November 7, 1988
Vancouver, B.C.

(PROCEEDINGS RECONVENED AT 10:00 a.m.)

THE REGISTRAR: Order in court. In the Supreme Court of British Columbia this Monday, November 7, 1988, in the matter of Delgamuukw versus Her Majesty the Queen at bar, my lord.

THE COURT: Ms. Mandell.

MS. MANDELL: My lord, this morning we are going to argue the motion involving expert documents and privilege. I have advised my friends that the witnesses that are to be called for the remainder of the week are available beginning tomorrow, and with your lordship's permission -- I don't know how long the argument will take regarding documents. I don't anticipate it will take the whole of the day, probably a portion of it, at least, and we then adjourn until tomorrow for the calling of the witnesses.

MR. WILLMS: That's fine, my lord.

THE COURT: All right. Thank you.

MS. MANDELL: I might also advise your lordship that I will be referring in the course of my argument to an argument which is -- which was written. Hopefully before I'm finished I'll have the opportunity of presenting it to your lordship. It was still on the way from our offices, and I am going to begin without it, but your lordship should have the benefit of it before you have to consider the matter.

THE COURT: Thank you. Before you start, Ms. Mandell, could I just inquire, and I don't need to know now, about the proceedings in Smithers starting, I guess, three weeks from today, is it not?

MS. MANDELL: Yes.

THE COURT: Is it intended that there will be cross-examination on affidavit of a number of witnesses in the courtroom?

MS. MANDELL: That's how I understood it.

THE COURT: And at the same time there will be, at some other location, cross-examination by other counsel of other witnesses?

MS. MANDELL: That's how I understood it.

THE COURT: Is it intended or expected that from time to time the proceedings in the court will be adjourned and I

will move to the other proceedings to make rulings on objections, or is it thought that those matters can be resolved by counsel without --
MS. MANDELL: Without the benefit of having you come in?
THE COURT: Yes.
MS. MANDELL: I had understood that it would be the forum that you would be sitting in court and the other proceedings would be proceeding on their own steam as if you weren't there.
THE COURT: And I won't be jumping back and forth?
MS. MANDELL: That certainly has been my understanding.
MR. WILLMS: I didn't understand, my lord, that you would be moving back and forth, but from time to time if an objection arose that objection could be brought before you.
THE COURT: Yes.
MS. KOENIGSBERG: It was my understanding that should the need arise in the out-of-court proceedings that counsel would come before you in the courtroom.
THE COURT: Yes, that's perfectly satisfactory. The other thing that I thought I should raise with counsel and that is if this is cross-examination of a witness, it's part of the trial and counsel and the court would be suitably dressed for trial proceedings?
MS. MANDELL: I had understood that, too.
THE COURT: Well, I think that's the right procedure to follow, but I thought we should understand each other in that regard.
MS. MANDELL: Yes.
THE COURT: And the cross-examination in court will take two weeks? Will the cross-examinations in court take two weeks?
MS. MANDELL: Yes.
THE COURT: All right.
MS. MANDELL: If my friends have any --
MR. WILLMS: I have nothing further.
THE COURT: All right. Is Mrs. Brower going to be available for those proceedings.
MS. MANDELL: Who?
THE COURT: Mrs. Brower?
MS. MANDELL: I think she'll be happy to go up north.
THE COURT: I will make an order accordingly. What is this I've been handed?
MS. MANDELL: There is two volumes. The first is an indexed 115. My lord, those contain the correspondence which has been delivered and where portions of them have been blacked out for claim of privilege.

THE COURT: I see.
MS. MANDELL: And we will probably make reference to four or five of the items and not the whole list, although my friend may wish to make reference to more.
THE COURT: So these are the documents upon which the argument will be?
MS. MANDELL: Yes, that's right.
THE COURT: All right.
MS. MANDELL: The second is just a volume of authorities. My lord, I propose to, for the purposes of this argument, argue before your lordship some general principles and at the end of the day we can get inside the documents and see how the principles apply.
THE COURT: Yes.
MS. MANDELL: My lord, if you will turn to tab 1 of the volume of authorities, you'll see there a letter from Mr. Willms to myself of September 14th. At page 2 the request which is set out for the production of Mr. Mathewes document is stated. He says:

> "We request that Mr. Mathewes produce to us all documents in his possession or power relating to the matters in question in this proceeding including communications with counsel, which fall within the category of those documents to be produced as determined by Finch, J. in Vancouver Community College v. Phillips, Barratt et al (1987) 20 B.C.L.R. (2d) 289 (S.C.), communications with other experts, communications with witnesses in the proceeding, drafts of his reports and documents to which he has been referred, or any documents which he has created, relating in any way to the preparation of his report."

That's the request that my friend asked of us with respect to production of documents. This was repeated in his letter of October 14th, and then in my letter of October 17th, the second full paragraph from the bottom of the page we replied in this way.
THE COURT: Yes.
MS. MANDELL:

> "I wish to advise you that in examining the correspondence and documents pertaining to this, and other experts, we have taken the view that you are entitled to all facts to which the expert had or made access during the

1 preparation of the report including facts
2 relied upon and facts considered, whether
3 relied upon or not, whether such facts were
4 provided by the Plaintiffs, their counsel or
5 otherwise."
6
7 And this, in our view, sets up the difference
8 between two counsel regarding the decision in the
9 Vancouver Community College case. It's our
10 submission that on the basis of the position that
11 has been taken by ourselves and the letter of
12 October 17th, there are three classes of documents
13 which we've identified that the defendants would
14 demand for their production, but which we say are
15 privileged. These documents divide themselves into
16 these categories. The first is documents which --
17 or parts of them which we say have no probative
18 value and are irrelevant to the litigation. And in
19 this respect, we include documents involving
20 discussions of financial matters arising between the
21 witness and the Tribal Council, arrangements for
22 scheduling of meetings, scheduling witness
23 preparation and attendance at trial, and what we
24 call housekeeping matters.
25 The second category is documents which may be
26 relevant to the proceedings but are unrelated to the
27 subject matter of the evidence of the witness and
28 over which we claim a privilege. And such examples
29 would include communications with counsel, other
30 witnesses and clients the subject matter of which
31 does not fall within the scope of the expert report.
32 THE COURT: I'm sorry, your example was such as correspondence
33 with --
34 MS. MANDELL: Counsel or witnesses or clients, the subject
35 matter of which does not fall within the scope of
36 the expert report.
37 THE COURT: Well, let's take an example of a -- a statement, for
38 example, taken of Mary Johnson about the Seely
39 Lake --
40 MS. MANDELL: Adaawk.
41 THE COURT: -- grizzly bear. Let's assume that Mrs. Johnson was
42 interviewed and she made a statement in writing or
43 notes were taken by counsel of her statement and
44 then she later gave evidence that that statement
45 didn't emerge. Now, whether or not that statement
46 was furnished to Dr. Gottesfeld or Dr. Mathewes, you
47 would contend that that statement still remain

1 privileged, would you?
2 MS. MANDELL: That one is a little bit close because they do in
3 their reports seek to reflect off of the adaawk, and
4 I would probably disclose that. But such other
5 statements as counsel has --
6 THE COURT: Well, all right, let's take an extreme case where
7 you had an opinion from another morphologist who
8 said: I've looked at the Chicago Creek slides and I
9 think they are all of very recent origin within the
10 last 200 years.
11 MS. MANDELL: That will be relevant. That, I think, would be
12 disclosed. I think an example I could draw your
13 lordship to --
14 THE COURT: It is highly relevant, why would it remain
15 privileged if it has gone to Dr. Mathewes and
16 Gottesfeld?
17 MS. MANDELL: If they had no opportunity to see it then we
18 wouldn't disclose it. But if they had seen it and
19 rely on it, then we would disclose it.
20 THE COURT: They didn't rely on it.
21 MS. MANDELL: That's right.
22 THE COURT: Okay.
23 MS. MANDELL: The example that I could draw your lordship to is
24 found at tab 6, I believe. If I can just make sure
25 that that's -- tab 8. Not of the volume of
26 authorities, my lord, but the index of documents
27 here.
28 THE COURT: Tab 8?
29 MS. MANDELL: Yes. If you'll look at that tab there is a letter
30 from Richard Overstall who is counsel's agent to Dr.
31 Mathewes in a letter of January the 9th. And your
32 lordship will see that the first full sentence in
33 paragraph 2 has been blacked out and we claim
34 privilege with respect to it. Now, we have
35 disclosed this only for the purposes of getting on
36 with it, so I think I can make reference to the
37 point. We say in this letter -- sorry, Mr.
38 Overstall says:
39
40 "Since you submitted your report last April we
41 have done further work on describing the
42 biogeoclimatic zones of the region as well as
43 some detailed examinations of the Gitksan and
44 Wet'suwet'en oral history which we can
45 date..."
46
47 THE COURT: "Partially date".

1 MS. MANDELL: Sorry.
2
3 "...partially date using archaeological
4 methods as well as the geological methods that
5 you contributed to. As a result of this work,
6 some more precise questions can be asked of
7 you with respect to the palaeoenvironmental
8 data. If you have time to respond to them in
9 the next two or three weeks, it would help
10 strenghten the evidence in a number of areas."
11
12 And then the questions are asked. Now, we would see
13 that the fact that counsel in the preparation of the
14 case has done further work in describing
15 biogeoclimatic zones and the fact that there has
16 been further work with respect to the history and
17 that this has been partially dated, all of this is
18 information which is part of the brief of counsel.
19 It is part of how we are going about the case. The
20 fact that we have done it, we have told Dr. Mathewes
21 in order to allow him to know why it is that we
22 asked him further questions. But what is relevant
23 to him and his report and to the disclosure are the
24 questions that we are subsequently able to ask him
25 and not the fact that we have probed in other areas
26 to prepare for the case.
27 So we would say that, yes, it's true that it
28 is relevant to the litigation the fact that we have
29 spent time and probed in various areas. As of
30 January 9, 1987, these were the areas counsel were
31 considering to develop evidence and so be it did.
32 But that fact is irrelevant to Dr. Mathewes, and to
33 his report, and we would claim privilege with
34 respect to that fact. That would be an example of
35 this kind of privilege that I'm introducing your
36 lordship to as the second category.
37 THE COURT: I have trouble with that, Ms. Mandell. It is
38 hardly -- I may not yet understand partly because I
39 may not have a full grasp of the reach of this
40 problem. I don't see what difference it makes to
41 block out the first sentence on the paragraph 2 when
42 you disclose that the work has been done in the next
43 paragraph. And you are saying, give us -- consider
44 it and give us your response. Surely that has to be
45 part of the facts upon which you relied. Why
46 wouldn't it be admissible? Why wouldn't it be
47 produced on that basis? That is a matter of --

1 well, that is a matter of privilege that's gone
2 because of the other authorities that have already
3 been discussed.
4 MS. MANDELL: Well, I would say this to your lordship, I think
5 that the fact that there has been more work done in
6 describing the biogeoclimatic zones is part of how
7 counsel is thinking about the case at that time is
8 not relevant to Dr. Mathewes. That's not his area
9 of expertise, and it's not something which he has to
10 know that we know in order to answer the questions
11 which are then asked of him. It's something which
12 counsel for the defendants, though, may make use of
13 the fact in understanding that the thinking of
14 counsel at that time was that the biogeoclimatic
15 zones were relevant to the litigation and there has
16 been work in developing that. Now, if that were Dr.
17 Mathewes' area of expertise that would be, of
18 course, different, but it's not. Similarly with the
19 oral histories.
20 THE COURT: I don't see what difference it makes. I have
21 difficulty finding a legal basis for an argument.
22 MS. MANDELL: Is your problem, my lord, that you don't see why
23 we would care whether or not the defendants would
24 know that?
25 THE COURT: Yes, partly.
26 MS. MANDELL: Well --
27 THE COURT: You're giving the material to Dr. Mathewes. He's
28 going to look at it. The material is going to be
29 producible anyway.
30 MS. MANDELL: That's correct. That's right.
31 THE COURT: And what you are seeking to retain as privileged is
32 that first sentence which says: You've done this
33 work?
34 MS. MANDELL: We've done this work, not you. We, the lawyers.
35 THE COURT: What would you say if your sentence said: We have
36 done this work and while we don't have any
37 confidence in it, we are sending it along to you.
38 And then you say that as a result of this work some
39 more precise questions can be asked. Do you say
40 that you should be able to keep that privilege?
41 MS. MANDELL: Well, first of all if we were sending the work
42 along to him --
43 THE COURT: Yes.
44 MS. MANDELL: -- I don't think so because he would have
45 considered it or at least perhaps he considered it
46 in the course of answering the questions. But if we
47 don't send the work along to him at all, and if we

say counsel has spent the last ten months concentrating on the oral history of the Gitksan and the Wet'suwet'en and as a result of that there is certain questions which arise which may affect your area of expertise and these are the questions, whether we have any confidence in our work or not, I say for the same reason as with respect to the first point raised to you that that's not something which we should disclose for Dr. Mathewes.

Now, it may be that if we do rely upon the work that we develop with respect to the oral histories, that will get disclosed in the context of that expert. But we haven't chosen to call that expert to the stand yet, and we say that that area of expertise is not one which should be probed with Dr. Mathewes. The fact that we've chosen to explore certain areas and make it part of our brief that, we say, is not a factor which the other side should at this stage be entitled to. But everything that Dr. Mathewes then considers with respect to any questions we can generate or any answers he gives, all of that is disclosable.

THE COURT: All right. Well, I understand, I think, the extent of the problem. But may I just ask this, I take it that for Dr. Mathewes' evidence, at least, your learned friends have seen this document in its unabridged form?

MS. MANDELL: That's right.

THE COURT: In it's original form?

MS. MANDELL: That's right.

THE COURT: Is that the case for all the documents or is it just for those?

MS. MANDELL: Just for Dr. Mathewes and Dr. Gottesfeld. For the experts to come, and there is a few examples of that because they reveal a point that we want to raise. But if your lordship should rule in one way or another, it would influence the documents that they would see prior to the giving of that expert's report.

THE COURT: All right. And the point in that is really -- is the point really in that passage that the work has been done by the Tribal Council and not that it was done by somebody else?

MS. MANDELL: The point in that passage is that the work was done in order to inform counsel's brief, and it wasn't done because it related to this expert's area of expertise which we then put into the work.

1 THE COURT: Yes, all right.
2 MS. MANDELL: The third classification of documents which we say
3 should be excluded are documents which reflect the
4 direct work product of counsel including
5 communications regarding trial strategy,
6 communications regarding potential witnesses for
7 both the defense and the plaintiffs and their
8 evidence, counsel's evaluation of the strengths and
9 weaknesses of the case, and --
10 THE COURT: You mean as disclosed to the expert?
11 MS. MANDELL: To the expert, that's right.
12 THE COURT: Yes.
13 MS. MANDELL: Evidence to be presented, trial strategy and the
14 report of the expert and other communications, all
15 notes and memoranda which would -- and this is what
16 we say the test is -- directly disclose counsel's
17 thought processes to the defendants.
18 THE COURT: Well, let me ask you this. If, using the example as
19 a moment ago, you said in some material: We are
20 sending this along to you. We don't think there is
21 much in it, but you might consider it and make such
22 use of it as you think appropriate. Would that
23 not -- using Judge Finch's terminology, would that
24 not be something that would bear on the credibility
25 of the witness if we -- he may have a very good
26 reason. Let's say he adopts it knowing that counsel
27 don't think there is anything in it. Now, he may
28 have a very good reason for adopting it, good
29 scientific reason. He may just plain disagree, but
30 does it not fall within that categorization of
31 material that might bear on his credibility?
32 MS. MANDELL: I think that that example probably, according to
33 the test that we are setting up, should be
34 disclosed. If we're saying: Here is a fact, we
35 don't think it's worth much but you tell us what you
36 think, I think that goes to credibility. But if the
37 comment were more to this effect: We've read your
38 report. These facts that you've identified we don't
39 think advance the case at all or, we think that they
40 are essential to the case, if you couple them with
41 the expert opinion of this person and this person
42 and you couple it with the evidence which will be
43 presented by this person. And together we think if
44 we put all of that together we think we are going to
45 be able to make our case on this point. In that
46 example, it doesn't advance the case unless we
47 couple it with other bits of evidence which we

1 intend to do. I say at that point we are really
2 getting into the direct work product of counsel's
3 thinking, and that would be an example of where
4 privilege would be claimed. But our evaluation of
5 whether or not we think a fact is strong or weak of
6 itself which is a fact upon which the expert
7 considers, that I would probably disclose.
8 THE COURT: This "direct work product" is an American
9 expression, is it not?
10 MS. MANDELL: Well, as I will lead you to the authorities, my
11 lord, it has been adopted in cases in Canada. But
12 the phrase comes out of an American authority.
13 THE COURT: Yes.
14 MS. MANDELL: And is then picked up from there.
15 THE COURT: All right. Well, what you are saying is that --
16 well, let me give you an example and see if I
17 understand your point. If you said: We are sending
18 you some material. We are not sure if it has
19 anything to do with what you are going to do, but we
20 are thinking of using it in another connection, and
21 for that reason if you use it don't disclose it in
22 your report.
23 MS. MANDELL: Oh, I see what you are saying.
24 THE COURT: That's strategy.
25 MS. MANDELL: That would be strategy.
26 THE COURT: And you say that should be -- should continue to be
27 privileged?
28 MS. MANDELL: Yes. Yes, I do. I think that should continue to
29 be privileged. The example I was advancing to you
30 is: We've read your draft report and we like this
31 passage that you've done. Of itself, it doesn't
32 take us as far as we want to go. We are letting you
33 know that we intend to call these following
34 witnesses to finish -- to drive the point, and these
35 are the witnesses that we are going to call. There
36 is an example of that in the material which I can
37 show your lordship. We would say that those
38 comments of counsel to the expert in response to his
39 report would be privileged.
40 THE COURT: Well, take it a step further. If, in that example
41 you've just posed, the witness forms his report
42 to -- because of the information you have given him,
43 not then a fact upon which he is relying or is it
44 material which he is relying?
45 MS. MANDELL: He may rely -- well, of course he is going to say
46 it in his report. So his report is done and he is
47 going to give that piece of evidence knowing how we

are going to use it, yes, that's true. But we say that it is more, that that piece of information is more probative of counsel's thinking of the case and that those thought processes are -- once available to the defendant, are more overall harm in the sense that it intrudes upon the counsel's brief that we say that for that reason those comments should be concluded and the privilege claimed.

Now, you know in some ways it's almost an example of the second category too where the information does fall outside of the expert's area as well. I mean it can be seen with respect to both categories.

THE COURT: All right.

MS. MANDELL: Before I move into the argument, my lord, perhaps I could illustrate two other kinds of examples that bear directly from the material. One is where before the reports are actually commissioned there is strategy sessions between counsel and the experts where the theory of the expert's case as it fits into the evidence is formulated. We would say that that is part of the brief and is privileged, and there is an example of that that will appear in the course of the material.

THE COURT: One of the problems I'm having with the whole area is that this whole -- this question arose because of certain experts being proven to be unreliable and to protect itself the court has gone as far as it went -- Judge Finch went as far as he went because we felt we could no longer rely on independent reports of expert witnesses who in earlier times were something we could rely on. They were professionals who would not give evidence that they could not themselves believe in. But experts have become hard guns that -- one theory is that they say whatever counsel --

MS. MANDELL: Pays them to say.

THE COURT: -- persuades them to say, and that you can buy an expert for any proposition that could be imagined. Now, if you're right in this part of your submission, is it not possible to arrange your affairs in such a way that everything would fall within that part of the exception, just categorize everything as strategy?

MS. MANDELL: Well, I don't think that's possible to do, in fact. If I can just comment on it from both sides, I don't want to be governed by cynicism.

