1 Smithers, B.C.
2 June 26, 1987.
3
4 (PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)
5
6 THE REGISTRAR: In the Supreme Court of British Columbia, this
7 26th day of June, 1987. Delgamuukw and others versus
8 Her Majesty the Queen and others.
9 THE COURT: Mr. Rush.
10 MR. RUSH: Yes, my lord. There are a number of subjects that we
11 want to raise with you, and various of counsel will be
12 addressing you on those different subjects, and Louise
13 Mandell will speak to you first.
14 MR. GOLDIE: My lord, perhaps before Miss Mandell starts, could
15 we have an understanding of the items that we wish to
16 cover today. My note is of the following: Firstly,
17 there is the Notice of Motion that was returnable on
18 Monday and which was deferred until yesterday.
19 Second, I understand my friends wish to make
20 submissions on the draft ruling. Thirdly, trial
21 organization, and finally a matter that was referred
22 to I think on the 16th of June, the marking of the
23 balance of the alienation documents. Part of the
24 trial organization would be the question of submitting
25 the transcripts of commission evidence, and I
26 understand my friend is prepared to speak to that
27 today. But those seem to me to be the items, my lord.
28 If we are in agreement on that, then we could have
29 some indication perhaps of the time that would be
30 taken up.
31 MR. RUSH: Well, those are some of the items, and Mr. Goldie has
32 indicated some that he has an interest in. I'm --
33 there is another issue that he didn't mention,
34 although I am sure he intended to. The question of
35 the agreement as to documents, I am going to make a
36 short submission to you on that. We also want to
37 raise the question of commissioning one of the elders,
38 and we also will raise with you the question of the
39 interrogatories that have been delivered to the
40 Federal defendant. We have a submission to you to
41 make on that. In terms of what we see as being the
42 major time consuming element of this morning's and
43 perhaps this afternoon's matters will be the trial
44 organization. This we see as a matter of considerable
45 concern to us, and we will have a major submission to
46 you on that. How long it will take, I don't know. We
47 have various -- various of us have submissions to

1 make. I think it will probably at least take the
2 morning and probably some part of the afternoon.
3 MR. MACAULAY: Insofar as interrogatories is concerned, my
4 friend has not delivered a letter yesterday afternoon.
5 There is no application before the court, and if he's
6 happy with the answers to the interrogatories, he
7 knows what his remedy is.
8 MR. RUSH: Yes. Well, Miss Mandell will be speaking exactly to
9 the point of the remedy that we would like to see.
10 THE COURT: All right. Well, I don't think there is a preferred
11 order.
12 MR. RUSH: Well, I think there are some items that are questions
13 that can be dealt with fairly speedily. We have
14 conceived of an order, perhaps we should just go ahead
15 with that. Miss Mandell is intending to speak to the
16 question of the commission and to the interrogatories.
17 THE COURT: Well, are you pressing for any particular order, Mr.
18 Goldie?
19 MR. GOLDIE: No. I wanted to have a listing so that we would be
20 able to -- be able to aim at dealing with all of
21 these, and --
22 THE COURT: All right. Well, can we divide them into
23 housekeeping and substantive or something like that
24 and deal with the housekeeping matters first.
25 MR. GOLDIE: I would agree with that. I would place a Notice of
26 Motion with respect to the experts' reports as
27 housekeeping, but it would appear that the matters
28 that Miss Mandell will be speaking to, namely an
29 application to take evidence on commission of one of
30 the elders, is probably a housekeeping matter.
31 THE COURT: All right. Let's start there then.
32 MISS MANDELL: Thank you. My lord, I do have two -- what are in
33 fact housekeeping matters. I'll deal both with the
34 Federal interrogatory motion and also the application
35 to take commission evidence, because --
36 MR. MACAULAY: There isn't a motion on interrogatories. That's
37 the point I am making.
38 MISS MANDELL: We understand that.
39 THE COURT: All right. I understand that. I will hear what
40 Miss Mandell says and keep your objection in mind, Mr.
41 Macaulay.
42 MISS MANDELL: My lord, what we are seeking from you in respect
43 of both matters is the same thing and that is that a
44 date be fixed which is agreeable to yourself and to
45 all parties sometime in perhaps two weeks time which
46 would allow the parties to use the court process to
47 settle these matters if some matters of resolution

1 can't be resolved in the interim.
2 THE COURT: And the two matters are commission evidence of -- ?
3 MISS MANDELL: Of Florence Hall Kweese and the second is the
4 request by the plaintiffs to have the Attorney General
5 of Canada answer interrogatory questions which they
6 have.
7 THE COURT: You have delivered interrogatories and you have
8 answers with which you are not satisfied?
9 MISS MANDELL: That's correct. The interrogatories were
10 delivered on March 12 and May 10, and there have been
11 responses given by the Attorney General of Canada to
12 both sets of interrogatories where some questions were
13 declined to be answered; others were answered in our
14 view inadequately. We have yesterday set out a letter
15 to the Attorney General of Canada the kinds of answers
16 which would satisfy us and we would like the Federal
17 Government to have an opportunity of responding
18 outside of the court process, but if that's not
19 possible and if we are really going to be fighting
20 about the questions or all of them, then it would be
21 our intention today to serve Notice of Motion and
22 affidavit and to fix a date to speak to the matter.
23 THE COURT: What date are you suggesting?
24 MISS MANDELL: Well, from my point of view, I think that they
25 should have some time to respond out of court, and I
26 think any time during the week of July 10th would be
27 convenient.
28 THE COURT: All right. What do you say about that, Mr.
29 Macaulay, or Miss Koenigsberg?
30 MR. MACAULAY: It would be more convenient if the applications
31 were made the following week. We have an application
32 of a similar kind to make. I say that because my
33 colleague, Miss Koenigsberg, will be out of town the
34 week of the 10th, and she has been --
35 THE COURT: Well, you are suggesting, say, Monday the 17th?
36 MR. MACAULAY: That would be --
37 THE COURT: What do you say about that, Miss Mandell?
38 MISS MANDELL: My lord, if that's the only day, then of course
39 we would take it. Our problem is that we had hoped to
40 be back up in Smithers before that time, and it's
41 going to require that we come back down during that
42 week to handle the application. So my preference, of
43 course, would be the week earlier when it would be our
44 plan at that point to be in Vancouver.
45 THE COURT: Well, it's obvious that someone's plans have to be
46 disturbed, and how am I to decide who should be the
47 one to be disturbed?

1 MISS MANDELL: I will be disturbed, my lord.
2 THE COURT: That's the best news I have heard so far today, Miss
3 Mandell. All right. July 17th. All right.
4 MISS MANDELL: My lord, on the same day, if it would be
5 convenient to your lordship, we have advised the
6 defendants that we have one witness, an elderly woman,
7 Florence Hall, who has been in preparation as a
8 witness throughout the few weeks that we have been
9 sitting in Smithers. And it's been our experience
10 with her that because of her health and also her age,
11 that she, in our view, would be a witness who ought to
12 be commissioned. Now, I've not been able as yet to
13 get a medical certificate for her. Her doctor has
14 been out of town. But this is -- this is something
15 which is being done. My friend, Mr. Goldie, has
16 indicated that he would ask to see the medical
17 confirmation of the witness, and I don't know whether
18 that would affect his decision to consent to a
19 commission should the medical information say that
20 it's the doctor's opinion that she ought to be so. In
21 any event, at the present time we are not in a
22 position where the defendants have agreed to consent
23 to her being commissioned, and we'd like the matter
24 set down for argument, and by that time I'm sure the
25 medical information will be available. It may be that
26 we won't again in the same as the first need the case,
27 but --
28 THE COURT: Well, is July 17th a convenient time for that as
29 well?
30 MISS MANDELL: That's a convenient time.
31 THE COURT: Yes. Well, all right. That will be heard the same
32 day. That's 10 o'clock in Vancouver.
33 MISS MANDELL: Okay.
34 THE COURT: All right. Anything else of a housekeeping nature?
35 MR. GOLDIE: Well, is the motion with respect to enlarging the
36 time for delivery of experts' reports a contentious
37 one, my lord? If it is, it's not housekeeping. But I
38 haven't heard any objection.
39 MR. RUSH: Maybe I can save my friend a concern about that. It
40 is not contentious. The application by my learned
41 friends is to widen the time from 30 days to 60 days,
42 being the time within which to deliver the expert
43 reports of the plaintiffs' experts. We don't take
44 issue with that. What I want to advise your lordship
45 about --
46 THE COURT: That's from the 30 --
47 MR. RUSH: To 60 days.

1 THE COURT: -- to 60 days before the witness is called?
2 MR. RUSH: That's right.
3 THE COURT: Yes.
4 MR. RUSH: What we ask is the same consideration from my learned
5 friends. There are two -- there are two reports which
6 are identified as summary reports that have been
7 delivered by the Provincial defendant. They are of a
8 Dr. Greenwood and a Mr. Williams. And we, of course,
9 would like to have their reports within a 60 day
10 timeframe within --
11 THE COURT: Before they are called?
12 MR. RUSH: Before they are called.
13 MR. GOLDIE: I agree with that, my lord.
14 THE COURT: All right.
15 MR. RUSH: And similarly with respect to a Mr. Guth, a report
16 that's been filed by the Federal defendant, that too
17 is identified as a summary and we take the same
18 position with respect to that.
19 MR. MACAULAY: That's agreed.
20 THE COURT: All parties. All right. Well, let me ask something
21 about that. Is the delivery of these reports to be
22 taken as conclusive notice that the witnesses will be
23 called?
24 MR. RUSH: That they would be called?
25 THE COURT: Yes.
26 MR. RUSH: I haven't considered that point as yet.
27 THE COURT: The only reason I ask is whether it would be useful
28 if I was to have the reports at the same time. If the
29 witness isn't going to be called, of course I
30 shouldn't have the reports. If he is going to be
31 called, then I wonder if I might have them so that I
32 can try and familiarize myself with what the expert
33 says before he's called. I think I'll leave it to
34 counsel -- well, no, I should -- it may be there is
35 some objection to this. If counsel decide having
36 delivered a report that he is definitely going to call
37 that witness, is there any objection if I have a copy
38 at that time?
39 MR. GOLDIE: Not so far as I am concerned, my lord.
40 MR. RUSH: Nor me. As a matter --
41 MR. MACAULAY: I am agreeable to that, my lord.
42 THE COURT: All right. Well, I will leave that to counsel. If
43 they would deliver the report and they have firmly
44 decided to call the witness, then I would appreciate
45 a chance to have the report in advance so that I can
46 try and get some understanding of at least the
47 terminology which is sometimes an aid to

