July 31, 1987
Vancouver, B.C.

THE REGISTRAR: Order in chambers.
(ANOTHER MATTER SPOKEN TO)
THE COURT: Where are your learned friends, Mr. Goldie?
MR. GOLDIE: Well, they were here.
MS. KOENIGSBERG: My Lord, they had just stepped out and I just went out to see them, but I don't see them in the hall and I'm not quite sure where they are.
THE COURT: All right.
MR. RUSH: I apologize for the late arrival, My Lord.
THE COURT: All right. I only have one motion before me, is that --
MR. GOLDIE: There may be two, My Lord. There's the motion that was adjourned from the 17th of July, that is my client's motion --
THE COURT: Yes.
MR. GOLDIE: -- and is intended to deal with some questions of privilege, but I believe also there was another motion.
THE COURT: I forgot about Miss Koenigsberg's. What was that about?
MS. KOENIGSBERG: Production of documents motion which will be brief. It was filed I believe for July 17th and then put over.
THE COURT: All right. Is it convenient to proceed with Mr. Goldie's motion first?
MS. KOENIGSBERG: Certainly. Ours will be quite brief.
MR. GOLDIE: My Lord, as I indicated, this motion was adjourned from the 17th of July and a blue book has been handed up in which the motion papers are found and it is with respect to -- in two parts, with respect to certain numbered documents on the plaintiff's lists and secondly with respect to documents arising out of an event which is referred to in paragraph two on page two of the notice of motion.

My friends have agreed that certain documents -- if Your Lordship can perhaps turn to page two of the notice of motion where the -- paragraph one, where there are numbered documents. My friends a couple of days ago agreed to the production of document 3328 in line 1, 1778 in line 2, and 1771 and 1769 in line 3 of the numbered sequence, and I was just handed a letter a minute ago by Mr. Grant indicating that the claim for privilege in respect of 3334, that's in line 1, is dropped.

Loose in Your Lordship's book are extracted pages

from the plaintiff's lists of documents and I will refer to those to indicate the description given to the documents. And I say first as a general proposition, but not anything that I have relied upon, that all of these documents were included in the lists of those in respect of which no objection to production was taken, but I think to be fair the understanding has been in this case that a claim for privilege or indeed a claim with respect to relevance can be raised at any time.

If Your Lordship would turn to the list of documents number three, it's got a facing page on it and the number three is just below the style of cause, list of documents, plaintiff, number three.

THE COURT: I'm sorry I don't -- that's in the loose documents?

MR. GOLDIE: Yes, in the loose documents. They're simply page numbers taken from -- in case it hasn't been --

THE COURT: I don't think it's here. Oh, thank you, I'm sorry, I have that. I was looking in the wrong place. Thank you.

MR. GOLDIE: Now, page 131 of that list is appended to the title page and on that page Your Lordship will see document number 1722.

THE COURT: Yes.

MR. GOLDIE: The date "July 31, 1979, Neil J. Sterritt to Mr. T. F. Glynn, D.I.A." My understanding is that is Department of Indian Affairs. "re: G.T.C.T." That would be Gitskan-Carrier Tribal Council "Activity Report". My submission is that from its description it is not a privileged document.

Then over the page, two pages -- or the last page I should say is 1783, second item on the list. The date is "September 4, 1980, Neil J. -- "

THE COURT: Is that 1783?

MR. GOLDIE: 1783, yes.

THE COURT: Yes.

MR. GOLDIE: The second item down. The description is "September 4, 1980, Neil J. Sterritt to Mr. T.F. Glynn" on it. It appears to be the same Mr. Glynn and it would appear that he -- that this is something addressed to an official in the Department of Indian Affairs and the subject matter is "re: Promissory Note".

THE COURT: Is this a list of documents where privilege is claimed?

MR. GOLDIE: No, no, these are all documents in respect of which no claim was made --

THE COURT: Yes?
MR. GOLDIE: -- until a request for production was made.
THE COURT: All right. Yes. Thank you.
MR. GOLDIE: So my submission is that on its face it cannot be privileged. It's written to a stranger to the proceeding or perhaps even an official of the second defendant.

Now, turning to the next extract which I -- is identified on its face as "Supplementary list of documents, number 1 --

THE COURT: Yes?
MR. GOLDIE: -- of the Gitksan-Wet'suwet'en Tribal Council." On the first page, document 1897, no date, "Marvin George, External Boundaries of Gitksan-Wet'suwet'en Territories."

My submission is that it's on its face relevant. We have heard the name Marvin George as an employee of the Tribal Council and who does the council's mapping. We have made many requests for maps and I am not aware of any position -- of any basis upon which privilege could be claimed.

1898, the description is the same. There is no author. 1900, again, the description is "External boundaries", no date, "including Kitwancool Territories".

Over the page at 3169, "February 8th, 1979, Gitksan-Wet'suwet'en Tribal Council Trapping and Hunting Grounds, Concerns and Recommendations." I know of no basis from that description for a claim to privilege.

And then finally on the last list --

THE COURT: Supplementary number two?
MR. GOLDIE: -- supplementary number two. Page one, 3326 is described as a letter of "August 7th, 1984. Neil J. Sterritt of the Gitksan-Wet'suwet'en Tribal Council (letter), of the council to the Minister of Indian and..." -- I must assume that that is Indian and Northern Affairs. That on its face cannot be privileged.

Over the page, the second item was the one produced this morning. Item 3335, "Mike Morrell, Fishery Management Opinion", the date is 1986. On its face there would not appear to be a basis for privilege. Item 3339, the Moricetown Fishery Report of Mr. Victor Jim, who's one of the plaintiffs in the action. 3342 --

THE COURT: I'm sorry, 3339 is one of the documents in issue

this morning?
MR. GOLDIE: Yes.
THE COURT: All right. Yes.
MR. GOLDIE: And then the last is the last one on the page 3342, "April 1986, David F. Hatler, History and Zoogeography of some selected mammals in Northern British Columbia." And if the document is relevant, as would appear from its inclusion in the list, then I know of no basis for privilege.

My Lord, with respect to those documents I have suggested to my friend that they be available for Your Lordship's inspection and that would seem to be -- with whatever submission my friends wish to make, that would appear to be an expeditious way of dealing with the matter, but I'll continue with the reference in paragraph two, which is stated in the notice of motion as documents, writings, video tapes, photographs, transcripts, and other materials relating to the second All-Clan Feast hosted by the Carrier-Sekani on April 4th and 5th, 1987, as are referred to in the letter dated June 18th, 1987, from Mr. Stuart Rush, counsel for the plaintiffs.

The background of that, My Lord, is found in the exhibits which are under Tab 2 and I will go directly to Exhibit I, which is a letter dated June the 17th. The relevant provisions in that letter are contained in the last two paragraphs, and I quote:

> "One further request I note in the transcript of the All-Clan Feast, a reference by Mr. Edward John at page 37 that a complimentary Feast would be called in the future. If such occurred I asked for production of all documents, photographs, videos, et cetera, relating to that Feast."

The background of that is this, My Lord, the Carrier-Sekani would appear to have a substantial overlap in their land claim, virtually the south-east corner of the Gitksan-Wet'suwet'en claim in the proceedings. There were produced, on the defendant's request from the plaintiff, a video tape and a transcript of a feast given by the Wet'suwet'en people for certain chiefs of the Carrier-Sekani with -- its purpose appeared to be to inform the Carrier-Sekani of the diligence that the plaintiffs had shown in demonstrating the scope of their claim. There was no

attempt to reach a settlement, at least from the video and the transcript. It was what I'll call an informal meeting. The transcript, however, contained a reference to a future meeting and it appears that that was held and the reference, My Lord, is found in Mr. Rush's letter of June the 18th which immediately follows this Exhibit J.

