

Proceedings

FEBRUARY 7, 1990

VANCOUVER, B.C.

1
2
3
4 THE REGISTRAR: Order in Court. In the Supreme Court of British
5 Columbia, this 7th day of February, 1990. In matter
6 of Delgamuukw against Her Majesty the Queen and the
7 Attorney General for Canada, My Lord.

8 THE COURT: Mr. Rush.

9 MR. RUSH: I have handed up fourteen new documents to be added
10 to the fifth volume of reply documents. I mentioned
11 that I was considering these additional documents
12 provided to me earlier this week by the Provincial
13 defendant, and I have decided to conclude them. I
14 have notified my friends yesterday, and they -- there
15 will be some re-numbering, My Lord, required from tab
16 119 through to tab 132. And I am suggesting that
17 these new documents be inserted in the fifth volume,
18 and a reordering of the existing tabs there, such that
19 the documents that are presently in that volume would
20 follow upon in sequence the additional documents that
21 I propose to add.

22 THE COURT: I'm sorry, this exhibit number is 1209-A?

23 MR. RUSH: No, My Lord, the exhibit number is 1256.

24 THE COURT: 1256?

25 MR. RUSH: Yes. That's the six volumes of reply documents of
26 the plaintiffs.

27 THE COURT: Oh. All right. 1256. I have it.

28 MR. RUSH: And I am also handing up a better copy of the
29 documents which are at tab 117, and I have also
30 prepared a revised index to reflect the changes that I
31 have spoken of.

32 THE COURT: All right.

33 MR. RUSH: The net effect, My Lord, is to add fourteen documents
34 relating to the Nishga petition and the correspondence
35 and claims of the allied tribes. These are primarily
36 documents which add to the sequence of documents which
37 have been tendered by my friends, the Province. On
38 the question of the --

39 MR. GOLDIE: Could my friend clarify the numbering for me
40 please.

41 MR. RUSH: I did provide a copy of the revised index to you
42 yesterday. The effect of the revised index, My Lord,
43 is to -- the new documents would be inserted
44 commencing at tab 119, and they would run through to
45 tab 132, and then 24 documents, which are presently
46 located at 119 through to 124, would be relocated at
47 the end of that sequence.

Proceedings

1 THE COURT: Yes. All right.

2 MR. RUSH: Mr. Goldie was good enough to provide me yesterday
3 with his objections to the reply documents that were
4 filed, and I was able to get back to him this morning,
5 and he advises that he has not had an opportunity of
6 considering the letter I provided to him.

7 MR. GOLDIE: My Lord, the letter arrived at 12:30, not a.m.,
8 p.m., and I have done part of it, and I have assured
9 my friend that I can deal with the rest of it this
10 afternoon.

11 MR. RUSH: I tried to be as fulsome as I could, and that
12 explains the response and the time of it. And, My
13 Lord, I seek to tender these documents, and I don't
14 know how Your Lordship wishes me to proceed. I am
15 happy to proceed through the documents seriatim, at
16 least the ones that are in dispute, and/or if my
17 friend wishes to identify which ones that remain in
18 dispute, if they are all in dispute, then I am happy
19 to go to the ones that are presently disputed between
20 us. I have not received any indication one way or
21 another as to Canada -- as to what their position is
22 on Mr. Goldie's letter or my response.

23 THE COURT: How many documents are understood between you to be
24 in dispute?

25 MR. GOLDIE: It's not so much a question of dispute, My Lord. I
26 have to a relatively few number an objection. I have
27 asked my friend to identify why others are tendered.
28 I have pointed out to my friend that a number of them
29 are already exhibits, and I think I have one with
30 respect -- one objection with respect to relevance,
31 and I have set that out in my letter.

32 THE COURT: Well, I'm like the man who is lost without a road
33 map, I think. I'm not really able to make any
34 definitive ruling. When you said that you thought,
35 Mr. Goldie, that you would be ready to deal with the
36 rest of your friend's letter this afternoon, what did
37 you have in mind? Are you thinking that you can work
38 on it while your friend is doing something else, or
39 are you suggesting we should adjourn for whatever time
40 is necessary?

41 MR. GOLDIE: I have been able to come to some conclusions just
42 before Your Lordship came in.

43 THE COURT: Yes.

44 MR. GOLDIE: My concern with respect to the objections is that
45 some of the documents appear to advance the
46 plaintiffs' case as opposed to reply, and I can deal
47 with those relatively soon.

