JUNE 27, 1990
VANCOUVER, B.C.

THE REGISTRAR: Order in court. In the Supreme Court of British Columbia, Wednesday, this 27th day of June, 1990. Delgamuukw versus Her Majesty The Queen at bar, my lord.

THE COURT: Mr. Goldie.

MR. GOLDIE: My lord, I wish to address several things this morning. The first I wish to speak to is the question of the reply to the counter-claim, and there was a discussion about that which took place yesterday morning, and it arose, as I read the transcript, from my friend Mr. Rush's suggestion that your lordship's memorandum of October the 5th, 1989 really settled the point, and that anything that the province had to say about the counter -- Canada's argument had to be said today.

My lord, I think it is common ground that your memorandum of October the 5th was based on a timetable that slipped.

THE COURT: Yes.

MR. GOLDIE: The first slippage occurred when the plaintiffs saw it and were granted leave to file their summary of argument on March 19th, rather than March 9th, and everybody moved down a bit from there. This slippage was aggravated when the plaintiffs sought and obtained some extra days of argument, so that they did not complete their submissions until the morning of May 14th.

The timetable for filing written summaries was not met by Canada in respect of the argument that you heard Monday and Tuesday until 7:00 p.m. until Monday night June the 24th, and it was at that time that this document, my lord, was delivered. That was the date of the delivery, and it was purely fortuitous that I happened to be in the office on Sunday evening. It's not a habit which I have -- which I am in the process of endeavoring to break.

Now, this summary was one that was supposed to be filed in April. The slippage occasioned by -- that I have already referred to made the filing date for that about April the 12th. What was received at the end of April was a 97 page summary of which 23 pages related to jurisdiction, and 74 pages to the counter-claim. That's this document, my lord.

And at the end of that document on page 97 I find

the following, and I quote:

> "The Attorney General of Canada will provide a more comprehensive summary of argument relating to post-union events prior to the province's final argument on the counter-claim."

Your lordship will see that that was not done. As I have said, on Sunday evening, June the 24th, long after our final argument had been completed, we received this blue volume, which runs to something like 331 pages, and except for the first 22, which deal with jurisdiction, it is not only new in bulk, but in many of the submissions.

As your lordship will recall, we made no reference to Canada's views and our submissions on the counter-claim, and we did that because we didn't know what they were going to be. We did refer to the plaintiffs, and we have no reply to the plaintiffs with respect to the counter-claim, nor can they add anything in their reply.

Now, yesterday my friend Mr. Rush correctly noted that on October the 12th, 1989 I raised the question of the counter-claim. At that time I stated there was no claim against Canada. As my friend did not refer to that aspect of my submission on October 12th, I would like to read what I said at transcript 278, my lord, at page 20647, line 32, to page 20648, line 41. And my first -- I have two comments to make, and the first one is not relevant here, but at line 32 I said this:

> "My second comment, my lord, relates to your lordship's observations about the counter-claim. As stated in paragraph two:
>
> > 'The plaintiffs will deliver to the other parties ...'"

And, my lord, I should interject here and say that paragraph two is your memorandum of October 5th. And a quotation from it is at lines 37 to 41, which I quoted from at that time. And the quotation is as follows:

> "The Plaintiffs will deliver to the other parties not later than Friday, March 23rd, 1990 a full summary of the evidence and the law upon

which it relies, including its arguments against Canada on the counter-claim."

And then I took this up at line 43.

"Now, the counter-claim is directed to the plaintiffs. It is a counter-claim. I should read to your lordship the wording of paragraph one of the counter-claim, paragraph 42 which is the first paragraph. The counter-claim reads:
'this Defendant repeats the allegations set forth in the above Statement of Defence.'"

And then pairagraph 43:

"Wherefore this defendant claims:
1. A declaration that the plaintiffs have no right, title or interest in and to the territory, the resources thereon, thereunder or thereover."

And paragraph 2 is in the alternative, and it states:

"Alternatively, a declaration that the plaintiffs' cause of action, if any, in respect of their alleged aboriginal title, right or interest in and to the territory and the resources thereof, there under --"

And then I interject:

"I am sorry, I am skipping."

And then picking it up:

"-- a declaration that the Plaintiff's cause of action, if any, in respect of their alleged aboriginal title, right or interest in and to the Territory and the resources thereof, thereunder or thereover is for compensation from Her Majesty the Queen in Right of Canada."

And then I continued at line 30.

"My lord, that is clearly directed against the plaintiffs. And if your lordship finds that

1 the cause of -- that the case is not to be
2 dismissed, then this defendant seeks a
3 declaration that the sole cause of action is
4 for compensation against the Crown in right of
5 Canada."
6
7 Now, my lord, that is a statement that I made on
8 October the 12th, and it's a statement that I stand
9 by, namely, that the counter-claim is directed against
10 the plaintiffs. And I went on to read from -- or make
11 reference to my opening. I said on October the 12th:
12
13 "Now, I outlined this at some length in my
14 opening and it was deliberately intended to
15 alert the plaintiffs to this defence and to the
16 counterclaim and I won't give your lordship --
17 read it, but I will give your lordship the
18 citation. It's Volume 3 of the transcript at
19 page 157 line 46 to page 158 line two."
20
21 My lord, I should make reference to that. At line
22 46, at page 157 of the opening in Smithers on May the
23 13th, 1987. And I quote:
24
25 "The defence pleaded by the province, if
26 successful, will mean that when the plaintiffs
27 issued their Writ on October, 1984 they did so
28 in the wrong court and against the wrong
29 defendant. It is not up to the plaintiffs to
30 suggest in their opening how the province views
31 its defence from selecting certain paragraphs.
32 The defences must be taken as a whole and by
33 omitting reference to the defence which I have
34 just referred, it distorts the historical, and
35 constitutional background which is of such
36 great importance in this particular case."
37
38 And of course I emphasize the words. They did so
39 in the wrong court and against the wrong defendant.
40 And then I turn again to page -- transcript 278 at
41 page 20648, line 42. And I say this:
42
43 "Now, Canada is here because it should have been
44 here from the beginning. It is here because of
45 the reasons given by Mr. Justice Trainor in the
46 Supreme Court of British Columbia and by the
47 Court of Appeal when an appeal was taken from

his judgment. So that if there is some element of aboriginal title which survives the union of British Columbia with Canada, then the remedy of the plaintiffs, and as I said this in my opening, is in another court against another defendant. So that I want to ensure that there is no basis for the plaintiffs saying well, we don't have to deal with this because it's a disguise claim over. It's no such thing. The relevance that it has now, besides that, is with respect to the order of argument. Your lordship has provided in paragraph seven:"

And then I refer to paragraph seven of the memorandum of October the 5th, and I read that. And then I went on to say:

"If the plaintiffs have not dealt with the counter-claim and seek to deal with it in their reply, then the -- my client will, of course, have the right of reply to that submission at that time. So the plaintiffs, if they are going to deal with the counter-claim and it's up to them, of course, must deal with it in their main argument, if they are to have the last word, as your lordship's present order ..."

That's of October the 5th.

"... contemplates."

Now, Mr. Grant made a few observations at that point, but I say that on October the 12th, 1989 we were all very clear on the object of the counter-claim, and in my submission we should have all been very clear that it was against the plaintiffs in 1987. And if I didn't make that clear, I failed in one of the purposes I had in making that opening back in May of that time.

But, my lord, as I have stated, this was all based on the proposition that if the schedule you proposed on October 5th was to be followed, we would know enough about Canada's position to deal with it. And that is -- and this was the subject matter of discussion by counsel and your lordship, that the written summaries of arguments would tell us what the

positions were of the respective parties. And the plaintiffs did deal with the counter-claim, and as I have said a few minutes ago, they -- we dealt with it, and we have no reply with respect to them, and they have no right to add to what they said. But we didn't have the 320 odd pages of argument that we were given on Sunday night in which we were to receive before we completed our final submissions. We had no opportunity of dealing with it.

Now, of course, the arrival on Sunday night of this did not cause anything more than the usual sense of frustration, because we understood from the discussion in Smithers that we had the right to reply in writing, and we fully expected to be able to deal with that.

Now, my friend suggested in his submission to your lordship yesterday that the question of a written reply was slipped in and had been slept on. I am referring to yesterday's transcript, my lord, at page 29030. And my friend said that he didn't know what really was being suggested here, and he was referring to a comment made by Ms. Sigurdson, and he said:

> "... I still don't, and it's for this that I wish to speak to your lordship. And I take it that Miss Sigurdson was voicing something that Mr. Goldie slipped into the discussion of the schedule at the end of the argument in April." And then over the page he said at line 18, after referring to your lordship's observations, or at least some of them, he said.