The last paragraph on that first page reads, and I quote:

> "I can advise that there was a second All-Clan Feast hosted by the Carrier-Sekani on April 4th and 5th, 1987. We are not in possession of any video tapes or transcripts of this Feast. I do not know if there are any photographs of the Feast, if there were, and as to any documents that might be in possession of the Gitksan-Wet'suwet'en participants in this Feast, we claim privilege for these."

I have indicated the obvious importance of any documents relating to that second Feast. I'm unaware of any basis for claiming privilege with respect to such documents and my -- the order I seek is the production of the -- the listing and production of the documents, subject to any ruling made with respect to privilege.

THE COURT: What was the date of the first Feast?
MR. GOLDIE: About a year before.
THE COURT: In April '86?
MR. GOLDIE: '86, yes.
THE COURT: All right.
MR. GOLDIE: The Edward John referred to in my letter is the president of the Carrier-Sekani Tribal Council and a chief of the Carrier-Sekani.
THE COURT: Mr. Goldie, did you say the overlap was in the south-east corner or south-west corner?
MR. GOLDIE: South -- well, it's substantially south-east extending right across to the west.
THE COURT: Yes. All right. Thank you.
MR. GOLDIE: It's a large part of the territory that Mr. Alfred Joseph was describing in his evidence.
THE COURT: Yes. All right. Thank you. Mr. Rush or Mr. Grant?
MR. RUSH: I'll address you on this, My Lord.
THE COURT: Thank you.
MR. RUSH: We've prepared an affidavit, and part of the reason for our late arrival was the inevitable problems of

technological production. The library here assisted us a little more so and it's an affidavit of Mr. Grant and it's been -- it's not filed, but it is sworn and I'll pass it up to you now, and I apologize to my friends for not getting it to them sooner. I just had it prepared. I also have a book of authorities that may be of some help.

THE COURT: Well, I suppose the first thing I have to resolve is when did Mr. Goldie get this, just now?

MR. RUSH: Yes, he did.

THE COURT: Shall we take a moment to read it?

MR. GOLDIE: I may ask Your Lordship for a moment, but I assume my friend is going to go through it.

MR. RUSH: I'm going to go through it item by item.

Now, My Lord, I have a copy of a notice of motion. You have that in front of you.

THE COURT: Yes.

MR. RUSH: I intend to go through the documents as they're listed in the notice of motion, and I'm relying on the sequencing as indicated by Mr. Goldie in his application so I'm going to begin response by reference to document number 3326.

Now, I should tell Your Lordship that what I have here are some of the documents. For the grand majority of the documents, and in some of the cases here, there's a cover page which is the notation of the librarian and in other cases there's just notations with numbers and so on on the face page of the document, but I have the documents here and as we go through them I'm quite happy to pass them up to Your Lordship so you can peruse the document as we go through them.

The first point I'd like to emphasize, however, is the point that was made by Mr. Goldie at the beginning of his submission and I hope Your Lordship appreciates that informally between counsel it was understood that we would list as the documents that came into the possession or control of the plaintiffs, and that subsequent to that objections could be taken to relevance and to privilege.

THE COURT: All right.

MR. RUSH: And this is -- on the basis of that is why the privilege claims were subsequently made. So I want to first deal with document number 3326, the first document that's referred to in Mr. Goldie's notice of motion, and I have that document here.

THE COURT: Thank you.

MR. RUSH: And if Your Lordship turns to paragraph number six --
THE COURT: Six of?
MR. RUSH: -- of Mr. Grant's unfiled affidavit?
THE COURT: Yes.
MR. RUSH: Your Lordship will see that Mr. Grant deposes as follows:

> "Document 3326 is described in the plaintiff's list of documents as: 'August 7, 1984, Neil Sterritt, Neil J./Gitksan-Wet'suwet'en Tribal Council (letter) 1984 August 7, Gitksan-Wet'suwet'en Tribal Council, Hazelton, B.C., (2) Minister of Indian and...'
>
> In fact, this document is a letter between myself as legal counsel and Stuart Rush with respect to the litigation in question herein. Attached to our letter is a draft form of letter prepared by myself..." -- that is, Mr. Grant -- "...for review of Mr. Rush. That draft form of letter is addressed to the Minister of Indian and Northern Affairs from Mr. Sterritt. As document 3326 is correspondence between legal counsel for the plaintiffs in this action and relates to the matters in this action, privilege is claimed for them."

What the case is here, My Lord, is that the document in the list is misdescribed and what you see is in fact communication between counsel in respect of a matter that is in relation to the litigation, and there is annexed to that a document which is sought to be reviewed by one of the counsel. So in our submission it's a question of solicitor and client communication and communication between counsel which communication is a privileged communication and I'm not sure of the extent to which Your Lordship wishes reference.

MR. GOLDIE: I can save my friend that. The document is misdescribed, as my friend says. It implies or it suggests that there was an original letter sent to the Minister. I don't press for item 3326, but I would like to know if the original -- if there was a letter sent to the Minister, and if so, has it been produced?
THE COURT: Yes, I was going to ask Mr. Rush the same question. I would prefer not to read the correspondence between counsel if I can avoid doing so.

MR. RUSH: I would appreciate that as well.
THE COURT: Well, you have it here. I haven't uncovered the document itself and I was going to ask the same question. If there's a -- if as a result of your conferences with Mr. Grant by correspondence a draft was settled and sent to the Minister, then it seems to me that's the same question Mr. Goldie's just asked and that's a different question --
MR. GOLDIE: My Lord, if it turns out that these are -- they're really misdescriptions, then perhaps it would be useful too if we did indeed now have a brief adjournment so that I can go through this. It may well be that there's nothing here --
MR. RUSH: No, I don't think they're all misdescriptions. There are some misdescriptions. There is some flawed descriptions, but they're certainly not all misdescriptions and --
THE COURT: All right.
MR. RUSH: And unless you'd like to take a moment and just read the affidavit -- but I do believe there are contentious issues here so -- and that will become obvious.
THE COURT: Well, are you going to answer Mr. Goldie's question about whether there was a letter sent?
MR. RUSH: I can't say that there was or wasn't. I believe that there was. What I can't say is whether or not the letter isn't elsewhere disclosed in the document list. We can ascertain whether a letter was sent and if it was we can list it on the document list. My sense of it is that a letter was sent. Whether it's on the document list and whether it's available to my friends I can't say.
THE COURT: It wouldn't bear the date of August 7th presumably because that's the date of the exchange between counsel?
MR. RUSH: It would not bear the date of August 7th because the letter that is attached to the August 7th letter is a draft.
THE COURT: Well, would it suffice if I was to merely order that the letter referred to in this item to the Minister, if written and sent, be produced, if not already produced?
MR. GOLDIE: Yes. I think -- given the background of this, I think the onus is on the plaintiffs to properly identify the documents and in this case to inform us if there was a letter sent and I'm content with that order.

MR. RUSH: Well, My Lord, my preference would be that no order be made, but that we undertake to investigate whether or not such a letter was sent and we'll disclose this if it was. I don't -- it's completely speculation at this point.

