Vancouver B.C.
November 10, 1989.

(PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)

THE REGISTRAR: In the Supreme Court of British Columbia, this 10th day of November, 1989, in the matter of Delgamuukw versus Her Majesty the Queen at bar, my lord.

THE COURT: Yes, gentlemen.

MR. GOLDIE: My lord, I propose finishing the volume that I am almost at the end of now, and then I propose tendering Dr. Greenwood's footnotes and then I will be followed by Mr. Plant who will deal with some of the loose ends.

THE COURT: All right.

MR. GOLDIE: The document that we were looking at, my lord, is Volume 3, Calder number three, and I believe I had reached tab 30. This is -- tab 30 is Douglas' despatch of the 24th of August 1860 enclosing Mr. Justice Begbie's comments on Captain Clarke's land scheme. And as your lordship will see, it's quite lengthy. There is a typescript and the film of the original is -- a photocopy of the original follows. I refer -- the page numbers for the typescript are at the top of the page and I refer to the top -- to page three. Judge Begbie is there describing the physical attributes of the colony as he had seen them in the two years since he had come out from England. The bottom of page three he -- after describing the pleasant prospects of the land and the interior, he says at the bottom of the page:

> "But in all this country, larger I suppose than the length breadth and England, there are no magistrates, no laws, no surveyors will be there for years."

And then he refers to the road to the favourite gold fields.

THE COURT: I am sorry, where do you see that passage on page three?

MR. GOLDIE: It's right at the very bottom of page three, my lord.

THE COURT: Oh, yes.

MR. GOLDIE: And I should emphasize that the context is the country that we would call the Cariboo. It's the

southern end of the Cariboo, I should say. And then he goes on to make further reference to the physical characteristics, and at page six he's finished describing some of the settlements. And at the middle of that page he says:

> "There is a social difficulty not to be lost sight of, arising from the presence of large and increasing bodies of two of different imported races, besides the native population, that is, the Chinamen, important from their great numbers, industry and tenacity of gain; the negro, or mixed negro population, important from their acquaintance with our language and laws, and from their presence being in a great measure the test and pledge of British, as contrasted with United States domination."

Over the next page --

THE COURT: I must say I suppose troubled by the next passage.

MR. GOLDIE:

> "All three of these races are despised and to some extent, disliked by the prevalent white races, who are most strongly imbued with the United States notions on the score of colour and race."

I should continue, my lord.

> "There is not perhaps any dislike to the negro or the Indian population, except in view of their intermarrying with whites or attaining the full privileges of Citizens e.g. voting at elections or sitting on juries.
>
> In Vancouvers Island there is already considerable excitement about the negro or half negro population sitting in Churches or school rooms.
>
> The native Indian tribes are numerous very brave very patient and very intelligent: willing to work hard at some description of labour."

I pause to interject, my lord. I am not sure whether the reference to Vancouvers Island is coincidental

with Douglas' making available to a colony of black people who came from San Francisco and settled on Saltspring Island and that may not be the reference --

THE COURT: All right.

MR. GOLDIE: -- that the judge has in mind. And then on page seven he says at the middle of the page:

> "In the Australian Colonies the 'free negro' question is not so prominent, I conceive. And in those Countries moreover, the inferior races are treated like inferior races. In the neighbouring States at least, it would be a new sight, I imagine, for an Indian to bring complaint in open court before a Justice of the Peace against a white man who had committed a common assault (knocking him down and cutting his eyebrow with a blow) and for the white man to be summarily convicted and fined on wholly Indian testimony: as in a case before myself and Mr. O'Reilly at Fort Hope the other day."

And then he goes on to discuss the pecuniary resources of the colony. And at the bottom of that page he says:

> "As the revenue arises chiefly from Customs duties on articles of consumption the tax paying population may be reckoned as the whole body of consumers. Into which number the Indians would enter largely: for they now eat much flour and provisions, and consume considerable quality of cotton and woollen goods."

And then at page nine in the middle of the page after referring to the sale of lots at Queensborough, he says in paragraph numbered one:

> "There is in any Land system a great deal of very difficult and extensive work to be done in British Columbia.
> 2. The greater part of the work is not only difficult and expensive, but new, both in its intrinsic character, and in its external circumstances: that is: owing to the character, the habits the prejudices and the multifariousness of the various races who are

> all to be governed by one rule. One law is to discovered to which they will all submit: for if they refuse, or are disgusted, it would be difficult to coerce, and plainly impossible to detain them."

And then in the next page, midway through the page he talks about the temper of the population appearing to be very much in favour of having everything left as open as possible to settlement. And towards the bottom of that page, the second complete paragraph from the bottom which reads, and I quote:

> "The land system therefore which ought in my opinion to recommend itself to the Government, would be that which requires the least to be done by the Government or government officials, and allows the widest power of selection and the greatest share of responsibility to the public at large."

And then he goes on to say on the next page:

> "The principles of our land system -- "

Well, at the top of the page he says:

> "I think that the principles at present regulating the laws regarding both the land and the gold mines in this colony are tolerably correct."

Then he goes on to say:

> "The principles of our land system I take to be shortly as follows:"

Paragraph one refers to town lands. Paragraph two:

> "All other lands except Indian and Government reserves may before survey be sold either (a) to pre-emptors, staking out such a parcel as they may select, not exceeding 160 acres paying only eight shillings at the time of recording and acquiring the right of purchasing the land with all improvements at the Government price of the day (not to exceed ten shillings) when

such land shall come to be saleable after a survey"

And then B, and so on. And then on page 12 he says: "I beg -- " the second paragraph:

"I beg to refer to the pre-emption Act (proclamation 4th January 1860)"

And that is Calder 3, my lord.

"for the details under which these principles are carried into practice, in which proclamation your Excellency is aware I do not wholly agree.

I agree in the above principles as being the cheapest and most attractive in practice: (that is) looking at the question merely in a practical point of view, as best suited to the physical nature of the country and the moral nature of the population and the means we have at hand.

On the occasion of the Drafting of the proclamation of the 4th January I wished to codify the land system in many respects to define what should be considered town and suburban sites, what are the definite situation of Government and Indian reserves. Until this be done (and all but the Indian may be very shortly defined) nobody can be quite certain what unsurveyed lands are open for his selection either by pre-emption or purchase."

And so on. And he goes into the -- goes into the question of price and then at page 15, the second paragraph he says:

"Notwithstanding the great length of these observations I feel it proper to make further observations, seriatim, upon many of Mr. Clarke's proposed sections which I have taken the liberty of numbering in pencil.
Section 1. From this view I differ, in the case of ordinary agriculture lands, as already mentioned. I may also observe that the Indian title is by no means extinguished. Separate provision must be made for it, and soon: though

> how this is to be done will require some consideration. From the friendly intercourse with the natives however, no serious difficulty is to be apprehended."

And then he goes on to discuss each of the sections of Mr. Clarke's or Captain Clarke's draft order-in-council. And where he differs he states it. For instance, his comment on Section 6, Section 4 and 6, and page 16, Section 4 he simply says "I differ"; Section 6, "I differ" and gives his reasons. And then on page 18 where he's commenting on Sections 23, 26 and 28 he says, quote:

> "I am not acquainted with His Excellencys despatch, nor Mr. Murdoch's opinion and plan, except as I can gather it from the observations in the margin. To prevent occupation before survey is impossible to us in our present circumstances: we could not raise a police force who would act in the matter we should have to wait for an army of soldiers. But it would in my opinion be impolitic if it were possible; And it would seem contrary to natural equity to turn a man out of possession after he has entered and improved, to his own great discomfort and loss and to the detriment of the community at large: and equally inequitable to allow another man at an auction to buy his improvements over his head at an undervalue.
>
> When I first came to the Colony I was strongly of the same opinion as Mr. Murdoch is reported to be of, that is: 'that no occupation of the soil till after survey and sale be allowed.'.
>
> I have completely changed my opinion: and I don't believe any man could have gone round the country, even to the limited extent to which my duties have led me, without coming to the same conclusion, that is, that to carry out the prohibition is fortunately impossible, and impolitic if it were possible. See also my remarks on Section 6 and on the proclamation on 4th January 1860 (Pre-emption Act)."

And then at page to 20 he is there talking about the

possibilities of the land and in particular at -- in the Fraser Valley, but he goes on to say in the third complete paragraph, or maybe it's the second, beginning with the words, "The absolute right of the Crown."

THE COURT: Yes.

MR. GOLDIE:

> "The absolute right of the Crown in all these lands is perfectly recognized and I am happy to say that great confidence in the honor of the government is shewn by all parties."

THE COURT: How do you reconcile that with the statement that Indian title hasn't been extinguished?

MR. GOLDIE: I think -- I reconcile it in these terms, that Indian title is something for the Crown to recognize at its discretion. This, of course, is written long before St. Catherine's letter.

THE COURT: Yes. Yes. I am just wondering, he doesn't reconcile it in his letter --

MR. GOLDIE: No.

THE COURT: -- specifically.

MR. GOLDIE: No, there is -- I found nothing in his letter in which he says "but" or explains either of the two.

At paragraph -- I am sorry, tab 31 is the letter from the Immigration Office the 20th of November, 1860 commenting upon the two despatches from Governor Douglas, the first containing his own comments and the other transmitting a report from Mr. Begbie. And he goes through the -- he goes through the two and at page -- the second page under paragraph four of the typescript, the authors of the letter -- the author of the letter, Mr. Murdoch, states:

> "The objections to deferred payments have been so repeatedly stated that I do not reproduce them here. When Governor Douglas first sent home his land regulations those objections were, I believe, explained to him, and he was directed, whenever the Land regulations were revised, to introduce the system of prompt payment instead. A question, therefore, arises whether any modification of that instruction should now be made."

And then he goes on to discuss that. And then at the

bottom of the next page identified by the numbers 99d in the margin, he says:

> "In Governor Douglas's second despatch is enclosed, as I have stated, a report from Mr. Begbie the Judge of the Colony. Mr. Begbie commences with a very interesting description of the Country and the people and with a very satisfactory account of the character of the latter. He describes them as peaceable, orderly and well conducted, but shrewd independent and self-reliant - strongly impregnated with American views"

etc. And then on the next page he says this, and this begins with the end of paragraph -- or page 101 in the original. Beginning with the words:

> "I do not see, therefore, that there is anything in Mr. Begbie's paper to overrule the recommendations of Governor Douglas."

And your lordship will remember -- will recall that Governor Douglas' recommendations were that the land laws of the colony were satisfactory. And then paragraph eight:

> "From the Secretary of States Despatch of 16 July last enclosed in your letter it would appear, that this his decision on the Preemption Act of January last had been suspended until the receipt of Governor Douglas' report on Capt Clarkes suggestions. Looking to the clear and decided opinions on this point expressed by Governor Douglas and Mr. Begbie - the peculiarity of the circumstances of British Columbia - and to the sanction which has already been given to the principle of preemptive occupation before survey, I presume that the Duke of Newcastle will consider it right now to sanction the preemption Law. Whatever future inconvenience may arise from the occupation of unsurveyed Land with preemptive rights, it will apparently be less injurious than the risk of driving away from the Colony the only persons who are likely to bring any part of its soil into cultivation

for perhaps several years."

Then the minutes of the colonial office are found on the same page and Mr. Elliot's comment is:

> "I have read this report & I presume that the opinions which it contains will be adopted. If so write accordingly to the Governor? The despatch should, I apprehend, reiterate the chief practical suggestions which I have marked at pages 7, 9, 14 and 15."

Mr. Fortescue's comment:

> "These conclusions seem to me quite right. Judge Begbie should be thanked for his interesting Report."

And then under --

THE COURT: C.F. is --

MR. GOLDIE: C.F. is Mr. Fortescue.

THE COURT: Oh, I am sorry. Yes.

MR. GOLDIE: And he was, I think, the parliamentary under Secretary of State --

THE COURT: Yes. All right.

MR. GOLDIE: -- for the colonies. Mr. Elliot, of course, was one of the chief civil servants.

THE COURT: Yes.

MR. GOLDIE: And following, that is a photocopy of the original document. And then the next is under tab 32 is the Duke of Newcastle's despatch to Douglas of the 6th of December, 1860 acknowledging the despatches containing the comments on Clarke's scheme both by Douglas and by Begbie which I have referred to. And in the third paragraph he notes that:

> "...theoretically, the arguments in favour of prompt payment are conclusive, on the other hand I can readily understand that from the peculiar character of the population, and the great inducement for the employment of capital, at present, in gold seeking rather than in the cultivation of the Land, the system cannot be enforced practically in British Columbia without creating more inconvenience than it is designed to prevent. Upon the whole, therefore, and looking moreover to the general

> prevalence to deferred payments on the American Continent, I am willing that for the present the system which you consider essential to the progress of the Colony should be continued."

And then at the bottom of the page:

> "It remains therefore for me to convey to you Her Majesty's sanction, which had been withheld pending the receipt of your report, of the 'Pre-emption Act of 1860,' by which the foregoing regulations are enacted. You will doubtless not have overlooked the amendments in the Act which were suggested in my despatch No. 23 of the 7th May and a further amendment (clause 7) will appear to have become necessary in consequence of the reduction in the minimum price per acre of Crown Land which has been effected during the course of this correspondence.
>
> In conclusion I have to request that you will convey to Mr. Begbie my thanks for the interesting report which he has supplied on these subjects."

And then under tab 33 is Douglas' despatch of the 8th of June, 1861. I am sorry, the 23rd of April, 1861 received the 8th of June 1861. And he is transmitting copies of recent proclamations. And on page two, paragraph three, he states:

> "The 'Country Land Act 1861' reduces the price of all unsurveyed country land, whether acquired by occupation or purchase under the Proclamation of 1860,"

That Proclamation of 1860 is the Calder 3.

> "and the the minimum upset price of all surveyed country land exposed for sale at public auction, to 4s/2d per acre, in accordance with the authority conveyed in Despatch No. 41 of the 16th July.
>
> 4. The 'Pre-emption Amendment Act 1861' has been issued in consequence of Her Majesty's sanction of the Preemption Act of 1860,"

etc., and embodies the amendments suggested in the Despatch of the 7th of May. And he states in the balance of the paragraph:

> "This highly important measure has been weighed with careful attention, and I feel assured that Her Majesty's Government will never have cause to regret the initiation of a wise and liberal policy which will, if anything can accomplish that object, ensure the occupation and settlement of the vast domains of the Crown in British Columbia."

And he says in the last paragraph:

> "I will forward the Attorney General's remarks on those Acts as soon as they come to hand."

And then the minute in the colonial office is largely taken up with why the proclamations are transmitted without the remarks of the Attorney General. Now, that concludes that volume, my lord, and I tender it as Exhibit 1187.

THE COURT: All right.

THE REGISTRAR: Exhibit 1187.

(EXHIBIT 1187: Calder Proclamations Vol. 3 - Tabs 1-33)

MR. GOLDIE: On the same basis as the first two volumes dealing with Calder. My lord, one other matter of a housekeeping nature which I propose to deal with at this point. Your lordship will recall that a number was reserved, 1156, for the footnotes in Dr. Greenwood's report. What I did was to take that report and blank out the text and there has been some correspondence between my friend and myself with respect to the wording of the footnotes and a number of them have either been blanked out in part or in whole. My friend and I are not in total agreement but I think we have reduced our disagreement to, I think, about four of the footnotes. What I propose is tendering the document as Exhibit 1156 and if my friend wishes to make submissions with respect to those footnotes, then we can deal with it, I think, very shortly and very expeditiously.