And there the matter stood resting quietly until yesterday.

Now, I wish to refer to the discussion that took place in Smithers on April the 27th, 1990, and it's in volume 331, and it's at page 2 -- starts at page 25602, line 33, and extends to page 20603, line 4.

MR. RUSH: I have a copy of part of that, my lord.

MR. GOLDIE: My friend didn't refer to this in his submission yesterday, but this is what he is referring to when he said I slipped it in. Line 33:

> "My lord, I forgot to mention one thing with respect to the schedule, this provides no time for reply to the counter-claim by the province.

1 If we don't make up any time, I would propose
2 that the reply be filed in writing rather than
3 scheduling any further oral argument."
4
5 Now, that refers, my lord, to the analysis that we
6 had made on April the 27th, and to which I referred
7 on, I believe, that day, and I had come to the
8 conclusion that there was no time available from then
9 until the end of June, having regard to the slippages
10 which had occurred. And your lordship said:
11
12 "I think that would be preferable, because my
13 plans are uncertain, but I have an uneasy
14 feeling I am going to be in Nova Scotia for the
15 first week of July and perhaps beyond."
16
17 I said:
18
19 "I think it's desirable from the standpoint of
20 all, that we adhere to this schedule of the
21 completion of oral argument by June 30th."
22
23 And your lordship agreed with that. And then my
24 friend Mr. Grant, and there is the part that my friend
25 Mr. Rush did not refer to, said:
26
27 "The plaintiffs are certainly in agreement with
28 that. With respect to the schedule I don't --
29 as most of it affects Canada rather than us, I
30 don't think we can say."
31
32 And your lordship said:
33
34 "I haven't heard Mr. Wolf say that isn't was
35 acceptable."
36
37 And Mr. Wolf said he was at some disadvantage, but
38 he was -- he said if there is a problem it could be
39 raised again on May the 7th.
40 So it comes down to this, that up until yesterday
41 there was no doubt in our mind that we had a right of
42 written reply to the extent that we were entitled to
43 such a reply.
44 Now, my lord, I think I am to blame for creating a
45 misconception, because it is, as I read the
46 transcript, it is to that misconception which led to
47 your lordship's direction that we should reply today

as a result of the discussion that went on, and my friend, Mr. Rush, started the comment by observing yesterday -- I am referring to my friend's submission at page 29032 of yesterday's transcript. And as I read my friend's submission, it is that he has revived the question of the counter-claim against Canada or the plaintiffs. And I say that's a misconception, and I have referred your lordship to some of the -- my previous observations on the point, but as I read the transcript, I have contributed to that, and I must take the blame for it.

THE COURT: Well, I think you have to make a distinction between paragraphs one and two of the counter-claim.

MR. GOLDIE: That's precisely what I intend to do, my lord.

THE COURT: Yes.

MR. GOLDIE: Now, I have stated, as I say on numerous occasions, that the aim of paragraph two of the counter-claim is to obtain a declaration that the plaintiffs have no cause of action against the province, and that if they have any remedy it is against Canada. And as recently as June the 13th I said that at page 28405 at lines 4 to 11, and I was discussing Sparrow, my lord, and I said:

> "Now, whether that constituted an act for which the plaintiffs, or more accurately, the relevant bands, are entitled to relieve against Canada is not a question that has to be decided here. All that is necessary to decide is that if the plaintiffs or those who may properly represent them have any claim it is against Canada and not the province."

Now, I believe I can put my finger on my contribution to your lordship's present understanding, and I refer again to volume 357 and the same page -- no, it's 28406, my lord, and again, as I say, I was discussing Sparrow. At line 34 or line 30 I said:

> "My lord, that concludes my submission, and the only other comment I have is with respect to the nature of the order sought, and I hand up a replacement page for that. It's under tab 11 part two.
>
> That this action be dismissed and that the defendant province is entitled to a declaration that the plaintiffs, however represented, and

1 in respect of whatever claims, have no right,
2 title or interest in and to the claim area, as
3 from time to time defined, and the resources
4 thereon, thereunder or thereover save in
5 respect to reserve lands."
6
7 That, of course, is paragraph one.
8 THE COURT: That would follow as a matter of necessary
9 implication if the plaintiffs' action were dismissed.
10 MR. GOLDIE: Well, it's there, my lord, in case your lordship
11 dismissed the plaintiffs' case in a way that left it
12 open to bring further action.
13 THE COURT: I thought that practice had gone out of style when
14 Ireland left the Empire. It used to be done in
15 Ireland all the time, I am told -- actually would be
16 dismissed without prejudice to bring a fresh action
17 and that sort of thing. That isn't the practice here
18 and never has been.
19 MR. GOLDIE: It may not be the practice, my lord, but by
20 implication, if your lordship -- for instance, if your
21 lordship came to the conclusion that there were
22 certain claims which, if they had been properly
23 pleaded, would have ground a cause of action,
24 paragraph one was intended to meet that.
25 THE COURT: I would have thought the ordinary rules of estoppel
26 would preclude that.
27 MR. GOLDIE: Your lordship has heard a great deal of argument
28 about who are the proper plaintiffs. As recently as
29 yesterday Ms. Koenigsberg has suggested that if the
30 bands are the proper plaintiffs, these are the
31 plaintiffs who can represent them. There has been --
32 we have heard a great deal of evidence about how
33 people come and go in the houses. It was not
34 inconceivable to the province's advisors when we were
35 contemplating the novelty of the claims in this case
36 that in a number of instances the action could be
37 dismissed, but in a manner which would allow the
38 plaintiffs or somebody else asserting the same kind of
39 claim.
40 THE COURT: Well, we have that situation, of course, with the
41 Kitwancool.
42 MR. GOLDIE: Yes.
43 THE COURT: But I couldn't make any order that would bind them,
44 unless they are caught by the rules of estoppel, which
45 I tend to think they are anyway. They may not think
46 so, but --
47 MR. GOLDIE: I appreciate -- it is arguable that if -- let me

1 put it this way. That if this action was dismissed,
2 period, paragraph one of the counter-claim is
3 unnecessary.
4 THE COURT: Yes.
5 MR. GOLDIE: But it was put in there, you can say out of an
6 abundance of caution. I have endeavoured to put
7 before your lordship other examples of why it was
8 considered to be necessary, having regard to the fact
9 that the claim was novel. It was clearly not a Calder
10 action, and we were simply confronted with an unknown
11 situation, but it would be, in our submission,
12 regardless of how the matter was left, we were
13 entitled to that declaration.
14 Now, I went on -- if I may return, my lord, to the
15 comments I made on June the 13th at page 28407 of the
16 transcript, line 41. I said:
17
18 "In the alternative, that if in any aspect of
19 the plaintiffs' claim succeeds, that the
20 plaintiffs' cause of action and judgment
21 pursuant thereto in respect of their aboriginal
22 title, right or interest in and to the claim
23 area and resource thereof, thereunder or
24 thereover is against Canada."
25
26 And then I went on:
27
28 "I don't characterize what that cause of action
29 might be, but I say that in view of the
30 documents that have been laid before your
31 lordship, and in view of the true
32 interpretation that must be accorded PC 1265,
33 that that would be the appropriate order."
34
35 And your lordship said:
36
37 "I am not sure I understand how your second
38 claim would arise if you succeed on the first
39 one."
40
41 And I said:
42
43 "It will not."
44 THE COURT: If you don't succeed in the first
45 one, then similarly the second couldn't arise,
46 could it?"
47

1 And I said:
2
3 "If your lordship finds that the plaintiffs have
4 the standing to maintain a claim to aboriginal
5 right and sufficiently specific to come within
6 the rights of Sparrow, such that a judgment can
7 be given against the province, then I say that
8 any -- that the action must be dismissed on the
9 basis that any such claim must be made against
10 Canada in the Federal Court of Canada."
11
12 THE COURT: But if that were so, then the action would be
13 dismissed.
14 MR. GOLDIE: That's correct.
15 THE COURT: As again the province.
16 MR. GOLDIE: As against the province. But paragraph two is in
17 the alternative, and it is to meet the situation of
18 your lordship finding some measure of success on the
19 part of the plaintiffs' claim to establish some
20 relief. And I said notwithstanding that, the province
21 is entitled to have the claim against it dismissed,
22 and that the remedy is against Canada in the federal
23 court.
24 THE COURT: Well, that would follow if ineluctably, as some
25 judges say --
26 MR. GOLDIE: That brings us to the next problem.
27 THE COURT: -- by operation of law.
28 MR. GOLDIE: Well, it may be, but if I hadn't pleaded the
29 counter-claim, I wouldn't be entitled, at least in my
30 submission, I might not be entitled to having the
31 action dismissed as against the province.
32 THE COURT: At the moment I am having trouble seeing how you can
33 ask for more than to have the action dismissed.
34 MR. GOLDIE: Well, we have a third situation, and the third
35 situation is that if your lordship finds that the
36 plaintiff is entitled to some relief and dismisses the
37 counter-claim, then we must go into the federal court.
38 And it's that situation which gives rise to the
39 proposition that the plaintiff would be -- that the
40 defendant province would be pursuing Canada in the
41 federal court.
42 THE COURT: That's what I understood you to say would be your
43 course.
44 MR. GOLDIE: If you dismiss the counter-claim, if you find that
45 the plaintiff is in some measure successful and
46 dismissed the counter-claim.
47 THE COURT: Successful against the province.

