

Proceedings 1 Vancouver, B.C.

2 December 19th, 1989

3
4 (PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)

5
6 THE REGISTRAR: In the Supreme Court of British Columbia, this
7 19th day of December, 1989. In the matter of
8 Delgamuukw versus Her Majesty the Queen at bar, my
9 lord.

10 MR. MACAULAY: My lord, the Attorney General of Canada is still
11 in the process of completing its case and it may be
12 appropriate that I deal with a number of matters,
13 exhibits, and so on.

14 THE COURT: Thank you.

15 MR. MACAULAY: I understand Mr. Rush will have an application to
16 make, and perhaps that could be made when I reach the
17 subject of wills.

18 Exhibit 1231, my lord, is the book of exhibits
19 that were entered --

20 THE COURT: I'm sorry. What's the number?

21 MR. MACAULAY: Exhibit 1231.

22 THE COURT: Yes.

23 MR. MACAULAY: The exhibits that were entered at the time that
24 Mr. McIntyre, Mr. Ray McIntyre, was examined and
25 cross-examined and we have a new index for the
26 documents and it simply conforms in the way in which
27 the tabs were marked. Your lordship may recall
28 that -- that one or two of the original tabs were not
29 marked. And could I hand up an index.

30 THE REGISTRAR: Thank you.

31 MR. MACAULAY: We have provided our friends with copies of this
32 new index. That's simply by way of a housekeeping
33 matter really.

34 THE COURT: Thank you.

35 MR. MACAULAY: The next item of business concerns the historical
36 documents. Your lordship may recall that at tabs 20,
37 21, 22, 23, 25 and 26 were --

38 THE COURT: Of which exhibit? Which exhibit?

39 MR. MACAULAY: It was exhibit -- I'm sorry, my lord, I should
40 have that.

41 THE REGISTRAR: 1239C. 1239C.

42 THE COURT: Thank you.

43 MR. MACAULAY: Well, there's A, B and C actually, isn't there?

44 THE REGISTRAR: That's right.

45 MR. MACAULAY: Three volumes of them. And in volume 1 tabs 20,
46 21, 22, 23, 25 and 26 were objected to because in our
47 index we have not disclosed the source. Now we have

Proceedings 1 disclosed the source, and my friends
have received

2 copies of the new index. That was couriered to my
3 friends on December 14th. Not only were those
4 particular documents identified, that is their source
5 identified, in most cases it was the Hudson Bay
6 Company archives or GR1069, but there was a
7 misdescription of tab 27. We have corrected that too.
8 It's GR1069, Inventory 1, File 201 is the proper
9 description. If I could hand up a new page three.
10 It's 1239A. Actually the index is 1239A, volume 1,
11 not 1239C. I'm handing two copies up, one for your
12 lordship's copy and one for the exhibit itself.

13 THE COURT: Thank you.

14 THE REGISTRAR: This is at tab 7 or 27 you said?

15 MR. MACAULAY: No. It's the index. I referred to tabs 20, 21,
16 22, 23, 25, 26 and 27. Those are the changes because
17 of the index which appears at the front of volume 1
18 which is 1239A.

19 THE COURT: Thank you. I don't remember is volume 1 the same as
20 1239A?

21 MR. MACAULAY: Yes, my lord.

22 THE COURT: All right. Thank you.

23 MR. RUSH: I took the position on this, my lord, that those
24 particular tab references did not indicate a source in
25 the index and therefore we couldn't determine what the
26 depository was.

27 THE COURT: Yes. All right.

28 MR. RUSH: During the course of the argument we were told these
29 came from the Vancouver Public Library.

30 THE COURT: Oh, yes.

31 MR. RUSH: I said in that case I probably wouldn't make any
32 objection to it. We now find they're from the Hudson
33 Bay Company archives. My position is still the same.

34 MR. MACAULAY: In the case of tab 21 there is no document. Now
35 we discovered tab 21 is the same as tab 20. There's a
36 blank there and that is reflected on this new index.
37 And the various archives are now identified.

38 THE COURT: All right.

39 MR. MACAULAY: And I'm grateful to my friend Mr. Rush for
40 pointing that out. We should have done this before.
41 I would like to hand up also, and this is being
42 provided for the counsel for the other parties, a
43 transcription of tab 134 of 1239. Now, that sounds
44 like 1239C if it's -- the tab number's that high.
45 It's either B or C.

46 THE COURT: All right.

47 MR. MACAULAY: It's a transcription of a report by Father Morice

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Submission by Mr. Rush

1 to his superiors. Of course it's just the
2 transcription. The original is in French.
3 MR. RUSH: It's a translation.
4 MR. MACAULAY: Yes, it's a translation. That's right, it's a
5 translation. If that could be handed up. And my
6 friends have a copy of that translation.
7 THE REGISTRAR: Do you have two.
8 MR. MACAULAY: No. We only have one here today. We'll get
9 another one for the registrar. I should draw your
10 lordship's attention also to the fact that a member of
11 our research staff amended the index, this index to
12 1239, by adding in handwriting the word transcript in
13 the case where the document was transcribed. And my
14 friends were advised of that on -- and a copy of the
15 amendment on December 6th. I hope that takes care of
16 Exhibit 1239.
17 We should tender also the Federal position as
18 requested by your lordship at the last sitting. It's
19 entitled "Fundamental Difference Between the Attorney
20 General of Canada's Position and that of the
21 Province's". And it deals with -- it's a further
22 clarification of the document that is setting out the
23 Federal government's position on extinguishment.
24 THE COURT: Was the other document -- yes -- that --
25 MR. MACAULAY: 1248.
26 THE COURT: Yes.
27 MR. MACAULAY: Is the original statement and this is --
28 THE COURT: Yes. Right.
29 MR. MACAULAY: And this is a further clarification regarding
30 blanket extinguishment. And the document speaks for
31 itself. I hand up two copies of it. Yes. Ms.
32 Koenigsberg points out to me that there's already a
33 1248A. Perhaps this could just be added as page four
34 of 1248.
35 THE COURT: All right.
36 THE REGISTRAR: Thank you.
37 MR. RUSH: Well, before we move on, my lord --
38 THE COURT: Yes. I haven't seen it yet.
39 MR. RUSH: Yes. And I just saw it for the first time just now.
40 This is a document which is one page in length marked
41 page four at the top and two paragraphs. The first
42 cast of my eye over this would be that it is
43 inadequate in terms of the direction that your
44 lordship gave to the Federal defendants, but I take
45 the position that it ought only to be marked, if at
46 all, at this point subject to our submissions as to
47 its adequacy. Just on a brief perusal of this

