Vancouver B.C.
November 27, 1989.

(PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)

THE REGISTRAR: In the Supreme Court of British Columbia, this 27th day of November, 1989. In the matter of Delgamuukw versus Her Majesty the Queen at bar, my lord.

THE COURT: Thank you. Well, I don't want to protest too much, but I want counsel to know that I am not late. I have been sitting in chambers. So we will proceed if you are ready, Mr. Macaulay.

MR. MACAULAY: I am. My lord, I have with me today Mr. Murray Wolff. Mr. Wolff is an associate of my firm now and as your lordship may know, he has been involved in this litigation in another capacity for some three years. He has now been appointed an agent of the Attorney General of Canada.

THE COURT: Thank you.

MR. MACAULAY: And still has a responsibility for keeping me on track.

THE COURT: Well, he's failed miserably at that endeavor thus far, Mr. Macaulay. Let's see how he does now. Mr. Wolff is welcome, of course.

MR. MACAULAY: My lord, may I hand up an overlay. This, of course, is no more an exhibit than the map we had handed up.

MR. GRANT: What is it?

MR. MACAULAY: It's the reserves some years ago and that your lordship is using for reference. This is the overlay showing the reserves in the claim area and it corresponds with the map that was introduced in evidence last week.

THE COURT: That would be --

THE REGISTRAR: 1231, my lord.

THE COURT: 1219, isn't it?

MR. MACAULAY: The map itself.

THE COURT: I think it's 1219. Map 29?

MR. MACAULAY: Yes.

THE COURT: As it's been called. Yes. All right.

MR. MACAULAY: It shows the same reserves. And it is intended merely for the assistance of the court. My friends have copies of this.

THE COURT: Well, now, 1219 was admitted with certain conditions imposed by Mr. Grant that the colour code be deleted from the legends.

MR. MACAULAY: There is no colour code.
THE COURT: And a reserve -- or rather a reservation that he imposed on the admission of the reserve map that it may not include all reserves.
MR. GRANT: That's correct. And that I was going to say that, of course, would apply if my friend says this is a photographic reduction of that map showing those reserves, of course the same reservations apply.
THE COURT: All right, does the overlay in some way depict what it purports to be so that if it's --
MR. MACAULAY: Well, there is a tab on it, my lord.
THE COURT: Does the tab say --
MR. MACAULAY: The tab says 62 and that's no longer a significant number.
THE COURT: Yes.
MR. MACAULAY: Ind, I-n-d, reserves.
THE COURT: Yes. All right. What are you suggesting, Mr. Macaulay, that I attach it to this map which is not an exhibit, I don't think?
MR. MACAULAY: That's right. It's not an exhibit.
THE COURT: Oh, it's not an exhibit.
THE REGISTRAR: 1219? Oh, sorry.
THE COURT: No. This one here is not an exhibit.
MR. MACAULAY: Well, it has the same status as the map and the other overlays for that map. They are not exhibits.
THE COURT: Yes, but you are tendering as an exhibit.
MR. MACAULAY: No, I am not.
THE COURT: Oh, I see. You are not. Well, that's a convenient aide-memoire?
MR. MACAULAY: That's right.
THE COURT: Thank you. So that it should be folded up and put away. I should attach it to --
MR. MACAULAY: Well, when the witness is giving evidence he will give evidence -- this next witness will be giving evidence about certain Indian reserves and he will start by showing where the limits of his jurisdiction, what the boundaries of his jurisdiction were in the claim area and it may be, you know, easier or convenient to follow by reference to that kind of thing.
THE COURT: Yes. All right.
THE REGISTRAR: Mr. Macaulay, do you need map 29?
MR. MACAULAY: I might, but I don't think so. I will ask for it if I get into it. We still don't know what's missing by way of Indian reserves.
THE COURT: No.
MR. MACAULAY: I haven't heard.

THE COURT: Very difficult to draw a map of missing reserves.
MR. MACAULAY: That's right. We've tried to find them all.
THE COURT: Yes.
MR. MACAULAY: I call as the next witness, my lord, Mr. Rae McIntyre. Oh, before Mr. McIntyre is sworn, I have told your lordship that I would give you the citation for a Loring report that referred to a considerable reduction in food fishing and I used the figure 80 per cent. That appears at Volume 6 at tab 42. It's the Loring report for July, the monthly report dated July 31, 1919, page two of that report.
THE COURT: All right. And that's out of Exhibit --
THE REGISTRAR: 1209 has been reserved.
THE COURT: Sorry?
THE REGISTRAR: 1209.
THE COURT: 1209.
THE REGISTRAR: Has been reserved.
THE COURT: Yes.
MR. MACAULAY: I'd referred to it, but I didn't have it.
THE COURT: All right. Swear the witness, please.

RAE MANNING McINTYRE, a witness called on behalf of the Defendant Canada, after having first been duly sworn, testified as follows:

THE REGISTRAR: Would you state your full name and spell your last name, please,
A Rae Manning, spelled M-a-n-n-i-n-g.
THE REGISTRAR: Yes.
A And my last name is McIntyre, M-c-I-n-t-y-r-e.
THE REGISTRAR: Thank you, sir. Please be seated.
THE COURT: First name R-a-y?
A R-a-e.
THE COURT: R-a-e. Thank you.
MR. MACAULAY: My lord, may I hand up a book of documents. These are the documents I'll be putting to the witness and I'll ask that now that a number be reserved or assigned to this collection and that the documents be marked in the usual way, tab one and so on.
THE COURT: This will be 1231, Madam Registrar?
THE REGISTRAR: Yes.
MR. GRANT: I have no objection to my friend reserving the number for this binder, but I have fairly serious objection to certain of the tabs, my lord, but I will wait until my friend comes to it.
THE COURT: Thank you.

MR. MACAULAY: My lord.

EXAMINATION IN CHIEF BY MR. MACAULAY:

Q Mr. McIntyre, you are an officer in the -- in what department of the Government of Canada?

A I am presently an officer in the Department of Industry, Science and Technology Canada and I am located in Prince George.

Q And when you started with the public service what department did you belong to?

A I started with the Department of Indian Affairs.

Q Was that in the year 1956?

A Yes, it was. February 17.

Q And you served as clerk at the Stuart Lake agency from 1956 to 1958?

A Yes.

Q And then as assistant superintendent at Merritt in 1958 to 1964?

A Yes.

Q The term superintendent in those days, that was the what, a new term for Indian agent?

A Yes, it was the term that had replaced the common term of Indian agent by the time I began my career. It was the term that related to the senior office -- to the senior officer of an administrative -- of a specific geographical area of responsibility within the Province.

Q And then you were superintendent at Burns Lake from 1964 to 1969?

A Yes.

Q That was a district, was it?

A It was still referred to as an agency.

Q At that time. All right.

MR. GRANT: What years, I am sorry?

MR. MACAULAY: 1964 to '69.

Q And then in 1969 you were -- you went to Prince George?

A Yes.

Q And you were there till 1982?

A I'm still in Prince George.

Q Well, when you went to Prince George you were still with the D.I.A.?

A That's right.

Q And you continued with D.I.A. until 1982?

A Right.

Q Prince George became the headquarters for a larger area that included what had been the Burns Lake

agency?
A That is correct.
Q And in 1982 you joined the another government department?
A Yes. Uh-huh.
Q What department was that?
A That was then the Department of Regional Economic Expansion and since then the name of that department has changed and is now known and I am now employed by Industry, Science and Technology Canada.
Q Now, there is an ARTA program undertaken by that department?
A It was called Special ARTA, yes.
Q And were you involved in Special ARTA?
A Yes. During the past years of my career with -- with Regional Economic Expansion and currently with Industry, Science and Technology Canada.
Q What is the ARTA program?
A It was a joint Federal and Provincially sponsored program oriented to economic development for Native people.

MR. MACAULAY: My lord, I am going to show the witness for convenience a copy of the map, the aide-memoire.

THE COURT: Yes.

MR. MACAULAY:

Q I don't propose to mark it, but the witness will simply indicate on this map with reference to this map the boundaries of the then Babine -- sorry, Burns Lake agency?
A Yes.
Q And he has -- he's looking at the overlay that I've just handed up, simply the base map and that overlay. Now, Mr. McIntyre, there is a black line that shows the claim area?
A Yes.
Q And inside that black line can you indicate to his lordship the -- this is only inside the area.
A Yes.
Q The limits of -- the outer limits of the Burns Lake agency while you were --
A My area of responsibility involved the Indian bands and their reserves within what was then known as the Burns Lake agency. It began in the north, roughly at at the north end of Fort Babine or of Babine Lake in this area here, and then going in a counterclockwise direction, roughly -- in fact along the black line to a place approximately -- to approximately east of the

town of Telkwa and then -- let's see. Okay. And then from Telkwa roughly down to the area shown as Felix George No. 7, which was a reserve of my responsibility. And then I may as well say directly then south to the black line here at the bottom of the map and then following along the black line, but excluding a little reserve down in the corner here known as Binta Lake. That reserve was not within my area of responsibility. And then back again following the black line over to its point here.

Q The eastern most point?

A Yes, the eastern most point. And then -- and then roughly directly north so as to include all of Babine Lake but not -- and I would say along the height of land dividing Babine Lake from Takla Lake and then back again to the point where I commenced to about there.

Q And what were the bands in your agency?

A There were four bands in my agency. The Lake Babine band, the Omineca band, the Cheslatta band and the Burns Lake band.

THE COURT: I am sorry, what was the second one? Babine was first.

A The Omineca band.

THE COURT: Omineca, Cheslatta and Burns Lake?

A Right.

MR. MACAULAY:

Q Do you know what the Omineca band is called now?

A I believe since I left the Department of Indian Affairs --

MR. GRANT: Well, this would be -- my lord, would this not be hearsay? This is something that's happened since he left department.

THE COURT: Mr. Grant, I am sure they talk a little bit about this in Prince George.

MR. GRANT: Probably not, my lord.

THE COURT: I am sure it's a matter of reasonably notorious understanding, is it not?

MR. MACAULAY: I think so, my lord.

THE COURT: Yes.

Q What is it called --

A The Omineca band, it's my understanding that it is now being divided into two bands. One being called the Nee-tai-buhn band. N-e-e.

THE COURT: N-e-e?

A E space t-a-i, I think, space, b-u-h-n.

THE COURT: B-h-u-n?

A Yes. Nee-tai-buhn band. And the other band being the Broman Lake band.

MR. MACAULAY:

Q And within this claim area, did the Cheslatta band have some reserves?

A Oh, yes. Yes. And they are to the best of my recollection all identified there.

Q I mean they are all described as Cheslatta number one and Cheslatta --

A Yes. If I could just look again, though, I believe there are -- there are a number of reserves -- no, they are all identified there.

Q Yes. As Cheslatta?

A To the best of my -- to the best of my recollection.

Q Now, you mentioned the Binta Lake band, Binta Lake reserve number two as being outside your jurisdiction?

A Yes.

Q The map shows that that's on the east shore of Binta Lake?

A Right. That is a reserve that at my -- during my time was a reserve of the Stellaquo band. S-t-e-l-l-a-q-u-o.

Q And around Burns Lake itself there is Burns -- there are some Burns Lake reserves?

A Yes.

Q And can you identify the Burns Lake reserves that you knew?

A The bands that belong to the Burns Lake reserve were their home reserves Burns Lake, Burns Lake Indian reserve number 18 and then there are other unoccupied reserves and I'll refer to them just by numbers if that's -- if that's suitable.

THE COURT: Yes.

A Number 17, number 17A and number 19. The other reserves around and immediately within around Burns Lake are reserves of the Lake Babine band.

MR. MACAULAY:

Q Do you see the names on the map of that lake you're looking at of the Lake Babine band?

A Yes. Woyenne, number 27, and Chapel Park, number 28, are virtually within the town of Burns Lake. And then there are, of course, other Lake Babine band reserves which are outside of the area that are not identified on this map.

Q Most of the Lake Babine band reserves are on the lake itself, Babine Lake, are they?

A Most, but not all.

Q Yes. And the -- you mentioned the Felix George number 7 --
A Yes.
Q -- reserve. That is in your bailiwick?
A Yes, it was.
Q And it was a reserve for what band?
A It was a reserve of the Omineca band.
Q And there were a number of other reserves?
A Oh, yes. Uh-huh.
Q The western most of the reserves, they were -- were they generally Omineca reserves?
A Yes.
Q Now, did -- your area included Tahtsa Lake, did it, your agency?
A I can't recall whether Tahtsa Lake was within the then map of my area. If it was within the area, I had never had any cause to go there, because it's a very remote area. There were no -- there are no reserves there as you can see. And it really -- it really wasn't relevant as to whether -- whether or not it was -- it was in my area or out of my area.
Q And how about Nadina Lake, was that in your area?
A I don't -- I don't recall that.
Q Did you ever have any reason to go there?
A Not on business.
Q No.
A I went there for my own pleasure.
Q Now, the Felix George number 7 reserve was on Owen Lake?
A Yes.
Q And you used to go there?
A Yes. Yes.
Q And then there is some reserves on Francois Lake?
A Yes.
Q Many reserves?
A Yes. There are quite a number of.
Q And you were -- that was certainly part your bailiwick?
A Yes. There were reasons for me to go there from time to time.

MR. MACAULAY: I'm going to refer the witness now to tab one, my lord.

THE COURT: Thank you.

Q It's the superintendent semi-annual report for October 1, 1965. Mr. McIntyre, this is a report that you made in October 1965?
A Yes, it is.

Q Covering the previous six months?
A Yes.
Q And would that have been your first semi-annual report in that agency?
A Yes, it would have been.
Q And I draw your attention to page two of the report under the heading "Indian Land," the second paragraph, which says:

> "Approximately 7.1 acres of Burns Lake Indian Reserve No. 18 was sold to the Lake Babine band during the period."

Do you recall that?
A Yes, I do.
Q And why was that done?
MR. GRANT: Well --
A That was done to enlarge the reserve that was or subsequently became known as Woyenne Indian reserve number 27, and the purpose of that exchange was to provide more -- more home building area on Indian reserve number 27 for members of the Lake Babine band.
MR. MACAULAY:
Q Were Lake Babine Indians moving into the Burns Lake area in and around 1965?
A Yes, they were. And they had been moving in for some years previous to that point in time.
Q Now, under "Labour and Employment" on the same page you start the paragraph by saying:

> "There was no shortage of employment opportunities during the period. All those who wanted to work had little real difficulty finding work. Logging, sawmilling and construction jobs were readily available in most areas."

You see that?
A Yes, I do.
Q There was -- was there full employment for the Indians at that time?
A There was not full employment.
MR. GRANT: Well, my lord -- my lord, with respect, my friend is making very generic statements here now about events in Burns Lake. My -- my question is, is he tying this to the plaintiffs, and if so how? I mean, we are not talking about Indians in general here. We're talking

about the Gitksan and the Wet'suwet'en and the Lake Babine band is not a named plaintiff -- the evidence has indicated that many members of the Lake Babine band and the Burns Lake band are not plaintiffs. There are some that are. I am not denying that. But the majority of them are not from the evidence we've thus far heard. And for my friend to start to wax eloquent about what's going on in Burns Lake in 1965 in terms of employment opportunity for quote Indians end quote, I'd say it's very very far afield and not relevant, unless he's going to establish through this witness who the witness is talking about and can connect that to the plaintiffs. And I don't think it's proper for him to just say because this witness is talking about Indians he's talking about the plaintiffs.

THE COURT: A good part of this area upon which this report is made deals with claim territory, does it not?

MR. GRANT: The area -- the area of the Burns Lake agency that the witness has described in the southeast sector of the claims area, that's true. But he's not -- there is a difference. He's now referred to the Cheslatta, who are not, of course, Wet'suwet'en, and he's talking about Indians and asking about full employment for Indians. And I say that he has to tie this to the plaintiffs in some way. He can't make just by innuendo that the witness is talking about plaintiffs. And I don't think that this report does that.

THE COURT: Well, perhaps one well phrased question of Mr. Macaulay can --

MR. MACAULAY: Well, my lord --

THE COURT: What part of this is related to the plaintiffs, if any?

MR. MACAULAY: My lord, this witness' evidence deals with a number of issues. One of them is overlap. The area is full of non plaintiffs.

THE COURT: I am sure that will be right. There is a number of white people living in the area as well.

MR. MACAULAY: Well, no. Members of bands who are not plaintiffs.

