PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)
2
3 THE COURT: Have counsel decided how we will proceed?
4 MS. MANDELL: Well, my lord, there has been no agreement, but no
5 discussion either. Perhaps in the manner that we've
6 been proceeding with these motions the plaintiffs can
7 begin.
8 THE COURT: All right. Is this the argument on treatises?
9 MS. MANDELL: I believe it is. If it's not, I've not got much
10 to say.
11 THE COURT: I wasn't able to look for that book of authorities.
12 Perhaps would it be convenient if Ms. Thompson would
13 look for it now?
14 THE REGISTRAR: Yes. What was the first case in that book?
15 THE COURT: Phillion, P-H-I-L-L-I-O-N. Perhaps you would be
16 good enough, Ms. Mandell, to outline the problem.
17 MS. MANDELL: As I see it?
18 THE COURT: Yes. I am not sure what it is we are concerned with
19 here.
20 MS. MANDELL: Well, I might say that that's a concern for us,
21 too. My lord, the question as to the treatises began
22 by way of, as I understand it, an objection which was
23 taken by Mr. Willms at the time when Sylvia Albright's
24 exhibits were to be tendered. And if I could advise
25 your lordship, it is found at tab 1 of the materials
26 that I've handed up. There is a number of extracts in
27 the first tab. If your lordship could find the volume
28 which is numbered 10475 of Sylvia Albright which is a
29 few pages into the tab.
30 THE COURT: Yes.
31 MS. MANDELL: And if you could turn to 10477 of that sequence.
32 THE COURT: That page number is what volume?
33 MS. MANDELL: I will have to get it for your lordship. I just
34 have my actual pages. Mr. Rush is tendering his
35 three-ring binder and asking that they be marked as
36 exhibits.
37
38 "Mr. Willms: My lord, the only point I wish
39 to make, and I made it earlier, and I can't
40 recall the witness, but when I referred your
41 lordship to the Regina and Anderson case
42 about the use of textbooks in examining
43 witnesses, and their usual use in
44 cross-examination rather than in leading the
45 witness, and I don't mean to -- I'm sure my
46 friend isn't suggesting by marking this that
47 it's just indicative of the materials that

1 the witness reviewed, and if that's why he's
2 submitting it, then it can be marked. But
3 if he's purporting to submit it as proof of
4 the contents of each and every one of the
5 documents in it, then I object.
6 THE COURT: I'm sure you're not putting it in as
7 proof of the truth of the contents of each
8 and every document.
9 MR. RUSH: No, I couldn't do that, my lord, and
10 I'm not purporting to do that, but I think
11 that -- I'm entering this document book as
12 it pertains to references to which the
13 witnesses referred, but also to the extent
14 that she commented on the references in her
15 evidence in chief. I think that it goes
16 somewhat farther than what my learned friend
17 indicated, but she certainly didn't make
18 reference to all of the particular published
19 material here."
20
21 And then your lordship marked it as an exhibit, and
22 you said:
23
24 "...for such use as may lawfully be made of
25 them, and unless I hear from counsel to the
26 contrary, I will take it that they are
27 intended to show the research upon which the
28 witness has relied or verified, as the case
29 may be in her evidence. It's really a
30 matter of argument of law. It's not a
31 matter of magic or hocus-pocus or anything."
32
33 And then if I could ask your lordship to turn to the
34 last page in that tab. The rest of the volumes are
35 being marked. And Mr. Willms -- this is the volumes
36 with respect to cross-examination.
37
38 "MR. WILLMS: I would ask that that be marked
39 849-7.
40 THE COURT: All right. On the same basis that
41 the other --
42 MR. WILLMS: Yes, of course, my lord.
43 THE COURT: Other works were permitted."
44
45 And as I understood it at that time, the objection
46 which was raised was that the treatises could not be
47 marked for proof of the truth of them, but simply as

1 research of the expert. And Mr. Rush qualified that
2 to say, and to the extent that the witness relies upon
3 them or comments upon them then that, too, is part of
4 the purpose for which they are being tendered. Now,
5 in court on Friday last, and I will have to read to
6 your lordship this if you don't have the volume handy.
7 I didn't include it in my materials. It is at page
8 18737.
9 THE COURT: Which volume?
10 MS. MANDELL: This is volume 254.
11 THE COURT: I think we have it, yes.
12 MS. MANDELL: 18737.
13 THE COURT: 18737?
14 MS. MANDELL: Yes.
15 THE COURT: Yes.
16 MS. MANDELL:
17 "MR. WILLMS: I can advise your Lordship that I
18 will be arguing the submission in respect of
19 treatises, and the treatise submission that
20 will be made will be roughly parallel to the
21 document submission because, as your
22 lordship will appreciate, many of the
23 plaintiffs' witnesses rely on the treatises
24 for the facts that are contained in the
25 treatises so that they don't merely say that
26 I've read this opinion and this opinion
27 supports my opinion or I adopt this opinion,
28 which is the normal -- what you might say is
29 the normal method of using a treatise.
30 THE COURT: Well, you both put treatises to
31 witnesses, and in those treatises that have
32 been put to witnesses the treatises contain
33 both facts and also opinions in the
34 treatises based on the facts, and so the
35 submission that will be made in respect of
36 the facts is going to parallel the
37 submission that is made on the historical
38 documents. And if your lordship will
39 recall, what I submitted was that if they
40 don't go in for the truth -- as prima facie
41 proof of the truth of the contents, if
42 that's not what they're going in, then the
43 opinions have no weight. And I'm going to
44 make the same submission with respect to the
45 treatises, that if the treatises aren't
46 going in, for example, as prima facie proof
47 of the truth of the facts stated in the

1 treatises, then insofar as opinions are
2 based on those facts, they're entitled to no
3 weight at all or they're inadmissible, and I
4 have an alternate submission in respect of
5 that similar to the submission that I made
6 in respect of historical documents. So the
7 submission are parallel."
8
9 And then this is to further clarify the issue because
10 it seems somewhat still blurry as to what points were
11 being argued upon, I wrote to my friends early this
12 week and asked them if they could set out their
13 position, and we would do that too, and have a better
14 understanding of what the issues were. And if I could
15 ask your lordship to turn to tab 1 which is the
16 position of the Province. And I'll ask your lordship
17 simply to read the letter. I won't read it out loud.
18 THE COURT: Well, let me just stop after the second paragraph.
19 Mr. Willms says:
20
21 "The opinions advanced by the Plaintiffs'
22 witness..."
23
24 and I'm sure that means witnesses...
25
26 "...depend upon facts and on opinions in the
27 treatises marked as exhibits."
28
29 That is not entirely true, is it?
30 MR. WILLMS: Well, my lord, it is the old inextricably woven
31 argument that I have made from time to time. My lord,
32 I do take the position that where a whole opinion has
33 been marked you can't pull out the narrow opinion.
34 Certainly Ms. Albright came to some conclusions based
35 solely on her investigation. But most of her opinions
36 are based on Aimes' investigation at Hagwilget.
37 Allaire, they are all the same. Dr. Daly is the same.
38 A lot of his opinion is based on participant
39 observation. But interwoven in that is other
40 information received from other treatise writers. So
41 when I make that statement, I don't mean to say that
42 if you went through you could not find admissible
43 opinion in those reports. I don't mean to say that.
44 THE COURT: All right. Well, when you say, Mr. Willms:
45
46 "We understand that you are submitting the
47 treatises as prima facie proof of the facts

1 contained therein so far as those facts are
2 relevant to this action."
3
4 MR. WILLMS: And what I mean by that -- for example, you will
5 recall -- I have Ms. Albright's report. She had the
6 chart, my lord --
7 THE COURT: Yes.
8 MR. WILLMS: -- comparing excavations. She did one excavation
9 only. The other excavations were all done by
10 different people. So she compared the facts, i.e. the
11 results of those investigations and then came to
12 opinions. Some of them based on the opinions of the
13 people who did the investigations, but most of them
14 based on the facts in those. So that without those
15 facts from what the other people discovered at Prince
16 Rupert, for example, or what Aimes dug up at
17 Hagwilget, without those facts she has no basis for
18 coming to the conclusions that she made over the broad
19 area.
20 THE COURT: All right. Then pray tell for what purpose did you
21 submit treatises to the witnesses in
22 cross-examination?
23 MR. WILLMS: Well, my lord, at the time that -- well, first I
24 should say this. I don't recall how many, but it
25 would be very few of the treatises that were submitted
26 by me on cross-examination were not documents that the
27 expert referred to in the bibliography. In other
28 words, there weren't documents that were outside that.
29 THE COURT: Yes.
30 MR. WILLMS: And to the extent -- once again to the extent that
31 I referred extracts, for example, factual extracts or
32 opinion extracts, the factual extracts from The Epic
33 of Nekt, for example, the opinion extracts from The
34 Epic of Nekt, the factual extracts were submitted and
35 tendered to each witness as prima facie proof of the
36 truth of what MacDonald said he found. And the
37 opinions, and my friend -- if your lordship read a
38 little further in the letter, my position is that
39 those treatises go in as prima facie proof of the
40 facts contained in them so far as they are relied on.
41 Because if they don't, then as I said in -- last week,
42 either the opinion is entitled to no weight whatsoever
43 or it is inadmissible.
44 The second thing is that I say that all of the
45 opinions that have gone in from the treatise writers,
46 and most of these treatises are the treatises referred
47 to by the plaintiffs' witnesses in their reports, are

1 all matters that your lordship can consider in
2 weighing the opinion.
3 THE COURT: Well, are you saying that the treatises are in as
4 prima facie truth of the facts stated in them?
5 MR. WILLMS: I am. I am. All of them. All of the treatises.
6 THE COURT: And what are you saying, Ms. Mandell?
7 MS. MANDELL: Well, I just want to point out that that's the
8 very objection that my friend raised to all of what we
9 thought we were dealing with such as Sylvia Albright
10 and thereafter that the treatises were not going in
11 for the proof of the truth of it. So we are now
12 riding a different horse, and I want to make that
13 point clear.
14 But what we are saying is that the treatises are
15 material which was evaluated by the witness in coming
16 to their opinion and that it is admissible to the
17 extent that the opinion within the treatise or the
18 facts were adopted by the witness. And if they were
19 commented upon or qualified, it is the opinion of the
20 expert which we say is the evidence before the court.
21 And if the witness completely dealt with the treatise
22 for the purposes of refuting it or qualifing it, then
23 certainly the treatise doesn't go in for the proof of
24 the facts or the opinions contained therein. But the
25 evidence before the court is the expert opinion which
26 either adopts or qualifies that particular treatise.
27 THE COURT: Well, for example, Dr. Kari said that Kobrinsky's
28 paper was rather like a low passing grade on a term
29 paper, I think he said, or something like that.
30 MS. MANDELL: He completely disagreed with it.
31 THE COURT: I'm not sure -- didn't he say it wasn't or did he
32 say it was an opinion --
33 MR. WILLMS: I think that was C minus.
34 THE COURT: I don't know if that is opinion or not.
35 MS. MANDELL: A lot of Kobrinsky's paper was put to him. And in
36 general terms he said it was a C minus of some grad
37 student, and who is Kobrinsky anyway. But then he was
38 taken to specific of various opinions. For example,
39 his theory that Athabaskans weren't matrilineal
40 historically. He was asked that passage, and it is
41 found in tab 17 of the materials. He expressly
42 refuted it and said, I don't agree with it. I agree
43 with Dyen and Aberle on this point.
44 And we would say about that -- and I will refer
45 your lordship to the Anderson case to refresh yourself
46 if you need it. But we would say about that that if a
47 treatise was put to the witness and he on

cross-examination doesn't accept any of it then none of it's evidence. It isn't in for the weight or the proof of the truth or anything. It is simply not evidence. And if he adopts part of it that becomes part of his evidence. And if in the case of Sapir, for example, where he says Sapir is a leading eminent person, I accept this particular passage from Sapir and adopt it as my own. I also qualify it because he worked a long time ago. And we have done work which takes over and adds to it, I say that Sapir should be added to and this is now my opinion about it. And I say that it is the evidence of the witness that -- relating to the treatises as they relate to them, adopt them, qualify them or add to them which is the evidence of the court.

