December 11, 1989

(PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)

THE REGISTRAR: In the Supreme Court of British Columbia this 11th day of December, 1989, in the matter of Delgamuukw versus Her Majesty the Queen at bar, my lord.

MR. MACAULAY: My lord, I suppose our case is not yet quite closed.

THE COURT: No. I don't think anyone said those magic words yet.

MR. MACAULAY: And that being so, if I may have leave to hand up an affidavit of Judge Robert W. Metzger. Judge Metzger deposes that he was a witness to the will, the last will and testament of Wallace Barnabus Morgan. May I say -- that's the original and there is a copy. May I say that we have the will itself, the original will in court. Judge Metzger has identified, has been shown the will as the affidavit shows and he attaches a copy of it to his affidavit. I suggest the original not be marked. We intend to recommend to the government official who has received it that it be returned to the executor.

THE COURT: All right.

MR. MACAULAY: Could that be marked as the next exhibit, my lord?

MR. RUSH: Well, I don't think so. Not yet, my lord.

THE COURT: All right.

MR. RUSH: My practise has been that we would, I think, have a number reserved and then subject to any cross-examination that we might want to undertake. This came into our hands, I think, Thursday or Friday of last week and I don't think we have a position with regard to this affidavit and the deponent. On the face of it, it looks rather innocuous. I would like just to -- my principal concern is to determine what other documents are around this document. These things don't stand in splendid isolation.

MR. MACAULAY: This one does. The will came floating in. I think I made that clear last week. It hasn't got a file.

MR. RUSH: Well, it's always interesting for the plaintiffs to determine how these things float around, my lord. What we'd like to do is simply have it reserved. We will take a position on it and then advise my friends.

1 MR. MACAULAY: It came in from a plaintiff, I believe.
2 THE COURT: Yes, all right.
3 MR. MACAULAY: We can't make those inquiries because they are
4 plaintiffs.
5 THE COURT: The next number I believe is 1242. It will be given
6 that number tentatively and if I don't hear further
7 from you, Mr. Rush, or from someone on your side of
8 the table, it will become an exhibit. I hope, though,
9 that you can let us know one way or the other so that
10 all uncertainty can be removed.
11 MR. RUSH: Yes. Thank you.
12 THE COURT: Thank you.
13 MR. MACAULAY: On the subject of wills, we had expected that
14 Miss Peters, the custodial affiant who we have offered
15 for cross-examination, would be examined last week.
16 But that wasn't to be and she will now be
17 cross-examined, as I understand it, on Friday, the
18 15th of December. We have -- Mr. Grant says he wants
19 to see the estate files, all of the estate files
20 referred to in Mrs. Peters' affidavit and they will be
21 available for him on December 13 and 14 at the Justice
22 Research Centre and he can take whatever copies of
23 whatever documents that he wishes at that time. We
24 have made a member of the clerical staff available to
25 him. That brings us to the question of marking the
26 three volumes of wills. They are still sitting on the
27 edge of the table here. First, could I ask if your
28 lordship is available during the week of December 18?
29 THE COURT: Yes. I think so.
30 MR. MACAULAY: If that's the case, if we can be reasonably sure
31 that your lordship will be available, then after the
32 cross-examination on December 15, which is a Friday,
33 and this is a date chosen by the plaintiffs, not by
34 ourselves.
35 THE COURT: That's the 15th?
36 MR. MACAULAY: 15, yes.
37 THE COURT: Yes.
38 MR. MACAULAY: In fact all of those three days, the 13th, 14th
39 and 15th, the two days for examination of the
40 documents, and 15th for cross-examination, I suggest
41 that whatever submission the plaintiffs have regarding
42 the wills be made during the week of the 18th so that
43 we can finally end the matter.
44 THE COURT: What do you say about that, Mr. Rush?
45 MR. RUSH: I have this to say, my lord. That's a good
46 suggestion. I don't have any problem with it. The
47 only counter suggestion I might make is that the

1 cross-examination is to take place on the 15th. I
2 don't know that the whole of the day of the 15th is
3 going to be dedicated to that cross-examination and if
4 it isn't we might be able to deal with it on that day
5 at the end of the day.
6 THE COURT: What day of the week is it?
7 MR. MACAULAY: That's a Friday.
8 THE COURT: I'd rather not -- you think you are convening in the
9 afternoon, Mr. Rush?
10 MR. RUSH: Something in that order.
11 THE COURT: Well, if it's more convenient to your side and not
12 inconvenient to anyone else, I'll see about that sort
13 of thing. I expect to be here and I have to be
14 somewhere every second of my life. Might as well be
15 here as there.
16 MR. MACAULAY: Well, can we -- can we set a time? Is your
17 lordship sitting --
18 THE COURT: No, the court won't be sitting and I don't have
19 jurisdiction anywhere except the Court of Appeal, so I
20 will be available.
21 MR. MACAULAY: How shall we arrange that?
22 THE COURT: Oh, just speak with --
23 THE REGISTRAR: Miss Gosney.
24 THE COURT: Yes. We better go through the Supreme Court trial
25 coordinator, I think.
26 MR. MACAULAY: Yes. Thank you, my lord. The next matter, as I
27 understand it, is no longer a bone of contention
28 between the plaintiffs and ourselves. It's the
29 overlays to the base map, the map that's been standing
30 over in the corner for all this time.
31 THE COURT: Yes.
32 MR. MACAULAY: I'd like to hand up the overlays and have the
33 base map marked. The overlays I'm handing up are the
34 overlays showing the railways -- railway. Is only one
35 railway shown there. The B.C. Railway is not shown.
36 And then the maps showing the Federal presence other
37 than reserves, those are 29A and B now. The tag says
38 64A and B, but those -- that numbering was long since
39 abandoned. These are overlays of 29A and B showing
40 the small -- modest holdings of the --
41 THE COURT: A is railroads, is it?
42 MR. MACAULAY: Now, the railway map is numbered.
43 THE REGISTRAR: 31A and B, I think. Those big maps? 31A.
44 MS. KOENIGSBERG: There is just one railway map.
45 MR. MACAULAY: There is one railway map.
46 THE REGISTRAR: Five.
47 MR. PLANT: Well, my lord. Exhibit 1223 --

1 THE COURT: Yes.
2 MR. PLANT: -- is the railway's map and within the alienations
3 mapping series the Provincial numbering, that was
4 originally map five.
5 THE COURT: Yes. Well, we have this noted as being map five
6 C.N.R. and Grand Trunk Pacific Railway. Does it
7 include the B.C. Rail as well?
8 MR. MACAULAY: Not the overlay doesn't.
9 MR. PLANT: Well, I think it does.
10 THE COURT: It does.
11 MR. MACAULAY: Oh, does it?
12 THE COURT: Yes. I can tell just looking at that that that's
13 obviously B.C. Railway running from nowhere to nowhere
14 on this map.
15 MR. MACAULAY: On the exhibit itself it's shown.
16 THE COURT: Yes.
17 MR. MACAULAY: I didn't -- I hadn't noticed it was shown on that
18 overlay.
19 THE COURT: Well, this redish line.
20 MR. MACAULAY: Oh, yes.
21 THE COURT: I think it's the B.C. Railway. All right.
22 MR. MACAULAY: It's not a Federal -- I mention 29A and B. I
23 misspoke myself. It's 31A and B in our numbering
24 system. The Federal presence.
25 THE COURT: Well, you have marked as 1227 map 31A.
26 MR. MACAULAY: That's right.
27 THE COURT: Federal presence as of 1984.
28 MR. MACAULAY: That's right, my lord.
29 THE COURT: All right. Well, now, just let me get something
30 else. There was another overlay that was reserved and
31 it --
32 MR. MACAULAY: Reserved.
33 THE REGISTRAR: It was just submitted. It wasn't given --
34 THE COURT: Yes. It's just an aide-memoire. It doesn't seem to
35 have been admitted into evidence. I don't think you
36 asked it be admitted into evidence.
37 MR. MACAULAY: Now, the plaintiffs have a submission to make
38 concerning missing reserves. We are waiting for that.
39 THE COURT: I see. All right. All right. Well, we can deal
40 with that when the time comes then.
41 MR. MACAULAY: These are ones that I understand are not -- are
42 not now the subject of debate. I understand the
43 plaintiffs' position to be that they are -- they prove
44 no more, no less than the exhibits that they mirror or
45 reflect in and of course that's true.
46 THE COURT: I am sure that's right. All right. Well, then,
47 what is it that you wish to do Mr. Macaulay? How do

you want to mark --
MR. MACAULAY: Well, there is the base map. I ask that the base map itself be marked and that these be marked exhibits A, B and C respectively. Perhaps the rail --
THE COURT: Well, the base map is Mr. Macaulay's famous map that hasn't yet been admitted as an exhibit, is it?
MR. MACAULAY: Yes, my lord.
THE COURT: That's not opposed now?
MR. RUSH: Pardon me?
THE COURT: That's not opposed now?
MR. RUSH: I take it that my friend is assuring the court that the base map is also reflected in some other evidence in the court. That's -- and that's Exhibit 5, is it?
MR. MACAULAY: Exhibit 5. There is a line on the base map showing the then outer boundaries of the claim area and it is intended to show the line on Exhibit 5, the plaintiffs' Exhibit 5.
MR. RUSH: Well --
MR. MACAULAY: Nothing more than that.
MR. RUSH: My lord, setting aside the line for the moment.
THE COURT: Yes.
MR. RUSH: Is the base under the line the base of Exhibit 5? That was my question.
MR. MACAULAY: No, it isn't.
THE COURT: Oh.
MR. RUSH: And that's what I think we have to know is where does that base come from?
MR. MACAULAY: We have long since described where it came from over -- we've been exchanging correspondence about what that is over time. It's a shrinking of an NTS map. And I thought that Mr. Grant had taken the position on that that --
MR. RUSH: Apparently he has, my lord. We have agreed to it.
THE COURT: All right. Well, then the base map will be the next number which will be 1243, won't it, Madam Registrar?
THE REGISTRAR: Yes, my lord.
THE COURT: Now, just before you go on to it, Mr. Macaulay, I have got a bunch of overlays on it already.
MR. MACAULAY: Yes, my lord.
THE COURT: Now, what's the status of those interesting documents?
MR. MACAULAY: Well, those are overlays that were handed up by the Province, I believe, just looking at them from here. They represent -- or did we? I don't remember who handed them up. But they represent some of the plaintiffs' exhibits except for the overlap.
THE COURT: Well, the first one is marked number 68 External

MR. MACAULAY: That is a -- that represents an -- in effect a plaintiffs' exhibit and it compares it with an earlier plaintiffs' exhibit. That's why the colouring is --
THE COURT: Is the 68 the number of the plaintiffs' exhibit number?
MR. MACAULAY: Oh, no.
THE COURT: What does this 68 mean?
MR. MACAULAY: Well, those numbers we don't use any more.
THE COURT: All right. Then the second one is said to be Internal Boundaries.
MR. MACAULAY: Yes.
THE COURT: And the third one is said to be House Territories.
MR. MACAULAY: Well, the plaintiffs from time to time have put in exhibits. These all reflect plaintiffs' exhibits and the plaintiffs have put in exhibits showing various boundaries and that's what those are. They are a reduced version of the plaintiffs' various exhibits. I think what we better do is make arrangements with the Registrar to identify which of the plaintiffs' exhibits, that is prepare a tag for those overlays, showing which of the plaintiffs' exhibits that they represent.
THE COURT: Should I take them off and give them back to you? They are not exhibits?
MR. MACAULAY: No. All right, my lord, yes.
THE COURT: I am giving back the three overlays that I have become comfortable with for so long. And now we're going to mark the underlying base map as Exhibit 1243. All right. And then the first overlay then will be the railway map which might conveniently be 1243 capital A.
MR. MACAULAY: Yes, my lord. Please.

(EXHIBIT 1243: Base map - claim territory)

MR. RUSH: My lord, my recollection is not sharp on this point, but I had not thought that the B.C.R. line is portrayed on that overlay as part of the Federal Government's proof of its map.
MR. MACAULAY: It's on the map.
MR. PLANT: And it's in the book that was handed up as one of the component parts of that alienations map.
THE COURT: Do you accept that, Mr. Rush?
MR. RUSH: I guess the Province has a sharper idea to that one. I will take that.
THE COURT: We will put this on as the first overlay. Is there

1 a trick about putting these on? Do you start at the
2 middle or something?
3 THE REGISTRAR: That's going to be 1243A.
4 THE COURT: Yes.
5 THE REGISTRAR: Railway.
6 THE COURT: I will need a tag on it, Madam Registrar.
7 THE REGISTRAR: Yes.
8
9 (EXHIBIT 1243A: Overlay - Railway)
10
11 THE REGISTRAR: Mr. Rush is looking at the other two.
12 THE COURT: Yes.
13 MR. RUSH: Yes. Yes. I am satisfied.
14 MR. MACAULAY: Then if 1243B could be the -- what was 31A.
15 THE COURT: There is two here.
16 MR. MACAULAY: The first of the two Federal presence maps.
17 THE COURT: All right. Now I have two. One is Federal presence
18 in '82 and the other is Federal presence '84.
19 THE REGISTRAR: '84.
20 THE COURT: '84.
21 MR. MACAULAY: '84.
22 THE COURT: All right. Should they be B and C?
23 MR. MACAULAY: '82 as B and 1984 as C.
24 THE COURT: Yes. And 1982, 1984.
25
26 (EXHIBIT 1243B: Overlay - Federal presence (1982))
27 (EXHIBIT 1243C: Overlay - Federal presence (1984))
28
29 MR. PLANT: My lord, may I inquire as to whether there is a
30 little plastic tab sticking out of that overlay?
31 THE COURT: Yes.
32 MR. PLANT: And what are the numbers on those?
33 THE COURT: 64B. A and B.
34 MR. PLANT: 64A and B?
35 THE COURT: Yes. A is '84 and B is '82.
36 MR. PLANT: Thank you.
37 THE COURT: Conveniently in reverse order chronologically. All
38 right. So '82, however, is going to be 1243B. Thank
39 you.
40 MR. MACAULAY: The other overlay in which Canada is interested
41 is the reserve overlay that's sitting over in the
42 corner of your lordship's desk.
43 THE COURT: Yes.
44 MR. MACAULAY: The map itself was marked Exhibit 1219.
45 THE COURT: Yes.
46 MR. MACAULAY: At the time objection was taken to it on the
47 grounds that there were reserves missing. We haven't

1 heard any more about that and since I'm reminded by my
2 friend, my colleague, Miss Koenigsberg, that the map
3 itself is already marked as an exhibit, I take it
4 without qualification, that maybe the overlay should
5 be marked D in this series of overlays.
6 MR. GUENTHER: I don't think that's a problem. My recollection,
7 my lord, was that Mr. Grant was having a look at that
8 to determine there was the possibility of a reserve
9 not reflected in the map. But to the extent that the
10 overlay reflects only the exhibit already marked with
11 the qualifications made at the time on the record,
12 presumably again if nothing is said then that remains
13 as evidence without proviso, but I believe Mr. Grant
14 is going to look at this. But we have no objection to
15 marking the overlay on that basis.
16 THE COURT: All right. Thank you. 1243 capital D.
17
18 (EXHIBIT 1243D: Overlay - Indian land reserves in
19 claim area)
20
21 THE COURT: I take it that when one is looking at this for
22 pictorial assistance one has to take -- look only at
23 the -- in some cases look only at the overlay in
24 question, because the '82 and '84 Federal presence
25 will overlap in some cases, not others.
26 MR. MACAULAY: That's right, my lord. They are very small
27 differences.
28 THE COURT: All right.
29 MR. MACAULAY: Perhaps the overlays that should be dealt with in
30 batches or groups are the ones that your lordship just
31 handed back.
32 THE COURT: Yes.
33 MR. MACAULAY: Those that we've handed up are, my lord, for the
34 court's assistance when you reach that topic.
35 THE COURT: Yes.
36 MR. MACAULAY: With the others, they don't show anything
37 significant one on top of the other.
38 THE COURT: No.
39 MR. MACAULAY: The ones that you handed back might, though, and
40 that's something we'll have to address.
41 THE COURT: Well, I'll be glad to hear from you on that. It
42 seems to me that the one -- particularly the ones
43 purported to show house boundaries may be incomplete.
44 It may be that they are not. But it just occurred to
45 me that particularly down in the southwest corner
46 there is a very large area that seems to be
47 unallocated to a house by number, but maybe it's

1 all -- maybe it appears somewhere else.

2 MR. PLANT: I can assist your lordship to the extent of
3 explaining that the map which -- I am sorry, the
4 overlay which had the little tab with the number 61
5 and the description House Territories is identified in
6 the upper right-hand corner as interrogatories maps.
7 So this overlay was derived from the Provincial
8 Government's interpretation of the interrogatories
9 maps which were of the maps showing the house
10 territories which were part of the plaintiffs' answers
11 to interrogatories.
12 THE COURT: Yes. All right.
13 MR. PLANT: That explains one of the three overlays that your
14 lordship handed back.
15 THE COURT: Yes, all right. And the other one -- I think one of
16 the other ones was intended to show the changed
17 boundaries relating in part to Nii kyap's territory up
18 in the northeast corner.
19 MR. PLANT: Yes. One of them was intended to show, if I can put
20 it this way, the evolution in the external boundary of
21 the claim area as taken again from Provincial
22 Government's interpretations of the plaintiffs' --
23 well, in one case from the statement of claim filed
24 May 11, 1987 and in another case from a document which
25 was Schedule A to a report of Neil Sterritt dated
26 March '87.
27 THE COURT: Yes. All right. Thank you.
28 MR. MACAULAY: We come now to the Loring books of -- Loring
29 reports, six volumes. I can tell your lordship that
30 in addition to the transcript -- transcriptions of the
31 Loring reports from 1889 to 1904, the handwritten
32 ones, we have asked a member of our staff to go to
33 Ottawa to look at the original documents and she is
34 doing that right now. I've noticed, too, that there
35 have been typographical errors in the transcriptions
36 that were provided for my friends and for your
37 lordship. We intend very shortly to provide improved
38 transcriptions. The plaintiffs take the position, and
39 quite rightly, probably, that those are simply our --
40 they are by way of our submissions about what the
41 documents say rather than definitive or authoritative
42 material. That's true.
43 THE COURT: Of course, that's the case with any translation or
44 attempt to duplicate some other -- some original
45 material.
46 MR. MACAULAY: That's right.
47 THE COURT: Or any original material, rather.