Proceedings

1 THE COURT: All right.
2 MR. GOLDIE: I do object to documents which are already exhibits
3 being marked again as exhibits, but that's just a
4 procedural point.
5 THE COURT: All right.
6 MR. GOLDIE: And as I say, I had one objection with respect to
7 relevance. If Your Lordship wishes me to proceed on
8 that basis --
9 THE COURT: If that's convenient, Mr. Rush?
10 MR. RUSH: Yes, certainly.
11 THE COURT: Yes. All right.
12 MR. GOLDIE: If Your Lordship would have before you the volume
13 one.
14 THE COURT: That's the documents up here?
15 MR. GOLDIE: Yes. I am only going to be dealing with the ones I
16 have a question about. Everything else goes in.
17 THE COURT: All right.
18 MR. GOLDIE: I raised a question about tabs 1, 2, 3 and 6, and
19 Your Lordship will see that these are -- well -- and I
20 think my friend's letter confirms this, are related to
21 documents that Mr. Morrison has put in. My friend
22 takes the position that 1, 2, 3 and 4, that is to say
23 an early letter from a Mr. Norton of the Hudson's Bay
24 Company, details of the names and distances of each
25 nation, La Verendrye to Beauharnois, Pouchet, Memoir,
26 Extract, Wisconsin Historical Collections, table of
27 Indians in the army of the Marquis de Montcalm, 1757,
28 and biography of one "Dejordy de Villebon", and
29 Dictionary of Canadian Biography.
30
31 My friend states:
32
33 "These all speak to the same point, namely what
34 Indian tribes were known to have inhabited the
35 lands west of the Mississippi, who they were
36 and with whom they were allied in the seven
37 years war."
38
39 This is in response to Dr. Greenwood's evidence at
40 volume 2799, page 20789. Your Lordship will recall
41 that Dr. Greenwood was not permitted to express
42 opinions, and on re-examination he was asked questions
43 to which my friend replies, and those questions
44 related to the cross-examination starting at page
45 20788. The question at line 19 is --
46 MR. RUSH: Excuse me. I have a copy of that, My Lord, if it
47 would be of assistance to you. It's an extract.

Proceedings

1 THE COURT: Thank you. where are you Mr. Goldie?

2 MR. GOLDIE: Page 20788 at line 19:

3

4 "Q You were referred to Vaudreuil's instructions,
5 and I am referring here to -- if I may see his
6 book again. The reference that my friend
7 directed your attention to was page 150 under
8 his tab 3, which again is the Wisconsin
9 HIstorical Collections, and you are asked --
10 your attention was directed to the first
11 paragraph, but under the heading Versailles,
12 March 22nd, 1755, it reads, and I quote:"

13

14

15

And then I ask him some questions, and then over
on page 10789:

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

47

Those were answers given in cross-examination.

THE COURT: All right.

MR. GOLDIE:

"Q They were considered to be in the upper
country?

A Yes, I would think so.

Q Any tribes that you have identified whose
habitat was west of Lake Superior?

A Identified when and for what purpose?

Q In the seven years' war as allied with the
French.

A With the French, west of the Mississippi."
And.

Then my friend interjected.

"MR. RUSH: Wasn't this covered, My Lord in direct?"

And he said:

"I think that the question of the French allies
was a question raised specifically and
specifically answered and I raised it again and
I got the same answer in cross."

1 So that we are dealing with a subject which was
2 raised in cross-examination. Then I refer to the
3 document which my friend had put to the witness in
4 cross-examination, and I ask him if he would know to
5 whom they fit, and then he said at line 36:
6

7 "I would have to consider that at length, Mr.
8 Goldie, to interpret it. The 'allied savages'
9 of the French, as far as I understand it, were
10 not located west of the Mississippi River."
11

12 So, My Lord, if these documents are directed to
13 that, I say it's not reply. I say it is an advance
14 assisting my friend's own case. And specifically my
15 friend through Mr. Morrison tendered evidence in Mr.
16 Morrison's documents of who the Indian allies were.
17 And my friend's purpose in cross-examination was to
18 obtain admissions, and my purpose was to clarify those
19 admissions, and in my submission the documents that he
20 now proposes to tender in items 1, 2, 3, 4 and 6 have
21 nothing to do with reply. They are simply bolstering
22 my friend's own case.

