Vancouver, B.C.
November 9, 1989

(PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)

THE REGISTRAR: In the Supreme Court of British Columbia, this 9th day of November, 1989. In the matter of Delgamuukw versus Her Majesty the Queen at bar, my lord. May I remind you, you are still under oath.

A Yes.

THE REGISTRAR: Would you state your name for the record, please?

A Sheila Patricia Robinson.

THE REGISTRAR: Thank you.

THE COURT: Mr. Grant.

MR. GRANT: Thank you.

CROSS-EXAMINATION BY MR. GRANT CONTINUED:

Q Dr. Robinson, would you look at footnote two of your report for a moment. Footnote two is where you refer, and from my review of your footnotes it's the only place where you refer, to Bishop and Ray of 1976, but you do cite it there in footnote two; is that right?

A Yes. I don't know if I refer to it elsewhere.

MR. GRANT: Yes. I've reviewed it and it appears that that's the place you refer to it.

My lord, I believe that I was up to tab 46 last evening.

THE COURT: Yes.

MR. GRANT: And your lordship and my friends were missing tabs 44 and 45. And here are those tabs. That's one set.

THE COURT: Thank you.

MR. GRANT:

Q Okay. Have you got Bishop and Ray that I just passed up?

A Yes. Tab 47, yes.

Q Yes. And this is the Bishop and Ray article to which you cite in your footnote, and you cite in your bibliography to your report; is that right?

A Yes.

Q Okay. Now, the abstract of Bishop and Ray, and, of course, you're familiar with this treatise by Bishop and Ray?

A Yes, I've read the article.

Q Yes. They state in their abstract that:

"The lack of a historical perspective in

> studies of Central Subarctic peoples is considered, and the use of archival source materials to compliment archaeological and ethnographic data in constructing culture histories is discussed."

And that's a fair synopsis of what they're dealing with in this treatise; is that right?

A Yes. I believe they deal with some other issues as well.

Q And then they define in the first paragraph, the last sentence, on page one -- actually this is page 116, my lord. It goes from pages 116 to 144. The subsequent pages are numbered, but the first pages aren't.

> "The region selected is the Central Subarctic, defined approximately as extending from western James Bay in the east to the eastern Mackenzie watershed in the west, and from Lake Superior and the parkland belt bordering the Plains on the south to the taiga-tundra on the north."

And that's the area in which they are specifically focusing in terms of their study in this treatise; is that right? You don't dispute that?

A Yes, I believe that's correct.

Q Okay. Can you go to page 117.

THE COURT: Well, does that include any part of this area? It does not, does it?

MR. GRANT: It doesn't include any part of the area which is the subject matter of this claim. And, in fact, my lord, I may as well pass this up right now. The other day, my lord, you asked about -- about the Subarctic.

Q And, Dr. Robinson, what I handed to you now is an extract from pages 272 and 257 of volume six, the Subarctic Handbook which we've referred to, and, in fact, I think that's the same one as Tobey's article is located in. You're familiar with that?

A Are you asking me?

Q Yes.

A Yes.

MR. GRANT: And volume six -- now, my lord, I want to advise on the photocopy that you have of page 263 there's a shaded in area and an outline in black on the photocopy.

THE COURT: Just a minute. I haven't found page two. What page did you say, two?

MR. GRANT: I'm sorry. It's 272. It's the first page of the two page extract.
THE COURT: That's page 272?
MR. GRANT: Yes, that's page 272. It's down at the bottom right-hand corner you see an outer black line. I added that line just so that on the photocopy you could see the shaded in area, because I was afraid it wasn't clear on the photocopy on the maps. Now, figure 1 is Chipewyan territory in historic times, and it shows where one of the groups that we were talking about, the Chipewyan, and you see a date of 1716 which shows them, and a date of 1815 and 1870 to give a sense of where the Chipewyan were located historically. And if you go to the next page it is -- it is with respect to the Cree. And it's actually page 257. And there I didn't put an outline, because I think the darkened portion is easily discernable, but it's the territory in the eighteenth century of the Cree. And so that this is -- and here we are talking so that you have -- to give your lordship a sense of what that portion of the Subarctic dealing with the Cree is and that portion dealing with the Chipewyan is referring to. I'd ask that be put in at the next tab.
THE COURT: Ahead of this Bishop and Ray?
MR. GRANT: It could go right after, my lord.
THE COURT: All right. It will be 48 then.
MR. GRANT: That's correct, yes. It would be 48.

(EXHIBIT 1191A-47: Ethnohistoric Research in the Central Subarctic - Bishop & Ray)

(EXHIBIT 1191A-48: Extract - Vol.6 - Subartic Handbook)

MR. GRANT:
Q Now, Doctor, go to page 117. You can see that it says on the end of the first paragraph:

> "Ethnographic models based upon field studies of Algonkian, Siouan and Athapaskan-speaking peoples, although often excellent, can be highly misleading if used uncritically and extended backwards to the prehistoric or protohistoric period. In many instances, errors could have been avoided had the rich archival materials pertaining to the region

been employed."

And you would agree with that general proposition of these writers, wouldn't you?

A Well, these writers are certainly entitled to their opinion, and that covers one aspect of the research field. I'd like to draw attention to your tab 44 where you brought the court's attention to some of the articles in the 1986 Anthropologica issue dealing with hunting territories and suggest that --

Q Before you go --

MR. WILLMS: Let the witness --

A There's another article by Firket Berkes which deals with common property resources and hunting territories which extends this notion of research in another direction which is also useful which deals with ecological models and the applicability for understanding the dynamics of territories, territorial changes, and demonstrates how territory is one aspect of resource use practices amongst band societies. So I agree that this is one thing that's useful, what they're stating here, and there are other directions we should follow as well.

MR. GRANT:

Q I'm not asking you about all of the other alternative models that you may agree with. This is a source that you have cited in your report. I'm asking you a very simple question. Do you agree with the proposition I've read to you or not? These are scholars that you're familiar with, and you've read this treatise, and you've cited it.

A I'm not sure that my experience with Algonkian and Siouan, if that's how it's pronounced, S-I-O-U-A-N. I'm not sure if I'm familiar with those materials to be able to gauge the value of their statement with regards to them. With regards to the Athapaskan I have some knowledge of what they're referring to, but don't know enough about a broad sweep to understand its applicability for all references they're probably intending to cover.

Q So you have no reason to dispute it, but you can't agree with it because of your lack of knowledge of these groups; is that right?

THE COURT: I think she put it the other way. For that reason she didn't want to commit herself to agree with it.