1 THE COURT: Well, we have become very cynical of experts and we
2 think with good reason. I don't say that in
3 connection with this case.
4 MS. MANDELL: No, I understand that. I only say that with
5 respect to the proposition of Phillips, Barratt
6 which raises several points of practice that counsel
7 with a larger budget may find themselves in a
8 position where they can hire two sets of experts:
9 one to advise with respect to the case who will
10 never then be called to the stand, and a second who
11 will be called to the stand, but will be shielded
12 from the major interaction with the litigation team
13 or where the communications with the experts are
14 sanitized by counsel, having in mind the fact that
15 there will be some disclosure of all of these
16 written communications at some later point down the
17 road.
18 I think that the better point of caution is to
19 arrive at a formula which allows counsel to do their
20 job in a way that permits communication between the
21 counsel and the experts in an open fashion where
22 drafts can be critiqued and communication can be
23 honest, and that there will be some clear rules set
24 as to what in the end is disclosable. And that's
25 the effort that we are seeking to ask of your
26 lordship today.
27 I don't think that the court should be led
28 into a rule which asks for less disclosure or even
29 the same disclosure as a lay witness. I think that
30 the expert taking the stand is in a different
31 position and that the rules of disclosure with
32 respect to their material which they have had access
33 to must be high. And for that reason if there is an
34 error, I think it should be more on the side of
35 disclosure. But I do still think there is an area
36 to be protected called counsel's brief, and that we
37 should try to define what that is and get on with
38 reasonable preparation of these cases.
39 THE COURT: Well, I don't think any of us who have thought of it
40 are happy with the result of Judge Finch's decision,
41 although in that case it was clearly a necessary
42 step for him to take. The expert in that case was a
43 fellow within the category of what I just described,
44 and it turned out that the kind of investigation
45 that was conducted there was necessary.
46 Now, how do you -- I'm anxiously awaiting your
47 further -- the further development of the argument

because I would be anxious to know how you say we can arrive at such a formula which would permit both --

MS. MANDELL: I do think I have led you there and at the end of the day I will have -- at the end of the morning then I will have something.

THE COURT: All right.

MS. MANDELL: I say that the issue is, is the solicitor's brief privilege in its entirety over materials in the possession or control of an expert witness whenever that witness is called to give evidence within his expertise by the party which retained him.

Now, I've mentioned and I restate that the plaintiffs recognize that disclosure of materials in the possession of a witness which are relevant to the substance of his report or to his credibility is required when the witness is tendered to give an expert opinion. Without such disclosure cross-examination would be unreasonably hampered and there would be no value of the expert opinion which can't be tested.

On the other hand, materials which come into the possession of a consultant while assisting counsel with the development of the case that have little or no relationship to the subject matter of his evidence, would be of no assistance in testing the value of his opinion, and the disclosure of which could gravely prejudice the ability of counsel to prepare and conduct a case with the degree of privacy to protect the integrity of the litigation process.

THE COURT: Ms. Mandell, do you think this is for you?

A VOICE: This is for Louise Mandell.

MS. MANDELL: My lord, we have just obviated the necessity of you taking notes.

THE COURT: Thank you.

MS. MANDELL: My lord, I am reading at page 4. I'm reading from the third paragraph on page 4.

THE COURT: Yes.

MS. MANDELL: It is our position that the defendants place an unwarranted reliance on the Vancouver Community College case. This case is not an authority for the proposition that all materials relevant to matters in question in a proceeding are compellable. To the extent that certain obiter comments of the judge in that case permit such an impression, those comments are not a correct statement of the law and were

1 unnecessary to the decision actually arrived at.
2 If I can just stop there. My lord, we are not
3 saying yet that the Vancouver Community College case
4 is wrong. I think that it can be properly read to
5 include the principles that we're discussing. Our
6 submissions are summarized at the bottom of page 4.
7 An expert retained by counsel during the preparation
8 of the case for trial may act in the capacity of a
9 consultant and a participant on the litigation team.
10 When this occurs, the material assembled by or in
11 the possession of the expert are protected from
12 disclosure by the solicitor's brief privilege.
13 THE COURT: Do you say that even if he relies upon that material
14 in his report?
15 MS. MANDELL: Where the material is -- where the facts are used
16 in the report, any of the facts which may be
17 generated from his participation as a member of the
18 litigation team, where any facts are relevant to his
19 report and are used, those facts are disclosable.
20 But the -- but the material assembled which are
21 assembled reflecting his capacity as a consultant to
22 the litigation team, we don't bear directly on the
23 facts of his report, but more on the theory of the
24 case, this we say are protected.
25 THE COURT: All right.
26 MS. MANDELL: And I might mention this goes to identifying of
27 documents in our possession, too. If we have in the
28 conduct of our preparation of the case assembled a
29 fact, although not directly related to this expert
30 but which the expert has seen, we say it is
31 disclosable even though it is part of our brief. We
32 say that's the test. When the opinion of an expert
33 is tendered as evidence in court, the solicitor's
34 brief privilege is not waived except to the extent
35 necessary to permit full and complete
36 cross-examination as to the contents of the report
37 and the credibility of the expert. Notes and
38 memoranda of counsel, not constituting instructions
39 to the witness or conveying facts upon which an
40 opinion is based remain privileged. In the
41 alternative, as a matter of public policy, the court
42 ought to accord special protection to the materials
43 within the solicitor's brief which directly
44 represent the applied thought processes of counsel
45 to the case.
46 THE COURT: Even if the lawyer says: Well, as a result of this
47 discussion I don't think we've got a case at all

1 unless you're prepared to say this. So the expert
2 says: Oh, well, I'll say that. So --
3 MS. MANDELL: I think that's relevant. I think that has to be
4 disclosed. If the expert is being directed as to
5 what to say that, to me, is not part of counsel's
6 thought process.
7 THE COURT: Well, to say: I don't think we have a case unless
8 you can -- unless you can provide a way through
9 these difficulties for us, and the expert says: Let
10 me think of it and go away and then come back and
11 there is a report. Now, he has reached this knowing
12 that counsel don't think they've got a case.
13 Now, I have to say that I have been in those
14 situations before and I didn't think I was doing
15 anything wrong by doing that. I frankly said: I
16 don't think we have a case. We need an expert on
17 this one, without an expert we don't have a case. I
18 never thought that would be producable. What do you
19 say about it? Sometimes I surprise myself when I
20 start out with a case and it isn't going anywhere
21 and it turns out to be a pretty good one and
22 sometimes even win one. Counsel can't win all their
23 cases. You would say that's within counsel's
24 thought process and part of his protected brief?
25 MS. MANDELL: It's -- you know, it's so close to the line
26 because it actually almost goes into the category of
27 the agreement between counsel and the expert as to
28 what the frame of reference of the report is, and
29 this we would say is disclosable if counsel directs
30 the witness to investigate certain areas.
31 THE COURT: Yes.
32 MS. MANDELL: We say that has to be disclosable as part of
33 the --
34 THE COURT: Instructions.
35 MS. MANDELL: -- instructions to the expert's report. It is
36 part of the instructions.
37 THE COURT: Yes.
38 MS. MANDELL: So I would probably black out: We don't think
39 we've got a case at all --
40 THE COURT: Yes.
41 MS. MANDELL: -- unless you look at the following areas. I
42 would probably start: You look at the following
43 areas and then put in the areas that need to get
44 examined. But I don't think I would say that they
45 are entitled to my reaction that we don't have a
46 case at all unless --
47 THE COURT: Yes, all right.

1 MS. MANDELL: Submission one, I'm reading on page 5. An expert
2 retained by counsel during the preparation of a case
3 for trial may act in the capacity of a consultant
4 and participant on the litigation team. When this
5 occurs, the materials assembled by or in the
6 possession of the expert are protected from
7 disclosure by the solicitor's brief privilege.
8 The courts have often noted the confidential
9 nature of communications between counsel and an
10 expert retained to assist in the preparation of a
11 case. Particularly in complex or technical
12 litigation, the assistance of one or more experts
13 may be indispensable to counsel in understanding the
14 facts in issue, in framing, even from the earliest
15 stages, the shape of the prosecution or the defense
16 of a claim, identifying the available relevant
17 evidence and selecting witnesses, including
18 additional experts.
19 And I won't turn your lordship to the Pasco
20 v. Bouchard case because I know you are familiar
21 with it. But it does highlight the fact that
22 experts are often times, and before they are
23 identified as witnesses of a case, brought into the
24 litigation strategy at the early stages and often
25 onwards to assist in the preparation of the case.
26 The courts have recognized that work done by
27 an expert in his capacity as an advisor to counsel
28 as described above, as well as materials which come
29 into the possession of the expert are privileged
30 from disclosure until the privilege is waived,
31 either expressly or by implication. This protection
32 is variously referred to as solicitor's brief
33 privilege, solicitor-professional privilege or the
34 attorney work product doctrine. Protection over the
35 contents of the solicitor's brief has long been
36 recognized at law as an essential element of
37 fairness in the adversary system.
38 If I could ask your lordship to turn to the
39 Lyell v. Kennedy case which is found at tab 5, at
40 page 26 of the judgment. The concept of the
41 solicitor's brief being an essential element to be
42 protected as an element of fairness was, I think,
43 well set out. I'm reading from the middle of the
44 first full paragraph on page 26 which begins:
45
46 "In my opinion, it is contrary to the
47 principle on which the Court acts with regard

1 to protection on the ground of professional
2 privilege that we should make an order for
3 their production. They were obtained for
4 the --"
5
6 And I should just refer your lordship to the bottom
7 of page 24. The documents in issue here are the
8 fact that inside the brief of counsel were certain
9 photographs of tombstones and houses. The mere
10 presence of those documents inside the solicitor's
11 brief was a clue to the other side as to the case to
12 be made. And the court says in Lyell v. Kennedy,
13 and I'll read on:
14
15 "In my opinion, it is contrary to the
16 principles on which the Court acts with regard
17 to protection on the ground of professional
18 privilege that we should make an order for
19 their production; they were obtained for the
20 purpose of his defense, and it would be to
21 deprive a solicitor of the means afforded for
22 enabling him to fully investigate a case for
23 the purpose of instructing counsel if we
24 required documents, altough perhaps publici
25 juris in themselves, to be produced, because
26 the very fact of the solicitor having got
27 copies of certain burial certificates and
28 other records, and having make copies of the
29 inscriptions on certain tomb, and obtained
30 photographs of certain houses, might show what
31 his view was as to the case of his client as
32 regards the claim made against him."
33
34 And then the two cases are cited, and he is
35 referring to the case of Wood.
36
37 "...he protected the records and extracts from
38 books which had been made by an accountant for
39 the defendants who had collected together a
40 number of entries, because the extracts, when
41 put together, showed the view which he and the
42 solicitor of the defendants took of the
43 particular fraud which they were there
44 investigating, and the Judge considered that
45 to order the defendants to produce them
46 would be not only giving production to the
47 parties who were asking for production, but

1 giving them a clue to the advice which had
2 been given by the solicitor, and giving them
3 the benefit of the professional opinion which
4 had been formed by the solicitor and those who
5 had acted in a professional capacity for the
6 defendant."
7
8 And then the Susan Hosiery case which is found in
9 the next --
10 THE COURT: What did Justice Cotton do in that case? Did he say
11 that they didn't have to produce these photographs?
12 MS. MANDELL: That's right.
13 THE COURT: But they had been -- they had been identified in
14 some way and claimed privilege?
15 MS. MANDELL: In the interrogatories. This arose in the
16 interrogatories.
17 THE COURT: But they were described as -- claimed privilege as
18 being photographs and certificates?
19 MS. MANDELL: Yes.
20 THE COURT: All right.
21 MS. MANDELL: In the Susan Hosiery case at page 33, this is --
22 the facts are -- none of these facts are absolutely
23 on point. It all has to do with what constitutes
24 the solicitor's brief. I thought, though, that your
25 lordship should be awake to the passages at page 33
26 where he begins: "As it seems to me...". This is
27 the first full paragraph on page 33.
28
29 "As it seems to me, there are really two
30 quite different principles usually referred to
31 as solicitor and client privilege."
32
33 And then:
34
35 "(a) all communications, verbal or written,
36 of a confidential character, between a client
37 and a legal adviser directly related to the
38 seeking, formulating or giving of legal advice
39 or legal assistance..."
40
41 and so on. And (b) which is what we stress:
42
43 "(b) all papers and materials created or
44 obtained specifically for the lawyer's "brief"
45 for litigation, whether existing or
46 contemplated, are privileged."
47

1 And then the last paragraph:
2
3 "Turning to the "lawyer's brief" rule, the
4 reason for the rule is, obviously, that, under
5 our adversary system of litigation, a lawyer's
6 preparation of his client's case must not be
7 inhibited by the possibility that the
8 materials that he prepares can be taken out of
9 his file and presented to the court in a
10 manner other than that contemplated when they
11 were prepared. What would aid in determining
12 the truth when presented in the matter
13 contemplated by the solicitor who directed its
14 preparation might well be used to create a
15 distortion of the truth to the prejudice of
16 the client when presented by someone adverse
17 in interest who did not understand what gave
18 rise to its preparation. If lawyers were
19 entitled to dip into each other's briefs by
20 means of the discovery process, the
21 straightforward preparation of cases for trial
22 would develop into a most unsatisfactory
23 travesty of our present system."
24
25 Now, the rationale behind the protection accorded
26 the solicitor's brief in both England and the United
27 States is a recognition that privacy and
28 confidentiality are essential elements of the
29 adversary system of adjudication and that counsel
30 would be unable to properly prepare a case if they
31 did not have protection against disclosure of their
32 work. I have read to you the leading cases of both
33 jurisdictions that have been relied upon by Canadian
34 courts.
35 I would like to refer you to the Hickman v.
36 Taylor case which is where the rule or that concept
37 of solicitor's brief, in our view, first came into
38 the light and was later picked up in the Canadian
39 authorities. The Hickman v. Taylor case is found at
40 tab 7. It was in that case concerning oral
41 depositions of a party or witness taken by counsel,
42 and the question was whether or not they were
43 properly covered by privilege. And if I could ask
44 your lordship to turn to page 462, the facts of the
45 oral depositions are set out at 462. And at 463 in
46 answering the question whether or not those
47 documents should be clothed with privilege, the

1 court said at the top of the page:
2
3 "Here is simply an attempt, without
4 purported necessity or justification, to
5 secure written statements, private memoranda
6 and personal recollections prepared or formed
7 by an adverse party's counsel..."
8
9 THE COURT: I haven't found that. Page 463 is the bottom
10 corner.
11 MS. MANDELL: This is the first paragraph beginning at the --
12 it's actually page 462.
13 THE COURT: Okay.
14 MS. MANDELL: Do you see that?
15 THE COURT: Oh, yes. I have it, thank you.
16 MS. MANDELL:
17 "Here is simply an attempt, without purported
18 necessity or justification, to secure written
19 statements, private memoranda and personal
20 recollections prepared or formed by an adverse
21 party's counsel in the course of his legal
22 duties. As such, it falls outside the arena
23 of discovery and contravenes the public policy
24 underlying the orderly prosecution and defense
25 of legal claims. Not even the most liberal of
26 discovery theories can justify unwarranted
27 inquiries into the files and mental
28 impressions of an attorney."
29
30 THE COURT: But that has got nothing to do with the situation
31 with an expert witness who is called as a witness,
32 does it?
33 MS. MANDELL: Not really. This has to do with whether or not
34 the oral depositions taken by counsel of a
35 witness --
36 THE COURT: Yes.
37 MS. MANDELL: -- are themselves compellable.
38 THE COURT: Whether that witness is called or not?
39 MS. MANDELL: That's right.
40 THE COURT: This is at the discovery stage?
41 MS. MANDELL: That's right.
42 THE COURT: Yes.
43 MS. MANDELL: That's right.
44 THE COURT: You won't have any difficulty with that proposition.
45 MS. MANDELL: We are trying, although, to suggest that this is
46 the rationale which governs the protection that we
47 are asserting to your lordship.

THE COURT: Yes, all right.
MS. MANDELL:
"Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.

Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare legal theories and plan a strategy without undue and needless interference.

This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways.

Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably and in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served."

THE COURT: That's pretty dramatic.
MS. MANDELL: We all fall apart.
THE COURT: I'm sure none of the lawyers I know.
MS. MANDELL: The protection accorded the solicitor's brief is broader than the solicitor-client privilege. It covers not only communications, but all matters, otherwise not privileged, which come into the possession of a solicitor or his agent in the course of preparing a case. It is not the material itself that is necessarily privileged, but the fact of its presence in the solicitor's brief.

It is settled law that the protection extends

1 not only to the materials collected by or in the
2 possession of counsel, but as well to materials
3 assembled by and in the possession of third parties
4 where such possession is under the direction of
5 counsel and for the purposes of litigation. And it
6 is actually the passage of this material into the
7 hands of the experts which are we are asking your
8 lordship to help create a bridge to determine which
9 of those materials is disclosable. And we say that
10 the rationale behind the solicitor's brief
11 protection is one which effectively should be
12 carried into an analysis of the documents which the
13 expert then has available at their disposal, and
14 which we hope won't pass into the hands of the
15 defendants without some proper consideration.
16 The second submission is outlined in the
17 bottom of page 6. When the opinion of the expert is
18 tendered as evidence in court, the solicitor's brief
19 privilege is not waived except to the extent
20 necessary to permit full and complete
21 cross-examination as to the contents of the report
22 and the credibility of the expert. The first point
23 on page 7, I don't believe, is a contested point.
24 That is that privilege is retained except when and
25 to the extent waived.
26 We've drawn your lordship to the authorities
27 that we say say that and the point of mentioning it
28 is the law now already appears to have recognized
29 that the privilege is one which is important, and
30 the onus in determining when it's waived is
31 definitely in favour of the containing of the
32 privilege rather than the waiving of it. So the
33 court has already, in our view, as a matter of
34 common law, protected the privilege with just this
35 kind of doctrine, and we draw that to your
36 lordship's attention.
37 And paragraph B is similarly along the same
38 lines that the tendering of the evidence at trial is
39 not a complete waiver of the privilege. It is
40 conceded that the disclosure required of an expert
41 witness at trial may be substantially greater than
42 the disclosure required under the Evidence Act. It
43 is submitted that the disclosure under the Act has
44 for its purposes notifying adverse parties of the
45 case which will be made, while disclosure at trial
46 is intended to permit a thorough cross-examination
47 of the expert with respect to both the content of

his report and to his credibility.

No authority requires, however, that where disclosure cannot be justified by reference to either of those objectives, it can be compelled, whether the expert tenders his report in evidence or appears on the witness stand.

Now, in the Vancouver Community College case, the learned trial judge makes certain statements which, if unqualified, would appear to compel an expert witness giving evidence at trial to disclose all material in his possession related to the litigation, whether or not such material is relevant to the subject matter of his report or a determination of his credibility.

And if I could turn your lordship now to the Vancouver Community College case, it's found at tab --

THE COURT: Tab 4.

MS. MANDELL: Tab 4. And the passage which I think really is the one which my friend would be relying upon as stating the sweeping proposition is found at the bottom of page 296:

> "So long as the expert remains in the role of a confidential advisor, there are sound reasons for maintaining privilege over documents in his possession."

And that, my lord, I just stress does reaffirm the first point that we make in the submission.

> "Once he becomes a witness, however, his role is substantially changed. His opinions and their foundation are no longer private advice for the party who retained him. He offers his professional opinion for the assistance of the court in its search for the truth. The witness is no longer in the camp of a partisan. He testifies in an objective way to assist the court in understanding scientific, technical or complex matters within the scope of his professional expertise."