THE COURT: All right. Thank you.
THE REGISTRAR: Exhibit 1156, my lord.

(EXHIBIT 1156: Footnotes Referred to by Dr. Greenwood)

THE COURT: Do you have a copy before you mark it, please?
MR. RUSH: Yes, I do have objections to two of the remaining footnotes at issue, my lord. As Mr. Goldie has indicated we have been corresponding on this and I think we've reduced our disagreement now as a result of the letter yesterday and I can advise my friend to two.
THE COURT: Yes.
MR. RUSH: And they are these. 129 and 143, and I direct you to footnote 129. It's at page 98.
THE COURT: Yes.
MR. RUSH: And 129, my lord, the sentence to which I take objection on the basis of your lordship's ruling about Dr. Greenwood's report is the second one beginning with:

> "The colonial statutes invariably included avoiding provisions and unlike the proclamation were in addition very detailed as to the types of transactions prohibited and penalties exigible."

And I say that simply falls within your lordship's ruling. And secondly --
THE COURT: Let me read it again. Are you objecting to that and the following or --
MR. RUSH: No, no. I am --
THE COURT: Just that sentence?
MR. RUSH: I am just objecting to that, because I say that that is Dr. Greenwood's mind being applied to his version -- his interpretation of what the colonial statutes did as an invariable feature of those statutes. Given the evidence that he, of course, did not review all of the colonial statutes.
THE COURT: I suppose these colonial statutes are all going to be before me, are they?
MR. RUSH: Well, presumably the ones my friend wishes to rely upon, I suspect that that's so.
MR. GOLDIE: They are in large part in the documents that he spoke to.
THE COURT: And are exhibits now then?

MR. GOLDIE: Yes, my lord.
THE COURT: Well, then, why, Mr. Goldie, is it necessary for him to say? It can be argued from the documents whether it includes avoiding provision or not.
MR. GOLDIE: Well, the -- my concern simply was that to take that sentence out rendered the next sentence unintelligible and the next sentence, I think, is perfectly -- perfectly appropriate.
THE COURT: Yes. Well, I don't know if there is a halfway house here or not. My view is that this sentence is not necessary in its own right, because of the fact that the documents to which it refers are in, and if they are avoiding provisions and if they are very detailed, then that can be illustrated by reference to the documents. So for that reason I would exclude the sentence, but I wonder if it's possible to say that it's excluded for what that says but it's available as furnishing context for what follows?
MR. GOLDIE: Well, I suppose we could achieve that, my lord, having listened to my friend's concern, if the word "invariably" was removed and the last clause was removed. So that it was: "Colonial statutes included avoiding provision" period. "See for example the 1758 Georgia statute."
MR. RUSH: I don't have a problem with that.
THE COURT: All right.
MR. RUSH: It was primarily the use of the adjective.
THE COURT: All right. Take out the word "invariably". That, and cross out after "provision". Yes. All right.
MR. RUSH: Yes. Thank you. And then, my lord, the next one to which I take issue is to be found at page 109. It's footnote 143. And I don't take issue with the footnote as it is rendered on page 109. It's the portion of the footnote that appears on 110 that I do take issue with.
THE COURT: What's on one --
MR. RUSH: 110.
THE COURT: It's a continuation, is it?
MR. RUSH: Yes, yes, it is. It's intended to be part of the same footnote and I say here that what Dr. Greenwood is doing is simply interpreting from his view the maps of the mid-eighteenth century and I take issue for two reasons. The maps are in evidence and speak for themselves, and secondly, Dr. Farley addressed this issue and was examined on the issue at some length and in my submission here it really is a question of Dr. Greenwood giving his interpretation of what these maps

say and what the cartographers did in terms of locating words on maps at certain places on the map and again I say that this falls into the ruling that your lordship made on the issue.

THE COURT: These -- these -- well, they are not all here because it says: "Eastern Sioux were invariably placed by them" and he's talking about cartographers and I am sure we haven't got all of them before us.

MR. RUSH: Well, that's right, and I take issue with that. I take issue with that even with the maps that are before the court. So I say that it's not up to him to say what invariably is the case or what is even the case in the number of cases, the number of maps before the court. That's a function of my friend and I to debate out by you by demonstrating hopefully with examples where we say that the location of these words and the sigificance of them.

THE COURT: What about the last sentence:

> "Thus, for example, the Bowen coloured map, which was enclosed with the Board of Trade's report of 8 June 1763, has a printed note 'Eastern Sioux,'"

Is that factual?

MR. GOLDIE: Yes, my lord.

MR. RUSH: I think it is, yes.

THE COURT: So there is no problem with that sentence?

MR. RUSH: No. I must say I can't disagree with that.

THE COURT: Yes. All right. Well, if it were changed to say: "Some cartographers located the former group west of the river between these latitudes and the Eastern Sioux were sometimes placed by them east of the river," would that suffice?

MR. RUSH: Well, that would suffice from my standpoint, because I think that does accord with the evidence, but I don't think that -- it doesn't to my mind deal with the first sentence which I think is objectionable, but your lordship's amendments I don't really object to either, following that.

THE COURT: And if we added "some maps" at the beginning of the headnote?

MR. RUSH: Yes, I think that's right.

MR. GOLDIE: There has already been, I think, an exclusion there to meet my friend's objections and I would have to -- it seems to me, my lord, that the concern that my friends have would be met if the sentence beginning

with "the cartographers" was taken out and the -- and I wouldn't object to the next sentence, the example that would then be referable is to the nation usually divided into the Western Sioux and Eastern Sioux.
THE COURT: Well --
MR. GOLDIE: Which is factual.
THE COURT: All right. So you don't object, Mr. Goldie, if we took out the sentence starting "the cartographers"?
MR. GOLDIE: That's correct.
THE COURT: All right. We will take that out. And then we will add "some maps" at the start of the first sentence?
MR. GOLDIE: Yes.
THE COURT: Would that suffice?
MR. RUSH: Except for the word "invariably," my lord.
THE COURT: I thought I -- I thought we had that struck out.
MR. RUSH: No. Just the one sentence, although Mr. Goldie did say that he didn't object to the next one being struck. And if he doesn't, then I'm content with that. If he wants -- if it's agreeable to strike those two sentences in the middle of that.
THE COURT: Oh. I thought you were agreeing to both sentences, Mr. Goldie, were you not?
MR. GOLDIE: I beg your pardon, my lord?
THE COURT: Were you agreeing to strike out both sentences?
MR. GOLDIE: Yes, I am.
THE COURT: Yes, all right.
MR. GOLDIE: I am a little unhappy about adding the word "some."
THE COURT: Well, it may be that it's not. I have no way of knowing if that's an accurate statement without "some." I have -- I would have no way of tracing it.
MR. GOLDIE: No. There is quite a lot of evidence on this point.
THE COURT: Yes.
MR. GOLDIE: So that this isn't going to be determinative of the point.
THE COURT: No, no. Oh, I think I'll put the "some" in. I think it qualifies it and makes it a statement that I can deal with. I can check and see if any of them do. If any do, well, then it's accurate.
MR. GOLDIE: Well, if your lordship puts in "some" then the second sentence needn't be taken out because the "some" -- it is accurate to say that "some maps placed the Eastern Sioux east of the river."
THE COURT: Well, then if the second sentence stays in the "invariably" would have to be changed to "sometimes."
MR. GOLDIE: All right. I was going to submit that the word "some" modifies everything to the --

THE COURT: Well, I am not sure that it does. "Invariably" is a pretty strong word and we will change "invariably" to "sometimes."
MR. GOLDIE: All right. Thank you, my lord.
MR. RUSH: All right. I am content.
THE COURT: All right. Thank you. So that will now be Exhibit 1140 -- 1156.
MR. GOLDIE: 1156. I think now, my lord, my colleague, Mr. Plant, will provide --
THE COURT: Thank you. Mr. Plant, this is a relentless problem of dealing with other problems that seem to arise every morning about this time is that have you got something you can conveniently do in five minutes or would it be better if we adjourned?
MR. PLANT: I was proposing first to tender a volume of interrogatories which should take about 30 seconds and then I would be happy to adjourn at that point.
THE COURT: Yes. All right.
MR. PLANT: I have a brown binder that contains extracts from the interrogatory response of the plaintiffs and the binder has some 34 tabs and the binder also has an index. The index identifies the name of the affiant and the question numbers and answers that are tendered.
THE COURT: Yes.
MR. PLANT: Perhaps I could hand a copy of that up to your lordship.
THE COURT: Yes.
MR. GOLDIE: And I would ask that the binder be marked as the next exhibit for ease of reference.
THE COURT: 1196 would be the number.
THE REGISTRAR: Yes, my lord.
THE COURT: Would it?
THE REGISTRAR: Yes, it would.

(EXHIBIT 1196: Interrogatory responses of the Plaintiffs (34))

THE COURT: Yes, Mr. Rush.
MR. RUSH: Now, my lord, my comment on this is that I don't object to this being marked as an exhibit subject to the plaintiffs' rights to add what are appropriate interrogatory answers which either relate or explain or necessarily are connected to the answers that are here given. And we have examined some of these, but certainly not all of them. In some cases interrogatory answers were made referable to other

answers in the interrogatory response itself. So it might be that we would think that it's desirable to file that other response. So subject to that and our advising our friends if there is further answers to be added, then I don't object to this being marked.

THE COURT: Any problem with that, Mr. Plant?

MR. PLANT: No. I ask, though, that my friend provide me with his position by a week today in order that we can close our case without having this matter left hanging beyond that time.

THE COURT: Is that convenient?

MR. RUSH: I think so.

THE COURT: Yes. All right. All right. There is one other matter that I am -- I hesitate to bring to counsel's attention, but I would like to throw it out for your consideration. We have a collection of old historical photographs around the courthouse of -- taken of some memorable trials, not for the last maybe 50 years. We also have archives where we try to have photographs taken of all judges and we are running very much in arrears on that at the moment because there has been so many recent appointments. And arrangements are being made to have a photographer come to take some judges portraits, of which I am sure we will all be interested, and I wonder if counsel thought it useful or worthwhile to arrange to have a historical photograph taken of the counsel and parties engaged in this trial. Some may say it has some historical significance; others might disagree.

MR. GOLDIE: Mr. Plant's children are of an age where they would be interested in that sort of thing, my lord.

MR. PLANT: I was reminded, however, of the photograph which is shown in books of the last pronouncement of the death sentence in England in a court which the photograph was taken surreptitiously.

THE COURT: Yes. Well, I am sure that the subject of that photograph is happy to be recorded in that way. I have no strong feelings about it. I merely wish to throw it at counsel. As I say, this photographer will be coming for the next several Friday mornings and I think I'll just leave it with counsel. If they want to pursue it I will be glad to hear from them at any time. All right. We will take the adjournment. Thank you.

(PROCEEDINGS ADJOURNED PURSUANT TO MORNING BREAK)

Read in by Mr. Goldie

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

Laara Yardley, Official Reporter,
United Reporting Service Ltd.

(PROCEEDINGS RECONVENED PURSUANT TO THE MORNING BREAK)

THE REGISTRAR: Order in court.
MR. PLANT: My lord, I did wish to read one set of answers to the interrogatories. The extracts that are now comprised in what is Exhibit 1196 all come from questions 101 and 103, and I would only read -- I only intend to read from tab 1, which is the affidavit in answer of James Angus, whose chief's name is Wii Eelast, W-i-i space E-e-l-a-s-t. And your lordship will see that the sequence here is that the affidavit which Mr. Angus has -- in which he swears to the truth of the answers in the exhibit is two pages, then there's a reproduction of the Exhibit "A" stamp, and then extracts from questions 101, 103 and their answers.

Question 101:

"Have you, any of the members of your House or their ancestors been denied the right of access to and use of your House's lands and resources?"

There the answer is yes. The question continues:

"If so,
(a) how have you or they been denied."

And the answer is:

"According to non-Gitksan laws the Defendant claims that our aboriginal title, ownership and jurisdiction have been taken. For example, I cannot go hunting without a permit. I am not allowed to burn the trees to harvest berries or to cut or sell the trees on my territory."

Sub-question (d):

"who denied such access and use."

Answer:

"Representatives of the governments of British Columbia and of Canada."

Sub-question (e):

"where did such denial occur."

Answer:

"Within my territory."

And sub-question (f):

"how was such denial expressed or affected?"

That should probably be effected. And the answer is:

"Verbally, through the imposition of permits and other requirements contrary to Gitksan law."

And then question 103:

"What is your personal knowledge of:
(a) the damage as a result of restrictions on rights suffered by you, the members of your House or their ancestors."

And here follows what is, in effect, a standard answer that recurs with occasional minor changes throughout the balance of the affidavits that are in this book. And the answer is:

"The members of my House and my ancestors have suffered culturally and socially by the severe imposition of the laws of the Province of British Columbia and Canada on our system and way of life. The provincial and federal governments have attempted to enclose the Gitksan within reserve lands and have attempted to deny them access to their territories. These attempts have caused severe dislocation in the social system and seasonal round. Laws aimed at restricting our access to resources in the territory have caused harm to the Chiefs and House members. Laws requiring inheritance of property through the father's line upon the death of a male Chief have adversely stressed social relations among the people."

Sub-question (b):

"the names of such members and their ancestors

who suffered such damage, the details of the damage suffered and the restrictions imposed."

Answer:

"All of the members of the Houses and Clans of the Gitksan people suffered damage. The damage occurs throughout our system and strikes at the heart of the way of life of the Gitksan. Also see (a)."

(c), sub-question (c):

"the date of imposition of such restrictions and the parties involved in such imposition."

Answer:

"The restrictions have been imposed upon the Gitksan since the first forced imposition of non-Gitksan law upon the Gitksan people. Those involved were the governments of British Columbia and Canada, their servants, agents and contractors. Also see (a)."

Sub-question (d):

"the nature of such restrictions."

The answer:

"Many laws stop us from pursuing the special way of life of the Gitksan. Also see (a)."

Sub-question (e):

"the nature of the rights so restricted."

The answer:

"The rights are those aboriginal rights of the Gitksan to own and govern their land. Also see (a)."

And then sub-question (f):

"the basis for your answers to these questions?"

And the answer:

> "My knowledge and the knowledge of the members of my House and the other elders of my House and Clan of what has occurred to the Gitksan people since the arrival of the white man."

Now, my lord, as I say, there are some variations on those answers throughout the balance of the book, but I won't trouble your lordship with the details of that now.

The next item that I wish to speak to concerns amendments to the statement of defence. Your lordship had an application by the plaintiffs to amend their statement of claim, and the -- that application was allowed on certain terms, and that's, in effect, another matter because irrespective of the amendments which we may have to make to our defence to reply to the plaintiffs' amendments, there are one or two aspects of our pleadings which we wish to tidy up at this stage.