1 MR. MACAULAY: We invite our friends, the plaintiffs, and also
2 the Provincial defendants to improve on them. As we
3 have -- it took quite awhile to reach the point we
4 have reached now, we expect some small improvements,
5 further small improvements and we will hand up a
6 second edition of the transcriptions.
7 THE COURT: Well, the original documents will always prevail if
8 there is a dispute and either side can make
9 suggestions as to what the original document is. Or
10 what it says, rather.
11 MR. MACAULAY: Now, these Loring -- the Loring reports were not
12 actually marked.
13 THE COURT: No. They are 1209 as the number that's been
14 reserved for them.
15 MR. MACAULAY: Reserved for them. I would ask that they are
16 marked now.
17 MR. GUENTHER: Yes, we -- well, we advised our friends, my lord,
18 that we have no objection to the Loring documents be
19 marked subject to the usual reservations as to
20 relevance to be made in argument.
21 THE COURT: All right.
22 MR. GUENTHER: What is reference.
23 THE COURT: That will be 1209 A to F, their being six volumes.
24 MR. MACAULAY: Yes, please.
25
26 (EXHIBIT 1209A: Loring Reports - Vol. 1)
27 (EXHIBIT 1209B: Loring Reports - Vol. 2)
28 (EXHIBIT 1209C: Loring Reports - Vol. 3)
29 (EXHIBIT 1209D: Loring Reports - Vol. 4)
30 (EXHIBIT 1209E: Loring Reports - Vol. 5)
31 (EXHIBIT 1209F: Loring Reports - Vol. 6)
32
33
34 MR. GUENTHER: Just for clarity, my lord, I take it that the
35 transcriptions, then, are simply -- are they to be
36 marked separately or are they --
37 THE COURT: I think they will just be inserted in tabs but not
38 marked as exhibits.
39 MR. MACAULAY: I believe I have stated correctly what our
40 understanding of the status of those transcriptions
41 are.
42 THE COURT: Yes. I think for convenience sake it should be
43 inserted in the tabs but not form part of the evidence
44 at the trial.
45 MR. MACAULAY: Next are the three volumes of what you might call
46 miscellaneous historical documents. They are intended
47 to supplement all the collections of historical

1 documents that have been marked as exhibits over the
2 years by various parties. The number 1239A, B and C
3 was reserved for them.
4 THE COURT: What number, please?
5 MR. MACAULAY: 1239A, B and C. And I would ask that those three
6 volumes be marked now.
7 THE COURT: Yes. They were so marked. Any objection?
8 MR. RUSH: Yes. Well, there is an objection. Observation and
9 an objection to some. My lord, most of these
10 documents are directed at the evidence of -- in
11 attempt to reply, I think to the evidence of Dr. Ray
12 and Dr. Galois, and in our view should properly have
13 been put to those witnesses. It strikes me as a
14 backfilling of the -- both the Province's and the
15 Federal case in that respect. The difficulty is that
16 I recognize your lordship's rulings on the question of
17 documents. And having said that, I don't think I can
18 go beyond saying anything further about their
19 admissibility, except for one issue and that is that
20 there are a number of documents which are purportedly
21 ancient documents for which there is no source
22 indicated and I don't think those documents should be
23 marked. And they are by my reckoning documents at
24 tabs 20 through to 26 save and except 24. Now, those
25 documents, my lord, simply don't indicate where the
26 document came from. And I think that my friend simply
27 can't produce a document which on its face looks old
28 and which -- for which there are clearly -- there are
29 parties whom we know were people that were involved in
30 activities in the period. Nonetheless, I think that
31 if the Ancient Document Rule is to have any meaning
32 whatsoever, apart from the fact that the document is
33 old and appears on its face to be old, it has to come
34 from some source, that we can identify the source and
35 satisfy ourselves that that source is a reputable
36 source. And throughout these tabs that I've mentioned
37 to you there is source question mark, source question
38 mark, source unknown, source unknown. And I don't
39 think that that's the type of document that can really
40 assist your lordship in any way and it certainly
41 doesn't assist us to determine whether or not we can
42 accept the reliability of the document. There are
43 some other documents where the source is not readily
44 known, but -- for example, tab 36, the document of
45 Father Legaic, but I know from separate investigations
46 the source of the Legaic records, so I am not
47 concerned about that one. The others I've mentioned I

1 am concerned about and I don't think they should form
2 part of this volume. Apart from my comments and those
3 particular comments, I don't take any further position
4 about the marking of this three-set volume.
5 THE COURT: All right. Mr. Plant? Do you have a position, Mr.
6 Plant?
7 MR. PLANT: Well, my lord, I am just surveying some of these
8 documents now with Mr. Rush's concerns in mind. I see
9 that one or two of them come from A.G.B.C. documents.
10 They have a reference to my list of documents in the
11 upper right-hand corner.
12 THE COURT: You think they are already in?
13 MR. PLANT: I would hope that I could address Mr. Rush's concern
14 in relation to one or two of them, but at the moment
15 have nothing else to say.
16 THE COURT: Thank you.
17 MR. MACAULAY: I have just been informed by a member of my
18 staff, research staff, that we got them from the
19 Vancouver Public Library. They are well-known figures
20 in history, in the local history. The first one is
21 Mr. Conway who was a major figure in the Colin's
22 Overland Telegraph. There is Roderick Findlayson by
23 whom your lordship has heard, a principal -- one of
24 the principal figures of the Hudson Bay Company at the
25 time and it's a letter to Mr. Manson who is another
26 official of the Hudson Bay Company. Another is Mr.
27 Tolmie's letter to William, the same Manson of the
28 Hudson Bay Company. The next is a letter by -- from
29 Manson to Findlayson. Obviously that's one that's not
30 objected to. We identified it as part of the Hudson
31 Bay Company archives. The tab 25 is Tolmie's letter
32 to Manson and 26 Edgar Dewdney's letter to Pearce, the
33 assistant surveyor general. These are all letters
34 written in the 1860s -- well, the last one is written
35 on April 10, 1871 just before Confederation. Perhaps
36 we ought to have listed the source as Vancouver Public
37 Library and that's where -- that's how it came to us,
38 it came to us. I might add that these were not
39 collected in order to rebut anything -- any particular
40 thing said by Dr. Ray. We thought he sort of took
41 care of himself in his evidence and we didn't need to.
42 THE COURT: It's additional to what Dr. Ray said?
43 MR. MACAULAY: I beg your pardon?
44 THE COURT: I take it you are putting it forward on the basis
45 that it's in addition to what Dr. Ray said?
46 MR. MACAULAY: Well, no, it's -- we will be making submissions
47 about various aspects of the history of the claim area

1 and we will be relying largely on documents that are
2 already -- have already been put in of evidence by
3 other parties, but in some cases in order to make our
4 point we add a few documents and that's -- I tried to
5 explain that in my opening and that -- the reason for
6 these. For instance, we will be making submissions
7 concerning the origins of the land claim idea. I
8 believe we cross-examined Dr. Galois about that and
9 others, other expert witnesses. We intend to make
10 submissions and one or two of those documents will
11 fill out the already ample record. They are really
12 intended for that kind of purpose. It happens in a
13 case like this where you have hundreds if not
14 thousands of documents produced by a witness that
15 after the cross-examination you find that in the huge
16 number of documents we have in our collections now
17 there are a few more that we might have put to that
18 witness.
19 THE COURT: Well, I am not troubled and I think Mr. Rush has
20 realistically recognized the way the wind is blowing,
21 on the question of putting the documents to the
22 witnesses in a case like this it would be suicidal for
23 a judge or -- to order that every document might be
24 tendered later has to be put to a witness. That is a
25 salutory rule when one is dealing with conventional
26 litigation, but I don't need to hear you on that part
27 of it. But there is a substantial question arising
28 out of Mr. Rush's other submission that an ancient
29 document only becomes admissible by being ancient and
30 by being found in a depository which contributes to
31 the -- to its trustworthiness and regularity. I think
32 you've now given me an answer. I'm not sure it's a
33 sufficient answer to Mr. Rush's objection when you
34 tell me that they come from the library. Mr. Rush
35 required verification that could be done by affidavit,
36 but the question now is is that enough? Libraries get
37 things long, sometimes long after the event and --
38 MR. RUSH: My lord, perhaps I would be prepared to accept the
39 document from the Vancouver Public Library --
40 THE COURT: Yes, all right.
41 MR. RUSH: -- of this antiquity to satisfy you on the depository
42 issue.
43 THE COURT: All right.
44 MR. RUSH: But I would like something from my learned friends
45 indicating that that is the source and for this
46 reason, and only for this reason, and that is that
47 there are other documents identified as having come

Public Library identified in the
index and these ones weren't and I'm concerned about
that distinction.
THE COURT: Yes.
MR. RUSH: And my second point is that as Mr. Plant has already
indicated, that of some I think only one of the
documents that I noted that where the source was not
identified, it is from the A.G.B.C.S. and my friend
Mr. Macaulay may not be able to satisfy me about that
document and I'd like to know about that one as well.
MR. MACAULAY: Which one is that?
MR. RUSH: That's 26.
THE COURT: 26.
MR. MACAULAY: Yes.
MR. RUSH: Now, my lord, I would ask -- my position is that
those documents should be excluded from the volume.
As a pragmatic approach, however, I'm prepared to do
this, that subject to my friend satisfying me about
these particular documents, the documents can be
filed.
THE COURT: Yes. All right. Well, I won't ask that they be
physically excluded, but until the matter is dealt
with further the three volumes except tabs 20 to 23
and 25 and 26 will not be included and the three
volumes will be Exhibits 1239A, B and C.

(EXHIBIT 1239A: Historical Doc's collection - Vol. 1)
(EXHIBIT 1239B: Historical Doc's collection - Vol. 2)
(EXHIBIT 1239C: Historical Doc's collection - Vol. 3)
(EXCEPT TABS 20, 21, 22, 23, 25, 26)

MR. MACAULAY: Is tab 27?
THE COURT: I haven't got a note of tab 27.
MR. RUSH: No, not 27.
MR. MACAULAY: Oh, okay. All right, my lord. Thank you. I am
grateful to my friend for that and your lordship.
There is one other matter, that is the ONC documents
concerning which Madam Ladouceur has submitted an
affidavit, made an affidavit. Could my colleague,
Miss Koenigsberg, deal with that after the morning
adjournment?
THE COURT: Yes.
MR. MACAULAY: We have made the inquiries that your lordship
directed to be made and we have some material that I
think my friends should see and that perhaps we can
deal with today. Those are the -- those are the
matters that I wanted to deal with and the only --

1 apart from ONC, the only major hurdle we have now
2 seems to be the wills and that, as I understand it,
3 will be dealt with perhaps on the -- after the 15th.
4 THE COURT: Yes. All right.
5 MR. MACAULAY: My lord, now, there are other matters. The
6 plaintiffs have informed me that they have matters
7 they want to bring up.
8 MR. GUENTHER: My lord, just for the purpose of listing, there
9 is one other matter that relates to the Federal case
10 that we wish to address at some point and that was the
11 order -- you made an order, broadly stated, with
12 respect to particularization on the Federal position
13 on extinguishment. And my friends have provided me
14 with a letter this morning that I have not had an
15 opportunity to review, but that's the only other
16 matter with respect to the Federal case that is
17 outstanding in addition to the ONC.
18 MR. MACAULAY: We don't intend to put that in as an exhibit.
19 MR. GUENTHER: No. But --
20 MR. MACAULAY: That was a statement of position.
21 THE COURT: Yes. All right.
22 MR. GUENTHER: Yes, I had understood that, my lord. I wished to
23 review it, however, to -- with respect to the
24 possibility of the plaintiffs taking a further
25 position on it, and I wish to try to do that over
26 lunch and perhaps speak to it this afternoon, if that
27 is at all necessary.
28 THE COURT: Yes. Thank you.
29 MR. PLANT: My lord, I have a number of matters that I would
30 hope could be spoken to. I have taken the liberty of
31 preparing a sort of checklist or agenda and I have a
32 copy of it. It's really just for reference.
33 THE COURT: Thank you.
34 MR. PLANT: I am not sure that I will go through these
35 necessarily in the matter -- in the order in which
36 they appear, but the first item of business on this
37 agenda is to tender as Exhibit 568 capital A, a letter
38 from Mr. Chiasson of Ladner Downs to Peter Grant and
39 this is being done by way of agreement between Mr.
40 Grant and myself. I have two copies.
41 THE COURT: All right. And that -- that's now going to become
42 Exhibit 568 by consent or without opposition?
43 MR. RUSH: It goes in without objection.
44 THE COURT: Yes. All right. Exhibit 568A, thank you.
45
46 (EXHIBIT 568A: Letter dated Sept. 19, 1985 re
47 agreement)

1 MR. PLANT: The next item is an extremely minor matter of
2 housekeeping. At Volume 306 page 23167 of the
3 transcript.
4 THE COURT: 23167?
5 MR. PLANT: 167, yes, my lord. What is Exhibit 92B is there
6 referred to as Exhibit 292B and I merely wish the
7 record to be clarified.
8 THE COURT: All right.
9 MR. PLANT: It's Volume 306 of the transcript. Oh, the page is
10 23167.
11 THE COURT: All right. Is there -- are you aware of this, Mr.
12 Rush?
13 MR. RUSH: I'm not aware of it, but I'm sure my friend wouldn't
14 make the submission if it weren't so. We accept that.
15 THE COURT: All right.
16 MR. PLANT: It's not a matter in which there is any doubt. It's
17 part of a sequence of documents that we were --
18 THE COURT: Madam Registrar tells me there is another problem
19 about that page.
20 THE REGISTRAR: There is another exhibit. It should be titled
21 numbered 969-4 and it's titled 949-4, an Alaskan
22 Boundary Tribunal.
23 THE COURT: It's in the index to Volume 306. Yes.
24 MR. PLANT: And it appears there in the index as nine --
25 THE REGISTRAR: 49.
26 MR. PLANT: And it should be 969?
27 THE REGISTRAR: Yes.
28 MR. RUSH: It must be in a sequence, my lord.
29 THE COURT: Yes. All right.
30 MR. PLANT: That actually corresponds with our list of exhibits
31 also that the documents should be identified as 969-4.
32 THE COURT: Dash four. So marked. All right. Thank you.
33 MR. PLANT: The next item I have on this list is the renewal of
34 our application to examine on commission Mr. Boys and
35 your lordship will recall Mr. Boys was produced for
36 examination some time ago by the Federal defendant and
37 we wish now to renew the application which I made a
38 few days ago to examine Mr. Boys ourselves on
39 commission. The application was deferred at the time
40 because Mr. Guenther or Mr. Rush wished time to
41 consider their position. I have an affidavit of Mr.
42 Mackenzie which has been filed and my friends have
43 copies. It really speaks to just one or two issues
44 that are of some importance. I think the first point
45 of significane is in paragraph numbered three on page
46 two where Mr. Mackenzie speaks to the fact that when
47 Mr. Boys was originally examined the examination took

1 place by consent and then there are some observations
2 by Mr. Mackenzie with respect to Mr. Boys' physical
3 condition at the time of his original examination in
4 November, 1988.
5 MR. GUENTHER: My lord, if I may assist my friend. We don't
6 take the position here that if it is appropriate for
7 the Province to examine Mr. Boys that it's all
8 inappropriate that it be done by way of deposition or
9 commission or that it be done by proposed -- or in the
10 manner proposed by the Province. We do take objection
11 to the proposition that they should be allowed to
12 examine him at all at this point.
13 THE COURT: All right. Thank you.
14 MR. PLANT: Well, I think I hear my friend saying that he is
15 objecting to our seeking to reopen our case --
16 THE COURT: Yes, I think he said that.
17 MR. PLANT: -- for this purpose. But my friend Mr. Guenther --
18 MR. GUENTHER: No, not exactly.
19 MR. PLANT: -- is shaking his head, so I better make sure I get
20 his objection just right. Sorry, I can't sit down up
21 here, but --
22 MR. GUENTHER: You don't have to. It's not an objection to
23 reopening and reopening it at this stage. It's simply
24 a question of the Province in essence having had an
25 opportunity to do that which they seek to do now and
26 in essence are now essentially moving to call a
27 witness or commission a witness a second time and we
28 take the position that that's not appropriate under
29 the circumstances. And I suppose to be more explicit
30 about our position it is this, and I have reviewed
31 your lordship's comments on the argument as to the
32 admissibility of Mr. Mackenzie's cross-examination of
33 Mr. Boys as against the plaintiffs as well. It was
34 our position on that argument that the Province was
35 not at liberty to cross-examine a witness tendered in
36 that manner by another defendant. It was our
37 position, however, that they could have examined him
38 on some of the areas of concern to the Province, not
39 by way of cross-examination. Now, I did not take your
40 lordship's ruling to be so broad as to be that the
41 Province could not examine a witness such as that
42 commissioned or called by the Federal defendant. Our
43 position, if that be so, is that, simply put, the
44 Province chose to cross-examine Mr. Boys on issues
45 that they said largely went to an issue between the
46 defendants and now seek again to examine him, having
47 chosen to cross-examine him and in the course of

Ruling 1 cross-examination having been ruled not to be
2 appropriately evidence against the plaintiffs. So in
3 essence what they are attempting to do here is to
4 correct that which they chose to do wrongly the first
5 time and our position is that this is not appropriate
6 course to take at this time in this trial.
7 MR. PLANT: Well, I think then one starts from the premise that
8 we could have examined Mr. Boys at our own instigation
9 initially and --
10 THE COURT: Well, Mr. Plant, I don't think I need to hear you.
11 I think that the way this matter developed that it was
12 assumed, I think by all before they really had to
13 address themselves to this question, that when Mr.
14 Boys' evidence was taken that the convenient way to
15 get the evidence of each of them was by examining him
16 at that time and while it would have been better for
17 Mr. Mackenzie to have examined in chief and
18 arrangements to have been made beforehand, the fact of
19 the matter is that when we got to trial and we got
20 back into court we -- having been at trial for some
21 time, that the question of what was at issue between
22 the parties became a matter of some debate and it was
23 then ruled with some hesitation that this was -- this
24 was not on the pleadings and an issue upon which there
25 could be cross-examination, but there was no ruling
26 that the evidence wasn't -- wouldn't be admissible if
27 brought forward in a different way than
28 cross-examination. And I don't -- I've said several
29 times I don't think there should be like a game
30 checkers where you have made your move the moment you
31 have lifted your hands from the piece. I think there
32 is room for redemption in this world and I think a
33 completely understandable mistake of procedure was
34 made. The evidence could have been obtained in a
35 different way. I think that I would not preclude the
36 plaintiff from -- I am sorry, the Province from
37 obtaining this evidence even at this late date if --
38 in view of the fact that it could have been obtained
39 and would have been obtained, I assume, in the proper
40 way if the issue had been presented as squarely to
41 parties as it later was. And I think I'm influenced
42 in part also by the fact that I think -- I recall that
43 the plaintiff was pressing the -- I am sorry, Canada
44 was pressing the plaintiffs for some months to arrange
45 the date for the examination of Mr. Boys and this
46 issue might well have arisen far earlier than it did
47 if the examinations had been conducted at an earlier

1 date. I don't say that in criticism of anyone.
2 Everyone has been busy and it was not convenient to
3 have the examination till it was, but the matter was
4 substantially delayed, as I recall it, and I don't
5 think this further delay is a matter that I should
6 regard as one of any consequence. So I'm going to
7 give you leave, Mr. Plant, to open your case and to
8 adduce commission evidence of Mr. Boys to be taken on
9 fairly strict terms, though, and it will have to be
10 sometime -- I would think it would have to be done if
11 Mr. Boys is available and it can be done I think
12 before the 15th of January, so if there is any
13 difficulty we can deal with the matter when we
14 reconvene at that time.
15 MR. PLANT: Very good, my lord.
16 THE COURT: Thank you. That doesn't dispose of your list, Mr.
17 Plant?
18 MR. PLANT: That gets us to item four on my list.
19 THE COURT: Yes.
20 MR. PLANT: The next item under the description of evidence is
21 Bud Hobenshield. There has been a development here
22 since my last correspondence with my friends on
23 Friday. I am instructed that Mr. Hobenshield -- well,
24 I should pause for a moment. Mr. Hobenshield, as your
25 lordship will recall, is a resident of Kitwanga. He
26 swore an affidavit and the plaintiffs wish to
27 cross-examine him on that affidavit. My advice and
28 instructions are that Mr. Hobenshield will not agree
29 to attend at -- voluntarily at a cross-examination,
30 but there is some reason to believe that he would
31 respond to a court order that he be directed to attend
32 in Smithers for cross-examination on the affidavit
33 which he has sworn. I am prepared to speak to your
34 lordship as to the importance of his evidence and the
35 reason why I say it should not be lost. But in sum
36 I'm asking your lordship for an order akin to a
37 subpoena, but not directly a subpoena, because we
38 don't ask your lordship for an order that he be
39 produced for cross-examination in Vancouver, but
40 rather that he be produced for cross-examination in
41 Smithers in keeping with the earlier arrangements.
42 Now, I have not yet had an opportunity to speak with
43 my friends about convenient dates, but it would be out
44 of the question that we would want this to be delayed
45 past mid-January. Again, the aim would be that it
46 could be done in early January in Smithers. Now, I
47 haven't addressed your lordship on the reason why Mr.