1 understanding. All right. Well, does that dispose of
2 your problem, Mr. Goldie?
3 MR. RUSH: I just want to make one other submission on this.
4 THE COURT: Yes.
5 MR. RUSH: And that is that in Mr. MacKenzie's affidavit, he
6 incorrectly characterizes three of the reports. The
7 Rigsby/Kari report is a full report. Not a summary.
8 This is really for their advice. The Harris report is
9 a full report and not a summary. And the Sterritt
10 report is a summary, not a full report. Now, I am
11 sure that Mr. MacKenzie will be happy to hear that the
12 error is not one of his making but one of mine.
13 THE COURT: That's very gracious of you to say that.
14 MR. RUSH: I advised incorrectly my learned friends of that
15 fact, but I hope that by stating this we can get it
16 sorted out.
17 THE COURT: All right. So your friends now know that they
18 shouldn't expect anything further from you with
19 respect to the first two?
20 MR. RUSH: That's right.
21 MR. GOLDIE: We have requests outstanding with respect to some
22 of these as to the supporting documents.
23 THE COURT: Yes.
24 MR. GOLDIE: But I have my friend's point that these three are
25 to be characterized in the manner that he has given.
26 THE COURT: Yes. Thank you.
27 MR. MACAULAY: The day wouldn't be completed without mentioning
28 Mr. Morrell yet.
29 THE COURT: The ubiquitous Mr. Morrell.
30 MR. MACAULAY: Our customary application in that regard -- from
31 time immemorial.
32 THE COURT: I don't know if you want to respond regarding Mr.
33 Morrell, Mr. Rush.
34 MR. RUSH: Mr. Grant will respond to that.
35 THE COURT: Thank you.
36 MR. RUSH: As is our custom. My lord, the other point that fell
37 to me to raise with you is the question of the
38 agreement as to documents. My friend, Mr. Goldie,
39 raised this I think yesterday more as a collateral
40 matter. There have been discussions and
41 correspondence among counsel to resolve the question.
42 My friend raised it with you. I really don't feel
43 that this is a matter for the court to intercede on,
44 whether you could at all intercede on this issue at
45 this point. But in my view the discussions have not
46 worked their way through to the conclusion that it
47

1 ought to. There are -- I am the agent of the last
2 letter to the other side, and we -- at least the
3 Federal Crown has not expressed its views with respect
4 to proposals made by Mr. Goldie. I think the matter
5 is still outstanding. I think that it is a matter
6 that we can reach some agreement on. And I think
7 counsel should continue to make those efforts and I
8 think that can be done and we should wait in due
9 course for that process to play itself out before any
10 applications or whatsoever be made to your lordship.
11 MR. GOLDIE: Oh, I wasn't making any application to your
12 lordship. I mentioned that in the context of how we
13 can best eliminate possible cause of delay, and I
14 am -- there is a lowest common denominator of
15 agreement now with respect to our title documents. We
16 have to go a bit further than that and I am quite
17 happy to do that.
18 THE COURT: All right. I am in a position of the Minister of
19 Labour who doesn't want to appoint a mediator then.
20 Let the parties work it out. Well, I think --
21 MR. GOLDIE: Not yet.
22 THE COURT: -- I will rush in where counsel have not yet
23 explored the ground.
24 MR. GRANT: Yes, my lord. Maybe to wrap up on the housekeeping
25 matters. First was the filing of the commission
26 evidence, which I believe all parties have agreed the
27 other day that that should be done. And I want to be
28 clear to the court that at this point what I am filing
29 would be the transcripts of that evidence, and I will
30 refer to them in a moment. I am not -- I do not have
31 at this point in time the exhibits which were -- which
32 were tendered on the commission with those assembled
33 in a way to be filed. But -- and of course with
34 respect to the first witness, Mrs. Brown, Exhibit 1
35 has already become an exhibit in the trial. But I
36 will -- I will prepare and assemble those, and I will
37 provide those in due course to correspond to my
38 friends and we will sort that matter out.
39 THE COURT: Well, if you are filing these commissions or these
40 depositions taken under commission, then they are
41 being filed for the purpose of being evidence at the
42 trial.
43 MR. GRANT: Yes.
44 THE COURT: And the exhibits -- subject to all just exception, I
45 am sure, and then the exhibits will similarly become
46 evidence at trial.
47 MR. GRANT: Yes.

THE COURT: Are there disputed parts of the evidence that was taken under objection that I have to resolve?

MR. GOLDIE: There was no objection taken during the course of the examination, because there was nobody there to rule on it. And it was obvious to interrupt the examination for the purposes of getting a ruling would simply cause a considerable delay. The position that I took was that objections would be taken at the trial to the extent the evidence is objectionable, so that if the evidence is referred to in the course of the trial and there is an objection, it can be dealt with at that time. Or if it is referred to in argument, it can be dealt with at that time. My recollection is, subject to correction by other counsel who appeared during other of these examinations, is that there may be some areas which would come within rulings that would be made at the trial. But I see no good purpose now of dealing with it.

THE COURT: All right. Well, let me ask counsel, then, specifically, is there any reason why I should or should not read the deposition?

MR. MACAULAY: Well, in some cases the -- I am referring to the case where we were not notified of taking of his evidence. We can either take the position that they are not binding on us or I would like to cross-examine and we will elect to cross-examine, so that I don't know whether those transcripts ought to go in now. We can exercise that right in summer.

THE COURT: How many are you tendering, Mr. Grant?

MR. GRANT: I am tendering eight. The evidence of eight witnesses.

THE COURT: All right. And how many are subject to this --

MR. GRANT: Well, I have to --

THE COURT: -- deficiency mentioned by Mr. --

MR. GRANT: Well, my recollection of it - and I may be corrected on this - was that certain of the hearings, that is certain of the attendances of certain of the witnesses, they were not -- the Federal Crown was not notified of. It was my recollection that when that oversight was brought to our attention, that they subsequently attended, and it was also my recollection that those hearings at which they didn't attend were direct evidence of which, of course, they have a transcript. And I -- I do not recall which of any of the witnesses they didn't have an opportunity to cross-examine. And I say this from my recollection, and I had intended to review my correspondence on it

1 and I didn't. So if my friend can maybe refresh -- if
2 I am in error, that's fine. Otherwise I would propose
3 that they all go in right now.
4 MR. MACAULAY: I can't recall what the exact circumstances were.
5 I'll have to look at our correspondence at the time.
6 THE COURT: All right. Well, I think that the deposition should
7 be filed subject to the objections Mr. Macaulay raises
8 about them not being -- about the evidence contained
9 in them not being binding or not being evidence
10 against the Federal Crown. And I will just forbear
11 the pleasure of reading them for the time being until
12 the matter is resolved. Unless counsel can tell me
13 that there is some I can read and some I can't.
14 Perhaps counsel can consider that and give me a memo
15 as to any to which no objection would be taken.
16 MR. GOLDIE: I can say now, my lord, that we have no objection
17 to your lordship examining those transcripts.
18 THE COURT: Oh, no, once they are filed they would become
19 evidence against -- evidence in the case for and
20 against the plaintiff and the Provincial Crown. It's
21 just a question of whether I should read them until
22 this other question is resolved.
23 MR. MACAULAY: There is another anomaly, if I can call it that,
24 some of the commission evidence was done and completed
25 before the Attorney General of Canada was joined. I
26 don't know whether we --
27 MR. GOLDIE: Well --
28 THE COURT: That wouldn't trouble me. But if you want to make a
29 submission on it, I would be glad to hear you. I
30 think you take the lawsuit as you find it at the time
31 you become a member of it, subject to the question of
32 admissibility we have mentioned.
33 MR. GOLDIE: It would be my understanding that if either party
34 wished to use that evidence as against the Attorney
35 General of Canada prior to his being joined, the
36 witness would have to be called.
37 THE COURT: I am not sure that that should be stated as a
38 ruling. That was an observation I made as a possible
39 way of solving that problem. I am not sure that I
40 have ruled on that.
41 MR. GRANT: My lord, maybe if I can speak. I concur with what
42 your lordship has said that of course the history of
43 the matter is that the Provincial defendant applied to
44 join the Attorney General of Canada in this
45 litigation. We had initiated these commissions of
46 elderly people well in advance of that and we, the
47 plaintiffs, should not be denied the opportunity of

the utilization of that evidence, particularly where it is the events are of the circumstances, not of our making. However, I think what I propose to do, as I say, and I will review this over the lunch break, because I want -- I believe you should have the opportunity to read these. That's why I had intended to tender them now, and I will refer to the history of the ones, and there is only two that I can consider there is is any possibility of question raised by my friends. The first one I wish to tender would be four volumes of the commission evidence of Martha Brown, and these -- this commission evidence was amongst the first given, and it was completed on January 23, 1986. The appeal -- in the Court of Appeal of the joinder of the Federal Crown of the Attorney General of Canada as I understand -- as I recall was February 25 of '86. So this is an example of a commission evidence that was completed prior to their joinder by my recollection.

THE COURT: But the joinder would surely date from the date of the order in the trial court, would it not?

MR. GRANT: Yes. That's true. And I believe that --

THE COURT: What is that date?

MR. MACAULAY: I don't recall that.

THE COURT: I would have thought it would be a date that would be stamped indelibly upon your memory, Mr. Macaulay.

MR. MACAULAY: I don't know if we were then aware of the fact that there was commission evidence being taken. I don't think so. And I don't criticize anybody for not telling us.

THE COURT: No. But I just have in mind if a party were to be added halfway through a trial, for example, I think that party comes into the trial with the evidence --

MR. MACAULAY: Cast in --

THE COURT: I should think so.

MR. MACAULAY: -- a mold without the opportunity of examination.

THE COURT: I think arrangements might be made for some cross-examination or something of that kind. But I wouldn't think that adding a party halfway through a trial would cancel the evidence taken to that point.

MR. MACAULAY: I am not suggesting the evidence is cancelled.

THE COURT: You just say it doesn't affect you?

MR. MACAULAY: Either it doesn't affect us or -- it's one or the other. Either it doesn't affect us or we have a right to challenge the evidence if we choose.

THE COURT: Well, I haven't had to deal with this question, so I

haven't got a firm view of what the answer to that would be. But --

MR. MACAULAY: It may be that we can work at some practical solution with my friends over the summer. If not, the submissions could be made with my friends later. I don't want to just lie in the weeds and let this -- let things go.

THE COURT: All right. Let's go through them, if you will, Mr. Grant and we will just find out the status.