THE COURT: So you don't agree with Mr. Willms then that even with respect to the material that you put in that it is part of the evidence in the case as prima facie proof of the facts stated in them?

MS. MANDELL: Well, I could, for example, turn your lordship to some of the tabs. There are some examples where the witness does adopt treatise portions which in our submission then would answer to that point. For example, at tab 12 there is a quote from Dr. Kari who, by the way, I might mention, my lord, that no objections were taken to any of the evidence as they were tendered in evidence of Dr. Kari. But he is talking about Dr. Sapir at the bottom of page 11459. He talks about "the foremost American linguist". And then a passage from Sapir is put to him. The passage relates to the Athabaskan languages, how they are unified, stuctured, who the speakers are, what kind of societies the Athabaskan speaking people come from. And then the question at the bottom of the page:

"Q Do you adopt the quote that is here mentioned by Dr. Sapir as being an accurate statement of your knowledge of the Athabaskan peoples?
A Yes."

You interjected and said.

"THE COURT: I'm sorry, do you?
THE WITNESS: Yes, it is a generalization. It is a textbook generalization, but yes."

So we would say that to the extent that Dr. Sapir is here adopted by the witness that that is something which would go in for the proof of what Dr. Sapir was saying. And other examples of the same vein, my friend mentioned Sylvia Albright and perhaps I could ask your honour to turn to that. It is found at tab 21 of these materials. She is talking about work that she has done which compares to work which Dr. Fladmark did. And at page -- in the transcript 10355 she has referred to a paper "Glass and Ice The Archeology of Mount Edziza". And the question at line 13:

> "Q Did you make reference to this paper when conducting a comparison of point A to other similar points?
> A Yes. I referred to this report by Dr. Fladmark on his work in the Stikine area, and compared the point that I had recovered to several points that he had recovered in the Edziza area."

And then to line 25:

> "Q And how does Dr. Fladmark describe the point that is contained there?"

And then she describes it. And then at line 30:

> "Q And which is the point that in your judgment is the one that most -- that compares most favourably to the one that you found?"

And she found similarities with figure A.

> "Q And did you draw any comparisons with the points found by other archeologists?"

And she goes on to talk about the literature showing certain leaf-shaped points in the interior to be similar to what she found.

Now, we say that with respect to that what she's done is she has assumed as fact the material which Dr. Fladmark wrote about in his treatise. She reveiwed that and used it to compare the archeological material that she found and she drew certain conclusions. And we say about that very different perhaps than Dr.

1 Sapir and Dr. Kari because of the nature of their
2 disciplines being quite different. But, nevertheless,
3 it is a similar point where the material is part of
4 the specialized area of research which the expert
5 consults. They consult it. They adopt some of what's
6 in the material as being true to them, the state of
7 the art at the time. What they will accept as true.
8 Then they make their own judgments on the basis of
9 that and say so in court and are available for
10 cross-examination.
11 So we say that some of this material, and it's
12 definitely a case-by-case and item-by-item analysis
13 and is in fact introduced for the proof of the truth
14 of it. But it's not the treatise that goes in for the
15 proof of the truth of it. It is the way that the
16 expert deals with the treatise which creates the
17 evidence on that point.
18 THE COURT: So you do disagree with Mr. Willms in the broad
19 statement he made that the treatises are either proof
20 of -- prima facie proof of what they state or they're
21 inadmissible.
22 MR. WILLMS: I should say prima facie proof of the truth of the
23 facts contained in there, or my friend's opinions
24 based on those are inadmissible.
25 THE COURT: Yes.
26 MR. WILLMS: And then secondly, dealing with the opinions
27 contained in the treatise, I say that your lordship
28 can consider those opinions when assessing the
29 opinions of the witness. In other words, the opinion
30 part of it is a matter that goes to weight, and I
31 accept that. So that to the extent that opinions are
32 expressed in these treatises, I say that's a matter
33 that your lordship can consider at the end of the day
34 in respect of all of the evidence, and that's a matter
35 of weight. But I say it is a matter of admissibility
36 where a fact in a treatise is the basis, is the
37 foundation for an opinion of a witness in this case
38 unless it's being tendered as prima facie proof of the
39 truth of the fact contained in the treatise, i.e. Dr.
40 Aimes did an excavation. He dug down 10 feet. Here
41 is what he found in the first three feet, here is what
42 he found in the next four feet, and here is what he
43 found in the next two feet. And if Ms. Albright uses
44 that and that is not going in for proof of the truth
45 of what Dr. Aimes found there is absolutely no basis
46 for the opinion. And I say the opinion is
47 inadmissible. But if it is going in then that's fine.

1 Then the treatise goes in, Dr. Aimes' findings go in.
2 But I also say at the end of the day when your
3 lordship is considering Ms. Albright's findings on Dr.
4 Aimes' findings you can also consider Dr. Aimes'
5 findings on weighing the evidence. That is just as a
6 matter of illustration.
7 THE COURT: What do you say, Ms. Mandell, that the opinion of
8 the witness is all that is really in evidence?
9 MS. MANDELL: That's right. I say that the opinion of the
10 witness is in evidence. And so, too, is the treatise,
11 but to the extent that the witness has commented upon
12 it.
13 THE COURT: And so also is the treatise to the extent that the
14 witness has commented on it?
15 MS. MANDELL: And where she relies upon certain facts within the
16 treatise, those facts can be tendered for the proof of
17 what they said, if your lordship at the end of the day
18 thinks that the witness's evidence is credible on
19 that.
20 THE COURT: Yes.
21 MS. MANDELL: But, my lord, where the witness is put -- for
22 example, you will recall that Kobrinsky and Bishop and
23 a number of other writers were put to Dr. Mills and
24 Dr. -- well, actually put first to Dr. Kari and I
25 believe to Dr. Daly, and they weren't adopted. The
26 opinions in those articles were not adopted. And Dr.
27 Mills, in the course of her evidence, assumes the
28 burden of talking about them and giving her opinions
29 in direct and again doesn't adopt any of those
30 opinions, then I don't agree with my friend that those
31 types of opinions should be tendered for the proof of
32 the truth of the opinions. And it all goes to weight
33 because it's not evidence which has been properly
34 tendered in court. It's not evidence of anything.
35 The only thing the witness has done with those is have
36 them put to her or have her comment on how she
37 disagrees with them.
38 And in this respect I would like to remind your
39 lordship of the Anderson case. It is found at tab 3
40 of the materials. I have only taken extracts, but at
41 page 206 the material, you will recall the question
42 here was whether or not there was an error made when
43 the judge limited the cross-examination of Mr. Smyth
44 by counsel for Mr. Anderson in refusing to allow the
45 said counsel to read to said Smyth from recognized
46 textbooks on mental diseases in the course of such
47 cross-examination. And the passage immediately below

1 it I believe is the --
2 THE COURT: This is on page 206?
3 MS. MANDELL: This is on page 206. You will see question 9.
4 This was a textbook put to the witness in
5 cross-examination.
6
7 "I agree with what my brother Beck has said
8 with reference to the use of text-books. As
9 all evidence is given under the sanction of
10 an oath or its equivalent, it is apparent
11 that text-books or other treatises as such
12 cannot be evidence. The opinion of an
13 eminent author may be, and in many cases is,
14 as a matter of fact, entitled to more weight
15 than that of a sworn witness, but the fact
16 is that, if his opinion is put in in the
17 form of a treatise, there is no opportunity
18 of questioning and ascertaining whether any
19 expression might be subject to any
20 qualification respecting a particular case.
21 A witness would not be qualified as an
22 expert if his opinions were gained wholly
23 from the opinions of others and the faith
24 that is to be given to the opinion of an
25 author of a treatise must come through the
26 faith in the witness and the confidence to
27 be placed in the witness's opinion, in
28 theory, is not to be derived from the
29 confidence in the author with whose opinion
30 he agrees."
31
32 And then the next passage:
33
34 "On principle, therefore, nothing may be
35 given from a text-book, other than as the
36 opinion of a witness who gives it. On
37 cross-examination the Judge should be
38 careful to see that an improper use is not
39 made of text-books, practically to give in
40 evidence opinions of absent authors at
41 variance with those of the witness. It is
42 quite apparent that if the witness is asked
43 about a text-book and he expresses ignorance
44 of it, or denies its authority, no further
45 use of it can be made by reading extracts
46 from it, for that would be in effect making
47 it evidence, but if he admits its authority,

1 he then in a sense confirms it by his own
2 testimony, and then may be quite properly
3 asked for explanation of any apparent
4 differences between its opinion and that
5 stated by him."
6
7 And, my lord, if I could ask you to turn to tab 17,
8 for example, you'll recall that Mr. Swadesh's -- I
9 believe it is Mr. Swadesh's Lexico-Statistics paper
10 was put to Dr. Kobrinsky. This is an example where he
11 was asked: You adopt not this fact but this
12 methodology which was being advanced. And the second
13 page of the extract, the first page just identifies
14 the exhibit. I won't read it to you in length, but
15 from lines 4 to 24 he expressly says, no, I don't like
16 that. I don't think that it works. I'm not -- I'm
17 here to tell you why. He explains the way language
18 patterns work, doesn't conform to how the methodology
19 works. Now, we say that if Mr. Willms was right the
20 Swadesh paper should be put in for the proof of the
21 truth of the opinion and it all goes to weight. But
22 all that we have before the court is the opinion being
23 advanced and the witness refuting.
24 THE COURT: Some other witness used it.
25 MS. MANDELL: Pardon?
26 THE COURT: Some other witness used the Swadesh test other than
27 Dr. Rigsby.
28 MS. MANDELL: Well, that's the question of the day.
29 THE COURT: Was it Dr. Rigsby?
30 MR. WILLMS: It is referred to in the report. Swadesh is in the
31 report and the list is in the report.
32 MS. MANDELL: Well, to the extent that the witness qualifies
33 what he feels the value of that is, we say that the
34 theory does not go in for the proof of the truth of
35 it, but the witness's statement with respect to it is
36 what is the evidence before the court. Perhaps that
37 example might be a bit blurry because of the fact that
38 there may be some argument that Dr. Rigsby relied upon
39 it.
40 A clear example may be at the next tab at tab 18.
41 And there is many examples of this, but I chose one
42 just for the sake of illustrating the point. There is
43 where Dr. Kobrinsky is being put to the witness, and
44 he's asked -- he has quoted from Dr. Kobrinsky at line
45 6 to 11. Dr. Kobrinsky's opinion is:
46
47 "There are rather weighty ethnographic indications

1 - to be reviewed below - of the recency of
2 matrilineal divisions among the northwest
3 Carrier."
4
5 The witness is asked, do you agree? And he says at
6 line 32:
7
8 "Do I agree with Kobrinsky or Dyen and Aberle? I
9 agree with Dyen and Aberle, and Delagune in 1975
10 as well as in this whole genre of literature. I
11 don't accept Kobrinsky's thesis."
12
13 And if I could just continue in the tab, other
14 examples but there is many, many throughout the
15 cross-examinations. This is in the evidence of Sylvia
16 Albright. She's being asked about something that
17 Jenness wrote. And at page 10983.
18 THE COURT: What tab are you in?
19 MS. MANDELL: This is the same tab as tab 18. I am moving in
20 through the quotes. There are a number of textbook
21 references or transcript references.
22 THE COURT: Yes.
23 MS. MANDELL: She is being asked about Jenness at page 10982.
24 She has been quoted a paragraph by Jenness about
25 Dizkle and Temlaham. She is asked at line 17:
26
27 "Q Now, you accept that, don't you?
28 A No, I don't."
29
30 And I can go on with examples, but only to make the
31 point that if the witness is being asked about a
32 treatise that they disagree with it's, in our
33 submission, not proper law that the treatise should go
34 in for the proof of anything. That the point is what
35 the witness does with the treatise.
36 THE COURT: Well, let's take the position where a witness -- it
37 is unthinkable, but the the witness was confronted
38 with Darwin's theory of evolution, and he said I don't
39 accept it, it's entirely wrong.
40 MS. MANDELL: Where are you then?
41 THE COURT: Are you then in a position where you have to say,
42 well, Darwin is out and there is no evidence? The
43 only evidence I have is what this witness says. Or
44 are there treatises that what if they say the very
45 fact that the witness disagrees with Darwin on his
46 theory of evolution is some evidence that the
47 witness's credibility is suspect?