1 Hobenshield's evidence is important, but I am not sure
2 what my friend's position will be in response to this
3 application.
4 MR. RUSH: Our position has been the same throughout. We want
5 to cross-examine him and if a direction of the court
6 or if a subpoena from the plaintiffs would have
7 sufficed, we would have taken that as well.
8 THE COURT: Yes.
9 MR. RUSH: And we are quite happy to make whatever convenient
10 arrangements can be made. There has been some
11 difficulty, inconvenience between Mr. Hobenshield and
12 Mr. Grant and I think that can be worked out. We
13 simply want to cross-examine his affidavit.
14 THE COURT: All right. Well, I am not disposed to make an order
15 that he be attended to be examined. I think I should
16 follow the usual practice and procedure in these
17 matters and merely to order that he be -- that the
18 plaintiffs be at liberty to cross-examine Mr.
19 Hobenshield on his affidavit and that it is the
20 responsibility of the Province to make him available
21 and that they have leave, if required, to issue a
22 subpoena for the taking of his cross-examination at
23 the time and place to be arranged at Smithers.
24 MR. PLANT: Thank you, my lord. The next item on my list
25 concerns the territorial affidavit of Philip Turner.
26 This was an affidavit that was tendered by the
27 plaintiffs as part of the package of territorial
28 affidavits tendered some time ago. After the original
29 bundle of territorial affidavits was tendered in
30 keeping I should say with the directions which your
31 lordship gave back in July of 1987, it subsequently
32 became apparent that Mr. Turner's health did not
33 permit him to attend for cross-examination on that
34 affidavit. Now, after that the plaintiffs prepared
35 another affidavit deposing to the same territory.
36 That affidavit was sworn by Stanley Williams who held
37 the name Gwis gyen. We had arrangements in place, I
38 recall, to cross-examine Mr. Williams on that
39 affidavit, but unfortunately Mr. Williams was killed
40 in a car accident before that cross-examination could
41 take place. Now we are in the situation where the
42 affidavit of Mr. Turner is in the record before the
43 court, but has not been cross-examined on. And our
44 initial position on this is that the plaintiffs should
45 endeavor to produce another affiant as to this
46 territory. Failing which then either the affidavit
47 should be withdrawn or at a minimum it should remain

1 in the record with the rider, as it were, that it
2 stands for whatever it stands for in recognizing that
3 there is no one else around who knows enough about
4 this territory to be able to swear an affidavit about
5 it.
6 THE COURT: What is the problem with Mr. Turner now? He's not
7 available to be cross-examined?
8 MR. MACAULAY: He's quite old and either as we speak or at
9 sometime in the recent past he's been hospitalized.
10 THE COURT: Yes.
11 MR. PLANT: My friends have given that advice to us from time to
12 time and I have no reason to doubt it. So that leaves
13 us in the position where on the basis of my friends'
14 assurances I understand that we are not able to
15 cross-examine Mr. Turner on his affidavit and we are
16 concerned to have an opportunity to test that evidence
17 in some way or other.
18 THE COURT: Is there any material difference between the
19 affidavit of Mr. Williams and the affidavit Mr. Turner
20 with respect to this particular territory?
21 MR. PLANT: No. They were, I think, just about word for word
22 the same.
23 THE COURT: Yes.
24 MR. PLANT: My understanding was that Mr. Williams' affidavit
25 was produced because Mr. Turner was unavailable.
26 THE COURT: Yes. And then Mr. Williams wasn't cross-examined on
27 that.
28 MR. PLANT: He was not cross-examined on that affidavit. Now, I
29 have to recall to your lordship that when the matter
30 last arose, that is to say when Mr. Grant some time
31 ago sought to file the Stanley Williams' affidavit on
32 the basis that Mr. Williams had died and that this was
33 somehow necessary evidence, it was drawn to your
34 lordship's attention that Mr. Williams had been
35 extensively cross-examined on commission and when he
36 was commissioned he swore an affidavit which deposed
37 to the boundaries of territories that surrounded this
38 one and so his commission evidence naturally did touch
39 on the periphery or the boundaries of this particular
40 territory. But at the time he was commissioned we did
41 not have this affidavit of this territory to
42 cross-examine him on.
43 THE COURT: All right. Yes.
44 MR. RUSH: Couple of points. My friend's advice to the court I
45 think is essentially correct on all matters. Mr.
46 Turner is infirm. He's in and out of hospital and
47 that's the difficulty is that he has been hospitalized

1 several times for lengthy periods of time and then
2 he's out again. Our position on this, my lord, is
3 that you have already dealt with it and that's our
4 view with our learned friends. It was dealt with at
5 Volume 278 at page 20645 and this is what you said.
6 This was during the time that Mr. Grant made a
7 submission to have Mr. Williams' affidavit placed
8 before the court. This is what you said at line 12:
9
10 "Well, I don't think so, Mr. Grant. I'm not
11 going to rule on it at the moment, in view of
12 the fact that there may be somebody else who
13 can swear the affidavit. If there isn't, Mr.
14 Turner's affidavit is before the court and is
15 evidence. I would have to consider the weight
16 to be given to it in view of the fact that it
17 hasn't been tested on cross-examination, but
18 balanced against that is the reason why it
19 hasn't been tested on cross-examination and I
20 suspect that the weight to be given to it would
21 be affected hardly at all unless there are
22 rather intrinsic reasons why the affidavit
23 should be doubted. But I don't -- I think I
24 agree with Mr. Goldie that there is no point in
25 oath helping one person's affidavit with
26 another. Mr. Turner's evidence was sworn to.
27 It's in evidence. It's here. It will be
28 before us at the time of argument and judgment.
29 And it can be supplemented, if you wish, by
30 another -- another affidavit, if such a person
31 exists who can be cross-examined and that will
32 solve all of problems or some of them. But I
33 don't think at this time I should merely
34 substitute another untested affidavit for Mr.
35 Turner's. I don't think you can renew the
36 application if -- well, no, I don't think there
37 is any point in putting Mr. Williams' affidavit
38 in. I think I should dispose of that."
39
40 So Mr. Williams' affidavit was not tendered. It was
41 not permitted to be tendered as evidence and Mr.
42 Turner's affidavit was to allow it to be tendered as
43 the evidence that it represents with whatever
44 infirmities it has.
45 THE COURT: What's the page reference there, Mr. Rush?
46 MR. RUSH: That's page 20645 or twenty thousand six hundred and
47 forty-five. And my lord, I -- it's my position you

1 have dealt with this. My friend is raising it
2 essentially to revisit the same issue. I think that
3 we are no farther ahead than we were back at the time
4 you dealt with it at that time and in my submission
5 the matters should stand as they did at that time on
6 this occasion as well.
7 THE COURT: All right. Thank you. Any reply?
8 MR. PLANT: Just one point, my lord. Your lordship made those
9 observations that Mr. Rush has read to you in the
10 context of the application to tender Mr. Williams'
11 affidavit in the circumstances. Your lordship did not
12 have before you on that occasion the admissibility of
13 Mr. Turner's affidavit in as a consequence or not of
14 the issue which was before your lordship which was
15 whether or not in the circumstances Mr. Williams'
16 affidavit should be put in. So my own reading of your
17 lordship's comments was that you were disposing of the
18 application to put Mr. Williams' affidavit in and the
19 reasons that your lordship gave in my submission don't
20 necessarily dispose of the admissibility of Mr.
21 Turner's affidavit.
22 THE COURT: Well, all right. I think they do, Mr. Plant. I
23 think that the ruling I made then encompasses this
24 problem. I can say this, that it's the ruling that I
25 proposed to make subject to being persuaded otherwise
26 with respect to Mr. Hobenshield's affidavit, that it
27 was -- it was in, I think it was in, it had been
28 tendered and I proposed to treat his lack of
29 cross-examination in the circumstances a matter of
30 weight and I propose to do the same thing with Mr.
31 Turner's affidavit.
32 MR. PLANT: Very good, my lord. The next item on my list --
33 THE COURT: Before you go back, Mr. Turner's affidavit has been
34 filed and is in evidence, is it not?
35 MR. PLANT: I believe so.
36 MR. RUSH: Yes, it is.
37 MR. PLANT: I stand to be corrected on that.
38 MR. RUSH: Yes, it is.
39 THE COURT: All right. Thank you.
40 MR. PLANT: Under the heading 1930 Prince Rupert Forest District
41 Annual Report Extract, what I there am intending to
42 refer to is the documents that were filed as a result
43 of in the first instance the cross-examination which
44 Mr. Adams conducted of Robert Harding at the time that
45 the cross-examinations on the alienations map project
46 were taking place. Mr. Adams tendered some old
47 extracts from old annual reports of the Prince Rupert

1 Forest District. Mr. Harding was unable to identify
2 them. We were then asked to go away and see if we
3 could authenticate them and we were able to
4 authenticate them. My friends then sought to tender
5 them as documents essentially arising in the case and
6 at the time that they were tendered and admitted into
7 evidence by your lordship I sought a reservation that
8 if there were in those annual reports any other
9 extracts or pages which I considered ought to be added
10 to provide context or were otherwise relevant, then I
11 would seek leave to file them. That's what I have
12 now. I have one page, a further page from the Prince
13 Rupert Forest District Annual Report Operations 1930.
14 And I have copies of these, but I -- perhaps your
15 lordship should hear from my friends, because as I
16 recall, they are prepared to deal with it, but I am
17 not sure what their position is going to be on the
18 admissibility of this document.
19 MR. RUSH: Under the circumstances, my lord, I don't think we
20 could take a position in opposition and we don't.
21 THE COURT: Thank you.
22 MR. RUSH: The only thing I am not clear about is whether or not
23 this page is of one of the page -- is of one of the
24 reports that we've filed. I cannot recall that.
25 MR. PLANT: My recollection is that the series of reports that
26 the plaintiffs filed only began in 1930. The extract
27 which I propose to file is a further extract from the
28 1930 annual report.
29 THE COURT: All right. And what exhibit number are those
30 reports?
31 MR. PLANT: That I can't -- ah, they are from Exhibit 1125 and I
32 think the documents that were included under Exhibit
33 1125 have already been given a capital letter
34 designations A through N.
35 THE COURT: All right.
36 MR. PLANT: This could be added to the series.
37 THE COURT: And this is -- would be part of the 1930 which would
38 be capital A?
39 MR. PLANT: There were a number of documents, as I recall,
40 marked as part of the series which is documented --
41 which is Exhibit 1125 and my recollection at the
42 moment is that the series of documents begins with A
43 and it goes up to N. Some of those documents are not
44 annual reports. Some are. And --
45 THE COURT: Well, this can be Exhibit 1125 capital A-1, can it
46 not?
47 MR. PLANT: Ah, yes, very good.

1 THE COURT: Thank you.
2 MR. PLANT: I have just seen the reference. I have two copies.
3 My lord, there are some matters on this list. I
4 am going to move below item number 7 and I would be
5 happy to speak to -- well, I won't be speaking to item
6 number eight, the Barbara Lane documents. But either
7 that or item number nine, examination for discovery
8 questions. The item number nine is a reference to
9 some questions which the plaintiffs wish to add to the
10 reading in of the discovery -- of our discovery, our
11 examination for discovery of two of the plaintiffs.
12 My friend Mr. Rush and I reached an agreement on some
13 additional questions to be read in, but my friend and
14 I are still at odds with respect to certain additional
15 questions which my friend wishes to read in and I am
16 happy to argue their admissibility now, if that's
17 convenient to your lordship and my friend.
18 THE COURT: All right. Well, I haven't -- I have been waiting
19 for this and have for that reason delayed reading any
20 of this. Is it convenient and useful to argue it when
21 I haven't read it or is it --
22 MR. RUSH: Well, my lord, I was going to propose a course of
23 action on this. I think that this comes down to a
24 kind of argument that is yes it's in, no it isn't in.
25 THE COURT: All right.
26 MR. RUSH: Frankly, I have reviewed all of the questions and
27 answers and I think ultimately your lordship will have
28 to read them and our simple view is that the text --
29 the test here is a relaxed one and that our requests
30 are in fact quite modest in relation to the totality
31 of the discovery. And we simply ask that you read the
32 questions and I have the questions --
33 THE COURT: Do I have a list of them?
34 MR. RUSH: If you don't, I can provide you with one.
35 THE COURT: All right.
36 MR. RUSH: I have the questions -- I can give you the
37 correspondence where my friend and I disagree. I have
38 the examination for discovery, the relevant portion of
39 Mr. Green's evidence and Mr. Williams' evidence and I
40 also have the passage at the proceedings at Volume 266
41 where my friend's passages were read into the record
42 on his behalf, I believe, by the -- you didn't read
43 them in, but they were read in by the process of just
44 folding them into the record. So I have all of those
45 for your lordship.
46 THE COURT: All right. Well, I will -- I think the time has
47 come when, subject to what Mr. Plant says to read the

1 questions that the Province is seeking to put into
2 evidence and to read the additional questions for
3 which the plaintiff contends, and I will give you an
4 answer.
5 MR. RUSH: What I am going to hand up to you, my lord, is a
6 letter from Mr. Adams to Mr. Plant of December 2
7 outlining what's been agreed to and what remains for
8 agreement.
9 THE COURT: Yes.
10 MR. RUSH: And secondly, the discoveries of Mr. Green and Mr.
11 Williams. And then secondly, a letter from Mr. Plant
12 to myself indicating what questions and answer are
13 read into the record and then the record and of where
14 they were in fact read into the record. So I can hand
15 this all to your lordship and --
16 THE COURT: All right. Can counsel remind me what is the
17 exhibit number of the list of questions that Mr. Plant
18 put into evidence?
19 MR. RUSH: The exhibit number?
20 THE COURT: Yes. I think the list was marked as an exhibit, as
21 I recall.
22 MR. PLANT: I don't think there is an exhibit number.
23 MR. RUSH: Well, I don't think so, my lord. Yes, there is.
24 There is. 1146.
25 MR. PLANT: Yes, that's right. That was the list.
26 THE COURT: Yes, all right.
27 MR. PLANT: There is one error in Mr. Adams' letter of December
28 2 which Mr. Rush is going to give your lordship. Does
29 your lordship have a copy of that letter yet?
30 MR. RUSH: I'll hand it up to your lordship. It's page two of
31 Mr. Adams' letter. There is an entry under Williams,
32 the first entry under Williams should be under Green.
33 THE COURT: All right.
34 MR. RUSH: And your lordship can see that.
35 THE COURT: Is that so marked?
36 MR. RUSH: Pardon me? No, it doesn't, but if your lordship can
37 look at it and you will see the 440 to 446 reference
38 should actually be under Green. That's what you were
39 referring to, isn't it?
40 MR. PLANT: Yes.
41 THE COURT: All right. It is now. Then I can keep all this
42 material or did you want it back?
43 MR. RUSH: Yes.
44 THE COURT: I don't need it.
45 MR. RUSH: After your lordship has perused it.
46 THE COURT: Well, it seems to me I have my own copies.
47 MR. RUSH: I not sure that you have your own copies of our -- of

1 the discovery of Green and Williams that wasn't read
2 in and that we are proposing to read in.
3 THE COURT: I wasn't given the full transcripts? I thought I
4 was.
5 MR. PLANT: I wasn't here when the discovery transcripts were
6 read in.
7 MR. RUSH: No, I don't think you were, my lord. What you were
8 given was the questions and answers as read into the
9 record as interpolated by the court reporter.
10 THE COURT: Madam Registrar, can you find me the transcripts
11 that were put in or do you think I have them already?
12 THE REGISTRAR: I will try and find them.
13 THE COURT: See if you can find them. They may be downstairs.
14 All right. Well, then I'll look after that and give
15 you answer as quick as I can. Is it convenient to
16 take the morning adjournment?
17 MR. RUSH: Yes, I think so.
18
19 (PROCEEDINGS ADJOURNED PURSUANT TO MORNING
20 ADJOURNMENT)
21
22 I hereby certify the foregoing to be
23 a true and accurate transcript of the
24 proceedings herein to the best of my
25 skill and ability.
26
27
28
29 Laara Yardley, Official Reporter,
30 United Reporting Service Ltd.
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THE REGISTRAR: Order in court.
THE COURT: Well, going back to the matter we were on before, I have a transcript of Sylvester Green which seems to be complete as far as page 66 is concerned -- no, beyond that, 67. And I have a list of questions that the plaintiff -- the province wishes to put in. And then there is a transcript of Sylvester William which seems to be complete up to page 66 as well, and then a list of questions. So is that the totality of the discoveries that the province is putting in, Mr. Plant?
MR. PLANT: Yes. And your lordship now has the material from Mr. Rush that will identify the disputed questions.
THE COURT: All right. Where did that go?
MR. PLANT: Oh, I am sorry. I thought Mr. Rush handed up some material.
THE COURT: Oh, it's here. Yes, it is. All right. Well then, I don't need the transcripts, Mr. Rush. I have your letter.
MR. PLANT: I am not sure that you need my letter either, because I agree with the questions that are set out in items one and two on page 1 of Mr. Adams' letter of December 2, as questions that I have agreed should be added to those which I have already asked to be read in.
THE COURT: So those two sets of collections -- of questions are agreed by Mr. Plant.
MR. PLANT: Yes. It's just the questions then identified on page 2 of Mr. Adams' letter which I don't consent to.
THE COURT: Yes, all right. I'll give an answer as quickly as I can. Thank you.
MR. PLANT: And I will go back to item number seven on my list of matters to be spoken to. And this is similar in some respects to item number six.

Item number seven, described there as "Tender the balance of the Kitwancool land reserve documents." What I intend to refer to there is the events that arose out of the plaintiffs' cross-examination of Mr. Duffy, the surveyor general. He was examined on his affidavit in support of the territorial alienations mapping projects. He was examined out of court, and during that examination he was asked some questions about something called the Kitwancool land reserve or Kitwancool territorial reserve, and he had no knowledge of it. He was asked to look for documents.

