Vancouver, B.C.
June 13, 1988

THE REGISTRAR: Order in court. In the Supreme Court of British Columbia, this Monday, June 13, 1988. Calling Delgamuukw versus Her Majesty the Queen at bar, My Lord.

THE COURT: Mr. Grant.

MR. PLANT: I have one housekeeping matter of sorts that I could dispose of very quickly.

THE COURT: Thank you.

MR. PLANT: When Madam Registrar and I were reviewing the grey book of documents re Glen Williams after court a week ago Friday, we took out all of the documents that were not marked as exhibits with two exceptions, and we had just a grain of doubt whether they should be taken out without some comment from your lordship. At tab five of that book was the affidavit of Glen Williams sworn in the Fishing By-law case. It is June 1986. I made some reference during Mr. Williams' evidence to that affidavit during my cross-examination of Mr. Williams, I should say. I read to him some paragraphs from the affidavit. I did not seek to have the affidavit marked as an exhibit and I do not now seek to have it marked as an exhibit. From my prospective, I would be quite happy to take it out. But as I say, a week ago Friday Madam Registrar and I had some concern about whether that would be appropriate given the exstensive reference that had been made to it.

And perhaps in the same vein I should refer your lordship to the document at tab 14 which puports to be a record of the third annual convention of the Gitksan Carrier Tribal Council of November 5, 6 and 7, 1980. I made reference to this document, particularily with respect to a resolution numbered 5 that I asked Mr. Williams about in cross-examination. And my recollection is that he did not have a specific recollection of that resolution, that's why I didn't seek to have the document marked. But again because there was some reference to it in the evidence, Madam Registrar and I collectively had some concern about whether it should be taken out of the book without your lordship's blessing. So I bring those two documents

1 to your lordship's attention. As I say, I would be
2 happy to have them both removed. They are not
3 exhibits, but I am in your lordship's hands on that.
4 THE COURT: Well, are counsel agreed on what should be done in
5 this regard?
6 MR. GRANT: I didn't know about this at all until just now about
7 this concern. What I had agreed was that --. Well,
8 let me speak to this, regarding the June 16, 1986
9 affidavit it is my position regarding that affidavit
10 that as it was put to the witness and he identified
11 it that it should be marked as an exhibit and I had
12 anticipated that my friend was going to do that and
13 he didn't. So the point I was going to request if
14 he did do that was that it should be put in as an
15 exhibit together with the exhibits because the
16 affidavit itself does not make entire sense without
17 reference to the exhibits. I would suggest that
18 that be marked as an exhibit. With respect to tab
19 14, I agree with what my friend says is that, in
20 fact, Mr. Williams could not identify or recall that
21 resolution, although he was cross-examined on that
22 convention, and I don't think that should go in as
23 an exhibit. There was no identification.
24 THE COURT: You are in agreement with that, Mr. Plant?
25 MR. PLANT: Yes, My Lord. And perhaps my friend and I could
26 discuss the affidavit and that should have been done
27 beforehand.
28 THE COURT: In this context, I am happy to approve whatever
29 counsel feels --
30 MR. PLANT: Well, then tab 14 should be removed and my friend
31 and I will come back to your lordship on the
32 question of tab 5.
33 THE COURT: Thank you.
34 MR. PLANT: My only reluctance to accede to my friend's
35 suggestion, as I understand it, is that the exhibits
36 to that affidavit are about an inch to an inch and a
37 half thick and that may be more paper than your
38 lordship needs.
39 THE COURT: All right. Thank you.
40 MR. PLANT: Thank you, My Lord.
41 THE COURT: Mr. Grant.
42 MR. GRANT: Yes, My Lord, I have one housekeeping matter before
43 proceeding any further and that is that I propose
44 that the itinerary for the court, the red book that
45 was used by the court and provided to counsel, it
46 may be appropriate to have it marked as an exhibit
47 because it gives some references to where that is.

Your lordship may wish to refer to it in the course of connecting some of the evidence with your viewing. I don't know what the position of my friends is. Of course, the viewing itself wasn't recorded, but I would propose that the book itself be marked as an exhibit.

THE COURT: Mr. Plant and Ms. Koenigsberg?

MS. KOENIGSBERG: Obviously I wasn't there, but I did have a look at the book when Ms. Russell returned. And my only comment about it is that she advised me or instructed me that the flight paths that are in fact indicated on some of the maps could not and were not followed.

THE COURT: Not precisely, but they are very close.

MS. KOENIGSBERG: And my assumption is that it, at least in part, shows intention rather than reality and to that extent it probably shouldn't be evidence. Now, to the extent that it would be of assistance to the court to have a record of the view that was taken, I have no objection.

THE COURT: Mr. Plant.

MR. PLANT: Well, I haven't had an opportunity to discuss this with Mr. Mackenzie who your lordship may recall was with you. I think that to the extent that your lordship considers that the document may be of some assistance in recalling the view that I don't have any objection to having it marked.

THE COURT: I think it would be useful to mark it with the infirmities that have just been mentioned. It doesn't show precisely the flight paths, but it is very, very close in most instances. And for that reason, I think it would be useful to have it marked with the limited purpose that we mentioned. It could be the next exhibit. I have my copy at home, but mine shouldn't being marked because I made notes.

MR. GRANT: I note that mine is clean, but on one of the maps where the rivers are marked in blue.

THE COURT: The next exhibit number will be?

THE REGISTRAR: 590.

THE COURT: We will reserve it for that book of maps and flight paths.

(EXHIBIT 590 RESERVED)

MR. GRANT: Now, My Lord, the next point or phase is a proposal that as a result of discussions that occurred after

1 court on Friday a week ago, June 3rd, with our
2 clients, we have arranged and all counsel have
3 agreed that this week could be dedicated to the
4 viewing of the commission evidence of Mr. Stanley
5 Williams, Chief Gwis Gyen and to that end we have
6 arranged for the monitors and the videos. It was
7 the plaintiffs' proposal that, of course, not all of
8 the commission of all witnesses be viewed in its
9 entirety, but that this witness and possibly one
10 other witness be viewed in their entirety and there
11 will be excerpts from the others. I anticipate, My
12 Lord, that this will take a week.
13 The plaintiffs do not wish to interfere with
14 the scheduled commencement of Mr. Sterritt's
15 evidence next Monday, which is agreed to with the
16 defendants and suits Mr. Golie's schedule as well,
17 because we are concerned that we want his evidence
18 completed before the end of the session this year.
19 And to that end, I am prepared to speak to how the
20 scheduling should proceed, but we would like to
21 endeavor to complete the evidence of Mr. Williams
22 this week.
23 And I propose to my friends and they have --
24 we have all exchanged objections, that is it would
25 be maintained that the issue of the objections
26 raised by both defendants and by myself would be
27 dealt with initially with this proviso which Mr.
28 Plant proposed that objections on re-direct be held
29 off until after you have viewed it because it would
30 be hard for you to put in context why the objection
31 was made and we agree with that. The only
32 difficulty with that, My Lord, is that I am not --
33 in terms of proceeding with the trial and the next
34 witnesses, I am not intending to be here after
35 today. I would ask that the objections on re-direct
36 that the court hear all of the evidence while other
37 counsel is here. And I presume that Mr. Plant would
38 like to argue those objections, I certainly would,
39 on re-direct and that that be put off until some
40 time next week, although Your Honour could hear all
41 the evidence and Mr. Plant could note the
42 objections. The facility of having all the other
43 objections dealt with is so we avoid any
44 interruptions. We are also prepared to -- the
45 plaintiffs are prepared to accede to the Court's
46 suggestion, although I don't know what exact time
47 table you will consider, of sitting longer court