1 MS. MANDELL: Well, I think that what you are really talking
2 about is the Zundel case in effect where you have two
3 witnesses, one giving the opinion that there was no
4 Holocaust and relying on treatises and other documents
5 which he reviewed and another that relied upon
6 documents and said there was a Holocaust. And I say
7 that if the matter is a matter for debate then there
8 should be another witness called and the matter can be
9 waived in the course of time.
10 THE COURT: Well you can each call another one and you still
11 have an imbalance.
12 MS. MANDELL: There is a balancing if there is a debate. If
13 there is no debate then your lordship is assisted to
14 the doctrine of judicial notice, and I don't have to
15 take you through it. But there is a broad ability in
16 the court to take notice of historical facts that are
17 both present and past if they are of a reliable and
18 uncontroversial nature. Or there is an exception to
19 the hearsay rule which was talked about in Zundel
20 where if there is also historical material which is
21 the kind of treatise that is accepted as primary
22 authoritative historical works then there may be an
23 exception to the hearsay rule which would permit that
24 contravailing theory to come in in the absence of a
25 witness, but simply to come in as a document.
26 But where there is a debate then in our
27 submission -- and where it is not perfectly settled as
28 a matter of historical or anthropological or
29 linguistical fact what the proper theories are which
30 are at that point acceptable, then the -- in our
31 submission the answer is that there is witnesses
32 called and everything can be tested in the proper
33 course of time.
34 THE COURT: But we've been through that process.
35 MS. MANDELL: Well, we've been through one side of it.
36 THE COURT: Yes.
37 MS. MANDELL: But, my lord, the thing that is troubling is we
38 received about ten minutes before the court began my
39 friend's written argument where he posits the view
40 that he has just done, that is that treatises are all
41 to be put in for the -- I don't want to state it for
42 him, but he says that the treatises if they satisfy
43 certain tests of reliability should be received as
44 prima facie proof of the facts contained therein and
45 the opinions based on those facts are also admissible.
46 And then says:
47

1 "On this basis, the hearsay objection to the
2 treatises relied on in the opinions of Ms.
3 Albright, Dr. Mills, Dr. Daly, Dr. Rigsby and Dr.
4 Kari would be withdrawn by this Defendant."
5
6 So what in our submission is really going on is that
7 this range of objections that we've been struggling to
8 meet with respect to which is the proper way to deal
9 with all of the opinions and facts which the witness
10 is relying upon, my friend is now, if I understand his
11 submission, seeking to waive them. And what he is
12 really doing is trying to seek an advance ruling to
13 let whatever treatises that the defendants may want to
14 rely upon go in without the benefit or without the
15 obligation of their calling a witness and subjecting
16 that to cross-examination. I say that's what this
17 motion is really about.
18 THE COURT: Well, what do the authorities say about the
19 admissibility of treatises? It is not every thesis
20 that qualifies for admission without exception to the
21 hearsay rule?
22 MS. MANDELL: If I could take you through -- the authorities are
23 very weak, very scant in this area. And I can advise
24 you that I believe that the law with respect to
25 treatises are subject to the rules regarding expert
26 opinion evidence, and that that is really what we are
27 left with.
28 THE COURT: What in the world does that mean?
29 MS. MANDELL: This is with reference to the quote that I've
30 already read in the Anderson case where the treatise
31 is of itself not evidence if the witness adopts the
32 treatise, then to the extent that they've adopted it
33 or not then there would be -- the treatise would
34 become part of the opinion of the witness.
35 THE COURT: That means that a witness can make admissible that
36 which would not otherwise be admissible?
37 MS. MANDELL: That's right.
38 THE COURT: Just by agreeing with it?
39 MS. MANDELL: Well, he is not. He has got an area of expertise
40 that he has got to live within. He is not -- he is
41 not giving something out of the blue, the quality of
42 admissible evidence. He is an expert in a field. And
43 because of that qualification of his expertise he is
44 permitted to agree or disagree with certain of the
45 writings within the field.
46 THE COURT: But at the same time he can say because I agree with
47 this treatise that is part of my -- I incorporate that

in part of my evidence because --

MS. MANDELL: He is passing a judgment based on his area of expertise. My friend would have it that you don't even need a witness to do that, that we could go to the U.B.C. library and pull out a treatise written by a C minus student and put it in and have that weighed up in the absence of anybody in the field agreeing that it is even on the graph. If I could ask your lordship to turn to the Zundel case which is found at tab 4, there is some further discussion here as to when a treatise can be admitted as evidence at page 385.

THE COURT: What tab is it?

MS. MANDELL: It is at tab 4. This is again as I mentioned it is with respect to the opinion facts of witnesses that the treatise here discuss --

THE COURT: What page is it, please?

MS. MANDELL: This is at 384.

THE COURT: Yes.

MS. MANDELL: At the bottom of the page:

> "There are, however, certain well-established qualifications to the rule that expert evidence based on hearsay is of no weight."

And then the first paragraph on 385:

> "There are two exceptions to the hearsay rule which are relevant, and in the circumstances of this case, are. In our opinion, mutually supportive. The first is that events of general history may be proved by accepted historical treatises on the basis that they represent community opinion or reputation with respect to an historical event of general interest. The historical event must be one to which it would be unlikely that living witnesses could be obtained, and in addition, the matter must be one of general interest, so that it can be said that there is a high probability that the matter underwent general scrutiny as the reputation, evidenced by the historical treatises, was formed."

And that is just a quote from Wigmore. And then skipping the next paragraph:

"If an historical treatise is admissible to prove an historical fact of general public interest, we think it should logically follow, if the conditions for this exception to the hearsay rule are met, that an expert historian can testify as to the existence of an historical event relying upon material to which any careful and competent historian would resort. The testimony of an expert historian is, in our view, superior to the admission of an historical treatise, because the expert can be cross-examined."

And then the second exception is found at page 387 at the bottom of the page.

"The second exception which is relevant in this case is that an expert witness may give evidence based on material of a general nature which is widely used and acknowledged as reliable by experts in that field. This exception, however, has hitherto been confined to a few narrow classes of cases such as, for example, mortality tables and the standard pharm --"

THE COURT: Pharmaceutical.

MS. MANDELL: "...pharmaceutical guide." And there is a reference to Pattenden. And then quoting from Professor Pattenden, he is speaking -- I am starting from the line "Provided". This is the third line in.

"Provided the hearsay on which the expert relies is of a sufficiently general nature to be regarded as a part of the corpus of knowledge with which and expert in his field can be expected to be acquainted, no objection will be taken to his evidence on this ground."

And then at the bottom of the quote:

"This exception to the hearsay rule (for such it surely is) is largely based on necessity, but a recognition of the greater

1 ability of the expert than the court to
2 evaluate the reliability of background
3 hearsay may also be a factor."
4
5 And then there is very broad rules cited in the United
6 States. And that's McCormick on Evidence quote. And
7 then on page 389. I am reading from the third -- the
8 third line down in the first full paragraph:
9
10 "The material upon which Dr. Hilberg relied
11 in forming his opinion was material to
12 which, as we have previously indicated, any
13 careful and competent historian would
14 resort. Having regard to the fact that his
15 opinion related to an historical event of
16 international interest, and the unlikelihood
17 of obtaining living witnesses who had
18 first-hand knowledge of Nazi government
19 policy and its implementation with respect
20 to the subject-matter of the Holocaust which
21 lies at the foundation of the case, we are
22 satisfied that Dr. Hilberg's opinion
23 evidence, in the circumstances of this case,
24 also fall within this hearsay exception and
25 was therefore admissible on that basis."
26
27 And we say that this is dealing with historical
28 evidence and your lordship has been through this case.
29 But we are here talking I think in general principle
30 to the same kind of analysis with respect to
31 archeologists and anthropologists and linguists. And
32 that is that if it is within their field of
33 discipline, and it is proper for them to consult as
34 part of their making of an opinion certain treatises
35 they are, as part of their opinion, entitled to
36 evidence the treatise, evaluate it. And what's the
37 value in it evidence before the court is the extent to
38 which that expert, having been so qualifies --
39 qualified adopts or refutes or comments upon the
40 treatise in question.
41 THE COURT: Well, let me ask you about another situation.
42 Assuming its relevant, the witness, without mentioning
43 Darwin, totally rejects the theory of evolution. So
44 in cross-examination counsel puts Darwin's text to him
45 and says, Do you agree with this? Do you agree with
46 this? Do you agree with this? And in each case the
47 witness says, No. In your view is Darwin then a

1 non-issue in the case, the court can't consider it?
2 MS. MANDELL: No, if it is an issue in the case then my friend
3 should, or whoever is on the other side of this,
4 should call the witness and submit their -- submit
5 their thesis including put that before the witness and
6 have it tested. You know, I believe that Darwin is
7 right. I mean I am a person in 1989 who has been
8 educated to take this as fundamental fact. And I do
9 have further authorities in here where your lordship
10 will become aware again, if you need to, of the
11 doctrine of judicial notice where if Darwin isn't in
12 issue of the case, if it is not something which the
13 parties are contending about, then according to the
14 doctrine of judicial notice your lordship should be
15 entitled to go to Darwin's work. It is very widely
16 known. It appears to be uncontradicted and is highly
17 reputable. Your lordship, independent of counsel,
18 could perhaps take judicial notice of it. But what if
19 Darwin's theories are suddenly disputed again? What
20 if new evidence becomes known to the scientific
21 community which would put into question Darwin's
22 theories? This may be an issue of the case. We say
23 that if it is a matter of controversy, if there is
24 anything that isn't agreed to by the witness who is a
25 qualified expert then -- and if that point is a point
26 of issue of the trial then there should be a witness
27 who stands up and makes their case based upon the
28 theory which is being advanced.
29 THE COURT: What I am wondering about is whether it would be
30 possible for the court to say in that situation
31 without accepting Darwin as scripture one could say,
32 well, Darwin is a well-known authority and the witness
33 disagrees with the witness and therefore the evidence
34 of the witness has to be scrutinized more carefully
35 and possibly rejected just because the witness
36 disagrees with a well-known authority. Or,
37 alternatively, if there is a matter of onus can the
38 court say because the witness disagrees with Darwin we
39 are not going to -- I don't think she has proven her
40 case. I don't think the witness -- I am thinking of a
41 witness for the moment. I am thinking if Dr. Albright
42 was to disagree with something from an eminent author,
43 could I then say because she has disagreed with an
44 eminent author I am entitled, perhaps, to conclude and
45 consider all of the evidence and persuade that her
46 evidence ought not to be accepted or her evidence does
47 not carry the case on that issue which she is talking