While this, in our submission, may be an accurate description in many cases, to say that it's authority for the fact that all material in his possession must be disclosed we say is an

1 overstatement of the law. An expert, particularily
2 one retained at an early stage of complex
3 litigation, may have access to a great deal of
4 confidential material dealing with elements of the
5 case, including the evidence of other witnesses,
6 both expert and non-expert, the development of trial
7 strategy, and other confidential matters that have
8 no bearing upon the subject matter of his own expert
9 report, cannot be used to impeach his own opinion,
10 and are irrelevant to the issue of his own
11 credibility.
12 And we say that Mr. Justice Finch has made
13 ample allowances in his judgment, despite the
14 above-quoted language, for just such a situation.
15 At page 296, in the paragraph that I have read, he
16 states that the opinions of the expert and their
17 foundations, he says, "...are no longer private
18 advice for the party who retained him". We say here
19 when he uses the word "opinions", he is referring to
20 the opinions tendered in evidence by the expert and
21 not his opinions and his knowledge of other aspects
22 of the case of the party who retained him. It is
23 submitted that those matters still remain "private
24 advice for the party who retained him" and no
25 rationale can be advanced for their disclosure.
26 Now, at page 297, Mr. Justice Finch refers to
27 the waiver of privileges, and this we say also
28 qualifies that broad statement. He says, beginning
29 at the third paragraph of the page:
30
31 "It is fair that expert witnesses should be
32 thoroughly cross-examined on all matters
33 touching the weight of the evidence they
34 offer. In our system, that is the accepted
35 method of getting at the truth. It would not,
36 however, be fair to require the witness to
37 deliver up papers that are wholly irrelevant,
38 either to the substance of his opinion or to
39 his credibility. For example, papers
40 concerning his personal affairs remain his own
41 and are no one else's business. Similarly,
42 the expert may be doing work for other persons
43 not party to the litigation. He should not be
44 required to disclose their secrets. As well,
45 in the litigation in which the witness is
46 called to testify, he may remain a
47 confidential advisor to the party who retained

1 him in, at least, one respect. He may be
2 asked or may have been asked to give advice on
3 how to cross-examination the other side's
4 witnesses. In putting forward his own
5 opinion, he need not necessarily attack the
6 opinions of experts opposite. Counsel may
7 wish to save that kind of ammunition until
8 after the adverse expert has been called. It
9 would not be fair to require the witness to
10 disclose documents relating only to the
11 cross-examination of such adverse experts
12 because it would give the other side an
13 advantage not available for the party calling
14 evidence in the subject matter first.
15 There are, no doubt, other examples of what
16 may or may not be fair in other circumstances,
17 but I believe those I have given will
18 suffice for present purposes."
19
20 As a practical matter, counsel does not prepare a
21 complex case for trial with knowledge from the
22 outset of what experts will be required and what
23 will be the subject matter of the opinions required
24 from each. Requiring disclosure of all materials in
25 the possession of a witness relating to the matters
26 in question in the proceedings, such as is sought by
27 the defendants could seriously impair the ability of
28 counsel to prepare a case.
29 As was noted in the Bouchard and Kennedy
30 decisions, such experts are often privy not only to
31 the facts which they will eventually rely on the
32 production of an opinion, but the detailed thoughts
33 of counsel as to the nature, development, weaknesses
34 and the case, the witnesses and the evidence. This
35 is a point your lordship has already asked of us.
36 Requiring disclosure of the range of materials
37 sought by the defendants would have a chilling
38 effect on the ability of counsel to prepare a case
39 for trial. Counsel will be reluctant to confide in
40 experts until the precise nature of their eventual
41 opinion is determined. Or counsel will be required
42 to retain two sets of experts, one of which will
43 assist counsel in analysing the case and preparing
44 the evidence, the other of which will be given
45 carefully selected facts and a precisely worded
46 question on which an opinion is sought. Counsel
47 will not exchange correspondence or memoranda with

1 advisors, but will limit themselves to oral
2 communication. Counsel will be preoccupied, in any
3 discussion with a potential witness, not to reveal
4 any matter concerning his own view of the case,
5 where the evidence of the witness fits into the
6 larger picture, or other matters of disclosure
7 which, prior to or at trial, he would prefer to
8 avoid.
9 I might stop here, my lord, and say from my
10 best understanding, and I stand to be corrected, the
11 reports of the plaintiffs were all delivered before
12 September, 1987, that is before Mr. Justice Finch
13 rendered his decision. And to my knowledge, the
14 reports of the defendants were all delivered
15 subsequent to that. And we say that without casting
16 any suggestions of sanitization. I don't mean to
17 infer it at all. Had we been guided by Mr. Justice
18 Finch's decision prior to the delivery of our
19 reports, our relationship to the material which our
20 experts were exposed to may or may not have been
21 different. And, similarly, the amount of disclosure
22 that we are subsequently able to achieve from the
23 defendants too may have been influenced by this
24 decision coming, as it were, in mid-flight.
25 It is submitted that this situation does not
26 advance the interests of the profession, clients
27 seeking legal assistance, or the judicial process
28 itself. In the end, it would hinder rather than
29 assist the fact-finding process which is at the core
30 of the litigation process. The public policy
31 arguments protecting the solicitor's briefs, as set
32 out in Canadian, American and English authorities
33 have been referred to earlier.
34 It has been stated that the privilege which
35 attaches to the solicitor's brief in the pre-trial
36 stage no longer has application at trial. American
37 authorities to this effect are set out in the
38 Vancouver College judgment at page 296 and are cited
39 with approval by Mr. Justice Finch. With respect,
40 it is submitted that the statements referred to are
41 not an accurate statement of the law of the United
42 States and the principles cited therein, while often
43 appropriate, are not universally applicable.
44 If I could draw your lordship back to the
45 judgment of the Vancouver Community College case at
46 page 296, you'll see that this broad principle is
47 referred to and justified by Mr. Justice Finch at

page 296. He cites and relies upon the Wisconsin decision of Shaw v. Wuttke. This case was cited in Wigmore, and it is the only case cited in support of the proposition that privilege over solicitor's briefs ends at trial.

Now, this case was referred to in the judgment of Mr. Justice White in the Nobles case. And you'll see, my lord, that this was referred to by Mr. Justice Finch in the paragraph which follows. And in the Nobles case, Mr. Justice White was dissenting on this point and was concurred by Mr. Justice Rehnquist, as he then was.

Mr. Justice Powell, who was writing for the majority of six justices, said on this point:

> "Disclosure of an attorney's efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of his case."

And I won't read to you the passage in the Nobles case which I put into the argument, but it's found at tab 11.

The law in Canada is to the same effect. In the Susan Hosiery case, Mr. Justice Jackett said at page 33:

> "Turning to the 'lawyer's brief' rule, the reason for the rule is, obviously, that, under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were prepared."

THE COURT: But that surely is not at risk, is it? The only thing that is at risk is what the lawyer conveys to the expert or the witness who is later called to give evidence.

MS. MANDELL: That's right.

THE COURT: He can disclose -- well, I suppose if the witness is called by the other side, it might be possible to ask what the lawyer said because it was a statement by lawyers. It would probably be privileged at that point. I doubt you could get the lawyer's thoughts

1 from somebody to whom he made a statement, but this
2 area doesn't really attack the foundations of the
3 solicitor's privilege. It is confined to those
4 cases where there have been disclosures by the
5 solicitors to a witness.
6 MS. MANDELL: That's right. Which I think that it really does
7 boil down to those disclosures which may, in and
8 out, be sanitized. We will be more careful in
9 talking to the experts about -- or I think the
10 situation which is more to the point where the
11 witness carries on two functions, one is as counsel
12 to the -- as advisor to counsel where counsel is
13 developing their thinking alongside of the advice
14 given by the expert with respect to the overall
15 trial strategy or the theory of the case on one
16 hand. And is also, at the same time, preparing a
17 report for which he will be called as an expert.
18 I think that if I could just say that there is
19 certain kinds of experts which, in my view, appear
20 to be more prone to this kind of problem arising.
21 They are not the trustees or the actuarial people
22 who have their own area of expertise which is
23 objectively out there in the sense that it is
24 developed and they are called in to appreciate the
25 fact of the case and then make their opinion. It is
26 more the social scientists which there -- in cases
27 such as this where the social scientists work within
28 the community, live in the communities, interact
29 regularly with the clients and the lawyers and
30 together, over a long period of time, there is
31 finally a theory of the nature of the organized
32 society which evolves where the particular witnesses
33 will have a much more intense pipeline, if you will,
34 into the lawyer's brief than with respect to other
35 kinds of experts.
36 THE COURT: Well, there is no doubt that the material that the
37 expert relies upon, from whomsoever he obtains it,
38 must be disclosed. It can be original research or
39 it can be given by the lawyer.
40 MS. MANDELL: That's right.
41 THE COURT: Or he can get it from X, Y and Z.
42 MS. MANDELL: That's right.
43 THE COURT: There is no problem with that. The evidence covers
44 that. The interface arises in connection with the
45 credibility. The cross-examination of credibility,
46 I suppose.
47 MS. MANDELL: That's right. That's right.

1 THE COURT: If it wasn't for the cross-examination of
2 credibility, we wouldn't have this problem I don't
3 think.
4 MS. MANDELL: I don't think we would. But there, my lord, you
5 are balancing -- in our submission, and we will
6 finish the argument and you will see how the courts
7 have addressed it, you are really balancing in the
8 adversarial position of protecting the lawyer's
9 brief on one hand with the necessity that there be
10 as much information available for the purposes of
11 cross-examination for the court, as well as the
12 other side to appreciate the reliability of the
13 expert on the other. And I think that without there
14 being a balancing, with all the scales tipped inside
15 of the full disclosure, other problems arise which
16 in our submission aren't warranted.
17 THE COURT: Well, how can you cross-examine fully on
18 credibility, and I stress the word "fully" because
19 that's what the cases seem to suggest, if the lawyer
20 says: We don't have a case but let's put one
21 together? Now, surely if that happens, and that is
22 an extreme case, that goes right to the credibility
23 of the expert, doesn't it? He's been told there is
24 no case.
25 MS. MANDELL: Well, he may not agree with the lawyer.
26 THE COURT: Well, he can say that. As I say, we all deplore
27 this direction that the law has taken. It's
28 unfortunate, but it is long overdue. The increased
29 use of experts in just about every case has lead us
30 to be terrribly, terrribly cynical, and with good
31 reason in many, many cases.
32 There are doctors who appear in cases on a
33 regular basis to give evidence that no one would
34 believe. I mean it's not just on the side of
35 plaintiffs, it is on the side of the defendants as
36 well. There are some doctors that appear in 40, 50,
37 60 cases a year. Out of 400 motor vehicle accident
38 cases, I suspect there are some doctors that appear
39 in 25 per cent of them or maybe less than that, but
40 case, after case, after case and saying: There is
41 nothing wrong with this plaintiff. And other
42 experts called in case, after case, after case
43 saying: This poor plaintiff will never work again.
44 The cynicism has a very, very substantial factual
45 basis.
46 Now, how do you draw the line as to where that
47 cross-examination of credibility will be limited?

While you think about that, Ms. Mandell, we will take the morning adjournment.

THE REGISTRAR: Order in court. Court will recess.

(PROCEEDINGS ADJOURNED AT 11:15 a.m.)

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

_____
LISA FRANKO, OFFICIAL REPORTER
UNITED REPORTING SERVICE LTD.

1 (PROCEEDINGS RESUMED PURSUANT TO A SHORT ADJOURNMENT)
2 THE REGISTRAR: Order in court.
3 THE COURT: Ms. Mandell?
4 MS. MANDELL: Thank you. My lord, as always your questions
5 require me to synthesize my answer.
6 THE COURT: Yes.
7 MS. MANDELL: I think that the distinction on which you're
8 asking for clarification is in balancing the facts
9 necessary to establish and test credibility against
10 the attorney's brief protection, where is the line
11 to be drawn. And I think that the -- a short answer
12 is that all the facts are -- the facts which are
13 given to the expert by counsel are discloseable,
14 whereas counsel's opinions with respect to those
15 facts are not, providing those opinions fall within
16 the -- the test which we're aided by in its
17 development, in a case, which I'm going to refer to
18 your lordship, where certain documents are called
19 the opinion work product of counsel, and I think
20 that this is really the nub of it.
21 THE COURT: Opinion work product?
22 MS. MANDELL: The opinion work product. If I can take your
23 lordship to Tab 14, it's a case called the Bogosian
24 v. Gulf Oil Case. Here in that case the issue of
25 the compellability of materials produced by counsel
26 and placed in the hands of an expert witness was at
27 issue where those witnesses were called to give what
28 the parties agree are to be treated as trial
29 depositions. I don't think we have exactly the same
30 process here. And that was the consideration in
31 this case.
32 And the Court referred to documents prepared by
33 attorneys containing solely their mental impressions
34 and thought processes relating to the legal theories
35 of a complex case. And that was the issue which was
36 there placed before the Court. And at page 593 the
37 Court said this. They made a distinction between
38 what amount's to be work product and core work
39 product. And they said -- I'm reading, just to
40 identify the section, at page 593 in the first
41 column:
42
43 "The particular protection to be accorded
44 such work product, denominated 'opinion
45 work product'..
46
47 And they showed the case, the Upjohn Case, and others

which dealt with it. And then at page 593 at the second column. I'm beginning from the top of the page:

"It is significant for the case before us that the work product that the Court held required 'a far stronger showing of necessity and unavailability', was an attorney's interview notes. The work product in this case merits even greater protection. Petitioners contend that the material here relates to the legal theories of their attorneys. In their Petition for a Writ of Mandamus, they describe the material as 'documents prepared by attorneys containing solely their mental impressions and thought processes relating to the legal theories of a complex case'. Since respondents are willing to accept this description for purposes of the Petition, we also assume that the documents at issue may reflect the legal theories of petitioner's attorneys. The documents thus described represent core work product, entitled to even more heightened protection than witness interview notes. If attorneys are to feel free to commit to writing the mental processes by which they sift and evaluate various possible theories on which they will base their cases, they must feel confident that such material will be protected from disclosure. Otherwise, the freedom of thought essential to carefully reasoned trial preparation would be inhibited."

And I think that in thinking about your question over the break, I really did finally land on that; that there's certain opinions which we as counsel give which are really either there to reflect our theory or to sift through our theories, and that these are passed on to the expert, or they may in consultation with us help us to arrive at that, and it's really that which requires protection.

I feel less strongly, although I don't abandon the position, that my opinion as to the strengths and weaknesses as to the expert's report in the context

1 of the case is a core work product, and in some
2 situations it may very well be. And I think really
3 as a general rule, any of our opinions about facts
4 are not discloseable, although where it does go to a
5 fact upon which the expert relied, I say, yes, it is
6 discloseable. But the place where in the Bogosian
7 Case they talked about opinion work product, or as
8 they talked about a core work product relating to
9 the legal theories in a complex case, that I say is
10 the line which really requires protection. I think
11 that that whole case actually is instructive,
12 because it does deal with, in part, the issue which
13 is before your lordship today.
14 The Court goes on to say -- and actually I should
15 draw your lordship to the passage.
16 THE COURT: In the same case?
17 MS. MANDELL: In the same case.
18 THE COURT: Yes.
19 MS. MANDELL: At page 595.
20 THE COURT: Well, at the bottom of page 593 it says:
21
22 "The district court concluded that showing
23 the material to the witnesses did not
24 waive the protection for attorney work
25 product, a view we accept as supported by
26 persuasive authority."
27
28 MS. MANDELL: That's right.
29 THE COURT: So you would adopt that?
30 MS. MANDELL: That's right.
31 At page 595 they deal with this problem that you
32 raise about cross-examination, beginning the first
33 full -- well, actually I should start at the
34 beginning of the first column at page 595, the
35 fourth line down.
36
37 "The district court reasoned that since the
38 opposing party is entitled to the
39 substance of the facts and opinions as to
40 which the expert is expected to testify
41 and a summary of the grounds for each
42 opinion, and since 'the attorney's
43 thoughts and opinions given to an expert
44 witness can constitute part of the grounds
45 for the expert witness' opinion',
46 discovery of counsel's opinion work
47 product utilized by an expert witness 'is

1 a necessary corollary of the right to
2 examine into an expert's basis for forming
3 his opinion. We do not agree with the
4 conclusion.
5 The thrust of Rule 26(b)(4) is to permit
6 discovery of facts known or opinions held
7 by the expert."
8
9 And I rely upon the next passage particularly:
10
11 "Examination and cross-examination of the
12 expert can be comprehensive and effective
13 on the relevant issue of the basis for an
14 expert's opinion without an inquiry into
15 the lawyer's role in assisting with the
16 formulation of the theory."
17
18 And I underline theory.
19
20 "Even if examination into the lawyer's role
21 is permissible, an issue not before us,
22 the marginal value in the revelation on
23 cross-examination that the expert's view
24 may have originated with an attorney's
25 opinion or theory does not warrant
26 overriding the strong policy against
27 disclosure of documents consisting of core
28 attorney's work product."
29
30 And at the -- at page 595 in the second column, the
31 paragraph that I wish to rely upon is found under
32 "Procedure to Protect Core Product". And I just
33 draw your lordship's attention to about 12 lines
34 down:
35
36 "Of course, where the same document contains
37 both facts and legal theories of the
38 attorney, the adversary party is entitled
39 to discovery of the facts."
40
41 And then later in the paragraph:
42
43 "Where such combinations exist, it will be
44 necessary to redact the document so that
45 full disclosure is made of" --
46
47 THE COURT: What does that word mean?

1 MS. MANDELL: I took it to mean black out, to read out of the
2 document or cover up.
3
4 "... so that full disclosure is made of
5 facts presented to the expert and
6 considered in formulating his or her
7 opinion, while protection is accorded the
8 legal theories and the attorney-expert
9 dialectic."
10
11 And this is what we've done, is just parsed the
12 document of those passages which we think reflect
13 the core work product opinion of the lawyers.
14 I think, my lord, if I could just refer you on
15 page 13 of the -- we -- I discussed the Bogosian
16 Case on pages 12 and 13 of the argument. And at the
17 bottom of page 13 it's an analytic point which I
18 wish to draw to your lordship's attention. I'm
19 reading from the second paragraph at the bottom of
20 the page. If the privilege over counsel work
21 product does not survive the tendering of evidence
22 by the witness it is submitted, in the alternative,
23 that the Court ought to exercise its discretion not
24 to require production of such materials.
25 There does not appear to be a Canadian case
26 directly on point, that is whether or not the case
27 really is an exercise of discretion or whether it
28 folds into whether or not the work product is
29 subject to privilege. We say either one is a method
30 of analysis appropriate for this occasion.
31 It is submitted that an analogous principle was
32 stated in the Noor Mohamed Case, which is found at
33 Tab 15. And I've taken the passage of that case
34 which I wish to draw to your lordship's attention at
35 the top of page 14.
36 THE COURT: It's branded in every defence lawyer's heart.
37 MS. MANDELL: It's the first time I came across it. I now have
38 it for next time.
39 THE COURT: Except that I'm not so sure that -- that the
40 principle wasn't seriously curtailed in Wray, which
41 you mention in the next paragraph. Wray said that
42 the only discretion we had is if the evidence had --
43 Wray said if admissibility was tenuous. I don't
44 know what that means. Things are admissible but
45 they're not. And they had only trifling
46 consequence. That Noor Mohamed discretion I think
47 was seriously curtailed by Wray.