23 That's my submission with respect to the first
24 group that I asked my friend about. And then I
25 referred him to a group beginning with number 7. And
26 one I didn't question, number 7, I raise no objection.

27 THE COURT: Tab 7 of volume 1?

28 MR. GOLDIE: With respect to 12, which is entitled "Summary of
29 Events at the Upper Post for the year 1762, Wisconsin
30 Historical Selection." Now, My Lord, both Mr.
31 Morrison and my friend used this historical collection
32 extensively. No document from this was introduced in
33 Mr. -- Dr. Greenwood's case.

34 THE COURT: Was he cross-examined about it?

35 MR. GOLDIE: Not to my knowledge, My Lord. My friend's
36 statement:
37

38 "This document addresses the state of knowledge
39 about the western posts, and the Indian
40 inhabiting the far west. It answers Dr.
41 Greenwood at footnote 177 and his evidence at
42 Vol. 279, p. 20, 787."
43

44 And again Dr. Greenwood was being re-examined on
45 documents put to him in the course of his
46 cross-examination. And I do not see anywhere a
47 document comparable to this one that was put to him in

1 his cross-examination, and this in my submission is
2 simply an addendum to the plaintiffs' own case. Mr.
3 Morrison put in a lot of documents about the forts and
4 the west, and in one sense Dr. Greenwood's
5 cross-examination was for the purpose of obtaining
6 admissions which would support Mr. Morrison, and I
7 won't trouble Your Lordship with the documents that
8 Mr. Morrison put in. You may recall that he placed a
9 great deal of documentary significance on the French
10 forts and how far they reached. So this is not in
11 reply to Dr. Greenwood.

12 Then I went to tab 22 and 23. Those are plates
13 from the historical atlas, and my friend has pointed
14 out to me that he reserved the right to add to the
15 plates which I put in, and I think was through Dr.
16 Farley, and I withdraw my objection.

17 Then I raised a question about tabs 24 to 29.
18 These all deal with New Zealand, My Lord. And I think
19 the first reference to New Zealand came with Mr.
20 Morrison, who put in the Treaty of Wotanga of New
21 Zealand. And then Dr. Lane put in the letter from
22 Barclay to Douglas of December, 1849, in which Barclay
23 makes reference to the practise in New Zealand.

24 Now, subsequent to that I put in instructions to
25 the Governor in Chief of New Zealand. The report of
26 the Select Committee on New Zealand of Parliament.
27 And my friend now wishes to expand that by placing in
28 the parliamentary debates, and he advises me in his
29 letter that -- he says:

30
31 "The Province tendered the instructions to
32 Governor Hobson dated December 9, 1840.
33 Hobson's instructions of August 14th, 1839 are
34 here being tendered to fill out the record on
35 the instructions which were given to Hobson
36 regarding New Zealand.
37 These documents fill out the record concerning
38 what was thought by the parliamentarians about
39 the New Zealand experience. The document
40 addresses the selection of the Barclay to
41 Douglas letter, December 17, 1849, read into
42 the record by you."

43
44 I think my friend is mistaken. I believe it was
45 read into the record by Dr. Lane. Be that as it may,
46 Your Lordship will see that my friend is saying it's
47 not really reply, it's filling in. And I don't think

1 I am going to take the objection that I took
2 originally, which was that the -- this was not proper
3 reply. I think I will withdraw my objection on the
4 basis of Your Lordship's earlier rulings that people
5 may add to their own documents what they consider to
6 be necessary to fill them out. On that basis I think
7 they may be marked.

8 Then the next objections I took was in volume 2 at
9 tab 38. Now, this is an extract from Maine's ancient
10 law, a publication which has been around before this
11 case began, and my -- my objection to it was that it
12 was, if anything, put in for the purpose of argument.
13 But my friend tells me that it explains a reference
14 made by Begbie in Langevin's report at tab 37. I am
15 not objecting to tab 37 going in, but to file a
16 document which purports to explain a reference in an
17 exhibit is something for argument, and not to be
18 marked as an exhibit. I object to it being marked as
19 an exhibit. I will not object to any reference my
20 friend makes to it in argument in submitting that it
21 does make -- provide the explanation he says.