1 about. Is that a possibility?
2 MS. MANDELL: Well, it is. And I answer you first by saying
3 with respect to the Darwin witness, if you have a
4 witness on the stand who is qualified as a scientist
5 in the area of evolution of species they will have a
6 strong opinion with respect to Darwin. Now, they may
7 not agree with Darwin and that may be the subject of a
8 debate.
9 THE COURT: Darwin is perhaps too notorious of an example. But
10 let's say we are talking about physics and somebody
11 disagreed with Dr. Openheimer or Dr. Teller or
12 somebody of international stature. And they say,
13 well, I have my own theory of quantum physics. I
14 don't agree with Dr. Openheimer. He didn't know what
15 he was talking about. In the absence of anything
16 else, could you say that witness because he disagrees
17 with a leading authority can't carry the side for
18 which he contends over the burden of purpose?
19 MS. MANDELL: Well, I think your lordship has identified your
20 job at the end of the day. And that, by the way, is
21 the position that we said to our friends. We didn't
22 get you to our position with respect to how this is
23 done, but we say that if there was an objection taken
24 to the treatise it should have been done at the time
25 and the purpose for which the treatise was being
26 advanced should have been explained and dealt with at
27 that time. But alternatively what your lordship says
28 we say is the proper approach, and that is at the end
29 of the day your lordship is going to evaluate the
30 weight of the expert evidence that is before you. And
31 your question is, well, should the treatise be
32 admitted just to say that there is a reputable
33 treatise which the witness disagrees with? We say
34 that if the witness is an expert in the area and there
35 is a reputable treatise to be valued in the evidence
36 that that is the subject of evidence which the witness
37 commented upon and in the end of the day your lordship
38 will deal with it. And if the answer which is given
39 by my -- by the witnesses is one which puts the
40 treatise into a non-admissible state then there can be
41 another witness called which -- an expert also in the
42 area who will say that this is a reliable type of
43 document which this witness should not have weighed
44 the way that she did.
45 I might, for example, at tab 14 draw your
46 lordships attention, for example, to Morice as was
47 commented upon by Dr. Kari. There is many examples of

this, but I think this is one that may help to illustrate the point that you make. This is in chief Dr. Kari commenting upon his estimation of the depth of coverage of the Babine Wet'suwet'en language by Morice. And at line 38 he says:

"A Well, I have tried -- I have studied all of Morice's published works and we, in our library in Fairbanks, do try to acquire manuscripts of that vocabularies of unpublished works too. And Morice, in what he refers to as Babine, published no more than 150 vocabulary items or grammatical items on the language.

Now, I could give you the relative scale but he's published more on Sekani than that; he published more on Tahltan than that; he published, and had documented Chilcotin more on that, of course he lived down in Williams Lake when he did the Chilcotin; and he published a vast amount of Central Carrier, but the documentary record on what he calls Babine linguistic record is rather small. I do not mean to slight his judgments in his history of northern interior British Columbia. He has some very interesting and sophisticated analysis of Babine history and historic contact and so forth but he just didn't work on the language very much."

And so you might very well have somebody who is well reputed in the area whose work is being put to witness, but it is the extent to which in his area of specialty the witness qualifies it and comments upon the weight. And in the end your lordship will be able to weigh up whether or not it's this witnesses opinion on this and other points which is to be given any beat, but not on some global objection with respect to treatises.

That's the point that we made to Mr. Willms as well. And that is that this isn't, in our view, the proper subject for a global ruling with respect to the treatises. The treatises have gone in to do many things. I have indicated some of them. They have adopted some facts. They have adopted some opinions. They have refuted some facts. They have qualified certain opinions. There has been evidence, and I have indicated it in the tabs, and I won't take you to it.

But where the witness says for 1929 that was good, but we've gone way beyond it and so there is new evidence which would be here to deal with it. There is a tab from Dr. Morrison's work which is spelled out at or set out at tab -- Mr. Morrison at tab 19 where he introduced a treatise. In this case it was a Dictionary of Canadian Biography. It is at the second page of the tab.

> "These are just a couple of excerpts from a secondary source, namely, the Dictionary of Canadian Biography Volume 1, and they deal with geographical knowledge of North America, and I note on the first page it is a biography, short biography of Francis Drake, suggesting that he may have been the first British subject to sight the coast of -- the Pacific Coast of what's now Canada."

And so this treatise isn't being introduced for the proof of any of the facts, but simply to show what was the general state of public knowledge in and around 1763 of the coast of the pacific. So there were many varied purposes for which these treatises were introduced.

It is our submission that there is no one blanket ruling which could or should be made at this time with respect to why these treatises have gone in. It is all, in our view, a matter of weight at the end of the day based upon how or in what way the treatise was introduced, for what purpose, and how it was adopted by the witness.

If there is no point of dispute then there may be either judicial notice or the treatise be put in as a matter of accepted historic fact or accepted anthropological fact. But where there is difference then we say that the treatise is somebody else's opinion and an expert in the area should be put forth to comment on it, which we've done.

There is no basis on this point to revisit that with respect to the fact of two treatises. And in Jim Morrison's testimony all of these treatises have been marked now as exhibits in the trial we say to be able to be used at the end of the day for whatever argument is proper within the context of the existing law and for the purposes that they were put in.

1 THE COURT: I guess what is troubling me about your submission
2 is that it almost forces the defendants to call a lot
3 of evidence that may, if some other theory were
4 accepted, would be admissible. For example, if Mr.
5 Willms can get some benefit from the treatises he put
6 to your witnesses in cross-examination he doesn't have
7 to call a lot of witnesses. If he can't get any
8 benefit from them -- let's assume for the moment that
9 the authorities that he put are far more persuasive
10 than the evidence of the witness or because the
11 witness wouldn't adopt them or wouldn't agree with
12 them they were authoritative, or might say the author
13 is authoritative but I don't agree with the author,
14 then he has got to call a lot of witnesses who parrot
15 what the treatise says that he has already put to the
16 witness.
17 MS. MANDELL: Don't forget, though, that the treatise is
18 challenged. It is not a matter where the treatise can
19 speak for itself. It is an opinion of an expert in
20 the area where another expert qualified in the area
21 which is a step higher than the treatise writer who
22 isn't qualified yet as an expert in the area says that
23 they disagree or find qualifications to be made with
24 respect to a theory.
25 Now, take Dr. Kobrinsky, for example. We've had
26 any number of witnesses say that they think that his
27 theory doesn't conform to any of the facts or opinions
28 that the witness themselves have tried and tested and
29 read about and formed a view on in the area. Well,
30 Dr. Kobrinsky is alive. He lives in Calgary. If
31 there is something which is to be made of that let Dr.
32 Kobrinsky take the stand and we will find out if that
33 is something with you which your lordship should way
34 either to test --
35 THE COURT: That's what troubles me because that makes lawsuits
36 more prolonged than this already is. And I didn't
37 intend my comment to be limited to the treatises that
38 Mr. Willms put in cross-examination. I think also the
39 treatises upon which your opinions witnesses relied
40 and your bibliographies and which found their way into
41 evidence in some form or another. Surely you
42 shouldn't be in a position that you have to call them
43 all before you get any benefit on them or should you?
44 MS. MANDELL: Well, we didn't. We called an expert in the area.
45 THE COURT: My opinion is consistent with what these other
46 experts have said.
47 MS. MANDELL: They aren't consistent.

THE COURT: Should you have to call them all in order to get the benefit of that consistency?
MS. MANDELL: Well, we certainly didn't call them all.
THE COURT: Oh, no.
MS. MANDELL: But I do want to say that the point is a contentious one in the trial which obviously whether the Gitksan are newly formed in their area and have formed a sect in the fur trade which is what Kobrinsky says, or whether they've been there since time immemorial. And if that is a contentious issue in the trial and if the literature is contentious, that is that if the people who have written about this don't form one view, then in that case I don't think you can shorten the lawsuit by unwiping or to limiting the ability to cross-examine on the countervailing view by saying that all of these treatises should go in for the proof of everything they say and at the end of the day it is all a question of weight.

The question really isn't should all lawsuits be lengthened because of this proposition. We say that this is -- I think, and it is what I said earlier, that this motion is a motion which isn't a proper ruling for your lordship to make at this time, that is what are these treatises going in for? We say that my friend has taken the view all along that he admits or accepts that at least they go in as the underlying facts which the expert relied upon it.

We say that each of the experts created some evidence with respect to it and that is going to be argued for at the end of the day. There is no one right purpose for how all of the treatises either went in or are used, and that my friend is using this application to try and create a ruling which will allow him to choose to call an expert to rebut the theories that were refuted by the experts on direct. I say that it's not a question of shortening the trial. I don't think there is appropriate application for a general ruling on treatises.
THE COURT: All right. Well, I think we will take the afternoon adjournment. I think that perhaps we should try and sit a little late to make up a little bit of lost time. Shall we sit to 4:30? Would that be convenient?
MS. MANDELL: Yes.
THE COURT: All right.
THE REGISTRAR: Order in court. Court stands adjourned for a short recess.

1
2 (PROCEEDINGS ADJOURNED)
3 (PROCEEDINGS RESUMED)
4
5 MS. MANDELL: My lord, I have two short things to say in
6 summary, and I will sit down and let my friends have
7 their turn.
8 THE COURT: All right.
9 MS. MANDELL: I wanted to stress the fact that many of the
10 treatises that the plaintiffs put in were put in not
11 to show the proof of the truth of anything in them,
12 but rather to refute the theories or the facts which
13 were found in them. And I can draw to your lordship's
14 attention --
15 THE COURT: I'm sorry, these are the treatises that the
16 plaintiffs put in?
17 MS. MANDELL: The plaintiffs put in. I can draw to your
18 lordship's attention, for example, the evidence of
19 Antonia Mills where the treatises of Dr. Kobrinsky and
20 Dr. Bishop, for example, were put to the witness.
21 Objection was taken by my friend to that happening.
22 Your lordship intervened and said, well, you have this
23 an issue in the case and certainly the witness can
24 comment upon it. These treatises were introduced for
25 the witness to comment upon the extent to which he
26 found the theories there disreputable. This was the
27 purpose for the plaintiff putting those treatises in.
28 And I secondly want to say in response to your
29 question about aren't we talking about a massive
30 amount of court time being used for everybody taking
31 the stand. We are really talking about in practical
32 terms one witness. You will recall Mr. Goldie in
33 volume 250 describing the plans of the defendant's
34 case. This is at page 18449.
35
36 "The order would be Dr. Farley, Dr.
37 Greenwood, and Mr. Williams. And then there
38 is a question with respect to Dr. Robinson.
39 And I say a question because the -- your
40 lordship's rulings on the submissions made
41 by Ms. Mandell will have a bearing on Dr.
42 Robinson's report..."
43
44 There has been a report filed which do deal, by the
45 way, with these areas which are of controversy between
46 the witnesses.
47

