Vancouver, B.C.
June 11th, 1990

(PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)

THE REGISTRAR: In the Supreme Court of British Columbia, this 11th day of June, 1990. Delgamuukw versus Her Majesty the Queen, at bar, my lord.
THE COURT: Mr. Goldie.
MR. GOLDIE: My lord, before I start on Part X may I refer briefly to Volume 4 that was before your lordship on Saturday.
THE COURT: Yes.
MR. GOLDIE: And at that time I did not refer to section or Tab X, and I do so now. Your lordship will see that it's entitled "Supplement to Submission of the Province in Response to the Plaintiffs' Final Argument Entitled 'Law Applicable to Aboriginal Title in British Columbia'". Volume 7 is of the plaintiffs' final argument, and this reply -- it's not reply really, it's a supplement to our submission, deals with the Introduction and Parts I and IV of that volume. And Section A of what is now before your lordship relates to the introductory section to Volume 7, pages 1 to 8, which was handed up on May the 8th, 1990. Section B relates to Part I which is entitled "Recognition of Aboriginal Title: Pre-1871", pages 8 to 158, handed up May the 8th, 1990. And Section C relates to Part IV, "Union with Canada", 1871, handed up on May 9th, 1990. And I'm not going to go into this in any detail, my lord, it is simply handed up as a supplement. And the organization I think is apparent from it. It makes reference to a specific argument followed by a comment. And the argument in some cases is always identified by the page number in the plaintiffs' Volume 7, and sometimes reference is made to a transcript. But apart from that I don't propose making any further observation, my lord, and I now return to -- return to Volume 3 of the plaintiffs', I'm sorry, of the province's written summary of argument.
THE COURT: Are you going to be arguing from something in this Volume 4?
MR. GOLDIE: No. Just in 3.
THE COURT: So I can put 4 away for the moment?
MR. GOLDIE: Yes. And I will be referring to yellow binder 21 initially, but I have handed up --

1 My lord, this submission deals with the
2 counterclaim. And your lordship has already been
3 introduced to the counterclaim, if I may put it that
4 way, when I dealt with Part VIII of the province's
5 submission. However, there is a considerable
6 background which leads up to the discussion of the
7 Dominion order in council. And the purpose of the
8 parts that I'm now going to deal with is to provide
9 your lordship with that background. And I will seek
10 to avoid any repetition, although some of it will
11 become obvious it is necessary.
12 Turning to in Volume 3 the introduction to the
13 counterclaim, a couple of pages preceding tab 1 I say,
14 the counterclaim, as pleaded, seeks the following
15 relief:
16 1. A declaration the plaintiffs have no right, title
17 or interest in and to the claim area, and the
18 resources thereon, thereunder or thereover;
19 2. Alternatively, a declaration that the plaintiffs'
20 cause of action, if any, in respect of their alleged
21 aboriginal title, right or interest in and to the
22 claim area and the resources thereof, thereunder or
23 thereover is for compensation from Her Majesty the
24 Queen in Right of Canada.
25 Now, my lord, it is not necessary for me to use
26 the word compensation. As I said to your lordship
27 when I was dealing with Part VIII there is no part in
28 my case to characterize whatever claim the plaintiffs
29 may have against Canada as a result of British
30 Columbia being discharged from further responsibility.
31 Prayer one -- just to note this a bit further, prayer
32 one, of course, flows from the defence. Prayer two is
33 in the alternative and is assumed that there is some
34 form of aboriginal right surviving union in 1871.
35 And, of course, the claim area means the lands
36 within the claim area as defined in paragraph 8.B of
37 the statement of defence excluding Indian reserves.
38 I say in paragraph 3, as has been stated --
39 THE COURT: I'm sorry. Any significance in your reference to 8B
40 as opposed to 9A and B?
41 MR. GOLDIE: Well, that's to the defence, my lord. I'm sorry
42 the statement of claim. And the particular paragraph
43 in the statement of claim makes reference to 9A and
44 9B.
45 THE COURT: Yes.
46 MR. GOLDIE: It reads as follows.
47

1 "The lands delineated by the external boundary
2 on Exhibit 6469-A and 6469-B together and other
3 lands claimed by the plaintiff from time to
4 time in this proceeding are hereinafter
5 referred to as the claim area."
6
7 Well, I think it's now accepted that 9A and 9B are
8 exhaustive of the claims.
9 THE COURT: And you're not referring to anything different when
10 you refer to paragraph 8B, are you?
11 MR. GOLDIE: No. That paragraph is the paragraph that makes
12 reference to 9A, maps 9A and 9B.
13 Continuing with my summary. As has been stated in
14 earlier sections of this summary it is the position of
15 the province that the plaintiffs' claim as pleaded is
16 a claim to ownership and jurisdiction, rather than a
17 claim to aboriginal title, or the non-proprietary
18 claim of use and occupancy, and that as such it fails
19 on the evidence and on the law. It may be argued that
20 the counterclaim, by seeking declaratory relief in
21 respect of right, title or interest and aboriginal
22 title, right or interest has placed aboriginal title
23 in issue where the statement of claim did not. The
24 answer to that suggestion is that for the purposes of
25 the counterclaim the issue is not whether the
26 plaintiffs' alleged rights ought properly to be
27 described as ownership and jurisdiction or as
28 aboriginal title, but rather that, whatever their
29 nature, claims to such rights are not, for the reasons
30 submitted below, maintainable against the province.
31 This is because, either, in my submission,
32 (a) the aboriginal interest, howsoever defined, was
33 completely extinguished by reason of, among other
34 things, the matters pleaded in paragraph 41 of the
35 statement of defence, or alternatively, the aboriginal
36 interest which survived Confederation in respect of
37 lands outside reserves consisted only of equitable
38 claims against Canada.
39 Now, I repeat with respect to the word equitable
40 what I said with respect to the word compensation.
41 I'm not seeking to characterize the nature of a claim
42 that the plaintiffs may have against Canada.
43 Continuing with paragraph 4 of my summary. The
44 counterclaim is directed against the plaintiffs.
45 Accordingly, no constitutional issue with respect to
46 the jurisdiction of this court over the Federal Crown
47 arises because no relief is sought against it, but the

1 Federal Crown will be bound by any findings made by
2 your lordship in this action.
3 Now, I go to a summary of the argument. I say,
4 the counterclaim, and here I am speaking of prayer
5 number two, is primarily an argument concerning the
6 proper construction of the constitutional instruments
7 pursuant to which, upon Confederation with Canada, the
8 Dominion assumed responsibility for Indian affairs,
9 while British Columbia assumed a concomitant
10 obligation under term 13 in respect of the allocation
11 and transfer of lands for Indian reserves. It will be
12 submitted that the pertinent instruments, construed in
13 their historical context, wholly negative any
14 suggestion that the lands of British Columbia were,
15 after Confederation, burdened by anything which might
16 be described as an Indian interest.
17 I am excluding, of course, those lands which were
18 set aside for reserves and were subsequently
19 transferred to Her Majesty the Queen in Right of
20 Canada for the use and benefit of the Indian peoples.
21 And I will be submitting, if I may add to that
22 paragraph, I will be submitting that there is -- that
23 this history negatives any claim of jurisdiction which
24 could be sustained against the province, and I will be
25 relying upon the Sparrow case in that respect.
26 Paragraph 6, it will be submitted that any of a
27 number of junctures in the history of the relationship
28 among the Indians of British Columbia, the Government
29 of British Columbia and the Government of Canada since
30 1871, the question of aboriginal title in British
31 Columbia was settled once and for all.
32 And this process culminates, of course, in Order
33 in Council PC 1265.
34 The basis for paragraph 41 of the statement of
35 defence is simple and straight forward. It rests upon
36 constitutional provisions embodied in the
37 Constitution Act, 1867 and the British Columbia Terms
38 of Union, 1871. Those provisions include:
39 a.) Except as they were varied by the British
40 Columbia Terms of Union, 1871, the provisions of the
41 Constitution Act, 1867 apply to British Columbia in
42 the same way and to the like extent as they apply to
43 the other provinces of the Dominion. And then I quote
44 Term 10 of the Terms of Union which supports the
45 statement I've just made.
46 b.) Canada has exclusive powers over Indians and
47 lands reserved for them. Section 91 of the

reads in part, and then I set
2 out the -- the first part of Section 91 and then head
3 24.
4 c.) From and after July 20, 1871, the date of the
5 union of British Columbia with Canada, only Canada had
6 the authority to enter into land cession agreements
7 with the Indians of British Columbia or to extinguish
8 aboriginal title otherwise, if it chose to do so.
9 d.) Unalienated lands in British Columbia belong to
10 the Crown in Right of British Columbia, and the Crown
11 owns the underlying title in all lands within the
12 province. And then I quote Section 109 of the
13 Constitution Act of 1867.
14 Now, my lord, I say that Section 109, which, of
15 course, was in the original 1867 act is, in its
16 application to British Columbia, merely declaratory in
17 the sense that British Columbia already owned its
18 public lands at the time it joined Confederation. And
19 this, of course, is in contrast with the provinces of
20 Manitoba, Saskatchewan and Alberta which did not own
21 their public lands until 1930.
22 e.) The only restraint on the alienation by the Crown
23 of lands in British Columbia was contained in Term 11
24 of the Terms of Union, under which British Columbia
25 was bound to convey lands to Canada in aid of the
26 construction of a railway to the Pacific coast, an
27 undertaking of national importance. And then I quote
28 Term 11 in part.
29
30 "... that until the commencement, within two
31 years ... from the date of the union of the
32 construction of the said railway, the
33 Government of British Columbia shall not sell
34 or alienate any further portion of the public
35 lands of British Columbia, in any other way
36 than under right of pre-emption, requiring
37 actual residence of the pre-emptor on the land
38 claimed by him."
39
40 That put a species, if I may put it this way, of
41 freeze for two years after -- for two years from July
42 1871.
43 Paragraph f --
44 THE COURT: That wasn't in any way related to any right-of-way,
45 because they didn't know where it was?
46 MR. GOLDIE: They didn't know where it was going to be, that's
47 correct, my lord. There were survey parties that were

1 exploring routes through the Yellowhead, survey
2 parties that went to the head of Bute Inlet, survey
3 parties that eventually found the Kicking Horse Pass
4 route, but at the time of 1871 there was no fixed
5 route.
6 THE COURT: What were they contemplating, in your understanding,
7 that this would reduce the amount of land in private
8 hands that they would have to deal with when they
9 selected their route?
10 MR. GOLDIE: Yes. And it had a double aspect. The concept of
11 lands along the right-of-way was intended to provide
12 the railroad company itself with funds.
13 THE COURT: Yes. I'm just thinking what was the thinking behind
14 the Federal Government when it said you can still
15 alienate based by pre-emption based upon actual
16 residence even though that may land right in the
17 middle of our eventual right-of-way. You say they
18 would expropriate that?
19 MR. GOLDIE: Yes. Railway -- when the company, the Canadian
20 Pacific, when it was incorporated had the powers of
21 expropriation.
22 THE COURT: I guess it wasn't incorporated at this time, was it?
23 MR. GOLDIE: No. No. I have the original act of incorporation
24 which -- well, I shouldn't be quite so hasty in saying
25 it wasn't incorporated.
26 THE COURT: Yes. It might have had an earlier emanation of some
27 kind.
28 MR. GOLDIE: Yes. I know we are going to come to it, but I have
29 a recollection that in 1868 there was an
30 incorporation.
31 THE COURT: All right.
32 MR. GOLDIE: The whole of Term 11 is under tab -- in the yellow
33 binder number 21, my lord, under tab 10/Intro-7e. And
34 it may be useful to read it in full, because it does,
35 I think, answer one of your lordship's questions.
36 THE COURT: What number did you say again?
37 MR. GOLDIE: 7e.
38 THE COURT: Yes. Yes.
39 MR. GOLDIE: And does your lordship have that?
40 THE COURT: Yes. Yes.
41 MR. GOLDIE:
42 "The Government of the Dominion undertake to
43 secure the commencement simultaneously within
44 two years from the date of Union, of the
45 construction of a railway from the Pacific
46 towards the Rocky Mountains, and from such
47 point as may be selected, east of the Rocky

1 Mountains, towards the Pacific, to connect the
2 seaboard of British Columbia with the railway
3 system of Canada; and further, to secure the
4 completion of such railway within ten years
5 from the date of the Union.
6
7 And the Government of British Columbia agree to
8 convey to the Dominion Government, in trust, to
9 be appropriated in such manner as the Dominion
10 Government may deem advisable in furtherance of
11 the construction of the said railway, a similar
12 extent of public lands along the line of
13 railway throughout its entire length in British
14 Columbia, not to exceed, however, 20 miles on
15 each side of said line, as may be appropriated
16 for the same purpose by the Dominion Government
17 from the public lands in the north-west
18 territories and the Province of Manitoba.
19 Provided, that the quantity of land which may
20 be held under pre-emption right or by Crown
21 grant within the limits of the tract of land in
22 British Columbia to be so conveyed to the
23 Dominion from contiguous public lands".
24
25 Now, that was one way of ensuring that the source
26 of funds for the railway company was kept whole. And
27 then the second proviso:
28
29 "That until the commencement, within two years,
30 as aforesaid, from the date of the Union, of
31 the construction of the said railway, the
32 Government of British Columbia shall not sell
33 or alienate any further portions of the public
34 lands of British Columbia"
35
36 Et cetera. And then the final clause.
37
38
39 "In consideration of the land to be so conveyed
40 in aid of the construction of the said railway,
41 the Dominion Government agree to pay to British
42 Columbia from the date of the Union, the sum of
43 100,000 dollars per annum, in half-yearly
44 payments in advance."
45
46 Now, that was the only restraint on the alienation
47 of public lands when Canada -- when British Columbia

joined the Union.

THE COURT: How long did that hundred thousand dollar payment continue? Is it still in force?

MR. GOLDIE: It continued for a long time, but I can't tell your lordship what happened to it, or whether it's still being paid.

THE COURT: All right.

MR. GOLDIE: Diminishing annually with the rate of inflation.

Item f on page five of my summary. British Columbia was obligated to provide lands for Indians. And then there's Term 13.

> "The charge of the Indians and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liveral as that hitherto pursued by the British Columbia Government, shall be continued by the Dominion Government after the Union.
>
> To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians, on application of the Dominion Government, and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies."

British Columbia has performed its obligation under Term 13. And I there refer to Dominion Order in Council PC 1265 and the British Columbia Order in Council of 1036 under which the reserves were transferred to the Dominion.

h.) If on the day of union the lands of British Columbia were burdened by unextinguished Indian title, which was not then and not now admitted by the Province of British Columbia, that burden was a liability assumed by Canada under the Term 1 of the Terms of Union, which reads very simply:

> "Canada shall be liable for the debts and

1 liabilities of British Columbia existing at the
2 time of the union."
3
4 My lord, the documentary history relating to the
5 counterclaim confirms and illustrates the arguments
6 stated above, and demonstrates, in my submission, that
7 that argument has at numerous times in the past, been
8 acknowledged and accepted by Canada as dispositive.
9 This history is essential to the court's
10 understanding what has gone before, and of why, in
11 1990, it should not, in my submission, overturn what
12 has been decided by past governments.
13 A survey of the documents is also important
14 because of allegations which have been made against
15 British Columbia by the plaintiffs and by others.
16 One of the gravest of these is that, when British
17 Columbia joined Canada in 1871 under the eye of Sir
18 John A. Macdonald, it did so under false pretences,
19 that the Colony's representatives knowingly and
20 deliberately deceived and misled Canada with respect
21 to its policies respecting Indians and Indian land.
22 This allegation is not new. It was first made in
23 1874 during the administration of Alexander Mackenzie,
24 and it has been repeated many times since. It has, in
25 my submission, taken on the aspect of a revealed truth
26 for some, despite or perhaps because of the absence of
27 any supporting evidence whatsoever. And then I'll
28 deal with Lord Dufferin's famous speech.
29 But then I go on in paragraph 11. Perhaps the
30 most important fact demonstrated by the counterclaim
31 exhibits was noted earlier. The documents in evidence
32 go beyond the short legal disposition of the question
33 of British Columbia's power or responsibility for the
34 extinguishment of aboriginal title, a question which
35 is easily disposed of by reference to Canada's
36 constitutional arrangements, to establish that, in my
37 submission, notwithstanding intermittent impressions
38 to the contrary, the question at large has been
39 resolved in a sense which is final, at least so far as
40 it concerns the Province of British Columbia. That
41 resolution appears to have been forgotten and needs to
42 be reaffirmed.
43 My lord, before I turn to the section of the
44 counterclaim may I say a word about the exhibits.
45 Your lordship may recall that a number of volumes were
46 filed in red binders which constituted the exhibits in
47 the counterclaim. They were given the number 1203-

1 with a volume number, and they are arranged basically
2 in a chronological order. The index to those volumes
3 of documents is so arranged that it is in sections
4 with a Roman numeral and each section is now going to
5 be dealt with by me. The yellow binders follow the
6 same principle that we have followed from the
7 beginning. That is to say where there is a reference
8 to a document in the text of the summary the extract
9 of that document is under the appropriate paragraph
10 number. That means that in many cases there is a
11 repetition of extracts from the same document which
12 will lend an air of bulk to the yellow binders which
13 is not necessarily intimidating.
14 THE COURT: Oh, I can assure you it's intimidating. I'm easily
15 intimidated.
16 MR. GOLDIE: I will, of course, be concluding by urging your
17 lordship to read the original exhibits.
18 THE COURT: Yes.
19 MR. GOLDIE: My lord, the popular history --
20 THE COURT: Before you start. You said that the red binders are
21 arranged chronologically in Roman sections?
22 MR. GOLDIE: Yes.
23 THE COURT: Do they start at Roman ten or do they start at Roman
24 one?
25 MR. GOLDIE: They start at Roman one.
26 THE COURT: And so does that equate your Roman one at the start,
27 second line of page 9 here?
28 MR. GOLDIE: Yes. Yes.
29 THE COURT: All right.
30 MR. GOLDIE: Now, that doesn't mean that there is a section in
31 each volume, because the sections take up varying --
32 but, for instance, Exhibit 1203-1, which is the first
33 volume, section 1, is entitled "Awareness of Canada
34 and Colonial Office of Indian Title Prior to the Union
35 of Canada with British Columbia" and tabs 1 to 17
36 constitute the documents in that.
37 THE COURT: Yes.
38 MR. GOLDIE: Now, I say with respect to section 1, which is
39 taken up with the Awareness of Canada and the Colonial
40 Office of claims of Indian title prior to union of
41 Canada and British Columbia, I say with respect to
42 that that the conclusion I will be asking your
43 lordship to come to after looking at these documents
44 is that the existence of Indian title was well-known
45 to Canada when it entered into union with British
46 Columbia in 1871. And I say, the popular history of
47 Indian affairs in British Columbia is rife with

1 misunderstandings borne of a highly selective reading
2 of the documentary record. This section of the
3 counterclaim argument is directed to three such
4 misunderstandings which may be expressed as follows:
5 (a) It was the uniform policy and practice of the
6 Imperial government, derived from the Royal
7 Proclamation of 1763, to recognize Indian title in
8 newly acquired territories and to secure the cession
9 of such title in return for adequate compensation.
10 I emphasize that these are misunderstandings, and
11 that I am dealing with it not with the substance of
12 them, but with the knowledge of the people at the time
13 that runs to the contrary.
14 (b) This policy was universally adopted by the
15 Colonial governments in the colonies which united to
16 form the Dominion in 1867.
17 (c) The Dominion netotiated the Terms of Union
18 with British Columbia in ignorance of the policies
19 followed by the Colonial government in relation to
20 Indian matter, policies which people say were much
21 less liberal than the wording of Term 13 suggests.
22 And then in paragraph 2 I note two examples of
23 publications which reflect these propositions.
24 And I say, what will be demonstrated in my
25 submission is the following: First, Imperial policy
26 was not uniform, Canadian policy was not uniform, both
27 Canada and the Colonial Office were aware of the
28 concept of aboriginal title, and the British Columbia
29 Terms of Union were negotiated in that knowledge.
30 My lord, if I could interject at this point. It
31 will be seen that a major part of this section relates
32 to the acquisition of Rupert's Land by Canada. Now,
33 this took the form of a surrender by the Hudson's Bay
34 Company to the Imperial Crown, but the agreement which
35 led to that surrender was in reality negotiated by Sir
36 George Cartier and Mr. McDougall of the Canadian
37 government with the Hudson's Bay Company, but through
38 the Colonial Office.
39 THE COURT: Cartier and?
40 MR. GOLDIE: And McDougall. M-C-D-O-U-G-A-L-L.
41 THE COURT: And when you said it was a surrender was it to the
42 Imperial Crown?
43 MR. GOLDIE: To the Imperial Crown, yes.
44 THE COURT: Yes.
45 MR. GOLDIE: And then the Imperial Crown or the Imperial
46 government caused Rupert's Land in the North-West
47 Territories to be incorporated in Canada, or to become

1 part of Canada. Now, this was an object of Canada
2 from a very early time, and reference will be made to
3 the Joint Address of the Senate and House of Commons
4 to the Queen which alluded to the desirability of
5 Rupert's Land being incorporated in Canada. The
6 negotiations which led to the surrender and the
7 eventual incorporation took place in 1868 and 1869.
8 Now, another major part that I will come to
9 relates to the fact that two sets of delegates came to
10 Ottawa at almost the same time. Those from the Red
11 River settlement in March of 1870, and those from
12 British Columbia in May of 1870. Now, they had, of
13 course, my lord, a very different status. The people
14 from the Red River settlement came to urge upon the
15 Dominion authorities provisions to be incorporated in
16 the Constitution of the new Province of Manitoba, and
17 against the background of the Riel rebellion. The
18 other group came from the Crown Colony of British
19 Columbia, who brought a set of terms reflecting the
20 interests of that Colony. And I will be suggesting to
21 your lordship that we can find in these two events
22 which overlap to some extent, the antecedents of two
23 very different policies with respect to Indians to be
24 followed by the Dominion, one east and the other west
25 of the Rockies.
26 That, my lord, is just by way of an introduction
27 to this section, and then I turn to paragraph 4.
28 Before Confederation the Provinces of Canada, Nova
29 Scotia and New Burnswick in 1867, only the Province of
30 Canada had entered into land cession treaties with
31 Indians, and only in Upper Canada, now the Province of
32 Ontario. Amongst these agreements were the
33 Robinson-Huron and Robinson-Superior treaties of 1850,
34 and the Manitoulin Island Treaty of 1862.
35 And at the top of page 11 I have a note. And note
36 also the order in council of the old Province of
37 Canada with supporting documents. That is the order
38 in council dealing with the lease that Mr. Hewitt
39 Bernard, then solicitor for the Indian Department of
40 the old Province of Canada, reported on in terms of
41 its acceptability under the Royal Proclamation. I
42 referred to that the other day.
43 I say, in 1857 the Province of Canada sent a
44 representative, Chief Justice Draper, to observe the
45 proceedings of the Select Committee of the House of
46 Commons on the Hudson's Bay Company. In testimony
47 before the committee, Chief Justice Draper referred to

1 past treaties made by the Province of Canada, and the
2 need of dealing justly with the Indians by not
3 depriving them of their property without a reasonable
4 compensation. And under that tab beneath I refer to
5 the questions and answers that were put to Chief
6 Justice Draper and given by him when he was giving
7 evidence.
8 Six, when asked if the Hudson's Bay Company had
9 extinguished the Indian title to land formerly granted
10 to Lord Selkirk, Edward Ellice, a Member of Parliament
11 and a major shareholder in the company, replied:
12
13 "We are getting into a question about Indian
14 title, which is very difficult altogether. The
15 English Government never extinguished the
16 Indian title in Canada when they took
17 possession; the Americans, while they have been
18 extending their possessions, have extinguished
19 the Indian title, but in Canada there has never
20 been any treaty with the Indians to extinguish
21 the title; The Crown, retaining certain
22 reserves for the Indians, has always insisted
23 upon the right to occupy the lands, and to
24 grant the lands."
25
26 Some months after the committee's deliberations
27 Mr. Corbett, a clergyman from the Red River
28 settlement, who had appeared twice before the
29 committee to give evidence, wrote to the Secretary of
30 State for the Colonies to suggest, among other things,
31 that land cession treaties should be entered into with
32 the Indians along the route of a Canadian survey then
33 underway in Rupert's Land.
34 Now, the exhibits, my lord, are -- your lordship
35 has already been referred to those exhibits. And then
36 I have already referred to the minute of Mr. Merivale
37 who said, and I set out some of what is contained in
38 his minute, and I won't repeat that.
39 I say, it is difficult to reconcile such
40 observations by a senior administrator with the
41 contention that Imperial policy was uniformly
42 consistent with the policy said to be embodied in the
43 Royal Proclamation.
44 And then I make reference in paragraph 8 to the
45 letter from Mr. Kennedy to the Colonial Office
46 inquiring in December of 1859 whether the Imperial
47 government intended to recognize the proprietary

1 rights of the Indians in the soil should a Crown
2 Colony be established there. And it too is minuted by
3 Mr. Merivale, and I have read that to your lordship,
4 and the emphasis is added to the extract from his
5 minute.
6 Now, my lord, I come to the Joint Address in
7 December of 1867 of the Parliament of the Dominion of
8 Canada, that is to say less than six months after
9 Confederation, which requested that steps be taken to
10 unite Rupert's Land and the North-Western Territory to
11 Canada.
12 I'm going to refer to that document, my lord.
13 It's under Tab X/I-9. And this, of course, is just an
14 extract, but this is the the Joint Address to Her
15 Majesty and the recitals include the desire of
16 extending westward to the shores of the Pacific Ocean,
17 the colonization of the fertile lands of the
18 Saskatchewan, the Assiniboine and the Red River
19 districts, and so on. And reference is made to the
20 146th section of the British North America Act, and
21 then the terms of the prayer:
22
23 "That we do therefore ..."
24
25 This is one, two, three, four, five lines down --
26 five paragraphs down.
27
28 "That we do therefore most humbly pray that
29 your Majesty will be graciously pleased, by and
30 with the advice of your most Honorable Privy
31 Council, to unite Rupert's Land and the
32 North-Western Territory with this Dominion, and
33 to grant to the Parliament of Canada authority
34 to legislate for their future welfare and good
35 government; and we most humbly beg to express
36 to your Majesty that we are willing to assume
37 the duties and obligations of government and
38 legislation as regards those territories."
39
40 And then the second paragraph below that.
41
42 "And furthermore, that, upon the transference
43 of the territories in question to the Canadian
44 government, the claims of the Indian tribes to
45 compensation for lands required for purposes of
46 settlement will be considered and settled in
47 conformity with the equitable principles which

1 have uniformly governed the British Crown in
2 its dealings with the aborigines."
3
4 Now, in paragraph 10 the next event that I make
5 reference to is on July 31st, 1868 the Queen was
6 empowered by the Rupert's Land Act, an act of the
7 Parliament of the United Kingdom, to accept a
8 surrender of Hudson's Bay Company lands and to annex
9 them to Canada.
10 And that's the next document, my lord, and I refer
11 to paragraphs two and three. The first paragraph
12 defines Rupert's Land as "including the whole of the
13 lands and territories held or claimed to be held by
14 the said Governor and Company." Now, what that did
15 was include Hudson's Bay lands beyond technically
16 Rupert's Land. Rupert's Land being defined by the
17 drainage area of the Hudson's Bay Company. But this
18 meant that all of the Hudson's Bay lands beyond the
19 drainage areas of Hudson's Bay would fall within the
20 definition.
21 Now, then the paragraph 3:
22
23 "It shall be competent for the said Governor
24 and Company to surrender to Her Majesty, and
25 for Her Majesty by any instrument under Her
26 Sign Manual and Signet to accept a surrender of
27 all or any of the lands"
28
29 Et cetera. And then on paragraph 5:
30
31 "It shall be competent to Her Majesty by any
32 such Order or Orders in Council as aforesaid on
33 Address from the Houses of Parliament of
34 Canada, to declare that Rupert's Land shall,
35 from a Date to be therein mentioned, be
36 admitted into and become part of the Dominion
37 of Canada."
38
39 Now, returning to my summary --
40 THE COURT: No mention of Indians?
41 MR. GOLDIE: Not in this act. No, my lord. The reference to
42 the Indians was in the Joint Address which, of course,
43 preceded this.
44 THE COURT: Yes.
45 MR. GOLDIE: And I say in paragraph 11, and I get into some
46 detail here just to indicate the nature of the
47 discussion and knowledge, anticipating the annexation

1 to Canada of the Hudson's Bay Company lands and
2 territories to the north and west, the Aboriginies'
3 Protection Society, in August of 1868, addressed a
4 memorial to the Prime Minister of Great Britain, then
5 Disraeli, which noted Canada's recognition of "the
6 expediency of extinguishing the native title" and
7 urged "that in transferring these territories to
8 Canada, such stipulations may be made as will ensure
9 the peaceful extinction of the native title."
10 I make reference to this, my lord, because it was,
11 as far as I can make out, that the -- it was here that
12 the word title was injected into the discussion. The
13 reference in the Joint Address of 1867 being to the
14 claims of the Indian tribes to compensation for lands
15 required for the purposes of settlement, which is not
16 quite the same thing.
17 The Prime Minister promised to consider the
18 memorial. That page number should be 80, my lord, not
19 81 in that exhibit. And I note that during the last
20 stages of the negotiations, and I'm now referring to
21 the negotiations leading up to the surrender, during
22 the last stages of the negotiations in 1869 a copy of
23 the same memorial was presented to Lord Granville,
24 Secretary of State for the Colonies, by a delegation
25 from the Aborigines' Protection Society, which again
26 urged upon the Imperial government the importance of
27 extinguishing native title in Rupert's Land.
28 Now we step back a bit. In October 1868, Sir
29 George Cartier and William McDougall were delegated by
30 Canada to participate in the negotiations with the
31 Imperial government and the Hudson's Bay Company.
32 Cartier, who was Minister of Militia and Defence,
33 later played a leading role in securing the passage of
34 the Manitoba Act in May of 1870. The Manitoba Act was
35 an act of the Parliament of Canada, and May, of
36 course, of 1870 was the month before the delegates
37 from British Columbia arrived. And as I note in the
38 next clause, and in negotiating the Terms of Union
39 from delegates of the Colony of British Columbia in
40 June of the same year.
41 McDougall was the Canadian Minister of Public
42 Works. As Commissioner of Crown Lands, and ex officio
43 Superintendent General Indians Affairs, for the
44 Province of Canada, he had negotiated the Manitoulin
45 Island Treaty in 1862. That is to say, McDougall was
46 an official of the former Province of Canada in that
47 part of the province which became Ontario.