MR. GRANT:

Q You don't want to agree with it, because you're not

sure with respect to these groups?
A I'm not sure which examples they're citing here or referring to here that give them the basis for making their judgment, and because of that, and because I'm not as familiar perhaps with some of the materials they are referring to, although those aren't specified, I don't really want to make a judgment about it.
Q Well, the materials they are referring to are specified it appears to me. If you look at page 139, 140, 141, 142, 143 and 144 you have -- all those pages are references.
A I'm not sure if these are the field studies of Algonkian, Siouan and Athapaskan-speaking peoples to whom they refer. They haven't drawn attention to specific studies which they're stating are highly misleading. And I'm not, because there's not enough information given here, prepared to make a statement whether I go with or don't go with this statement.
Q Can you look at the bottom of the next paragraph, the second last sentence, page 117, Exhibit 1191A tab 47.

> "Successful resolution of these questions clearly involves the careful application of the direct historical approach employing all available lines of evidence and effective interdisciplinary cooperation. Yet it has been frequently noted that such a goal has remained more of an ideal than a reality."

Do you agree with that proposition with respect to the Subarctic?
A Not entirely, because I think successful resolution of some of the questions relating to traditional socioeconomies and changes in those socioeconomies will never be achieved because information is lacking about some aspects of those developments.
Q And, of course, one doesn't know what information is lacking in the historical material until one does a very careful review of it. And that's what these authors are directing in terms of their historical approach. Let me break the question up. One does not know --
A I don't know if that was a question, sir.
Q You do not know -- you cannot say whether this applies to the Wet'suwet'en or Gitksan, can you?
A Yes, I believe I can say something about that with

regards to the Gitksan and Wet'suwet'en. And I do not believe that there is ever going to be sufficient historic documentation that will come to light that will allow us to resolve some of the questions pertaining to traditional socioeconomies or early post-contact ones or protohistoric ones, because I do not believe that that information does exist.

Q But in order to confirm whether that information does exist or not one must look carefully at the historical data that does exist. You would agree with that?

A Yes and no. I believe that certainly in the context of this rather lengthy trial proceedings had there been additional historic information that would have solved some of those kinds of questions that information would have come to light. There may indeed be more historic information that does have bearing on reconstructions of traditional socioeconomies and those in the protohistoric and historic periods. However, I have not seen in any of the readings that I have done the kind of detail that would allow us to resolve certain kinds of academic questions or have a full or complete reconstruction ever possible about some aspects about those traditional socioeconomies or those that were changing in the protohistoric or historic times.

Q Have you read the historic documents tendered in the examination of Dr. Skip Ray? All of them?

A I'm not sure if I did read all of them thoroughly. I read many of them.

Q They're at tab -- they're listed at tab 5 of Exhibit 1191, the exhibit that I showed you before. You can't say which of those you've read?

A I could on some reflection, but it's very difficult to put titles against certain passages that I've reviewed.

Q Have you read all of the documents tendered in Dr. Galois' evidence, the historical documents?

A I've read much of the material tendered in connection with Dr. Galois' evidence.

Q But not all of it?

A I'm not sure without some reference to his bibliography and some review of the materials I have gone through.

Q Can you go to page 1191, please.

THE COURT: Before you leave that is archaeology the best bet for a better understanding?

A I don't believe so, because archaeology gives us a lot

of information about material culture, but what anthropologists do with comparative studies in the behavior of groups often deals with those non-material aspects that lays the stuff together. So basically to get at patterns of behavior in the past we have to use a combination of anthropology, historic sources and archaeology. So archaeology is one of the bets, but it's going to give us a set of material things.

THE COURT: What do you understand the authors to be talking about when they say in the sentence immediately before the one Mr. Grant referred to in the top paragraph on page 117:

> "However, there are problems that stem from the general failure on the part of many scholars to appreciate the enormous changes which have transpired over the past three to four centuries emanating from Euro-Canadian influences."

What Euro-Canadian influences would extend back four centuries?

A Coming from the east coast of North America and also up through the Mississippi drainage there is some -- there's some thought that indirect European influence was having its effect on Indian groups quite far removed from the direct sources of contact. Some of those influences included diseases spreading through, and perhaps extracting considerable tolls on some populations before there was ever any real historic record of it. There seems to be -- and even such -- such things as the introduction of horses from Spanish sources, for instance, seems to have had tremendous effect on the settlement patterns and economic behavior and social relations of Indian groups through the plains and prairies, for instance. So something as minor as the horse coming in caused tremendous dislocations through the prairies.

THE COURT: That would go back to the sixteenth century?

A Yes. So the post-contact period or protohistoric period has been traced to the first arrival of Europeans in the New World. Some scholars take it back that far. From the northern northwest American direction and the Siberian connections some people are saying that if we lift the notion that only Europeans can affect North American cultures then we are dealing with an Asiatic influence; Chinese, Japanese and so

on. That seems to have stimulated trade and trade economies. That's much more conjectural as you push it back into the past, but there are certainly scholars who agree that indirect influences were important.

THE COURT: Thank you. Go ahead, Mr. Grant.

MR. GRANT: Thank you.

Q Can you turn to page 119. Dr. Ray and Dr. Bishop state under "Some Problems With the Direct Historical Approach", which we've discussed in evidence. I asked you about earlier. They state:

> "While a truly effective application of the direct historical approach involves the utilization of all available sources of evidence (archaeological, ethnographic, linguistic, biological, and archival)."

Now, just stopping there. You would agree that that would be a truly effective application of the direct historical approach to use all available sources of evidence? You don't have any dispute with that proposition?

A I don't have any dispute with that.

Q "The emphasis here", and they're talking about their article:

> "Is primarily on the problems of integrating archaeological, documentary and ethnographic data into meaning interpretive framework to account for the culture history of the Central Subarctic."

They then go on to say at four lines from the bottom under the heading "archaeology and Ethnohistory":

> "Since the 1950's, archaeologists have grown acutely aware of the necessity of integrating archival and archaeological data pertaining to historic ethnic groups with ethnographic techniques to resolve anthropological problems, a method now referred to as ethnoarchaeology (James and Lindsay '73)."

And that's a fair statement of the development of ethnoarchaeology, isn't it?

A Yes. Except that I'd say that with other names archaeologists have often used historic information to help them interpret the archaeological finds.

Q And I think he comes to that, but here I think they're talking about the ethnographic -- the ethnographic techniques. Now, just -- I think we'll come to what you're raising though. On page 120, the bottom paragraph:

> "Regarding the presumed problem of the lack of objectivity in historical data, it should be stressed that although most historical records are 'purposeful', it does not follow that they are biased to favour presenting particular points of view of culture history."

Now, you would agree with that proposition, wouldn't you?

A Yes and no. I would say that because they are purposeful in some areas they can be lacking the kind of information which would make them amenable to treatment from certain theoretical perspectives. So if we wanted to talk about the evolution of religious thought, for instance, there may not be information contained in those purposeful historic records that pertains to that.

