

Submission by Mr. Grant

Vancouver, B.C.

October 5, 1989

(PROCEEDINGS RECONVENED AT 10:00 A.M.)

THE REGISTRAR: Order in court. In the Supreme Court of British Columbia, this 5th day of October, 1989. Matter of Delgamuukw versus Her Majesty the Queen at bar, my lord.

THE COURT: Mr. Grant. Excuse me a moment. Yes. Go ahead, Mr. Grant.

MR. GRANT: Thank you, my lord.

I just wish to comment on Exhibit 974-A, which is a binder prepared by the Provincial defendant and entitled "Extracts from Interview Field Notes of Mr. Morrell". I have -- as you may recall, this was a -- your lordship directed that they could take extracts as well at the time that Exhibit 974 was marked the other day.

I have two comments to make with respect to this. Firstly, that from my review, I realized why I did -- wanted an opportunity to review. These are not solely extracts from interview field notes of Mr. Morrell. In fact, I think that it would be more properly described that Exhibit 974-A are extracts from the files of Mr. Morrell that he accumulated over his years of research, because it includes, as well as interviews done by himself or persons working under him, it includes a large series of other documents. As an example, tab 2 is a D.F.O. fisherman list of 1948 at Moricetown with commentary, and other such documents.

In order to avoid any further delay, I don't wish to object -- or make any argument about the admissibility of this at this point, except that I would reserve the right. And his files, my lord, that were delivered to the other side were, I believe, two or three file boxes, if I recall rightly, of files of the size of the box at the end of counsel table. And I want -- I had asked, and I will be reviewing these extracts to ensure that they're complete. And in order to do that, I'll want to review some of these with Mr. Morrell, who is not up north, as you recall.

In any event, I would just ask to reserve the right that if there is something that is incomplete, that I may later make a submission that it should be added in as part of the tab. And secondly, that I

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1           would reserve the right that not all of these may  
2           be -- to object to them on the -- some of them on the  
3           basis of relevance, because there's much more than  
4           just interviews, it's extracts from his files. And  
5           subject to those cautions, I would -- I don't need to  
6           say any more about Exhibit 974-A this week.  
7   THE COURT: Is it an exhibit now or is it for identification  
8           now?  
9   MR. GRANT: What happened was this number, Exhibit 974-A, was  
10           reserved --  
11   THE COURT: Yes.  
12   MR. GRANT: -- on Monday when you ruled that Exhibit 974 should  
13           go in. You indicated that I should advise the court  
14           of my position on Exhibit 974-A now.  
15   THE COURT: All right.  
16   MR. GRANT: I haven't compared -- my files of Mr. Morrell's are  
17           in my office up north, and I haven't now re-compared  
18           these, but I understand that these files are -- these  
19           documents are ones taken out of the files that were  
20           disclosed in advance of Mr. Morrell giving evidence,  
21           and that's what I understood was Mr. Goldie's position  
22           at the time of Mr. Morrell giving evidence.  
23   THE COURT: I have it now, that 974 and 974-A are both exhibits.  
24   MR. GOLDIE: Yes.  
25   THE COURT: At trial now.  
26   MR. GRANT: They are both exhibits at trial. I just reserve the  
27           right to include a complete document of ones in part  
28           and also to argue relevance of some of the tabs, if it  
29           comes to that.  
30   THE COURT: All right. Well, subject to what your friends say  
31           about that at the time.  
32   MR. GRANT: Yes. To argue the relevance.  
33   MR. GOLDIE: I only quarrel with the word "right".  
34   THE COURT: Yes.  
35   MR. GOLDIE: I think my friend can come back and make any  
36           submission he wants to, but he does not have any  
37           right.  
38   THE COURT: Yes, I think that's so.  
39   MR. GRANT: Yes, I would be -- I don't want it to be taken that  
40           I am agreeing that they are all relevant, that's what  
41           I'm trying to make clear --  
42   THE COURT: Yes.  
43   MR. GRANT: -- at this point.  
44   THE COURT: Thank you. Mr. Rush.  
45   MR. RUSH: Now, my lord, I am returning to the blue binder, and  
46           I had left off at tab 7, and I was at page 16149 in  
47           volume 222, and I was directing your attention here to

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1 Ms. Mandell's question at line 21.

2 THE COURT: Yes.

3 MR. RUSH: Mr. Morrell's -- excuse me, Mr. Morrison's answer at  
4 line 25, and your lordship's interjection at line 34,  
5 after Mr. Morrison points out that he has selected a  
6 number of documents, you say:  
7

8 THE COURT: Well, I think we now have ourself into  
9 a position where I think I have to deal  
10 with Mr. Goldie's objection that the  
11 sources having been disclosed, the witness'  
12 role as a researcher does not permit him to  
13 go on and express an opinion on the period  
14 under consideration.  
15

16 Mr. Goldie then outlines his argument.

17 And I wanted to direct a few of your lordship's  
18 comments to you. On page 16150 at your interjection  
19 at line 11 and the observations made at line 28 to 30:  
20

21 THE COURT: My recollection simply is if I can  
22 figure out what the evidence means I can't  
23 have a witness tell me what it means.  
24

25 The argument continues and your lordship interjects  
26 again, the next page, at line 29. You say:  
27

28 THE COURT: Why can't you in the material before me  
29 and in an argument say the situation in the  
30 years 1761 and years prior to Proclamation  
31 was simply -- the situation was simply  
32 this, that the Indians had been --  
33

34 And then you go on and you summarize what you consider  
35 to be the summary of the evidence there.

36 Then the next page, my lord, at line 30, you pose  
37 the question to Ms. Mandell:  
38

39 THE COURT: Is there anything that he can say that  
40 you can't say in argument?  
41

42 And then the argument proceeds with ultimately your  
43 lordship making the ruling at 16155 at line 23. And  
44 you say:  
45

46 THE COURT: Thank you. Well, I'm persuaded that I  
47 should not have the witness summarize his

1 conclusions based upon this documentary  
2 material.

3 And you say:

4  
5 THE COURT: I do not base that ruling on any lack  
6 of qualifications on the part of the  
7 witness. I don't think you have to have a  
8 PhD in history as opposed to years of  
9 experience in research to express an  
10 historical opinion in proper circumstances,  
11 but what I have here is a situation that  
12 our American friends have grappled with and  
13 have solved the problem for their purposes  
14 by the Brandeis brief.

15  
16 And then your lordship goes on and makes a comment  
17 with regard to the American practise of submissions  
18 via a Brandeis brief. This passage, my lord, is one  
19 of your rulings which I included at tab 5 of the same  
20 binder.

21 The next page, I would like to refer you to your  
22 lordship's comments concluding that ruling at line 22,  
23 where you say:

24  
25 THE COURT: I think the role of the experts should  
26 be confined as the English Court of Appeal  
27 did in R v. Turner (1975) Q.B. 834 to  
28 matters where the evidence is of a  
29 scientific character which is likely to be  
30 outside the experience and knowledge of a  
31 judge or jury. They went on to say that if  
32 on the proven facts a judge or a jury can  
33 form their own conclusions without help  
34 then the opinion of the expert is  
35 unnecessary.

36  
37 Now then, my lord, I refer you to the next page  
38 which, if I may say, is an application of the ruling  
39 that your lordship made at that point in time. Ms.  
40 Mandell at line 7 poses the question:

41  
42 MS. MANDELL:

43 Q And could you explain the significance of  
44 the letter as you see it with respect to  
45 the Royal Proclamation as it's evolving?

46  
47 Mr. Goldie interjects:

1  
2 MR. GOLDIE: Well, I object to any suggestion the  
3 Royal Proclamation is evolving. That's  
4 pure argument, my lord.  
5 THE COURT: I think in view of my ruling you should  
6 ask the witness, Ms. Mandell, what parts of  
7 the letter he thinks I should pay  
8 particular attention to.  
9 MS. MANDELL: All right. I'll ask the question as  
10 it's just been asked by you.  
11 THE COURT: And give an explanation of anything  
12 that isn't patent on the face of it.  
13  
14 And I just like to pause there, my lord, because here  
15 I think you are setting out what it is you are saying,  
16 that an historian may comment on, in respect of  
17 documents before him: "What parts of the letter he  
18 thinks I should pay particular attention to." "And  
19 give an explanation of anything that isn't patent on  
20 the face of it."  
21 And I would like to add to that, my lord, that  
22 subsequently -- and I think it's wound up in your  
23 comments at line 19, that you indicated that a witness  
24 could give evidence of context.  
25 Then on the next page which is 16179,  
26 unfortunately the question is -- or at least the  
27 objection is truncated, but we can solve that problem.  
28 I will read, my lord, from the portion of the  
29 transcript that unfortunately was taken out. It's Mr.  
30 Goldie's objection on the bottom of 16178 after Ms. --  
31 Mr. Morrison in answering a question relating to a  
32 specific document of July the 1st, 1763. And Mr.  
33 Morrison, at the end of that answer says, and I am  
34 quoting at line 41 of the page. Unfortunately, you do  
35 not have it:  
36  
37 A Of course at about this time the Indians in  
38 actual fact had captured most of those  
39 interior posts, although it would appear  
40 that the Lords of Trade and the imperial  
41 authorities were not yet aware of it.  
42 MR. GOLDIE: My lord, I take exception to that.  
43 The document itself says, "acts of  
44 hostility with which you will doubtless be  
45 acquainted". Unless the witness is going  
46 to direct us to some other source, I don't  
47 think it is competent for him to offer that

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1 speculation.  
2 THE COURT: It says, "which you will be acquainted  
3 before the receipt hereof."  
4 MR. GOLDIE: Yes.  
5 MS. MANDELL:  
6 Q That's right.  
7  
8 MR. GOLDIE: Well --  
9 MR. RUSH: Then, my lord, I am going to direct your attention to  
10 16194.  
11 MR. GOLDIE: Well excuse me, my lord, but my friend should point  
12 out that the witness is allowed to go on at some  
13 length.  
14 MR. RUSH: And gives sources.  
15 MR. GOLDIE: Yes.  
16 MR. RUSH: And makes reference to sources.  
17 MR. GOLDIE: And offers --  
18 MR. RUSH: And speaks of those sources.  
19 MR. GOLDIE: And offers conclusions.  
20 MR. RUSH: And does not offer conclusions, with respect, outside  
21 the bound of those sources. He cites the source, my  
22 lord, and that is what he relies upon.  
23 I would like to go to 16194 and 96, line 32:  
24  
25 MS. MANDELL:  
26 Q All right. What's --  
27  
28 THE COURT: Sorry, I haven't found that yet.  
29 MR. RUSH: It's the next page, my lord.  
30 THE COURT: All right.  
31 MR. RUSH: 16194.  
32 THE COURT: Yes.  
33 MR. RUSH: Miss Mandell at line 33:  
34  
35 Q All right. What's the historical  
36 background of the assertion made " the  
37 present and until our further pleasure be  
38 known" on page 198?  
39 MR. GOLDIE: I take it my friend is asking for the  
40 documents that provide that?  
41 THE COURT: Well, are you Ms. Mandell?  
42 MS. MANDELL: No.  
43 THE COURT: Well, is there historical material  
44 which either answers or bears on that  
45 question?  
46 MS. MANDELL: Well, you've been referred to some of  
47 it, my lord, and I think that we'll be

1                   referring to some more of it, but at this  
2                   point, in my view, it's a proper question  
3                   to understand why that phrase is being  
4                   inserted now.  
5           THE COURT: Well, what you're asking the witness to  
6                   explain is why those phrases were added?  
7           MS. MANDELL: Yes.  
8           THE COURT: Does -- will the witness say that his  
9                   source of his information is other  
10                  documents he looked at?  
11           MS. MANDELL: He -- yes. But not -- you'll have  
12                  some of those documents placed before you  
13                  now and tomorrow, so it's not as if your  
14                  lordship, it's true, can't see it yourself,  
15                  but I think there is an historical reason  
16                  why those phrases are being put in at this  
17                  time, and the witness will know it.  
18           MR. GOLDIE: Well, my lord, if the witness knows  
19                  it's so and it's historical it must be in a  
20                  document. The witness wasn't there.  
21           THE COURT: I don't think he was there.  
22           MR. GOLDIE: Not as far as I'm aware.  
23                  A   Not as far as I'm aware.  
24           MR. GOLDIE: So we might as well have the sources  
25                  of the information.  
26  
27                  Now then, we go on to the next document which is  
28                  at tab 26-30.  
29                  Then, my lord, I direct your attention to 16197.  
30                  And in his answer, Mr. Morrison makes mention of a  
31                  document of date March 7th, 1768, and he goes on to  
32                  say at line ten:  
33  
34                  A   ...but I would propose to refer to several  
35                  topics which are discussed in this  
36                  representation. It's summarizing five  
37                  years of historical events in North America  
38                  after the promulgation of the Royal  
39                  Proclamation of 1763.  
40           THE COURT: Well, Ms. Mandell, it seems to me that  
41                  it would be useful to have the witness  
42                  point out the things that are significant.  
43           MS. MANDELL: Yes.  
44           THE COURT: And I'm happy to have him go that far.  
45                  I think it's a summary of five years of  
46                  historical events I don't need an expert.  
47

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1 THE COURT: I think that's "if it's a summary".

2 MR. RUSH: Yes.

3 And then, my lord, at 16211 at line 21:

4

5 THE WITNESS: Well, I mean --

6

7 This is the witness speaking now:

8

9 THE WITNESS: Well, I mean obviously the overall  
10 question is the Seven Years War. Some of  
11 the specifics, though, I believe, related  
12 to the fact that in the lengthy  
13 negotiations that went on, [with] the  
14 French officials, including the Duke  
15 Desoiseau (phonetic) kept trying to  
16 establish to the great shock, horror and  
17 dismay --

18 MR. GOLDIE: Well, excuse me, my lord, that's  
19 purely the witness' characterization. What  
20 he is talking about is the unsuccessful  
21 peace negotiations of 1761, all of which  
22 were documented.

23 MS. MANDELL: My lord, this is historical context.  
24 I think that the witness can give his view  
25 of it and, if my friend has other evidence  
26 to tender or cross, he can do that.

27 MR. GOLDIE: No, no, I am sorry. I am entitled to  
28 know the facts upon which an expert relies,  
29 and if he is going to make any statement, I  
30 am entitled to know the document upon which  
31 he founds that opinion.

32 THE COURT: Well, I'll be happy to have him tell  
33 you what documents he founds his opinion  
34 on. I frankly am curious enough to want to  
35 know about what he is going to tell me.  
36 But what is it that the French caused so  
37 much consternation about, by trying to  
38 establish what?

39

40 And then the witness explains that, and he cites from  
41 a document. And at the conclusion of that, at line  
42 11, my lord, it's -- he states, citing the document,  
43 "its limits towards the West, extending over countries  
44 and nation hitherto undiscovered."

45 MR. GOLDIE: What page are you on, please?

46 MR. RUSH: 16214. I'm sorry, my lord, that is a new reference.

47 MR. GOLDIE: Yes.



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1 MR. RUSH: My mistake.

2 Let me go to that reference. In -- at line 11,  
3 citing the passage, and then going to line 14, the  
4 witness adds:

5  
6 THE WITNESS: And the European powers of course  
7 were in the habit of claiming enormous --  
8

9 And at this point Mr. Goldie interjects:  
10

11 MR. GOLDIE: Well, my lord, I am reluctant to get  
12 to my feet once again but we are now  
13 reading from something characterized as  
14 Unofficial Descriptions of the Boundaries,  
15 and this is in most cases, not all, but in  
16 most cases after the Royal Proclamation  
17 but, whether before or after, is it  
18 relevant because the boundary hasn't been  
19 fixed?

20 THE COURT: I think we are about to go on to  
21 something else.

22 MR. GOLDIE: I hope so.  
23

24 Then, my lord, at 16219, it's the next extract  
25 from this after the -- submitting a number of  
26 documents, the court at line 31:

27  
28 THE COURT: Now, from tab 11 on, they are for the  
29 purpose of showing the Crown's intention  
30 with respect to the operation of the Royal  
31 Proclamation?

32 MS. MANDELL: That's right.

33 MR. GOLDIE: Well, on what principle is my friend  
34 tendering those and on what principle is my  
35 friend relying on tendering it on that  
36 basis?

37 THE COURT: You are advancing to prove the  
38 intention?

39 MS. MANDELL: Yes, and prove -- that's right.

40 THE COURT: Are they capable of proving that  
41 intention? I haven't read any of them.  
42 Never seen any of them before.

43 MS. MANDELL: I hope you will agree with us that  
44 they are. This is -- your lordship is  
45 going to be asked to interpret the phrase,  
46 the Indians with whom we are connected and  
47 to live under our protection, and that

1 phrase is one which, in our submission, in  
2 interpreting that phrase you are going to  
3 be drawn to how the Crown interpreted it  
4 themselves in their dealings with the  
5 Indian Nations subsequent to 1763 and, in  
6 our view, when you do interpret that phrase  
7 in light of the documents which you're  
8 going to have presented to you, you are  
9 going to be urged into a view as to the  
10 territorial reach of the Proclamation.

11 THE COURT: Does it go any further than the  
12 category that we just dealt with; that is,  
13 that you want these documents in a  
14 classification or status where you can use  
15 them to support an argument?

16 MS. MANDELL: Yes. I would use them to support an  
17 argument. But, you know, my lord, I also  
18 say that a great many of these documents  
19 must in our submission be seen in their  
20 historical context. It is not the document  
21 simply on its face that we intend to rely.

22 THE COURT: Well, that doesn't trouble me because I  
23 have the view that counsel are just as  
24 competent to give me the historical context  
25 as the witness is even if the counsel is  
26 reading from an historical opinion.

27  
28 And then, my lord, what follows is an extensive  
29 exchange between the Court and Ms. Mandell. And you  
30 offer this next observation at line 28, the next page,  
31 where you state:

32  
33 THE COURT: If counsel have the facility to rely on  
34 the documents to support an argument, and  
35 that problem is cleared away, it seems to  
36 me there is no advantage to having the  
37 witness go through them seriatim  
38 laboriously.

39  
40 And then you go on to indicate how that may be  
41 used in argument. There are some further exchanges  
42 and then, my lord, you make this comment at line 17 of  
43 page 16222: "If we" -- starts at 17, but the passage  
44 I direct your attention to is at 20:

45  
46 THE COURT: We just have to find a better way to do  
47 these things. And it seems to me that this

1 is in a matter of history. If we were  
2 talking about physics or chemistry, which I  
3 don't understand and can't expect to  
4 understand even by the written word, I  
5 would say that it would have to be  
6 explained by a witness, but history is far  
7 too vast, far too unspecific and far too  
8 unmanageable to have it explained in the  
9 witness box. It has to be proven by  
10 documents and it has -- or by -- in the  
11 case of an oral history by those who  
12 remember it, and explained by counsel, and  
13 I see no harm to anyone by taking that  
14 easier route.  
15

16 And then the next page, my lord, is really your  
17 ruling on the subject as of the end of that  
18 discussion. Beginning at line 20 of your lordship's  
19 comments:  
20

21 THE COURT: When you are dealing with a matter of  
22 history where the evidence flows from  
23 documents and which the witness does not  
24 have personal knowledge of but is merely  
25 using his intellectual advantages to make  
26 the selection and explain the significance  
27 of them, then it seems to me that the  
28 sensible course to follow is to give  
29 counsel opportunity to ensure that the  
30 right documents are identified, either by  
31 being marked as exhibits or by being  
32 collected together in some way and  
33 identified in that way, and for the  
34 significance and the connection between  
35 them to be explained by counsel in  
36 argument, keeping in mind that counsel in  
37 such circumstances is at liberty to read  
38 from a briefing paper or opinion of an  
39 expert.  
40

41 You carry on, my lord. There is a discussion of  
42 Egremont and then you state at line 12:  
43

44 THE COURT: My conclusion, therefore, to which I  
45 have driven myself is that I should only be  
46 concerned at this stage in ensuring that the  
47 documents are in some suitable way made

1                   available for you in argument and that is, as I  
2                   say, that's what I am driven to. I think  
3                   however that having regard to the time of day,  
4                   that it might be useful if, having stated what  
5                   I have just said, we were to adjourn and resume  
6                   this tomorrow.  
7

8                   Well there is an adjournment until tomorrow and  
9                   the matter is raised again on April the 22nd, and  
10                  that's at tab 8. And this is -- on April the 26th at  
11                  volume 223, and in the morning, my lord, Ms. Mandell  
12                  seeks to address the subject again, and she makes her  
13                  argument.

14                 Mr. Goldie replies beginning at 16235, and he  
15                 begins his reply setting out four points that he seeks  
16                 to make, beginning at line 35. And on page 16236, at  
17                 line 9, Mr. Goldie reminds the court that, "there are  
18                 canons of construction that are applicable to the  
19                 Royal Proclamation," and he wants to refer you to  
20                 those. He refers you to the passages and phrase, and  
21                 the next page, in Heydon's, and at 16237, at the  
22                 bottom of the -- after having made his reference to  
23                 Heydon's case, he says:  
24

25                 MR. GOLDIE: If I may pause there, in an ancient  
26                 document, that is to say, one which came  
27                 into being beyond living memory, the only  
28                 way in which one can glean a consideration  
29                 of the context, the setting in which the  
30                 disputed words are placed, and the design  
31                 of the whole statute, is from documents or,  
32                 as I will later refer to, user.  
33

34                 Well then he comes to that issue. He comments  
35                 again at line 24:  
36

37                 MR. GOLDIE: Now, again, that's a matter for the  
38                 court to determine.  
39

40                 His argument is:  
41

42                         No witness is entitled to state what those  
43                         four points are. These are aids to  
44                         construction by the court.  
45

46                 He then, on the next reference I have, 16239, Mr.  
47                 Goldie makes his submissions on the question of user.