1 During the negotiations, officials in the Colonial
2 Office, and on behalf of the Imperial government,
3 acted as a channel of communication between the
4 Canadian delegates and the Hudson's Bay Company. My
5 lord, the paragraph 5 should be paragraph 6. The
6 document from which extracts are taken is a rather
7 voluminous collection of papers relating to Rupert's
8 Land, and the whole of the document is an exhibit --
9 is part of the exhibit that is identified there.
10 The negotiations with the Hudson's Bay Company
11 were, as I've said, three-cornered. The Colonial
12 Office was the conduit and in favour, of course, of
13 Rupert's Land being transferred to Canada, but Canada
14 was going to be responsible for the compensation
15 payable to the Hudson's Bay Company so it had a pretty
16 direct interest. The Hudson's Bay Company wanted a
17 million pounds to begin with, and they finally settled
18 for 300,000 pounds.
19 Preliminary correspondence between the Colonial
20 Office and the Hudson's Bay Company respecting terms
21 of the proposed surrender contemplated only that lands
22 would be set aside and reserved for Indians.
23 And that is apparent, my lord, in the document
24 under -- the documents, I should say, under tab 13.
25 On the first page, which is a letter from Sir Frederic
26 Rogers, who was the senior official in the Colonial
27 Office, to Northcote, who was the Governor of the
28 Hudson's Bay Company. Rogers forwards a copy of a
29 letter which Lord Granville had received from Sir G.
30 Cartier and Mr. McDougall who were in London at the
31 time. And then he goes on to say about midway down
32 the page:
33
34 "It is, of course, obvious that this
35 negotiation for the purchase of the Hudson's
36 Bay Company's Territory is really between the
37 seller and the buyer, the Company and the
38 Colony; and Lord Granville is of the opinion
39 that if the negotiation is revived on this or
40 any other basis, Her Majesty's Government can
41 at present do no good by assuming to frame or
42 suggest terms of accommodation, but can merely
43 offer to act as a channel of communication
44 between these two real parties to the
45 transaction, using its best endeavors to remove
46 any difficulties."
47

1 And then I go on to the last document beginning at
2 page, in the upper right-hand corner, 119, number 11,
3 copy of a letter from the Right Honorable C.B.
4 Adderley, MP, to the Earl of Kimberley. And Adderley
5 was as noted, the Parliamentary Undersecretary of
6 State for the Colonies. And the Earl of Kimberley at
7 that time was associated with the Hudson's Bay
8 Company. And then there is a series of terms set out
9 which the Hudson's Bay Company had either put forward
10 or were interested in. And then at the bottom of page
11 121, the paragraph begins with these words:
12
13 "These conditions his Grace cannont accede to;
14 his Grace would, however, recommend Her
15 Majesty's Government to agree to a surrender on
16 the following conditions:"
17
18 THE COURT: I haven't found that, Mr. Goldie.
19 MR. GOLDIE: Oh, the page number that I'm referring to, my lord
20 is 121 in the upper right-hand corner.
21 THE COURT: Yes.
22 MR. GOLDIE: And the paragraph is the last one on that page
23 beginning with the words "these conditions".
24 THE COURT: Oh, yes. Thank you.
25 MR. GOLDIE:
26 "... his Grace would, however, recommend Her
27 Majesty's Government to agree to a surrender in
28 the following conditions:"
29
30 And then I go over the page.
31 THE COURT: His Grace is who?
32 MR. GOLDIE: His Grace is the Secretary of State for the
33 Colonies, Lord Granville.
34 THE COURT: Oh, all right. Yes.
35 MR. GOLDIE: This isn't -- this isn't the end of the negotiation
36 but the 12th term is significant.
37
38 "Such lands as Her Majesty's Government shall
39 deem necessary to be set aside for the use of
40 the native Indian population shall be reserved
41 altogether from this arrangement, and the
42 Company shall not be entitled to the payment of
43 any share of receipts, or any royalty
44 therefrom, or right of selection in respect
45 thereof, under previous articles, unless for
46 such part, if any, of these lands as may be
47 appropriated, with the consent of the Crown, to

1 any other purpose than that of the benefit of
2 the Indian natives."
3
4 And then I say the negotiations went on. And I
5 say in paragraph 13 what I have referred to there as
6 preliminary correspondence between the Colonial Office
7 and the Hudson's Bay Company respecting terms of the
8 proposed surrender contemplated only that lands would
9 be set aside and reserved for Indians.
10 14, in February 1869, Cartier and McDougall
11 addressed a long letter to the Colonial Office,
12 setting out Canada's position with respect to the
13 current state of negotiations. And that is found
14 under tab 14. Their letter averted to the terms and
15 conditions incorporated in the December 1867 Joint
16 Address of Parliament, and referred to the
17 representation respecting compensation for Indian
18 lands which would be required for settlement.
19 And the page references in my summary relate to the
20 page number directly opposite the title papers
21 relating to Rupert's Land. So it's page 53 of that
22 pagination, and in the upper right-hand corner it's
23 145. And the reference to the Joint Address is in the
24 first paragraph, and the third item is the reference
25 that I make to the claims of the Indian tribes for
26 compensation for lands required for purposes of
27 settlement. And then reference is made to the
28 situation which has arisen in terms of the
29 negotiations.
30 THE COURT: They speak of the uniform equitable principles that
31 are governing.
32 MR. GOLDIE: The House of Commons did, yes.
33 THE COURT: Yes.
34 MR. GOLDIE: I mean, sorry, the Joint Address did. And Sir
35 George Cartier and Mr. McDougall went through the
36 positions being taken by the Hudson's Bay Company, and
37 were very critical of them. They weren't prepared to
38 accept the terms that had been laid down by that
39 company, and they questioned the value that the
40 company was putting on its interests, and in so doing
41 they made a number of references to the evidence of
42 the -- of the Select Committee in the Hudson's Bay
43 Company in 1867.
44 In paragraph 15, on March 8th, 1869, towards the
45 close of the negotiations, a deputation from the
46 Aborigines' Protection Society presented Lord
47 Granville with a copy of the memorial referred to in

1 paragraph 9 above, and urged upon him the importance
2 of the extinguishing native title in the lands soon to
3 be acquired Canada. It will later be seen that,
4 commencing in August 1869, Lord Granville directed and
5 supervised the steps taken towards the union of
6 British Columbia and Canada.
7 The next day, on March 9th, on Granville's
8 instructions, a memorandum of proposed terms, drafted
9 by Sir Frederic Rogers, Under-Secretary of State for
10 the Colonies, was delivered to the Canadian delegates.
11 This particular memorandum was silent as to Indians
12 and aboriginal title.
13 The terms and conditions eventually agreed upon by
14 the company and Canada's delegates were set out in two
15 memoranda dated 22 and 29 March 1969.
16 The eighth paragraph in the 22 March memorandum,
17 headed "Details of Agreement between the Delegates of
18 the Government of the Dominion and the directors of
19 the Hudson's Bay Company", dealt indirectly with the
20 Canadian Parliament's representation respecting
21 compensation for Indian lands. It did not pledge the
22 Dominion to adopt any particular course of action; it
23 merely relieved the company from liability respecting
24 any such claims. And paragraph 8 reads as follows:
25
26 "It is understood that any claims of Indians to
27 compensation for lands required for purposes of
28 settlement shall be disposed of by the Canadian
29 government, in communication with the Imperial
30 Government, and that the Company shall be
31 relieved of all responsibility in respect of
32 them."
33
34 And that eventually became clause 14 of the Deed
35 of Surrender. And I say, note that the Imperial
36 government was to be consulted respecting the
37 disposition of any such claims.
38 This term respecting liability for claims of
39 Indian title was ultimately incorporated as clause 14
40 in the Deed of Surrender. And I might --
41 THE COURT: Well, you use the term Indian title, but clause 8
42 doesn't use that term.
43 MR. GOLDIE: No, it doesn't, my lord. And, as I say, the word
44 title is one that the Aborigines' Protection Society
45 has used in its petitions or submissions to the
46 Colonial Office and to the Prime Minister, but when we
47 look at the documents the interest of the Indians is

1 expressed either as being that in lands required for
2 the purposes of settlement or saving the Hudson's Bay
3 Company harmless in respect of such requirements.
4 Now, in April of 1869, and I'm now referring to
5 the document under tab 18, my lord, Lord Granville
6 wrote to the Governor General of Canada, Sir John
7 Young. And he's talking about the Hudson's Bay
8 Company and Rupert's Land, and in the third, fourth
9 paragraph he says this:
10
11 "On one point, which has not been hitherto
12 touched upon, I am anxious to express to you
13 the expectations of Her Majesty's Government.
14 They believe what whatever may have been the
15 policy of the Company, and the effect of their
16 chartered right upon the progress of
17 settlement, the Indian tribes, who form the
18 existing population of this part of America,
19 have profited by the Company's rule. They have
20 been protected from some of the vices of
21 civilization; they have been taught, to some
22 appreciable extent, to respect the laws and
23 rely on the justice of the white man, and they
24 do not appear to have suffered from any causes
25 of extinction beyond those which are
26 inseparable from their habits and their
27 climate. I am sure that your Government will
28 not forget the care which is due to those who
29 must soon be exposed to new dangers, and, in
30 the course of settlement be dispossessed of the
31 lands which they are used to enjoy as their
32 own, or be confined with unwontedly narrow
33 limits.
34
35 This question had not escaped my notice while
36 framing the proposals which I laid before the
37 Canadian Delegates and the Governor of the
38 Hudson's Bay Company. I did not, however, then
39 allude to it, because I felt the difficulty of
40 insisting on any definite conditions without
41 the possibility of forseeing the circumstances
42 ..."
43
44 And so on. And then he goes on to say at the last
45 part of that paragraph:
46
47 "That Government ..."

1 That is to say the Government of Canada.

2

3 "... I believe, has never sought to evade its
4 obligations to those whose uncertain rights and
5 rude means of living are contracted by the
6 advance of civilized man. I am sure that they
7 will not do so in the present case, but that
8 the old inhabitants of the country will be
9 treated with such forethought and consideration
10 as may preserve them from the dangers of the
11 approaching change."

12

13 Now, that was -- that dispatch contained no
14 direction or even a suggestion respecting claims of
15 and aboriginies' title.
16 In May of 1869, the Parliament of Canada adopted
17 the terms and conditions agreed upon, including clause
18 8 of the 22 March 1869 memorandum, and also resolved
19 inter alia:

20

21 "That upon the transference of the territories
22 in question to the Canadian government, it will
23 then be the duty of the Government to make
24 adequate provision for the protection of the
25 Indian tribes whose interests and well-being
26 are involved in the transfer."

27

28 Now, that tends to reflect the language of Lord
29 Granville's dispatch of April of 1869.
30 Now, the Joint Resolution of the Parliament of
31 Canada, which as I say was adopted on May 28th, 1869,
32 included the paragraph numbered eight which I read to
33 your lordship, because it is taken straight out of the
34 March 22nd, 1869 agreement. And then on the next
35 page, which is the fourth page of the document under
36 tab 18 -- tab 19, I'm sorry.
37 THE COURT: No. I think 20.
38 MR. GOLDIE: Beg pardon, my lord?
39 THE COURT: I'm sorry. You're right. 19, yes.
40 MR. GOLDIE: It's -- if one follows the page numbers in the
41 bottom centre of the page it's 268.
42 THE COURT: Yes.
43 MR. GOLDIE: The resolution that I read to your lordship "that
44 upon the transference of the territories in question
45 to the Canadian government", et cetera.
46 So the company -- I'm sorry. Canada had a
47 contractual term, which I'll call a save harmless

1 term, and it had a resolution which expressed the
2 intention and a direction to the government to make
3 adequate provision for the protection of the Indian
4 tribes whose interests and well-being are involved in
5 the trade.
6 THE COURT: In transfer.
7 MR. GOLDIE: In the transfer. I'm sorry.
8 I say at page 20 of my summary, the Joint
9 Resolution of the Parliament of Canada was
10 incorporated into the Joint Address to Her Majesty
11 praying for the union of Rupert's Land and the
12 North-Western Territory with the Dominion of Canada.
13 Thirteen months later, on June 22nd, 1870, the
14 executed Deed of Surrender was accepted by Her
15 Majesty, and by virtue of the Imperial Order in
16 Council dated June 23rd, 1870, Rupert's Land and the
17 North-Western Territory were admitted into union with
18 Canada.
19 Now, my lord, that delay reflected the fact that
20 the Riel rebellion had broken out in November of 1869,
21 and it wasn't until that was controlled that Canada
22 was prepared to pay the 300,000 pounds to the Hudson's
23 Bay Company.
24 THE COURT: Well, Mr. Goldie, is it your submission or
25 understanding that this transfer included any parts of
26 the lands of British Columbia as it is now?
27 MR. GOLDIE: No, my lord, because nothing west of the Rockies
28 was -- could be claimed by the Hudson's Bay Company.
29 They had an exclusive licence to trade, but they
30 didn't have any proprietary claim.
31 THE COURT: The Peace River district --
32 MR. GOLDIE: But the Peace River district and the drainage area
33 of -- of -- well, the drainage area of Hudson's Bay,
34 and they laid some claim to the area drained --
35 draining into the Arctic.
36 THE COURT: I suppose what's lacking in my understanding of this
37 is a definition of the North-Western Territories.
38 MR. GOLDIE: Yes. And there is -- there is one available. And
39 when I say available it I think --
40 THE COURT: If North-Western Territories included the drainage
41 area of the Mackenzie then, of course, it caught the
42 Peace River district?
43 MR. GOLDIE: Yes. Yes.
44 THE COURT: Do you understand that it did?
45 MR. GOLDIE: That's my -- see, the Rupert's Land Act of the
46 Imperial government was very coy about this. It
47 simply said for the purposes of this act the term

1 Rupert's Land shall include the whole of the lands and
2 territories held or claimed to be held by the said
3 Governor and company.
4 THE COURT: Yes.
5 MR. GOLDIE: And by 1868 when that was passed the Colony of
6 British Columbia had been in being for ten years, and
7 clearly that was excluded from the claim of the
8 Hudson's Bay Company.
9 THE COURT: Well --
10 MR. GOLDIE: But the North-Western Territory included everything
11 to the west and north of Rupert's Land, and in respect
12 of British Columbia, the north of British Columbia
13 that included what has become the Yukon Territory. So
14 to that extent there was territory west of the
15 Rockies.
16 THE COURT: At this time did British Columbia have a northern
17 boundary?
18 THE COURT: Yes, it did, my lord.
19 THE COURT: The Stikine resolution or --
20 MR. GOLDIE: The Stikine territory was incorporated in British
21 Columbia in 1862, so the northern boundary had been
22 fixed at the 60th parallel.
23 MR. RUSH: I believe, my friend is making an argument here, my
24 lord, as opposed to directing you to a particular
25 document, because I think this is disputed.
26 MR. GOLDIE: Well, I'm not sure who disputes it.
27 MR. RUSH: I do.
28 MR. GOLDIE: Well, I'll go to this Territorial Evolution of
29 Canada, my lord.
30 MR. RUSH: With my objection.
31 MR. GOLDIE: Your lordship will see, and I say that this can be
32 consulted by your lordship, and I can use it for the
33 purposes of demonstrating my submission.
34 THE COURT: Yes. I think you can.
35 MR. GOLDIE: The North-Western Territory by 1825 -- well, the
36 better one is 1849 -- now still better is 1866,
37 because then British Columbia is fully developed, and
38 Rupert's Land is the drainage area, and the
39 North-Western Territory is north of British Columbia
40 and west of Rupert's Land.
41 THE COURT: So it would include the drainage areas of the
42 Mackenzie River and the Hudson's Bay?
43 MR. GOLDIE: And I think the Yukon River.
44 THE COURT: And the Yukon River.
45 MR. GOLDIE: Yes. There is a document which is an exhibit, my
46 lord, and I'll get it during the break, which purports
47 to show the area of the Hudson's Bay Company

THE COURT: Does all of our beloved territory known sometimes as the Yukon drain into either the Mackenzie or the Yukon? No, it can't.

MR. GOLDIE: No. There would be part of it would drain directly into the arctic.

THE COURT: Into the arctic and some directly into the Pacific. Or does it? Perhaps not.

MR. GOLDIE: I think not, my lord. I think that is what led to the fixing of the boundary of Alaska.

THE COURT: Yes.

MR. GOLDIE: My lord --

THE COURT: Yes. When one drives from Whitehorse to Skagway one crosses a height of land one of which drains into the Yukon running from Whitehorse and one draining into the Pacific.

MR. GOLDIE: Into the Pacific, yes.

THE COURT: I think when one gets into the area of draining into the Pacific one is in the United States, but I'm not sure about that.

MR. GOLDIE: The Alaska boundary arbitration I always had in the back of my mind fixed upon a height of land except one or two exceptions.

THE COURT: Yes. Thank you.

MR. GOLDIE: My lord, in paragraph 20 I make reference to the Riel rebellion, and I won't make any further discussion -- give your lordship anything further on that.

But on paragraph 21 I now come back to British Columbia and I say, in a period substantially overlapping that relating to the surrender of Rupert's Land, the attention of governments of Canada and Great Britain returned also to the union of the Colony of British Columbia with the Dominion of Canada.

The first formal communication on this matter from the Secretary of State, which was Granville, to the Governor of British Columbia was the dispatch of August 14th, 1869, informing the Governor that, as terms for the annexation of the Hudson's Bay Company had been agreed to, the union of British Columbia with Canada could be considered. Musgrave was informed that Her Majesty's government was content to leave most of the terms and conditions respecting the proposed union to the wishes of the people and the legislature of the Colony, but the subject of Indians was one of two matters reserved for the Governor's personal attention. That dispatch has been read to

1 your lordship.
2 THE COURT: Sounds almost like Meech Lake.
3 MR. GOLDIE: Yes.
4 Other contemporary documents relating to the union
5 of B.C. and Canada which refer to the impolicy of
6 leaving relations with Indians to the vagaries of
7 popular sentiment are, and then I set out a number of
8 quotations which indicate that the Colonial Office in
9 particular was concerned about leaving the care and
10 attention of the Indian peoples to the local
11 legislature. And I say only with respect to those
12 three that head 24 of Section 91 of the British North
13 America Act of 1867 was already in place, and that
14 ensured that the -- that the attention to the Indian
15 peoples was a matter for the central government.
16 THE COURT: Sorry. That was 91.24?
17 MR. GOLDIE: 91.24, yes.
18 And the last document cited on -- under para Roman
19 one on page 23 is the Report of the Select Committee
20 on Aborigines of 1837 where Suggestion I is:
21
22 "The protection of the Aborigines should be
23 considered as a duty peculiarly belonging and
24 appropriate to the Executive Government, as
25 administered either in this countryor by the
26 Governors of the respective Colonies. This is
27 not a trust which could conveniently be
28 confided to the local Legislatures."
29
30 So that there's a pattern of both parliamentary
31 exortation and recognition within the Colonial Office
32 itself that the affairs of the Indian -- of indigenous
33 peoples should be either monitored or actually
34 supervised by the central government.
35 And then in paragraph 22 I refer to the
36 Aborigines' Protection Society complaint about affairs
37 in Vancouver Island which have been brought to the
38 society's attention by Mr. Sebright Green. And then
39 Mr. Green made reference to the Cowichan Indians, and,
40 of course, as we know, the Secretary of State for the
41 Colonies sent copies to Musgrave and asked for his
42 observations. And that, of course, gave rise to the
43 memorandum of Mr. Trutch. And Musgrave endorsed
44 Trutch's memorandum with the words "from other sources
45 of information I have every reason to believe Mr.
46 Trutch's statements to be correct." And Trutch's
47 memorandum which -- as I said, was sent by Sir Anthony

1 Musgrave to the Colonial Office in January of 1870,
2 made the statement which has been referred to in a
3 number of times.
4
5 "... the title of the Indians in the fee of the
6 public lands, or any portion thereof, has never
7 been acknowledged by Government, but, on the
8 contrary, is distinctly denied."
9
10 And then I have a couple of other observations on
11 that, but I go down to paragraph 27 and I say, the
12 Secretary of State for the Colonies sent copies of
13 Musgrave's dispatch, including Trutch's memorandum, to
14 the Aborigines' Protection Society.
15 My lord, that page reference should be 149 to 150.
16 THE COURT: Instead of 151?
17 MR. GOLDIE: Yes.
18 THE COURT: Thank you.
19 MR. GOLDIE: And both the dispatch and the memorandum were
20 published in the society's publication, The Colonial
21 Intelligencer.
22 And I say in paragraph 28, what is demonstrated by
23 the foregoing is that the Colonial Office was aware of
24 claims of Indian or native title, considered the
25 necessity of dealing with it in the vast region of
26 Ontario and British Columbia, and was
27 contemporaneously put on notice that so far as the
28 Colony of British Columbia was concerned there was no
29 aboriginal title. Or as Mr. Trutch put it there was a
30 denial of Indian title in the fee of the public lands.
31 And that denial was published widespread in England.
32 And by November 1869, Lord Granville's August 1869
33 dispatch to the Governor of British Columbia
34 respecting the proposed union of the Colony had been
35 made public both in Canada and in British Columbia.
36 That is to say, it was published both in the Colony
37 and made public in Canada. The proposed union was
38 under active discussion by Canada's Privy Council in
39 December 1869. Your lordship will see how closely the
40 Manitoba and British Columbia matters were
41 overlapping. The interested governments, British
42 Columbia, Canada and Great Britain, continued to
43 communicate among themselves. And I set out a number
44 of the documents.
45 And on paragraph 30, on February 20th, 1870,
46 Governor Musgrave sent to the Governor General of
47 Canada a copy of the resolution embodying his

1 government's recommended Terms of Union with Canada,
2 which was to be introduced to the Legislative Council.
3 In the last paragraph of this dispatch Musgrave wrote,
4 and I quote:
5
6 "In Lord Granville's Dispatch No. 84 of 14th of
7 August which was communicated to your Your
8 Excellency he mentioned the condition of the
9 Indian Tribes as among some questions upon
10 which the constitution of British Columbia will
11 oblige the Governor to enter personally. I
12 have purposely omitted any reference to this
13 subject in the terms proposed to the
14 Legislative Council. Any arrangements which
15 may be regarded as proper by Her Majesty's
16 Government can I think best be settled by the
17 Secretary of State; or by me under his
18 direction, with the Government of Canada. But
19 'Indians, and lands reserved for Indians' form
20 the twenty-fourth of the classes of subjects
21 named in the 91st Section of the Union which
22 are expressly observed to the Legislative
23 authority of the Parliament of the Dominion."
24
25 Now, that, my lord, that dispatch of -- of
26 Musgrave to the Governor General of Canada was in fact
27 communicated to the Canadian Privy Council on the 18th
28 of March, 1870. And that document is -- under Tab
29 1-30 your lordship will find the dispatch in question.
30 THE COURT: I'm sorry. Which book?
31 MR. GOLDIE: In the yellow book.
32 THE COURT: Yes. 30?
33 MR. GOLDIE: Tab 1-30, yes. And the dispatch has minuted on it
34 right up at the top of the page "Received 16 March
35 acknowledge receipt. Done. Transmit to clerk for
36 consideration of council. Done 18th of March, 1870."
37 THE COURT: I haven't found that yet. What page of your tab
38 number is it, Mr. Goldie?
39 MR. GOLDIE: It's the first page of the 1-30 page one. And --
40 THE COURT: Oh. It's these handwritten notes?
41 MR. GOLDIE: Yes.
42 THE COURT: Received 16th March?
43 MR. GOLDIE: Yes. And then the word "Ach", which I take to be
44 acknowledged. Acknowledge receipt. And then
45 underneath that is done. Then the words "transmit to
46 clerk of" something "for consideration of council.
47 Done."