Q Right.

A So in that sense the kinds of theories to which they can be adapted are limited.

Q And that's, of course, one of the things that these authors deal with in this treatise is that -- is these terms. When you go down to page 121 at the bottom:

> "The relationship between history and historical archaeology is not totally one-sided, of course (although we have emphasized one side), since there are numerous examples where archaeological data have functioned to correct and amplify the documentary records. (Alice Kehoe's paper in this volume is an excellent example.) Nevertheless, when the archaeologist is engaged in excavating protohistorical and historical sites where written records are available, it is essential that these be employed since as Hudson has stated: 'Even the most methodologically expert prehistoric

> archaeologist is not competent to excavate an eighteenth century site unless he knows a fair amount of the history of the period and the place in question."

And you would agree with that proposition of Hudson's that they cite, wouldn't you?

A I don't know if Hudson is an archaeologist, because an archaeologist would draw a distinction between excavation and interpretation of archaeological finds. And a competent archaeologist can excavate most sites and record the information contained therein fairly systematically and adequately in terms of archaeological methods. For interpretation it's best to bring in some specialists that have some knowledge of historical records, and I would agree with him in that sense.

Q And that Hudson is the same Hudson that you cite. It's the same person, but a different treatise. You cite his unpublished MA thesis from 1972?

A I don't believe it is the same Hudson. No, it is not the same Hudson.

Q Okay.

A It's Doug Hudson in the MA thesis. This is Charles Hudson.

Q Right. Do you know Charles Hudson?

A No, I do not.

Q "Ethnology and Ethnohistory", page 122:

> "A good deal has been written concerning the relationship between ethnology and ethnohistory."

They have dealt with archaeology and the relationship of that history. Now they're dealing with ethnology and ethnohistory, and they cite some sources.

> "These studies and others have all stressed the value of using documentary sources in ethnological research to gain time perspective on cultural processes. But time depth is equally important to structural studies of present day people."

Do you agree with that proposition, the propositions in those last two sentences; firstly, the

proposition that the value -- that there is a value of using documentary sources in ethnological research to gain time, do you agree with that?

A Yes. That can be of value. I'm really not quite sure what the next sentence means on its own.

Q Okay.

A I think it probably follows. It is explained in the next sentences.

Q Okay. Page 123, four lines from the bottom, first full paragraph above the heading the authors say:

> "Therefore, all too often there has been too little archival research done to effectively, and not superficially, apply the direct historical approach. We now consider the manner in which these issues have influenced time perspectives in Subarctic anthropological research."

Do you agree that with respect to the Gitksan and Wet'suwet'en there is "all too often too little archival research done to effectively, and not superficially, apply the direct historical approach"?

A Yes. I think that statement could apply to the Gitksan and Wet'suwet'en. But I'm not quite sure about the "all too often" phrase. That suggests frequency, and I'm not sure that there have been that many studies directed specifically to the Gitksan and Wet'suwet'en vis-a-vis the direct historical approach.

Q Okay.

> "The Central Subarctic: Toward a Suitable Chronolgical Framework."

And they're, of course, talking about the area they defined at the beginning of the Central Subarctic and they're using it for the purpose of their model. They state:

> "In order to evaluate the nature and rate of culture change in the post-contact Central Subarctic, it is essential that a suitable chronological framework be established."

And you would agree that that proposition would apply equally to the Gitksan and Wet'suwet'en?

A Yes. And I would also say that as much as these

writers have found it very problematic to do that, and perhaps even impossible even with the most thorough review of historic and other documentation, I would say that it's similarly perhaps limited for the Gitksan and Wet'suwet'en. It's a nice thought, but I'm not sure it can be done.

Q Well, of course, these authors in this dissertation -- I'm sorry -- in this treatise are saying it hasn't been done with respect to the Central Subarctic. It hasn't been done well enough or often enough.

A I'm not even sure they're saying it can be done. That's all my response was about.

Q You're not sure whether it can be done?

A I can't speak for them, but that's my response to your question.

Q Well, they speak for themselves in this publication, of course, on page 124, half-way down:

> "With respect to linking the historic records with those relating to the prehistoric period, it must be stressed that the chronological units designated as the Prehistoric, Protohistoric, and Historic periods have to be clearly defined and employed in a consistent fashion by archaeologists, ethnologists and ethnohistorians."

You agree with that, don't you?

A Yes. To the extent that they can be defined and that there's agreement amongst the archaeologists, ethnologists and ethnohistorians about what constitutes the region that's described in the next paragraph, because the archaeological region, the ethnological region and ethnohistorical region or regions might all be spatially quite different things.

Q But you've hit on a very good point, which is, is that the region, the spatial context as well as the time context, are both important, and you have to make sure you're talking about the same space as well as the same time frame for this to mesh?

A Yes. As Frederica De Laguna brought up in an earlier article, which I think has been entered as an exhibit for the Klingit area, the difficulities of meshing archeological, ethnohistoric and ethnological information are great, and sometimes for some regions, however, those are defined insurmountable.

Q Is that from Under Mount Saint Elias, the one you

cited?
A No. I think it's the Study of Angu (phonetic), the History of the Klingit Community, and I think it's 1950.
Q And, of course, these authors are writing 26 years later, and they have a much broader historical archival base than De Laguna did?
A I think that's questionable, sir.
Q You're not aware of the increased accessability to archival sources in the last 20 years?
A I'm not sure that they would have been drawing on the same material so that it's comparable at all, because the De Laguna study I was referring to was in the Klingit area. Also in the sense of this kind of historical ethnohistoric research many good, sound, scholarly contributions have been made throughout the eighteenth and nineteenth century. Simply because something is written two or three or eight or 26 years later doesn't mean to me that the research is necessarily better, broader, sounder, and so on.
Q No. But if the research done 20 years later has more data than the earlier author that may, not necessarily, but it may, one suspects, improve the scholarly research; right?
A No. I'm not saying I could agree with that, because I don't know if more data means better interpretation.
Q Well, yes. Okay.
A Or that we can gauge more data in terms of counts of facts and figures.
Q Page 125 at the top.

> "It is necessary to stress that these two periods, the Protohistoric and the Historic, overlap considerably in time depending upon the geographical region involved, and in this sense they reflect conjunctive or interactive relations rather than absolute chronology."

And I think what they are saying here -- I suggest to you what they are saying here is something like you were explaining to his lordship earlier, that if you were to look at the Huron, for example, you would be talking about a different time period for the protohistoric than if you were looking at the Gitksan. And it just goes as a matter of -- it's obvious.
A Well, I'm not sure if it is obvious, because I'm not quite sure what they intend by that sentence. It

seems to me you could also read it to say that protohistoric and historic could overlap in one region depending on the geographic region involved, and in that sense I'm not really sure what they're talking about. Perhaps they're suggesting that the presence of one European means an intermittent historic episode in an otherwise broad protohistoric area. But I'm not quite sure what they're intending here, because it's not clear if it's the same geographic region.