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1 And at line 18, he -- or 17, he says:

2

3 MR. GOLDIE: I can find no instance of a witness  
4 being permitted to say "This is user."  
5 What he can do in the case of an ancient  
6 document is to bring before the court a  
7 document or evidence of usage of the facts  
8 of usage, and since no living person can  
9 speak of it, the only source is a document.

10

11 And then at the bottom, my lord, he states:

12

13 MR. GOLDIE: In my submission, the plaintiffs now  
14 have an opportunity of placing before your  
15 lordship every document which may be of  
16 assistance in determining not what was  
17 within the minds or what motivated the  
18 framers, but which would throw light on the  
19 words which your lordship has to construe  
20 in the Royal Proclamation itself.

21

22 Of course I would make the same argument in respect of  
23 Dr. Greenwood's report.

24

25 But then your lordship makes the ruling that I  
26 have referred you to, following these submissions, at  
27 line 16 of page 16243. And this, my lord, I have  
28 already referred you to, it's at tab 2 of this binder.  
29 And I -- I direct your attention to your ruling at  
30 line 22 where you say:

31

32 THE COURT: I have an equally settled conviction  
33 that when one is coming to determine  
34 judicially the meaning and effect of a  
35 proclamation, for I equate that to a  
36 statute or enactment, it is not competent  
37 for a witness to tell me what it means. It  
38 is competent and is expected of counsel to  
39 discharge that function. I do not think I  
40 should allow this or any witness to give me  
41 a theory of construction.

42

43 And so on.

44

45 Now, my lord, I direct you to the next page,  
46 having made your ruling, at 16244. Ms. Mandell at  
47 line 11 then seeks to pose the next question.

48

49 THE COURT: Just a moment, I'm sorry. I'm sorry, Mr. Rush, I  
50 was looking for something else. You are now going to

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1 16244?

2 MR. RUSH: Yes. It's the next page from the ruling your  
3 lordship made.

4 THE COURT: Okay.

5 MR. RUSH: Line 11:

6

7 MS. MANDELL: Mr. Morrison, are there any  
8 historical facts which indicate the  
9 relationship between the fur trade and the  
10 Indians with whom the Crown was connected  
11 and who lived under their protection in the  
12 period around the Royal Proclamation's  
13 passage?

14 MR. GOLDIE: This doesn't conform to your  
15 lordship's ruling. Historical facts are  
16 the matrix in which the document comes into  
17 being. We've had those. Now, as I  
18 understood it, we're into the post-1763 --

19 THE COURT: Yes.

20 MR. GOLDIE: -- period. And surely we're not  
21 talking about historical facts. We're  
22 talking about, if there's anything to be  
23 talked about, is have you got anything  
24 which tells us how the Royal Proclamation  
25 was used, or whatever.

26

27 Presumably this is a reference to his use of it. And  
28 at line 26:

29

30 THE COURT: The problem with the question, Miss  
31 Mandell, is that when you used the words,  
32 around the Proclamation, you're deciding  
33 the very question I have to answer, aren't  
34 you, or are you asking the witness to  
35 decide?

36 MS. MANDELL: My lord, those words are used in the  
37 documents too and so they're not a term of  
38 art in that sense.

39 THE COURT: But you're not asking the witness for  
40 historical facts, you're asking him to draw  
41 a conclusion as to who are the witnesses  
42 with whom His Majesty was connected or  
43 associated, connected I think was the word,  
44 isn't that so?

45

46 And then your lordship goes on:

47

Submission by Mr. Rush

1                   You see, we're into this question now  
2                   because we are dealing with a proclamation  
3                   which I think is the equivalent of a  
4                   statute for this purpose. We're not  
5                   talking about historical matters generally  
6                   that are directly in issue in this case.  
7                   We're talking about historical facts that  
8                   will aid in the construction of the  
9                   Proclamation and -- well, I've said that so  
10                  many times now. I have great trouble with  
11                  your question.

12                 MS. MANDELL: Let's try it this way.

13  
14                 And she attempts a reformulation of the question.  
15                 Now my next --

16                 MR. GOLDIE: Which was answered.

17                 MR. RUSH: Well yes, of course it was answered. In conformity  
18                 with his lordship's direction.

19                 At line 37 at page 16258 and nine, my lord, Ms.  
20                 Mandell formulates the question:

21  
22                 MS. MANDELL: Are there any historical facts to  
23                 which you can draw to the court's attention  
24                 which indicate how the Indian country or  
25                 the Indian reserve was used by the Crown  
26                 through its subjects immediately after the  
27                 proclamation was enactment?

28  
29                 "Enact" I think she means to say.

30  
31                 MR. GOLDIE: Well, I think that the form of that  
32                 question is objectionable.

33  
34                 Says Mr. Goldie's interjection.

35  
36                 I have no objection to a question what  
37                 documents do you wish to bring to the  
38                 court's attention with respect to the use  
39                 of country. We're after the event again,  
40                 my lord.

41                 MS. MANDELL: All right. I have no problem with  
42                 rephrasing the question.

43                 THE COURT: All right.

44                 MS. MANDELL: What documents do you wish to bring  
45                 to the court's attention with respect to  
46                 the Indian country and the Crown's use of  
47                 it immediately after 1763?

1 MR. GOLDIE: No. The use of country, Indian  
2 country calls for a judgment. That term is  
3 one that is going to be debated, my lord.  
4 MS. MANDELL: To the Indian reserve.  
5 THE COURT: Well --  
6 MS. MANDELL: To the area west of the Appalachians.  
7 THE COURT: Well, I think that either you must put  
8 the question that way or there must be some  
9 definition.

10  
11 And then she goes on to define it in the way of the  
12 area west of the Appalachians.

13 My point here is, my lord, that wherever there is  
14 a question that presupposes some judgment,  
15 interpretation, opinion on the part of the witness, an  
16 objection is taken and the questioner, Ms. Mandell,  
17 conforms to objections and interjections by the court  
18 by reformulation of the questions.

19 And the next passage, my lord, is at 16312, line  
20 25:

21  
22 MS. MANDELL:  
23 Q My lord, the last area of evidence is  
24 contained in Volume 2. My lord, this area  
25 of the evidence deals with the land grant  
26 provision.

27 And I'd like to first deal with the  
28 question of the historical documents  
29 relating to the province of Quebec and ask  
30 you are there any historical documents  
31 which indicate how applications for grants  
32 of land in the possession of the Indians  
33 were treated in the province of Quebec  
34 between 1763 and 1774?

35 A I made a selection of -- from among the  
36 large number of historical documents which  
37 deal with this question, and I would begin  
38 very quickly at Tab 1, which are the royal  
39 instructions to Governor James Murray of  
40 Quebec issued on the 7th day of December,  
41 1763. And these --

42  
43 And then there is a Registrar interjection, and the  
44 witness goes on and cites a passage from the document,  
45 at the end of which he states, and I quote:

46  
47 THE WITNESS: And the minutes of the council go on



Submission by Mr. Rush

1                   to record the discussions and purchase does  
2                   eventually take place. And I note still  
3                   the parallel 75 years later with the  
4                   council meetings from --

5                   MR. GOLDIE: Well, that's a conclusion, my lord.  
6                   We'll leave that to Ms. Mandell.  
7

8                   I am sorry, my lord, I've skipped once again.

9                   MR. GOLDIE: That has nothing do with --

10                  MR. RUSH: Yes, quite right. I've referred you to one  
11                   interjection at 16312, and the other one quite  
12                   separately, my lord, is at 16340.

13                  MR. GOLDIE: Yes. The witness goes on and speaks for pages 313,  
14                   314, 315, and the first question appearing at 315 at  
15                   line 17. So he proceeds to read from and discuss the  
16                   instructions to Governor Murray for some two pages.

17                  MR. RUSH: He goes on, my lord, and not discusses, but describes  
18                   the document. There is -- with great exception, there  
19                   is no opinions offered with respect to those  
20                   documents.

21                   In any event, my next reference is at 16340.  
22                   Again, here he makes reference to a document.

23                  THE COURT: 16340?

24                  MR. RUSH: Yes, my lord. It's the next page.

25                  THE COURT: Yes, all right.

26                  MR. RUSH: And I should say, my lord, that the document that is  
27                   being referred to was at Mr. Morrison's tab 33. He  
28                   apologizes about the quality of the document,  
29                   indicates that it's a document of June 8th and 9th,  
30                   1811, between Claus and Johnson. Cites the document  
31                   and then "the parallel 75 years later" at line 22 of  
32                   16340, "with the council meetings from --"  
33

34                   MR. GOLDIE: Well, that's a conclusion, my lord.  
35                   We'll leave that to Ms. Mandell.

36                  THE COURT: All right.  
37

38                   He goes on to the next document.

39                   Now finally, my lord, at tab 9, the proceedings  
40                   briefly on April the 27th at volume 224 are found at  
41                   this tab. And I direct your attention to lines --  
42                   excuse me, page 16344 and to Ms. Mandell's comments at  
43                   what appears to be about line 13, and the question  
44                   posed there:  
45

46                   MS. MANDELL: Mr. Morrison, are you aware or have  
47                   you been able to find any historical

1 documents which would indicate that the  
2 Crown and/or the Imperial officials took a  
3 definitive position as to the boundaries  
4 expressed in the Charter to Hudson's Bay  
5 Company of 1670?  
6 MR. GOLDIE: I'm sorry, there are two questions  
7 there. One was "Are you aware", and the  
8 other one "Have you been able to find  
9 documents". I object to the "Are you  
10 aware", I have no objection to the document  
11 question.  
12 MS. MANDELL: All right, I'll go with that.  
13 THE COURT: All right.  
14 A I've been unable to find historical  
15 documents which indicate that the Crown  
16 took a definitive -- or Imperial official  
17 took a definitive position as to the  
18 boundaries expressed in the Charter of the  
19 Hudson's Bay Company. I think it's a well  
20 known historical --  
21 MR. GOLDIE: Excuse me, that's what I object to,  
22 because when the witness talks about well  
23 known historical facts, I want the  
24 documents, otherwise I'm completely at sea.  
25 MS. MANDELL: Well, there will be, we'll make  
26 reference to the documents he'll be  
27 speaking about, my lord.  
28 THE COURT: All right. There are documents, are  
29 there, that you have in mind and the answer  
30 you hope to give us?  
31  
32 And then he goes on, my lord, to make reference to  
33 those documents.  
34 Now, my argument, my lord, is this: The extracts  
35 from the evidence of Mr. Morrison indicated that he  
36 was permitted to give evidence about a document as an  
37 historian. That is to say, to read from a document or  
38 to read from passages from it. He was able to explain  
39 the context of that document. That is to say, the  
40 maker, the receiver, the date and places that are  
41 referenced in the document. He was permitted to  
42 explain the significant -- significance of any latent  
43 ambiguities on the face of the document.  
44 Now, if there were opinions given by Mr.  
45 Morrison -- and I say that if there were, there were  
46 precious few -- it was in respect of those later two  
47 areas and related specifically to the documents under

1 consideration.

2 Now, my lord, I think that these extracts  
3 demonstrate that objections were taken, objections  
4 were sustained, and rulings were made as a whole.  
5 That in any case where Mr. Morrison sought to  
6 interpret a document, where he sought to draw  
7 conclusions from the document, where he sought to  
8 provide an opinion about the meaning of a statute  
9 about a tree, about a Proclamation, where he was  
10 offering his view of larger historical questions over  
11 wider historical periods, those were objected to and  
12 the evidence was not given in those areas.

13 And in my submission, my lord, when Dr. Lane also  
14 in -- qualified as an ethnohistorian -- presented her  
15 evidence, she too was constrained to the parameters of  
16 those as defined by your lordship's rulings and  
17 defined in respect of specific objections that were  
18 raised in the course of Mr. Morrison's evidence.

19 Now, in my submission, the evidence of Dr.  
20 Greenwood can go no farther. His evidence, if given  
21 viva voce would be inadmissible. That is, the  
22 evidence in the report as it's presently formulated,  
23 would be inadmissible if tendered viva voce. And in  
24 my submission -- and I think this is amply shown by  
25 the extracts I've referred to your lordship -- that  
26 the report is riddled with impermissible conclusions,  
27 arguments and opinions on almost every one of its  
28 pages. It's not something that you can easily edit.  
29 You can't go to the report with a black pen and start  
30 striking out what portions of the report are  
31 admissible or not. You can't separate out the  
32 discussion of documents -- or the description of  
33 documents from his opinions on them, because in  
34 respect of each and every one of those documents, it's  
35 my submission, he offers an opinion or an  
36 interpretation. And I say he is essentially  
37 presenting the opinion, he is presenting the  
38 interpretation that the Crown and Province is going to  
39 make at the end of the case in its argument, and  
40 that's where it should be made.

41 I say the defendants cannot use a written report  
42 as their device to get impermissible opinions and  
43 arguments before the court when they wouldn't  
44 otherwise be admitted. And I think, in my submission,  
45 it would be prejudicial to place the document before  
46 your lordship and use it as some kind of reference  
47 point or guide in the leading of the viva voce

1 evidence when the viva voce evidence should be  
2 restricted to the consideration and description of  
3 documents and their context.

4 Your lordship has had the report in front of you  
5 and I know you haven't referred to the report itself,  
6 but I think it would be useful for you to see the wide  
7 sweep of the areas and types of documents that are  
8 considered by the report under the various subject  
9 headings. And for that purpose, I think it would be  
10 useful for you to have a look at the Table of  
11 Contents. And I say, my lord, that the Table of  
12 Contents amply demonstrates the intent of the witness  
13 in directing his research considerations and his  
14 opinions to various particular documents, treaties,  
15 documents which were documents that were  
16 chronologically situated prior to the passing of the  
17 proclamation. And then Part 3, you will see, is a  
18 consideration "Of the Geographic Reach of the Indian  
19 Provisions". And then Dr. Greenwood's efforts in Part  
20 4, which you will see runs for almost a page and a  
21 half, to give his views on "The Indians Lands  
22 Provisions Applicable to the Reserve". And my lord,  
23 that, as I say, runs over onto the second page, and  
24 then he gives his general conclusions. He goes into  
25 the Quebec Act and various other documents. And I  
26 think that that demonstrates the full scope of what is  
27 intended by this report.

28 Now, my lord, in the case of Mr. Morrell's  
29 evidence, Mr. Morrell's report, after having gone  
30 through a similar process as I have taken you through  
31 here, you ruled, without examining the report, that  
32 you would not receive the report because it was filled  
33 with argument and that parts of it were irrelevant.  
34 And I want to refer your lordship to the decision that  
35 you made there and it's in -- I don't think I appended  
36 that as part of the binder I handed up to you, but  
37 I'll give you the extract from volume 207.

38 THE COURT: You may prove me wrong, Mr. Rush, but my  
39 recollection of Mr. Morrell's problem was largely  
40 whether it arose out of the pleadings.

41 MR. RUSH: Well, I don't know if I'll prove you wrong or right  
42 on this point, my lord, but I'll simply direct you to  
43 your lordship's ruling.

44 And again, keeping in mind, my lord, that you did  
45 not have -- you did not review the report, you say at  
46 line 21 -- unfortunately I don't have the exact page  
47 reference.

Submission by Mr. Rush

1 THE COURT: Looks like something 846.

2 MR. RUSH: The page number is cut off at the top. I can get the  
3 exact page number for you. You say at 21:  
4

5 THE COURT: Thank you. I am not troubled by Mr.  
6 Morrell's qualifications to express  
7 opinions on fisheries matters even if they  
8 include some historical or anthropological  
9 components. Ten years work in the field is  
10 a sufficient exposure to the primary  
11 fisheries discipline he follows to permit  
12 him to express fisheries opinions which may  
13 include some inter-disciplinary content.

14 I am constrained to conclude,  
15 however, that Mr. Morrell's report, which  
16 Mr. Grant puts forward as a summary of an  
17 opinion under Section 10 of the Evidence  
18 Act, cannot at this time be admitted into  
19 evidence, because it and its appendices are  
20 so heavily laced with arguments that are  
21 inadmissible hearsay and projections of  
22 forecasts on better or future systems or  
23 fishery management that they fall within  
24 that limited class of cases where judges of  
25 this court have recently felt impelled to  
26 rule against their admissibility partly on  
27 the ground of them being argumentative and  
28 partly on the ground of their relevance. I  
29 tend to accept Mr. Macaulay's submission.  
30

31 MR. GOLDIE: Well, I think you should read the rest of that.  
32 Because that -- it will certainly be my submission  
33 that that's the thrust of your lordship's argument.

34 MR. RUSH: Well, the thrust of your lordship's argument is right  
35 there in line 39:  
36

37 ...their admissibility partly on the ground  
38 of them being argumentative and partly on  
39 the ground of their relevance. I tend to  
40 accept Mr. Macaulay's submission that the  
41 wisdom or the values of federal fisheries  
42 and other federal legislation are not  
43 relevant issues at this trial.  
44

45 That, surely, is the ground of relevance.  
46

47 As I held in the reasons for judgment

1 I delivered in this action on February 18th  
2 of last year this does not mean that Mr.  
3 Morrell cannot give any evidence in this  
4 case. I am sure he can. At the opening of  
5 his examination of this witness Mr. Grant  
6 described the areas in which he expected to  
7 adduce expert or opinion evidence from Mr.  
8 Morrell. I think he can give evidence  
9 subject to all these exceptions on those  
10 areas, or most of them. He can, for  
11 example, tell me, if asked, about the  
12 actual present Gitksan and Wet'suwet'en  
13 fishing practices and about the impact of  
14 actual fishing -- fisheries practices  
15 outside the claimed territory. I cannot  
16 rule on the admissibility of historical  
17 practices as that question must depend upon  
18 the sources of his information upon which I  
19 shall hear from counsel as the evidence  
20 proceeds.

21 In brief, I think that the opinion  
22 report if it is to be filed must be recast,  
23 but I see no reason why Mr. Morrell should  
24 not be examined generally upon the subject  
25 matters -- upon the admissibility subject  
26 matters described by Mr. Grant unless it  
27 transpires that those opinions are -- come  
28 as a matter of genuine surprise to counsel  
29 because of their complete absence from the  
30 report, which I understand has been in the  
31 hands of the defendants for sometime, on  
32 which I am disposed to treat as notice of  
33 the general tenor of the evidence which  
34 will be adduced.

35  
36 My lord, what you are saying, as I interpret your  
37 lordship's reasons, is, while the report may not go  
38 in, Mr. Grant, you can lead the evidence viva voce and  
39 endeavour to lead the evidence to conform with your  
40 ruling with Mr. Morrell on the witness stand. But  
41 there is no question your decision is based on the  
42 fact that the report itself contained arguments which  
43 your lordship had found to be inadmissible.

44 Now, you say there that you felt that Mr.  
45 Morrell's report fell into that limited number of  
46 cases where judges have ruled recently against the  
47 admitting -- the admissibility of those reports. But

Submission by Mr. Rush

1 I dare say, my lord, that those cases are directly on  
2 point with respect to the report that's tendered here  
3 as Dr. Greenwood's opinion report, and these cases  
4 were argued extensively by the defendants in that --  
5 in terms of Mr. Morrell's evidence, and in respect of  
6 other witnesses. But I simply want to refer you to  
7 some of those cases, and I am sure your lordship has  
8 heard these perhaps more often than you would wish,  
9 but these were submitted as part of a binder of  
10 Provincial authorities on expert witnesses, and I make  
11 reference to that now.

12 The first is your lordship's own decision in  
13 Sengbusch v. Priest, and your lordship's decision in  
14 that case, which is at tab 6 of that binder, was found  
15 at page 40 where you said simply --

16 THE COURT: Yes, go ahead.

17 MR. RUSH: I can provide your lordship with my copies.

18 THE COURT: No, no. I will follow you.

19 MR. RUSH: At page 40 of that decision, my lord, and it's your  
20 comment: "It is unnecessary" -- considering R. v.  
21 Turner, considering the psychological report that was  
22 before you, you said simply:

23  
24 It is unnecessary, however, for experts to  
25 perform the court's function or for counsel to  
26 adduce arguments in the guise of evidence.

27  
28 That report, my lord, is an argument. That's an  
29 argument that you will hear at the end of the day. It  
30 is, in its most constrained form, evidence. The vast  
31 body of that material in that argument renders  
32 opinions which you are going to hear argued by my  
33 learned friends.

34 Secondly, the Emil Anderson v. B.C. Rail case.  
35 This is at tab 7 of that binder. Mr. Justice  
36 Macdonald, considering the report that came before him  
37 there, and what he says, my lord, that I think is  
38 particularly pertinent here, at page 32, and I will  
39 read from that:

40  
41 I considered the possibility of editing the  
42 report to remove those portions which are not  
43 admissible as I did in Litwin Construction  
44 (1973) Ltd. v. Kiss (1985), 66 B.C.L.R. 337  
45 (S.C.). That would be impractical here, not  
46 only due to the volume of the report itself but  
47 because the offending portions are, as W.T.C.

1 puts it, "on almost every page".

2 The underlying difficulty is that the  
3 report was neither conceived nor prepared on a  
4 basis appropriate for admission under s. 10 of  
5 the Act. It is a document such as an engineer  
6 might provide to an owner faced with a claim by  
7 a contractor for extra work or damages. It is  
8 an "assessment" of the claims of W.T.C. in this  
9 action. In the course of that assessment,  
10 opinions are expressed. However, those  
11 opinions are so mixed with evidence which is  
12 inadmissible that they are themselves not  
13 admissible in their present form.  
14

15 His lordship then goes on to consider a number of  
16 difficulties, some of which -- I won't cite them  
17 all -- some are not relevant particularly to my  
18 argument, but two of them are:  
19

20 (c) Many opinions are expressed as to the  
21 proper interpretation of the contract in issue  
22 here and as to construction law generally.  
23 Those are questions of law for determination by  
24 the court.