We wrote to our friends on the 2nd of October advising them of our intention to make these changes, and from their silence I have inferred if not active consent at least a lack of opposition. What I am going to ask for now is leave to file the amended statement of defence. I have a copy for your lordship and the original, and I do intend to just make brief reference to the changes that have been made.

THE COURT: Mr. Rush.

MR. RUSH: The letter was sent on the 6th of November, my lord, and my friend probably shouldn't have inferred -- well, yes, there seem to be two letters. Whatever the case is, he shouldn't infer by my silence or my colleagues' silence that we don't take objection to at least one of the paragraphs. I can say right off the top there are three, to my eye, changes proposed, and we don't take any position on two of them. We do take a position on the third and last, which is that found at page 16. And I don't --

THE COURT: So you don't object to the changes on page 14 and 15?

MR. RUSH: I don't object to the changes on page 14, which is to add the word "or."

MR. PLANT: That's simply a typographical correction, my lord. It was the word "of."

MR. RUSH: And on page 37, I don't take any position on that. I

don't -- it is -- with respect, I think the substantive change is 38A, and I do take -- I will take a position on that.

THE COURT: All right. Are you ready to argue it now?

MR. RUSH: Yes.

THE COURT: All right.

MR. PLANT: My lord, the amendment to paragraph 37 is to replace the original first -- or the previous first clause of that paragraph with the words:

> "That if any obligation under the Terms of Union existed regarding the Plaintiffs or the Territory,"

and then the balance of the paragraph remains as it was.

THE COURT: That means under the terms, it doesn't mean at the time of the terms or prior to the time of the terms of union, does it?

MR. PLANT: It means, as I understand it, that if an obligation was created pursuant to the terms of union.

THE COURT: All right.

MR. PLANT: And the documents that are set out after that or are referenced after that comprise the high points of the historical sequence of actions which culminated in the transfer of reserves, reserve lands from the province to Canada by Order in Council 1036. It's really an issue of emphasis rather than a substantive change to the pleading.

Now, my friend takes issue though with paragraph 38A.

THE COURT: Yes.

MR. PLANT: And the change made there is to add to that paragraph the words:

> "and subsequent actions in respect thereof by Canada and the Plaintiffs."

Now, my friend characterizes this as a substantive amendment. Our intention, my lord, is simply to avoid the danger which may or may not exist of this pleading as it formally was or as it now is being read too restrictively. And that is the -- all that's done here is to move beyond the reliance on the report itself to the actions and documents and matters which already are in evidence before your lordship concerning the events that happened after the joint

committee report, and that would include such matters as expenditures under the B.C. Special Vote. It's really to insure that the compass of the allegation is not overly narrowly constricted that we seek that amendment.

THE COURT: Well, perhaps I'm anticipating your friend, but should there not be some particulars?

MR. PLANT: I -- if that's my friend's concern, I don't see any difficulty in providing particulars of that change.

THE COURT: Subsequent actions could encompass a wide variety of deeds and misdemeanours.

MR. PLANT: And I'd be happy to put some focus on the -- on which of those acts and demeanours is intended to be caught by the pleading.

THE COURT: Perhaps we should hear what your friend says.

MR. RUSH: The difficulty with this amendment is that the plaintiffs had assumed by the language of 38A that there was a particular reliance on the report of the Special Joint Committee and sought obviously to read it restrictively, as we assumed was the intention of the defendants here. In making the proposal that they do, they now widen, I think, without any limit the possible inclusionary actions on the part of Canada and on the part of the plaintiffs, so there are two aspects, therefore, that would presumably be encompassed within the report or the ramifications or resonances of the report.

Now, the difficulty that we face, my lord, in the suggestion of particulars, because that too is what came to my mind, my first response was, well, what is in the mind of the defendant as to what it thinks those subsequent actions are, because if they are relying on their evidence, then they should be able to point to me in the evidence what it is they're relying on, and if it could be dealt with simply in that way, then I would be satisfied, I think. But I don't think it can be, especially in the submission that Mr. Plant made where he says it would include such matters as, such to allow him to, at his choice and discretion, to make the determination as to what other matters that they might like to seize upon as being swept into the general statement "and subsequent actions." So my difficulty is this, that I think at least in respect of the Special Joint Committee and possibly of some subsequent legislative-type actions the plaintiffs may well have examined more broadly at least one witness I can think of, and that would be Mr. Boys, who was

commissioned; and secondly, that I had assumed the defendant's case itself was predicated on the reliance on the first part of that without the additional clause being added to the last part of that paragraph.

So my first submission in sum is that I oppose it at this date; and secondly, if your lordship is not inclined to agree with me there, that there has to be some very substantial narrowing or at least delimiting particulars such that the plaintiffs can make some kind of decision as to whether to call reply evidence about it or to have some knowledge in the existing corpus of evidence what's being referred to and how we might answer it with our own evidence, in the evidence that we've called from the plaintiffs or we might be able to call in cross-examination from the witnesses put up by the federal defendant; and thirdly, I would say that again if your lordship is inclined to direct that exhaustive or more detailed particulars be required of the provincial defendant, then I think that this would -- of necessity there ought to be a rider on that that the plaintiffs can call further evidence to deal with that issue.

THE COURT: Well, I do not think that I can deal with the matter in the absence of particulars, Mr. Plant. For example, Mr. Goldie in his response to Mr. Rush's opening many years ago made reference to an Order in Council. I don't know if it's going to be mentioned in the documents that I'm yet to hear about or not, but I don't think I've seen it. And I don't know if you're going to be relying on it, but it seems to me that it ought to be -- if there's something specific like that consequent upon this report, and I don't know if that Order in Council was consequent upon that report or what it was, but it seems to me that it should be particularized, whatever it is that you're going to be relying upon as being something that is a subsequent action to the report of the Special Joint Committee. So I think the matter should be stood down, and I think you should give your friend particulars and it may be spoken to again.

MR. PLANT: Well, if I might just say this, that, first of all, there is some narrowing in the terms of the pleading itself, and that is that the subsequent actions that are made relevant by the pleading are only those actions which are in respect thereof; and secondly, I have already agreed to give those particulars.

THE COURT: I'd like to see them before I deal with Mr. Rush's

objection.
MR. PLANT: Very well.
THE COURT: Thank you.
MR. PLANT: Well, yes, there are two other aspects of -- two other aspects of pleadings, my lord. First, to reiterate that this amendment does not constitute our anticipatory response to the plaintiffs' final amendment.
THE COURT: No.
MR. PLANT: And secondly, a couple of points.
THE COURT: You may take the order for the amendments on pages 14 and 15.
MR. PLANT: Yes. There is another typographical error which has escaped many vigilant eyes. It's on page 13. It's in paragraph 35 under Roman numeral -- item number Roman numeral 12, the Union Proclamation. It says 1B66, and it should be 1866.
THE COURT: 1866?
MR. PLANT: It should be 1866. It refers to a proclamation of 1866. We'll make that change to the text of the final document.

And secondly, in the letter of October 2nd, 1989, we advised my friends that we intended to make certain changes to our particulars, the particulars that have already been provided, and we haven't yet completed that matter or that aspect of the matter. So that remains outstanding. When I say we haven't completed it, we haven't prepared an amended text that incorporates the changes that were identified in our letter to Mr. Rush.

Now, I have another matter to speak to, which concerns the notice under the Constitutional Question Act that the plaintiffs delivered in February 1986, and I have a copy of some correspondence that has gone from our office to Mr. Rush's office concerning the -- this notice, and I'm going to ask Madam Registrar to hand copies up to your lordship. The reason I'm handing your lordship up the letter of August 18th is that it has the plaintiffs' notice attached to it, and the letter of August 18th identifies certain concerns that we have with the notice.

Now, the concerns might best be explained by turning directly to the notice. In the fourth line of the first paragraph of the notice the plaintiffs indicate an intention to challenge "the constitutional validity and/or constitutional applicability of enactments past and present, of the Province of

British Columbia, as defined in the Interpretation Act." Now, the reference there is important because as I read the Interpretation Act, enactments there brings in -- the word enactment there brings in colonial enactments, and that would include the enactments that my colleague Mr. Goldie has been reading documents concerning, those that are known as the Calder 13.

Now, what we want is to have some identification of which of the enactments are being challenged, and the particular concern that we have here is that there was an issue raised -- I think it's in the judgment of Mr. Justice Hall in Calder, and there is an issue which we perceive to be raised, at any rate, with respect to whether or not the pre-conditions for the validity of colonial enactments were properly adhered to, whether they were sent to London and whether they were laid before parliament in such matters as that.

We have endeavoured to respond in the form of evidence to that concern as it relates to the 13 Calder proclamations, but if there are other proclamations that we should be directing our attention to here, there are other proclamations that the plaintiffs are challenging, then we want to know what they are in order that we can, if necessary, embark on the same paper chase that would be necessary to authenticate and validate those documents. So that in respect of the plaintiffs' challenge of the laws of British Columbia, that's the reason why we wish the plaintiffs to identify those laws.

If your lordship turns then over to the next paragraph, the plaintiffs there challenge "the constitutional validity and/or...applicability of those laws of England which purport to derogate from the aboriginal title" and so on of the plaintiffs. And then they say down at the bottom of the paragraph:

> "...and, without limiting the generality of the foregoing, those laws of England set out in,"

and then there are some references to subparagraphs in paragraph 35 of our statement of defence.

Now, there are some laws in England that are referred to in our defence that are not included in that list. One example is the Statute of Westminster. And obviously, although perhaps unnecessarily, the plaintiffs themselves, of course, rely on the

Constitution Act of 1867 and the Royal Proclamation of 1763. The plaintiffs covered themselves by saying: "...without limiting the generality of the foregoing..." And again, what we want to know is which, if any, other laws are being challenged by the plaintiffs in this proceeding.

Carrying on to the next paragraph, there the plaintiffs challenge the "applicability of federal enactments, so far as they purport to extinguish the aboriginal title" and so on, and there they do particularize those that they challenge again by reference to our statement of defence. We wish to be certain that those are all the federal enactments that are being challenged.

Now, my lord, I have the extract from Section 8 of the Constitutional Question Act that I would like to refer to briefly. Section 8(2):

> "Where in a cause, matter or other proceeding,"

and then sub (a),

> "the constitutional validity or constitutional applicability of any law is challenged."

And then carrying on:

> "...the law shall not be held to be invalid,"

and so on until notice has been given.

Subsection (4) sets out the requirements of the notice, and it says:

> "The notice shall,"

and I'm omitting a few words here, state the law in question and give particulars necessary to show the point to be argued.

So I say the requirements of the Constitutional Question Act are that the law, the particular law in question has to be identified in the notice, and it's not sufficient to say in the notice that we challenge all such laws which may or which purport to derogate from our rights. The plaintiffs do have that obligation to go a further step and identify and particularize the laws that they're challenging.

Now, I think I better draw your lordship's

attention to subsection (5), which says:

> "The notice shall be served at least 14 days before the day of argument unless the court authorizes a shorter notice."

Now, in my submission that notice requirement is clearly directed to the ordinary case where the notice is not only going to be 14 days before the day of argument, but that will also be 14 days before the day of trial. And here what I submit I'm compelled to do by my construction of the statute is to say that the plaintiffs ought to be put to a larger time frame or rather a shorter notice period. And again bearing in mind that the content of their notice may create evidentiary issues for us, it may mean that we wish to file or adduce further evidence, I would ask that the notice in proper form be delivered within a matter of a week or so from now. And I'm certainly not sticking to seven days or eight days, but in order that the matter not be left hanging that much longer. And those are my submissions on that matter, my lord.

THE COURT: Thank you. Ms. Russell, do you want to make any submissions.

MS. RUSSELL: No, my lord. Thank you.

THE COURT: Mr. Rush.

MR. RUSH: My lord, my friend misconstrues the nature of the notice. He's made his argument as though it's a pleading. The notice is not a pleading in the proceedings, and hence it is not something for which the type of particulars he's asking for may be requested. The particulars conceived of there are particulars necessary to alert the Attorney-General of Canada or the Attorney-General of British Columbia of the issue to be argued, not alert to the points of fact to be asserted in the pleading. The function of the notice under the particular act, the Constitutional Question Act, is as its title suggests, to notify the province or the federal Crown of the fact that their legislation is being challenged or impugned.

THE COURT: Well, I don't know if I'm interfering with your argument, Mr. Rush, but my view of this, for what it's worth, is that the only issue is whether particulars should be given of the specific statutes or enactments which are going to be argued are unconstitutional. I think that the statement of claim is sufficient notice

of the point or points to be argued, and I think the only question is whether you should have to specify, as you did with respect to federal enactments, provincial or imperial and colonial enactments that you're going to be alleging are to be impugned. I wouldn't worry yourself about the question --

MR. RUSH: I say simply that it -- to seize upon the notice, the constitutional notice as the basis for requiring further particulars at this stage, in my submission, is completely inappropriate. It seems to me that, practically speaking, my friends are going to be told or given what our vision is of what is being impugned or attacked or the validity of which is being challenged at the point that our argument is delivered to them. I think it will be patently clear from that.

I think, furthermore, that it is -- we've been operating on a statement of claim and a statement of defence that's predicated on certain assumptions of the challenge of certain of the legislation. What we challenge and what my friends have obviously endeavoured to respond to, I see now, is certain of the provincial statutes which apply. I mean, it's clear in terms of the interrogatory responses of the plaintiffs. Those are factual issues, my lord, that I think will only really be addressed at the point of argument. That's the point that we're going to join, and my friends at that point will, in my submission, be alerted. If they need to be alerted further than what was required by law under the Constitutional Question Act, which I don't think they are entitled to, the fact of the matter is that this notice was given to the provincial and the federal government for the purposes of alerting the federal Attorney-General of Canada to determine whether or not he's going to be a party in terms of that notice. There was quite an argument about that. They were -- on the motion of the province the federal government was added, and here we are.

But in terms of the type of particular being requested here, in my submission it's not a matter now to turn on the interpretation of our response to the constitutional question requirement of notice. And I say that the whole matter is going to be a function of argument and ought to be dealt with there. I say the notice is specific enough. I must say that if my friends had said to us about what they are now calling a paper chase in order to demonstrate the authentica-

tion of certain of the proclamations or enactments, they might have approached us and asked us if that was an issue, and it may well have been something that could have been obviated. I don't know whether it's the -- it's the first I've heard of it, that it's been a question. I thought for their own purposes they sought to demonstrate the linkage to a proclamation or endorsement by the Crown or whatever. Those are my submissions.

MR. PLANT: I'm happy to have given my friend another leg for his case, but I do wish to say one thing in reply, my lord, and that is that I'm not relying on subsection 4(d), give particulars. I'm relying on 4(b), state the law in question, and I say that's the provision which obliges my friend not simply to state such laws as may conflict with his clients' claims, but rather to state all such laws which it is their position do have that effect. And that's all I have to say in reply, my lord.

THE COURT: Well, I'm troubled by Section 8(2), which provides that no law shall be held "invalid or inapplicable nor shall the remedy be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of the Province in accordance with this section." And as Mr. Plant points out, this section says or states the notice shall state the law in question, and I think at some point the plaintiffs must particularize the specific law or laws which it seeks to impugn. The question is whether or not it is sufficient, as Mr. Rush suggests, to raise these items specifically in argument or whether it must be done more formally outside the scope of argument.