Q Okay. They give an example, and maybe that will help us all to understand what they're saying. They say:

> "The Protohistoric Period lasted for a considerable time in the region southwest of Hudson Bay. For instance, different Indian groups visited York Fort for over seventy years before Euro-Canadians actually visited their villages and established posts either indirectly through intermediary sources or as a result of lengthy trips to European settlements outside the traditional territorial boundaries. In short, the historic baseline may not usually provide us with a picture of aboriginal ('traditional') culture. Although these three periods are frequently employed in dating schemes, most attempts to establish a baseline for culture change studies do not follow this threefold division, but rather, in effect, consider only the Prehistoric and the Historic Periods."

And that's one of the points they make is you have to take into account the protohistoric?

A If I understand correctly, and maybe I'm misinterpreting this, they would say that some of the Atnah or Gitksan villages remained in the protohistoric period, or even some Atnah or Gitksan individuals remained in the protohistoric era while others were having historic labels attached to their activities.

Q Well, let's go back to page 124 right after the sentence where you're not sure about consistency between archaeologists, ethnologists and ethnohistorians, because Dr. Ray and Dr. Bishop make a very good effort to define prehistoric, protohistoric and historic. They say:

"The Prehistoric Period can be said to end when trade goods or other Euro-Canadian influences such as disease first reach a region. Obviously, changes can occur before direct firsthand contacts with Europeans take place locally. The initial influx of trade wares (or disease) serves to make the beginning of the Protohistoric Period if these goods are obtained through Indian middlemen."

They explain Indian middlemen later. And then they give an example of a horse.

"The Protohistoric Period also includes the time during which Indians travelled beyond the limits of their territories to visit missionaries or to obtain trade goods to be used by themselves and to be exchanged, often after they were worn out, for furs obtained by other usually more remote Indians."

And then they describe there's an argument about the middlemen, and then they go on a few lines down.

"The Historic Period begins when Indians experience direct contacts with Europeans and when they themselves trap the fur bearers needed to obtain the trade wares."

Now, Doctors Bishops and Ray here have defined in this model using prehistoric, protohistoric and historic, they have defined quite carefully what they mean by those three terms.

A And vis-a-vis the Central Subarctic.

Q My question to you is is this what you meant when you referred to prehistoric, protohistoric and historic among the Gitksan and Wet'suwet'en?

A It's close enough.

Q Is it what you meant?

A Not specifically.

Q Is there -- these are the authors you cited.

A Not specifically for that definition. No. I cited those authors in reference to the sentence on page one or two of my report where I said:

"Most modern scholars engaged in North American ethnohistoric research agree that indigenous

populations were profoundly affected by indirect contact with Europeans before they experienced direct contact with them."

And that's the context in which I brought Bishop and Ray into play in my opinion report.

Q And that's the only point --

A But I didn't use their definition specifically. But I would agree it's more or less what I'm referring to. Sometimes protohistoric or -- let's put it another way. Sometimes European influence doesn't have to be manifest in things like the actual presence, for instance, of trade goods, but you can have the stimulus to a regional economy coming in with some groups being directly affected by Europeans and some groups interacting with them not necessarily receiving the goods, but having their whole wealth in economy picked up.

Q It would be impossible to document that, wouldn't it?

A I'm not sure why it would be impossible.

Q Unless one relied on the oral histories.

A I'm not sure it would be necessary to rely on the oral histories.

Q You couldn't rely on archaeology if there were no goods there?

A Probably not. And similarly --

Q Couldn't rely --

MR. WILLMS: Could you let the witness finish, please.

MR. GRANT:

Q You couldn't --

MR. WILLMS: Could you let the witness finish, please.

A If I hadn't --

THE COURT: Are you in the middle of an answer or have you finished?

A Well, I finished enough for the time being, I think. It's now confused beyond the point.

MR. GRANT:

Q You could not rely on historical data for that, could you, because if they were outside the pale, if they were affected by the protohistoric in some other indirect way than say disease or trade goods there would be no historic record, because there wouldn't be direct contact. If there's direct contact it's historic, so you couldn't rely on historical record for that?

A Well, that's your opinion.

Q How could you rely on historical record for it?

A Well, I think that the examples that come to mind, and I wish I could think of specific references, or a specific reference are some African examples where there are records of indirect European influence not necessarily associated with trade goods that seemed to stimulate regional economies. These are reflected in colonial records, so it's historic sources I'm thinking of. Now, the colonial records themselves might be, and probably are, based on what native informants told them about what had been going on before the arrival of Europeans, but it's an African context that I was thinking of for that group.

Q So that proposition wouldn't apply to the Gitksan, or hasn't been applied to the Gitksan?

A No, not directly. I haven't applied that proposition directly to the Gitksan and Wet'suwet'en. But I'm just saying that their example of protohistoric, prehistoric and historic is generally acceptable, and in their case they're talking about the Central Subarctic.

Q Page 128 of Bishop and Ray they state:

> "The establishment of a clear picture of early contact cultures is necessary for the additional reason" --

I'm sorry, my lord, I'm on the third paragraph.

THE COURT: Yes, I have it.

MR. GRANT:

Q Do you have that Dr. Robinson?

A Yes, I do.

Q

> "The establishment of a clear picture of early contact cultures is necessary for the additional reason that it is easy to fall into the trap of attempting to determine the degree to which Indian societies have been transformed through contact by considering the extent to which historical variants of Indian culture approximate present-day Euro-Canadian culture."

And you would agree with that proposition, wouldn't you?

A I'm not quite sure what they are referring to there. I'll read it again carefully and see if I can find some kind of congruence in my own thoughts.

Yes, I think that their sentence there makes

sense.
Q And you agree with it?
A Well, again they're speaking of an ideal. It's --
Q They're speaking of a model, aren't they?
A In order to state whether or not I agree with it I'll just say that it's an ideal, and where they state that it's necessary, "The establishment of a clear picture of early contact cultures is necessary", I'm saying that that's an admirable goal, but not always attainable because of the kind of documentation that's available. So that although I agree it's an interesting principle, and they seem to have expressed it fairly well, and it's something I generally would agree with is sound, it's not always approachable.
Q Go to page 138, their conclusion, fourth line. No.
THE COURT: I'm sorry. What page?
MR. GRANT: Page 138, my lord.
THE COURT: Okay.
MR. GRANT:
Q Six lines from the bottom of that, the section on conclusions. They say:

> "Historical research when combined with a knowledge of the ethnology and archaeology of a region should not onlt correct many standardized errors still present in the literature, but should also be of considerable importance to comparative studies of cultural change and cultural ecology until recently restricted to a rather narrow time period."