22 Now, I had objections to the documents at tabs
23 119, 120, 121 and 122. Those have been renumbered,
24 and the -- I referred at volume 5. My Lord, I can
25 identify the renumbered documents. They are 133, 134,
26 135, 136. 133 is part of Wilson Duff's article, and
27 as my friend puts it, it is not strictly reply, it is
28 the balance of the Duff article to supplement the
29 two-page extract found at Exhibit 1039-23. I don't
30 want to be overly technical, but it seems to me that
31 that's a document which my friend can refer to in
32 argument. But Dr. Lane did not think the balance of
33 the article was significant, and I think to put it in
34 now puts it in the same category as what she passed
35 judgment on. And I will raise no objection to my
36 friend's use of it in argument, but I do object to it
37 being marked here.

38 Then the documents at tabs 134, 135 and 136 are
39 numbered treaties entered into by Canada. No one of
40 which involves any part of British Columbia. No one
41 of which touches -- there is no allegation with
42 respect to these treaties. British Columbia is not a
43 party to them. And in my submission they do not fall
44 into the category of treaties which my friend has been
45 supplementing from time to time between Indians and
46 former colonies or other -- or parts of Canada in
47 which the Royal Proclamation prevailed. So I object

Proceedings

1 to those, My Lord, treaties 9, 10 and 11.
2 MR. MACAULAY: Can I interject? I think treaty 9 is already an
3 exhibit. That would save my friend.
4 MR. GOLDIE: I'll confine my objection to 10 and 11 then.
5 Yes -- well, I am not sure, My Lord. I think my
6 friend may be referring to a more current James Bay
7 treaty. This one was entered into in -- made in 1905
8 and 1906. It's not the current James Bay treaty.
9 THE COURT: Yes. The argument or the objection is not based
10 upon authenticity, but --
11 MR. GOLDIE: It's based upon partly relevance, and partly
12 because I can discern nothing in which it purports to
13 be a reply to, or if it is added to the collection
14 which previously existed, it is not -- these are not
15 of the same character.
16 123 was a Census. And my concern was more the
17 relevance than anything. My friend has now explained
18 this to me, that the Census was not made available to
19 us until January of this year. We sought it in May of
20 '87. It became available to Canada on January 8th,
21 1990, and it's tendered. I assume it's not tendered
22 as a reply document, but one which my friend would
23 have tendered if he had it available. As such I have
24 no objection to that.
25 Now, the next category of documents were those
26 that we were unable to discern the purpose. And what
27 I asked my friend was we need to know what part of the
28 defendants' case the documents under the following
29 reply to. And the first one was tab 7 -- I'm sorry,
30 tab 4, and which is the "Journal du Marquis de
31 Montcalm" during his campaigns in Canada. And my
32 friend has advised me that that too relates to the
33 question of the tribes which inhabited lands west of
34 the Mississippi. And he puts them in the same
35 category as documents 1, 2, 3. And accordingly my
36 objection with respect to those stand -- include that
37 in that group then.
38 Seven I don't object to. It's Dr. Greenwood's
39 footnote 207.
40 Thirteen, which is the "Journal of the
41 Commissioners for Trades and Plantations", my friend
42 tells me that that's referred to in Greenwood's
43 footnote 50, but was not tendered as an exhibit.
44 THE COURT: What number are you at now?
45 MR. GOLDIE: Thirteen in volume 1. And I asked for what purpose
46 this document was tendered, and my friend says:
47

1 "I am tendering this document which was referred
2 to at footnote 50, but not tendered as an
3 exhibit during Dr. Greenwood's evidence. This
4 fills out the record about what Egremont knew
5 about the French posts in the Indian country."
6

7 And all I have to say is it wasn't put to
8 Greenwood on cross-examination. It does not -- it is
9 not reply to anything of -- in Greenwood's documents.
10 My friend is simply adding to his case by use of a
11 document that Dr. Greenwood had in his footnotes.

12 Then 17 -- oh, 15 is the next one I wish to refer
13 Your Lordship to. And it is the proceedings and
14 debates of the British Parliament respecting North
15 America, 1754 - 1783. And it is not only debates in
16 the House, but it is also proceedings before a
17 committee, and before this committee Sir Guy Carleton
18 was called. Mr. Morrison referred to Carleton in a
19 number of his documents, and my friend says that:

20
21 "This document is tendered to respond to the
22 documents and supposed argument that the Quebec
23 Act repealed the Royal Proclamation."
24

25 I don't know of any suggestion by Dr. Greenwood to
26 that effect.

27
28 "This argument is suggested throughout Dr.
29 Greenwood's filings."
30

31 Well, if it is, they speak for themselves, and I
32 would -- and my friend goes on to say:

33
34 "The statements of Carleton provides some
35 insight into the thinking of the framers of the
36 Quebec Act. Another excerpt from this document
37 was filed by Dr. Greenwood at Exhibit 1163 -
38 317(b)."
39

40 In my submission the document is irrelevant if it
41 is tendered for the purpose of construing the Quebec
42 Act. Your Lordship will have to construe that on your
43 own, and I don't find that that is -- it is simply a
44 document that my friend wishes to put in to support
45 his own case.