MR. GRANT: Martha Brown is the four volumes.

THE COURT: That will be the next exhibit.

MR. GRANT: I ask that be the next exhibit and I propose that the exhibits that are with this when filed would be within the same number and may be sub-numbers.

THE COURT: Yes. What's the next exhibit number, please?

THE REGISTRAR: 68.

THE COURT: This will be 68 A, B, C, D.

MR. GRANT: And there are four volumes there.

(EXHIBIT 68A, B, C, D: Four volumes of commission evidence of Martha Brown)

MR. GRANT: The next which I wish to deal with is the commission evidence of Fred Johnson or Lelt. That's three volumes. That was in September, October, and December of 1986, and the Federal Crown, the Attorney General of Canada was represented at this commission, had the opportunity of cross-examination.

THE COURT: All right. That will be 69 A, B and C.

(EXHIBIT 69A, B, C: Commission evidence of Fred Johnson)

MR. GRANT: The third one is the evidence of Wii'goob'l, or Jessie Sterritt, and that's two volumes. And that occurred in December of 1985 and January 1986. I believe this was -- this similar timeframe was when the Federal Government commenced before they were going, as I recall.

(EXHIBIT 70: Commission evidence of Jessie Sterritt)

THE COURT: So A.G. Canada not participating.

MR. GRANT: Not participating.

MR. MACAULAY: My recollection, without consulting my notes, is that we were joined -- Mr. Justice Trainor made his order in February 1986. It was in 1986, and the Court

of Appeal decision was handed down in April. So the original order confirmed by the Court of Appeal was made in February sometime. I think it was late February.

MR. GRANT: Of '86.

MR. MACAULAY: '86.

MR. GRANT: Yes, that's my recollection as well. Sorry, I did say the Court of Appeal, but it was my understanding they were joined. The next commission evidence is that of Mr. Bazil Michell and Josephine Michell. And they were commissioned together in the subsequent volumes by agreement between counsel, and the Federal Government was represented at this commission, and I believe they didn't -- they elected not to cross-examine.

THE COURT: Well, it was Bazil, and the other name?

MR. GRANT: Bazil Michell. B-a-z-i-l. And Josephine Michell. They are sister and brother.

THE COURT: All right. And that's how many volumes?

MR. GRANT: Three.

THE COURT: All right. That will be 70A, B and C.

THE REGISTRAR: I believe Jessie Sterritt was 70.

THE COURT: That's right. She was 70. Exhibit 71.

(EXHIBIT 71: Commission evidence of Bazil and Josephine Michell)

MR. GRANT: The next one is two volumes of the commission evidence of David Gunanoot. And in this case the -- this occurred in May -- in February, March and May of 1986. And it's my understanding that the Attorney General of Canada participated by their presence in part of this, and they were present for the cross-examination.

THE COURT: 72A and B.

(EXHIBIT 72: Commission evidence of David Gunanoot)

MR. GRANT: The next commission is that of Emma Michell. It commenced August 1986 and completed on December 18, 1986. Consists of five volumes, and the Federal Government participated and cross-examined in that case.

THE COURT: All right. 73A, B, C, D and C.

(EXHIBIT 73A, B, C, D: Commission evidence of Emma Michell)

MR. GRANT: The next one is Mr. Johnny David, Maxlaxlex. It consists of eight volumes. This is the gentleman who was approximately one hundred years old. It commenced in September 1985 and it proceeded through to the end of April, 1986 and just so that you have a -- there is a situation in which the direct examination was completed prior -- was completed in the end of January, 1986, and I do not believe the Federal Government participated or was present at --

MR. MACAULAY: I don't think we heard about that one.

MR. GRANT: But they were advised of it.

THE COURT: For chief or cross?

MR. GRANT: The chief was completed before they were joined.

THE COURT: Yes.

MR. GRANT: And they were advised of its continuation for cross-examination and they elected not to attend.

MR. MACAULAY: I object to that. I will have to --

MR. GRANT: To my recollection.

MR. MACAULAY: There will be a letter on the file if we were advised.

THE COURT: Well, I am going to say tentatively no Attorney General presentation, but I'll expect counsel to clarify that for me, please.

MR. GRANT: Yes. They certainly never attended and I understand they were --

THE COURT: All right. That will be 74A to H.

MR. GRANT: Yes.

(EXHIBIT 74A to H: Commission evidence of Johnny David)

MR. GRANT: The latter one I wish is that of Mr. Thomas Wright. Guuhadak. It consists of three volumes and this may be the one that may cause the concern. The Federal Government was represented and did attend at one of these sessions. But it may be they were not notified of another one of the sessions and that's what I am checking out. So this last one, it's the only one that I recall there was any question of, and they did attend, I believe, a middle session and it may have been the last session, one of the sessions they were not notified of, but they attended it in part.

THE COURT: 75 A, B and C.

(EXHIBIT 75A, B, C: Commission evidence of Thomas Wright)

THE COURT: And I'll have to ask counsel to please let me have a memo, that is plaintiffs' and Attorney General of Canada's counsel, let me have a memo stating specifically their position on each these so that I can --

MR. MACAULAY: I didn't know this was coming up today.

THE COURT: No. I understand. Yes.

MR. GRANT: I would ask also if there was any questions of my friends corresponding with us immediately and I will be reviewing it over the lunch hour, but that this matter be resolved, I believe the date was scheduled was the 17th of July, if there is any question, because I would like to have an opportunity --

MR. MACAULAY: We'll have that sorted out before then.

THE COURT: Well, it may be that --

MR. GRANT: At the hearing date.

THE COURT: It may be you'll have an argument on it.

MR. GRANT: If there is an argument to be made, that that would be made on July 17 that this matter --

MR. MACAULAY: Yes. Yes. It's understood, my lord.

THE COURT: Thank you. I think we'll take a very short adjournment, please - don't anyone go away - so that we can change reporters.

(PROCEEDINGS ADJOURNED PURSUANT TO MORNING BREAK)

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

Laara Yardley,
Official Reporter,
United Reporting Service Ltd.

(PROCEEDINGS RECONVENED PURSUANT TO THE MORNING

1 ADJOURNMENT)
2
3 THE REGISTRAR: Order in court.
4 MR. GRANT: Just one moment, my lord. I've just reviewed my
5 correspondence, my lord. I just wanted to -- from a
6 review of my correspondence, my lord, the sole concern
7 that I can see that was raised was with respect to
8 inadvertence in not notifying the Federal Attorney
9 General of the commencement of the commission evidence
10 of Fred Johnson and Emma Michell in September, 1986.
11 And by letter of September 16th Ms. Koenigsberg
12 said -- raised her concern about this, that they
13 received no notice, "except for informal notice by
14 telephone between yourself and Mr. Macaulay with
15 regard to commission evidence scheduled for this week
16 and the next," and then she indicated they'd like to
17 receive notice in the future, "and because of the time
18 constraint involved we've consider that should we find
19 it necessary to cross-examine, we would be prepared to
20 do so even after the trial has commenced."
21 On both Emma Michell and Fred Johnson they had
22 attended and, in fact, had a -- attended and had an
23 opportunity to cross-examine, and they had -- they
24 received the transcripts well in advance of the
25 cross-examination. These witnesses all took more than
26 one session.
27 There was some concern expressed by myself about
28 that because of the elderly nature of these people,
29 and that if they wished to cross-examine, I wanted
30 them to do it now. And basically there was
31 correspondence with respect to it.
32 Now, ultimate -- then with respect to Mr. Thomas
33 Wright, Bazil Michell and David Gunanoot, Mr. Irving,
34 who was at that time with the -- working for the
35 Attorney General of Canada or their agent, attended
36 portions of those -- those examinations and was
37 invited by myself in the case of Mr. Wright, by Ms.
38 Mandell in the case of Mr. Michell, and by Mr. Rush in
39 the case of Mr. Gunanoot to exercise the right of
40 cross-examination, and he declined to do so in all
41 cases. He said he just wished to observe. And then
42 the only two persons that remained outstanding for
43 cross-examination were Emma Michell and Fred Johnson,
44 and in both cases my understanding is that the Federal
45 Attorney General of Canada exercised that right. They
46 cross-examined both Emma Michell and Fred Johnson. So
47 it's my -- unless there is any question raised by my

1 friends, by my review of the correspondence all of
2 those matters were resolved.
3 THE COURT: Well, there is a problem about Martha Brown.
4 MR. GRANT: Oh, I'm talking about the ones where they weren't
5 notified after they were a party. Martha Brown
6 completed before they became a party.
7 THE COURT: And Jessie Sterritt.
8 MR. GRANT: And Johnny David completed before. Oh, not Johnny
9 David. Jessie Sterritt completed before they became a
10 party.
11 THE COURT: All right. Well, I'll hear from each of you in this
12 connection, and I won't read any of those impugned
13 volumes for the time being.
14 MR. GRANT: I'm going to endeavour to arrange for the exhibits
15 to be filed as well, my lord. I've asked the court,
16 of course, to reserve sub-headings under those exhibit
17 numbers so -- under the exhibit numbers of the
18 transcripts so the exhibits could be tied directly to
19 the transcript.
20 THE COURT: All right.
21 MR. GRANT: Except for the large photograph, which was presented
22 at Kispiox House, which is Exhibit 1 in Martha
23 Brown's.
24 The next matter I wish to deal with, my lord, may
25 go beyond housekeeping or may be the biggest part of
26 the house cleaning we have to deal with --
27 housekeeping we have to deal with, and that is with
28 respect to the trial organization. As you recall, two
29 days ago I made a submission at the end of the court
30 day on behalf of the Plaintiffs regarding trial
31 organization, and I proposed a resolution which I had
32 corresponded to my friends in a number of ways. And
33 one of the concerns expressed by the court and by
34 counsel, of course, was with respect to the proof of
35 the boundaries -- excuse me -- the boundaries, the
36 place names and significant locations within the
37 territories. And as you may recall, I proposed that
38 we would take specific territories and then tie
39 them -- and then -- and provide detailed evidence of
40 those, and then we would present the balance of the
41 evidence through Mr. Sterritt.
42 And, of course, the position we would take and our
43 submissions ultimately dealing with your draft set of
44 reasons on the hearsay rule, we wish to further deal
45 with that.
46 But -- and my friend Mr. Goldie construed that
47 proposal as a "test case proposal," and I -- I said

that's not exactly what we had in mind. And I also indicated to the court our concern about the utilization of affidavit evidence for the direct evidence. But at the end of the day yesterday you raised another variation on this theme, and it gave counsel for the Plaintiffs food for thought, if I may say, and that is the concept of a mixture of affidavit and oral evidence. And after considering this matter and the implications of it, we, counsel for the Plaintiffs, agree in principle with this. This may resolve some of the concerns of the court while protecting the Plaintiffs' concern, the Plaintiffs' interest in the proper and best presentation of the case. We could anticipate the utilization of affidavit evidence in conjunction with oral evidence to prove the boundaries and territories of the Gitksan and Wet'suwet'en, as shown on Exhibit 5. The utilization of affidavits should minimize or extensively reduce the concern about place names and the use of Gitksan and Wet'suwet'en words, which the court indicated perceives -- and I must say that I didn't perceive it was the percentage that the reporters indicated for it. But, in any event, it takes up time, and everbody agrees with that.