MR. GRANT: Well --

THE COURT: Well, I think that what Mr. Grant's problem is is with the statement there was no shortage of employment during the period, and I suppose his question is no shortage for whom and if it -- if the witness' answer is it's for all the Indians in my territory, then it seems to me that it has some relevance.

MR. MACAULAY: The greater includes the less.
THE COURT: Yes. Well, let's just confirm that it does in this case.
MR. MACAULAY:

Q Was there no shortage of work for the Indians in your agency?
A Except for those people who lived in the remote area along the northern -- or at Fort Babine, which is at the northern end of Fort -- of Babine Lake. It was my -- my opinion when I -- when I wrote the report that those -- those Indian people who lived in and south of Burns Lake had employment opportunities. It was something else in my opinion as to whether or not they chose to exploit those opportunities and many of them did not choose in my opinion to exploit those opportunities. The opportunities were mainly in the forest industry, almost entirely in fact in the forest industry. Either in sawmill -- in sawmill employment or in bush operations.
Q Did you -- now, those employment opportunities were available to the Omineca band members?
A Yes. Yes.
Q As well as to the Cheslatta and the Burns Lake?
A To the Cheslatta and to those members of the Lake Babine band who, of course, had by then moved into Burns Lake.
Q Yes. And you met with officials of the Granisle Mines Limited?
A I am not -- I'm not sure that Granisle Mines was underway at that point in time. In any case --
Q I am drawing your attention to the last paragraph on that page two.
A I guess it was. Yes, I can recall -- I can recall having discussions with officials of Granisle Mine.
Q And what was -- I don't want you to tell his lordship what you said, what they said to you, but what was the purpose of your discussion, the general purpose?
A To determine the measure of employment opportunities that would then exist or were likely to exist in the future beyond that point.
Q Could you turn to page five of this report. At the top of the page under the heading "Community Liaison in Education Matters." Did you have anything to do with the first -- what you describe there as the first adult literacy classes?
A Yes, I did.
Q And were they for the members of all of bands in your

agency?
A Well, they were. But these courses, since they were being held in Burns Lake, obviously the -- you know, the greater numbers of band members that would -- that attended these courses were members of the Lake Babine band simply because the location of the courses or the location of the course was not that convenient to members of the Omineca or Cheslatta band, but certainly to the extent that those members would have wanted to travel to Burns Lake to take the courses, they were available to them.
Q And in the next paragraph you refer to planning literacy classes at amongst other places Grassy Plains?
A Yes.
Q Was Grassy Plains -- what bands lived around Grassy Plains?
A Members of both the Omineca and Cheslatta bands lived around Grassy Plains. The location of their reserves didn't -- didn't adhere to any -- any -- any specific geographical location as it tends to in many other -- in many other areas of the Province. Their reserves were in fact located side by side in some cases.
Q And were there -- these courses at Grassy Plains, were they ever undertaken?
A I honestly don't remember.
Q Now, if you'll turn to part two, you have a part two of your report, part two, page two. Under the heading "Development in Publicity and Public Relations" and the sub-heading "Indian Affairs Committee Organization." Do you see that in the middle of the page?
A Yes.
Q Was such a committee established?
A I can recall that it was established in Burns Lake. I cannot recall whether it was actually established at Hazelton or Smithers.
Q And what was the purpose of the committee?
A The last of my report says midway through the first paragraph, there was perceived at that time to be a need for greater understanding and tolerance, a greater understanding and tolerance and acceptance of Indian people. And this was of concern to me specifically in Burns Lake, because of the -- of the migration of many members of the Lake Babine band into the town of Burns Lake and the overcrowding results that had occurred because of that migration.

Q Now, my lord, I'm turning to tab 2, another report. This is the semi-annual report dated April 1 -- as of April 1, 1966. This is another report of yours?
A Yes.
Q And on page one at the bottom of the page under the heading "Fur and Wildlife," you say:

> "Increased fur prices this year probably resulted in a slightly increased fur catch, but trapping remains unpopular with most of the younger Indians. Most fur is caught in the immediate vicinity of the reserve where the trapper can return home each evening."

You reported that at the time?
A Yes, I did.
Q Did those remarks apply to the Omineca band members?
A Yes.
Q And to the other band members in the --
A Yes.
Q -- Burns Lake area?
A Yes.
Q And at the top of page two you report that moose and deer in the area were in abundant supply that winter. Was there a lot of hunting by members of the various bands under your supervision?
A It was my perception that there was, yes.
Q Did you hunt yourself?
A In season, in and around Burns Lake, yes.
Q Was there any -- ever any objection made to your hunting?
A No. No.
Q Do you know of any objection made to any other resident of Burns Lake hunting?
MR. GRANT: Well, I object, my lord. My friend's moving much further afield here. This isn't something reflected in his report. It would only be something that somebody would tell him second- or third-hand.
MR. MACAULAY: This isn't an expert witness.
THE COURT: No.
MR. GRANT: I am not suggesting he is an expert. I am not asking --
THE COURT: But there is no report.
MR. GRANT: I am sorry, I meant his --
THE COURT: Oh, his written material?
MR. GRANT: This written report that he wrote. I mean he's asking now did somebody else tell him that somebody

else complained about somebody else. I mean I think we are getting into --

THE COURT: The most he can say is that he has not had complaints brought to his attention.

MR. GRANT: Well, yeah, he can say that somebody complained to him, but he can't ask if somebody complained to somebody else.

THE COURT: No. I think when one is in the position of a clearing house, or a potential clearing house, or complaints department, one can say whether he has received complaints or not. It doesn't prove the truth of them, or the accuracy, or the bona fides even, but it can go so far as to say I didn't have any complaints at all or I had some complaints. That's about as far as it can go in the absence of being qualified in some way as an expert or a different foundation being laid.

MR. GRANT: Right.

THE COURT: For business records or something of that nature.

MR. MACAULAY:

Q Did the -- did any band members of the bands that you have mentioned that were under -- in your agency complain to you about local residents, non-Indian local residents hunting?

A No. I don't ever recall any such complaints being made by any band members to me. There were occasional complaints that I -- that I heard from band members about non-resident guided trophy hunters taking -- taking animals only for their trophy value. And -- and allegations made that these unnamed unknown trophy hunters had had abandoned carcasses in the woods. But that was -- that was the only complaint I ever recalled hearing.

Q Could you turn to page three of this report. Under the heading "Winter Employment" in the second line you say:

> "Most men found employment in logging during the winter.

Does that statement pertain to the Omineca and Burns Lake band members?

A Yes. I think it was -- it was a fair general statement that could have applied or that did apply to all of the -- all of the Indian people in my area.

Q And did a substantial number of the men of those two bands work in the --

MR. GRANT: Well, I'd ask that my friend would not lead so much as he's doing. Ask the witness what he knows about it.
THE COURT: Your friend doesn't want you to lead, Mr. Macaulay.
MR. MACAULAY:

Q Was there -- what was the level of employment?
A Well, I don't know that I could use the term substantial, but I think a term I would prefer to use would be significant number. The nature of logging activities in that area was -- it's much easier to log in that area during the winter when ground -- or when ground conditions are frozen than it is at any other time of the year. And so the main removal of wood from the forest at that time and even now still tends to be during the winter months when equipment can work on frozen ground or on frozen swamps or whatever.
Q Could you refer to tab three, witness. My lord, I will refer the witness now to his report dated October 1, 1966. This is another of your reports?
A Yes.
Q And under the heading "Labour and Placement" you report here that -- and I read from the first -- the first sentence:

> "There have been good employment opportunities available for local Indians this summer."

Did that apply to the Omineca and Burns Lake bands?
A I think it applied mainly to -- to members of the Lake Babine band who were living in -- who were living at Pendleton Bay at Babine Lake or those who may have been living in Burns Lake who chose to commute to Pendleton Bay. At this point in time, as my report says, there were -- this was -- there was an increase in mill capacity at Pendleton Bay. In the area of the Omineca and Cheslatta people, on the other hand, there was no such increase in capacity. So my recollection is that there was no -- that there was no significant increase or decrease in employment opportunities for those people at that time.
Q Could you turn to tab four, witness. My lord, this is the report for April 1, 1967. This is another report of yours?
A Yes.
Q Now, on page one of part one you say under the heading "Commercial Fishing":

"We have had discussions with Provincial authorities concerning a proposal to allow Indian to fish local lakes for whitefish and to sell them locally."

You see that?

A Yes.

Q What lakes were you talking about?

A The main focus and only focus of this -- of this particular proposal related to Francois Lake and specifically involved a few members of the Omineca band. I discovered some months previous to this that certain members of the Omineca band were catching commercial grade whitefish, which I believe, and I am not an expert in this, but I believe they are a specie exactly the same as the commercial type of whitefish found in northern Saskatchewan and Manitoba. As my report says, I saw here an opportunity perhaps where this resource could be -- could be developed and I asked for and obtained a feasibility study on the -- on developing this fishery. It was in fact -- it was in fact an ARTA program that undertook the study. The outcome of the study was that the reproductive capacity of Francois Lake in respect to this particular fish species was not -- was not sufficient to support a commercial fishery. And so it never went beyond the feasibility study stage.

Q Who were the people catching these fish in Francois Lake?

A Mainly a lady by the name of Mary Jane Morris and immediate family who were members of the Omineca band and in fact Mary Jane, either then or shortly before or shortly thereafter, was chief of the band.

Q And you knew her?

A Oh, yes. Very well.

Q And her family?

A Uh-huh.

Q Do you know anyone else who is catching those fish in Francois Lake?

A No. I know of no other person that caught them, although it's possible that there were other members of the band who -- who set nets. The reason I say that I believe that Mary Jane was the only one that caught the fish was that to the best of my knowledge she's the only one that had a boat on the lake. And the place where she used to catch the fish was immediately off-shore from her home.

Q And the other band members didn't have boats --
A No.
Q -- who were living on the lake?
A Well, there weren't that many of them actually living on the lake. Most of the reserves of the Omineca bands are not located on the lakes. Rather they are located, you know, off -- you know, off from the lake. Not -- not far from the lake, but they are not lake-using people. There was no reason for them to use the lake like there was reason for members of the Lake Babine band to use the lake. The lake provided transport -- a transportation route for members of the Lake Babine band and the Omineca and Cheslatta people were able to travel by road.
Q Were any of the four bands heavily engaged in fishing?
A The Lake Babine band, of course, was very very heavily involved. They were involved in mainly in salmon, in the Babine River which is -- which flows out of Babine Lake and is a tributary of the Skeena. It was not my perception that members of the Omineca, Cheslatta or Burns Lake band were as reliant or as dependent, if you like, on the salmon resource as members of the Lake Babine band were.
Q When you went to a Lake Babine band reserve, could you tell whether or not they were -- just by looking around whether they were fishermen?
A Oh, yes. You could see nets hanging up. You could see their smokehouses. In salmon season these smokehouses would be used. You would see people preparing fishing, smoking them. That sort of -- sort of thing. I did not see the same kind of activity in respect to members of the Burns Lake, Cheslatta or Omineca bands.
Q Could you turn to page three of this report and under the heading "Band Council Administration." The last paragraph reads:

> "All bands in this agency have completed their annual revenue budgets for 1967, '68. This is the first time that the Cheslatta and Omineca bands have prepared a budget."

And you go on to talk about the amounts. Do you recall this first time that the Omineca band prepared a budget?
A Today I can't recall it, but I can recall that before I went to Burns Lake these bands were not preparing

budgets and when I left Burns Lake they were. So it must have -- it must have occurred as I reported.

Q Could you turn to tab five. My lord, this is a report for October 1, 1967. And to page two of that report. There is a reference in the third paragraph there to this proposed fishery, Indian food fishery on the third paragraph at the top.

A I'm sorry, do I have the wrong tab here?

Q No. The paragraph that reads:

> "Discussions were held during the period with personnel from -- "

A Oh, right.

Q

> "-- the Provincial fish and game department with a view to establishing an Indian food fishery for members of the Omineca and Cheslatta bands on nearby lakes in this agency."

Is that the proposal you just referred to resulting in a study?

A No, no. This would have been -- this would have been a separate matter than the study. Rather it would have been a concern that I had at the time that there were non-commercial fish species available in numerous lakes around -- around the area south of Burns Lake. And I believe --- I seem to recall that it might be a good idea if Indian people could be allowed to set nets in these lakes during different times of the year in order to catch fish for their own use. I don't recall that anything very much ever -- ever came of this. I suspect, although I don't recall, but I suspect that this would not -- this kind of an arrangement would not have been very acceptable to the non Native sport fishery interests.

Q You are talking about the lakes south of Burns Lake?

A Yes.

Q Were band members of any of the bands doing any net fishing in any of those lakes that you knew of?

A Not that I was aware of, no.

Q Now --

A Except -- except for Mary Jane Morris who used to set a net and catch these whitefish that attracted my interest that I mentioned earlier.

Q Now, if you will turn to page five, fifth page, three-quarters of the way down the page is a paragraph entitled "Labour and Placement." And the last sentence, two sentences are as follows:

> "In addition to this we will also try to encourage Indians to make better use of their traplines. We have not been too successful in this regard in past seasons, but I believe the amount of fur that exists on most Indian traplines certainly justifies our efforts in trying to get Indians out to trap."

You see that?
A Yes.
Q Could you tell by going around your bailiwick or speaking to the band members how many of them were trapping?
A I couldn't tell on pure, you know, in real accurate terms. All I could go by was my perception that they were not -- that they were not trapping a great deal. I obtained those perceptions because I saw very few traps. I saw very little evidence of people out setting traps. In my visits to their homes I almost never noticed any fur being prepared. I heard very little discussion about trapping success or lack of trapping success or anything to do with trapping and yet I was aware that these people possessed traplines. And I was -- I was told, and it seemed obvious from trapline maps that occasionally attracted my attention, that these people had traplines in over -- over remote areas and that there must be some fur there and that maybe I as Indian superintendent ought to be doing something to encourage trapping.
Q Did you speak to band members about record keeping?
A Yes, I did.
Q In connection with trapping?
A Yes, I did.
Q And what -- did you give them some advice in that regard?
A I suggested that whenever they caught fur that it might be to their long-term advantage to -- to keep some records of their fur catch, because I felt that one day those records might be useful to them. Useful to them, for instance, in a, you know, in a situation, you know, of a land claims such as this. There were -- there was very little by way of record keeping

being done to my -- in my opinion by the Department of Indian Affairs or by the Provincial Government or by anybody, and I thought it would be -- it would be advantageous to Indian people to at least keep their own records such as fur sales slips or anything else.

Q Did you have any success in getting more trapping going while you were superintendent at Burns Lake?

A Oh, in retrospect I don't think so.

Q Would you turn to tab 6. My lord, these are minutes of the Omineca band nominating meeting held on August 17, 1967.

MR. GRANT: I would like to know what the relevance of this is before my friend asks questions about it. I would like to know what the relevance of this is of the Omineca band's nominating meeting held in 1967, what relevance does that have to the issues in this court?

MR. MACAULAY: It shows one of the activities of the Indian superintendent in connection with the running of Indian affairs and of the band members themselves.

THE COURT: Are any of the members of this band plaintiffs in this action?

MR. MACAULAY: I believe so, my lord.

THE COURT: We have heard quite a bit about some of these people.

MR. MACAULAY: Sophie Ogen, certainly.

THE COURT: Yes. And the Skin family and the Tom family, but I don't know if they are using the same people or not, and the Morris family, of course. We heard about them. Although I don't know whether Mr. and Mrs. Tommy Jane Morris had been previously mentioned. What part of the report particularly, if any, or of the minutes are particularly -- are you planning to refer to, Mr. Macaulay?

MR. MACAULAY: I'm not going to refer to any particular part of the minutes except the -- the -- what, the overall effect. I am going to be asking the witness if this was a contested election, and I suppose page two does show us that, and whether they were generally contested elections. It also refers to the taking on of more responsibilities in the context of band government, self-government.

THE COURT: Well, I wouldn't have the slightest hesitation in allowing it into evidence if it was shown to relate to the plaintiffs. I am a little worried about its relevance.