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1 document it seems unlikely given what I remember your
2 lordship to have said that it can comply with the
3 directions that you gave. But that's as a cursory
4 examination of it. It seems like it can't really
5 qualify as an answer to the directions that your
6 lordship gave. But, as I say, I want to consider it
7 with a little more thought.

8 THE COURT: All right. Well, you're at liberty to do that and
9 we may be advised, Mr. Rush. It will be made page
10 four of Exhibit 1248 subject to what Mr. Rush has just
11 said. Will you staple it together, please, Madam
12 Registrar.

13 THE REGISTRAR: Yes.

14 THE COURT: Thank you.

15 MR. MACAULAY: Now, the next is the overlays to map -- for maps
16 9A and 9B. Copies were provided for the plaintiffs in
17 September of this year, and we suggest that these be
18 marked 1243H. It's one map -- I'm sorry, it's one
19 overlay, but it covers maps 9A and 9B.

20 THE COURT: You're suggesting what exhibit number?

21 MR. MACAULAY: 1243H. This was provided for the plaintiffs in
22 September.

23 THE COURT: So it will be -- I've already got --

24 MR. MACAULAY: That's the wrong series, my lord. It's the
25 other. I think your lordship's looking at the
26 plaintiffs' map there.

27 THE COURT: Yes.

28 MR. MACAULAY: This is what we have been calling the judge's
29 series.

30 THE COURT: Oh.

31 MR. MACAULAY: It's a different scale. It's to your lordship's
32 left on the floor there. It's that one.

33 THE COURT: Oh, all right. I didn't think those were 9A and B.

34 MR. MACAULAY: You haven't got 9A and B in that series yet.

35 THE COURT: I'm having a little trouble with this.

36 MR. PLANT: I'm going to take a stab at helping, if I might. On
37 the plaintiffs' series of overlays --

38 THE COURT: Yes.

39 MR. PLANT: -- There's a representation of the internal
40 boundaries of the house territories which within the
41 terms of that series are called map 9A and map 9B.

42 THE COURT: Yes.

43 MR. PLANT: Now, the plaintiffs' series is at a one to 70,000
44 scale. What my friend Mr. Macaulay has done is cause
45 to be prepared an enlargement of those overlays so
46 that it will be compatible with your map series or our
47 series of map overlays. And when Mr. Macaulay refers

Proceedings 1 to this overlay which he now wishes
to tender as map

2 9A and 9B that's a reference to the numbers which
3 appear on the plaintiffs' series of overlays. So
4 you'll now have an overlay that will allow you to see
5 the relationship between the other overlay in our
6 series and the final internal boundaries of the
7 plaintiffs' claim.

8 THE COURT: But --

9 MR. MACAULAY: I thought that's what I said or was saying.

10 THE COURT: But -- yes. I see. All right. The one that I have
11 here are traplines so this will be -- wait a minute.

12 MR. MACAULAY: They're earlier internal boundaries.

13 THE COURT: Yes. All right. All right. I'm with you now. All
14 right.

15 MR. MACAULAY: And these -- this is the last word. And there's
16 a little tag on the right-hand side of this overlay
17 and it simply reads map 9A and 9B. 9A was the
18 Gitksan, the northern area. 9B was the Wet'suwet'en.

19 THE COURT: Yes. You've got it on one?

20 MR. MACAULAY: And we've got it on one.

21 THE COURT: Yes.

22 MR. MACAULAY: They don't overlap. So we can put it on --

23 THE COURT: All right. Thank you.

24 MR. MACAULAY: On one.

25 MR. RUSH: A minor matter, but nevertheless one of interest to
26 me, Mr. Plant's explanation was, as I took it, this
27 overlay was an enlargement of the plaintiffs' 9A and
28 9B and --

29 THE COURT: I don't know if he meant enlargement or transferred
30 to a different scale.

31 MR. PLANT: I don't want to be trapped into whether it's an
32 enlargement or reduction. It's a transfer on to a
33 different scale.

34 MR. RUSH: I had understood that what my friends had done was to
35 take the maps, the one to 250,000 scale, and reduced
36 it to their scaled series.

37 MR. MACAULAY: That's correct, my lord.

38 THE COURT: Yes. All right.

39 MR. MACAULAY: We worked from the original, or our mapper did.

40 THE REGISTRAR: 1243H.

41

42 (EXHIBIT 1243H: Overlay - Judges Series Map 9A and
43 9B)

44

45 THE COURT: All right. Would it most convenient to put that on
46 Mr. Macaulay's famous map? Is that the best place to
47 keep it? All right. Thank you.

Proceedings 1 MR. MACAULAY: Next, my lord, has to do with
wills, the first

2 item concerning wills. The Exhibit number 1242 was
3 reserved for the will of Wallace Morgan now deceased.