THE COURT: All right. All right. Well, I think that's satisfactory and I will then return the document to Mr. Rush.

MR. RUSH: Now, My Lord, just carrying on with the chronological listing in Mr. Goldie's notice of motion -- 3328 I think has been disposed of --

THE COURT: Yes.

MR. RUSH: -- as has 3334. Both of those documents have been disclosed.

The next document which is in issue is 3335, and this is a document that pertains to an opinion, a draft opinion of one of the experts, and it's dealt with in paragraph number 7. And document 3335, as is deposed to in the affidavit, is entitled in the plaintiff's list of documents as "1986 Morrell, Mike Fishery Management Opinion". And this is a memorandum of one of the experts prepared for legal counsel for review prior to the preparation of the final opinion and forms part of the counsel's brief, and it is on that basis that privilege is claimed. And I -- again I have the document here for Your Lordship to review, but we stand on our claim for privilege in respect of a draft report by one of our experts for submission to counsel and it is a draft prior to the submission of the final report.

THE COURT: Well, what do you say the law is, Mr. Rush, with respect to that sort of document? If Mr. Morrell has produced an expert's report can he be required to produce drafts, or if he's called -- if not, if he's called as an expert, can he in cross-examination be required to produce his drafts? I confess to some fuzziness in my understanding of what the present state of the law is in that regard.

MR. RUSH: Well, I say those are two very distinct issues and one certainly is not for resolution today, that is, whether or not on cross-examination Mr. Morrell is required to produce drafts, but as to the law, I take the position that the draft report forms part of the counsel's brief and is submitted for the purposes of review and instruction to counsel and as such it is not disclosable for the reasons of privilege.

Now, I take support for that from the -- I have a

number of cases that I want to refer you to. The Susan Hosiery case, which is at Tab 1, and it's at the bottom of page 33 that I would ask you to turn to. Beginning with the paragraph "Turning to the 'lawyer's brief'..." -- I should perhaps begin somewhat earlier on that page about midway through. It's a sub-indented paragraph about which makes reference to "all papers and materials created or obtained specially for the lawyer's 'brief' for litigation, whether existing or contemplated, are privileged."

THE COURT: Yes.

MR. RUSH: And then at the bottom:

> "Turning to the 'lawyer's brief' rule, the reason for the rule is, obviously, that, under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were prepared. What would aid in determining the truth when presented in the matter contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system."
>
> And continuing into the next paragraph.
>
> "What is important to note about both of these rules is that they do not afford a privilege against the discovery of facts that are or may be relevant to the determination of the facts in issue. What is privileged is the communications or working papers that came into existence by reason of the desire to obtain a legal opinion or legal assistance in the one case and the materials created for the lawyer's brief in the other case."
>
> And it's my submission that on this authority that the report that is prepared by way of a draft for the

assistance of counsel for the production of an opinion that would be of assistance to the court is just the kind of document that is the contemplated material in the lawyer's brief upon which the lawyer makes his judgments.

Now, I'd ask you to refer as well to the Bombardier case at Tab 3. Again a decision of the Federal Court, this time Mr. Justice Cattanach, and I cite it only for the -- in this case there were a number of disputed memoranda, disputed in the sense that some claims to privilege were made in respect of documents which were disclosed but were said to be in counsel's brief. The pertinent part of this case is to be found at page 253 beginning there at the third to last paragraph.

> "During the course of his testimony counsel for Bombardier requested that the witness produce certain documents but counsel for the Director objected to that production.
>
> Basically those documents were the contract for services of Dr. Rosenbluth and 'as well as all subsequent letters, memoranda or notes relating to the subject of his terms of reference or mandate exchanged between them.'"

And then on page 254 there are listed items (a) to (i) which form part of the body of material in the lawyer's brief for which objection to production was taken on the basis of privilege. The Director was compelled to disclose items (b), (c), and (i) from that listing, but I ask you to turn to page 255 at the top. These are the comments of the trial judge:

> "On their face these documents appear to me to be privileged..." -- and he's here referring to (a), (b), and (i), the disputed ones -- "...as being material prepared for the purpose of litigation, either when contemplated or in existence and that is not limited to communications between the client and his lawyer but extends to communications from third parties which are to be used by counsel in preparing the case for him, the classic example of which is written opinions of experts who have been asked to formulate an opinion on given facts."

And I say, My Lord, that that applies to the draft written opinions or drafts or comments or exchanges of communication between counsel and experts. And I should go on to say that the decision of the learned trial judge was reached on page 261 and it's interesting -- I should point out at the bottom of page 260 it is interesting that the learned trial judge notes that:

> "Counsel agreed, and I join in their agreement, that all documents listed in the letter of April 24th, 1980, itemized as (a) to (i) are privileged including items (b) (c) and (i) which the Commission ordered produced in its letter dated May 1, 1980."

MR. GOLDIE: Well, My Lord, I'm not challenging that law. What my concern was was we never got an adequate description of the claim for privilege and that's made very clear in the correspondence. If my friend had ever told me that this was a draft of Mr. Morrell's opinion which was going to be placed in evidence, I wouldn't be pressing that.

MR. RUSH: Well, I'm grateful to my friend for that, and I accept your point that we may have been somewhat less than fully explanatory. We maybe have been remiss in this, but this is what this document is about and it's in relation to one or two of the other documents there.

THE COURT: Well, I don't have any doubt at all about the law. What my -- Mr. Goldie's partner Mr. Steves always referred to as solicitor's privilege as opposed to solicitor and client's privilege, and the documents the solicitor has are obtained -- were treated for the purpose of litigation and --

MR. GOLDIE: I certainly didn't ever want to introduce the subtleties that seem to plague the American system of solicitor work product and things of that order. If my friend -- if the description which now appears in this affidavit had been given me, this application would not have been made.

THE COURT: All right.

MR. RUSH: Now, My Lord, if I may just move to the next document on the notice of motion, this is the Moricetown Fishery report. It is document 3339. Now, the reference I direct you to is at paragraph 8 of Mr. Grant's affidavit:

"This document 3339 is entitled: '1986, Jim Victor, Moricetown Fishery Report: Summer 1986.'"

And Mr. Grant deposes to the fact that:

"In June 1986, I was instructed by the Moricetown Band to assist in the preparation of a defence against an ex parte injunction against a fisheries by-law prepared by the Moricetown Band. Victor Jim..." -- who's a member of the band council -- "...instructed me on behalf of the Moricetown Band and provided me with information which was formed part of an affidavit sworn by Victor Jim in June, 1986. In the course of the preparation of that affidavit, I was advised by Victor Jim that a questionnaire had been prepared by the Moricetown Band in order to implement a 1986 fishery by-law. I requested Victor Jim to provide me with a report of the results of that questionnaire. He requested permission to distribute that report to members of the Moricetown Band so that he could confirm the results of the report and also to write the report in a manner in which it could be used to stimulate discussion amongst the Moricetown Band members. I agreed that he could do this so long as the report was solely disclosed to Moricetown Band members who were my clients for further discussion.

Document 3339 is the copy of the report prepared by Victor Jim at my request. I required that report for the preparation of a case on behalf of the Moricetown Band in the Attorney General of British Columbia v. Wale et al. which case is still before this court." It should not -- well, yes, it is before this court at the trial level, but is before the Supreme Court of Canada in terms of interlocutory proceedings. "I intend to claim privilege with respect to document 3339 in Attorney General of British Columbia v. Wale on the basis that it was a report prepared at the request of counsel."