We produced documents. There was an issue about the relevance and/or a claim of privilege to some of those documents. Your lordship was asked to review the file, and your lordship ordered that certain documents in the file were relevant. Those documents were then disclosed to the plaintiffs, and one of the documents in that collection was tendered by the plaintiffs and is now Exhibit 1208A, according to my notes.

Now, I wish now to tender the other documents that were part of the -- well, the balance of the documents that your lordship ordered to be disclosed as being relevant, and I -- in order to elaborate on that submission, I have to refer to Exhibit 1208A, and I have a copy of the whole bundle for your lordship, including 1208A.

Turning to the second page of this bundle, this is a memorandum from A.F. Smith, the Assistant Director of Lands. This is Exhibit 1208A. And the -- it's a reply to a memorandum from someone in the Department of Recreation and Conservation, and appears to be the Associate Deputy Minister. And it starts:

> Your letter of December 20, 1974...has been read with a great deal of interest since I am familiar with the Lower Kispiox Valley...

And so on.

> As is so often the case, it would be very helpful if we had more basic inventory information before starting to assess a specific request such as the one presented in the Kispiox Valley Community Association brief.
>
> I should mention that a large part of the proposed conservancy area lies within the Kitwancool Territorial Land Claim area.

And I think that the balance of that doesn't add to my point other than the first line or so in the final paragraph:

> We would be prepared to see the area designated as an integrated resource management study area if such a suggestion were to receive the approval of the Secretariat.

Now, my submission here is simply that the

Submission by Mr. Plant 1 balance of the documents which your lordship ordered
2 to be disclosed, were disclosed because they pertain
3 to this Upper Kispiox nature conservancy proposal.
4 And the document which is 1208A, the memorandum that
5 I've been reading from, really doesn't make any sense
6 unless you have some idea of what this Kispiox Valley
7 Community Association brief is.
8 So if you go through the balance of the file, you
9 will see the next item after 1208A is the letter of
10 December 20th, 1974, to which Exhibit 1208A is the
11 reply, and other documents including a memorandum
12 responding to the proposal, a letter of July 4, 1974,
13 and then the proposal itself entitled "The Upper
14 Watershed of the Kispiox River as a Nature
15 Conservancy." And this is dated 1974 at Hazelton,
16 B.C. It's for -- appears to be authored by the
17 Kispiox Valley Community Association, the Zoning and
18 Planning Committee, and I'm really now referring to
19 what would be the nineth page in this bundle, which is
20 the title page of the proposal.
21 THE COURT: Yes.
22 MR. PLANT: And if your lordship turns to the next page and sees
23 Table of Contents, the heading -- the two headings
24 "Synopsis" and "Introduction", and I just want to
25 refer briefly to one or two points in this proposal.
26 Under the heading "Synopsis" on page 1:
27
28 We, the residents of the Kispiox Valley,
29 are concerned with the future of our community.
30 We strongly feel that the Provincial Government
31 must:
32
33 And then there is a list of the things which the --
34 this proposal, which are the proposals, really.
35 And going on to page 5 of the synopsis, just
36 before the introduction:
37
38 This brief has been compiled and formally
39 approved by the Kispiox Valley Community
40 Association, the local governing body in the
41 Kispiox Valley.
42
43 And it's signed by Neil Sterritt and by Margaret Clay.
44 And that's really all I need to refer to in order to
45 make the point that I have endeavoured to make, which
46 is that if this letter which is 1208A is to make any
47 sense, then the documents which give rise to it ought

1 also to be part of the record.
2 THE COURT: Is Margaret Clay a plaintiff?
3 MR. PLANT: Not to my knowledge, my lord.
4 MR. RUSH: No.
5 MR. PLANT: But my knowledge is insufficient on that.
6 THE COURT: Well, I am not sure that I've completely followed
7 you. This is a document that had not been produced to
8 the plaintiffs on the ground of relevance and --
9 MR. PLANT: But one quibble with that. The proposal itself is
10 actually on the plaintiffs' list of documents, and has
11 been from almost the beginning of time. So it was in
12 the first instance, although the copy that your
13 lordship has comes from the file which, as I agree, we
14 originally did not produce.
15 THE COURT: But the plaintiffs supplied, and I ordered that you
16 produce for my inspection after some discussion, the
17 examination of your file on this Upper Kispiox
18 conservancy proposal. I don't think it was called
19 that. It was called the land reserve, wasn't it?
20 MR. PLANT: That's right. It was the Kitwancool Territorial
21 Reserve File which contained these documents.
22 THE COURT: Yes. So I looked at them and I said I thought there
23 was only a few of them that were relevant, and this
24 letter of January 24th is one of them that I said was
25 relevant, is it?
26 MR. PLANT: Yes. Including -- in fact, the bundle that I've
27 been referring to comprises the entirety of the
28 documents which your lordship ruled were relevant.
29 THE COURT: Yes. And you now want to put them in?
30 MR. PLANT: My friend has -- my friends have put in the first
31 document.
32 THE COURT: I see.
33 MR. PLANT: At the time they did so, I indicated that I wished
34 to reserve the question whether others should go in.
35 THE COURT: Yes.
36 MR. PLANT: And I am revisiting that question.
37 THE COURT: All right. Thank you. Mr. Rush.
38 MR. RUSH: Well, my lord, I say that if it's my friend's wish to
39 put in the rest of the documents because, as he says,
40 nothing makes sense here in this letter of January
41 24th unless you have the totality of the documents,
42 then I say yes, I agree with that submission. But
43 everything should go in, including the Kitwancool
44 territorial land reserve. That this is, in my
45 submission, a -- a self-serving device on the part of
46 my friends to put a document in. And it all arises,
47 essentially, because we, the plaintiffs, decided -- we

1 found a reference to the Kitwancool land reserve in
2 Provincial Government documents and wanted to pursue
3 that to determine whether that was relevant. We were
4 not able to determine that because that was within
5 your lordship's purview. We did not see the
6 documents. You disclosed these documents as saying if
7 anything is relevant, this one document is relevant.
8 THE COURT: Yes.
9 MR. RUSH: And we -- or not this one document, but this bundle
10 of documents is relevant, and we chose from that
11 bundle what we wanted to put in.
12 Now in my submission, my lord, that if my friends
13 wanted to deal with any of these documents, it was
14 open to them to do so. They didn't want to. They,
15 for their reasons, felt that it wasn't important to
16 their case. However, the only document that makes
17 reference to the Kitwancool territorial land reserve,
18 which is what we consider to be of relevance, is this
19 one of January 24th, '75. Otherwise, it's dealing
20 with the Upper Kispiox nature conservancy proposal
21 which is not a matter which came out of the
22 cross-examination in its original history.
23 So, my lord, I say that for my friends now to put
24 in the rest of this document, it's simply not open to
25 them to do so, simply in order to fill out this one
26 document. What do they care about that? And I say
27 that if your lordship is disposed to allowing a full
28 letter record to be before the court rather than this
29 document, then I say two things: I say firstly, that
30 really the fuller record must comprise of the
31 Kitwancool land claim reserve documents which you have
32 determined are not relevant. And secondly, at the
33 very least, there is a reference at the bottom of
34 paragraph one -- I'm sorry, the last paragraph of the
35 January 24th, '75 letter, to a map indicating the
36 position of the Kitwancool territory in red. And I
37 would be very happy to have that map as part of this
38 letter and the rest of the documents to be filed as --
39 to use my friend's language -- in order to fill out
40 the record and to make the document make sense.
41 Because surely, my lord, if his argument is that these
42 other documents need to be admitted for the purposes
43 of making the January 24th letter sensible, then so
44 should the map.
45 THE COURT: All right. Do you have a position on this, Mr.
46 Macaulay?
47 MR. MACAULAY: No, my lord.

1 THE COURT: All right. Any reply, Mr. Plant?
2 MR. PLANT: Yes, my lord. My position is that the rationale
3 behind your lordship's ruling was that the Kitwancool
4 territorial reserve was irrelevant, and therefore
5 documents which pertain to it ought not to be
6 disclosed. However, this document, the document which
7 is 1208A, was disclosed because it referred to this
8 Upper Kispiox nature conservancy proposal. And in my
9 submission, that in order to make sense of that
10 conceivably relevant matter, your lordship should have
11 the balance of the documents, all of which were
12 ordered to be produced, because they were relevant to
13 that issue, not to the Kitwancool territorial reserve
14 issue.
15 THE COURT: Thank you. I do not think that there is any
16 relevance at all in the Kitwancool, so-called,
17 Reserve, which I know from having read the material
18 did not exist. But I can see some possible relevance
19 in this letter, although I must say I do not find much
20 relevance to it. However, I do not think that putting
21 this letter in requires the admission of a lot of
22 other material about the so-called Kitwancool
23 territorial reserve. I would allow you, Mr. Rush, to
24 withdraw this document if you wish, but I would not
25 allow it to be used as a reason to put in this larger
26 volume of material which, in my view, has no relevance
27 at all. If this letter is to go in, I think the
28 explaining documents based upon the same rule we use
29 with regard to discovery, that is connection, requires
30 this other material to be admitted.
31 But -- I should not press you. If you wanted to
32 withdraw the document, I would certainly allow it to
33 be done because I am not sure it means much. But if
34 you do not wish it to be withdrawn, you are welcome to
35 put it in, but I think the other material that Mr.
36 Plant has now tendered must be included as well as
37 explaining what the subject matter of that letter is,
38 which is referenced Upper Kispiox nature conservancy
39 proposal.
40 MR. RUSH: Well, my lord, I don't intend to withdraw the
41 document. But I do think that if my friend is
42 permitted to put in this amplifying material, then so
43 should the map be put in, because it's part and parcel
44 of the material.
45 THE COURT: Well, I don't see anything wrong with that. The map
46 itself can go in.
47 MR. PLANT: Yes. I don't have any objection to that, my lord.

THE COURT: Yes.
MR. PLANT: -- the document which is now 1208A, I couldn't recall having seen the map in the file.
THE COURT: Yes.
MR. PLANT: And that's my only reservation now. If the map is in the file, I will produce it and, subject to your lordship's comments, it will also form part of this package.
THE COURT: All right. This letter now is exhibit -- what exhibit is this letter now?
MR. PLANT: According to my note, it's 1208A.
THE COURT: Yes. All right. Well then these other documents can be 1208A-1, 2, 3, as the case may be, all subject to Mr. Plant determining whether that map is available, and if not, we will have to speak to the matter again. This is whose material? That must be the one we are keeping?
THE REGISTRAR: This is a photocopy.
MR. PLANT: You may have what I've given the Registrar, and I don't know that Ms. Sigurdson's covering letter on the front part of the package should remain a part. But the first item in the package would be the document that's already 1208A.
THE REGISTRAR: Miss Sigurdson's covering letter is 1208.
THE COURT: Yes.
MR. PLANT: That's right. Yes, I'm sorry.
THE COURT: And I don't know whether there is a 1208B.
MR. PLANT: There isn't yet.
THE COURT: All right. Well then these other documents can be numbered B, C, and D and E. I think there is four there. And that will -- whatever number we get to if and when the map is located.
MR. PLANT: Thank you, my lord.
THE COURT: Thank you.

(EXHIBIT 1208B - Letter from Mr. Ahrens to Mr. Redel dd. December 20, 1974)
(EXHIBIT 1208C - Upper Kispiox River Nature Conservancy Proposal)
(EXHIBIT 1208D - Letter from M. Clay to B. Price dd. July 4, 1974)
(EXHIBIT 1208E - The Upper Watershed of the Kispiox River as a Nature Conservancy dd. 1974)

MR. PLANT: My lord, the next item on my list which I wish to speak to is item ten, and this concerns the

1 application which I made some time ago to amend the
2 province's statement of defence. The amendments which
3 I sought were not responsive to the anticipated final
4 version of the statement of claim, but rather were
5 matters that came to our attention as we reviewed the
6 pleadings from time to time, and we considered that
7 they needed to be addressed at this point. Your
8 lordship acceded to the amendments which I sought in
9 all but one respect. And the -- that was an amendment
10 which I sought to paragraph 38A.
11 THE COURT: Let me know what document I should be working from.
12 MR. PLANT: I'm sorry, I'm going to give your lordship the only
13 document you'll need.
14 THE COURT: I have a document loose in the trial record which is
15 a further amended defence of the province date stamped
16 August 22nd, 1988. Now what is that? That's the --
17 MR. PLANT: I think that's the document that --
18 THE COURT: That you are seeking to amend again?
19 MR. PLANT: Yes. Is your lordship -- if your lordship turns to
20 paragraph 38A of that defence.
21 THE COURT: Yes.
22 MR. PLANT: Is there an amendment at the end of that paragraph
23 which is underlined?
24 THE COURT: No.
25 MR. PLANT: All right. Well then I've got here the correct
26 further amended statement of defence.
27 THE COURT: Well, we may have it. We may have it. Oh yes,
28 thank you. Yes, I ordered this August 22nd, 1988,
29 defence amended on November 9th, 1989, as to
30 paragraphs 14 and 15, but I adjourned on -- I'm sorry,
31 pages 14 and 15, and I reserved insofar as page 16 is
32 concerned, pending particulars.
33 MR. PLANT: Correct, my lord. I have the reply to your
34 lordship's direction to provide particulars, and I am
35 going to ask Madam Registrar to provide you with a
36 copy.
37 THE COURT: Has your friend seen these?
38 MR. PLANT: Excuse me, my lord?
39 THE COURT: Has your learned friend seen this?
40 MR. PLANT: Yes.
41 THE COURT: Yes.
42 MR. PLANT: The -- at the bottom of page 1 and the top of page
43 2, the paragraph which is the subject of this
44 direction --
45 THE COURT: Yes.
46 MR. PLANT: -- is set out, and then the directions. And our
47 reply is set out -- perhaps I won't read it, I'll ask

1 your lordship to read it though, if I may.

2 THE COURT: All right. Yes.

3 MR. PLANT: Now, I am prepared to speak not merely to the
4 adequacy of this reply, but also to the issue at
5 large, whether or not the amendment to paragraph 38A
6 should be granted at this time. I couch my position
7 in that term -- in those terms, because after we
8 listened to Mr. Rush's submission, when this matter
9 was first raised in early November, we went back to
10 the transcript and to the record of proceedings to see
11 what the basis was for the concern that Mr. Rush
12 identified to you then. And my position, generally,
13 here, is that the plaintiffs have known for a very
14 long time what it was that this was all about. And
15 this amendment to the statement of defence clarifies
16 what might, on a very narrow reading of our earlier
17 paragraph 38A, have been a potential problem. But in
18 fact, everyone has known from -- well, from as far
19 long ago as the examination by Mr. Goldie of Alfred
20 Joseph in January of 1988, about our interest in the
21 B.C. Special Fund and whether Indian bands received
22 monies from the fund and how they were spent.
23 We asked similar questions of Dan Michell in
24 February of 1988, and Dora Wilson-Kenni in March of
25 1988. In May of 1988, volume 92 of the transcript,
26 May 1st, we applied for an order for the production of
27 B.C. Special documents which were -- we considered to
28 be in the possession or control of band councils. And
29 to comply with that order which your lordship did
30 make, Mr. Grant -- my friend Mr. Grant requested that
31 Canada produce B.C. Special documents. And this is
32 what he said at volume 92 page 5835:
33
34 Q ...that's one of the reasons we are
35 demanding the documents from Canada, so
36 we can focus on this and track it down.
37 As you say --
38
39 Referring to your lordship.
40
41 -- the defendants have raised [the B.C.
42 Special], they have said it's an issue
43 and that's been argued out and I don't
44 think anybody is really disputing that
45 one of the issues before the court is
46 going to be the B.C. Special. The
47 defendants at least have raised that.

And then your lordship went on to make the order which Mr. Grant sought, as I recall, saying at page 5836 and seven:

> Q Well, I am going to make an order for production under the B.C. Special, category of this application, but I am going to follow the practice that used to prevail in the Provincial Court in cases of drunkenness and hold the order for a week to give everybody a chance to get out of town and thereby solve the problem. I have no doubt that a very simple --

I don't know that it worked that time, my lord.

> I have no doubt that a very simple admission is all that's required in this case, in this connection. I doubt if Mr. Goldie wants to know how many specific dollars each band received. I suspect he would be satisfied or he should be satisfied, I think, to say that each year the various bands received, if such was the case, their pro rata share.

THE COURT: Did I say then that one time Mr. Scott gave what was called a floater to a dog that was ordered to be destroyed, and he gave the dog 24 hours to get out of town? I thought what I said at the time, you people would go up to Smithers and find the records.

MR. PLANT: Well, we haven't yet had the admission on the B.C. Special.

THE COURT: I see.

MR. PLANT: Whether it's in town or out of town. And really, the B.C. Special, while it's just one part of the events which transpired as a result of -- or consequent on the 1927 Joint Committee Report, is a pretty important part of the package.

And I am not going to take your lordship through the various exhibits and I don't have reference to the particular passages in the evidence of Mr. Michell or Ms. Wilson-Kenni or Mr. Boys or Mr. McIntyre that all pertain to that. But the basic proposition is that this issue has been a live one for a long time and

there is really not any question either of surprise or prejudice on the part of the plaintiffs which stand in the way of our getting leave to make this further amendment to paragraph 38A now.

THE COURT: What I ordered was particulars of the subsequent actions, was it?

MR. PLANT: Yes. And that's what the particulars endeavoured to do.

THE COURT: Yes.

MR. PLANT: There is the -- most of the references are references to B.C. Special expenditures and decisions about those expenditures. And there is also in point three, the adoption of the report itself by the plaintiff, and that's at the bottom of page 2 of our reply.

THE COURT: All right. Thank you. Any submission on this, Mr. Macaulay.

MR. MACAULAY: No, my lord.

THE COURT: Thank you. Mr. Rush.

MR. RUSH: Yes, my lord.

I think that my friend makes a submission that, "Well, everybody knows and so there is really no surprise," and so on and so forth. But if that's so, then I think he should be a little more forthcoming. Because I don't think these particulars are satisfactory unless a few words are altered, and they were key words, my lord. And if you just read the particulars, it says in the fourth line, "After detaining certain actions including administrative actions, consequent to and pursuant to the report, the Indian Act and other laws of Canada." And my point was always throughout: What were those actions which at the end of the day my friend said was the type of action which he is saying supports that plea?