MR. GOLDIE: Successful against the province, your lordship may dismiss the submissions that I have made under the judgment.
THE COURT: If I give judgment against the plaintiff, I don't see how I can say that the province is entitled to judgment on the counter-claim. If I don't give judgment against the province, you don't need it.
MR. GOLDIE: Well, I am going to make a submission to your lordship about that, because it is an important aspect.

I say that it is precisely in the event that I don't succeed in my defence that I want paragraph two here. Now, I said a few minutes ago that I wanted paragraph one in the event that your lordship dismisses the action on some ground that leaves the door open to future litigation. I would submit that on the basis of the evidence and the law, that I am entitled to a declaration that the plaintiffs have no claim of whatsoever nature against the province.
THE COURT: Let me just stop you there please. That would have to be for -- on any -- if you were to get that declaration, if you were to get a dismissal of the action, and that declaration would surely have to be for any cause or matter arising out of the pleadings.
MR. GOLDIE: I don't think I am that strictly bound, my lord. I say that --
THE COURT: The plaintiffs may have an action of contract somewhere that's never been ventilated in this lawsuit. I couldn't make a declaration if I dismissed this action that there is no possibility of any other action, outstanding cause of action between the parties. I simply don't know what might be out there in the way of actions and contract tort or other unknown cause of action. It would have to be a declaration with respect to the matters in the pleadings surely.
MR. GOLDIE: Well, as between the parties, as between the parties that the plaintiffs have the duty to bring their best case forward.
THE COURT: With respect to the matters in the pleadings.
MR. GOLDIE: Well, with respect to any cause of action.
THE COURT: With respect, I am not sure I agree with that. As I say, if a provincial vehicle ran down a plaintiff on the streets of Telkwa -- people would wander across the street from Telkwa from time to time, I'm sure, and run over by trucks coming down the hill -- if that were to happen, that would be a cause of action that I

1 couldn't within a declaration consequent upon the
2 dismissal of this action --
3 MR. GOLDIE: It is comprehended in the evidence led by the
4 counter-claim that the whole thrust of the
5 counter-claim is that -- the history of matters since
6 1871 is that British Columbia is absolved, is
7 discharged in respect of any matters that can be found
8 within the general claim of aboriginal title or
9 interest. Now, somebody gets run down, that's
10 clearly --
11 THE COURT: Separate cause of action. That's why I say I think
12 it has to be limited to the matters raised in the
13 pleadings here, and it seems to me that that follows
14 as matter of law if the action is dismissed.
15 MR. GOLDIE: Well, if the action was dismissed period, the
16 paragraph one of the counter-claim is unnecessary, and
17 that's what I meant --
18 THE COURT: And paragraph two as well, is it not?
19 MR. GOLDIE: No. Well, paragraph two doesn't come into play,
20 because it's an alternative, but paragraph two does
21 come into play if your lordship finds any ground for
22 granting relief to the plaintiffs, any ground at all.
23 And we say with respect to paragraph two that we are
24 entitled to a declaration that the action is dismissed
25 as against the province.
26 Now, I want to deal with the question of whether
27 anything further can be said with respect to that, and
28 I come back to the factual situation that arises when
29 paragraph two is brought into play.
30 First, the plaintiffs have persuaded your lordship
31 that there is some aspect of their claim which
32 entitles them to relief. I say under paragraph two
33 that there is no claim in respect of that against the
34 province on the basis of PC 1265 and all the matters
35 which have been submitted to your lordship in the
36 counter-claim. That leaves the question open. If
37 there is a claim, if there is a remedy against whom
38 and against -- and under what circumstances are they
39 entitled to make it.
40 THE COURT: But you have raised that as a matter of defence, and
41 I have to deal with that before I could give relief in
42 this action.
43 MR. GOLDIE: I'm sorry, my lord --
44 THE COURT: For the purpose of this discussion I find that the
45 plaintiffs are entitled to some relief in judgment of
46 any kind. It seems to me I cannot give that judgment
47 until I have disposed of your argument based upon PC

1 1265.
2 MR. GOLDIE: That's correct.
3 THE COURT: So that would be subsumed in the judgment I would
4 give consequent upon the finding that the plaintiff
5 was entitled to some remedy. That would have to carry
6 with it the objection of the argument based upon PC
7 1265.
8 MR. GOLDIE: That's the third situation. But the second
9 situation is your lordship finds a remedy. Now,
10 against whom can the remedy be brought home --
11 THE COURT: Only against the province in this action.
12 MR. GOLDIE: -- in this action. Then why -- on what basis do we
13 say we are entitled to the action dismissed? On the
14 basis of the counter-claim. And in the counter-claim
15 we say the plaintiffs are entitled to know against
16 whom they can bring that remedy. And they are
17 entitled under that set of circumstances to rely upon
18 the fact that Canada has been brought in here as a
19 party, and is bound by your lordship's findings.
20 Now, this is the situation that I discussed when I
21 was talking about Sparrow. I say that the nature of
22 the plaintiffs' claim is akin to that of the
23 beneficiary who sues a trustee for a breach of trust
24 by doing something which binds the beneficiary, or the
25 agent discharges a third party acting within its
26 ostensible authority. It doesn't matter. CP and
27 Paul, which was referred to in Sparrow, tells us that
28 the third party, that is to say the province's
29 discharge --
30 THE COURT: Well, I still have the view that if I dismissed the
31 action, the province is discharged of all matters that
32 fall within the ambit of the pleadings in this action.
33 MR. GOLDIE: Well, I want to --
34 THE COURT: I gave the example the other day of the action of
35 conspiracy, where having failed in showing that the
36 means were unlawful, then brought a second action to
37 show that the purpose was unlawful, and were held up
38 to be unable to do that.
39 MR. GOLDIE: Yes, that's --
40 THE COURT: And it seems to me an action -- a defence of liabel
41 once failed on the ground of a defence failed on the
42 ground of qualified privilege, and I think there the
43 difficulty then brought an action for a declaration to
44 say that he should have succeeded on a ground -- it
45 wasn't liable on the ground of absolute privilege.
46 That was found to be an abusive process of the court.
47 There are some unusual cases in the books that make

one wonder how it ever got to the point of being at trial, but I can't see any possibility of these plaintiffs being able to pursue the province for any cause of action that's within the scope of these pleadings, and if this action is dismissed.

MR. GOLDIE: Well, what I am addressing is your lordship's observation yesterday at page 29038, line nine, where your lordship said there:

> "Well, I am slicing this cheese as thin as I can slice it, and it seems to me that when Mr. Goldie agreed that --to enforce the claims he has advanced in part 2 of the counter-claim, he would have to go through another court. He is removing that issue from this trial."

That's what I want -- that's what has brought me to my feet, because if your lordship feels that paragraph two is a claim against Canada which can only be made in another court, then I say if I made that concession, I withdraw it, and I should. I mean, if I made it, I am incompetent, because that -- the counter-claim is aimed and it always has been aimed at the plaintiffs, and it is aimed on the basis that the province has been discharged.

Now, I want to come to the third proposition. And that is the situation that would occur if your lordship is not persuaded that the submission made under the counter-claim, namely, the effect in law of PC 1265, PC 751 is what I say it is, and gives judgment against the province and dismisses the counter-claim. Now, if that occurs, then that is the other reason why I wanted the Attorney General of Canada here. I want them here bound --

THE COURT: Yes.