Now, I have that -- again, My Lord, I have that document here for you to peruse. In my submission, although not prepared in respect of this litigation, it was prepared in respect of extant litigation

between the Attorney General of British Columbia and four bands and their members in respect of the application of certain fisheries by-laws to waters adjacent to their rivers. In my submission this too is a document which forms part of counsel's brief and for which there is a just claim for privilege, and although I didn't fully canvass the authorities to which I had referred Your Lordship, but I do rely again on the cases of Susan Hosier, Bombardier, and the Voth case, which is at tabulation 5 of my brief of authorities.

THE COURT: All right.

MR. RUSH: Now, if I can direct Your Lordship's attention to document number 3342, this is described in paragraph nine of Mr. Grant's affidavit as "April, 1986, Hatler, David F. History and Zoogeography of some selected mammals in Northern British Columbia." This, like the draft report of Mr. Morrell's, is a draft of an expert report of Dr. Hatler which was prepared for the review of plaintiff's counsel in this action and since the production of this list the final report of Professor Hatler has been produced and tendered to counsel for the defendants as this draft was prepared on the instructions of counsel it forms part of counsel's brief in this action.

And I make the same submission in respect of Dr. Hatler's draft report as I did in respect of Mr. Morrell's.

Now, the next grouping of documents, if I may put it that way, are -- there is 1897, 1898 and 1900. And I -- these documents I do not have here. I requested maps from our library and the wrong maps were sent to me. What I can say, however, My Lord, is that these are described as -- generally, as the external boundaries of external territories with markings there. Paragraph number 5 is the paragraph in which Mr. Grant refers to these documents, and he deposes to this:

> "From a review of these documents and from my knowledge as counsel in this case, all three documents were prepared for legal counsel and form part of counsel's brief. These documents are all draft maps which were marked by researchers for the assistance of legal counsel in the preparation of this case. For example, I specifically requested a map of Gitksan and Wet'suwet'en

territories which included the territory of Kitwancool for my own preparation of this case."

Regrettably these maps aren't here for you to see, and of course I would like you to have been able to see them and if it -- if you're not persuaded by the deposition, then Your Lordship will have to adjourn this portion of the case, if you would, so that you can review these maps. I simply got the wrong tube. In any event, our submission in essence is similar to that made in respect of Mr. Morrell's reports, that counsel requested draft maps to be prepared for counsel's use in respect of the determination of the boundaries and features of the Gitksan and Wet'suwet'en territories. These are part of those draft maps and they are maps that were prepared by one of the people, Marvin George, that we have indicated to our friends we intend to call as an expert cartographer and so it is for this reason that we say that these maps too are part of our brief and in our submission ought not to be disclosed.

Mr. Grant advises me further that there are markings on these maps which were made by other experts who -- for the assistance of counsel, advisors and experts who may not be called at trial.

Now, if I may address --

MR. GOLDIE: Excuse me, is Marvin George the author of all three of them?

MR. RUSH: Yes. Mr. Grant advises me to be more specific in this. Mr. George is the author of the base map of each of these but not the markings on all of them.

THE COURT: Yes.

MR. RUSH: Now, if I may direct you to document 3169 next in line on this notice of motion, Mr. Grant deposes in paragraph 4 of his affidavit that a document numbered 3169 is described in the list of documents as:

"February 8, 1979, Gitksan-Wet'suwet'en Tribal Council trapping and hunting grounds, concerns and recommendations.

This document is a copy of a brief for a meeting in which I participated as legal counsel and advised certain Gitksan and Wet'suwet'en Chiefs as well as representatives of the Gitksan and Wet'suwet'en Tribal Council with respect to possible legal remedies of concerns regarding trapping and hunting grounds. The minutes

concluded with recommendations which were made to me as legal counsel. In February, 1979, I was the lawyer at U.S.C.L.A.S...." -- which is the Upper Skeena Community Legal Assistance Society under an associate body with the Legal Services Society of the province -- "...and references in the document to U.S.C.L.A.S. are references to recommendations made to myself. At the time of this meeting, litigation was contemplated by my clients specifically with respect to the hunting and trapping grounds and that was part of the reason for the meeting. Privilege is claimed on the basis that document 3169 includes legal advice and instructions to legal counsel to such a degree that those sections of document 3169 cannot be..." -- I think he means "...excised. Appendix "B" to document 3169 has already been disclosed to the defendants and is separately listed as 1707 on the plaintiff's list of documents."

Now, in my submission privilege is claimed here on the dominant purpose theory, if I may put it that way, that the dominant purpose for which the communication was generated was the purpose of -- was the contemplation of litigation in respect of hunting and trapping grounds.

THE COURT: I'm not sure from this who prepared the document.

MR. RUSH: It is one of -- it's not clear from the document either I can tell you, but one of the persons that participated in the meeting, there were a number of Gitksan and Wet'suwet'en chiefs and their advisors were present at this meeting. I have the document here for you if you would like to peruse it.

THE COURT: I take it from this that this is not a brief prepared by Mr. Grant for a meeting?

MR. RUSH: That's right.

THE COURT: But it seems to be a document, if I'm reading this right, it's a document that was prepared something in the nature of minutes, recording of recommendations made?

MR. RUSH: That's right. It is a summary of the meeting and what occurred at the meeting and instructions to counsel. It is a communication of the participants of that meeting to counsel instructing further action to be taken by him.

THE COURT: And recommendations to be made?

MR. RUSH: And recommendations to be made for further legal

action. And I say that this is not in the -- if I may use the Susan Hosier division of solicitor and client communication and lawyer's brief -- this, in my submission, falls into the category of solicitor-client communication and here there were directions given by the persons attendant at that meeting to Mr. Grant as counsel, as attending counsel, to take further action. And I say that there's little difference between that and the presence of a client in the lawyer's office giving instructions to a solicitor to take further steps on his behalf, and it matters little it seems to me whether it is committed to writing or the instructions were taken verbally.

Now, My Lord, if I may direct you to the next document in this list which is at 1783, this is dealt with in Mr. Grant's affidavit at paragraph 11.

> "Document 1783 is listed as: 'September 4, 1980, Neil J. Sterritt to Mr. T.F. Glynn re: Promissory note.'.
>
> This document is correspondence to Mr. Glynn of the Office of Native Claims with respect to the agreement referred to in paragraph 10 of this affidavit. It was inadvertently included in the list of documents and bears no relevance to this action. The first defendant would not normally have access to this document as it concerns a private agreement between the Gitksan-Carrier Tribal Council Association and the government of Canada. Neither this document nor document 1722 shall be referred to or relied on in any way by the plaintiffs and bears no relevance to the lis between the parties herein."

For matters of clarification this is not a claim to privilege, this is a claim to say that this is a document that lacks relevance in the lists of the litigation between the parties. It is, in effect, correspondence between Mr. Sterritt on behalf of the Tribal Council and the Office of Native Claims with regard to the funding of the activities of the Tribal Council and the Gitksan and Wet'suwet'en Chiefs. And in my submission it is not a document that we are obliged to disclose and it ought not to be disclosed at this time. Again I have that document for you to look at if you wish.