And then he goes on to say, "such as those actions indicated in." Now, are those the actions which are the particulars, or is there something else? And I think it's very helpful to know that this is what is being referred to. And if that's all that's being referred to, then I'm happy with this, because I think that what that says is those are the actions, and if there are other actions, then I would like to know what those other actions are, because presumably they ought to be in the evidence. If there are other like actions, then it seems to me my friend, having gone to the trouble that he has in isolating -- and I take no issue with the B part there -- I don't think he has to

1 go chapter and verse to the sections. I can find them
2 as easily as he. But if he is referring to other like
3 actions in the evidence, then I think having done his
4 listing here, he ought to be in a position to
5 demonstrate to me what those other examples are.
6 But my concern, really, is this, my lord: is that
7 my friend isn't stating, because of a desire to keep
8 the door open, exactly what it is they are relying on.
9 And I think he -- he -- I think they ought to say that
10 now, and they can say that now, and that your lordship
11 asked for particulars of a detailed nature.
12 My friend says that we were aware that one of the
13 issues was the B.C. Special vote. Well, sure, we
14 were. You would have to be blind to the statement of
15 defence not to know it. But the statement of defence
16 as pleaded, 38A, and it isn't -- it wasn't known to us
17 at the time of the evidence being elicited in
18 cross-examination, that subsequent actions to 1927
19 were actions which in fact were thought to be, in the
20 mind of the defendant, material to 1927.
21 Now, I simply say that if these are the -- either
22 the inclusive body of examples, then it should be
23 said, "Those are the examples that we are relying on,"
24 and leave it at that. And I think I would be happy
25 with that.
26 If there are other types of evidence which my
27 friends rely on, I would like to know what those types
28 of evidence are. I think that there should be some
29 kind of enclosure, some kind of certainty here without
30 these -- what I think are the open-door language, the
31 terminology of including or-such-as statements. And
32 it is for those reasons that I say that this is really
33 not a fully responsive, although partially responsive
34 response to the demand for particulars, or their
35 suggestion that there be -- this section, paragraph,
36 be particularized.
37 THE COURT: Mr. Plant?
38 MR. PLANT: Well, as I hear my friend, his -- one of his
39 concerns is that the list is not exhaustive. That is
40 a list which sets out --
41 THE COURT: Exhausting but not exhaustive.
42 MR. PLANT: Yes. And I think that's really the point. The
43 first point I have in reply is that it's good enough
44 to give my friend an idea of what we are on about.
45 But as a practical wrinkle to that, it's based on the
46 review of the evidence that we were able to conduct
47 within a moderately reasonable time framework. And in

Submission by Mr. Plant 1 order to come up with the things that, as we could
2 recall them, were directly and immediately -- spoke
3 directly and immediately to the point. There may be
4 other material in the order. For example, there may
5 be material in the three or so volumes of historical
6 documents which the Attorney General of Canada has
7 filed, which we have not yet had an opportunity to
8 look through. It will be in the record, the material
9 will speak for itself to that extent, and I think it
10 would be most unfortunate, and entirely unnecessary to
11 require us at this point to basically state in a
12 conclusive way what our argument at the end of the day
13 is. There is no smoking gun here. There is nothing
14 that we are keeping in our back pocket that I know
15 about. We have done the best we could, given the time
16 frame and the circumstances, to assist my friend to
17 point him to the evidence which bears on what we have
18 in mind. And it's quite clear that my friends have
19 had some idea of what was in mind for a long time.
20 There is no attempt to lie in the weeds here. We just
21 don't want to slam the door irrevocably in
22 circumstances where it may be foolish to do that.
23 There may be other material which your lordship ought
24 to have in order to consider this issue at the end of
25 the day, material which is already in the record, or
26 will be, as a result of whatever reply evidence that
27 my friends may choose to call.
28 And I submit that this is adequate. In fact, it
29 is more than sufficiently responsive to my friend's
30 concerns, and it sufficiently identifies the kinds of
31 things that we have in mind. And it does more than
32 that. It identifies all of the things that we have in
33 mind that we could come up with in the time frame that
34 we have.
35 Now, there is one qualification to what I've just
36 said. I do not recall at the moment whether the
37 material identified in points one, two or three
38 incorporates a documentary reference to the -- the
39 vote as it first occurred in the annual government
40 expenditures for Parliament in 1927. That may be in
41 the material, but I am not even sure if the document
42 exists.
43 THE COURT: You mean the Parliament proceedings leading up to
44 and including the vote?
45 MR. PLANT: Well, no. Simply a record of the vote. That would
46 presumably be an extract from Hansard or the Gazette.
47 That in the books for Canada, shows in 1927 or 1928

when it first happened, a hundred-thousand dollars under B.C. Special vote, that's just a matter of record. And I can't recall right now whether such a thing exists or whether -- whether or not it does or whether it's in the material.

But I say that my friend's concern with respect to the point of keeping the door open is all well and good. But what we are really up to now, I say, is giving the plaintiffs and your lordship an indication of what we had in mind by this amendment with sufficient detail to make it quite clear what it's all -- but without foreclosing the possibility that there might be other material which, when we are preparing our argument, ought to be put before your lordship.

THE COURT: All right. Well, as is so often the case, and as I have sometimes said before, I think there is merit in what both counsel have said.

I think as a matter of notice, the particulars that are now tendered are sufficient for this time. But I think the plaintiff is entitled, as Mr. Rush has said, to have some finality. And I think that it must be -- these must be treated as inclusive or exhaustive unless at the time the province delivers its written submission it clearly indicates what other facts it proposes to rely upon. And that will give the plaintiff some chance to amend their argument or to adjust it not much but some, and will permit both sides, when they start their argument, to know precisely what it is, if additional to these matters, the province propose to rely upon them.

With that caveat, is there any reason other than what you've already said, Mr. Rush, why the amendments amended by the defence as proposed on November 9th should not now be amended?

MR. RUSH: No. That was the only submission I had.

THE COURT: Yes, all right. Then that proposal -- the defendant -- the defence of the province will be amended in the form proposed on November 9th, subject to what I have said today.

MR. PLANT: My lord, I have the original of that statement of defence.

THE COURT: All right.

MR. PLANT: If it would be of assistance for the record.

THE COURT: Yes. Thank you.

MR. PLANT: And as a collateral matter to that, we will, in due course, be filing amended particulars because we have

one or two amendments to the consolidated particulars that we've already been -- that we've already delivered, and these particulars will be incorporated into the consolidated particulars.

THE COURT: All right. Thank you.

MR. PLANT: My lord, item 11 on my list of matters to be spoken to reads, "Amendments to statement of claim". This is really a matter which I would be grateful to hear from my learned friends about.

There was -- there have been discussions and orders have been made with respect to a final statement of claim from the plaintiffs, and I -- my understanding was that certain things were to happen by December 1st, or thereabouts, that we were to get particulars of a certain -- if a certain amendment was to be taken by the plaintiffs. We haven't received any such particulars, and we haven't received a final amended statement of claim yet. And I am particularly concerned to know what the timetable is for those events. Among other things, we would like very much to deliver a final statement of defence, and we can't do that until we see the final version of the statement of claim. I don't know if my friends are in a position to assist your lordship on that now or not.

MR. RUSH: Your lordship ordered particulars of certain amendments, I think we called it the predecessor language amendment. We are not in a position to deliver those as yet, so I must say the discussion around the statement, the particulars tendered by my friends has been helpful and maybe that will assist in helping to sharpen our formulation of those particulars. We are trying to do it in an expeditious way.

THE COURT: All right. I am not disposed to make any draconic orders fixing time limits or anything, but it must be soon. I am sure you agree, Mr. Rush.

MR. RUSH: Yes, my lord.

THE COURT: Thank you. Mr. Plant.

MR. PLANT: I can jump down one item because item number 13 is extremely brief.

Item number 13 reads, "Schedule for Oral Argument." I wish only -- here I wish only to refer to the discussions that have been held and the memorandum of your lordship concerning the timetable for the memorandum of -- for the plaintiffs' oral argument in Smithers. And as I understand it, your lordship has reserved a courtroom, and the position is

that the plaintiffs have up to four weeks to adduce their oral argument. My only note is that the province wishes to have one or two days in Smithers for the purpose of outlining its response and its argument, and I -- it would have to follow directly upon the completion of the plaintiffs' oral argument, and I would hope that it could be done within the four-week timetable that I understand has been set aside for submissions in Smithers. But if not, I would ask that we have the opportunity to stay in Smithers, in effect, for the purpose of outlining the province's argument, and this would take a day or perhaps two, but no longer than two days. That's really all that I had to say on that subject.

MR. MACAULAY: I have something to say about that.

THE COURT: Yes.

MR. MACAULAY: I heard of this just recently and I've told my friends, the counsel for the province, that if they do that, we ought to have the same opportunity; that is, to outline -- and I don't know whether we will need a day or two days, but outline the Attorney General of Canada's position. I don't think one defendant should be --

THE COURT: Well, let me find out what you mean, Mr. Macaulay. Do you mean after the plaintiff has argued -- after the province has argued?

MR. MACAULAY: No. After -- we can't all go up there again after the province has come down here, and spend two and a half or three weeks making their full argument. What I'm saying is that if the province seeks that indulgence then the federal defendant ought to have the same opportunity.

Clearly, what they want to do is just outline their whole argument, their whole position in the claim area, so to speak. If they are allowed to do that, so are we, and I don't see why one defendant should be treated differently than another. And the only way of achieving that is to have us follow immediately on their submission in Smithers.

THE COURT: Well, this raises problems that I haven't given much thought to.

MR. MACAULAY: As I say, this has just came up recently and that's my suggestion.

THE COURT: You will be seeking only to reply to the province's argument and not to the plaintiff?

MR. MACAULAY: No.

1 THE COURT: I am trying to --
2 MR. MACAULAY: No. We have -- we have -- we have a different
3 defence and different submissions to raise vis-a-vis
4 the plaintiffs, as well as a submission we have to
5 make regarding the province counterclaim.
6 Now, the -- I don't know what I -- I suppose the
7 province wants to talk about its counterclaim in
8 Smithers. We haven't been told that, whether they
9 want to confine their day or a day and a half to their
10 defence to the plaintiffs' claim, or whether they want
11 to deal with the -- their claim over, as your lordship
12 has characterized it. Whatever it is, I don't think
13 that the federal defendant should stand mute in
14 Smithers while the province delivers its message,
15 which is what it sounds like, not a legal argument, a
16 message.
17 THE COURT: I don't imagine you are in a position to assist us,
18 are you, Mr. Rush, in indicating whether you think
19 your argument will be four weeks or three weeks or
20 part of a fourth week?
21 MR. RUSH: No. I am completely unable to say and I wouldn't be
22 able to say until we got a lot closer to that time.
23 THE COURT: Yes.
24 MR. RUSH: But if I may --
25 THE COURT: Sorry. Go ahead.
26 MR. RUSH: My comment in respect to both requests is that I
27 would support them in whatever way they can be
28 accommodated to the scheduling and to the court's
29 convenience. I would also point out to your lordship
30 that there is another, in my view, outstanding issue
31 as to the locus or situs of the reply. And it was our
32 early submissions to you that the arguments of the
33 plaintiffs be in Smithers, and although we never
34 really addressed the question of the reply being in
35 Smithers, I do raise it now, and it is a matter that I
36 feel should be addressed at some point by the court.
37 THE COURT: I don't think it was mentioned when we last talked
38 about this.
39 MR. RUSH: No, it wasn't the last time we talked about it, but
40 it is in my first submissions, that the plaintiffs'
41 arguments, including reply, be in Smithers. And I --
42 and your lordship, I think, has dedicated three or
43 four days to the reply.
44 THE COURT: Yes.
45 MR. RUSH: And I do make that request of you now, if it hasn't
46 been made articulately before, that the reply be in
47 Smithers.

1 THE COURT: Well, one of the problems that I have, of course, is
2 the enormous difficulty of moving these exhibits.
3 MR. PLANT: I think I might be able to assist your lordship
4 in -- on that. I am virtually certain and I can
5 confirm this over the lunch break, that it would be
6 unnecessary for the purposes of our day or two day
7 introduction to the case to have many or any of the
8 exhibits.
9 THE COURT: That's no problem though, because they will already
10 be there.
11 MR. PLANT: Well, yes. I didn't -- all right. Fair enough.
12 THE COURT: The plan was to have them moved down here during the
13 off week between plaintiffs.
14 MR. PLANT: And my point being, if for some reason we had to
15 stretch over that off week, then the exhibits could
16 still be moved down. Unfortunately, the bodies would
17 have to be moved back up for a day or two at the
18 beginning of that next week.
19 THE COURT: All right. Well, I'll have to think about this one.
20 I am not able to deal with this at the moment. I
21 think that I have to try my best to project what state
22 we are all going to be in after four weeks, if it goes
23 that long. I am not optimistic about that thought,
24 and I am conscious of the difficulties we all labour
25 under, and I'm sure counsel will be giving some
26 consideration to the particular difficulties in which
27 I suffer. I would not be disposed to risk the early
28 completion of this whole trial by this sort of
29 discussion we are having now, and the consequences of
30 it. I -- my first thought is that we might be
31 exhausting ourselves by having four weeks in a row to
32 complete the plaintiffs' argument. To add another
33 week to that is something I wouldn't be prepared to
34 risk, or any part of an additional week.
35 MR. PLANT: Well, my lord, I don't wish our position to
36 interfere with that aspect of your lordship's
37 concerns. Our principal concern is --
38 THE COURT: I wish you hadn't brought it up, Mr. Plant, or we
39 wouldn't have this difficulty.
40 MR. PLANT: Well, what I mean by that is if it's two weeks and
41 then a week off and then two weeks, that's -- whatever
42 is --
43 THE COURT: No, Mr. Plant. There has to be some certainty to
44 these things. I thought that this was settled and I
45 am troubled by it being reventilated now when it
46 wasn't mentioned before, and I am tempted to say we
47 have set the schedule and that is what it will be. I

1 have to give some thought to what counsel say about
2 these things. I am prepared to give it that thought.
3 I am not very optimistic about it because I think that
4 it is imposing burdens on us that we ought not to
5 risk, but I -- it was two years ago, but I must say I
6 found the experience to be very, very difficult to be
7 in the situation of being there for four weeks in a
8 row. It's -- with so many other things to worry
9 become and the ambiance being what it's been. But
10 I'll give it whatever thought I can and I'll get back
11 to you as soon as I can.
12 MR. PLANT: Thank you, my lord. The next item --
13 THE COURT: How much more have you got to go, Mr. Plant?
14 MR. PLANT: Well, I have two items on -- left on my list of
15 matters to be spoken to. The --
16 THE COURT: All right. Well, perhaps we should come back at two
17 o'clock. You have got some matters too, Mr. Rush?
18 MR. RUSH: Yes.
19 THE COURT: Yes, all right. I think we will resume at two.
20 THE REGISTRAR: Order in court. Court stands adjourned until
21 two o'clock.
22
23 (PROCEEDINGS ADJOURNED AT 12:30 P.M.)
24
25 I hereby certify the foregoing to be
26 a true and accurate transcript of the
27 proceedings herein transcribed to the
28 best of my skill and ability.
29
30
31
32 _____
33 Toni Kerekes, O.R.
34 United Reporting Service Ltd.
35
36
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1 (PROCEEDINGS RESUMED PURSUANT TO LUNCHEON ADJOURNMENT)

2

3 THE COURT: Mr. Plant, have you finished your agenda?

4 MR. PLANT: My lord, the next item on my agenda that I wish to

5 deal with or to be dealt with is item -- the item that

6 pertains to the Barbara Lane documents which is item

7 eight and my colleague Ms. Sigurdson and I believe Mr.

8 Rush will be dealing with that.

9 THE COURT: Thank you.

10 MR. RUSH: My lord, maybe I can take the lead here. Ms.

11 Sigurdson and I have been corresponding on the Dr.

12 Lane documents and it seems like there is relative

13 agreement on most issues except for two. And if you

14 have Exhibit 1206, which is the thin volume of Barbara

15 Lane's documents before you, I think we can move

16 quickly to a point of -- a point of dispute. I can

17 advise your lordship that the particular volume was

18 broken into tabs in accordance with various documents

19 and lists that were requested of Dr. Lane or offered

20 by Dr. Lane and we had reached agreement on one and in

21 terms of tab 2.

22 THE COURT: Yes.

23 MR. RUSH: I'd like you to turn to that now, my lord.

24 THE COURT: Tab 2?

25 MR. RUSH: Yes. Tab 2.

26 THE COURT: Yes.

27 MR. RUSH: Your lordship can ignore the note at the top of the

28 page, because it's by agreement. We have agreed to

29 excise that. The only issue on tab 2 page three is

30 the last sentence.

31 THE COURT: Oh, I'm sorry. I've only got one page on tab 2.

32 MR. RUSH: You should only have one page in tab 2.

33 THE COURT: I thought you said --

34 MR. RUSH: And it should be page three.

35 THE COURT: Oh, yes, it is page three. Thank you. That's a new

36 one. First page is number three.

37 MR. RUSH: They are organized this way, my lord, because there

38 are separate lists in each tab, although they were

39 tendered to me by --

40 THE COURT: All right. Yes.

41 MR. RUSH: -- Dr. Lane in this form. The only issue between my

42 learned friend and I is that the last sentence I say

43 can be included and my learned friend says it is not

44 necessary to include it. I say that it goes to the

45 question of --

46 THE COURT: I am sorry, the last sentence at the foot of the

47 page or the last sentence in that long paragraph?