hours.
THE COURT: Well, I was all for that, but I wasn't given any notice of that. I regret to say that this is a bad week for longer hours because of other commitments I now have. I made a list of them, but I left it conveniently on my desk. I have a pre-trial conference arranged already for this afternoon at 4 o'clock and another one for tomorrow morning at 8:30. I would have had to stand the trial down for Wednesday morning mainly because it is the Vancouver Foundation and unfortunately I have to be at this particular meeting.
MR. GRANT: There would not be -- there would be no sitting on Wednesday morning?
THE COURT: On Wednesday morning, I'm afraid not. I think Thursday is okay except for an 8:30 appointment. I could cancel that. We have Mr. Justice Hollinrake's ceremony at 9:30 on Friday morning.
MR. GRANT: Yes.
THE COURT: I have engagements already scheduled for tomorrow evening.
MR. GRANT: Well, I can appreciate the problem and what happened is this came out of further discussions on Friday to resolve the conflict.
THE COURT: I was hoping that it would be a week where I could try and clear my schedule as much as I can, but this is a particularily bad week. I would think that we could -- well, unfortunately I have left that piece of paper behind. Madam Registrar, would you phone my office and ask them if there is a fullscap piece of paper with this week's schedule on it and ask them to send it right up. How long do you think it will take for the objections to be argued?
MR. GRANT: I have only one objection that I am going to maintain, but I think most of the objections are Mr. Plant's on direct.
THE COURT: Is testimony something that will be argued before we see anything?
MR. GRANT: That's what was proposed.
THE COURT: Why don't we go ahead with the objection and we can get the schedule after that.
MR. GRANT: I would think it would be proper for Mr. Plant to deal with his objections first.
THE COURT: Yes, all right.
MR. PLANT: Does your lordship have a copy of the transcript?
THE COURT: No, I don't. I have it downstairs. This would be the transcript of Stanley Williams?

MR. PLANT: Yes, his commission.
MR. GRANT: It has been filed as an exhibit.
THE COURT: I think maybe we will adjourn and I will go get it. I know where it is. I will be right back.
THE REGISTRAR: Court will adjourn.

(PROCEEDINGS ADJOURNED AND RESUMED PURSUANT TO BRIEF RECESS)

THE REGISTRAR: Order in court.
THE COURT: Yes, all right. I have my schedule now, do you want to talk about that some more?
MR. GRANT: Sure.
THE COURT: Well, I have a pre-trial conference at 4:15 this afternoon. I have no idea how urgent it is, but counsel are planning their day on that basis. I should probably not cancel it if I can avoid it. Tomorrow I don't have a pre-trial conference, I have a dentist appointment at 8:30.
MR. PLANT: I don't think I want to sit at all tomorrow morning then, My Lord.
MR. GRANT: I am not going to be here, but it is not because of what has been said, My Lord.
THE COURT: There is the Vancouver Bar new judges lunch I have to go to which I should leave a little early tomorrow at lunch time. I have a dinner that I have to attend tomorrow evening related to the judiciary. I have a pre-trial conference on Wednesday morning and I have the Vancouver Foundation at ten. Thursday is a day I can make free. I have a meeting at 8:30. I can probably dispense with the pleasure of meeting with the representatives of court services for what I'm sure will be important matters, but I can put that off. Friday, as I said, we have the ceremony for Mr. Justice Hollinrake. I can't do much with today. We can sit late on Wednesday afternoon and into the evening if counsel wish.
MR. GRANT: Counsel for the plaintiffs are available Wednesday evening.
MR. PLANT: Oh, and we are too.
THE COURT: I could sit long, long hours on Thursday, but I can't sit long hours on Friday.
MR. GRANT: My Lord, what I had worked out with other counsel for the plaintiffs, and maybe this would only apply to Thursday as a result of your schedule, but I propose to start at 9 a.m. and go through to 12:30 with a break and 1:30 to 4:30.

THE COURT: On Thursday?
MR. GRANT: Yes, that would be for any day which you would be available, but it appears that's Thursday.
THE COURT: Thursday is the only day that I could do that.
MR. GRANT: So that would be Thursday, and I just would have to notify counsel. And then Wednesday evening, as I say, counsel for the plaintiffs are available then.
THE COURT: All right. Well, I think we are going to have too much -- do counsel want to sit this evening?
MR. GRANT: I am available this evening, My Lord.
MR. PLANT: I am available this evening.
THE COURT: Well, I have to adjourn at four, but I could come back at seven and sit until nine, for example.
MR. GRANT: That's agreeable. I would be available.
THE COURT: Yes, all right, seven to nine this evening.
MR. GRANT: Would that be the same on Wednesday?
THE COURT: Yes, we could sit seven to nine on Wednesday as well. And do you want to sit Thursday evening as well?
MR. GRANT: I think there are some problems in terms of availability for counsel.
THE COURT: All right. Regular hours except we will have the seven to nine sitting tonight and on Wednesday night. We will sit the hours described by Mr. Grant on Thursday and regular hours on Friday.
MR. GRANT: And no session Wednesday morning?
THE COURT: And no session Wednesday morning.
MR. PLANT: I have nine objections, My Lord.
THE COURT: All right.
MR. PLANT: The first two are in volume one. The first of those is at page 9. I have a two-page list of objections, a copy of which was delivered to my colleague Mr. Rush on Friday.
THE COURT: Thank you.
MR. PLANT: For the most part, the objections that I am making this morning are within the scope of your lordship's earlier reasons on the general reservation with respect to the reputation exception and so on. These objections are directed to other subjects. Page 9 at line 33 Mr. Grant's question is:

> "Q You described to me before this commission the seating of the people as you described it now; is that right, the seating at your table in Gitsegukla?
> A Right."