With respect to the next document, which is 1778,

that is dealt with at paragraph 10.
THE COURT: Mr. Goldie said it was agreed that it had been produced.
MR. RUSH: Yes, that's right. You're quite right about that, 1722, that's correct. This is dealt with at paragraph 10. It's listed as:

> "'July 31, 1979, Neil J. Sterritt to Mr. T. F. Glynn D.I.A. re: G.C.T.C. Activity Report.'
> This document is correspondence to the Office of Native Claims of the government of Canada regarding funding by the Gitksan-Carrier Tribal Council. This document was inadvertently listed on the plaintiffs' list of documents and is not at all relevant to the case at bar. Furthermore, the first defendant would not normally have access to this document as it concerns a private agreement between the Gitksan-Carrier Tribal Council Association and the government of Canada."

And it bears no relation to the litigation between the parties. It in fact deals with the funding of the Tribal Council, and in my submission it's -- my friends are no more entitled to documents of that order than I'm entitled to documents of the provincial government as to how the provincial government is funded in respect of its activities.
Now, I think that deals with all of the disputed documents. I'd like to turn to the second category of matters.
THE COURT: Unfortunately, Mr. Rush, I have to deal with a matter about getting what I understand is a Bill 19 application heard sometime today, so can we take just a very short adjournment here, please?
MR. RUSH: Thank you.
THE REGISTRAR: Order in chambers, chambers stands to recess.
(PROCEEDINGS ADJOURNED FOR A SHORT RECESS)

(PROCEEDINGS RECONVENED PURSUANT TO ADJOURNMENT)
THE REGISTRAR: Order in chambers.
THE COURT: Could I interrupt you for a moment, Mr. Rush, to say to Mr. Goldie in connection with the application you and Mr. Giles made this morning to move that trial, I never thought to ask you about other parties.
MR. GOLDIE: Oh, we've canvassed them.
THE COURT: They've been covered?
MR. GOLDIE: Yes. I think there's only one --

THE COURT: So they all know --
MR. GOLDIE: -- who had not advised us, and without disparaging its importance, it's right at the tail end.
THE COURT: All right. Well, I was just giving instructions to the Registry and I thought are there third parties or something.
MR. GOLDIE: There are a number of third parties and I should have mentioned that to Your Lordship.
THE COURT: Fine, thank you. Thank you, Mr. Rush.
MR. RUSH: The final matter to be dealt with is the second part of Mr. Goldie's application dealing with the disclosure of certain documents pertaining to the All-Clan's Feast of April 4th and 5th of 1987. I can advise Your Lordship that we are not pressing our claim for privilege as a general claim to privilege in respect of these documents. I say that there were certain persons in attendance at that meeting who were there on instructions of counsel and we have not canvassed with them whether they have any information to communicate to us or not, but should there be such documents, we may well claim privilege in respect of that, but I told my friend that we are canvassing with others, who we believe were present at the meeting, to find out if there were other documents, photographic documents or notes taken, and should we find that those documents are available and in the possession and control of our clients, which is about something we can't say for certain, we will disclose those on the list. The short of it is that we withdraw our general claim to privileges indicated in my letter to Mr. Goldie.
THE COURT: All right. Thank you. Mr. Goldie, I'm sorry, I should hear from your learned friends.
MS. KOENIGSBERG: We have nothing to add.
THE COURT: Thank you.
MR. GOLDIE: My Lord, I think, as Your Lordship gathered, if I had been aware of the nature of the claims I would not have raised these at all, some of them anyway. The only document that I would ask Your Lordship to look at is that described in paragraph four of Mr. Grant's affidavit.
THE COURT: 3169?
MR. GOLDIE: 3169. The reason I ask Your Lordship to look at it is that if in the minutes, for instance, of a director's meeting that are otherwise relevant, a statement is made and the lawyer should look into this, that doesn't immunize the document as a whole or

even that particular statement. And if this is -- if the nature of the minutes in their general context is relevant to the issues at bar, and I'm assuming that's the case, then I ask Your Lordship to consider whether it -- its overall flavour is an instruction to the lawyers in which case the question of dominant purpose is not truly relevant, it's really whether the communication taken reasonably is a solicitor-client communication. So that is one that I would ask Your Lordship to --

THE COURT: Well, my problem with that, Mr. Goldie, is that if I concluded that Mr. Rush's position is sound and that it is indeed a -- that the dominant purpose of the meeting was to give legal advice and it includes counsel's recommendations on a course of action and instructions from the client to proceed, I'm not sure as trial judge I'd want to see that.

MR. GOLDIE: Well, I'm not so much troubled by that because the statement is made in Mr. Grant's affidavit that the legal remedies are not in relation to this action at all. He says "...with respect to possible legal remedies of concerns regarding trapping and hunting grounds." I don't take that to be instructions with respect to this action, so that I don't think there is a possible ground of embarrassment for Your Lordship.

THE COURT: Well, it was a meeting of the plaintiffs in this action or their Tribal Council and "...with respect to possible legal remedies regarding trapping and hunting.", it may be that it was legal remedies outside the confine of this lawsuit, I don't know.

MR. GOLDIE: I would say that when I brought this motion on and I asked my friends to have the documents present I had in mind that Mr. Justice Macdonald did this in the Northern Power case, which involved a great many documents, and both parties were content to have as an expeditious way of determining it, and if His Lordship said I -- that's privileged, the trial took so long that anything -- any residual impression that was left in his mind was long removed.

THE COURT: Yes.

MR. GOLDIE: But when I read this affidavit, the question is left in my mind whether taken as a whole the documents can be immunized by virtue of the references to the solicitors.

THE COURT: What is your position now, Mr. Goldie, with respect to the other matters?

MR. GOLDIE: Well, I'd say only this, My Lord. I take my

friend's statement that documents which arose as a result of the All Clan Feast will be listed or we will be notified of them.

THE COURT: Right.

MR. GOLDIE: If my friend claims privilege with respect to some aspect of them, I would like nevertheless that it be listed in the claim made because I'm by no means convinced at this point that if somebody goes to a meeting at which there are strangers and takes down notes that that becomes part of the work product or part of counsel's brief.

THE COURT: Yes, all right.

MR. GOLDIE: I should say also that there appear to be other -- there appear to be other feasts that we may not be aware of at this time, and I make reference to Mr. Macaulay's affidavit and a motion brought by the -- I'm sorry, a motion with respect to interrogatories and Mr. Macaulay annexes or exhibits the interrogatories that he wishes and some of the answers and the one question was "Describe the last ten feasts that have occurred in the claim area involving any of the named plaintiffs which involved a purpose other than the passing of a name?" And the answer makes reference to "All Clan Feast of the Wet'suwet'en on February 1987, Moricetown re: Settlement of boundary claim with the Carrier-Sekani." If that is not the -- that appears to have occurred in February and the one that I was writing my friend about was with respect to April and I would like my friend's assurance that as to that one, as well as to the April one, the same -- the same searches would be made.

THE COURT: But are you now -- apart from the All Clan's Feast, are you pressing for production of any other documents except this one that doubles in paragraph four of Mr. Grant's affidavit?

MR. GOLDIE: The only other one about which there is a question is referred to in paragraph eight of Mr. Grant's affidavit. That's 3339.

THE COURT: Yes.

MR. GOLDIE: The difficulty is that there appear to be a number of documents lying below the simple description of Moricetown Fishery report, summer 1986.

THE COURT: Yes.

MR. GOLDIE: One of them is a questionnaire, another appear to be the questions -- the answers to the questionnaire, and finally there is Mr. Victor Jim's report in respect of which the privilege is claimed. Accepting

for the moment that the final document is -- bears the characterization that my friend has given it, I would like to see the documents that are -- precede this report.