46 Then tab 16 is an extract from the dictionary of
47 Canadian biography, which is Sir Guy Carleton's

1 biography. That's for argument. It's not a reply
2 exhibit.

3 And then tab 17 my friend informs me that:

4
5 "Is designed to respond to Dr. Greenwood's
6 documents regarding the Quebec Act and the
7 effect that it might have had on the Royal
8 Proclamation. Dr. Greenwood's relevant
9 documents are to be found at footnotes 321-324.
10 This document responds to those documents."
11

12 Dr. Greenwood wasn't, My Lord, wasn't
13 cross-examined on any of this. It's all a matter of
14 argument. If my friend wanted to extract admissions
15 from Dr. Greenwood, he should have put these documents
16 to him.

17 And tab 18 is to the same effect.

18 Tab 19 is again purported rebuttal of Dr.
19 Greenwood's documents, and makes reference to Dr.
20 Greenwood's filings at footnotes 331, 334. Well, if
21 my friend wanted to get Dr. Greenwood's views on these
22 documents, he might have asked him.

23 That concludes the group of documents in respect
24 of which I asked for information, and as Your Lordship
25 will see, I have maintained my objection with respect
26 to some of them.

27 The next group of documents are those that have
28 already been marked as exhibits. They are tabs 8, 9,
29 39, 57, 58, 59, 74, 75, 85, 97, 98, 111, 118. Those
30 are all presently in as exhibits. My submission
31 simply is that a document that is already an exhibit
32 doesn't properly become a reply document simply by
33 being re-marked. If it's there, it's there for all
34 purposes. That comment also applies to a couple of
35 the new documents.

36 Tab 120 and 121 are both exhibits.

37 Now, I should also make reference here to tabs 45,
38 49 and 67.

39 THE COURT: 45, 49 and 67?

40 MR. GOLDIE: Yes. That's in volume 3.

41 THE COURT: Is this a continuation of documents already marked?

42 MR. GOLDIE: No. No. I am moving to a new category. And one
43 of these is a document that I object to on the basis
44 of relevance.

45 THE COURT: These are all objected to on relevance?

46 MR. GOLDIE: One of them is, My Lord. I am going to, in view of
47 the explanation given me by my friend, withdraw my

1 objection to 45. 49, My Lord, is a Despatch from Lord
2 Carnarvon at the colonial office to the Governor
3 General Lord Dufferin of the 18th of June, 1879. It
4 is wholly related to Carnarvon's offer to act as a
5 mediator in connection with the railway dispute which
6 had come up between British Columbia and Canada. My
7 friend's statement is, and I quote:

8
9 "This letter shows Carnarvon's thinking as to
10 when and under what conditions it would be
11 appropriate for him to mediate disputes under
12 the Terms of Union. This is part of the
13 collection of materials, some filed by you,
14 concerning the Colonial Office's view of the
15 Terms of Union."
16

17 And my friend doesn't really say it's a reply
18 document, and indeed it doesn't reply to anything that
19 has to do with the Terms of Union. It's entirely
20 taken up with the railway dispute.

21 67 is a letter to O'Reilly from the Department of
22 Indian Affairs of August the 9th, 1880, which is
23 providing the -- providing O'Reilly with instructions
24 and a copy of the Order-in-Council appointing him to
25 the position of Indian Reserves Commissioner.
26 My concern with respect to it is that it made
27 reference to marking out fishing stations. Now, that
28 is a reference which has been made in a document filed
29 by me, but the reference in this document is an
30 explicit instruction to O'Reilly, and as such is a new
31 item. And I advise my friend that I would have no
32 objection to this going in, but I wish to file two
33 documents relating to the question of whether O'Reilly
34 had power to allot fishing stations. It would be
35 merely explanation. Otherwise I would have no
36 objection to that. But I say that it does introduce a
37 new topic.