1 This follows some questioning about the seating at
2 the head table in Gitsegukla. My objection is a
3 rather narrow one that as I hear this question, or
4 at least as I read it last week, it appeared to me
5 that the question is inadmissible as an attempt to
6 lead a prior consistent statement from the witness.
7 THE COURT: Well, I'm sorry, I'm not following you, Mr. Plant.
8 What he is talking about is who sits where at the
9 feast in Gitsegukla.
10 MR. PLANT: That's right. He has given evidence -- up to line
11 33, he has given some evidence about that, most of
12 that or all of it is quite properly adduced.
13 THE COURT: Yes.
14 MR. PLANT: Then there is an attempt, I say, to buttress that by
15 reference to a conversation that appears to have
16 taken place between counsel and the witness before
17 the commission: "You've talked about this before to
18 me and what you told me before is what you are
19 telling me now, right?"
20 THE COURT: Yes.
21 MR. PLANT: It is a pretty narrow objection, My Lord, and it is
22 not one that really taints the broad brush of the
23 evidence.
24 THE COURT: But there is nothing leading in that question at
25 line 33. He has reminded the witness that he has
26 discussed it with him and I'm not sure there is
27 anything wrong with that. Maybe there is a
28 statement between them, but that doesn't show on the
29 record.
30 MR. PLANT: If it is only a reminder, I don't think it is
31 objectionable. But if it is an attempt, as I was
32 afraid it was, to confirm the witness' evidence by
33 reference --
34 THE COURT: That might be so if he asked a leading question, but
35 the question was:
36
37 "Now, who sits in front of you at the
38 feasts in Gitsegukla?"
39
40 MR. PLANT: I am not taking objection to that, it is simply the
41 one question and the one answer.
42 THE COURT: Well, I am against it, Mr. Plant.
43 MR. PLANT: All right. Page 13.
44 THE COURT: Page 13.
45 MR. PLANT: Line 2 to 7. And actually to put this in context, I
46 should go back to page 12 line 44.
47

"MR. GRANT:
Q Okay. After this trip with Ambrose Derrick the and events with the beaver where he hit you with the beaver tail, did you go goat hunting with Gordon Johnson, the present Malii?
A I went with Gordon on Sakxum higookx's territory.
Q And can you describe where that is in relation to Gitwingax village?
A On the -- I know, he told me.
Q Oh, he said --
A On the front, the gaa lax dil..."

The next three words are G-A-A, space, L-A-X, space, D-I-L.

THE COURT: With respect, it is not spaced, it is underlined.

MR. PLANT: Well, the first G is underlined, AA space, L-A-X underlined, space, D-I-L.

THE COURT: Yes.

MR. PLANT:

"...is sort of the front part of a -- across the river from Gitwingax.

And Gitwingax is in the transcript and the court reporter has a copy of that. My objection to that is simply that it is hearsay because the knowledge is said to come from Gordon Johnson who is a living person.

THE COURT: What is it he is describing "where that is". What is "that"?

MR. PLANT: I took that to be Sakxum higookx's territory.

THE COURT: Yes.

MR. PLANT: A place where he went goat hunting with Gordon Johnson.

THE COURT: All right. Well, I think that, depending on what your friend says, I would agree with you if it is adduced or relied upon for the proof of where Sakxum higookx's territory is, but are there not other bases for admissibility that may well apply?

MR. PLANT: There may well be, and I don't know what my friend's position is on the basis for the admissibility of that question.

THE COURT: Is this a private fight between you and Mr. Grant or does Ms. Koenigsberg --

MR. GRANT: She has adopted Mr. Plant's objections.

1 MS. KOENIGSBERG: There are some questions that we object to.
2 THE COURT: Let me know if you want to be heard in this private
3 fight.
4 MS. KOENIGSBERG: I don't consider it a private fight. I have
5 reviewed the material.
6 THE COURT: Mr. Grant, you don't suggest that is admissible to
7 prove the boundaries of Sakxum higookx, do you?
8 MR. GRANT: No, it's not. With respect to that, My Lord, I
9 think it's a bit unclear as to whether or not when
10 the witness refers to: "On the -- I know, he told
11 me" that he is referring to Gordon Johnson. It is
12 not proof of the truth of the territory, but it is
13 evidence of reputation, that is that that knowledge
14 of that territory has been passed on and I would say
15 that it's admissible on that basis. It is not
16 necessary for this evidence to prove the boundaries,
17 and I would ask that it be admitted. It is evidence
18 from Gordon Johnson and other evidence indicates he
19 is Malii. And it is another head chief and he knows
20 that boundary. He describes something which is
21 consistent with what the other evidence is and it
22 is, as I say, not evidence of the boundary itself.
23 THE COURT: Well, I have a problem with that, Mr. Grant, and we
24 had better take it by the throat. I wouldn't have
25 thought that you could prove reputation in the mind
26 of Gordon Johnson by his otherwise inadmissible
27 statement to Mr. Williams. It would be
28 self-serving, would it not?
29 MR. GRANT: Well, Mr. Johnson, the state of his mind of what he
30 knows --
31 THE COURT: Mr. Johnson is a living person, is he not?
32 MR. GRANT: Yes, and that's where I am having the trouble with
33 it because I read it a bit differently than my
34 friend. I read it based on --
35 THE COURT: I have to assume that "he" in the answer on line
36 five refers to Gordon Johnson who is the last person
37 named. It may have been Ambrose Derrick. Is
38 Ambrose Derrick deceased?
39 MR. GRANT: Yes.
40 THE COURT: Well, he may have meant Ambrose Derrick, but I have
41 to apply the ordinary rules that he is referring to
42 the last person named unless it indicates otherwise,
43 and it doesn't. So in other words, what you are
44 saying is Gordon Johnson's reputation or his
45 knowledge of reputation is entitled to be proven by
46 his self-serving statements to Stanley Williams and
47 I am against you on that.

MR. GRANT: No, Gordon Johnson is another head chief. He is not Sakxum higookx.
THE COURT: Oh, all right.
MR. GRANT: So all that is the evidence that --
THE COURT: Well, it doesn't matter whether it is self-serving or not, it is just hearsay, isn't it?
MR. GRANT: Well, it is hearsay to prove the truth of the facts stated herein, it is not there to prove the state of mind of Gordon Johnson. All that it goes in for is to show his state of mind, that is his belief.
THE COURT: You think it is competent to prove the state of mind of a person by out-of-court statements he makes about someone else's territory?
MR. GRANT: Well, all that is evidence of is his belief, that's all it is, which I would submit is as much a fact as anything else, the belief of that person. And the reason I don't press it is that I don't think it -- it doesn't carry much weight except for the state of mind of Gordon Johnson, that's all it shows. And it is not proof of the boundaries, I agree with my friend. It can't be for the proof of the truth of the matter stated therein. Those are --
THE COURT: Well, I would have thought that if the state of mind of Mr. Gordon Johnson was relevant you would have to call Mr. Gordon Johnson. You can't prove his state of mind by hearsay evidence. You can prove the state of mind of the witness by what people told him. If the state of mind of the witness is relevant, then you can prove his state of mind by what other people tell him. There is no other -- sometimes there is no other way to get into that state of mind, but I wouldn't have thought -- I must confess that I have never given detailed consideration of this, but I wouldn't think that you could prove the state of mind of a non-witness by statements that person makes, the non-witness makes.
MR. GRANT: Well, of course what is important in this evidence is the state of mind of Mr. Williams who testifies to this territory and the boundary of this territory.
THE COURT: Well, by an exception to the hearsay rule I have held that his state of mind can be proven or reputation can be proven by the statements that deceased persons have made to him, but not statements made to him by living persons.
MR. GRANT: Right.
THE COURT: And Gordon Johnson is a living person.