4 THE COURT: 1242?

5 MR. MACAULAY: Yes. The will -- that will was the subject of an
6 affidavit by Judge Metzger, and it was handed up on
7 the last occasion, and I now apply to have that marked
8 as an exhibit. Your lordship will recall that Mr.
9 Grant when this matter first came up, this will, Mr.
10 Grant wanted to consider whether or not he wanted to
11 apply for an order for the cross-examination of Judge
12 Metzger.

13 THE COURT: Yes.

14 MR. MACAULAY: We haven't heard from Mr. Grant, and I assume he
15 decided not to do that.

16 MR. RUSH: Well, I was the one who handled that, and I remember
17 it wasn't an order for cross-examination of the
18 learned judge that we were interested in, but rather
19 reviewing what he had to say. We've done that and we
20 take no objection to that.

21 THE COURT: All right. It will now be marked as Exhibit 1242.

22 THE REGISTRAR: My lord, back before then 1237D was reserved.
23 It was a copy of the Wallace Morgan will and they
24 provided an executed copy now and I'm just going to
25 cross reference.

26 THE COURT: Well, 1237D was only a reserved number and you're
27 not seeking to have them both in, are you, Mr.
28 Macaulay?

29 MR. MACAULAY: Only the affidavit with the copy of the executed
30 will.

31 THE COURT: All right. Well, then 1242 will be the affidavit
32 and the copy of the will and 1237D will disappear from
33 our cognizance.

34

35 (EXHIBIT 1242: Affidavit of Robert W. Metzger with
36 executed copy of will of Wallace Morgan exhibited at
37 tab 35A, tab 82 and tab 116A)

38

39 MR. MACAULAY: There were two wills that were marked as exhibits
40 during the trial that we would ask for the sake of
41 convenience be included in the collection of wills.
42 The one is -- the first is the will of Richard Fowler
43 whose chief's name is A-U-Q-E-S. It was marked as
44 Exhibit 446-5 at trial.

45 THE COURT: What number?

46 MR. MACAULAY: 446-5.

47 THE COURT: Yes.

Proceedings 1 MR. MACAULAY: And what we're asking is for
leave to put that in
2 with the rest of the collection just for sake of
3 reference. Not that it be assigned a new number, but
4 it be put in the wills collection, or three books of
5 wills as tab 35A. We have listed the wills in
6 alphabetical order and Mr. Fowler's name comes in
7 effect 36th, but we have a 36th. If we could have
8 that marked as 35A. I have copies for your lordship
9 and my friends to insert in their corresponding book
10 35A with the tabs.
11 THE COURT: Any objections, Mr. Rush?
12 MR. RUSH: No.
13 THE COURT: Thank you. All right. That will be inserted there.
14 MR. MACAULAY: The next one is a similar matter. Somewhat
15 similar. This is the Wallace Morgan will and the
16 covering affidavit. If that could be put in as tab 82
17 which will fit in with the, as I say, the alphabetical
18 order. And I have --
19 THE COURT: As tab 82 of Exhibit 1235?
20 MR. MACAULAY: Yes. The collection of wills.
21 THE REGISTRAR: 1237 there's three volumes.
22 MR. MACAULAY: Yes.
23 THE REGISTRAR: Do you know which volume that 82 would be in?
24 Would it be volume C?
25 MR. MACAULAY: It's in the second volume.
26 THE COURT: All right.
27 THE REGISTRAR: The second volume the tabs start at 117.
28 THE COURT: It doesn't go up to tab 82. There's a glitch here
29 somewhere.
30 MR. MACAULAY: There's an unmarked copy of the will at tab 82,
31 an unexecuted copy of the will.
32 THE COURT: We can't find tab 82.
33 THE REGISTRAR: There's a tab 82 in volume C. Oh, three of
34 three?
35 MR. MACAULAY: No. Volume 2.
36 THE REGISTRAR: Volume 2 starts at 117. They have put the wrong
37 numbers in, that's all.
38 THE COURT: Oh, I see. Ours goes A, B, C.
39 MR. MACAULAY: Could we have that changed --
40 THE COURT: Oh, yes. I think so.
41 MR. MACAULAY: -- If that's the case from A, B, C to one, two,
42 three.
43 THE REGISTRAR: B starts at 61 of the exhibit, so behind tab 82.
44 THE COURT: Yes. This one starts at 61 as well, but we have it
45 marked as C. Volume 3. We just got it transposed
46 two, three or B and C. All right.
47 MR. MACAULAY: Here is our two copies. It's what now will be