25 (f) Viewed in its totality --  
26

27 This is page 33:  
28

29 -- the report is more appropriate as argument  
30 than it is as evidence. It is argument  
31 prepared by engineers under legal direction,  
32 rather than by lawyers with the benefit of  
33 engineering advice. That does not make it any  
34 the less effective as argument. Quite the  
35 contrary. However, this is not the stage for  
36 hearing argument.  
37

38 Now, my lord, there is a second Emil Anderson  
39 case. I think it in substance arrives at the same  
40 conclusions. I needn't refer you to that. But I do  
41 ask you to take into account that it's again a Mr.  
42 Justice Macdonald decision at tab 8.

43 And then there is the decision at tab 9 in  
44 Quintette v. Bow Valley, decision of Mr. Justice  
45 Spencer. Now Mr. Justice Spencer, in examining the  
46 reports that came before him -- again, a lengthy case  
47 dealing with voluminous reports of experts -- he went



1           on to say this at page 3 of this unreported judgment:

2  
3           The report at present is too voluminous and  
4           too full of objectionable material to make it  
5           feasible to go through it and rule on it page  
6           by page. So I confine myself to re-stating  
7           those things which an expert may and may not  
8           do, as I understand the principles of law  
9           involved. I do not purport to re-state them  
10          exhaustively but only for the purposes of this  
11          witness's evidence at this point in the trial.  
12          There may be other specific matters to which  
13          the expert may or may not testify which will  
14          become relevant later on, and counsel may raise  
15          them then. For the time being I state Mr.  
16          Rennie's role as follows:

17  
18          And then he goes through, my lord, in numbers 1  
19          through 8, detailing what are the permissible limits  
20          for the admissibility of expert opinion. And they  
21          near, in terms of their parallel -- the parallel  
22          nature of that case to this one, with the principles  
23          enunciated by your lordship.

24          And then he concludes at page 5:

25  
26          Mr. Rennie's report, as presently tendered,  
27          is not admissible. Hopefully the time and  
28          expense which have gone into its preparation  
29          will not all be wasted, but some portions of it  
30          may be re-tendered in proper form as an  
31          expert's opinion, and others may be  
32          incorporated subsequently into counsel's  
33          argument

34  
35          Now, my lord, in my submission, the report in its  
36          present form is not admissible. It is, in essence, an  
37          argument. It contains inadmissible opinions of every  
38          nature. They appear page by page throughout the  
39          report and, in my submission, this is not a time for  
40          argument. This -- these issues, these arguments,  
41          these views of the authorities and of the documents  
42          will be submitted, I suppose, most strenuously to you  
43          at the time that argument arrives. And in my  
44          submission, this is not a question for evidence. The  
45          report is not in itself admissible and, in my  
46          submission, if evidence is sought to be led from this  
47          witness, it should be led through documents and the

Submission by Ms. Russell  
Submission by Mr. Goldie

1 witness' description of the documents and the  
2 confinement of the witness' evidence to the kinds of  
3 evidence and along the rulings of the principles set  
4 out by your lordship with regard to Mr. Morrison.

5 THE COURT: Thank you. Ms. Russell?

6 MS. RUSSELL: My lord, I have a very brief submission to make.  
7 I'm sure Mr. Goldie will make full reply to Mr. Rush.

8 I think all I need to say is your lordship is well  
9 aware of the evidence adduced by the plaintiffs  
10 through such witnesses as Dr. Ray, Galois, Morrison  
11 and Lane. And your lordship is also aware of the  
12 problem of interpreted evidence and argument  
13 intermingled with evidence. Such reports as Mr.  
14 Brody's, to which we took serious exception and listed  
15 extracts and put them before you, and you have decided  
16 in your wisdom to admit those reports and to consider  
17 all of this at the end of the day. And I think that  
18 your reasons given and placed at tab 1 of Mr. Rush's  
19 submissions at page 18, say very neatly, and that is,  
20 that, "Generally speaking --"

21 THE COURT: Page?

22 MS. RUSSELL: Page 18, tab 1 of Mr. Rush's submissions. You  
23 say:

24  
25 Generally speaking, therefore, I can have  
26 regard to the opinions the historians have  
27 expressed about the facts they think the  
28 documents are describing, and in some cases why  
29 they think such things were happening, and the  
30 consequences of these historical events even  
31 though their evidence will in most cases be  
32 based upon inferences drawn from statements  
33 found in the ancient documents. Impermissible  
34 opinions and the conclusions they wish me to  
35 reach in connection with the subject matters of  
36 their opinion will undoubtedly be interwoven  
37 with permissible opinion, and it will be my  
38 responsibility to disregard the former while  
39 profiting from the latter.

40  
41 I think that says it very neatly, my lord, and  
42 that you are able to do that with respect to Dr.  
43 Greenwood's report.

44 THE COURT: Thank you. Mr. Goldie.

45 MR. GOLDIE: Thank you, my lord.

46 My lord, as Ms. Russell has indicated, the issue  
47 is whether the witness should be allowed to proceed by

Submission by Mr. Goldie

1 reference to his report or whether he and the court  
2 are being deprived of the assistance, sight unseen, of  
3 his report.

4 If Dr. Greenwood's report is excluded in total it  
5 would be the first time such a step has been taken in  
6 this trial. Mr. Morrell's report, as it was tendered,  
7 was rejected, in my submission, because it contained  
8 an attack on the Department of Fisheries regulation,  
9 which Mr. Macaulay successfully submitted was  
10 irrelevant, and because it contained a large part  
11 dealing with future regulation of the fisheries. In  
12 fact, a good part of his report came in, in the course  
13 of his evidence, marked as individual exhibits.

14 Now, the defendants here elected not to file  
15 reports by Mr. Morrison or Dr. Lane. Reports were  
16 filed by Professor Ray, Dr. Galois, Mr. Brody, Dr.  
17 Daly, Mrs. Harris and so on. Some of these reports  
18 were objected to in whole or in part. The objections  
19 were taken, and in some cases, to the reports as a  
20 whole, and these were all overruled, and Ms. Russell  
21 has referred your lordship to that.

22 I just wish to emphasize in your lordship's ruling  
23 of July the 14th, 1989, in Mr. Rush's material, page  
24 16, line 22:

25  
26 In this case the parties wish to establish  
27 many historical details such as the context in  
28 which the Royal Proclamation of 1763 was  
29 issued.

30  
31 And then over on page 17, lines 16 -- or line 14:

32  
33 Such opinions will be most useful, if not  
34 invaluable, in placing historical events or  
35 occurrences in context.

36  
37 And your lordship has made the same observation  
38 with respect to context in one of the rulings made in  
39 the course of Mr. Morrison's evidence. And I  
40 emphasize that Mr. Morrison's evidence was given  
41 without a report. The reference I have in mind is  
42 16123 -- I am sorry, 223 in volume 222 under tab 7 of  
43 Mr. Rush's collection. Yes, 223, where you said at  
44 line 30, "for the significance and the connection  
45 between."

46 THE COURT: I haven't found that. Tab 7?

47 MR. GOLDIE: Tab 7, page 16223, "for the significance and the

1 connection between them."

2 Now, many of the statements that my friend  
3 objects to, as I hope to show, are in fact contextual  
4 not textual. I make the distinction between an  
5 opinion with respect to text which is textual, and  
6 which is objectionable, and which -- and those which  
7 are contextual. And of course my friend is taking the  
8 statements he objects to, using the word in another  
9 sense out of context, because your lordship has not  
10 seen the report. They occur in a context not isolated  
11 and open to misunderstanding.

12 The -- with Mr. Morrison giving his evidence  
13 orally, there -- and without a report, there was no  
14 way of knowing what the context was. And under --  
15 under my friend's tab 9, we have an example of this.  
16 At page 16344 and at line 29 I said:

17  
18 MR. GOLDIE: That's what I object to, because when  
19 the witness talks about well known historical  
20 facts, I want the documents, otherwise I'm  
21 completely at sea.

22  
23 And at that point, the -- and a couple of other  
24 points in the trial, the documents simply weren't  
25 available and I was asking for identification of them.

26 Now, in a report, the context is immediately  
27 apparent. There is another example I wish to give.  
28 Well, I can come back to that later.

29 The proposition that an expert -- that Mr.  
30 Morrison was not allowed to give any opinions but was  
31 just allowed to refer to documents and to link them  
32 is, of course, erroneous. Mr. Morrison gave a large  
33 number of comments. He even referred to the Labrador  
34 boundary case which my friend takes exception to in  
35 the case of Dr. Greenwood. In volume 222 at page  
36 16215, he was asked the source of the document at tab  
37 3. This is line 7. Line 9 he said:

38  
39 A It is from a published compilation which  
40 was used -- I mean a similar one was when  
41 the dispute over the Labrador boundary,  
42 various historical documents were collected  
43 and bound together and printed as an aid  
44 when the -- in this case, the particular  
45 discussion went all the way to the privy  
46 council or the Judicial Committee of the  
47 Privy Council, and a number of these

1 historical documents are...used in those  
2 cases and it was a -- it involved Canada,  
3 Ontario, Manitoba, in particular.

4 Q This was the Labrador boundary?

5 A No. This one right here [the one he was  
6 referring to], the northern and western  
7 boundary of Ontario involved the Ontario  
8 boundary.  
9

10 Well, Mr. -- Dr. Greenwood uses the same source of  
11 materials.

12 Mr. Morrison offered opinions and he offered lots  
13 of them. The -- at volume 222, page 16212, it's not  
14 in my friend's -- not in my friend's present  
15 collection, the page is omitted. Mr. Morrison gives  
16 this answer in reference to maps:  
17

18 A And the second one is the famous  
19 Bartholomew DeFonte, and on the Bowen map  
20 which was looked at earlier, there was the  
21 reference to the Lac DeFonte, and DeFonte  
22 was a nonexistent person but apocryphal  
23 account of the Geography of North America  
24 had considerable influence and had appeared  
25 on several 18th century maps --  
26

27 And so on. That's a conclusion and an opinion. He  
28 construed documents.

29 I refer to my friend's collection, volume -- under  
30 tab 7 at page 16157, line 26, the answer:  
31

32 A Thomas Fitch down below. He's the governor  
33 of Virginia. And in the second letter,  
34 which is dated the same day, there's  
35 reference made to, and it explains what is  
36 set out in the covering letter to Amherst,  
37 explains that some people from Connecticut  
38 have been under pretended purchases from  
39 the Indians, that is making -- have been  
40 settling in the neighbourhood of the  
41 Susquehannah and Delaware Rivers, which  
42 settlements -- which settlements appeared  
43 to be contrary to the Indians, and such  
44 settlement threatens Indian war.  
45

46 And so on. That's -- in my friend's eyes, that's a  
47 construing of the document.

1           Now, where a report has a mixture of argument and  
2           opinion, your lordship has stated that it is you who  
3           will set them aside and separate them. I give your  
4           lordship one very simple example, and I deliberately  
5           chose it as a simple one. It's Dr. Galois' report,  
6           and at page 1442, he is talking about events at  
7           Hazelton in 1889. And he said that:

8  
9                   Captain Fitzstubbs and two of the special  
10                  constables remained at Hazelton. They provided  
11                  an official presence in the area until a more  
12                  permanent solution to the problem of Indian  
13                  hostility could be found. In 1889, this  
14                  solution took on an administrative form. The  
15                  Federal government established the Babine  
16                  Indian Agency.

17  
18           And at page 47 he says:

19  
20                   The ultimate consequence of these Indian  
21                  Gitksan protests was the establishment in 1889  
22                  of the Babine Indian Agency.

23  
24           Now, consequence is either a question of fact or  
25           it's a question of opinion. There are no documents  
26           saying this was done as a consequence. That was his  
27           opinion. That was his argument.

28           So in my submission, if your lordship is going to  
29           undertake to respond to my friend's objections at this  
30           stage, one must go to the report itself.

31           And before I deal with my friend's specific  
32           objections in the terms that he has made them, I  
33           should tell your lordship that this report, in its  
34           basic form as the witness has testified, was that of  
35           July 1986. He filed a summary in accordance with the  
36           court's directions in October of 1986, and to my  
37           recollection, he was the only witness who did so. Mr.  
38           Morrison's summary was not filed until March of 1987.

39           The delay in completing the -- or incorporating  
40           into Dr. Greenwood's report the material that he had  
41           assembled between July '86 and this year was, again,  
42           delayed because of Mr. Robertson's death. But  
43           essentially, the -- his report was indicated in his  
44           summary which was filed before any of the summaries of  
45           the plaintiffs' experts were filed.

46           Under tab 6 of my friend's compilation, he sets  
47           out a large number of pages, and the conception -- the

1 misconceptions -- when I say a large number of pages,  
2 he has some 32 pages in which he purports to set out  
3 the objections from the report. The misconceptions  
4 that he is labouring under are found first from the  
5 title -- and I'm looking at page 1 of his -- under tab  
6 6. He says:

7  
8 This title indicates that the purpose of the  
9 report is to determine the intention of the  
10 framers of the Royal Proclamation.

11  
12 And that misconception extends to a large number of  
13 the references that he has in his compilation. For  
14 instance, page 5, item 27 (i):

15  
16 i) Did the framers of the Royal Proclamation  
17 intend --

18  
19 And he underlines the word "intend".

20 Item 28, "ascribe to the framers any intention to  
21 prescribe". He is quoting from the report.

22 And page -- item 31:

23  
24 P.101 - "In summary, it appears that the  
25 framers -- "

26  
27 So on and so forth --

28  
29 "-- had no intention of extending them to..."

30  
31 And item 32 again refers to intention. What is being  
32 referred to there is intention as a question of fact,  
33 not intention in terms of law. Is there an intention  
34 in terms of fact? And that can only be demonstrated  
35 by reference to the documents which are there.

36 The word "intention", and in my friend's  
37 submission, is taken out of context. It is not the  
38 intention of the King, in the legal sense. It is an  
39 intention to be gleaned from the words of documents.

40 Now we long ago passed the question of relevance  
41 of such factual intention. Many, many of Mr.  
42 Morrison's documents deal with intention. There is a  
43 whole package of them, the Travaux Preparetoires of  
44 the Royal Proclamation itself, these have all been  
45 admitted. They all deal with the question of  
46 intention as a matter of fact, and that is referred to  
47 by your lordship in your ruling of July 14th at page

Submission by Mr. Goldie

1 17, line 27, where you say, "many useful opinions,  
2 based upon inferences from the documents about  
3 recorded facts of history". And I say an opinion with  
4 respect to the nature of the factual question of  
5 intention of the framers falls precisely within that  
6 description.

7 Now, a second category objected to by my friend  
8 comes from when the witness sets out a legal  
9 interpretation, usually of others, and tests that by  
10 the historical facts which he documents. An  
11 outstanding example of that is found at page 155 of  
12 Mr. -- of Dr. Greenwood's report. I should start with  
13 a partial reference to this made by my friend at page  
14 26 of his tab 6. I'm sorry. He states, apparently,  
15 it being objectionable, item 9:

16  
17 P.155 - "In the case of White & Bob, Norris  
18 J.A. founded his opinion on the assumption that  
19 the framers were eager to expand the empire to  
20 the Westcoast."

21  
22 He then cites an extensive passage from White  
23 & Bob and states: "I submit, with all due  
24 respect that this was a misreading..."  
25

26 Now, the passage to which Dr. Greenwood referred  
27 is set out at page 155, and contains this sentence,  
28 and I quote:  
29

30 The Proclamation is to be construed in  
31 accordance with the common understanding of  
32 the British expansionists of those days, who  
33 claimed the extension of dominion not in the  
34 terms of precise definition or of survey or of  
35 British settlement.  
36

37 Mr. Justice Norris advising, as a matter of law, there  
38 is a question of fact as to what British  
39 expansionists, whoever they may be, what their common  
40 understanding was, and whether, in fact -- and I  
41 emphasize the words "in fact" -- it was that  
42 understanding which the framers adopted. And that is  
43 what Dr. Greenwood is addressing.

44 THE COURT: Is it convenient to interrupt your argument and take  
45 the morning adjournment?

46 MR. GOLDIE: That's fine, my lord.

47 THE REGISTRAR: Order in court. Court stands adjourned for a



Submission by Mr. Goldie

1 short recess.

2

3 (PROCEEDINGS ADJOURNED AT 11:15 A.M.)

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

---

Toni Kerekes, O.R.  
United Reporting Service Ltd.

## Submissions by Mr. Goldie

1 (PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)

2

3 THE COURT: Mr. Goldie.

4 MR. GOLDIE: My lord, I had referred your lordship to the  
5 proposition that a judge of the court of appeal had  
6 stated that the Royal Proclamation was to be construed  
7 in terms of expansionous views and Dr. Greenwood was  
8 addressing the factual question of what those views  
9 were. And I want to refer to another part of my  
10 friend's brief where he incorporates a submission of  
11 mine that was made at page -- Volume 223 at page 16239  
12 and which illustrates the basis of many of the  
13 concerns that I had about Mr. Morrison's evidence.  
14 And it is the difference between the factual existence  
15 of an intention objectively defined and motivation,  
16 and I said this, beginning at line 6:

17

18 What my friend wants to do is to have somebody,  
19 and I don't -- I don't talk about qualification  
20 at the present time, but have somebody tell  
21 your lordship not what the document -- he wants  
22 to inform your lordship of the minds of the  
23 framers. And an example was given yesterday  
24 when he said Lord Hillsborough would be against  
25 that because of his estates in Ireland. A  
26 court of law is not concerned with motivation.  
27 A court of law is here to determine the meaning  
28 of the words that have been used."

29

30 And the distinction that Dr. Greenwood makes, and he  
31 doesn't talk about the Earl of Hillsborough's estates  
32 or his motivation, he talks about what the documents  
33 reveal in terms of the factual existence of the  
34 intention of the framers of the Proclamation.

35 As I said earlier, this case has proceeded on the  
36 assumption that in the construction of the Royal  
37 Proclamation some extrinsic aids are necessary as well  
38 as the factual matrix. That was the basis upon which  
39 Mr. Morrison's evidence was tendered. And I refer to  
40 my friend's brief at tab 2, page 16245, line 4, Miss  
41 Mandell says:

42 "It's evidence that is crucial to your  
43 lordship,"

44

45 And then states her question:

46

47 "Are there any historical facts which indicate

1                   the category of Indians with whom the Crown was  
2                   connected in and around the time of the  
3                   Proclamation's passage?"  
4

5                   Now, those words "with whom the Crown was connected"  
6                   is a direct reference to similar words in the Royal  
7                   Proclamation. What she was asking the witness to do  
8                   was to interpret those words as a means of assisting  
9                   your lordship.

10                  Now, there will be -- my submission at the end of  
11                  the day will be that the Royal Proclamation can be  
12                  construed with very little reference to historical  
13                  documents other than the matrix of facts, the  
14                  circumstances surrounding it. But Mr. Morrison and  
15                  Dr. Greenwood have both looked at everything which is  
16                  referable to extrinsic aids. Mr. Morrison was asked  
17                  to go beyond what he should have gone in that  
18                  question, but nevertheless that was the intention of  
19                  the question.

20                  Now, my friend, as I have said, in his objections  
21                  confuses it summarizing and in interpreting. And I  
22                  refer under his tab 6 to item four. He quotes:  
23

24                                "Insofar as they relate to the interpretation  
25                                of the Royal Proclamation, the North American  
26                                provisions may be summarized as follows."  
27

28                  Now, what he is summarizing are the provisions of the  
29                  Treaty of Paris. And that's all he does. He simply  
30                  states following the sentence that is objected to:  
31

32                                "Britain restored Guadeloupe, Martinique and  
33                                two smaller Caribbean islands to France and  
34                                granted the latter restricted fishing rights on  
35                                the coast of Newfoundland and the Gulf of St.  
36                                Lawrence. France was ceded the islands of St.  
37                                Pierre and Micquelon to serve as as shelter for  
38                                fishermen. Spain retrieved all the territory  
39                                Britain had 'conquered in the island of Cuba,  
40                                with the fortress of Havannah.'"  
41

42                  And then he goes on. And all of that is a plain,  
43                  ordinary summary of a lengthy document and there are  
44                  other examples of that.

45                  Now, my friend suggested the report is legal  
46                  argument. In my submission, and I have endeavored to  
47                  apply to the report, which, as I have said, is really

1 the report of July 1986, the distinction that your  
2 lordship makes in your ruling of August 14 between  
3 textual and contextual, and I'll come to that in a  
4 minute, but I say that it is perfectly appropriate for  
5 Dr. Greenwood to take a legal interpretation by  
6 somebody else, as he did with respect to Mr. Justice  
7 Norris, and test that legal proposition by reference  
8 to the historical facts. My friend has submitted that  
9 this report, sight unseen by your lordship, must be  
10 rejected because it can't be edited.

11 Mr. Justice Spencer in the Bow Valley case had the  
12 report, examined it and concluded after examining it  
13 and hearing submissions that it could not be edited,  
14 but your lordship is asked to take that step without  
15 looking at it. I'm advised, but I haven't seen the  
16 reasons, that Mr. Justice Spencer in a case that was  
17 before the courts either I think last week, maybe the  
18 week before, Canada Trust and Singh, has issued  
19 further reasons with respect to it, the experts'  
20 reports which contain mixed fact and argument, or  
21 mixed opinion and argument in which he says the proper  
22 course is to edit, and this implies, of course, that  
23 he deals with the objectionable points one by one.