I can't for a moment conceive that this case can be decided or affected in any way by the terms of the notice given under this section in view of the kind of notice that has been given, and in that respect I refer to notice with a capital "N" rather than generally conveying the nature and particulars of the claim in both the statement of claim and in the plaintiffs' evidence. To be safe, I think the plaintiffs must, in order to comply with Section 8(4)(b)(i) of the Constitutional Question Act, give the defendant province notice of the laws which it seeks to impugn, but I do not think that that must be done until the commencement of argument. I think, however, that it is necessary to do it formally, not

just in a long written argument. I think there must be a list of the specific provisions which will be impugned in the argument, and I think the best way to do that, so there is no doubt that the section has been complied with, that it would be most convenient for me to order that particulars be given of those various statutes, enactments or laws which are under attack.

MR. PLANT: My lord, your lordship said at the commencement of argument. Did you mean at the commencement of oral argument or at the time that the plaintiffs deliver their outline or summary of argument to us.

THE COURT: I think it should be at the time of the delivery of the summary.

MR. PLANT: My lord, I'm prepared to proceed to the next item on my agenda --

THE COURT: Yes. All right.

MR. PLANT: -- which will be very brief. I have a number of submissions to make with respect to various documents that are at this point marked for identification rather than as exhibits proper. This item has been the subject of correspondence with my learned friends. I understand that Mr. Grant advised your lordship yesterday that he would endeavour to provide us with a letter this morning that would narrow the issues here. He was unable to do so, obviously, as I haven't received any such letter. So that means that as far as the matter of exhibits goes, I think that we're going to have to leave this until the court resumes on the 20th of November. Is that the next -- a week Monday.

THE COURT: Aren't we sitting next week?

MR. RUSH: I don't believe so.

THE COURT: Oh, I thought we were. Well --

MR. PLANT: I'm happy to deal with -- no, no.

THE COURT: I just thought all our time was being used up. I guess I was aware but not cognizant of the fact that we weren't sitting next week. But if that's so, that's the best news I've heard so far today. So the 20th I suppose is as convenient a time as any.

MR. PLANT: It is to me.

MR. RUSH: Yes, I'm just agreeing to that.

THE COURT: I thought Mr. -- oh, I suppose there was going to be a week after Mr. Macaulay opened. I just sort of had the feeling that when it was decided not to have his opening on Wednesday of this week that it got put off to -- I guess it was specifically put off to the 20th.

I just assumed it had gone off to the earlier week. Of course, that raises the more interesting question is there any need to sit on Saturday. We could carry on and sit on Monday, I suppose.

MR. RUSH: Well, Monday is a holiday.

THE COURT: I'm sorry, I meant Tuesday. Although I don't mind sitting tomorrow if people made plans to do other things next week.

MR. RUSH: Yes. Perhaps I should point out that I think the assumption of all of us has been that next week is a down week.

THE COURT: Yes.

MR. RUSH: But I can't advise you. There would have to be, I think, some scheduling accommodations made among counsel to determine our availability next week --

THE COURT: Yes.

MR. RUSH: -- if that was your lordship's --

THE COURT: Well, I'm in counsels' hands. I don't mind sitting tomorrow and finishing the reading of documents, if it's necessary, or putting it off to the following Tuesday.

MS. RUSSELL: My lord, if I might speak to that for a moment. As you will recall, next week was set aside as a week we would not sit due to plaintiffs' scheduling problems.

THE COURT: I only recall that now.

MS. RUSSELL: The federal defendant now has plans to use that week, and it would not be at all convenient for us to sit next week.

THE COURT: Well then, we'll sit tomorrow. That's what we've arranged to do, and that might be the best thing to do.

MR. PLANT: Perhaps then I could --

THE COURT: This matter may go to the 20th.

MR. PLANT: The exhibits matter will go to the 20th. And I would want to speak with my friends for Canada about whether or not the reading in of documents should continue on Saturday as opposed to being put off, and perhaps Mr. Goldie can come back at two o'clock --

THE COURT: Yes.

MR. PLANT: -- with his additional documents to speak to you about that.

Now, that then deals with all of the matters that I -- oh, yes, that deals with all of the matters that are on my list as being matters for which I'm responsible. Ms. Sigurdson does have one issue that she would like to speak to.

THE COURT: Thank you.
MS. SIGURDSON: I will speak to this now as Mr. Rush is here. You may recall we reserved Exhibit number 1062 for a copy of Marvin George's mylar map. The problem with that map was that Mr. George wished to retain the original to work with.
THE COURT: Yes.
MS. SIGURDSON: And it wasn't readily copyable because some of the marks were erase marks.
THE COURT: Yes.
MS. SIGURDSON: We turned our hand at doing what was -- the phrase coined at the time was a doctored copy, delivered it my friends in July. Earlier this week we got a response saying that they couldn't agree to our copy. Unfortunately, we didn't get details of the reasons why or the original back. So we can wrap this up, I would propose that the plaintiffs turn their hand to this matter now and try to provide us with a copy by the end of next week, and hopefully we can wrap it all up November 20th. But we're at an impasse now because we don't have the original and we don't know what's wrong with our copy.
THE COURT: Well, that sounds like a very unreasonable position to take, Ms. Sigurdson.
MR. RUSH: Well, my lord, I was desperately hoping we could avoid filing another map.
THE COURT: Yes.
MR. RUSH: What Mr. -- I -- what I did was to send the mylar and the copy to Mr. George, and Mr. George looked at the mylar and the copy and said they don't match up. And what he did was to provide me with another map which shows me where it doesn't match up. Now, I suppose what I could do is file that, and if -- if at some point in the trial it becomes important, I suppose, to match all these up, the two of them will be there, and I think it expresses the point of difference that Mr. --
THE COURT: You mean Mr. George's letter, or is it a map that he --
MR. RUSH: Well, he's given me a letter, but he's given me a map with directions to me saying here is where they haven't drawn a line and here is where they haven't drawn a line. Now, it's not clear whether if I provide that to my friend -- what I didn't want my friends to do was to simply take another map of Mr. George's and file another map of Mr. George's, which I see this as being an effort to do, but --

THE COURT: Well, I take it Ms. Sigurdson hasn't seen this.
MR. RUSH: She hasn't, no, because I wasn't clear what her response was going to be to the fact that we couldn't agree that the two didn't match up.
THE COURT: Well, is it convenient, Ms. Sigurdson, for Mr. Rush to give you what Mr. George has sent by way of explanation regarding the lack of matching and the matter be spoken to again on the 20th?
MS. SIGURDSON: Yes, that would be fine.
THE COURT: Thank you. All right.
MR. PLANT: Now, my lord, I understand that my friend Mr. Rush may have one or two matters to deal with, and I'd be happy to deal with them now or at your lordship and my friend's convenience.
THE COURT: All right.
MR. RUSH: One point that I have to deal with -- I have several matters to deal with. I have a host of paper here that I'd like to pass up to your lordship.
THE COURT: Yes.
MR. RUSH: But one point is that there were some questions made of Dr. Barbara Lane, and Mr. Goldie and I had been corresponding on that question, and I take it that you choose to leave that for Mr. Goldie's presence before dealing with it.
MR. PLANT: Yes.
MR. RUSH: That's fine. All right. Then, my lord, just to deal with a number of outstanding questions, the first is a notice to admit. A notice to admit was sent to my friends July 10th, 1989. This was one of the plaintiffs' outstanding matters. I propose to file the notice to admit and the response to the notice to admit presented by the provincial defendant as the next exhibit. There was no response provided by the federal defendant.

This relates to the identification of the -- the chiefs and the -- the names of the chiefs and the English names of the chiefs at feasts where names -- these were succession feasts where names were passed on and recorded by Mr. Sterritt in his field notes. And you may recall that quite some time ago Mr. Goldie said that he would be prepared if we provided him with a list of those to make certain admissions, and certain admissions were made and others weren't, so to the extent that they were made, this represents them.
THE COURT: All right. What does it mean if the federal Crown has not responded? Does that mean they're taken to be admitted or does it mean that they're not admitted?

MR. RUSH: Well, I take it that no response means they admit it, but I think it's -- I presume that the limitations placed upon the -- their admission would be set out in the provincial defendant's response because certainly I couldn't go any farther than what the provincial defendant admitted.
MS. RUSSELL: Perhaps, my lord, I could check that at lunch. I'll get back to you.
THE COURT: I could never keep it straight, whether the failure to admit amounted to an admission or the failure to admit just meant that it went nowhere.
MR. RUSH: They're supposed to respond within 14 days.
THE COURT: Yes, I think so.
MR. RUSH: And that then makes a concession of admission. On this count there have been various delays in admissions, and I don't take anything terribly adverse to the federal defendant's failure to respond here, but I think as far as I can go is what's sets out in the provincial defendant's admission.
THE COURT: The notice then should be exhibit --
MR. RUSH: The notice to admit.
THE REGISTRAR: 1197 is the next number.
THE COURT: 1197?
THE REGISTRAR: Yes.
THE COURT: And the --
MR. RUSH: Provincial defendant's response.
THE REGISTRAR: 1198.
THE COURT: Yes.

(EXHIBIT 1197 - NOTICE TO ADMIT)

(EXHIBIT 1198 - PROVINCIAL DEFENDANT'S RESPONSE TO THE NOTICE TO ADMIT)

MR. RUSH: All right, my lord, that completes that. The next matter that I wish to speak to is -- this relates to the document books filed in respect of Dr. Robert Galois' evidence, and what I have here are new and improved and hopefully more expressive indices to Dr. Galois' several volumes, I believe eight volumes of documents.
THE COURT: Yes.
MR. RUSH: Now, if I may explain this, my lord. The first set of indices that I'm handing to your lordship is to be placed in the first volume, and it represents a listing of all of the documents contained in all of

the volumes. Then what I have, my lord, are separate listings for each of the volumes, so one would be assisted in going to the first or any of the subsequent volumes by having an index volume to volume. So what I will do is to hand up groupings of the indices for each of the separate volumes. Now, this is -- these are indices for volumes 1 to 8 separately for each volume, and there's a second set.

THE REGISTRAR: Thank you.

THE COURT: All right.

MR. RUSH: Now, my lord, next I'd like to deal with a matter that arose out of Dr. Galois' evidence -- excuse me -- in relation to Mr. David Williams' evidence and --

THE COURT: This can't be done in three minutes, can it, Mr. Rush?

MR. RUSH: It may be able to be.

THE COURT: Oh, all right.

MR. RUSH: It's going to be fairly quick. During the course of the cross-examination of Mr. Williams certain extracts from population tables of DIA population data were submitted, and it was agreed that Mr. Adams could file further tables, population tables which were relevant. And the particular passage for your lordship's reference is at volume 286, page 21378. It's in the cross-examination of Mr. Adams.

THE COURT: 21378?

MR. RUSH: Yes. Cross-examination by Mr. Adams of Mr. Williams. And he was given leave to file further population statistics, and I'm now simply filing those and ask that these be placed as part of Exhibit 1172-24. And I'd suggest that these just be placed at the back of that exhibit.

THE COURT: Any objection to that, Mr. Plant, Ms. Russell?

MR. PLANT: My lord, I wasn't in attendance. If I have any problem, I'll speak to that at two o'clock.

THE COURT: Yes. All right.

MR. RUSH: Thank you. Here's the additional copies. So as I say, my lord, this should be placed as part of and included in Exhibit 1172-24, which was part of the cross-examination binder of Mr. Williams.

Now, my lord, I may even be able to deal with another matter.

THE COURT: All right.

MR. RUSH: Hopefully. Perhaps this might be more conveniently dealt with by correspondence with my friends, but we have had correspondence from the provincial defendant with regard to certain extracts from the examination

for discovery of Sylvester Williams and the examination for discovery of Sylvester Green, and they proposed to read in certain of the extracts from the discovery, and you have read them in. And I have a number of questions here which I propose to read in or can be referred to, whichever is convenient, for the purposes of what we say are proper exemplifications or dealing with answers which are so necessarily related to the discovery that they ought also to be included as part of that.

THE COURT: I don't think Mr. Plant actually read them. I was given a list and I haven't --

MR. PLANT: No. I'm sorry, when I say they were read in, the court reporter inserted in the transcript the extracts having had the number -- the question numbers, and I did not read them out loud.

THE COURT: No.

MR. PLANT: No one read them out loud.

THE COURT: I haven't either because I've been waiting to do it all at once.

MR. RUSH: Yes. Well, perhaps it would be most convenient for me simply to read the question numbers which I have here. And I see that we're beyond 12:30, my lord, and I'm happy to do that after. It will take a few minutes for me to do so.

THE COURT: All right. Two o'clock.

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

(PROCEEDINGS ADJOURNED AT 12:30 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.

_____

Leanna Smith
Official Reporter
United Reporting Service Ltd.

(PROCEEDINGS RESUMED PURSUANT TO LUNCHEON ADJOURNMENT)

THE COURT: Mr. Plant.
MR. PLANT: Just two brief matters, my lord, before my friend Mr. Rush continues. The first is that I am advised by my colleague, Mr. Goldie, that he will be able to complete the reading in of historical documents tomorrow, that part of our case, and would prefer to do so.
THE COURT: Yes. All right.
MR. PLANT: The second is that before the luncheon adjournment my friend tendered some census documents which were referred to during the course of David Williams' cross-examination and I said I wanted to have the lunch hour to consult with my colleagues about whether we consented to their admissibility. We do consent to their admissibility with the observation that as to the bulk of them neither the author nor the basis of enumeration is known.
THE COURT: Yes.
MR. PLANT: But that appears from the face of the documents themselves.
THE COURT: All right. Well, then, those documents will be added Exhibit 1172-24.
MR. PLANT: Dash two four, yes, my lord.
THE COURT: Yes. All right. Thank you. Mr. Rush?
MR. RUSH: Yes, my lord. The next matter I wish to deal with pertains to two document books marked as Exhibits 948 and 949. Now, these are hereditary chiefs' interviews transcripts, and over the summer I sought leave to have these two books taken from the court for the purposes of tabulating the interviews and in effect what I wanted to do was to simply make it easier to follow by dividing the interviews one from the other.
THE COURT: Yes.
MR. RUSH: And I did that, but in so doing found that there were missing in -- I think in the case of eight of those listed in the covering letter, eight of the interviews were missing, and so what I did was to find those and a letter to Madam Registrar I returned the two volumes tabbed as well as the separate interview transcripts, separately identified, and I am asking simply to have the additional interviews added at the appropriate tab references and they are in chronological order in accordance to my transfer letter of July 27, 1989. They would be tabs 8, 9, 23, 24, 31, 35. And in the second volume, Volume 949, that is the second volume,

Exhibit 949, tab 6 and 7. Now, for reasons that I cannot explain, those particular interview transcripts were not in the court copy, although they are indicated to have been so by the transfer letters that were contained when those two exhibits were filed. So I am simply asking that they be added and that the appropriate tabs -- that they be added to the appropriate tabs which I placed in the binder simply to complete what's there.

THE COURT: Any objection to that, Mr. Plant?

MR. PLANT: No, my lord.

THE COURT: Yes, all right.