MR. MACAULAY: Well, my lord --

MR. PLANT: If I may say, I would urge your lordship to find

that this is relevant. This is a document in which, taken for the moment the assumption that the majority of these individuals are not claimants in the action before your lordship, this is a document which appears to disclose acts of governments taking place within the land claims area by aboriginal peoples other than the claimants. And of course, in paragraph 61 of the Statement of Claim the plaintiffs say that they have exercised jurisdiction over the territory as against other aboriginal peoples. This is in my submission part and parcel of what might be called the res gestae of the overlap situation, which I say a great deal of this witness' evidence goes to. And there are other reasons that I could think of why this document is relevant, but those in my submission are sufficient for your lordship's purpose now without taking the trouble to review the other evidence to determine whether -- for example, I know that Sophie Ogen has appeared in the proceedings before now. Others of these names are familiar to me, but I can't say off the top of my head whether they are Wet'suwet'en or not. We have Mr. Grant's statement and much evidence to the effect that members of these bands include people who claim to be Wet'suwet'en as well as people who claim affiliation with the Carrier/Sekanni, and I would urge your lordship at this particular moment to allow Mr. Macaulay to proceed.

THE COURT: Well, I am disposed to do that, Mr. Grant, because I notice that this is an election to take place at Grassy Plains, which is within the claim territory, and I think on that basis as a minimum threshold of admissibility, I would allow the evidence to be adduced.

MR. MACAULAY: I'd say, my lord, that Eileen Andrew, number five Omineca band, was a -- swore a territorial affidavit as Jimmy Andrews' daughter.

THE COURT: Yes. Of course she was ruled ineligible, wasn't she, in this election?

MR. MACAULAY: In that particular election.

THE COURT: Yes.

MR. MACAULAY: But she is a plaintiff.

THE COURT: All right. You may proceed.

MR. MACAULAY:

Q Were you present at this meeting?

THE COURT: I think he was.

A Yes, I was.

MR. MACAULAY:

Q And who took these minutes?
A It was -- it was probably my assistant.
Q Do you recognize the typing?
A Yes. It was certainly our office typewriter that typed them.
Q Okay. Now, this -- this was a contested election, was it?
A Yes.
Q Was that common?
A Yes.
Q And you make reference in the bottom of the first page to the importance of electing a good band council because band councils were taking on more responsibilities. Was that the case that the band councils were taking on more responsibilities?
A Oh, yes indeed, yes. Uh-huh.
Q And was that your policy in dealing with the various bands and getting them to take on more responsibilities?
A To the extent that they wanted to do this, to the extent that they felt competent to do it, yes.
Q By this time was the Omineca band drawing its own budget, this is August of 1967?
A I believe they were. To the best of my recollection they were.
Q The chief was Mary Jane Morris at that time?
A Yes.
Q That was the lady that was catching the whitefish?
A Right.
Q Did you know all these people who are listed as present?
A Yes.

MR. MACAULAY: Those are my questions on that document, my lord.
THE COURT: Thank you.
MR. MACAULAY: Next is tab 7 is the first of a series of documents concerning Mathew Sam. Your lordship has heard -- this is Noralee Mathew Sam. Your lordship has heard a good deal about Noralee Mathew Sam. And tabs 7 to 16 deal with his estate, particularly with his trapline.
MR. GRANT: I have a submission to make with respect to this, my lord.
THE COURT: Yes.
MR. MACAULAY: I expected it.
MR. GRANT: The Provincial defendant to my recollection tendered tab 7 as an exhibit and it is an exhibit in the

cross-examination of Mr. -- of Mr. Morris, but as my friend has indicated, this is one of a series --

THE COURT: Mr. Roy Morris?

MR. GRANT: Roy Morris, yes. Exhibit 670A-2. But this is --

THE COURT: 670A-2.

MR. GRANT: Yes.

THE COURT: Yes. All right.

MR. GRANT: My lord --

THE COURT: Are you going to be some time on this, Mr. Grant? Would it be better if we had the adjournment now?

MR. GRANT: Sure. Yes, I will be some time on the submission, my lord.

THE COURT: All right. We will take the morning adjournment now.

(PROCEEDINGS ADJOURNED PURSUANT TO MORNING BREAK)

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 AT 11:30 A.M.)

THE REGISTRAR: Order in court.
THE COURT: Yes, Mr. Grant.
MR. GRANT: Thank you, my lord.
THE COURT: We are talking about tab 7, are we?
MR. GRANT: Tab 7 and through to tab 16, I think is the numbers my friend referred to, which are correspondence and material taken out of estate files.

My friends have also delivered to myself three volumes called "A Wills Collection" taken out of estate files, and an affidavit of another witness. And it appears, though my friends advise me they intend to introduce these through this witness, that is these ones and others, and I submit that it is time to grapple with the issue that that raises.

My lord, I would like to start by referring you -- and I don't have it in the tab, I apologize, but I didn't have volume 10 available at the time I was preparing the authorities. Volume 10 of the transcript in which Mr. Macaulay first endeavoured to introduce estate files at page 575, and I objected at that time, and I raised that these documents were private files, personal files, and asked that they not be -- that they be protected, that is, that they not be published. And the court asked if it's a public document, and I stated:

> MR. GRANT: No. It's our position it's not a public document.
> MR. MACAULAY: I have no objection to whatever protection my friend seeks for his clients if indeed he is acting for anyone who has present interest in this estate. But I could tell Your Lordship that these -- a lot of this material, and certainly the material that I am now producing to the witness, is the kind of material you would find in a probate file.
> THE COURT: That's why I was wondering if it was a public document anyway.
> MR. MACAULAY: And the Minister -- the Department of the Minister sort of acts as a court of probate, in fact their functions under the Act are also identical to that of a court of probate in regard to Indian

estates.

THE COURT: These wills are not probated through the Supreme Court?

MR. MACAULAY: No, they are not.

And I go on to say:

MR. GRANT: And, My Lord, I may say that unlike a will that is probated through the Supreme Court, until my friends disclose these on their list of documents, we were unable to obtain access to them. They were not public, they were kept in the -- and the position of the Departmental officials were they were not for public disclosure and not to be released to any member of the public.

And of course I say including the plaintiffs, even if they were descendants.

The court says:

THE COURT: All right. Well, a policy question is certainly involved here. It's generally accepted that litigation should be open -- as open as possible, and that matters that are dealt with in litigation are generally speaking, not protected from even curious scrutiny. It may be that I'll have to make a definitive ruling on this question in due course. I think for the time being no harm would be done if I accede to Mr. Grant's request for the time being, and order that this exhibit and others of this kind that come along, and which are specifically mentioned by counsel, are -- are not open to inspections for the time being. And when a volume of them arises sufficient to get a sense of what's involved in the matter, then it may be, as I said, that I'll have to rule definitively. But for the time being, this exhibit which will be Exhibit 13, will not be open to public scrutiny.

And we are relying on that ruling. Certain other

wills have gone in but they've gone in on a sporadic basis. But we are now coming to the point, my lord, where I am asking -- I am making a submission, which I submit these should not go in.

Now --

MR. MACAULAY: I should say, my friend put in a will, which is discussed at volume 22 of the transcript.

MR. GRANT: My lord, Canada is in a peculiar situation here, and I may say that the disclosure of these files and the utilization of them by the Attorney General of Canada is the condoning of, what I would say action that is close to, if not a breach of, trust by Canada.

THE COURT: But that's never been a concept that stood in the way of admissibility.

MR. GRANT: I would say, my lord, my submission will be that there are good public policy reasons for your lordship not to allow the second defendant to rely on these documents, based on their fiduciary obligations.

If you refer to tab 1, my lord, which sets out the statutory provision of descent of property in the present Indian Act, section 42 sets out that:

> 42. (1) Unless otherwise provided in this Act, all jurisdiction and authority in relation to matters and causes testamentary, with respect to deceased Indians, is vested exclusively in the Minister, and shall be exercised subject to and in accordance with regulations of the Governor in Council.

The Minister, my lord, has at the present time and since, I dare say -- I went back as far as 1906 because I don't believe any of these documents would pre-date that -- but from -- from -- this type of legislation has been in place since 1906 and I believe even in the earlier legislation of the Indian Acts.

And the Section 43 provides the powers of the Minister without restricting the generality of Section 42:

> 43. ...the Minister may
> (a) appoint executors of wills and administrators of estates of deceased Indians, remove them and appoint others in their stead;
> (b) authorize executors to carry out the terms of the wills of deceased Indians;
> (c) authorize administrators to administer the

property of Indians who die intestate;
(d) carry out the terms of wills of deceased Indians and administer the property of Indians who die intestate; and.
(e) make or give any order, direction or finding that in his opinion it is necessary or desirable to make or give with respect to any matter referred to in section 42.

Section 44 allows that a court could have jurisdiction if the Minister consents, 44.(1), but otherwise, the court does not have jurisdiction. There is no dispute, I don't believe, from Mr. Macaulay, from the Federal Crown, that any of these wills, any of these files are probated. They are not in the public record.

MR. MACAULAY: A few are.

MR. GRANT: And to the extent that wills are probated, of course, that they could be put in through the -- through the court record. And that's, of course, not the area of dispute.
Section 45 (3) states that:

(3) No will executed by an Indian is of any legal force or effect as a disposition of property until the Minister has approved the will or a court has granted probate thereof pursuant to this Act.

And Section 46 gives the Minister the power to declare any will void.
Section 47 on the next page, my lord, of the 1970 Indian Act.

THE COURT: There are conditions attached to declaring the will null and void, are there not?

MR. GRANT: Yes. If he was satisfied of any of those matters. And the final one is that "the terms of the will are against the public interest."
Yes. It gives him those powers to declare it void under certain conditions.

THE COURT: Yes.

MR. GRANT: But while I would -- well, I would say his power is quite broad, let me say that.
There is a provision for appeal under Section 47, an appeal to the Exchequer Court. And from my review of the material, none of this comes out of the Exchequer Court, so that issue that documents would

come out of the courts is not applicable except with a few exceptions.

Now, my lord, the second tab -- and I am not going to go through it except to refer you to the 1906 Act, Sections 25 through 31; the -- and that goes up to page 185 -- the 1927 Act, Section 25 through 33, that's pages 251 through to pages 254; the 1951 Act, Sections 42 through 46, pages 326 through to 328; and the 1952 Act, pages 371 through to 374, Sections 42 to 46, are all provisions similar -- they are not -- the '51 and '52 Act I would say are almost identical, but they are all similar in the earlier Acts to the legislation that we have.

MR. MACAULAY: May I interrupt my friend for a second to ask if the witness can be allowed to leave the witness box.

THE COURT: Certainly.

MR. MACAULAY: It sounds as if it's going to be a long seige.

MR. GRANT: Certainly.

THE COURT: Yes.

(WITNESS STOOD ASIDE)

MR. GRANT: Now my lord, the powers of the Minister were dealt with by the Supreme Court of Canada in 1975 in the case of Attorney General of Canada v. Rees & Canard. And I have at tab -- I've just given you the entire decision, but I have at tab 3 the relevant pages of the Attorney General of Canada v. Rees & Canard.

Now, in that case, an Indian who was registered pursuant to the Indian Act was killed by a car, and the Minister of Indian Affairs appoint -- appointed the local Indian agent, superintendent, as the administrator, and the widow opposed that and said -- there were a couple of grounds of argument, one including that he was not ordinarily resident on the reserve, and they found -- the court found he was. And the other was whether or not this was contrary to the Bill of Rights. But in the course of dealing with that issue -- and they found that these provisions were not contrary to the Canadian Bill of Rights as discriminatory on the basis of race. Mr. Justice Martland at page 12, which is at tab 3, my lord, says at the very bottom with respect to the Indian Act:

> Section 91(24) of the B.N.A. Act, 1867, gave to the Parliament of Canada exclusive legislative authority over the subject of "Indians, and Lands reserved for the Indians." Pursuant to this authority Parliament has

> enacted the Indian Act, which establishes a comprehensive regime for Indians, dealing with such diverse matters as the possession of lands in reserves; the surrender of reserve lands; wills; the distribution on property on intestacy; mentally incompetent Indians; the administration of property of infant children; loans to Indians; schools; and enfranchisement.
>
> The provisions of the Act dealing with wills and estates provide a scheme for testamentary capacity and for the administration of estates. It is characterized by a discretionary and supervisory jurisdiction in the Minister of Indian Affairs rather than in the courts.

And as you can see in the full decision, Justice Martland in a relatively brief reasons goes on to agree with the leading judgment in the case, which is that of Mr. Justice Beetz.

And I have just, in this extract, included page 26 of Mr. Justice Beetz, and the following pages are all Mr. Justice Beetz -- Beetz I should say, of the Supreme Court of Canada. And he states -- Justice Beetz states that -- the second last -- the last full paragraph:

> We are not called upon to decide the constitutional validity of ss. 42 et seq. in all their substantive and jurisdictional ramifications. Yet, for the purposes of this case, I find myself in agreement with the general propositions that testamentary matters and causes with respect to deceased Indians come within the class of subjects of "Indians and Lands reserved for the Indians" and that Parliament can constitutionally oust the jurisdiction of provincial courts in these as well as in other federal matters and vest it in a federal agency, subject perhaps to an obvious qualification: while Parliament has the power to establish courts for the administration of the laws of Canada, it does not necessarily follow that it can clothe a Minister, or any official or board of a non-judicial nature, with all the functions of a superior court; the powers of Parliament are limited by the wording

> of s. 101 of the B.N.A. Act as well as by the federal and fundamental nature of the constitution which implies an inherent and entrenched jurisdiction in the courts to adjudicate in constitutional matters.

The court then goes on to say:

> However, the power to appoint an administrator of the estate of persons who have died without leaving a will is not one which must necessarily be assigned to a court.

And he goes on to summarize the history. And about ten lines from the bottom of that same paragraph he says:

> This power is quasi-administrative in its purpose. It involves a substantial degree of discretion although such discretion must be exercised judicially. In a matter of exclusive federal competence, such as "Indians and Lands reserved for the Indians" there is nothing unconstitutional in Parliament excluding the authority of provincial courts over this subject and bestowing it upon a Minister, particularly if it makes it subject to a form of judicial control as is provided by s. 47 of the Indian Act.

THE COURT: That's the appeal to the Exchequer Court, is it?
MR. GRANT: That's correct.

On the next page that I photocopied, page 32, again it's Mr. Justice Beetz, he states:

> In bestowing upon a Minister --

The first full paragraph.

> -- rather than upon a provincial surrogate court the power to appoint an administrator to the estate of a deceased Indian, the Indian Act evidently creates for Indian estates a forum which differs from the forum which would be competent in other testamentary causes. But in my view, the establishment of a special forum does not of itself entail a form of undue

> discrimination.

And there, of course, he is dealing with the Bill of Rights challenge.

He concludes at the bottom of that paragraph, about eight lines up:

> Furthermore, the power bestowed upon the Minister by the Indian Act to appoint administrators of Indian estates, given its nature and history, is a power perfectly capable of being exercised by him in a judicial or quasi-judicial manner, under judicial control, in accordance with the due process of law and with standards applicable to other Canadians as well as with all the requirements of the Canadian Bill of Rights.
>
> I see nothing in ss. 42 and 43 of the Indian Act which prevents the Minister from exercising in this manner the surrogate power devolved upon him.

And finally at page 34, two pages over, in the line from the bottom, he compares it to see if there is equality by the parallel provisions in provincial law. And this was a Manitoba case out of Manitoba, so he says:

> In referring to the Manitoba Surrogate Courts Act and to the statute of 1529, c. 5, I should not be taken to mean that the Minister was bound by the Canadian Bill of Rights to adhere to all the provisions of such laws which, again, I quote as purely illustrative of a relatively general practice.

And the court concluded that those provisions were not contrary to the Bill of Rights.

Now, what the Supreme Court of Canada said in this that is relevant or has a bearing here, my lord, is that the -- the authority to administer estates and the discretion and the power is properly in the hands of the Minister. Now, the practice, of course, is that the Minister takes those estates, takes these matters in hand, and then it deals with it in a confidential and not a public forum.

Now, I come now to the issue of the trust -- and I

may say this, my lord, the Minister isn't just acting like a court here, the Minister is acting as -- in a way as legal counsel for the estate. The Minister takes everything into the file and deals with all matters in the file. And it's a parallel not to just getting out of the file what would go into the probate file, but it's -- the parallel is of taking the lawyer's file of the client, of the estate as well. And so those things are lumped together.