THE COURT: It not only takes up time, but it breaks the flow and, I think, contributes very substantially to the difficulties we've had with progress.

MR. GRANT: Well, what we propose is that the affidavits may deal with the -- the provision of place names, which is a very important part of the Plaintiffs' case, and the co-relation, for example, of those names to the places on maps presented for the court's assistance, which will be later proved, or the photographs, which we have tendered to the Province and the Federal Government. The other two Defendants I should say.

But I must -- I must stress that -- that the -- what -- what appealed to us about your proposal is that there can be some mixture. And this is not a movement away from our original proposal where we would see that we would develop extensive evidence about specific territories. And let us say that that would be at one level. Then we would deal with, through witnesses -- as I indicated in my submission two days ago, that in conjuction with Mr. Sterritt's evidence there would be other informants who would speak to several territories. We would still utilize those witnesses, but in conjunction with their

1 evidence would be the affidavits of other chiefs
2 dealing with those territories.
3 Now -- and I must emphasize, of course, that this
4 proposal is -- is an effort to integrate what you
5 raised yesterday with our original proposal, and we
6 have been working on a method to -- to develop this,
7 to see if it's feasible and to develop how we can --
8 how we can handle it, and this is why Ms. Mandell,
9 although she -- she interrupted her -- her schedule,
10 this was part of how we're trying to develop that
11 schedule for the vacation period, and we want to meet
12 further amongst counsel and amongst our clients to
13 develop this proposal, that is, to -- to see how far
14 we can advance it. But as I say, and I emphasize, in
15 principle we agree with it. We think that this is a
16 workable way to both meet the concerns that we have as
17 counsel for the Plaintiffs in the proper presentation
18 of the case and to meet the concerns that you've
19 expressed with respect to the pace of the trial.
20 It does not address -- it -- there is still
21 concerns we have with respect to the hearsay and the
22 draft reasons, and the extent to which we wish to
23 develop that argument and the reason we do not wish to
24 proceed with it today is that depends on the extent to
25 which we can integrate this -- this proposal or
26 integrate this utilization of affidavit evidence into
27 our -- into our strategy for the presentation of the
28 Plaintiffs' case, the balance of the Plaintiffs' case.
29 THE COURT: I'm sorry, Mr. Grant, what is it that you don't wish
30 to proceed with today?
31 MR. GRANT: The hearsay.
32 THE COURT: You don't wish to proceed with hearsay?
33 MR. GRANT: No. We wish to proceed with that matter -- there
34 are hearsay matters to be dealt with in your draft
35 reasons, and we would like your reasons to remain as
36 drafts.
37 THE COURT: But doesn't everything else turn on that?
38 MR. GRANT: Well, we -- well, that's what we -- that's what is
39 interesting about what you raised yesterday. It
40 was -- was -- what we're saying is you proposed, for
41 example, with respect to the difficulty raised in Mr.
42 Joseph's evidence about the third parties, and you
43 said you could hear it subject to the utilization of
44 affidvaits, and then yesterday -- and yesterday you
45 said, well, you recognize the concerns I raised the
46 other day, and you -- you expressed your concern about
47 possibly a mixture of oral evidence with respect to

this matter and affidavit evidence, and that -- that hybrid approach is the one that we feel closest to. Now, of course, when we tender affidavit evidence, it would be -- those witnesses could be called to be cross-examined.

THE COURT: Oh, yes.

MR. GRANT: Etcetera. So the extent to which we can deal with the issues by the use of the affidavit combined with oral evidence may resolve some of the concerns we have -- we have with respect to the hearsay issue.

THE COURT: Well, Mr. Grant, I'm not sure I'm quite following you. I must say I'm terribly encouraged by what I've heard so far.

MR. GRANT: Maybe I should stop now.

THE COURT: Well, that's counsel's choice in cross-examination, but I don't think it's counsel's choice at this point. What is so complicated about having a witness -- now, let's take Mr. Joseph. He's in the box. With respect to his territory, of saying in an affidavit my claimed territory is shown on map Exhibit A of my affidavit. Its boundary I say is, and he starts at point A and goes around to point A again. And he can say the source of my information in this regard is A, B and C or D, E and F, prominent features in my territory are, and he might have done that in his perimeter description or he may do it separately. Now, if that was done by each of the Plaintiffs, and perhaps Mr. Joseph is not a good example because he was tendered as what was called earlier a substantial witness in the same category as Mrs. MacKenzie and Mrs. Johnson and Mrs. Ryan, but if we were talking about a Plaintiff whose real purpose in giving evidence is, or his primary purpose in giving evidence is to identify his territory, his claim to it, if that could then be called viva voce to say whatever else in a general sense counsel want to ask the witness about, do we have a problem with the hearsay rule at all?

MR. GRANT: Well, that's --

THE COURT: I don't think we do.

MR. GRANT: No, I don't think you do at that point. It's subject to -- when you say he got his information from A, B and C, who A, B and C are.

THE COURT: Well, the source of his information may be a --

MR. GRANT: If they are deceased persons, for example, he gets the information from his grandparents and something has been passed on orally, then, of course, we're right into -- within the rubric of what you have

already ruled.
THE COURT: Yes. But I don't -- if that happens with each Plaintiff, I don't see the need to have the Sterritt-Joseph type of evidence, but I may be missing something.
MR. GRANT: Well, we do. We do see the need for Mr. Sterritt's evidence, but that certainly -- if we develop it that way, that would certainly impact. And let me make an analogy here. And I don't want to, and I certainly don't want my friends to -- to tie us to this example because it's an example that Mr. Rush is working -- would be working with in conjunction with Mr. Joseph's evidence. But Mr. Joseph talked not only about his own territory, he talked about the territory of Madeek.
THE COURT: But couldn't he do that by affidavit as well? It's too late for Mr. Joseph, but if there are other witnesses in that category.
MR. GRANT: Well, let me just say how the proposal would work. What we would propose would be that there would be a person, if that evidence -- in a case like that, who would describe the territory of Madeek through an affidavit. Mr. Joseph has done other things, in our submission, with respect to his knowledge of the boundaries. And there are certain persons, not many, but there are -- I'm saying this, that we don't intend to call a lot. There are certain persons that would fall into a middle category, which part of Mr. Joseph's evidence fit into, and that is some of the informants who have been taught by many former chiefs and, in our view, within, for example, the Gitksan system, would be considered custodians of the knowledge of those boundaries.

Now, we -- it is our view, given the evidence that you've already heard, that it would be important for you to hear viva voce evidence with respect to a sampling of those witnesses, but with this hybrid use of affidavits and oral evidence, we see that we can resolve the time concerns you have, the place name delays and those kinds of things, plus a large other body of the territories, and that we don't have to -- wouldn't have to call viva voce evidence on every single one of the territories individually. So that once you had that sampling of -- by a person who was a custodian of the information and -- and why and the relationships of those boundaries, then from that point on then you could -- then the affidavits would

1 fit into -- into a category, and the affidavits would
2 deal with the territories that possibly that person or
3 those two or three persons hadn't spoken of. So, my
4 lord, that's -- that is our submission, and I -- I --
5 what you have just raised as a sampling is close to
6 the kinds of things we're thinking of.
7 Now, I want to -- there are some concerns we have
8 about it, and that is the workability of it. And
9 you've heard extensive evidence from a few witnesses
10 where they were cross-examined extensively on maps,
11 for example. It's generally our experience that, with
12 some exceptions, that many of the Plaintiffs or many
13 of the witnesses who would give affidavit evidence,
14 the utilization of the map isn't a satisfactory
15 approach because what they see -- they're dealing with
16 something on the ground. But having that aside, we --
17 we think that there is a way to approach this and
18 that -- that what you are suggesting is -- in terms of
19 this mixture -- is one that we -- we would like more
20 time to work on it, but we think that it's -- it's a
21 productive approach.
22 THE COURT: All right. Well, I think that I have to say this,
23 Mr. Grant, not responding generally to what you said
24 but particularly, that I think with some conviction
25 that I was wrong in letting Mr. Joseph say a great
26 many of the things that he said. I think I allowed
27 Mr. Joseph, if I may say so, to fly in the teeth of
28 the hearsay rule, and I did so only because I felt
29 that to rule otherwise would have been to properly
30 cause an interruption in the trial and because I felt
31 it useful to explore alternative ways of proceeding
32 with that kind of evidence and to create a real life
33 example of how these things might be done by affidavit
34 for the purpose of the discussion I knew we were about
35 to have, and I think that I probably saved the
36 situation by the conditions that I imposed, but I
37 wouldn't want you to proceed on the basis that I would
38 make the same ruling again that I made with respect to
39 Mr. Joseph.
40 MR. GRANT: This is with respect to statements by third parties
41 alive and the use of affidavits?
42 THE COURT: Well, I don't think it matters whether he says viva
43 voce in the witness box or if it's an affidavit. If
44 it's statements made to him by living witnesses, then
45 I see no escape from the hearsay rule, and I don't
46 think that I have the right to waive it probably even
47 to the extent that I did with respect to Mr. Joseph.