Proceedings 1 tab 82 is Judge Metzger's affidavit
and the executed

- 2 will. We hadn't included it in the series, but we
3 left a space for it. We knew it was around. And
4 that's the other copy.
- 5 THE REGISTRAR: Thank you.
- 6 MR. MACAULAY: Another one, my lord, is the will -- the
7 holographed will of Daniel Skowill. It was marked at
8 trial as Exhibit 72B-3-5. 72B-3-5. It was an exhibit
9 to the cross-examination of David Gunanoot who gave
10 commission evidence. Mr. Gunanoot, as your lordship
11 will see, was the witness to the testator's execution
12 of the will. What we have there now, and I don't say
13 that it should be removed, what we had in our file,
14 our Hazelton district file, was a true copy of the
15 kind that used to be made in those days. That is a
16 typist would type out a typewritten version of the
17 will and a typewritten signature and would put (copy)
18 on it and the original would go to Ottawa. And that's
19 how they would have a record back at the base -- back
20 at Hazelton of the will that was sent on. Well, I
21 discovered that a photocopy of the original had been
22 put to Mr. Gunanoot and he had identified that will
23 and so I suggest this be added as tab 116A so that we
24 have both.
- 25 THE COURT: Well, I'm sorry, 116A of what, of 72B?
- 26 MR. MACAULAY: It's already marked 72B. What I'm trying to do
27 is include it in the wills collection. It's now
28 72B-3-5. It is an exhibit that is on record.
- 29 THE COURT: So you want to make it tab 116A of --
- 30 MR. MACAULAY: 116A.
- 31 THE COURT: Of Exhibit 1237?
- 32 MR. MACAULAY: Yes, my lord.
- 33 THE COURT: Any objection to that, Mr. Rush?
- 34 MR. RUSH: Well, my recollection unfortunately is hazy on this,
35 but I thought David Gunanoot couldn't identify that
36 will, but I can't recall that with clarity.
- 37 THE COURT: Nor can I.
- 38 MS. KOENIGSBERG: Well, I was there, and we also have the
39 transcript here in the courtroom which I could
40 probably rustle up for Mr. Rush to remind him. I can
41 assure him he did identify.
- 42 MR. MACAULAY: I read the transcript myself. I wasn't there,
43 but I read the transcript or I wouldn't be making that
44 statement if it isn't marked.
- 45 THE COURT: It's already in, as you say, as part of Exhibit 72?
- 46 MR. MACAULAY: Yes.
- 47 THE COURT: That being so I think it can be added as tab 116A to

Proceedings 1 Exhibit 1237.

2 MR. MACAULAY: Now we come to another will, and this has just
3 come to my attention. It's the will of Agnes Sutton
4 of Cedarvale. Agnes Sutton is a hereditary chief --
5 was a hereditary chief. It's a will made on July
6 27th, 1981. We have learned that this will which is
7 not in the Indian Act system is the subject of
8 litigation in the courts in British Columbia, and I
9 understand that Mr. Grant is acting for one of the
10 parties to that litigation. And we are looking for
11 the appropriate court file so that we can prove it.
12 That way seems to be the easiest way of doing it. In
13 the meantime I ask that it be included, subject of
14 course to our filing it, and marked as an exhibit when
15 we find the file consuming the will. But it might be
16 convenient to have it put in the collection of wills
17 at tab 122A which would have put it in the proper
18 order, alphabetical order.

19 THE COURT: Mr. Rush.

20 MR. RUSH: I think if my friend is going to go to the steps of
21 trying to obtain the will in the file then we should
22 wait until he does that and it should be marked in the
23 ordinary course of affairs. I don't know anything
24 about it. I haven't seen it before.

25 MR. MACAULAY: That's right, Mr. Rush hasn't seen it before.
26 Mr. Grant certainly has, as I understand.

27 THE COURT: The number doesn't need to be reserved because it's
28 an addition to an existing series. And you have given
29 your friend notice and you're going to be dealing with
30 this matter again at sometime.

31 MR. MACAULAY: Yes.

32 THE COURT: So I don't think there's any advantage in marking it
33 now in any case. I'll be glad to hear from you again
34 when you're ready to deal with the matter in a total
35 sense.

36 MR. MACAULAY: Thank you, my lord. It may be the Prince Rupert
37 Registry. We know there's litigation about it.

38 That brings me to the subject of wills generally,
39 and I wish to tender the wills as exhibits. The
40 plaintiffs have cross-examined the custodial affiant
41 Miss Peters last week, and I submit that those --
42 those three volumes of wills ought to be marked as
43 exhibits. Some already are exhibits, but the
44 balance -- the three volumes ought to be marked as --

45 THE COURT: All right. As I have it on November 29th three
46 books of wills had numbers reserved for them 1237A, B
47 and C.

Proceedings 1 MR. MACAULAY: That's right, my lord.
2 THE COURT: You're now tendering them. Mr. Rush.
3 MR. RUSH: Yes. My lord, we have an application about generally
4 the question of the custodial care of these documents,
5 but I think that that is in addition to the marking of
6 the exhibits, so I think we've had our
7 cross-examination and we'll be speaking to you shortly
8 about that.
9 THE COURT: All right. They can be marked in the meantime or at
10 this time?
11 MR. RUSH: I see no problem.
12 THE COURT: All right. The reserved designation will be
13 removed.
14
15 (EXHIBIT 1237A: Affidavit of Peters and Wills
16 Collection - Vol.1)
17
18 (EXHIBIT 1237B: Wills Collection - Vol.2)
19
20 (EXHIBIT 1237C: Wills Collection - Vol.3)
21
22 MR. MACAULAY: I have one more thing, my lord. I told your
23 lordship last time at the last sitting, or perhaps it
24 was the sitting before that, that I was going to make
25 every effort to improve the transcriptions of the
26 Loring reports with other documents. I arranged for a
27 researcher to go to the archives to look at the
28 original documents and to make arrangements, if
29 necessary, for the photographing of the originals if
30 they were in better condition than these awful copies
31 that we've been dealing with, and I think all the
32 parties have been dealing with. Well, we discovered a
33 number of things; the first is that it may be
34 possible, and we are going to try this week if we can
35 get a photographer to get at it, a person with
36 sufficient skills to have another run at using the
37 reels that are distributed to all comers by the
38 archives. We have already done a trial with one
39 report and we believe that if we reduce the size to
40 five by seven from -- that's the present size, and we
41 use a better reel, that is a better quality reel which
42 is available from the archives -- we discovered it's
43 available. It can be made available. We expect to
44 receive such a reel today -- that we may be able to
45 vastly improve the quality of the original. That will
46 make it easy for us -- easier for all of us and will,
47 of course, make it not unnecessary to have