Now, I refer you to tab 4, my lord, and that is the Guerin decision with which your lordship is familiar, and I photocopied from Mr. Justice Dickson's -- then Mr. Justice Dickson and now Chief Justice Dickson's decision at page 494 where he sets out the fiduciary relationship. And he quotes that that is a question of the Crown's obligation, and he states -- and of course he is referring here to the reserve, issues of reserve lands, but he is dealing with the nature of the Crown's relationship to Indians under the Indian Act. And he says in the middle paragraph there, page 494:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.

Now then, at page 5 -- this is the section of the decision dealing with this, and he summarizes the nature of Indian title and section 109. And at page 500 he has a sub-heading, "The Crown's Fiduciary Obligation", and he deals with that in relation to the Proclamation of 1763. And then he states at the top of page 501:

> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians,

has the effect of transforming the Crown's obligation into a fiduciary one. Professor Weinrib maintains in his article "The Fiduciary Obligation" [citation given] that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion."

Now, that's exactly what happened in the case of Mrs. Canard. She was at the mercy of the discretion of the Minister, and the Supreme Court of Canada held that that was proper in those circumstances.

Earlier, at p. 4, he puts the point in the following way:

"[Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion."

I make no comment upon whether this description --

This is, of course, out of the quote and Mr. Chief Justice Dickson's comments at that stage.

I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

That, my lord, is what the situation that the Minister of Indian Affairs, as official of the Federal Crown, is in, in the relationship relating to Indian estates. It's a fiduciary relationship.

THE COURT: Well, let's assume that's so. Let's assume that

there is a relationship which might be termed a general fiduciary relationship rather than the kind that Mr. Justice Dickson was dealing with, because he was dealing with a fiduciary duty that has no close resemblance to what we are talking about. But let's assume the reason, there is general fiduciary duty. That -- that is what determines what the obligations of one would be towards the other. Then superimpose upon that an action by an Indian against the Minister. You say that that kind of a fiduciary duty would preclude the Minister from using documents or notice of conduct which came to the Minister in the courts of that relationship in defence of the claim brought against the Minister by the Indian?

MR. GRANT: Well, I think that it would have to be determined in particular circumstances as a balancing. But there is two -- with respect to the analogy that you raise, my lord, there is two -- there is certain assumptions that don't apply. And the first one that I want to emphasize is, of course, in this case, these plaintiffs have not brought an action against the Minister or the Federal Crown. They have not done that. There is no claim again the Federal Crown and there has not been.

THE COURT: Well, I understand -- I must say that the tide has come in and gone out on this a number of times, but I thought that you were claiming that you had -- your clients had the superseding jurisdiction and control over all the lands within the territory.

MR. GRANT: We made that claim and I argued that in February of '88, and I referred you to that the other day. But your lordship made it clear that such a claim, vis-a-vis the Federal Crown, could not be made without express amendment, and no such amendment has been made. So the argument that I made at that time by implication of what your lordship has said, cannot apply to the federal lands. It's a claim -- and my friends raised then, and I think they even uttered it on Friday, that there would be a jurisdictional challenge if that's what we endeavour to do in this court. But be that as it may, that's academic.

THE COURT: Well, all right. Go to the next step and say that the Indians claim again the province, and the province claims over against the Federal Crown, and the Federal Crown in defending itself says, "Your claim against the province is no good." And in support of that, that -- and it's in the Federal Crown's interest to

establish that, because without success by the plaintiffs there is nothing for the Federal Crown to answer and then claim over. And so the Federal Crown says, "All right. In order to defeat the plaintiffs' claims I am entitled to rely upon the deeds and acts, A-C-T-S, of the Indians as best I can." Why isn't that open to him without, it seems to me, affecting the fiduciary interest of the Indians, except to the extent of confidentiality, I suppose?

MR. GRANT: Well, my lord, it's a peculiar situation, and if an Indian person, an individual appealed his estate --

THE COURT: I agree, Mr. Grant it's unusual. But your witnesses were at great pains to establish in their case that they lived and conducted themselves according to Gitksan or Wet'suwet'en law and custom and tradition. Why isn't it competent for a party to show that in some respects they do not?

MR. GRANT: Well, I think that in the cross-examination of the witnesses by the Federal Crown to the extent that these things are relevant, they questioned them on these issues. But my lord, what I was about to say about the peculiarity of this situation is this: In this case, the fiduciary, the person with the fiduciary obligation is utilizing, taking advantage of the statutory fiduciary relationship to the detriment of the beneficiary.

THE COURT: Surely the fiduciary relationship only relates to the administration of the estates.

MR. GRANT: But my lord, the plaintiffs could never have accessed these materials. The plaintiffs were denied access to these very materials. And the person in charge of these materials declined to give them to the Attorney General of Canada until so directed by the Minister of Indian Affairs, because these files were kept in confidence. They were files that were not open even to the descendants of the deceased persons. And here we have a situation in which the Federal Crown is expressly taking advantage of the fact that it has a statutory control over these estates, thereby it can accumulate these estate files, and now it can use those directly against the descendants of these same parties.

THE COURT: Well, that's a matter that I can understand why the Indians or some of them subjectively would regard that as an outrage. But that's never been a test for admissibility. The test for admissibility is relevance, and parties are not -- it's not unusual for

a party to say, "Well, I'm claiming privilege or protection or confidentiality for a document until the time comes to use it in court. And when that time comes I'll make up my own mind whether or not to use it. But in the meantime, I'm going to treat it as confidential or privileged or both." And normally a court then could order the document can be produced. I don't have much doubt that if anybody had applied in chambers before trial to get this information it probably would have been ordered to be produced.

The Minister is entitled to take the position he took regarding confidentiality, if such was his wish, or he could have claimed privilege for all. I know I'm not sure on what basis it could be said to be privileged, but he could certainly have claimed confidentiality. But if it's relevant to the issue -- to an issue in this case, and it seems to me that it is, that is because the Indians have themselves set up as part of their case, both in pleadings and in evidence, that they govern their affairs by Gitksan law.

MR. GRANT: Well, the impact of that -- my lord, it was -- a similar issue was raised, and I refer to it at tab 6, by Miss Koenigsberg regarding the O.N.C.

THE COURT: Sorry, the O.N.C. What's the O.N.C?

MR. GRANT: Offensive native claims in the Kwakiutl claims, and she states:

> MS. KOENIGSBERG: Strictly speaking, my submission on this subject is not merely its relevance, but rather the confidential nature of the process, and that document weighed against its relevance.

And of course your lordship found --

THE COURT: Yes.

MR. GRANT: -- that the confidentiality overrode the issue of relevance.

Now, what I'm suggesting here -- or urging upon your lordship here, is that the impact of the Federal Crown being able to disclose these in the court is a breach of their fiduciary obligation to those persons whose estates they are dealing with, and that this court should not accept that. This court should not condone that conduct. It gives them a benefit. It gives them a benefit, my lord, and I dare say it gives the province a benefit to which it was not entitled.

THE COURT: It does nothing more than allow them to show what the Indians did.
MR. GRANT: But this witness can describe what the Indians did. The tendering of the wills and the estate files is not necessary for that. The witnesses were cross-examined as to what they did. They were cross-examined. You may recall there was a great exchange about the farm with respect to Mrs. Johnson, and that that points -- it was your lordship who raised the questions and it was raised about the different types of property held, if you recall. And at that point, I thought that this issue was -- was side-stepped in the sense that it was not necessary. But here, the impact of tendering over 200 wills, I say, is not necessary and is not -- in this place, confidentiality and the fiduciary obligation should be given precedence over that.
THE COURT: Well, it may be that in the common course of events in a case like this there would be an admission and it wouldn't be necessary to put in 200 wills. But I don't see much sign of admissions being made in this case. It seems to me to be relevant, if such is the case, that 200 plaintiffs have purported to dispose of property that is said to be communal. But I don't know if that's the case or not, and that seems to me that it would be relevant if the evidence showed that. And if you didn't want the details to be made available by -- for reasons of confidentiality, then I would have thought there would have been an admission.
MR. GRANT: Well my lord, I submit that the Federal Crown in its particular position and its statutory power under the Indian Act is taking advantage of that to the detriment of the very beneficiaries it's supposed to be giving. This is not something that has ended, of course, with the litigation. The statutory power and authority of the Federal Crown with respect to Indian estates is ongoing and you have, I believe, tendered here, the estate of Albert Tait and others who died immediately before the trial started. In other words, the plaintiffs, the Indian people have no way out of this situation, and the Federal Crown can continue to take advantage.
THE COURT: But I can't concern myself with that. It seems to me that this falls within that general category of cases that Mr. Justice Martland described in Regina v. Wray where he said that yes, it's -- yes, it's prejudicial, most of the Crown's evidence in this case is prejudicial, but the question is, is it unfairly

prejudicial? And "unfairly" in that context means is it legally prejudicial? It isn't prejudicial just because it's evidence against a party, it's got to be more than that. And while you may characterize the conduct of the Federal Crown any way you choose to, it doesn't seem to me that that's a matter that I can pay any attention to. I have to deal with the question of the relevance, and if the Crown has the documents and if the Crown wants to use them and if they are relevant and if there is no statutory prohibition against their admissibility, then I can't rewrite the laws of evidence and say, "Well, I am going to decide in this case that it is not admissible." It may be that under Wray there is -- if Wray is still good law, which is itself doubtfu -- there is a general proviso that says unless the evidence is of tenuous admissibility and of trifling probative value I could exclude it. But I don't know that this is -- I don't think this is a tenuous admissibility and I can't say whether it's of trifling probative value. And where is my jurisdiction to say to a party who is tendering relevant evidence, "No, you can't do that because it's a dirty trick," if such -- and I don't say it is, but that's what you are saying it is.

MR. GRANT: I say it's more than even a dirty trick.

THE COURT: Well --

MR. GRANT: In any event. Well, I say, my lord, on the last tab, the last page, your ruling on October 28th --

THE COURT: What did I say?

MR. GRANT: Well, it's your ruling with respect to the part of the CV Of Sheila Robinson and that document. And you say at line 33, your ruling goes in on it that the issues are terribly unrelated to those of this case, and the report is an overview of the claim, a description of some --

THE COURT: Oh, this is about the comprehensive claims.

MR. GRANT: That's right.

THE COURT: Yes. But I took that away and I read it and it was of -- that one certainly was of trifling probative value. I don't think it had any relevance at all.

MR. PLANT: Your lordship said there was absolutely nothing in it that could in any way assist.

THE COURT: Yes.

MR. GRANT: Thank you, Mr. Plant.

THE COURT: I am not able to say that about any of these wills. I just don't know.

MR. GRANT: Well, I am certain that you can say it about a lot

of these wills, but I don't think that the approach -- I'm not suggesting here the approach is to give them to you and have you make that ruling, that's not the -- I don't think that's the appropriate approach in the circumstances. But I say that -- you say that:

> ...I ought not to order its production, not because it is privileged, although it might be, but not on that ground but, rather, on the ground of a general jurisdiction to preserve confidentiality to the extent possible without prejudicing the trial of these issues.

And I say, my lord, that the effect of allowing the Crown to do this in this manner is to allow them to take advantage of their fiduciary relationship to the plaintiffs to the detriment of the plaintiffs, allow them to collect data, collect the information, and to use it in any manner they see fit and --

THE COURT: Well, you can make the same argument with regard to trapline files and --

MR. GRANT: No.

THE COURT: Why not?

MR. GRANT: Well, the trapline files -- for one thing, a large part of the trapline files are provincial.

THE COURT: I'm talking about any -- you could make the same argument with respect to any document that the federal government has in its files relating to Indians, couldn't you? You could say that the Constitution imposes a trust upon the federal government to look after the affairs of Indians and, therefore, they can't use any documents that come into their possession pursuant to that trust.

MR. GRANT: No. Quite simply, my lord, because if you go back to that ruling, how Mr. Justice Dickson described that fiduciary relationship on page 501 of the Guerin case, he says:

> ...that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion."

Now, as this witness has already described, he asked the Indians to report about their traplines. There is no statutory obligation on them to do that. They could and they could not, and he could take his

notes about traplines or he could not. It's not the situation that we are in with respect to the estates. The estates are relatively unique in this respect: the Indian people have absolutely no choice. They have no choice. They are required.

THE COURT: No. But the fact that they don't have a choice, surely doesn't in any way touch upon the question of relevance. Let's assume that there is a will that -- where a plaintiff said, "I am chief of such-and-such a House. And while it may be argued that the House territory belongs to the House and not to me, I say it's mine and I am not paying any attention to Gitksan law and I bequeath that territory and all the rights that go with it to my son John." You couldn't seriously argue that such an admission couldn't be proven against that plaintiff, are you?

MR. GRANT: Well, of course if the plaintiff was alive it could be proven through discovery. If he was deceased --

THE COURT: Well, he is a predecessor of the present plaintiff and it would -- it would be evidence which would go to the question that the general foundation of the plaintiffs' case, that these matters are conducted according to Gitksan law. And here in the example I postulated, an Indian has made a statement against the interest of the plaintiffs generally, that Gitksan law governs these matters at all.

Now, surely you are not saying that because of desirable confidentiality the court would be deprived of -- and the parties would be deprived of highly relevant evidence which in an extreme case might even be conclusive. Surely you couldn't argue that that would be protected and that -

MR. GRANT: I think there is a way.

THE COURT: And that the court can be asked to deal with the matter in an unrealistic basis in the absence of clearly relevant evidence.

MR. GRANT: Well, there would be a way, but I say there are ways other than that to get that evidence before the court. And the fact of the matter --

THE COURT: Well, how would you get that before the court except by proving the will?

MR. GRANT: The -- well, for example, the officers that were involved. I mean if such a statement was made, that's --

THE COURT: I mean made in a will.

MR. GRANT: In a will?

THE COURT: Of a deceased person.

MR. GRANT: Of some time. Well I mean, I submit there may be a way in weighing fact, my lord.
THE COURT: Well, there is a weighing factor with any evidence that goes in. These will be weighed. I mean I look at this first one, only one I have -- only one I've really seen. I'm not sure that it's unequivocal. "All my property of every nature and kind and wheresoever situate." If it's said that Matthew Sam was a hereditary chief and he had territory, I am not sure that that -- that would be an admission against the position for which you contend anyway, because one could say it wasn't his property.
MR. GRANT: Well, when you go on beyond that of course, my lord, that will -- that particular will was put in under the ambit of your ruling in the Roy Morris cross-examination out of court, and I -- but you get the application for administration, you get approvals of the wills, you get all of the file begins to --
THE COURT: Well, the reality is, Mr. Grant, that facts are facts and unless they are excluded and then subject to relevance they are admissible. It may be that Mr. Sam hasn't helped your case any or his beneficiaries haven't helped the case any, but that's -- that's just part of the process. Usually these things don't -- aren't conclusive and I doubt if any of these are. But as a matter of admissibility, I have very little difficulty with this. Does he make a declaration here about the land?
MR. GRANT: Well, I'm sure my friend is saying he makes declarations about all kinds of things.
THE COURT: I'm looking at the land interest and it says "No formal land allotment made to Matthew Sam." Doesn't look like he had any land.
MR. GRANT: That's on the reserve.
MR. MACAULAY: He had a trapline, my lord.
MR. GRANT: This was exactly the kind of thing, my lord, that you had ruled, with respect, with Mrs. Johnson, that you didn't see that it was necessary to get to deal with the question of the on-reserve property. I mean my friends have clearly revived this whole approach, notwithstanding your understanding of the issue of the individual as opposed to the House property.
MR. MACAULAY: We are not reviving the on-reserve property and these documents show what we are dealing with.
THE COURT: Oh, I see. It does say the "deceased probably claimed all of Tatla Indian Reserve at Noralee." But I suspect that that was a claim that wasn't based upon

Gitksan law but upon some other form of right or licence under the reserve system, but I don't know. I have a terrible feeling that all this is going to come to an argument about construction as to what it all means, but I can't exclude it on that basis. Save yourself a lot of trouble if I could.

MR. MACAULAY: We will be making no submission about the reserve at Noralee.

THE COURT: Yes.

MR. MACAULAY: That's not the point of this at all.

THE COURT: Yes.

MR. GRANT: Well my lord, I submit that it -- that the Federal Crown here is going -- stepping over the bound and they should not be allowed to utilize their trust responsibility regarding Indian estates in the way that they are doing it here. I may say, my lord, that of course if the Federal Crown wasn't ordered in, I don't think the province could even get access. They may have under a court order, that would have been argued at that point. It wasn't necessary. But the Provincial Crown would have no independent access to these estate files other than the Federal Crown, and I think this first one was put in by the province, if I recall rightly, on the cross-examination of Mr. Sam.