24 Now, in Dr. Greenwood's report there are some  
25 places that arguably are textual as opposed to  
26 contextual. At page 70, for instance, and this is one  
27 of the ones that my friend objects to, Dr. Greenwood  
28 attempts to distinguish between the words "reserved"  
29 and "reserve" in the Proclamation. That's a  
30 self-contained section and can be ignored by your  
31 lordship as you intended to do with a number of other  
32 reports. There are other examples which I am quite  
33 prepared to deal with in a very short basis, but they  
34 do not affect the bulk of the report nor is there a --  
35 is there any colouration of his examination of  
36 historical documents by any textual comment he may  
37 make. In my submission, and I have not attempted to  
38 deal with my friend's questions objectively --  
39 completely or exhaustively, the appropriate course is  
40 to continue, as has been done, with experts who tender  
41 reports as opposed to those who have not done so, let  
42 Dr. Greenwood testify and we will deal with objections  
43 in the light of the rulings that your lordship has  
44 made in your judgment with respect to such reports. I  
45 remind your lordship that so far as legal argument is  
46 concerned some of the plaintiffs' experts even  
47 referred to paragraphs of the statement of claim and

Reply by Mr. Rush

1                   said that their views supported those contentions.

2                   As I say, I am prepared to deal summarily, that is  
3                   to say I am prepared to deal with sections of the  
4                   report, some of which my friend has identified which  
5                   can be properly dealt with in light of your lordship's  
6                   rulings, but your lordship's ruling does not support  
7                   my friend's argument that this report should be  
8                   excluded in its entirety.

9                   THE COURT: Mr. Rush.

10                  MR. RUSH: I will deal with Mr. Goldie's submission, my lord.  
11                   The first point is that should the report not be  
12                   admitted you will be deprived of the report. I think  
13                   it's fairly evident that what you will be deprived of  
14                   is inadmissible opinions if you agree with the  
15                   submissions of their making. So there is nothing to  
16                   that argument. We are not saying that Dr. Greenwood  
17                   should not, as Mr. Morrison has done, refer to the  
18                   manuscripts and the original source of which he has  
19                   done so much research. That surely is the appropriate  
20                   way to proceed.

21                   Second point, my lord, is that my friend raises  
22                   the argument that if you exclude the report it will be  
23                   the first time you have done so. Well, in my  
24                   submission that's not quite accurate. Firstly,  
25                   portions of Ms. Haussler's opinion were excluded and  
26                   the black pen came out and crossed out several  
27                   passages referenced on her maps. Secondly, certain of  
28                   Mike Morrell's opinions were also excluded, that is to  
29                   say his maps.

30                  MR. GOLDIE: Portions.

31                  MR. RUSH: Portions thereof. That is so. Thirdly, my lord,  
32                   that it's inescapable the fact that Mike Morrell's  
33                   report and his appendices were directed by your  
34                   lordship not to be tendered as evidence.

35                   Now, perhaps in respect of Mr. Morrell's evidence  
36                   that was unique and perhaps, my lord, you are facing  
37                   another unique situation in these circumstances, but  
38                   the reality is that your lordship's rulings with  
39                   regard to the admissibility of historical evidence  
40                   dealing with ancient documents were made during the  
41                   course of Mr. Morrison's evidence in April of 1989,  
42                   subsequently amplified, and I say in substantial  
43                   conformity, to your lordship's rulings in April 26 and  
44                   27 of 1989. You amplified those in July 14 of 1989.  
45                   But the fact of the matter is, my lord, that those  
46                   rulings were made at that time and following that  
47                   plaintiffs' counsel, the witnesses that were tendered

Reply by Mr. Rush

1                   by the plaintiffs leading historical evidence had to  
2                   be bound by your lordship's rulings and I submit they  
3                   were. This report, my lord, is the first report in my  
4                   submission that was revised after your lordship's  
5                   rulings and does not comply with your lordship's  
6                   rulings and is in my submission --  
7       MR. GOLDIE: My lord, that is not reply and it is contrary to  
8                   the evidence of Dr. Greenwood.  
9       MR. RUSH: Well, I would submit --  
10      THE COURT: It's not reply, Mr. Rush.  
11      MR. RUSH: Very well. My friend argues that Mr. Morrison's  
12                   evidence was given without the benefit of a report.  
13                   There was also a cross-examination, my lord. The  
14                   point I make here is that in the course of Mr.  
15                   Morrison's evidence your lordship had to deal with the  
16                   question of the admissibility and the parties joined  
17                   on that and that's where the rulings flowed and from  
18                   that point guidance was given. We all had to be  
19                   guided by the direction of the court. My friend says  
20                   that there was no way of knowing the context of the  
21                   documents led by Mr. Morrison. Well, with the  
22                   greatest respect, my lord, my friend was arguing as  
23                   though the issue of the applicability of the Royal  
24                   Proclamation was a new one that the defendant had to  
25                   face for the first time when Mr. Morrison came on the  
26                   witness stand. This is not a new issue. The genesis  
27                   clearly was in R. v. Adolf and the fact of the matter  
28                   is that that summary report was filed and it was  
29                   evident what the documents, disclosed documents of  
30                   Dr. -- Mr. Morrison would be and the issues to which  
31                   they would be addressed. So one cannot say that there  
32                   was no context and one had to amplify these. The fact  
33                   is that was known before Mr. Morrison gave his  
34                   evidence and the context is the context of the  
35                   document.  
36      MR. GOLDIE: Excuse me.  
37      MR. RUSH: Not the context as a whole.  
38      MR. GOLDIE: I take -- I assume my friend is not suggesting that  
39                   Mr. Morrison's documents were wholly disclosed in his  
40                   summary?  
41      MR. RUSH: I am not suggesting that.  
42      MR. GOLDIE: Thank you.  
43      MR. RUSH: And -- but I doubt very much if there was any  
44                   surprise on my friend's part in respect of the  
45                   documents that Mr. Morrison led. There only is a  
46                   select grouping of documents, my lord, and it's a  
47                   question of how those documents would be interpreted.

Reply by Mr. Rush

1           That's a function for your lordship.

2           Now, my friend says, my lord, that Mr. Morrison  
3           gave comments, presumably this is an attempt to reply  
4           to the evaluation that I have attempted to give to  
5           your lordship about Dr. Greenwood's evidence. What  
6           does he provide? Two examples. One of the examples,  
7           De Font's account as it appears on several eighteenth  
8           century maps, my lord, as it appears on the maps  
9           secondly, Thomas Fitch, what -- who was then Governor  
10          of Virginia. The evidence goes on to describe --  
11          describe the content of the document that is referred  
12          to in that evidence. Again, with the greatest  
13          respect, in my submission these are not opinions,  
14          those examples are not opinions of the kind that are  
15          disclosed throughout the examples that I have referred  
16          your lordship to.

17          Now, my friend refers to the Galois documents. I  
18          simply say in answer that if my friend went to the  
19          documents he would see the linkage between the  
20          conclusion that was drawn and the documents that Dr.  
21          Galois referred to, in addition to the eight volumes  
22          of documents underlying the opinions and several  
23          documents that spoke directly to the question of what  
24          Captain Fitzstubbs did at that time and how that led  
25          to the creation of the Babine Agency and the need for  
26          the presence of the Indian Affairs Department in that  
27          agency.

28          Now, my friend makes the argument that  
29          intention -- that Dr. Greenwood addresses in his  
30          report intention as a matter of fact. My lord, you  
31          don't need Dr. Greenwood for that. It's not Dr.  
32          Greenwood's view of intention. It's the documents'  
33          view of intention. Dr. Greenwood as a mediary for  
34          that type of factual information is wholly  
35          unnecessary, except to direct your lordship's specific  
36          attention to what he thinks is important. That, I  
37          submit, is all that is pertinent. Wherever Dr.  
38          Greenwood has referred, as he has done time and time  
39          again, about his view of the intention, my lord, you  
40          don't need any of that. What you need solely is the  
41          document and the passage which it will be argued and  
42          it will be suggested is a statement of fact about the  
43          intention of the framer. And I say, my lord, there is  
44          no misconception here. You can't play with words.  
45          It's a slate of hand to play with words to somehow say  
46          that the mediating mind of a historian is going to  
47          assist you with regard to determining intention,

Reply by Mr. Rush

1 because in my submission what that mind is doing here  
2 is giving you its intention. And again, if you refer  
3 to the summary of the objectionable passages you will  
4 see time and again how he does that.

5 My friend makes the argument that both Mr.  
6 Morrison and Dr. Greenwood were asked to look at  
7 extrinsic aids. Yes, that's true. Documents -- in  
8 the documents, the documentary record disclose the  
9 extrinsic aids. But, my lord, what the pitch of our  
10 argument, the trust of our argument, as I've tried to  
11 demonstrate by the examples, is that Dr. Greenwood  
12 goes far and beyond that to interweave, interpose his  
13 own views and Mr. Morrison did not. My friend argues  
14 that it is perfectly appropriate for Dr. Greenwood to  
15 take a legal interpretation and test that proposition  
16 by reference to historical facts. Well, with respect,  
17 my lord, I think that that view, Mr. Goldie's view of  
18 the permissible bounds of Dr. Greenwood's opinion  
19 states succinctly what the opinion does. It says it's  
20 okay for Dr. Greenwood to test, to evaluate, to  
21 somehow assess those views, in this case the views of  
22 Mr. Justice Norris, against the historical facts. My  
23 lord, the testing is not for Dr. Greenwood. The  
24 testing is for the court. What Dr. Greenwood will do  
25 is to bring those facts to your lordship and you will  
26 be the testor of those facts. You will be the one to  
27 determine whether those facts brought by Dr. Greenwood  
28 support Mr. Justice Norris or whether they don't. My  
29 friend will urge you one way and perhaps I will urge  
30 you another. But the fact of the matter is testing is  
31 not the function of a historian.

32 Now, my lord, my friend makes the point that  
33 you've not seen the report and I've endeavored,  
34 perhaps naively, to obviate that necessity by finding  
35 what I thought were the offensive passages and to  
36 demonstrate how in our submission those offensive  
37 passages permeate the entire report. If your lordship  
38 feels that that's not good enough, then I take the  
39 position look at report. The report in my submission  
40 will amply support the arguments that we are making  
41 here about the offensive character of the opinions and  
42 conclusions expressed there. I tried to avoid that.  
43 Of course I don't want your lordship to be faced with  
44 the opinions that we are going to be faced again at  
45 the time of argument. But in my submission, my lord,  
46 these -- this is of such a critical nature that your  
47 lordship, if you feel that it's not sufficient of what



## Ruling

1 I have done here, then I invite your lordship to look  
2 at the report, because it raises serious questions for  
3 the plaintiffs in terms of the need to reply to that  
4 report, in the event that the report in that form is  
5 tendered as evidence of those opinions and those  
6 conclusions and we say those arguments on the law.

7 I say, my lord, that the distinction between  
8 textual and contextual, I am not sure what my friend  
9 here is arguing. What your lordship has ruled is the  
10 context of a particular document is the permissible  
11 subject area of opinion giving. The text, my lord,  
12 surely must be the document and the description, the  
13 outline, the description of the document and its  
14 antecedents and its formal characteristics. Now,  
15 those I say, my lord, are permissible subjects of  
16 examination. My friend has volumes of documents that  
17 he intends to lead. That, my lord, is in my  
18 submission appropriate to put the sources, the  
19 underlying facts before you. And in my submission  
20 that can be done without the aid of this report.

21 THE COURT: Thank you, Mr. Rush. I find this a particularly  
22 difficult question because it deals not with  
23 scientific matters beyond the common understanding of  
24 lawyers and judges but rather with history, which is  
25 either a collection of understandable facts or  
26 inferences or conclusions to be drawn from those  
27 facts. In addition this report on its face contains a  
28 great deal of material which is clearly argumentative.  
29 I confess to suspecting it would be extremely useful  
30 and I also suspect interesting to have the report in  
31 evidence, but I am comforted by the fact that counsel  
32 may achieve that purpose during argument. I am  
33 persuaded that the argumentative passages to which Mr.  
34 Rush has referred me are so numerous that consistency  
35 and the authorities require me to reject the report as  
36 evidence. This is not to say that Dr. Greenwood  
37 cannot give evidence of historical facts and documents  
38 in their context as was done by Mr. Morrison. This  
39 information may then be used, if thought desirable, to  
40 support arguments counsel may wish to advance at the  
41 end of the case. But I conclude, as I have already  
42 stated, that I accept Mr. Rush's submissions in this  
43 point and I cannot permit the report to be marked as  
44 an exhibit, or to be placed in evidence.

45 Mr. Goldie, I notice it's 12 o'clock. Would you  
46 wish to adjourn for the noon hour adjournment now and  
47 reconsider how to proceed or are you ready to go

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1 ahead?

2 MR. GOLDIE: I prefer to go ahead, my lord.

3 THE COURT: All right. Thank you.

4 MR. GOLDIE: Dr. Greenwood.

5

6

FRANK MURRAY GREENWOOD, resumed:

7

8 THE REGISTRAR: May I remind you, sir, you are still under oath.

9 Would you state your name for the record, please?

10 A Frank Murray Greenwood.

11 THE REGISTRAR: Thank you, sir.

12 MR. GOLDIE: My lord, I propose that the witness have before him  
13 his report. I propose referring to particular  
14 documents and I am going to be asking him to identify  
15 them and their significance, but the document assembly  
16 is arranged on the basis of the footnotes to the  
17 report. There are almost three hundred footnotes.  
18 The selection has been made on the basis of those  
19 which the witness considers to be significant and I am  
20 going to -- I ask your lordship to allow him to have  
21 his report in front of him so that he can identify the  
22 documents to which I am going to refer him and so that  
23 he is able to deal with a great many documents in a  
24 way that is hopefully coherent and the first volume of  
25 documents that I wish to hand up.

26 MR. RUSH: Well, my lord, I -- my -- I object to that and I do  
27 so for this reason, that my friends have presumably  
28 organized, keeping in mind what the chronological  
29 development of the evidence and the documents is that  
30 they wish to put before the court. Surely the  
31 indexing and the tabulation of the volumes that you  
32 will see is by its organization the very kind of  
33 assistance that the witness needs in terms of his  
34 evidence. He surely doesn't need his report for the  
35 purposes of his evidence. In my submission the  
36 organization brought to the documents as they will  
37 come to you in their volume, construction is all that  
38 the witness needs.

39 THE COURT: Well, I don't think that I can make that  
40 determination, Mr. Rush. Surely this is no more than  
41 the witness having an outline of what his evidence is  
42 going to be or an index of the order and the sequence  
43 of the documents. We used to have a rule that  
44 witnesses couldn't refer to notes until they had  
45 exhausted their recollection, but that was when we  
46 were dealing with simple every day matters of  
47 occurrence that one could be expected to remember.

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- 1 But I don't think anybody should be expected to  
2 remember this sort of thing, nor do I think I should  
3 presume to dictate the kind of index from which the  
4 witness wishes to or counsel wishes the witness to  
5 operate from and I would -- I would not object to him  
6 having the report. I will hear from counsel if he  
7 strays into the text of the report in an objectionable  
8 way. And for that reason I think the matter may  
9 proceed as has been suggested.
- 10 MR. GOLDIE: My lord, I am handing up to the court Volume 1,  
11 documents -- it's entitled "Documents re Dr.  
12 Greenwood's Report, Footnotes 3 to 104A." Of course  
13 the report itself will not be marked.
- 14 THE COURT: Footnotes 3 to --
- 15 MR. GOLDIE: Footnotes 3 to 104A.
- 16 THE COURT: Thank you.
- 17 MR. RUSH: Do I have a copy?
- 18 MR. GOLDIE: Sorry.
- 19 MR. RUSH: Thank you.
- 20 MR. GOLDIE:
- 21 Q Now, Dr. Greenwood, in the front of the volume of  
22 documents is an index which gives a date and a  
23 description and a source. The A.G.B.C. number is  
24 simply from the Province's list of documents. The  
25 report page which your lordship can ignore and the  
26 footnote number and tab which also your lordship can  
27 ignore, but is -- will be of assistance to the witness  
28 in describing to your lordship the significance of the  
29 document.
- 30 THE COURT: These tab numbers refer to the book that I have just  
31 been given, not to the report?
- 32 MR. GOLDIE: Yes. The tab numbers, and I will be asking the  
33 exhibit numbers to the tab numbers, so that the  
34 exhibit will be whatever exhibit number is applied to  
35 the volume and then dash, and perhaps we can use a  
36 volume number, dash one or separate exhibit number for  
37 each volume. But instead of numerical sequence in  
38 order, it will be 8, 12-A or 3.
- 39 THE COURT: How have you organized the balance of -- you have a  
40 number of volumes?
- 41 MR. GOLDIE: We have six volumes and it contains -- it's  
42 organized in exactly the same way.
- 43 THE COURT: But are the tabs consecutive by volume?
- 44 MR. GOLDIE: The tabs are by footnote and therefore --
- 45 THE COURT: The Volume 2, we'd be at tab one again?
- 46 MR. GOLDIE: No, no. Volume 2 will --
- 47 THE COURT: Start with 104B?

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1 MR. GOLDIE: 104 will be 105.  
2 THE COURT: 105.  
3 MR. GOLDIE: All right.  
4 THE COURT: All right. Well, then I think that this volume  
5 should be -- should have reserved for it the next  
6 exhibit number which will be --  
7 THE REGISTRAR: 1159.  
8 THE COURT: 1159. And the documents, if the matter proceeds,  
9 and they are held to be admissible, the documents in  
10 this volume will be 1159 dash followed by their tab  
11 number.  
12 MR. GOLDIE: If a document is inadmissible we can simply pull  
13 the tab out and that's the end of it.  
14 THE COURT: Yes. All right.  
15  
16 (EXHIBIT 1159 RESERVED: Documents Re Dr. Greenwood's  
17 Report, Volume 1, Footnotes 3 - 104A)  
18  
19 MR. GOLDIE:  
20 Q Dr. Greenwood, under tab 3 you have the Treaty of  
21 Paris. Is there anything you wish to direct his  
22 lordship's attention with respect to the Treaty of  
23 Paris?  
24 A If your lordship would turn to internal page 84, which  
25 begins "the English translation of the Treaty of  
26 Paris," which was dated 10th of February.  
27 THE COURT: I am sorry, that's the treaty itself, is it,  
28 starting at page 84?  
29 A It's a copy of the English translation of the treaty.  
30 THE COURT: What are the first few pages?  
31 MR. GOLDIE:  
32 Q The French.  
33 A The French.  
34 THE COURT: French, all right. You think we need them both, do  
35 we? All right.  
36 A The treaty was dated February 10, 1763.  
37 THE COURT: Just a moment. Yes.  
38 A And it was concluded between or amongst George III of  
39 England, Louis XV of France and King Don Carlos of  
40 Spain.  
41 THE COURT: I am sorry, that's George III, Louis the --  
42 A XV.  
43 THE COURT: XV?  
44 A Often referred to as His Most Christian Majesty in the  
45 document, and Don Carlos, King of Spain. And I direct  
46 your lordship's attention --  
47 THE COURT: What about the King of Portugal, that's not the King

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1 of Spain?  
2 A Ceded the same day, yes.  
3 MR. GOLDIE:  
4 Q And in terms of the relevance to the Royal  
5 Proclamation, are there any sections to which you wish  
6 to direct his lordship's attention?  
7 A I think Section IV might be looked at which is an  
8 internal page 85 at the bottom, line five. His Most  
9 Christian Majesty ceded, quote, "Canada, with all its  
10 dependencies," unquote.  
11 THE COURT: Now, where is that now?  
12 A That's article IV internal page 85.  
13 THE COURT: Yes.  
14 A Line five, "Canada, with all its dependencies."  
15 THE COURT: I haven't found that language yet.  
16 MR. GOLDIE: It's the fifth line down in article IV which is  
17 at the bottom of the page, my lord.  
18 THE COURT: Yes, I see it, thank you.  
19 MR. GOLDIE:  
20 A And no boundaries are given for Canada in that article  
21 or in the treaty. Article VII internal page 86  
22 beginning at line three:  
23  
24 "The confines between the dominions of his  
25 Brittanick Majesty and those of His Most  
26 Christian Majesty, in that part of the world,  
27 shall be fixed irrevocably by a line drawn  
28 along the middle of the River Mississippi from  
29 its source to the River Iberville."  
30  
31 Unquote.  
32 Q Thank you.  
33 THE COURT: Iberville down on the Gulf of Mexico?  
34 A Yes. So that was to be the international frontier, as  
35 it appears in the treaty it's an international  
36 frontier between France and England. However, prior  
37 to the treaty France had ceded Western Louisiana to  
38 Spain so that on its face it's an agreement between  
39 France and England; in reality Spain only the  
40 territory west of the Mississippi.  
41 MR. GOLDIE:  
42 Q Was that known?  
43 A No.  
44 Q By I should say --  
45 A By the British at that time, no.  
46 Q Thank you. Do your documents deal later, Dr.  
47 Greenwood, with the interval between the cessation of