38 THE COURT: I'm sorry, did I understand you to say you wanted to
39 put in two more documents?

40 MR. GOLDIE: Yes, My Lord, if this document goes in. My
41 friend's position, and I'll read what he says:

42
43 "This deals with the instructions to O'Reilly as
44 the sole Indian Reserve Commissioner. It is
45 part of the selection of documents already
46 tendered by you concerning the instructions to
47 the Indian Reserve Commissioners."

1
2 I think more accurately my friend would find that
3 the documents which I have filed were instructions to
4 the Indian Reserve Commission, the body as such. Be
5 that as it may, my friend goes on to say:
6

7 "The fishing sites question is not new; it was
8 raised in all the previous instructions to the
9 Reserve Commissioners. It is not for the issue
10 pertaining to fishing sites that I am
11 particularly filing this document. I will
12 oppose your attempt to supplement your
13 documentary record by tagging it onto these
14 instructions."
15

16 Well, if my friend is not putting it in for the
17 fishing one, I would ask him to agree that the
18 sentence which alerted my concern should be struck
19 out. My friend agrees to that, then I will withdraw
20 the other two documents which I would tender.

21 Now, I think that probably completes what I had to
22 say about it, My Lord, and it may be taken that -- if
23 I don't mention a document, I don't have an objection
24 to it.

25 THE COURT: Thank you. Mr. Macaulay.

26 MR. MACAULAY: My Lord, I support my learned friend's submissions
27 regarding tabs 1, 2, 3, 4, 6, 12 and 13. I have no
28 submissions to make concerning his other objections,
29 and I am not opposing the marking of those documents
30 that are dealt with. Insofar as Tab 134 is concerned,
31 I've found Exhibit 1203-7 entitled Defence and
32 Counterclaim volume 7. My learned friend Mr. Goldie's
33 document at tab 21 of that volume there is a document
34 entitled "James Bay Treaty no. 9 (made in 1905 and
35 1906) and adhesions made in 1929 to 1930."

36 MR. GOLDIE: I am obliged to my friend. We needn't consider it
37 as a reply document.

38 MR. MACAULAY: So we don't need to deal with that one, I don't
39 think.

40 THE COURT: I think he got us, Mr. Goldie.

41 MR. GOLDIE: I think he has.

42 MR. MACAULAY: Having chipped in, I thought I --

43 THE COURT: All right. Mr. Berger told me the other day of a
44 case he had in the provincial court where a case was
45 being conducted before a Magistrate by a R.C.M.P.
46 prosecutor, and Mr. Berger made a preliminary
47 objection, and a long silence, and the learned

Proceedings

1 provincial court judge said "I think he's got us".

2 Mr. Macaulay is doing just as well.

3 MR. MACAULAY: There are one or two comments rather than
4 objections I have to make. In my copy of these five
5 volumes there are no original documents for tabs 40
6 and 46. We have only transcriptions, and I assume
7 that the rule that applies to our Loring documents
8 applies here as well. The transcriptions are not
9 evidence themselves. Perhaps if the plaintiffs could
10 provide the original documents in those cases, they
11 ought to. In the case of tabs 53, 54, 55 -- I'm
12 sorry, 65 and 103, there are a number of extra
13 documents that aren't described in the index. It
14 would be better if the index gave a proper description
15 of those documents. In the case of 53, for instance,
16 the index shows a document dated November 12th, 1874.
17 A December 12th, 1874 document was transcribed. I am
18 not objecting to the document, but drawing Your
19 Lordship's attention to the index. And that applies
20 to the other three tabs that I have mentioned, 54, 65
21 and 103. Those are my submissions on that, My Lord.

22 THE COURT: Thank you. Mr. Goldie, before I call on Mr. Rush,
23 you've said enough to lead me to be concerned that I
24 might not be able to do justice to your objections
25 without canvassing all the various antecedent
26 documents to which these are said to relate or to
27 reply. It seems to me that I would have to consider
28 the evidence that was led in your defence, including
29 the cross-examination in order to determine whether
30 any of these documents are truly documents that are
31 admissible in rebuttal, or alternatively whether they
32 are admissible under one or more of the various other
33 rulings which I have found myself required to make in
34 the course of these many days. I am prepared to do
35 that, if I must, but I am tempted, although it sounds
36 like a bit of escapism, to admit them subject to the
37 objection, and to deal with the matter when I am in a
38 better position to do so, or if they are not referred
39 to again, perhaps not to have to deal with them.