1 THE COURT: Is that 18th March?
2 MR. GOLDIE: 1870.
3 THE COURT: That's a seven O, is it?
4 MR. GOLDIE: Yes.
5 THE COURT: Yes. Thank you.
6 MR. GOLDIE: Turning back to my summary I say in paragraph 31,
7 the terms proposed by the Governor of British Columbia
8 were debated in the Colony's Legislative Council in
9 March of 1870. And that reference, my lord, is to the
10 print, British Columbia Legislative Council. Debate
11 on the Subject of Confederation with Canada.
12 The amendment respecting Indians:
13
14 "... that they receive the same protection
15 under Confederation as now ... in being allowed
16 to occupy land and enjoying equally with white
17 people the protection of the law ..."
18
19 Was briefly considered, but was defeated. Some
20 members thought that Canada's policy should be
21 embraced instead because:
22
23 "... the Canadian government occupies the
24 position of guardians to Indians. They are
25 treated as minors ..."
26
27 On April 12, 1870, Musgrave sent the Legislative
28 Council's resolution respecting the proposed terms,
29 together with proposed amendments and supplementary
30 resolutions to the Governor General of Canada. He
31 also enclosed printed reports of the Legislative
32 Council's debate.
33 I say, my lord, that the Dominion was thus fully
34 aware of the points of view expressed in the debate.
35 And here I wish to refer to my friend's argument at
36 transcript 334 for May the 9th, 1990 at page 25919,
37 lines 22 to 27.
38 THE COURT: I'm sorry. I've lost you, Mr. Goldie. Where are
39 you now in your text?
40 MR. GOLDIE: I'm injecting a comment following paragraph 32.
41 THE COURT: Yes. All right. And what is the reference?
42 MR. GOLDIE: And I am going to refer to the transcript 334 for
43 May the 9th.
44 THE COURT: Yes.
45 MR. GOLDIE: Page 25919, lines 22 to 27 where my friend --
46 THE COURT: That's not in your yellow book?
47 MR. GOLDIE: It's not in my yellow book, no.

1 THE COURT: Yes.
2 MR. GOLDIE: But my friend is commenting upon this debate, and
3 he says, and I quote:
4
5 "Public discussion of the Indian policy it
6 seems was sought to be prevented. The content
7 of the debate was never publicized within the
8 Indian community, let alone in the public
9 press."
10
11 Well, my lord, not only was the -- were the
12 debates sent to Ottawa, but they were printed in the
13 British Columbia Gazette, and made public. And that
14 is apparent, my lord, from what is found under tab
15 1-31, which is a sessional paper reprinted from the
16 Government Gazette Extraordinary of March, 1870.
17 And my friend went on to say, and I quote:
18
19 "There is no evidence of communication of this
20 debate in Ottawa. Not of the fact of the
21 debate, but of the debate itself."
22
23 In fact the very document that I'm talking about
24 was transmitted to the Governor General and made
25 available to the Canadian cabinet.
26 Members of the Canadian Privy Council had read the
27 Legislative Council's debates before British
28 Columbia's delegates arrived in Ottawa to negotiate
29 the Colony's Terms of Union. And that -- I should
30 before I turn to that turn to the document under tab
31 1-32, which is Musgrave's dispatch to the Governor
32 General of the 12th of April 1870. And he says:
33
34 "Referring to my Despatch, No. 11, of 20th
35 February, I have the honour to forward to your
36 Excellency the Resolution passed by the
37 Legislative Council of this Colony on the
38 subject of union of Canada, with certain
39 proposed amendments in the terms, and some
40 supplementary recommendations from the Council
41 in respect of matters which they deem to
42 require consideration in the special
43 circumstances of this Colony. I also enclose
44 printed reports of the debate upon the
45 introduction of the resolution."
46
47 And then under the same tab, my lord, is an

1 extract from Mr. Helmcken's diary, he being one of the
2 three delegates. And I have marked by a sideline an
3 exchange which he reports with Sir George Cartier.
4 And Cartier has said:
5
6 "'Now we have to make up the money somehow.
7 Suppose we give them $100,000.00 per annum for
8 the Railway belt.' I smiled. 'Oh,' said Sir
9 George, 'I know what you are smiling about, you
10 promised to give us the land for the railway
11 for nothing. We have read the Debates of your
12 House on these matters, know all your reasons
13 and opinions.'"
14
15 So not only were these debates a matter of public
16 knowledge, they were a matter which had been marked by
17 the negotiators in Ottawa.
18 Now, I move to the paragraph 33, my lord, and I
19 now come back to the Red River situation. And I say,
20 before the British Columbia Terms of Union were
21 negotiated, however, delegates from the Red River
22 Colony went to Ottawa, and this was in March of 1870,
23 carrying with them a list of rights to be used as a
24 basis for negotiating with the Canadian government the
25 terms under which the self-styled Province of
26 Assiniboia, later Manitoba, would join Confederation.
27 Now, this is taken from -- the document in
28 question is taken from Alexander Begg's History of the
29 North-West, and the letter of instructions starts at
30 page 475 and the list of rights so-called is those
31 which were handed to the delegates.
32 Now, item 13 on that list of rights, which is page
33 477 of --
34 THE COURT: Yes.
35 MR. GOLDIE:
36 "That treaties be concluded between Canada and
37 the different Indian tribes of the Province of
38 Assiniboia, by and with the advice and
39 co-operation of the Local Legislature of this
40 province."
41
42 Now, the delegates were instructed that this
43 article was one of those which were "peremptory".
44 THE COURT: When will it be convenient to take the morning
45 adjournment, Mr. Goldie?
46 MR. GOLDIE: That is as good as any.
47 THE COURT: All right. We'll take the adjournment.

1 THE REGISTRAR: Order in court.

Proceedings adjourned for a
2 short recess.
3
4 I hereby certify the foregoing to
5 be a true and accurate transcript
6 of the proceedings transcribed to
7 the best of my skill and ability.
8
9
10
11
12 _____
13 Peri McHale,
14 Official Reporter,
15 UNITED REPORTING SERVICE LTD.
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1 (PROCEEDINGS RESUMED PURSUANT TO A SHORT ADJOURNMENT)

2 THE REGISTRAR: Order in court.

3 THE COURT: Mr. Goldie.

4 MR. GOLDIE: My lord, I was at page 29 and I had just noted that
5 in the list of rights which the delegates from the Red
6 River Settlement, then calling themselves the Province
7 of Assiniboia, took with them to Ottawa in March of
8 1870, was the item 13, which I have set out in page
9 29. And I have noted that they were instructed that
10 this article was one of those which was peremptory.
11
12 The capacity in which those delegates were
13 received in Ottawa, that is to say as delegates chosen
14 by the people of Red River and not as envoys of Riel,
15 is set out in a secret memorandum, which I needn't
16 refer to. But the Governor General reported that two
17 of the delegates have urged upon him:
18
19 "The propriety of quieting the possession of
20 their holdings in the lands of those who had
21 squatted upon or occupied lands within limits
22 where the Indian title had not been
23 extinguished."
24
25 On this point, the Governor General stated to the
26 Secretary of State for the Colonies:
27
28 "... it seems quite within the competency of
29 the Canadian Government to deal with it - i.e.
30 to engage to buy up or satisfy the Indian title
31 and then assure the quiet possession of their
32 holdings to bona fide holders."
33
34 And, of course, the Manitoba Act, which was given
35 Royal Assent only three weeks earlier, has
36 particularly relevant provisions in it. It's under
37 Tab 35. And this is the Act of the -- of the
38 Dominion. And I have made reference to sections
39 32(3), which is on page 255, referring to the page
40 number at the bottom of the page:
41
42 "All titles by occupancy with the sanction" --
43
44 Well, it starts off -- Section 32 starts off:
45
46 "For the quieting of titles, and assuring to
47 the settlers in the Province the peaceable

possession of the lands now held by them, it is

2 enacted as follows:
3 (3) All titles by occupancy with the sanction
4 and under the license and authority of the
5 Hudson's Bay Company up to the eighth day of
6 March aforesaid, of land in that part of the
7 Province in which the Indian Title has been
8 extinguished, shall, if required by the owner,
9 be converted into an estate in freehold by
10 grant from the Crown."
11
12 And then I also make reference to Section 30 itself in
13 the preceding page:
14
15 "All ungranted or waste lands in the Province
16 shall be, from and after the date of the said
17 transfer, vested in the Crown, and administered
18 by the Government of Canada for the purposes of
19 the Dominion, subject to, and except and so far
20 as the same may be affected by, the conditions
21 and stipulations contained in the agreement for
22 the surrender of Rupert's Land by the Hudson's
23 Bay Company to Her Majesty."
24
25 Now, that was -- that was the one in which there was
26 the contractual -- I call it contractual undertaking
27 to save harmless the Hudson's Bay Company in respect
28 of Indian title or claims.
29 There is no provision in the Act relating to
30 Indian treaties, but Section 31, marginally captioned
31 "Provisions as to Indian Title", refers to the
32 expediency of extinguishing Indian title to lands in
33 the new province, and to that end, it provided for the
34 appropriation of 1,400,000 acres of ungranted lands
35 for the benefit of half-breed or Metis residents. And
36 then I quote the section itself. Then I quote Section
37 30.
38 Paragraph 36. The Prime Minister, Sir John A.
39 Macdonald, who introduced the Manitoba Bill on May
40 2nd, 1870, referred to the provisions respecting Crown
41 lands, Indian title and the reservation of lands for
42 half-breeds. And he said:
43
44 "... with respect to the lands that are
45 included in the province, the next clause
46 provides that such of them as do not now belong
47 to individuals, shall belong to the Dominion of

Canada ... There shall, however, out of the

> lands there, be a reservation for the purpose of extinguishing the Indian title, of 1,200,000."

Later, my lord, that was amended to 1,400,000 acres.

> "This reservation, as I have said, is for the purpose of extinguishing the Indian title and all claims upon the lands within the limits of the Province ... It is, perhaps, not known to a majority of this House that the old Indian titles are not extinguished over any portion of this country, except for two miles on each side of the Red River and the Assinniboine."

And then Sir George Cartier also spoke about these provisions, and I quote what he said on Hansard, and Macdonald's further references to the lands and Deed of Surrender to the Hudson's Bay Company and his reference at the top of page 33 about the clauses in the Act. Last sentence he says:

> "Those clauses referred to land for the half-breeds and go toward extinguishing the Indian title."

One Member of Parliament asked about "the care and guardianship of the Indian tribes" and whether the new Province would be responsible for paying treaty annuities, "or did the Dominion Government intend to retain in its own hands the power of dealing with those Indians and seeing whether contracts or undertakings, made with them should be faithfully carried out."

Macdonald noted in reply that the 1.2 million acre reservation was not for the purpose of buying out the full blooded Indians and extinguishing their titles. There were very few such Indians remaining in the Province, but such as there were, they would be distinctly under the guardianship of the Dominion Government.

My lord, it has to be born in mind that the province of Manitoba, which is being referred to here, was a very, very small area, just around -- virtually around the Red River Settlement. And that is shown on the -- this map, the Territorial Evolution of Canada,

1 where the original province of Manitoba is almost of a
2 postage stamp size.
3 THE COURT: But it's more than 1,200,000 acres.
4 MR. GOLDIE: Yes. It's not postage stamp in our terms, my lord,
5 postage stamp in terms of the present province of
6 Manitoba.
7 THE COURT: What is 22,000 square miles times 640? What are
8 they talking about? Couple million?
9 MR. GOLDIE: I did it about five years ago and I've forgotten
10 what the number is.
11 THE COURT: When I have a moment, I'll multiply it.
12 MR. GOLDIE: One of the Dominion's concerns, evident throughout
13 the debate on the Manitoba Bill -- that word "debate"
14 can be struck out, the second word -- was to secure
15 peaceful passage through the newly acquired lands for
16 settlers and for the contemplated railway to the
17 Pacific.
18 Now, that appears from the extract from Hansard,
19 and under Tab 1 - 38, column 1309, Hansard, the
20 left-hand column, the debate for May 2nd, 1870, Sir
21 John A. Macdonald is -- is responding to questions and
22 about a third of the way from the bottom of his
23 comments are these words:
24
25 "He pointed out that the territory had been
26 purchased for a large sum from the Hudson's Bay
27 Company, that settlement had to be made with
28 the Indians, the guardianship of whom was
29 involved, that the land could not be handed
30 over to them, as it was of the greatest
31 importance to the Dominion to have possession
32 of it, for the Pacific Railway must be built by
33 means of the land through which it had to
34 pass."
35
36 THE COURT: Of course, there was no deal with British Columbia
37 at that time, was there?
38 MR. GOLDIE: No. But the -- he's referring to the Canadian
39 Pacific Railway, the incorporated company.
40 THE COURT: Yes.
41 MR. GOLDIE: At least I think that's the case, because your
42 lordship is quite right. There wasn't any --
43 THE COURT: Some railway.
44 MR. GOLDIE: Yes. Another -- then I go on at para 39. Before
45 the Bill was passed, Macdonald fell gravely ill and,
46 in his absence, Cartier led the debate, which returned
47 to questions of the control of Crown lands, the need

Submissions by Mr. Goldie 1 for peaceful passage for the railroad, the reservation
2 of lands for the extinguishment of half-breed title,
3 and provision for Indian claims.
4 Just before I go on, the railroad had been
5 partially built to Winnipeg because some of the troops
6 that were used to resist the Riel rebellion were
7 carried partway and in the partially completed
8 railway.
9 Another participant in the Manitoba Bill debate
10 was Sir Francis Hincks, Minister of Finance, who with
11 two other Dominion Privy Councillors (Cartier and Sir
12 Leonard Tilley), was soon charged with negotiating
13 Terms of Union with the delegates from the Colony of
14 British Columbia.
15 Now, turning to that delegation, as your lordship
16 knows, the delegates from British Columbia were
17 Trutch, Helmcken and Carrall, members of the Executive
18 and Legislative Councils of the Colony, nominated by
19 Musgrave to discuss Terms of Union with the Dominion's
20 Governor in Council.
21 And the governor himself, although charged with
22 personal responsibility for making arrangements
23 respecting Indians, was unable to accompany the
24 delegates. He did, however, set out his views on May
25 the 9th in a minute which he addressed to Mr. Trutch.
26 I interject here, my lord, to note that my friend
27 took the position in his written argument that there
28 was no evidence that either Musgrave or the Imperial
29 Government participated in the Ottawa negotiations.
30 And with that in mind, I'd like to read his
31 instructions to Mr. Trutch of May the 9th, 1870:
32
33 "The administration of Indian Affairs is a
34 matter to which my attention has been called by
35 Lord Granville as requiring special care in
36 respect of the arrangements for Union. But
37 under the provisions of the British Columbia
38 North America Act, it is one of a class of
39 subjects specially confided to the Government
40 of the Dominion. It will be necessary,
41 however, that I should be acquainted, for the
42 information of the Secretary of State, with the
43 mode in which the Government of Canada propose
44 to deal with this subject."
45
46 Just pausing there, I note that he required to be
47 informed for the benefit of the Imperial Government,

and we know that he was in telegraphic communication to both from San Francisco.

Continuing:

> "You will be able to point out to them the policy which has been hitherto pursued with considerable success."

Then he goes on to talk about the nature of the people and the necessity of the magistrates being directly under the authority of the Lieutenant Governor himself, who will be responsible to the government at Ottawa.

In a private letter of May the 10th, my lord, to Sir John A. Macdonald, Musgrave expressed his confidence in each of the delegates, but especially in Trutch, whom he described as "an able and cautious man, who would be a valuable public servant anywhere". He informed the prime minister that he had given Trutch a minute of his views "respecting the arrangement of Indian Affairs". And that -- that minute which I have read from was in fact given to the Dominion people upon Trutch's arrival.

Only a few days before the British Columbia Confederation delegates arrived in Ottawa, the Secretary of State for the provinces, the ex officio Superintendent General of Indian Affairs in Canada, wrote to the Lieutenant Governor of Ontario with respect to lands which Indian title had not been extinguished. The lands were identified and described in relation to lands which had already been the subject of treaties with Indians in that province.

I bring that in, my lord, because of the juxtaposition in time of the -- on the one hand, the Dominion Cabinet Minister was Mr. Howe, I believe, writing to the Lieutenant Governor of Ontario saying, in effect, don't forget to extinguish title to certain lands, and on the other, a delegation coming from British Columbia where it was known to the Dominion that title in the fee of the lands had been denied. This is -- all of this is out in the open. There's nothing hidden about this at all. Only a few days -- well, I've read that.

Paragraph 43. The only record which has been

1 found regarding the substance of the negotiations
2 between the Colony and the Dominion in June 1870 is a
3 diary kept by Helmcken. The negotiations were
4 constitutional in nature and, therefore, were kept
5 strictly secret and confidential. Helmcken noted in
6 his reminiscences that the understanding with the
7 Canadian Privy Council was that "whatever took place
8 was not to be divulged".
9
10 There is clear evidence that Governor Musgrave
11 participated in the negotiations by telegraph. And
12 that, my lord, is referred to in 43, Tab 43, at the
13 page number that's referred to there, 355, where at
14 the top of the page Helmcken says:
15
16 "The council have sat four hours then
17 adjourned, but not before the subject of
18 government responsibility, i.e. responsible
19 government, had been talked over, but we were
20 obliged to wait for telegram from Governor."
21
22 And the footnote at the bottom:
23
24 "No explanation of this reference seems to be
25 available."
26
27 But, of course, it's obvious that if they were obliged
28 to wait for a telegram from the governor, that's not
29 the first communication they had from him. And I
30 say --
31 THE COURT: I haven't found that.
32 MR. GOLDIE: Oh, it's page -- does your lordship have the diary
33 itself?
34 THE COURT: Yes. 345?
35 MR. GOLDIE: 355.
36 THE COURT: 55.
37 MR. GOLDIE: Yes.
38 THE COURT: Yes. I see that. Thank you.
39 MR. GOLDIE: And I say that there is clear evidence that he
40 participated in the negotiations by telegraph. And in
41 my submission it is implicit in the wording of Term 6
42 (respecting pensions for Colonial officers) and Term
43 13 (respecting Indian matters) that the Imperial
44 Government was also consulted, because the
45 arrangements agreed upon in each of those terms
46 required its knowledge and consent. Then he makes
47 reference to the secret and confidential despatches

which Musgrave sent back to London and other subsequent destruction.

And I'm at paragraph 45. The only direct evidence of the discussions concerning Term 13 comes from Helmcken's diary and from the text of Term 13 itself.

The only reference to Term 13 in Helmcken's diary is the entry for June 27, 1870, the last day of negotiations, where he wrote:

> "The clause about Indians was very fully discussed. The ministers thought our system better than theirs in some respects, but what system would be adopted remained for the future to determine."

I interject there, my lord. The only body constitutionally able to determine what system would be adopted in the future was, of course, Canada.

Continuing:

> "I asked about Indian wars and Sir George Cartier said that it depended upon the severity, as a rule the expense would have to be borne by the Dominion Government."

And that excerpt is under Tab 45.

The preamble of Dominion Order in Council P.C. 155B of 1 July, 1870, which incorporated the terms agreed upon by the Governor in Council and the delegates from British Columbia, noted that there had been "several interviews" and "full discussion" of the terms between the Privy Council Committee and the delegates.

And then I set out Term 13 as it appears in that Order in Council of 1 July, 1870, and the Order in Council is signed by Sir George Cartier.

The Dominion Government had the sole constitutional responsibility for Indians and lands reserved for Indians. This alone makes it more than probable that the Dominion fully considered Indian title, and that it drafted Term 13, containing as it did the interesting quick solution in time of

1 impasse - a reference to the Secretary of State for
2 the Colonies.
3
4 It is inconceivable, in my submission, that the
5 delegates from British Columbia would have attempted
6 to deceive Dominion officials on any point related to
7 Indians. The Imperial Government, whose approval of
8 the terms would have to be obtained, had overseen and
9 knew all about British Columbia's policy.
10
11 Moreover, as will be seen later, Sir John A.
12 Macdonald, under whose first administration the terms
13 were negotiated, appointed Joseph Trutch the
14 Dominion's confidential agent in British Columbia
15 during his second administration. Also during that
16 administration, the Dominion frequently and
17 consistently declined to entertain the question of
18 Indian title in British Columbia and stated its
19 intention not to recede from the terms of union. I'll
20 be coming to the Order in Council which asserts that,
21 my lord.
22
23 These actions would be inexplicable if Macdonald
24 and the Dominion government considered that Musgrave
25 or his delegates had perpetrated a fraud by
26 misrepresenting the facts as to British Columbia's
27 policy respecting claims of Indian title.
28
29 If the Dominion disagreed with British Columbia's
30 approach and considered that the public lands of
31 British Columbia were burdened by Indian title (that
32 is, that they were subject to an interest other than
33 that of the province within the meaning of Section 109
34 of the Constitution Act, 1867), it would have placed
35 some restraint on the alienation of Crown lands in the
36 province pending extinguishment of that burden. It
37 did not do so. The only restraint on alienation is in
38 respect of the anticipated Railway Belt - see Term 11.
39
40 Now, that reference, my lord, should be to Exhibit
41 1200 - 1.
42
43 Now, we have noted, my lord, in respect of Term 11
44 that there was a partial alienation to actual
45 settlers. This, of course, would ensure that lands
46 speculation was not indulged, but the subject of that,
47 there was a restraint of alienation. And I say that's

1 wholly inconsistent with the Dominion's view that
2 there was an extinguished Indian title.
3
4 Copies of the terms agreed upon were sent to the
5 Secretary of State for the Colonies and to the
6 Governor of British Columbia.
7
8 The Colonial office minutes concerning the
9 proposed terms raised no concern respecting the
10 arrangements made for Indians or the resolution of any
11 claim of Indian title. Excuse me, my lord. I think
12 there's a -- an addition to be made here, just if your
13 lordship will excuse me for a minute. Well, I'll come
14 back to that.
15
16 The procedures necessary to accomplish the union
17 were not completed until July -- that should be 20th,
18 not 21st, a year during which all three governments -
19 Colonial, Dominion and Imperial - could consider the
20 terms agreed upon in July of 1870.
21
22 My point there, my lord, is that there was lots of
23 time for people to have second thoughts and, in fact,
24 in respect to some of the financial arrangements,
25 there were some attempted second thoughts. But there
26 was none with respect to suggestion of Indian title.
27
28 In the meantime, the Dominion government proceeded
29 with the establishment of governmental institutions in
30 Rupert's Land and the Northwest Territories, which
31 were formally annexed to Canada on June 23rd, 1870 by
32 Imperial Order in Council.
33
34 Three Dominion Orders in Council, all touching
35 upon the management of Crown lands in the province of
36 Manitoba and in the Northwest Territories, and each
37 signed by Sir George Cartier, were approved on August
38 2nd, 1870. And I go through these.
39
40 The first Order in Council approved preliminary
41 instructions for the Lieutenant Governor of the
42 Province of Manitoba, A.G. Archibald, which provided,
43 amongst other things:
44 - that immigrants were to be restrained from any
45 lawless intrusion upon the settlers or upon Indian
46 tribes;
47 - that pursuant to Section 31 of the Manitoba Act, the

1 Lieutenant Governor was to select lands for the
2 extinguishment of half-breed title;
3 - and that a full report should be made:
4
5 "... upon the state of the Indian tribes now in
6 the province, their numbers, wants and claims;
7 the system heretofore pursued by the Hudson's
8 Bay Company in dealing with them - accompanied
9 by any suggestions you may desire to offer with
10 reference to their protection and to the
11 improvement of their condition."
12
13 The Lieutenant Governor was also reminded that a
14 military force had been sent to the North West "with a
15 view to protect Her Majesty's subjects from the
16 possible intrusion of roving bands of Indians by whom
17 they are surrounded and to give stability to the civil
18 government" which he was to organize.
19
20 P.C. 42 approved preliminary instructions for the
21 Lieutenant Governor of the North West Territories - a
22 position also held by the same individual. In these
23 instructions he was told that he was to open up
24 communications with the Indian bands occupying the
25 country lying between Lake Superior and the Province
26 of Manitoba with a view to establishment of such
27 friendly relations as may make the route from Thunder
28 Bay to Fort Garry secure at all seasons of the year,
29 and to facilitate the settlement of such portions of
30 the country as it may be practicable to improve.
31
32 Your lordship will see that the so-called
33 Northwest Territories at that point actually included
34 the land lying between Lake Superior and what was then
35 the Province of Manitoba.
36 Continuing:
37
38 "You will also turn your attention promptly to
39 the condition of the country outside of the
40 Province of Manitoba on the North and West, and
41 while assuring the Indians of your desire to
42 establish friendly relations with them, you
43 will ascertain and report to His Excellency the
44 course you may think most advisable to pursue,
45 whether by treaty or otherwise, for the removal
46 of any obstructions that might be presented to
47 the flow of population into the fertile lands

1 that lie between Manitoba and the Rocky
2 Mountains...
3
4 You will also make a full report upon the state
5 of the Indian tribes now in the territories,
6 their numbers, wants and claims," so on.
7
8 The third relevant Order in Council of 2 August,
9 1870 approved a memorandum by Cartier recommending
10 that Archibald be appointed "administrator on behalf
11 of the Government of Canada of the ungranted or waste
12 lands" in Manitoba, and suggesting that he submit a
13 report "... as to such lands in the province as it may
14 be desirable to open up at once for settlement..."
15 and suggesting regulations under Section 31 of the
16 Manitoba Act for the selection of lands for the
17 children of half-breeds, and the mode and conditions
18 of settlement for such lands.
19
20 Paragraph 50. On November -- that should be
21 November 18th, my lord -- 1870, Sir John A. Macdonald
22 wrote privately to Lieutenant Governor Archibald:
23
24 "We are looking anxiously for your report as to
25 Indian titles both within Manitoba and without;
26 and as to the best means of extinguishing the
27 Indian titles in the valley of the
28 Saskatchewan. Would you kindly give us your
29 views on that point officially and
30 unofficially. We should take immediate steps
31 to extinguish the Indian title somewhere in the
32 fertile belt in the valley of the Saskatchewan
33 and open it for settlement."
34
35 And he talks about -- and his last sentence:
36
37 "I have a strong idea that in order to relieve
38 you from your numerous and harassing duties
39 that a special commissioner to deal with Indian
40 treaties should be appointed."
41
42 There was no equivalent concern or direction to
43 officials in British Columbia either before or after
44 British Columbia joined Canada on July 20th, 1871.
45
46 I just pause there. While the actual union didn't
47 take place until that date in 1871, the negotiation

1 and settlement of the Terms of Union with British
2 Columbia had taken place only a month before the
3 Orders in Council which Sir George Cartier had signed,
4 and the letter that Sir John A. Macdonald wrote to the
5 Lieutenant Governor and the Northwest Territories, of
6 course, took place in the year in which the Terms of
7 Union with British Columbia were under consideration
8 with all concerned.
9 THE COURT: Mr. Goldie, is there a dichotomy that I haven't
10 fully grasped in Manitoba as to whether the
11 constitutional provisions respecting Indians applied
12 or did not apply to Metis, or was it assumed that the
13 responsibility of the Dominion extended to the Metis?
14 MR. GOLDIE: I don't know whether at that time they were
15 regarded in the same light as what I'll call the full
16 blooded Indians. In fact, at some point the Metis
17 were to be given a choice, whether they wished to live
18 with the band -- with a band that they identified with
19 or whether they wished to be given script for land
20 independently. But certainly at this time there were
21 two separate -- two separate modes of treatment. The
22 Metis, who were numerous and very influential in the
23 Province of Manitoba, were specifically referred to in
24 the -- in the Manitoba Act. The Indians were less
25 specifically referred to, but they -- Canada had --
26 had given an undertaking to the Hudson's Bay Company
27 that it would, so to speak, ensure that there were no
28 claims made. That would include claims for title.
29 THE COURT: I'm just wondering if it was thought at the time
30 that 91(24) applied or didn't apply to Metis.
31 MR. GOLDIE: I don't think it did, my lord. There's -- there
32 was -- the Dominion Government kept in its hand all
33 public lands, but it obtained Parliamentary sanction
34 for setting aside 1,400,000 acres for the Metis. If
35 it was -- if it was acting under 91(24), it wouldn't
36 have required Parliamentary sanction, in my view.
37 THE COURT: That would be executive responsibility, would it
38 not?
39 MR. GOLDIE: Yes. And, in fact, when it came to -- to dealing
40 with the numbered treaties, the Dominion purported to
41 set aside reserves and to deal with the Indians in a
42 way that -- at that time it wasn't dealing with the
43 Metis. But there was -- in some cases there were very
44 strong links between the Indians and Metis, in other
45 cases not -- not to the same extent.
46 THE COURT: You say that Canada retained control of waste land
47 in Manitoba in the Northwest Territories and --

MR. GOLDIE: Yes.
THE COURT: In the Northwest Territories and Manitoba.
MR. GOLDIE: Yes. Yes.
THE COURT: Until --
MR. GOLDIE: 1930.
THE COURT: Yes. All right.
MR. GOLDIE: The -- the -- yes. And I make reference to that later on when I speak about Ontario and Quebec.