THE COURT: The questionnaire?

MR. GOLDIE: The questionnaire and the answers to the questionnaire.

THE COURT: All right.

MR. GOLDIE: I should make comment about the documents 10 and 11 -- I mean the documents referred to in paragraphs 10 and 11. These are apparently related to funding. My Lord, I'm not going to ask for the document's production, but in my submission they are properly listed and for which no privilege can be claimed. This is no privilege arising out of a private piece of correspondence between A and B to which, without litigation, C is not entitled to receive. That's a claim of confidentiality or something of that order.

THE COURT: But it's also a claim in this context arising out of relevance, is it not?

MR. GOLDIE: Well, I don't know whether it's going to be relevant. If the proposition is that the issue of funding can never be relevant, I'd like to reserve my position on that point. I'm not going to call for their production. My submission is the documents should remain properly in the list at this time because I see no claim for privilege arising out of the submissions made.

THE COURT: Isn't that the awkwardness, that if you list something that isn't relevant then because there's no claim to privilege you've got to produce it?

MR. GOLDIE: If called upon.

THE COURT: You hadn't listed it, and it didn't have to be listed, then there would be no obligation to produce it that seems to be the --

MR. GOLDIE: Well, when I say I'm not going to call for the production because as far as I'm concerned at this point I've got no interest in that. What I want to avoid being fixed with is the proposition that anything relating to funding is either automatically privileged or irrelevant. It may become -- at some aspect of this trial, the issue of funding may become of relevance, but --

THE COURT: But I suppose if somebody said in a report "We have no case, but we want funding anyways.", just to give you an example, even then I'm not sure that that would be relevant because then who's making the statement,

the person making the statement may not be aware of all the facts.

MR. GOLDIE: Well, I'll give Your Lordship one other example which may be a little closer to the mark in this case. The province has a counter-claim which asserts that the second defendant is liable if the province is found liable. There may be admissions with respect to the final responsibility of the government of Canada for these claims in that kind of thing, but I -- my submission at this time is limited to the proposition that there is no privilege and the documents are there and if they come to be called for there may be a fight over relevance, but --

THE COURT: All right.

MR. GOLDIE: -- that's my position at this point.

THE COURT: All right. Thank you. Well, I don't think I need to hear you, Mr. Rush. I'm going to try and dispose of this now, but if there's something that hangs over residually, well, then I'll hear you again on it. Having said that I've just changed my mind. I do need to hear you Mr. Grant on the question of questionnaires. Why should the questionnaires not be produced?

MR. RUSH: We don't have any problem with that.

THE COURT: All right. Well, then I'm going to make no order with respect to documents 3326 and 3335, I don't think they're producible. 3339 I'm going to direct that the underlying documents such as the questionnaire and any others in the same category should be listed and produced. I don't think document 3342, on the basis of the information in Mr. Grant's affidavit, is producible. The same applies to 1897, 1898 and 1900. I'm going to come back to 3169.

With regard to 1783 and 1822, I'm not going to presume on this application to determine the question of whether funding could ever be relevant, but on the description that I had been given with respect to document 1783 and 1722 I'm not going to order that they be produced.

With respect to the All Clan Feast I accept Mr. Rush's assurance that he will search out and list documents that relate to the All Clans Feast held in April of this year and I will leave it to him to advance a proper claim for privilege, if any, with respect to those documents. And it seems to me that other feasts of the same category should also be or should similarily be researched and documents

disclosed with or without a claim for privilege.

That leaves only this question of looking at this document 3169. I'm reluctant to do that. I want to look at as little as possible at documents that might be privileged. I recognize a precedent made by Mr. Justice Macdonald in the Moricetown case, but that was a commercial case without the overtones that -- well, perhaps Mr. Goldie doesn't remember it that way, but it was a commercial case and this is more than a commercial case and I think it's more important that I should not look at a document for which it's said that it contains instructions to counsel and recommendations of counsel, even if it's with relation to another subspecies of litigation. It's within the same general description of the action that -- or within the same classification of action as this one and for that reason I don't want to look at it. If you want to pursue it, Mr. Goldie, I think I'd like to have some other judge hear the matter and I would refer your application regarding 3169 to another judge. I don't think today's a very good day to hear it though.

MR. GOLDIE: Well, Your Lordship will appreciate that this was one of a substantial number. It's the only one left and we wish to consider whether it's worth pursuing.

THE COURT: Well, I think if you want to pursue that one I will be glad to assist you in arranging for some other judge to hear it without waiting for chambers on any date convenient to counsel in this case. I think that disposes of all the matters in the application.

What is the other application? It's yours, Miss Koenigsberg?

MS. KOENIGSBERG: That's correct, production of documents application.

THE COURT: All right. Who's involved in that application, just Mr. Grant and Mr. Rush or is Mr. Goldie and his group involved in that as well?

MS. KOENIGSBERG: Well, some of it I suppose may be of interest to them, but they're not directly involved.

MR. GOLDIE: If Your Lordship is going to be kind enough to excuse us then --

THE COURT: Well, that's why I raised it, yes, I don't think it's necessary for you to stay, but before you do leave there is a problem. I want to play the role of the judicial busybody for a moment, now that I have you all here, and to throw out for your consideration a question I have that -- for which there may be a

very simple answer, and I don't require it or expect anyone to give an answer today, but I want to explain to counsel this question I have in my mind.

I think it's something that I might address to you, Mr. Rush, as a question that you can take as notice, and that is simply, why is it necessary for the plaintiffs in this case at this trial to prove by evidence the internal boundaries? I'm assuming at the moment that the plaintiffs are agreed or can resolve any conflicts amongst themselves regarding internal boundaries. What I had in mind is a series of possibilities such as if the plaintiffs win they could either resolve their internal boundaries themselves or they -- those boundaries could be litigated separately as between the plaintiffs, but -- and I don't say this in any critical sense at all, but I assume that there isn't a conflict between the plaintiffs on internal boundaries, or maybe there is and everyone's been agreed that they'll be represented by the same counsel, but if the plaintiffs were to win and the action is one, as presently stated, for aboriginal title and jurisdiction, it is a question in my mind why it's necessary for the plaintiffs to prove the internal boundaries.

I concede that the plaintiffs would want to show an attachment, an association, use and occupation and all those things with territory, but I'm wondering if it's necessary that they show that association in the detail required to prove the internal boundaries. Alternatively, if the plaintiffs were not to succeed, then it still wouldn't be necessary, it seems to me, but if they should not succeed on the question of ownership and jurisdiction, then it seems to me it wouldn't be necessary in that event to prove the internal boundaries.

And so I'm throwing out to counsel this question invented by necessity, or desperation perhaps, is really is it necessary that you prove the internal boundaries or could that question be conveniently and without prejudice to anyone left to subsequent judicial treatment if required. I don't know if anybody wants to even respond to that at the moment, but it's been running through my head for the last week or so and I thought I'd expose my failure to understand some of the subtleties to counsel for whatever assistance they can give me.