THE COURT: I am sorry, Mr. Grant, I am against you on this one. I do not think I have much choice. And it is not for me to characterize the decision of Crown to use this or not use this. That is their decision, and there may be a political price somewhere else to pay, but that is not my concern.

MR. GRANT: I may say then, my lord, that I ask that all of these documents coming out of these estate files be dealt with as you directed with respect to Exhibit 13, that these documents not be generally public documents. And that is, I am -- would submit would be some minimal protection to the parties.

THE COURT: Well, I have some misgivings about that, Mr. Grant. My experience is that you only get in trouble when you do that. But I'll hear what your friends say about that. Perhaps it's not their concern, perhaps it's my concern about maintaining the principle of open proceedings. I haven't the slightest doubt that if the representatives of the media knew that I was even thinking of making such an order they would be here with counsel and making submissions about the collapse of western civilization if any such thing was to be countenanced. And I'm surprised that at least Mr.

Guenther would associate himself with any such suggestion.

MR. GUENTHER: I never said anything, my lord.

THE COURT: I know. But we've had some recent experience in these matters. I remember Mr. Justice Wood just last week was persuaded to make such an order, and in that somewhat controversial case, and he was persuaded half an hour later to change his mind. I had to deal with that very matter in chambers this morning where an attempt was made to have an examination of a judgment creditor in aid of execution before the Registrar held in camera, and I had representations from the media who thought it was the most important case they thought they had ever heard. And I think the same would apply here. But I should hear what your friends say.

MR. GRANT: I am making this submission in the context in which these files and documents have come before the court.

THE COURT: Yes.

MR. GRANT: And I can only say that I take it my friends are aware of the obligations of the Federal Crown on that matter.

THE COURT: Well --

MR. GRANT: And they will exercise their judgment.

THE COURT: Yes. I will hear what they say.

Mr. Plant, what do you say about the question? I don't need to hear you on the question of admissibility generally, but on the question of protecting them from examination and disclosure?

MR. PLANT: I don't support Mr. Grant's request, my lord. Nor can I say that I vigorously oppose it. It presents practical problems given the size of the record in this case.

I do have the concern, though, that when is suits my friend, Mr. Grant's, convenience, he does file and exhibit wills. And I am thinking here, for example, of Exhibit 446-5, tendered by him during the examination of Stanley Williams on commission. I don't recall my friend claiming the same protection in respect of that document. Presumably because he thought it assisted his case at the time. And in those circumstances, those kinds of circumstances, I would be very reluctant to support my friend's request, and that's why I don't do so.

I would be prepared to speak to your lordship at greater length on the point if your lordship considers it necessary to have full submissions, this afternoon,

but my initial reaction is as I've stated it.
THE COURT: Thank you.
MR. GRANT: My lord, if I may say regarding that will, that came out of a provincial -- it came -- Mr. Williams had a copy of this document himself so it was properly disclosable by the plaintiffs. It wasn't something from the D.I.A. files. And it also came out of the provincial trapline files and it was in their own files. So yes, there was a document that was labelled, a will, but it didn't come out of this body of files.
THE COURT: All right. Mr. Macaulay.
MR. MACAULAY: Of course we will abide by any order your lordship makes in connection -- on the question of confidentiality. The wills are -- half a dozen are already marked as exhibits. There are really two documents not just one that we will seek to prove in this collection of wills, not -- I am not dealing with Matthew Sam at the moment. That's a different case. They are generally speaking, the will itself and a document, usually the application for probate or the application for administration which identifies the testator, and that's the reason that it's -- we seek to include it, so that your lordship will know who we are dealing with, from what House, and of what lineage. We have one at tab 8 here. That kind of thing.

This shows -- in that case, actually, it just shows as next of kin only Amelia Sam who was the testator's widow. But in most cases, it lists the sons and daughters and gives the band number and so on, so there can't be any doubt when you look at the will and the document, who it is.

This witness will describe the steps that are taken in connection with wills by reference to this larger collection of documents from Matthew Sam of Noralee. All the wills are bound in one small series. It's easy enough to make an order regarding them, that's the vast majority of them, and they are being -- it wouldn't be overly difficult to restrict their distribution and use. We've given them only to counsel and I'm sure counsel hasn't published them, so there is no harm done so far. It might be an embarrassment to the descendants of certain chiefs and others that their ancestor made certain dispositions in wills. I can't think of any other harm though, of a personal nature, that would cause grief. They are

all people who are dead. They are not living. But it would be easy to make an order, a particular order directing the District Registrar not to release that exhibit when it comes along. We haven't marked it yet.

THE COURT: All right.

MR. MACAULAY: May I continue with Mr. McIntyre's evidence, my lord?

THE COURT: Well, I think I have to rule on your friend's request.

MR. MACAULAY: Oh. Yes.

THE COURT: I think that I will make an order that the will material be protected from public examination until I have seen some of it and have had a chance to assess the true nature of the information.

My strong sense of legal principle here is that if people want to keep things confidential they should have arbitrations where they can control the consequences. And when they come to the law they have to expect that it will be conducted in a broad plain view. But I do not know that it is necessary that I make that decision until after I have seen some of the material, after which time I will be delighted to deal with it again.

All right. Do you want to proceed for five minutes or do you want to adjourn, Mr. Macaulay?

MR. MACAULAY: Might be better to adjourn. I'm starting on a topic and I make it four minutes.

THE COURT: Yes, four minutes. All right. Two o'clock. Thank you.

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

(PROCEEDINGS ADJOURNED AT 12:25 P.M.)

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

_____

Toni Kerekes, O.R.
United Reporting Service Ltd.

(PROCEEDINGS RESUMED PURSUANT TO LUNCHEON ADJOURNMENT)

THE COURT: Mr. Macaulay.
MR. MACAULAY: My lord, we were at tab 7.

Q Mr. McIntyre, did you know Noralee Mathew Sam?
A Yes, I did.
Q And do you remember his estate being administered?
A Yes, I did.
Q Do you recognize that form of will in which Mathew Sam bequeaths his estates to Roy Morris?
A The form of the will is not the form that was provided by my office for use by people in my district who chose to use the Government of Canada printed form.
Q Well --

MR. GRANT: Well, the witness was going to answer your question. Hear what he has to say.
MR. MACAULAY: I was going to ask the question about the printed form.
THE COURT: All right.
MR. MACAULAY:

Q There was a printed form?
A Yes.
Q That your office used?
A Uh-huh. Yes.
Q And what are the circumstances underwhich your office used the printed form?
A For those people who would choose to seek our assistance in creating a will, the Government of Canada at the time had a standard printed will form which was available in pad form and occasionally Native people would come in and ask me or ask my assistant to help them make a will. And when that occurred we would get out one of these printed forms and to the extent that it was suitable we would simply fill in the blanks and have them sign it and that eventually that -- that will would be sent to Ottawa for approval. We would usually take the Affidavit of Witness at the same time and it would be filed on our agency will file.
Q Did you encourage band members to make wills?
A Whenever we were aware that people had assets of substance, yes, we did.
Q And when you encouraged those people who had property to make wills, did they usually make a will?
A Sometimes. Sometimes not.
Q And in dealing with old people, how did you -- did they have any assistance independent of the staff of

your office?
A I can recall on some occasions they chose not to come to our office to make their wills and I can recall on at least -- on at least one occasion that upon the death of an individual it was discovered by me, or my staff or both, that this individual had in fact made a will through an outside lawyer, and this was -- this was then sent on to Ottawa. And as I recall there was -- there was consent given to the administration of estate outside of my office.
Q Could you turn to tab 8. It's a form of application for probate or administration with will annexed?
A Yes.
Q This particular one concerns Mathew Sam. Did you have anything to do with the preparation of this form, filling it in?
A At the time I recall that my assistant, a man by the name of Walter Brown, was more involved in the preparation of these kinds of forms than I was.
Q Are --
A I don't recall filling in the blanks on this form and it -- my perception is that Walter Brown probably did it.
Q Now, the form recites that Mathew Sam died on October 16, 1973. Were you still at Burns Lake at that time?
A Yes, I was.
Q And the form shows a band number. It's in this case 23 of the Omineca band. Was it your practice to identify the testator in that way?
A Yes.
Q And where did you get that number and the band designation Omineca, for instance?
A Within every Indian Affairs office there is a band list of people, of members of the band and they are numbered.
Q Was it part of your function as the superintendent to either make -- fill out these forms yourself or have them filled out by your staff?
A Yes.
Q And at the bottom of the first page there is a -- there is a place where Amelia Sam is shown as wife and also the band number 23?
A Yes.
Q And a date of birth?
A Yes.
Q Did you know Amelia Sam?
A Yes.

Q And was it your practice to list wives and children and so on in this part of the form?
A Oh, yes. Yes.
Q In this case there were no children apparently?
A Right.
Q And you would get the name of Roy Bernard Morris from the will itself, would you? It appears on that first page --
A Yes.
Q -- listing Roy Morris as executor?
A Right.
Q Now, on the second page there is a list of property and there is some comments about it. For instance, there is typed in:

> "The widow will be allowed to continue to occupy the dwelling."

How would that come about, that kind of information?
A I don't recall the specifics of what -- of what provoked that comment. My belief is that that -- those comments arose out of subsequent discussions with the band council who indicated that her continued occupation of the -- of the home that she had shared with her husband on that particular reserve would not be contested by anybody else and that she would be allowed to remain there for as long as she chose to do so.
Q Now, the following page shows various assets. Is this where you listed chattels and the like?
A Yes.
Q And non-reserve property?
A Yes.
Q And one of them appears to be a Provincial Government trapline at latitude 53:50, longitude 126:20?
A Yes.
Q And how would you determine whether or not the testator had a trapline?
A I think it was a routine -- it was a routine in all such cases where a person died that we would do a search of our files and anywhere elsewhere we thought it to be necessary to search for assets.
Q You would get that information from your trapline files?
A That's right. That's right.
Q All right. And on page four under the heading "Funeral Accounts," there is a notation:

"The Omineca Council indicate they will be submitting a claim."

Do you see that?

A Yes.

Q Where would you get that information?

A From discussions with the band council.

Q And then on page five there are affidavits -- an affidavit of witness, Mr. Cecil Alfred. Did you know Cecil Alfred?

A No.

Q And the affidavit was sworn before Kenneth Muldoe. Do you know Kenneth Muldoe?

A He was the -- he was an officer of the Department of Indian Affairs in Hazelton at the time. I have met him, but I have to tell you at this point in time that I would probably not recognize him today.

Q Now, if you turn to tab 9, there is a form entitled "Approval of Will." And it's dated January 20, 1975. Where were you in 1975, what department?

A I was still with the Department of Indian Affairs.

Q But where were you stationed?

A I was in -- I was in Prince George at that time.

Q Yes. And is -- and by that time what had happened to the Babine agency? I am sorry, the Burns Lake agency?

A By that time the Burns Lake agency had been amalgamated with the Stuart Lake agency. A new larger district, as they call it, had thus been created. A district called the Lakes District with headquarters offices at Prince George. And by that point in time of course I had -- I had been transferred to the Prince George office.

Q Were you still dealing with what had at one time been the Burns Lake agency?

A Oh, yes. But I was also dealing with matters relating to other -- to other parts of the total lake district as well.

Q And what was happening to wills like Mathew Sam's after this merger?

A Oh.

Q Which office dealt with them?

A Oh, it would have been the Prince George office, simply because there was no office in Burns Lake at that time to deal with.

Q Is this approval of will, is this standard form?

A Yes.

Q And is it to your knowledge required in the case where there is a will, an Indian will?
A To my knowledge it was required then, yes.
Q Yes.
A Uh-huh.
Q And when you were superintendent at Burns Lake, did you see to it that the applications were made for approval?
A Yes.
Q That was just a standard procedure?
A That was part of the routine, yes.
Q All right. Now, the next tab 10 is a letter from Sophie Ogen. You've already given evidence in connection with an earlier tab. That is the bands council minutes that you knew all the people present and one is Mrs. Sophia Ogen. You knew her?
A Oh, yes.
Q And she wrote you apparently at Prince George addressed to you at Prince George in 1974. That's where you were then?
A Yes.
Q This is after the merger of the two --
A Right.
Q -- of these agencies.
A Uh-huh.
Q And there is a reference to the transfer of a trapline to Roy Morris without band authorization. Was it necessary to get band authorization in these circumstances for the transfer to Roy Morris of Mathew Sam's trapline?
A It was not necessary in my opinion at that point in time. And I say that because it was apparent that the Provincial Fish and Wildlife Branch had jurisdiction over all wildlife matters in the Province and was simply -- simply a matter of getting their approval rather than the band's council -- rather than the band council's approval.
Q And there is a reference to Mrs. Christine Holland. Do you remember her? Did you know Mrs. Christine Holland?
A Since this event I have become acquainted with Christine Holland, but at the time that this was going on I was not acquainted with her.
Q So you didn't speak to her about this issue?
A No. No.
Q And then you received that letter?
A It appears so, yes.

Q And here is a letter -- well, it's the carbon copy in the next tab, tab 11, of a letter addressed to Mrs. Sophie Ogen at Burns Lake. Do you remember sending Mrs. Ogen such a letter?
A Yes, I do.
Q And this had to do with Mathew Sam's trapline?
A Yes, and Mathew Sam's estate --
Q Yes.
A -- generally, yes.
Q Yes.

MR. GRANT: I just want to note, my lord, I was under the impression from how Mr. Macaulay led the evidence, that this witness was the -- who was the superintendent of the Burns Lake agency moved over and remained a superintendent, and it appears that this witness from tab 10 is the economic development officer, from tab 11 is the district real estate officer, neither of which in my understanding is the superintendent at this time and therefore wouldn't necessarily be in charge of all the estate files. I just wonder if my friend can clear up what he was when he moved to Prince George by asking him a question.

MR. MACAULAY:

Q When you moved to Prince George were you the district real estate officer?
A My title in Prince George immediately following my transfer there was not -- was not terribly clear to me or anybody else to the best of my recollect. And I say that because I had been superintendent of the Burns Lake -- of the Burns Lake agency. Upon amalgamation of the two agencies I was obviously the junior superintendent and my duties there for a period of time consisted of a wide variety of things and it was only after I had been in Prince George did I seem to acquire a title pertaining to anything at all specific.
Q Well, when you got to Prince George were you still dealing with estates like the Mathew Sam estate?
A I probably was because of my background knowledge of such things that I brought with me from the Burns Lake area.
Q And now, Mrs. Ogen addresses you as the economic development officer. This is in her 1974 letter at tab 10. Were you the economic development officer at Prince George by 1974?
A I don't believe I was. I believe another person was in fact an economic development officer, but it must

have been terribly confusing to the Indian people in Burns Lake at the time just exactly who I was and how I was to be addressed. So I think you would have to forgive Mrs. Ogen for any -- any mistitle that she may have given me at the time.

Q But you were district real estate officer when you answered her?

A Yes.

Q And what did that involve, being the district real estate officer?

A Well, most all things involving Indian land, and I suppose the reason that I was also, you know, answering to estate matters was that often, very often these estate matters would involve land and therefore come to the attention of the district real estate officer.

Q I hope that satisfies my friend's enquiring turn of mind, my lord.

Now, tab 12 is a letter from -- addressed to you by Roy Morris and it starts -- in January 14, 1974, and it starts with the words:

> "Just a line to say that I am sending you the will paper of late Mathew Sam and now the people like Christine Holland of Houston try to take back the trapline which they will never get back because Mathew told me to look after it and he made a will for me. Now the non-status Indians like Sarah Layton of Prince George and Elsie Tiljoe and others wants the trapline back."

Do you remember receiving that letter?

A Not really, but I must have received it.

Q It has the Lake Babine and --

A It has the Lakes District received stamp on it bearing a date of January 15, 1974.

Q The next document is a letter from you as district real estate officer to Mr. Cox, the conservation officer in Smithers. You knew Mr. Cox?

A Yes.

Q And he dealt with traplines for the Provincial Government?

A Yes.

Q He registered them?

A Well, he attended to the records, however it was -- however that was to be done.

Q And you are writing him about the Mathew Sam trapline at that time?
A Yes.
Q And you were telling him that Mathew Sam had, by will, left all his property to another -- a status Indian, is that right?
A Yes. Roy Morris.
Q Roy Morris. And you are asking him there to confirm that Mathew Sam did indeed have a trapline, the last sentence, "if you confirm that --"?
A Yes. Uh-huh.
Q Is that the kind of letter you would write in order to determine just what the assets of the estate were?