In paragraph 51 I note that there was no equivalent concern or direction to officials in British Columbia either before or after British Columbia joined Canada. However, the Governor of British Columbia was concerned about the future position of stipendiary magistrates who, in addition to their other duties, acted as Indian agents in the colony. He wrote to the Governor General on November 22, 1870. Before reading this, I remind your lordship this was a matter that was raised by Musgrave in his minutes of instruction to Trutch of May the 9th on the eve of the negotiations and then in this particular document to the Governor General of Canada, he says:

> "As the supreme government of the Colony, as well as the administration of all affairs relating to the Indian tribes, will rest with the Dominion, I regard it as of the greatest importance to the tranquility of the province and the success of the Union, that these officers should be officers of the Dominion and not be transferred to the control or caprice of local party government, who, through mistaken motives of economy, by the substitution of or unpaid irresponsible magistrates, or some such policy, might entail upon the Government at Ottawa an amount of trouble and expense not easily to be computed."

So that in the same month that Sir John A. Macdonald was writing about title to the Lieutenant Governor of Manitoba, the Governor General, who would no doubt pass it on to the cabinet, was receiving communication from Governor Musgrave his concern with respect to the administration of the affairs relating to Indian tribes, the status of the stipendiary magistrates who had been the colony agents, amongst other things.

On December 20th, 1870, the Lieutenant Governor of Manitoba sent to the Dominion his observations respecting the disposal of Crown lands in the province in accordance with his instructions. He first described and discussed the lands in respect of which the Indian title had been extinguished, that is small areas of land along the Red and Assinniboine Rivers which had been the subject of Lord Selkirk's disputed 1817 Treaty. He next listed other lands, including the half-breed grant, which would be excluded from lands subject to survey and disposal. Finally, he discussed the merits of survey and disposal schemes. He also referred to the cost of extinguishing Indian title and to the possibility of performing preliminary surveys prior to extinguishment.

Archibald viewed with favour certain U.S. provisions for the survey and disposal of public lands appending several sections of an 1841 U.S. statute to his report. Section 10 of the U.S. statute did not admit of settlement on public lands to which Indian title had not been extinguished. Now, that, my lord, is an important point because that turns up in subsequent Dominion Lands Act provisions and was the means of ensuring that there be no settlement prior to extinguishment and also exempted from its operation Indian reserves and certain other lands acquired by Indian treaties. And there was a proviso in an Act to establish the Territorial Government of Oregon to the same effect.

It will be seen that in 1872 the Dominion made similar provisions in its first statute relating to the regulation and administration of Dominion lands, which would include all of the waste or vacant lands and the province of Manitoba and the North Western Territories.

Arrangements for making land cession treaties with Indians in Manitoba and the Northwest Territories were being pressed forward at the same time. On 19 December 1870, Mr. S.J. Dawson, a surveyor and engineer familiar with the country between Lake Superior and the Red River Settlement, addressed a long and detailed memorandum to Langevin, Canadian Minister of Public Works, concerning the negotiation of a treaty for the cession of the territorial rights

1 of the Saulteaux Indians who occupied lands "on the
2 line of route now being opened between Lake Superior
3 and the Red River Settlement".
4
5 On April 14th, 1871, Sir John A. Macdonald wrote
6 to Sir Francis Hincks, Minister of Finance, about the
7 details of arrangements then being made for "payments
8 to Indians in the North West for the right of way or
9 for the surrender of lands..." Arrangements for such
10 payments were approved by Dominion Order in Council.
11 Now, that should be Exhibit 1201-1, my lord, of 2.
12
13 Dawson's report, along with copies of an April 25,
14 1871 Dominion Order in Council appointing the first
15 treaty commissioners -- and stroke out the words "and
16 their instructions", Exhibit 1201-1, Tab 42, if your
17 lordship would just take those out. It's the Order in
18 Council -- was sent to the colonial office by the
19 Governor General on May 17th, 1871.
20
21 So there was -- it is clear that the Dominion had
22 embarked upon the first steps towards the treaties on
23 the Prairies. And this, of course, was before the
24 Terms of Union had been approved by the Imperial
25 Government. The Terms of Union with British Columbia
26 had been approved by the Imperial Government and the
27 Imperial Government was receiving information with
28 respect to the situation on the Prairies.
29
30 The Order in Council, instructions, and many other
31 of the documents relating to the numbered Treaties 1
32 and 2, which were concluded in August of 1871, were
33 printed in the Report of the Indian Branch of the
34 Department of the Secretary of State for the Provinces
35 for 1871.
36
37 This report also referred briefly to British
38 Columbia, which had become a province on July 20,
39 1871, all the necessary steps having been taken
40 earlier in the year. And the chronological sequence
41 is the terms were approved in British Columbia on
42 January 20th, 1871 and adopted an Address to Her
43 Majesty asking that British Columbia be admitted into
44 Canada.
45
46 The Governor General in February 27th, 1871
47 presented to the House of Commons a collection of

1 "papers relative to the proposed union of British
2 Columbia with the Dominion of Canada", including the
3 Address to the Queen from the Members of the
4 Legislative Council of British Columbia. These were
5 printed as Sessional Paper Number 18 of 1871.
6
7 I interject, my lord, that Sessional Paper Number
8 18 contain many of the despatches and letters leading
9 up to the negotiations of June 1870. In other words,
10 they provided a background to the debate which took
11 place in the House of Commons in March of 1874, to
12 which I now refer.
13
14 Debate on the proposed terms was opened by Sir
15 George Cartier in the House of Commons. Concerning
16 Term 13, he said:
17
18 "... a certain portion of the public lands had
19 been reserved for the Indians, and the only
20 guarantee that was necessary for the future
21 good treatment of the Aborigines was the manner
22 in which they had been treated in the past."
23
24 Now, that, my lord, was stated by somebody who
25 knew all about the claim of -- or the concern with
26 respect to aboriginal title in -- on the Prairies and
27 had signed Orders in Council relating to it and
28 participated in the negotiations for the acquisition
29 of Rupert's Lands in which aboriginal title was raised
30 explicitly on a number of occasions.
31
32 Then on April the 1st, 1871 the House of Commons
33 adopted an Address to the Queen similar to that
34 adopted earlier by the Legislative Council of British
35 Columbia.
36
37 The Senate of Canada followed suit on April the
38 5th, 1871.
39
40 Officials in the colonial office were kept
41 informed of the legislative progress of the terms,
42 which they were confident would be approved.
43
44 The Queen approved the "terms and conditions set
45 forth" in the Addresses from the Legislative Council
46 of the Colony of British Columbia and from the House
47 of Commons and Senate of Canada by Imperial Order in

1 Council dated May 16, 1871, which set July 20th as the
2 date upon which the colony of British Columbia would
3 be admitted.
4
5 My lord, my submission is that the Government of
6 Canada and the Government of the United Kingdom were
7 aware of native claims to interests in land which were
8 generically called "aboriginal" or "native" or
9 "Indian" title at the time British Columbia entered
10 confederation, and were equally aware that so far as
11 the Colony of British Columbia was concerned, there
12 was no such title. I add the word acknowledged.
13
14 Furthermore, there was a year in which all
15 concerned could take stock during which the question
16 of title was raised on a number of occasions, both in
17 respect of the Prairies and as I have noted in respect
18 of the new province of Ontario.
19
20 It is further submitted that it is necessarily
21 implicit in the Terms of Union that the Dominion
22 agreed that there was no aboriginal title in British
23 Columbia. And I'm going to emphasize the fact that --
24 that there was nothing in the Terms of Union which
25 required extinguishment of title for railway purposes,
26 a subject-matter which was referred to by Sir John A.
27 Macdonald in the debates on the Rupert's Land
28 acquisition on March -- May of 1870.
29
30 And I say after July 20th, 1871 it was, of course,
31 always open to Canada to negotiate land cession
32 agreements with Indians in British Columbia should it
33 decide to do so for policy reasons - as it did with
34 Treaty 8.
35
36 My lord, that is the --
37 THE COURT: Well, is that an accurate statement of your
38 position, Mr. Goldie, as it did with Treaty 8? Are
39 you saying Treaty 8 was a policy decision and not a
40 recognition of the same right that seems to have been
41 discussed so freely in relation to union with
42 Manitoba?
43 MR. GOLDIE: The -- the basis for my statement is the Order in
44 Council -- the Dominion Order in Council, and it -- it
45 refers only to the anticipated difficulty that might
46 be experienced by people who are going after gold
47 discoveries and also to a concern over relations

1 between people at Lesser Slave Lake and the police.

2 There are about three or four points that are raised
3 by the commissioner of the mounted police by the
4 report of the then Superintendent General to the
5 Cabinet, none of which refer to the extinguishment of
6 Indian title as a reason for it.
7
8 Now, my lord, I am saying that Treaty 8, however,
9 for the most part was within the area that was subject
10 to Canada's undertaking to the Hudson's Bay Company of
11 22nd of March, 1869, I guess it was, that it would
12 save harmless the Hudson's Bay Company from any claim
13 made by Indians. And that, as we will see, was
14 considered at least by the -- some officials of the
15 Dominion to be the reason for the numbered treaties.
16
17 My lord, before going to Part II, may I go back to
18 the question of the extent of the Hudson's Bay's
19 territories?
20 MR. RUSH: As claimed.
21 MR. GOLDIE: By whom?
22 MR. RUSH: Well, that's what it says on this map, as claimed by
23 the Hudson's Bay.
24 MR. GOLDIE: Yes. Well, what else?
25 The -- your lordship asked me if the Peace River
26 block was within the territory owned by the -- or
27 claimed by the Hudson's Bay Company.
28 THE COURT: I wasn't limiting it to the Peace River block; the
29 Peace River area generally.
30 MR. GOLDIE: Yes. It is, of course, east of the Rockies.
31 THE COURT: Yes.
32 MR. GOLDIE: And it is in British Columbia, because the border
33 between British Columbia and the other territories
34 takes off from the Rockies and goes up --
35 THE COURT: Yes.
36 MR. GOLDIE: -- 123rd. But --
37 THE COURT: And it's in the drainage area of the Peace which
38 flows into the Mackenzie.
39 MR. GOLDIE: Into the Mackenzie.
40
41 Now, I'm going to hand up to your lordship what is
42 AGBC 26A, which is a -- a map that was printed in 1857
43 at the time of the select committee hearings on the
44 Hudson's Bay Company. The first thing I note is that
45 the greenish tint is the drainage area of the Hudson's
46 Bay, and that's Rupert's Land in its May 1670 Charter
47 sense.

1 MR. RUSH: In Canada above the 49th. It's not correct to say
2 that it's the drainage area. It goes below the 49th.
3 THE COURT: The drainage area of the Hudson's Bay.
4 MR. RUSH: Yes, my lord.
5 THE COURT: Does it? I guess it does.
6 MR. GOLDIE: It goes marginally below the 49th. My lord, I'm
7 referring to the map "Lakes, Rivers and Glaciers",
8 which shows drainage areas in Canada. And it is
9 pretty close to that map. And there is a very small
10 portion of it which might -- which drops below the
11 49th parallel.
12 MR. RUSH: Dr. Farley did it and that map shows it quite well.
13 MR. GOLDIE: Yes. I think it does. The -- the area that was
14 carved out of the western part of British North
15 America or British Columbia is very difficult to
16 discern on that map, but it's -- it is identified as
17 Caledonia.
18 THE COURT: Yes.
19 MR. GOLDIE: And it will be seen, my lord, that that area to the
20 north -- I shouldn't say that area because that
21 implies I'm referring to British Columbia. I'm
22 referring to the area north of what became British
23 Columbia, and that is drained by the Pelly or Yukon
24 River plus rivers flowing into the arctic, and there
25 appears to be at least one which drains through what
26 is marked on that map as Russia Alaska.
27 THE COURT: Well, the area that's claimed by the Hudson's Bay
28 Company on this map is the area in green, is it?
29 MR. GOLDIE: That was the original Rupert's Land.
30 THE COURT: Yes. And the red areas are Her Majesty's other
31 territories, are they?
32 MR. GOLDIE: Her Majesty's other territories. The Hudson's Bay
33 Company possessed an exclusive right to trade in some
34 of them.
35 THE COURT: Yes. Thank you.
36 MR. GOLDIE:
37 Q My lord, I'm turning to Tab Roman II. And the heading
38 of this is Indian land matters from the date of union
39 to the end of Sir John A. Macdonald's first
40 administration. That is from July 20th, 1871 to
41 November 5th, 1873. My lord, if I can just interject
42 and give your lordship a slight sketch of what is
43 being dealt with in this section. The highlights of
44 the period, apart altogether from Macdonald's
45 resignation over the railway -- so-called railway
46 scandal which terminated his ministry, would, in my
47 submission, be first a visit by Langevin to B.C. in

led to a long report of his;
2 second, the appointment of a Dr. Powell, as Indian
3 Superintendent of B.C.; third, the fire at
4 Kitseguecla, about which your lordship has heard a
5 good deal; and the apprehension of difficulties in the
6 Chilcotin area over a railway survey to the head of
7 Bute Inlet; fourth, there was the creation of boards
8 of Indian commissioners, one for British Columbia and
9 one for Manitoba, the Northwest Territories. And,
10 finally, there was the acknowledgement on the part of
11 the Dominion that B.C. was free to alienate lands
12 without the restraint on alienation in Term 11 and the
13 two-year period stated in that term expired. Those
14 are the things that occurred in this period.
15
16 And I turn now to the summary itself. I say in
17 paragraph 1 that while Helmcken and his fellow
18 delegates had been told in June of 1870 that the --
19 while the Colony's Indian policy was better than the
20 Dominion's in some respects, what policy the Dominion
21 would apply would remain for the future.
22
23 However, soon after British Columbia's admission
24 to union on July 20th, 1871, Canada's Minister of
25 Public Works, Hector Langevin, was sent out with the
26 mission of acquiring knowledge about the new province
27 and its requirements. He reported his findings and
28 recommendations in a report printed as a Session Paper
29 of Parliament in 1872. My lord, that -- that is in
30 the next yellow binder.
31 THE COURT: Am I finished with this one?
32 MR. GOLDIE: We're finished with this one, my lord. There are
33 many fascinating documents in it, my lord, and I have
34 skipped over them very quickly.
35 THE COURT: I'm looking forward to meeting them all.
36 MR. GOLDIE: The report of Langevin is found under Tab Roman
37 II-2. I should say the excerpt from it is found under
38 Tab II-2. It contains one section and several
39 appendices relating to Indians. The Indian session,
40 pages 23 to 31, incorporated a lengthy memorandum by
41 Chief Justice Begbie describing his understanding of
42 Indian land matters in the province. He wrote in
43 part:
44
45 "I am not aware of any treaty having been made
46 with any tribe on the mainland. I believe that
47 some sort of arrangement as, binding in honour

as a treaty, has been made at different times

> with different tribes in Vancouver Island. I am not aware that it has been reduced to writing; I believe it has generally (where it exists) been in the form of a declaration of intentions by the local government.
>
> Reserves have been laid out both here and on the mainland, in the vicinity of tribal families, of land reserved for their use; but I am not aware of anything in the nature of a treaty. No general treaty would be possible, for there are a vast number of tribes, mutually more jealous and unintelligible than are the whites to them.
>
> They are in that state of powerlessness and respect for the superior power, numbers, and acquirements of the governing race, that any arrangements which that race would, consistently with self-respect and humanity, think proper, would readily be adopted by the native.
>
> Their chief anxiety is always about their reserves of lands which, perhaps necessarily, have not always been made in accordance with their wishes"...

At the end of his memorandum, the Chief Justice noted that Indians in British Columbia were "exceedingly well disposed" to "the government and to the authorities".

Of course, Begbie was mistaken in thinking that what he called "some sort of arrangement, as binding in honour as a treaty" with Indians on Vancouver Island had never been written down, but his ignorance of the Hudson's Bay Company's written agreements with Indians there strongly reflects the fact that, in neither of the separate Colonies, nor in the united colony of British Columbia was there a government policy to enter into treaties with the Indians.

Langevin declined to express an opinion on what policy should be adopted towards Indians in British Columbia. Instead, in a section headed "Their Treatment, Present and Future", he referred to two documents appended to his report. One was Trutch's January 1870 memorandum (to which reference has

1 already been made) and the other was a letter from the
2 Catholic Bishop of British Columbia.
3
4 With respect to aboriginal title, the two
5 appendices pointed in opposite directions. Trutch's
6 memorandum, of course, said:
7
8 "... the title of the Indians in the fee of the
9 public lands, or any portion thereof, has never
10 been acknowledged by government, but on the
11 contrary, is distinctly denied."
12
13 The Bishop, on the other hand, recommended that
14 treaties should be made with the Indians to extinguish
15 their title, although he disparaged the suggestion
16 that the United States' reservation system be adopted.
17
18 That, my lord, appears from -- from the section of
19 the -- of the Langevin report, which is under Tab 3.
20 And it is the third page in, but which is actually
21 page 153 of the document. And Appendix AA is -- is
22 Trutch's 1870 memorandum. Appendix BB is a letter
23 from the Bishop of British Columbia to Langevin. And
24 he says in the first -- or the left-hand column after
25 acknowledging the interest that Langevin's visit has
26 aroused, he says in the fourth paragraph:
27
28 "With regard to the system which might be
29 adopted by the government in connection with
30 the Aborigines, opinion is divided; some
31 persons speak of compelling the Indians of this
32 Province, to collect on certain general
33 reserves which would be set apart for them ad
34 hoc; if I do not mistake, that is the system
35 which the Americans have adopted in their
36 dealings with the Indians who inhabit the
37 territory bordering upon this Province."
38
39 And he says:
40
41 "I am astonished, sir, that those who know, or
42 who have been in a position to know the
43 deplorable consequences of such a system, can
44 be desirous of seeing it adopted and carried
45 into operation in British Columbia."
46
47 And then in the last paragraph he makes reference to

the cost of the American system. He says:

> "It is an historical fact that the system adopted by the Americans in their relations with the Indians has cost them millions of dollars, and has been productive of barely a single good result."

And then he goes on to speak in terms of his own views. At the top of the right-hand page he begins with these words:

> "To attain this most desirable end, it would be sufficient, it appears to me: 1st. That the Federal Government should set apart in each Indian village, a reserve of land proportionate to the number of the inhabitants. 2nd. That a treaty should be made with the Indians for the extinction at the earliest possible period of their titles to their lands. 3rd. That the sum of money to be allowed to the Indians by the government should be applied to supplying them, annually, either with agricultural implements and others such as axes, large saws, planes, et cetera, or with clothing and blankets as they may require and select."

So I say that Langevin's set forward two exactly opposite points of view. He -- under the heading "Treaties with the Indians" -- I'm back in my summary -- Langevin confirmed that there had been what he termed "treaties" on Vancouver Island, but none appeared to have been made with Indians on the mainland.

Appended to his report were copies of two of Douglas' 1850 agreements and a list of all of the Vancouver Island transactions under the heading "Return of Treaties" made Hudson Bay Company with Indian tribes showing lands conveyed and sums paid.

Mr. Langevin was not content to accept Begbie's recollection that nothing had been written down. He also appended British Columbia's 1870 Land Ordinance.

So I say in paragraph 4 that the Dominion was thus presented with two distinct policy choices with

1 respect to aboriginal title in British Columbia: It
2 could choose to recognize and extinguish it by
3 entering into treaties with the Indians, or it could
4 follow the long-established colonial policy -
5 described by Begbie and Trutch - of reserving lands
6 for their use. The latter course would require
7 nothing more than the implementation of Term 13.
8
9 I say that Trutch's January 18 --
10 THE COURT: Mr. Goldie, didn't the Archbishop also include
11 setting aside some lands for their villages?
12 MR. GOLDIE: Oh, yes. Yes, indeed. He put it -- he put the two
13 things together. This is on page --
14 THE COURT: Is his suggestion and Begbie's so different?
15 MR. GOLDIE: Well --
16 THE COURT: One recognizes title and says recognize their title
17 and make a treaty and the other says recognize their
18 occupation and set it aside for them.
19 MR. GOLDIE: Yes. I think they're at one at recognizing actual
20 occupation.
21 THE COURT: Yes.
22 MR. GOLDIE: The villages.
23 THE COURT: Yes.
24 MR. GOLDIE: But the Bishop goes on to say -- and he puts it in
25 sequence, my lord. He says, first, that the federal
26 government should set a part in each Indian village a
27 reserve of land proportionate to the number of
28 inhabitants; second, that a treaty should be made with
29 the Indians for the extinguishment for the earliest
30 possible period for titles to their lands. Now, it's
31 not quite clear whether he -- he equates the two as
32 referring to the same geographic feature, but he has
33 opened his discussion by stating that -- in the first
34 page, he says:
35
36 "With regard to the system which might be
37 adopted by the Government in connection with
38 the Aborigines, opinion is divided; some
39 persons speak of compelling the Indians of this
40 Province to collect on certain general
41 reserves."
42
43 And he says he doesn't like that idea. But what I'm
44 getting at, my lord, is that there is no -- there is
45 no doubt that the Bishop is raising the question of
46 title.
47 THE COURT: Yes. That's the difference between them.

1 MR. GOLDIE: That's the difference between them. And that
2 Trutch is denying that they have an interest in the
3 fee, which inferentially, of course, denying the need
4 for a treaty.
5 THE COURT: All right. Thank you.
6 MR. GOLDIE: And I'm at paragraph 5, my lord.
7
8 Trutch's January 1870 memorandum came to the
9 notice of Dominion officials by other means in 1871.
10 On 21 July, the day after Union, the Secretary of
11 State for the Provinces asked for the Lieutenant
12 Governor's views respecting allegations by the
13 Anglican Bishop of British Columbia that insufficient
14 funds were available for improving the education and
15 welfare of Indians in the Province, and asking for a
16 grant of money to be dispensed through missionary
17 societies. Now, this -- this came, as I say, a day
18 after the province was admitted to the union.
19
20 The Lieutenant Governor's response of September
21 26, 1871 reflected the constitutional changes which
22 had been brought about two months earlier. Trutch
23 wrote:
24
25 "I regard the charge of the Indians in this
26 Province as among the most critical and direct
27 responsibilities, as well as among the foremost
28 and most pressing duties of the Dominion, as it
29 has been of the colonial government; and I
30 rejoice in the hope and confident expectation
31 that the increased financial means which it may
32 be anticipated will now be appropriated for the
33 improvement of the condition of our Indian
34 population, may be so applied as to promote in
35 reality their welfare, spiritual and temporal."
36
37 And then he suggests that it was imprudent to delegate
38 it to the -- any expenditures or any monies to the --
39 to the -- to the missionaries.
40
41 And in partial answer to the Bishop's charges of
42 neglect, Trutch sent to the Secretary of State for the
43 Provinces a copy of his January 1870 memorandum which,
44 he noted, had been published in the Colonial
45 Intelligencer. And he concluded:
46
47 "... that this system"...

1 And I'm reading from midway down in paragraph 9 of his
2 dispatch:
3
4 "... this system needs not change or reform,
5 but only increased means to bring out its real
6 merits and capabilities" and that the
7 responsibility "should not be devolved on
8 others."
9
10 Now, in April, 1872 Parliament enacted the
11 Dominion Lands Act, which applied only to Federal
12 Crown lands in Manitoba and the Northwest Territories.
13 And that, my lord, is referred to in -- under Tab 7.
14 And your lordship will see in paragraph 1:
15
16 "This Act shall apply exclusively to the lands
17 included in Manitoba and the Northwest
18 Territories, which lands shall be styled and
19 known as Dominion Lands; and this Act shall be
20 known and may be cited as the Dominion Lands
21 Act."
22
23 And that was assented to on April 14th of 1872. And
24 it, of course, contains section 42, which is on the
25 next page:
26
27 "None of the provisions of this Act respecting
28 the settlement of agricultural lands, or the
29 lease of timber lands, or the purchase and sale
30 of mineral lands, shall be held to apply to
31 territory the Indian title to which shall not
32 at the time have been extinguished."
33
34 Now, that was the means by which settlement was
35 controlled, because the provisions of the Act with
36 respect to settlement of agricultural lands, lease of
37 timber lands, or the purchase and sale of mineral
38 lands was -- were all controlled by the provisions of
39 the Act.
40
41 Now, I say with respect to that, that Canada's
42 policy of extinguishing Indian title in lands
43 purchased from the Hudson's Bay Company - a policy
44 born in Clause 14 of the company's Deed of Surrender,
45 and by that time already implemented in part by Canada
46 in Treaties 1 and 2, was given statutory support by
47 Section 42, which I have just read.