1 MS. MANDELL: You know, it's funny. When you look for
2 something, you look for what you want to read in it.
3 When I read the combination of Wray in this case
4 recently, I took it to mean that at the very back of
5 everything, if there's no other way of doing it, you
6 could always evoke the doctrine which is being
7 discussed in Noor Mohamed.
8 THE COURT: Well, most of the criminal defence lawyers would
9 tell you that Wray is the worst decision ever made;
10 Noor Mohamed is the better one. So the two don't
11 sit together very well.
12 MS. MANDELL: You have to be very diplomatic. Well, I think
13 really then at page 15 I cite my conclusions. And,
14 my lord, if your lordship is -- is wishing it, I can
15 either now or at the point of reply go through the
16 examples from the correspondence which may be in
17 issue between my friend and I and seek to apply the
18 principles here that we've argued before.
19 THE COURT: I think you should do that, Ms. Mandell, because
20 it's really in the examples where we find the
21 difficulty. Of course, the other problem I have
22 with your submission is the fact that I'm sitting
23 here really as a -- well not really. I'm sitting
24 here as a trial judge of the Supreme Court, and I'm
25 expected to follow the judgment of Mr. Justice Finch
26 in the Vancouver Community College Case. Do you
27 have a theory of -- of escape for me from following
28 that decision?
29 MS. MANDELL: Well, I have -- I've posited one theory in the
30 course of the argument, and that is if you read his
31 decision properly, in our submission you can read
32 into it what we argue is the theory, that is
33 opinions or opinions as he's developed them and not
34 reflective of the opinions of counsel. If your
35 lordship feels that -- that that reading is
36 inconsistent with the wording of his judgment, which
37 we don't agree upon, we've included in the volume of
38 authorities at Tabs 15 to 19 the -- the authorities
39 which permit your lordship to overturn a decision of
40 the -- of the Supreme Court in this case.
41 And the only case there that I would draw to your
42 lordship's attention is at Tab 18. I think the
43 Mitrunen Case does set out the principles upon which
44 your lordship may see as proper to overturn or
45 qualify a judgment of -- of the Court. And I would
46 draw your lordship's attention there to the passage.
47 I don't have my volume handy. Just excuse me for a

1 minute.
2 THE COURT: Well, isn't Hansard, Spruce, Mills the locus
3 classicus on that problem, on that question?
4 MS. MANDELL: Yes. And he cites it and goes on, at the same
5 time includes the fourth test that was developed in
6 Cairney. It may not be that there is much of a
7 difference between the three tests of -- but it's
8 the usual -- usual ways.
9 We say there that the two points which might be
10 relevant to your lordship is, in our submission, we
11 do think that Mr. Justice Finch misread the Nobles
12 Case. And I've drawn your lordship to the arguments
13 with respect to that. And we also -- with respect
14 to his second judgment, that is the one that deals
15 with the disclosure of drafts, which isn't part of
16 this judgment before your lordship, that appears to
17 be a decision from the bench and he may not have
18 considered the authorities which -- which are
19 available for him to consider. And particularly I
20 think the American authorities and the Bogosian Case
21 are important cases for him to consider in bearing
22 in mind the strong reliance in this jurisdiction of
23 the American doctrine or the doctrine which is
24 reflective in the American law as well as our law.
25 THE COURT: Is it your submission that I would not be offending
26 against the rule of stare decisis if I were to say
27 that opinions expressed by lawyers to experts who
28 are called as to the strength or weakness of their
29 case do not bear insufficient credibility, that they
30 must be disclosed?
31 MS. MANDELL: I don't think that Mr. Justice Finch goes the
32 distance.
33 THE COURT: Put it quite that plainly?
34 MS. MANDELL: No. I don't think you'd be offending the rule of
35 stare decisis. I think you'd be elaborating on a
36 point that is vague in the decision of Mr. Justice
37 Finch.
38 THE COURT: All right. Show me your examples, please.
39 MS. MANDELL: In Tab 1 you'll see that the full text of the
40 letter is -- is contained. The first paragraph
41 which is blacked out, the -- we say that it's within
42 the context of the -- of the brief of the lawyer as
43 to who the expert met with from among counsel's team
44 if that person is not part of the area of expertise
45 of the expert.
46 THE COURT: Of course the expert in cross-examination could be
47 asked who -- who he met with and when, could he not?

1 MS. MANDELL: Yes. But we say that it's --
2 THE COURT: You don't have to tell him. You don't have to
3 furnish the information so he can point out the
4 question.
5 MS. MANDELL: And we also say if it's somebody in his area which
6 helped to formulate his report, that's one thing,
7 but in this case Miss Marsden is a specialist in
8 Adaawk. She doesn't have any knowledge of
9 geophysical biological evidence, and we say that
10 it's up to us to select who we put in touch with the
11 expert and helped to formulate the questions of the
12 report.
13 Bearing in mind this is before the actual field work
14 was designed.
15 THE COURT: Yes. All right.
16 MS. MANDELL: The last two paragraphs we excised because we say
17 that it's part of the housekeeping matters and
18 aren't something which the defendant needs to know.
19 THE COURT: Well, instead of saying $1,000, which seems little
20 enough, if it is to say $100,000, would that not
21 reflect on credibility, being paid a huge amount for
22 a relatively straightforward scientific opinion?
23 MS. MANDELL: I would --
24 THE COURT: Why the bonus?
25 MS. MANDELL: Yes. I concede that. I think that's right. I
26 think they should be entitled to no financial
27 affairs if that is an issue for credibility.
28 THE COURT: Well, 15 years ago I would have been appalled at the
29 thought of such a matter ever being ventilated at
30 trial, but I must say I've changed my view.
31 MS. MANDELL: I can see, as your lordship puts it, that it may
32 arise in credibility, so it could be disclosed.
33 THE COURT: Yes.
34 MS. MANDELL: Tab 2, again the major excising was with respect
35 to what we called housekeeping matters, and again I
36 don't now have problems with revealing the amounts.
37 THE COURT: Yes.
38 MS. MANDELL: Tab 3, my lord, this is a memorandum of Stuart
39 Rush to various persons who are named as those to
40 whom the memo will be sent. And our first point --
41 and it's responding to a draft of a report which Dr.
42 Gottesfeld presented to Richard Overstall, who is
43 counsel's agent in this matter. And we say, first
44 off, that the -- those people who received copies of
45 the report or are part of the committee, counsel's
46 committee to advise with respect to the litigation,
47 that information is privileged and ought not to be

1 disclosed, and so I excised the names of everybody
2 who received the memorandum, except for Richard
3 Overstall, because it was through Mr. Overstall that
4 the witness then received a copy of the report. And
5 I say this because I think that there is privacy to
6 be maintained regarding who counsel's advisors are
7 in the preparation of the case.
8 Now, in paragraph two, this is again counsel
9 speaking to his agent agreeing that another person,
10 John Clague, should review the report and give his
11 informal critique. And we say that if and when Mr.
12 Clague passes on any information which he then makes
13 of the report to the expert, this is discloseable.
14 And you'll see at Tab 4 in fact Mr. Clague did
15 develop an opinion, and this was brought to the
16 attention of the witness. And we say that certainly
17 Mr. Clague's opinion, if it gets developed, is
18 discloseable. But the fact that we might choose to
19 consult with other potential witnesses or other
20 potential experts and if that information doesn't
21 then find its way back by way of critique to the
22 expert, we say the fact that we consulted with
23 others is not part of what the defendant should know
24 about our case.
25 Now, the third paragraph, this is Stuart
26 critiquing the -- Stuart Rush critiquing the
27 strengths and weaknesses of the actual draft report
28 itself. And in my view I -- I've excised it because
29 I think that the opinion of counsel regarding
30 whether or not according to his opinion the report
31 is good and does what it's meant to do or doesn't do
32 what it's meant to do is not a fact, or it's not --
33 it's not an assumption which -- which, in our
34 submission, is probative enough that it should be
35 revealed. And I say this because here is counsel
36 commenting upon his view of the evidence having the
37 advantage of the overview of the case. And I say
38 that it shouldn't be to the benefit of the
39 defendants how Mr. Rush views the evidence which is
40 coming in. Now, should he then generate any further
41 facts, that's different. But his own private
42 opinion about the -- the strength of the evidence,
43 in my view, isn't discloseable.
44 THE COURT: How does this report get into this area for
45 discussion at all if a copy wasn't sent to Dr.
46 Gottesfeld?
47 MS. MANDELL: Well, it was in fact by Richard Overstall.

1 THE COURT: I gather Mr. Overstall --
2 MS. MANDELL: Sent it on to Dr. Gottesfeld. So it's part of his
3 file and he went through it.
4 I draw to your lordship's attention the same point
5 on the third paragraph. I've excised the statement
6 "The conclusions drawn about dating on page 14 are
7 fantastic", and I've excised that. "But we should
8 explain either on page 14 who's Beta Analytic", the
9 reason I say again that that should be excised is
10 that it's emphasis which is available for the
11 defendants to appreciate that counsel in their
12 wisdom in looking at the evidence highlights certain
13 points of significance to their argument. And this,
14 I say, is the benefit of opposing counsel's views
15 which they shouldn't have.
16 And, finally, the last paragraph, the -- on page 2
17 we've excised. And I say that this is another
18 example, only perhaps a clearer one, of why we say
19 that counsel's opinions regarding this should be
20 excised. In this case he's -- Mr. Rush is
21 explaining that the report is helpful in
22 corroborating the authenticity of the adaawk. Maybe
23 that wasn't completely apparent in the evidence
24 provided by Dr. Gottesfeld for its purpose, and that
25 that's certainly something which will be left to
26 legal argument and which may or may not at the end
27 of the day be accepted by your lordship, but we say
28 that it's not proper that the defendant get at this
29 early stage how it is that this evidence will be
30 used in the legal argument. Now, this witness --
31 perhaps it's more obvious than others to come, but I
32 say that the principle is there and that the
33 comments are appropriate.
34 Now, Tab 4 was put in to demonstrate the fact that
35 Mr. Clague's letter in its entirety was disclosed,
36 because we say that is the fact that my friend is
37 entitled to.
38 Tab 5 --
39 THE COURT: I'm sorry. Disclosed because Mr. --
40 MS. MANDELL: Dr. Gottesfeld.
41 THE COURT: -- Dr. Gottesfeld relied on it?
42 MS. MANDELL: Well, he saw it before he completed his report.
43 He saw the opinion generated by counsel of another
44 expert as to his work and he could consider it and
45 reject it or accept it or do what he pleases with
46 it, but that's certainly facts that he has that he
47 then considered.

1 THE COURT: Yes.
2 MS. MANDELL: But had he not, my lord, generated that opinion,
3 the fact that we had asked Dr. Clague to do that, in
4 our submission, is what's protected.
5 Tab 5, it's another housekeeping problem. You'll
6 see at the bottom of the last page, this is an
7 invoice enclosure.
8 Tab 6 --
9 THE COURT: I gather that the invoice wasn't disclosed.
10 MS. MANDELL: We didn't have it, no.
11 THE COURT: Yes. All right.
12 MS. MANDELL: Tab 6 is a problem of a similar order as that
13 raised by Mr. Rush's memo. This is a memorandum
14 from Richard Overstall, who's our agent, to Dr.
15 Gottesfeld. And the first strike is, as I
16 indicated, when we spoke last, I don't, in our
17 submission, feel that it's proper that the defendant
18 has indication of every time when we speak to our
19 experts.
20 And then later in the paragraph: "I can only echo
21 Stuart's remark that the report and the field work
22 is excellent to produce exactly the evidence we
23 hoped to find when we initiated the research".
24 THE COURT: But how is this restricted by solicitor's privilege
25 when it's not written by a solicitor?
26 MS. MANDELL: Well, Mr. Overstall was our agent in this case.
27 THE COURT: Well, I want to hear your friends on that. I'm a
28 little troubled by the thought that the privilege
29 could be extended merely by constituting your
30 clients as agent.
31 MS. MANDELL: He's not a client.
32 THE COURT: All right. Clients -- client's agents as lawyer's
33 agents for the purposes of extending privilege. You
34 may be quite right, and there's a logical reality to
35 what you say, but that -- historically it is a
36 solicitor's privilege to bear the solicitor-client's
37 privilege not limited to what the lawyer does.
38 MS. MANDELL: I should look up -- I looked up this point many --
39 many months ago and it was my impression -- and I
40 can find cases for your lordship and perhaps we can
41 set it aside.
42 THE COURT: Yes. I'd like to have some help on that. It seemed
43 to me there was a mention made in Lord Justice
44 Cotton's judgment. That was Tab 5, Lyell and -- was
45 it the Kennedy Case?
46 THE COURT: Oh, it was Lyell and Kennedy, yes.
47 MS. MANDELL: This had to do with the accountant. That's right.

1 THE COURT: On page 26, I think.
2
3 "... for the purpose of his defence, and it
4 would be to deprive a solicitor of the
5 means afforded for enabling him to fully
6 investigate a case for the purpose of
7 instructing counsel if we required
8 documents."
9
10 Further down page 26 he says:
11
12 "... when that case came before
13 Vice-Chancellor Wood, he protected the
14 records and extracts from books which had
15 made by an accountant for the defendants,
16 who had collected together a number of
17 entries, because the extracts, when put
18 together, shewed the view which he and the
19 solicitor of the defendants took of the
20 particular fraud which they were there
21 investigating."
22
23 So it does seem to me that he is saying that the
24 privilege extends beyond just what the lawyer has
25 done. He refers to an accountant. All right.
26 Well, that would seem to answer my question subject
27 to what your friends say.
28 MS. MANDELL: All right. The point at the bottom of the memo of
29 June 11th, this is -- we've excised that whole
30 discussion with the exception of the facts which we
31 say were relevant to -- the facts or assumptions
32 which we say are relevant to the witness. There on
33 the basis that the description by Mr. Overstall is
34 really more on the -- more pointing to the trial
35 strategy of the plaintiffs in going one way or
36 another in choosing to lead specific evidence for
37 the purposes which are being set out. And we say
38 this is all trial strategy and goes into the brief
39 and has nothing to do with the facts upon which the
40 expert would rely.
41 THE COURT: Yes.
42 MS. MANDELL: And then the last point, which is the same as a
43 point already raised at page 4, where we say that
44 the enclosures, that is who's part of the litigation
45 team with respect to these issues, are not a subject
46 for disclosure.
47 THE COURT: Yes.

1 MS. MANDELL: At Tab 7 I don't think there's anything other than
2 housekeeping here, except for the statement at the
3 last paragraph: "I discussed this with you and
4 Susan recently. It's the same point as to whether
5 or not we're forced to reveal the names of those
6 that are part of the litigation team with respect to
7 this expert".
8 Tab 8 the first deletion is housekeeping, but the
9 second one I believe we've already argued about. It
10 has to do with whether or not the material which
11 counsel is in the process of generating but which
12 doesn't touch particularly on the expert's report is
13 discloseable, or, as we've chosen, the material only
14 which pertains to the expert's facts or assumptions,
15 and that's on the first full paragraph of the
16 January 9th letter.
17 And the last -- we deleted the first paragraph of
18 the -- the first sentence of the last paragraph. I
19 think it should be included. I don't justify having
20 deleted it. This is where we indicated that we gave
21 a copy of the letter to Jim Pojar. The reason we
22 deleted it at that time is for the same reason --
23 actually I remember now. It's the same reason as we
24 deleted "We've given a copy of your letter to Mr.
25 Clague". And that is that we don't think that who
26 we consult about the report, unless there's some
27 feedback back, should be disclosed. So that's the
28 reason why that was excluded. And again with the
29 copy to Jim Pojar, we don't -- we don't say that --
30 it's the same point about not disclosing the
31 litigation team.
32 On page -- on Tab 9, I believe this is all
33 housekeeping with the exception of the financial
34 aspects which now we agree should be included.
35 THE COURT: Yes.
36 MS. MANDELL: Tab 10, my lord. I'm going to pass up to you the
37 full text of this memo. We haven't disclosed it to
38 my friends, only the edited one. And if I can
39 explain here that this was the by-product of a
40 meeting among the experts and counsel at an early
41 stage of the litigation where Mr. Pojar was being
42 asked as an expert to interact with a number of the
43 biophysical experts and assist in analysing whether
44 the theory of the case which we were advancing and
45 which we would ultimately be arguing for to him as
46 an objective observer appeared to be supportable on
47 the basis of the material which was disclosed to

1 him. And so the passages which are blacked out, in
2 our submission, are all his views as to whether or
3 not our theory could be supported by the evidence
4 which we exposed him to, and we say all of that has
5 to do with the developing of the lawyer's core
6 opinions.
7 THE COURT: This was disclosed, given to Dr. Gottesfeld, was it?
8 MS. MANDELL: No. This was given to Sybille Haeussler, who
9 wasn't come up yet.
10 THE COURT: All right.
11 MS. MANDELL: And if I could also pass up to your lordship -- at
12 Tab 10 it's also a memorandum where the full text of
13 which hasn't been disclosed to my friends but where
14 privilege has also been claimed with respect to the
15 blacked out passages. And this also has to do with
16 a witness to come, Miss Haeussler. And I don't
17 believe that there's any point raised in this
18 memoranda which hasn't already been discussed by us
19 and as objections to earlier memoranda. It's --
20 it's really -- all of the points have already been
21 dealt with and these are more examples of the same.
22 THE COURT: I wonder if for the purposes of this argument I
23 should keep these documents. Your friend hasn't
24 seen them and it's very difficult -- I think I'd
25 rather give them back to you. I think I would try
26 and reach a decision on principle without regard to
27 matters which I've seen to which your friends
28 haven't seen. I think the point -- the points
29 you're making emerge out of the examples you have,
30 and you've -- I'll take what you've told me as a
31 submission or an argument that could be made as a
32 hypothetical; that, for example, you might have had
33 a meeting, a team meeting in the early stages and
34 discussed the theory of the case and there might be
35 minutes or notes, and I might deal with it as a
36 hypothetical. Your friends haven't seen the
37 documents.
38 MS. MANDELL: And, my lord, to advise my friends, we've
39 explained that a letter of December 20th, 1985 for
40 Richard Overstall to Sybille Haeussler hasn't been
41 disclosed on the basis of privilege, and it's with
42 respect to the same meeting that the Pojar memo is
43 designed to cover.
44 The only last item is -- again it's one where my
45 friend doesn't have the disclosure. It's at Tab 15.
46 And I'll just advise you what the nature of that is.
47 Oh, this is financial problems. We've covered that

1 already.
2 MS. MANDELL: Thank you.
3 THE COURT: You say your friends don't have Tab 15?
4 MS. MANDELL: Not the full letter. But the point that's been
5 marked off there has to do with the discussion.
6 THE COURT: I don't have the full --
7 MS. MANDELL: No. You don't either. These are disclosures with
8 respect to Sybille Haeussler, and that has -- the
9 blacked out portion, I can advise, has to do with
10 financial matters.
11 THE COURT: Yes. All right. All right. Mr. Willms? Thank
12 you, Ms. Mandell.
13 MR. WILLMS: My lord, I've got an outline of the argument which
14 I'll supplement with oral argument. And I think
15 I've anticipated most of what my friend has said. I
16 also have a brief of documents. Some duplicate,
17 some don't. I apologize for the ones that do,
18 but --
19 THE COURT: Thank you.
20 MR. WILLMS: And the one final thing -- and this is something
21 which I'd ask that your lordship keep with you because
22 it will be relevant in the witnesses to come. I'm
23 not going to refer to all of these cases, but it
24 will -- it's a binder of cases that my friends have
25 dealing with expert evidence generally.
26 Now, the starting point, my lord, even before I
27 get to Vancouver Community College, which I've set
28 out in paragraph 1, is really what your lordship
29 said in Sengbusch and Priest, which is at Tab 6 of
30 the book of authorities. And it's in particular
31 at -- starting at pages 39 and over to page 40, your
32 lordship really set out in quotations from Kelliher
33 and Smith on page 39 and then Turner from 39 over to
34 40 and then finally Abbey what an expert is. And I
35 think that the distinction's important here because
36 it bears on some of the discussions that have been
37 taking place between the witnesses as evidenced by
38 the documents. And an expert is -- and this is
39 Abbey on page 40: His function is:
40
41 "... to provide the judge and jury with a
42 ready-made inference which the judge and
43 jury, due to the technical nature of the
44 facts, are unable to formulate. 'An
45 expert's opinion is admissible to furnish
46 the Court with scientific information
47 which is likely to be outside the

1 experience and knowledge of a judge or
2 jury. If on the proven facts a judge or
3 jury can form their own conclusions
4 without help, then the opinion of the
5 expert is unnecessary."
6
7 And your lordship went on at the bottom of the
8 page to distinguish between argument disguised as
9 opinion and true opinion evidence. And I'll come
10 back to this later, my lord, but really at the heart
11 of a lot of these meetings and the correspondence is
12 an assessment of how much of the report is truly
13 scientific and how much of it is part of the
14 plaintiff's argument fitted in case by case, expert
15 by expert. And I think the first two experts are an
16 illustration of why it's important for the
17 defendants to know why extracts are in a report, why
18 they're out of a report, who spoke to the expert and
19 why.
20 And these are all matters which are covered, in my
21 submission, by the essence of what Mr. Justice Finch
22 covered in Phillips, Barratt. And I've set out, my
23 lord, on the first page of the typewritten argument
24 what Mr. Justice Finch said and what we say the law
25 is. And that is -- and Phillips, Barratt was a case
26 where the expert was served with a subpoena. It was
27 really treated as a Subpoena duces tecum, a subpoena
28 for documents, because the witness was being offered
29 to give evidence on behalf of the party calling the
30 witness, and it was the opposing party that served
31 the subpoena. But the language of the subpoena is
32 the normal language of a subpoena, all documents
33 related to any matter in issue in the proceedings.
34 And your lordship is aware of the tests of relevance
35 related with that kind of language. It's the same
36 language in discovery under Rule 26. And it was in
37 that context that Mr. Justice Finch said that:
38
39 "When an expert witness who is not a party
40 is called to testify, or when his report
41 is placed in evidence, he may be required
42 to produce to counsel cross-examining all
43 documents in his possession which are or
44 may be relevant to matters of substance in
45 his evidence or to his credibility, unless
46 it would be unfair or inconsistent to
47 require such production."