MR. GRANT: Well, I don't -- this witness has not indicated that he dealt with estates. He was the superintendent and he said his associate dealt with the estates, and then he was this real estate officer and he dealt with this estate. I think that this letter can -- it will speak for itself, but I don't think that my friend can -- I don't think there is any foundation for the question that he's just asked, that this witness himself dealt with these matters.

MR. MACAULAY: My friend, Mr. Grant, misunderstood my question. I asked him if this is the kind of letter that the witness wrote in connection with the processing of estates in order to determine what the assets were.

MR. GRANT: And that's what I objected to, my lord.

THE COURT: Well, the witness did write it.

MR. GRANT: The witness wrote this letter.

THE COURT: Yes.

MR. GRANT: But now my friend is going to try to say well, is this the kind of letter he wrote. Well, the witness' evidence I don't think is that the witness generally did deal with estates. Thus far we certainly --

THE COURT: I am not sure whether he did or not. Perhaps the witness can tell tell us that.

MR. MACAULAY:

Q Did you deal with estates?

THE COURT: After you went to Prince George.

MR. MACAULAY:

Q After you went to Prince George?
A Oh, yes, I did. Uh-huh. I am not sure that I was the only one who dealt with estates, but I was -- I was obviously the one that dealt with this estate.
Q And did you deal with other estates at the time you were in Prince George?
A Probably so, yes. Although I can't recall any -- any

estates specifically that I may have dealt with.
Q You remember this one?
A Oh, yes. I remember it because it was controversial, because of the issues raised by Roy Morris and others and Sophie Ogen.
Q Yes. And you did write that letter to Mr. Cox?
A Yes. Uh-huh.
Q And then you got a letter from Mr. Slavens, conservation officer at Burns Lake in reply?
A Yes. This letter has to do mostly with some apparent discrepancy in the location of the trapline. And then the final paragraph of the letter simply adds that in accordance with the wishes of Mathew Sam, the disposition of that trapline.
Q And now, tab 15 you wrote a letter to Mr. McFarlane, the district supervisor of the Babine Indian District?
A Yes.
Q What was the purpose of that letter?
A Well, first of all, to advise him of the existence of -- of this estate, the nature of the assets, the nature of the will or the instructions of the will and to request Mr. McFarlane's assistance in completing the Part 9, which -- Part 9 on page four, as it says in the letter, also to request that an affidavit of the witness be taken.
Q Now, could you go back to tab 8 at page four and page five. Are those the pages you were referring to?
A Page five?
Q Yes.
A Uh-huh, yes.
Q You -- is it -- it's as a result of this letter to Mr. McFarlane that an affidavit was made before Kenneth Muldoe. Does that seem likely?
A Yes. That's --
Q Yes.
A That's undoubtedly what happened.
Q Yes. Your letter is February 15 and I notice the -- the affidavit is sworn on the 19th of February. So that would be --
A Uh-huh.
Q So this letter at page -- at tab 15 is in the process of administering the estate, getting the forms filled out?
A That is correct.
Q And is that your signature on this letter, February 15, 1974?
A Yes.

Q So in that case you were doing this yourself?
A Yes.
Q By the way, the handwriting at the bottom of the letter, is that yours or someone else's? Reference to selling one horse and something about a power saw, tab 15.
A Tab 15?
Q Yes. Some handwriting at the bottom.
A It's not my handwriting.
Q It's not your handwriting?
A No. And I don't know who -- I could not begin to guess whose handwriting it is.
Q Now, could you turn to tab 16. It's a letter dated December 12, 1974, and it's signed by Amelia Sam or signed by her mark?
A Yes.
Q Addressed to you. Do you remember hearing from Amelia Sam, the widow, about the Mathew Sam's will?
A I seem to recall that Amelia Sam together with Agnes Tom and Sophie Ogen -- well, this was in '74?
Q Yes.
A No, it was --
Q It was after the death.
A No. It --
Q I remind you the death was in October '73 and we're now in December '74.
A This is my -- this is my handwriting. I drafted the letter and I must have done so in the presence of Amelia Sam and Mrs. Agnes Tom and Mrs. Sophie Ogen, but I don't recall where I did this. It seems unlikely, in my recollection, that they would have travelled all the way to Prince George to do this and I must conclude, therefore, that I probably did it during the course of one of my travels out to the Burns Lake area. But I have to tell you that I don't specifically recall the occasion.
Q That is your handwriting, is it?
A Yes.
Q Okay. And now I'm going to -- at tab 17 I'll show you another -- what appears to be a form of will starting with the "further if I ever be gone to Paradise, trapline for my grandson Wilfred Charlie," and it's signed Theresa Sam. Did you know Theresa Sam?
A Yes, very well --
Q What band did she belong to?
A She belonged to the Burns Lake band.
Q And do you remember her will?

A No, I don't remember her will.
Q Now, clearly this is not on the government form?
A That is -- that is quite clear, right.
Q Now, the next document is a Statement of Value and Relationship "A." That looks rather different from the five-page document that we'd seen in connection with Noralee Mathew Sam. From your experience can you tell his lordship why that form would be used in this case? This is tab 18 I'm talking about. It's just a one-page thing.
A Well, taking my clues from the words that appear at the top of one form as opposed to the top of the other form, I see the form which is under tab number eight is the form to be used where there is a will which is submitted for approval. Whereas, in the case of the Theresa Sam will under tab 18, this was the form to be used where the deceased died in testate where there were no land interests and assets not exceeding $500 in value.
Q But at the bottom of the form the enclosures are stated to be a will, affidavit witness and invoices, at the bottom of that form?
A Yes.
Q So this was not a case where there was no will?
A No. There was what appeared to me to be an acceptable will. And I felt it my duty to submit that, as crude as it might appear to my eye, to the administrator of estates to test his acceptance of it.
Q Now, the next document, tab 19, this is your letter to Mr. Slavens at Burns Lake, the conservation officer there?
A Yes.
Q And this is regarding Theresa Sam's trapline?
A Yes.
Q And you recite there that she bequeaths her trapline to her grandchildren, Wilfred and Christopher Charlie?
A Yes.
Q Did you know them?
A Yes.
Q Did they live at Burns Lake?
A Yes. They lived -- they lived right next door to their grandmother.
Q Yes. And you say that you would recommend to the administrator of estates of your department that they -- that that be done, that the trapline be passed to Wilfred and Christopher?
A Yes.

Q And was that the kind of letter written in the ordinary course of administering this estate?
A Yes. Sometimes. It really depended on the nature of the estate assets and the circumstances surrounding it.
Q And the next tab is another letter from you. Again you are district real estate officer in both cases?
A Yes.
Q In the case of tab 19 and also tab 20, you were writing as the district real estate officer?
A Yes. This is tab 20 you are speaking of?
Q 20 now.
A Okay. Right.
Q And is this a letter to the administrator of estates?
A To the administrator of estates at Ottawa.
Q At Ottawa?
A Right.
Q And that's who you dealt with to get approvals of wills and that kind of thing?
A He was the person to whom I had to report to in all estate matters.
Q And you are addressing a letter to Ottawa here?
A Yes.
Q About --
A Obviously it's in reply to an enquiry that he has made to me and I suspect it was an enquire as to the treatment of traplines as estate assets.
Q And you say there:

> "The great majority of traplines possessed by Indians in this District are considered special Indian status traplines in that the Provincial Government has agreed that while they may transfer from one Indian to another, they will not be transferred to a non-Indian."

Was that then your understanding of the Provincial policy?
A Yes.
Q Now, if you'll -- I don't think there is anything else arising out of that letter that we need to look at. The next tab, tab 21, is a letter from Mr. Tupper, the Administrator of Estates. That's the man in Ottawa who was then administrator of estates, was it?
A Yes.
Q And it's addressed to the District Supervisor, Lakes District. Who was that in May of 1975?

A I believe it was a man by the name of Clifford Roach.
Q Was the trapline in the case of Theresa Sam treated as an asset of the estate?
A It appears so by Mr. Tupper's letter, right.
Q And this involves the bequeathing of the trapline to her grandsons Wilfred and Christopher?
A Right.
Q Now, next tab, tab 22, this is your letter to Slavens about Theresa Sam's trapline?
A Yes.
Q And by the way, my lord, the latitude and longitude place this trapline partly in and partly outside the claim area. It's at the southeastern tip, more or less. And in this letter you are telling Mr. Slavens that the administrator has advised that Theresa Sam's will should be followed?
A Yes.
Q So that obviously you had seen Mr. Tupper's letter by the time you wrote this?
A Yes.
Q Yes. And then you say that Kenneth Sam and Nancy Charlie should be the trustees because these were infants?
A Yes.
Q Did you know those two trustees --
A Oh, yes.
Q -- Kenneth Sam and Nancy Charlie?
A Uh-huh.
Q They were relatives of the two boys, were they?
A They were parents of the boys.
Q Oh, they were parents. And 24 -- sorry, 23. Now, here is another form of will. Do you recognize that one?
A Yes.
Q You witnessed this will, did you?
A Yes.
Q And you knew Frank Tibbett?
A Yes. Very well.
Q And he was the chief of one of the bands?
A That's correct.
Q Of Burns Lake band?
A Right.
Q And did you find that Mr. Tibbett needed your advice on where and how to leave his estate?
A No, he certainly didn't need my advice on how he should leave his estate. He had his mind made up when he came into my office.

Q And -- but did you use the government form in that case?
A Yes.
Q And did he tell you something about how he wanted his property to evolve?
A Yes. He told me how he wanted his will constructed and how he wanted to bequeath his estate.
Q Yes. Then the next page in that same tab is a --
A That's the affidavit of -- that's my affidavit as a witness.
Q And did -- you knew right at that time when the will was made it -- it's said to be the 7th of December, one of the 29th of November?
A Okay. My --
Q And this is the --
A It appears that I was a witness to the --
Q To the will?
A To the will on the 29th day of November 1973 and that my affidavit was taken on the 7th day of September.
Q December.
A I'm sorry, December, right.
Q Then Mr. Roach took your affidavit?
A Yes.
Q And that would be at Prince George, then, would it?
A Yes.
Q Do you remember whether Mr. -- Chief Tibbett made his affidavit at Burns Lake or was it at Prince George?
A I don't recall.
Q Now, 24 is a document entitled "Trapping and Fur Management." It's dated July 30, 1969. It's addressed to the Regional Superintendent Development and it's signed by a Mr. Larsen. Do you know Mr. Larsen?
A Yes, I do.
Q And in 1969, of course, you were the superintendent at Burns Lake, July '69?
A Yes.
Q Did you receive a copy of that document at that time?
A I don't ever recall seeing a copy of that document until it was shown to me in this --
Q Until I showed it to you, until we showed it to you?
A Yeah, until you showed to to me.
Q Right. Have you read it?
A Yes.
Q And from your experience up to that time, that is up to July of 1969, have you any -- do you agree or disagree with the contents of the document?

MR. GRANT: I object, my lord. This is a seven-page document that this witness never saw until it was shown to him by Mr. Macaulay. Surely -- and now he's being asked if he agrees with the contents of a 20-year-old document up to that time. I mean this deals with trapping and fur management in all aspects. And I -- I would object that this witness really can't -- if my friend has a specific point, then he should ask him if he knows if this such and such was the case, but I don't think it's proper to ask the witness to adopt an entire document like this. It's entirely leading what my friend is doing here. He puts a document the witness has never seen before to him and he says well, I mean is that consistent with what your facts are in a seven-page report about -- is that what you thought it to be 20 years ago. Well, this witness has made it clear he can't remember -- he can't remember about wills that he was dealing with 20 years ago. Here is a document he just saw last week or sometime.

THE COURT: Well, we don't know that.

MR. GRANT: Well, at some time from Mr. Macaulay -- I don't think Mr. Macaulay was instructing him 20 years ago.

MR. MACAULAY: No, no. It's quite reasonable, my lord. All right. I will run at it again at another way.

THE COURT: All right.

MR. MACAULAY:

Q Look at page five of this document, Mr. McIntyre. Near the -- about halfway down the page the author says this:

> "It is fair to say this cost should be amortized over ten years for an annual depreciation of $53.00. This cost must be deducted from gross returns of a $199.29 for a net return of $145.29 for 319 hours spent or 46 cents an hour."

Now, did you -- in 1969 did you -- do you agree or disagree that a trapper might look forward to an income of $200 a season for his trapline?

MR. GRANT: Well, I -- this is an opinion here, my lord. This is clearly --

THE COURT: I don't know what he's talking about. I haven't figured out what he is talking about.

MR. GRANT: Well, I know. I have a great deal of difficulty with that too. But this is opinion evidence, and if Mr. Macaulay wants to call this kind of evidence he

should have provided it to us in an expert report 60 days in advance. This witness is not qualified to give that kind of opinion evidence.

THE COURT: Well, I suspect he is. That's not the point.

MR. GRANT: Well, he may be qualified to give that opinion evidence, but there is some requirements of notice other than this. This, I believe, was a document that -- I mean it's a hypothetical, it seems to me, what is being asked about here. It's not an actual statement of fact. If Mr. Macaulay wants to ask this witness something that this witness knew from his personal knowledge in 1969, that's fine. But this is leading to put this statement to him and then to say is that what you thought it was. He should ask the witness just the question. Not what --.

MR. MACAULAY:

Q Mr. McIntyre, in your experience what were fur prices like in 1969?

A I honestly can't remember, but my perception looking back --

MR. GRANT: Well --

A -- is that I don't think they were very good.

MR. MACAULAY:

Q Had you ever calculated how much a trapper might earn in a season?

A I might attempt such a calculation with one trapper, but to generalize it here as Mr. Larsen has attempted to do, no, I -- no, I would not have attempted to do what he is attempting to do here.

Q I think we'll have to remove that document from the exhibits, my lord. That's tab 24. Fair enough.

Now, the next document, Mr. Larsen, is a -- it's a document entitled "A Trapper Assistance Proposal." Have you seen that?

A Yes. This is one of my creations.

Q And on the last page it shows the date of February 1, 1974?

A Yes.

Q What was the purpose of this document? Why did you take the trouble to draw it up?

A I guess I took the trouble to draw it up because I thought I had an idea at the time of a way that the Department of Indian Affairs could justify financial assistance to Native trappers in a way that would -- it would be useful to them, it would motivate them, but most of all it would be useful to them. And so I set about to put my ideas on paper. I submitted it to

our Vancouver office. And to make a long story short, nothing ever came of it. But it seemed a good idea at the time.

Q Now, you classify -- you -- on the first page you set out the situation faced by many Indian trappers and you number them one, two, three. Number one is:

> "Lifestyle changes. Mandatory enrollment of children in school removed the family from the trapline."

Did you then consider that to be a factor in --

A Yes.

Q And why was that? Why did you consider that to be a factor?

A Because during the years previous it was -- it was well-known that Indian children often -- many Indian children did not attend school, and so therefore they were free to join their parents out on the trapline. But with increasing emphasis and determination that Indian children should receive a formal education that it obviously took them off the trapline.

Q And what effect did that have on trapping?

A I think in some cases it may have -- well, I think it did two things. It denied -- it denied Indian children of an opportunity to learn trapping, because they obviously couldn't attend school and trap at the same time. Particularly those children who were -- who were required to attend an Indian residential school. And I don't know what else can I say.

Q Now, the second is other employment opportunities. I suppose that speaks for itself, does it?

A Yes.

Q And the third is destruction of the fur habitat. You were referring there to logging, mining?

A Yes.

Q Agriculture. Did you learn about this destruction of the fur habitat from band members?

A I heard many many complaints from band members, from band members who had -- who had earlier been out trapping and who were discovering, as they are still discovering, that clear-cut logging -- the logging of any kind, for that matter, is detrimental to fur habitat.

Q And then you go on to classify the trappers in three categories. The trapper, the landlord trapper, and the part-time trapper.