Do you agree with that proposition with respect to research for the Gitksan and Wet'suwet'en?
A Well, first of all, let's discuss the proposition and then I can answer about its applicability to the Gitksan and Wet'suwet'en.
Q Do you agree with the proposition?
A As a general proposition I'll say that my answer is similar to the one I just gave, that it's a wonderful ideal and certainly serves as a standard perhaps that ethnohistorians, culture ecologists and so on would like to reach, but that it's not always achievable. I don't agree with the last part of the sentence, unless it's only applying to the Central Subarctic, that cultural studies, comparative studies of culture change and culture ecology until recently have been restricted to a rather narrow time period.

Q Okay.
A That to me has absolutely no application because cultural ecological theory and comparative studies of culture change deal with prehistoric sequences going back many thousands of years in many parts of the world, and it's certainly not a discipline or set of disciplines that are in their infancy. So my general response is to say that that sounds very nice, and its application for the Central Subarctic is certainly something that bears some testing out, and again it's an ideal -- with response to the last part of your question it's an ideal that is admirable and could in future be applied to studies of the Gitksan and Wet'suwet'en. I don't believe that the archaeological knowledge of the Gitksan and Wet'suwet'en region is very useful yet. It may be in the future for helping to interpret some of these problems. I don't know if the historical research will bear the fruits of labour that warrant it being held out to be that great a documentary record. So it sounds good, but I can't say I agree with it or really disagree with it vis-a-vis the Wet'suwet'en or Gitksan.
Q Well, let me paraphrase it. Do you not agree that historical research with respect to the Gitksan and Wet'suwet'en may correct many standardized errors still present in the literature?
A It's possible. But I cannot gauge the likelihood that because my current knowledge of the historic sources is such that it suggests to me that it's doubtful that they will shed much light on the early historic or protohistoric periods for that region.
Q Okay. Of course, you're not an ethno-historian either? You're not an historian?
A Well, we have spent a lot of time discussing labels. I feel quite comfortable doing ethnohistoric research in the sense that I've got some experience in the archives, some experience with archaeology and some experience with anthropological thought and theory. If you don't think I'm an ethnohistorian that's your opinion.
Q You didn't do that archival research for this report. You explained that.
A Yes. Many times I believe, sir.
Q Can you go to tab 31 of book one which is the Yerbury book. Now, Yerbury is another author to which you referred. When I say book it's Exhibit 1191, tab 31, and I'll refer you to page ten. Your citation of

Yerbury in your report is to an unpublished MA thesis from Simon Fraser in 1975. You did not cite the 1986 book by Yerbury on the Subarctic Indians and the Fur Trade. Had you read that at the time of preparation of your report?

A I'm not sure of the sequence with which I became familiar with Yerbury's various works and whether or not I read this one before or after.

Q Okay. You read it before you took the stand?

A Not thoroughly. I do have a copy of it. I haven't had the opportunity to sit and digest it completely.

Q Okay. Can you go to page ten, tab 31. "A Chronological Framework for the Canadian Athapaskans". Now, I'm not going to go back to what Yerbury explained his purpose is. That was discussed a few days ago, or last week when I put this in. It's set out there. But here he's talking about a model. And he says:

> "To analyze the processes of change, it is essential that a chronological order of distinguishable historic periods be delineated for the Canadian Athapaskans. The attempt of Bishop and Ray (1976)"

Referring to what we've just been discussing.

> "To establish a Subarctic chronology offers a heuristic model which should be empirically tested against the available published and archival data. The chronological units they define are employed throughout this study."

Now, you agree he's there referring to their chronological units of prehistoric, protohistoric and historic?

A I'm not sure those are the only chronological units he's referring to, because I think in that article they may also make some attempt at broadly delineating time frameworks for those periods or others even. I don't know if they broke the region down then or subsequently. So I'm not sure if he's only talking about historic, protohistoric and prehistoric in the context of that sentence.

Q But at least he's -- those were their general frameworks?

A Well, chronological -- to me they gave verbal

catagories, and I'm not sure by chronological he's referring to anything else in their article.

Q

> "The chronological units they define are employed throughout this study. Because Bishop's and Ray's model is a spatial one based on Subarctic Algonkians of the northern Prairie Provinces, Ontario, and Quebec and the Siouan Assiniboine rather than the Subarctic Athapaskans, the temporal sequence of these chronological units has to be adjusted to the specific variables of White-Indian interactions and, or course, to the subsequent sociocultural changes among Canadian Athapaskan populations."

And you would agree that to adapt their model -- assume for the purpose of this discussion he is referring to their model of prehistoric, protohistoric and historic, that to adapt that model, that temporal model, to another group such as he's doing here with respect to the Athapaskans one has to adjust the temporal sequence to the specific variables of white Indian interactions?

A Yes. And that's again why I would stress that perhaps it's something else that Yerbury is referring to other than the descriptions of prehistoric, protohistoric and historic, because he's talking about adjusting a temporal sequence of chronological units, and I don't know if in the descriptions we just read there was any temporal sequence of chronological units offered. So all I'm suggesting is that he may be referring to something else in that article other than simply those definitions.

Q Page 11 of Yerbury, Exhibit 1191-31, he states five lines down from the middle paragraph:

> "Since only documentary sources are employed in this study to establish chronological stages or eras, the Prehistoric Era is left to archaeologists. Within the Protohistoric and Historic Eras, manageable units or periods are chosen to describe or relect significant culture change.
>
> The model outlined here closely follows that discussed by Bishop and Ray (1976). Essentially, their model has both spatial and

> temporal dimensions. The temporal dimension involves the three main eras, and the spatial dimension is also defined. Shortly after each post was established, it was encircled by Local, Middlemen and Indirect Trade Areas."

So you can see here, you would agree with me, in the context of this that he's talking about in his temporal dimensions the three eras, three main eras?

A I believe so. And all I'm asking again is if there's any specific chronological framework that Ray and Bishop have offered in their article that he's also referring to.

Q Well, you're familiar with their article.

A Not recently enough to have a specific recall. And it seems to me from the passage at the beginning of Yerbury that you first read that he's dealing with something more specific or temporally designated than those general catagories.

Q Page 12:

> "Bishop and Ray insist that although their model was designed for the French-English fur trade era that ended."

That is the first full paragraph on page 123 of Yerbury.

> "That although their model was designed for the French-English fur trade era that ended in the Central Subarctic in 1763, it can be used to demarcate changes in socioeconomic relationships through time in other regions and at other times. These spatial dimensions reflecting the native way of life and trade relationships are temporal as well as spatial units, and they can be considered as periods within the Protohistoric and Historic Eras. The Indirect Contact Period of trade and the Middlemen Period would be included in the Protohistoric Era, as previously defined, while the Local Era falls fully within the Historic Era because contact was direct and regular."