1 Now, this provision was retained - with differing
2 section numbers and slightly varied text - in
3 succeeding Dominion Lands Acts until 1908, when it was
4 deleted because (according to the explanatory notes in
5 the amending Bill) -- I have read this to your
6 lordship sometime ago, but I emphasize it here:
7
8 "... it created a question as to whether the
9 Act applied to the Yukon territory where no
10 extinguishment of Indian title was ever
11 effected, for the reason that the same policy
12 was followed in regard to Indians there as was
13 followed on the Pacific coast. The only object
14 conceivable for the provision was the making of
15 a statutory guarantee that the condition of the
16 deed of surrender from the Hudson's Bay Company
17 to the Dominion, which provided that the Indian
18 claim should be extinguished within the tract
19 ceded, would be carried out; but as the
20 territory covered by the deed of surrender has
21 been ceded by the Indians there is no longer
22 reason on that score for perpetuating the
23 section."
24
25 I have drawn to your lordship's attention before
26 that the Yukon territory, which was originally part of
27 the Northwest Territories, did not attract any of the
28 numbered treaties, was never included in a numbered
29 treaty until, I think, part of Treaty 11, 1921. Very
30 small part of the Yukon was then included. But in
31 1908, Section 42 and its descendants was removed from
32 the Dominion Lands Act.
33
34 And the same explanation was found in the Bill No.
35 21 for the previous session of Parliament.
36
37 I'm at paragraph 8. It will be seen later that
38 the extinguishment provision in the Dominion Lands Act
39 was applied to Dominion lands in British Columbia,
40 only very briefly, from 1875 to 1880.
41
42 Now, it was applied during Mackenzie's
43 administration and removed -- well, Mackenzie's
44 administration and removed in Macdonald's second
45 administration.
46
47 It is sufficient for present purposes to point out

1 that in 1872, when the provision was first introduced,
2 it was not applied to Dominion lands in British
3 Columbia, even though by Clause 11 of the Terms of
4 Union the Dominion would acquire a large area of land
5 in the Province for the proposed Canadian Pacific
6 Railway."
7
8 And I won't bother reading to your lordship
9 paragraph 9. It is the -- records the incorporation
10 of the Canada Pacific Railway Company, incorporated by
11 a statute in 1872, only two months after the Dominion
12 Lands Act went into force. It incorporated by
13 reference the Railway Act, 1868, which -- in which
14 there was a section which required compensation to be
15 paid where a railway passed "through any land
16 belonging to or in possession of any Tribe of Indians
17 in Canada".
18
19 The C.P.R. Act gave the Governor in Council rights
20 of way "over any unimproved lands of the Dominion, or
21 any lands acquired for stations or other necessary
22 purposes of the Company, in the Province of Manitoba
23 or British Columbia, or in the North West
24 Territories."
25
26 And I say, page 61, it is submitted that with the
27 prospective application of the C.P.R. Act, 1872 to
28 lands in British Columbia which had not yet been
29 acquired by the Dominion under Term 11, and the
30 simultaneous failure to apply prospectively the
31 Dominion Lands Act, 1872 to the same lands, clearly,
32 in my submission, indicates that the Dominion did not
33 think it would be necessary to compensate Indians in
34 British Columbia for lands through which the railway
35 would pass, provided, of course, that the provisions
36 of Term 13 were met. Now, we come to --
37 THE COURT: Is it convenient to adjourn for lunch, Mr. Goldie?
38 MR. GOLDIE: Yes, my lord.
39 THE COURT: Thank you. Two o'clock.
40 THE REGISTRAR: Order in court. Court stands adjourned.
41
42 (PROCEEDINGS ADJOURNED)
43
44
45
46
47

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

Kathie Tanaka, Official Reporter
UNITED REPORTING SERVICE LTD.

THE REGISTRAR: Order in court.

THE COURT: All right, Mr. Goldie. I informed Mrs. Thompson that 5:00 o'clock is satisfactory tonight.

MR. GOLDIE: That would be helpful, my lord.

My lord, when I was at paragraph 48 of Section 1, I had a note that there was a page to be added, and I have done that. I have given it to my friends, and I have given it to -- it goes into the yellow book, my lord. I am not going to refer to it.

I was at page 61 of Part II, and having nothing better to do over the noon hour than to be instructed in such matters, I am informed that 22,000 square miles is the equivalent of 14,080,000 acres.

THE COURT: 14,080,000?

MR. GOLDIE: Yes. And I have confirmed over the noon hour that my aide-memoire, which is entitled "Territorial Evolution of Canada", will provide in graphic form what can be described in a wordy form "The Evolution of the Northwestern Territories and the excursion of the Colony of British Columbia in what is called the Northwestern Territories".

But, my lord, of course, in the Act of 1821 the granting of the Hudson's Bay exclusive trading licence, the Crown reserved a right to erect a colony, and it did in 1858. And that was the colony of British Columbia which was later extended by the addition of the Stikene territory.

THE COURT: But the 1821 exclusive trading licence was for a limited term, was it not?

MR. GOLDIE: It was for a limited term, but it was extended. I think it was to expire the second time around about --

THE COURT: '65, I think?

MR. GOLDIE: Yes, it was certainly later than 1858.

Now, if I could turn, my lord, to page 61 of Section II. I was just about to refer to paragraph 10, and here I am going to be referring to the first time that British Columbia applied to the Dominion for a relaxation of the restraint, the partial restraint on alienation of Crown lands which imposed by virtue of set Term 11.

The request was made in January 1872, which means that the two-year term, of course, had not expired, and the request was not granted by the Governor in Council, which, however, promised to give a tentative consideration to any sufficiently defined scheme which the province proposed, and in my submission that the

1 Dominion had considered that the public lands in
2 British Columbia were subject to a trust or interest
3 other than that of the province within the meaning of
4 Section 109 of the Constitution Act, the Governor in
5 Council should not have invited further proposals from
6 the province.
7 Paragraph 11. I make reference here to the
8 concern that was expressed with respect to the
9 surveying of the Bute Inlet, route of the railroad
10 through the Chilcotin, and this was before railroad
11 construction began in British Columbia, and
12 exploratory surveys were being made to determine the
13 best routes.
14 On June 24th, 1872, the Lieutenant-Governor of
15 British Columbia, that is to say Mr. Trutch, wrote to
16 Ottawa regarding rumours that the safety of a survey
17 party was threatened by Indians in the Chilcotin area,
18 who were reported to be dissatisfied because they had
19 been told that:
20
21 "... the lands in the District which they claim
22 as their own are about to be appropriated by
23 the white people without any consideration
24 being rendered to them in compensation therefor
25 and themselves restricted to today certain
26 limited reserves."
27
28 The Lieutenant-Governor recommended that a
29 Dominion Government send an agent to the district to
30 set the minds of the tribe at rest as to the
31 apprehension above alluded to.
32 Following the Dominion's authorization, the
33 Lieutenant-Governor appointed a Magistrate, Mr.
34 O'Reilly, to confer with the Chilcotin Indians.
35 And he recommended to the Dominion:
36
37 "... it certainly appears very desirable that an
38 authoritative settlement of the boundaries of
39 the lands to be reserved for the use of these
40 Indians should as soon as possible be made and
41 a definite understanding come to with them for
42 the determination of their claims to the
43 remainder of the District of country they
44 consider theirs. But as I am not apprised of
45 the wishes of the government in this respect -
46 I have felt unable to include any commission to
47 that effect in my instructions to Mr. O'Reilly

as it would otherwise have been very desirable to have done."

The Lieutenant-Governor enclosed with his 6th July despatch a copy of the instruction he issued to O'Reilly, and in part they read as follows:

> "... for the purpose of conferring with the Indians, making enquiries into the cause of disturbances, and doing all you can to establish friendly relations between them and the white people who are desirous of settling in their country.
>
> You will be careful to explain to them, as fully as possible, the changed system of government consequent upon confederation, as it regards the Indian population, that the care of them now belongs to the Dominion Government, who will at an early date appoint some person to take charge of their affairs, and arrange for their continued occupation and enjoyment of such a portion of the country as maybe necessary to them; and further that such agent of the Dominion Government will take such other steps as well be expedient to ameliorate their condition ...
>
> You will also explain to them the object of the survey now being made from Bute Inlet through the Chilcotin country ..."

My lord, that page number should be -70, not -69.

The document is a handwritten copy, photocopy of the instructions to O'Reilly, and the page numbers are in the upper right-hand corner. They are at the top of the page I should say.

Continuing -- two other enclosures in the Lieutenant-Governor's despatch to the Dominion authorities were copies of letters from Chief Justice Begbie. Now, the first one, my lord, is at -- referring to those page numbers at the top of the page, 183776 to 89. That's the first, Chief Justice Begbie's letters. And in that he recommended that exclusive reserves should be laid out right away to alleviate difficulties caused by a white man whose pre-emption claim in the Chilcotin area encroached on lands occupied by Indians. Begbie indicated a considerable amount of knowledge about the actual

1 condition there, and he blamed a white man by the name
2 of Salmon (?) for a good deal of it.
3 Now, the second letter is from page 183791 to 96,
4 91 to 96. Now, in that letter, which was also an
5 enclosure in a despatch to the Dominion, the Chief
6 Justice advised that while the Chilcotin Indians
7 should not be allowed to think they could dictate
8 where whites could settle, the situation might be
9 improved if the survey party were to be delayed for a
10 short time.
11 My lord, my submission with respect to this July
12 6th, 1872 despatch with its enclosures, is that it
13 demonstrates, first, that the government of the
14 province, that is to say through the office of the
15 Lieutenant-Governor, was concerned to see the Dominion
16 take charge of Indian affairs in the province.
17 That the Lieutenant-Governor, Mr. Trutch, was not
18 hostile to the concept of agreements being made with
19 Indians respecting lands they claimed, but on the
20 contrary, urged the Dominion to consider such a step.
21 Third, that the Dominion, which was committed to
22 commencing construction of the railroad through
23 British Columbia no later than July 20, 1873, as
24 things then stood, was aware that Indian disturbances
25 threatened to disrupt the crucial surveys which had to
26 be completed before construction could begin.
27 The fourth, that the Dominion was on notice that
28 entering into treaties with Indians in British
29 Columbia was an option it could adopt, without
30 opposition from the province, at least from the
31 Lieutenant-Governor, if it chose to do so.
32 Fifth, that Mr. O'Reilly, whom the Dominion
33 Government had authorized be sent to the -- speak to
34 the Indians, was instructed to tell the Indians that
35 arrangements would be made for their continued
36 occupation and enjoyment of such a portion of the
37 country as might be necessary to them.
38 In my submission this was a continuation of the
39 old colonial policy.
40 And finally, that Chief Justice Begbie, who had
41 been in British Columbia since 1858, was concerned to
42 protect lands occupied by Indians, but did not
43 consider that they had any rights or proprietary
44 interests in large areas.
45 Now, following Mr. O'Reilly's assurances to the
46 Chilcotin Indians that they would not be disturbed in
47 the possession of their homes, and their hunting and

fishing grounds, the province reserved from settlement all the lands in the area until instructions could be obtained from Ottawa respecting Indian reserves.

That's under Tab 15. And under that tab, my lord, I have put pages 110, 111, 112 of the relevant documents which are collect -- collect in Exhibit 1182. And this is -- the first letter is from the Provincial Chief Commissioner of Lands and Works to the Superintendent of Indian Affairs, which would be a federal official. And he says:

> "Shortly after your appointment as Superintendent of Indian Affairs in November last, I had the honour of drawing your attention to the position of the Chilcotin Reserve, and the desirableness of some steps being at once taken to map out the Indian Reservations, and throw the country open to intending settlers.
>
> On the 20th August, last, Mr. O'Reilly reported to His Excellency the Lieutenant-Governor the result of his conference with the three principal Chilcotin Chiefs. They were then assured of protection, and that their tribes would not be disturbed in the possession of their homes, and their hunting and fishing grounds; and that the Dominion Government would provide them with the means of education, and assist them in their agricultural pursuits. The nature, also, of the Railway Survey, then initiated, was explained to them ..."

And then the second -- the last paragraph:

> "On the 26th of August, a despatch was forwarded to the Dominion Government urging immediate action, and yhe appointment of a Superintendent with instructions to define the reservations necessary. It was also stated that all the lands had been reserved for this purpose."

And then the subsequent correspondence is found on page 111 and 112. The letter from the Superintendent of Indian Affairs, that is to say Dr. Powell to the Chief Commissioner of Land and Works of December 6th,

1872, acknowledges the letter of the December 5th, and then the -- that's followed by letter of 15th January, 1873 in which the then Chief Commissioner says:

> "I have the honour to inform you that the Government proposed taking off the reservation on the Chilcotin Valley, and desire that you will acquaint them officially with your views as to the reservations ..."

And Powell replies on the same day. He says in the second paragraph:

> "In reply I beg to state that I consider the removal of the whole of the present reservation would prove a fruitful source of Indian difficulty, were no special Reserve provided for the Native Tribes, and of danger to the white settler who might be sufficiently courageous to take up land in their country previous to such Reserve being made."

And then he goes on to suggest a reserve of a provisional character.

I am now back at paragraph 16 of my summary. Besides Mr. Trutch's official communications with the Secretary of State for the provinces, he carried on an unofficial correspondence with Sir John A. Macdonald. On July 16th, 1872 he wrote to Macdonald about several matters, including Indian policy. Adverting to the recent difficulties at Kitsegukla and the delay entailed by the necessity of obtaining authorization from Ottawa to deal with Indian matters, he stressed the urgency of appointing a Dominion officer to take charge of Indian affairs in British Columbia. And he put it in these terms:

> "... I consider the charge of our Indians the most ticklish business and the gravest he is responsibility of the Dominion Government within this province ... Our Indians having learnt that under confederation a new system is to be adopted towards them are becoming restless and dissatisfied at having to wait so long for the good things which they are told are in store for them -"

1 I simply point out, my lord, that the information
2 with respect to the changes in the administration and
3 the change in the system was one that obviously had
4 become widespread throughout the country.
5 Paragraph 17. Trutch wrote to Macdonald again in
6 October of 1872. Now, this is, of course, after the
7 Chilcotin, and indeed after the Dominion had appointed
8 Dr. Powell to the post of Indian Superintendent for
9 British Columbia, and offered advice respecting the
10 treatment of Indians in British Columbia, estimated to
11 number between 40,000 and 50,000.
12
13 "... As to Indian policy, I am fully satisfied
14 that for the present the wisest course would be
15 to continue the system which has prevailed
16 hitherto only providing increased means for
17 educating the Indians - and generally improving
18 their condition moral and physical - The
19 Canadian system as I understand it will hardly
20 work here - We have never bought out any
21 Indian claims to lands nor do they expect we
22 should - but we reserve for their use and
23 benefit from time to time tracts of sufficient
24 extent to fulfill all their reasonable
25 requirements for cultivation or grazing - "
26
27
28 Then he goes on to say:
29
30 "If you now commence to buy out Indian title to
31 the lands of B.C. you would go back of all that
32 has been done here for 30 years past and would
33 be equitably bound to compensate the tribes who
34 inhabited the districts no settled ..."
35
36 My friend referred to that letter, and my -- the
37 only point I emphasize is that it is after he has had
38 the experience of the two incidents I have referred
39 to; namely, Kitseguecla and the Chilcotin matter. In
40 both cases he is the Lieutenant-Governor who is
41 required on behalf of the Dominion to take a
42 personal -- take personal steps.
43 The prime minister replied privately to Trutch's
44 letter on December 27th, 1872.
45
46 "... I quite agree with you in your view as
47 expressed in your letter of 14th October last

1 respecting Indian matters generally, and I hope
2 to inaugurate a system for the management of
3 the Indians both in British Columbia and
4 northwest which will be satisfactory."
5
6 And he went on to outline his idea of constituting
7 three-member boards of Indian Commissioners to direct
8 general policy and management in Manitoba and the
9 Northwest Territories and in British Columbia.
10 I say by the end of 1872, no Dominion legislation
11 relating to Indians had yet been extended to British
12 Columbia, Manitoba, and the Northwest Territories,
13 although a draft Bill to that end was printed during
14 that year. According to its preamble, it was:
15
16 "... desirable and expedient that uniformity of
17 system and practice under the sanction of law
18 should prevail in all Provinces of the Dominion
19 of Canada alike."
20
21 Now, that draft legislation is found under Tab 19,
22 and I emphasize here that it was no more than a draft,
23 but it did contain in the preamble what I have just
24 read. And the first section states that:
25
26 "From and after the passing of this Act, the Act
27 cited in the preamble to this Act, and all
28 other statutory provisions now in force in the
29 Province of Ontario and Quebec relating to
30 Indian affairs shall be, and be held in force
31 in all the provinces and territories of the
32 Dominion of Canada, in respect to Indians,
33 Indian Lands, and Indian Affairs, and in so far
34 as the same are applicable and varied by this
35 Act, to all lands in any part of Canada, not
36 surrendered to the Crown, subject nevertheless,
37 to the provisions hereinafter made."
38
39 And Section 5 would have provided, and I quote:
40
41 "All lands in territory unsurrendered and
42 unconveyed to the Crown, by the Indians
43 claiming to own the same, shall be under the
44 special charge of the superintendent general of
45 Indian Affairs."
46
47 And then sections 15 and 16, which are on the

third page over, provides:

> "In case of any encroachments upon lands reserved or set apart, for any Indians, or upon lands which may not have been surrendered and ceded to the Crown; it shall be lawful ..."

Et cetera.

And 16:

> "Lands required for railway or other Public purposes which have been or may be taken for such objects with the consent of the Superintendent General of Indian Affairs, and the Band or Body of Indians interested therein, may be conveyed by Letters Patent on payment of such just value as may be determined by the Superintendent General, or if objection is made to the amount of compensation demanded ... by arbitration."

My lord, I say with respect to that, that this draft legislation, if it had been enacted, would have recognized aboriginal title. And I say that upon the basis of the sections I have read.

Section 1 made the Bill applicable to all lands in any part of Canada not surrendered to the Crown. Stipulated that all lands in territory unsurrendered and unconveyed to the Crown, by the Indians claiming to own the same, shall be under the special charge of the Superintendent General of Indian Affairs, and rendered invalid any deed, lease or other instrument purporting to affect such lands.

Section 10, which I have not read, and I'll just summarize it here, contemplated that treaties would be made with Indians in Manitoba and Northwest Territories; other sections protected timber, metals and minerals in unsurrendered lands and provided for redress in case of encroachment on unsurrendered or unceded lands.

Section 16 required the Indians' consents where lands were required to be taken for railway or other public purposes.

This Bill was not enacted in 1872. It was reconsidered and rejected again in 1874, when Indian legislation was finally extended to the provinces of

 That legislation was
2 silent as to aboriginal title.
3 Now, my lord, the 1872 Bill is of academic
4 interest because it was never enacted, but it is
5 instinctive, however, of an attitude which wasn't
6 remedied, if I may put it this way, until St.
7 Catherine's Milling. It purported to deal with
8 provincially owned Crown lands in British Columbia,
9 and I say for this the Dominion lacked any power under
10 Section 91 of the Constitution Act.
11 Now, on the 3rd of January, 1873, the Indian
12 Superintendent for British Columbia was told that his
13 powers were limited by the laws of British Columbia
14 because no Dominion Indian legislation applicable to
15 the province had been enacted - although it was in
16 contemplation to pass a Bill having for its object the
17 applying to it such statutory provisions as may be
18 suitable for its Indian population.
19 So it would appear that by January 1873 it was not
20 any longer thought desirable and expedient by Sir John
21 A. Macdonald's government to have uniform Indian
22 policy in all of the provinces of Canada as had been
23 contemplated in the 1872 Bill. Instead, it would
24 appear the policy would be tailored to suit local
25 circumstances.
26 I say it should be noted that all the laws of
27 British Columbia that were in force on July 19th,
28 1817, the day before Union, continued in force until
29 they were altered by the Parliament acting in
30 accordance with its constitutional powers. Existing
31 Dominion statutes, even in matters which were strictly
32 within the scope of Section 91, had no force in
33 British Columbia until they were applied specifically
34 by Dominion legislation. Any such act of Parliament
35 would impliedly repeal an inconsistent provincial
36 statute.
37 Now, my lord, that is taken from Sir John A.
38 Macdonald's letter to Trutch of October the 27th,
39 1871. That is to say we are back now in the fall
40 immediately succeeding the Union of British Columbia
41 and Canada, and right down to the very bottom of the
42 page, the last four lines:
43
44 "All the laws of British Columbia as they
45 existed on the 19th day of July last, are still
46 in force there, except as they are altered by
47 the said chapter 13 and by chapter 17,

respecting the militia."

And 5:

"You are right in supposing that the Dominion Laws, even on matters strictly within the scope of federal legislation, can have no force in your province until applied to you directly by legislation here.

There need not be an express repeal of any Act or ordinance of yours. An Act of the Dominion Parliament on any subject within its competence, will, by new enactment impliedly repeal any provincial act which is inconsistent with it. Thus Chapter 17, already referred to, makes the Militia Law of Canada applicable to British Columbia, and it therefore impliedly repeals all your acts and ordinances relating to the militia which are inconsistent with its provisions."

Now, in paragraph 23 I jump forward again, this time into June of 1873. The Governor in Council approved an order establishing boards of Indian commissioners to manage Indian Affairs in British Columbia and in Manitoba and the Northwest Territories.

This Order in Council recognized that the Indian population on the west side of the Rocky Mountains and along the coast is bordering on the Pacific was about double the number on this side of the Rocky Mountains. Because of the great distances from Ottawa and the difficulty of communication, it was decided to leave the management of Indian affairs to local officials, subject to the supervision of the Superintendent General in Ottawa.

Now, that was under Tab 23, and the page reference there, my lord, should be 1 to 3, as opposed to 1 to 2. And that pretty well paraphrases what I have just -- what I just said pretty well paraphrases what is found starting on page 1. The total population in the prairie province or what became the prairie provinces and British Columbia, that is to say all west of Ontario, was thought to be 68,000, of which 23,000 were east of the Rockies, and the balance in British Columbia.

The duties -- turning back to my summary. The

1 duties and responsibility of the Northwest Territories
2 and Manitoba were to:
3
4 "... suggest the general principles under which
5 the Indians are to be dealt with, arrange
6 earned the directions of the Superintendent
7 General all negotiations and Treaties with the
8 Indian tribes, and report from time to time to
9 the bases upon which all questions of general
10 policy in Indian Affairs should be settled."
11
12 A board with similar powers would be constituted
13 in British Columbia.
14 What they did was to more or less spell out the
15 situation in Manitoba, and then recommend that a board
16 with similar powers would be constituted in British
17 Columbia. There was no necessary -- in my submission,
18 there was no necessary implication that the same
19 policies were to be employed, or that treaties must be
20 negotiated in British Columbia.
21 The Order in Council does not say that the B.C.
22 Board had the same powers; it contemplates only that
23 the powers would be similar.
24 The composition of the Boards was to be different
25 as well. The Manitoba and Northwest Territories Board
26 would consist of the Lieutenant Governnor, the Chief
27 Officer of the Dominion Land Granting Department at
28 Winnipeg, and an Executive Officer to be styled the
29 Indian Agent, while in British Columbia, the Board
30 would consist of the Lieutenant Governor and two
31 subordinate commissioners, one Protestant and one
32 Roman Catholic.
33 The duties spelled out for the subordinate
34 officers were also different. The Indian Agent in
35 Manitoba and the Northwest Territories would be the
36 executive officer and should carry out the
37 instructions of the Board and the orders of the orders
38 of the Superintendent General, while in British
39 Columbia the subordinate officers should be jointly
40 the executive officers, one to remain in Victoria, the
41 other to act in the field.
42 In the section of this summary dealing with
43 Mackenzie's administration, it will be seen that the
44 Department of Justice was instructed to omit the power
45 to negotiate treaties from the commissions which were
46 then being drafted for the British Columbia Board.
47 However, because of difficulties experienced both

in British Columbia and on the prairies, the Boards never functioned as they were intended. The Order in Council under which they were established was cancelled by the Governor in Council in December 1875 - during the period when the terms of reference for the Indian Reserve Commission in British Columbia were being arranged between the two governments. That's in MacKenzie's administration, and I'll come to that. But the reasons explained in the cancelling Order in Council had to do with both boards. And that is apparent from the Order in Council under Tab 2-24.

THE COURT: When is the British Columbia Board established?

MR. GOLDIE: When, my lord?

THE COURT: Yes.

MR. GOLDIE: I think it was -- I was going to say 1874. Yes, February 9th, 1874 the composition of the British Columbia Board was completed by the appointment of its third member. And the Board was in effect cancelled in --

THE COURT: 1875.

MR. GOLDIE: 1875. The cancelling Order in Council says that the -- this is page 8 of the document.

> "The arguments which existed in favour of the abolition of the Indian Board for the north west are in his opinion equally applicable to British Columbia and from and after February lst, 1876 they be rescinded, the Orders in Council."

One of the last acts of Sir John A. Macdonald's first administration, which was forced out of office in November, 1873, was the release of Crown lands in British Columbia from the restraint on alienation imposed by Term 11. The Order in Council of October 21st, 1874 recognized:

> "That as the two years within which the Government of British Columbia were, by the terms of the Union of that province with Canada, prevented from making any conveyance of land, have expired there does not seem to be anything now to prevent the government from granting conveyances ..."

And I say implicit in this order is the recognition there was no trust or interest other than

1 that of the province to be considered in lifting Term
2 11 restraint. It is submitted that this Order in
3 Council would not have been approved had it been
4 considered that Section 109 of the Constitution Act
5 operated to restrain alienation of Crown lands in
6 British Columbia pending the extinguishment of Indian
7 title.
8 And I conclude this section by saying neither this
9 Order in Council nor any other document put into
10 evidence, except for the 1872 Bill, which was never
11 enacted, suggests that during the period from July
12 20th, 1871 to November 1873, the Dominion considered
13 that aboriginal title existed in British Columbia, or
14 that means had to be taken - either by the province or
15 by the federal government to extinguish such title.
16 To the contrary, the Dominion acknowledged that
17 British Columbia had complete liberty to take actions
18 which were wholly inconsistent with the existence of
19 aboriginal title in its Crown lands.
20 Now, the principal and obvious action which is
21 inconsistent is the alienation of lands.
22 Section III, my lord, deals with Indian land
23 matters in British Columbia during Alexander
24 Mackenzie's administration, November 7th, 1837 to
25 October 8th, 1878. And in this is included -- in this
26 period is included the disallowance of the 1874
27 British Columbia Land Act and the establishment of the
28 Indian Reserve Commission.
29 THE COURT: That's a federal commission.
30 MR. GOLDIE: Well, that's the joint commission, my lord. As
31 established, it consisted of a joint commission, in
32 the sense of jointly appointed, and then one appointed
33 by the province and one appointed by the Dominion.
34 And this came about as the means of resolving a
35 dispute which had been brewing for about -- from about
36 the fall of 1873, and which came to a head in the fall
37 of 1874. And it was a dispute which centered around
38 the question of acreage for reserves. The Dominion
39 wished to apply a uniform policy of 80 acres per
40 family. The province's first reaction to that was
41 that there should be no more than 10, and then there
42 was a compromise of 20, and even then -- even that
43 went by the boards. And it was a conflict which has
44 been referred to a number of times, but here I
45 endeavour to set stage for a bit greater detail.
46 Now, at first, and when I say first, I am talking
47 about commencing with November 7th, 1873, the course

1 followed by Mackenzie's administration was that set by
2 the Sir John A. Macdonald's administration.
3 In February 9th, 1874, the composition of the
4 British Columbia Board of Indian Commissioners, which
5 is the one we have just been talking about, was
6 completed by the appointment of its third member, Mr.
7 Lenihan, the others being Lieutenant-Governor Trutch
8 and Dr. Powell.
9 The Dominion Order in Council appointing Lenihan
10 reiterated the duties set out in the June 1873 Order
11 in Council for the Northwest Territories Board, among
12 which was to arrange all negotiations and treaties
13 with the Indian tribes, under the direction of the
14 Superintendent General. The earlier Order in Council
15 had directed only that the British Columbia Board was
16 to have similar powers.
17 Now, I say in apparent recognition of the error in
18 the Order in Council appointing Lenihan, the
19 Superintendent General of Indian affairs, David Laird,
20 instructed an official of the Department of Justice,
21 where commissions for members of both boards were
22 being drafted, that no provision for negotiating
23 treaties was necessary for the British Columbia
24 commissioners because:
25
26 "... the rights of the Indians to the lands of
27 British Columbia have never been recognized by
28 the local government."
29
30 And that document, my lord, is under Tab III-3,
31 and there is a typed script preceding a photocopy of
32 the archival document. And the memo is addressed to
33 Mr. Richardson, Department of the Minister of Justice,
34 and in my submission this is from Mr. Laird, because
35 that's what the initials appear to be, "DL". He says:
36
37 "I have looked over the draft commission of the
38 Indian commissioners of Manitoba and the
39 Northwest which you handed me this morning and
40 I would respectfully suggest that in preparing
41 the Commission for the Indian Commissioners for
42 British Columbia. It seems to me desirable to
43 modify the provisions of that Commission."
44
45 And then he goes on to state those. He has
46 several reasons, and I won't read the first one. Then
47 over the page:

"Secondly, in the draft commission for M & N.W. the commissioners are given power to negotiate treaties with the Indians for the cession of their lands."