Proceedings 1 transcriptions, but it will make the
transcriptions

2 much more reliable or much easier to compare the
3 transcriptions with the original for all of us.
4 The researcher discovered also a number of other
5 documents in the archives. I'm talking only about
6 Loring archival documents now. The monthly reports --
7 more monthly reports for the early period, special
8 letters on various topics of historical or
9 anthropological interest, and other archival material
10 all in the same archival series that we hadn't
11 received before. When I say we hadn't received them
12 before they may be, and they probably are on the
13 reels, but in the initial process the people whose job
14 it was to look on the screen at these documents just
15 gave up in many, many cases, in other cases couldn't
16 make out the relevance or significance of them. And
17 for -- well, these people are gone. They were
18 employees, the people we employed as researchers
19 sometime ago. Some two, three years ago. At any rate
20 there are additions that I wish to make to the Loring
21 collection. They're all in that -- mostly in the 1889
22 to 1900 period. I'm going through some of them now,
23 the legible ones, discarding a lot of them as not
24 being relevant or particularly helpful, but I have
25 determined that there are some others that ought to be
26 before the court to complete the record. As I urge on
27 your lordship in argument that's a portrait of an age
28 when you take it altogether, and I do believe the
29 additions ought to be made. I hope to be in a
30 position -- very shortly to be in a position to
31 provide my friends with copies of the ones we seek to
32 have added to the existing collection. As I say, we
33 haven't got what I hope will be a legible,
34 decipherable reel yet. We live in hopes that it comes
35 in today and we'll get right at it. I know how I'm
36 going to be spending my run up to Christmas, looking
37 at those things on the machine. If I may I would like
38 to speak to that on the next convenient occasion. I'm
39 not asking your lordship to have a special sitting for
40 that purpose.

41 THE COURT: All right.

42 MR. MACAULAY: And that -- that's as far as I can go now. We'll
43 be tendering after my friends have looked at them
44 Terry Turnball's reports. Ms. Koenigsberg will be
45 able to speak to that. She dealt with the Turnball
46 reports. But I just mention it now as another of the
47 very few remaining items to be dealt with on our side.

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1 If your lordship pleases, I understand that Mr. Rush
2 has an application to make regarding a DIA officer
3 called Pat Simon.
4 THE COURT: Yes. All right. Do you wish to do that now, Mr.
5 Rush?
6 MR. RUSH: I'm happy to. I just would like it if my friends
7 would exhaust all the things they have to do and I can
8 get up and do what I have to do.
9 MR. MACAULAY: That's it for now.
10 THE COURT: Ms. Koenigsberg's not able to deal with that other
11 matter you mentioned?
12 MS. KOENIGSBERG: No. I just enlightened my friends we had
13 undertaken at Mr. Grant's request to edit the Terry
14 Turnball fishing reports because they contained a lot
15 of extraneous material. We just sent those to him. I
16 don't think I should tender those until Mr. Grant has
17 an opportunity to look at them.
18 THE COURT: That's all you have to deal with?
19 MR. MACAULAY: Yes, my lord.
20 THE COURT: Do you want to exhaust Mr. Plant?
21 MR. RUSH: No.
22 MR. MACAULAY: Just one other thing. I have a new index to the
23 wills collection.
24 THE COURT: All right. To Exhibit 1237?
25 MR. MACAULAY: Yes, my lord.
26 THE COURT: Yes. All right.
27 MR. MACAULAY: We've added the odd one. And two copies. And
28 the index I believe includes the Agnes Sutton will.
29 That's not yet marked so we'll be glad to strike that
30 out if we are not able to prove that will.
31 THE COURT: All right. All right.
32 MR. MACAULAY: I'm sorry to interrupt my friend.
33 THE COURT: No. Thank you. Mr. Rush.
34 MR. RUSH: Yes. My lord, I have a number of questions that I
35 wanted to revisit. The first was with regard to the
36 exhibiting of the treaty volumes and the treatises.
37 Your lordship may recall that you exhibited for
38 identification a set of three volumes of treatises,
39 and these were Exhibits 1244, 45 and 46, being volumes
40 one, two and three.
41 THE COURT: Just reserved at the moment.
42 MR. RUSH: No. These were exhibits for identification. There
43 was an argument on this, my lord.
44 THE COURT: Yes. All right.
45 MR. RUSH: And the upshot of the argument was, if I can
46 summarize it, that you requested that I categorize
47 these documents around particular subject areas. And

Submission by Mr. Rush 1 evidence, and I am
disposed to mark them all

2 now for identification, giving them a number
3 for that purpose, and to ask counsel to let me
4 know which ones they think fit into the
5 categories I mentioned or any other categories
6 that they might develop on their own, and I
7 will have to deal with them when -- I will have
8 to deal with the residue when the time comes."
9

10 And the categories that you mentioned are on the
11 earlier page of 23,243. And the categories were there
12 described by yourself in these words:
13

14 "I can think of collections of documents which
15 actually or potentially -- or might is a better
16 word -- explain the historical background for
17 the Royal Proclamation, both in Britain's North
18 American possessions in what is now Canada and
19 in what is now the United States.
20

21 I can categorize further, documents that might
22 record treaties made in obedience to or in view
23 of the Royal Proclamation, leaving it open for
24 later determination regarding the actual breach
25 of the Proclamation.
26

27 I can categorize" --
28

29 THE COURT: I'm sorry. Mr. Rush, I think that was reach on the
30 Proclamation.

31 MR. RUSH: Yes. That would make sense to me.

32 THE COURT: Yes.

33 MR. RUSH: Strike the B there.
34

35 "I can categorize further and say that the
36 documents connected with matters already in
37 evidence would be proper subject of
38 supplementing the collection."
39

40 Your lordship then went on to comment about some
41 of the documents in the collection. And what I'm
42 coming back to do today, my lord, is to simply place
43 those documents in those categories and deal with
44 these documents now, because I'd like them to be -- to
45 be marked as exhibits in the proceedings. And,
46 firstly, I want to say that the documents which are
47 contained in volume 1, which is 1244, documents 1 to