MR. RUSH: Well, I would prefer to take this as a notice of

inquiry.
THE COURT: Yes.
MR. RUSH: And if Your Lordship would allow us we'll consider answering in due course. I should say that it also is included within a question Your Lordship posed about the character of the claim as being joint or several.
THE COURT: Right.
MR. RUSH: And we've been looking at that as well. We, of course, were interested in further illuminating the process by our answer so I would prefer to leave it on that basis.
THE COURT: I'm happy with that and if you think that there would be a useful purpose in having a discussion about that, the question I just posed or the other one, between now and the resumption of the trial, I'd be glad to accommodate counsel and we could deal with it, but it is a matter that I would like to have counsel consider and see if it is necessary that that very difficult in detail kind of evidence is really necessary. I'll say no more than that at the moment and we can hear further from counsel in that regard.
MR. GOLDIE: My Lord, your reference to the resumption of trial reminds me that notice has been given of an application for leave to appeal from the direction that the trial resume in Vancouver on September 8th.
THE COURT: What sort of leave is required -- oh, I'm sorry, you mean leave to the Court of Appeal?
MR. GOLDIE: That's correct.
THE COURT: All right.
MR. GOLDIE: I'm assuming, and I will -- I ask my friends to comment if the contrary is the case that the trial will commence -- resume in Vancouver on September 8th and Mr. Alfred Joseph will be on the stand to complete his evidence and be subject to cross-examination, and that on the basis of our present information he would be followed by a witness of whom we have been given notice, I think it's Madeline Alfred. Beyond that there had been no indication, but there are some directions with respect to that.
THE COURT: All right.
MR. GOLDIE: And that's our -- that's the basis upon which we're proceeding at this time.
THE COURT: Are you able to respond to that, Mr. Rush?
MR. RUSH: I can say little more than that our instructions have -- are unchanged in respect of the continuation of the trial and resumption of the trial and it's present date, although, as I indicated yesterday, that

I think with the filing of the leave application with the Court of Appeal that my clients may view that that has certain implications in terms of the resumption of the trial, but I can advise Your Lordship that we have no present instructions to change the present course, although again I say that that too is a matter of consideration of the plaintiffs. They're obviously considering their position all the time.

THE COURT: Well, I can just say that I'm expecting to resume the trial on -- what was the date?

MR. GOLDIE: September 8th.

THE COURT: September 7th. If somebody wants to change that I have no doubt they'll take such steps as may be necessary to bring that on.

MR. RUSH: The second part of my friend's question, as I took it, was the question of the resumption of Mr. Joseph's examination and I told him yesterday, and I will advise the court now, that it's our intention on the resumption of the trial to continue with the direct examination of Mr. Joseph, which will not be lengthy, and the cross-examination.

THE COURT: All right.

MR. GOLDIE: My only comment, My Lord, is that when we were here last on July the 17th and my friend outlined the changes that he is having regard to, my comment was that I had no comment until the necessary motions were made in which we would be given specifics of those who would be examined on commission and those whose evidence would be forthcoming on affidavit, and I simply repeat what I said at that time that the sooner we have those applications, the better we'll be able to deal with them.

THE COURT: Well, as I said before, I will be basically be here for the month of August and can be -- I can be brought here on short notice. If counsel find the need, I'll be glad to see them. All right. Thank you. We'll proceed with Miss Koenigsberg's application then and you're excused Mr. Goldie if you wish.

MR. GOLDIE: Thank you, My Lord.

THE COURT: Not that, as I have said many times, I don't think it's the court's right to require counsel to stay if their clients don't think there's any need for them to be here.

MS. KOENIGSBERG: My Lord, the material that I think you can have regard to is the notice of motion and Mr. Macaulay's affidavit. This was filed on July 13th and on July 17th my friend filed an affidavit in response

and I just want to deal with part of that.
THE COURT: Well, I have to tell you that we're having a terrible time collecting together all the various bits and pieces of paper and I don't have your --
MS. KOENIGSBERG: My friend has given me another copy of Mr. Adams' -- and I'm sorry I don't have another copy of my notice of motion, but I'm going to abbreviate it in any event so I don't anticipate you'll have much difficulty.

I would preface my motion with two background points. The object of what I'm going to refer to as our omnibus production of documents motion, which is before you now, is to attempt to obtain documents already in existence, and I want to be very clear that we do not intend with this motion to attempt to get orders for documents to be created faster, only those which are in existence. And the object of it --
THE COURT: The documents are already in existence, but not yet produced?
MS. KOENIGSBERG: That's right. And documents -- and the purpose, in our view, is to attempt to obtain these documents before witnesses are called.
THE COURT: Before any more witnesses are called?
MS. KOENIGSBERG: Yes. In our material, which you don't have and so I'll just refer you to it in Mr. Macaulay's affidavit, he simply deposes to that which I believe Your Lordship is already familiar, that there was a difficulty at trial, and it's listed in paragraph two and three the instances in which either during examination in chief, and I believe in at least one instance during cross-examination, material involving either maps or interviews with witnesses became available only at that late date. It's because of that that we seek production now and in this form.

Now, in the motion we've asked for all the things in our submission we would be entitled to in any event, but I would like really only to deal with those documents, specifically interviews, which certain of the experts make reference and which we understand are in existence. Now, in my friend's affidavit, the one that I've handed up to you, it's an affidavit of Murray Adams, he has deposed that -- sort of seriatim -- that certain documents would be available by last week or today and that certain other documents would be available hopefully by the end of August, I believe in most instances, and in one instance 60 days before the witness is called.

I want to deal with these things in categories. In paragraph -- first the ones that should be produced or were said to be available and would be produced either before today or today. Paragraph 11 is the first of those and that is a document from Wilson Duff which is on the plaintiff's list of documents and it is -- it's said that it would be available July 24th, 1987. Now, I can tell Your Lordship that Mr. Grant has advised me today that they're looking for it.

Again, paragraph 16, there's no time limit on this one, but this deals with documents relied upon by Barbara Lane, which have been listed, and in this affidavit are said to be available. Some of them are available, some of them are not.

THE COURT: When you say "not available", you mean you haven't been able to get them?

MS. KOENIGSBERG: That's right. The plaintiffs can't locate them or haven't been able to get them to make them available to us. I'm advised that we now have been -- now available to us are some of the documents on those lists, some of them are not available to us and I assume Mr. Grant, and I want to put that to this category of things which I would like an order for in the fairly near future.

Paragraph 17, appendices to Susan Marsden's report, were said to be available by the end of July. Paragraph 18, interview notes of Antonia Mills were said that they would be available by the end of July. No doubt some of these things are more likely to appear sooner than others. In our submission there's only one recourse that we have to push up the list of authorities of these things on the list of priorities and that is to ask for an order that they be produced and made available by August 6th. That gives my friend one more week to get them together. I ask for that order because --

THE COURT: Are you saying August 6th for everything up to and including paragraph 18th?

MS. KOENIGSBERG: Everything said to have been available already or by the end of July.

THE COURT: Yes.

MS. KOENIGSBERG: And I just come back to the point that the trial date is to be resumed September 8th and I don't know of any other way to be sure that we have some chance of getting this material so that we can properly prepare.

Now, there's the other category of things. In

paragraph 10, Mr. Brody's material is referred to and it's said that it will be available by the end of August. Mr. Daly, in paragraph 12, his material is said to be available by the end of August, and Miss Harris' material, that's the genealogical charts, a particular form of them, which is referred to in paragraph 15, and we have received some of the material. I assume that we have received all of that which is referred to as being available by July 16th because we did receive some. The genealogical charts are said to be available four weeks after the plaintiffs receive funding for it and I don't know what category to put that in, but dealing with those things which were said --

THE COURT: Excuse me, Miss Koenigsberg. Sorry, Miss Koenigsberg.