MR. GRANT: Well, the affidavit which is Exhibit 11 in his commission evidence of course relies on the statements by deceased persons with respect to this territory.
THE COURT: Right.
MR. GRANT: And that's why I say it is not necessary for this evidence to prove the territory.
THE COURT: Well, I don't think so, Mr. Grant. I have the view that that -- just that question and answer, I suppose, is inadmissible because you are going back to his evidence -- oh, no, you are still going on to talk about the territories. You have left the subject of sitting at the feast table.
MR. PLANT: Well, I --
THE COURT: What is a gaa lax dil again?
MR. GRANT: It is a place on the face of a mountain across the Skeena River from the Village of Gitwingax.
THE COURT: I don't think that Gordon Johnson's state of mind is relevant at this point. If it becomes relevant, I don't think it can be proven by statements he himself makes out of court except the statements he makes to the witness. I'm sorry, except the statements that are made to him, not by a witness. But let me ask you, assuming that finally I say this is not admissible, will it be edited out? How will you mechanically do that?
MR. PLANT: I think I am content with the negotiation that your lordship can disabuse himself.
THE COURT: Yes, all right. Well, I think that I am going to hear it, it is here. I am going to read it again, but I think that as presently advised I will be deciding that that is inadmissible.
MR. GRANT: I just want to be clear as to what --
THE COURT: Do you want me to state it again?
MR. GRANT: I understand your statement, I want to be sure as to what is excluded. I mean I think that --
THE COURT: Well, when you said:

> "Q And did you kill any goats in that territory on that trip?
> A We got seven."

That is obviously personal knowledge so it is only from lines two to five, isn't it? No, two to seven.
MR. PLANT: Two to seven was the extent of my objection.
THE COURT: Yes.
MR. PLANT: And my objection is directed to the admissibility of

the evidence or the evidence being tendered as being evidence of the location.

THE COURT: Yes, all right. It is out for that purpose.

MR. PLANT: I next would turn to volume 2. Now, page 79, line 31. I should put this in context by saying that at the opening of proceedings on the morning of April 13th my friend provided me with five, maybe six maps which were said to have been prepared by Neil Sterritt on Mr. Williams' instructions prior to proceedings that morning. And my concern with the evidence at line 31 to 34 and line 43 to 46 is really, as much as anything, desired to red flag problems which proliferate through volume 2 and some of volume 3 of the transcript where the evidence may not be inadmissible, but because of the way that it was led it may at the end of the day have no weight. And I think your lordship may derive some assistance by just having a brief look at the problem. At line 31 Mr. Grant asks in reference to a map which has been prepared and is identified by letter "T", letter "T" in this case referring to a portion of the Stanley Williams territorial affidavit which describes the territory. And Mr. Williams has identified the map and then Mr. Grant asks this question.

> "Q Now, referring you to Exhibit 4, letter "T", the line there appears to start at Xsan, upstream of Doreen. Is that where the boundary of this territory commences?"

And my concern with that is it is a form of weeding that reduces the weight of the evidence to virtually nothing. And perhaps an example of the problems that that form of weeding leads to, if I could put it that way, is that at line 43 of the same page where Mr. Grant asks.

> "Q Do you know a creek named Winna Wedda?
> A It is about eight miles from -- coming from the Skeena River.
> Q And is this a junction of creeks?
> A Yes."

When you are weeding as this evidence is being led, a lot depends on the accuracy of the question being

put by the questioner. And here we have, as I see it, two inconsistent suggestions being made to the witness. First, that there is creeks named Winna Wedda and, second, that this place Winna Wedda is a junction of creeks. I am not asking your lordship to make any ruling with respect to this, but merely to take note of our concern now. And perhaps just to do that with reference to one other series of questions, I could ask your lordship to turn to volume 3, page 141. Now, there at line 9 --

MR. GRANT: What page?

MR. PLANT: On page 141 of volume 3. Mr. Grant has been asking Mr. Williams about trips made to certain territories with Neil Sterritt. And the question is:

> "Q And you showed him all of the other boundaries except you did not take Neil -- all of the other boundaries described in your affidavit and all of the boundaries described in Exhibit 4 except for the following: You did not take Neil Sterritt to Xsansisnak, did you?
> A No. I just told him where the location is.
> Q And you described those boundaries to him without taking him there?
> A Yes, I told him.
> Q And you didn't take him to Wii Tax, did you?
> A No, I didn't take him there.
> Q But you described those boundaries to him?
> A Yes."

And so on. And in that context the examination takes the flavour of the cross-examination or an examination for discovery rather than an examination in chief. And as I say, I only do that for the purpose of drawing your lordship's attention to this evidence. I do have an objection --

THE COURT: Well, Mr. Plant, if we ruled inadmissible the answer to every leading question I was going to say we would never get through this case. But the penalty or the sanction for leading isn't usually anything more than a matter of weight, is it?

MR. PLANT: Is usually more than a matter of weight?

THE COURT: It isn't usually more than a matter of weight.
MR. PLANT: And I am not suggesting that it is, My Lord.
THE COURT: I am not sure that these are all leading questions. Back on page 79 when the witness was asked:

"Q Do you know a creek called Winna Wedda?"