Submission by Mr. Rush 1 70, and contained in
volume 2, which is 1245, again in
2 the treaties series, tabs 1 to 16, that these
3 documents are documents which form part of the
4 historical background to the Royal Proclamation and
5 these treaties demonstrate the underlying principles
6 reflected in the Proclamation. And we say that
7 these -- these treaties form part of that collection,
8 as I argued with you earlier.
9 THE COURT: These documents are all themselves actual treaties?
10 MR. RUSH: Or descriptions of congresses at which treaties were
11 resolved -- evolved.
12 THE COURT: Negotiated and/or concluded, I suppose.
13 MR. RUSH: Yes, that's correct. And the title of the reflection
14 lists treaties, conferences, councils and deeds.
15 Now, my lord, I simply want to say that the
16 collection is supplemental to documents Exhibits
17 1026-1 through to 1026-8 of the Morrison collection.
18 MR. PLANT: 1026-1 to 8?
19 MR. RUSH: 1026-1 to 8 of the Morrison collection. And they are
20 documents of a similar kind. In fact indeed some of
21 them are duplicates in the collection that we've
22 handed up to you, and we've put them in a
23 chronological order.
24 MR. RUSH: Now, the tab references that I've given to your
25 lordship are all tab references in anticipation that
26 we'll argue or in as a prelude to the Proclamation of
27 1763.
28 THE COURT: Are they all dated prior to 1763?
29 MR. RUSH: That's right. Then there's a second grouping of
30 documents, if I can put it that way, which are
31 treaties in the post Proclamation period. And these
32 are found at volume 1, tab 71 to 74. And volume 1, as
33 I said, is Exhibit 1244, and volume 2 which is 1245,
34 tab 17, and thirdly, volume 3 which is Exhibit 1246A
35 at tab 1.
36 Now, tab 1, my lord, is in effect a collection by
37 a privy councillor in 1880 of all of the treaties
38 negotiated by Canada up to that time. And it goes up
39 to the numbered treaty treaty number seven. Now, the
40 category that these fall into in that historical
41 period following the Proclamation we say is the
42 continuation of the development of those underlying
43 principles and the giving effect of the forward or
44 prospective application of the principles enunciated
45 in the Proclamation.
46 Now, Jim Morrison -- Mr. Morrison tendered a
47 number of the post Proclamation treaties the most

Submission by Mr. Rush 1 notable of which is the
Fort Stanwix, S-T-A-N-W-I-X,

2 treaty.

3 THE COURT: I'm sorry. S-T-A-N-W-I-X?

4 MR. RUSH: Yes. And that's again reproduced in this volume. I
5 should point out that I believe Dr. Lane also made
6 reference to that in the collection that she filed as
7 1205. You will recall that was part of the response
8 by one of the questions posed to her by Mr. Goldie.
9 Also, there were treaties -- the Douglas treaties
10 evidenced by Dr. Lane in her evidence which you will
11 recall were in the late 1840s and early 1850s. She --
12 Dr. Lane also exhibited treaty eight and its adhesions
13 as one of the exhibits to her material, and that's
14 Exhibit 1040-96. So that the grouping here of post
15 Proclamation treaties is to supplement those documents
16 found in the evidence of Mr. Morrison and Dr. Lane
17 around the collection category, if you will, of the
18 continuation and the giving effect -- continuation of
19 the underlying principles which we say are evident in
20 the treaties, and secondly, the giving effect to the
21 forward prospective reach of the Proclamation. I
22 should just point out to your lordship that the early
23 Iroquois treaties were also referred to by Dr. Daly.
24 And they were also referred to by Dr. -- or by Mr.
25 Morrison. And the exhibit references there are
26 Exhibit 886-2 for Daly and for Mr. Morrison Exhibit
27 1026-2. And I've already referred to that.

28 Now, my lord, that deals with the documents up to
29 the documents contained in volume 3 which is Exhibit
30 1246A. And I want to deal with those now. These are
31 tabs --

32 THE COURT: That covers volumes 1 and 2, does it?

33 MR. RUSH: And the first tab of volume 3.

34 THE COURT: Yes. And tab 1 of volume 3.

35 MR. RUSH: Yes. We are now to tabs 2, 3 and 4. And this is
36 where we're tendering the comprehensive land claims
37 agreement in principle between the Yukon Indians and
38 the Government of Yukon. That's tab 2. Tab 3 is the
39 agreement in principle between the Dene Nation and
40 Metis Association of Northwest Territories. And tab 4
41 is the Framework Agreement between the Nishga Tribal
42 Council and Canada dated December 1988.

43 Now, the category that we tender these under, my
44 lord, is this; that these agreements in principle
45 demonstrate what we say to be the current application
46 of the Federal policy which in turn previously was the
47 imperial policy of the principles underlying the

Submission by Mr. Rush 1 Proclamation. And our
collection here is attempting

2 to fill out prospectively the treaty agreements which
3 have been entered into in the post Confederation
4 period between the Federal government and various
5 treated Indian peoples as an expression of the
6 principles of the Proclamation, principles which we
7 say really emerge from Mr. Morrison's document
8 collection, which is that the Proclamation was
9 intended to have and did have a prospective intent and
10 a prospective reach, and that prospective reach
11 reaches to the present day. And these agreements are
12 demonstrative of those principles as reflected in the
13 Proclamation.