1 "...together with your ruling on an argument
2 that you've yet to hear which deals with the
3 use of treatises. And that is one of the
4 things that has been left open by my friends
5 and which we would like to see concluded as
6 soon as possible."
7
8 Now, it is really that that which we are speaking
9 about. And that is just as the plaintiffs called a
10 witness expert in the area to comment upon a variety
11 of treatises, certainly not ever author was called to
12 the stand and didn't need to be, were here talking
13 about the defendant calling somebody who has delivered
14 a report and has obviously referred and relied upon
15 various of these treatises to take the stand and to be
16 cross examined with respect to them. Thank you.
17 THE COURT: All right. Thank you. Mr. Willms.
18 MR. WILLMS: I think my friend Ms. Koenigsberg has said she
19 would be -- it might help if she went first.
20 MS. KOENIGSBERG: That was very kind of you, Mr. Willms.
21 My lord, I thought it might be appropriate for me to
22 make my submissions at this point because I guess I
23 find myself, I guess it isn't unusual, somewhere
24 between what I understand each of my friends'
25 arguments to be. It is our submission that there are
26 really two issues here. And if we can unscramble
27 them, at least as I have understood them, at least I
28 will understand where we are.
29 The first issue seems to be what is a treatise.
30 Our submission is that the answer to that question is
31 well set out in the law. And that we are dealing with
32 what are referred to as learned treatises in Wigmore.
33 And essentially a short form of what a treatise is for
34 the purposes of the exception to the hearsay rule is
35 encompassed in the term standard text, a
36 non-controversial accepted work on a subject within a
37 field of expertise. But the ahllmark of a treatise
38 for it to be admitted into evidence for the prima
39 facie truth of the contents is that the it must have
40 been subjected to expert public review and use by
41 acknowledged experts to gain that status.
42 THE COURT: What was it again, to public --
43 MS. KOENIGSBERG: Expert public review as opposed to just public
44 and use by acknowledged experts. And, my lord, that
45 really goes to -- it is set out in Wigmore. You've
46 had this referred to you at various times. I can just
47 provide you with the extract. You already have it in

1 a couple of other places, but rather than go look for
2 it.
3 THE COURT: Thank you.
4 MS. KOENIGSBERG: Wigmore is here dealing beginning with section
5 1690 of Learned Treatises. And he is dealing with it
6 as an exception to the hearsay rule. He deals with
7 the two topics, necessity and trustworthiness. And if
8 I can summarize it, what he is saying is it is
9 analagous to reputation evidence. It is analagous to
10 evidence at the other -- at the extreme end that your
11 lordship can take judicial notice of. Now, you
12 certainly could have a treatises that fit within the
13 exception, I would suggest to you that you could not
14 take judicial notice of. But that is the very end of
15 that spectrum, so to speak. It is the reputation
16 aspect that is essential in my submission to qualify
17 as a treatise under the exception to the hearsay rule.
18 And that is why I say it is a work which must have
19 been subjected to expert public review.
20 And that, in my submission, is why when a treatise
21 is put to a witness, in most cases, it is to have that
22 witness who is an expert in the field acknowledge that
23 the author of the treatise or the treatise itself is
24 an authoritative work in the field, something
25 recognized by a large number of people in the field.
26 We usually think of it in the context of medical
27 textbooks, scientific works. I don't say it's
28 exclusive to that, but we think of it in those terms.
29 We think of it in those terms because we are thinking
30 of the use to which it is put. It is being tested all
31 the time and if there is something wrong with it
32 somebody will say so.
33 In my submission that is the analysis that Wigmore
34 goes through. And, in my submission, that is
35 analagous to the way again in which historical
36 treatises were referred to in the Zundel case that
37 we've just been looking at, and in my submission that
38 is appropriate. If the work meets the test of being a
39 treatise then it is, in my submission, admissible for
40 the prima facie truth of its contents.
41 THE COURT: I suppose --
42 MS. KOENIGSBERG: Usually you have to prove it.
43 THE COURT: I suppose some of these might qualify and some might
44 not.
45 MS. KOENIGSBERG: Exactly. I cannot agree with my friend Ms.
46 Mandell, if I understand her, that most of the works
47 that have been put to the witnesses in this case would

1 qualify to go in as treatises. That doesn't mean that
2 they aren't in because of something that the witness
3 said about them. The witness may have qualified that
4 work and the facts. They may have proven the facts by
5 something that they have said. That is a different
6 issue, in my submission. But if we are talking about
7 treatises and how do they go in, if it qualifies as a
8 treatise in my submission it's in.
9 Now, it doesn't matter if my friend in putting in
10 a book or a published work which qualifies as a
11 treatise and has been demonstrated to be to a witness
12 in chief, that witness has then qualified that work or
13 criticized it or told your lordship that it is wrong
14 for this reason or it only goes this far or whatever,
15 assuming it is a treatise there is nothing wrong with
16 that. Your lordship will then weigh it.
17 If there is any controversy about it, you will
18 weigh the opinion of the witness and their reasons for
19 qualifing that work and the work. And if one of the
20 defendants wants to call a witness or in the course of
21 cross-examining or whatever leads evidence that the
22 reasoning isn't adequate then you will be asked to
23 weigh that. But my first difficulty with my -- well,
24 with both of my friends is that we are calling
25 everything here a treatise which means that a C minus
26 thesis is a treatise.
27 THE COURT: Actually I think a C minus is pretty good.
28 MS. KOENIGSBERG: Well, it is a pass.
29 THE COURT: That's right. It used to be a pass.
30 MS. KOENIGSBERG: Actually there are some graduate schools in
31 which that is not a pass. But, we will leave that
32 aside because I don't know where Mr. Kobrinsky went to
33 school.
34 And I only single that out -- I would say there is
35 probably an argument on whether Jenness is a treatise.
36 And I would your ask your lordship to test it this
37 way. You may recall in cross-examination of I think
38 Mr. Daly for another purpose I put to him the
39 controversy within the field of anthropology which was
40 highlighted by the work between Mr. Redfield and Oscar
41 Lewis about a Mexican town. And you had one very
42 reputable highly recognized well-authoritative
43 anthropologist who went there and wrote an
44 anthropological work about that village. Along came
45 Lewis 20 years later and went into the same area, an
46 unusual thing to happen unfortunately in the
47 anthropological field and came to the same conclusion,

1 equally authoritative. How could we say that is
2 non-controversial? How could we say that qualifies as
3 the idea of general usage about which there is a
4 reputation? In my submission we can't. And for that
5 reason generally -- I don't say without exception, but
6 generally a discipline in which no matter how well
7 qualified a person is if they go in and do a study but
8 other people don't have access to that and therefore
9 can't generally accept or reject the contents it
10 should not be evidence in a court of law.
11 So that's my submission on treatises. And in my
12 submission the first thing we have to deal with in
13 deciding whether something is in or not is we have to
14 decide if it is a treatise. After that if it is a
15 treatise, my submission comes fairly close I think to
16 Mr. Willms' submission. And that is assuming it is a
17 treatise it is admissible for the prima facie truth of
18 its contents. And I would submit to your lordship
19 that probably applies to both opinion and facts, but
20 certainly to the facts. And the very process that we
21 have gone through that we have seen plaintiffs'
22 counsel go through and counsel for the defendants in
23 relation to the works which have been put to the
24 witnesses is the very testing that should go on both
25 of a treatise. And if a witness says, as has been
26 said, well, this person went this far at this time and
27 it was great for the time, but we've moved on from
28 there. That doesn't detract from the fact that as far
29 as it went it is in for the truth of it.
30 THE COURT: That would be a matter of weight in your submission?
31 MS. KOENIGSBERG: That's right. A matter of weight. And when
32 we are dealing with works which are not treatises,
33 then in my submission the appropriate thing to do is
34 to analyze it in terms of it could be admissible on
35 other grounds. But you put to it to the witness, if
36 you want to do so in cross-examination as might be
37 done and as was done, and they may admit some parts of
38 it, then it's in. Or they may disagree with it and
39 then it is not in for the truth of it at that point.
40 But it's in and it could be argued.
41 But if you want the facts in as evidence from a
42 document that is not a treatise, you either have to
43 find another exception in my submission or you have to
44 prove those facts in another way.
45 And I think I have mentioned it, but I would just
46 say finally that in my submission there are not very
47 many works that have been submitted. And the hallmark

in my submission for many of these works is that it is a work, for instance, archeological work. Even though it is related to a very specific thing. If it is utilized, the person is recognized and if it has been utilized by someone else and built on, it probably qualifies as a treatise because if there is something wrong with it, it will have been discussed in the literature. I think that's probably all I have to say.

THE COURT: Thank you. Mr. Willms

MR. WILLMS: My lord, I have a written submission. Before I start it I should say that with respect to what my friend Ms. Mandell said that this only concerns one witness and that the issue isn't right. Ms. Albright's report was marked subject to objection. It is in volume 165 at page 10476, and that is the basis upon which it was marked subject to objection. And in my submission it is right. The objection is raised again now if that's necessary to have this right for argument. It is my submission that if as a result of your lordship's ruling these treatises are not going in, for example, as prima facie truth of the facts contained in them that Ms. Albright's report is inadmissibility.

THE COURT: Which page did you give me for that again?

MR. WILLMS: The page, my lord, is page 10476.

THE COURT: Thank you.

MR. WILLMS: Volume 165. And my friend Ms. Mandell has already handed up to your lordship the portions where I objected to the marking of the treatises, et cetera. Now, my lord, you will recognize I hope the first paragraph of this submission and I am not going to repeat it. It is almost verbatim to the first paragraph of the submission that I made in respect to historical treatises. That is in many respects unless the facts -- and my friend Ms. Mandell I think highlighted this when she described Fladmark's photographs of arrowheads. Ms. Albright takes her arrowhead and compares it with something that Fladmark found. If Fladmark isn't in, that is if Fladmark is outside the courtroom door there is no basis whatsoever for Ms. Albright to come to any conclusions about that arrowhead at all because there is nothing -- she can't say that there was another arrowhead found somewhere else unless Fladmark is in to say that. That's what I mean by prima facie proof of the truth of the facts contained in it.

1 There are a number of other examples, I gave your
2 lordship some examples of what Aimes dug up at
3 Hagwilget and Allaire dug up at Kitselaas Canyon and
4 MacDonald excavated in Prince Rupert. Those are
5 facts. I make a distinction about facts and opinions.
6 Now, I would like to point out, and I do this at
7 the bottom, that there is some authority for a
8 proposition that treatises are not admissible as prima
9 facie proff of the facts contained therein, especially
10 where they were written with a view to litigation.
11 And the best description is O'Brien v. Angley. I know
12 your lordship doesn't have the black binder that I
13 handed up last time, but fortunately it is in the
14 other one. The opinion, the one I handed up some time
15 ago.
16 THE COURT: Well, I have the one that was handed up on the
17 argument on opinions. Is that the one that starts
18 with Phillion.
19 MR. WILLMS: Oh, you have one.
20 THE COURT: I'm sure I know where that one is. I didn't look
21 for it. But Ms. Thompson wasn't able to find it, but
22 I think I know where it is.
23 MR. WILLMS: You don't need it, my lord, because in this
24 particular one at tab 2.
25 THE COURT: Yes.
26 MR. WILLMS: You will find the O'Brien case. For everybody else
27 it is at tab 11 of the Phillion authorities. This is
28 a judgment of the Supreme Court of Ohio. The issue
29 was not that dissimilar from the issue in the Anderson
30 case about the use of treatises in cross-examination
31 witnesses. The discussion of the law is at page 493,
32 my lord. And what was attempted here was an attempt
33 to introduce excerpts from an editorial published in
34 the journal of the American Medical Association where
35 the text of the journal involved litigable matters.
36 The discussion starts -- there is a paragraph 2, 3
37 where the court says:
38
39 "Furthermore, it is generally recognized
40 that the trial court's discretion in
41 regulating the admissibility of evidence
42 includes controlling the extent to which
43 learned treatises may be used in the
44 cross-examination of expert witnesses.
45 Although the admission of learned treatises
46 in evidence would constitute a violation of
47 the rule against the admission of hearsay