MR. GOLDIE: -- by what goes on. And in that case I would be going into the federal court of Canada, but I would be the person seeking relief by way of indemnity.

Now, my lord, I have been very careful. I hope to avoid the constitutional issue raised by Canada, that is a lack of jurisdiction in this court. If Canada could be sued in this court, then there would be a third paragraph to the counter-claim saying in the further alternative this defendant seeks contribution against the second defendant. But I can't do that. But I do want the counter-claim to be dealt with in -- I say your lordship may come to the conclusion that

the basis upon which you dismiss the action against the province is as far as you are going to go, but I say the counter-claim is there to guard us against the possibility of your lordship coming to the conclusion that the action should be dismissed but for reasons that may leave it open to future litigation. The counter-claim, in my submission my lord, at least requires the issue to be dealt with so that that submission is going to be the basis upon which your lordship makes some findings.

Now -- and I have to agree that I -- that the comments that I made in the discussion that took place on June the 13th may have misled your lordship, because I did make a reference to:

> "I have to go into another court and seek to establish Canada's indemnity."

THE COURT: That only dealt with part two.

MR. GOLDIE: That dealt with part two, and I have assumed that it was my somewhat overly terse way of dealing with that third possibility that led your lordship to suggest yesterday that I had withdrawn the part two of the counter-claim, because it related only to a claim made in another court. That's only so if your lordship dismisses the counter-claim and grants some relief. In other words, it's that third alternative which I can't raise by way of a contribution in this court that requires me to keep the Attorney General of Canada here so that he may be bound when I go into the other court.

THE COURT: Well, I think that advantage is available to you. That isn't anything that requires any determination on my part. That follows as a matter of law.

MR. GOLDIE: That follows because they are here.

THE COURT: Yes.

MR. GOLDIE: What I seek to avoid, if I am forced into that other court, is Canada saying we disagree with the finding of liability that was made here. Now, I relied upon the Tuxedo Holding case, my lord, for that.

THE COURT: I don't think there is any problem with that.

MR. GOLDIE: But that doesn't mean that I have ever wavered in the proposition that the counter-claim is aimed at the plaintiffs. But what I -- as I say, I have attempted to avoid the constitutional issue, and I am quite prepared today to deal with the Attorney General's

1 submission on the jurisdictional issue. But I am
2 concerned about dealing today with 300 and some odd
3 pages that we received on the Sunday. And that's a
4 matter which doesn't concern the plaintiffs as such,
5 because I dealt with their submission in my principle
6 argument. I went so far in attempting to avoid any
7 constitutional aspect, to say that the word
8 "compensation", their only claim was for compensation,
9 or that their only claim was equitable. I said those
10 words were not necessary, because they simply
11 characterize the cause of action against Canada that
12 the plaintiffs might have. And I didn't want to get
13 into the position of appearing to trespass upon
14 another court's right to deal with the way in which
15 causes of action are framed before it, but what I do
16 ask for, in the event that your lordship finds any
17 basis for granting relief to the plaintiffs, is that
18 their action is dismissed, and that in the form of the
19 order that I hand up, and that their claim is
20 elsewhere.
21 Now, my lord, I am going to -- I am going to go on
22 now to deal with other matters of reply. When I
23 conclude with that, I will be asking your lordship to
24 reinstate the original arrangement that the province
25 would file a written reply to the Attorney General's
26 submission which we received on Sunday evening. But I
27 will now go onto the question of Canada's argument
28 with respect to jurisdiction. And I have already
29 intimated to your lordship that that can be dismissed.
30 MR. RUSH: Excuse me, my lord. If the determination of the
31 issue of whether or not my friend is entitled to a
32 further written reply would affect his subsequent
33 submission, then with respect I think should be dealt
34 with now. If it wouldn't, then I see no harm in it
35 being dealt with in a manner he proposes.
36 MR. GOLDIE: Well, I am going to deal now with matters -- with
37 everything that I can, and I will come back and ask
38 your lordship to rule on my submission that I have now
39 completed with respect to the requirement that I deal
40 today with the 300 some odd pages that we received on
41 Sunday.
42 Now I am dealing with the -- as matter of reply I
43 am now dealing with the Attorney General of Canada's
44 submission with respect to jurisdiction. And I say it
45 is -- it can be put to one side in its entirety,
46 because it is based on the erroneous belief that the
47 counter-claim is a claim against Canada, and that

1 transpires from --
2 THE COURT: Before you do that, Mr. Goldie, I don't know if
3 anyone wants to -- and I should hear them if anyone
4 wants to associate themselves with what Mr. Goldie has
5 said up to the present time today regarding the nature
6 of the counter-claim, because there have been no
7 response. It's fairer that I say that while I --
8 while I appreciate and enjoy sometimes stubborness in
9 others, I dislike it in myself, and it may be that I
10 am being stubborn now, but I have the view that the --
11 that paragraph one of the counter-claim is subsumed in
12 the defence, and that I could not give judgment
13 against the province if I had not before doing so
14 rejected all of the province's defences, including its
15 argument on the effect of PC 1265, which as I
16 understand the argument, is that it constitutes a
17 discharge on the province. I could not give judgment
18 against the province if -- unless I had decided that
19 the province is not discharged by PC 1265 or any other
20 defence that has been advanced by the province.
21 As to paragraph two of the counter-claim, it asks
22 for a declaration that the plaintiffs' claim, if not
23 dismissed against the province, is really against
24 Canada. But the plaintiff makes no claim against
25 Canada, and if the action is not dismissed, then it
26 seems to me that the plaintiffs must in that set of
27 circumstances have judgment against the province,
28 which I have already said could not go unless I had
29 decided against the province on all its defences.
30 That being so, it seems to me that in the present
31 state of vexatious case, using Mr. Macaulay's
32 language, the counter-claim is, in my view, subsumed
33 in the defence, and I do not think I can be persuaded
34 otherwise. The question is when should anyone have an
35 opportunity to persuade me otherwise.
36 I can only foresee one possibility in that regard,
37 and that is that at some stage in this case, at some
38 stage of my deliberations with myself regarding this
39 case I might well ask counsel for further argument on
40 a specific point. That seems to me is an option
41 that's open. I would hope that I wouldn't have to
42 take advantage of that process, but that, it seems to
43 me, might arise. But other than that, I don't see any
44 opportunity or likelihood of the matter requiring
45 further submissions from counsel.
46 It seems to me that leaves this question open as
47 to whether Mr. Goldie should have time to prepare for

the response that I think he is entitled to the matters raised by Canada in its defence.

MS. RUSSELL: If I might rise on that point alone. The reason that delivery was so late, and we did not think there was difficulty with that, was that we believed until yesterday that the province had the right of written reply to our argument on the counter-claim. Thank you.

THE COURT: Well, I see no answer to this problem. There is no answer, except to prolong even further the completion of this trial, which I regard as a most distressing prospect, but I am not disposed to change the order of argument. I think the province must make its reply to Canada, and then the plaintiff must make its reply, and I have to ask you, Mr. Goldie, when can you make your reply?

MR. GOLDIE: My lord, I am making my reply to Canada's submission in respect of all matters other than those 300 odd pages. We anticipated that when this came in Sunday night, we anticipated we would have to prepare our reply by Saturday.

THE COURT: By Saturday?

MR. GOLDIE: If the case was to end on June the 30th. And I emphasize again, my lord, that the plaintiffs have no interest in this. We have no right of reply as against the submissions made by the plaintiffs, and they have no right to add to their submissions. It is only with respect to this.

MR. RUSH: I have something to say about that, my lord.

MR. GOLDIE: My friend may say it, but that's the position I take, that I have no right of reply with respect to what he said, because I have dealt with it, and I dealt with it in the way in which your lordship contemplated it would be dealt with, namely, that we would handle matters which to some extent were in anticipation, because he had, before we made our submissions and before the plaintiff made its submissions, he had our written summary, and he dealt with the counter-claim. He said all he can say about that. But I am simply saying that to state what is trite law. I am in your lordship's hands.

THE COURT: Well, Mr. Macaulay's how many odd pages it was took 15 minutes of argument, I think.