Surely that's no more than directing the attention of the witness to a particular subject matter. What should the question be: Do you know the name of a creek which I can't tell you?
MR. PLANT: No, I don't object to the question: "Do you know a creek named Winna Wedda."
THE COURT: No.
MR. PLANT: I have a concern with the next question: "And is this a junction of creeks." I read that as being, and maybe I'm wrong, Do you know of a street called 41st Avenue? Oh, yes, I know of that street. And then the next question is, Is that an intersection of 41st and Granville? Oh, yes, it's that.
THE COURT: That may be so, but he didn't name the other creeks, he said: "And is that a junciton of creeks?" If you know about the Skeena, you know about the Bulkley. And if you ask both questions: "Is there a junction?" And then answer: "Yes, there is a junction."
MR. PLANT: Well, as I understand Mr. Williams' evidence as a whole, Winna Wedda is a name for a junction, it is not a name for a creek. There is no creek.
THE COURT: There is no creek named Winna Wedda?
MR. PLANT: No.
THE COURT: Well, then it is an artistically phrased question, but it is not the worst thing I have heard in this trial.
MR. PLANT: Well, I am only drawing this to your attention which, in my submission, may bring argument at the end of the day.
THE COURT: I think it is a matter of weight that has to be determined at some point, but I am not ruling it inadmissible.
MR. PLANT: Nor am I asking you to do that.
MR. GRANT: I would like to make a comment at this point on that, My Lord.
THE COURT: Do you have to, Mr. Grant?
MR. GRANT: Well, I am just worried about the weight that my friend has raised and that is that generally when the question is about leading is that counsel for

1 the defendants -- and this has been a matter of
2 courtesy, counsel for the defendants have said:
3 Please don't lead in this area and we've backed off.
4 But what happened here, My Lord, is that 25 maps
5 were produced and it was introduced on page 78 that
6 Mr. Sterritt drew these lines on the instructions of
7 the witness and then there was leading to try to get
8 to the point.
9 MR. PLANT: Actually only six maps. The balance of the maps
10 weren't produced until later.
11 MR. GRANT: Yes, they were produced during the commission, but
12 the Exhibit 4 for identification had all the maps in
13 it. In any event, My Lord, all I am saying is that
14 I am worried that -- I am very concerned that now if
15 we get into an argument about weight when the whole
16 practice has been during commissions is that once
17 counsel says: Look, please don't lead on this, and
18 then we back off. And now they say: Yes, but you
19 led there. We didn't raise anything about it at
20 that time and now we are going to challenge the
21 weight, that's my concern.
22 THE COURT: What are you saying, Mr. Plant, about the practice
23 that your friend has made a comment on?
24 MR. PLANT: Well, I have objected to leading evidence from time
25 to time where it was in an area where I did have
26 some particular concern that I could cope with right
27 at the moment that was apparent to me. I have
28 not -- I guess it is fair to say that the practice
29 that we have followed is to let my friend, generally
30 speaking, lead the evidence the way he wants to lead
31 it, and only in areas of particular sensitivity have
32 we asked not to lead. And that's the practice that
33 we have followed and, as much as anything, out of a
34 desire not to interrupt the flow of evidence,
35 particularily when we don't have a judge there to
36 police the proceedings.
37 THE COURT: Mr. Grant, I think that I can take into account you
38 say that the practice was to respond responsibly to
39 the request not to lead, but I don't think it is a
40 matter of law. I can look at a leading question and
41 say: I am not going to take into account the fact
42 that it is a leading question. I might not make
43 much of a deduction for weight, if I can put it that
44 way, where there is no objection. But if it is a
45 leading question, it is a leading question.
46 MR. GRANT: I think you have answered my concern, My Lord.
47 THE COURT: All right.

MR. PLANT: Now, the next note I have of the objection is at page 14 or page 80.
THE COURT: Of?
MR. PLANT: Of volume two.
THE COURT: Yes.
MR. PLANT: However, I don't wish to pursue that now, My Lord, that is under the same category of the matters that we have already discussed.
THE COURT: All right.
MR. PLANT: And I just go to page 84, line 20. Oh, yes, at that point the witness Mr. Williams was giving evidence about the fortress near Gitwingax which has a name in Gitksan which Mr. Williams uses at line 29 of the preceding page "T'a'ootsip".
MR. GRANT: My Lord, I may be able to anticipate my friend on this point. There is clearly hearsay here involved.
THE COURT: Yes.
MR. GRANT: I think that what really you can take out of this because my friend refers to it in his memo of page 86, line two to six which should be looked at in conjunction with it and which is:

> "Q Okay. How do you -- how did you learn of the finding of the jaw-bone?
> A Russell showed me.
> Q Did he -- he showed you the jaw-bone?
> A Yes."

I think all we can take out of this in terms of it is admissible out of that paragraph is the -- just I believe my friend is referring to the paragraph starting:

> "About ten years ago Russell Dutton..."

THE COURT: Yes.
MR. GRANT: Is that there was a jawbone. And the witness saw the jawbone and there was a jawbone.
THE COURT: He didn't see the jawbone on page 84.
MR. GRANT: He saw the jawbone on page 84.
THE COURT: He didn't say so.
MR. GRANT: He didn't see Russell Dutton dig it up.
THE COURT: The passage on page 84 has to stand on its own and it is clearly inadmissible. If the witness later on says: "I saw a jawbone", then that becomes admissible, but I don't think this passage can be used to explain what he later saw. Because he saw it, he can't then say: I saw it and therefore I can

now say in evidence that Russell Dutton found it.
MR. GRANT: No, I agreed.
THE COURT: He washed it off and gave it to an anthropologist.
MR. GRANT: No, all he can say is: I saw a jawbone. I am just anticipating my friend. I am not going to argue that.
THE COURT: That paragraph on page 84 starting "About ten years ago", that is inadmissible and it will be not treated as evidence. If I could strike it from the record I would do so.
MR. PLANT: That concludes the objections I have for volume two, My Lord, and there are a few in volume 3. Well, my note, and perhaps I should do this now is I have a note here that there is an apparent transcript error and this would be in volume 1, page 34, line 25. I don't have the benefit of my friend's comments on this.
THE COURT: Page 34?
MR. GRANT: My Lord, I noticed it and I think my friend is correct, but I would like us to wait until the time of the video because I haven't had a chance to compare the transcript with the video.
MR. PLANT: And nor have I, so I will reserve that.
THE COURT: Okay.
MR. PLANT: And now moving ahead to page 186 of volume 3, line 35.

> "Q I'm going to show you -- I'm going to have the interpreter read to you page 5 of a transcription of the video tape which I understand is a translation -- which I've been instructed is a translation of what you said."