1 But I wouldn't want you and your colleagues to proceed
2 on the basis that I would make the same ruling for
3 other witnesses that I've made with respect to Mr.
4 Joseph. I say that merely for the purpose now of
5 acquainting you with that concern I have about that
6 ruling I made -- it seems a long time ago, but I
7 suppose it was Monday or Tuesday of this week.
8 MR. GRANT: All right. Well, if I may say something --
9 THE COURT: Yes.
10 MR. GRANT: -- in response to that. My lord, that is why we
11 would -- we -- on reconsideration and based on your
12 comments we didn't want to argue our position on the
13 hearsay rule right now because we want to -- you
14 know -- we want to investigate the scope of this, and
15 as you -- you know, in some model it may well be that
16 that's not an issue, and if it's not an issue, then we
17 don't want to spend the time arguing it.
18 THE COURT: Yes, of course.
19 MR. GRANT: Or having you hear that argument. As I say, there
20 are other concerns we have with your draft reasons,
21 and we want an opportunity to do that in due course,
22 but that doesn't focus directly on this issue.
23 THE COURT: Do you think it would be convenient to do that on
24 July 17th?
25 MR. GRANT: Yes, that would be -- that would be worthwhile.
26 THE COURT: Mr. Goldie, would that be a convenient time for
27 that?
28 MR. GOLDIE: It has just become convenient.
29 THE COURT: Yes. Thank you.
30 MR. GRANT: And those -- those are -- those are my submissions
31 as far as the trial proposal, and I -- I appreciate
32 the comments that you have made because I think that
33 by -- by this you will see the scope of where we can
34 go in terms of this mix and the scope of the hearsay
35 issues that we wish to raise.
36 THE COURT: All right. Thank you. Mr. Goldie, do you have
37 anything to contribute to this dialogue?
38 MR. GOLDIE: Probably not. It is, of course, apparent that my
39 friends are in the process of formulating what I take
40 to be a new proposal which would supersede, if I may
41 put it that way, that which is set out in the letter
42 of June the 23rd, although as I listened to Mr. Grant
43 I understood him to say that certain features of that
44 proposal would remain. I think the argument on July
45 17th will have -- will be only useful if we receive
46 beforehand the proposal that my friends have in
47 sufficiently detailed form that we understand before

we walk into the courtroom how the trial would be conducted if that proposal was accepted.

The -- I -- I made a comment about the proposal as set out in the letter of June 23rd as being a test case, and I think that that was an accurate way of putting it as it was set out in that letter. And the reason why I think it was accurate is the way in which the Plaintiffs have characterized their case to date.

What I consider to be a feasible way of organizing the trial is to take a group of Plaintiffs, six to eight or twelve, or whatever is necessary, and dealing with them in their entirety, and if that was done, I think the hearsay problem disappears.

THE COURT: Disappears as to those representative Plaintiffs.

MR. GOLDIE: As to those people.

THE COURT: Yes.

MR. GOLDIE: Now, if they are severed, the other Plaintiffs' cases are, in effect, stood down. I am confident that those cases would be governed by the principles established with respect to those Plaintiffs whose cases were heard. I -- I have to --

THE COURT: But there might never be an effective order made.

MR. GOLDIE: With respect to the balance?

THE COURT: Right.

MR. GOLDIE: Well, the -- there would have to be a mechanism for disposing of the remaining Plaintiffs, and that is an interest which is common to the Plaintiffs and to the Defendants. There is -- there is no point in a procedure which leaves tag ends, if I may put it that way. But if the -- if the cases were severed and a mechanism was put in place which would allow the resolution on the instance of either parties or either one of the -- any one of the parties of the remainder, then I think it might -- it might do. Now, I -- I don't want to say anything further because, as I say, I recognize that my friends are dealing with -- they're in mid-flight, so to speak, and my understanding of what has been said is that they will formulate that, I asked them to let the Defendants know before the 17th of July what it is, and that on that date we will also hear submissions with respect to your lordship's draft rulings, if I followed what they said correctly.

THE COURT: Well, what you're suggesting, Mr. Goldie, seems to me to be a distinct alternative to what Mr. Grant has been discussing.

MR. GOLDIE: It's an alternative to what I've heard this

1 morning.
2 THE COURT: Yes.
3 MR. GOLDIE: It --
4 THE COURT: Yes.
5 MR. GOLDIE: -- was based on my friend's letter of July -- June
6 23rd.
7 THE COURT: Right. Do you think that between now and the 17th,
8 keeping always in mind the unlimited ingenuity of
9 counsel, that you could propose a triggering formula
10 to resolve the cases stood down?
11 MR. GOLDIE: Yes.
12 THE COURT: Would it be convenient if you were to give your
13 learned friends a copy of that before the 17th?
14 MR. GOLDIE: I would be quite happy to. What I'd be quite
15 prepared to do is to give them my conception of the
16 alternative to the June 23rd letter.
17 THE COURT: Yes.
18 MR. GOLDIE: And, as I say, I would expect to receive their
19 completed version of what we heard in sketch form this
20 morning.
21 THE COURT: The problem that I've always had with test cases is
22 how you dispose of the untested cases without -- so
23 that the court can make an effective judgment
24 disposing of the entire action, and I would be very
25 interested to see and on the 17th to hear your
26 proposal for that part of the case.
27 MR. GOLDIE: Yes.
28 THE COURT: I can say that a test case has no particular
29 attraction to me if it doesn't carry with it the
30 formula for the disposition of the outstanding cases.
31 MR. GOLDIE: I don't think the proper approach is a test case.
32 THE COURT: Yes.
33 MR. GOLDIE: I should say this, that my conception of what is
34 appropriate here is based upon my understanding that
35 each of the Plaintiffs has, so to speak, his or her
36 own case.
37 THE COURT: Yes.
38 MR. GOLDIE: And it's on -- it's on that footing that I -- I
39 would be happy to formulate the --
40 THE COURT: That's the source of --
41 MR. GOLDIE: -- suggestion.
42 THE COURT: -- all the difficulties or most of the difficulty
43 because without that the Plaintiffs would have no
44 concern with internal boundaries.
45 MR. GOLDIE: That's correct.
46 THE COURT: All right. Well, we'll look forward to hearing what
47 you can -- I was going to say devise, but propose in

1 that regard is perhaps a better word.
2 All right. Mr. Macaulay, do you --
3 MR. MACAULAY: My lord, the proposal made by Mr. Goldie sounds
4 reasonable enough, but the fact is that the Plaintiffs
5 say, and I don't know why they say it, but the
6 Plaintiffs say that there is a joint claim that is not
7 severable, that you can't treat the individual claims
8 separately, that the whole is greater than the parts
9 or something along those lines. I can't express it
10 because I don't understand it at all. But there is
11 not much point in spending time and effort in making
12 proposals, myself and Mr. Goldie making -- if
13 that's -- if the short answer is, well, that doesn't
14 take account of the character and nature of the claim.
15 So perhaps we should -- if the Plaintiffs can explain
16 either -- well, this afternoon how it is that these
17 claims are united, can't be severed even to that
18 evident extent, then we'll at least -- we'll know
19 where we're going and what kind of claim we're facing.
20 THE COURT: Well, until Mr. Grant hesitante, dubitante and
21 maybe even reluctante said the other day that they
22 were all in the same boat, I had the same view as Mr.
23 Goldie that each Plaintiff had a discrete claim. But
24 I have wondered about the nature of the claim, and
25 perhaps Mr. Grant or Mr. Rush or Ms. Mandell can tell
26 me whether -- well, two things, in declaration number
27 1, a declaration the Plaintiffs have a right to
28 ownership of and jurisdiction over the territory,
29 whether that is a joint claim, a several claim or a
30 joint and several claim.
31 MR. GRANT: My lord, with respect to that, and, of course, the
32 territory is defined --
33 THE COURT: Yes, but the territory is defined in the form of an
34 external boundary.
35 MR. GRANT: It is a joint claim.
36 THE COURT: So they each have an interest in the whole
37 territory?
38 MR. GRANT: That's correct.
39 THE COURT: All right. And I suppose the same applies to claim
40 number 2?
41 MR. GRANT: Just one moment, my lord. Yes, yes.
42 THE COURT: Well, I won't ask you about the rest because that's
43 probably undoubtedly the same answer. But when you
44 get to 6, is that a claim that could be construed as
45 being a claim for aboriginal rights as an alternative
46 possibly for something less than ownership and
47 jurisdiction? The aboriginal rights is the word used,

1 and what I have wondered is does that mean the
2 aboriginal rights of ownership and jurisdiction and
3 the other items mentioned in the other claims or could
4 it be read as, alternatively, if we haven't got the
5 legal entitlement to ownership and jurisdiction, do we
6 still have a claim for what I might be forgiven for
7 calling more conventional aboriginal rights such as
8 were advanced in Calder and Baker Lake and that sort
9 of thing?
10 MR. GRANT: The wording in Section 6, of course, of the
11 declarations is directly out of Section 35. The
12 reason the terminology of aboriginal rights is used
13 there --
14 THE COURT: Yes.
15 MR. GRANT: -- is because aboriginal rights are the wording of
16 the Constitution Act of 1982.
17 THE COURT: Yes.
18 MR. GRANT: And, of course, as your lordship knows, it's
19 notorious that there's been efforts to define what
20 that means.
21 THE COURT: Oh, yes. Well, I'm going to do that some day.
22 MR. GRANT: Yes. And that's why we are here.
23 THE COURT: But you see --
24 MR. GRANT: But it -- it says -- I'm sorry, my lord.
25 THE COURT: Well, 6 says including ownership of and
26 jurisdiction.
27 MR. GRANT: That's right. That's the point I was going to come
28 to.
29 THE COURT: And that led me to inquire is that possibly a claim
30 for something less than -- a claim for aboriginal
31 rights but something less than ownership and
32 jurisdiction and possibly the right to govern the --
33 harvest, manage, use and that sort of thing mentioned
34 in 3 and 4, that is, to govern in accordance with
35 legal and social institutions as they exist or
36 develop.
37 MR. GRANT: I can answer -- I have something to say about it
38 now, but I possibly should discuss that question over
39 the lunch hour.
40 THE COURT: Well, I don't think this is a matter which anybody
41 is committed at this stage, but I think that at some
42 early stage I would be surprised if this was not an
43 alternative claim. Why shouldn't the Plaintiffs
44 advance whatever alternatives may be available to them
45 if they fail on the ownership and jurisdiction claim?
46 MR. GRANT: Well, I -- I agree, and I -- and we do, and I think
47 it is important to answer and to try and elucidate it