MR. GOLDIE: Well, he may have taken 15 minutes of argument, but he left 300 pages in your lordship's hands, and the matters for reply that occur in those pages are the usual ones that occur for reply. And he is seeking to

1 persuade your lordship that the submission made by the
2 province that it has been discharged is wrong. The
3 point of his submission is to have our defence
4 dismissed on that point, and he and my friend Mr. Rush
5 are at one. Mr. Rush had his crack at it in his
6 principal submission, and I dealt with that when I
7 came to deal with Mr. Rush's submission and in my
8 argument, but I did not have either Mr. Macaulay's
9 views or the documents which he has introduced, and
10 Canada takes -- goes at some pains to talk about how
11 important those documents are.
12 I am going to deal with whatever I have to deal
13 with whenever I have to deal with it, as directed by
14 your lordship, but I am simply saying that I wish to
15 get on with what I can deal with today, and I'll
16 expect a direction from your lordship on the rest of
17 this when I finish.
18 THE COURT: Well, I think we have to settle this. It seems to
19 me that if you are not able to deal with Mr.
20 Macaulay's submission fully today, then I think we
21 have to put this case off. I see no other
22 alternative.
23 MR. GOLDIE: Well, Mr. Macaulay took a day to deal with his
24 counter-claim, my lord. I think your lordship's
25 recollection is in error when you said 15 minutes.
26 THE COURT: I am talking about the time he actually spent on
27 those pages. I don't think he spent very much time on
28 those pages.
29 MR. GOLDIE: Well, he spent a day going through the binder, I am
30 told. This is the binder that we got Sunday night.
31 It took a day to go through that.
32 THE COURT: Oh, all right, yes, he may have taken a day, but he
33 certainly didn't read it all, and I certainly --
34 MR. GOLDIE: Well, perhaps the appropriate --
35 THE COURT: I don't think it matters. It seems to me that the
36 case must go off. I just find that to be the most
37 deplorable thought that I have had since the start of
38 this trial. I think it's most unfortunate, but Mr.
39 Goldie's been good enough to take simply the blame for
40 what's happened, and I have to take the blame for the
41 rest. I should have forced counsel to keep to the
42 schedule that they have agreed to. I should have
43 forced everybody to do what I thought they should have
44 done, but they didn't do throughout the course of this
45 trial, and I thought that by doing that we would get
46 through it, and at the end we would be better off than
47 we are, but that seems to have been misplaced

1 optimism. When can you be ready to make your
2 submission, Mr. Goldie?
3 MR. GOLDIE: Your lordship is speaking now of an oral
4 submission?
5 THE COURT: Yes. Mr. Rush is insisting -- everybody is
6 insisting on having their own way here, so --
7 MR. RUSH: If you'll allow me to make a submission on this.
8 THE COURT: All right.
9 MR. RUSH: There are many things I would like to say about my
10 learned friend's argument, but there is a practical
11 one, and I would like to confine myself to that issue.
12 The way that I view this counter-claim argument on the
13 part of the so-called counter-claim argument by Canada
14 is that it is primarily, I would say, upwards of 80
15 percent a review of documents, a historical review and
16 minimally an issue dealing with law. These documents
17 were documents of a kind that were canvassed by my
18 learned friend in two places in his argument. One, as
19 a matter of defence, and two, as a matter of what he
20 calls his counter-claim. I think the matter was
21 disposed of when your lordship used the words that the
22 counter-claim was subsumed within the defence, and
23 that is the case, and it doesn't matter whether there
24 is one-third of my friend's arguments, that is the
25 province, dedicated to a counter-claim so-called, the
26 fact of the matter is that it is a really a matter of
27 defence, and I submit that with regard to Canada's
28 argument in reply, it falls into the same category.
29 Now, on that issue, I read that reply in a matter
30 of two hours. I know what I have to say about that
31 document, and I see no reason why my learned friend in
32 the same time span cannot read, digest and know what
33 he has to say about that counter-claim. I think -- I
34 agree with your lordship, it's deplorable that this
35 case should go beyond June the 30th, and to that end I
36 would say, my lord, that if my friends need more time
37 to prepare their response on that counter-claim, then
38 the plaintiffs are prepared to give up some of their
39 time, and we are prepared to start later tomorrow, if
40 need be. But I say that it's not the onerous task
41 that my friend paints it to be. It can be disposed
42 of, and it can be disposed of in oral argument.
43 Now, the reason, my lord, that the plaintiffs feel
44 it is necessary that the defendants proceed --
45 province proceeds with its argument before we do, is
46 because these documents, the argument and the
47 documents filed by Canada cannot be so easily severed

1 into these discreet little categories that my friend
2 makes. These are documents that cover both aspects of
3 his argument, and I have no doubt that though the
4 arrow is aimed, it is said, by Canada, to respond to
5 their counter-claim, that arrow will come at us, and
6 there are responses both in terms of the documents and
7 arguments of Canada, and no doubt the characterization
8 that my learned friend the province will place in
9 those documents which we may want to pass on.
10 As your lordship knows, there are 30 odd documents
11 which, until Canada produced these documents, we
12 hadn't seen. Now, many of these documents, in our
13 view, can be constructed favorably to the plaintiffs'
14 argument, and for that reason there may be very little
15 comment that we have to say about that, and certainly
16 none that my -- none in response to my friends, no
17 doubt, colouration of those documents. But I think
18 would be -- it would pervert the real underlying
19 character of this trial if in fact the real issue were
20 to be left to be decided by the province as the final
21 word. And the plaintiffs have said that when you
22 look -- when you clear away the smoke and mirrors,
23 that the plaintiffs will be really responding to the
24 defences raised by the province, and that, with
25 respect, is the point of reply.
26 THE COURT: Well, the point, unfortunately, Mr. Rush, is that we
27 do not go behind, and I have tried not to go behind
28 the various representations that counsel made
29 throughout the course of a trial, that when a document
30 is delivered late, that time is required to digest it
31 and consider it and decide what to do with it. Ex
32 facie, Mr. Goldie has an impossible job. He has got
33 300 pages that he hasn't had time to digest. You say
34 you can do it more quickly. I can't go behind what
35 Mr. Goldie says in this regard, and ex facie there is
36 unfairness in asking counsel to deal with a document
37 of that magnitude that's delivered to him on a Sunday
38 night especially, or a fortiori, when there's been a
39 reconsideration arising out of the conclusion I have
40 now reached about the nature of the counter-claim, and
41 that being so, it seems to me that I have to give Mr.
42 Goldie some reasonable amount of time. He only knew
43 yesterday that this was going to be required or was
44 being suggested. He now says he can't be ready to do
45 it. I can't go behind that.
46 The only good news I have is that I don't have to
47 be in Nova Scotia next week. I have to be there the

week after. I had other plans next week, as I am sure other counsel do, but it seems to me to maintain this pristine fairness that we struggled for, it seems to me that that's where we have to spend next week.

MR. GOLDIE: Well, my lord, before we go any further, I would like to say this. I wish to discuss with my colleagues the question of preparing and presenting an oral reply to this. I can tell your lordship right now that we have, I think, two propositions that in our submission will dispose of the whole of that document. That leaves us with about a quarter of the way through the particular submissions made by Canada which are the proper subject of reply. I would like to discuss with my colleagues --

THE COURT: It's time for the morning adjournment. We will do that now.

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

(PROCEEDINGS ADJOURNED FOR A BRIEF RECESS)

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

_____
LORI OXLEY
OFFICIAL REPORTER.
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(PROCEEDINGS RESUMED PURSUANT TO SHORT RECESS)

THE COURT: Mr. Goldie.
MR. GOLDIE: My lord, what I propose is this: That I continue with the matters that I planned on dealing with and that we then adjourn, and I will be prepared to deal with my reply to Canada's counterclaim tomorrow morning.
THE COURT: All right. I think that's the best we can do. And I will leave it to Mr. Rush to suggest what hours he would like to sit. Can we start early tomorrow morning?
MR. GOLDIE: I would prefer ten o'clock, my lord. I'm counting on using time --
THE COURT: All right.
MR. GOLDIE: -- Between 12:30 and ten o'clock.
THE COURT: Yes. All right.
MR. RUSH: Well, my lord, I'm going to proceed on the assumption that the plaintiffs will start their reply at two tomorrow.
MR. GOLDIE: I don't think I'll need that length of time.
MR. RUSH: Or any --
THE COURT: Or earlier?
MR. RUSH: Or earlier, yes.
MR. GOLDIE: I'll certainly be finished.
THE COURT: Yes. All right.
MR. GOLDIE: I do not anticipate taking tomorrow -- the whole of tomorrow morning.
THE COURT: Yes. All right. Thank you.
MR. GOLDIE: My lord, I was about to deal with the jurisdictional argument that is put forward in Canada's binder marked Final Counterclaim Argument Volume I. And it starts at page five and runs through to -- I shouldn't say it starts at page five. It really starts earlier than that. But the substance of what I'm going to deal with starts at page five and runs through to page 20. And if your lordship would turn to page five.
THE COURT: Yes.
MR. GOLDIE: There are two grounds, as I understand it, put forward in support of the proposition that this court does not have jurisdiction. A: The Supreme Court of British Columbia lacks jurisdiction to determine claims relating to "controversies" between Canada and the Province. And B: The Supreme Court of British Columbia lacks jurisdiction to entertain the claim and to grant the relief claimed in paragraph 2 in the

counterclaim as against Canada by virtue of section 17 of the Federal Court Act.