14 Now, we say in addition that subject to a number
15 of potential arguments that these framework agreements
16 also reflect more or less a spectrum of types of
17 rights which those principles were intended to deal
18 with, and were dealt with in the manner that those
19 particular agreements in principle reflect. So we say
20 that they are tenderable for that purpose. And I
21 should say, my lord, that we haven't tendered but
22 intend to tender the remaining numbered treaties.
23 That is to say nine, ten and 11. We just haven't
24 collected them yet, but we think that all of these
25 treaties demonstrate that continuity of the
26 prospective reach of the application of those
27 principles and the common law into the present, and
28 that that is relevant for your determination of the
29 effect of the Proclamation.

30 Now, I want to -- I want to turn now to volumes 4
31 and 5 in the sequence. And this is Exhibit 1246B and
32 C. And your lordship can have -- make a handy
33 reference, if you will, to the 15 items that are
34 tabulated --

35 THE COURT: Just a moment.

36 MR. RUSH: -- In the index to this -- these treatises.

37 THE COURT: Volume 4. Yes. Thank you.

38 MR. RUSH: Now, if you look at the treatises here, my lord.
39 Now, these treatises are compatible treatises with the
40 treaties which I have just tendered. They are
41 intended to be part and parcel as treatises of the
42 document collection which is reflected in Exhibits
43 1244 through 1246A. However, the categorization
44 breaks down somewhat. And I'll do that for you now.
45 Tabs 1 to 4 are part of the historical context
46 pertaining to the underlying principles that found
47 expression in the Royal Proclamation. And, as I say,

Submission by Mr. Rush 1 these are treatises or
learned discussion by these

2 various authors with respect to that period.

3 THE COURT: But written much later.

4 MR. RUSH: Oh, yes. Written at various times, my lord. And
5 you'll see the dates that are appended to those. Then
6 tabs 5 through 11.

7 MR. PLANT: Sorry. Could I just interrupt. When was tab 1
8 actually written? As you say, not the edition which
9 my friend recited, but Franciscus De Victoria's actual
10 text, when was that composed?

11 MR. RUSH: It should be there. The accumulation or compilation
12 of that text is much later at -- it's indicated in
13 1917, but the document itself, and if it's unclear,
14 and I see that it is as I flip through, I know to have
15 been written either in the seventeen or eighteenth
16 century. I believe it's a document that is a
17 sixteenth -- excuse me, a seventeenth or eighteenth
18 century document by De Victoria.

19 THE COURT: Written in some other language originally?

20 MR. RUSH: I believe it's written in Spanish.

21 THE COURT: Yes.

22 MR. RUSH: Or possibly Latin.

23 THE COURT: Well, you hope so.

24 MR. RUSH: Now, my lord, really the other documents in this
25 collection, tabs 5 through 11, deal in the -- deal as
26 treatises with the immediate or pre Proclamation
27 history and the post Proclamation history of the
28 principles and the expression and development of those
29 principles embodied in the Royal Proclamation. As a
30 sub category, if I can say that, tabs 12 through to 15
31 deal with the prospective application and
32 interpretation of the Royal Proclamation in the post
33 Proclamation period. I should point out to your
34 lordship that the Trigger volume, which is tab 14, has
35 been variously referred to. It's exhibit -- portions
36 of it were exhibited in Daly's evidence Exhibit 888
37 and in Dr. Lane's evidence at Exhibit 1037. So I am
38 tendering these treatises as really parallel --
39 learned commentaries by learned authors about the
40 native peoples and their -- the governments,
41 discovering governments of those periods as a parallel
42 collection to the treaties which I have -- I have
43 tendered.

44 Now, as I said, my lord, volumes 4 and 5 have not
45 previously been tendered. I'm tendering them now as
46 exhibits and I wish to have all of these documents
47 marked as exhibits in the proceedings.

Submission by Mr. Plant 1 THE COURT: So this index in volume
4 covers volume 5 as well,

2 does it?

3 MR. RUSH: Yes, it does.

4 THE COURT: All right. Thank you. Mr. Plant.

5 MR. PLANT: Yes, my lord. I have heard for the first time just
6 now Mr. Rush's categorization of the treaties and
7 treatises under the various headings that he's given.
8 I would like a bit of an opportunity to think about
9 his categorization of the so-called treaties
10 collection which would be the first three volumes, but
11 I am happy to speak to the admissibility of volumes 4
12 and 5 in the treatises.

13 I object to all of these documents, any of them,
14 being marked as exhibits, but at the same time while
15 this takes the form of an objection it also is a
16 request, if I can put it that way, for clarification
17 of the way in which this material might properly be
18 put before the court. And there are, I say, a number
19 of reasons why this material or most of it ought not
20 to become evidence. But there are different types of
21 material here I don't accept my friend's breakdown of
22 the purpose for which they are -- might be used. And
23 I say that there are some different considerations
24 applicable to the different types of documents. I
25 think that your lordship needs to have one or two
26 facts to put my friend's submission in context, and
27 perhaps I could do that most conveniently by asking
28 your lordship to look at the index to the treatises
29 volumes 4 and 5.

30 THE COURT: Yes, I have it.

31 MR. PLANT: We've done a computer search of volumes 76 to -- we
32 left out the first 75 volumes because that's all lay
33 evidence and there is no reference in any of the
34 evidence before your lordship to the following items
35 from this index; 1, 2, 3, 4, 6, 7, 9, 11, 12, 13 and
36 15. So from the point of view of the oral evidence
37 given we start from the position that 11 of these 15
38 treatises are new. This is the first time that they
39 have come to your lordship's attention.