1 evidence, in that such evidence purports to
2 employ testimonially a statement made out of
3 court by a person not subject to
4 cross-examination, the primary justification
5 for admitting such evidence as a limited
6 exception to the hearsay rule is predicated
7 upon consensus that learned treatises are
8 inherently more trustworthy than customary
9 forms of hearsay. This view is founded upon
10 a recognition that learned treatises are
11 ordinarily written for members of the
12 author's profession and, therefore, the
13 author is thought to have no motive to
14 misrepresent the material construed therein.
15 A powerful incentive exists to publish a
16 work which will be accepted by the other
17 members of the author's profession as a
18 fundamentally sound and authoritative
19 exposition of the subject. Where, however,
20 the author publishes an article with a view
21 toward litigation, or where he expresses a
22 personal interest in a litigable matter, a
23 probability of bias exists which undermines
24 the logic supporting the admission of this
25 material in evidence as an exception to the
26 rule against hearsay. Such publications do
27 not as a matter of course fall within the
28 learned treatise exception to the hearsay
29 rule."
30
31 In this case they held that this particular journal
32 which was written with a view towards a particular
33 piece of litigation was not admissible, the treatise
34 was. But they cited a general rule. And the case is
35 illustrative, at least in the United States of the
36 change in admissibility of treatises as an exception
37 to the hearsay rule. My friend read to you the
38 Anderson case which is a case from the Alberta Court
39 of Appeal in 1914 where, if I can put it, the classic
40 theory that is unless you get the witness in
41 cross-examination to acknowledge that the work is
42 authoritative you can't even put it to him. You
43 should call your own witness unless you can get the
44 witness to acknowledge that the work is authoritative.
45 Fortunately we don't have that problem in this case
46 because I would say 98 per cent of the works that I
47 put, for example, to a plaintiffs' witness were from

1 the plaintiffs' own book. I mean the plaintiff had
2 read them all, acknowledged that the author -- nobody
3 said that Kobrinsky was a C minus anthropologist. In
4 fact, Dr. Kari later on commented on another one of
5 Dr. Kobrinsky's work very favourably. He just said
6 this one is a C minus work. We had another witness.
7 I think Dr. Ray commented on a witness and said he got
8 his Ph.D., but just barely. But then commented on
9 another work of this that particular witness.
10 It is my submission here that the traditional view
11 expressed in Regina and Anderson doesn't really apply.
12 Now, the more -- if I can put it this way, the more
13 modern view which recognizes the advances of science
14 if you turn to the tab of page 2, my lord, which has
15 the reference -- a reference to Wigmore, Wigmore lists
16 and then deals with reasons advanced in respect of
17 inadmissibility. And this if you turn, my lord, to
18 tab 1 of the book of authorities that you have,
19 Wigmore is at tab 1. Tab 14 for anyone following the
20 other book of authorities. This was also, I believe
21 handed up by my friend Ms. Koenigsberg. But at the
22 beginning Wigmore talks about this, and says:
23
24 "This exception is usually spoken of as
25 involving the use of "scientific books" or
26 "medical books" or "books of science and
27 art"; but the term "learned treatises" seems
28 more accurate in indicating the scope of the
29 doctrine. As an exception to the hearsay
30 rule, it has obtained complete recognition
31 in only a few jurisdictions; but it deserves
32 a fuller acceptance.
33 What are the reasons for and against
34 recognizing it?
35 (1) More than one reason has been advanced
36 for prohibiting the use of learned treatises
37 in evidence. The only forceful one, and the
38 one generally pointed out and relied upon in
39 judicial opinion, is that such an offer of
40 evidence purports to employ testimonially a
41 statement made out of court by a person not
42 subjected to cross-examination; i.e.,
43 purports to violate the fundamental doctrine
44 of the hearsay rule."
45
46 Now, I am just going to deal with each of the reasons,
47 my lord, and then the responses by the learned author.

1 Over to the next page reason number 2. And my friend
2 Ms. Mandell mentioned this.
3
4 "We have been told that science is shifting;
5 that experiment and discovery are
6 continually altering scientific theories and
7 rendering them valueless; so that a medical
8 book which was a standard last year becomes
9 obsolete this year; that there is no general
10 agreement among scientists, and that
11 testimony characterized by such instability
12 and uncertainty is untrustworthy.
13 There is ignorant exaggeration in these
14 charges. They attribute to the entire body
15 of scientific knowledge the instability due
16 to casual rapid progress in certain
17 departments of the sciences; and they ignore
18 even in those departments the small
19 proportion which the field of possible
20 change bears to the large area of
21 established truth. But, leaving this aside,
22 we find that the objection is in itself
23 inconsistent with accepted legal practices,
24 and would if consistently applied exclude
25 all testimony even on the stand from
26 scientific witnesses. For if these works
27 are rejected because they may not embody the
28 latest results of science, what shall be
29 said of specialist witnesses in general?"
30
31 And I just pause there, my lord, to say that Dr. Ray
32 and Dr. Kari both acknowledged, in colourful terms for
33 Dr. Ray, that their opinion could change in five years
34 and ten years and that science is progressing. That
35 that's their opinion today. And of course in a court
36 of law that's what we have to deal with. We have to
37 deal with what the witness's opinion may be today.
38 But a theory that 50 years ago they didn't know very
39 much and now they know a lot more is no reason to rule
40 out the treatises as my friend Ms. Mandell I think
41 suggested. Because if that's a rule -- a reason to
42 rule it out then Dr. Kari's is ruled out and Dr. Ray's
43 is ruled out. I know that some of the other witnesses
44 said that their opinion would probably never change
45 like Dr. Daly and Ms. Albright. But I don't think
46 whether or not the witness says his opinion will
47 change or not affects its admissibility. And I say

1 that applies to treatises, too.
2 Now, down, my lord, item 3 is not really relevant
3 here. It is the suggestion that technical passages
4 will confuse the jury. Nobody is arguing that one, my
5 lord.
6 Number 4:
7
8 "Another objection, once made, is that
9 treatises may be used unfairly, by taking
10 passages which are explained away or
11 contradicted in other books or in other
12 parts of the book. Here, again, so far as
13 the possibility is appreciable, the opposing
14 counsel may be trusted to protect his
15 client's interests (exactly as he does) by
16 bringing to the stand one expert to oppose
17 another, and with much less difficulty and
18 expense."
19
20 And that's a key of it that you pointed out, my lord.
21 Do we need to call Dr. MacDonald, Dr. Aimes, Dr.
22 Coupland, Dr. -- such of the anthropologists like Dr.
23 Goldman who are still alive. I don't know if Dr.
24 Goldman is still alive. These are all people referred
25 to by the plaintiffs' witnesses in their lists. Some
26 of them are alive and some of them aren't. But do
27 they all need to be called or can we use the treatise?
28 It is my submission that we can use the treatise.
29 Just carrying on:
30
31 "All these objections, appearing in the
32 beginning as the casual thoughts of
33 individual judges in past and less liberal
34 generations, were elevated to the rank of
35 accepted reasons and given vogue in one or
36 two treatises on evidence, and thence found
37 their way into many judicial opinions of a
38 later generation. But for this, it is
39 probable that the true reason for the rule
40 of exclusion would not have been obscured."
41
42 I won't deal with the next one, my lord, which is the
43 original, the starting objection in Collier v. Simpson
44 by Chief Justice Tindal because that argument as
45 Wigmore says has not re-appeared.
46 Now, just turning to Wigmore's discussion of The
47 Exception As Recognized under section 1691. The

1 learned author says:
2
3 "The necessity seems palpable enough, if we
4 examine carefully the results of the strict
5 enforcement of the hearsay rule. The
6 ordinary exert witness, in perhaps the
7 larger proportion of the topics upon which
8 he may be questioned, has not a knowledge
9 derived from personal observation. He
10 virtually reproduces, literally or in
11 substance, conclusions of others which he
12 accepts on the authority of the eminent
13 names responsible for them. If, whenever
14 this is discovered, we are to reject the
15 evidence absolutely, then on all such
16 matters the only resource is to search for a
17 qualified expert, who may or may not be
18 available within the jurisdiction."
19
20 And I just pause there, my lord. That goes to the
21 plaintiffs' case. And that is one of the basis of my
22 objection. If they're not tendering these treatises
23 as proof of the facts contained in the treatise and
24 tendering the opinions in the treatise as something
25 that your lordship can consider in considering the
26 opinions of the witness, then they've got to call them
27 because they are completely inadmissible. Now, just
28 carrying on.
29
30 "Even where such a person is legally
31 procurable...
32
33 And my friend Ms. Mandell mentioned Kobrinsky in
34 Calgary,
35
36 "...(all the chances being against it except
37 in a few centers of population), the expense
38 is frequently disproportionate. Costly
39 litigation is the parasite of justice; and
40 we pay too high a price when we refuse to
41 accept our information from a competent
42 source ready at hand. Moreover, there are
43 certain matters upon which the conclusions
44 of two or three leaders in the scientific
45 world are always rule are always
46 preeminently desirable; and it is highly
47 unsatisfactory that, except in the region

1 where they may happen to live, the opinions
2 of world-famous investigators should have no
3 standing of their own. Whether such persons
4 are legally unavailable, or whether it is
5 merely a question of relative expense, the
6 principle of necessity is equally satisfied;
7 and we should be permitted to avail
8 ourselves of their testimony in the printed
9 form in which it is most convenient.
10 The proper rule would be for the court to
11 allow the use of a printed treatise,
12 approved and read aloud by a witness expert
13 in that subject, unless in its discretion,
14 considering all the circumstances, the
15 author if available should be summoned. In
16 practice, the courts which allow the use of
17 learned treatises apparently do not impose
18 any such condition."
19
20 Now, just pausing there, my lord, as I said earlier,
21 99 per cent or maybe 95 per cent of the treatises, the
22 extracts that I put to witnesses in cross-examination,
23 or obviously the ones that the plaintiffs put, are
24 treatises that were referred to and relied upon by the
25 plaintiffs' witnesses in coming to their conclusions.
26 I can't see how it advances the interests of justice
27 in this case to have to call all those people. It
28 simply frustrates the object of coming to some
29 reasonably timely conclusion to this litigation. And
30 so, for example, for Dr. MacDonald who was relied on
31 by many witnesses, Dr. Aimes who was relied on by many
32 witnesses, Dr. Allaire, Dr. Coupland, a couple of
33 witnesses, and all of the other witnesses who relied
34 on various experts, in my submission it is not
35 necessary to call them. We've got the treatise here.
36 It's been cross-examined on. It has been the subject
37 of evidence, and your lordship can take that into
38 consideration in assessing the weight.
39 Now, on trustworthiness, my lord, just carrying on,
40 Wigmore says this:
41
42 "Under the second general consideration for
43 hearsay exceptions, the question here is
44 whether there are any circumstances
45 attending the publication of a learned
46 treatise which give a fair probability of
47 trustworthiness. If we consider the