MR. RUSH: All right. Thank you.

Now, my lord, the next matter which I inadvertently failed to begin my afternoon submissions were concerning the additional answers to the discovery questions of Messrs. Green and Williams and my friend Mr. Plant has reviewed the list of questions and can agree with some and not agree with others. So I think it will require us to be somewhat more exacting in our exchanges between us and I suggest that we leave it to that form of communication for the time being.

THE COURT: All right.

MR. RUSH: The next matter pertains to one outstanding issue regarding the amendments by the plaintiffs to their statement of claim, and this had to do with the insertion in certain of the paragraphs of the proposed amended statement of claim of the word "predecessors" or the words "and predecessors" and your lordship indicated that you would be predisposed to allowing the amendment so long as particulars of those amendments were provided at some date in the not too distant future. The amendments are, I think, set out in the Notice of Motion. We have advised the Province and the Federal Attorney General that we intend to take the amendments and we will provide the particulars as directed by your lordship and I have set that out by a letter to my friends in a letter of November 30. And I am now advising your lordship of that fact, and I think your lordship said that you propose in the early part of December, which we took to be the first week of December, would be the time within which you suggested such particulars should be provided and we are content with that.

THE COURT: All right. Well, counsel will no doubt bring the matter up again when it's necessary so to do.

MR. RUSH: But here I am asking your lordship for the order that -- the order as sought subject to the providing of particulars in respect of that language now used in the statement of claim.

THE COURT: Well, I think I've -- I guess I have only indicated I would make the order. I am not sure whether I should make the order until your friends have had a chance to look at the particulars and either accept them or persuade me that they are insufficient in which case the amendments wouldn't be made. I am hesitant to make a blank-cheque amendment.

MR. FREY: My lord, my recollection of those proceedings was that until the particulars were provided your lordship couldn't reconsider the issue.

THE COURT: I think I used the words as Mr. Rush described that I was disposed to make the amendment and I am -- but I am not disposed to make it until there has been agreement or a decision on the form of the particulars.

MR. PLANT: And I would urge your lordship not to do so.

THE COURT: I think you are leaning on open ground, Mr. Plant. I think when you have your particulars ready I think the matter should be spoken to again, Mr. Rush.

MR. RUSH: All right. Thank you. Now, the next matter, my lord, is a matter -- well, perhaps I can deal with, before I go on, to a matter that Mr. Goldie and I had been corresponding about, and that is the question of the admissibility of certain documents pertaining to the cross-examination of one of the affiants that related to the custodial affidavits filed by the Province. And in this respect, my lord, there were certain annual reports of the Prince Rupert Forest District that were disclosed as a result of an examination on his affidavit of a Mr. Harding. And what we seek to do is to tender the documents which have now been acknowledged as being authenticated extracts from the Prince Rupert Forest District reports for the years 1930 to 1944 excepting 1931 and excepting apparently the cover page for 1938. Now, these documents appear from the transcript Volume 263 at page 19434. The matter came up in the cross-examination of Mr. Harding by Mr. Adams and the question at line 16 proceeds in this manner:

> "Okay. I wanted to show you some documents, and I don't have a lot to say about them, I just want to know if you can identify them for

me.

Now, I wonder if you can first confirm my understanding which is that certainly the bulk of the land claims area is included in what was, at least in 1944 and earlier, the Prince Rupert Forest District?

A You know, before I could confirm that, really confirm it, I would have to see the two on a map. You know, off the top of my head I would be reluctant to confirm that."

And then over to page 19435, the question was put to Mr. Harding:

"All I am suggesting you go to you is that, broadly speaking, what is now the land claims territory is within the Prince Rupert Interior Forest District; is that a fair statement?

A You know, I really don't have a good picture of that right now. It would be easy enough to confirm."

At the same page at line 44:

"My lord, I wonder if I could proceed in this way, I would propose to provide my friends with copies of these, and I have a series of these reports covering 1930 to 1944, and have them confirm, since the witness indicates that this is something that he is in a position to confirm, but not here and not today, if they are accepted as genuine then they could go in. I don't have any questions from him arising out of them.

THE COURT: Yes, I think that's -- well, subject to what Mr. Plant says."

And Mr. Plant replies again on page 19436:

"If I understand my friend, he is saying that he is going to be delivering me copies of these similar documents and he is going to be asking that they be tendered in some way or another, but not through further examination?

MR. ADAMS: Not through this witness.

MR. PLANT: Well, subject to my review of the documents, they appear on the face of it could

be over 30 years old and within the terms of your lordship's ruling, I do have a question I would like to take consultation with, as to whether it's appropriate that my friend prove his case at this point or not. Other than that, I don't think there is any problem with my friend's request.

THE COURT: All right. Do you want to mark it for identification, Mr. Adams, or just want to put the whole question aside and give your friends the documents and ask them to confirm their authenticity?"

And that's where the matter stood.

THE COURT: What option did he adopt? Were they marked for identification?

MR. RUSH: No, they weren't. Following that, there was apparently an exchange of correspondence between Mr. Adams and Mr. Plant, and Mr. Adams on the 19th of September says:

"As advertised in court on September 11, during Mr. Harding's cross-examination on his affidavit, we enclose copies of extracts from the following Prince Rupert Forest District Reports for 1930 to 1944, excepting 1931, and invite your agreement that these are authentic documents, and may be tendered at some convenient time as part of the plaintiffs' case. We also invite your agreement that the territories claimed in the action were and are largely within the Prince Rupert Forest District. Thank you."

Mr. Plant replies on the 22nd:

"I acknowledge receipt of your letter of September 19, 1989, and its enclosures:
We will make inquiries:
(a) as to the authenticity of the documents;
(b) as to the boundaries of the Prince Rupert Forest District between 1930 and 1944.
Irrespective of the outcome of these inquiries, we decline your request to tender the documents as part of the Plaintiffs' case. The Plaintiffs have closed their case. Unless ordered to decline to be -- "

Let me start again:

> "Unless ordered, we decline to permit it to be re-opened for this purpose as it was not within the matters reserved when the Plaintiffs' case was closed in July."

And then I believe this morning Mr. Plant provided me with a copy of the letter directed to Mr. Adams in which he authenticates the documents. Now, perhaps Mr. Adams, my lord, misspoke when he said that the documents should form part of the plaintiffs' case, but it certainly should form part of the plaintiffs' case as cross-examined in the cross-examination of Mr. Harding.

THE COURT: Well, I don't think there is any magic in this. I think -- I think that evidence is evidence in the case.

MR. RUSH: I agree with that, my lord. My point is that it is clear from the transcript that Mr. Harding was going to make inquiries about whether or not these were authentic documents from his department. He apparently went out and did so. He advised Mr. Plant that they were so authentic and had he done so at the time he was on the witness stand, he certainly would have thereby authenticated, if we can use that terminology, the documents and they would have been tendered as exhibits in cross-examination and they would have become part of the evidence in the case. And I think that's where the matters stand at this point. They ought to be accepted as exhibits in the cross-examination for -- of Mr. Harding and I would tender them for that purpose given the authentication which we now have been provided with by Mr. Plant.

THE COURT: Mr. Plant?

MR. PLANT: Well, my concern arises out of the fact that these documents were all likelihood within the plaintiffs' possession and control prior to closing their case. And to say, as my friend did at the outset, that these documents were disclosed as a result of an examination on his affidavit of Mr. Harding misses the point that they were disclosed -- they were tendered on the court by the plaintiffs at that time. It's not as if we made these documents relevant during our case. They were documents in respect of which authentication could have been sought and obtained prior to closing

the plaintiffs' case.

Now, I concede that there is some merit in my friend's point that had Mr. Harding recognized the documents in the witness stand when he was being cross-examined, they would have been marked then and there. The fact is, though, that Mr. Harding saw those documents and indeed I saw those documents for the first time when Mr. Harding was being cross-examined and Mr. Harding was unable to identify them. I have a concern about whether or not that is an appropriate way to tender documents in this or any case. I have a second concern and that is that none of these documents, read in context or otherwise, are relevant. But that --

THE COURT: Well, then --

MR. PLANT: -- to elaborate on that would require --

THE COURT: Then they don't mean much, do they?

MR. PLANT: I beg your pardon?

THE COURT: Then they don't have much meaning or effect in this case?

MR. PLANT: No. The only mention of Indians seems to be references to what the authors of the reports, using the phraseology of the day, describe as pow-wows on Lake Babine, which is outside the land claims area. I don't think it matters much one way or the other, and if your lordship were to find against me with respect to the first objection, then I would say that we would want the right to tender such other parts of those documents as we may, using the very elastic definition of relevance which has to be used if any of this stuff is relevant, which may be equally relevant. And that's all I have to say on those.

THE COURT: Well, now that you have your friend's collection, I would entertain an application, if you wanted to bring it forward at some convenient time, to supplement what Mr. Rush is putting forward. I think Mr. Rush's collection should be treated as if it had been marked during the cross-examination of the witness and forms evidence in the case to the extent that it may found to be relevant. And I don't think it's any more difficult than that. How are these to be identified, Mr. Rush?

MR. RUSH: These are to be identified as the Prince Rupert Forest District Annual Reports, 1932 operation, 1933 operation, 1934, '35, '36, '37, '38, '39, '40, '41, '42, '43, '44, all with the word "operation" after them. What that means I don't know.

THE COURT: Yes. All right.
MR. PLANT: In each case, my lord, the extract is one page with the accompanying title page of the report for that year.
THE COURT: Yes.
MR. RUSH: Yes.
THE COURT: All right.
MR. RUSH: And it has the submission signature of the district forester in some cases.
THE COURT: Yes. That's fine. Thank you. Now, is there a number to which they can be attached or was a number reserved?
MR. RUSH: I don't believe there was a number reserved, although I'm not sure of that.
MR. PLANT: Well, there is no number reserved to my recollection in the transcript. I'm just wondering whether there was any exhibit number. Well, the exhibit of Mr. Harding, the affidavit of Mr. Harding appears to be Exhibit 1125.
MR. RUSH: Yes. Well, I propose that we make it as part of that series.
THE COURT: What was his name, Harding?
MR. RUSH: Harding, H-a-r-d-i-n-g.
MR. PLANT: Robert.
THE COURT: All right. Well, I think it will be useful to give it a number in -- I don't know that I have Mr. Harding's distinction -- no, I don't have that evidence with me. I'm in a new book now. What did -- did we have an exhibit number for Mr. Harding?
MR. RUSH: Just for his affidavit, my lord. Exhibit 1125.
THE COURT: All right.
MR. RUSH: This was -- I propose we make these a part of the 1125 series, either one through eleven, I guess it would be.
THE COURT: Yes. All right. Yes, I think they should be 1125 capital A to whatever number you reach.
MR. RUSH: Yes. All right.
THE COURT: Mark them sequentially.
MR. RUSH: Is that possible?
THE REGISTRAR: This is letter A to whatever I reach?
THE COURT: Yes.

(EXHIBIT 1125A: Prince Rupert Forest District Annual Report 1932)

(EXHIBIT 1125B: Prince Rupert Forest District Annual Report 1933)

(EXHIBIT 1125C: Prince Rupert Forest District Annual Report 1934)

(EXHIBIT 1125D: Prince Rupert Forest District Annual Report 1935)

(EXHIBIT 1125E: Prince Rupert Forest District Annual Report 1936)

(EXHIBIT 1125F: Prince Rupert Forest District Annual Report 1937)

(EXHIBIT 1125G: Prince Rupert Forest District Annual Report 1938)

(EXHIBIT 1125H: Prince Rupert Forest District Annual Report 1939)

(EXHIBIT 1125I: Prince Rupert Forest District Annual Report 1940)

(EXHIBIT 1125J: Prince Rupert Forest District Annual Report 1941)

(EXHIBIT 1125K: Prince Rupert Forest District Annual Report 1942)

(EXHIBIT 1125L: Prince Rupert Forest District Annual Report 1943)

(EXHIBIT 1125M: Prince Rupert Forest District Annual Report 1944)

MR. RUSH: Yes. All right. And I -- I propose, my lord, filing Mr. Plant's letter together with the map that is appended to the letter, and I would make it as part of that sequence as well so whatever those --

THE COURT: Mr.?

MR. RUSH: Plant's letter of November 10, 1989.

THE COURT: To separate it from the other documents, Mr. Plant's letter, and that can be Exhibit 1125B. What's the date of Mr. Plant's letter?

THE REGISTRAR: I am going to use 1125 A to G or H?

THE COURT: It's more than that, I think.
THE REGISTRAR: Okay.
THE COURT: Yes. That's fine.
THE REGISTRAR: So the letter now -- the second one --
THE COURT: It will be B already.
THE REGISTRAR: Yes.
THE COURT: All right. You make Mr. Plant's letter 1125X. You wouldn't go that far. Or Z if you have to.

(EXHIBIT 1125X: Covering Letter dated November 10, 1989 to Adams from Plant re Reports)

MR. PLANT: I might say, my lord, that the map which my friend has referred to, just to have some explanation here, the map is the map which I was provided of -- provided with showing the boundaries of the Prince Rupert Forest District or region, whatever it was called, because that was one of Mr. Adams' request -- requests of me.
THE COURT: Yes.
MR. RUSH: Now --
THE REGISTRAR: Is this going to be separately identified?
MR. RUSH: It can be in the sequence.
THE COURT: Call it Y.
THE REGISTRAR: Y?
THE COURT: Yes.

(EXHIBIT 1125Y: Map - Prince Rupert Forest District)

MR. RUSH: Now, the next matter, my lord, pertains to the filing of certain lists and documents that were requested of Dr. Lane in her cross-examination, and I propose to do that now. These documents and lists were requested of her by Mr. Goldie during the course of the cross-examination and she has identified the relevant documents and provided copies of some of them as well as lists. And I propose filing those now.
MR. GOLDIE: My lord, I have an objection to that.
THE COURT: All right.
MR. GOLDIE: Is that not the document sent me?
MR. RUSH: Yes -- no, this isn't.
MR. PLANT: Oh.
MR. RUSH: No. What I will -- Mr. Goldie has set out his objections to this proposal and what I intend to do, my lord, is to provide you with a copy of the relevant portions of the transcript.
THE COURT: Thank you.

MR. RUSH: What I intend to do, my lord, is to simply begin by referencing to my letter to Mr. Goldie of October 20, which is found at tab 8 of the cerlox bound volume, containing references regarding requests of Dr. Barbara Lane in her cross-examination, and this is my transfer letter in which I transfer the material to my learned friends and I say:

> "During the course of Dr. Barbara Lane's cross-examination you requested that she identify certain materials referred to by her during your cross-examination. Dr. Lane has provide me with the additional information in two letters dated September 14 and 15, 1989.
>
> I am enclosing the following information provided to me in answer to the requests made by you of Dr. Lane."

And I there set out items one through six. And then I say:

> "I am advised that in answer to a further request made by you of Dr. Lane that Dr. Lane will be sending me a list of the treaties which were made by Great Britain with native people in Canada and referred to in Dr. Lane's evidence. I will forward these these to you as soon as I receive them.
>
> I intend to tender the enclosed documents as exhibits in the proceedings and I will ask the Court to have them marked as part of Dr. Lane's documents."