And then there is the part which is set out in my summary. Now, back to my summary.

At the same time, the Dominion was reviewing for possible disallowance Acts passed by the British Columbia legislature during the previous year which had been reserved as to their operation until the expiration of the two-year restraint on alienation of Crown lands in British Columbia imposed by Term 11.

And the Order in Council which reflects the reservation and the legislation question is under Tab III-4, and the second paragraph in the first page reads, and I quote:

"The honourable the Minister of Justice to whom said despatch with the Acts has been referred reports upon the following acts as follows:

1. An Act to amend the Land Ordinance 1870.

2. An Act to amend the mineral ordinance 1869.

3. An act to amend the gold mining ordinance 1867 and the gold mining amendment Act 1872."

He says:

"These acts are respectively reserved as to their operation either ;by express enactment or in effect until the 21st day of July 1873. And that date is evidently fixed as being at the expiration of the period of two years by, which under the terms under which British Columbia entered the Union, lands were to be reserved by the Government of British Columbia from sale with a view to setting part such lands as are requisite for the Canada Pacific Railway, as such period of two years expired on the 21st July the Province has the power to pass laws and make other arrangements for the sale of their lands and there is therefore no objection for the passage of these Acts, and the minister

1 recommends therefore that they be left to their
2 operation."
3
4 Then he goes on to suggest that the province have
5 drawn to its attention the fact that it might cause
6 some inconvenience, however, if there were alienations
7 in the -- on the right-of-way.
8 And then at page 77 of my summary I say in the
9 second paragraph: Far from raising any objection that
10 lands in the province were subject to a trust or
11 interest other than that of the province within the
12 meaning of Section 109 of the Constitution Act, 1867,
13 as would have been the case had they been burdened by
14 Indian title, the Minister of Justice noted only that
15 some practical inconvenience would eventually be
16 encountered, the kind that I have referred to.
17 And the report was approved in March of 1874. And
18 that is similar to that given by the Dominion
19 Government under Sir John A. Macdonald's
20 administration.
21 Then I say in paragraph 5: Increasing pressure
22 was brought to bear on the Dominion Government to
23 adopt a policy in British Columbia. In April 1874,
24 the Minister of Interior, Mr. Laird, received a letter
25 from a British Columbia member of Parliament who
26 advised that:
27
28 "... the Indians in British Columbia were
29 beginning to complain that the Indians in the
30 North West Territory received an annual bounty
31 from the Dominion Government, and that they
32 received nothing ..."
33
34 And I understand annual bounty refers to the
35 annuity payments provided for in the numbered
36 treaties, of which three had by that time been
37 concluded with Indians in Manitoba and the Northwest
38 Territories.
39 And finally in May of 1874 a statement of the
40 policy which the government proposes to pursue towards
41 the Indians in British Columbia, particularly in the
42 matter of presents, was set out in an Order in Council
43 which reinforced Laird's February instructions to the
44 Department of Justice that no treaties would be
45 necessary in British Columbia. Now, this Order in
46 Council, my lord, is one that I have referred to
47 beforehand, and it contains the paragraph that is set

out in quotation marks:

> "That it is assumed that the Government does not contemplate giving the Indians of British Columbia any compensation for their lands, as has been done with the Indians of the North West ..."

The Governor General, Lord Dufferin, signified his approval of the Order, and appended this question:

> "Why is a different system pursued in B.C. with regard to Compensation to Indians from that in the N.W. Territories?"

And I say and I submit that it is -- that the answer which should have been given to the Governor General's question is that no such compensation had ever been made in British Columbia, and that the Dominion was not obliged by any provision of the Terms of Union, the Constitution Act, 1867, or any other statutes or legal or equitable principle to institute such a policy in British Columbia.

Now, I refer to four Dominion statutes that were given Royal Assent just one week after this Order in Council.

The most important of these was the Act which applied Dominion Indian legislation to the provinces of British Columbia and Manitoba. And that Act is found under Tab 7, and it contains a number of provisions amending the Indian Act, and it contained no provision respecting Indian title or extinguishment, although by looking again at the 1827 Bill which was drafted for the same purpose as the 1874 Act, it is clear that such provisions had been at least briefly considered in 1874.

Now, my lord, I am referring to that 1872 draft Bill which I characterized as having, if it had been enacted, would have recognized aboriginal title, and it is clear there was also considered again in 1874 for the reasons that I note in paragraphs A and B of my summary and page 80.

Now, returning now to the 1874 Indian Act which extended the Dominion legislation respecting Indians to British Columbia and Manitoba. The definition of "Indian" in Section 8 reads:

1 "An Indian is hereby defined to be a person
2 within the definition contained in the
3 fifteenth section of the thirty-first Victoria,
4 chapter forty-two as amended by the sixth
5 section of the thirty-second and thirty-third
6 Victoria, chapter six, and who shall
7 participate in the annuities and interest
8 monies and rents of any tribe, band or body of
9 Indians."
10
11 Now, that imported into the definition of Indian
12 as someone who could only be receiving payments under
13 a treaty. And I say that it was quickly recognized
14 that this definition was inapplicable to the Indians
15 in British Columbia, and so negated one of the stated
16 purposes of the Act.
17 An Order in Council was passed in August of 1874
18 authorizing a Proclamation to exempt Indians and
19 Indian lands in the Province of British Columbia from
20 Section 8, and:
21
22 "in as much as none such exist, in that Province
23 who participate in any annuities or interest
24 monies or rents."
25
26 Three other relevant Dominion statutes to which
27 Royal Assent was given at the end of May, 1874 were
28 first, the Canadian Pacific Railway Act, which
29 incorporated by reference the Railway Act of 1868, and
30 made provision for a number of matters, including the
31 grants of rights-of-way in British Columbia.
32 That should be Section 8, my lord, not Section 7.
33 It has already been noted that Section 9(37) of the
34 Railway Act required that Indian tribes be compensated
35 where a railway passed through any land belonging to
36 them or in their possession.
37 That an Act to amend the Dominion Lands Act, which
38 made a number of technical amendments, but left the
39 extinguishment section (42) of the 1872 Act unchanged.
40 And your lordship will recall that that was the
41 section that said unless title has been extinguished,
42 no settlement.
43 And finally an Act respecting the appropriation of
44 certain Dominion lands in Manitoba which appropriated
45 lands for the extinguishment of the Indian title of
46 half-breeds in Manitoba.
47 Now, my lord, in paragraph 10 I say: Only days

1 after these statutes went into force, the Dominion, in
2 my submission, affirmed yet again that treaties would
3 not be necessary in British Columbia. On June 8th Mr.
4 Trutch, Lieutenant-Governor, sent a telegram to the
5 Minister of the Interior, expressing concern that the
6 Dominion's failure to issue commissions and
7 instructions to the British Columbia Board of Indian
8 Commissioners would result in complications if
9 Superintendent Powell, who was to leave soon for the
10 Interior, undertook negotiation with Indians there.
11 Now, that tells us, my lord, that although the
12 board had been appointed, commissions had not been
13 issued, and Mr. Laird's response to that is -- the
14 first document is Trutch's telegram. The second
15 document is Mr. Laird's response, and he states, and I
16 quote:
17
18 "Appointment with Indians at Kamloops must be
19 kept no treaties or special negotiations now
20 necessary. Powell need not cause
21 complications. Thought board would appoint
22 Powell visit coast and Lenihan Kamloops but not
23 then aware arrange might go at Kamloops."
24
25 I say in paragraph 11, the documents and statutory
26 enactments considered to August 1874 - made by both by
27 the Parliament of Canada and by the Governor in
28 Council under each of the first two Dominion
29 administrations, demonstrates, in my submission,
30 either explicitly or implicitly, one, that the
31 question of Indian title in British Columbia was
32 considered carefully on a number of occasions by the
33 Dominion Government and its officials in the
34 Department of Justice and Indian Affairs.
35 Now, what I have in mind when I say that is Mr.
36 Laird's memorandum to the Department of Justice about
37 the Commission, the wording of the Commissions of the
38 British Columbia Commissioners; the 1874 Dominion
39 Indian Act, which made no reference to title
40 whatsoever; the Proclamation exempting Indians from
41 the definition of Indian in that Act, the -- Mr.
42 Laird's response to Trutch's concern about Powell
43 going off to Kamloops; and finally the legislative
44 history of the Bill which would have required
45 consideration of aboriginal title, 1872 and 1874 Act.
46 That's what I had in mind there, my lord.
47 Number two, that the Dominion did not recognize or

1 make any provision for extinguishing aboriginal title
2 in British Columbia, while at the same time doing so
3 in Manitoba and the Northwest Territories. That is,
4 treaties were busily being negotiated in the prairies,
5 while nothing of the kind was even contemplated in
6 British Columbia.
7 The Dominion saw no inherent contradiction in
8 applying different policies to meet different
9 circumstances.
10 And finally that Crown lands in British Columbia
11 were not considered by the Indians' guardian to be
12 subject to any trusts or any interest other than that
13 of the province within the meaning of Section 109 of
14 the Constitution Act.
15 And I have noted that the Dominion raised no
16 objection to the province resuming full alienation of
17 lands that had been restricted under Term 11.
18 Now, my lord, I come to the Dominion's 4th
19 November 1874 Order in Council. And I should say at
20 this point that this is a very critical -- by critical
21 I mean it expressed criticism of the province in
22 relation to the acreage allotment for reserves. It
23 was transmitted to the colonial office under cover of
24 a very strong despatch from the Governor General, and
25 it is one of the documents which is often referred to
26 as indicated, the niggardly policy of the province
27 with respect to reserves.
28 Paragraph 12 begins with the words: The Dominion
29 Government wavered in its view over the course of the
30 next year, that is to say -- well -- however, no doubt
31 partly as a result of disagreements with the
32 Government of British Columbia about the
33 interpretation of Term 13 of the British Columbia
34 Terms of Union, and I set this out. And the
35 dispute -- the details of the protracted dispute, the
36 acreage dispute between the governments about the
37 interpretation of Term 13 are largely irrelevant to
38 the issues of the case at bar. However, a
39 consideration of some of the related documents is
40 necessary to an understanding of the full implications
41 of the 1875-76 agreement between the Dominion and
42 British Columbia governments by which the joint Indian
43 reserve commission was established.
44 Now, much of the correspondence and related Orders
45 in Council was printed in the 1876 sessional paper of
46 the legislature of British Columbia, entitled papers
47 relating to the Indian land question, Exhibit 1182.

Some of the same documents, and others were printed by the colonial office for its own use in May of 1875. That is following receipt of the 4 November 1874 despatch and some matters which were connected with that -- or said to be connected with that despatch, primarily the disallowance of the B.C. Lands Act.

Now, the colonial office print, my lord, is under Tab III-13, and from time to time I will be referring to that print, and when I do that, the extract of the pages is under the appropriate tab, my lord.

Now, I say on page 85: Although most of the original documents have been found in the Department of Indian Affairs, Privy Council, and other records in the National Archives of Canada, or in Colonial Office records, reference will be made, where possible, to the documents as printed in the B.C. Sessional Papers, Exhibit 1182, or in the Confidential Print. However, I should note here, an exception to that. There was -- there were some changes made in the wording of the Order in Council, and when I come to that I am going to make reference to the original documents themselves.

Now, the background that we start with is on September 23rd, 1874 at the request of the Dominion Government Dr. Powell sent copies of his correspondence with British Columbia officials on the subject of Indian Reserves about which there were several points of disagreement, mainly having to do with the size of reserves to be allotted. The page reference for that number should be 19 to 33. And that's under that tab, and that's from the colonial office printed.

Later in the fall of 1874 the Dominion received other correspondence on the subject, including a clear statement of the provinces view of Term 13:

> "... that all that is 'reasonable and just' to demand of the Provincial Government is that the 13th Section of the Terms of Union should be faithfully observed. Should the Dominion Government be of opinion that concessions beyond those provided for in the said section are necessary it becomes the duty of that government to make provisions accordingly."

That was a communication that Lord Dufferin referred to adversely -- in an adverse way I should

say.

And then I say: This statement was written in reply to Lenihan's 8 October 1874 letter with which he had enclosed copies of letters written by two missionaries expressing disappointment that Indians in British Columbia would not receive the same treatment as those in other parts of the Dominion. The page reference should be 37 to 43.

Another letter received in Ottawa in October 1874 was that written by Douglas, in which he outlined his practise with regard to Indian reserves. Dr. Powell had written to him, and this was part of Douglas's response. And he said:

> "... in laying out Indian Reserves, no specific numbers of accused acres was insisted on. The principle followed in all cases was to leave the extent and selection of the land entirely optional with the Indians who were immediately interested in the Reserve; the surveying officers having instructions to meet their wishes in every particular; and to include in each Reserve the permanent village sites, the fishing stations and burial-grounds, cultivated land, and all the favorite resorts of the tribes, and, in short, to include every piece of ground to which they had acquired an equitable title through continuous occupation, tillage, or other investment of their labour. This was done with the object of securing to each community their natural or acquired rights; of removing all cause for complaint on the ground unjust deprivation of the land indispensable for their convenience or support, and to provide as far as possible against the occurrence of agrarian disputes with the white settlers."

As I say, that letter was written in 1874, Douglas had been retired for something like 10 years, and he died in 1877.

MR. RUSH: My lord, I think it would be fair to draw to your attention the particular response to which -- the letter to which Mr. Douglas was responding, which was also found in the tab preceding the letter referred to.

THE COURT: Tab 16.

1 MR. RUSH: Yes, my lord, the Powell request of October 9, 1874.
2 THE COURT: All right. I made a note of that.
3 MR. GOLDIE: Thank you, my lord. I say the language used by
4 Douglas in this letter is similar to that used by the
5 Hudson's Bay Company in its December 1849 instructions
6 to him regarding Indians lands on Vancouver Island
7 which in turn referred to the findings of the 1844
8 Select Committee of the House of Commons on the
9 affairs of the New Zealand Company, that aboriginal
10 people had a claim, not a proprietary interest, in
11 lands actually occupied. In turn, those findings
12 reflected the experience in New Zealand to which
13 reference has been made.
14 I submit that Douglas's letter is inconsistent
15 with any assertion that his failure to extinguish
16 aboriginal title over most of Vancouver Island and in
17 all of the mainland was due to a lack of funds, and
18 not to policy considerations. First, the passage from
19 Douglas's letter quoted in the paragraph above
20 recognizes possessory rights and note proprietary
21 rights, only in lands actually occupied and used.
22 Douglas's letter referred to the allotment of reserves
23 as grants and grants of lands, an inappropriate word
24 if it were considered that Indians already had title
25 or even a a proprietary interest in the lands.
26 Moreover, Douglas wrote that the title in the reserve
27 allotted should remain vested in the Crown so as to
28 inalienable by any of their own acts.
29 The first of these underlying passages recognizes
30 no title, past or present, other than that of the
31 Crown. The restraints on alienation denies that the
32 Indian interest was similar to a title in fee simple,
33 one of the key attributes of which that it is freely
34 alienable. Neither of the underlined phrases
35 consistent with the notion that the Indians had rights
36 in land which approached the incidents of ownership
37 recognized by Europeans. These implications of
38 Douglas's 1874 letter do not appear to have been
39 considered in the steps which were subsequently taken
40 by the Dominion in its dispute with the province.
41 Now, Powell's reports and related correspondence
42 formed the base of a Dominion Order in Council dated 4
43 November 1874, to which was annexed a 2 November
44 memorandum of the Minister of the Interior, that is to
45 say Mr. Laird. And that, my lord, is under Tab 18,
46 the first part being reproduction of the handwritten
47 despatch, and following the separator sheet is the

1 print as it appeared in the province's collection of
2 papers 1182.
3 Now, two versions of that Order in Council were
4 printed. The one sent to the --
5 THE COURT: I think, Mr. Goldie, that perhaps before you start
6 with the two versions we will take the afternoon
7 adjournment please.
8 THE REGISTRAR: Order in court. This court stands adjourned for
9 a short recess.
10
11 (PROCEEDINGS ADJOURNED)
12
13 I HEREBY CERTIFY THE FOREGOING TO BE
14 A TRUE AND ACCURATE TRANSCRIPT OF THE
15 PROCEEDINGS HEREIN TO THE BEST OF MY
16 SKILL AND ABILITY.
17
18 _____
19 LORI OXLEY
20 OFFICIAL REPORTER
21 UNITED REPORTING SERVICE LTD.
22
23
24
25
26
27
28
29
30
31
32
33
34
35
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44
45
46
47

1 (PROCEEDINGS RESUMED PURSUANT TO SHORT RECESS)

2

3 THE COURT: Thank you, Mr. Goldie. Wait a minute. Here's Mr.
4 Rush. That's all right. Go ahead.
5 MR. GOLDIE: My lord, I'm at page 89 of my summary.
6 THE COURT: Yes.
7 MR. GOLDIE: And I am just about to deal with an episode which
8 originated with the Governor General himself and
9 resulted in two different versions of the order in
10 council. One version was that which was sent to the
11 Province of British Columbia, and the other was the
12 version that was sent to the Colonial Office. And if
13 your lordship would look at the bottom of page 89 I'll
14 indicate the differences and then I'll indicate to
15 your lordship how it came about.
16 THE COURT: Well, why are they sending this sort of thing to the
17 Colonial Office at this stage?
18 MR. GOLDIE: Well, the Colonial Office was the arbitor --
19 THE COURT: Oh, yes.
20 MR. GOLDIE: -- In case of a dispute under Term 13.
21 THE COURT: Yes. All right. It didn't have any other
22 responsibility, did they, the Colonial Office?
23 MR. GOLDIE: Well, in 1874 the Dominion of Canada was still
24 technically subject to having its laws disallowed by
25 the -- by the United Kingdom government.
26 THE COURT: And did the Colonial Office revise that?
27 MR. GOLDIE: Well, the Colonial Office was the conduit through
28 which the communications flowed.
29 THE COURT: All right.
30 MR. GOLDIE: What was sent to the Lieutenant Governor of British
31 Columbia is in these words:
32
33 "When the framers of Terms of admission of
34 British Columbia into the Union inserted this
35 provision, Term 13, requiring the Dominion
36 Government to pursue a policy as liberal
37 towards the Indians as that hitherto pursued by
38 the British Columbia Government, they could
39 hardly have been aware of the marked contrast
40 between the Indian policies which had, up to
41 that time, prevailed in Canada and British
42 Columbia respectively."
43
44 Now, what went to the Secretary of State for the
45 Colonies was this:
46
47 "When the framers of the terms of admission of

into the Union inserted this
provision requiring the Dominion Government to pursue a policy as liberal towards the Indians as that hitherto pursued by the British Columbia Government, they could hardly have been aware of the marked contrast between the Indian policy which has always been pursued in Canada and the policy which is sought to be enforced in British Columbia."

That word respectively should be deleted, my lord. Now, I say, the first version recognized that the Indian policy in the Colony of British Columbia was different from Canada's at the time of union. The altered version suggests that the province was seeking to enforce a policy which was very different.

The documents are found under tab 18. And if your lordship would look first, and I'm going to refer to the page numbers at the lower right-hand corner which are arranged sequentially, and at page eight is the photograph of a draft.

THE COURT: I'm sorry. Page eight?

MR. GOLDIE: Yes. At the lower right-hand corner it's -- it is under tab 8 at tab 18.

THE COURT: Yes. Mine's -- oh, I'm sorry. I'm not looking -- sorry. I'm looking at the divider.

MR. GOLDIE: Yes.

THE COURT: Yes.

MR. GOLDIE: On that page your lordship will see at the words crossed out: "Which had up to that time prevailed and always been pursued".

And then if we turn to page 27 we're looking at the papers printed by British Columbia, and about two-thirds of the way down the page begins the paragraph following a quotation:

"When the framers of the terms of admission of British Columbia into the Union inserted this provision requiring the Dominion Government to pursue a policy as liberal towards the Indians as that hitherto pursued by the British Columbia Government, they could hardly have been aware of the marked contrast which had up to that time prevailed in Canada and British Columbia respectively."

And then if your lordship would turn over to the

1 print of the Colonial Office at page 33, and it's the
2 second paragraph from the end, again it follows the
3 quotation of Term 13, and you'll see the words "the
4 marked contrast between the Indian policy which has
5 always been pursued in Canada and the policy which is
6 sought to be enforced in British Columbia".
7 THE COURT: I haven't found that on page 33 yet.
8 MR. GOLDIE: Oh, it's --
9 THE COURT: Oh, yes, I have it. I have it.
10 MR. GOLDIE: Yes. The only -- this is not a particularly
11 significant change, but it was -- it was made by the
12 Governor General. And that is apparent, my lord, if
13 your lordship would refer to tab 21, page three.
14 Again we're looking at a draft. And the change that I
15 had referred to is midway, about a third of the way
16 down the page:
17
18 "They could hardly have been aware of the
19 marked contrast between the Indian policy which
20 had always been pursued".
21
22 Et cetera. And then in the margin written at
23 right angles to it is the statement: "These changes
24 were made in the copy of that sent to the Colonial
25 Office by something of Lord Dufferin 4/12/74", and
26 then the initials E.A.M.. Now, Mr. Meredith -- there
27 was a Mr. E.A. Meredith who was Deputy Minister of the
28 Interior and Deputy Superintendent of Indian Affairs.
29 I'm not impugning the Governor General. He was
30 undoubtedly seeking to make a point clear, but the
31 fact is that it got -- one version went to the
32 Colonial Office and the other version went to British
33 Columbia. The version that went to the Colonial
34 Office went undercover of his dispatch of the 4th of
35 December, I think it was, in which he, as I say,
36 criticized the province in very harsh terms and said
37 that the papers were being sent to the Colonial
38 Secretary with a view to invoking his assistance under
39 Term 13.
40 It will be seen, my lord, that the people at the
41 Colonial Office when they read the order in council
42 saw that there was no such request for arbitration,
43 and they advised the Colonial Secretary accordingly.
44 Now --
45 THE COURT: On the argument you've made both versions are wrong.
46 MR. GOLDIE: Oh, they are. That's true. And this dispatch is
47 the source of a number of statements that the Dominion

1 did not know what the B.C. policy was. Now, I have
2 endeavored to dispell that proposition in Section I of
3 the counterclaim.
4 Mr. Laird, whose report the Governor and Council
5 adopted, was of course in opposition at the time that
6 the negotiation of the Terms of Union. But it's
7 clear, in my submission, my lord, that he could not
8 even have read the material in his own department to
9 have made the statement that he did make, whichever
10 one it is you take.
11 And the same proposition is made in a couple of
12 other changes. And these are summarized -- I
13 shouldn't say a couple of other changes. Another
14 change. And these are summarized in page 92 of my
15 summary. And if your lordship will look at the top of
16 the page, and the -- this is an extract from the order
17 in council or the report of Mr. Laird's which was
18 adopted. And it reads:
19
20 "Whereas in British Columbia, ten acres of land
21 was the maximum allowance for a family of five
22 persons, in old Canada the minimum allowance
23 for such a family was 80 acres: and a similar
24 contrast obtained in regard for grants of
25 education and all other matters connected with
26 Indians under the respective governments. Read
27 by this light, the insertion of a clause
28 guaranteeing the aborigines of British Columbia
29 the continuance by the Dominion Government of
30 the liberal policy heretofore pursued by the
31 Local Government, seems little short of a
32 mockery of their claims."
33
34 And then the change is seen in the succeeding
35 paragraph, the one that went to the Colonial Office.
36
37 "Continuance by the Dominion Government of a
38 policy as liberal as now pursued by the Local
39 Government."
40
41 Again it implies that it was not a policy which
42 prevailed in Colonial times. And that too has the
43 notation that the changes were made at His
44 Excellency's request.
45 The point, however, is that the apparent or the
46 suggested ignorance of the Dominion has gained
47 widespread ground, and was received in England as

1 being literally the case by some of the people who
2 minuted the dispatch. When I say -- I don't say they
3 minuted on the question of the Dominion's ignorance.
4 They simply minuted to the effect that affairs were
5 going very badly in British Columbia.
6 Now, I have skipped over a number of paragraphs in
7 my summary, and I don't mean to delete them, I'm
8 simply going to turn now to paragraph 25.
9 In the event, nothing seems to turn on the
10 Governor General's alterations. What the evidence
11 outlined above does demonstrate, however, is that Lord
12 Dufferin took a very personal interest in this
13 controversy, and that he exceeded his powers as the
14 Queen's representative in Canada which, even in 1874,
15 was limited to acting upon the advice of his
16 responsible advisors.
17 And I will be submitting that he exceeded his
18 instructions or he exceeded his constitutional
19 authority again in Victoria in 1876.
20 I say in paragraph 30, the inclusion in Term 13 of
21 a mechanism for the settlement of disputes by means of
22 a reference to the Secretary of State for the Colonies
23 is compelling evidence that the possibility of a
24 disagreement was forseen. And, in my submission, it
25 is a contingency that can only have been anticipated
26 if British Columbia's policies were known to be
27 different from that of the Dominion.
28 It should also be noted that in 1870 when the
29 Terms of Union were negotiated no formula relating to
30 reserve size had yet been fixed in Canada.
31 None of the pre-Confederation land cession
32 treaties, and I add in what became Ontario, contains a
33 formula for reserve size.
34 The first two of the so-called numbered treaties,
35 which did specify reserve size in the proportion of
36 160 acres per family of five, were not negotiated
37 until August of 1871, several weeks after B.C. joined
38 the Union, and more than a year after the Terms of
39 Union were agreed upon.
40 And paragraph 32, almost all of Laird's 2 November
41 1874 memorandum concerns the disagreement between the
42 governments regarding reserve size, and is irrelevant
43 to the issues in the case at bar. But there are some
44 other -- other references which I make, and which I
45 needn't go into at the present time.
46 I go to page 100, my lord, in paragraphs -- well,
47 I'll start in paragraph 36 on page 99, the last

1 paragraph.