40 Can you suggest any serious prejudice by following
41 that perhaps cowardly course that I am tempted to --

42 MR. GOLDIE: No.

43 THE COURT: -- consider? Well, I don't think I need to hear
44 from you, then, Mr. Rush. I think I will admit the
45 documents subject to the objections that have been
46 made, and if it ever becomes necessary to deal with
47 these matters, I will ask counsel to identify for me

Proceedings

1 any of these documents if they are referred to during
2 argument, and I will deal with them at that time. I
3 just don't think I can do justice to this kind of an
4 objection with this much evidence that is piled up
5 ahead of it. That may be unnecessary. I will take
6 the cowardly course.

7 MR. GOLDIE: However Your Lordship characterizes the course, we
8 will endeavour to keep track of these interesting
9 documents. Basically it refers only to Dr. Greenwood,
10 and -- now, My Lord, that leaves only a couple of
11 minor items.

12 THE COURT: I'm sorry, before you do that, Mr. Goldie. Mr.
13 Rush, I have these volumes already marked with
14 numbers. I just did them for convenience yesterday.
15 They haven't actually been admitted in evidence yet?

16 MR. RUSH: I think the basis upon which they were tendered and
17 marked yesterday was subject to the argument we were
18 to have today, and I take it that given Your
19 Lordship's ruling that they now become exhibits in the
20 proceedings.

21 Before my friend moves to the next issue, however,
22 I think there is one or two points that I could
23 conveniently make. One deals particularly, My Lord,
24 with the proposal to add two documents of Mr.
25 Goldie's, and I think they should be dealt with,
26 because I do stand by my objection. This is not -- in
27 our submission the sequence of events was the filing
28 by my friend in his collection of documents of a
29 number of instructions given to the Indian Reserve
30 Commission, and I accept my friend's amendment on
31 that. And what we wanted to do was to add to the
32 instructions so that you had all the instructions that
33 were given to the Indian Reserve Commissioners, so
34 that you knew upon which basis they were acting.

35 Now, our view of it is that Your Lordship ought to
36 know what the Indian Reserve Commissioners were
37 supposed to do upon their instructions. I make the
38 point that in -- because in the particular O'Reilly
39 instructions there is something that my friend finds
40 new, I take issue with the fact that it's new. I say
41 that it's not new at all, that in fact it was the
42 subject matter of previous instructions, and that
43 therefore my friend is really attempting to add to
44 the -- to add to his filings. But I appreciate Your
45 Lordship's inability to really adjudicate on this
46 without referencing all the material. And in that
47 situation, My Lord, I will accept Mr. Goldie's

1 proposal that if we can identify the sentence that
2 worries him in those instructions, that I am happy to
3 have that sentence taken out, because frankly those
4 instructions in my submission are mirror orders on
5 earlier instructions, and I am not particularly
6 concerned about that feature of it. It's the fact of
7 the instructions. But I am concerned about further
8 documents being tendered, because I frankly would have
9 to reply to those documents. Those documents don't
10 stand in splendid isolation, and rather than getting
11 into another round of that, I would accept the
12 proposal here that that sentence, whatever that is, if
13 my friend can identify it to me, be taken out, and we
14 not get into another round of document exchanges.

15 And so that's my first point. That is with
16 reference to the instructions of O'Reilly found at tab
17 67.

18 So far as -- I guess I needn't speak to the other.
19 I agree there are some duplications, and I won't speak
20 to that issue.

21 THE COURT: You had a minimal amount of repetition in this case,
22 and a little more won't hurt.

23 MR. RUSH: I am driven to speak to one other final issue. The
24 Census -- and it isn't an issue, My Lord, but I
25 checked the previous discussion on the question, and
26 my friend advised us, Mr. Macaulay advised us in May
27 of 1987 that there was a 92 year rule that applied
28 before the disclosure of Census material, and I did a
29 quick calculation, and I realize that we have not gone
30 by the 92 years. I couldn't figure out how that
31 information was released. But there it is, and I am
32 happy to have it and tender it.

33 MR. MACAULAY: My friend's curious, I can tell him.

34 MR. RUSH: I would like to know.

35 MR. MACAULAY: My Lord, do I take it that Mr. Rush agrees that
36 it's the original and not his transcription of any
37 documents, the exhibit? That's in reference to the --
38 my submissions on tabs 48 to 46.