1 for you.
2 THE COURT: Yes.
3 MR. GRANT: And I also think though that it's important in light
4 of the concept that Mr. Goldie has raised of a test
5 case, which is --
6 THE COURT: Yes.
7 MR. GRANT: -- is not what we see as a way to present the case.
8 It's not a satisfactory way. It will not work. And
9 what we endeavoured to raise was a method of
10 presenting evidence, but we see that it is the claim
11 that must be dealt with.
12 THE COURT: All right.
13 MR. GRANT: And it's our -- it is our submission, my lord, what
14 I proposed this morning is not -- when I raised the
15 question of dealing with it on June 17th, that's
16 dealing with the issues of hearsay. We have an
17 application to make to you with respect to hearsay --
18 your draft reasons and on the hearsay issue, and
19 that's what we wish to deal with on June (sic) 17th.
20 My lord, well in advance of July 17th we intend to
21 proceed with this proposal --
22 THE COURT: Yes.
23 MR. GRANT: With how we desire to approach the case. And we are
24 going to -- we are going to proceed with that now, and
25 it's how we see the case being presented and developed
26 by the Plaintiffs in a way that will meet many of the
27 concerns that you have raised and yet get the evidence
28 before you.
29 THE COURT: All right.
30 MR. GRANT: And that is our intent.
31 THE COURT: Well, that's entirely to be desired. But, and this
32 is an additional wrinkle that I'm raising with you
33 now, I think we all have to understand what 6 means,
34 what claim 6 of the Roman I-6 means. I don't want
35 your friends to be saying at the end of the trial,
36 well, we thought it was ownership and jurisdiction or
37 nothing, and you say no, we're advancing -- an
38 argument we're advancing is that, but if it isn't
39 that, it's this; and if it isn't that, it's something
40 else. I think that should be clarified as best it can
41 be clarified, and I'll be glad to hear from you in
42 that connection.
43 All right. Well, what else have we to do?
44 MR. GRANT: The only other point, of course, I wish to make is
45 that we don't see severance as an option, my lord,
46 particularly -- particularly in light of the
47 historical evidence that you will hear of with respect

to the provincial Defendant and with respect to the proposal -- the reaction of both Mr. Goldie and Mr. Macaulay to how they saw it. We don't see that severance will at all resolve the issues, and we may all end up in a -- in a trial that is complex, costly, and extensive which doesn't resolve the issues, and we certainly don't want that to happen.

THE COURT: Well, if Mr. Goldie has a --

MR. GRANT: Oh, if he wishes to correspondence with his proposal --

THE COURT: If he has a solution --

MR. GRANT: -- I'm always going to read his correspondence.

THE COURT: -- to the disposition of the stood-down cases, then it seems to me that the matter deserves some further consideration. At the moment, I can say very clearly that I do not look favorably upon any plan that doesn't lead to a final judgment of this entire action. But that's a goal to be, an objective to be pursued.

MR. GOLDIE: The -- there is only one other outstanding thing, and that is that on June the 16th your lordship said with respect to the alienation exhibits that I should be advised by my friends which of those they took some exception to, and I assume that they will give me that by the end of the day because it was contemplated that those -- the remainder of those exhibits would be -- would be marked for identification at that time. But perhaps we can deal with that at two o'clock, if there's still something to be done.

THE COURT: All right. Thank you. Two o'clock.

THE REGISTRAR: Order in court.

(PROCEEDINGS ADJOURNED PURSUANT TO THE LUNCHEON BREAK)

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

Leanna Lynn
Official Reporter
United Reporting Service Ltd.

(PROCEEDINGS RESUMED PURSUANT TO LUNCHEON ADJOURNMENT)

1 THE COURT: All right. Gentlemen, what's next on the menu?
2 MR. GRANT: Well, I thought that what was next was with respect
3 to our declaration, our prayer for relief of a
4 declaration number 6 and I wish to briefly speak to
5 that matter. Just a moment, my lord. This is the
6 declaration.
7 THE COURT: I am sorry, Mr. Grant, I seem to have --
8 MR. GRANT: There was a bound copy of the trial record now.
9 THE COURT: Well, I had a copy. Yes. I have it, thank you.
10 MR. GRANT: And you have the statement of claim with that?
11 THE COURT: Yes.
12 MR. GRANT: This is the declaration that the aboriginal rights
13 of the plaintiffs including ownership of and
14 jurisdiction over the territory are recognized and
15 affirmed by section 35 of the Constitution Act. Now,
16 what we are seeking here is that the court will make a
17 declaration that the plaintiffs' aboriginal rights are
18 recognized in section 35 and affirmed --
19 THE COURT: But I wouldn't make such a declaration unless I knew
20 what I was declaring those rights to be.
21 MR. GRANT: Yes. And that's moving on. Now, as far as the
22 plaintiffs are concerned, it is our position that that
23 declaration of aboriginal rights will encompass a
24 declaration of ownership and jurisdiction. Now,
25 ownership and jurisdiction is defined as we perceive
26 it in section 57 of the statement of claim, which
27 refers back to section 56, where the plaintiffs have
28 zoned and exercised jurisdiction over the lands
29 described in Schedule A and set out in the map as
30 Schedule B. Now, section 57 says: Without
31 restricting the generality of that:
32
33 "The plaintiffs and their ancestors have -- "
34
35 And this is what is meant by the ownership and
36 jurisdiction,
37
38 " -- lived within the Territory;
39 (b) harvested, managed and conserved the resources
40 within the Territory;
41
42 governed themselves according to their laws;
43
44 governed the Territory according to their laws and
45 spiritual believes and practices;
46
47 "exercised their spiritual believes within the

1 Territory;
2
3 maintained their institutions and exercised their
4 authority over the Territory through their
5 institutions;
6
7 protected and maintained the boundaries of the
8 Territory;
9
10 expressed their ownership of the Territory through
11 their regalia, adawks, kun'xa and songs;
12
13 confirmed their ownership... through their poles;
14 asserted their ownership....by specific claim."
15
16 Now, although in some of those it's -- it may not
17 be -- they make reference to the ownership which is
18 part of the jurisdictional claim. The plaintiffs'
19 position is that what is meant and what you will see
20 through the evidence is meant by ownership and
21 jurisdiction is reflected in paragraph 57.
22 Now, the authorities of aboriginal rights to date
23 indicate that there is a range of aboriginal rights
24 and some of those authorities view aboriginal rights
25 as something less than ownership and jurisdiction.
26 Now, those cases amongst which we would include
27 Calder --
28 THE COURT: Yes.
29 MR. GRANT: -- did not have the evidentiary basis upon which the
30 plaintiffs are relying in this case to go -- to define
31 the aboriginal rights as ownership and jurisdiction.
32 And that, my lord, is what is so important is that, of
33 course, when we seek to ask you to make a declaration
34 of aboriginal rights, as with all these other judges
35 and all these other cases, the foundation for that and
36 what you find those aboriginal rights to be must be
37 rooted in the evidence that you have heard or has been
38 presented in whatever form.
39 Now, Sparrow, for example, in the Court of Appeal
40 interpreted section 35, but it did not -- it was
41 dealing, of course, with a specific component of a
42 fishery right. It did not again have anything --
43 any -- anything but the sparcest development of what
44 was meant by the aboriginal right to in that case the
45 Musqueaum people. It just had the outlines of it, so
46 it didn't have an evidentiary foundation for ownership
47 and jurisdiction and there is no way that it could be

1 either sought in that case or nor was it sought for a
2 declaration that the aboriginal rights included the
3 ownership and jurisdiction over the fishery because it
4 didn't have the evidentiary foundation. So what we
5 are seeking is that although these others cases -- and
6 I dare say that there is not a case to our knowledge
7 in which the depth of the aboriginal system before the
8 court has ever been presented like the case is being
9 presented to you in the sense of the laws, the
10 complexity, the development of the system. Now -- so
11 what we are asking when we deal with paragraph six is
12 that the declaration -- you make a declaration of
13 aboriginal rights, that you make it rooted in the
14 evidence, and what we anticipate you will find is
15 paragraph 57, which is a definition of ownership and
16 jurisdiction, in other words, shows components of
17 ownerships and jurisdiction is what you will find at
18 the end of the day.
19 THE COURT: Well, I think I understand all that, Mr. Grant, but
20 what I'm putting to you and I put it to you solely as
21 an intellectual exercise, is that it seems to me that
22 if you fail on your claim for ownership as defined in
23 section 57 or otherwise, that you may not be asking
24 for anything else. And I couldn't give it to you even
25 if the evidence justified it without an amendment that
26 could be allowed at that time. But the far better it
27 seems to me to straighten those things out now.
28 MR. GRANT: Well, yes. What I am saying, my lord, is that we
29 are asking that you will make a finding that the
30 plaintiffs' aboriginal rights are protected and
31 recognized. What you are saying to me is --
32 THE COURT: I don't think - I speak subject to correction and
33 after hearing argument - I would be very surprised if
34 any court would make a declaration that undefined
35 rights are recognized and protected and they have to
36 be defined first.
37 MR. GRANT: I agree, and that is, of course, part of the role of
38 evidence and the legal argument to define what is
39 meant there. But I would refer you, for example, to
40 paragraph three of the declaration, which is a
41 declaration that the plaintiffs' rights of ownership
42 and jurisdiction include the right to use, harvest,
43 manage, conserve, transfer the land and natural
44 resources and make decision in relation thereto. And
45 of course paragraph 57(b) deals with the same thing.
46 So if one said, well, what about Sparrow, and Sparrow
47 says about the fishery. And there has been evidence

in this case of the fishery, and there will be more, is there an aboriginal right to the fishery? We say that it is encompassed within the ownership and jurisdiction. It's also encompassed within the declaration number three and it is also -- so when you define aboriginal rights you may say, well, I agree with you about these aboriginal rights as part -- what you say as part of ownership and jurisdiction; I don't agree with you about those.

THE COURT: Let me put a scenario to you very briefly and perhaps this will put the question in my mind in perspective. But let us postulate just for the purpose of the discussion that you end up with a situation at Baker Lake where it was held that, yes, there was aboriginal title; yes, it has been extinguished to the extent that the territory authority of the Federal Government had dealt with other rights such as mineral rights, and what was left was an aboriginal right to hunt and fish. Are you asking for that kind of a -- that kind of a declaration if that's all that is available to you? Doesn't seem to me your statement of claim asks for that. Now, maybe you say it does ask for that, but I'm -- I'm uncertain and if I'm uncertain perhaps your friends are and we should perhaps all get on the same set of tracks here.

MR. GRANT: That is -- my lord, if all we sought was the first declaration, a declaration of a right of ownership and jurisdiction over the territory --

THE COURT: Yes.

MR. GRANT: -- I would understand and I would say, yes, there may be something here that we must amend.

THE COURT: Yes.

MR. GRANT: But what we are seeking is, of course, different declarations but declarations that encompass the type of scenario that you have postulated. And as I said, for example, the third declaration deals specifically with that kind of an issue which is the right of use.