My lord, in essence, I am going to deal with both of those at the same time. But I say with respect to the question of controversy that it is wholly incidental to the claim against the plaintiffs. I say the issue between the province and the plaintiffs is a constitutional one the province raised in its defence and by way of counterclaim a course of dealing which resulted in the province's discharge and absolution in respect of the plaintiffs' claims.

Now, in my submission, that is no more of a controversy between the province and Canada than the issue which was raised in the Law Society case, and sometimes known as the Jabour case. In that case the Law Society received a notice that a hearing would be held under the Combines Act, or an inquiry under the Combines Act. And in response to that the Law Society commenced an action challenging the validity of the application to it and to its members of the Combines Investigation Act and sought an injunction from restraining the director from proceeding with the hearing. The Attorney General of Canada sought to strike out the statement of claim on the ground that exclusive jurisdiction over all declaratory relief involving the federal Crown and federal boards was vested in the Federal Court of Canada. That was rejected by the trial judge. The appeal was dismissed by the Court of Appeal, and the appeal from that was dismissed in the Supreme Court of Canada.

My lord, I wish to make reference to the judgment in the Court of Appeal. And I just refer to the headnote which reads:

> "The jurisdiction given to the Federal Court does not oust the jurisdiction of a superior provincial court to grant a declaratory judgment where the applicant is not seeking relief in the nature of having something done in order to give effect to his legal rights against the Crown or a decision that he is entitled to an interest in property."

And that, of course, is property of the Crown. The relief sought against the plaintiff can be -- and its lack of application to the Crown in right of Canada can be tested this way: If the province had

1 brought an action against the plaintiffs in
2 anticipation of the plaintiffs doing things, and by
3 that I mean this, my lord. Your lordship may recall
4 that in Bear Island the Province of Ontario was the
5 plaintiff, and it moved because that the band in
6 question had sought to cloud the title -- cloud title
7 of Crown grantees. If the same sort of thing had
8 happened here and the province had brought an action
9 seeking a declaration that the plaintiffs' sole relief
10 was against Canada would it have had to have brought
11 that action in the Federal Court? Clearly not. Any
12 more than the Attorney General of Canada in the Law
13 Society case could say that all declaratory relief
14 involving the Crown in right of Canada must be sought
15 in the Federal Court. As is evident from the reasons
16 for judgment the particular circumstances are to be
17 looked at and one must discern what, if anything, is
18 being asked of the federal Crown. The province seeks
19 nothing from the federal Crown.
20 As I said earlier the Tuxedo Holding case in the
21 Court of Appeal of Manitoba dealt with, amongst other
22 things, the attempt of the Attorney General of
23 Manitoba to be struck out of the action. At issue was
24 the question of the rights of the parties under
25 various agreements between the Tuxedo Company and the
26 University of Manitoba which had been dealt with by
27 provincial orders-in-council. The plaintiffs took the
28 position that these agreements which related to land
29 to be granted to the university under certain
30 conditions and an undertaking on the part of the
31 university to put up a particular educational
32 institution. The position was that on the part of the
33 land company that these were agreements that were
34 related one to another. The university took the
35 position that the agreements were ultra virus. And
36 the Attorney General took the position that the
37 order-in-council was ultra vires. And the Attorney
38 General asked that the order making him a party was to
39 be set aside. Now, the action by the Tuxedo Company
40 was that the agreements were binding and it was, in
41 effect, seeking specific performance against the
42 university.
43 The particular issue that gave rise to the case
44 that I've given to your lordship reported in the 1930
45 Volume 1 of the Western Weekly Reports was the order
46 in which the Attorney General of Manitoba was made a
47 party to the defendant to the action. And Mr. Justice

Dennistoun, who gave the judgment of the court, after reviewing the circumstances said at page 467:

> "The Attorney General appeals to this Court and asks that the order making him a party be set aside on three grounds, which are found in the Esquimalt & Nanaimo Railway v. Wilson".

And he sets out the three grounds, one of which is somewhat similar to the position -- one of the positions taken by the Attorney General of Canada here. That it's not necessary that he be a party.

And after reviewing that he then reviews at page 468 the judgment of the referee in chambers. And he says midway down the page, or a third of the way down the page:

> "I will take the opportunity presently of referring to the cases in which this statement of the law is founded, pointing out now, that the rights of the Crown are not immediately affected in the present action. No relief is asked against the Crown, all that is sought is a declaratory judgment that the contracts and Order-in-Council are not ultra virus but are as valid and binding as they appear to be upon their face.
>
> No injunction is against the Crown, but an injunction is asked to restrain the Governors of the university from accepting any money from the Crown for the erection or maintenance of university buildings, elsewhere than in Tuxedo Park."

And then he says if the injunction should be made the public at large are affected and they should be represented by the Attorney General.

Then he goes on to the second to last paragraph and he says, and I quote:

> "There is an additional reason. The Attorney General takes the position that the agreements are not interdependent and that the Order-in-Council which confirmed them is ultra virus of the Lieutenant Governor in Council. If he should succeed in establishing this, the

1 plaintiffs contend that they may have certain
2 claims against the Crown by petition of right
3 in respect to the free site which the Crown has
4 obtained for the school for the deaf.
5
6 To this end it is necessary that the Crown
7 should be bound by the interpretation which the
8 Courts will put upon these agreements in the
9 present action. These questions must be res
10 judicata by a declaratory judgment which will
11 not leave it open to the Crown to set them up
12 again, and perhaps take the opposite position
13 in future proceedings."
14
15 Now, that of course is the situation which might
16 occur in the third circumstance that I outlined to
17 your lordship this morning. Namely, that if the
18 plaintiffs succeed in some respects and the
19 counterclaim is dismissed then we want the Crown bound
20 by the interpretations which your lordship placed upon
21 the plaintiff's claim.
22 So in my submission, my lord, the whole concept of
23 the Attorney General of Canada's objection to the
24 jurisdiction falls to the ground because, firstly,
25 there is no claim against Canada in the sense that the
26 cases make it clear and, secondly, that the inherent
27 jurisdiction of this court makes it right and
28 appropriate that where there is something which could
29 be characterized as a controversy between the Crown in
30 right of Canada and the third party, which is
31 incidental to the resolution of the main issue, but
32 then this court retains that jurisdiction.
33 That really is my reply to the jurisdictional
34 question, my lord. I point out that the Attorney
35 General of Canada basically raised all these points in
36 the Court of Appeal and he failed in that regard.
37 Well, not only my friend the Attorney General, but the
38 plaintiffs did.
39 Now, I want to move on to the Mitchell case, which
40 Ms. Koenigsberg referred to yesterday. Mitchell is in
41 the plaintiffs' blue book, tab 11. I'm sorry. It's
42 in Canada's blue book, my lord.
43 THE COURT: Yes. I'll have it in just a moment. Yes. I have
44 it.
45 MR. GOLDIE: My friend Ms. Koenigsberg's submission, as I
46 understand it, really should start at page 29077 of
47 yesterday's transcript, Volume 365. And she goes on

to page 29084. And as I read it she is suggesting that the judgment of Chief Justice Dickson supports the proposition that the provincial Crown is under a fiduciary duty or is in a fiduciary relationship with the aboriginal peoples.

Now, Ms. Koenigsberg stated that the Chief Justice although concurring in the result proposed by Mr. Justice La Forest dissented in his reasons for concurring. But I think she suggested that that really didn't bear upon the propositions that she was relying upon with respect to the provincial Crown. And I say that that, with respect, is not so. She said, and I quote -- this is page 29082 at line 39. She said:

> "And all justices agreed that 'Her Majesty' or 'The Crown' may very well mean Provincial or Federal depending on the context. And the split centered around when one would say that it meant both Provincial and Federal."

If it was meant to suggest that in this case, the Mitchell case, that it was merely a question of a difference over the text then in my submission she was, with respect, quite wrong. There was a profound difference over the philosophical question of whether the Indian people should be protected in respect of property beyond that which comes to them as Indians. The Chief Justice would have extended that protection. Mr. Justice La Forest rejected that. He said in respect of commercial matters they are as other citizens of Canada.