I will stop there. This is a transcript of the Hanamuxw pole raising feast. Your lordship saw the video a year ago.
THE COURT: Yes.
MR. PLANT: And a transcript was marked at that time as Exhibit 30A For Identification. My information from looking at the transcript of the examination of the plaintiffs' witness Solomon Marsden is that that transcript was tendered again through Mr. Marsden because Mr. Marsden was one of the speakers at the feast that was the subject of the video tape -- at the ceremony which is the subject of the video tape. And what happens between the bottom of page 186 and

1 the top of page 188 is that the words that Stanley
2 Williams is said to have spoken at this ceremony are
3 then put to him in a form of a translation of the
4 transcript and he is asked to confirm those
5 statements. And now I think what happened when that
6 was done for Mr. Marsden was there was some
7 discussion about what that could be admissible for.
8 My submission is that it is not admissible for much,
9 but I think it was marked as evidence of the fact
10 that the words were said.
11 THE COURT: Yes.
12 MR. PLANT: And I make that note now in respect of this evidence
13 which pertains to that part of the transcript which
14 reproduces what Stanley Williams said at this
15 ceremony.
16 MR. GRANT: Well, I say that it goes further than that, My Lord.
17 This was the first cut ceremony. It wasn't a pole
18 raising feast, it was a first cut ceremony. First
19 of all, Mr. Williams agrees on page 188, line 10,
20 after the transcript is read to him that he did say
21 those words, so that goes to the fact that they were
22 said which my friend agrees. The other is that he
23 agrees that those statements are true. In other
24 words, he adopts and confirms what he said there as
25 being correct. And in the context of the ceremony,
26 I say that that is important and it is relevant.
27 What he has said -- of course, it is all open for
28 cross-examination as to what he said, but he said, I
29 said those words and those words are true so he
30 affirms them. And this goes to the next objection
31 which my friend has which is related to the same
32 material which is the statement of Lelt, Fred
33 Johnson, made at the same time as the transcription
34 Exhibit 30A. And in that context Mr. Williams
35 adopts Mr. Johnson's statements. He adopts them and
36 he says, I heard him say those and those statements
37 are true. They are correct statements of our laws.
38 And I would submit that they are admissible, both of
39 them, for that reason.
40 MR. PLANT: I haven't addressed your lordship on the second
41 point of my friend.
42 THE COURT: Yes. Well, on the first part I am not going to
43 disturb the evidence as it appears in the
44 transcript. I think it is admissible for the same
45 reason that I held Mr. Marsden's evidence
46 admissible. It confirms to the extent that
47 confirmation is necessary. He said those words on

that occasion, but that's, I think, as far as it goes.

MR. PLANT: The next point then is whether Mr. Williams as someone who attended this feast --

THE COURT: Yes.

MR. PLANT: -- can confirm statements made by --

THE COURT: Ceremony.

MR. PLANT: I'm sorry, ceremony, yes. Statements made by Fred Johnson who is chief Lelt, an old man, but nonetheless for what it's worth, as I understand it, still living.

THE COURT: Well, we have a problem there and it is simply this, I don't think that it is competent for the witness to say Fred Johnson said, The Gitksan law is X, Y, Z, and he's right, that is authenticating someone else's testimony or someone else's out-of-court statements. I think he can say that I believe Gitksan law is X, Y, Z. But if he says, I think that's Gitksan law because Fred Johnson told me so, then I think it is inadmissible. If he says, I have always understood that to be Gitksan law and because my elder who is now deceased told me that that was the reputation in our community, then it is admissible. But it doesn't become admissible because Fred Johnson told him so. Now, have I ruled against you, Mr. Grant?

MR. GRANT: Well, I think if you look at page 191 at the very top you will see exactly the words that are said. This is after the transcription is read.

> "Q Do you remember Lelt saying those words and then singing the song?"

That's the question --

THE COURT: Yes.

MR. GRANT: -- after it is read. The answer is:

> "A Everything that Lelt said about our laws are always true, and this is the reason why we -- why we were present there, and he was present there when the -- when they first cut the pole, and this is the loss of our grandfathers."

So basically the witness was asked if he remembered those words and then he adopted on his own. Without

1 being asked, Do you agree with those statements? he
2 adopts in his own answer that everything he said
3 about our laws are always true.
4 THE COURT: "Loss" there should be "laws", shouldn't it?
5 MR. GRANT: Yes, L-A-W-S, that's in line 6?
6 THE COURT: Yes.
7 MR. GRANT: On page 191 for the record.
8 THE COURT: I don't think he can prove Gitksan law by repeating
9 what someone else said out of court.
10 MR. GRANT: No. All he is saying is he is one of three chiefs
11 participating in this ceremony. Lelt says certain
12 things. He says, everything that he says are always
13 true. What he is saying is -- the witness at that
14 point, My Lord, is adopting and saying as his own
15 that that's true. It is not a question then of
16 whether or not he is saying -- he doesn't say it is
17 true because Lelt said it, he just said it is true,
18 that's right. And he adopts this statement as his
19 own.
20 THE COURT: I think if a ceremony is relevant he can say what is
21 said at the ceremony, that is direct evidence. I
22 saw the two cars proceeding toward the intersection.
23 I saw them come together.
24 MR. GRANT: But he can also explain why certain things happened.
25 THE COURT: That is direct evidence. I think he can say what
26 happened at the cermony if he knows from experience
27 or otherwise that this is the way ceremonies are
28 conducted and he can say why they do these things.
29 MR. GRANT: And that's what he says there.
30 THE COURT: But I don't think he can authenticate Gitksan laws
31 by a general statement that everything that Lelt
32 says about our laws are always true without
33 explaining the basis for his belief. I don't know
34 if he is saying there everything Lelt said about our
35 laws are always true because he thinks that Lelt is
36 an honest man or whether he is saying, I have heard
37 these same things from our elders and this is a
38 reputation from our community and what Lelt said is
39 confirmed with that reputation.
40 MR. GRANT: Well, I should put in context, My Lord, the point of
41 this evidence was what you had seen and it was like
42 you had your ears closed. You had heard the first
43 ceremony and you saw the video. There was a
44 translation made of it which was Exhibit 30A For
45 Identification.
46 THE COURT: Yes.
47 MR. GRANT: And I submitted that it was important that you know

what was said at that and since it was all in Gitksan it should be in English.

THE COURT: And I ruled that I should not -- I was misunderstand, obviously, but I said I was not going to be like the monkey that saw nothing. I was going to hear what was said and this is just a repetition of that and I think that this is admissible. But I could not think that is admissible to prove that these are Gitksan laws just on the basis of that narrow passage. There may be all kinds of other evidence that will direct my attention to prove it in other ways, but I don't think one can say that Fred Lelt, a living person, told me that such is such and such and of course that is true.

MR. GRANT: And that is not what the witness is saying. And the point is that that answer, although not as clear as it could be, is what I emphasize is this is the reason why, why we were present there. And that's what I am saying is the witness is explaining why Lelt was there. And he was present there when they first cut the pole and this is the laws of our grandfather and that's why I asked that that question be allowed -- that answer be allowed in because he explains why Lelt was there.

THE COURT: Well, the note I am making beside that passage on the first answer on page 191 is it is admissible as proof of what happened at the ceremony, but not as authenticating Gitksan laws, and I think that's what it has to be.

MR. GRANT: And as proof of why certain things happen at the ceremony?