1
2 In my submission Mr. Justice Finch in that case held
3 that when the witness was tendered, all documents --
4 privilege over all documents in his possession were
5 waived subject to what he said about fairness and
6 consistency. And that is what I have set out in
7 paragraph 2. And, my lord, this is consistent with
8 the U.S. position.
9 And I'd just like to turn to two of the cases that
10 my friend read to you from her authorities. The
11 first one is the Nobles Case, which is at Tab 10.
12 Sorry. Tab 11, my lord, is the Nobles -- the
13 Nobles Case. And my friend read to you from page
14 1 -- didn't read from the case, but it's page 154
15 that the quote in her argument is taken from. And
16 the quote, my lord, if you look down under
17 paragraph -- this is on page 154 at Tab 11.
18 THE COURT: Yes.
19 MR. WILLMS: What my friend read to you, if you come midway down
20 the left-hand column down to the "Disclosure of an
21 attorney's efforts at trial, as surely as disclosure
22 during pretrial discovery, could disrupt the orderly
23 development and presentation of his case", that's
24 the portion that my friend quoted in her argument.
25 The Court then carried on to say this:
26 "We need not, however, undertake here to
27 delineate the scope of the doctrine at
28 trial, for in this instance it is clear
29 that the defence waived such right as may
30 have existed to invoke its protections.
31 The privilege derived from the work
32 product doctrine is not absolute. Like
33 other qualified privileges, it may be
34 waived. Here respondent sought to adduce
35 the testimony of the investigator and
36 contrast his recollection of the contested
37 statements with that of the prosecution's
38 witnesses. Respondent, by electing to
39 present the investigator as a witness,
40 waived the privilege with respect to
41 matters covered in his testimony.
42 Respondent can no more advance the work
43 product doctrine to sustain a unilateral
44 testimonial use of work product materials
45 than he could elect to testify in his own
46 behalf and thereafter assert his Fifth
47 Amendment privilege to resist

1 cross-examination on matters reasonably
2 related to those brought out in direct
3 examination."
4
5 Now, my lord, that, in my submission, is entirely
6 consistent with what Mr. Justice Finch said in
7 Phillips, Barratt subject to the fairness, which
8 I'll get on to in a minute. But the work product
9 doctrine just -- it's not a doctrine where you can
10 pick and choose which parts of the work product are
11 discloseable later on.
12 My friend, in effect, seeks to say where the work
13 product changed the expert's opinion, that's
14 discloseable. I agree with that. But where the
15 work product was merely something that the expert
16 considered but you can't tell whether he changed his
17 opinion from it, then for some reason that core work
18 product or whatever it is isn't discloseable.
19 Now, my lord, that's a test that is going to shift
20 from witness to witness, document to document. And
21 what Mr. Justice Finch said in -- and which I submit
22 he said in Phillips, Barratt provides a test that
23 has at least some metes and bounds. And that, my
24 lord, is set out in paragraph 2 where Mr. Justice
25 Finch -- and this is in my argument -- gave an
26 example of something that fairness would not
27 require, would require protection of, and that is
28 advice on how to cross-examine the other side's
29 witnesses. So that when he's putting forward his
30 opinion on the stand, he may not be putting forward
31 his opinion. It may not involve his opinion at all
32 when he's given advice on how to cross-examine. And
33 I would add to that. And I've added that, my lord,
34 at the bottom of the first page, giving advice on
35 how to rebut affirmative allegations made by another
36 party where that advice is not related to the report
37 or to the evidence so that you may retain an expert
38 in a particular field. You may have a
39 multi-disciplinary expert. He may be an
40 archaeologist. He may be an ethnographer. You may
41 only want the archaeology in the evidence, but you
42 may want to meet an affirmative allegation made by
43 the defence when the defence is called, either in
44 cross-examining or after the defence is called to
45 rebut it, and it may not involve calling the witness
46 to give evidence about that at all. Now, those are
47 the kinds of things that I think Mr. Justice Finch

1 was alluding to in Phillips, Barratt when he
2 mentioned the retention of the confidential advisor
3 capacity in some circumstances.
4 Now, just before I turn to the second decision of
5 Mr. Justice Finch, I do want to deal with the
6 Bogosian Case that my friend cited. And that case
7 is at --
8 THE COURT: Tab 14, isn't it?
9 MR. WILLMS: Thank you, my lord. Tab 14. The important thing
10 to note in that case, my lord, or the two important
11 things, in my submission, are, first of all, the
12 Court in Bogosian acknowledged the waiver by calling
13 the witness. And if you turn to the page that my
14 friend read to you, that's page 593 of Tab 14 --
15 THE COURT: Yes.
16 MS. MANDELL: -- you'll see -- and this is in accordance with
17 the usual American method of dealing with points.
18 There's a footnote. And if you -- at the bottom of
19 page 593 on the right-hand corner:
20
21 "The district court concluded that showing
22 the material to the witnesses did not
23 waive the protection."
24
25 And then you can see the footnote:
26
27 "This situation is distinguishable from that
28 before the Court in United States v.
29 Nobles where the Court held that a
30 defence investigator waived protection
31 over his own reports of witness statements
32 when he testified that those statements
33 contradicted testimony introduced at
34 trial."
35
36 So the first point, my lord, is that there's --
37 this Bogosian is not strictly speaking inconsistent
38 with Nobles. It recognizes Nobles. It's a pretrial
39 matter, and it's a case on a clash between two
40 federal rules in the United States. The dissent
41 sets out clearly that there is a -- a difference of
42 opinion even with the majority, and I'm not going to
43 read this to your lordship, but the dissent deals
44 with judgments in different jurisdictions, which on
45 the whole I think it must be said that if there is a
46 difference between the two cases, between Bogosian
47 and Nobles, that Mr. Justice Finch has adopted the

Nobles proposition, and that that's the law in British Columbia, and that he has not adopted the principles if they are different and I say they aren't, set out by the majority in Bogosian.

THE COURT: What do you say is different about those two cases?

MR. WILLMS: Well, I thought my friend was suggesting that the Bogosian Case said that there was some protection over work product at trial, core work product. Well, what I'm suggesting is Bogosian is another one of the pretrial cases of which there are legion in the United States. You can't dip into opposing counsel's brief pretrial. That's to be distinguished from the Nobles Case where the matter came up when the witness got in the stand and a waiver of privilege was the result.

Now, the types of documents that Mr. Justice Finch sets out in his -- in a later ruling -- and, my lord, the later ruling is at Tab 12 of the black binder that I handed up. And in this judgment Mr. Justice Finch says:

> "On September 4, 1987, during the evidence of an expert witness called by the plaintiff, I held that the expert could be compelled to produce drafts of his reports, working papers, written communications passing between him and counsel who retained him, and other documents pursuant to a subpoena which had been served on the witness by counsel for the defence. I said that the calling of the witness to testify, or the adducing of his report in evidence constituted waiver over those papers in the possession of the expert which would otherwise have been protected from disclosure by the privilege protecting papers in the 'lawyer's brief'."

I think, in my submission, my lord, that makes it clear that at the first stage Mr. Justice Finch was saying that the privilege is waived completely, but he does talk about fairness and consistency.

THE COURT: But only as to the documents in the file of the witness.

MR. WILLMS: Only -- this refers only to the file of the witness.

1 Now, in this particular judgment, and I don't
2 think anything turns on it in this case, Mr. Justice
3 Finch also directed that documents that were once in
4 the possession of the witness but were no longer,
5 that if there were drafts in the possession of other
6 people, they could be produced. This would have
7 not -- this would not have arisen had the expert
8 still had his drafts. But you don't think that
9 arises here. But I think what Mr. Justice Finch has
10 done here is clarified the intent of the initial
11 ruling. And in my suggestion -- in my submission,
12 my lord, it is a two-step process, and the first
13 step of the process is a complete waiver.
14 But to deal with the relevance issue that my
15 friend has brought up, it's just the same as looking
16 at the document and deciding whether or not it
17 should go on a list of documents. It's the same
18 test. If it's so far field from an issue --
19 something that's an issue in the case, then it's not
20 relevant and it doesn't need to be produced, because
21 it's the same as the response to the subpoena, the
22 response to the demands for discovery of documents.
23 With the privilege gone, it just falls into the
24 general category of documents. And if the document
25 isn't relevant under the Peruvian Guano Case, it
26 doesn't need to be disclosed. But if it is
27 relevant, then the next stage arises, and that is
28 fairness and consistency.
29 THE COURT: All right. Then I think we'll adjourn then, Mr.
30 Willms. Before we do, after lunch could counsel
31 direct my attention -- I don't have a copy of the
32 rules -- to what is -- what the legislative
33 provision that is in the rules giving the Court the
34 authority to look at documents which privilege is
35 claimed in order to determine such a question? I'm
36 quite sure there's -- there is such a provision in
37 the rules. I'd like to be reminded of what it is,
38 please. All right. Thank you. Two o'clock.
39 THE REGISTRAR: Order in court. Court will resume at two.
40
41 (PROCEEDINGS ADJOURNED)
42
43 I hereby certify the foregoing to be
44 a true and accurate transcript of the
45 proceedings transcribed to the best
46 of my skill and ability.
47

Kathie Tanaka, Official Reporter
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(PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)

THE REGISTRAR: Order in court.
THE COURT: Mr. Willms.
MR. WILLMS: My lord, I was on page 2 of the outline of argument that I handed up.
THE COURT: Thank you.
MR. WILLMS: And I had just read to your lordship from the description in the second -- in the unreported Vancouver Community College case. I do want to draw the distinction, and I have drawn the distinction in page 2 between working papers and the facts upon which the opinion is based because those are already the subject of an earlier ruling of your lordship.
THE COURT: Yes.
MR. WILLMS: So it's clear, working papers here are not something which the witness has relied on in preparing his report that is the subject of the argument today. Now, I think my friend's argument

1 has tracked her letter to me, but at the -- in the
2 black binder which says "Defendants Documents on
3 Privilege", the first document is the letter from my
4 friend setting out the points on privilege. And
5 it's that that I have responded to in the written
6 outline here. I think it picks up all of the points
7 that my friend made in the brief that she handed up
8 to your lordship this morning.
9 The first point that I want to make is that it
10 is it the direct work product privilege that has
11 been impliedly waived according to the reasons in
12 Phillips, Barratt. So it's not a question of
13 whether it's been waived or not, it's waived by
14 offering the witness. The question is which
15 portions -- which documents should be protected from
16 disclosure by reason of fairness or consistency.
17 That's the point that I have made at the bottom of
18 page 2 and over to the top of page 3. So that the
19 focus, in my submission, of the inquiry here is once
20 they're waived, which ones would fairness dictate
21 protection for.
22 And as I said earlier before lunch, Mr.
23 Justice Finch said: "Preparing the
24 cross-examination or assisting in the preparation of
25 the cross-examination of an opposing witness",
26 that's as a confidential advisor. It would be
27 unfair to let the other side know what your
28 cross-examination was going to be before the witness
29 took the stand rebutting -- where it doesn't form
30 part of the report or is in any way related to the
31 witnesses' report, rebutting an affirmative
32 allegation of the other party. And the reason why I
33 say that, my lord, is that where the expert witness'
34 report fits into a strategy of proving your case,
35 that should be distinguished between rebutting the
36 opposing party's case and cross-examining the
37 opposing party's witnesses. That is where the
38 expert may still remain a confidential advisor and
39 where it would be unfair to, if you may, tip the
40 hand in advance.
41 There is no fairness or unfairness in tipping
42 the hand when you are putting your case in. There
43 is no secrets when you are putting your case in.
44 There shouldn't be a surprise when putting your case
45 in. It's all part of your case and your strategy,
46 and I don't think, with all due respect to my
47 friend, that trial strategy is something that's a

1 secret until final argument. I think most trial
2 strategy becomes obvious as the evidence goes in and
3 as the witnesses are led. If it doesn't, then it is
4 very hard to mount any kind of a defense to it.
5 Now, here my friend set out in the November
6 1st letter, and she has repeated it in her argument
7 today, in the fourth paragraph down items in which
8 privilege or she says privilege is maintained. I
9 have broken them down into (a), (b) and (c) on page
10 6. But in each case, I have suggested that there
11 should be a distinction drawn between correspondence
12 or documents that are related only, and that's the
13 word Mr. Justice Finch used, only to
14 cross-examination of opposing parties witnesses or
15 only to rebutting affirmative allegations of the
16 opposing party, and unrelated in any way to the
17 substance of the report or the substance of the
18 evidence of the witness.
19 THE COURT: Those are very difficult things to categorize, are
20 they not? Surely there is no overlapping.
21 MR. WILLMS: Well, there is overlapping, and my suggestion is on
22 the issue of overlapping it is my friend's onus --
23 and I am going to get to it in a minute, it is her
24 onus to show where it would be unfair. I can't say
25 that it is unfair to disclose something when I
26 haven't seen it, but my friend can make submissions
27 that it would be unfair to disclose something
28 because it would relate solely to a matter which has
29 nothing to do with the witness' evidence whatsoever.
30 Now, I have on page 4, my lord, gone through
31 letter by letter, at least to the extent that my
32 friend set out in her November 1st letter, and if I
33 can just relate those to the tabs. The first one
34 paragraph (a) is tab 1. And as I understand what my
35 friend said in her argument, she wasn't really
36 maintaining her objection in respect of the
37 financial aspects anymore which is on page 2, but
38 that she still suggested that the meeting, the fact
39 that there was a meeting with another witness, was
40 something that reflected trial strategy and was
41 unrelated to the report.
42 Now, in respect of meetings with other expert
43 witnesses, and I'm going to come to this in a little
44 more detail when I conclude, my lord. But, in my
45 submission, when one or two or three experts sit
46 down, with or without anyone else, to discuss the
47 substance of their report, to discuss what their

1 report might contain, to discuss what they might
2 report on, that is not -- that is a classic area
3 where the privilege is waived under what Mr. Justice
4 Finch said, and there is no fairness in protecting
5 that. There is no fairness in protecting the fact
6 that Dr. Gottesfeld met with Susan Marsden, that Dr.
7 Mathewes met with Susan Marsden to discuss where
8 their expert reports would intermesh.
9 THE COURT: Even if they decided upon a plan that was later
10 totally abandoned as unworkable?
11 MR. WILLMS: My lord, that is where I draw the distinction
12 between something that is part of advancing the
13 case. And I think a perfect example is Dr.
14 Gottesfeld's record. Dr. Gottesfeld was initially
15 asked to look for two old landslides. One wasn't
16 old enough and that's not in his report. The other
17 one is old enough and it is. And on that version,
18 in my submission, we wouldn't have known about the
19 other part and why the other part wasn't in anymore.
20 Now, I think the reason why something is out
21 is just as important as the reason why something is
22 in, in my submission. Especially when you have a
23 bunch of experts in a room doing whatever they're
24 doing. I don't know. I haven't seen any minutes of
25 any meetings with Ms. Marsden. But the fact that we
26 can all think of various things that could have
27 happened, maybe they didn't, but that doesn't go to
28 whether or not the documents should be disclosed.
29 It goes to whether or not the document is any use in
30 testing the credibility of a particular witness.
31 But that decision, my lord, in my submission is for
32 opposing counsel on whether it's useful in testing
33 credibility. That's not for the party presenting
34 the witness and the party who is waiving the
35 privilege.
36 The second document that my -- that I've
37 referred to on page 4, my lord, is tab 3. That's
38 the memorandum from Mr. Rush to Mr. Overstall.
39 It's the memorandum that was ultimately forwarded to
40 Dr. Gottesfeld. Each of the extracts that have been
41 blacked out are related directly to the substance of
42 the report. Now, certainly they say: This is a
43 good report. We like the report. But in my
44 submission, my lord, the fact that it may not be
45 very useful in cross-examination isn't the test.
46 What the test is is: Is it unfair to disclose the
47 document in all the circumstances of the case. Now,

1 this document was sent on to the expert. Who knows
2 what part the document played in the formulation of
3 the expert's opinion? But the ability to test what
4 part the document played in the formulation of the
5 opinion is the reason why fairness, in my
6 submission, would not protect this from disclosure.
7 It would require disclosure if it's been passed
8 along to the witness.
9 I'm jumping around a bit, my lord, because I
10 want to keep with the written outline as closely as
11 I can before I get back to the other documents that
12 my friend referred to. Tab 6 is the next one under
13 paragraph C. All of the blacked out portions of tab
14 6, my lord, relate to the evidence or the proposed
15 evidence of the witness. And, in fact, the blacked
16 out portions starting at the bottom of page 1 of the
17 letter and over to page 2 are really a discussion on
18 whether or not Dr. Gottesfeld is the appropriate
19 person to give certain evidence about how the adaawk
20 is linked or the adaawks may be linked to the
21 landslide which he was told to investigate. Now,
22 that is the category that I described earlier of
23 what is not part of -- which has been part of a
24 draft which explains why part of a draft is changed.
25 This letter came after the first draft, and it
26 explains why certain aspects of the first draft have
27 been changed.
28 Now, in my submission, that goes right to the
29 report. There is no doctrine of fairness that would
30 require this remain protected. It doesn't tip
31 anyone's hand as to who they are going
32 cross-examine. It doesn't tip anyone's hand as to
33 rebutting the other party's case. It doesn't give
34 anything away in terms of my friend's case. The
35 opening remark she made when Dr. Gottesfeld was led
36 is: These are going to corroborate the adaawk. So
37 there is no secrets they are being protected.
38 Tab 10, my lord, which is the memorandum from
39 Dr. Pojar to Mr. Overstall is a little different.
40 And the reason it's a little different, and I've
41 advised my friend of this by letter, is set out in
42 the three ring brief that I handed up to your
43 lordship starting at tab 2. And at tab 2 Mr.
44 Pojar --
45 THE COURT: Tab 2 is blank in my book. Yes.
46 MR. WILLMS: Tab 2 is a letter asking Mr. Pojar about
47 communications he has had with Mr. Overstall. It is

1 a letter from counsel for the defendant to Mr. Pojar
2 inquiring as to the communications that he's had
3 with the defendant -- sorry, with the plaintiff.
4 THE COURT: Yes.
5 MR. WILLMS: Now, the reply is at tab 3, my lord. And the
6 important part of the reply is on page 2, and I'll
7 wait if your lordship.
8 THE COURT: Well, unfortunately my tab 3 is what you just gave
9 me, so now I don't have tab 3. Maybe it's at 4.
10 Tab 4 should be at -- yes, it is.
11 MR. WILLMS: This is the reply from Mr. Pojar, and in his
12 reply --
13 THE COURT: What's a "drop point"?
14 MR. WILLMS: I suppose maybe that's out of Gorky Park or
15 something. John Laquaray (sic). It's that
16 paragraph on the second page, my lord.
17 THE COURT: Yes. Yes.
18 MR. WILLMS: In my submission, my lord, based on that Mr. Pojar
19 can by no stretch be termed part of the work product
20 of the plaintiff's confidential advisor as something
21 privileged when the witness has taken the stand.
22 Dr. Pojar has made it crystal clear that all that he
23 is doing is dispensing information as available and
24 as requested. There is nothing privileged about
25 that at all.
26 And, in fact, there is a serious question
27 whether or not any information or any correspondence
28 to Mr. Pojar which is also copied to an expert is
29 privileged as well. And if the document is shared
30 outside the work product privilege area, the
31 privilege is waived. But, in my submission, based
32 on Dr. Pojar's only description of his
33 communications with Mr. Overstall, there can be no
34 claim to privilege over portions of Dr. Pojar's
35 communications which are passed along to any
36 witness. He is simply dispensing public
37 information. In fact, it may well be the facts on
38 which the opinions are based. I don't know. I
39 haven't seen it.
40 Now, the December 20th letter which I referred
41 to on page 4, my lord, I haven't seen that. All I
42 can do is assert the general argument that I've made
43 on the previous page. This is a letter from Mr.
44 Overstall to Ms. Haeussler of December 20th.
45 THE COURT: Yes.
46 MR. WILLMS: I don't know what the contents of that are, but I
47 suggest that if it relates to cross-examination

1 only, if it relates only to rebutting the opposing
2 party's case --
3 THE COURT: The problem is these things seldom relate to things
4 like that. They may relate to all sorts of things.
5 MR. WILLMS: That may be. They may relate to all sorts of
6 things. It may be that whole paragraphs relate to
7 something else, and the communication that my friend
8 has suggested where that is the relevant part of the
9 communication can be blacked out. Thank you for
10 your comments on the report of Doctor X, we will use
11 those in cross-examination or something like that.
12 That would be -- fairness requires that that
13 wouldn't be disclosed, and it may require blacking
14 out portions of correspondence which is related to a
15 number of different things.
16 But the principle, my lord, in my submission,
17 is not a complicated principle. And that is that if
18 it's related only to cross-examination of another
19 witness or only to rebutting the allegations made by
20 the other party, and is unrelated in any way to the
21 report, then fairness requires that it not be
22 disclosed. But in all other cases, the error should
23 be on the side of providing, since the witness is
24 brought to court as being truthful, honest,
25 independent, unmoved by irrelevant aspects, unswayed
26 by counsel's views, standing firm on his or her
27 opinions, --
28 THE COURT: But that's not the way the world works, Mr. Willms.
29 MR. WILLMS: That's what Mr. Justice Finch said in his judgment.
30 THE COURT: Well, he is a very nice young man and hasn't lived
31 long enough to appreciate that that's not the way
32 the world works.
33 MR. WILLMS: Well, my lord --
34 THE COURT: That's not the proper categorization -- I'm sorry,
35 that's not an accurate characterization of expert
36 witnesses today.
37 MR. WILLMS: My lord, I suppose the difficulty with the
38 characterization of what an expert witness is today
39 is unfortunately too much an advocate.
40 THE COURT: Way too much. That's what is all the trouble.
41 MR. WILLMS: And that gets back to the point that I made at the
42 very opening in referring to your lordship in
43 Sengbusch, and that is that experts are scientific
44 or technical people, or at least they are supposed
45 to be. And as long as they are confined to their
46 area of scientific and technical expertise, as long
47 as counsel doesn't share strategy with the witness,

as long as counsel doesn't sit down and have these sessions, then the witness will be a true expert witness.