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1                   hostilities in North America and the Treaty of Paris  
2                   with particular reference to the first or unsuccessful  
3                   peace negotiation?  
4           A       Yes, they do.  
5           Q       We will come to that. One other consideration.  
6                   Turning to the page 81, my lord, I direct the witness'  
7                   attention to about midway down the page the words, and  
8                   I quote:  
9  
10  
11                                "For this purpose, the high contracting parties  
12                               have named and appointed their respective  
13                               Ambassadors."  
14  
15  
16                   Do you see that document?  
17   THE COURT:   Page 81?  
18           A       No, I don't.  
19   MR. GOLDIE:   Page 81 -- I am sorry, 84, my lord.  
20   THE COURT:   Oh. And how far down the page?  
21   MR. GOLDIE:   About halfway down the page there is a sentence --  
22   THE COURT:   "For this purpose"?  
23   MR. GOLDIE:   Pardon, my lord?  
24   THE COURT:   "For this purpose"?  
25   MR. GOLDIE:   "For this purpose"?  
26   THE COURT:   Yes.  
27   MR. GOLDIE:   Yes.  
28           Q       The British Plenipotentiary, viz, is the Duke of  
29                   Bedford?  
30           A       That's correct.  
31           Q       And he was what?  
32           A       He was the Ambassador commissioned to negotiate the  
33                   peace preliminaries in Paris.  
34           Q       Thank you. I want next to direct your attention to  
35                   tab 8. Before I do, my lord, unless I hear an  
36                   objection I will not go through the process of asking  
37                   each of these documents to be marked as an exhibit. I  
38                   would ask that in order to move along with the matter  
39                   that it be treated as being tendered and being marked  
40                   in accordance with the numbering that we've discussed.  
41   MR. RUSH:   My lord, I will make my objection if I have any and I  
42                   am content to go with that procedure.  
43   THE COURT:   All right. Thank you.  
44   MR. GOLDIE:  
45           Q       I refer to tab 8, and would you tell his lordship what  
46                   this is, please?  
47           A       These were royal instructions from the King of Great

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1                    Britain to the newly appointed governor of the newly  
2                    created Colony of Quebec, James Murray. They are  
3                    dated 7 December 1763.  
4                    Q    Now, you say the newly appointed Colony of Quebec?  
5                    A    Newly created colony.  
6                    Q    Newly created, I am sorry. Would you state briefly to  
7                    his lordship the events that occurred between the  
8                    Treaty of Paris at tab 3 and the instructions to  
9                    Governor Murray at tab 8?  
10                  A    In terms of the creation of --  
11                  Q    The events that occurred, just identify them.  
12                  A    Well, yes.  
13                  MR. RUSH: Excuse me, just before he does that, perhaps your  
14                          lordship should be aware of the month and date of the  
15                          Treaty of Paris. I wasn't clear if that was --  
16                  A    10th of February.  
17                  THE COURT: It was February, yes. I was given that a minute  
18                          ago.  
19                  MR. RUSH: And these events are December 7, 1763?  
20                  THE COURT: Yes.  
21                  MR. GOLDIE:  
22                  Q    Yes. I am just asking the witness to identify the  
23                          events.  
24                  A    Well, the government took into consideration the new  
25                          acquisitions, what policies would be appropriate to  
26                          better exploit them commercially; how to organize  
27                          their governments and constituents; whether to create  
28                          new colonies, and how to deal with Indian policy and  
29                          Indian unrest on the frontier. So there were a series  
30                          of policy documents going back and forth between the  
31                          secretary of state and the king on the one hand and  
32                          the cabinet and on the other hand usually the Board of  
33                          Trade or advisors of the Board of Trade, the clerk  
34                          particularly, John Pownall. Now --  
35                  Q    That's P-o-w-n-a-l-l?  
36                  A    N-a-l-l. The policy process was going on in early  
37                          August 1763 when news arrived at Pontiac's Rebellion  
38                          in the Ohio country in the Great Lakes country and at  
39                          that point the Board of Trade recommended that a  
40                          proclamation be issued dealing with Indian policy  
41                          rather than to proceed by way of instructions to the  
42                          individual governors. That recommendation was  
43                          accepted by the Imperial government and the Royal  
44                          Proclamation, of course, issued on the 7th of October  
45                          1763. In it three new colonies --  
46                  THE COURT: I am sorry, the Proclamation issued when?  
47                  A    7th October, 1763.

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1 THE COURT: Thank you.

2 A And in the Proclamation there is an announcement of  
3 the creation of three new colonies, East and West  
4 Florida and Floridas had been ceded, you know, by  
5 Spain to England in the Treaty of Paris, and Quebec,  
6 which included some of the geographical area of the  
7 Old French Colony, Canada. But it was given definite  
8 boundaries and was a great deal smaller than Canada  
9 had been. The name change from Canada can be  
10 documented to the 19th of September 1763. At that  
11 point an instruction was given to the Board of Trade  
12 that the name of the new colony would no longer be  
13 Canada, which, of course, was offensive of the name to  
14 British Americans and henceforth would be Quebec.

15 MR. GOLDIE:

16 Q And just to complete your very brief chronological  
17 reference, Governor Murray was -- governors were  
18 appointed for the new colonies?

19 A That's correct.

20 Q And Governor Murray was one of them?

21 A That's correct.

22 Q Now, you have made reference to the -- to the Royal  
23 Proclamation and, my lord, I would like to hand up a  
24 copy of the Royal Proclamation which you will find  
25 this -- Dr. Greenwood, a copy that I have handed up to  
26 his lordship has lettered on the side of it A through  
27 AA and you've had those -- you've had those lettered  
28 there for ease of reference?

29 A Yes.

30 MR. GOLDIE: They certainly are not part of the original  
31 Proclamation, my lord, they are just there --

32 THE COURT: Yes. All right.

33 MR. GOLDIE: -- to enable the reader to make a quick reference.  
34 And the --

35 MR. RUSH: Perhaps you should point the witness to the  
36 underlining too.

37 MR. GOLDIE:

38 Q Well, there is some underlining there. That's either  
39 yours or somebody else's, but that too is not part of  
40 the original document, is that correct?

41 A Correct.

42 Q And this document was taken from the publication in  
43 the Canadian Government source, is that correct?

44 A Revised Statutes of Canada 1970, Appendices.

45 Q Now, would you just take his lordship through the  
46 Royal Proclamation and highlight those parts which  
47 will be of relevance or to which you have already



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- 1                   referred.
- 2           A    Yes. Well, beginning on paragraph D, the boundaries
- 3                   of Quebec are given. Paragraphs E and F, the
- 4                   boundaries of East and West Florida respectively are
- 5                   given.
- 6           Q    Now, may I just pause there. Politically who was the
- 7                   sovereign power in respect of what is now described in
- 8                   the Royal Proclamation as East Florida?
- 9           A    At this time?
- 10          Q    Prior to the Treaty of Paris?
- 11          A    Oh, well, that was Spanish territory.
- 12          Q    Yes. All right.
- 13          A    It had been ceded in the Treaty of Paris along with
- 14                   West Florida.
- 15          Q    Yes.
- 16          A    Or actually it was just Florida in the time of the
- 17                   Spaniards. Paragraphs K to M inclusive for the new
- 18                   colonies there is a promise of an assembly that is a
- 19                   part of the legislature which would be elected. This
- 20                   was promised by the king "so soon as the state and
- 21                   circumstances of the said colonies will admit."
- 22                   That's a quotation from paragraph L.
- 23          Q    Thank you.
- 24          A    Moving down to N and O, there is an announcement that
- 25                   the governors had been authorized to constitute
- 26                   courts, these new colonies and these courts would
- 27                   operate or would apply the laws of England as near as
- 28                   may be agreeable, to quote paragraph N. Paragraph R,
- 29                   these are the system of rewarding soldiers and
- 30                   officers who had fought in the Seven Years' War and
- 31                   were resident in North America. Paragraph S is a
- 32                   preamble to the following paragraphs or the section I
- 33                   suppose you could say dealing with Indian matters.
- 34                   And S is the preamble. I don't think it's necessary
- 35                   to read it, is it?
- 36          Q    No.
- 37          A    No.
- 38          Q    We may come to that later on with other documents.
- 39          A    All right. Paragraph T prohibits the governors of the
- 40                   new colonies to issue warrants of survey or to grant
- 41                   lands outside their boundaries. Paragraph U prohibits
- 42                   other governors from passing warrants of survey or
- 43                   making land grants beyond -- quote:
- 44
- 45                               "Beyond the Heads or Sources of any of the
- 46                               Rivers which fall into the Atlantic Ocean from
- 47                               the West and North West"

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1  
2 Unquote. That paragraph U goes on and deals also with  
3 lands which have not been ceded to or purchased by us.  
4 They also -- they cannot -- they cannot have land  
5 grants or warrants of survey on those particular  
6 unsundered lands either. Paragraph V establishes a  
7 huge area in the continent as one in which the Indians  
8 will have the special protection of the king. Now, in  
9 common parlance among scholars it's often referred to  
10 as the Reserve. I don't know whether there is any  
11 objection to that here. The capital R, Reserve. But  
12 the protected area is announced in that paragraph and  
13 its boundaries or some of its boundaries are  
14 indicated. Paragraph, W there can be no private  
15 purchases of settlements on the Reserve without the  
16 special licence of the king. Paragraph X, persons who  
17 have settled themselves inadvertently on the Reserve  
18 or on other unsundered lands must leave forthwith.  
19 Paragraph Y, the first part of it at least prohibits  
20 private purchases in the settled parts of colonies,  
21 private purchases of tribal lands from the Indians.  
22 So all purchasing must be done by the Crown or the  
23 Crown's representatives and they are to proceed,  
24 quote, in the middle of paragraph Y, "at some public  
25 meeting or an assembly of the said Indians to be held  
26 for that purpose by the Governor or Commander-in-Chief  
27 of our Colony respectively within which they shall  
28 lie," unquote. At the bottom of paragraph Y and in  
29 paragraph Z, an arrangement for regulating the fur  
30 trade is announced. In particular, fur traders must  
31 get licences from the Governors or the  
32 Commander-in-Chief of a colony must give security to  
33 observe any regulations that the king might issue  
34 governing the fur trade. Paragraph AA enjoins and  
35 requires all officers, military or those in the --  
36 employed in the management of Indian Affairs to  
37 apprehend persons suffering from justice in the  
38 colonies and to return them under proper guard to the  
39 colony where they are accused of a crime.  
40 Q All right. Thank you, doctor. Before proceeding with  
41 the parts of the Governor Murray's instructions to  
42 which you wish his lordship to note, you made mention  
43 of Pontiac's Rebellion. Now, my lord, in the -- Dr.  
44 Greenwood has made reference to that rebellion and as  
45 has Mr. Morrison. It is so far as I am aware not a  
46 part which is referred to by -- which is objected to  
47 by my friend. Would there be any objection to him if

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1 not reading it providing the court with the sources  
2 that he had relied upon, and I make this suggestion,  
3 because I do not want to be deprived of the use of the  
4 secondary sources which Dr. Greenwood has identified  
5 as appropriate for the use of a review of this part of  
6 the historical background.

7 THE COURT: How long is the passage?

8 MR. GOLDIE: It extends one, two, three -- three and a half  
9 passages -- three and a half pages, but also he has a  
10 section preceding that on Indian land policy during  
11 the Seven Years' War. Now, Mr. Morrison talked about  
12 that at some length. Mr. -- Dr. Greenwood has  
13 provided a number of secondary references and again  
14 I'm -- I did not note an objection to that. I want to  
15 conform to your lordship's ruling, but there are parts  
16 of Dr. Greenwood's report which have not been objected  
17 to.

18 THE COURT: I am going to adjourn for lunch and counsel can  
19 consider that suggestion and I'll be glad to hear from  
20 you at 2 o'clock.

21 MR. GOLDIE: Thank you, my lord.

22  
23 (PROCEEDINGS ADJOURNED PURSUANT TO LUNCHEON  
24 ADJOURNMENT)

25  
26 I hereby certify the foregoing to be  
27 a true and accurate transcript of the  
28 proceedings herein to the best of my  
29 skill and ability.

30  
31  
32  
33 Laara Yardley, Official Reporter,  
34 United Reporting Service Ltd.  
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Discussion on Scheduling  
In Chief by Mr. Goldie

1 (PROCEEDINGS RECONVENED AT 2:00 P.M.)  
2  
3 THE REGISTRAR: Order in court.  
4 THE COURT: May I raise a brief question of scheduling with  
5 counsel? Assuming, Mr. Goldie, that you finish your  
6 case on or before the end of the week of the 23rd of  
7 October -- the 23rd is the Monday and I think that's  
8 the -- I think you indicated you might well finish the  
9 week before?  
10 MR. GOLDIE: I think I said that would depend upon sitting  
11 Saturdays and evenings.  
12 THE COURT: Yes. But assuming that we finish your case on  
13 the -- at least on the 27th of October.  
14 MR. GOLDIE: Yes.  
15 THE COURT: I have to ask Miss Russell and Mr. Frey whether they  
16 will be expecting to embark upon their defence on the  
17 30th?  
18 MS. RUSSELL: My lord, those are not our instructions. It's my  
19 understanding that we would be prepared to commence  
20 on -- in the week of November 6th, to commence  
21 probably on November the 8th.  
22 MR. GOLDIE: Yes.  
23 THE COURT: Yes, all right. I knew there was some reason why I  
24 am in some trouble downstairs. And that's -- that's  
25 your understanding too, is it, Mr. Rush?  
26 MR. RUSH: I understood Mr. Macaulay's submissions of, I think,  
27 two days ago, that he sought to start his case on the  
28 8th, which is a Monday.  
29 THE COURT: Yes. All right.  
30 MR. RUSH: Yes, that's my understanding.  
31 MS. RUSSELL: That's a Wednesday, my lord.  
32 THE COURT: Yes.  
33 MS. RUSSELL: My lord, I should just explain that that's because  
34 of the Pascal (phonetics) appeal in the Supreme Court  
35 of Canada.  
36 THE COURT: I recall now. There is a sitting of five judges in  
37 the appeal court that I am needed on on the 30th, so  
38 that will fit nicely. Thank you. Mr. Grant.  
39 MR. GRANT: My lord, the only other matter is the suggestion  
40 that possibly we will be sitting in court on the week  
41 of the 23rd, which was scheduled as the off-week, and  
42 you may recall we had scheduled out-of-court cross-  
43 examinations.  
44 THE COURT: Yes.  
45 MR. GRANT: In that week.  
46 THE COURT: Yes. Well, the only reason we would sit in the week  
47 of which -- in the week of the 23rd would be to finish

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1                   Mr. Goldie's case.  
2   MR. GOLDIE: Well --  
3   MR. GRANT: I am saying there may be -- what I'm concerned about  
4               is the last witness he has scheduled --  
5   THE COURT: Yes.  
6   MR. GRANT: -- and counsel involved with that witness may well  
7               be the same counsel as involved with the out-of-court.  
8               Right now we are operating on the basis that the  
9               Tuesday, I think the 24th and 25th, we are going to be  
10              dealing with the --  
11   THE COURT: Let's hope you will be able to, but I think  
12              completing the case in court is going to have to take  
13              priority. If I can -- I can tell counsel I hope to  
14              have a memo for them later today about scheduling of  
15              argument, which will probably please no one. Thank  
16              you.  
17   MR. GOLDIE: My lord, I should have tendered the Royal  
18              Proclamation, the copy that Mr. -- Dr. Greenwood is  
19              utilizing as an exhibit.  
20   THE COURT: All right. Next number, then, is?  
21   THE REGISTRAR: 1160.  
22   THE COURT: Thank you.  
23              (EXHIBIT 1160: ROYAL PROCLAMATION DD. OCTOBER 7,  
24              1763)  
25   MR. GOLDIE: My lord, at the luncheon adjournment I was  
26              proposing that some means be found of dealing with  
27              sections of Dr. Greenwood's report which were  
28              essentially not those which have been objected to, and  
29              I was going to suggest, my lord, that pages 5 to 12 of  
30              his report -- which deals with Indian land policy  
31              during the Seven Years War and Pontiac's Rebellion --  
32              be marked as an exhibit, and that would ensure that  
33              the secondary authorities -- I wouldn't need to take  
34              Dr. Greenwood through that.  
35              Now, I should tell your lordship that my friend  
36              has taken, as to those pages, no objection except --  
37              and I will now indicate the exceptions. If your  
38              lordship would have before you my friend, Mr. Rush's  
39              brief, the blue book, at page 30, under tab 6. And I  
40              wonder -- I'm going to ask your lordship to have  
41              before you the pages in question from his report.  
42   THE COURT: Thank you.  
43   MR. GOLDIE: And page 5 -- and these objections are all  
44              statements on the broad scope of history. And page 5,  
45              the sentence -- first sentence under paragraph 1.B.:  
46  
47                   Before, during and immediately after the war,

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1 British - Indian relations were bedeviled by  
2 European encroachments on lands occupied by  
3 native tribes as their hunting grounds.  
4

5 And footnote four provides the secondary sources.

6 Now, that sentence really is no more than an  
7 introduction to the specific evidence which is of  
8 almost precisely the character that Mr. Morrison gave.

9 Page 7, the sentence which introduces the first  
10 complete paragraph, starting with the words:  
11

12 During the early years of the war Britain  
13 absorbed some hard lessons from its failure to  
14 afford the Indians adequate protection for  
15 their tribal lands and in an ad hoc manner  
16 began moving towards the comprehensive policies  
17 found in the Royal Proclamation.  
18

19 I have no objection to that coming out, my lord.

20 And then on page 9, my friend objects to the  
21 words in the second-to-last sentence in the first  
22 complete paragraph, which begins with the words, and I  
23 quote:  
24

25 By 1762, then, the main lines of the Imperial  
26 government's approach to Indian lands had been  
27 worked out...  
28

29 It seems to me, my lord, that that is an  
30 unobjectionable summary of the evidence which -- or  
31 the evidence to which Dr. Greenwood has referred  
32 previously. But if my friend seriously objects to  
33 that, I have no objection to taking it out.  
34

35 And then on page 11 --

36 THE COURT: Well, I should hear what Mr. Rush has to say.

37 MR. RUSH: My lord, I, with respect, say this is not the way to  
38 proceed. My friend is reading my brief as the basis  
39 that these were the only objections that I raised.  
40 These were the most obvious objections that I raised  
41 and the submission was based on what, in my view, was  
42 the very poignant examples, if I may put it that way.  
43 I don't think that my friend should assume that simply  
44 because I just focused on these, that somehow I don't  
45 take objection to other passages. That's not the  
46 case. In respect of how my friend --

47 THE COURT: This is what Mr. Morrison told me, isn't it?

MR. RUSH: Some of this is what Mr. Morrison told you. That --

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1 THE COURT: That passage is.

2 MR. RUSH: That passage is, yes, that's right. But what my  
3 friend proposed was one of two suggestions to deal  
4 with his evidence, here at the break for lunch. One  
5 was either to have the witness read through certain  
6 passages of this report, which I do take issue with.  
7 The other was in respect of his evidence to refer  
8 to -- to have him refer the witness to certain  
9 secondary sources that I don't take objection with.  
10 And if my friend wants to refer him or lead him to the  
11 secondary source, that's fine by me. But I think it  
12 runs counter to your lordship's ruling here, to read  
13 in certain passages of the report based upon the fact  
14 that I only highlighted certain of the ones as I did  
15 in my brief. That certainly was not the point of my  
16 brief.

17 THE COURT: Well, I am not sure what I -- that I understand what  
18 is meant by "secondary source". What are the primary  
19 sources?

20 MR. GOLDIE: The primary sources are original documents. But  
21 the secondary sources -- and for instance, footnote 5,  
22 the sources principally relied on here are Howard  
23 Peckham, Pontiac and the Indian Uprising; Sosin,  
24 Whitehall and the Wilderness. For example, Sosin was  
25 referred to by Mr. Morrison.