And here he's talking about, as you say, the different eras that they are -- they're sub-breakdown of the eras in their article. And you would agree

that the spatial dimensions -- I'm sorry. That the model can be used to demarcate changes in socioeconomic relationships through time and other regions and other times?

A I'm sure it has some application for other regions and other times. It seems to be pretty broad and generalized as a model.

Q Can you go to page 166, chapter seven, Dr. Yerbury's conclusion. And after his MA Dr. Yerbury did do a PhD?

A I'm not sure. I believe so.

Q You haven't cited it though?

A Not directly.

Q You haven't cited it?

A You've probably done a more thorough review of that than I have so I'll take your word for it.

MR. GRANT: Okay.

THE COURT: Where do I find his conclusion, please?

MR. GRANT: It's the page following page 16, my lord.

THE COURT: Thank you.

MR. GRANT: It's actually page 166.

THE COURT: Oh, yes. Thank you.

MR. GRANT:

Q The first two sentences:

> "This ethnohistorical reconstruction has three interrelated aims. First, it has established an empirically based temporal framework to produce a more precise cultural history of the Canadian Athapaskans between 1680 and 1860 and to provide a proper comprehension of their changing ecological and sociocultural conditions."

You have not done that ethnohistorical reconstruction with respect to the Gitksan and Wet'suwet'en in your report, have you?

A Well, no. And I haven't produced a more precise culture history of the Canadian Athapaskans between 1680 and 1860.

Q You haven't produced a more precise cultural history of the Gitksan and Wet'suwet'en either, have you?

A No.

Q Okay. Page 167 Dr. Yerbury here comments:

> "Documentary research by Subarctic specialists is recent, and more sophisticated techniques

for analysing historical documents are currently developing. Chronological frameworks and terminology used a decade ago have now been superseded, although, too often, they are still being used. For example, Subarctic, the sixth volume of the 20 volume Handbook of North American Indians is seriously flawed because it uses a chronology by Helm, Rogers and Smith."

And he cites Krech, as well as Ray and Roberts. You agree with that proposition, do you not?

A Well, I don't really have a broad enough base in Subarctics as a specialty to be able to comment meaningfully on it.

Q Okay.

A Except to say what seems to be offered here is one scholarly opinion with the support of some other people, which I'm sure is countered by scholarly opinions by the people he's criticizing. It's not uncommon in anthropology for there to be concurrently several chronologies, models being offered for the same era or area, and scholars do disagree about the details of some of the interpretive frameworks. I wouldn't say that it's one of those baby bath water things that just because Yerbury doesn't like how Helm and Rogers and Smith have handled some details in some North American Indians Subarctic volume you'd want to throw the whole thing out.

Q But --

A So I'm not really sure what he's referring to specifically there, but I would say -- all I will comment on is that it's not uncommon to see this kind of criticism in the literature.

Q You would agree that more sophisticated techniques for analyzing historical documents are currently developing, you'd have no dispute with that?

A Well, sophistication is a relative thing. Just because it's recent doesn't mean it's better or more sophisticated.

Q Do you agree with that proposition or not?

A No, I don't entirely.

Q You would agree that documentary research with respect to the Gitksan and Wet'suwet'en is recent? Historical documents.

A I'm not sure I would agree with that. No, I will not agree with that.

Q Barbeau, Jenness did not refer to Brown or Harmon, did

they?
A I'm not sure. And I'm not sure why you're reaffying (phonetic) Brown and Harmon.
Q Why I'm what?
A Why you're separating out Brown and Harmon as a guage for measuring whether or not an analysis of historic materials is sophisticated.
Q I thought you said reaffying?
A Reaffy.
Q What do you mean?
A To set up on a pedestal. I think there's probably a more precise dictionary definition.
Q Well, I'm just using Harmon and Brown as an example of this early -- what about Simon Fraser, have you referred to Simon Fraser's writings by the way?
A Not specifically in this context. I am aware of --
Q You haven't read them or referred to them or cited them with respect to your opinion report here?
A I may have read them with regards to the opinion report. I didn't cite them or refer to them directly, no.
Q You can't remember whether you read them in respect to the report?
A Specifically with respect to the report, no, I can't remember.
Q Okay. Simon Fraser was at Fort Fraser around 1806, if I recall right. At Fraser Lake around 1806; is that right?
A I wasn't sure that was a question.
Q Is that right? If you don't know that's okay.
A Oh, good, I'm glad.
Q I just didn't hear you.
A I said I'm glad that's okay. I'm not sure of the exact date that Simon Fraser was in the area of New Caledonia.
Q Okay. Go to page 168.

"In contrast, the general model for cultural change adopted in this study accounts for changes within the protohistoric and historic eras and shows that the fur trade acted as the catalyst for successive modifications in Canadian Athapaskan culture history, cultural ecology, and social organization."

And then he said -- then he says:

> "Those who wish to debate the model must do so in terms of essentially the same source materials."

Now, my only question out of that is you would agree that if a -- if you are going to debate the model in terms of challenging Yerbury you would have to deal with the same source materials. That would be the proper way to challenge it. You would agree with that?

A I'm not sure. I think a theme that you've been referring to or coming back to once in awhile is that if you come to an understanding that there are additional materials those can form the basis of your challenge or inquiry.

Q Yes. Are you familiar with Edward Hosley, H-O-S-L-E-Y?

A No, I don't know him personally or professionally.

Q Have you read any of his treatises?

A I don't think so. In fact, if I'm not aware of him professionally then I probably haven't.

Q But as we discussed last night --

A Last night?

Q As we discussed last night you are aware of the -- just a moment.

A Yesterday afternoon.

Q You are aware of Arctic Anthropology, that publication?

A Yes. I think that was brought to my attention yesterday afternoon.

Q Yes. And this issue in 1980 dealt with -- it had this article by Hosley in terms of The Aboriginal Social Organization of the Pacific Drainage Dene. And you have not seen this before. I mean, you certainly didn't cite it and you say you don't recognize him so.

A If that was a question, no, I have not seen this before.

Q Can you turn to page 15, please. The conclusion of Mr. Hosley is in his -- this treatise of 1980:

> "It is my contention, therefore, that the Pacific Drainage Athapaskans, including those of the cordillera, were basically upland big game hunters, highly mobile, and characterized by a widespread, very fluid social structure which supported a highly flexible adaptive strategy."