A Yes.
Q Now, by the trapper you meant the full-time trapper who goes -- is that what you're talking about?
A That was category one, right.
Q Yes. And then the landlord trapper. Were there band members who are landlord trappers?
A You would call them that. I called them that because they more often than not came to me because the Provincial Government required them to. They came to me to get my -- to obtain my approval of their -- of their intention to rent their trapline for a year or two to a non-native.
Q In that connection -- we'll come back to this exhibit, but could you turn to Exhibit 26 -- tab 26. There are two letters there?
A Yes.
Q One is written to D.I.A. by Clifford Cousins and the other --
A Yes.
Q -- is a letter "To whom it may concern," which appears to bear your signature right at the bottom?
A Yes.
Q Is that the kind of transaction you're talking about, the landlord trapper?
A Yes.
Q And in this case did you know Isaac Sam?
A Yes. He was Theresa Sam's husband.
Q And was that kind of a transaction -- did that happen fairly often, this lease -- I guess it's a lease of a trapline or is that rare?
A I don't know that I would say it happened -- happened fairly often. It was not an unusual kind of an arrangement, but I -- I can't recall whether it was -- you know, whether it happened a lot or a little bit. I'm not even sure that all of these -- all of these arrangements necessarily came to my attention.
Q Did you know Mr. Cousins?
A Yes.
Q Cliff Cousins?
A Yes.
Q Was he a band member?
A No, he was not. He was a non-native.
THE COURT: I'm sorry?
A He was a non-native.
THE COURT: Oh.
MR. MACAULAY:
Q He was a white trapper?

A Yes.
Q And then the part-time trapper.
A Uh-huh.
Q Was there -- how much part-time trapping was going on?
A These would be individuals who would have a full-time job, that is a Monday to Friday job, for instance, in a local sawmill who would choose to do trapping on the weekends or on their days off or on -- if -- if they happened to be laid off for a short period of time in their sawmill job or their bush job or whatever. They were the type of trapper who was most dependent on sources of income other than trapping.
Q By the time you drew this document, what experience did you have in trapping? This is a document dated February 1, 1974.
A What experience did I have in trapping?
Q Well, with -- in regard to trapping, your writing about it.
A I have never -- except when I was a very young teenager, I have never -- never set a trap for a wild animal in my life. But through association with Indian people and through discussions with trappers I guess I gained at least a little bit of knowledge of trapping, but I have never possessed a trapline nor have I set a trap.
Q Did you know a Mr. Kendall?
A Yes.
Q Did he have -- was he an officer of the D.I.A.?
A Yes, he was.
Q And did he take a particular interest in trapping?
A He was -- he was -- he was recognized and known as the regional wildlife officer for some period of time, I believe even prior to my transfer to Prince George, yes.
Q And --
A And he was considered to have knowledge of the fur industry and had -- had developed contacts with Provincial people in regard to wildlife matters, yes.
Q What -- do you remember him leaving Prince George?
A He was never ever stationed in Prince George.
Q Oh.
A He was -- during my acquaintance with him, he was always located in Vancouver. Although I understand that prior to the commencement of his career in Vancouver he was -- he was located in one of the prairie provinces and had -- had apparently gained some recognizable qualifications in matters of a

wildlife -- in matters of a wildlife nature.
Q Did you ever at any point take over any of his functions or duties?
A Yes. Yes, in fact when he -- when he retired for a couple of years I was -- I was given the assignment of being the regional wildlife officer which I attended to in addition to my other -- to my other duties of a real estate or land nature.
Q And did you get any information from him when you took over?
A Oh, I got his files, such as they were.
Q Now, if you could turn to tab 27.

MR. GRANT: My lord, I am going to be objecting to the admissibility of tab 25. This is a proposal put together by this witness to the department that in his in his own words went nowhere. And certainly not something, of course, dealt at all with the plaintiffs specifically. It's a -- it's a departmental official's proposal to another departmental official and it went nowhere. And I think that it's just quite irrelevant. I don't see what the point of this is. My friend has used some of the terminology to have the witness explain and I have no objection to that, but I think the proposal should be kept out. It's not relevant.

THE COURT: Are you pressing for its admissibility, Mr. Macaulay?

MR. MACAULAY: I don't think I need that particularly --

THE COURT: All right.

MR. MACAULAY: -- as part of my case, my lord.

THE COURT: All right. We will delete it from the book. Thank you.

MR. MACAULAY: I see it's 3 o'clock.

THE COURT: All right. We will take the afternoon adjournment. Thank you.

(PROCEEDINGS ADJOURNED PURSUANT TO AFTERNOON BREAK)

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 AT 3:15 P.M.)

THE REGISTRAR: Order in court.
THE COURT: Mr. Macaulay.
MR. MACAULAY:
Q My lord, I'm going to deal with the next several tabs together, if I may, that's 27, 28, 29, to do with the witness, 30 and 31 and also 32.
Witness, would you look at that series of documents, the first being a letter from Ruth Lord with an enclosure?
A Um-hmm.
Q The second being a letter from Theresa Sam to you?
MR. GRANT: Well, before my friend goes on, my lord, I am going to object to all of these. I'm glad he has grouped them, because I object on the basis of relevance. There is no evidence that Isaac Sam is a plaintiff and I object on the basis of any relevance relating to this. I don't see what the relevance of this is to this case.
THE COURT: Is this trapline said to have a latitude of 54:50 -- sounds like a good way to start a fight -- and 125:10? Is it in the claim territory or --
MR. MACAULAY: Partly in and partly out, my lord. It's on the eastern border.
THE COURT: Yes.
MR. MACAULAY: I think I've got a note of the trapline number.
THE COURT: Well, if it is within the claim territory or part of it, Mr. Grant, it would seem to me to have a threshold of relevance.
MR. GRANT: I wonder if my friend can assist me. That's why -- what I was unable to determine from the documents, whether it was. But I understood my friend's evidence, of course, in this realm was to relate to conduct of the plaintiffs and that's why I --
MR. MACAULAY: Sometimes difficult to know who are plaintiffs and who aren't. But it's in the claim area, my lord.
MR. GRANT: Which number is it?
MR. MACAULAY: My instructions are it's number 605T006, my lord, just in the eastern end of the -- southeastern end. But it jumps the border and it extends farther.
MR. PLANT: My lord, on my copy of this overlay, it looks like that number is on top of the Indian reserve in the extreme southeastern corner called Sheraton Creek number 19.
MR. GRANT: To the extent that that -- that there is some overlap on -- within the area, if that's the focus of

my friend, but it certainly hasn't been the tenor of his questions with respect to these kinds of documents. It's been at the conduct of the plaintiffs, I understood. But if -- given that situation, I am not going to -- I think you are right.

THE COURT: All right.

MR. GRANT: It holds a threshold of relevance.

THE COURT: Sometimes these things are multi-dimensional.

MR. GRANT: Oh yes.

THE COURT: Go ahead, Mr. Macaulay.

MR. MACAULAY:

Q Have you looked at that series of documents? Are they all concerned with the -- well, what eventually -- the Henry Isaac trapline became the Theresa Sam trapline; is that right?

A The only --

Q Or Isaac Sam?

A The only information I obtained to the effect that this was once the Henry Isaac trapline was information conveyed to me by the conservation officer at Burns Lake, a man by the name of Bill Richmond, who told me, as my note indicates, that at some point in time, undoubtedly prior to my -- my time in Burns Lake, this -- that Henry Isaac had apparently sold this particular trapline to Isaac Sam. But --

Q And Theresa?

A Yes. These documents deal with the -- deal with the trapline that I understood to be in possession by Isaac Sam.

Q And was Theresa Sam his widow?

A Yes.

Q That was his wife?

A Yes.

THE COURT: And she leased it to Mrs. Lord?

THE WITNESS: From time to time, yes.

MR. MACAULAY:

Q Well, Isaac Sam had also leased it apparently?

A Yes, yes.

Q And Mrs. Lord was a non-Indian trapper?

A That is correct.

Q And then this is the same trapline that Mr. Cousins had at one time leased?

A Yes. Mr. Cousins and Mr. and Mrs. Lord, to the best of my recollection, they all resided in the same household and may, in fact, have been related to each other. That is -- it is possible, although I don't know for sure that Mrs. Lord and Mr. Cousins were

somehow related to each other. But I don't know that to be a fact.

Q They are both trappers?

A Yes, they were.

Q Now, this brings us to tab 33. It's a letter from you to Mr. Slavens again about the Toby Charlie trapline. Did you know Toby Charlie?

A Yes. Very well.

Q Do you remember what that letter was about?

A Well, from the words that are in the letter, it appears that Mr. Slavens was questioning me as to my opinion as to who -- who should presently be entitled to trap on this particular trapline.

Q Um-hmm.

A And I was giving him my reply.

MR. MACAULAY: My lord, those co-ordinates are in the claim area.

THE COURT: Yes.

MR. GRANT: Does my friend have a number for that one?

MR. MACAULAY: Well, I can get one. If I haven't I'll get one shortly. I'll inform your lordship tomorrow morning of what the co-ordinates of that Toby Charlie one is.

The next one, I do have co-ordinates.

THE COURT: Next one being tab 34?

MR. MACAULAY:

Q Thirty-four -- yes, 34. That's a -- or rather I have the trapline number in this case it's 604T036 and that's in the claim area, my lord.

If you look at tab 34, it's a two-paged letter and your signature appears at the bottom of the second page?

A Yes.

Q And this was another lease proposition, wasn't it?

A Yes. Between Joe Isaac Augusta and Alfred Harrison, of the Burns Lake area.

Q Did you know Mr. Harrison?

A Vaguely, yes.

Q Was he a non-Indian trapper?

A Yes, he was.

Q Did you know Joe Augusta?

A Yes, I did.

Q And what band did he belong to?

A Joe Augusta was a member of the Stilako Band.

Q He had a trapline near Burns Lake somewhere?

A If my memory is correct, his trapline was somewhere along the shores of Francois Lake.

Q My instructions are, my lord, that it was -- it's --

that trapline is south of Francois Lake and north of Ootsa Lake.

And now the next is -- tab 35 is a -- this is your note?

A Yes. This is a note to myself reminding myself that on my next -- on my next trip to the Fort Babine area, that I should -- I should contact a member of the Lake Babine Band by the name of Charlie Nicholas, and discuss with him who he preferred his trapline to go to in the event of his death. This man was at the time very, very old.

Q Do you remember where his trapline was, roughly?

A I seem to recall that it was in the Bear Lake country, north -- northwest of Takla Landing.

Q And Charlie Nicholas was a very well-known man?

A Oh yes, yes. He was one of the key -- main characters in a book entitled Driftwood Valley that was -- that was written by a lady and her husband, who lived -- who spent a couple of winters in the valley, the Driftwood Valley in the mid to late 1930's.

Q And Charlie Nicholas, was he better known by another name?

A He was also more commonly known as Bear Lake Charlie and was referred to -- and you know, he was referred to in that manner very frequently throughout her book and indeed, within the community of Fort Babine during the time that I was there.

Q So you made this note to yourself. And then in the next tab there is another document dealing with Charlie Nicholas or Nicholas Charlie, and this doesn't bear your signature though. Do you know who that document was created by?

A Well, the witness here was a man by the name of Jim Gagnon who was a short-term employee at the time with the Department of Indian Affairs. It was Mr. Gagnon's role as an employee to do what he could do to encourage and facilitate trapping by native people in the Lakes District. And I suppose that in the travel envelope, the note that I made to myself under tab 35, that Jim Gagnon probably picked up my note and attended to the matter. The matter being, obtaining a statement or a document signed by Charlie Nicholas as to his disposition or intended or desired disposition of his trapline, which, incidentally, he made to his son Michelle, and I believe the other persons, William and John, are also his sons.

Q My lord, we are not tendering that as a will.

THE COURT: No? Michelle, William and John are all sons of Bear Lake Charlie, are they?
THE WITNESS: Certainly Michelle is his son, and it's my belief that William and John are also his sons. And I say that, you know, from my personal knowledge of Charlie Nicholas and because of the fact that he hasn't -- that last names are not identified on this document.
MR. GRANT: Well, my lord, with respect to William and Johnny, I would suggest that maybe the witness is -- it sounds like he is speculating as to those two.
THE COURT: I don't know if he is speculating or if he is -- perhaps he can clear it up if he is giving evidence of reputation. Perhaps you can clear it up.
MR. MACAULAY:
Q Had you heard when you were carrying out your duties that William and John were sons of Bear Lake Charlie? Had you heard that?
A I don't recall that. But certainly it would seem that if one were to examine the band lists of the Takla Lake Band that one might find that William and John might -- are probably listed there, and if one were to further trace back, I suspect that William and John would be discovered to be identified as the sons of Charlie Nicholas.
THE COURT: But you haven't heard people discussing this and expressing that belief that they're sons?
THE WITNESS: No. I'm trying to go by memory here and it's been awhile.
THE COURT: All right.
THE WITNESS: It just seems to me that if they were not sons, it would have been last -- some other last name included in this document.
THE COURT: All right.
MR. MACAULAY:
Q Tab 37, the letter to you from Mr. Slavens, the conservation officer. Did you know Steven Morris?
A Yes.
Q And do you recall whether or not he relinquished his rights to his trapline to his son Eddie?
A Well, that appears to be the case by the purpose of this letter. It was a letter -- it's really nothing more than a letter from Mr. Slavens, the conservation officer, to myself.
Q Telling you this?
A Telling me this. So I have no -- I have no -- nothing else to say about it.
Q And Keom Morris. We've seen that name in the -- that

exhibit showing the band elections?
A Yes.
Q And did you know Keom Morris?
A Oh yes. Very well.
MR. MACAULAY: I believe Keom Morris is a plaintiff, my lord. I can't be sure of that, but it's an awfully familiar name.
THE COURT: Well, he was mentioned probably by Mr. Shelford, I think.
MR. MACAULAY:
Q Now, the next document is tab 38, it is a letter signed by Mr. -- the same Mr. Harrison, I guess, the same signature, and do you recall that letter?
A No, I don't recall this letter.
Q Did Eddie Morris have his trapline in the Ootsa Lake area?
A I believe I at least rediscovered that later on in my capacity as a Special ARDA Officer, but I may have been aware of that at the time. It's -- you know, it's quite awhile ago.
Q But do you know A.J. Morris -- A.J. Harrison?
A Alf Harrison.
Q Alf Harrison of Burns Lake?
A Yes.
Q And he was --
A He did not live in Burns Lake, he lived in the area south of Burns Lake.
Q And he was a non --
A Non-native.
Q A non-native trapper?
A Yes.
Q And that's the Lakes District stamp in use at that time?
A Yes.
Q There is an initial over in the left and the name "Rae". Does that indicate anything to you?
A No. I -- I might speculate that when this was received at the office on March the 20th, that someone thought I was probably to be made aware of this letter, and consequently someone put my name on it in order to draw my attention to this letter.
MR. GRANT: If my friend is going beyond that I would ask -- this witness says he doesn't know anything about this letter, and if that's leaving it at that, I think it would be appropriate to have this one excluded.
THE COURT: Well, is it not a business record?
MR. MACAULAY: It's a business record, my lord, that's why I

asked him about the stamp and so on. He knows the -- Mr. Harrison and he knows Eddie Morris and he says he knows that Eddie Morris had his trapline in the Ootsa Lake area.

THE COURT: And did this letter come from the records of the --

MR. MACAULAY: This letter --

THE COURT: -- Department of Indian Affairs?

MR. MACAULAY: Yes, my lord. That's what the stamp is, Lakes District, Prince George, 20th March, 1978. He has identified that stamp as the stamp of the Lakes District.

MR. GRANT: Well that suggests, my lord, that my friend's suggestion is that anything that happens to go into the office of the Indian Affairs is, by definition, a business record. This isn't written by any officer there and it's not something that's required to be delivered there. This isn't even of the nature of the kind of documents that the Fish and Wildlife are attending to. And the witness did say later on, yes, at Special ARDA he knew that Mr. Morris had a trapline in this area, but he can't say about it this time and he had no knowledge of this letter. How can this letter be identified in this way? I mean it's just that anything that my friends happen to think comes out of the office that this witness happened to work at, they put to the witness whether he knows it or not and it goes in.

THE COURT: Well, if it's the type of thing that's normally incumbent in an office, then it meets the other tests of admissibility. And I haven't looked at the sections to see if it does or not. What you have just said is indeed the case, is it not, and it's prima facie truth of the facts stated in it. But I am not sure what notice is required and that's where, presumably, these documents were made known sometime ago, were they?

MR. MACAULAY: The index, my lord, if you'll turn to the index, tab 38 is described; its origin, its source that is, the departmental file number. We assert that, of course, not the witness. It's -- this number is 11169, that was disclosed about a year ago from the number, our list number.

THE COURT: All right.