I wish to refer your lordship to the -- the judgment of Mr. Justice La Forest, but before I do so I note that his reasons with respect to this issue -- well, I should go back a step. His judgment was concurred in by Mr. Justice Sopinka and Mr. Justice Gonthier.

THE COURT: I'm sorry. The Chief Justice's judgment was concurred in?

MR. GOLDIE: No. Mr. Justice La Forest. The judgment that I'm about to refer to. And we're dealing with a court with seven judges.

Mr. Justice La Forest's reasons were concurred in by Mr. Justice Sopinka and Mr. Justice Gonthier. Madam Justice Wilson's judgment was concurred in by Mr. Justice Lamer and Madam Justice L'Heureux-Dube.

1 And as we will see she expressly agreed with the views
2 of Mr. Justice La Forest on why the Provincial Crown
3 was not involved. In the result, in my submission,
4 that is a judgment of six judges concurring in the
5 views expressed by Mr. Justice La Forest.
6 Now, I turn now to his reasons for judgment, my
7 lord, which start off at following page 13 and start
8 with the pagination number one. And he starts off by
9 saying on the first page of his judgment:
10
11 "I have had the advantage of reading the
12 reasons of the Chief Justice. I agree with his
13 proposed disposition of this case, but I do so
14 for quite different reasons. With respect, I
15 am unable to agree with his approach and, in
16 particular, with his adoption of the trial
17 judge's interpretation of Section 90(1)(b) of
18 the Indian Act."
19
20 And then he states the issues.
21
22 "The Chief Justice has summarized the facts and
23 the judicial history and I need not repeat
24 them. In broad terms, the issue to be
25 determined involves funds in the hands of the
26 Government of Manitoba, which it agreed to pay
27 to the respondent Indians in settlement of a
28 claim for the return of taxes paid by the
29 Indians to Manitoba Hydro in respect of sales
30 of electricity on reserves. The question is
31 whether those funds may be garnisheed by the
32 appellants who are suing the Indians for fees
33 for representing the Indians in negotiating the
34 settlement."
35
36 And I next turn to page five. And he first starts
37 off with a textual discussion. And in the course of
38 that -- and the thrust of his analysis is that the
39 words "Her Majesty" in Section 90(1)(b) of the Indian
40 Act refer only to the Crown in right of Canada. Page
41 five he says:
42
43 "Similarly, Indian treaties are matters of
44 federal concern and, as I see it, the terms
45 'treaty' and 'agreement' in Section 90(1)(b)
46 take colour from one another. It must be
47 remembered that treaty promises are often

1 couched in very general terms and that
2 supplementary agreements are needed to flesh
3 out the details of the commitments undertaken
4 by the Crown."
5
6 Now, of course treaties can only be entered into
7 by the Crown in right of Canada.
8 And the next paragraph he says:
9
10 "Finally, the use of the term 'given' in
11 Section 90(1)(b) can be taken as a distinct and
12 pointed reference to the process of cession of
13 Indian lands."
14
15 Of course the Crown can take a cession or
16 surrender of Indian lands as only the Crown in right
17 of Canada.
18 Then on page 12 after looking to some of the cases
19 that the Chief Justice relied upon for his broader
20 decision he says in the last paragraph:
21
22 "As is clear from the comments of the Chief
23 Justice in Guerin v. The Queen these
24 legislative restraints on the alienability of
25 Indian lands are but the continuation of a
26 policy that have shaped the dealings between
27 the Indians and the European settlers since the
28 time of the Royal Proclamation of 1763. The
29 historical record leaves no doubt that native
30 peoples acknowledge the ultimate sovereignty of
31 the British Crown, and agreed to cede their
32 traditional homelands on the understanding that
33 the Crown would thereafter protect them in the
34 possession and use of such lands as were
35 reserved for their use."
36
37 And he is of course now going in the direction of
38 why the reference in the Indian Act should be confined
39 to the Crown in right of Canada. And his observations
40 continue.
41
42 "See the comments of Professor Slattery in his
43 article 'Understanding Aboriginal Rights'."
44
45 Et cetera.
46
47 "The sections of the Indian Act relating to the

1 inalienability of Indian lands seek to give
2 effect to this protection by interposing the
3 Crown between the Indians and the market forces
4 which, if left unchecked, had the potential to
5 erode Indian ownership of these reserve lands.
6 This Court, in its recent decision of Canadian
7 Pacific Ltd. v. Paul alluded to this point when
8 it noted at page 677 that the feature of
9 inalienability was adopted as a protective
10 measure for the Indian population lest it be
11 persuaded into improvident transactions."
12
13 And as your lordship has heard throughout this
14 case it is to the Crown in right of Canada alone that
15 the Indian peoples can alienate their interests.
16 And he says:
17
18 "I take it to be obvious that the protections
19 afforded against taxation and attachment by
20 Sections 87 and 89 of the Indian Act go
21 hand-in-hand with these restraints on the
22 alienability of land. I noted above that the
23 Crown, as part of the consideration for the
24 cession of Indian lands, often committed itself
25 to giving goods and services to the natives
26 concerned."
27
28 And of course he's talking about the Federal Crown
29 there. And he goes on to talk about the numbered
30 treaties.
31 And then at page 23 he -- and this is where he
32 gets into the policy aspects. He said:
33
34 "When Indian bands..."
35
36 This is the third paragraph.
37
38 "When Indian bands enter the commercial
39 mainstream, it is to be expected that they will
40 have occasion from time to time to enter into
41 purely commercial agreements with the
42 provincial Crowns in the same way as with
43 private interests. The provincial Crowns are,
44 after all, important players in the
45 marketplace. If, then, an Indian band enters
46 into a normal business transaction, be it with
47 a provincial Crown, or a private corporation,

1 and acquires personal property, be it in the
2 form of chattels or debt obligations, how is
3 one to characterize the property concerned? To
4 my mind, it makes no sense to compare it with
5 the property that enures to Indians pursuant to
6 treaties and their ancillary agreements.
7 Indians have a plenary entitlement to their
8 treaty property; it is owed to them qua
9 Indians. Personal property acquired by Indians
10 in normal business dealings is clearly
11 different; it is simply property anyone else
12 might have acquired, and I can see no reason
13 why in those circumstances Indians should not
14 be treated in the same way as other people."
15
16 Your lordship will see how far the distinction
17 that Mr. Justice La Forest is making between the Crown
18 in right of the province and the Crown in right of the
19 dominion or the federal government.
20 And at page 23 -- I'm sorry. I've read that. At
21 page 28:
22
23 "By contrast..."
24
25 I should say that throughout this he is giving his
26 reasons why he is taking issue with the analysis made
27 by the Chief Justice. He says:
28
29 "By contrast, if 'Her Majesty' is to bear the
30 broad meaning that flows inexorably from the
31 interpretation that the trial judge would
32 ascribe to it, I am unable to find any cogent
33 reason why Parliament would interpose the
34 protective mantle of the federal Crown in this
35 matter. It seems to me to be an extraordinary
36 proposition that Indian bands which conclude
37 ordinary business dealings in the commercial
38 marketplace with provincial Crowns, would
39 thereafter be precluded from dealing as free
40 agents in respect of any personal property
41 accruing to them as a result of such
42 agreements."
43
44 I ask your lordship to conclude that there can be
45 no such fiduciary relationship between the provincial
46 Crowns and the Indian peoples as in the broad sense
47 that was suggested to you arose out of this case.