Then at tab 9 a letter of November 6, I indicate the following:

> "Further to my letter of the 20th please find enclosed a binder containing a transfer letter from Dr. Lane, a list of selected treaties between the British Crown and Indians, 1768 - 1870 and tabbed copies of those treaties.
>
> I will be tendering these documents to be marked as exhibits."

Now, in order to narrow the points of difference between my friend and I, Mr. Goldie has provided me with a letter of November 9 in which he sets out his

objections, but in respect of the November 6, 1989 transfer letter of mine which is tab 9, my lord, Mr. Goldie agrees that the list of the treaties together with the treaties themselves may be marked as an exhibit. He takes objection, however, to the transfer letter written by Dr. Lane to myself. And so the binder that I have prepared contains that transfer letter, the list and the treaties. So in respect of that November 6 issue we will be focusing solely on the question of her transfer letter. Well, where did this all arise? Your lordship would -- I direct your attention first to the first tab which -- somebody has my notes. Perhaps your lordship --

THE COURT: No.

MR. RUSH: No. Here they are. Tab one, my lord, June 12, 1989, Volume 238. This pertains to the treaties. Since there is not much issue in this, I'll simply direct your attention to page 17504 of tab one beginning at line 40 where the issue of the treaties arose and I'll correct one mistake in the record at line 12 instead of Mr. Rush speaking it's Mr. Goldie.

THE COURT: At line 12.

MR. RUSH: Yes. At line 12 at 17505, the next page.

THE COURT: Yes.

MR. RUSH: Yes. And down to line 38, my lord, is really the request that Mr. Goldie makes of Dr. Lane in respect of these treaties. And as I said, that's what is contained at tab 9.

Now, the other requests, and there were a number of them, the next one is set out at tab 2, Volume 239, line 17576, beginning at line 13:

"Q And in the transcript, in Volume 229 at page 16770, and you are referring here about the discussion of the estimates in tab 51, and you say in line 39:

'These selections are taken out of a large body of written materials dealing with the question of extinguishing Indian title on Vancouver Island and I have merely selected examples to show different things.'.

Q Would you provide me with a list of the written materials to which you refer?

A Well, as I say, they should have been included in the lists that were sent to you.

Q Well, I am not sure what you mean by should have, are you familiar with those --

A I don't know what went to you. I know what I provided to counsel and I can only speak about what I know.
Q Would you inform yourself then by looking at what Mr. Rush sent to me and tell me if there is anything that is not on the list to which you have referred in the answer, written materials from which you made selections; do you follow me?
A I am not sure.
Q All right. I will try it again. I want you to inform yourself what Mr. Rush sent to me, are you with me so far?
A Yes.
Q And when you go through that, will you please tell me if there is anything not included in that which would fall under the description 'a large body of written materials dealing with the question of extinguishing Indian title on Vancouver Island?
A Certainly."

So that's the second request, my lord. And then at tab 3 at line 37 of page 17588, lines 28 to 30:

"Q Lines 28 to 30, you say:
'I would look then to Douglas' reports on his treaties to London in which he says what it was he did and what he spent that money for.'
I would like you to identify for me Douglas' letters to London, firstly the colonial office, and I think you told me yesterday that there are some thousands of documents that you have examined from time to time and it may be that you cannot find any of Douglas to the colonial office reporting on the treaties, and to use your language, in which he says, '... what it was he did and what he spent that money for'. Do you follow me?
A Mr. Goldie, I am reading the paragraph you have directed my attention to in the transcript and I refer in that paragraph to Douglas' reports on his treaties to London, and I do not say to the colonial office. He was writing to the Hudson's Bay office in London.
Q If that's what your answer is, that it is

writing to the Hudson's Bay Company, you would agree with me then that he did not write anything to the colonial office that matches the description of what you have stated here?

A I never said that he wrote to the colonial office. I said in that same paragraph that Mr. Blanchard wrote to the colonial office.

Q All right then.

A Mr. Douglas reported to Hudson's Bay Company.

Q Yes. That's what my understanding was also. So if London is the head office of the Hudson's Bay Company, can you identify for me the letters in which you reported on, if they are in your collection, in which he reported on what he did and what he spent the money for?

A Yes. I believe they are in the collection and I will attempt to figure out out which tab that's at.

Q All right, thank you. And then at line 39 in the same page of the transcript, you say, and I quote:

> 'And then I would look at the whole series of documents that we have been reviewing, I believe yesterday, as for the need for government to take action to expend money to extinguish Indian claims in London which occurred, as I recall, in the contemporaneous accounts of the discussions in the House of Assembly and the address of Governor Douglas to the assembly in which he alerts them to the need to expend money to extinguish Indian land claims in Cowichan Valley and elsewhere.'.

I would like you to identify any document which makes reference to the extinguishment of Indian claims on Vancouver Island other than to the Cowichan Valley?

A I believe that's the same question you put to me earlier today.

Q I think it may be."

So there, my lord, you have the next request. Then at tab 4, June 13, page 17597.

THE COURT: I am sorry, tab?

MR. RUSH: Tab 4.

THE COURT: Tab 4, yes.

MR. RUSH: 17597. I am going to the next request.

THE COURT: Yes.
MR. RUSH:

"Q I am at 16804. The question was put to you:
'Just before I take you to this tab...'.
And he's -- Mr. Rush has referred you to Mr. Trutch's letter of the 13th of January, 1870, you said -- he put it to you:"

And then it's the quote from the letter and then the question:

"Would you provide me with a list of documents that you reviewed for the purpose of evaluating the letter at tab 81?
A This is the letter at page 183 of that correspondence. Is that what you are referring to?
Q Yes, you read from page 185?
A Sorry?
Q But it's from that letter."

And there is further exchanges, and then over on to 17598 beginning at the top:

" And similar documents to which.
'Q Similar documents -- my use of the word 'similar' was similar documents in reference to your review of the record in relation to the letter of the January 13, 1870?'.
So, as I understand it, you were being asked, did you conduct a review of Mr. Trutch's letter to Sir John A. Macdonald that you read from, and your answer was yes, and I am asking you to provide me with a list of the documents that you reviewed in course of that evaluation. Can you do that?
A Sure.
Q Thank you."

So that's the next request, my lord. Then tab five, same date, page 17606, question of Mr. Goldie at line two:

"Q And there is a memorandum dated November 2nd, 1874, which is an addendum to that, signed by

David Laird, Minister of the Interior and, Dr. Lane, you read from page 152 of the papers relating a paragraph about two-thirds of the way down the page.

And I think, my lord, that is reproduced at page 16808 of Volume 230. And perhaps if the witness could have that, please.

Now, Dr. Lane you read out and the extract that you read is found at lines 11 to 19 on that page, and my question is: did you subject that statement of Mr. Laird's to the same sort of procedures that you followed with respect to the statements of Trutch and Musgrave that you have described to the court?

A Yes, I have tried to use the same methodology in assessing the statements of all of the writers whose documents I have examined.

Q Yes.

A If they had anything to say that was germane to my research.

Q You apparently considered this to be germane?

A Yes.

Q And can you provide me with a list of the documents that you referred to as part of that process?

A They are the same documents that we have been talking about.

I am getting a little bit concerned, Mr. Goldie, I seem to -- I don't have paper and pencil with me here and I assume someone else is making a record of this, but I have a growing feeling that I am being asked to go and do a great deal of recovery of documents, and I am wondering how long this will go on and where it will end?

Q So am I.

MR. RUSH: So am I.

THE COURT: So am I.

MR. GOLDIE:

Q We will provide you with a list.

A Will you provide me with the wherewithal to do it?

Q I am not asking you to recover documents, I am asking you to give me a list of the documents that you refer to.

A Yes, this take time, you understand.

Q Well, I am simply exploring the evidence that

you have given, and you have stated that you have subjected certain statements to processes?

A Yes, and if you had a particular problem that you could point me to I might be able to narrow the search of documents or the list of documents that I have referred to.

Q I have already referred --

A But I have sort of an open-ended request, you said this, tell me everything you looked at, rather than pointing me to a particular difficulty that may exist."

There is further discussion of the question and there is a further interjection and then finally, my lord, the requests made of Dr. Lane were summarized by Mr. Goldie at the conclusion of his cross-examination and that summary was to be found at tab 6. This is at the conclusion of that particular day's cross-examination, I believe, and it's at, as I said, tab 6 and it's at line 39 of page 17642. If you look at the bottom of the page, my lord, the requests were summarized in this manner:

"Q M'hm. All right. Now, the outstanding matters that I asked you to look at first was the list of treaties made by Great Britain with native peoples in what is now Canada.

A Yes.

Q And, secondly, whether you can lay your hands on Captain Clarke's proposals in greater detail.

A My recollection is that I have the second -- I should be able to do both of those with -- those I do not find burdensome. It was the more open-ended requests that if they cannot be more focused I frankly find onerous and unduly burdensome.

Q All right. And then I wanted to know what Douglas' reports on treaties to London were.

A Yes. That I can do.

Q Yes.

A Those are focused matters where I don't have a problem.

Q Yes. And then I wanted to know in reference to your evidence the documents on need for extinguishment other than those with regard to the Cowichan?

A Again, I can supply that.
Q Yes. Then I wanted to know the documents that you referred to in respect of the process you described you went through in connection with Mr. Trutch's statement, or his letter of the 13th of January 1870, and of Governor Musgrave's covering dispatch. And in order to assist you, if I could, I'm looking for the reference I made earlier on that day, my lord, to the exchange that -- that -- the objection I raised and the witness was asked to state what she had done in evaluating, if I remember her word correctly, Mr. Trutch's letter. My lord, I'm sorry, I can't lay my hands on that, and perhaps if I provide that to the court tomorrow morning."

Then it is found and the particular passage is cited to the witness of your lordship's comments where you make the point, and I quote:

> "'I think what the witness can be asked is for a list of references to documents which I can consider in assessing the correctness or otherwise of what Mr. Trutch has written.'

And that's what I'm asking for, my lord. That's with respect to Trutch. And the 13th of January 1870, Musgrave's covering memorandum. And I believe I had one other. Oh, Laird's memorandum about -- Laird's statement that the witness read that Canada could not possibly have known the state of affairs in British Columbia at the time of the union. It's those three documents, my lord.

THE COURT: Well, I don't think that I can at this time assess the difficulty of those requests, and I think I'll leave the matter as I attempted to pronounce earlier on this question earlier this afternoon."

Now, my lord, I'd like to tender two volumes in this respect.

THE COURT: These documents are already --
MR. RUSH: Pardon me?
THE COURT: These were not included in her collections of documents?

MR. RUSH: Some of these documents were included --
THE COURT: Yes.
MR. RUSH: -- in the collection of documents, yes. But not -- not by any means all of them or perhaps even the majority of them.
MR. PLANT: May I see them, please?
MR. RUSH: Yes. Here's a second. Perhaps I will deal with the easier one first, which is the fatter one.
THE COURT: I wonder before you do that, Mr. Rush, if I could get some indication what the nature of the objections is.
MR. GOLDIE: It's primarily the argumentative nature of Dr. Lane's covering letters. She is not content with answering the questions. She goes on at some length and then in my submission she simply is rearguing matters which she was -- in respect of which it was stated she could not give evidence.
THE COURT: The covering letters are in the books, are they?
MR. GOLDIE: Yes.
MR. RUSH: Yes.
THE COURT: Why do you want the letters in, Mr. Rush?
MR. RUSH: Well, for this reason. In the case of the Treaty Volume, of which is the fatter of the two, my lord, the letter states what is the request made of her. It states what her mind was to the request, what she interpreted the request to mean, because there was an issue throughout as between the scope of the request and what was intended by the speaker, Mr. Goldie, the cross-examiner in that case and what she understood this to be, and this is what she understands the nature of the request to be. And in my submission her understanding is in accordance with what the transcript says, although my friend and I differ on that point apparently. The third point in respect of the covering letter is that -- and I am here speaking now of the Treaty Volume, is that it identifies the source of the first tab and all the remaining tabs. So that's what that cover letter does. Now, in respect of the second volume or the first in time, if I can put it that way, this volume, it's the thinner of the two, again is a letter addressed to me from Dr. Lane and the letter in sum does this: it sets out the basis upon which she understood the requests for identification of the documents to have been made to her. It sets out the particular nature of the requests, identifies the requests as she answered them in the letter, and it sets out -- it gives her

explanation of why it was that it took the period of time from when the request was made to when it was delivered back to me. It's a explanation for that period of time. And she sets out what the lists enclose and she identifies the lists and in some cases provides copies of the documents, and as I understand it there is no issues taken with that. So that's what that covering letter does, and I don't see anything that's argumentative in that. The only thing that I can see that's argumentative, frankly, is -- let me put in another way. The only thing that I can conceive of what my friend thinks is argumentative, because I don't see it as argumentative, is in respect of a note which is appended to the first list, which note deals with an issue that was raised in her examination, cross-examination, and that is the issue which I now perceive to be resolved as between the parties and since was since Dr. Lane's evidence, but was an extant issue at that time, and that is does the witness or the party presenting a document take everything in the document to be true? And what Dr. Lane does at the beginning of her lists is to set out what she takes the documents and the list of the documents to be how she understands them and how she uses those documents. So that's with regard to the first list, and I have put the lists in separate tabs. The third --

THE COURT: Sorry. I take it, Mr. Goldie, that you are willing, or anxious, or what, to have these documents go in?

MR. GOLDIE: No. I am -- I asked for certain things which were referred to by Dr. Lane in her cross-examination. She was unable to supply the answer because she didn't have her working papers here, but she did say I'll go to my notes.

THE COURT: Yes.

MR. GOLDIE: And fine, do that. I am not interested in any of these except for my own use. It's my friend who wants to file them along with Dr. Lane's additional arguments.

MR. RUSH: Well, my lord --

MR. GOLDIE: I am quite happy to have -- I have told my friend I am quite happy to have the treaties in question filed and all that needs be done is to file them.

MR. RUSH: My lord, I don't think my friend quite gets off the hook that easily. The question is he put a question to Dr. Lane in cross-examination.

THE COURT: Yes.

MR. RUSH: She was asked to identify from her notes or working papers or her assembly of material in her library those documents by list and in some cases by references to the document itself. She did that. And in my submission in doing so, having been asked to make the inquiry, she made it and it's a matter now to be presented back to the court. And --

THE COURT: Well, if Mr. Goldie had asked you for the treaties that Governor Douglas made with the Indians on Vancouver Island and she reached in her briefcase and pulled them out and Mr. Goldie looked at them and said, "Oh, I don't think I want them," surely they don't have to go in evidence. Now, there is old law that says they do, but I take that law to be discredited and that one can ask for a document and then make a decision whether he wants it to be filed or not.

MR. RUSH: I agree with that, my lord. My -- Mr. Goldie could pick and choose as he thought fit.

THE COURT: Yes.

MR. RUSH: But when I come along in redirect and I don't like his choices, then I can say you had the documents in front of you, may we see them and may we file them, and in my submission I would have been entitled to file those.