40 Now, I earlier corresponded with my friend Mr.
41 Rush to ask for some assistance in identifying where
42 we might find references to these 15 treatises and he
43 has suggested that we also look at the documents filed
44 by Dr. Lane, by Mr. Morrison and at the footnotes of
45 Mr. Greenwood. That required a manual search and I
46 can tell you that none of the 15 treatises are
47 mentioned in any of Dr. Greenwood's footnotes. None

Submission by Mr. Plant 1 of the 11 that I just identified appear in the indexes

2 to any of the documents filed by Dr. Lane or Mr.
3 Morrison. So taking my friend's suggestion of where I
4 could find this material I find there is no reference
5 to 11 of these treatises in any of the material before
6 the court up until now. That I say is the factual
7 context in which my submission takes place. But I
8 hasten to observe I'm not taking issue with notice.
9 I'm not taking a position here where I say I'm
10 surprised or that this is the first time. My concern
11 is to figure out how, given what I've just said, how
12 can he possibly get this material before the court.
13 And if the answer is X, Y and Z then I will know I can
14 go back to my office and I can look at my library and,
15 right, if those are the terms of admissibility if this
16 material is to become evidence in the proceedings in
17 this way then what have I left out for whatever reason
18 that I now wish that I ought -- I ought to file.

19 Now, I now am going to regrettably have to take
20 your lordship to just a few of the treatises in this
21 collection to give your lordship some indication of
22 why I disagree with my friend's attempt to describe
23 the essence of the material. And I'm going to
24 start -- I'm only going to refer in detail to one or
25 two, but I am going to make a brief reference to the
26 majority of them.

27 The first document tab 1, this appears under
28 heading of "Classics of International Law". If your
29 lordship will turn to tab 1. That's exactly what it
30 is. It's a text on international law. It's an
31 extract from a legal treatise on international law,
32 and I will have something to say later about the
33 special nature of the international law problem in
34 this case.

35 Tabs 2, 3 and 4 are very brief extracts from
36 material that appears to relate to something described
37 on the title page of this tab 2 as a study of the
38 disputation between De Las Casas, that's D-E L-A-S
39 C-A-S-A-S and Sepulveda, S-E-P-U-L-V-E-D-A, in 1550 on
40 the intellectual and religious capacity of the
41 American Indians. That is a subject which I venture
42 to suggest is far removed from any of the issues
43 before this court. And as I've said those particular
44 tabs, those references have not appeared in any of the
45 evidence which your lordship has heard to date.

46 Now, tab 5, this is entitled "Children or
47 Brethren: Aboriginal Rights in Colonial Iroquoia".

Submission by Mr. Plant 1 It appears to be several
-- well, a couple of hundred
2 pages of PhD thesis of Dr. Hurley. Dr. Hurley is a
3 lawyer who practices in Montreal. This is his PhD
4 thesis. Not surprisingly it is in my submission
5 almost wholly legal argument. In fact, what it is is
6 a legal argument buttressed by historical references.
7 I am going to give your lordship some indication of
8 material here which supports that proposition.
9 Starting with the introduction.
10
11 "While the Constitution Act, 1982" --
12
13 I'm at the very beginning here of the text.
14
15 "entrenches aboriginal rights in Canada, it
16 does not define them. Instead, it provides for
17 a series of constitutional conferences to
18 consider the identification and definition of
19 the rights"
20
21 And so on.
22
23 "Such rights can only be ascertained by
24 reference to the case law.
25
26 This case law rests upon certain legal
27 premises"
28
29 And then the bottom of the large paragraph on that
30 page.
31
32 "This thesis aims to test these premises."
33
34 It's a legal argument. Page five, my lord. The
35 paragraph that starts four or five lines down.
36
37 "The only available criteria of statehood are
38 those supplied by the law of nations."
39
40 This is a long way removed I would submit from the
41 categorization that my friend said your lordship could
42 see this document for.
43 We then -- I just -- I really haven't read all of
44 the many hundreds of pages of this material, but on
45 page 30 there's a reference here to the Iroquois.
46
47 "If the Iroquois did not possess as elaborate

Submission by Mr. Plant 1 governmental
structures as those associated

2 with large-scale European states, it was
3 because they did not need them. It is those
4 elements that constitute the kernel of the
5 criterion of government."
6

7 Argument. Legal argument. Turn the page and your
8 lordship will see a reference to the Privy Council
9 decision In re Southern Rhodesia, and Dr. Hurley goes
10 on to talk about that case.

11 Jumping ahead to the page numbered 243 there is --
12 THE COURT: I take it this document isn't complete?

13 MR. PLANT: It's incomplete. According to my calculations it
14 contains the introduction, chapter one, and I think
15 it's chapter seven and chapter eight of the thesis so
16 it's not quite complete. Substantially incomplete,
17 but still a large chunk of material here.

18 On the page 243 -- does your lordship have that?

19 THE COURT: Yes.

20 MR. PLANT: Then the first paragraph that starts on that page:

21
22 "On 3 September 1700, Iroquois, French and
23 allied Indian delegates met in Montreal and
24 concluded the proposed peace treaty."
25

26 Then we carry on with some talk about the
27 circumstances. And at the bottom of that page:

28
29 "The treaty seems to consist, properly
30 speaking, of those parts which set forth the
31 points of agreement between the parties."
32

33 The construction I would submit of a legal
34 document, its purport, its effect, its interpretation
35 and its significance. I could carry on with page 304.
36 Bottom of page 304 there's talk about -- there's a
37 long discussion about what British recognition of
38 aboriginal sovereignty amounts to as a matter of law,
39 but I think those are sufficient references to make my
40 point.

41 If I could ask your lordship to turn to tab 6.

42 THE COURT: Is it convenient to take the adjournment before we
43 do that?

44 MR. PLANT: Yes.

45 THE COURT: All right. Thank you.

46 THE REGISTRAR: Order in court. Court stands adjourned for a
47 short recess.

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Submission by Mr. Plant

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(PROCEEDINGS ADJOURNED AND