26 THE COURT: I haven't even found footnote 5.

27 MR. GOLDIE: Oh. It's page ten. I am sorry, my lord.

28 THE COURT: Secondary source in this sense, then, are what we've  
29 been calling learned treatises?

30 MR. GOLDIE: Yes.

31 MR. RUSH: Yes.

32 THE COURT: All right.

33 MR. GOLDIE: But my friend said I put forward two proposals. I  
34 agree with that. But the first one was consistent  
35 with what was done with Morrell. Your lordship said  
36 this: "I am not taking this report in its present  
37 form." So then what was done was to take the sections  
38 which appeared innocuous and they were marked. And in  
39 my submission -- my friend may have additional  
40 objections and I am quite prepared to see if I can  
41 accommodate him. All I am doing was taking the  
42 sections that he found objectionable and brought to  
43 your lordship's attention, and saying some of these  
44 are -- can't be objectionable. They are exactly the  
45 sort of thing that Mr. Morrison did, although I don't  
46 admit for a minute that Dr. Greenwood is now to be --  
47 that he is bound by the limitations that Mr. Morrison

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1           has established. That's -- it's independent of that.  
2           Your lordship's ruling is what I am bound by.  
3           The -- but I just wanted to complete what I had to  
4           say, and that is, that on page 30 of my friend's  
5           brief -- and he's -- these are the objections which  
6           then I take are what he characterized as "poignant".  
7           And at page 11, what he objects to is the words, "in  
8           hindsight"  
9       MR. RUSH: No, that's not right. I don't object to the words  
10           "in hindsight". I begin a sentence.  
11       MR. GOLDIE: Well --  
12       MR. RUSH: Because I underlined -- I mean, am I to have to -- my  
13           lord, the point of my argument was not to restrict  
14           myself to language like "in hindsight". I mean the  
15           point of my argument was to convince your lordship why  
16           the document, per se, is not admissible. Your  
17           lordship has made a decision on that. And my friend's  
18           option, in my submission, is to proceed with viva voce  
19           evidence, not to parse the report.  
20       MR. GOLDIE: Well, I was endeavouring to adhere to my friend's  
21           exhortation to your lordship about consistency, and  
22           this is the manner in which Morrell's report was dealt  
23           with. And finally, at page --  
24       THE COURT: Well, the problem I have with that, Mr. Goldie, is  
25           that the parts of Mr. Morrell's report that were  
26           admitted were admitted by, I think, by consent.  
27       MR. GOLDIE: They were admitted without objection, my lord.  
28       THE COURT: Well, that may be. I am not facing that now. I am  
29           facing an objection.  
30       MR. GOLDIE: Well, all I am suggesting is that when your  
31           lordship looks at the objections which are made, and  
32           if my friend has any others, let him make them. But  
33           this, in my submission, is a way in which a portion of  
34           Dr. Greenwood's evidence can be dealt with  
35           expeditiously. Now, of course, if we keep on arguing  
36           about it --  
37       THE COURT: Is there a bibliography to Dr. Greenwood's report?  
38       MR. GOLDIE: No. It's all in the footnotes, my lord.  
39       THE COURT: Just footnotes?  
40       MR. GOLDIE: All in the footnotes.  
41       THE COURT: Yes.  
42       MR. RUSH: There is no bibliography, so footnotes are footnotes.  
43       THE COURT: So footnotes are the bibliography.  
44       MR. RUSH: Well, not everything in this is footnoted, of course.  
45       MR. GOLDIE: Well, every primary source is footnoted, and my  
46           friend has copies of every reference in here, unless  
47           the document is in the public domain. But the



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1 secondary sources which are treatises --  
2 THE COURT: Well I think we have managed the problem and I would  
3 be -- I would be anxious to hear what counsel have to  
4 say about receiving in evidence a collection of all  
5 the footnotes which would be treated as the  
6 bibliography, containing the secondary sources upon  
7 which the witness relied for the various parts of the  
8 evidence he is going to give. And that would make it  
9 clear what he has relied upon and counsel would be  
10 free to look into those matters as learned treatises  
11 have been used with respect to the other witnesses.  
12 MR. GOLDIE: That's quite satisfactory to me. Only comment I  
13 make is that it is not quite as expeditious as taking  
14 innocuous sections and filing them. But if my friends  
15 take an objection to that, then I would be quite happy  
16 to file a collection of the footnotes.  
17 THE COURT: I think that that's perhaps what we ought to do.  
18 MR. RUSH: Yes. My lord, a collection of the secondary sources  
19 in the footnotes.  
20 THE COURT: All right.  
21 MR. RUSH: The footnotes --  
22 THE COURT: I haven't got that distinction.  
23 MR. RUSH: Yes. Well, many of the footnotes themselves are  
24 objectionable for the reasons I've argued earlier.  
25 Not all the footnotes are free of opinions offered by  
26 the witness. Many of the footnotes contain sources to  
27 those. I have no difficulty.  
28 MR. GOLDIE: Well, that's what we are talking about.  
29 MR. RUSH: Well, as long as it's understood that that's what we  
30 are talking about, because there are many footnotes  
31 here that do not contain secondary source.  
32 THE COURT: Well, I would be glad to receive a collection of the  
33 footnotes which describe the secondary sources upon  
34 which Dr. Greenwood has made reference, and presumably  
35 relied upon in support of the evidence that he is  
36 going to give. And if, as in the case of some of the  
37 other witnesses, counsel want to put before me  
38 photocopies of those secondary sources, or portions of  
39 them, I will be glad to receive them too, as we have  
40 in other cases.  
41 MR. GOLDIE: I had not understood that was necessary.  
42 THE COURT: Well, it may not be. I am not suggesting it is.  
43 MR. GOLDIE: And of course, the -- I will deal with the question  
44 of -- that my friend raised about objectionable parts  
45 in the footnotes. For all I know, my lord, there may  
46 be objectionable parts in the secondary source. They  
47 are filled with argument.

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1 THE COURT: Well, we've faced that problem and accepted that  
2 one.

3 MR. GOLDIE: Yes.

4 THE COURT: At least it's not sworn to.

5 MR. GOLDIE:

6 Q Now Dr. Greenwood, just using page numbers in your  
7 report as a means of orienting yourself with respect  
8 to my questions and not -- and ensuring that you  
9 are -- that you are not going beyond his lordship's  
10 ruling. My understanding is that at pages 5 to 9 of  
11 your -- you had expressed some views and collected  
12 some authorities with respect to Indian land policy  
13 during the Seven Years War. And are those secondary  
14 sources -- well, I'll just use the word "sources"  
15 rather than "secondary". Are the sources for the  
16 views you expressed found in footnote 4?

17 A Yes.

18 Q And with respect to Pontiac's Rebellion, are the  
19 footnote sources that you relied upon -- or the source  
20 upon which you relied, primarily those found in  
21 footnote 5?

22 A Yes.

23 Q Thank you. Do you wish to comment on the -- well, no,  
24 I'll ask that question later.

25 Now, turning to concept -- the part of your  
26 report that -- in which you express opinions about  
27 concepts of Imperial expansion?

28 A Yes.

29 Q I understand there you have collected sources and  
30 comment upon what constitutes expansion and what  
31 constitutes mercantilism?

32 A Yes.

33 Q What is mercantilism?

34 A Well, it was the prevailing economic theory in the  
35 18th century which contended that the state should  
36 regulate the economy, often in quite a detailed way,  
37 in order to increase the wealth of the state. It's  
38 obviously distinguishable from laissez-faire, the  
39 theory of Adam Smith, who publishes -- or published,  
40 however, only in 1776, as the Wealth of Nations. So  
41 that would be a general description of mercantilism.

42 Q Was there -- what was the relevance of these two  
43 theories to the period that we are referring to here,  
44 namely, immediately prior to and at the time of the  
45 Royal Proclamation?

46 A Well, the second, laissez-faire, has no relevance  
47 because it's unborn at this time and doesn't become an

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- 1                   orthodoxy until after the Napoleonic wars. As far as  
2                   mercantilism is concerned, one of the principles was  
3                   that colonial manufacturing in general -- there might  
4                   be a few exceptions such as potash and a few things  
5                   like that -- but in general, colonial manufacturing  
6                   was to be discouraged so as not to compete with the  
7                   manufacturing of the British Isles.
- 8           Q       The word expansionism has been used?
- 9           A       Yes.
- 10          Q       What would you --
- 11          A       Well, do you want me to sort of link mercantilism  
12                  to --
- 13          Q       Just tell his lordship --
- 14          A       -- towards expansion?
- 15          Q       Just tell his lordship what that word means in the  
16                  same way that you've described mercantilism?
- 17          A       Well, expansionism is simply a word that I used to get  
18                  at attitudes. Dealing with whether settlements should  
19                  proceed west of the Appalachian range or not.
- 20          Q       All right. Perhaps you might link those two things --  
21                  or discuss those two?
- 22          A       Yes. Well, as I said, mercantilism had this principle  
23                  of colonial manufacturing should be discouraged. And  
24                  it was the opinion of many people -- pamphleteers in  
25                  the early 1760's, officials who worked on the policies  
26                  that were later found in the Royal Proclamation  
27                  dealing with Indians -- there was a considerable body  
28                  of opinion that expansion should not proceed westward,  
29                  because if it did, the people who went into the  
30                  western parts of North America would not be able to  
31                  bring their bulky goods, grain, cattle, timber, et  
32                  cetera, to the Atlantic for export, and they would not  
33                  import British manufactured goods, and they would  
34                  also, themselves, take up manufacturing.
- 35          Q       Now, the --
- 36          A       To the detriment of the mother country.
- 37          Q       I understand that some of the sources for your  
38                  statements are found in what you refer to as Part 4.E.  
39                  later on in your opinion. But am I right in my  
40                  understanding that the sources for the summary of  
41                  which you have just given us, are found at least in  
42                  part in footnote 6?
- 43          A       In part in footnote 6, yes.
- 44          Q       Thank you. Can you tell his lordship whether there  
45                  was any question arose in Britain at the time with  
46                  respect to the retention of Canada as a fruit of the  
47                  war in contrast to retaining Guadeloupe, and if so,

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1                   what the nature of that was?  
2           A       Well, there certainly was a pamphlet controversy --  
3                   quite an intense controversy among pamphleteers as to  
4                   whether Guadeloupe should be retained at the peace or  
5                   Canada be retained. Now the arguments in relation to  
6                   retaining Canada often dealt with security. But  
7                   insofar as the economic situation is concerned, those  
8                   who argued for the retention of Guadeloupe -- some of  
9                   them, at least -- suggested that removing the French  
10                  danger, right, by taking Canada, would mean that the  
11                  British Americans would move westward and would start  
12                  manufacturing on their own.  
13          Q       Now, you make reference to instructions given to royal  
14                  governors and you refer to tab 8?  
15          A       Yes.  
16          Q       Which is, as you have already identified it, the  
17                  instructions given to Governor Murray of December the  
18                  7th, 1763?  
19          A       Yes.  
20          Q       And what part of that do you direct his lordship's  
21                  attention to, in relation to this question of --  
22          A       Yeah.  
23          Q       -- mercantilism?  
24          A       Article 63 of the instructions on internal page 145,  
25                  beginning on line three of that article. It's tab 8,  
26                  my lord.  
27    THE COURT:   Page 145?  
28    THE WITNESS:  Internal page 145, article 63, the third line in,  
29                  and I'll quote that:  
30  
31                               And it is our express will and pleasure --  
32  
33    THE COURT:    I am sorry?  
34    MR. GOLDIE:   It's about half-way down the page, my lord, 63.  
35                  Beginning with the words, "You are to use your best  
36                  endeavours"?  
37    THE COURT:    Yes. Yes, I have it. Thank you.  
38    THE WITNESS:   And I am quoting from the third line.  
39    THE COURT:    Yes.  
40    THE WITNESS:                       And it is Our express Will and Pleasure, that  
41                               you --  
42  
43  
44                               That is James Murray.  
45  
46                               -- that you do not, upon any Pretence whatever,  
47                               upon pain of our highest Displeasure, give your

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1 Assent to any Law or Laws for setting up any  
2 Manufactures and carrying on any Trades, which  
3 are hurtful and prejudicial to this Kingdom.  
4

5 Now that was a standard instruction given to the  
6 royal governors, and I think there were a dozen, by  
7 the end of 1763, royal colonies.

8 MR. GOLDIE:

9 Q Can you -- do you have authority for that -- or source  
10 of your information in that respect?

11 A Yes. It's Labaree's book on the royal instructions.

12 Q Can you spell the name of that author, please?

13 A Yes. I just have to look up a reference here.

14 Q All right. Thank you.

15 A Yes. The reference is Leonard Woods Labaree.

16 THE COURT: L-A-B --

17 THE WITNESS: -- A-R-E-E, Editor, Royal Instructions to British  
18 Colonial Governors. Royal Instructions to British  
19 Colonial Governors, this is a book, 1670-1776, two  
20 volumes, New York, circa 1935, volume 2, page 654.

21 MR. GOLDIE:

22 Q But that's --

23 A Number 910.

24 Q Yes. That reference to the publication, as such, is  
25 in one of your footnotes?

26 A No. That publication of Labaree?

27 Q Yes?

28 A Yes. Not the precise pages, but Labaree himself has  
29 been cited at the footnote.

30 Q Footnote which?

31 A Footnote 105.

32 Q Thank you.

33 A Do you want me to explain the royal colonies?

34 Q Well, perhaps you should.

35 THE COURT: The royal?

36 THE WITNESS: Colonies.

37 THE COURT: Oh.

38 THE WITNESS: Well, there were three different kinds of colonies  
39 at the time.

40 MR. RUSH: Well, my lord, what is the basis for this? The  
41 source of this?

42 THE COURT: The source of this?

43 MR. RUSH: Yes.

44 THE COURT: Yes. What is the source of this?

45 THE WITNESS: The source of my distinguishing three kinds of  
46 colonies?

47 MR. GOLDIE:

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1           Q    Yes?  
2           A    Would be Labaree, among other things, and Blackstone.  
3                For example, case of Campbell v. Hall, argument of  
4                counsel, Lord Mansfield in the House of Lords in 1766.  
5   THE COURT: All right.  
6   MR. RUSH: Well, my lord, these -- this is Dr. Greenwood  
7                speaking as a lawyer about how he comes to a  
8                conclusion about what constitutes colonies. And that  
9                does call for a legal interpretation and a legal  
10              argument.  
11   THE COURT: Well, I would have thought --  
12   MR. RUSH: It's not, certainly, fixed.  
13   MR. GOLDIE: My friend has misunderstood the question. All --  
14                the witness used the phrase "royal colonies", and all  
15                he --  
16   THE COURT: That was the name of the -- that Labaree gave, was  
17                it not, or Labaree?  
18   THE WITNESS: No. It's just simply a standard term that  
19                scholars use to distinguish three kinds of colonies.  
20                It's used in the 18th century in several sources. I  
21                can't necessarily specify that Labaree used it in any  
22                particular place.  
23   MR. GOLDIE:  
24           Q    You said that these instructions were given to the  
25                governors of the royal colonies?  
26           A    I can list the colonies if you want.  
27           Q    No. Well, you can do that later. But can you tell  
28                his lordship, succinctly, what a royal colony is, as  
29                opposed to any other kind of colony?  
30   THE COURT: Well, I think we have to dispose of the objection.  
31                It seems to me, Mr. Rush, that this is an historical  
32                fact, isn't it?  
33   MR. RUSH: Well, my lord, what is an historical fact was what I  
34                thought my friend was coming to and what I thought the  
35                witness was going to, and that is what are the royal  
36                colonies.  
37   THE COURT: Yes.  
38   MR. RUSH: What the witness I thought was about to embark upon  
39                was the legal analysis of different types of colonies  
40                done by Blackstone.  
41   THE COURT: They might be the same thing, I suppose.  
42   MR. RUSH: And they might not.  
43   MR. GOLDIE: Well, he is speaking as an historian. Historian --  
44                he tells us historians talk about royal colonies and  
45                other kinds of colonies.  
46   THE COURT: Yes. I think he can tell me what he understands the  
47                royal colonies were.

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1 MR. GOLDIE:

2 Q Can you do that? As a matter of -- it's partly --  
3 this is one of those areas where his evidence becomes  
4 partly a matter of fact and partly a matter of  
5 opinion. But this is his belief on what the facts  
6 are, and that's something that I believe all the  
7 witnesses have done.

8 A Well, the royal colonies or royal provinces were  
9 colonies whose governments consisted of governors who  
10 were commissioned and instructed by the Crown  
11 councils, which functioned as privy councils in  
12 executive matters, and as Houses of the Legislature,  
13 upper houses, and elected assemblies. So that was the  
14 structure of a royal colony. The main thing of  
15 interest here is that the governors were regularly  
16 instructed by the King through the Secretary of State.

17 Q All right. Now, can you give us some examples of  
18 royal colonies?

19 A New York, Nova Scotia, Massachusetts in this period,  
20 Georgia, Quebec, East Florida, West Florida.

21 Q Thank you.

22 A And all but Nova Scotia had that instruction in 1763.

23 Q Thank you.

24 You have described the debate that went on  
25 between the people who wished to retain Canada and the  
26 people who wished to retain Guadeloupe. I believe you  
27 refer to that as a pamphlet --

28 A Pamphlet debate because it never affected, as far as I  
29 can see, affected the government's decision to retain  
30 Canada, which was made in 1761 and reaffirmed in 1762  
31 by the new government under the Earl of Bute.

32 Q Under tab 9a --

33 A Yes.

34 Q -- of Exhibit 1159, would you explain to his lordship  
35 the significance of what is found there and what part  
36 you wish to refer to?

37 A Well, this was an important -- this was one of the  
38 main pamphlets in the pamphlet war over whether to  
39 retain Guadeloupe or Canada. And this particular  
40 pamphlet argued for retaining Guadeloupe, and it  
41 received a considerable amount of publicity. I  
42 believe it was reprinted in the annual register. At  
43 the top of page -- I think there is only one page  
44 actually filed -- the author goes into the point about  
45 what's going to happen if the British Americans are  
46 allowed to move westward without any control. And as  
47 I've summarized the quotation, he wrote this, that

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- 1 as the colonials "recede from the sea," they would, of  
2 necessity, be "driven to set up manufactures similar  
3 to those of England...and in the process of time will  
4 know little, inquire little, and care little about the  
5 mother-country. "
- 6 And most of that quotation comes from the last  
7 lines there of the first paragraph.
- 8 Q Now, in -- you state -- you have made a review of the  
9 pamphlet literature?
- 10 A Yes, I have.
- 11 Q And you state -- you've given under tab 9a one of the  
12 primary sources, and am I correct in my understanding  
13 that other examples are found in the catalogue of  
14 pamphlets in the Public Archives of Canada to which  
15 you refer in footnote 10?
- 16 A Yes, that's correct. That footnote states that I made  
17 a review of all the pamphlets that appear to be  
18 relevant on the question, and of which are held by the  
19 National Archives of Canada. And for those that were  
20 advocating the retention of Canada, none of them  
21 argued that it would be a benefit that there would be  
22 western expansion.
- 23 Q Can you provide his lordship with an example of a  
24 policy adviser to one of the framers of the  
25 proclamation who held specific views with respect to  
26 mercantilism and expansion? And if you need a  
27 reference, I am referring to page 18 of your report?
- 28 A Yes. Well, for the policy advisers we don't always  
29 know whether they were in favour of retaining Canada  
30 or not. But in one case, William Knox was a policy  
31 adviser of the Imperial government at the time the  
32 policies were being worked out, which found their way  
33 into the Proclamation. He was quite clearly in favour  
34 of retaining Canada as opposed to Guadeloupe, and yet  
35 was against western expansion as I pointed out later  
36 in my report.
- 37 Q You provide the documents in greater detail?
- 38 A Yeah. His actual statements on the point.
- 39 Q Yes?
- 40 A But he is an example of what might be called a  
41 Continental mercantilist, but he is not advocating --  
42 in fact, he is very much opposed to western expansion.
- 43 Q All right.
- 44 MR. RUSH: And where are those sources located, please?
- 45 MR. GOLDIE: We are coming to them. They are in Part 2.A., 3,  
46 which is -- is not before his Lordship, but it's later  
47 on.



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1 THE COURT: Well, can we be given -- is it a footnote?

2 THE WITNESS: It's tabbed. We will be, undoubtedly, looking at  
3 them.

4 MR. GOLDIE: I am not sure that's in this volume yet, my lord.

5 THE COURT: All right.

6 MR. GOLDIE:

7 Q You have at footnote -- tab 12a, a document entitled  
8 The Papers of Benjamin Franklin. Why have you  
9 included that and what is its significance?

10 A Well, Franklin was the only pamphleteer I was able to  
11 come across, published prior to the proclamation, who  
12 advocated western expansion as a positive good.  
13 Franklin stood isolated, as it were, on that point.  
14 And in fact, admitted the strength of his opponents'  
15 case. That is, those who argued against western  
16 expansion, he admitted at page 78, were having an  
17 impact.

18 Q Page what?

19 A I think it's page 78 of -- the internal page 78 of the  
20 pamphlet. And I quote at length from him just to show  
21 his argument. His argument was, basically, as the  
22 settlers moved west they would be too busy farming to  
23 take up manufacturing, and those in the east, the  
24 sparehands in the east would be moving west. But as I  
25 say, it stands isolated and is -- I don't think  
26 reflects the conventional wisdom of the day.

27 Q All right. And the --

28 MR. RUSH: Well, I object to that, my lord.

29 MR. GOLDIE: Well --

30 MR. RUSH: The pamphlet speaks for itself on page 78. That's  
31 really what the witness is referring us to.

32 MR. GOLDIE:

33 Q No. His evidence of importance though, my lord, stems  
34 from the fact that he has made review of the  
35 pamphlets, and his opinion is that Franklin stands  
36 alone, based upon that. And the sources of his  
37 information with respect to his research are found in  
38 footnote 10.

39 The -- you next refer, Dr. Greenwood, to the  
40 structure of governmental decision making on colonial  
41 matters, and at footnote 13 you have an extract from  
42 the Commentaries of Blackstone. And what is the  
43 purpose of including that in your documentary source?

44 A Well, the entire section is really background provided  
45 for people who are not intimately acquainted with the  
46 constitution in the 18th century. And the quotation  
47 from Blackstone supplies an introduction in that it

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- 1 summarizes in fairly brief compass, the classic theory  
2 of the balanced constitution of the King representing  
3 the principles of monarchy, the Hereditary Monarchy.  
4 The House of Lords representing aristocracy and  
5 supposedly wisdom. And the Commons supposedly  
6 representing the nation or democracy or feelings of  
7 humanity. But it's simply an introducer into the way  
8 one should look, I guess, at the constitution of the  
9 18th century.
- 10 Q All right. Having done that, am I correct in my  
11 understanding that the secondary sources -- or the  
12 sources that you have found useful are found in  
13 footnote 14; is that correct?
- 14 A Yes. They are -- yes, 14.
- 15 Q And are there any other references that you wish his  
16 lordship to be made aware of in connection with this  
17 introductory -- introduction into the constitution and  
18 decision making of the British government in the  
19 early -- mid to late 18th century?
- 20 A Well, I -- you know, I've been teaching this for  
21 almost a quarter of a century, so there are many  
22 sources, you know, that I have used and perhaps can't  
23 recall at my finger tips. But one important secondary  
24 source that might be added would be Sir Lewis Namier.
- 25 Q Yes?
- 26 A The Structure of Politics at the Accession of George  
27 III. That's The Structure of Politics at the  
28 Accession of George III, originally published in 1928,  
29 second edition, London, 1961. As far as the primary  
30 sources are --
- 31 MR. RUSH: Excuse me. That is an addition to what's in footnote  
32 14?
- 33 THE WITNESS: That's right, yes.
- 34 MR. RUSH: And has that been disclosed?
- 35 MR. GOLDIE: It is a public treatise.
- 36 MR. RUSH: It may well be. That wasn't my question.
- 37 MR. GOLDIE: Well, the disclosure is limited by the defendant to  
38 what is in our hands and it's certainly not in our  
39 position.
- 40 THE COURT: Well, what I understand you are doing, witness, is  
41 you're adding a reference -- published reference to  
42 footnote 10?
- 43 THE WITNESS: I think it's footnote 14, my lord.
- 44 THE COURT: Fourteen, sorry?
- 45 THE WITNESS: Yes. And I was asked what additional sources, and  
46 I was trying to respond to that. Do you wish me to  
47 give additional primary sources?