39 MR. RUSH: Yes. Definitely.

40 THE COURT: All right. Now, are you -- are counsel ad item on
41 the portions of the document that leads you, Mr.
42 Goldie, to put in two more documents?

43 MR. GOLDIE: I can identify them.

44 THE COURT: Are you agreeable to Mr. Rush's suggestion?

45 MR. GOLDIE: I am going to say that technically my friend is
46 entitled on the Counterclaim to put in any document he
47 wants, and it's my right to have the last say in reply

Proceedings

1 to what he puts in his cases, but I think if we get
2 embarked upon that we are going in a never diminishing
3 circle. If Your Lordship will look at tab 6.
4 THE COURT: Which volume is it in please?
5 MR. GOLDIE: This is volume 3.
6 THE COURT: Yes.
7 MR. GOLDIE: Down at the bottom the sentence that gave rise to
8 the subsequent correspondence within the government
9 between the Department of Fisheries and the Department
10 of Indian Affairs is -- begins three lines from the
11 bottom:
12
13 "Their fishing station should be very clearly
14 defined by you in your reports to the
15 department and distinctly explained to the
16 Indians interested therein so as to avoid
17 further future misunderstanding on this most
18 important point."
19
20 That was an instruction to O'Reilly, which was --
21 goes beyond anything that is in the documents
22 previously, and my friend agrees to have it taken out.
23 I am quite happy to do so.
24 THE COURT: All right. Let's take out that sentence.
25 MR. GOLDIE: My Lord, I have only to say that we will be
26 pleading to the amendment to Section 72(A) of the
27 Statement of Claim, and I don't have -- I don't have
28 the amended defence to it, but I will be pleading to
29 it, and I take it I am entitled to do that, My Lord.
30 THE COURT: Oh, yes, I am sure you are, as is Mr. Macaulay.
31 Now, Mr. Macaulay isn't replying to the Statement of
32 Claim. Have you filed a Defence to the Statement of
33 Claim, or just to the Counterclaim?
34 MR. MACAULAY: I filed a Defence to the Statement of Claim.
35 THE COURT: Well, then, you are entitled. I should think if you
36 have done that, you are entitled -- you are entitled
37 do that.
38 MR. MACAULAY: I don't.
39 MR. GOLDIE: I would have filed it today, but I haven't been
40 able to complete it. My Lord, I am advised that Mr.
41 Plant said yesterday that we would tender the
42 satellite base map as Exhibit 1247-A, and a letter as
43 Exhibit 1247-A1. And there is the satellite base map
44 as 1247, and here are two copies of the letter of
45 January the 4th, 1990 addressed to my friend with a
46 copy to Ms. Koenigsberg. That will be 1247-A1.
47 THE REGISTRAR: Exhibit 1247-A and 1247-A1.

Proceedings

1 THE COURT: Yes.

2

3 (EXHIBIT 1247-A - SATELLITE BASE MAP)

4 (EXHIBIT 1247-A1 - LETTER DATED JANUARY 4,
5 1990)

6

7 MR. GOLDIE: I think that completes my submission, My Lord.

8 THE COURT: Thank you. Mr. Rush?

9 MR. RUSH: I have no further reply evidence, and I have nothing
10 further to clean up by way of a housekeeping question.

11 THE COURT: All right. Thank you, Mr. Rush. I must say I am
12 almost speechless. I am not sure what to say, except
13 that it will be a pleasure -- I shall look forward to
14 hearing from you further in Smithers on April 2nd at
15 10:00 a.m., and wish you all -- there is one matter.
16 Can counsel remind me of the dates when submissions
17 are to be exchanged? Yours will be first, Mr. Rush,
18 and I can look forward to receiving it when?

19 MR. RUSH: I think it was the 9th of March, and I wasn't -- I am
20 not clear. I don't remember when the defendant
21 Province's submissions --

22 MR. GOLDIE: Ms. Sigurdson tells me the 23rd of March.

23 THE COURT: All right. I'll look forward to seeing you in
24 Smithers, and thank you all so much.

25 THE REGISTRAR: Order in court.

26

27 (PROCEEDINGS ADJOURNED AT 3:00 P.M.)

28

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

33

34

35

LORI OXLEY
OFFICIAL REPORTER
UNITED REPORTING SERVICE LTD.

36

37

38

39

40

41

42

43

44

45

46

47