THE COURT: Long ago Mr. Justice Coady gave us a lecture and told us that it was our responsibility to thoroughly familiarize ourselves with the experts and their reports. We were expected to sit down with experts and become a master of that particular issue. Now, how do you reconcile that -- if that's a good way for counsel to practice, how do you reconcile that with what you are now saying?

MR. WILLMS: My lord, the reconciliation of that is first of all there is nothing in the importing of the discipline to counsel, in my submission, that when the expert takes the stand is going to be privileged. In other words, as a general topic of information. It's going the other way. It's the communications. It's the response to communications. It's coming from counsel that is the difficulty and that has proven to be it the difficulty. And that's the difficulty that, in my submission, Mr. Justice Finch sought to remedy in Phillips, Barratt.

Now, I am mindful, my lord, and there are difficulties that that decision creates. It does change the way and it probably changes the way that 90 per cent of expert evidence is led or more. But as your lordship pointed out, it's a reaction to a problem of experts. And in the recent decisions in Emil Anderson, a problem of experts coming in and giving argument dressed up as opinion rather than true scientific or technical expertise. It's just another method to allow counsel to get at that in the true adversarial spirit. Because if it weren't for that, my lord, there would be no way to touch it. There is no way to effectively deal with argument disguised as opinion unless you can get into how it was disguised.

THE COURT: Well, I don't have any difficulty with the -- with going into how an expert's report came to be prepared or how he came to reach his opinion, that is to know who he talked to about the subject matter and what the course of his opinion development was. That seems to me to be a legitimate subject for cross-examination. What troubles me is when you start involving counsel because you're driving lawyers into depriving clients who can't affored to retain a separate set of experts or for the lawyer

1 to retain another lawyer, that's what the English
2 did because counsel didn't talk to the experts, the
3 solicitor did. Now, certainly we don't want to
4 drive our public to a second layer of expenses?
5 MR. WILLMS: My lord, on the point of second layer of expense,
6 where the distinction is drawn between the expert as
7 a true confidential advisor, and I don't mean to be
8 exhaustive in the two-point list that I gave to your
9 lordship, one comes from what Mr. Justice Finch
10 says, Land one comes from what I'm suggesting today.
11 But even with a single expert under Mr. Justice
12 Finch's judgment in Phillips, Barratt, it is
13 possible to ensure that the confidential advisor
14 aspect of the witness is as little blurred as
15 possible with the opinion-giving aspect of the
16 expert. And to the extent that it is blurred, then
17 it's counsel that have to assume the responsibility
18 for doing that.
19 But that, in my submission, my lord, is not an
20 insurmountable problem for counsel. It's a
21 difficult, but it's not insurmountable. It maybe
22 changes the way counsel have been retaining experts
23 in the past and dealing with them, but it's an
24 answer to a situation which had gone too far. And,
25 in my submission, it is possible to do it. It is
26 harder on the lawyer, but that's a burden that the
27 lawyer should assume.
28 My lord, any of the lines that my friend
29 suggests, each of them are so fraught, and the one
30 that -- I think the first one that my friend pointed
31 out to you was at tab 8 of her documents. And on
32 this one, and in particular the second paragraph,
33 describing the further work on describing the
34 biogeoclimatic zones that I think my friend said
35 something about the overall trial plan, you know,
36 thought processes of witnesses.
37 THE COURT: Yes.
38 MR. WILLMS: Well, the fact is that on the very next page the
39 report that is being referred to in that paragraph
40 on biogeoclimatic zones is sent to the witness,
41 that's the Haeussler report. It's the one in the
42 last paragraph where Mr. Overstall says: I've sent
43 the report along, that too may be helpful.
44 Now, on the suggestion that I made, my lord,
45 there is no difficulty drawing any dividing line
46 between what Mr. Overstall says on the last page and
47 what he says on the first page. It's all disclosed.

1 THE COURT: But there is nothing to tell me with any certainty
2 that the first sentence of paragraph 2 is --
3 constitutes the Haeussler report that was provided
4 in the last paragraph and nothing else.
5 MR. WILLMS: Well, it may well be the communication with Mr.
6 Pojar as well.
7 THE COURT: Well, maybe a number of other things. There may
8 have been a huge amount of matters on that area.
9 Why shouldn't that be confidential until a report is
10 furnished and then go through the same process
11 again?
12 MR. WILLMS: My lord, if there were no biogeoclimatic zone
13 reports forwarded to the witness and simply the
14 reference here to that, then that's one thing. Then
15 maybe fairness requires that since this is going to
16 be perhaps the cornerstone of a response of the
17 plaintiffs to some allegation of the defense that it
18 would be unfair to disclose it. But we all know
19 that biogeoclimatic evidence is going to be led in
20 this case. The reports have all been forwarded.
21 How they link together is what these documents tell
22 opposing counsel. And how experts have either
23 discussed points with each other, changed their
24 reports or not changed their reports in response to
25 that.
26 And that really gets me, my lord, to the last
27 point which I think is what my friend described as
28 the reluctance to disclose the legal team, who the
29 legal team was. In my submission, where the legal
30 team is made up of experts, and they all sit around
31 at a meeting and discuss how they're going to divvy
32 up proving parts of the case, for example, and whose
33 going to do what and discuss each other's drafts, in
34 my submission, that's waived when the witness takes
35 the stands. There is no fairness in protecting that
36 because that comes the closest, in my submission, to
37 putting together the final argument in advance when
38 you have the advantage of being there with the
39 witnesses who are going to say the evidence that
40 will fit right into the final argument. There is no
41 obligation, in my submission, to disclose to an
42 expert witness where that witness' evidence fits in
43 with the overall game plan. And if counsel does
44 that, and if counsel let's the witness know where
45 his evidence fits in, who knows what influence that
46 will have on an expert's evidence. You are the only
47 witness that can give us this evidence, and if you

1 don't give us this evidence our case is doomed to
2 failure.
3 Now, under Mr. Justice Finch's ruling, and in
4 my submission re Hansard Spruce Mills, there is no
5 escape hatch, my lord, from that case. The case is
6 binding. Mr. Justice Finch explained what he meant
7 in the second Reasons for Judgment. The privilege
8 is waived. And it is fairness and consistency that
9 is the test of whether or not other documents which
10 are unrelated to the report and the evidence need
11 not be disclosed. But, in my submission, that's the
12 dividing line. And as I said, I've given you two
13 examples.
14 If I may have a moment. My lord, it is rule
15 26(12):
16
17 "Where, on an application for production of a
18 document, production is objected to, the court
19 may inspect the document for the purpose of
20 deciding the validity of the objection."
21 THE COURT: Yes.
22 MR. WILLMS: It is very difficult, my lord, to make submissions
23 generally. In all of the submissions in respect to
24 the documents that my friend has blacked out, it is
25 my submission that nothing that has been blacked out
26 would be protected by fairness from disclosure.
27 There may be other documents that my friend has and
28 different reasons advanced for protecting them, but
29 the fact that it is part of work product is exactly
30 the privilege that is pierced and waived under
31 Phillips, Barratt.
32 Now, the last point, my lord, you asked about
33 agent.
34 THE COURT: Yes.
35 MR. WILLMS: There is a case in my friend's book of authorities
36 called Steeves v. Rapanos which is at tab 8. And on
37 the point that I'm going to refer your lordship to,
38 there are two holdings in the case. One was
39 reversed on appeal, but one wasn't. The holding in
40 the case that was not reversed on appeal is set out
41 at the bottom of page 63 under "Law".
42
43 "That principle protects from inspection
44 information obtained from a person by his
45 solicitor or his agent or by the agent of
46 the solicitor where litigation is
47 anticipated or has commenced."

1
2 Now, that extends the work product protection to an
3 agent. But there is an important caveat for how far
4 the protection goes, and this refers directly to Mr.
5 Overstall, any communications with Mr. Overstall.
6 And that is set out -- the conclusion is at the last
7 page. It's a test that your lordship may have heard
8 before, the dominant purpose test. But on the very
9 last page, on page 75 there are two conclusions that
10 Mr. Justice Bouck comes too. Conclusion A was the
11 conclusion that was reversed by the Court of Appeal.
12 Conclusion B was confirmed. There is Voth Brothers
13 and a number of other cases that come to the same
14 result. And that is the burden is on the party
15 claiming privilege over an agent's communications to
16 show that the dominant purpose for acquiring the
17 information was for use in litigation.
18 Now, insofar as the first two witnesses that
19 have taken the stand, the evidence shows, for
20 example, with Dr. Gottesfeld -- and this is the
21 letter, if I can find this. Yes, it's the July 8th
22 letter at tab 1 of my friend's book. This is the
23 letter that sets out that Mr. Overstall wants a
24 report from Dr. Gottesfeld. And he says this in the
25 second paragraph. Yes, it's in both letters blacked
26 out.
27
28 "The purpose of this work would be to
29 corroborate certain events recorded in the
30 Gitksan oral history and which may have left
31 some trace in the recent geological deposits
32 of the area. The information may be used by
33 the Gitksan and Wet'suwet'en chiefs in their
34 aboriginal title action..."
35
36 Now, in Steeves v. Rapanos the adjustor swore an
37 affidavit saying that the -- he believed that the
38 matter would likely lead to litigation and the
39 statements would aid in the conduct of litigation.
40 That was held by Mr. Justice Bouck and the Court of
41 Appeal to not be enough, to not be the dominant
42 purpose. Your lordship has seen both of the
43 contracts of Dr. Gottesfeld and Dr. Mathewes with
44 the Tribal Council. Both contracts speak of advice
45 to legal counsel as other support. Secondary, not
46 the primary purpose of the reports that are being
47 sought by the Tribal Council. So that from the

1 documents themselves, at least for the first two
2 witnesses, it appears that the dominant purpose of
3 the creation of the document was not litigation, but
4 to provide information on the history in one
5 instance in respect of the adaawk, and that it was
6 only a secondary purpose for the contemplated
7 litigation.
8 So that, I think, that answers your lordship's
9 question on how far the protection goes, and that is
10 how far it goes. It's my friend's burden, she has
11 got to show that anything that Dr. Overstall or Mr.
12 Overstall wrote to anybody or requested from anybody
13 or got from anybody was for the dominant purpose of
14 anticipated litigation.
15 Now, unless your lordship has any questions,
16 those are all my submissions.
17 THE COURT: Thank you, Mr. Willms. Ms. Koenigsberg.
18 MS. KOENIGSBERG: My lord, I come at this problem slightly
19 differently from my friend. But before I get to
20 what I'm going to say, I'll tell you where I'm
21 going. In my submission in balancing -- and that is
22 the act that we are doing here, balancing the
23 protection of counsel's brief from proper disclosure
24 of documents in relation to an expert where I would
25 submit the court should come down when it gets to
26 the line of having to decide and exercising it's
27 discretion, it is to protect counsel's brief.
28 Having said that that's where I'm going, in my
29 submission where one starts is to look at the
30 context for making that decision. The context here,
31 of course, is in relation to admissibility of expert
32 reports and expert evidence. That, in itself, is
33 admissible only usually as an exception to the
34 hearsay rule. Not for every aspect of an expert's
35 evidence, but usually it is as an exception. I
36 think that Wigmore in an excerpt which I believe my
37 friend Mr. Willms included in the book that he
38 handed up to you in the first tab. He handed to you
39 a book called "Authorities Respecting Opinion
40 Evidence".
41 THE COURT: Yes.
42 MS. KOENIGSBERG: It's a black binder. And at tab 1 he has
43 excerpted out Wigmore's statements on the admission
44 of learned treatises. It really has to do, in my
45 submission, with the problems and the admissibility
46 of expert evidence. And it is at page 6 that I
47 would ask you to have record. He is dealing with --

now this is in the context, he is dealing here with texts, but in my submission the principles are the same. Under 1692, and then (a), he is dealing with the issue of Trustworthiness, and he says:

> "There is no need of assuming a higher degree of sincerity for learned writers as a class than for other persons; but we may at least say that in the usual instance their state of mind fulfils the ordinary requirement for the hearsay exceptions, namely, that the declarant should have 'no motive to misrepresent'. They may have a bias in favor of a theory, but it is a bias in favor of the truth as they see it; it is not a bias in favor of a lawsuit or of an individual. Their statement is made with no view to litigation or to the interests of a litigable affair."

THE COURT: But that's simply not true, is it?
MS. KOENIGSBERG: Well, in my submission, not only is it true as a test for trustworthiness, it should be true.
THE COURT: Well, we all know it should be true.
MS. KOENIGSBERG: Well, in my submission, what we are dealing with here is what evidence is a court going to admit? And, secondarily, what evidence is a court going to accept and give weight to? And then what considerations should the court have in addressing that issue of weight because ultimately that's what the disclosure of the documents that we're talking about comes down to. It comes down to full opportunity for cross-examination on credibility of expert evidence. And the independence of an expert witness is the essential aspect of the evidence to give it full weight.

That's not to say, my lord, that you couldn't have an expert who has been a full advocate on behalf of a party and not -- and that you would find that you could not accept their scientific work. I think that your lordship, after having heard a test of how that work was arrived at, might very well accept it. It may be good science.

But, in my submission, the very reason why you should allow that expert to testify, and Mr. Willms has alluded to this, we should only be hearing in a courtroom, in my submission, the opinions of experts if their opinions are arrived at through a process

1 which is not easily understood by your lordship. If
2 that's the case, and if that is the basis for the
3 admissibility of an expert's report or an expert's
4 evidence, then surely your lordship is also robbed
5 of your ability to fully assess the credibility of
6 that expert's evidence because you don't have the
7 same tools for testing it that you do when a witness
8 is testifying to something which may be within your
9 experience.
10 Therefore, their independence is relevant to
11 testing the methodology used and the things that are
12 included and not included. Having tested it, it may
13 be good science and, in my submission, then as to
14 how helpful it is in deciding the issues in a case.
15 The fact that that person may be strongly affiliated
16 with one party or another becomes irrelevant to the
17 actual usefulness of that evidence.
18 THE COURT: Well, the converse is true as well, is it not?
19 MS. KOENIGSBERG: Yes, it is.
20 THE COURT: The witness may not be independent, yet his evidence
21 is good science.
22 MS. KOENIGSBERG: Oh, I'm sorry, I meant -- I misspoke myself if
23 I said the opposite. That's exactly what I was
24 trying to say. In my submission, ultimately your
25 lordship has to either accept the science or reject
26 it. You don't have available to you all of the
27 arsenal usually available to a judge to determine
28 whether that is good science or bad science because
29 one of the very reasons that you're allowing that
30 evidence in is because it's outside your common
31 experience. Therefore, you have to have some basis,
32 and a very full basis, for testing it outside the
33 essence of its expertise, and it is credibility of
34 the science. And in my submission, that's exactly
35 what Wigmore is talking about in this section. If
36 there is detectable and persuasively a bias in
37 favour of a lawsuit or of an individual, that's very
38 relevant to the assessment of the validity of the
39 opinion.
40 If we go down to even (b) under that section
41 of General Principles, Trustworthiness:
42
43 "The writer of a learned treatise publishes
44 primarily for his profession. He knows that
45 every conclusion will be subjected to careful
46 professional criticism, and is open ultimately
47 to certain refutation if not well founded;

1 that his reputation depends on the correctness
2 of his data and the validity of his
3 conclusions; and that he might better not have
4 written than put forth statements in which may
5 be detected a lack of sincerity of method and
6 of accuracy of results."
7
8 If we just take that out of the context of a learned
9 treatise because we are talking here about published
10 material where the whole spectrum of professionals
11 will be testing the methodology, and we are back
12 into a courtroom where evidence is being given, at
13 that point in time, from unpublished work and
14 perhaps unpublishable work, and we are going to
15 accept it as good or bad science, we are going to
16 try and test it. The only way we have of testing it
17 is to go at: Is there a motive to misrepresent? If
18 there is not, it's either good or bad science for
19 another reason, but that is our primary tool. The
20 independence of the expert in the way he applies his
21 science is crucial, in my submission, to be tested.
22 Having said that as the context in which, in
23 my submission, we have to look at disclosure of
24 counsel's brief because it is part of counsel's
25 brief being disclosed that we are really talking
26 about. It has been posed that that throws up the
27 problem of: Will you then have two sets of experts
28 or intercede a solicitor between the barrister and
29 the witness. And, in my submission, that gets you
30 past the problem, but that's not the only solution.
31 All of us, I am certain, in preparation for a
32 case of this magnitude have had available to us
33 individuals of varying numbers with expertise in a
34 variety of areas. In some cases, for all of us,
35 they may be have become what we could call members
36 of our litigation team. They may be experts. They
37 may have put in reports. Until the time that we
38 decide to put them forward as experts for the court
39 to accept their opinions, everything that they say
40 to us is privileged. We then make a decision to put
41 them forward. It surely is part of counsel's
42 responsibility and part of counsel's judgment as to
43 how persuasive the independence of that expert will
44 be given that they have participated as part of a
45 litigation team. Their science, their expertise,
46 stands or falls, but it is a hurdle we put in front
47 of us as counsel that we have to get over that we

1 have subjected that individual to persuasion of our
2 point of view. When we ask the court to accept an
3 expert as independent and trustworthy, we're saying
4 to the court: Accept this independent person.
5 Accept this person as an expert because their
6 independence of our point of view.
7 THE COURT: Well, surely the test for admissibility is not
8 independence?
9 MS. KOENIGSBERG: No, I don't say --
10 THE COURT: The test for admissibility is relevance. All the
11 independence question does is go to the matter of
12 credibility.
13 MS. KOENIGSBERG: I agree. It goes to the weight. I don't say
14 that you can't accept an expert because they are
15 part of the team. And in this case, of course, your
16 lordship hasn't done that and couldn't do that. We
17 had Mr. Sterritt, not only a plaintiff, a very
18 intense part of the plaintiff's case, put forward as
19 an expert in a particular area. In my submission,
20 it was relevant and important to examine his role in
21 the totality of the plaintiff's case in evaluating
22 him as an expert. But it didn't mean, in my
23 submission, that he couldn't be put forward as an
24 expert.
25 THE COURT: How have we along for hundreds of years until now
26 when we suddenly have this whole new approach?
27 MS. KOENIGSBERG: Well, in my submission, my lord, there are two
28 things. Number one, I don't think we can accept the
29 proposition that we have gotten along for hundreds
30 of years. If we go along -- if we read Wigmore, he
31 goes onto say -- it caught my eye because of the
32 discussion we were having -- C on page 7:
33
34 "Finally, the probabilities of accuracy, such
35 as they are, at least are greater than those
36 which accompany the testimony of many expert
37 witnesses on the stand. The abuses of expert
38 testimony, arising from the fact that such
39 witnesses are too often in effect paid to take
40 a partisan view and are practically
41 untrustworthy, are too well know to repeat." .
42
43 THE COURT: Can that not be exposed without going into the
44 lawyer's brief?
45 MS. KOENIGSBERG: Yes, my lord, and without going holus-bolus,
46 in my submission, into the lawyer's brief. Yes, my
47 lord, and that's where I fall perhaps -- well, I