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1 MR. GOLDIE:

2 Q Not unless they are in your -- not unless they are  
3 footnoted.

4 A Oh, okay.

5 Q You have referred -- would you explain, please, so far  
6 as the decision making process of government is  
7 concerned, what is meant by "inner cabinet"?

8 A Well, there was an inner and an outer cabinet. The  
9 outer cabinet by the 1760's had become a purely  
10 honorary body. And, for example, the inner cabinet of  
11 nine or ten ministers alone ratified the Treaty of  
12 Paris. It wasn't sent to the outer cabinet. There  
13 have been several councils in the past. They've grown  
14 too large and a smaller body had emerged to advise  
15 with the secrecy and dispatch needed in foreign  
16 affairs. The last event of that kind was the  
17 emergence of the inner cabinet in the 1730's through  
18 to the 1760's and they called themselves His Majesty's  
19 Servants, who were entrusted with his most secret  
20 affairs. They were technically members of the privy  
21 council but they are the functioning advisory body at  
22 the highest level.

23 Q And the source of your information with respect to  
24 that is footnotes 17, 18 and 19?

25 A And the material which is relevant in note 14.

26 Q And 14, yes. Thank you.

27 And was the King an active part of the decision  
28 making process?

29 A Yes. In terms of the potential, in any case. The  
30 executive power was vested in the King and he was not  
31 a nominal ruler. He might, by preference, allow the  
32 politicians a great leeway but he always had to be  
33 reported to and had to approve the decisions. He also  
34 appointed the First Minister -- the ancestor to the  
35 Prime Minister -- and he had the final word on  
36 executive policy. Now this could vary with the  
37 personalities or the circumstances, but during the  
38 American War, for example, George III is often  
39 described as "his own Prime Minister". Earlier in the  
40 period we are dealing with, in 1763, he let  
41 politicians mainly make the decisions but they had to  
42 be cleared through him.

43 Q All right. You have described at -- or you are aware  
44 of and are able to describe, are you, the particular  
45 make-up and relation to government of the Board of  
46 Trade?

47 A Yes.

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- 1 Q And it's -- its division into colonial -- who the  
2 Cabinet Minister was, was responsible for colonial  
3 policy?
- 4 A Yes. Take the latter first. There were two --  
5 physically, there were two Secretaries of State  
6 although the office was one. And there was a  
7 Secretary of State for the Northern Department who  
8 dealt with Russia, Scandinavia, the Germanys and so  
9 on. The Secretary of State for the Southern  
10 Department who dealt with, say, France and Spain and  
11 the colonies. And an important point there is, I  
12 think, that the Southern Secretary had intimate  
13 knowledge of foreign policy related to France and  
14 Spain, for example, in the negotiations leading to the  
15 Treaty of Paris, as well as the Royal Proclamation.
- 16 Q All right. Now, I made reference to the Board of  
17 Trade. Can you tell his lordship what that was?
- 18 A Well, it was a specialized Royal Commission  
19 established first in 1696. In our period it consisted  
20 of seven members and a president. The persons  
21 appointed to the Board of Trade in 1763, there were --  
22 they were usually appointed for party political or  
23 faction political reasons. These were sinecures,  
24 essentially. I mean they did some work but not a  
25 great deal. They knew something about the colonies.  
26 The Board itself was really a Board for -- Board of  
27 Report. It had no executive powers in this period.  
28 It did not, for example, correspond with the  
29 governors. And it was -- it could -- its machinery  
30 could be initiated only by the Secretary of State or  
31 the plantations committee of the privy council which  
32 was essentially the cabinet meeting in public.
- 33 Q Would you list the members of the Board, and if you  
34 need a reference to assist you, at page 29, I believe  
35 you list those.
- 36 MR. RUSH: When and at what time?
- 37 MR. GOLDIE:
- 38 Q Well, perhaps you can tell his lordship what period we  
39 are talking about?
- 40 A It would be the period from the spring -- let's say  
41 April 1763 to August -- early August 1763.
- 42 Q All right. Now, who were the members of that Board?
- 43 A Well, the President was Lord Shelburne, the Earl of  
44 Shelburne who was the --
- 45 Q Well, just give us the names and --
- 46 A Okay. Lord Shelburne, President. Soame Jenyns,  
47 S-O-A-M-E, J-E-N-Y-N-S.

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- 1 Q A member of Parliament?
- 2 A He is a member of Parliament.
- 3 Q Yes?
- 4 A John Yorke, with an E.
- 5 Q Yes?
- 6 A Bamber Gascoyne, B-A-M-B-E-R, G-A-S-C-O-Y-N-E, he was  
7 a lawyer and an M.P. Edward Bacon, George Rice M.P.  
8 and Edward Eliot, with one T and one L.
- 9 Q And we've heard the name given by Mr. Morrison, but  
10 could you comment who John Pownall is?
- 11 A Yes. John Pownall was the Principal Secretary of the  
12 Board of Trade. So he would have overall control of  
13 the archives and of the drafting of reports. And he  
14 was far more than that, though, he was a policy  
15 adviser to the Board's presidents. He had been  
16 associated with the Board since 1741 and it's  
17 generally conceded, I think, that he probably knew  
18 more about the colonies than any official or  
19 politician or other official or politician in Great  
20 Britain.
- 21 Q I'm sorry. Go ahead?
- 22 A I was just saying, he had exercised an enormous  
23 influence, well-known, over Lord Halifax, who had been  
24 President of the Board of Trade in the 1740's and  
25 '50's, and he exercised a great deal of influence over  
26 Lord Shelburne during the policy formation period and  
27 that's the year before the proclamation.
- 28 Q And your sources, amongst others, for that statement  
29 with respect to Pownall's influence, is found in  
30 footnotes 23 and 24?
- 31 A Yes. But several manuscript documents also dating  
32 from the period of the policy formation which makes it  
33 clear of the role he played and the draft proclamation  
34 itself.
- 35 Q Those are documents we will be coming to?
- 36 A We will be coming to, yes.
- 37 Q Yes, thank you.
- 38 Now, you subsequently address the question of the  
39 genesis of the policy of the Royal Proclamation and  
40 you make -- oh, I should say, my lord, I made  
41 reference to certain papers and they are -- I should  
42 have the witness identify them. Under tab 20, what  
43 are the -- what is the document we find there?
- 44 A These are minutes of the cabinet meetings held  
45 under -- when George Grenville was First Minister in  
46 1763 to '65, I believe. And they are found in a  
47 source John R.G. Tomlinson, Additional Grenville

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1 Papers, 1763 to '65.  
2 Q Perhaps if you could just identify those at 25 and 26.  
3 We can come back to them at a later point. Just  
4 identify the documents at 25, 26 and 27?  
5 A Yes. The first in 25 is a copy of a letter from the  
6 Earl of Egremont to Jeffrey Amherst who was  
7 Commander-in-Chief, dated Whitehall, January 27th,  
8 1763. And there are some references to the need to  
9 conciliate the affections of the Indians by protecting  
10 their lands from encroachments.  
11 THE COURT: Where do I see that?  
12 THE WITNESS: That's the first textual page below that insert,  
13 Fitch Papers.  
14 THE COURT: The letters?  
15 THE WITNESS: The last -- last eight or nine lines.  
16 MR. GOLDIE:  
17 Q Of the mid portion?  
18 A Yeah.  
19 THE COURT: What page?  
20 MR. GOLDIE: My lord, the -- there is one -- as the witness put  
21 it, one textual paper and the heading is the Earl --  
22 the words "Earl of Egremont to Jeffrey Amherst."  
23 Amherst was the Commander-in-Chief in --  
24 THE WITNESS: In North America.  
25 THE COURT: Am I in the wrong place?  
26 MR. GOLDIE: Tab 25.  
27 THE COURT: Oh, I'm sorry. All right. What page?  
28 MR. GOLDIE: It's the -- it's the first of the two printed  
29 pages.  
30 THE COURT: Yes.  
31 MR. GOLDIE:  
32 Q The letter is to Sir Jeffrey Amherst and he was the  
33 Commander-in-Chief of North America?  
34 A Yes.  
35 Q Of the British army?  
36 A Yes.  
37 Q And the Earl of Egremont at the time was?  
38 A Was the Southern Secretary.  
39 Q And the date of the letter is January 27, 1763?  
40 A '63.  
41 Q And the portion that you referred to is in the mid  
42 paragraph which begins with the words, "This matter,  
43 you shall think most expedient"?  
44 A Yes.  
45 MR. RUSH: Where is this?  
46 MR. GOLDIE: In the -- and then the words --  
47 THE COURT: I haven't found that, I'm sorry.

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1 MR. GOLDIE: Well, does your lordship have --

2 THE COURT: I have Fitch Papers.

3 MR. GOLDIE: Yes, about three-quarters of the way down that  
4 paragraph.

5 THE COURT: "And you will accordingly make the necessary  
6 inquiries"?

7 MR. GOLDIE:

8 Q Yes. And if your lordship will go on to that:

9

10 "That His Majesty may be able to judge what  
11 farther Orders it may be expedient to give to  
12 prevent effectually any Hazard of an Indian  
13 War, His Majesty having it much at heart to  
14 conciliate the Affection of the Indian Nations,  
15 by every Act of strict Justice, and by  
16 affording them His Royal Protection from any  
17 encroachment on the Lands they have reserved to  
18 themselves for their hunting Grounds, and for  
19 their own Support and Habitation: and I may  
20 inform you that a Plan, for this desirable End,  
21 is actually under consideration."

22

23 And you note that that is dated January 27th,  
24 1763. And this is relevant to the policies embodied  
25 in the Royal Proclamation; is that correct?

26

A Yes.

27 MR. RUSH: My lord, I take it that we can assume that the under-  
28 lining and any marginal notations and so on, and any  
29 interlineations, are not part of the document?

30 THE COURT: I am sure that is right.

31 MR. GOLDIE:

32 Q Yes.

33 Now, would you explain to his lordship the  
34 document under tab 26?

35 A Yes. That's a letter in manuscript form, copy of a  
36 manuscript letter from Pownall, the Secretary of the  
37 Board to Egremont.

38 Q Yes?

39 A 15th of February, 1763. And it's found in the  
40 Egremont papers in the Public Record Office.

41 Q It may be difficult for his lordship to -- or for the  
42 assembled audience to read that. Perhaps, can you  
43 make it out, Doctor?

44 A Yes, I can summarize it.

45 MR. RUSH: Well, I would prefer, my lord, that he read it. I  
46 can't read it. He's probably gone over it.

47 THE COURT: I can't read it. Oh, I can make some of it out, but

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1 not all of it.

2 MR. GOLDIE:

3 Q Well, perhaps --

4 A Well, it's page 2, internal page 236. I am not sure  
5 that it is worth the reading because all he says is  
6 perhaps the Board of Trade is not competent to do  
7 this, to work out policies for North America, and  
8 perhaps we should put it in the hands of a special  
9 committee of the privy council.

10 THE COURT: Where does it say that?

11 THE WITNESS: I think at the bottom of page 236.

12 MR. GOLDIE:

13 Q That is --

14 A "Whether this great business".

15 Q -- paragraph 4?

16 A I have it as three here.

17

18 "Whether this great business would not be more  
19 effectual and more expeditiously done by a  
20 select Committee of the Privy Council,  
21 consisting of the two Secretaries of State and  
22 First Lord of Trade."  
23

24 So he is saying that the Board of Trade as such  
25 is probably not a good instrument, why don't we have a  
26 special committee.

27 Q All right. And this is all part of the beginning of  
28 the --

29 A This is trying to work out how the policy process will  
30 be organized.

31 Q All right. And under tab 27 you have a letter from  
32 the King to Lord Bute?

33 A Yes.

34 Q And who is Lord Bute?

35 A Lord Bute was the First Minister at that time. And it  
36 was George III's personal favourite, political  
37 favourite.

38 Q And is he the "D. Friend" that is referred to in that  
39 letter?

40 A Yes, "Dear Friend".

41 Q And this, too, is part of the context of the  
42 assignment to the Board of Trade in the eventual  
43 production of the Royal Proclamation; is that correct?

44 A That's correct.

45 Q Thank you.

46 Now, can you tell his lordship approximately when  
47 Lord Egremont indicated that he was working on an idea



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1                   for the -- of the new settlement of North America?  
2   MR. RUSH: Well, perhaps the ground work should be the document  
3                   where it indicates that that's happening, my lord.  
4   MR. GOLDIE:  
5       Q   Well, the source of that is -- would you tell his  
6           lordship the source of any comments you make, and I am  
7           referring to footnote 28, page 34, and it refers to a  
8           statement that you are making at page --  
9       A   Yes. That's a letter dated March 11th, 1763.  
10      Q   Yes?  
11      A   From Egremont to Grenville who was then the First  
12           Minister.  
13      Q   And the source of that is?  
14      A   And the source -- it's a quotation taken from a  
15           secondary source, Sosin, Whitehall and the Wilderness,  
16           page 53, note one.  
17   MR. RUSH: Do we have that here?  
18   MR. GOLDIE:  
19      Q   No. That's a treatise quoted by Mr. Morrison.  
20           That was March I think you stated?  
21      A   Yes.  
22      Q   Can you give us any further chronological information?  
23           I'm referring to page 34?  
24      A   Well, perhaps you are referring to the letter of May  
25           5th --  
26      Q   Well --  
27      A   -- 1763.  
28      Q   Well prior to that, am I to understand that a decision  
29           was taken to annex the Labrador coast to Newfoundland?  
30      A   To Newfoundland. I think that was March 24th, '63.  
31      Q   And the source of your information for that is  
32           footnote 29?  
33      A   Yes.  
34      Q   And then you were about to refer to a letter of May  
35           5th?  
36      A   May 5th, 1763, a letter from Egremont to the Board of  
37           Trade.  
38   MR. GOLDIE: And that, my lord, is under your book of  
39           authorities under tab 30 -- not authorities,  
40           documents.  
41   THE COURT: All right. Before we turn to that, can we take the  
42           afternoon adjournment, please.  
43   THE REGISTRAR: Order in court. Court stands adjourned for a  
44           short recess.  
45  
46  
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F.M. Greenwood (for Province)  
In chief by Mr. Goldie

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(PROCEEDINGS ADJOURNED AT 3:00 P.M.)

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

---

Toni Kerekes, O.R.  
United Reporting Service Ltd.

F.M. Greenwood (for Province)  
In Chief by Mr. Goldie

1 (PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)

2

3 THE COURT: Yes, Mr. Goldie.

4 MR. GOLDIE: Thank you, my lord.

5 Q Dr. Greenwood, you had told us that in March Egremont  
6 had informed Mr. Grenville that he was working on a  
7 rough idea of the new settlement of North America.  
8 You had told us that on March 24 the Labrador coast to  
9 Newfoundland had been -- the Labrador coast had been  
10 annexed to Newfoundland and I want you now to come to  
11 a document under tab 30 which is a letter dated May 5,  
12 1763 and would you tell his lordship who that is from,  
13 to whom it is addressed and its significance, please?

14 A Yes. The letter is from the Secretary of State, Lord  
15 Egremont, to the Board of Trade May 5, 1763,  
16 requesting the board to report advising how the  
17 Imperial government should organize His Majesty's new  
18 acquisitions in North America, the Caribbean and  
19 Africa. The Board of Trade was to recommend such  
20 regulations as would produce the greatest commercial  
21 advantage from the recent cessions and North America  
22 was to be considered the principal object of their  
23 recommendations.

24 MR. RUSH: My lord, I think the witness should refer to the  
25 portion of the document he's going to refer to.

26 A Well, I will be quoting from it in a minute.

27 MR. RUSH: Well, I am sorry, but I can't find the quote.

28 MR. GOLDIE:

29 Q Well, if you would look -- if my friend would just  
30 have some patience and if you would look at page 94  
31 towards the bottom of the page he'll find what I  
32 assume the witness is now about on refer to.

33 A Yes.

34 Q If he doesn't I will be surprised.

35 A Well, the questions that were asked the Board of Trade  
36 are found in the middle of page 94 and the questions  
37 which relate to North America in general are one, or  
38 first:

39

40 "What New Governments should be established &  
41 what Form should be adopted for each new  
42 Governments? and where the Capital, or  
43 Residence of each Governor should be fixed?  
44 2ndly What Military Establishment will be  
45 sufficient? What new Forts should be erected?  
46 and which, if any, may it be expedient to  
47 demolish?

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1                   3rdly In what Mode least Burdensome and most  
2                   palatable to the Colonies can they contribute  
3                   towards the Support of the Additional Expense,  
4                   which must attend their Civil & Military  
5                   Establishment, upon the Arrangement which Your  
6                   Lordships shall propose?"  
7

8                   End quote. He said on the second question related --  
9                   this is at the bottom of page 94, the second question  
10                  relating to security the board was to --

11                Q   Security of North America?

12                A   Yes. Military security of North America was to take  
13                  into account European powers, but also, quote:

14                               "The Preservation of the Internal Peace &  
15                               Tranquility of the Country against any Indian  
16                               Disturbances,"  
17  
18

19                  Unquote. And then at the --

20                Q   Well --

21                A   Sorry.

22                Q   Sorry, go on.

23                A   At the bottom page 94 he begins to elaborate or  
24                  elaborates on policies for the Indians and I don't  
25                  know whether you wish me to quote that --

26                Q   Yes.

27                A   -- segment.

28                Q   You are directing his lordship's attention to this,  
29                  are you?

30                A   Yes. Yes.

31                Q   All right. Proceed.

32                A   Beginning at the beginning of the last full paragraph  
33                  on the page:

34  
35                               "Tho' in order to succeed effectually in this  
36                               Point, it may become next to erect some Forts  
37                               in the Indian Country, with their Consent, yet  
38                               His Majesty's Justice & Moderation inclines Him  
39                               to adopt the more eligible Method of  
40                               conciliating the Minds of the Indians by the  
41                               Mildness -- "  
42

43                  And I am changing pages now to 95:

44  
45                               " -- Mildness of His Government, by protecting  
46                               their Persons & Property & securing to them all  
47                               the Possessions, Rights and Privileges they

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- 1                           have hitherto enjoyed, & are entitled to, most  
2                           cautiously guarding against any Invasion or  
3                           Occupation of their Hunting Lands, the  
4                           Possession of which is to be acquired by fair  
5                           Purchase only."  
6
- 7           Q   All right.  
8           A   Unquote. And this was a guideline and I think it's  
9               perhaps the only time that the board was given a real  
10              guideline by Egremont on policy.  
11           Q   When you say a guideline, you are referring to --  
12           A   You must take this into account when you come forth  
13               with your recommendations.  
14           Q   Yes. And you say that's the only guideline of all of  
15               the matters which the board was asked to consider in  
16               this?  
17           A   It's the only one which significantly narrowed their  
18               options, yes.  
19           Q   All right. Now, there is -- if one goes to the end of  
20               the letter --  
21           A   Yes.  
22           Q   -- on page 96 of the document under tab 30, you find a  
23               reference to enclosures?  
24           A   Yes.  
25           Q   Do you see that?  
26           A   Yes. It's written "enclosure," but I presume it  
27               should be "enclosures."  
28           Q   Does that set out the total number of enclosures that  
29               accompany this letter?  
30           A   No, it does not. No, it does not.  
31           Q   How many in total were sent with the letter to the  
32               Board of Trade?  
33           A   Thirty.  
34           Q   And can you indicate to his lordship which -- and by  
35               reference to the documents themselves, which of these  
36               were the most significant in relation to the issues  
37               before the court?  
38           A   Yes. Well, most of the documents sent were mere  
39               informational documents such as a copy of the Treaty  
40               of Paris. There were three enclosures, however, which  
41               embodied policy proposals. There was a circular  
42               letter on Indian policy dated 16 March 1763.  
43   THE COURT: Just a moment, please. On Indian matters dated -- ?  
44           A   Indian policy dated 16 March 1763.  
45   THE COURT: I am sorry, I can't write quite as fast. March 16?  
46           A   Yes.  
47   THE COURT: 1763?

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1           A    1763, which had been sent from the secretary to the  
2               governors and this was an enclosure. This particular  
3               circular letter had advised the governors to meet with  
4               the Indians and assure them that there would be no,  
5               you know, encroachments and that His Majesty would  
6               protect them. The second policy document was an  
7               undated anonymous memorandum entitled quote, "Plan of  
8               Forts & Garrisons -- "  
9   MR. GOLDIE:   Excuse me. To assist his lordship, this is a  
10               document under tab 32, my lord.  
11   THE COURT:   Is the first one a tab in the --  
12   MR. GOLDIE:   No. Perhaps I can get the source of that for you,  
13               but it's not in the book.  
14   THE COURT:   All right.  
15   MR. GOLDIE:  
16           Q    Now, you are referring to the document under tab 32,  
17               are you, doctor?  
18           A    Yes, I am.  
19           Q    And you commenced to give the -- to give the title.  
20               It's headed "Distribution of Troops, 1763, Plan of  
21               Forts & Garrisons proposed for the Security of North  
22               America, and the Establishment of Commerce with the  
23               Indians"?  
24           A    Yes.  
25           Q    And you say there is no known author of that?  
26           A    No. Scholars have speculated on the author.  
27           Q    Is there any consensus amongst scholars?  
28           A    No, there is not. There is consensus that it's a very  
29               important military policy document, but no consensus  
30               on the author.  
31           Q    All right. And would you indicate to his lordship the  
32               points that -- in the document to which you draw his  
33               lordship's attention?  
34           A    Right. Internal --  
35   THE COURT:   I am sorry, I am lost again. I was getting three  
36               important policy documents.  
37   MR. GOLDIE:   Yes.  
38   THE COURT:   Now I can't even find where my notes are. What  
39               document were we looking at when you referred me to  
40               tab 32, do you remember?  
41   MR. GOLDIE:   That's an undated anonymous memorandum entitled  
42               "Plan of Forts & Garrisons Proposed for -- "  
43   THE COURT:   Sorry, Mr. Goldie. We were looking at a document  
44               and he was telling me about the enclosures.  
45   MR. GOLDIE:   Oh. Yes. Well, that was 30.  
46   THE COURT:   That was 30?  
47   MR. GOLDIE:   Yes. And that was Egremont's letter to the Board

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1 of Trade.