Going to the next paragraph he says:

> "It has been suggested in the past that the widespread clan structure of the Alaskan Athapaskans, as well as the potlatch system, were elements that diffused relatively recently from the complex social structures which developed along the Pacific Northwest Coast. While there is little doubt that some aspects of social structure, concepts of wealth, and the like, did so diffuse, I am suggesting that the matrilineal basis, perhaps a system of ranked clans, and even the concept of the potlatch itself were ancient, and were indeed the basis upon which the Northwest Coast Dene speakers built their specialized cultures of complex social and economic relationships."

Going to the last paragraph.

> "In conclusion, the ethnographic data appear to support the proposal that the aboriginal social organization of the Pacific Drainage Athapaskans had as its basis a matrilineal complex of social structures. This was functionally related to an adaptive stato an adaptive strategy empasizing extensive big-game hunting supplemented by fishing in an environment which required high mobility, and was reinforced by widespread raiding and trade relations. Furthermore, I believe that the extremely widespread nature of this system supports the proposition that the matrilineal complex is ancient, and was part of the aboriginal core culture of all Dene-speakers."

You can't comment -- you can't comment on that because you haven't seen it before, but that certainly -- that -- Mr. Hosley's -- and I'm not sure if it's doctor.

A It's doctor. Well, he has a PhD listed at the --

Q Thank you. Dr. Hosley's treatise would be relevant to a consideration of the issues you were dealing with?

A Yes. To the extent that he's dealing with the northern Athabascans in Alaska on the Pacific that Kutchin, Kochan and Ingalik it has some bearing, and so does this issue of ancient matrilineal, but it has some research relevance in the broadest sense, but not

direct bearing that I can determine on the opinion report dealing with the protohistoric for the Gitksan and Wet'suwet'en.

Q Just a moment. Now, yesterday I referred you or I made an aside when we were talking about Kobrinsky to his unpublished dissertation, and I believe that you had -- just a second.

Yes. I'd ask that Hosley be put in at tab 49.

MR. WILLMS: I wonder if my friend has a reference for which of the plaintiffs' experts referred to this, or sorry, is this brand new to him too? It would be helpful if we knew which bibliography of the plaintiffs' experts this came out of.

MR. GRANT: It didn't, my lord. This is relevant to this witness.

MR. WILLMS: I'm sorry. My friend said it was important to research. I thought it might be referred to by a plaintiffs' expert.

MR. GRANT: Hosley is --

THE COURT: 49.

MR. GRANT: 49.

THE COURT: This will be 50.

(EXHIBIT 1191A-49: The Aboriginal Social Organization of the Pacific Drainage Dene - Hosley)

(EXHIBIT 1191A-50: Ethnohistory & Ceremonial Representation of Carrier Social Structure - Kobrinsky)

MR. GRANT:

Q Yes. Yes. And this is the lead page, abstract section of the introduction of the Kobrinsky dissertation which is unpublished. You recognize this dissertation. You looked at in advance of preparing your report, didn't you?

A I think I did, yes.

Q M'hm. And you didn't cite it. You cited this paper in your bibliography. In any event, it is here. Can you just go to the abstract at page one or Roman numeral one. The dissertation is entitled "Ethnohistory and Ceremonial Representation of Carrier Social Structure". It's dated August, 1973.

"The dissertation is in two parts. The first part develops a largely conjectural reconstruction of the social history of the

> Carrier Indians of north-central British Columbia in three stages."

And this is where he's referring, of course, to what he also refers in his paper you rely on of largely conjectural reconstruction. Going to the introduction, pages two and three. And I wanted to correct the report on this, my lord. My notes were -- my own note was incomplete. And at page two he states:

> "We are profoundly indebted to Diamond Jenness for his precise data on the seating structure of the Bulkley River potlatches (Chapter 4). The information concerning prestation-distribution procedures is contributed by my own field notes, also obtained in this instance from interviews with Bulkley River (Moricetown) informants. There is always a risk in combining data obtained at different times. (there is a thirty year span between Jenness' record and my own) as aspects of a single phenomenon. I have taken that risk in a number of contexts, but not without secondary support, or without acknowledging the uncertainty to the reader."

Going to page three he states with respect to this:

> "I should note, in this context, that my greatest wish, while among the Carrier, was to acquire firsthand observational data on a well-attended and well-structured potlatch. I had initiated fieldwork, in the first instance, with a view to producing an analysis of gift-symbolism, primarily in the potlatch context; such a study called, of course, for a detailed account of kinds and amounts of prestational relations of donors/recipients in the potlatch and in satellite settings. My interest in that problem arose out of casual observations made in connection with wedding and Bar-Mitzvah gifts in my home community of Winnipeg, and became focused upon the potlatch, specifically, during field work among the Coast Tsimshian (in the summer of 1968, preceding my

first stay at Fort Babine) of Kitkatla and Prince Rupert. During a total field period of something over a year among the Carrier (mostly at Fort Babine, plus three summer months at Moricetown) I attended one small funeral potlatch (of an untitled person), and two small para-potlatch events at Fort Babine (a woman's public repayment of personal debts incurred by her to persons of her father's phratry, and a ceremony known as 'returning the feathers' held several months following the funeral potlatch mentioned above), and I witnessed some potlatch proceedings through the community hall doorway during a brief visit, as a stranger, to Moricetown (I was still stationed at Fort Babine)."

He then goes on to describe the Fort Babine funeral. So he reflects here that he did spend three summer months at Moricetown. He spent most of his time at Fort Babine. And you have no reason, of course, to dispute his description of his fieldwork?

A No, I do not.

Q And he -- the only observation of a potlatch in Moricetown was as a stranger outside the door.

MR. WILLMS: No. He talks about discussions later on in the paragraph.

MR. GRANT: I said the only evidence of an attendance at a potlatch was -- at Moricetown was as a stranger outside the door.

MR. WILLMS: Oh.

MR. GRANT:

Q Now, if you go to page 32 -- page 32 and 33.

THE COURT: I think if you're going there we'll take the morning adjournment, Mr. Grant.

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

(PROCEEDINGS ADJOURNED)

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

Peri McHale, Official Reporter
UNITED REPORTING SERVICE LTD.

(PROCEEDINGS RESUMED AT 11:40 a.m.)

THE REGISTRAR: Order in court.
THE COURT: Mr. Grant.

CROSS-EXAMINATION BY MR. GRANT: (Continued)

Q I think I was referring you to page 32 at the bottom, third line up. This is of Kobrinsky's dissertation and he states there:

> "Recall that the point of the intended shift of the Hudson's Bay Company trading post, circa 1826, from Ft. Killmars to witpalt, was to intercept trade in furs and salmon with a main body of the Babine population."