THE COURT: Well, this statement doesn't say why they were doing things. It may be elsewhere, but from the narrow statement that passage doesn't explain why things are done. I think somebody else has explained that.

MR. GRANT: Yes.

THE COURT: I think someone else explained why these things were being done.

MR. GRANT: Yes.

THE COURT: All right. I have got to take a short adjournment, please.

1 THE REGISTRAR: Order in court. Court will recess.
2 (PROCEEDINGS ADJOURNED AND RESUMED PURSUANT TO MORNING RECESS)
3
4
5
6 I hereby certify the foregoing to
7 be a true and accurate transcript
8 of the proceedings herein
9 transcribed to the best of my
10 skill and ability.
11
12
13
14 LISA FRANKO, OFFICIAL REPORTER
15 UNITED REPORTING SERVICE LTD.
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22
23 (PROCEEDINGS RESUMED PURSUANT TO A SHORT ADJOURNMENT)
24 THE REGISTRAR: Order in court.
25 THE COURT: Mr. Plant.
26 MR. PLANT: My lord, at page 198 of Volume 3 -- actually, 199,
27 line 5, I make an objection on the transcript, which
28 I now withdraw.
29 THE COURT: All right.
30 MR. PLANT: The objection was made because the evidence
31 concerned events of extremely recent occurrence, and
32 I've made objections to that kind of evidence
33 before. As it happens, I like the witness' answer
34 on this occasion, so I'm not going to pursue my
35 objection.
36 At page 200 -- from page 200 to page 204 there is
37 an exchange arising from Mr. Grant's proposal to
38 examine the witness on what is now paragraph 39B of
39 our statement of defence. That's the -- the
40 acquiescence laches pleading. And the particular
41 question --
42 THE COURT: That amendment had been made at this time.
43 MR. PLANT: It had not been made. It was at that point
44 proposed. In fact, the sequence of events is clear
45 from Mr. Grant's comments or introduction, if you
46 will, beginning at line 29 on page 200 where he says
47 the document is a proposed change to the defence

which had been delivered to him on Monday morning of that week. He then has the proposed pleading read and translated to the witness, and at page 202 line 17 asks this question:

> "Now, I would like you to comment on what -- why the hereditary chiefs, the plaintiffs and particularly yourself have been involved, if you have, in getting licences or grants, licences from the province and on -- comment on what the provincial defendant is saying here, if that's true as far as you know."

And then I object. I don't think your lordship has to refer to that. After we sort out that problem, Mr. Grant re-asks his question at the bottom of page 202 line 47:

> "So can you comment on -- do you agree with what the province says here, that you and your grandfather -- that the other Gitksan chiefs have agreed or consented to the jurisdiction of the province over your territories for receiving public monies and receiving licences?"

The substance of my objection is what I say from line 6 to line 18 on page 203, which really is that this is a question of law as it has been framed for the witness.

THE COURT: All right.

MR. PLANT: That's my objection.

THE COURT: Were you about to rise to your feet, Miss Koenigsberg?

MS. KOENIGSBERG: I'm sorry, my lord. I was actually looking at something else. All of my --

THE COURT: I thought you were in furtive conversation with Mr. Frey, possibly about adding something about what Mr. Plant said.

MS. KOENIGSBERG: I was actually trying to anticipate a problem that Mr. Grant may have on one of my objections, or one of his objections.

THE COURT: I don't need to hear you, Mr. Grant. I'm not going

1 to rule this evidence out on the basis that it might
2 be a question of law. I have in mind some recent
3 authorities that suggest that waiver which is
4 usually considered to be a matter of law must be a
5 knowing, deliberate, conscious step or decision.
6 Madam Justice McLachlin dealt with this, I think,
7 when she was a trial judge, and I followed her
8 recently in a case involving whether there's been a
9 waiver of solicitor and client privilege by the
10 accidental or incautious document which might have
11 been privileged and whether that amounted to a
12 waiver, and it may be that there's a subjective
13 element to acquiescence. I'm not sure whether there
14 is or not. That's a matter of law that has to be
15 argued in due course and I don't think I would rule
16 out the subjective views of what the witness says.
17 I don't think it's competent for the witness to just
18 sort of comment generally in the pleadings as the
19 question rather invited the witness to do, but
20 that's a matter of form that I would not use as a
21 ground for ruling the answer inadmissible. I think
22 your objection may have some substance, Mr. Plant,
23 but I think it's one that I would reserve on
24 regardless of what Mr. Grant says at this time, and
25 I think I should deal with it when we come to deal
26 with the -- with the argument at the end of the case
27 when we know precisely what it is he said to
28 acquiesce and what it is he said to constitute
29 acquiescence, and I'm not going to refuse to hear or
30 admit evidence what the witness subsequently and
31 subjectively now says about it. I think those are
32 matters that we ought to deal with at the end of the
33 day.
34 MR. PLANT: Very good, my lord. I was unable to attend for
35 re-examination, but my colleague, Ms. Koenigsberg,
36 was kind enough to pretend -- take my mental
37 approach, and she did object to some questions which
38 Mr. Grant asked on re-examination, and I want to
39 adopt some of those objections, but I -- as I
40 understand it, my friend, Mr. Grant, and Ms.
41 Koenigsberg and I are in agreement at this moment --
42 or at this point that Ms. Koenigsberg is going to
43 search for a day where she would be -- it would be
44 more convenient for her to deal with the objections
45 that she took on re-examination, and subject to your
46 lordship's convenience, we could defer the argument
47 on those questions until some time in the next week

1 or two.
2 THE COURT: All right. I'm -- if Mr. Grant's agreeable to that,
3 I am as well.
4 MR. GRANT: Yes, my lord.
5 THE COURT: All right.
6 MR. PLANT: Those are all the objections I had --
7 THE COURT: All right.
8 MR. PLANT: -- for today, my lord.
9 THE COURT: All right. Well, then -- and this other list I
10 have, objections from the re-examination, that's
11 what's going to be adjourned to another date?
12 MR. PLANT: Yes, my lord.
13 MS. KOENIGSBERG: Yes.
14 THE COURT: All right.
15 MR. PLANT: That's a list which I prepared.
16 THE COURT: All right.
17 MR. PLANT: My friend, Mr. Grant, was kind enough to correspond
18 with us this morning to give us an indication of
19 some of the objections that might be made, he might
20 wish to make to cross-examination. He doesn't have
21 any objections now or has withdrawn some of the
22 objections. Let me see if I can say it this way.
23 He has withdrawn all of the objections he made to
24 the questions that I asked in cross-examination, but
25 he may have one or two objections with respect to
26 questions that Ms. Koenigsberg asked.
27 THE COURT: All right. Are you ready to proceed, Mr. Grant?
28 MR. GRANT: Yes. I just was chatting with Ms. Koenigsberg. She
29 was investigating -- there was one outstanding
30 objection I had. This is at Volume 5 page 345. And
31 I think that what this objection relates to, my
32 lord, is the utilization by the Federal Crown of
33 their own private files, and I say private because
34 they're not generally discloseable, relating to
35 estates of deceased Indian people.
36 Now, Ms. Koenigsberg has indicated to me, and it
37 may be the case, that the will dealt with here was
38 actually probated and, of course, the position I've
39 taken is if the position the Court adopted was if a
40 will is probated and that's part of the public
41 record, then that privilege, of course, is attached
42 to it, and I think that's the only objection I had
43 and I based it on the fact that Document 1141 of
44 1987 of the federal defendants is a -- is the file,
45 the D.I.A. file, estate file of Mrs. Sutton, and I
46 think that that should probably be stood over
47 because maybe if it's a probated matter that is a

public record, then my objection on that particular issue, I will not be maintaining it.