2 THE COURT: Just a moment. Yes. All right. Now, I have the  
3 first two of those three important policy proposals.  
4 Before we go to one of them, can I find out what the  
5 third one was?

6 MR. GOLDIE: Yes.

7 Q The third one, would you tell his lordship what the  
8 third one was?

9 A The third one is Hints, to give it a short title in  
10 tab 34.

11 THE COURT: All right. That's fine. Thank you. Now you want  
12 to go to tab 32?

13 MR. GOLDIE:

14 Q I was just going to ask the witness, my lord, if he  
15 would look at tab 32 and indicate to your lordship the  
16 particular points or particular part of it which has  
17 some -- which you regard as having some significance?

18 A Yes. I refer your lordship to page, internal page 7.

19 Q It's the --

20 A It would be the first full paragraph on internal page  
21 7. And there the author lists five policy  
22 considerations. For example, the first:

23  
24 "To keep His Majesty's New Subjects in Canada &  
25 Louisiana in due Subjection.

26 2ndly To retrain the Inhabitants of our ancient  
27 Provinces in a State of Constitutional  
28 Dependence upon Great Britain.

29 3d To create a proper Respect for Us &  
30 establish necessary Authority among the  
31 Indians.

32 4th To prevent any Encroachments of the French  
33 and

34 5thly To protect our Own & to Annoy the  
35 Colonies and disturb the Commerce of our  
36 Enemies in a future War."

37  
38 So these are the five purposes laid out by the  
39 author for military policy at this time. And there  
40 are no other general purposes stated in the  
41 memorandum.

42 Q And from item number four "to Prevent any  
43 Encroachments of the French," Dr. Greenwood, that  
44 would necessarily assume that the author was unaware  
45 of the cession of Louisiana to Spain?

46 A Yes.

47 MR. RUSH: I object to that, my lord. It's leading, number one.

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- 1                   It's suggestive of what -- or what was or was not in  
2                   the mind of the author.
- 3       MR. GOLDIE: Well --
- 4       MR. RUSH: The witness -- if Mr. Goldie wants to ask the witness  
5                   about, as he did, is there any portion of this that  
6                   you think should be drawn to his lordship's attention,  
7                   he did draw that to your attention.
- 8       THE COURT: Yes.
- 9       MR. RUSH: Presumably in its significance he would have  
10                  something to say. But I -- I --
- 11       THE COURT: Well, it was leading, wasn't it, Mr. Goldie?
- 12       MR. GOLDIE: Yes, it was intended to be leading, my lord,  
13                  because I didn't think there was any doubt about it.
- 14       THE COURT: No. All right.
- 15       MR. GOLDIE:
- 16           Q     Now, doctor, before you go on, the -- I referred to  
17                  the fact that -- or you referred to the fact that the  
18                  enclosures in Egremont's letter under tab 30, the list  
19                  of enclosures did not appear to be complete?
- 20           A     That is correct.
- 21           Q     And your source in respect of that is tab 31 --  
22                  footnote 31?
- 23           A     Footnote 31, the Board of Trade journals for 6 May  
24                  1763. That's a printed primary source.
- 25           Q     And that is the one that contains the full list of --
- 26           A     That contains -- it actually contains 31 items, but  
27                  one of them is the actual letter of May -- May 5, so  
28                  it's obviously not an enclosure.
- 29           Q     Right.
- 30           A     So it's 30, and I don't think we have that in a tab  
31                  form.
- 32           Q     And with respect to the document under tab 32, the  
33                  anonymous I will call it military memorandum?
- 34           A     Yes.
- 35           Q     There are secondary sources which you have consulted  
36                  and they are referred to in tab 32?
- 37           A     Yes.
- 38       MR. RUSH: Footnote 32.
- 39       MR. GOLDIE: Footnote 32, I am sorry. Thank you.
- 40           Q     Footnote 32, the document itself is, you understand,  
41                  tab 32 of Exhibit 1159, but the secondary source which  
42                  examines it is collected -- are collected in footnote  
43                  32. Now, I want to come to the document to which you  
44                  have referred as the Hints and that is under tab 39 --  
45                  33?
- 46           A     33.
- 47       THE COURT: 34 I thought you said. Is it 33 or 34?



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- 1 MR. GOLDIE: I think 30 --
- 2 Q Which is it?
- 3 A 33.
- 4 Q 33. And under that, what is -- what is the source of
- 5 the text which we have here?
- 6 A It's an edition by Verner W. Crane, C-r-a-n-e, which
- 7 was printed in Volume 8 Mississippi Valley Historical
- 8 Review, 1921/22 at pages 370 to 373. There is a
- 9 contemporary copy, that is eighteenth century copy, in
- 10 Colonial Office Series 323 in the public record
- 11 office.
- 12 Q And that source as well as the Crane source is
- 13 referred to in footnote 33 of your --
- 14 A Yes.
- 15 Q Yes. Now, would you tell us what part of the document
- 16 that is referred to as Hints, and this is, I take it,
- 17 is the way in which it is referred to in the
- 18 literature?
- 19 A Yes, it is. It's full title, which may be relevant
- 20 here, is, quote, "Hints relative to the division and
- 21 government of conquered and newly acquired countries
- 22 in America," unquote. I call it Hints, but the title
- 23 might be important because the document may need to be
- 24 dated.
- 25 Q Yes. All right. In fact before you go on to indicate
- 26 to his lordship the significant parts, could you tell
- 27 us something about the date of the document?
- 28 A Well, can I go into authorship first? Would that be a
- 29 little more convenient?
- 30 Q Well, tackle it any way you wish.
- 31 A Okay. There is a very high level of consensus that
- 32 the author of this document was Henry Ellis, high
- 33 level consensus in the scholarly community that the
- 34 author was Henry Ellis who was the former Governor of
- 35 Georgia.
- 36 Q Now, am I correct in my understanding that the
- 37 secondary authorities that you have examined in
- 38 arriving in support of that statement is found in
- 39 footnote 34?
- 40 A Yes. And there is also -- there are also primary
- 41 sources which indicate that in 1763 Ellis was a very
- 42 influential advisor to Lord Egremont, and I don't
- 43 believe we filed these documents but I can read them
- 44 out.
- 45 Q Just identify the footnote number --
- 46 A Oh. Okay. Footnote --
- 47 Q -- that you referred to in support of your statement

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- 1                   that Ellis was a protege of Egremont?
- 2           A     Right. Footnotes 36, 37 and 38.
- 3           Q     Thank you.
- 4           A     And also there is a scholarly consensus on that point
- 5                   as well. Now, the dating of the document cannot be
- 6                   later than the 24th of March 1763 because the author
- 7                   of Hints - from now on I am going to use Ellis - Ellis
- 8                   advocated the annexation of Labrador to Newfoundland,
- 9                   a decision which was made that day. The document
- 10                  cannot be earlier in my view than November 3, 1763
- 11                  because the title refers to new acquisitions and
- 12                  November 3, 1763 was the date of the peace
- 13                  preliminaries which preceded the Treaty of Paris. So
- 14                  between November 3, -- '62, I am sorry. That should
- 15                  be '62 and March 24, 1763.
- 16           Q     All right. Now, having established or at least
- 17                  indicated to his lordship the sources for your
- 18                  information or your opinions with respect to the date
- 19                  and author, can you indicate to his lordship the parts
- 20                  that you consider to be significant and to state
- 21                  something of its significance?
- 22           A     Yes. Ellis recommended in Hints that the vast extent
- 23                  of Canada be divided, that the -- that Canada be
- 24                  divided into two colonies with a division point being
- 25                  Trois Riviere or Three Rivers. For the time being he
- 26                  recommended legislative power should be vested in
- 27                  governors and appointed councils. Florida was to be
- 28                  divided into two provinces, a peninsular province and
- 29                  one extending in the west to the Mississippi. One
- 30                  proposal put forward in Hints was the establishment of
- 31                  a western boundary between settlement in the older
- 32                  colonies and in the Indian country, so boundary
- 33                  between settlement and the Indian country.
- 34           Q     Could you refer to the particular part of the document
- 35                  that you are referring to?
- 36           A     Yes. It's internal page 371, fourth full paragraph
- 37                  towards the bottom of the page. And I will quote
- 38                  that:
- 39
- 40                         "It might also be necessary to fix upon some
- 41                         Line for a Western Boundary to our ancient
- 42                         provinces, beyond which our People should not
- 43                         at present be permitted to settle, hence as
- 44                         their Numbers increased, they would emigrate to
- 45                         Nova Scotia, or to the provinces on the
- 46                         Southern Frontier, where they would be useful
- 47                         to their Mother Country, instead of planting

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- 1                   themselves in the Heart of America, out of the  
2                   reach of Government, and where, from the great  
3                   Difficulty of procuring European Commodities,  
4                   they would be compelled to commence Manufacturs  
5                   to the infinite prejudice of Britain."  
6  
7                   Unquote.  
8           Q       I'm not sure, doctor, if I -- if you referred to  
9                   footnote 38 as part of your authorities for Ellis'  
10                  authorship. If I didn't, I'd ask --  
11           A       I believe so.  
12           Q       -- did you?  
13           A       I believe so, and the answer is yes.  
14           Q       All right. Thank you.  
15           A       I might note here that while Ellis was recommending a  
16                   boundary line between settlement and the Indian  
17                   country, he did not specify where that boundary line  
18                   should be.  
19           Q       Right.  
20           A       It doesn't appear in the document.  
21           Q       And in the part immediately following what you have  
22                   quoted, there is a recommendation that the country to  
23                   the westward of the boundary be put under the  
24                   immediate protection and care of the officers  
25                   commanding at the distant posts?  
26           A       Yes.  
27           Q       And for the settlement of disputes amongst traders  
28                   and/or traders with the Indians, and so that's a  
29                   recommendation with respect to jurisdiction of the  
30                   courts?  
31           A       Yes.  
32           Q       Yes. All right. And the parts that you have referred  
33                   to, do they find any reflection in the Royal  
34                   Proclamation?  
35   MR. RUSH: Well, doesn't that call for an interpretation, my  
36                   lord?  
37   MR. GOLDIE: Well --  
38   THE COURT: In one sense yes; in another sense it may be a  
39                   matter of just pointing to a paragraph which becomes a  
40                   matter of fact.  
41   MR. RUSH: Then the witness should be directed to do that, I  
42                   think, in my submission.  
43   MR. GOLDIE: Well, what he can do surely, my lord, is say these  
44                   things found their reflection in the Royal  
45                   Proclamation. And if my friend requires him to go to  
46                   the Proclamation itself, we can do that.  
47   MR. RUSH: Well, that -- that's the point, my lord. That is a

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1 conclusion.

2 MR. GOLDIE: All right.

3 Q Mr. -- or Dr. Greenwood, would you state whether any  
4 of these provisions found their counterpart in the  
5 Royal Proclamation and identify in the Royal  
6 Proclamation those parts that you have reference to  
7 what you make -- when you give your evidence.

8 MR. RUSH: I still say that's a conclusion, my lord. That's a  
9 conclusion for your lordship to compare the documents  
10 and to determine whether in your view the document is  
11 read such that you can conclude that they found their  
12 way into the Proclamation. That is your conclusion,  
13 not the witness'.

14 THE COURT: Well, ultimately it must be mine, but I can be  
15 assisted. If something -- if it's vague and uncertain  
16 about whether it is what the witness says it is, then  
17 it certainly is my responsibility, but if it's a  
18 matter as straightforward as I think this is, surely I  
19 am merely having my attention directed to it so I can  
20 make the conclusion. I won't be able to reach that  
21 conclusion if I'm -- unless I go hunting on my own,  
22 which maybe I will do. Maybe counsel will direct me  
23 to it in argument. Maybe all kinds of things will  
24 happen. I don't understand what we are fighting about  
25 here. It doesn't seem to be much between you -- I am  
26 sorry, there is much between you, but it seems to me  
27 that you're blunting your swords over a mouse or less.

28 MR. GOLDIE: Or less.

29 THE COURT: I don't see what the importance of this one is. So  
30 this one, I think, is not a matter of substance.  
31 Incidentally, a matter of much greater importance, I  
32 notice the Ile St. Jean, that's Prince Edward Island,  
33 I guess?

34 A Yes.

35 THE COURT: Is that where Prince Edward Island came --

36 A Yes, it was. At the Treaty of Paris.

37 THE COURT: At the Treaty of Paris?

38 A Yes.

39 THE COURT: I am sorry, Mr. Goldie.

40 MR. GOLDIE:

41 Q Dr. Greenwood, can you indicate to his lordship by  
42 reference to Hints and to the Royal Proclamation, and  
43 take your time over those parts of Hints, which find  
44 some reflection in the Royal Proclamation?

45 A Well, beginning with the geographical recommendations,  
46 all of the geographical recommendations except for the  
47 division of Canada were reflected in the Royal

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- 1 Proclamation.
- 2 Q And you are --
- 3 A Do you want me to specify?
- 4 Q I am sorry, go ahead.
- 5 A Do you want me to specify them here?
- 6 Q Yes, please. Thank you.
- 7 A Paragraphs E and F, Florida was divided into two.
- 8 Paragraph I, annexation of Ile St. Jean and Ile
- 9 Royale, Cape Breton, to Nova Scotia, this was
- 10 recommended by Ellis. The annexation of Labrador to
- 11 Newfoundland, but I just can't find the paragraph at
- 12 the moment.
- 13 Q Well, that was accomplished through -- that was
- 14 done --
- 15 A Done earlier, yes.
- 16 Q Yes.
- 17 A As far as a boundary line between settlement and the
- 18 Indian country, that would appear in paragraph U and
- 19 paragraph V.
- 20 Q And you say that the recommendation of the government
- 21 of Quebec to be broken into two was not followed?
- 22 A Was not followed and the recommendation to delay
- 23 assemblies was not followed either in the
- 24 Proclamation. The structure of government for the two
- 25 Floridas, the Royal Form of Colony recommended by
- 26 Ellis was followed in the Proclamation.
- 27 Q Thank you. Now, the next document to which I wish to
- 28 refer you to is in the -- is in the Exhibit 1159 under
- 29 tab 45 and that is sometimes known as the Knox
- 30 memoranda?
- 31 A Yes.
- 32 Q I shouldn't say document. There are several
- 33 documents. But would you tell us first who the -- who
- 34 William Knox is?
- 35 A Yes. William Knox was a protege of Edward Ellis.
- 36 Q Of Edward Ellis?
- 37 A Sorry. Of -- excuse me, of Henry Ellis.
- 38 Q Yes.
- 39 A He was a councillor, provost marshal and colonial
- 40 agent for Georgia and he followed his patron, as it
- 41 were, to London.
- 42 Q Now, is the source of your information with respect to
- 43 Knox and his career footnote 44?
- 44 A Yes.
- 45 Q Thank you. Proceed.
- 46 A Late February 1763, Knox submitted three memoranda to
- 47 the Earl of Bute dealing with colonial policy and

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1                   these memoranda which appear in tab 45 are taken from  
2                   an edition by Thomas C. Barrow which appeared in  
3                   Volume 24 of the William and Mary Quarterly 3rd series  
4                   1967 pages 108 to 26.  
5           Q       Thank you. And there are other sources which are  
6                   detailed by you in footnote 45?  
7           A       Yes.  
8           Q       All right. Now, in tab 45 there are the three  
9                   memorandum themselves. Can you tell his lordship what  
10                  the significance was that you attribute to this?  
11          A       Well, I saw the importance in being that Knox  
12                  recommended a confinement of western settlement based  
13                  on Mercantilist's arguments and in my report I had  
14                  quoted him at length and the quotation and I think the  
15                  relevant passage would be found on internal page 114  
16                  down to first full paragraph on page 115 ending with  
17                  the words "Maritime power of Great Britain."  
18          Q       Now, this --  
19   THE COURT:   It starts on page 104?  
20          A       Starts on page 114.  
21   MR. GOLDIE:   It's about halfway through the last paragraph, I  
22                  think it is, my lord.  
23          Q       "Now in order to make"?  
24          A       "Now in order to make" and then down to roughly the  
25                  middle of page 115 "Wealth or Maritime power of Great  
26                  Britain." But --  
27          Q       And without reading that quotation in full, can you  
28                  indicate to his lordship the tenor of it?  
29          A       Well, it says exactly the same thing really as the  
30                  next memoranda which is easier to quote from because  
31                  it's shorter.  
32          Q       All right.  
33          A       So --.  
34          Q       Now, these memoranda --  
35          A       Memorandum. Excuse me.  
36          Q       -- of Knox --  
37          A       Yes.  
38          Q       -- you say found their way into the hands of the Earl  
39                  of Bute and you have identified him as one of the  
40                  king's principal advisors?  
41          A       That's correct. And he also -- Knox also transmitted  
42                  copies of these memoranda to Shelburne, the president  
43                  of the Board of Trade.  
44          Q       Yes.  
45          A       Probably in May or early June.  
46          Q       All right. Now, you were going to go on and deal  
47                  further with the memoranda?

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1           A    Yes.  There was an additional memorandum drafted by  
2               Ellis -- sorry, Knox, in May or early June and sent to  
3               Egremont.  This is an untitled memorandum preserved in  
4               Shelburne papers at the National Archives of Canada  
5               and I believe it's tab 48.  
6           Q    Yes.  
7   THE COURT:  So tab --  
8   MR. GOLDIE:  Of Exhibit 1149 -- 1159.  
9   THE COURT:  Tab 48 is all one document?  
10  MR. GOLDIE:  It is all one document.  It consists of the three  
11               memoranda as published in the William and Mary  
12               Quarterly.  
13  MR. RUSH:  I am sorry, I am confused by that one.  
14  THE COURT:  I am too.  
15  MR. RUSH:  I thought the second memoranda was the Knox memoranda  
16               in tab 48.  
17  MR. GOLDIE:  Oh.  
18  MR. RUSH:  Is that -- is that correct?  
19           A    There were three memoranda sent to Lord Bute by Knox  
20               in February 1763 and they were all printed together by  
21               Mr. Barrow.  And I quoted from one of those.  
22  MR. GOLDIE:  
23           Q    And --  
24           A    And the fourth memorandum, if you wish --  
25  MR. RUSH:  Oh, I see.  
26           A    -- is the one coming up now which is in manuscript  
27               form found in the National Archives of Canada,  
28               Shelburne papers.  And I would direct attention to --  
29  THE COURT:  This was sent to whom?  
30  MR. GOLDIE:  To --  
31           A    Lord Shelburne.  
32  THE COURT:  And the date.  Oh, May-June 1763?  
33           A    Yes.  And it was attempted to answer -- the document  
34               attempted to answer the questions raised in Egremont's  
35               letter of May 5.  So it seems clear that it was  
36               involved in the policy-making process.  But the  
37               passage I would like to refer your lordship to is  
38               found on internal page 32 and essentially the same  
39               thing was said in the earlier memoranda and I will  
40               quote.  On the beginning of the third full paragraph  
41               "the British Colonies."  
42  THE COURT:  Yes?  
43           A  
44  
45                               "The British Colonies are to be regarded in no  
46                               other Light, but as subservient to the Commerce  
47                               of their Mother Country; the Colonists are

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1                   merely Factors for it the Purpose of Trade and  
2                   in all Considerations concerning the Colonies,  
3                   this must always be the leading idea.

4                   If it was thought proper to Form a great  
5                   Empire in America, it might be right to  
6                   establish inland Settlements, because the  
7                   Settlers wanting a ready Communication with  
8                   Europe would immediately turn their Attention  
9                   to Manufactures and Arts.

10                  But if they are to be made subservient to  
11                  this Kingdom, they must be kept as near as  
12                  possible to the Ocean that they may be able to  
13                  export their more bulky Commodities as well as  
14                  import those of Europe which the inland  
15                  Settlers cannot do."

16  
17                  End quote.

18       MR. GOLDIE: Thank you.

19       THE COURT: Is it convenient to adjourn, Mr. Goldie?

20       MR. GOLDIE: Yes, thank you, my lord.

21       THE COURT: I have for counsel a memorandum which I will leave  
22                  with you, leave you with matters scheduled upon which  
23                  I shall be glad to have reviewed tomorrow or which may  
24                  be convenient.

25  
26                  (PROCEEDINGS ADJOURNED UNTIL FRIDAY, OCTOBER 6, 1989  
27                  AT 10:00 A.M.)

28  
29                               I hereby certify the foregoing to be  
30                               a true and accurate transcript of the  
31                               proceedings herein to the best of my  
32                               skill and ability.

33  
34  
35  
36                               Laara Yardley, Official Reporter,  
37                               United Reporting Service Ltd.

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