1 And then the page 30 he is dealing with the case
2 of Nowegijick v. The Queen. And the Chief Justice had
3 taken the position that in construing the statute a
4 broad and liberal interpretation should be given based
5 upon the canons of construction set out in the
6 Nowegijick case. And he says at the top of page 30:
7
8 "I note at the outset that I do not take issue
9 with the principle that treaties and statutes
10 relating to Indians should be liberally
11 construed and doubtful expressions resolved in
12 favour of the Indians. In the case of
13 treaties, this principle finds its
14 justification in the fact that the Crown
15 enjoyed a superior bargaining position when
16 negotiating treaties with native peoples."
17
18 Now, that -- of course it's the Crown in right of
19 Canada alone has the ability to negotiate treaties.
20 Then into the next paragraph:
21
22 "But as I view the matter, somewhat different
23 considerations must apply in the case of
24 statutes relating to Indians. Whereas a treaty
25 is the product of bargaining between two
26 contracting parties, statutes relating to
27 Indians are an expression of the will of
28 Parliament. Given this fact, I do not find it
29 particularly helpful to engage in speculation
30 as to how Indians may be taken to understand a
31 given provision. Rather, I think the approach
32 must be to read the Act concerned with a view
33 to elucidating what it was that Parliament
34 wished to effect in enacting the particular
35 section in question. This approach is not a
36 jettisoning of the liberal interpretative
37 method. As already stated, it is clear that in
38 the interpretation of any statutory enactment
39 dealing with Indians, and particularly the
40 Indian Act, it is appropriate to interpret in a
41 broad manner provisions that are aimed at
42 maintaining Indian rights, and to interpret
43 narrowly provisions aimed at limiting or
44 abrogating them."
45
46 I just want to point out there that the provinces
47 of course cannot pass legislation which deals with

Indians as Indians. If it applies to Indians by virtue of Section 88 of the Indian Act it applies as if it was federal legislation. If it applies ex proprio vigore it is because it is a statute of general application which does not deal with them in their conditions as Indians.

And then over on the next page -- oh, at page -- yes. At page 31 he says:

> "At the same time, I do not accept that this salutary rule..."

Which is the rule relating to the interpretation of treaty provisions or statutes involved in treaty provisions.

> "...must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation."

I say that applies a fortiori with respect to the provincial matters.

Then he goes on to say this:

> "It is consideration of this factor that leads me to reject the interpretation the trial judge would give to Section 90(1)(b). The provincial Crowns bear no responsibility to provide for the welfare and protection of native peoples, and I am not prepared to accept that Parliament, in enacting Section 90(1)(b), intended that the privileges of Sections 87 and 89 exempt Indian bands from taxation and civil process in respect of all personal property that they may acquire pursuant to all agreements with that level of government, regardless of where that property is located. This interpretation is simply too broad."

Now, my lord, I couple that with the observation that he makes on the next page at page 32. He said -- in the second complete paragraph he says:

> "In arriving at his conclusion that the trial judge was correct in interpreting 'Her Majesty'

1 in Section 90(1)(b) as including the provincial
2 Crowns, the Chief Justice sets considerable
3 store in what he takes to be the aboriginal
4 perception of 'Her Majesty'. With deference, I
5 question his conclusion that it is realistic in
6 this day and age, to proceed on the assumption
7 that from the aboriginal perspective, any
8 federal provincial divisions that the Crown has
9 imposed on itself are simply internal to
10 itself, such that the Crown may be considered
11 what one might style an 'indivisible entity'."
12
13 Now, my lord, I say that is particularly apt in
14 this case because the plaintiffs are in the position
15 of having been funded by one Crown to prosecute an
16 action against the other.
17 MR. RUSH: I'm sure that you mean partially funded, don't you?
18 MR. GOLDIE: All right. Partially funded, but sufficiently
19 funded to have created long delays in its absence.
20 MR. RUSH: I doubt that the delays were solely precipitated by
21 that.
22 MR. GOLDIE: Well, that's -- and then on the whole question of
23 fiduciary relationships, my lord, this judgment of Mr.
24 Justice La Forest underlines the reason or the absence
25 of any reason why such relationship should exist
26 between the provincial Crown and the -- and the Indian
27 peoples. And your lordship will recall that in Guerin
28 the Chief Justice, or Mr. Justice Dickson as he then
29 was, cited with approval the proposition that the
30 fiduciary relationship arose out of the dependency of
31 one person on another, the other having been empowered
32 to exercise his discretion without reference to the
33 first. Now, that dependency simply doesn't exist
34 between the provincial Crown and the Indian peoples.
35 And hasn't existed in the case of British Columbia
36 since 1871.
37 Now, Madam Justice Wilson said at -- and her
38 judgment is next, my lord. And I read only from page
39 two of her reasons. And she said:
40
41 "I agree with my colleague La Forest J.'s
42 interpretation of Section 90(1)(b)."
43
44 Now, his interpretation of Section 90(1)(b) was
45 based not only on the text, but on all of the policy
46 considerations which I have referred your lordship to.
47 So I say that six judges concurred in the view that a

1 province was not included in the words "Her Majesty
2 the Queen" in the Indian Act and rejected the
3 proposition that the Chief Justice said followed
4 from -- rejected the proposition that they were in the
5 same position as the federal government.
6 THE COURT: I rather thought Ms. Koenigsberg was stressing this
7 more for the purpose of suggesting that the
8 justification process described in Sparrow had to be
9 applied to provincial legislation where it interfered
10 with aboriginal rights as much as it applied to
11 federal legislation in that context. I didn't
12 understand she was putting the argument forward in
13 support of a proposition that the province had a
14 fiduciary duty. But I haven't read her reasons or her
15 argument over.
16 MR. GOLDIE: I think your lordship is correct in this sense,
17 that at page 29084 she says at line 44:
18
19 "And in my submission that Mitchell decision,
20 that analysis by Chief Justice Dickson makes it
21 crystal clear that after 1982 provincial laws
22 of general application and provincial laws
23 which can apply ex proprio vigore still apply,
24 but they are going to have to meet the
25 justificatory test. And it is also authority
26 for the proposition that the fiduciary
27 relationship, which seems now to be described
28 as almost a floating charge, is one which
29 surrounds the Crown's dealing with aboriginal
30 people when it becomes crystalized and could be
31 said to have applied and still apply to the
32 provincial power when it is exercised in
33 relevant circumstances."
34
35 And it is that last point in which my submission
36 she is, with great respect, completely in error.
37 My lord, my next point is in response to the
38 submission of the Attorney General with respect to
39 holders of rights. Now, there was handed up to your
40 lordship --
41 THE COURT: Mr. Goldie, can I interrupt you. You're not going
42 to finish in 15 minutes, are you?
43 MR. GOLDIE: Yes. I am, my lord, because I'm going to hand up
44 something.
45 THE COURT: Thank you.
46 MR. GOLDIE: And it is in response to what was handed up
47 yesterday by Ms. Koenigsberg entitled "Reply Section

35 and Summary Remarks". And my understanding is that counsel for Canada argues, and I quote:

> "That 'the preponderance of evidence ... supports the conclusion that the kinds of aboriginal rights existing in the claim area were held by Gitksan and Wet'suwet'en persons as organized in villages'."

And this submission follows upon an argument of the defendant. And when I say the defendant I mean the defendant Canada. That, and I quote:

> "But for the pleadings and but for the fact that the evidence has not been adduced in this way that the most appropriate group in the present case would be the village as presently constituted by the various bands organized under the Indian Act."

And I say of course another "but for" is the fact that it runs contrary to the plaintiffs' final argument.

Now, my lord I'd like to hand up --

THE COURT: I thought I had that. A how many page document are you reading from there? I have a document called "Section 35 and Summary Remarks".

MR. GOLDIE: That's what I'm answering now.

THE COURT: Yes. And you read to me -- did you read from that?

MR. GOLDIE: I'm reading to you from what I'm now about to hand up.

THE COURT: I see.

MR. GOLDIE: Which summarizes what my friend stated.

THE COURT: All right.

MR. GOLDIE: Oh, I'm sorry. I read from paragraph 2 of what I have just handed to your lordship and said:

> "This submission follows upon an argument of this defendant."

That of course is the province.

THE COURT: Oh, yes.

MR. GOLDIE: And I say:

> "Another 'but for' is, of course, the fact that it runs contrary to the plaintiffs' final argument."

Now, my lord, the -- my friends -- my friend's oral argument submitted that the constituent members of the bands were before the court and thus appeared to say that the court could make an order in respect of bands. And it is that proposition that I wish to take issue with. And it is set out in what I've handed up to your lordship and I don't propose to enlarge upon that. And with that, my lord, I would ask that we adjourn.

THE COURT: Yes.

MR. GOLDIE: At ten o'clock I will deal with the Sunday night special.

THE COURT: All right. Are you in a position, Mr. Rush, to say whether you think we'll have to sit tomorrow evening?

MR. RUSH: Yes, my lord, I am. We will not. The plaintiffs are intending to keep regular hours for the remaining time.

THE COURT: Yes. All right. It's useful to schedule certain matters that are pending. Thank you. All right. We'll adjourn until ten o'clock tomorrow morning. Thank you very much.

THE REGISTRAR: Order in court. Court stands adjourned.

(PROCEEDINGS ADJOURNED TO JUNE 28, 1990 AT 10:00 a.m.)

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

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Peri McHale,
Official Reporter,
UNITED REPORTING SERVICE LTD.