MS. KOENIGSBERG: Okay. Dealing then just with Mr. Brody's material which is said to be hopefully available August 30th, and Mr. Daly's material which is said to be hopefully available August the 30th, I would ask for an order that it be made available by August 30th. The balance of the material referred to, I believe counsel can hopefully deal with. If we can't, then we can deal with it later.

THE COURT: Well, the balance -- the only one I know of in the balance is the four weeks for Heather Harris.

MS. KOENIGSBERG: Well, there's Marvin George.

THE COURT: Where do I find that?

MS. KOENIGSBERG: Sorry, it's really a different category of things. It's paragraph 14 and they say that we'll receive those maps 60 days before Mr. George testifies and I think we simply have to deal with whether there are any interviews and I will deal with my friend on that.

THE COURT: All right.

MS. KOENIGSBERG: And the same for Mr. -- I believe we probably received everything from Neil Sterritt, but I just -- I'll again deal with that. That's paragraph 21.

THE COURT: Yes, all right.

MS. KOENIGSBERG: So the balance I believe we can deal with without an order and I would ask that you make the order in the circumstances that we've been before you numerous times and my friends no doubt are making efforts, but somehow orders have a tendency to make those efforts a little more efficient or productive.

THE COURT: I think Miss Russell wants to speak to you.

MS. KOENIGSBERG: Thank you.

THE COURT: Thank you. Mr. Rush or Mr. Grant?
MR. RUSH: My Lord, I address you again on this subject. Mr. Adams' affidavit I think canvasses what we say to be the history of the question of the applications for production of documents. Our general submission is this, that when in the course of the trial a proposal was made by Mr. Goldie that there be 60 days prior notice of the production of an expert report agreed to by Mr. Macaulay, I would point out that that in fact was sufficient prior notice to insulate the defendants in this case from surprise at the further production of the final reports of those experts. And in my submission it should be sufficient in the -- in respect of the defendant's concerns that they have the reports, together with the appended references and the additional footnotes, whatever else comes in with these final reports, within that time frame.

What we've tried to do, however, is to give -- despite that, is to give my learned friends an indication of when they could expect to receive this. Now I, in my submission, see no point whatsoever in making an order of the kind that my friend has indicated. We've basically worked on the best efforts principle and I can see that in some cases it hasn't worked to the -- in the best possible way and in other cases I say that it has. In my submission there's no point in making an order at this juncture when we've tried to commit ourselves to a schedule within which these documents and notes are going to be produced.

Most of the information that is required by my learned friend, that is, in respect of Barbara Lane, Miss Marsden, and I think Mr. Daly and Mr. Brody, these are expert reports, the final version of which has not been prepared. We do not have the final report. Summaries for the most part have been delivered. We feel that the present order as it stands now permitting the -- or requiring the plaintiffs to deliver the reports within 60 days of use is sufficient notice to my learned friends. Having said that, however, we want to -- and we've been advised that reports such as the form of the appendices will be available.

Now, I can tell Your Lordship that with respect -- if I can just deal with these items one by one because if they need to be dealt with individually I can address them individually. The Wilson Duff document, we're looking for it. Both Mr. Grant and I have seen

the document, it's putting our hands on the document. We have no problem in delivering it to my friends as soon as we have it. It's a short letter. I can advise my friend it's a short letter which, as far as I can see, would have no bearing on anything that's going to come up in the trial in the next ensuing period of the trial and I'm sure that they will see that when they see the letter. However, they're entitled to the letter and we want to get it to them as soon as we can. We've asked our librarian to try to locate it for us.

So far as Barbara Lane's documents go, we have listed all of her documents and to my knowledge they had been produce to us and listed upon production on our document list. If that is not so, then we will certainly obtain the ones that we do not have in our physical possession, whether it's because they did not find their way to our library or whether Dr. Lane was unable to give us copies. I don't know what the glitch is there, but it had been my impression they were produced to our librarian, they were listed, and were available. Now, if there's a problem we'll certainly try to find out what that is.

In terms of Susan Marsden's report, yes, we've said we want to produce her appendices by the end of July. It's not yet the end of July. We're very close to it, I concede, and I'm hoping that mountains will be moved to produce this document by the end of the day, but My Lord, I know that Miss Marsden when we canvassed this subject with Mr. Overstall, who's endeavouring to co-ordinate this for us, gave that as her deadline for the production of those appendices. We would like them and --

THE COURT: What is her specialty?

MR. RUSH: She's an anthropologist, a Gitksan anthropologist. And so we would, of course, like those -- to obtain those documents as well and expected them at the end of today's date. We don't -- I'm unable to advise Your Lordship as to what the current status is. The status that we were aware of is indicated in Mr. Adams' affidavit.

I see no purpose in making an order of the kind that my friend has indicated. We've tried to committ ourselves to a deadline. I would ask that you not make an order in that respect. It would serve no useful purpose, if for some reason through illness or whatever, Miss Marsden was unable to produce the

balance of her appendices.

In terms of paragraph 18 of Mr. Adams' affidavit, my friend is asking for the Antonia Mills notes and I indicated that these would be available by the end of July. I can tell Your Lordship that I have the notes. I've reviewed them. I'm in the process of reviewing them, and I'm trying to get them fully reviewed before I pass them over to my friends. I had expected, it is true, to have them by the end of today's date. Again, I'm using my best efforts to get them done. I hope to have them ready for her next week.

So far as Mr. Brody's notes, Mr. Daly's notes, the information that we were given by both of these experts, both of whom are out of the country, was that they would be able to produce their material -- their reports at the end of August, and I take it that they would be able to produce all of the notes and references which they have made in their reports. I see no reason why that would not be forthcoming. I say that it would be premature to make any order in respect of that and if the end of August, when it comes around, my friends and I are not both in possession of these reports, then I think it would be propitious for my friends to reassert their claim.

So far as Heather Harris' genealogical --

THE COURT: I think I'll stop you, Mr. Rush. I'm going to propose this. I'm reluctant to make an order. It's easy to -- easier sometimes to play the role of the tough guy and make an order, but it doesn't have much of a practical application. I'm going to adjourn this matter for a status report to see how you're getting along. I have to -- I'm going to be presiding at a pre-trial conference in a case involving Mr. Giles and Mr. Goldie on the Monday the 10th. If there's not some overwhelming reason not to fix that date, I'd like to hear counsel on this matter before I embark on Mr. Goldie's matters on the 10th; is that a convenient date?

MR. RUSH: If you'll just excuse me for a moment?

MS. KOENIGSBERG: That's fine with me.

MS. RUSH: Yes.

THE COURT: All right. And then if counsel can work out their problems between them, a phone call would suffice. It wouldn't be necessary to make an appearance.

MS. KOENIGSBERG: I would like to make it clear to Your Lordship, and to my friend, I'm not asking for the reports.

MR. RUSH: I understand.

THE COURT: All right. Then if there's nothing else we'll adjourn then and I have to say to counsel that if they need to have access to the file in this matter I'm trying to get them all collected together and the file hasn't yet come down from Smithers and there are bits and pieces. I'm trying to collect them all together and the best place to make inquiries is to my chambers for the moment. I'll set up some kind of a place where they can be more conveniently -- where the file will be more convenienty available. All right. Thank you.

THE REGISTRAR: Order in chambers. Chambers is adjourned.

(PROCEEDINGS ADJOURNED)

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

Tanita S. French
Official Reporter