THE COURT: Well, I am not sure about that, Mr. Grant. I can read that differently. I can read that as being a claim to use and harvest and make decisions in relation to the whole territory. But I at the moment have some misgivings about whether you are claiming -- or whether your statement of claim includes a lesser claim for aboriginal rights than ownership and use and self-government and all those things. Now, I think this is a -- this is a discussion that will assume

much more importance later than it does now. I raise it only to alert all counsel to the question I have about what the position of the plaintiffs is. That is, there is no doubt about what the position of the plaintiffs is in the first instance. But as to alternatives, I am in some doubt about what alternatives you are actually claiming.

MR. GRANT: Well --

THE COURT: But I take it what you are saying now is that yes, you are claiming at least or as a last resort the Baker Lake type of relief.

MR. GRANT: Well, of course we say that the evidence will go far beyond that.

THE COURT: Yes, I know. But assuming that --

MR. GRANT: If the court says is it -- I will give you -- it's a difficult question to ask counsel in this situation because you are saying you are claiming this large bundle here, but if I only find there is a few little things left in the bottom of the bag, do you want the --

THE COURT: Do you want the crumbs.

MR. GRANT: Do you want the crumbs. And I don't -- I would rather us mull that, but of course -- but I appreciate you raising it.

THE COURT: Yes. Well, I think your friends are entitled to know.

MR. GRANT: Well, I think that as I have said I have endeavored to interpret for you to show you what is incorporated within these differ declarations and why there are different declarations there which expressly under the part one is the contents of aboriginal rights. So that you may find that aboriginal rights includes everything the plaintiffs seek or some of the things the plaintiffs seek. And that's what we were trying to leave with you and yet frame it up so that it was consistent with what the plaintiffs perceive the case to be.

THE COURT: Well, I am proceeding at the moment on the basis that, yes, you are claiming aboriginal rights in all their various manifestations, and if your statement of claim doesn't include that, then your friends will have to take -- will undoubtedly take that position.

MR. GRANT: Well --

THE COURT: And you may then decide to stand on your present pleadings or you may decide to amend and that's a matter of law that will have to be resolved in due course.

1 MR. GRANT: Of course, as I appreciate you raising it, and of
2 course I don't think either the court or certainly the
3 plaintiffs' counsel do not want the case to turn on
4 the nature of the pleadings, and I alert my friends to
5 the position I have taken that they see the
6 alternative declaration -- the alternative
7 declarations and that's why we have put in six
8 declarations under the content aboriginal rights.
9 THE COURT: Well, it's a matter of construction whether you have
10 claimed that, Mr. Grant.
11 MR. GRANT: Yes.
12 THE COURT: I will put it no further than that.
13 MR. GRANT: Yes.
14 THE COURT: You say you have, and your friends may disagree at
15 some time in the future. All right. At least we
16 won't be taken by surprise anyway.
17 MR. GOLDIE: Well, I would not like the moment to go by in
18 silence and the possible -- the possible conclusion on
19 the part of my friends that I agree that there is an
20 alternative claim in the prayer for relief as it now
21 stands. If it was to be an alternative claim, six
22 would read a declaration that the aboriginal rights of
23 the plaintiffs excluding ownership and jurisdiction
24 over the territory are recognized and affirmed. We
25 have taken paragraph six as meaning ownership and
26 jurisdiction as defined by the plaintiffs are
27 entrenched under the language of section 35 of the
28 Constitution Act. With great respect, my lord, I
29 don't think there is a slightest sense of an
30 alternative plea being found in the declaration and we
31 have not proceeded on that basis. As far as we're
32 concerned, this case is going to be fought on the
33 pleadings as they now stand unless they are amended.
34 And if my friends fail to establish ownership and
35 jurisdiction in the sense that they have stated, then
36 in my submission the case is to be dismissed.
37 THE COURT: Well, I get the distinction impression that you
38 gentlemen have a different view of what the pleadings
39 claim.
40 MR. GRANT: And with many other aspects.
41 THE COURT: That's why I think it's a useful discussion to have
42 now. Mr. Macaulay?
43 MR. MACAULAY: My lord, I understood the pleadings to be
44 restricted to ownership and jurisdiction and our
45 statement of defence reflects that. We don't address
46 in our defence the important issues that would be
47 relevant to Calder type claims, but I always thought

1 were not relevant to this claim. As I understood what
2 my friends pleaded and said in the opening, it was --
3 it is an all or nothing position. Today I understand
4 it's -- I am hearing something a little different.
5 THE COURT: Well, we have two diametrically opposed views and
6 that's the way it often is in lawsuits.
7 MR. MACAULAY: But I think this is an -- after all, we are two
8 months into the trial and it might be timely to
9 resolve ambiguities, important ambiguities of that
10 kind.
11 THE COURT: Well, I --
12 MR. MACAULAY: Even now I couldn't quite understand whether my
13 friend's statement is an unambiguous one. I am left
14 whether the greater includes the less or whether it's
15 my original understanding of the matter was right.
16 That can't be left until the conclusion of the trial.
17 And it shouldn't be left any longer. It should be
18 settled now. Or as soon may be convenient at the
19 recess, the summer recess.
20 THE COURT: I think the matter can be left, Mr. Macaulay, for
21 further consideration and can be spoken to again on
22 the 17th. I am uncertain as to whether this is a
23 matter where I should pronounce on this, a matter that
24 may not be important, and it -- or at least it may
25 never arise or that may become clarified by the
26 evidence in some way. I prefer to jump off bridges
27 when I come to them.
28 MR. MACAULAY: I think we have come to the bridge.
29 THE COURT: I am not sure I met that bridge yet.
30 MR. GRANT: He is free to jump, my lord.
31 MR. MACAULAY: I knew you would say that. I enjoy giving my
32 friends openings.
33 THE COURT: I am going leave it.
34 MR. MACAULAY: I am reluctant to jump.
35 THE COURT: I will say this, that I have some difficulty finding
36 an alternative claim in the prayer for relief. But I
37 am not going to pronounce on that. All right. What
38 about the marking of the other documents, Mr. Goldie?
39 Are you --
40 MR. GOLDIE: Well, I had understood, my lord, that my friend was
41 going to inform me of which of the other documents for
42 which numbers have been reserved. That would be --
43 that he wished to give consideration to. I think your
44 lordship -- this is -- I am reading from the
45 transcript on June 16 at page 1301 where you said
46 this:
47

"Well, I think that if you are not going to press it, Mr. Goldie, and your friend wants time, I don't see why he shouldn't have time. The exhibits on this list from -- I am sorry, from 36(a) to 39(c) may be marked now for identification. The other numbers can be reserved in accordance with this list and Mr. Grant, I think that you should let your learned friends know and let me know perhaps by the end of the week if further submissions are going to be required if that's convenient by the end of this week."

And that's the way in which it was left.

THE COURT: Yes.

MR. GOLDIE: My submission, my lord, would be that I take my friend's silence to mean that they raise no further particular objections to the documents, and if they go in and they are marked, they become subject to the ruling that your lordship made with respect to affidavits.

THE COURT: They can be marked for identification.

MR. GOLDIE: They would be marked for identification. That's correct.

THE COURT: All right. Mr. Grant? Mr. Rush.

MR. RUSH: There are no further submissions that we'll make. We have not been able to have the other documents brought up to us from Vancouver, so we don't take any other -- we take no other position other than the one we took in respect of the others, and we would maintain a general objection as we did in respect of the earlier set of maps and supporting material. Having said that, if we choose -- we reserve the right, I suppose, to make some other specific objection, but apart from that I don't think I can say much more. I do say, however, that we have been advised by Mr. Goldie that he could obtain for us the affidavits that were required of him in the early part of the vacation and I would like some indication now as to when we could expect to get those. If it's going to be that we are going to use the vacation as a time period within which we can make some attempts to examine on these affidavits, we should have them as soon as we can and try and determine when we are going to do it.

MR. GOLDIE: Well, the five affidavits in respect of the five ones that have been marked are in the course of being drafted now. I can't make any statement with respect to the balance because I didn't know until now that

1 the documents would be going in without further
2 argument. But I appreciate my friend's position and
3 we will get along with it as fast as we can.
4 THE COURT: All right. That matter might be spoken to again
5 then on the 17th and in the meantime there is no
6 reason if the documents are here why they shouldn't be
7 marked now for identification.
8 MR. GOLDIE: Yes. Rather than take up the court's time, I would
9 propose that the documents in accordance with the list
10 that I handed up be marked in that and we will arrange
11 with -- that with the Registrar before the day is
12 over.
13 THE COURT: Yes. Those numbers have been reserved for that
14 purpose.
15 MR. GOLDIE: Yes.
16 THE COURT: All right.
17 MR. GRANT: My lord, possibly a similar process I was just
18 having listings done on the exhibits for the
19 commissions and possibly I could give copies of those
20 lists to my friends so those exhibits could be marked.
21 THE COURT: Yes. That would be convenient.
22 MR. GRANT: That will be at the end of the court day.
23 THE COURT: All right. Is there anything else, gentlemen? Mr.
24 Macaulay?
25 MR. MACAULAY: Mr. Morrell. Back to Mr. Morrell.
26 THE COURT: The ubiquitous Mr. Morrell.
27 MR. MACAULAY: I am addressing now a narrow matter, that is a
28 class of document that's been -- has existed for
29 years. It's not something the plaintiffs have to get
30 ready or edit or do anything with except have
31 photocopied. Mr. Morrell in his report sets out the
32 fact that he conducted interviews with -- of many
33 plaintiffs and took notes and on those notes he
34 obviously relies. They would have been privileged if
35 the Morrell report or a summary of the Morrell report
36 hadn't been provided, but that privilege has gone.
37 Our friend -- my friend, Mr. Grant, has given us one
38 set of these notes. There seems to be on the
39 plaintiffs' side a misunderstanding of their duties
40 under the rules in regard to relevant documents. It's
41 not enough in order to comply with the rules to issue
42 statements as witnesses turn up. We didn't get one --
43 to our astonishment this present witness wasn't
44 interviewed apparently, or if he was there was no
45 notes taken, and Mr. Joseph -- in Mr. Joseph's case.
46 But we haven't got the interviews, if there are such
47 interviews, of the three previous witnesses, nor of

the many -- I think there are 30 or whatever number. There may be others. And it doesn't stop there. If Mr. Morrell interviewed 80 plaintiffs, then we are entitled to 80 sets of documents now, not as they may appear. This isn't -- the charts, the geological charts stand on a different footing. As we understand our friends, these aren't ready and your lordship in those circumstances made an order that they produce them 14 days before leading evidence. But this is an entirely different thing. These are documents that are in their possession. They were created for the purpose of this litigation years ago. I say years ago. We have six months out of them, and they were dated 1982. That's one aspect of the Morrell problem. The other problem concerns the appendices, the many appendices. We have received one, appendix five.