Now, that deals with all of the matters except at page 337. I had asked -- lines 45 to 47. This is whether -- the question was:

> "Did you or were you aware that Jim Lax'nits' left his chief's name to Mrs. Amos Williams?
> Just a minute. In a will are you referring to?
> Yes.
> He left his chief's name in his will to Mrs. --
> Mrs. Amos Williams.
> Do you have a document that says that?"

The same objection applies to that, but also I had requested that I have that document because I was concerned about the wording that was put to the witness as to what the document itself says, and it's in an estate file, and I had requested that before we come to that evidence, which is some way down the road, that my friends produce that document to me and I can check it, and I may -- I reserve the right to object to that particular question. The only other procedural matter --

THE COURT: You can interrupt us when we get to it.

MR. GRANT: Yes. Or counsel who is here for the plaintiffs. I will instruct counsel if I'm not here. The only other question was that there was an exhibit -- I believe it's Exhibit 31, which is the Gitwangak fishing sites, and Ms. Koenigsberg at page 351 referred to it and --

THE COURT: Page 351.

MR. GRANT: Yes. The same volume. And Exhibit 14 for identification is the Gitwangak fishing sites map, and what it was was this same map, as I say Exhibit 31 or 32. It's a map of the Gitwangak fishing sites.

THE REGISTRAR: Exhibit 31.

MR. GRANT: Exhibit 31. Thank you. And she had a copy on which a marking was made and she was going to produce that copy for the Court. So that the same marking could be made on Exhibit 31 to make sense, because she had other notations on hers and we didn't want to

1 produce it as an exhibit, so I believe she's
2 probably able to do that at the break or a
3 convenient time. Other than that, I think there's
4 nothing to prevent us from proceeding.
5 THE COURT: All right. Ms. Koenigsberg?
6 MS. KOENIGSBERG: If I could just respond very briefly to my
7 friend's submissions. There is no problem with
8 Exhibit 31 and I think we can probably get a copy of
9 it over here after the noon hour.
10 With regard, however, to my friend's objection on
11 page 337, I received these objections this morning
12 and this is the first time my friend has requested
13 production of the document in question. As I had
14 said on the transcript at the time, the will I was
15 making reference to, which I had made the judgment
16 was not going to be producible to the witness, the
17 witness would not have seen it, had never seen, I
18 was sure, was from file 3735 on our list of
19 documents and was -- that file was -- that document
20 was listed probably last year sometime. I do have a
21 copy of that will for my friend now and it might --
22 I'll be glad to give it to him, but I wouldn't like
23 the Court to be left with the idea that I refused to
24 produce a document or hadn't listed it.
25 With regard to the -- my friend did not take the
26 objection with regard to this will at the time of
27 the commission that it somehow fell within this
28 category of -- of objections where he is taking
29 objection to the minister releasing estate files,
30 and that matter can be dealt with at a later time, I
31 suppose, but it will be my submission that -- and it
32 is my submission now that that objection was dealt
33 with before your lordship in Smithers during the
34 examination of Gwaans and it was ruled upon at that
35 time, and we have a very full ruling on -- on what
36 basis wills are producible.
37 THE COURT: I'm sure you'll remind me of that in due course.
38 All right.
39 THE COURT: All right. Are we ready to proceed?
40 MR. GRANT: I believe so, my lord.
41 THE COURT: One question. Were there a lot of exhibits marked
42 in this commission?
43 MR. GRANT: I think there's a total of --
44 THE COURT: I don't really care how many there are. Do I have
45 them?
46 THE REGISTRAR: I have them here, my lord.
47 MR. GRANT: There are 14.

THE COURT: Yes. All right. Thirteen, actually.
THE COURT: All right.
MR. GRANT: Fourteen is just a copy.
THE COURT: Thank you.
MR. GRANT: And I propose rather than a duplicate copy you refer to the witness' copy.
MR. PLANT: Actually, on that subject, in order to avoid an interruption during the course of the evidence, perhaps I could refer your lordship now to Volume 3 page 195. This part of the transcript preceded the marking for identification as Exhibit 8 of an undated letter from David Wells to Mathias Wesley concerning the death of one Walter Wesley, and what happened here is that Mr. Grant read this letter to the witness and then asked the witness some questions about the events which are referred to in the letter. He did not ask the witness to identify the document. Mr. Grant then asked that the document be marked as an exhibit and he asked that it be marked as an exhibit for identification. And at the top of page 197 I said:

> "Well, I just want to be sure I understand the basis on which you say it can be marked as an exhibit for identification."

Mr. Grant says:

> "It's a document to which I've referred the witness and I just think it's -- when the judge deals with the transcript, that it makes sense for him to have reference to that document."

I agree then and I agree now that that is a practice which had it been followed throughout the trial to date might have saved some considerable time fighting over the marking of documents. I wanted to draw your lordship's attention to it. It was -- it was marked actually as an exhibit proper when the exhibits were tendered and perhaps that could be corrected to an exhibit for identification.
THE COURT: Yes. We'll mark it for identification here.
THE COURT: And so it will be --
THE REGISTRAR: 446A.
THE COURT: All right. That will be fine. We'll do it that way.

(EXHIBIT 446A FOR IDENTIFICATION: Undated letter from David Wells to Mathias Wesley)

THE COURT: Thank you. Now, firstly will there be interruptions as we go along where counsel wish to make any observations, objections or interjections? So the tape will run continuously and the reporter won't be expected to take down what's on the tape, of course. It's already on a transcript. Is there any reason for the reporter to remain?

MR. GRANT: That's why I wished to deal with the objections at the beginning. I personally don't think it's necessary.

THE COURT: All right. Thank you, Madam Reporter. I think we'll excuse you. If we find we have problems and we have to have discussions, we will call you back. Until further notice, you're free for the day.

(REPORTER EXCUSED)

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

Kathie Tanaka, Official Reporter
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