1 MR. RUSH: No, the last sentence in the foot of the page.
2 THE COURT: "I do not have my position -- "
3 MR. RUSH: Yes. Reporting the Nanaimo treaty. And my friend
4 says that that I think does not address the
5 communications that were sought of her in the reports
6 of the treaties to London. I think she indicates, if
7 I am stating her position correctly, that there is no
8 indication that such a communication was made, there
9 is no evidence of that and therefore it shouldn't be
10 included. My argument is that the character of the
11 sentence presupposes the existence of such a
12 communication, but Dr. Lane didn't have it, but
13 nevertheless was one that she at least took into
14 account. Now, there is one other disputed issue and
15 if you wish me to go to that.
16 THE COURT: No. I think we should deal with this one, if that's
17 convenient.
18 MR. RUSH: That's fine.
19 THE COURT: Ms. Sigurdson?
20 MS. SIGURDSON: Our submission is that if there is a
21 communication the document, the citation should be
22 included, but this adds nothing. It assumes or
23 implies the communication exists and to my
24 recollection there is not one in evidence so far,
25 although I stand to be corrected on that point.
26 Absent an actual document the sentence is of no
27 assistance.
28 THE COURT: All it proves is that she doesn't have one if there
29 is one, but you say it suggests that there is and it
30 may not be.
31 MS. SIGURDSON: Well, that's my concern.
32 THE COURT: Why do you want it in, Mr. Rush?
33 MR. RUSH: Well, the fact that in my submission --
34 THE COURT: Like the mountain, it's there?
35 MR. RUSH: Well, Dr. Lane obviously believes that there is such
36 a communication, but she doesn't have it, and that's
37 to signal to the court that there is such a
38 communication and it's not in her possession, that's
39 all.
40 THE COURT: All right. Well, I think it's innocuous and being
41 as positive as I can instead of as negative as I can,
42 let's leave it in. It proves nothing and I think no
43 inference could possibly be drawn.
44 MS. SIGURDSON: If I can interject. Mr. Rush has delivered to
45 me copies of these pages with the parts we agreed
46 could be excised or blanked out.
47 MR. RUSH: Yes, I have those here. That's if your lordship

THE COURT: Exchange?
MR. RUSH: Yes. This is tab 2 and that can be inserted.
Thank you. Now, my lord, if you turn to tab 3 there is no disagreement on tab 3. If you turn to tab 4, this -- excuse me.
MS. SIGURDSON: Could I -- perhaps I can make my comments as we go along and it might save time.
MR. RUSH: Yes, go ahead.
MS. SIGURDSON: Our position on tab 3 is that we do not accept that all these treaties or documents are responsive to Mr. Goldie's question. Having said that, though, many of the documents to which we take objection in this context are already exhibits. We leave for now the relevance to argument.
THE COURT: Yes. All right.
MS. SIGURDSON: So we have -- we would like to tender two documents that we say provides context to one of the documents and I will do that after Mr. Rush is completed, if that's acceptable.
THE COURT: All right.
MR. RUSH: Thank you. Tab 4, this is page eight. My friend has a comment with regard to the two introductory paragraphs leading to the lists that are set out at this tab, but I don't take her comment to be that she disagrees that the contents of page eight shouldn't be included. I will leave her to make that comment.
MS. SIGURDSON: My only concern was that when I read the comment at tab 4 I wasn't sure of Dr. Lane's meaning. If in her comments she is setting out categories of documents and then listing all of the documents that she had in mind, then we take no objection. If there is any open-endedness, then we do object, and I will be asking for a complete listing. In my letter to Mr. Rush I simply ask for his assurance that that was a complete list.
THE COURT: Well, I doubt if Mr. Rush can give that assurance, can he?
MR. RUSH: Yes. I am bound by the language of Dr. Lane's response and I am a captive of it as much as my learned friend. I can only say that it says what it says there and I am not sure that I would be in a position to argue anything beyond what appears on this page.
THE COURT: Yes. Well, I think that it can stay the way it is. I have Ms. Sigurdson's comments in mind that -- and Mr. Rush's about being a captive to what's here and I

1 think no injustice will result from leaving it the way
2 it is.
3 MR. RUSH: All right. Now, my lord, the second page at tab 4
4 which is page number nine, the only disputed paragraph
5 on this page is the first paragraph under the second
6 heading beginning "for an assessment." Everything
7 else is resolved and I can hand you a page to that
8 effect in a moment. So the paragraph here, again it
9 is Dr. Lane's evaluation of that request and
10 contextualizes what will be the one reference that she
11 includes there under the 1975 Reminiscences of Dr.
12 Helmcken. I say that what it does is to again
13 identify for your lordship the absence of the material
14 directly on the point and expresses what she relied on
15 as a general information on the issue. And I really
16 have nothing more to say than that.
17 THE COURT: Thank you. Ms. Sigurdson?
18 MS. SIGURDSON: Mr. Goldie asked Dr. Lane if she could provide a
19 list of documents that she elected to assess this
20 letter for Mr. Musgrave's endorsement. She said she
21 could. The response in tab 4 at page nine is not a
22 list of documents nor is it a simple assertion that
23 there was no single document to look at, but goes away
24 and starts talking about general history. And if
25 there is general history we would like to know what
26 document she had in mind. If there is no particular
27 document, we are satisfied that that could be
28 included, but not the comment as it is here.
29 MR. RUSH: Well, in response, my lord, I would simply say that
30 general background must be an evaluation of the period
31 and the exchanges that had occurred without any
32 particular reference necessarily to one or even a
33 grouping of documents. There is that one entry and to
34 the extent that one constitutes a list, of course that
35 qualifies it.
36 THE COURT: I don't think this is the sort of thing where one
37 can be sent off to explain the basis for comment or a
38 statement and then having difficulty finding them
39 except for one it has to fall back on general
40 background information. I would have to read it in
41 the context of what she said and decide whether this
42 is a retreat or not, but if it is then it speaks for
43 itself and if it isn't, then well and good. But I
44 think that it would be asking too much of a witness to
45 have to specify what is included within general
46 background information. The doctor has already given
47 us four volumes, I think it is, of historical

1 documents and I just don't think that a witness with
2 the amount of knowledge these people have can be
3 pinned down that tightly and I wouldn't require this
4 to be changed.
5 MR. RUSH: All right. My lord, my learned friend and I have
6 agreed to excise certain other passages on this page.
7 THE COURT: All right.
8 MR. RUSH: And I will hand up to you a version of this page
9 which is a clean version. So I'd ask you to
10 substitute that new altered page nine.
11 THE COURT: Yes, I've done that. Thank you.
12 MR. RUSH: Thank you. And then, my lord, if you'll turn now to
13 tab 5.
14 THE COURT: This book alone is 1206, is it?
15 MR. RUSH: Yes.
16 THE COURT: Yes, all right. Tab 5?
17 MR. RUSH: Yes. And we have agreed --
18 THE COURT: Oh, I am sorry. Just a minute.
19 MR. RUSH: You were in tab --
20 THE COURT: The first one was from -- was tab 1, wasn't it?
21 MR. RUSH: Tab 2.
22 THE COURT: Tab 2. And the second was tab --
23 MR. RUSH: Was tab 4, page nine.
24 THE COURT: Yes. All right.
25 MR. RUSH: And the last one --
26 THE COURT: Oh, yes, I can figure them out by the page number.
27 MR. RUSH: Yes.
28 THE COURT: All right. Tab 8?
29 MR. RUSH: No, my lord, tab 5.
30 THE COURT: Five.
31 MR. RUSH: Page ten. And I'll -- my friend and I have agreed to
32 extract a certain portion of that and I am handing you
33 up now an amended version of that page.
34 THE COURT: Thank you.
35 MR. RUSH: Thank you. Now, tabs 6, 7, 8, 9 are to remain as
36 they presently are and there is a second part to this
37 volume which begins a new series of tabs and that's at
38 part two, tab 1, and we've agreed to take out the
39 cover letter which is at tab 1. So if you'll just
40 take that out, my lord, and that will be excluded.
41 THE COURT: Okay.
42 MR. RUSH: And the rest of the volume is to be -- is to remain
43 as is.
44 THE COURT: Thank you. All right.
45 MR. RUSH: And I think my learned friend wishes to speak to two
46 documents which she sought to tender as part of this
47 discussion.

1 THE COURT: Thank you.
2 MS. SIGURDSON: There is a letter referred to in the list at tab
3 3 from Sir John A. MacDonald to Joseph Trutch dated
4 April 9, 1874 and the document itself is found at part
5 two tab 1. We seek to tender two letters that --
6 THE COURT: Is this the letter of the -- I can never figure
7 these things out. 1874 04/09, whatever that is.
8 MS. SIGURDSON: Yes. April 9, 1874.
9 THE COURT: That's April 9, and that's the one you're talking
10 about?
11 MS. SIGURDSON: Yes. I have two letters here. The first is
12 from Joseph Trutch to Sir John A. MacDonald dated
13 March 26, 1874.
14 THE COURT: Is there a problem with this, Mr. Rush?
15 MR. RUSH: No, there is no difficulty with this.
16 THE COURT: All right. Thank you. And should it most
17 conveniently be put with this document?
18 MS. SIGURDSON: That would be my suggestion, my lord.
19 THE COURT: Yes. All right.
20 MR. RUSH: Which one does it go?
21 MS. SIGURDSON: Part two tab 1.
22 MR. RUSH: Part two tab 1.
23 MS. SIGURDSON: Is the document itself. The document, my lord,
24 is referred to at tab 3 of part one.
25 THE COURT: Yes.
26 MS. SIGURDSON: In a list.
27 THE COURT: Yes.
28 MS. SIGURDSON: The document itself appears at part two tab 1 --
29 pardon me, part two tab 2. Thank you. And the second
30 letter in the bundle I have given you is --
31 THE COURT: All right.
32 MS. SIGURDSON: -- a letter from Mr. Trutch to Sir John A.
33 MacDonald of May 25, 1874.
34 THE COURT: Where was that list again? Oh, yes. I have got it.
35 And what is the date of this other letter?
36 MS. SIGURDSON: There are two letters, my lord. The first one
37 is March 26, 1874. Oh, pardon me, the date of the
38 letter that these relate to is April 9, 1874. It is a
39 letter from Sir John A. MacDonald to Joseph Trutch.
40 THE COURT: It's the same letter.
41 MS. SIGURDSON: And there are two letters between the same
42 parties but different dates that I seek to tender.
43 THE COURT: Oh, all right. So they will both go into tab 2
44 then.
45 MS. SIGURDSON: Yes.
46 THE COURT: The second part of this document. Yes. All right.
47 I am confused. The document you handed me first has

1 three parts to it. Is that what it should be?
2 MS. SIGURDSON: The first two are the original and a typescript
3 or a transcript of the letter of March 26, 1874.
4 THE COURT: All right. Yes.
5 MS. SIGURDSON: The third item is the second letter. It is from
6 Joseph Trutch to Sir John A. MacDonald of May 25,
7 1874.
8 THE COURT: Yes. All right. They will all go in, then, as part
9 of the second tab 2 of 1206. Thank you.
10 MR. RUSH: Thank you, my lord. Now, I'm going to be addressing
11 a new issue and it's now a departure from the
12 Province's list of items. And I'm seeking to tender
13 certain volumes of documents at this stage and I'm
14 going to hand up to your lordship three volumes.
15 THE COURT: Your friends have seen these?
16 MR. RUSH: Yes, they have. Now, I will deal with those and I'm
17 going to hand up two more volumes which I'd like to be
18 dealt with in a different category, if I may. Now, my
19 lord, if I can deal with the set of the first three
20 that I handed up to you. There are two eight and a
21 half by 14 sized binders and one three-ringed binder
22 eight and a half by eleven. They are marked volumes
23 one, two and three and they are entitled Treaties and
24 Laws 1607 to 1789 and Treaties and Agreements 1850 to
25 1989. Now, these are being tendered now by the
26 plaintiffs as additions to the collections of
27 documents tendered as exhibits in the proceedings.
28 Your lordship has already expressed the view that such
29 documents may be tendered after the close of evidence
30 of a witness and this you stated during the course of
31 argument made when we tendered the Barbara Lane
32 documents and your lordship may recall that exchange
33 or you perhaps may not. But if you don't I'd like to
34 hand up to your lordship the passage. Now, I just
35 direct your attention, my lord, to pages 22385 and if
36 you look to the court's interjection at line 25 your
37 lordship will see the following:
38
39 "But we don't have that problem, because I am
40 presently of the view that they can go in as
41 part of your addition to the collection if you
42 want to put them in and it isn't a question of
43 consequences resulting from Mr. Goldie asking
44 for the documents. Now, I haven't heard Mr.
45 Goldie on that part of it. But it seems to me
46 that, again I come back to the analogy of the
47 cheque again, that in a case as massive as

1 this, I think you can supplement the collection
2 by further documents in the same general
3 classification as the collection and then it
4 becomes a question if you do, that Mr. Goldie
5 might be able to further cross-examine Dr. Lane
6 on those documents."
7
8 Now, that was within the context of that particular
9 discussion. You returned to this issue on the
10 following page, but I think it's simply a repetition
11 of the position taken by your lordship. And I take
12 the principle to be that where any of the parties seek
13 to add to the collection of existing documents that
14 were addressed in the evidence either viva voce or by
15 reference to the documentary record that's been filed
16 as part of that witness' evidence or cross-examined
17 upon, that that party may introduce further documents
18 by way of adding to the collection of those documents.
19 And I think a case in point is the -- is the example
20 of Ms. Sigurdson adding to the collection of documents
21 of exchange between Sir John A. MacDonald and Mr.
22 Trutch. The documents that I am seeking to tender
23 here in the first volume, Volume 1, which is a -- the
24 large volume, these are all ancient documents and they
25 all come from the same source, which is a source which
26 has been disclosed, and this is from a collection of
27 treaties by the general editor Eldon Vaughan and you
28 can see that by reference to the index and what this
29 is is a collection of the some of the conferences,
30 councils and deeds from early American Indian
31 documents, which is the name of the volume, Treaties
32 and Laws, and they run from 1607 to 1789. And, my
33 lord, the Vaughan document was disclosed under
34 plaintiffs' number 3930. Now, this collection
35 includes early American treaties, conferences,
36 councils and deeds of land between representatives of
37 European powers including Great Britain and the
38 colonies of North America and the Indians in those
39 colonies and in those particular areas. And they
40 range from the early Dutch deeds with the Indians
41 from -- the earliest one I think there is 1629 on the
42 east coast of North America to the treaties with the
43 Six Nations in the 1740s and 50s and then through to
44 the Treaty of Lochaber in 1870. Now, we say that
45 these documents are relevant to showing the historical
46 treaty-making process proceeding, leading up to and
47 founding the basis of the Royal Proclamation and after

1 the Proclamation. A number of treaties before and
2 after the Royal Proclamation have been tendered as
3 part of Mr. Morrison's collection and they were also
4 tendered -- or referred to in part by Dr. Greenwood.
5 Now, we are tendering these to fill out the -- that
6 collection of documents of Mr. Morrison's. Now, I
7 want to point out as well, my lord, that the treaties
8 in the second volume, this is in a sense a second
9 listing of these treaties and they run from tab 1 to
10 17 and except in the second volume tab 18, there is a
11 report of a select committee on aboriginees, the
12 official report of 1837, they are all treaties and
13 documents. Now, my lord, these documents have been
14 made in our submission particularly relevant by the --
15 and this is really, if I can put it this way, an
16 auxiliary or supporting point on the argument, by the
17 submission that Mr. Goldie made in his opening. And
18 I'd just like to hand up a copy of that to your
19 lordship. What I'm doing here, my lord, is referring
20 to Mr. Goldie's opening in Volume 250 at page 18454
21 and the focus by the Province on the question of
22 treaty making was particularly appropriate. He says
23 at 55 --
24 THE COURT: Is that the first or the second page?
25 MR. RUSH: That's 18455. That's the first page.
26 THE COURT: I can't see the numbers. They have been stapled
27 over. So is it the first or the second page?
28 MR. RUSH: It's the first page.
29
30 "I noted that when British Columbia became a
31 Province of Canada these powers of reservation
32 and disallowance were vested in the Dominion.
33 And what is possibly one of the most important
34 aspects of the case in the constitutional
35 sense, British Columbia lost the competence to
36 enact legislation in respect of Indians as
37 Indians. And that is, of course, as a result
38 of section 91."
39
40 And then he goes on to say:
41
42 "There have been suggestions from time to time
43 that British Columbia is somehow unique in not
44 having concluded land cession treaties with
45 Indian peoples in the province. That
46 uniqueness, so-called, is simply not so.
47 By way of illustration, my lord, I have put

1 up on the board, and it is rather small
2 scale.... map."
3
4 And what my learned friend did was to place a copy of
5 a Department of Indian Affairs map as of October of
6 1977, apparently demonstrating the treaties that had
7 been entered into with Indians in Canada. He goes on
8 to discuss that at the bottom of that page, taking a
9 position that in fact there were areas of Canada in
10 which there were -- large areas in Canada in which
11 there were no treaties covering that particular land
12 mass. And they he goes on at the bottom 47:
13
14 "Now, of course, British Columbia has been
15 constitutinally incompetent to make such
16 treaties since 1871.
17 So I simply say that the constitutional
18 observations made in May 1987 are as relevant
19 now as they are then. And they continue, as I
20 say, to be relevant. They are particularly
21 relevant when, in the intervening period of two
22 years we come to consider the nature of the
23 plaintiffs' claims.
24 It was then and is now a claim of ownership
25 and jurisdiction."
26
27 And he goes on touching on that issue. But I say that
28 Mr. Goldie clearly focused in on the extent of the
29 treaty making -- the extent of the treaty making in
30 the land mass which is now Canada and I think that
31 that generates the issue of the pre-existence of the
32 geopolitical reality of Canada and the post
33 confederation political land mass of Canada and the
34 treaties which were entered into prior to that time
35 and the treaties which had been entered into since
36 that time. Now, apart from Mr. Goldie's conclusions
37 which are contained there, of course which we take
38 issue with, Mr. Goldie placed precolonial and colonial
39 and post confederation treaty-making history directly
40 in issue. And it is essentially to these issues that
41 we seek to tender these volumes as well. And I say,
42 my lord, and I am going to direct you to the third
43 volume now, that what is contained in the third volume
44 are the -- there are four tabs and they -- these
45 contain firstly at tab 1 the treaties of Canada with
46 the Indians. The volume by the Honourable Alexander
47 Morris of 1880 which contain a number of treaties, and

1 I should say the numbered treaties except for two, as
2 well as the Selkirk, Robinson and Manitoulin Island
3 treaties negotiated in Ontario. The documents which
4 are at tabs 2, 3 and 4 are the comprehensive land
5 claims agreement in principle between the Council for
6 Yukon Indians and the Government of Yukon in May 1989.
7 The agreement in principle between Canada and the Dene
8 Nation of the Northwest Territories of September of
9 '88 and the agreement between the Nishga Tribal
10 Council and Canada in December of 1988.
11 Now, I say firstly, my lord, that the question of
12 the process of treaty making, the actual negotiated
13 treaties in the post confederation period was a
14 subject of evidence of Dr. Lane, Dr. Galois and Mr.
15 Sterritt. Indeed, while I don't intend to into it
16 fully, Mr. Sterritt referenced the document in all
17 fairness being the position of the office of Native
18 claims policy on the treatment of Indians and that is
19 referenced as Exhibit 615. You will also recall that
20 Treaty 8, which is one of the numbered treaties and
21 not in the Morris collection, and its adhesions were
22 tendered as part of Dr. Lane's evidence. And I say
23 the comprehensive lands claims process and the role of
24 the ONC was addressed by Mr. Sterritt and by -- well,
25 through several documents relating to his evidence and
26 the Federal defendant, as has been evident throughout
27 some of the exchanges between counsel, has sought to
28 lead ONC documents dealing with comprehensive claims
29 submitted to that body as part of its case.
30 Now, I say, my lord, that these documents are
31 admissible now and they are admissible under your
32 lordship's ruling. Now, I should address specifically
33 the documents that are contained in the two simply
34 marked volumes, Volumes 1 and 2 which I will redefine
35 as Volumes 4 and 5 in due course as part of this.
36 MR. PLANT: I wonder -- are you moving on to the treatises?
37 MR. RUSH: Yes. I simply want to advise the court what I have
38 done here, and if there is a problem with dealing with
39 it now, then we can touch on that. What's contained
40 in the two additional volumes simply marked one and
41 two are a number of treatises, all of which -- all but
42 four, as I count them, I have given notice to my
43 friends and which have been disclosed on the lists
44 and/or have been referenced in as footnotes to either
45 Dr. Greenwood's or Mr. Morrison's evidence. These are
46 treatises that we seek to add to the collection of the
47 documents which are outstanding. In some cases, my