MR. GRANT: You received two.

MR. MACAULAY: What's the other one. Oh, the first one is a report, yeah. We are missing two, three, four and six. In April we were told, your lordship I think was told that they would be along on various specific dates in April or May, and they are still not here. So that our advisors on fisheries can't attend to them and see what's -- what needs to be done about them in good time, so that there wouldn't be any delays. During the summer is an opportune time to work through that kind of material. In those circumstances I ask your lordship to make an order regarding the witness, the statements, Morrell -- the notes of Morrell's interviews, that they be delivered forthwith, and that an order that the appendices be delivered before the resumption of the trial in September.

THE COURT: All right. Mr. Grant?

MR. GRANT: Yes, my lord, I would like to speak to that. First of all, I received a letter and I am taken aback by what my friends just said in the last part, because in the letter that I received at the beginning of this week my friend proposed as we proposed were answers to the interrogatories. He said we would like a response and we would like these appendices by July 3rd. My calculation is that is a week from today. He said if we don't get your response by then, we are going to make an application for an order of appendices. With respect to the notes, my lord, I was in the process of reviewing those notes. I have no difficulty in delivering those notes to my friends, that is all that -- I have instructed Mr. Morrell to gather all of

the notes, and I am in the process of as counsel reviewing them, just in case there are matters that are not relevant or matters that are privileged. But other than that, I see no difficulty in disclosure of the notes, delivery of those notes to my friends next week. With respect to the appendices, upon receipt of my friend's letter I had a session with Mr. Morrell, who is also involved in the work on these fisheries maps which were being produced for the court, and I scheduled the timetable for him. And he -- that he could -- we worked out a timetable that he could meet and we are concerned to have all of the fisheries maps prepared and that's the first priority. It's something that my friends have been concerned about and then the balance of the appendices, I see them -- I understand then can be on a staged in process, but all of the appendices of Mr. Morrell on the present schedule he and I worked out will be able to be completed by the end of July. I have no problem with delivery of them at that time. And of course we have already dealt with that matter in a way, because of the 60 day request of Mr. Goldie on all reports back and forth. Mr. Morrell's entire report has been delivered. Two out of the six appendices have been delivered. Two of the appendices involved are solely a collation of data that is in the hands of the Attorney General of Canada and one of the appendices is based on other material. So I am trying -- we are working out that schedule, and I -- I was going to be corresponding -- communicating with my friends before next week regarding the appendices. So I would ask for no order with respect to the appendices because it's already been dealt with under the expert reports. I would advise the court that I see no need to make an order with respect to the delivery of notes forthwith. I have custody of these notes. I am in the process of reviewing them and I am going to deliver them and I have no problem doing that within the next week.

THE COURT: All right. Well, Mr. Macaulay, any reason why I shouldn't accept Mr. Grant's assurance you will get the notes before the end of next week?

MR. MACAULAY: No, my lord. I am content with that.

THE COURT: Yes. All right. I must warn you, Mr. Grant, I am beginning to -- I am beginning to sense a bias against Mr. Morrell by being sick of hearing his name mentioned in this context. So if he was going to be a witness --

1 MR. GRANT: I am certain that he is one of the experts upon
2 which Mr. Macaulay is most concerned about and he
3 keeps raising his name and I hope that -- poor Mr.
4 Morrell isn't here to defend himself and I am doing my
5 best to defend him in his absence. But he is
6 processing these appendices and as said a detailed
7 schedule is being worked out. It's a question of he
8 needs computer access time. He needs data
9 formulation. He has to get these fisheries full-time
10 on this and he has been for some time and --
11 THE COURT: All right.
12 MR. GRANT: That's what --
13 THE COURT: Thank you. Anything else?
14 MR. GOLDIE: Well, I suppose there is one other thing. Before
15 lunch, my lord, I said that I was prepared to
16 formulate a proposal, but in light of the statement by
17 my friend that the plaintiffs have a joint interest in
18 the property, it would be pointless for me to produce
19 anything that was based upon the proposition that each
20 plaintiff was making a claim in respect of his or her
21 property.
22 THE COURT: Well, I think each plaintiff is, but it's --
23 MR. GOLDIE: Well --
24 THE COURT: At least I take it that each plaintiff is making a
25 claim in respect of his property, but that
26 over-arching - sort of a new word that's come into
27 recent popularity - seems to be a suggestion from Mr.
28 Rush and Mr. Grant that the several claims are also
29 being advanced as joint claims.
30
31 MR. GOLDIE: Well, they haven't been identified as such up until
32 now. And I have made reference to an application
33 before Mr. Justice Taylor in April of 1985 when that
34 very point was in issue, and my friends assured his
35 lordship that the claims were being made by a chief on
36 behalf of the members of his House and that there were
37 47 - that being the number of plaintiffs at that
38 time - there were 47 separate and distinct claims, and
39 that's the basis upon which this lawsuit has been
40 conducted up until now as far as I'm concerned. And I
41 should say that given the statement that my friend
42 made in response to your lordship's question, was this
43 a joint and several claim, and my friend said a joint
44 claim, I see no point in spending my time in making
45
46 any proposals based upon other than that -- based upon
47 an understanding different than that. Now, I leave it

at that, because I realize that the proposals they are making is in the embryonic stage at this point and that we are going to be discussing that on July 17th, but I didn't want to be left with the thought that I was going to do anything of the kind that I proposed this morning. We may have to seek orders ourselves based upon what we see of their proposal, but -- and based upon the assertion that there is a joint claim, because certainly our cross-examination of the witnesses to date have not been based upon that assumption at all.

MR. GRANT: My lord, I see the next stage of the proposals that we -- of course we will correspond with our friends on it, but primarily it was a grappling with the issue raised by the court and the implications of that proposal. And I gather from the way the court has spoken, the court will look favourably upon it is that we will, of course, be making an application to tender certain evidence by way of affidavit subject to availability of cross-examination, and so we ourselves will, of course be required under the rules to make application to the court with the development of this proposal.

THE COURT: Well, all right. I think there is a serious problem in this question of joint and several that I wouldn't expect counsel to deal with now. I am not sure I understand it. I have -- I have proceeded more or less on the assumption, although I have never had directly directed my attention to it, that each plaintiff had assumed the burden of proving his or her claim to ownership of and jurisdiction over a specific territory, and that's as far as my thinking went. That is not in my understanding a joint claim. Mr. Grant said this morning, with some prompting from Mr. Rush, I noticed, that the claim was a joint one. And I think that that has to be considered, and I think that it will be useful if on the 17th of July we could also have some discussion about that so that we are all on the same track and we all have the same understanding of what the claim is. Unless you want to say something further about that, Mr. Grant, I wouldn't press you to say anything further about it today.

MR. GRANT: I have your point on that. I think we will leave it to the summer.

THE COURT: All right. Is there anything else?

MR. GRANT: There is nothing from the plaintiffs.

1 THE COURT: All right. Well, I want to just add this to what
2 you said a moment ago, Mr. Grant. I said the other
3 day that I felt obliged to bring this monstrous case
4 under some measure of control. Without prejudging the
5 issue in any way, it seems to me that the best device
6 or vehicle to accomplish that purpose that's been
7 mentioned, subject of course to what Mr. Goldie may
8 later say about the proposal he was formulating, is
9 this idea of having as much of the evidence of the
10 individual plaintiff's tendered in chief by affidavit
11 subject to cross-examination. I would not wish to
12 resile in any way from what I added yesterday, which
13 has been taken up by the plaintiffs, that it may be
14 possible to merge or meld the two concepts together
15 and perhaps have much of the detailed evidence given
16 by affidavit with liberty to the plaintiffs to adduce
17 such further matters viva voce. Either some which
18 have been overlooked perhaps and not including the
19 affidavit or other matters generally, but -- and I
20 think that's a proposal that deserves careful
21 consideration and is, as I have said, the best thought
22 that I've heard expressed so far. But there has to be
23 some control mechanism, and I think there has to be
24 some certainty, and without committing myself or
25 counsel at this time, I would like counsel to have in
26 mind that I am thinking of not leaving it to Mr. Grant
27 or the plaintiffs to make an application, but to make
28 an order that the evidence of the individual
29 plaintiffs be tendered by affidavit with appropriate
30 salient provisions for the advancing of some evidence
31 viva voce by the plaintiffs. And I say this now so
32 that counsel will know between now and the 17th, if
33 it's of any assistance to them in their ongoing
34 preparation, that this is something that I am
35 considering, and it may be that it will help them to
36 know what I am thinking now for the purpose of meeting
37 that form of trial if that eventuality should come to
38 pass. I think that I -- I think that I am right in
39 saying that I have not encountered personally or in my
40 reading any case where 70 or so joint, several or
41 joint and several claims have been advance inside one
42 action, and I think that factor plus the breath of the
43 claim that we have been talking about puts this case
44 in an -- in such a unique category that measures must
45 be taken to move the trial along at much greater pace
46 than we have been able to accomplish up to now. I
47 don't point fingers at anyone or make accusations or

criticisms. We have a very difficult case to deal with. And a slow start might be expected. But there is no point all of us getting over if we don't get smarter along the way. And I think the unusual nature of the case, the extraordinary nature of the case is such that something along the lines that I have just described which has been mentioned is definitely a possibility. And if that's of any assistance to counsel in their ongoing preparation when we meet on the 17th, then I am glad I have said what I have said. I think that is as much as needs to be mentioned now. But I do not accept, as I said yesterday, the somewhat simplistic notion that viva voce evidence is the only way in which a proper evidentiary record can be prepared for the purposes of argument or appeal. And it will be necessary for us to work out or for me to impose some regime that will accomplish the purpose I have in mind, which is to complete the evidence in a reasonable time. I have no idea what that might be in absolute terms. But I do not think I can allow the case to proceed at the pace it has in these past six weeks. All right. I think we will adjourn then until Monday the -- what is the date, July 17th, in Vancouver, and I wish you all a very pleasant summer.

MR. GOLDIE: It's a Friday, my lord.

THE REGISTRAR: Yes, 17th of July is a Friday.

THE COURT: All right. That is no better, no worse, except that we have a finite date. We can't go on to the next day if it's a Friday, can we? Friday, the 17th of July then.

THE REGISTRAR: Yes.

THE COURT: All right. Thank you.

(PROCEEDINGS ADJOURNED UNTIL FRIDAY, JULY 17, 1987)

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

Laara Yardley,
Official Reporter,
United Reporting Service Ltd.