2 As was noted in paragraph 35, the Privy Council,
3 that is of Canada, ordered that the memorandum and
4 related correspondence be sent to the Colonial
5 Secretary "to enable Lord Carnarvon to understand in
6 all its bearings a great national question now seeking
7 solution at the hands of the Dominion and British
8 Columbia Governments."
9 In paragraphs 4 and 14 of his dispatch to Lord
10 Carnarvon, however, Lord Dufferin wrote that his
11 responsible advisors wished to invoke the interference
12 and good offices of the Secretary of State for the
13 Colonies in settling the dispute.
14 I make reference to tab 38. I'm sorry, 36. And
15 the first document is the Earl of Carnarvon's covering
16 dispatch. He starts off by saying:
17
18 "In transmitting for your Lordship's
19 consideration the enclosed Order in Council and
20 the papers accompanying it, on the present
21 position of Her Majesty's Indian subjects in
22 British Columbia, I regret to be obliged to
23 call your Lordship's attention to the very
24 serious controversy which has arisen between my
25 Government and the Local Administration of that
26 Province, as to the principle which should
27 determine the area of lands to be reserved for
28 the support and accommodation of the Indian
29 communities."
30
31 And then he recites Term 13, and brings to the --
32 his lordship's attention the three propositions.
33 And then paragraph 4:
34
35 "It is in virtue of this latter stipulation
36 that my Responsible Advisers now invoke your
37 Lordship's interference."
38
39 And then in paragraph 14 he says -- and that's on
40 page -- two pages over. Yes, two pages over. He
41 says:
42
43 "These are the general circumstances under
44 which my Government is anxious to avail
45 themselves of your Lordship's good offices and
46 co-operation as provided for under the terms of
47 the agreement I have cited."

1 That's Term 13.

2 Now, my lord, with respect to the references on
3 page 100 it's to tab 16, pages one to three, and
4 delete "and 14".
5 THE COURT: One to three?
6 MR. GOLDIE: Yes. Pages one to three and delete the words "and
7 14".
8 Now, I say no detailed analysis of Lord Dufferin's
9 dispatch will be made here, although it might be
10 pointed out that he was misinformed with respect, at
11 least, to paragraphs 4, 7, 8, 14 and 18. The emphasis
12 he placed upon the extinguishment of Indian title in
13 the early paragraphs of the dispatch does not reflect
14 accurately the purport of the order in council and the
15 annexed memorandum of correspondence which dealt
16 mainly with the difficulities over Term 13 of the
17 Terms of Union, and only briefly and very indirectly
18 touched on any question relating to that topic.
19 In the last paragraph, number 22, Lord Dufferin
20 wrote that he forwarded a copy of the enclosed order
21 in council to British Columbia, but of course that was
22 not wholly accurate. The copy sent to British
23 Columbia was different in two respects than the one
24 cent to the Secretary of State for the Colonies.
25 The extent of Lord Dufferin's interest in the
26 question of aboriginal title in British Columbia can
27 be seen from two private letters he sent to Lord
28 Carnarvon, one in November and one in December 1874.
29 In the first he announced that he would be sending:
30
31 "... a very important Dispatch covering an
32 Order in Council relative to the unsatisfactory
33 position of the Indian question in British
34 Columbia. That Province appears to be treating
35 its Indian subjects with great harshness. It
36 does not recognize any obligation to extinguish
37 the Indian title before dealing with the Crown
38 Lands."
39
40 Now, that's from his letter of the 26th of
41 November.
42 Parenthetically, my lord, there appears to be no
43 explanation as why the order in council which was made
44 the 4th of November was delayed until the 4th of
45 December except the drafting of it appears to have
46 continued right up until the 4th of December.
47 And continuing with his second private letter --

1 THE COURT: What is this order in council saying?
2 MR. GOLDIE: The order in council which begins --
3 THE COURT: It's in tab 38?
4 MR. GOLDIE: It's -- well, actually it's a better place to go to
5 it, my lord, is back at tab -- tab 13, because that's
6 the Colonial Office print in whole. And at the end of
7 Lord Carnarvon's dispatch is a schedule of documents
8 accompanying the letter of the 19th of November from
9 the Department of the Interior. A is the order in
10 council for the 4th November 1874, and then there
11 are --
12 THE COURT: What page is that at tab 13?
13 MR. GOLDIE: Page six using the numbers in the lower right-hand
14 corner.
15 THE COURT: Yes. Yes.
16 MR. GOLDIE: Now, so that's -- that's the first enclosure. And
17 then if your lordship would go over to page seven and
18 the order in council is under the letter A.
19
20 "The Committee of the Privy Council have given
21 their attentive consideration from the
22 Memorandum from the Honorable the Minister of
23 the Interior in reference to the unsatisfactory
24 state of the Indian land question in the
25 Province of British Columbia, and they
26 respectively report their entire concurrence in
27 the views and recommendations submitted therein
28 and advise that a copy of this minute when
29 approved by Your Excellency be transmitted to
30 the Lieutenant Governor of British Columbia in
31 the hope that the views entertained by the
32 Dominion Government on this important question
33 as embodied in the said memorandum may meet
34 with an early and favorable consideration at
35 the hands of the Government of British
36 Columbia. They further advise that a copy of
37 this minute and annexed memorandum be
38 transmitted by Your Excellency to the Right
39 Honourable Her Majesty's Secretary of State for
40 the Colonies, accompanied by copies of such of
41 the other documents submitted as the Honorable
42 the Minister of the Interior may think
43 necessary to enable Lord Carnarvon to
44 understand in all its bearings the great
45 national question now seeking solution at the
46 hands of the Dominion and British Columbia
47 Government."

1 Now, that's the entire order in council.

2 THE COURT: All right. And what does Mr. Laird's memorandum
3 say?
4 MR. GOLDIE: That is what follows. And he is -- what he does is
5 say:
6
7 "I have been unable to persuade the provincial
8 authorities to give reserves of as many acres
9 as we think desireable."
10
11 Now, he goes through a great number of other
12 things pretty well all under heading of unsatisfactory
13 relations with British Columbia.
14 THE COURT: Thank you.
15 MR. GOLDIE: And he asserts that the -- that the Indians are
16 deeply discontented, but, my lord, neither in the
17 order in council itself nor in Laird's memorandum or
18 report which contains the assertions that the Dominion
19 government could hardly have known what the policy
20 was, does the question of title emerge.
21 THE COURT: Yes. Thank you.
22 MR. GOLDIE: To repeat myself to some extent, the background of
23 it was the desire of the Indian Superintendent, Dr.
24 Powell, pursuant to instructions to allot 80 acres per
25 family head for each reserve. The position taken by
26 the Provincial Government was that that was excessive.
27 THE COURT: Was it 80 per head or 80 per family?
28 MR. GOLDIE: I think it was per head of the family.
29 MR. RUSH: I think it was per family of five.
30 MR. GOLDIE: Yes.
31 THE COURT: Okay. Thank you.
32 MR. GOLDIE: That was the sum and substance of the problem, that
33 the Dominion wished to impose a uniform policy and the
34 province resisted. And, in my submission, the
35 province was perfectly entitled to resist it, because
36 an attempt to impose a policy that was uniform across
37 the length and breadth of British Columbia was just
38 simply nonsense. What was required for a fishing
39 tribe on the west coast was wholly inappropriate for
40 people of a semi-nomadic temperament around Kamloops,
41 and the old reserves recognized that. But be that as
42 it may, that was the state of affairs which had given
43 rise to this dispatch. And your lordship will have
44 observed that the order in council itself directs that
45 the report should go to British Columbia in the hope
46 that the impasse can be resolved.
47 I note in paragraph 38 that in Lord Dufferin's

1 second private letter to Lord Carnarvon of the 21st of
2 December he says:
3
4 "I don't think I have written to you privately
5 on the subject of the long British Columbia
6 Indian dispatch I had to send you. I don't
7 think that there is anything to add to the case
8 set forth in the official papers. The B.C.'s
9 have evidently been behaving very badly, and
10 they certainly should be required to extinguish
11 the Indian title before assuming possession of
12 the lands, which is the universal principle
13 observed in every province of the Dominion, but
14 the truth is British Columbia is hardly a large
15 enough Community to have as yet developed a
16 conscience."
17
18 My lord, it's now been seen that his lordship made
19 incorrect assertions in both letters. There's no
20 evidence that British Columbia had been treating
21 Indians with great harshness, and the extinguishment
22 of Indian title was by no means a principle observed
23 in every province of the Dominion.
24 Despite the Governor General's anxiety to
25 characterize the dispute as one relating to title, and
26 to obtain Lord Carnarvon's intervention, the Secretary
27 of State for the Colonies remained aloof. On February
28 5th, 1875, in reply to Dufferin's long British
29 Columbia Indian dispatch, he wrote:
30
31 "I have read these papers with great though a
32 painful interest, as I cannot but regret that
33 there should be any difference of opinion on
34 such a subject, or indeed that there should be
35 any ground for believing that the provision
36 made for the Indian tribes is not fully equal
37 to their requirements. It is not, therefore,
38 easy to overrate the importance of the question
39 to which these papers relate, but I do not
40 perceive that it is suggested that I should now
41 take any action in the matter, and, indeed, I
42 abstain from coming to any conclusion
43 respecting it, pending the receipt of the reply
44 to the representation addressed by the Dominion
45 Government to the Provincial Government, by
46 whom I cannot doubt that full and liberal
47 consideration will be given to all the

1 considerations of the case."

2

3 The Government of British Columbia's reply was
4 made on 18th of August 1875 in the form of an order in
5 council adopting a report of the province's Attorney
6 General, to which four documents, including Trutch's
7 January 1870 memorandum and two letters of William
8 Duncan, were annexed.
9 The order in council and annexed documents are
10 printed in Papers Connected with the Indian Land
11 Question, 1870-1875, which is Exhibit 1182, the
12 co-called yellow book.
13 The province's August 1875 report must be
14 considered in the light of two other actions taken by
15 the Dominion in the wake of the Term 13 dispute. A
16 disallowance of the province's 1874 Crown Lands Act,
17 and the application to British Columbia of the
18 Dominion Lands Act.
19 Now, that brings me, my lord, to the disallowance
20 of the 1874 Crown Lands Act.
21 In 1874 British Columbia enacted legislation to
22 amend and consolidate the laws relating to Crown lands
23 in the province. Among other things, it repealed the
24 Land Ordinance of 1870. This act was disallowed by
25 order of the Governor in Council on March the 16th,
26 1875. That means the disallowance was effective some
27 months after the November 1874 order in council had
28 been sent to British Columbia, but before British
29 Columbia had made any reply.
30 The reasons for the disallowance, in the form of a
31 report by the Deputy Minister of Justice Hewitt
32 Bernard, which was concurred in by the Minister of
33 Justice, had been approved by an earlier Dominion
34 order in council on 23 January 1875.
35 The January order in council and Bernard's report
36 were included in the Colonial Office Confidential
37 Print of May of 1875, to which subsequent references
38 in this summary will be made.
39 THE COURT: Just a moment. Could I go back to the top of page
40 103?
41 MR. GOLDIE: Yes.
42 THE COURT: I only have a vague recollection of this. What was
43 the British Columbian's -- what was British Columbia's
44 reply? You say it's a November 4th, 1874 order in
45 council. What did the order in council say?
46 MR. GOLDIE: Its reply is the 18th of August 1875.
47 THE COURT: Yes.

1 MR. GOLDIE: To the 1874 order in council.
2 THE COURT: Yes. All right.
3 MR. GOLDIE: And it proposed what became with the Dominion's
4 amendments, which in turn the province accepted, that
5 a commission be set up to determine reserves without
6 reference to any specific acreage.
7 THE COURT: Thank you.
8 MR. GOLDIE: But before we get to that we've got to deal with
9 the disallowance of the Crown Lands Act and the
10 application of the Dominion Lands Act of British
11 Columbia.
12 My lord, the reasons for the disallowance in the
13 form of Mr. Hewitt Bernard's long report is something
14 which has been referred to on a number of occasions.
15 It is the report in which the reference to the Royal
16 Proclamation occurs.
17 And in paragraph 43 I say, in his report the
18 Deputy Minister of Justice concluded that the
19 province's 1874 Crown Lands Act was objectionable as
20 tending to deal with lands which are assumed to be the
21 absolute property of the province. It was assumed,
22 instead, that Indian title existed in British Columbia
23 whether or not the Royal Proclamation of 1763 applied
24 to the province, because it was repeatedly and
25 erroneously asserted, in other parts of British North
26 America the Crown had invariably acted in accordance
27 withe the principles set out in that proclamation.
28 The report, dated 19 January 1875, began by
29 describing the general provisions of the province's
30 Crown Lands Act, and noted there was no:
31
32 "... reservation of lands in favour of the
33 Indians or Indian tribes of British Columbia,
34 nor are the latter thereby accorded any rights
35 or privileges in respect to lands or reserves
36 or settlements."
37
38 Now, I may interject there, that that was not
39 wholly accurate, because there continued in Section 3
40 the exemption from the lands open to settlement in the
41 form of not being an Indian settlement. In other
42 words, those words "excluded from presumption"
43 anything which answered that description.
44 After pointing out -- my lord, if I could just
45 insert the page number to the report at page 49.
46 After pointing that the Indian reserve question
47 had been the subject of an earlier order in council, 4

report addressed the larger
2 question, the legal position of the public lands of
3 the province.
4 The Deputy Minister noted that, except for the
5 lands on the Vancouver Island surrendered to the
6 Hudson's Bay Company, no surrenders of lands in that
7 province have ever been obtained from the Indian
8 tribes inhabiting it. He acknowledged that the policy
9 of obtaining surrenders at this elapse of time and
10 under the altered circumstances of the province may be
11 questionable, but felt it was his duty to assert such
12 legal or equitable claim as may be found to exist on
13 the part of the Indians.
14 He incorrectly stated that from the earliest times
15 England has always felt it imperative to meet the
16 Indians in Council, and to obtain surrenders of tracts
17 of Canada as from time to time such were required for
18 the purposes of settlements, and then went on to cite
19 the 1760 Articles of Capitulation of Montreal and the
20 Royal Proclamation of 1763.
21 Concluding that it was unnecessary to determine
22 whether the proclamation covered the land now known as
23 British Columbia, the Deputy Minister wrote:
24
25 "It is sufficient for the present purposes to
26 ascertain the policy of England in respect to
27 the acquisition of Indian territorial rights,
28 and now entirely that policy has been followed
29 to the present time, except in the instance of
30 British Columbia."
31
32 Why the Deputy Minister should have asserted with
33 such certainty that a policy of acquiring Indian title
34 had unfailingly been followed in England is a
35 mystery -- had been followed in Canada is a mystery.
36 There were not then, and except for Quebec are not
37 now, any land cession treaties between the Crown,
38 either in right of Great Britain or in right of
39 Canada, and Indians in the Provinces of Quebec, Nova
40 Scotia, New Brunswick, and Prince Edward Island. Nor
41 were there any in Newfoundland and Labrador.
42 Only in what is now the Province of Ontario had
43 there been land cession agreements before 1871, when
44 negotiation of the numbered treaties began in the
45 former Hudson's Bay Company territories.
46 However, for whatever reason, the view of the
47 Minister and his Deputy was that the Crown Lands Act

2
3 "objectionable, as tending to deal with lands
4 which are assumed to be the absolute property
5 of the Province."
6
7 They assumed instead that Indian title existed in
8 British Columbia, and that it constituted some sort of
9 interest in the lands of the province. And then I
10 quote the statement which supports that.
11 Paragraph 46, for this reason, the Minister of
12 Justice recommended that the act be disallowed, and
13 this was in January, but not until the last possible
14 date, and after consultation with the Lieutenant
15 Governor. He noted that the disallowance would cause
16 no practical inconvenience as the previously existing
17 Crown Land Act will probably suffice to enable the
18 province to continue, in the meantime, disposal of
19 lands.
20 In my submission, it was as an afterthought, that
21 the Minister of Justice also pointed out that the
22 provincial act contained no reservation of lands for
23 the railway route, a circumstance that might be
24 embarrassing when the railroad was eventually
25 constructed.
26 As was noted earlier, the governments of both
27 Macdonald and Mackenzie had already formally
28 acknowledged that after July 21, 1873 Crown lands in
29 British Columbia were free from the restraint on
30 alienation imposed by Term 11.
31 Now, my lord, I might comment, that I say it was
32 as an afterthought, that really it was rather an
33 important point that the Crown Lands Act did not make
34 provision for the railway. There I think they were on
35 sound ground.
36 Paragraph 48, the Governor General transmitted the
37 January 23rd, 1875 Dominion Order in Council approving
38 the report of the Minister of Justice on the "legal
39 position of the public lands in the province" to the
40 Secretary of the State for the Colonies. That too was
41 included with his dispatch. That is to say, Bernard's
42 report was included in the Colonial Office's
43 Confidential Print.
44 I just want to refer to -- well, we've got another
45 volume coming up, my lord.
46 THE COURT: Are we through this one already?
47 MR. GOLDIE: Yes. I'll be referring, my lord, to tab 48.

Now, this is part of the Colonial Office print of May of 1875. And your lordship will see that Lord Dufferin links the disallowance, or the report, I should say, with respect to the B.C. Act to the acreage dispute covered in his dispatch of November -- December 4th. He says:

> "With reference to my Dispatch, December 4th, 1874, transmitting a copy of an Order of the Privy Council of Canada on the present position of Her Majesty's Indian subjects in British Columbia, I have the honour of forwarding a further Minute of Council, to which is appended a report prepared by Mr. H. Bernard, Deputy of the Minister of Justice, in which the legal aspect of the rights of the Government to appropriate the entire lands of British Columbia without reference to the claims of the Indians, or the preliminary extinction of their title is very ably treated."

That was acknowledged by Lord Carnarvon on February 17th. Now, that reference -- that page reference, my lord, on page 109 that I've just read from is not page 45 in the first line of the reference, but 47.

I say in paragraph 49, that one other communication from the Governor General was included in the Confidential Print. It was a statement touching Indian policy and administration of British Columbia, prepared at Lord Dufferin's request by the Reverend J.B. Good, a missionary in British Columbia.

And that's under the next tab, my lord, in which Lord Dufferin forwards to the Earl of Carnarvon Mr. Good's statement. And the covering letter states:

> "I have the honour to forward a statement prepared by Reverend J.R. Good, a Missionary, who has for many years resided among the Indians of British Columbia, in reference to their present condition."

And then Mr. Good opens his letter with a statement:

> "I have the honour, in accordance with your request, to present the following report of the

1 condition of Indian affairs in British
2 Columbia."
3
4 Now, Mr. Good's statement set out his views on a
5 number of matters, including the extinguishment of
6 Indian title with respect to which he concluded:
7
8 "... that since for so many years the Crown has
9 assumed a right to the possession of the
10 country without reference to Indian right or
11 title the question should not, if possible, be
12 now raised as to the legality of such right,
13 which would entail the most serious
14 consequences if disallowed."
15
16 THE COURT: I'm sorry. Where is that?
17 MR. GOLDIE: That's on pages 46 to 47, my lord, beginning right
18 at the bottom of the page.
19 THE COURT: Oh, yes, I see it. Yes. Because --
20 MR. GOLDIE: Finally that --
21 THE COURT: Oh, yes.
22 MR. GOLDIE:
23 "To this end I would respectfully beg to
24 suggest through Your Excellency that since so
25 many years the Crown has assumed a right ..."
26
27 And so on.
28 THE COURT: Yes.
29 MR. GOLDIE: And, again, Lord Carnarvon declined to express any
30 opinion until he had received the province's reply to
31 the November order in council.
32 So I say in paragraph 50, my lord, the two main
33 issues between the governments relating to Indians and
34 land in British Columbia were now truly engaged. The
35 Dominion government under Alexander Mackenzie's
36 administration pressed both by means of Dominion
37 Orders in Council:
38 One - of 4 November 1874 - addressed the question what
39 actions were required of British Columbia to fulfill
40 its obligation to provide Indian reserve land under
41 Term 13.
42 And the other of 23 January of 1875, raised the
43 question whether the Crown lands of British Columbia
44 were burdened by aboriginal title, and were thus
45 subject to a trust or interest other than that of the
46 province within the meaning of Section 109 of the
47 Constitution Act.

2 issues in British Columbia were also raised in
3 Parliament. I'm not going to comment on that except
4 to note Mr. Mackenzie's -- Prime Minister Mackenzie's
5 comment in the Commons during the debate.
6
7 "... we will probably require that the Columbia
8 Government shall extinguish the Indian title."
9
10 Those debates were on the 22nd of February, not
11 the 19th of February, my lord.
12 And then in the same debate the Minister of the
13 Interior announced that the Boards of Indian
14 Commissioners for British Columbia, for Manitoba and
15 the North-West Territories had not been successful,
16 because neither of the Lieutenant Governors was
17 willing to participate, and that other arrangements
18 for the management of Indian affairs would be made.
19 Now, my friends have suggested that it was only
20 Mr. Trutch, Lieutenant Governor of British Columbia,
21 who was unwilling to co-operate. In fact, my lord, it
22 is clear that the difficulty of having a Lieutenant
23 Governor working with others in the administration of
24 Indian affairs was something which was a structural
25 problem in both British Columbia and Manitoba and the
26 North-West Territories.
27 Now, I come to the extension of the Dominion
28 Lands Act to British Columbia in April of 1875, which
29 was some three weeks after the Governor in Council
30 disallowed British Columbia's 1874 Crown Lands Act.
31 And the act itself which is found under tab 52 is very
32 short. It says:
33
34 "The Act passed in the Session held in the
35 thirty-fifth year of Her Majesty's reign..."
36
37 Et cetera.
38
39 "... known as the Dominion Lands Act, and the
40 several provisions thereof, are hereby extended
41 and shall apply to all lands to which the
42 Government of Canada are now or shall at any
43 time hereafter become entitled, or which are or
44 shall be subject to the disposal of Parliament,
45 in the Province of British Columbia, whether
46 the title thereof be legally vested in Her
47 Majesty the Queen for the Dominion of Canada,

or howsoever otherwise."

Now, in the result that was a prospective application to the 40-mile wide belt of lands known as the Railway Belt, which the province was bound to transfer to the Dominion for railway purposes, and to the additional lands the province was bound to convey to compensate the Dominion for lands within the belt which had already been alienated. These latter lands were eventually located in the Peace River Block.

As was noted earlier, Section 42 of the Dominion Lands Act, 1872 provided:

> "None of the provisions of this Act respecting the settlement of Agricultural lands, the lease of Timber lands, or the purchase and sale of Mineral lands, shall be held to apply to territory the Indian title which shall not at the time have been extinguished."

Your lordship will see that if that is applied to the Dominion lands in British Columbia it would require extinguishment of Indian title in the Railway Belt before those lands were offered up for settlement in accordance with what was planned.

Paragraph 53 of my summary I say, the application of Section 42 of the Dominion Lands Act to Dominion lands in British Columbia suggests two possible, but in my submission, opposite consequences.

First, if the Dominion considered there was no Indian title to be extinguished in British Columbia, unlikely at least for the Mackenzie administration considering the stated reasons for the disallowance of the 1874 Crown Lands Act, Section 42 could be ignored.

THE COURT: There would be no lands.

MR. GOLDIE: Well --

THE COURT: No lands to which it could apply.

MR. GOLDIE: No lands to which it could apply.

THE COURT: Yes.

MR. GOLDIE: Otherwise, if the Dominion considered that Indian title did exist in British Columbia, it had bound itself to extinguish such title before settlement in the lands it would acquire from the province under Term 11.

Now, it will be seen, and I am now speaking as your lordship will see looking ahead, it will be seen that the application of the Dominion Lands Act was

1 removed from British Columbia by Sir John A.
2 Macdonald's second administration on May 7th, 1880,
3 the day before the first attempt to convey the Railway
4 Belt lands to the Dominion.
5 It will also be seen that in 1885, after the
6 effective transfer of the Railway Belt, the Dominion
7 imposed regulations for the management of those lands
8 which specifically excluded the Dominion Lands Act
9 provision for extinguishing aboriginal title.
10 Moreover, from December 19th, 1883, when control
11 and administration of lands in the Railway Belt was
12 vested in the Crown in Right of Canada, until 1930,
13 when the belt was transferred back to the province,
14 the Dominion government took no steps to extinguish
15 Indian title to those lands over which it, and it
16 alone, had control.
17 Now, I come to British Columbia's response to
18 the -- what I call the acreage order in council of the
19 Dominion.
20 THE COURT: I think we are going to change reporters, and I'm
21 going to take a short walk.
22 MR. GOLDIE: Very well.
23 THE COURT: About ten minutes, please.
24 THE REGISTRAR: Order in court. Court stands adjourned for a
25 short recess.
26
27 (PROCEEDINGS ADJOURNED)
28
29 I hereby certify the foregoing to
30 be a true and accurate transcript
31 of the proceedings transcribed to
32 the best of my skill and ability.
33
34
35
36
37 _____
38 Peri McHale,
39 Official Reporter,
40 UNITED REPORTING SERVICE LTD.
41
42
43
44
45
46
47

1 (PROCEEDINGS RESUMED PURSUANT TO A SHORT ADJOURNMENT)

2 THE REGISTRAR: Order in court.

3 THE COURT: Mr. Goldie.

4 MR. GOLDIE: My lord, I'm at page 114 of my --

5 THE COURT: Yes.

6 MR. GOLDIE: -- summary, and I was just about to deal with

7 British Columbia's reply. It is contained in Exhibit

8 1182, following page 170, and it is set forth in --

9 in -- under Tab III-55.

10

11 Two copies were sent to Ottawa - one for the

12 Dominion's consideration and one for transmission to

13 the Secretary of State for the Colonies.

14

15 The Order in Council adopted "as the expression of

16 the views of this government as to the best method of

17 bringing about a settlement of the Indian land

18 question" a memorandum of the Attorney General dated

19 17 August 1875. I've quoted from that on a number of

20 occasions, my lord.

21

22 The Attorney General noted that the question at

23 issue between the two governments was "What assistance

24 in land shall British Columbia now give to enable the

25 Dominion to carry out her Indian policy?"

26

27 Now, if I may just pause there. The Attorney

28 General then set out to describe what he perceived to

29 be the Dominion's land policy, which was the

30 concentration of Indians on very large reserves with

31 an acreage allotment of 80 acres per head, per family

32 head of 5. And he contrasted that with the Colonial

33 policy and he -- he did so because partly to remove

34 what he described as

35

36 "... very unjust impressions respecting it

37 which had been created in the public mind by

38 the publication of the report of the Minister

39 of the Interior..."

40

41 And also because of the

42

43 "... undoubted right of the Imperial Government

44 (to whom the Indian correspondence has been

45 referred) to a full explanation respecting the

46 charges preferred in the report, of

47 mal-administration of a policy established

under their directing influence."

And:

> "In justice also to the past and present Governments of British Columbia, as well to its people at large"...

And then he goes on to describe what the policy of the Dominion as he understood it was. And your lordship will appreciate that it was quite the opposite of the policy of the Colony, which was to establish reserves where the village sites existed, whereas Mr. Walkem perceived it:

> "The policy of the Dominion aims at a concentration of the Indians upon reserves."

THE COURT: Is that an accurate statement of Dominion policy?

MR. GOLDIE: No. It -- if it was, it never was put into effect as a result of the -- of the agreement reached between the parties.

I say at the bottom of page 115 the Colony's policy had been to treat Indians as British subjects, subject to the requirements of the law and entitled to its protection. In general, no discriminatory practices were followed.

Reserves embracing "the village sites", settlements, and cultivated lands of the Indians" were set apart, and Indian property was protected by magistrates who acted as Indian agents.