1 lord, you'll notice if you look at the index to the
2 Volume 1, B. Trigger, "Natives and Newcomers." Mr.
3 Trigger's work has been periodically referred to and
4 pieces of that have been put into evidence, where the
5 evidence of Mr. Jennings, for example, F. Jennings,
6 "The Invasion of America" likewise has been referenced
7 on several occasions and I believe so has tab 8, "The
8 Covenant Chain Confederation." And so we are seeking
9 to add these documents to that collection of treatises
10 that your lordship ought to take into account as part
11 of the plaintiffs' evidence.
12 Now, I can say, however, that in perusing this
13 list, that there are four of these treatises which I
14 had not previously disclosed, and if this presents a
15 problem then I am happy to have the whole matter stood
16 down. They are tab 4, the de las Casses, the
17 document. They are the B. Johansson "Forgotten
18 Founders," tab 9 and the -- 11, C. Johnson, "The
19 Valley of the Six Nations" and as well as the Rochan
20 "Father and Children" tab 13. And I will be seeking
21 in due course, if it's a problem of notice, to have
22 those tendered as part of the documents. So that's my
23 submission. I'd like these to be tendered now. And I
24 don't know what my friends' positions are. They
25 are -- characteristically I would expect them to
26 oppose.
27 MR. PLANT: My lord, I want to deal first if I might with the
28 three-volume collection of treaties. My first comment
29 is really a question which perhaps my learned friend
30 can answer. That is to find out whether these
31 documents are being tendered as part of the
32 plaintiffs' case in chief or as part of their case in
33 reply, that is to say their rebuttal case. I asked
34 that question, I was prepared to ask that question
35 before my friend began. I ask it again now because
36 nothing that my friend has said has enlightened me on
37 that, because he says firstly as to the treaties that
38 these are simply additions to collections of documents
39 already tendered as exhibits in the proceedings and
40 then in support of his argument for their general
41 admissibility and relevance he refers to Mr. Goldie's
42 submission which, of course -- Mr. Goldie's opening.
43 That second observation suggests to me that he's
44 replying to the Province's case, in which case these
45 documents are being filed as part of the plaintiffs'
46 rebuttal. Whereas, the first proposition suggests
47 that they are being filed as part of the case in chief

1 and my response to my friends' submission depends on
2 which of the two positions he's taking. I really
3 can't say more without knowing which of the two it is.
4 MR. RUSH: The first.
5 MR. PLANT: Well --
6 THE COURT: I am sorry, the first being that there --
7 MR. RUSH: It's part of the plaintiffs' case and adding to the
8 collection of documents. That's correct.
9 THE COURT: All right.
10 MR. PLANT: Then I suppose my general problem is that these
11 documents -- I have my friends' general statement of
12 whose evidence they are seeking to add to now. I do
13 have a concern. I say that generally speaking it's
14 not appropriate to file such a mass of documents so
15 long after the witness has left the stand. Mr. Rush
16 referred to a couple of documents which my friend Ms.
17 Sigurdson has tendered as exhibits just a few nights
18 ago and that was a situation where, if Dr. Lane had
19 had the information when she was in the witness box
20 that Mr. Goldie was seeking, then Mr. Goldie would
21 have responded then and there by putting those two
22 extra documents into the record. Here we have the
23 situation where some months, if not a year - I am not
24 sure what the sequence is - after some of these
25 witnesses have given evidence, we are faced with this
26 additional volume of material, and it goes -- it
27 goes -- at this point I think I have to say that my
28 concern rises to an objection when -- I refer to
29 another point which is of the three volumes of
30 treaties, our work indicates that there are eight
31 treaties that were referred to in the evidence of Mr.
32 Morrison, so the balance of the documents are new.
33 Now, what -- the problem comes here, my lord,
34 because both Mr. Morrison -- well, Mr. Morrison in
35 particular was tendered as an expert to assist your
36 lordship in selecting relevant documents. His
37 opinions weren't, generally speaking, admitted and he
38 didn't file an opinion report. So what is it that Mr.
39 Morrison was doing to assist your lordship? And I
40 think here I can refer your lordship to -- and I won't
41 ask your lordship to get the volume out, but at Volume
42 222, page 16149 of the transcript, Mr. Morrison was
43 being led in chief by Miss Mandell and the question at
44 line 21:
45
46 "Q And were the documents which we've already
47 referred to from tab 1 to 19 a selection of

1 documents which -- which was done by you
2 with respect to some of the major issues of
3 this period as you understood them?
4 A Yes, it's a selection from among -- there
5 are an enormous number of historical
6 documents from the period and I selected
7 ones which I felt were important. There
8 are many, many documents."
9
10 What the plaintiffs are doing now by saying that all
11 of these documents pertain to the -- or many of the
12 documents in Volumes 1 to 3 pertain to the evidence of
13 Mr. Morrison is that they are impugning Mr. Morrison's
14 credibility. Mr. Morrison says here are the documents
15 which I'm bringing before your lordship. I as an
16 expert in these matters have selected documents which
17 I consider to be important. That's all he could do to
18 assist your lordship. And now we're getting three
19 volumes -- well, really it's Volume 1, and to some
20 extent Volume 2, that pertain to the Morrison
21 evidence, which casts doubt on Mr. Morrison's
22 assertion that he had already performed the selection
23 procedure. So in that respect I do have a concern
24 that rises to an objection on the issue of treaties.
25 We obviously don't have the opportunity now to
26 question either Dr. Lane or Mr. Morrison or Dr. Galois
27 about any of these documents. And there is some
28 potential for hardship in that regard. But I don't
29 make too much of that.
30 I do, though, have two other general comments.
31 And the first is that we have Mr. Goldie's comment
32 in -- his opening in mind. You will recall that Mr.
33 Goldie was referring to treaties in Canada and the
34 treaties based on my review, the treaties in these
35 Volumes 1 and 2 don't appear to be treaties made in
36 Canada. By and large appear to be treaties made in
37 the United States or what is now the United States.
38 So we're really opening up -- as I understand it we're
39 opening up new ground here at what I think is a fairly
40 late date to be doing it as part of the plaintiffs'
41 case in chief. But when we come to Volume 3, these
42 land claim agreements that are tabs two, three and
43 four, frankly I don't see what these have to do with
44 the case at all. This is the Government of Canada
45 entering into a land claims agreements in 1988, 1989.
46 There are agreements in principle. They are made and
47 have nothing to do with the Province of British

Submissions by Ms. Koenigsberg 1 Columbia so far as I can see or with any of the
2 plaintiffs other than the framework agreement between
3 the Nishga Tribal Council and what -- and what use we
4 are supposed to make or understand will be made of
5 land claims agreements being made in 1988 and 1989
6 escapes me. So I do take particular objection to tabs
7 two to four of Volume 3 on the basis of relevance and
8 I do have a concern with respect to the question of
9 how this tendering of documents now can -- what sense
10 are we to make of the evidence of Mr. Morrison when
11 the whole basis on which he was called and the only
12 thing that he did for your lordship as an expert was
13 to select some documents which he considered to be
14 important and we now find that his selection was
15 insufficient, inadequate and incomplete. Those are my
16 submissions. I prefer, if I might, just to deal with
17 that issue first before dealing with the treatises
18 issue. I think that those other two volumes raise
19 different concerns.
20 THE COURT: All right. Thank you. Mr. Macaulay or Miss
21 Koenigsberg?
22 MS. KOENIGSBERG: I'll be brief, my lord. I find a difficulty
23 in dealing with this large amount of material at such
24 a long -- well, actually in -- I think it was sent
25 over to us perhaps at the end of the Province's case
26 or at the beginning of our case and it becomes
27 difficult to know what to do with it essentially. The
28 documents on their face on the rulings that your
29 lordship has made are admissible. They are ancient
30 and probably archival or from an institution, so
31 that's not the difficulty. The difficulty is how do
32 we reply to it in the sense that we are now at the end
33 of our case, we hope, and we don't have a right of
34 rebuttal. And it's a massive job to now go through
35 this material and determine if there is something else
36 that your lordship should be looking at, because we
37 are dealing with some slightly new departures. We are
38 not dealing with the filling out of a small point
39 here. We're talking about the relevance of large
40 numbers of international treaties -- or rather
41 treaties outside Canada. And in the case of, for
42 instance, the land claims agreements, again it's a new
43 wrinkle, if you will, perhaps large enough to make a
44 pleat, as to what we do in terms of dealing with
45 whatever the submissions would be that would follow
46 from that. And on top of that, I have a real concern
47 about the land claims agreements which in fact follow

1 upon the negotiations, if you will, from the land
2 claims policies. And you'll be hearing about the
3 restrictions, if you will, of produceability and
4 relevance when we -- I hope this afternoon when we get
5 to the ONC documents. But the -- it's very clear and
6 the evidence is already before your lordship that
7 those negotiations and the settlements are without
8 prejudice and they have nothing to do with the issues
9 before your lordship. They are a separate process
10 that has gone along on a different track, and their
11 only relevance in this trial has to do with reputation
12 evidence, if you will, and the fact that claims have
13 been made by adjacent Indian groups. So here we are
14 now with a Nishga agreement in principle, not
15 concluded, and that follows on the process which was
16 entered into on a without-prejudice basis and that is
17 part of the policy of the Federal Government and it
18 was clearly put in place not only without prejudice,
19 but on the clear understanding that it was without
20 regard to legal liability. So I have a great deal of
21 difficulty with what can be made of and what in fact
22 we should even be doing with other documents which may
23 be relevant, if those are relevant. So I would object
24 on those grounds. And I repeat, I don't object on an
25 admissibility ground technically, but I certainly -- I
26 think that it is inappropriate to advance major
27 points --
28 THE COURT: Well, some of them are not ancient documents.
29 MS. KOENIGSBERG: Well, certainly not the Nishga. The land
30 claims agreements fall into a different category. And
31 even if they were technically admissible by proof, and
32 we wouldn't, I wouldn't think, put the plaintiffs to
33 that proof, technical proof that is, but I can't see
34 what the possible relevance could be particularly in
35 light of the process, the acknowledged process from
36 which those agreements arrive.
37 THE COURT: Thank you. Mr. Rush?
38 MR. RUSH: There are different types of objections taken here,
39 my lord. To answer Mr. Plant, if Mr. Morrison had not
40 been called, would his documents have been any less
41 admissible? I think it was evident in the rulings
42 that your lordship made that those documents were
43 admissible and were usable in argument notwithstanding
44 the witness. In fact, your lordship urged upon us
45 that there was an alternative course of action
46 available to counsel.
47 THE COURT: Well, indeed Mr. Goldie did. He elected to put his

documents in without a witness.

2 MR. RUSH: And precisely. And not just electing to put
3 documents in without a witness, but electing to leave
4 Mr. Morrison's evidence untouched in cross-examination
5 And by a particular choice on his part of the
6 appropriate way to proceed with regard to documents.
7 So I think it's -- the tendering of these documents as
8 part of that collection is -- says nothing about Mr.
9 Morrison's selection, but it says something about
10 the -- what counsel may make of the additions to
11 documents available to that collection. And my lord,
12 I say that the documents are relevant to the question
13 of what the Royal Proclamation says on its face to be
14 the policy of the treatment of Indian and Indian lands
15 as a matter of Crown's statement at that time, of
16 Crown policy at that time. It also -- the post -- the
17 post Proclamation documents as well in my submission
18 state the expression in treaty form of the, if you
19 will, the passing into being of the principles of the
20 Royal Proclamation through those treaties.
21 THE COURT: Well, Mr. Rush, when you find yourself in a position
22 like this you cast about for some legal shorthand to
23 describe the situation or some pigeon hole of the law
24 underwhich something can be placed or some principle
25 you can fall back on. And what I'm troubled about
26 here more than anything at the moment, although it's a
27 new problem to me, is this question of the time when
28 you do this, your friends have heard your case and
29 they have opened their case and they have presented
30 their evidence. And if it was a question of adding
31 documents which have been mentioned by witnesses or
32 are connected with sufficient proximity to others and
33 it was a matter just of supplementing the list that
34 you had already made and completing the list you have
35 already made, I would view it differently. But it
36 seems to me that the very brief exposure I've had to
37 these cases -- or these documents, rather, suggests
38 that it's a vastly expanded area of investigation and
39 Miss Koenigsberg mentioned that and I forget what
40 number she said, but something like X treaties had
41 already been mentioned in the Morrison documents, I
42 think she said, or something of that kind, and is
43 there not a difference between that and the rest of
44 your now tendered collection? Because there is --
45 seems to me that there is even in a wide range of
46 cases like this there is the basic understanding that
47 the plaintiff put their evidence in and then the

1 defendants put their evidence in and the plaintiff
2 makes a reply. And the plaintiff in reply is
3 precluded from bolstering its case in chief. It has
4 to be something that arises for the first time in the
5 defence. My first reaction is that a lot of these
6 documents don't meet that test. But if you can
7 persuade me -- you can persuade me otherwise, I am
8 sure perhaps we should do that after we break.
9
10 (PROCEEDINGS ADJOURNED PURSUANT TO AFTERNOON RECESS)
11
12 I hereby certify the foregoing to be
13 a true and accurate transcript of the
14 proceedings herein to the best of my
15 skill and ability.
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19 Laara Yardley, Official Reporter,
20 United Reporting Service Ltd.
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(PROCEEDINGS RECONVENED AT 3:15 P.M.)

THE REGISTRAR: Order in court.

THE COURT: Mr. Rush.

MR. RUSH: Yes, my lord. I make these points:

Firstly, with regard to the notice to my friends, that they were given notice of our intention to proceed with tendering these documents on November the 23rd before the end of the province's case.

The second thing, is that the objections to the extent that they are objections -- and I would like you to evaluate what I consider to be the qualified observations of the defendants here with regard to these documents. The only objection that I really heard in the arguments was one from Miss Koenigsberg, and that is that it's too big a task to deal with it at this point, which I -- with respect, does not -- well, I have a point to make on that as to just how big this task is, so-called. And indeed, there was no response to this proposal by my learned friends until you heard their objections, such as they are, today.

My position is, my lord, that these documents, despite the fact that they are numerous, does not -- that does not mean to say that they do not qualify as documents to add to the collection. The fact that they may be, in this case 92 entries, does not preclude them from qualifying under your lordship's determination that documents which are properly related to the evidence of witnesses -- and I dare say it's not just Mr. Morrison but also Dr. Greenwood's evidence -- that those documents may be added as part of the collection. And I say that all right, there are more than the two or three that were tendered by Miss Sigurdson. That doesn't deprive the plaintiffs from raising these documents as documents which are part of that collection. And I say, my lord, that the court shouldn't be deprived of relevant documents, and these are relevant documents to issues which are highly debated in the litigation.

The question of whether or not -- and I think this is really what it comes down to: is there some prejudice to the defendants for having delivered this number of documents of this kind at this stage in the trial? And I say, "Well, what is the real prejudice to them?" And that is what my friend, Miss -- Ms. Koenigsberg argues. Pragmatically, we've quoted a big bunch of documents that we had to deal with. And I --

1 my response to that is twofold: Firstly, what's new
2 about there being a big number of documents to have to
3 deal with in this trial? The federal defendant
4 provided me with three volumes of 154 entries of
5 historical documents a week ago Friday.
6 MS. KOENIGSBERG: In our case.
7 MR. RUSH: And we dealt with the documents this morning. And I
8 say, my lord, that there is absolutely no difficulty
9 or prejudice in terms of the number or the volume of
10 the documents that my learned friends have to deal
11 with here in terms of the evidence that these three
12 volumes represent.
13 In sum, there are 92 entries in the first two
14 volumes, there are four entries in the third. And I
15 say that there are -- on that basis, if that's the
16 argument that your lordship is concerned about here,
17 that there is -- there is no valid reason to sustain
18 that argument, given the number of documents that have
19 been tendered in this trial, and the capacity of the
20 various sides to deal with those documents and to deal
21 with them in some responsive way.
22 In my submission, my lord, your lordship has
23 created the very principle that permits us to tender
24 these documents. And I say that this is a principle
25 that applies to all sides, and that is, if there are
26 relevant documents that should be tendered, that the
27 parties clearly have the ability and ought to in a
28 case of this kind, to tender those documents in the
29 course of the trial. And it's with that in mind that
30 I am tendering these documents.
31 Now, the -- my friends, Mr. Plant, of course,
32 placed me at the election of, "Well, is this a
33 rebuttal form of tendering or is this something under
34 another provision such as the collections rule?" And
35 my lord, my response to that is, "What does it
36 matter?"
37 THE COURT: Oh, I think it might matter a great deal.
38 MR. RUSH: Yes, it would matter a great deal because no doubt
39 what my learned friends want to do is to go through
40 each of the documents to determine whether or not this
41 is a proper form of rebuttal. If that's the case, my
42 lord, then there is only one option that remains to
43 the plaintiffs, and that's to apply to reopen the case
44 as my learned friend Mr. Plant did with Mr. Boys'
45 evidence. And I say that that -- that those courses
46 of action are not necessary in circumstances such as
47 the -- that present themselves here, where you have a

1 general principle that your lordship has been applying
2 that -- where there are relevant documents, those
3 relevant documents link to the evidence of witnesses
4 that have been called, ought to be permitted to be
5 tendered. And that's what we are seeking to do with
6 these documents.
7 Now, I say -- I say this, and perhaps this
8 argument will have some more force when you -- when
9 Mr. Guenther discusses or raises the question of the
10 response to our request for particulars of the
11 position of Canada in terms of these proceedings and
12 in respect of their statement of defence. But the
13 current land claims agreements speak directly, in my
14 submission, to the position taken by the federal
15 defendant in these proceedings, which you will hear
16 shortly, no doubt, that they take the position that in
17 many instances, in relation to the use and occupation
18 rights claimed by the plaintiff, that they have been
19 extinguished, diminished or abandoned. And I say that
20 the present agreements in principle, that the federal
21 government has been negotiating with other native
22 peoples around this country, act as statements against
23 interest of the federal defendant. And there is no
24 way -- you would have to be an ostrich with your head
25 in the sand to --
26 THE COURT: No, no, no, Mr. Rush, that's unfair. That's unfair,
27 Mr. Rush. You don't have to be an ostrich. You can
28 be a lawyer.
29 MR. RUSH: Perhaps that's putting it at even a higher --
30 THE COURT: They are entitled to take a position in one case in
31 one way and take a position in another case another
32 way, aren't they?
33 MR. RUSH: Case by case perhaps, but not consistently.
34 THE COURT: Well, who said the defendant has to be consistent?
35 MR. RUSH: That's my -- my lord, that's what I'm going to argue.
36 THE COURT: Wait a minute. What principle of law says that a
37 defendant has to be consistent? A defendant facing a
38 number of claims can settle some and fight others.
39 MR. RUSH: Well, I -- of course it can. But I am saying that
40 what will be evident from the presence of these
41 treaties is that there is a policy to deal with native
42 people on a so-called "without prejudice" basis.
43 THE COURT: That's fine. You can have that kind of a policy and
44 still fight a lawsuit that's brought against you.
45 MR. RUSH: That may be so. But I say, my lord, that there are
46 statements you make against your interest that are
47 relevant to the positions you take in the litigation.