1 circumstances that have been regarded as
2 sufficient in the foregoing and the
3 following exceptions to the hearsay rule, it
4 must be concluded that the guarantee here is
5 at least as satisfactory:
6 There is no need of assuming a higher degree
7 of sincerity for learned writers as a class
8 than for other persons; but we may at least
9 say that in the usual instance their state
10 of mind fulfils the ordinary requirement for
11 the hearsay exceptions, namely, that the
12 declarant should have "no motive to
13 misrepresent." They may have a bias in
14 favor of a theory, but it is a bias in favor
15 of the truth as they see it; it is not a
16 bias in favor of a lawsuit or of an
17 individual. Their statement is made with no
18 view to a litigation or to the interests of
19 a litigable affair."
20
21 And just pausing there, that's where the Ohio Supreme
22 Court said that's where we're going to draw the line
23 where there is an interest in a litigable affair we
24 are not going to let the treatise in. Now, on to the
25 next page under paragraph B, my lord.
26
27 "The writer of a learned treatise publishes
28 primarily for his profession. He knows that
29 every conclusion will be subjected to
30 careful professional criticism, and is open
31 ultimately to certain refutation if not well
32 founded; that his reputation depends on the
33 correctness of his data and the validity of
34 his conclusions; and that he might better
35 not have written than put forth statements
36 in which may be detected a lack of sincerity
37 of method and of accuracy of results."
38
39 Now, that, in my submission, may tie in with what my
40 friend Ms. Koenigsberg said about what is a learned
41 treatise. There may be a Ph.D. thesis which has been
42 exposed, for example, Dr. Coupland's work is a Ph.D.
43 thesis which was exposed to his thesis committee. Dr.
44 MacDonald's work has been exposed to the archeological
45 world at large. And there may be a distinction there.
46 My submission is the distinction goes to weight and
47 not to admissibility because it is virtually

1 impossible to determine where you draw the line as to
2 what's generally accepted or not in the field unless
3 you call somebody which would require the plaintiffs
4 to call evidence to say, well, this is a
5 well-respected archeologist but this one isn't. And
6 then the defendants call evidence about it and we
7 really don't get very far. Now, in the last
8 paragraph, my lord, paragraph C, Wigmore says this:
9
10 "Finally, the probabilities of accuracy,
11 such as they are, at least are greater than
12 those which accompany the testimony of many
13 expert witnesses on the stand. The abuses
14 of expert testimony, arising from the fact
15 that such witnesses are too often in effect
16 paid to take a partisan view and are
17 practically untrustworthy, are too well
18 known to repeat. It must be conceded that
19 those who write with no view to litigation
20 are at least as trustworthy, though unsworn
21 and unexamined, as perhaps the greater
22 portion of those who take the stand for a
23 fee from one of the litigants.
24 It may be concluded, then, that there is in
25 these cases a sufficient circumstantial
26 probability of trustworthiness. The court
27 in each instance should in its discretion
28 exclude writings which for one reason or
29 another do not seem to be sufficiently
30 worthy of trust."
31
32 Now, turning back to my argument, my lord, at page
33 2 at the bottom from the quote, the shorter quote from
34 Wigmore, a great deal of archeological,
35 anthropological and linguistic research has been
36 conducted and published in respect of this territory.
37 I think that's clear. Whether each of these witnesses
38 agreed or disagreed with the anthropologists who
39 preceeded them, whether they agreed or disagreed with
40 the archeologists who preceeded them or the linguist,
41 and in some cases the linguist who preceeded them was
42 the same linguist, that is that Dr. Rigsby said in
43 1969 what he said 1987. But in my submission where
44 you have learned people who are relied on by the
45 plaintiffs' witnesses who have been in the area, those
46 treatises are entitled to as such consideration by
47 your lordship as the evidence of the witnesses.

1 Another point, of course, my lord, is that many of
2 these treatise writers are deceased. I mean there are
3 some that are still alive, but some of them are
4 deceased.
5 Now, one point that I would like to make here, and
6 it deals with my friend Ms. Mandell's point that there
7 is some difference between putting a treatise to a
8 witness who says "I accept this", and then so the
9 treatise then has some evidentiary value, or putting a
10 treatise to a witness and say "I reject this". Ms.
11 Mandell read from Dr. Kari's evidence, for example,
12 where Dr. Kari said "I prefer Dyen and Aberle to
13 Kobrinsky". And what -- and it is later on, and I
14 could find it if I needed to, but in Dyen and Aberle,
15 Dr. Kari acknowledged in cross-examination or another
16 witness, I can't remember which one, that the whole
17 assumption of Dyen and Aberle which is contained in
18 one line later on is an assumption that the Athabaskan
19 people did not borrow readily, all right. That is an
20 assumption in Dyen and Aberle that the Athabaskan
21 people do not borrow readily. So nobody has proved
22 that. I mean that is not a part of the evidence in
23 this case, that is an assumption of Dyen and Aberle.
24 Kobrinsky's assumption is that they do. Your lordship
25 has Dr. Rigsby's report and Dr. Kari's report about
26 borrowing. And it would be quite wrong, and I don't
27 mean wrong in terms of unfairness, but I mean quite
28 wrong in law if Dr. Kari could say Dyen and Aberle is
29 good, and therefore that's in evidence before your
30 lordship even though it is based on an assumption
31 stated right in the it. But because he says "I don't
32 accept Dr. Kobrinsky" it is not in because then your
33 lordship is only left with half of the facts.
34 It is quite clear, and maybe my friend is right, that
35 is certainly her submission that maybe the defendants
36 must call experts in every single field that the
37 plaintiffs have called in respect of the treatises
38 because I have already made a submission to your
39 lordship that it is pointless for the defendants to
40 call appear participant observationist anthropologist
41 after the commencement of this lawsuit, for example,
42 or a linguist after the commencement of this lawsuit,
43 for example.
44 And that leads me directly into page 4, my lord,
45 especially in respect of the defendants' use of
46 treatises. In respect of anthropology and linguistics
47 because I am suggesting that where a treatise marked

1 satisfies the requirements that, one, it is difficult
2 to obtain other evidence. And in respect of that if
3 your lordship at the end of the day accepts Dr. Daly's
4 evidence based on participant observation there is no
5 way for the defendants to meet that unless they could
6 put in Dr. Goldman which was put to Dr. Daly, or any
7 of the other anthropologist in the area. And so it is
8 practically difficult to obtain other evidence. Dr.
9 Goldman was a participant observation anthropologist.
10 He was there, he observed, he wrote down. So did Dr.
11 Kobrinsky. Dr. Kobrinsky was there as well. So were
12 all of the other ones. Some of them deceased, some of
13 them not. Some of them in Ottawa, some of them in the
14 United States. But the convenient way to lead the
15 evidence, in my submission, is to leave the treatise
16 in prima facie proof of the truth of the facts.
17 And in respect of the opinions, and I do want to
18 comment at this point, my lord, the reason I don't
19 suggest truth of the opinions is that opinions are
20 neither true nor false. Opinions are something for
21 your lordship to have regard to, in my submission, in
22 testing your own conclusions. That's what Kelliher
23 and Smith in the Supreme Court of Canada said. So
24 opinions aren't true or false, opinions are opinions.
25 THE COURT: Shakespeare said nothing was true or false.
26 MR. WILLMS: Pardon?
27 THE COURT: Shakespeare said nothing was true or false.
28 MR. WILLMS: Well, I won't go that far, my lord. I think we are
29 constrained to say some things are true or false.
30 THE COURT: Thinking makes it so.
31 MR. WILLMS: Now, the next three points, my lord, and these are
32 the same points I made with respect to ancient
33 documents with respect to the declarant. If the
34 treatise writer is disinterested and it was not made
35 in favour of his interest. And most of these clearly
36 are not made in anybody's personal interest. As
37 Wigmore says it is an interest in a view point, but it
38 is not a personal interest.
39 The third before dispute or litigation. Well, except
40 for the plaintiffs' experts' reports just about all of
41 these were before dispute or litigation. Of course
42 there haven't been any after because experts for the
43 defendants can't talk to the plaintiffs.
44 And the fourth is that the treatise writer had
45 peculiar means of knowledge. And I think the mere
46 fact that the plaintiffs' witnesses have relied on
47 them either to refute them or to accept them shows

that they had peculiar means of knowledge.
THE COURT: Well, these are the Master of the Rolls test?
MR. WILLMS: These are the Ares v. Venner test, that's right, my lord. And you see the cite from Ares v. Venner which refers to the page where the Supreme Court of Canada accepted I think that Master of the Rolls, Jessel.

Now, just to conclude this, my lord, the treatises that have been advanced in support of the plaintiffs' witness's opinions and treatises which have been put to these witnesses in cross-examination have been the subject of comment in evidence as to content and as to qualifications of the treatise writer. These matters go, in my submission, to the weight to be given in each case to the facts or to the opinions set out in the treatises and not to prima facie proof of the facts or the opinions based on those facts. And on page 4, my lord, I say again that unless my friends are treating -- are advancing these treatises for something more than something that the witness read, for example Ms. Albright's report is about 90 per cent inadmissible unless these treatises are going in for something more than what she read.
THE COURT: But Ms. Mandell says that they are made admissible by adoption or incorporation into the evidence of a witness who has been qualified as an expert.
MR. WILLMS: Well, if I can deal with facts, my lord.
THE COURT: Isn't that half way between your alternatives.
MR. WILLMS: On opinions that might be a halfway house. But in respect of facts, how can Ms. Albright say, "I relied on Fladmark's findings that he got an arrowhead and took a picture of it"? How does the fact that Ms. Albright says, "I have seen Fladmark's picture of his arrowhead and I accept that he found that at Mount Edziza. I saw Kobrinsky's description of an arrowhead that he says he found somewhere. I don't believe him. I don't accept that." As to the facts, my lord, the witness can't bootstrap the facts and make them admissible.

I've already made my submission on opinions where I draw a distinction. And I say that it would be wrong, for example, if your lordship could not consider all of the opinions in the treatises and test those opinions against the opinions of the witness and the opinions that your lordship may have which will lead to findings in this case.
THE COURT: Well, you're saying on the one hand you can't bootstrap facts in the treatises by incorporation, and

1 at the same time you are saying that they should be
2 accepted as prima facie true anyway.
3 MR. WILLMS: On their own. On their own. But your lordship
4 should realize, or I shouldn't put it that way, but it
5 is my submission that of course if I came into court
6 and handed your lordship Dr. Goldman and said, "He is
7 a well-respected anthropologist", my friend can stand
8 up and say, "Where did you get that"? But if I put
9 Dr. Goldman to Dr. Daly and say, "You know he is a
10 well-respected anthropologist", and Dr. Daly who is an
11 anthropologist says, "Yes", that is the basis for
12 admissibility, then it's in. The rest is weight.
13 And that's the line about -- I think that's clear
14 from Wigmore, my lord, that a treatise is of course
15 not what counsel call a treatise and that's not what
16 we are dealing with here. We are not dealing with any
17 treatises that counsel has called treatises but
18 witnesses haven't. What we are dealing with here are
19 documents that the witness has referred to and relied
20 on and said, yes, he is an archeologist. He is an
21 anthropologist. He is a linguist. He is an
22 historian, a well-respected historian. Dr.
23 MacDonald -- many of the plaintiffs' witnesses said
24 Dr. MacDonald is a well-respected archeologist for
25 northwestern British Columbia. And similar comments
26 are contained in the comments for all of the other
27 ones. That is not bootstrapping, my lord, that is
28 confirming that what you have before you is something
29 that is admissible under the treatise exception.
30 Now, I just -- I differ slightly from my friend
31 Ms. Koenigsberg in saying that you can somehow draw a
32 bright line somewhere between Dr. Coupland whose
33 thesis apparently was only reviewed by his
34 dissertation committee and somebody like Dr. Fladmark
35 who has published book after book after book which has
36 been circulated through the archeological,
37 anthropological, linguistic community. Those are
38 matters that evidence has been given on and that goes
39 to weight in my submission, but not to admissibility.
40 The other thing is I don't understand how a
41 document is marked except, as I said at the beginning
42 of this submission, opinion writers are entitled to
43 say what they relied on. And if that's all my friend
44 wants to put it in for then my objection goes to the
45 admissibility if there is no foundation. Unless they
46 are in for something more than that there is no
47 foundation for the opinion whatsoever.