THE COURT: Well, I don't think I have to answer that question, Mr. Rush, because it seems to me that when you put in a collection of the kind you did, I think that subject to what opposing counsel say, I would allow you to supplement the collection by putting more documents in. Although, Mr. Goldie might have a right to further cross-examination. But I -- as presently advised it doesn't seem to me that because he asked for them that they must automatically go in or that you have the absolute right to put them in along with a letter from Dr. Lane explaining them. Now, I am proceeding on the assumption that the old rule, that if you ever took a document from the witness in your hand it automatically then became evidence and everyone was powerless to do anything about it. I think that law is no longer good law. But it seems to me that if Mr. Goldie now decides he doesn't want them in but doesn't mind if you put them in, although I don't think he said that he was willing to let them all go in, he mentioned only the treaties.

MR. GOLDIE: I was only referring to the binder of treaties, my lord. I have no objection to those going in.

THE COURT: Some of those documents that Mr. Rush has described in tabs one to five I don't think were treaties.
MR. GOLDIE: Oh, no. It's just the first request.
MR. RUSH: We are dealing with two -- we are dealing with, I think, six or seven requests.
THE COURT: Yes.
MR. RUSH: The treaty which I think my friend and I -- the only disagreement is the covering letter, but as I say, my lord, is that I say two things. Firstly is that implied in the request is a suggestion that if you don't produce the treaty or you don't produce the list, that there is some weakness or flaw in the methodology or research that you took.
THE COURT: Yes, I think that might be right.
MR. RUSH: And I think it is incumbent upon my friend to accept the result of that process, and that is if you venture on it and if you ask for the product and it's produced, as I think here Dr. Lane did, I think he has to file it in order to allow me and Dr. Lane to rebut the presumption, if it comes to that, of a flawed research or something technically wrong with the methodology.
THE COURT: Well, I would want to have some argument on that. It seems to me that Mr. Murray Smith who has been at the University of London or he may be back doing a paper on this for the criminal law subsection a couple of years ago, and my recollection is that, with respect, that you may not have fully and accurately stated the law. I thought he suggested there were other considerations and that there isn't an absolute obligation to put it in.
MR. RUSH: Well, my lord, if I can just complete my argument.
THE COURT: Yes.
MR. RUSH: I think you have referred to Murray Smith's article before and I think we did get it.
THE COURT: Did you get it? I don't remember if it ever surfaced.
MR. RUSH: It did.
THE COURT: I am not sure it covers the situation that I think it does.
MR. RUSH: In that case passed away and maybe it will be revived and brought back to life. But my second point is, my lord, I wrote down the words that you said yesterday to Mr. Grant when he was objecting to certain of the re-examination of Mr. Willms and the words you said were these: The price of cross-examination on an issue is that when you ask a question on

cross-examination, then you open up the issue for re-examination. And I say that equally applies to questions of documents or list requests made during the cross-examination. I say my first argument is that the obligation is Mr. Goldie's to file this material, not mine, once responded to. But if I am wrong in that, it certainly is the case that if my friend elects that he's not going to file it, then I as a matter of right in re-examination can say well, here's -- for whatever use these may be put to, I am entitled to for the purposes of the credibility of the witness, the credibility of her process, having her research methodology, whatever, I am entitled to file this material as part of her responses to the request.

THE COURT: Well, I don't think I agree with that, Mr. Rush, for the reason that the context which I was debating this question with Mr. Grant was different and there he had asked a question and an answer had been given, so that the matter was into evidence. In this situation Mr. Goldie asked for the documents and they weren't produced and he's entitled to look at them, it seems to me, and then decide either to continue the cross-examination or to put them in.

MR. RUSH: But --

THE COURT: But we don't have that problem, because I am presently of the view that they can go in as part of your addition to the collection if you want to put them in and it isn't a question of consequences resulting from Mr. Goldie asking for the documents. Now, I haven't heard Mr. Goldie on that part of it. But it seems to me that, again I come back to the analogy of the cheque again, that in a case as massive as this, I think you can supplement the collection by further documents in the same general classification as the collection and then it becomes a question if you do, that Mr. Goldie might be able to further cross-examine Dr. Lane on those documents. I hope we don't get to that. But that seems to me to be the logical extent in where we are going. Unless you can satisfy me that by asking for the documents and having them produced, that they must go in, and I'm very reluctant to follow that course unless there is authority that requires you to do so, because I think it inhibits in a case like this, particularly counsel looking into something and then deciding not to go ahead with it. It may be that having looked at it he decides for any number of reasons he thinks sufficient

that he shouldn't pursue that or doesn't need to pursue that line of cross-examination. Now, it would be important if I didn't have a view that you could put them in. But I think what it comes back to then, it comes back to the question of whether in addition you can also put in Dr. Lane's letter. I don't at the moment see a base upon which Dr. Lane's letter could also go in.

MR. RUSH: Well, importantly to my argument, my lord, is the fact -- is the fact that the request was made and was responded to.

THE COURT: Oh, well, I think that's abundantly on the record now.

MR. RUSH: Well --

THE COURT: There is no question about that.

MR. RUSH: Well, yes, it may well --

THE COURT: Subject to what Mr. Goldie says, I would say that she has responded chapter, line and verse to the -- or chapter, verse and line to the request and that's -- that's -- that's a given at this point. But I notice it's three clock and perhaps when we resume you can enlighten me further.

MR. RUSH: Well, my lord, I would be -- I would like the opportunity to try and convince you. Your lordship isn't in my sense of your responses to me.

THE COURT: You get that impression, Mr. Rush?

MR. RUSH: Somewhat after so many years, my lord, one gets to understand certain responses from the court. But I would like an opportunity to convince you on the law that in fact in such a situation as faces us here, and it may be there isn't an issue, as I say, with the Treaty Volume, but I am prepared to let this issue stand down, to revisit it on another occasion if --

THE COURT: I am happy to be persuaded. I find it an interesting problem, because I do remember when I first started practicing that the rule was that if counsel even took the document in his hand, before he even looked at it counsel would stand up and say, "It's got to go in; he took it in his hands." And that's the end of it. There are some old authorities that suggest that. I don't think that's privy law any more. But I would certainly give you an opportunity to persuade me that that old law or its equivalent in some modern disguise is one that we should follow at this time.

MR. RUSH: All right. Thank you.

THE COURT: All right.

(PROCEEDINGS ADJOURNED PURSUANT TO AFTERNOON ADJOURNMENT)

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

Laara Yardley, Official Reporter,
United Reporting Service Ltd.

(PROCEEDINGS RECONVENED PURSUANT TO THE AFTERNOON BREAK)

THE REGISTRAR: Order in court.
THE COURT: Mr. Rush.
MR. RUSH: Yes, my lord. Just on the cross-examination requests made of Dr. Lane, I propose that we stand that matter down till another appropriate date, perhaps when we revisit some of the outstanding matters on the 20th.
THE COURT: Yes.
MR. RUSH: And I'll do my best to try and persuade you into another course of action.
THE COURT: I'll look forward to that.
MR. RUSH: Thank you.
MR. GOLDIE: I'm sorry to hear that, my lord, because I had made arrangements to be in another forum on the 20th.
THE COURT: Well, it doesn't have to be the 20th.
MR. GOLDIE: I was looking forward to persuading your lordship to maintain the integrity of your present approach.
MR. RUSH: Well, I would like to be here for that as well, my lord.
THE COURT: Yes. Let's all be here at the same time.
MR. GOLDIE: My lord, I propose continuing now with tendering documents. I have had placed before your lordship three volumes entitled "Selected Proclamations." I should explain what these volumes contain, and I can do so by reference to the index, which is found in the front of each volume. It is a collection of some -- the index is the same in front of each of the three volumes and comprehends the contents of all three. The collection is of some 24 colonial ordinances or proclamations, and the object is to provide for them the same background as I did with respect to the Calder proclamations. There are, of course, as your lordship will later see, many, many more proclamations and ordinances and acts of the colonial period, but these have been selected by counsel as bearing upon the question of Indian claims to the soil of the province, or upon rights claimed to be aboriginal in origin, or upon claims to sovereignty and jurisdiction.

The organization of the documents is roughly the same as that in Calder with the exception of the tabbing of the underlying documents, which run sequentially from 1 through 135.

THE COURT: Are these documents separate from the Calder 13?
MR. GOLDIE: Yes. They are the documents which relate to each of the ordinances, each of the 24 ordinances.

THE COURT: Yes.
MR. GOLDIE: In some cases there is the same document because a despatch, for instance, transmitting a proclamation make reference to other proclamations. And that happens a number of times. I am going to tender --
THE COURT: I'm sorry, may I ask also were these documents evidenced in the Calder case?
MR. GOLDIE: No. And your lordship will bear in mind that in fact in Calder there were none of the underlying documents. It was just the ordinance.
THE COURT: I was aware of that with respect to the Calder 13, but I didn't know with these.
MR. GOLDIE: None of these became part of the record in Calder. I'm going to propose, unlike the marking in the Calder volumes, that just one number be allotted to these three, so that the reference would be Exhibit number dash 1, 2, or 3 for the volume number, and then dash for the section number, which runs from 1 to 24.
THE COURT: Yes.
MR. GOLDIE: And then the tabs under that will not be particularized but will be as described in the index.
THE COURT: All right. The tabs are not consecutive through the three volumes?
MR. GOLDIE: They run all the way -- they run from 1 to 135 all the way through.
THE COURT: They do. Yes. All right.
MR. GOLDIE: That's why I'm suggesting that there just be the one exhibit number. I understand that's 1199, madam registrar.
THE REGISTRAR: Yes.
THE COURT: All right.
MR. GOLDIE: So the volume 1 would be Exhibit 1199-1, and everything under tab number 1, consisting of tabs running from 1 through 7, would form the third number of that series. And then when we get to the second volume, it would be Exhibit 1199-2 dash and then the section corresponding to the ordinance in question.

(EXHIBIT 1199-1 - VOLUME 1 SELECTED PROCLAMATIONS)

(EXHIBIT 1199-2 - VOLUME 2 SELECTION PROCLAMATIONS

(EXHIBIT 1199-3 - VOLUME 3 SELECTED PROCLAMATIONS)

MR. GOLDIE: My lord, for obvious reasons I don't intend to read these documents. I'm just going to refer to the organization of them and make the general statement

that that is parallel all the way through. And taking volume 1, number 1 as the example, it is the proclamation, and I see -- of the 6th of September, 1858, forbidding sale of liquor to native Indians in the colony. And the proclamation itself is under tab 1. The transmittal is under tab 2. When I say the transmittal, from the governor to the secretary of state for the colonies.

Under tab 3 is the Emigration Board's endorsement. Now, they're dealing with a number of proclamations, and this one is the first of them, and it's referred to in the middle of the first page where the board's letter reads:

> "The proclamations and notice enclosed in the first Despatch prohibit the introduction of Spirituous Liquors among the Natives..."

Tab 4 acknowledges the receipt of the despatch in Lytton's despatch to Governor Douglas. Tab 5, 6, and 7 are the parliamentary returns, tab 6 being that to the House of Commons and tab 7 being that to the House of Lords. And the date can be determined from the top of the volume, House of Commons, August the 12th, 1859. And then in the second column about midway down the page, the right-hand column about midway down the page:

> "Mr. Chichester Fortescue presented, by Her Majesty's Command, -- Further Papers relative to the Affairs of British Columbia: Part 2. Copies of Despatches from the Governor of British Columbia to the Secretary of State for the Colonies,"

and so on. And then he also presented returns. And then the next paragraph begins:

> "Mr. Chichester Fortescue also presented, pursuant to the directions of an Act of Parliament, -- Copies of Proclamations issued by the Governor of British Columbia, between the 8th May 1858 and the 14th February 1859.
>
> Ordered, That the said Papers do lie upon the Table."

And one can find the same sort of proposition

expressed more succinctly in the left-hand column of the next page, which is Hansard, the House of Lords. It's the third complete paragraph down.

> "Copies of Proclamations issued by the Governor of British Columbia between the 8th May 1858 and the 14th February 1859 were (pursuant to Act) laid before the House by The Lord Wodehouse, and Ordered to lie on the Table."

The second proclamation has -- is respecting land sales along the Fraser River, and without going into detail, the same kind of documentation is provided. The documentation is not in every case exactly the same. Some proclamations gave rise to more extensive consideration at the colonial office and more extensive correspondence between the governor and the secretary of state for the colonies.

THE COURT: Do you know if these were printed up in Victoria, or were they printed up in London?

MR. GOLDIE: They were printed up in London, my lord. So far as I'm aware, there has never been a printing in Victoria. But the printing -- and if your lordship would look under tab 11, there I have utilized an extract from Papers Relative to the Affairs of British Columbia, and, of course, that printing is all for the -- for the purposes of complying with the act of 1858, which required these papers to be laid before the House of Commons and the House of Lords.

THE COURT: The act of 1858 being?

MR. GOLDIE: Being the act creating the colony, the mainland colony of British Columbia.

THE COURT: And it had a requirement for this kind of paperwork?

MR. GOLDIE: Yes.

THE COURT: All right.

MR. GOLDIE: But nothing relative to what went on in the colony. Now, occasionally there will be a direction from the secretary of state that a certain proclamation -- approval of a certain proclamation be published in the colony's gazette, but so far as I'm aware, for the vast majority of the proclamations the approval by London was contained in a despatch which was not made public.

So number 2, under the tab marked number 2 is the proclamation respecting land sales along the Fraser River, and I don't propose going through that.

Number 3 is the indemnification proclamation,

which was directed by the colonial office to be proclaimed by Governor Douglas because of doubts about the validity of the things he had done. And under tab 1 is the indemnification proclamation itself. Under tab 2 is the despatch from Lytton to Douglas of September 2nd, 1958, in which he says in the third paragraph:

> "According to the opinion of lawyers in general, the colonists of a territory circumstanced like British Columbia carry with them the law of England, so far as it is applicable to their circumstances."

And then he goes on to say some of the things you've done strict legal authority is wanting, and I believe I read that when I was going through the papers relating --

THE COURT: You said tab 2, but you meant tab 19.

MR. GOLDIE: I'm sorry, tab 19. Thank you. And that concludes with the papers -- with the extracts which indicate the proclamation was laid before parliament.

Under tab numbered 4 is the "Proclamation, having the Force of Law to declare that English Law is in force in British Columbia," and that was one of the three that he proclaimed at Langley. And it contains the same sequence --

THE COURT: Now, just -- and I don't know if this is important or whether you even know, but when he proclaimed it in Langley, do you think he had this document in his briefcase.

MR. GOLDIE: That's my understanding, my lord.

THE COURT: Yes. So he received it first?

MR. GOLDIE: He received it first. And indeed it can be found -- that particular indication is found under tab 27, which is the despatch from Lytton to Douglas of September 2nd. There were a whole series of despatches --

THE COURT: Yes.

MR. GOLDIE: -- all bearing the same date.

THE COURT: Yes.

MR. GOLDIE: And this is exactly the same one as is under the tab relating to the indemnification proclamation, but this one is referred to in the fifth to last paragraph beginning with the words:

> "You are therefore authorized to issue two

Proclamations, of the same date with your assumption of the Government.

The one, which is rather matter of solemn form than of absolute necessity, to declare the law of England prevalent throughout the Colony, subject, of course, to your own power of modifying it by laws enacted by yourself when absolute necessity requires."