1 And I say that those statements against interest are
2 relevant considerations for the determination by your
3 lordship of the federal defendant's position in the
4 litigation.
5 THE COURT: Well, lawsuits aren't -- sorry, land claims aren't
6 site specific.
7 MR. RUSH: The claims are, of course, yes.
8 THE COURT: And one can say, "I have a policy of settling but I
9 am -- I am going to settle what I can." But I am not
10 able to look behind the scenes and say whether
11 those -- you people may be on the verge of a
12 settlement for all I know. I can't speculate about
13 these things. Or you might be saying let's -- "Let's
14 see what the judge is saying and then we will
15 negotiate from there." There is all kinds of
16 possibilities.
17 MR. RUSH: My lord, the plaintiffs will be asking you to draw
18 certain inferences from the pattern -- the recent
19 pattern of the federal defendant to negotiate land
20 claims agreements with native peoples in Canada under
21 certain established policies and principles.
22 THE COURT: But Canada can't negotiate a claim for territory and
23 jurisdiction.
24 MR. RUSH: It can't? I -- in my submission, my lord, it can.
25 THE COURT: Well --
26 MR. RUSH: And does.
27 THE COURT: I would be happy to know -- no, I mean -- I mean
28 land within the Province of British Columbia.
29 MR. RUSH: Well, my lord, in my submission, that's the point.
30 THE COURT: It can easily do it in the Yukon or the Northwest
31 Territories, but how do they do it in British
32 Columbia?
33 MR. RUSH: Well, they've endeavoured to do it and they've
34 established a process by which they can do it and
35 they've entered into and gone through that process in
36 the case of the Nishga people. And how that relates
37 in particular to the positions advanced by the Nishga
38 must be seen within the context of what is a policy
39 that exists -- is extended throughout the rest of
40 Canada. But I say to that extent, those agreements
41 are relevant to permit plaintiffs to ask your lordship
42 to draw certain inferences.
43 Now, your lordship may be -- judging from your
44 immediate response, you may not be warm to that
45 submission. But we hope to be able to persuade you by
46 reference to some of these documents why your
47 lordship's position on that is not -- is not

consistent -- or at least it's not sympathetic to what is the policy or the underlying principles from which the federal defendant moves in respect of those negotiations. And I say that they are relevant and, with respect, I say that I think the federal defendant thinks that they are relevant. And I think that's evident by their position on the O.N.C. document.

But in all, my lord, in my submission, these -- I'm tendering these documents on the principles that I have indicated. And in my submission, they are -- they are properly receivable by the court and ought to be received as relevant documents in the proceedings.

THE COURT: All right. Thank you.

Well, I have not any doubt that there is room for the plaintiffs to supplement their collection with documents of like kind or a character to those already put in evidence. And I would not hesitate to allow the plaintiffs to reopen their case for the purpose of that supplementing process if it were necessary so to do. I think, in view of the course of this trial, it is not probably necessary, technically, to reopen the case, because this question of supplementing collections has been with us for most of the course of this trial.

At the moment, I am not sure that I can properly categorize the areas where I think supplementing collections would be unobjectionable. I can think of collections of documents which actually or potentially -- or might is a better word -- explain the historical background for the Royal Proclamation, both in Britain's North American possessions in what is now Canada and in what is now the United States.

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

I can categorize further and say that the documents connected with matters already in evidence would be a proper subject of supplementing the collection. And I think I agree with Mr. Rush that we are not, as I have said before, entitled in this case to be overwhelmed by volumes of material, using volumes in its larger and more restricted sense.

I think we may be in some difficulty on this point because of the unpredictable consequences of treating these collections of documents as evidence.

Ruling 1 We might have been better off dealing with them in
2 some other way, and I have in mind, for example, the
3 renowned brief of Mr. Brandice, as he then was. And
4 it may be that some of these documents, even if not
5 tendered in evidence, could usefully be referred to in
6 argument.
7 So I tend to think that the plaintiffs' attempt
8 to -- or put it -- that sounds almost pejorative, and
9 I did not intend it that way. The plaintiffs'
10 application at this stage to supplement its collection
11 is one that I would regard generally with favour. I
12 am troubled about the category that has been most
13 recently debated this afternoon, being a land claims
14 case relating to, in some cases, other provinces, and
15 in all other cases, at least to other -- or to other
16 areas of the province. And when I say "province", I
17 include in this context, the territories.
18 I am conscious of the site specific nature of
19 these proceedings, and I am not persuaded that any
20 real significance flows from consistency or
21 inconsistency in this connection, particularly when
22 regard is had for the fact that these negotiations or
23 arrangements arise out of negotiations for settlement,
24 not necessarily with an admission that there is any
25 responsibility, if such is the case, and I haven't
26 studied the matter enough to know that that is so or
27 that it is not so.
28 But the plaintiff is not making any claim against
29 Canada here and it is my view that Canada can be
30 negotiating with generosity -- if I can put it that
31 way for descriptive purposes -- on one claim and
32 fighting another one tooth and nail. The facts and
33 circumstances may be different and I do not wish to
34 litigate more than just the claim of the plaintiffs in
35 this case.
36 Therefore, I am in the position where I think that
37 some of these documents are ones which I should admit
38 into evidence although, as I have said, I am not sure
39 that it is -- it now -- I am not sure that it now
40 appears wise that they be treated as evidence, but it
41 is far too late in the day to go back on that course.
42 I think some of them, however, are probably not ones
43 which should be admitted into evidence, and I am
44 disposed to mark them all now for identification,
45 giving them a number for that purpose, and to ask
46 counsel to let me know which ones they think fit into
47 the categories I mentioned or any other categories

that they might develop on their own, and I will have to deal with them when -- I will have to deal with the residue when the time comes. Keeping in mind, as I have said, that I am not sure that I would not hear argument, particularly where it is to be given in writing and advance the argument based upon some document that is not in evidence, if the fact of the document is -- has any significance.

My ruling was really intended -- my rulings have really been intended to obviate the necessity of proving underlying facts. And it may be that documents can be useful in argument for one purpose, although they might not be admissible in evidence for another purpose. But I do not want to get too far ahead of myself by saying any more than that just at this moment. And I am not sure that what I have said now is going to be sufficient, but I think that I have said as much as I can usefully say at this point. But I will be glad to be assisted further by counsel with whatever additional submissions they wish to make to supplement what they have already submitted.

MR. RUSH: My lord, I would therefore tender this volume 1 as the next exhibit for identification.

THE COURT: There is two volume ones, are there not?

MR. RUSH: No, no, my lord.

THE COURT: Yes, there are.

MR. RUSH: Well, I'm going to propose that with regard to the two -- the set simply marked volume 1 and 2, that will -- I will not proceed with those today, because there are some documents among them that my friends have not seen.

THE COURT: All right.

MR. RUSH: And it may be that -- well, I would like to hear their position on the whole of this set. It hasn't been accumulated before today.

THE COURT: Yes.

MR. RUSH: So I would prefer not to deal with those just now, but to deal with the set that's marked --

THE COURT: 1244 I think is the next number?

THE REGISTRAR: Yes, my lord

MR. RUSH: That would be volume I, Roman one, tabs 1 to 74, and volume II, tabs 1 to 19 would be the next one for identification.

THE COURT: All right. That would be 1244 Roman one and Roman two and Roman three.

MR. RUSH: My lord, I wonder if it might be more convenient to mark them separately, if you would do that?

1 THE COURT: All right. 1244, 45, 46.
2
3 (EXHIBIT 1244 - Plaintiffs' Book of Documents:
4 Treaties & Law, Vol. I, Tabs 1-74)
5 (EXHIBIT 1245 - Plaintiffs' Book of Documents:
6 Treaties & Law, Vol. II, Tabs 1-17)
7 (EXHIBIT 1246 - Plaintiffs' Book of Documents:
8 Treaties & Law, Vol. III, Tabs 1-4)
9
10 MS. KOENIGSBERG: How many tabs involved here?
11 MR. RUSH: Four.
12 THE COURT: Mr. Rush is going to take those two volumes back.
13 MR. RUSH: Yes, my lord. I think what I'll do, I'll tender
14 these on another occasion when my friends have had an
15 opportunity of considering the four documents that are
16 not -- hadn't been briefly disclosed to them.
17 THE COURT: All right.
18 MR. RUSH: I think that makes more sense rather than
19 anticipating an objection on that one
20 MR. PLANT: My lord, I understand that Mr. Rush is withdrawing
21 for later consideration the two volumes containing the
22 treatises which I have not made submissions about.
23 THE COURT: Yes, all right.
24 MR. RUSH: And I will retender those, my lord, probably if it's
25 convenient, on Friday.
26 THE COURT: Well, I want to speak about Friday. I'm afraid it
27 isn't convenient. I thought it was, but Monday or any
28 day next week almost.
29 MR. RUSH: Yes. Well, the next convenient date then.
30 THE COURT: Yes. We should set it now, shouldn't we.
31 MS. KOENIGSBERG: Yes, if we could.
32 THE COURT: Monday is the 18th.
33 MS. KOENIGSBERG: Yes.
34 THE COURT: Well, any day that week is -- except Friday the
35 22nd.
36 MR. RUSH: Well, I propose the Tuesday, my lord.
37 THE COURT: That's the 19th. Is that convenient?
38 MS. KOENIGSBERG: That's fine with me.
39 MR. PLANT: Yes, my lord.
40 THE COURT: Yes, all right.
41 MR. PLANT: I think at this point there is one item left on my
42 list and one item left on Mr. Macaulay's list. The
43 item left on my list, if I can proceed with it, is
44 item 12 on the list of matters to be spoken to, which
45 I handed up earlier. And it is described as, "Tender
46 judge's series overlays." And what I am referring to
47 here, my lord, is a box that contains more of the

1 plastic overlays that are compatible with the base map
2 and the overlays that Mr. Macaulay handed up earlier
3 and have been the subject of much discussion during
4 the course of the trial.
5 THE COURT: Yes.
6 MR. RUSH: I -- what I have in this box -- if I can just find my
7 note here -- are a series of overlays. I'm not too
8 sure how I can do this.
9 THE COURT: Any way it's convenient, Mr. Plant.
10 MR. PLANT: I beg your pardon?
11 THE COURT: Any way that's convenient.
12 MR. PLANT: Yes. Well, perhaps I can just start by saying that
13 each of the overlays in the series was given an
14 overlay number. The series contains numbers that
15 pertain to alienations or presence maps that are part
16 of the evidence of both the province and the federal
17 government. Mr. Macaulay has already provided your
18 lordship with those overlays that come from the
19 federal part of the series. I have here in this box
20 the -- those overlays which reproduce the information
21 in the provincial alienations mapping project that was
22 the subject of the custodial affidavits. Some of
23 those -- some of the affiants of those affidavits were
24 cross-examined some time ago, with one or two
25 additional overlays that I can explain and will
26 explain.
27 THE COURT: How many do you have? How many are there?
28 MR. PLANT: Well, unfortunately the numbers don't follow in
29 sequence. I would say there are over two dozen.
30 THE COURT: I take back what I said about being overwhelmed.
31 Well, what are these things? Surely you can't handle
32 that many on one of these maps, can you?
33 MR. PLANT: No. The object is to put up one at a time or
34 perhaps one or two at a time.
35 THE COURT: All right. I am no longer overwhelmed.
36 MR. PLANT: And the idea is that this is a more convenient way
37 of getting access to the information that now exists,
38 for the most part, on those six foot by three foot
39 maps that were marked some time ago as the provincial
40 alienation mapping project.
41 What the box has in it, in addition to the
42 overlays themselves, and room for the base map, is a
43 table that lists the titles of the overlays
44 alphabetically, giving both -- giving two references;
45 a reference to what is called here the judge's series
46 or overview number, and that is the number that
47 appears on the little plastic tab that sticks out on

1 the right-hand side of each of these sheets, and also
2 what appears as a map number. That number, the map
3 number, refers to the original map number assigned in
4 the provincial government's alienation mapping
5 project. What this table does not give your lordship
6 yet, because I haven't -- it hasn't been prepared yet,
7 is an exhibit concordance that would relate the
8 overlay to the map which is already an exhibit. And I
9 am going to see that that concordance is prepared.
10 There are a couple of wrinkles in what I've just
11 said. The first is that the overlays which have the
12 judge's series number --
13 THE COURT: What is the judge's series?
14 MR. PLANT: Well, we called this the judge's series. It was a
15 name that should have been explained. The intent was
16 to create this series of maps at a smaller scale for
17 ease of reference, and just to give it a name we
18 called this the judge's series.
19 THE COURT: All right.
20 MR. PLANT: So that the map that your lordship has had sitting
21 beside you for a long time is a map that forms part of
22 something that we have called the judge's series and
23 is identified here as -- with the word "judge's".
24 THE COURT: And it's in no respect separate in its state from
25 Exhibit 647, is it?
26 MR. PLANT: I don't know what the numbers are, I'm afraid, my
27 lord.
28 THE COURT: Which is this one?
29 MR. PLANT: It's a different scale and it's a different series.
30 THE COURT: Yes, all right.
31 MR. PLANT: As I recall, the plaintiffs' map series is at
32 something like the 1:700,000 scale, whereas the
33 so-called judge's series is 1:35,000 scale.
34 THE COURT: Yes, all right.
35 MR. PLANT: So -- okay. Here -- this collection of overlays
36 with the two exceptions that I'm about to relate to
37 your lordship, reproduce in a more convenient format
38 the information which is in the provincial alienations
39 mapping project.
40 Now, the wrinkles are these: The three overlays
41 that are identified as numbers two, three and four,
42 depict mineral, placer and coal tenure. They do so on
43 a large scale. When we provided your lordship with
44 the alienations mapping project information for mining
45 tenure, we did so in the form of smaller books because
46 we were -- we weren't able to produce accurately a map
47 that at the large scale that showed the location of

mineral claims with sufficient accuracy that we could hold it out as being a credible product.

The maps -- the overlays which are now numbered two, three and four are a reproduction of the original,maps. They are only tendered for the purpose of giving your lordship the most general indication of where mineral tenure activity is located.

The next wrinkle is --

THE COURT: Let me ask you about a wrinkle that's worrying me more than what you are saying and that is, what does the plaintiff say about all these overlays?

MR. GUENTHER: We were overwhelmed at first, my lord, until we realized the box had a nice carrying handle, and consequently we have no objection.

THE COURT: All right. That saves a lot of wrinkles.

MR. PLANT: The word "wrinkle" may not be as appropriate as others, I don't know.

THE COURT: Saves wrinkles in the manuscript of life.

MR. PLANT: The overlay which has the tab 65 is identified as N.T.S. Now all this is a reproduction of the National Topographic Series grid system itself. So that if your lordship is using the judge's series base map and wishes to find on an N.T.S. map which is a much more accurate scale, which, if your lordship wishes to know which N.T.S. map to go to, this key will tell you.

The last --

THE COURT: The key is where? On the cover?

MR. PLANT: It's on -- the key is on the overlay sheet.

THE COURT: All right.

MR. PLANT: Tab 65 which is marked N.T.S.

THE COURT: All right.

MR. PLANT: And the last item is the overlay sheet marked tab -- with tab number 66. That tab says "Plan Index". That formed the same function that I just described of acting as a guide or a key, but in relation to the mineral tenure maps that were earlier as part of the alienations mapping project.

So if your lordship wishes to relate an alienations mapping project mineral tenure map to the claim area at large, there is a map reference, a grid reference on the map that's part of the alienations mapping project and that will connect to this plan index, tab 66.

Now, so far as I'm aware, the balance of the overlays in this box, with the exception of one which I'm just removing, are all encompassed by the statements I have just made and the admissibility of

1 them has been agreed to by the plaintiffs.
2 THE COURT: All right. And how would you describe them? We'll
3 call the box Exhibit 1247 -- or the case, rather. The
4 very attractive case.
5 MR. PLANT: The box containing the judge's series overlays.
6 THE COURT: All right. And you don't know how many there are?
7 MR. PLANT: I can't tell your lordship just how many overlays
8 are in the box right now. I can tell your lordship
9 that the tab numbers that are in the box, if your
10 lordship wants to make a note, are 2, 3, 4, 7, 8, 9,
11 10, 11, 12, 13, 17, 21, 31, 37, 44, 46, 47, 48A, 48B,
12 49 to 51 -- well, 49, 50, 51, 58, 59, 60, 65, 66, and
13 69. And those numbers have a description that appears
14 on the table that's glued into the cover of the box.
15 THE COURT: Yes. All right. Thank you. That will be the next
16 exhibit then.
17 THE REGISTRAR: Exhibit 1147.
18
19 (EXHIBIT 1147 - Box containing Judge's Series
20 Overlays)
21
22 THE COURT: And I guess the only question is whether these
23 various tab numbers you described should be given
24 separate numbers? I am not sure I see any particular
25 need for it.
26 MR. PLANT: I don't think they need to, my lord. I am going to
27 provide your lordship with a list that will correlate
28 the tab numbers to the exhibit numbers, that -- in
29 respect of the tab numbers that do correspond to maps
30 in our alienations mapping project that have already
31 been made exhibits.
32 THE COURT: Yes. Mr. Guenther.
33 MR. GUENTHER: Yes, my lord. I was just going to say that I
34 would submit it should be marked as an exhibit --
35 single exhibit. It's my understanding, and the
36 understanding of the plaintiffs is that these truly
37 are aids to be marked as an exhibit, and that the true
38 evidence is the evidence from which they flow. And
39 with that proviso, we have no problem.
40 MR. MACAULAY: My lord, the numbers on our overlays are part of
41 the numbering system that was just referred to by Mr.
42 Plant. It was a numbering system that's been
43 abandoned because there are gaps in it. Some overlays
44 were struck out and some weren't, so there isn't a
45 consecutive number. As a practical matter, it's --
46 MR. PLANT: Your lordship will have 64A and B, and those are --
47 THE COURT: Yes.

1 MR. PLANT: Yes, those are numbers that appear in the same
2 series of numbers.
3 THE COURT: Yes. I think you only have three overlays, don't
4 you, Mr. Macaulay?
5 MR. MACAULAY: Four, my lord.
6 THE COURT: Yes. There is one hidden here. You have got 64A,
7 B, 62 and 35.
8 MR. PLANT: Yes, my lord.
9 THE COURT: All right. Thank you.
10 MR. PLANT: Now, my lord, I was hoping that I could speak on the
11 subject of the three overlays that your lordship did
12 have.
13 THE COURT: Excuse me, Mr. Plant. We are going to have to be
14 here tomorrow, aren't we?
15 MR. PLANT: I was about to say I am going to be a few minutes on
16 this subject.
17 THE COURT: Yes. Well, I have another matter I have to attend
18 to at four o'clock, so I think we will have to
19 adjourn. It's of no particular consequence except for
20 personal planning, but are we going to be all day
21 tomorrow or are we going into Wednesday or what does
22 the future have for us here?
23 MR. GUENTHER: Aside from the matter that Mr. Plant just
24 mentioned, I have three items remaining, two of which
25 relate to the federal case, and I wouldn't think that
26 that could possibly take all, but it could take a fair
27 chunk of the morning.
28 THE COURT: Yes, all right. Well, we -- we have all week so
29 it's just a matter of letting people know as much as
30 we can what's likely. We can finish everything that's
31 on the table now, can we, tomorrow?
32 MR. GUENTHER: Yes. But for the matter that Mr. Rush was
33 addressing that you put over to the 19th.
34 THE COURT: Oh yes. All right. Thank you. Ten o'clock.
35 THE REGISTRAR: Order in court. Court stands adjourned until
36 ten o'clock tomorrow.
37
38 (PROCEEDINGS ADJOURNED AT 4:00 P.M.)
39
40 I hereby certify the foregoing to be
41 a true and accurate transcript of the
42 proceedings herein transcribed to the
43 best of my skill and ability.
44
45 _____
46 Toni Kerekes, O.R.
47 United Reporting Service Ltd.