1 know that in relation to some of this material I
2 fall on a different side of the line from my friend,
3 Mr. Willms. I think that we still have to protect
4 the concept of counsel's brief.
5 THE COURT: What was the name -- what was the name of the great
6 pathologist who so often clashed with Marshall Hall,
7 Spillsbury was it? I think it was Spillsbury. He
8 was a man who was in the employment of the general
9 secretary. They were all jury trials. Mr. Hall was
10 able to show that this learned man had given
11 evidence which led to X number of accused being
12 executed and that he was paid and worked full time
13 for the general secretary. You don't have to get
14 into the lawyer's brief to establish --
15 MS. KOENIGSBERG: I agree, my lord.
16 THE COURT: -- bias in some cases.
17 MS. KOENIGSBERG: I agree, my lord. I think when you come down
18 to the line -- first you have to get to the line, in
19 my submission, before you start leaning over it, but
20 it's where is that line. And, in my submission,
21 that line is first of all one has to be clearly
22 inside the lawyer's brief before one says, yes, in
23 favour of protection of the counsel's brief.
24 And secondly, the thing that is distressing is
25 that, of course, there are areas in which there is
26 not only clear overlap, but in which counsel's
27 opinions are proffered and are given to an expert.
28 And, in my submission, at least technically, I agree
29 with Ms. Mandell. I do not believe that it is
30 necessary for the reasonably fair conduct of
31 cross-examination to disclose what counsel's
32 opinions are, unless counsel's opinions are taken
33 into account, obviously, in a report. The mere
34 advancement of counsel's opinions to an expert, in
35 my submission, does not make -- does not make it
36 necessary to disclose them, and it is highly
37 prejudicial to the administration of justice and our
38 system to disclose it. And it's because, in my
39 submission, when thinking about how one would go
40 about exposing an area of bias, if I can put it that
41 way, that I can usually think of two or three ways
42 that it is going to come out without having to go
43 that far into counsel's brief that I say it's
44 unnecessary to so disclose it and the public policy
45 ought to prevent the exercise of discretion on the
46 part of the court to disclose it.
47 THE COURT: Well, what about in the Vancouver Community College

1 case? Surely it was necessary in that case to get
2 inside the brief?
3 MS. KOENIGSBERG: Well, it depends, in my submission, how far
4 one goes. And in looking at the Phillips, Barratt
5 case, in the first place I start at page 296 and I
6 agree with Ms. Mandell, where his lordship said:
7
8 "His opinions and their foundation are no
9 longer private advice for the party who
10 retained him."
11
12 That waives the privilege. And let me just find it.
13 That's at tab --
14 THE COURT: It's tab 4.
15 MS. KOENIGSBERG: Here, I have it. I was just looking at the
16 wrong part of it. It is on page 296 at the bottom.
17
18 "So long as the expert remains in the role of
19 a confidential advisor, there are sound
20 reasons for maintaining privilege over
21 documents in his possession. Once he becomes
22 a witness, however, his role is substantially
23 changed. His opinions and their foundation
24 are no longer private advice for the party who
25 retained him."
26
27 And if we just stop there and say just starting
28 there as the beginning of disclosure, what's
29 included in his opinions, well, I have to agree with
30 Ms. Mandell. I don't think that that imports
31 opinions at that point in time other than that
32 expert's opinion. So I don't think we can take that
33 line out of its context.
34 And I further, in my submission, think that
35 Mr. Justice Finch sufficiently qualified the area of
36 disclosure, that we are dealing with relevancy as a
37 test, fairness and consistency as a test. And he
38 talks about testing his -- the experts -- his
39 consistency, reliability and qualifications and
40 other matters touching on his credibility.
41 In my submission, he takes us no further than
42 the very discussion that we're having right now.
43 That is if counsel has written to or discussed with
44 an expert whose opinions are going to be advanced in
45 the courtroom and provided that expert with
46 information, call it facts or opinions, upon which
47 the expert relies or utilizes or is influenced by,

then that is disclosable.
It's not relevant to the inquiry, in my submission, that it was counsel who said it instead of getting somebody else to say it to the expert because it is the expert's report and his evidence that we are testing. And in putting the expert forward, we waive the privilege that would otherwise attach to what counsel says. But, in my submission, that waiver goes no further than those facts or that information given to the expert which clearly becomes part of the opinions.

THE COURT: You mean if it's adopted or used in any way?

MS. KOENIGSBERG: I think if it is used in any way, simply because what is omitted can be as important as what's in. But I look -- if we were to take an example --

THE COURT: I think if you don't mind, Ms. Mandell or Ms. Koenigsberg, I will take a short adjournment. I will hear your example when we resume in a few minutes.

THE REGISTRAR: Order in court. Court will recess.

(PROCEEDINGS ADJOURNED AT 3:05 p.m.)

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

_____

LISA FRANKO, OFFICIAL REPORTER
UNITED REPORTING SERVICE LTD.

(PROCEEDINGS RESUMED PURSUANT TO A SHORT ADJOURNMENT)

THE REGISTRAR: Order in court.

THE COURT: Ms. Koenigsberg.

MS. KOENIGSBERG: I think, my lord, we left off when I was going to get to a specific example to illustrate the problem.

If we look at Tab 3 in the documents book which Ms. Mandell handed up, and it is Stuart Rush's memo, and dealing with the three blacked out parts, which are the second, third and fourth full paragraphs, Ms. Mandell advanced that in her submission all of these would not be discloseable, and in my submission I agree.

I start from the proposition, first of all, that this is a memorandum of counsel and therefore it's almost, in my submission, a prima facie case that should not be disclosed. So then we come to on what basis and for what reason should it be disclosed. I have to agree with Ms. Mandell that if we look at the first paragraph and its contents, at that point

1 it is not abundantly clear to me that Mr. John
2 Clague's review of that report until it is given to
3 Mr. -- or Dr. Gottesfeld is relevant, because it can
4 be given to counsel, who, in my submission, can
5 review it and determine its relevance and importance
6 to them.
7 This little paragraph, however, highlights some of
8 the difficulty that we get into when we're this
9 close to the line of we are in counsel's brief.
10 There may be areas that should be disclosed. And I
11 don't know as there's much debate that it's
12 discloseable if in fact it is used by the witness,
13 the expert witness. I took Ms. Mandell to be saying
14 it's not discloseable because at this point in time
15 it's not -- it's not indicated that it has been used
16 by the witness and therefore it doesn't directly
17 relate to his report. Our difficulty is that it
18 points up that it's just at this point in time that
19 we know that this particular paragraph is not in, my
20 submission, admissible. And it's sometimes a
21 difficult judgment call to make, although in this
22 case it doesn't seem to be, as to whether it would
23 be directly relevant to the actual report. In other
24 words, was Mr. Clague's informal critique
25 communicated to Mr. Gottesfeld in some other way.
26 But if we're just dealing with this document in
27 front of us, in my submission there's nothing in
28 that paragraph which demonstrates that it's directly
29 utilized or indirectly utilized for all that matter.
30 I would say the same thing with regard to the
31 second paragraph in question. I think this is a
32 very good example of counsel's comment of counsel's
33 reaction to the report, and I think it's irrelevant
34 as far as the cross-examination or the testing of
35 the credibility, the independence in the value of
36 the expert witness. I won't comment on whether it
37 goes to the credibility of counsel's evaluation.
38 And thirdly, in the last full paragraph, the part
39 that's taken out, again it is the reaction or
40 opinion of counsel and, in my submission, while it
41 may be that a witness is particularly susceptible to
42 flattery, I don't think that we can take much from
43 it. However, I think that the part that's not
44 blacked out and thus it is agreed that it should be
45 disclosed -- and I think here we have to pause and
46 say this is counsel's brief. It is being
47 disclosed -- "As a minor point some of the terms

1 should be explained when first used." And then the
2 last part: ".. but we should explain either on page
3 14 or in the references who Beta Analytic Inc. is."
4 Well, in my submission, of course that should be
5 disclosed. It's a direct instruction, if you will,
6 to the witness to do something in regard to their
7 report. It explains something about that report.
8 And the fact that that instruction was given by
9 counsel or counsel's agent is -- does not make it
10 privileged and does not take it out of the category
11 of things that should be disclosed.
12 THE COURT: How did this document come to light?
13 MS. KOENIGSBERG: I believe that Ms. Mandell disclosed this
14 along --
15 THE COURT: It was just volunteered, was it?
16 MS. KOENIGSBERG: -- with all other documents which were in the
17 witness' file.
18 THE COURT: It wasn't given.
19 MS. KOENIGSBERG: It was not given ahead of time and it wasn't
20 given --
21 THE COURT: It wasn't given. I suppose at some stage it must
22 have got to Dr. Gottesfeld.
23 MS. KOENIGSBERG: Yes. I understand that Mr. Overstall sent it
24 to Dr. Gottesfeld. If it hadn't ever got to Dr.
25 Gottesfeld, then, in my submission, it wouldn't have
26 been disclosed at this point in time. If it got to
27 Susan Marsden's file --
28 THE COURT: According to Justice Finch it should have been
29 disclosed whether it went to Dr. Gottesfeld or not,
30 anything in possession of the party that might
31 relate to the credibility of the witness.
32 MS. KOENIGSBERG: I don't read that. I believe that he's
33 confining his remarks to the witness, to the expert.
34 At least I read him that way. I read him in the
35 context of the opening paragraph on page 296, the
36 opening paragraph, to that part where he says the
37 determining factor is when a witness becomes a
38 witness. Before he's a witness, it's privileged and
39 so we're --
40 THE COURT: What if he becomes a witness? Does Mr. Justice
41 Finch confine it to -- confine the source of
42 disclosure to that of the witness?
43 MS. KOENIGSBERG: It says that constitutes an implied waiver
44 over papers in a witness' possession. Page 298 Mr.
45 Willms is pointing out to me.
46 THE COURT: 298 of --
47 MS. KOENIGSBERG: Phillips, Barratt. It's at Tab 4 of Ms.

1 Mandell's brief of authorities. It has a clear --
2 Tab 11 of the black binder.
3 THE COURT: Oh, I'm sorry. What tab?
4 MS. KOENIGSBERG: Tab 4, page 298. Yes. I believe again
5 he's -- if we look down at the third full paragraph,
6 he says:
7
8 "I will attempt to summarize my view of the
9 law. When an expert witness who is not a
10 party is called to testify, or when his
11 report is placed in evidence, he may be
12 required to produce to counsel
13 cross-examining all documents in his
14 possession which are or may be relevant to
15 matters of substance in his evidence or to
16 his credibility."
17
18 And again I take that to be documents in the
19 possession of the witness.
20 THE COURT: All right. What about what Madam Justice McLachlin,
21 as she then was, sitting on S & K and Mr. Justice
22 Wallace in the Thunderbird Case? Do they confine it
23 to the --
24 MS. KOENIGSBERG: I believe they're in here. Tab 9. And was
25 there a particular -- I hadn't thought that we had
26 in the law got beyond -- I hadn't -- I mean I can
27 certainly be pointed to something I've missed, but I
28 hadn't read it.
29 THE COURT: I hadn't read it for some time, but I thought that
30 somewhere he said it's quite a different thing when
31 the witness goes in the box.
32 MS. KOENIGSBERG: Yes. If I can just as a last point -- I --
33 I'm afraid I perhaps got a little confused in the
34 course of the argument, my lord, but in my
35 submission there is a difference in the law on
36 what's producible pretrial and trial.
37 THE COURT: Oh, yes.
38 MS. KOENIGSBERG: And that all documents that were referred to
39 in the American cases are the privilege stays, in my
40 submission, until it's waived and to the extent that
41 it's waived, and it is when counsel makes the
42 decision to call a witness and tenders the evidence,
43 either by notice or by delivery of a report, that
44 the waiver occurs, and it's at that point that
45 documents are produced.
46 THE COURT: I'm looking -- what I was thinking about was the
47 last sentence in the penultimate paragraph in the

1 judgment on page 222 where she says:
2
3 "In the event that the expert takes the
4 stand at trial, the situation respecting
5 waiver may well be different."
6
7 And I think Mr. justice Wallace says something to the
8 same effect in the Thunderbird Case. What's the
9 difference in principle between waiver of privilege
10 for those documents that happen to be in the file of
11 the expert and similar documents or documents in the
12 same category that happen to be in the file of the
13 solicitor?
14 MS. KOENIGSBERG: Well, I think that it's not just -- it's not
15 just where the documents are. It's what the
16 documents are about. And if the object of the
17 exercise -- if we're waiving privilege in order to
18 fairly test the independence and credibility of the
19 witness, we start first, of course, with those
20 documents which are in the possession of the
21 witness, because we assume constructively, if not
22 otherwise, that he has taken cognizance of them. If
23 a document is not in the witness' -- is not in the
24 witness' possession, is in counsel's brief or in
25 somebody else's brief that was once in the witness'
26 possession, then, in my submission, it's producible.
27 The test isn't is it today in the witness'
28 possession. It is did the witness have knowledge of
29 it.
30 THE COURT: What if there is in the lawyer's file a memo that
31 says I read Dr. Gottesfeld's report, which is
32 fantastic; it's sure a good thing he didn't know
33 about X and what he doesn't know won't hurt us? I
34 use that language because that's exactly the
35 language that I had to contend with one time in a
36 case as counsel. Now, doesn't that bear on the
37 credibility of -- or the reliability or credibility
38 of the expert?
39 MS. KOENIGSBERG: No, my lord. It bears on the credibility of
40 counsel.
41 THE COURT: I don't know why you should say that if he has some
42 information that no one else knows about. You're
43 saying that counsel shouldn't put the expert forward
44 on that basis?
45 MS. KOENIGSBERG: I say that if there is a piece of evidence
46 which is beyond peradventure relevant, then counsel
47 should tell the witness. Frankly I think it's less

1 on the credibility and much more on the judgment of
2 counsel to not tell a witness something which the
3 witness needs to know. It probably is very much a
4 comment on the counsel's lap, inability to estimate
5 the opposition as well.
6 THE COURT: See, I have difficulty seeing a distinction in
7 principle because of what's in the file of the
8 expert and what's in the lawyer's file if you're
9 talking about getting at the truth on the
10 independence and reliability and credibility of an
11 expert.
12 MS. KOENIGSBERG: Well, my lord, if there's some central fact --
13 I don't know at least if I'm straining too far into
14 the abstract, but if there's some central fact
15 that's in the knowledge of counsel and doesn't tell
16 the witness and nobody else knows, then it's true
17 that the Court and everybody else will have accepted
18 something which they might not have accepted
19 otherwise. That's in the nature of our system, in
20 my submission. And I think counsel is, of course,
21 taking an incredible risk to -- to hide a highly
22 relevant fact. It would be a most unusual
23 circumstance when counsel -- and we're assuming, of
24 course, that counsel has no obligation to the Court
25 as an officer of the Court to tell the Court. We're
26 not dealing with a criminal situation or something
27 like that.
28 THE COURT: You say there's a different rule in criminal law
29 then?
30 MS. KOENIGSBERG: Well, I think there is. I think, for
31 instance, if it goes to whether you're going to be
32 having somebody say something that's a lie and you
33 know it is --
34 THE COURT: Who knows it's a lie?
35 MS. KOENIGSBERG: Well, only counsel.
36 THE COURT: Counsel doesn't know. Counsel just has information.
37 MS. KOENIGSBERG: Then I don't think you have the problem. I
38 don't think that there is that problem. That's the
39 escape hatch, I suppose. But yeah. I think that we
40 protect counsel's brief, and I think that we rely on
41 counsel's honour, integrity and judgment in our
42 system. And, in my submission, we don't go into
43 counsel's brief without very good reason to do so.
44 And, yes, it may be that a number of facts never
45 come to light that would have changed the outcome,
46 but I -- I believe that more often than not, those
47 facts come out and that most of us who probably

1 either witnessed or had the experience of having
2 facts that we thought maybe we didn't know about put
3 to witnesses that the witness didn't know about, and
4 we take the consequences. But I do not believe that
5 in that situation we should open counsel's brief to
6 protect ourselves from that one problem.
7 THE COURT: All right. So your proposition is that Mr. Justice
8 Finch's judgment is limited to the documents which
9 are in his file?
10 MS. KOENIGSBERG: Or were in his file.
11 THE COURT: Or were in his file.
12 MS. KOENIGSBERG: Yes.
13 THE COURT: What about the things that counsel had told him?
14 MS. KOENIGSBERG: That has to be -- I don't think that whether
15 it's written or oral makes any difference.
16 THE COURT: So counsel cross-examining can effectively ask the
17 witness, well, what did my learned friend tell you
18 about this case and have counsel take off his gown
19 and put him in the witness box to refute it?
20 MS. KOENIGSBERG: In my submission no more than it's perfectly
21 permissible, of course, to inquire into the
22 instructions given to a witness even when they're
23 given by counsel as to what your terms of reference
24 are. And if you don't write them down, it doesn't
25 mean that counsel can ask what they are. We're into
26 again that judgment area. Yes. A witness can be
27 asked -- for instance, we have, say, three drafts of
28 a report with changes in it, with changes in them.
29 Naturally counsel, opposing counsel, with due
30 preparation will inquire into the reason for the
31 changes. The reason for the changes may very well
32 be counsel told the witness something. Surely we
33 don't say, well, you can't ask that question because
34 it was counsel that told them. When counsel becomes
35 the fount of facts, then there's no privilege.
36 There's a real distinction, in my submission,
37 between --
38 THE COURT: Even if counsel got it under -- got the information
39 on a privileged basis?
40 MS. KOENIGSBERG: Well, absolutely. It's coming out of the
41 witness in a different guise. The privilege is
42 waived, in my submission. The witness is giving
43 that evidence. He may not be saying I say X because
44 counsel told me and counsel got it from a privileged
45 source, but he's giving --
46 THE COURT: You may not have to go that far. And it's never
47 that simple. It may be that counsel told me

1 something, yes. He told me some things. What did
2 he tell you? He told me this. Did you use up your
3 report? No, I didn't.
4 MS. KOENIGSBERG: In my submission you wouldn't be able to get
5 at it that way. The only way you can get at it is
6 to inquire the reason for a change, and then if the
7 witness volunteers that the reason for the change is
8 because counsel told him something, we need to know
9 what it is that counsel told him in order to find
10 out about the change. We don't need to know
11 everything else counsel told him, but we do need to
12 know the things that counsel said which had a direct
13 bearing on what is in the report on the witness'
14 opinion.
15 It's no different, in my submission, than the
16 problem we actually have with -- which has been
17 partly canvassed in the codification project and Mr.
18 Grant. Mr. Grant is counsel in this case, and Mr.
19 Grant has participated in researching and has come
20 up with a product, we're told. If there are
21 interviews which Mr. Grant conducted with a witness,
22 which there is now an interview, in my submission
23 the fact that Mr. Grant is counsel is irrelevant to
24 the producibility of that interview. But if Mr.
25 Grant gives an opinion to his clients about what it
26 means, that's privileged. And it goes without
27 saying that these are difficult questions, because
28 they're on -- they're in the grey area. They're on
29 the borderline.
30 But in my submission we -- we have to protect
31 prima facie counsel's brief, but we have to protect
32 the process as well and put all of the facts and
33 the -- and provide the Court with the full ability
34 to judge those facts and weigh them as well. And if
35 that walks us into counsel's brief to the extent
36 that it's a fact or information which a witness has
37 used, then that privilege is waived when we put the
38 witness
39 forward to give the opinion.
40 THE COURT: Is there anything different what you said as you
41 read Mr. Justice Finch's judgment from what he said?
42 MS. KOENIGSBERG: I'm sorry. Mr. --
43 THE COURT: Mr. Justice Finch's judgment. Are you saying
44 anything different from what he said?
45 MS. KOENIGSBERG: No. In my submission I'm not. I might. I
46 might come to a different conclusion faced with a
47 particular document or a part of that document.