MR. MACAULAY:

Q It's in D.I.A. file 985/20-10-M-13. And I don't think the witness could at this long interval identify the file number.

Well, perhaps you can. Does that number mean anything?

A No.

Q I don't suppose it does?

A No.

THE COURT: Well, I don't recall now what the various requirements are for business records. But subject to Mr. Macaulay satisfying the qualifying requirements, then it seems to me that the document would be admissible. But I don't have such in front of me and I don't remember what's required.

MR. MACAULAY:

Q I'm going to ask another one or two questions. I think I've asked nearly all the questions I need to ask.

Now, you received from time to time letters from Mr. Harrison concerning his rental of traplines; is that right?

A Yes. As well as other non-natives concerning other traplines.

Q Like Mrs. Lord, for instance?

A Right, um-hmm.

Q And were you under some obligation to keep those letters on your file --

A Yes.

Q -- when you received them?

A On two counts that I -- that I perceived at the time. The first count being that there was an understanding between my office while I was at Burns Lake -- and I think that understanding probably carried on over into the time when I went to Prince George -- there was an understanding that had been reached with the Fish and Wildlife Office that whenever I came into -- into possession of information, be it a will or an arrangement that had been worked up like this, that I would -- that I would tell the Fish and Wildlife Branch and we would keep each other, you know, apprised of information of mutual interest to our files.

And secondly, there was an attitude that prevailed at the time within the Fish and Wildlife Branch Office, that none of these arrangements would be -- would be acceptable to the Provincial Government unless they were given the stamp of approval, if you like, of myself or some other officer of the Department of Indian Affairs. Now, in some ways I resented that. It smacked of paternalism which I

resented. But at the same time, I could see that if I -- if I denied my approval to these arrangements, I would be doing so at the cost of the Indian person who, after all, had been a party to this, and so I went along with it. But my main interests in having these was to maintain a file to the best of my knowledge and ability on each -- on each trapline file for which I felt responsible.

THE COURT: Well, Mr. Grant, this book of documents has only been given a number on a pencilled-in basis, and I would be glad to hear from you at any convenient time as to whether these are business records or not. If they are they go in, if not, they won't go to the extent they have been proven.

MR. MACAULAY: A great many of them, my lord, are the witness' own documents.

THE COURT: As I say, unless they have been proven in some other way.

MR. MACAULAY:

Q Now, regarding Eddie Morris, did you have -- I think you mentioned just awhile ago, you had -- if you didn't know it before, you found out where his trapline was when you were with the ARDA programme?

A Right.

Q That's after you left D.I.A.?

A Yes.

Q And do you remember speaking to Eddie Morris about his trapline?

A At the time of this arrangement or during my time as a ARDA officer?

Q During your time with ARDA, particularly in December of 1985?

A Yes, I do. I recall meeting with him in his home at Moricetown.

Q And what was the purpose of the meeting?

A The purpose of my meeting with him was to evaluate an application he and others had made, but particularly his application to the Special ARDA programme for financial assistance in order to trap on his trapline.

Q And did you make notes of the interview?

A Yes. I believe they are in a later tab, are they not?

Q If you turn to tab 39.

A Yes, those are.

MR. GRANT: My lord, if I may stand on this. I -- this is one of those that crosses the line that your lordship has not ruled on, but I would like to speak to. As this witness has evidenced in these tabs, the subsequent

tabs that I received just this morning and I just had a chance to review it over the noon hour, but he deals with ARDA applications, Special ARDA applications I may say, pre- and post-October 1984.

Now, this first one that Mr. Macaulay has raised is, of course, a post-1984 Special ARDA application. And this is the issue that came before your lordship almost a year ago with respect to the issue of new ventures, and I -- I referred you to this, I believe, earlier, with respect to the issue of whether or not these applications should be considered. And I just -- as relevant.

THE COURT: But here we have a statement made by Eddie Morris, who I assume is a plaintiff, who says to the witness, "This trapline has not been trapped on within the past ten years since Eddie obtained it from his father, the late Steven Morris." Now, that wouldn't matter that that statement was made in the course of an application for a new enterprise or not. The new enterprise may not be admissible but that kind of statement certainly would be.

MR. GRANT: That's -- I think that you've made a distinction with which I don't disagree. The interview itself may not be, and I anticipated -- maybe I anticipated wrongly, but from my review of the files, that my friend intends to put in ARDA applications post-October 1984. And if my friend does not intend to put those in then there are certain tabs I guess he intends to remove. But I -- I am not -- I don't dispute what you say with respect to the content of an interview, because I think that does come within the ambit of what your lordship ruled already, would be a discussion of a trapline, of an ongoing situation with respect to a trapline. And that's not what I'm opposing so I don't know if you are suggesting that I should wait until my friend raises the other issues, because I anticipate that's what he is going to do immediately.

THE COURT: Well, I am in counsel's hands. I have difficulty finding any possible objection to this statement.

MR. GRANT: To the interview?

THE COURT: This document.

MR. MACAULAY: That's all we've got for Eddie Morris.

MR. PLANT: My lord, I rise because I don't want my silence to be taken as acceptance that there is any difference in this regard for an application for a Special ARDA grant, whatever that is, before 1984 or after 1984.

Because the application form, or any other document connected with it, contains admissions by the plaintiffs against interest. I would say that the document is admissible for that purpose or the statement.

THE COURT: Yes. Why don't we deal with ARDA applications when we get to that.

MR. GRANT: That's fine, my lord, if my friend isn't intending to use them in this case.

THE COURT: All right.

MR. MACAULAY: It's only the record of the interview, my lord, and it's tab -- well --

MR. GRANT: I would like the entire document produced. As you can see, my friend deleted the last part of it and I would like, prior to my cross-examination, to have the bottom of the document produced to me.

MR. MACAULAY: That's recommendation. We --

MR. PLANT: Which Mr. Grant says is irrelevant.

MR. MACAULAY: Yes. That's the thing. We took off all the recommendations. They -- they are made in 1988 or 1989. Or a committee does.

THE COURT: This is a 1958 application and there is no difficulty showing Mr. Grant the other part of the document, is there, Mr. Macaulay?

MR. MACAULAY: Oh, no.

MR. GRANT: Thank you.

MR. MACAULAY: He can ask the witness too about it.

THE COURT: Yes.

MR. GRANT: Well, that's why I would like to see it before I ask the witness about what's on there. It's only fair.

MR. MACAULAY:

Q Well, I'll ask you. When these applications were made, did you make the decision or was it some other?

A No. I am not allowed to make decisions, but I am expected to make recommendations to a committee who may then accept or reject my recommendation.

Q And at that time were there any band members of any band, members of the committee?

A No.

Q In 1985?

A No. Moricetown Band has never had, to my knowledge, one of its own band members serving on the Special ARDA Advisory Committee.

Q Did the Gitksan have any band members serving on the committee?

A Norman Johnson, a member of the Kitwanga Band, was a member of the committee up until the time the Special

ARDA programme expired, at the end of March of this year.

Q And -- well, we've all read the document now. Mr. Morris told you that the trapline hadn't been used for ten years?

A Yes.

Q Ever since he had gotten it from his father?

A I can't do a quick calculation of the time from -- time Mr. Slavens advised me, but he told me ten years and that's what I wrote down.

Q Now, did you speak to David Blackwater Senior about a ARDA application?

A Yes.

Q And that was in 1985?

A Yes.

Q Do you recall what he said to you about his application?

A By virtue of these notes, I recall, yes.

Q Well, having refreshed your memory from the notes, what do you recall?

A Well, that he had a trapline for 20 years, and all of the points that follow thereafter. And as a result of my conversations with him, I made a recommendation as I did with all other applications.

MR. MACAULAY: All right.

MR. GRANT: This document is edited. I would make the same request.

THE COURT: What does number five say? "Trapline is at/near Klappan coal development." Is that what it says?

THE WITNESS: Yes, you've read that correctly.

THE COURT: Yes, all right. Now, he also traps on -- what's that next word? Jack?

THE WITNESS: Jasper Jack's trapline. I suggested his application might be enhanced if he could show me some written consent by Jasper Jack that he could also obtain permission to trap on that particular trapline. So that was -- that was the gist of my note there.

THE COURT: Yes.

THE WITNESS: And also comments with regard to his brother Walter, who apparently traps on an adjoining trapline and who might conceivably have joined him in this application.

THE COURT: Yes. All right.

THE WITNESS: The reason for my encouragement of this kind of additional documentation is that very often I felt that an applicant's application could be improved upon if it could be shown that he has a larger rather than

a smaller area in which to trap, and so I felt that I owed it to my clients to counsel them accordingly.

THE COURT: Yes. Okay.

MR. MACAULAY:

Q Now the next one, my lord, is a part of an application of Jeffery L. Harris. Do you remember Mr. Harris?

A Yes.

MR. GRANT: This is where I object, my lord. I say this is a new -- this is a project proposal of November of '86.

THE COURT: Yes.

MR. GRANT: And complete with funding requests and everything in it. And I object to the tendering of this type of document. It's obviously a form that's been prepared for Mr. Harris, funding and budgets, and I -- the position I take is that in accordance with your rulings of last year, that this is in the nature of a new project, a new proposal. And on the December 5th ruling, your lordship -- I'm sorry, my lord, it appears I have this part cut off. It's on page 10042. "The only" -- line 31:

> MR. GRANT: The only point, my lord, I don't know if you dealt with the snowmobile question which I view it -- I think I -- the reason I raise it is I anticipate a potential problem. I view it as a new venture because it all relates to ARDA applications of the Moricetown Band, but I may be wrong in that interpretation. The band made some submissions after the issuance of the writ.
>
> THE COURT: The snowmobile being used for trapping?
>
> MR. GRANT: Well, my friend is asking if the snowmobile was purchased and then the band got into some ventures to support people, and I think the allegation will be that it's related to trapping.
>
> THE COURT: I don't think it matters whether the band has snowmobiles or not. I think it might matter if snowmobiles are used for trapping, although I'm not sure what difference it would make.

And I'm sorry, my lord, it appears that the next page from that transcript I don't have, which has the end of that statement. And I can provide that to you.

I don't have the transcripts right in the court.
But in this case, my lord, this -- Mr. Harris' application to Special ARDA is with respect to funding for his trapping area for his son and his nephew, and as the witness quite ably described. I mean he was there assisting these people in this funding project, Special ARDA, of course, is the version of ARDA that is for native people. And I would submit that in the consequence of your rulings -- and this also dealt with the woodlot licence of Glen Vowell, of course, that this is a new venture in that sense, and that it's -- it's not relevant what particular application was made.
I take your point and I don't disagree that a statement made by a witness in the processing -- made by one of the plaintiffs to this witness about the utilization or nonutilization of a trapping area may -- I don't concede it's relevant in the pleadings -- but it may be relevant to my friends, and that's not the objection. The objection is, does this mean that all of these funding applications encouraged by the federal defendant I may say, encouraged by the federal defendant, are now -- and many of them post-litigation -- are now open for canvassing as a -- as a grounds for some kind of extinguishment, if that's what Mr. Macaulay is arguing that this material is relevant to, or something of that sort. And I say that it's not and that there is -- that this is a situation like that Kwakiutl document that is of such marginal relevance when it comes to the whole question of funding of these. And if the witness knows something about whether the trapline was used or not from the plaintiff then that's a different question, but that doesn't entail putting in the applications though, my lord.

THE COURT: Well, I think I made my original ruling in this area in order to avoid having to investigate in evidence a demonstration that had taken place since the commencement of the action aimed at impeding the CNR because of a dispute about some smokehouses in the area claimed, I think, by Mr. Art Mathews Junior, as I recall it.

MR. GRANT: That was the initial -- there was some comment --

THE COURT: Yes.

MR. GRANT: -- leading to that. Also the woodlot licence at Glen Vowell you directly ruled on.

THE COURT: Yes. Because it seemed to me that to start

something new after the commencement of the action does not relate to what is in issue at the time the action was started. But I do not think one can extrapolate from that so far as to exclude relevant statements made by plaintiffs about a matter in issue in the case.

Now, I have looked at this and I do not know what there is in this document that is thought to be a statement that is relevant. I do not think the fact that he made an ARDA application is relevant, and I do not think it matters whether his application was granted in whole or in part or refused. But I think it is significant -- or may be significant, sufficiently to be admissible if he -- if he made statements in there that are relevant.

Now, he says at the bottom that he "would like to open up an old trapping area." He would "be assisted by his son and perhaps his nephew. The area that he wishes to trap in is traditionally owned by his family." Now that seems to me to be material that would be relevant to issues in this case and it cuts both ways.

MR. GRANT: Yeah. I think that that's -- that's why I say the -- that kind of description, that if that is just another version of the Eddie Morris notes, in other words, another format, I don't object to that. But I say that the application itself -- and if my friend is protected by putting in that page or pages like that, I am not going to object to it. But the application itself and the proposal itself, I say is not relevant and that's what I'm objecting to.

THE COURT: Well, the fact that he made an application is certainly of no probative value. The statements that he made in connection with the application may or may not have probative value. Therefore, it seems to me that the application, if shown to have probative value, can go in for that limited purpose.

MR. GRANT: Well I look at, for example, page -- my lord, I agree with what you say. That second page. I look at the first page "Note to Applicants", I see no relevance in that. I look at the third page which only refers to partnership and remote rural community, and the fourth page which says when the project is expected to start, and then the fifth page of the funding of the project. And I say that -- and of course the statement of the applicant that is making the application. I say those have no probative value.

So if my friend is saying to put in the cover just so that you know what the document is, and the first page -- pages 1 to 6, that's -- I have no difficulty with that. But I say why -- the whole funding and everything else and what's needed and all of these things, I submit is not.

THE COURT: Well, considering the vast amount of completely useless material we have in this trial up to now, I see no reason to be tossing aside a few insignificant inoffensive pages. But we can do that if it is necessary to take the time to do it, but I really do not think it makes any difference if the whole document goes in for the limited purpose I have described or it is edited. I really do not think we ought to be worrying about editing a few pages out at this stage of the trial with the amount of paper that we have now.

MR. GRANT: I'm not concerned about that so long, my lord, as all parties understand what the document is going in for. I don't want to be taken by surprise that other parts of the document that have no probative value are then relied upon by one of the other parties and we don't anticipate.

THE COURT: You won't be hurt if it has no probative value.

MR. GRANT: Well, that's why I -- I am saying what is probative? My friends differ with that. They can say now --

THE COURT: Are you contending for any greater admissibility than what I've been discussing with Mr. Grant, Mr. Macaulay?

MR. MACAULAY: No, my lord. I will draw the witness' attention to the description of where the project was located.

THE COURT: Yes.

MR. MACAULAY: Which is the paragraph numbered three.

THE COURT: Yes.

MR. MACAULAY: And then paragraph numbered six that your lordship has referred to, to open up an old area, and then of course his signature. It's a -- that's there because this is a statement by a plaintiff. This is a named plaintiff.

THE COURT: Yes.

MR. MACAULAY: He appeared before your lordship in court in Smithers as a witness. Luus.

MR. GRANT: And this document was not put to him, so I don't know how much --

MR. MACAULAY: Well, the substance of it --

THE COURT: That rule can't strictly be applied in a trial of this magnitude, Mr. Grant. If everything had to be

put to witnesses that had to be proven, then the examinations would have taken even longer than they did.

MR. MACAULAY: I would have to look at Luus' transcript, my lord, but I propose -- because he was cross-examined by two people -- I propose to ask the witness what he recalls of his interview, if any, with Mr. Jeffery Harris.

THE COURT: Yes, all right.

MR. MACAULAY: I see it's five after four.

THE COURT: Well --

MR. MACAULAY: Perhaps we can --

THE COURT: Yes, all right.

MR. MACAULAY: I could tell your lordship that, as you can see, the -- there are a few more tabs. There are -- all of them, the Special ARDA tabs, which we can deal with in -- you know, fairly expeditiously, I hope, once we've gone through these initial difficulties. I have a few more questions to ask of the witness, not many, other than those tabs. Very few. I should be finished in an hour and that is our last viva voce witness.

THE COURT: All right. Well, we'll look forward to hearing what comes after that. All right. Ten o'clock. Thank you.

THE REGISTRAR: Order in court. This court stands adjourned until November 28th at 10:00 a.m.

(PROCEEDINGS ADJOURNED AT 4:05 P.M.)

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

_____

Toni Kerekes, O.R.
United Reporting Service Ltd.