And then if your lordship would turn over the page, you will see that the enclosure number 1 in that despatch is the form of the proclamation.

THE COURT: Yes.

MR. GOLDIE: And then that was printed up in Victoria in the form under tab 26.

THE COURT: So you think it was printed in Victoria?

MR. GOLDIE: I think so, my lord.

THE COURT: I see. All right.

MR. GOLDIE: I may be wrong in that, but there are other proclamations bearing the same general appearance which were unquestionably printed in Victoria. And perhaps, just as a matter of interest, if your lordship would turn back to tab 1, I believe that the material under that indicates that it was printed in Victoria. I may have misunderstood your lordship's question when you asked me if anything was printed in Victoria. I was then looking at the despatches.

THE COURT: Yes.

MR. GOLDIE: And the proclamations themselves I believe were all printed in Victoria.

Number 5 is a curiosity. The proclamation is under tab 34, but as your lordship will see from the index, no related documents have been found. I don't think that means that the Supreme Court of British Columbia lacks in existence.

THE COURT: It's the quality of the existence that concerns us at all times rather than the fact.

MR. GOLDIE: Perhaps it's a case of the -- it was -- its authenticity was so evident that nothing was needed to support it.

Number 6 is the Gold Fields Act of 1859, which is an act which had a great deal of significance in the colony, and there are quite a large number of underlying documents running through 36 to 44. That act, my lord, of 1859 introduced the concept of a free miner's certificate, and that is evident under tab 35, page 2, section Roman 5, the second from the bottom of

that page.

> "Every Free Miner shall, during the continuance of his Certificate, have the right to enter without let or hindrance upon any of the waste lands of the Crown, not for the time being lawfully occupied by any other person, and to mine in the land so entered upon."

Number 7 is a proclamation of the Gold Field -- a proclamation of the 25th of March of 1863, which is the Gold Fields Act of that year.

Then under tab 8 is found the Supply Ordinance of 1864, which is simply in here to indicate the nature of the expenditures which were being incurred in the colony by this time.

Tab 9 is the ordinance of -- which is called, and your lordship will see the name of the act on the second page, section Roman 7:

> "This Ordinance may be cited for all purposes as 'The Native Evidence Ordinance, 1865.'"

And it enabled a court or at an inquest or upon a trial of anything:

> "...to receive the evidence of any Aboriginal Native,"

and I'm reading from section 1,

> "or Native of the half-blood, of the Continent of North America, or the Islands adjacent thereto, being an uncivilized person, destitute of the knowledge of God, and of any fixed and clear belief in religion or in a future state of rewards and punishments, without administering the usual form of oath to any such Aboriginal Native or Native of the half-blood as aforesaid, but upon his affirmation or declaration to tell the truth, the whole truth, and nothing but the truth, or in such other form as may be approved by such Court, Judge, Coroner, Gold or other Commissioner, or Justice of the Peace."

And your lordship will see under tab 53 the

Attorney-General's report to the colonial secretary. Now, this is dated the 8th of May 1865, and the Attorney-General was Mr. Crease, and he explains -- and this was part of what was sent to London. He explains the reason for this enactment, paragraph 2 in his letter:

> "This enactment was rendered necessary from the painful scenes constantly arising in Court during proceedings in which native evidence was necessary to elicit the truth.
>
> It frequently happens that thoroughly credible natives are the only persons through whom gross crimes can be brought to justice.
>
> These men, thoroughly reliable in many respects, have no word in their own language for an oath; or any idea of adjuration, beyond the baleful phraseology of their white instructors.
>
> The slightest smattering of a knowledge of religious obligation, filtered not unfrequently through one or more interpreters, generally in ludicrous paraphrase, enables counsel to bring the bible to their lips, and Indians whose word no jury could disbelieve are accepted in Court as evidence ostensibly under a sanction, at best but imperfectly understood to the serious detriment of the ceremony itself on other occasions."

I might add, my lord, that it was some years before a similar ordinance was passed on Vancouver Island.

Under tab 54 is the handscript of the -- forwarding the Attorney-General's despatch.

And tab 56 is an ordinance which was passed in respect of a number of these acts, dated the 24th of January 1866, called the Confirmatory Ordinance 1866. Apparently it was felt necessary to pass that because of some difficulty with respect to the initial enactment. And then follows a schedule of the ordinances, and number 2 is the one in question here.

And this, as in other cases, tab 58 is the Queen's approval of this particular --

THE COURT: Just stopping you for a minute, at that tab 56, this schedule of ordinances.

MR. GOLDIE: Yes.

THE COURT: There's 28 here. You're not referring to most of

them in this collection, are you?
MR. GOLDIE: No. A number of them are on here, but they're not selected because they were confirmed. For instance, number 5 we'll be referring to.
THE COURT: How about a toll bridge across the Thompson River? You're not referring to that?
MR. GOLDIE: No, I'm not referring to that.
THE COURT: All right.
MR. GOLDIE: I do refer to it, but not given the same treatment as these ones are.
THE COURT: Yes. All right. Well, I guess what I'm really asking is are you putting before me all the ordinances?
MR. GOLDIE: Eventually, yes.
THE COURT: Yes. All right.
MR. GOLDIE: But not in the same detail.
THE COURT: No. All right.
MR. GOLDIE: The reason for the confirmation is indicated under tab 57, where the Attorney-General is reporting to the officer administering the government, that is to say, the acting governor of the colony, and he says:

> "I have the honor to report for the information of Her Majesty's Government that 'Ordinance No. 1 in confirmation of certain Ordinances' has been passed with a view of confirming all the Acts and proceedings of the last Session of the Legislative Council and of removing a doubt which arose with the Imperial Government upon technical grounds, as to the legality of the formation of the previous council."

So that indicates the reason for that. And that Confirmatory Ordinance, as indicated under tab 58, received the Queen's sanction and approval.
Number 10 is the International Telegraph Ordinance of 1865. That's the title given to it in section 17. And it is the legislative enactment with respect to the Collins Overland Telegraph line, which Mr. Williams spoke about. And he referred to section 3 granting -- it's over on the top of the next page -- granting to the telegraph undertaking the use of "unappropriated Crown lands in the Colony, not reserved for Indians, as may be necessary for such Stations," etcetera.
Tab 60 is the report of the Attorney-General and so on. There's -- sometimes, as I have said, the

indication that the Queen has approved and allowed the ordinance is indicated to be given publicly, and under tab 62 your lordship will see the secretary of state's despatch to Governor Seymour of the 28th of July 1865. In the last paragraph he says:

> "You will communicate Her Majesty's decision to the inhabitants of the Colony under your Government in the usual manner."

Then there is repeated the Confirmatory Ordinance, and that will be done wherever we're dealing with one of the ordinances listed. And that's volume 1.

Volume 2, under tab number 11 is the Supply Ordinance, and I have no comment to make on that. Well, I -- yes. And the report of the -- the governor's despatch, the colonial office, the Queen's approval, and the confirmatory ordinance.

Number 12 is the Indian Liquor Ordinance, which -- its purpose is indicative of -- and again there is the Attorney-General's report. The Attorney-General's report under tab 74 winds up on page 2 by stating:

> "The whole forming a Statute which without unduly infringing on the personal liberty is calculated to have a beneficialal local effect in favour of a class of Her Majesty's subjects requiring special protection from the law."

And 76 is the Queen's sanction and the Confirmatory Ordinance.

Number 13 is the Game Ordinance of 1865, and I won't make any further reference to that.

Number 14 is the Indian Graves Ordinance of April 3rd, 1865, which made it a punishable offence to steal or remove without the sanction of the government bones, articles or things deposited on, in or near any Indian grave in this colony, or to induce or incite any person to do so, and providing that in addition to fines or anything else, that somebody might be kept to hard labour for a term not exceeding 12 calendar months if convicted.

The Attorney-General's explanation is found under tab 87, paragraph 2.

> "The Natives of British Columbia are in the habit of depositing upon the graves of their

friends, articles of considerable value such as muskets, blankets, carefully carved and well dressed effigies of the deceased. The poorest Indian respects the native grave but white men have occasionally stolen things deposited thereon. Nothing is more exasperating to the Native than this want of respect for the resting place of their dead, and with a view to the preservation of the public peace, I caused the enclosed Ordinance to be laid before the Council."

And then the minute of the colonial office. Sir Frederick Rogers comments on why these articles are to be stated as property of the Crown. He says:

"...I suppose there is some special...technical necessity. It is curious."

A Confirmatory Ordinance as this one is also involved in that session.

Number 15, the Game Ordinance of 1867.

Number 16, the Indian Graves Ordinance of 1867, which was a revision of the one I referred to. Now, this, I should note, my lord, is after the union of British Columbia and Vancouver Island. The game -- the Indian Graves Ordinance of 1865 was applicable only in the mainland. And that is indicated under tab 98.

THE COURT: The first one only applied to the mainland?

MR. GOLDIE: Yes. Under tab 98 your lordship will see the governor's despatch to London. Paragraph 2:

"This simply extends a beneficial measure introduced by me on the Mainland in 1865, over the United Colony."

And then the queen --

THE COURT: Where was that?

MR. GOLDIE: That was under tab 98, my lord.

THE COURT: Oh, yes.

MR. GOLDIE: Number 17 is the Evidence Ordinance. And if your lordship would look under tab 101, the Attorney-General reports to the governor:

"I have the honor to state for the information of Her Majesty's Government that 'The Evidence

Ordinance 1867' is a condensation and extension of the British Columbian laws relating to taking oaths and evidence, to Vancouver Island, upon Union taking place."

18 is the Indian Liquor Ordinance of 1867, and I needn't refer to that. It repeals the one that prevailed in the mainland. And this, of course, extended to the whole of the colony.

Number 19 is the Mineral Ordinance of 1869, which again is a consolidation, consolidation and extension of the previous mineral acts. On page -- or section 35, which is one, two, three, four, five, six, seven lines in --

THE COURT: Sorry, 35?

MR. GOLDIE: 35, yes.

THE COURT: Yes.

MR. GOLDIE:

"Nothing in this Ordinance contained, shall be deemed or taken in any way to limit or affect the rights of Her Majesty, Her Heirs and Successors in or to the Crown Lands of the Colony, other than is herein particularly expressed, or to limit or affect the right of the Crown to grant or lease tracts of land for Mining purposes," etcetera.

And then mineral lands is defined excluding lands which are occupied or in any way reserved. That definition is on the last page of the ordinance, not the schedules.

THE COURT: I'm sorry, where are you looking?

MR. GOLDIE: It's under -- if your lordship will turn to the last page of the act itself.

THE COURT: Of tab 108?

MR. GOLDIE: Of tab 108.

THE COURT: Yes.

MR. GOLDIE: And just above section 64 I guess it is -- no, it would be 44, there's a definition of mineral lands.

THE COURT: Oh, yes.

MR. GOLDIE: It includes all waste lands of the Crown in the Mainland of the colony, including Queen Charlotte's Islands, and such other portions of the colony shall hereafter be brought under the provisions of the ordinance, and then it excludes -- "...not for the time being occupied by any other person, or in any way reserved, or the site of an existent or proposed

Town..."
THE COURT: Has anything been done to extend the colony beyond the Skeena?
MR. GOLDIE: Yes, we'll come to that.
THE COURT: All right.
MR. GOLDIE: That was done by the Stikine Ordinance of 1862.
THE COURT: I just noticed that this mentions Queen Charlotte's Island, and the other one seems to suggest --
MR. GOLDIE: Yes. By this time, 1869, my lord, the mainland colony had essentially the same boundaries as it has now. I shouldn't say the mainland colony. I should say the mainland of British Columbia had essentially the same boundaries as it has today.
THE COURT: Yes.
MR. GOLDIE: The report of the Attorney-General and so on. The Emigration Board recommended that the ordinance be approved by the Queen, and it was.

And the next one is the Game Ordinance of 1869, and the Attorney-General's report under tab 114 states that:

> "The local law prescribing the Game seasons, was found to be ineffective in a great measure in practice from the difficulty of proving how the Games seen in the hands of persons suspected of dealing in game during the close season, came into their possession.
>
> The present Ordinance throws the onus of disproof on the person in whose possession the game is found out of the regular seasons.
>
> The outlying settlers, and even the distant Indians, found the game on which they in great measure rely for subsistence during some season of the year, vanishing from their neighbourhood from the wholesale destruction of deer and game and the like, for the purposes of sale in the towns, out of the regular season.
>
> This Ordinance, it is hoped, will remedy the evil, at the same time that, practically no injury will be effected by the stringency of some of its provisions; as the only persons who would have been likely to be prejudiced by it would have been the settlers during the hay season."

And there is subsequent amendment to that. And then it goes through the regular process.

We come to number 21, the Indian Reserve Ordinance of 1869. This conferred upon the stipendiary magistrates the power to settle any dispute, and I'm referring to section 1:

> "...arising between or among any Indian or Indians, and any other person or persons as to the right to enter into, or occupy, or as to any damage done to, any Crown Lands in the Colony, being Indian Reserves or Settlements, or to the improvements, crops, or cattle thereon, it shall be lawful for the Stipendiary Magistrate of the District within which the land in dispute is situated, upon any complaint made to him thereon, or upon view of the premises, to hear and determine all such questions and disputes, as and when the same shall arise."

And he is enabled or the jurisdiction is conferred upon him to make an order requiring the removal of "any person or persons from off the land, or any portion thereof, in respect of which the dispute has arisen...."

The Attorney-General's letter under tab 118 states that the Ordinance,

> "...has been passed by The Legislative Council to provide a speedy and cheap means of remedying and abating encroachments on The Indian Reserves, and debateable land between Indian and White claimants, without the delay necessary in cases tried before the Supreme Courts.
>
> The difficulty and time taken up in dealing with such cases of the ordinary tribunals, have been a standing danger to the Peace, especially with a population so sensitive to an invasion of their supposed rights as the native tribes.
>
> They are taught to believe and in practice do, think of The Queen as their great chief, willing, able and prompt to remedy injury and prevent wrong.
>
> They are quite alive to the invasion of the Whites upon their old hunting and fishing grounds and potato patches, and only partially acquiesce in it, partly from a feeling of the

> White man's superiority, but chiefly from the confidence so constantly impressed on them by the Officers of the Government that Her Majesty will not allow formalities of law to militate against the speedy rendering of justice wherever they may happen to be in their right."

He says:

> "Although the Ordinance under report will tax the discretion of the Magistrates very largely, for the lands of the Indians are the best cleared, and most desirable for settlement of any in the country, and therefore a constant object of the white man's cupidity."

Then that goes through the usual process, and the Queen's confirmation is conveyed in the document under tab 120. And that's volume 2.

THE COURT: Do you think we should adjourn?

MR. GOLDIE: Well, you disappoint me, my lord.

THE COURT: All right. I disappoint myself. We're going to have a long day tomorrow. I think we'll adjourn in a civilized way tonight. Should we start at 9:30?

MR. GOLDIE: As your lordship pleases.

THE COURT: Thank you.

THE REGISTRAR: Order in court. Court is adjourned until 9:30 tomorrow.

(PROCEEDINGS ADJOURNED AT 4:00 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.

_____

Leanna Smith
Official Reporter
United Reporting Service