1 It's possible. But with the principles that he set
2 out, no.
3 THE COURT: All right. Thank you. Ms. Mandell?
4 MS. MANDELL: My lord, I'll be brief. It's hard to believe
5 there's yet more to be said about this having gone
6 on all day.
7 In answer to first Mr. Willms, who suggested that
8 the case law has settled that the lawyer's work
9 product is waived when the witness takes the stand
10 and that this has been decided in Phillips, Barratt,
11 I ask your lordship to read pages 154 and 155 of the
12 Nobles Case where, in our submission, the -- the
13 rule there cited is that the material disclosed in
14 that case did not fall within the core work product
15 rule, and the waiver was held to apply only to
16 matters covered in his testimony. And I say that
17 the broad statement made by my friend is not what
18 can be taken from the Nobles Case or which could
19 have been taken by Mr. Justice Finch in Phillips,
20 Barratt.
21 THE COURT: You're saying page 154?
22 MS. MANDELL: 154 and 155. It's at Tab 11.
23 THE COURT: Yes. I have it.
24 MS. MANDELL:
25 Q And I say that this is -- this is the quote I read:
26
27 "Disclosure of an attorney's efforts at
28 trial, as surely as disclosure during
29 pretrial discovery, could disrupt the
30 orderly development and presentation of
31 his case."
32
33 This is with respect to the documents.
34 Then at the top of the next full paragraph:
35
36 "The privilege derived from the work product
37 doctrine is not absolute. Like other
38 qualified privileges, it may be waived.
39 Here respondent sought to adduce the
40 testimony of the investigator and contrast
41 his recollection of the contested
42 statements with that of the prosecution's
43 witnesses. Respondent, by electing to
44 present the investigator as a witness,
45 waived the privilege with respect to
46 matters covered in his testimony."
47

1 And I say that's really the rule of the case. It
2 doesn't say with respect to the work -- the product
3 of the -- of the work, and I don't think then that
4 Mr. Justice Finch's rule could have gone further
5 than Nobles, upon which he relied.
6 Now, your lordship asked my friend, Ms.
7 Koenigsberg, regarding the extension of the rule
8 into solicitor's files. And if I could turn your
9 lordship to Mr. Justice Finch's oral judgment, which
10 is presented in Mr. Willms' material at Tab 12,
11 the -- and if I could turn you first to page 4, a
12 second category of documents which were being
13 discussed were draft reports which were prepared by
14 Mr. Walker, who's the expert. And I'm now in the
15 second paragraph:
16
17 "... upon which Mr. Hankinson"...
18
19 which was counsel for the defendant.
20
21 "... has made handwritten notations of his
22 own."
23
24 And this was the question:
25
26 "Although the document or a copy of the
27 document bearing Mr. Hankinson's
28 handwritten notations were not transmitted
29 to Mr. Walker"...
30
31 And I'm going to ask you to rely upon these same
32 passages that I've emphasized.
33
34 "... he told me that he made some changes to
35 his report at Mr. Hankinson's suggestion.
36 It is a fair prima facie inference,
37 subject to rebuttal, that Mr. Hankinson's
38 notations on the draft were made for the
39 purposes of discussing the report and
40 revisions to it with Mr. Walker."
41
42 In other words, in that case there was possibly a
43 casting of the document question outside of the file
44 of the expert alone and there the test, as set out
45 by Mr. Justice Finch, was to link in some way
46 through either evidence or submissions or both the
47 connection between those notations and what may have

1 been put finally to the witness.
2 And again at page 6 --
3 THE COURT: There Mr. Justice Finch did go right into the --
4 into the solicitor's brief.
5 MS. MANDELL: He did. And if I can finish this, I think that it
6 can only be explained with reference to the evidence
7 or submissions where Mr. Walker had told him, or
8 perhaps Mr. Hankinson, that there was some
9 connection between these notations and the witness'
10 evidence, and it was on that basis that he set up a
11 prima facie inference, which was subject to
12 rebuttal, that this could possibly be material
13 capable of being disclosed. And he said that also
14 on page 6 with respect to their drafts of reports
15 where there was notes. This is with respect to the
16 third category of -- which is a draft of Mr.
17 Walker's report bearing the handwriting of one of
18 the defendants. And there he said at page 6:
19
20 "I have read these notes, and I have in mind
21 Mr. Walker's evidence that some changes to
22 his report may have been suggested by Mr.
23 McCoy."
24
25 So on that basis he finds a connection sufficient to
26 the witness to compel the discovery through those
27 notes or the cross-examination.
28 And I say that in general terms it is the lawyer's
29 job to canvass for these connections if they exist
30 and that I think that in this case that Mr. Justice
31 Finch probably was doing nothing more than applying
32 the rule, which we've cited on page 11 of our
33 argument, that the burden of showing that the
34 privilege is waived or doesn't apply falls to the
35 party seeking production, and it appears as if he's
36 applied that test where he's found a connection and
37 therefore sought the production. But I think in
38 general terms only counsel can say whether or not
39 there is a connection which ought to be there for
40 disclosure.
41 I'd like to next address my -- both my friend's
42 points, and I hope I haven't made myself not -- I
43 hope I haven't been unclear about this. It's not
44 our position that the material in the solicitor's
45 brief is discloseable if it's used by the witness.
46 It's not such a wobbly test as that. We're saying
47 that where the strategy or the theory of the case is

1 expressed, the mental impressions, the thought
2 processes relating to the theories of the litigation
3 are part of the document; that whether they're used
4 by the witness or not, we say that should be
5 protected. We're not saying, well, if it's used --
6 if the thought processes of counsel are somehow
7 considered by the witness, that that should make
8 them disclosed. It would be a rare occasion, in our
9 submission, where lawyer's opinions in that context
10 could be disclosed and if our submission is
11 accepted -- and we're not suggesting that the lawyer
12 consult the expert and say did you make use of my
13 thought processes in forming your opinion and on
14 that basis disclose or not to the other side.
15 THE COURT: What about if the lawyer says this is the crucial
16 point in the case; without your evidence we're not
17 going to succeed? Do you say the witness can't be
18 asked that?
19 MS. MANDELL: This is a crucial point in the case?
20 THE COURT: Especially if you add on that the fact that the
21 witness says that he did revise his report after
22 that discussion. You don't -- if you don't bolster
23 up that part of your report, we're not going to win
24 this case.
25 MS. MANDELL: I think if he says if you don't bolster up that
26 part of the report we won't win the case, if --
27 first of all, the fact that he says if you don't
28 bolster up that part of your report, I think feeds
29 into something which must be disclosed, which is the
30 terms of reference for the expert. But if the -- if
31 counsel were to say that point is great; it's my
32 opinion that that's the crux of the case; without
33 that point we won't succeed; with it we're going to
34 win, if that's counsel's view, if that's his
35 reflection on the evidence, I don't think that's
36 discloseable. But if anything flows from that, like
37 bolster your point, say it this way or make sure you
38 say it that way, whatever goes into instructing the
39 witness, I say that's all discloseable.
40 THE COURT: But, you see, the problem with that test is it opens
41 it up for cross-examination with every witness to
42 find out precisely what did counsel say, because you
43 have to know that before you can decide whether it's
44 relevant or not.
45 MS. MANDELL: Well, I think that that's the point you raised
46 earlier with Ms. Koenigsberg. If I have read the
47 case right -- I won't take you to it in its

1 entirety, but I believe that the case which is cited
2 in our authorities at Tab 9, the S & K Processors
3 Limited Case, a decision of Madam Justice
4 McLachlin --
5 THE COURT: Yes.
6 MS. MANDELL: -- deals with that point to this extent. And, my
7 lord, I won't take you into it now, but I believe
8 that if the matter is the subject of privilege, the
9 privilege isn't waived by the expert having taken
10 the stand and --
11 THE COURT: No. The privilege is waived by the statute.
12 MS. MANDELL: That's right.
13 THE COURT: The privilege that she was talking about.
14 MS. MANDELL: That's right. That's right. So I'd say that if
15 the expert could be -- if the material is
16 discloseable, then the expert could be questioned
17 upon it. But if the material is not -- if there's a
18 privilege with respect to that material, then that
19 privilege arguably would be the subject of an
20 objection when the question is raised to the expert.
21 THE COURT: Does anyone have the citation for the Thunderbird
22 Case?
23 MS. MANDELL: I thought it was contained in the Phillips,
24 Barratt Case.
25 THE COURT: Is it?
26 MR. WILLMS: It's in Phillips, Barratt.
27 MS. MANDELL: You can see the citation at page 290. It's the
28 second-to-the-last case cited. And in that case if
29 I can -- if I can advance it, I don't think that
30 Madam Justice McLachlin really did get into the
31 problems that you're being asked to face now about
32 the witness taking the stand. She just said that --
33 THE COURT: She was entirely talking about pretrial disclosure.
34 MS. MANDELL: And she did say, as you mentioned, that if the
35 witness takes the stand, the case may very well be
36 different. And I think it is, because I think at
37 that point documents relevant for the purposes of
38 cross-examining on credibility become the issue and
39 not simply the facts upon which the opinions are
40 based.
41 THE COURT: I think the thing I am most troubled about, and I
42 just touch on it, if it's open for investigation to
43 determine what was said, well then every -- every
44 witness can be cross-examined about his
45 conversations with counsel.
46 MS. MANDELL: See, but I think the only way to really get at the
47 truth of it, which is the unfortunate part of it, is

1 to put counsel on the stand and say what did you say
2 and what did you mean. You're not going to do that.
3 THE COURT: We don't want that.
4 MS. MANDELL: So, in my submission, the extension of that is to
5 say, look, there's certain areas which the Court is
6 not going to be privy to. We're not going to be
7 able to cross-examine this witness on what counsel
8 said to him or her regarding that counsel's mental
9 impressions or thought processes relating to the
10 theory of the case. That's not going to be
11 something which the Court has access to. And I say
12 that with respect to the examples provided by my
13 friend, I don't see how a reasonably skilled lawyer
14 with all that's available to them can't get at the
15 kinds of things which Ms. Koenigsberg raised, that
16 is the motive of the witness or the -- what promoted
17 changes in the drafts of the report or what
18 influenced different conclusions. All that, in my
19 submission, can be had without reference to those
20 questions regarding what counsel's impression of all
21 of this was.
22 And, you know, my friend made reference to Dr.
23 Gottesfeld, who was asked to look at two landslides
24 and reported in his evidence primarily with respect
25 to one. Well, my friend knows that there was
26 reference to two landslides, because it was
27 disclosed in his contract. And so he knows that.
28 And he reads the report and he's -- it's open to him
29 to cross-examine Dr. Gottesfeld as to why the report
30 went one way or another. And certainly he didn't
31 need to know what Mr. Rush or myself or Mr. Grant
32 said to Dr. Gottesfeld about the landslides in order
33 to get at that point.
34 And I say that this is also true with respect to
35 the Dr. Mathewes and Mr. Overstall correspondence,
36 where a report was sent to Dr. Mathewes, which is
37 reflected in the correspondence, regarding Miss
38 Haeussler's work. Now, it would certainly be open
39 to my friend knowing that to cross-examine Dr.
40 Mathewes about that. Dr. Mathewes or my friend
41 don't have to join issue with what was told to Dr.
42 Mathewes about what the plaintiffs have done in
43 learning about the archaeological testing of certain
44 Adaawk, which is the part of the report which was
45 excluded, to get to his credibility. And I say that
46 all of what he raises can be had through normal
47 cross-examination techniques which were available

1 before Phillips, Barratt was decided.
2 If I can just lastly comment with respect to Mr.
3 Pojar. Yes. It's true that Mr. Pojar has said to
4 my friend that he sees himself generally available
5 to answer anybody's questions, but in this case he
6 was being asked to evaluate the evidence of the
7 plaintiff, and he does say in his letter if it's not
8 confidential, he sees it as open. We weren't asking
9 him about what maps were available or dispensing
10 information in the public domain. We were exposing
11 him to the litigation and to the evidence and asking
12 him for his evaluation of our theory. And I'd say
13 that in that instance it's not a public domain
14 question and that it falls into Mr. Pojar's
15 explanation of material which he would regard as
16 confidential. Certainly we do.
17 As for Mr. Overstall, being primarily in his
18 purpose concerned with the litigation, I don't know
19 that I can say anything further. I think my friend
20 said the test, and I really think the only -- if
21 your lordship has dispute or doubt about it, the
22 only way that I can see resolving it is with respect
23 to evidence, some form of affidavit which attests to
24 what the situation of Mr. Overstall is if that
25 becomes a point of dispute.
26 THE COURT: Is he going to be a witness?
27 MS. MANDELL: Mr. Overstall. No. I can't -- I would be doing
28 what my friend was, which is giving you evidence. I
29 don't think I can really do that.
30 THE COURT: Right. All right. Thank you. Well, I think that I
31 would like to -- I'm certainly going to reserve on
32 this because it's a matter of great importance, not
33 just to this case but to much other litigation, and
34 it is a matter of considerable distress to the bar.
35 And I will deal with it as quickly as I can.
36 I wonder if it's convenient to ask counsel for
37 their views on a ruling that says that the witness
38 must produce upon entering the witness box and
39 before, if counsel are being civilized to each
40 other, all the documents on his file which relate in
41 any way to the preparation of his opinion, and that
42 he may be asked in cross-examination about any
43 conversations he had with any persons that caused
44 him to include or to change any of his opinion, but
45 that with respect to counsel -- I'll put it another
46 way -- but that with respect to documents which are
47 in the file and which

1 convey what I will generically call strategic
2 information, it may be blacked out and the original
3 given -- if pressed, the original given to the trial
4 judge for him to decide whether in the context of
5 the case that information should be disclosed as
6 bearing upon the independence and therefore their
7 credibility and/or the reliability of the witness.
8 And further, that as to conversations with
9 counsel, which is in the same general category but
10 very different from correspondence with counsel, the
11 witness may be asked whether there were such
12 conversations and that before the contents of the
13 conversation need to be disclosed, the trial judge
14 will have to exercise his common sense, jurisdiction
15 and decide whether in the context of the case it is
16 one where discussions with counsel should be
17 disclosed, should be required and disclosed.
18 Now, that's a large and completely unconsidered
19 reaction to all that I have heard today and I don't
20 know if it's fair for counsel to respond now or
21 whether they would like to do so first thing
22 tomorrow morning.
23 MS. KOENIGSBERG: My lord, I don't -- I certainly don't mean to
24 be presumptuous, but with regard to the last matter
25 which you referred to where you said and witness
26 could be asked the contents --
27 THE COURT: Before he's asked the contents.
28 MS. KOENIGSBERG: Before he's asked the contents. And before
29 he's asked the contents. I wonder if there's one
30 matter that could be put there: And if the witness
31 altered or changed his report in any way as a result
32 of those conversations, then your lordship could
33 consider that. It seems to me that there is a -- a
34 nexus there that might be --
35 THE COURT: Well, I wouldn't have any problem with that except
36 that sometimes his conversation takes place before
37 the first report's prepared.
38 MS. KOENIGSBERG: Yes.
39 THE COURT: Therefore an inquiry as to alteration wouldn't carry
40 the day.
41 MS. KOENIGSBERG: Or his opinion. Yes. I hadn't considered
42 that particular one. Perhaps you're right.
43 THE COURT: Mr. Willms?
44 MR. WILLMS: My lord, the only part of that that -- that I'm
45 wondering about is the definition of strategic
46 information.
47 THE COURT: Well, I use that generic term.

1 MR. WILLMS: Because, as I hope is clear from my submission, my
2 submissions on what is strategic information are
3 different than what the plaintiff considers to be
4 strategic information, and so I don't know what else
5 I can --
6 THE COURT: Well, I'm only exposing counsel to some very, very
7 preliminary reactions I'm having. And I haven't had
8 a chance to consider whether I'm saying anything
9 that's in contrast with what Mr. Justice Finch is
10 saying. I don't think I have, but --
11 MS. KOENIGSBERG: I certainly would appreciate overnight to
12 consider your lordship's remarks and we can perhaps
13 have brief submissions in the morning.
14 THE COURT: I'd appreciate that very much. In the meantime,
15 other things permitting, I may have a chance to do
16 some more work. I may be in a position to define
17 that more precisely, but I am not sure about that.
18 Can I hear from counsel anything they want to say
19 about that at the commencement of proceedings
20 tomorrow?
21 MS. KOENIGSBERG: My lord, I -- I rise to bring up a problem
22 that we may have tomorrow. I understand Mr. Chilton
23 is going to be called tomorrow morning, and I will
24 be doing, I guess, what we refer to it as the lead
25 cross-examination on Mr. Chilton.
26 THE COURT: What's his discipline, please?
27 MS. KOENIGSBERG: He's a climatologist. And it's -- he's
28 provided a food drying index. And we have -- I
29 understand Mr. Grant is going to be leading that
30 witness. And on -- on Friday afternoon we received
31 a list of documents from Rod Chilton's file, and
32 it's lengthy. And in among that list are documents
33 which -- for which not only is no privilege claimed,
34 but they would appear to be the documents that we've
35 been asking for for some time. And they are -- I'll
36 just give you a for instance -- computer printouts,
37 recalculations of evapotransporation. I won't
38 bother you at this time with what evapotransporation
39 has to to with anything, but that, for instance,
40 along with some other documents which relate to the
41 data, I assume, upon which Mr. Chilton relied in
42 coming to some of his conclusions, and we've been
43 asking for them. Mr. Grant has said in his letter,
44 which we just received this afternoon, that he would
45 have this material in the courtroom tomorrow
46 morning. That's going to make it a little short.
47 Since I --

THE COURT: How long will he be in chief? Does anybody know?
MS. KOENIGSBERG: An hour to an hour and a half. It isn't a lengthy report. However, there are some -- it's definitely in the area of alcoholic technical scientific data. And we have -- we had, of course, provided a report which is responsive to that last year and which certainly let my friends know what problems we had with the methodology. And among -- on that topic was we're having trouble evaluating this because we don't have the data; can we have the data. But I'm getting to the fact that in Mr. Grant's letter of today, he says -- this is to Mr. Willms with a copy to us -- "As with the Chilton file, the map overlay is in Vancouver". And I'm just wondering if -- if that file is here and if the -- aside from the privileged or arguable, the data could be provided to us today or tonight, very soon. That might prevent --
THE COURT: Are these the overlays he's talking about?
MS. KOENIGSBERG: -- an adjournment.
THE COURT: Is this what he's talking about?
MS. MANDELL: I don't know.
MS. KOENIGSBERG: No.
THE COURT: Somebody put it on my desk, so I thought it might be we have the maps.
MS. KOENIGSBERG: And he certainly refers to the maps, but there are, for instance, notes on potential evapotransporation based on a particular formula. These notes are central to one of the difficulties that we thought there might be with that report.
THE COURT: Well, I don't know that I can do anymore for you than ask Ms. Mandell to convey your compliments to Mr. Grant and -- and to tell you that it may be that you're going to be in a position where you will have to seek an adjournment for your cross-examination if circumstances indicate that fairness would require you to have such an adjournment. I don't know if there's anything more I can do. Is Mr. Grant in town, Ms. Mandell?
MS. MANDELL: I wish I could be of more assistance. He's flying down today. I don't know whether he caught the early flight or the evening flight.
THE COURT: Well, if the documents for which apparently no privilege is claimed are here, I'm sure Ms. Koenigsberg and Mr. Willms would be happy to have them tonight, this afternoon or this evening if at all possible. I'll leave it to them to tell you

where they might usefully be delivered. Other than that, we'll have to deal with the matter as it arises tomorrow. Thank you.

THE REGISTRAR: Order in court. Court will adjourn until 10:00 a.m.

(PROCEEDINGS ADJOURNED UNTIL NOVEMBER 8, 1988 at 10:00 A.M.)

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

Kathie Tanaka, Official Reporter
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