1 I should say, my lord, that my friend read from
2 the Zundel case and an extract from Pattenden and
3 skipped over a section from Pattenden at page -- it is
4 tab 4 of her authorities, page 388. And the section
5 that she skipped over. I will just read a couple of
6 lines because it is completely consistent with what
7 Wigmore says about where most of these witnesses got
8 their knowledge in the first place.
9 THE COURT: Just a moment, please.
10 MR. WILLMS: It is tab 4, my lord, at page 388.
11 THE COURT: All right.
12 MR. WILLMS: And my friend read on the left-hand side and then
13 skipped over the extract from Mr. Justice Megarry in
14 English Exporters. Mr. Justice Megarry said this:
15
16 "As an expert witness, the valuer is
17 entitled to express his opinion about
18 matters within his field of competence. In
19 building up his opinions about values, he
20 will no doubt have learned much from
21 transactions in which he has himself been
22 engaged, and of which he can give first-hand
23 evidence. But he will also have learned
24 much from many other sources, including much
25 of which he could give no first-hand
26 evidence. Textbooks, journals, reports of
27 auctions and other dealings, and information
28 obtained from his professional brethren and
29 others, some related to particular
30 transactions and some general and
31 indefinite, will all have contributed their
32 share. The opinion is none the worse
33 because it is in part derived from the
34 matters of which he could give no direct
35 evidence."
36
37 And it is my submission that is my friend's point
38 about she gets in the good, but I can't get in the bad
39 completely frustrates what Mr. Justice Megarry is
40 alluding to there, and that is testing the source of
41 the opinion evidence and the weight to be given the
42 opinion evidence. And that is if we are limited in
43 terms of admissible evidence to that which the witness
44 accepts and not what the witness rejects we are either
45 driven to you calling the people who are rejected, or
46 as my friend suggests, call an anthropologist and do
47 the best you can even though you can't go up and do

1 participant observation now because there is
2 litigation proceeding. Or call a linguist which we
3 can't do right now because there is litigation
4 proceeding, or call an archeologist to go up and dig
5 on the Moricetown Reserve which we probably can't do
6 right now because there is litigation proceeding.
7 So in terms of necessity, my lord, people have
8 already done that. People did it before there was
9 litigation. It's trustworthy. And, in my submission,
10 admissible as prima facie proof of the truth of the
11 facts contained. And in respect of the opinions based
12 on those facts, your lordship can use those opinions
13 to weigh the evidence of the witness. Those are my
14 submissions, my lord.
15 THE COURT: Thank you. Ms. Mandell.
16 MS. MANDELL: I will be brief, my lord. I just wanted to draw
17 to your lordship's attention in response to my friend
18 who says that his general theory is that if none of
19 these treatises go in for the proof of the truth then
20 the expert opinion has no weight, and that's exactly
21 what the passage in the Zundel case at 384 addresses.
22 I've already drawn you to the passages. But that case
23 says, no, that there is qualifications to the rule
24 that expert opinion based on hearsay is of no weight
25 and then they go on to say the various things that
26 have been said.
27 So I think my friend's first proposition flies in
28 the face of Zundel, and I would like to start there.
29 As for the references to Wigmore, I would draw to your
30 lordship's attention first the passage that my friend
31 didn't read again at page 4. I will read it to your
32 lordship. It is a simple --
33 THE COURT: Page 4?
34 MS. MANDELL: Page 4 of Wigmore. He skipped over the objection
35 which is raised in the danger of confusing the jury.
36 THE COURT: I'm sorry, I don't think I have ever read page 4 of
37 Wigmore.
38 MS. MANDELL: I'm reading from the -- it is the material that
39 Ms. Koenigsberg handed up. Perhaps it is also in your
40 material.
41 MR. WILLMS: My lord, I read from tab 1 of the black book.
42 THE COURT: That is not page 4.
43 MR. WILLMS: Well, I read from the top of page 4. The page
44 numbers are at the bottom.
45 THE COURT: Well, all right.
46 MR. WILLMS: And I read from the top.
47 THE COURT: I know what you mean.

1 MS. MANDELL: And number 3 they are talking about the problems
2 of "confusing the jury by technical passages without
3 oral comment and simplification". Wigmore goes on to
4 say:
5
6 "A number of answers to this will suggest
7 themselves; it is enough to point out that,
8 so far as it is an appreciable danger, that
9 counsel may be trusted to protect themselves,
10 where necessary, against this danger by
11 calling also an expert to take the stand."
12
13 THE COURT: Sounds like a professor. They think you can do
14 anything that they can think of without any concern
15 about who our are going to get and what it is going to
16 cost and how much time it is going to take and all the
17 efforts that go into it. Professors just don't seem
18 to understand these things as counsel will.
19 MS. MANDELL: I won't take you on. At page 6 of Wigmore I want
20 to the also stress that Wigmore does say that the
21 practice which was done in this case by the plaintiffs
22 is what all of the material which my friend read leads
23 up to. I'm reading from the second paragraph on the
24 page.
25
26 "The proper rule would be for the court to
27 allow the use of a printed treatise,
28 approved and read aloud by a witness expert
29 in that subject, unless in its discretion,
30 considering all of the circumstances, the
31 author if available should be summoned. In
32 practice, the courts apparently do not
33 impose any such condition."
34
35 And I think that the point here to be stressed is that
36 Wigmore as well as in the Zundel case, and I might
37 here mention the Millirrpum case, all suggest that
38 where there is approved printed treatises to be
39 introduced in evidence that the proper rule would be
40 that there be some expert witness there to deal with
41 the treatise in context.
42 THE COURT: But you and Mr. Willms then are both relying on the
43 same passage.
44 MS. MANDELL: Well, I was surprised to see him relying upon
45 this, to be quite honest.
46 THE COURT: Well, I would think that this passage implies that
47 if you are going to read it aloud by a witness and

1 there is no difference in reading aloud and putting it
2 in a report then it becomes evidence and that's what
3 your friend's contention is.
4 MS. MANDELL: And approved. This is a question of whether or
5 not it is the witness, the expert witness who is in a
6 position to approve of the material.
7 THE COURT: All right.
8 MS. MANDELL: My friend makes much of the fact that there is
9 this very big onus that would then fall to him to find
10 many witnesses to refute the various treatises that
11 are put into -- into evidence. I wanted to underscore
12 two points. One is that the plaintiffs didn't rely
13 upon treatises. The plaintiffs when they referred to
14 treatises referred to certain selected extracts from
15 treatises. And my friend's proposition that
16 everything, because it's been referred to, the entire
17 treatise should all be put in for the proof of the
18 truth of it in our submission would then compel the
19 plaintiffs on reply to have to then sift through the
20 treatise for whatever other purpose my friend makes
21 may choose to rely upon it for, even though the whole
22 treatise but not passages of it were put to the
23 witness in order to search through the weight or the
24 adoption or the discretion of other facts in it. I
25 say this is an unmanagable and completely unworkable
26 rule from that point of view as well.
27 And I do say that we have had Sheila Robinson's
28 report since 1987. It is not as if my friends has to,
29 as he puts it, newly call witnesses into the area to
30 test digging at Moricetown or to do one thing or
31 another. The various authors who are the subject of
32 debate have been within the contemplation of the
33 defendant in their case at least for now two years.
34 And I am surprised to hear that this suggests some new
35 floodgates that nobody had anticipated or can't
36 control.
37 My friend also makes reference to this problem he
38 says is posed between Kobrinsky and Dyen and Aberle
39 each assuming a certain fact which apparently Dr. Kari
40 is testifying to. We say that there can be no problem
41 put there to -- or prejudice the different assumptions
42 could be put to the witness and he can comment upon
43 it. And that, in our submission, louse for the
44 testing of the evidence.
45 And I might here say that with respect to Ms.
46 Koenigsberg's argument it is our view that where it is
47 true that certain treatises can be introduced in the

1 absence of an expert as an exception to the hearsay
2 rule that that particular rubric isn't altogether
3 helpful where two things are present. One is where,
4 for example, her test which is that there must be some
5 subjecting to the expert public review and use, that
6 may very well in our submission require evidence and
7 some comment area upon whether or not within that
8 threshold is the document in question a treatise.
9 And the second is the one which I won't repeat,
10 but will only restate that where a witness takes parts
11 of the treatise and adopts it or refutes it or
12 modifies it that we are not at that point dealing with
13 the treatise as an exception to the hearsay rule but
14 part of the expert opinion evidence which is the
15 subject of the Zundel case in part. Thank you. Those
16 are the points I have to make.
17 I think Mr. Grant has one thing he wishes to say, not
18 on this argument.
19 MR. GRANT: Not on this argument. My lord, on July 10th, as you
20 may recall when the opening of the defendants started
21 and prior to that, we raised concerns with respect to
22 scheduling. It is now the 20th of July. Mr. Goldie
23 in response said that he would deal with that in his
24 opening and indicated that they were going to be
25 calling two witnesses and then they would be
26 commencing with expert evidence. And he alluded to
27 the fact that they would be calling that expert
28 evidence commencing in September. He also alluded to
29 the fact of further custodial affidavits on the
30 alienations. The first -- he did say which of the
31 first of the expert witnesses was which was Mr.
32 Farley. We do not have -- have not received any of
33 the custodial affidavits, and therefore cannot
34 determine whether we would be required to
35 cross-examination on them in August or not.
36 Also we do not have the -- we do not know whether
37 my friends intend to commence with Dr. Farley. This
38 is less than 60 days now before the end of the last
39 week in September. My friends may have changed their
40 approach and may be going into October with it. But
41 it is very problematic for us prior to the re decrees
42 of the court not to know when Dr. Farley is
43 anticipated to be called and for how long. We now
44 know the order it is Greenwood, Williams, and
45 depending on your ruling in this case, Robinson. We
46 have to arrange logistics with our own experts or
47 consultants. I would ask my friends tomorrow to

provide us with not only the order of the expert witnesses but who or when they anticipate Dr. Farley to commence and the order for September and October. At least the order up to Dr. Farley and Dr. Greenwood so we can make our arrangements in the recess for these.

I would ask them, of course, to disclose the affidavits that they intend to file on custodial affidavits and also to disclose who their first two witnesses are in September. I don't expect that now, but I wanted to raise it now so my friends could consider it tomorrow as one of the matters to be dealt with before we recess tomorrow.

THE COURT: Can you deal with that tomorrow?

MR. WILLMS: Most of it, yes, my lord.

THE COURT: And counsel have matters to deal with tomorrow?

MR. WILLMS: Yes, my lord.

MR. MACAULAY: I trust that Mr. Grant will be able to tell us when Mr. Turner, the last of the territorial affidavits, will be brought?

MR. GRANT: It is health problems. I will not be able to advise my friend of that tomorrow, and I can assure of him of that now.

MR. MACAULAY: It has been set down three times now. We don't want to go back just for Mr. Turner.

THE COURT: Go back to --

MR. MACAULAY: Hazelton.

THE COURT: Yes. Well, I will have to leave that with counsel. It has been brought up again that Mr. Grant cannot at this time give you an answer. I am not sure that I have any way of changing his mind on that question.

MR. GRANT: Well, I certainly will as soon as I know.

THE COURT: all right. Thank you. 10 o'clock.

THE REGISTRAR: Order in court. Court stands adjourned until 10 o'clock tomorrow.

(PROCEEDINGS ADJOURNED UNTIL JULY 21, 1989 at 10:00 a.m.)

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

_____

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