Then he described the Colonial Indian policy, and I have read that to your lordship on another occasion.

Paragraph 58. Practical reasons as well as the "common dictates of humanity" required that Indians be afforded "kind and liberal treatment", but the Province could not agree with the Dominion's views in the matter of reserves, which failed to take into account "the habits and pursuits" of the Indians and the characteristics of the Province.

After discussing these features in some detail, the Attorney General recommended the adoption of

1 suggestions for settling the matter which were based
2 on recommendations submitted by Mr. Duncan. The
3 details of Duncan's recommendations (one of which was
4 the source of much difficulties later) and of the
5 Attorney General's suggestions based upon them are
6 largely irrelevant to the case at bar, but it should
7 be noted that neither Duncan's recommendations, nor
8 anything else in his two letters which were appended
9 to the attorney general's report, contains any
10 reference to aboriginal or native title. His
11 self-interested conversion to that view would not come
12 about for another 7 or 8 years.
13
14 There were four appendices to the attorney
15 general's report:
16
17 Appendix A - an 1872 Order in Council permitting the
18 Indians to pre-empt land;
19 Appendix B - Trutch's January 1870 memorandum;
20 Appendix C - part of a May 1875 letter from Mr. Duncan
21 to the Minister of the Interior, and
22 which is the Dominion Minister; and
23 Appendix D - a July 1875 letter from Duncan to the
24 Attorney General of British Columbia.
25
26 And this introduces the process which resulted in the
27 agreement on the joint Indian reserve commission
28 agreement.
29
30 On November 10th, 1875, the -- in case I've slid
31 over too quickly, my lord, the suggestions that were
32 put forward by Walkem for the resolution of the
33 difficulty are found at Tab III-55, page 9, where he
34 says -- does your lordship see that?
35 THE COURT: Yes.
36 MR. GOLDIE: He says:
37
38 "The following suggestions for the settlement
39 of the subject have been made by Mr. Duncan.
40
41 1st. That no basis of acreage for Indian
42 Reserves be fixed for the Province as a
43 whole; but that each nation (and not
44 tribe) of Indians of the same language be
45 dealt with separately.
46 2nd. That for the proper adjustment of Indian
47 claims the Dominion Government do appoint

an agent to reside with each nation.

> 3rd. That Reserves of land be set aside for each nationality of Indians. Such Reserves to contain, in addition to agricultural land, a large proportion of wild and forest land. Every application for a Reserve shall be accompanied by a report from the agent having charge of the nation for whom the Reserve is intended; and such reports shall contain a census and give a description of the habits and pursuits, and of the nature and quantity of land required for the use of such nation.
>
> 4th. That each Reserve shall be held in trust for the use and benefit of the nation of Indians to which it has been allotted; and in the event of any material increase or decrease hereafter of the members of a nation occupying a Reserve, such Reserve shall be enlarged or diminished as the case may be, so that it shall bear a fair proportion to the members of the nation occupying it. The extra land required for any Reserves shall be allotted from vacant Crown lands, and any land taken off a Reserve shall revert to the Province."

My lord, if I may ask your lordship to note that, that is the origin of the so-called reversionary interest of the province in Indian reserves, which caused a great deal of difficulty and was only resolved when Mr. McKenna negotiated an agreement with Sir Richard McBride. But even then it is -- its shadows have cast themselves a long way.

> 5th. "That the present local Reserves"...

I note that Mr. Duncan referred to them as the present local reserves.

> "... be surrended by the Dominion to the Province as soon as may be convenient; the Province agreeing to give fair compensation for any improvements or clearings made upon any Reserve which may

1 be surrendered by the Dominion and
2 accepted by the Province."
3
4 Now, that proposition leans pretty heavily towards the
5 Dominion idea as perceived by Mr. Walkem of large
6 reserves upon which people are concentrated and
7 removed from their original village sites.
8
9 Now, the Dominion on November 10th, 1875 responded
10 to British Columbia's suggestions for the resolution
11 of the impasse by means of an Order in Council which
12 made alternate proposals for the Province's
13 consideration.
14
15 And that's under Tab 60. And I -- that Order in
16 Council, which is at page 321 of the papers relating
17 to the Indian land question, page 2 of the -- of the
18 tab, after reciting Mr. Walkem's memorandum and
19 reciting Mr. Duncan's advice and comparing the two,
20 has his own -- the Dominion have their own proposals
21 set out on page 4 of the tab:
22
23 1. "That with the view to the speedy and final
24 adjustment of the Indian Reserve question in
25 British Columbia on a satisfactory basis, the
26 whole matter be referred to three
27 Commissioners, one to be appointed by the
28 Government of the Dominion, one by the
29 Government of British Columbia, and the third
30 to be named by the Dominion and the Local
31 Governments jointly."
32
33 And then they're to go around to each Indian nation
34 and after full inquiry, to fix and determine for each
35 nation separately the number, extent and locality of
36 the reserves. And they go on from that.
37 THE COURT: Without a formula.
38 MR. GOLDIE: Without a formula.
39
40 Now, I summarize these on page 118. I say none of
41 the Dominion's alternative proposals spoke of Indian
42 title, and some were inconsistent with such a concept.
43 Briefly, they were:
44
45 1) That a three-member Commission, consisting
46 of representatives of both governments and a
47 joint commissioner be appointed.

1 2) The commission would "fix and determine for each Indian nation (i.e., all tribes speaking the same language) separately, the number, extent, and locality of the Reserve or Reserves to be allowed to it.

3) There would be no fixed basis for determining acreage.

4) The commissioners would be "guided generally by the spirit of the Terms of Union ... which contemplated a 'liberal policy' being pursued", and they were to consider "the habits, wants and pursuits" of each nation, "the amount of territory available in the region occupied by them", and "the claims of the white settlers."

5) Each reserve would be held in trust for the use and benefit of the nation concerned, to be enlarged or diminished as population fluctuated. Additional lands would be allotted from Crown lands, and lands no longer required would revert to the Province.

So the reversionary proposition that Duncan originated has picked up in the final proposal.

6) Certain existing reserves would be surrendered to the Crown.

Like its predecessors, copies of this Order in Council were sent to the Lieutenant Governor of British Columbia and to the Secretary of State for the Colonies. In his November 17th, 1875 transmittal despatch to the Secretary of State, Lord Dufferin noted:

> "... that the British Columbia Government have taken into consideration the representations submitted to them on behalf of the Indians by the Dominion authorities and that there is a fair prospect of a satisfactory issue to this important controversy."

Lord Carnarvon noted on the Minute Paper that he was satisfied that the Commission's "conclusions will be dictated by an enlightened spirit of humanity and regard for the best interests of the Indian

The government of British Columbia accepted the Dominion's counter-proposals dated 6th January 1876. And that's under Tab 62. And there is a typescript which follows it, my lord. I shouldn't say a typescript. It is the -- it is the copy as printed in the papers relating.

And copies were sent to the Dominion government and to the Secretary of State for the Colonies.

The two Orders in Council - P.C. 1088 of 10 November 1875, which was the Dominion and the British Columbia, one of the 6th of January, 1876 - formed the agreement under which the Joint Indian Reserve Commission was established.

Now, not long after putting forward its counter-proposals respecting British Columbia Indian reserves, the Governor in Council cancelled the June 1873 Order in Council which provided for Boards of Indian Commissioners to manage Indian affairs in Manitoba and British Columbia. I've already alluded to this, my lord, but in chronological sequence here it is. Citing the difficulties which had been been encountered with boards, including the reluctance of both Lieutenant Governor's to serve on them, the Order in Council made fresh arrangements for the management of Indian affairs west of Ontario.

Two features of this Order in Council are of interest:

a) It established new "superintendents" for British Columbia and for Manitoba and the Northwest Territories. The areas for those in British Columbia were described geographically, while those in Manitoba and the Northwest Territories were described with reference to areas covered by the treaties which had so far been concluded.

b) The duties of the Old Boards, including that of arranging "all the negotiations and treaties with the Indian tribes" were referred to, but the duties of the new superintendents and agents were left unspecified.

Now, we come back to British Columbia Crown Lands Act of 1875. Now, I have said, my lord, that this is

1 substantially the same as the Act which was
2 disallowed, and the only change of substance was to
3 recognize the obligations under Term 11 and Term 13.
4 And I say on November 10th, 1875 - the same day as the
5 Dominion's alternate proposals for settling the Indian
6 reserve matter were approved - the Governor in Council
7 approved a memorandum of the Minister of Justice
8 regarding objections to British Columbia's 1875 Crown
9 Lands Act.
10
11 It had received Royal Assent on the 22nd of April.
12
13 It replaced the 1874 Act which the Dominion had
14 disallowed on March 16, 1875, "as tending to deal with
15 lands which are assumed to be the absolute property of
16 the province" - the Minister of Justice holding the
17 opposing view that, in his words, "that which has been
18 ordinarily spoken of as the Indian title must of
19 necessity consist of some species of interest in the
20 lands of British Columbia".
21
22 The 1875 Act was substantially the same as its
23 disallowed predecessor, but Section 60 was altered to
24 provide specifically for reserves of unalienated lands
25 for Indian and for railway purposes. It provided:
26
27 "The Lieutenant Governor in Council shall, at
28 any time, by notice, signed by the Chief
29 Commissioner of Lands and Works and published
30 in the British Columbia Gazette, reserve any
31 lands not lawfully held by record, pre-emption,
32 purchase, lease, or Crown grant, for the
33 purpose of conveying the same to the Dominion
34 government, in trust, for the use and benefit
35 of the Indians, or for railway purposes, as
36 mentioned in Article 11 of the Terms of Union,
37 or for such other purposes as may be deemed
38 advisable."
39
40 The view of the Dominion's Minister of Justice in
41 November, 1875 was that "The alterations made in this
42 Act are not such as to meet the difficulties which
43 resulted in the disallowance of the former Act." And
44 it's no wonder that he had that view, my lord, because
45 the 1875 Act made no more concession to Indian title
46 than the 1874 Act did.
47

1 Adopting these views, the Governor in council
2 expressed the hope that the "grave questions" which
3 arose respecting the 1874 Act and "those under
4 discussion between the two governments as to the mode
5 of dealing with the Indians" would be settled before
6 the expiration of the disallowance period, but warned
7 that if there were no settlement, "the policy and line
8 of argument which led to the disallowance of the
9 former Act must lead to the disallowance of this one
10 also".
11
12 The Privy Council recommended that its views be
13 communicated to the Government of British Columbia.
14 And that was done. So that the Governor in Council
15 expressed the view that the -- what had led to the
16 previous disallowance might also lead to the
17 disallowance of this one.
18
19 However, as was noted earlier, the Government of
20 British Columbia agreed to the Dominion's
21 recommendations respecting a joint Indian Reserve
22 Commission on January 6th, 1876. That is to say after
23 the Order in Council in which the disallowance
24 prospect was raised. The date of that Order in
25 Council, my lord, was 10 November, 1875.
26
27 The Province -- I'm back in paragraph 68. The
28 Province maintained that the Dominion's objections to
29 its 1875 Crown Lands Act had been "removed by the
30 agreement for a settlement of the Indian land question
31 by commissioners", and on May 6th, 1876, the Dominion
32 decided against disallowing the 1875 Act.
33
34 And I say the position taken by the Province and
35 the Dominion is consistent with the Colonial policy of
36 British Columbia that Indians had an interest in lands
37 they actually occupied: The very lands which I say
38 would -- I might better say which might be reserved to
39 them by the Joint Indian Reserve Commission.
40
41 In his report on the matter, the Minister of
42 Justice, Edward Blake, wrote that he could not concur
43 in the view that the objections had been removed
44 entirely by the agreement to establish an Indian
45 Reserve Commission. He thought there were still
46
47 "serious questions as to whether the Act...is

1 within the competence of the provincial
2 legislature, yet since according to the
3 information of the undersigned, the statute
4 under consideration has been acted upon, and is
5 being acted upon largely in British Columbia,
6 and great inconvenience and confusion might
7 result from its disallowance and considering
8 that the condition of the question at issue
9 between the two governments is very much
10 improved since (November, 1875), the
11 undersigned is of opinion that it would be the
12 better course to leave the Act to its
13 operation."
14
15 That reference is pages 7 to 9, my lord.
16
17 The great inconvenience and confusion, about which
18 the Minister expressed concern, would have been little
19 greater in 1876 than in 1875, when the Dominion
20 disallowed the 1874 Act.
21
22 Although the Minister of Justice recommended that
23 the 1875 Act be left to its operation, he observed
24
25 "... that this procedure neither expressly nor
26 impliedly waives any right of the Government or
27 Parliament of Canada to insist that any of the
28 provisions of the Act are beyond the competence
29 of the local legislatature, and are
30 consequently inoperative."
31
32 Now, I say it is significant that neither the
33 Governor in Council nor Parliament ever attempted to
34 exercise the right claimed by the Minister of Justice
35 to disallow any of the provisions of the Province's
36 1875 Act.
37 THE COURT: Well, there can't be piecemeal disallowance, can
38 there?
39 MR. GOLDIE: At one time it was thought there could be.
40 THE COURT: I would have thought that what he's talking there
41 about being inoperative, that they would argue in a
42 court of law that the provisions were inoperative.
43 Do you think he's talking about partial disallowance?
44 MR. GOLDIE: Yes. Your lordship may recall that in some of the
45 older Acts, the -- there used to be a provision that
46 if this Act or any part thereof --
47 THE COURT: Yes. But I thought there was a time limit. Wasn't

there a time limit when they had to disallow --

MR. GOLDIE: Oh, yes. He's -

THE COURT: I'm not even sure there is a time limit.

MR. GOLDIE: There -- there used to be. I think of -- that they have to act within a certain period of time.

THE COURT: That's what I thought. It seemed to me to be awkward to let a statute be left to its operation, as he says, and then come along later and disallow it.

MR. GOLDIE: There's no time limit on ulta vires by a Court.

THE COURT: No.

MR. GOLDIE: But that isn't what they seem to be talking about here.

Now, we come to the establishment of the Joint Indian Reserve Commission. On the same day, that is to say May the 6th, 1876, that the Dominion cabinet declined to disallow British Columbia's Crown lands Act, 1875, the Governor in Council appointed the Dominion's representative on the Joint Indian Reserve Commission.

By the end of October, 1876, all three Indian reserve commissioners had been appointed and given instructions by the two governments, the first Laird to Anderson, being the Dominion appointee; Laird to Sproat, Sproat being the joint appointee; and the next, memorandum of instructions to McKinlay, being the B.C. appointee; and Sproat received two sets of memorandum of instructions.

David Mills, Laird's replacement as Minister of the Interior -- now, I had a date for when Mills took over that portfolio, my lord. I don't see it here, but he -- by this time he was the Minister of the Interior and by this time I have in mind the fall of 1876. But I'll check that. Mills reported on the Indian Reserve Commission appointments and instructions in the 1876 annual report of the Department of the Interior, and noted at the same time:

> "The question of the rights of the Indians in all the lands in British Columbia in which their rights have not been extinguished by treaties between themselves and the Crown is still unsettled."

1 Now, this report or this statement that I've just
2 read from that report reflects Mill's view that Indian
3 reserves and Indian title in British Columbia were
4 separate questions. The first question, Indian
5 reserves, had been provided for by Term 13 and by the
6 subsequent 1875-1876 joint agreement to establish a
7 mechanism for carrying it out. Mills considered that
8 the second question, Indian title, remained
9 unresolved. He would express similar, but more
10 forceful, views in 1877. These are the views that my
11 friends rely upon.
12
13 The Province, on the other hand, considered that
14 both questions were resolved by the joint agreement to
15 establish an Indian Reserve Commission. And I have a
16 note to refer to Tab 68. Under Tab 68, my lord, is an
17 Order in Council, which adopts a report dated 28th of
18 April, 1876 from the Minister of Justice with
19 reference to the two Acts of British Columbia, one of
20 them being the 1875 Act. And they concur -- they
21 recommend that the Acts be left to their operation,
22 but attached to it is the report of the Department of
23 Justice, and at page 7 using the pagination in the
24 lower right-hand corner, your lordship will find in
25 the paragraph in the middle of the page:
26
27 "The Lieutenant Governor's communication upon
28 this" -- I can't make out the next word.
29
30 THE COURT: Would that be these statutes?
31 MR. GOLDIE:
32 "... statues that the objections taken by
33 council to it are considered to be removed by
34 the agreement for a settlement of the Indian
35 land question by commissioners."
36
37 So the Province was saying all objections are resolved
38 by the provision that has been made for the joint
39 commission.
40
41 The purpose of Term 13 and of the joint Indian
42 Reserve Commission Agreement was to set aside such
43 lands. That is to say reserving to Indians lands they
44 used and occupied. Once this task was accomplished,
45 nothing would remain outstanding or unresolved so far
46 as British Columbia was concerned.
47

1 It is significant, in my submission, that
2 Parliament in 1876 saw no necessary conflict in
3 pursuing different policies respecting Indian title in
4 different parts of Canada. And when I say different
5 policies, I mean treaty versus nontreaty, because by
6 1876 with the -- with the institution of the Joint
7 Reserve Commission, the Dominion was pursuing a policy
8 in British Columbia that did not involve treaties,
9 whereas in the Prairies they were pursuing the treaty
10 policy vigorously.
11
12 Section 3(4) of the Indian Act, 1876 placed
13 "nontreaty Indians", as well as "Indians" otherwise
14 defined, under the operation of the statute, thus
15 remedying the flaw which had rendered the 1874 Act
16 inapplicable to Indians in British Columbia until they
17 were exempted from the operation of the definition
18 section. I made reference to that earlier, my lord,
19 but I -- I refer here to the -- to the amendment to
20 the Indian Act which was passed in April of 1876,
21 which defines Indian as any male person of Indian
22 blood reputed to belong to a particular band and so
23 on. And then subsection (4) the term nontreaty Indian
24 means any person of Indian blood who is reputed to
25 belong to a regular band or who follows the Indian
26 mode of life. That took care of the situation in
27 British Columbia and in Quebec for that matter.
28
29 Then I come to Lord Dufferin's speech in Victoria,
30 about much has been said, and that was in September of
31 1876. Now, my friends have cited that as a statement
32 of Imperial and Canadian policy respecting aboriginal
33 title to land in British North America. In my
34 opinion, there was no such thing. It was made without
35 the advice or even without the knowledge of his
36 constitutional advisors and it was made in his -- in
37 his capacity as a visitor, a distinguished visitor,
38 the Governor General on a progress through British
39 Columbia.
40
41 Now, your lordship will recall that in that speech
42 Lord Dufferin asserted that the government of British
43 Columbia was in "error" in "neglecting to recognize
44 what is known as the Indian title", something, which
45 he said, had "always been done" in Canada.
46
47 I say the fact that Lord Dufferin was misinformed

1 respecting policy in practice in Canada is not the
2 point here. What is significant is that his speech,
3 by far the greater part of which concerned the Pacific
4 Railway, was not made on instructions from his
5 responsible advisors in Canada or on instructions from
6 the home government, a fact acknowledged by the
7 Governor General in the speech itself, when he said
8 that he
9
10 "... had not come on a diplomatic mission, or
11 as a messenger, or charged with any
12 announcement, either from the Imperial or from
13 the Dominion government... nor should it be
14 imagined I have come either to persuade or coax
15 you into any line of action which you may not
16 consider conducive to your own interests..."
17
18 Now, my friends say he was on a diplomatic mission
19 and I take issue with that, and I -- I will endeavour
20 to show to your lordship that that simply wasn't the
21 fact.
22
23 In his confidential report to the Secretary of
24 State for the Colonies about his visit to British
25 Columbia, Lord Dufferin reminded Lord Carnarvon that
26 his visit to British Columbia "had nothing of a
27 diplomatic character", and that he had "been charged
28 with no special message either from your lordship or
29 from my ministers". And that is found at Tab 77. The
30 first page under that tab is from the speech itself,
31 my lord, and is the sideline to the acknowledgement he
32 made that he was -- he was not on a diplomatic mission
33 or as a messenger, et cetera. The second is from the
34 print in the colonial office, Lord Dufferin's report
35 of his visit to British Columbia, and at page 3, the
36 page headed "North American No. 93, number 1,
37 "Confidential - Draft Report of Lord Dufferin's isit
38 to British Columbia:
39
40 "Having now returned to Ottawa, I propose in
41 this Despatch to submit to your lordship the
42 impressions I have derived from my visit to
43 British Columbia.
44
45 Your lordship is aware that my journey to that
46 Province had nothing of a diplomatic
47 character."

Now, this was confirmed by Prime Minister Mackenzie, who wrote that when the Governor General went to British Columbia:

> ".... it was quite understood that he should not, and could not, have any mission from the Dominion Government, or any ambassadorial function even as an Imperial officer which might conflict with his vice regal duties here, and that his visit therefore was strictly a progress as governor."

That, my lord, is from the publication the Dufferin -- no. That's -- that is from a publication which contains Mackenzie's accounts of meetings with Lord Carnarvon at this time. It's Appendix 3 of that publication, page 409, and he's -- he's describing the discussion he had with Lord Dufferin about the changes to the railway commitment to British Columbia, and he said -- he describes Lord Dufferin in line 3:

> "He then commenced a general and excited discussion of what was involved in his writing of such a paper. Mr. Blake replied, pointing out what we had done when he left for Columbia, when it was quite understood that he should not, and could not, have any mission from the Dominion Government, or any ambassadorial function even as Imperial officer."

The Secretary of State for the Colonies acknowledged receiving a copy of the Governor General's speech "upon the subject of the construction of the Pacific Railway". As before, he made no comment on Lord Dufferin's exhortations concerning "Indian title" in British Columbia. So my -- it is clear, my lord, in my submission, that the Governor General was acting on his own -- on his own and he was pursuing an interest in Indian title which he had developed previously, perhaps on reading Bernard's memorandum.

In any event, I turn to Mr. Sproat's memorandum. Now, Mr. Sproat was the joint commissioner appointed by both, and as your lordship is probably aware, Mr. Sproat was a gentleman who went out to the west coast of Vancouver Island, I think, in about 1860 and

1 managed a sawmill there and held a number of
2 positions. But he met with Lord Dufferin while he was
3 in British Columbia. And soon after the Governor
4 General's departure, he sent a long memorandum on
5 Indian Affairs in British Columbia to the Minister of
6 the Interior. It's a memorandum dated the 29th of
7 September, 1876. And it is -- it was described by
8 McKenna when he wrote to Sir Richard McBride in 1912
9 as Sproat's unpublished memorandum. At any rate, it
10 survived in his -- in the -- in the archives, but as
11 far as I'm aware, it has not had any extended
12 reference by people who have been writing in this
13 time.
14
15 He said in his covering letter, dated 30
16 September, 1876, Sproat noted that the first part of
17 his memorandum concerned the question "of the full
18 Indian title to the country, and the supposed
19 necessity of extinguishing such full title".
20
21 Now, that I refer to Tab 80, which is a typescript
22 of his covering letter to Laird under the date 30th of
23 September, 1876. He says:
24
25 "I send you an official, though I fear a very
26 imperfect memorandum, on Indian Affairs out
27 here, an now beg leave to add a word or two for
28 your information on this matter, which is
29 larger and likely to be more costly than the
30 government imagined.
31 The first portion of the memo is on the
32 question of the full Indian title to the
33 country, and the supposed necessity of
34 extinguishing such full title. This is a
35 question which the Governor General several
36 times referred to, when here, in conversation
37 and also publicly, and I said to His Excellency
38 that I would send a statement of my views on
39 the subject to Ottawa, and perhaps His
40 Excellency may find time to read at least that
41 portion of the memorandum.
42 Passing over the question of whether the
43 principle is a sound one, I must say frankly
44 that I think it should not have been
45 communicated here, because I have no hope that
46 the Canadian Parliament will vote money to give
47 effect to it. If treaties are made here on the

1 basis of some of the Manitoba treaties, which I
2 have seen - $12 a head cash down, and so forth,
3 it will require an enormous sum of money, both
4 at once and prospectively, to be expended on
5 Indian account in this province. When it was
6 paid, the Indians would be no more satisfied
7 than they were before it was paid. It would
8 therefore be a waste of money. The difficulty
9 now is that the new principle is known
10 everywhere. The Indians in this province are
11 wide awake, half-breeds in Victoria read the
12 newspapers to Indians who transmit the news
13 from tribe to tribe, with a rapidity that
14 outstrips the mail; already the names and
15 characters of the commissioners"...
16
17 He's referring to himself and his two colleagues.
18
19 "... are known in all parts of the province.
20 The missionaries tell the Indians what is going
21 on. It is therefore necessary that the
22 commissioners should know what the Dominion
23 really require, looking to these facts and to
24 the nonexistence of any nontreaty Indians at
25 all in British Columbia at present. If Indians
26 ask about this new principle, what are the
27 commissioners to do?"
28
29 The full memorandum is a very lengthy one, my lord.
30 It's found under Tab 79. And the note I have is that
31 it's addressed to the Minister of the Interior and
32 it's 29th of September, 1876. The note I have is that
33 Mills came in on the 24th of October, '76. Laird went
34 out on the 6th of October and it was an interim
35 appointment.
36 THE COURT: I notice it's five o'clock, Mr. Goldie. Is this
37 a --
38 MR. GOLDIE: My lord, it was originally arranged that we would
39 start at nine o'clock tomorrow to allow Mr. Wilms and
40 my friends, Mr. Rush and Mr. Grant, to make some
41 submissions. They have very kindly agreed to do that
42 on Thursday so that I might start at nine with your
43 lordship's endurance.
44 THE COURT: All right. ARe you going to be able to finish
45 tomorrow?
46 MR. GOLDIE: I may take a few minutes on Wednesday morning if we
47 can start at nine o'clock then.

1 THE COURT: I have looked at my scheduled, which is different
2 from what I thought it was. I have a -- a reception
3 tomorrow. I could, if necessary, sit tomorrow evening
4 after from about seven-thirty, I think, something like
5 that if that would --
6 MR. GOLDIE: I think I better put my nomination in for that, my
7 lord.
8 THE COURT: What do other counsel say about that sort of regime?
9 If it's just a few minutes that you're going to take
10 on Wednesday and if Mr. Macaulay and his people won't
11 be unduly inconvenienced, I think as it's often been
12 said, I'd just as soon be somewhere else, but I
13 think --
14 MR. WOLF: I don't think there's any problem from our
15 prospective about starting at nine o'clock on
16 Wednesday morning if Mr. Goldie needs an hour, hour
17 and a half. I don't think Mr. Macaulay would object
18 to that.
19 THE COURT: All right. Well, I'll leave it open. But it should
20 be settled by noon tomorrow whether we're going to sit
21 tomorrow night or not. I can sit for a couple of
22 hours tomorrow evening if necessary. All right then.
23 You want to start at nine?
24 MR. GOLDIE: Yes, my lord. Thank you.
25 THE REGISTRAR: Order in court. Court stands adjourned until
26 nine o'clock tomorrow.
27
28 (PROCEEDINGS ADJOURNED UNTIL JUNE 12, 1990 at 9:00 A.M.)
29
30 I hereby certify the foregoing to be
31 a true and accurate transcript of the
32 proceedings transcribed to the best
33 of my skill and ability.
34
35
36 _____
37 Kathie Tanaka, Official Reporter
38 UNITED REPORTING SERVICE LTD.
39
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47