THE COURT: Where is that please?
A I am sorry.
THE COURT: Where is that please?
MR. GRANT:
Q I am sorry, page -- Exhibit 1191A tab 50 Kobrinsky, page 32 at the very bottom. Sorry, my lord.
Do you see that, three lines from the bottom?
A Yes, "recall" is where you started.
Q Yes, okay. Up to the citation of Morice?
A Yes.
Q Did you check his information in support of that from Morice when you reviewed his dissertation?
A I am not sure if I did specifically and I am not sure if it's mentioned in the article which I did cite in my report. As you pointed out a few times I didn't cite the dissertation in the reports, so I am not even sure whether or not he stated that specifically in the article which I did cite.
Q No, but in -- I understand that, but you did review the dissertation and correspondence indicates that you reviewed the article and the dissertation in preparation of this report, and I am just asking if in your review of the dissertation to -- you know, what he is referring to in Morice, that's the Morice history of the northern interior of British Columbia?
A That's the -- okay, that's the 1905 one, is it?
Q Right.
A Specifically, no, I didn't check that footnote.
Q Okay. If this could go in, my lord, at tab 21 of Exhibit 1191, it is another extract from the same book, and I am not certain, I may -- yes, it goes in

at tab 21. It solves part of the tabulation problem.
A No, that's 1906. Is this the same one as the 1905 one that's cited in his thesis?
Q Okay. Well, let's look at the pages, okay.
A Well, it's just this says 1906. I wasn't sure if it's the same.
Q Well, yes. It may have been a typographical error in his thesis because when you go to these pages it appears that Father Morice is referring to what he's talking about, and if you just would look at -- yes. If you look at the bottom of 194 of Exhibit -- of what I have -- the extract I have just given you, Exhibit 1191 tab 21 page 194:

"It was in that year (1836) that Fort Alexandria was removed from the east to the west side of the Fraser, and that, to attract the trade of the Babine Indians, Ogden decided to move Fort Kilmars down to the northern end of Babine Lake. At that time the village near what is now called the Old Fort comprised one hundred and fifty inhabitants."

Now, that's a reference to the Babine Lake Fort that he is referring to. Now, he -- it then goes on on page 209, which is another reference of Kobrinsky, the middle paragraph:

"As a means of forcing back trade to its natural channel, as the Hudson's Bay Company would have it, it was resolved to remove Fort Kilmars, now badly in need of repairs, to the northern end of the lake, in the very midst of the disloyal Indians, and scarcely seven miles from the fishery. William McBean, an educated half-breed, born in 1790 on the east side of the Rocky Mountains, was then in charge of that post. Late in 1836 Mr. Ogden instructed him to make no further improvements on his buildings, but to prepare material for a new fort, to be erected at Hwo'tat."

And I think that that is the name at the end of the lake. That is the name that is on the bottom of page 32 of Exhibit 1191A tab 50, the Kobrinsky dissertation. So you see, it appears that although, as I appreciate you pointing out Kobrinsky says 1905 and this is 1906, that when one looks at the pages

that this is the discussion. Now, if you could go over to page 210, and 211, the next two pages at the bottom which is not cited by Kobrinsky, Father Morice goes on to say at the bottom, this is about McBean:

> "In his next communication he hopes to be able soon to occupy his new fort, but that expectation was not to be realized. Work dragged on amidst numberless difficulties from not too friendly Indians, so that, on the 27th of September, 1838, Peter S. Ogden ventured to inquire about the reasons for McBean's dilatoriness in occupying his new buildings. Had the half-breed told the whole truth, he would have confessed that the building material, though now ready, had not been so much as lifted from the ground. Indeed, it was not until over fifty years had elapsed that the new fort was erected with new timber."

Now, this page 210 and 11 Kobrinsky doesn't cite but if he had looked there, he would have seen that notwithstanding the intentions, according to Father Morice, it was not built. You were unaware of this kind of historical error in Kobrinsky's dissertation, are you?

MR. WILLMS: My lord, I object. I have a distinct recollection of Dr. Ray accepting that the new fort was built in 1836 so I don't know who's making the error here, whether it is Father Morice or whether it is Kobrinsky. So I don't know what my friend is talking about. I think he should, rather than suggest that somebody has made an error, just put the propositions -- I am making an objection.

MR. GRANT: Well, just let me take this out of the way then.

MR. WILLMS: If my friend wants to state a proposition, that is Fort Kilmars wasn't built until 1886, he can state that proposition. We can then look back at the evidence, including the evidence of Dr. Ray, the plaintiff's own witnesses, and resolve it if it's relevant, but I don't think my friend should suggest that so and so was in error when he doesn't know and when the evidence is conflicting as to who's right.

THE COURT: Well, I think the problem arises in part from the affirmative nature in which you are stating your propositions, Mr. Grant, rather than putting them in question form. I think that the suggestion you made to the witness now was that she, I assume, was that

she should accept that this statement by Father Morice is correct. I am not sure that she knows it's correct or whether she disagrees with it because it is probably correct. I doubt if she knows what Dr. Ray said, I certainly don't remember what Mr. Willms says he said, so perhaps we would best deal with the problem by way of questions rather than assertions of what the facts are.

MR. GRANT:

Q Right, I will rephrase my question. You agree that Kobrinsky does not cite pages 210 and 211 of page 33 where he discusses the move of Fort Kilmars; is that correct? You agree with that?

A Yes, I agree that he doesn't cite pages 210 and 11 but he is describing the intention of constructing the fort, not the actual construction of the fort in his pages 32 to 33 sentence.

Q Do you know when that fort was actually moved?

A No, I do not, but in light of the discussions you two are having now, I am even more confused.

THE COURT: I suppose it's possible that Dr. Ray didn't know about this either.

MR. WILLMS: That may be. But it's also in a number of other extracts that have been marked as exhibits.

MR. GRANT: Can you turn to page 56 of the Kobrinsky extract, footnote 6?

THE COURT: What page please?

MR. GRANT:

Q Page 56, my lord, Exhibit 1191A tab 50.

> "I confess to being puzzled."

I am referring you to footnote 6:

> "I confess to being puzzled by the distinction between 'clans, and houses' introduced by Jenness in the foregoing citation. There is, to my knowledge, only a single level of formal (named) matrilineal divisions subtended to the phratries: these may be referred to interchangeably as 'clans' or 'houses'. The Carrier term for these divisions is yox meaning 'houses'."

Did you take into account, in relying upon Kobrinsky, his puzzlement at Jenness' distinction?

A Perhaps I did not take this specific puzzlement into consideration but I am certainly aware that there is

considerable question about the use of terms such as house, band, tribe, chief, lineage, and so on throughout the region. Just as an example from a slightly different area, I noted the other day that Don Mitchell notes that Viola Garfield, from her 1939 to her 1950 publication, dropped the use of the word "house", and now he's using the term maximal lineage. There is a considerable amount of confusion throughout the area about terminology and so I may not have investigated this one specifically, but I am aware that it's often contentious.

Q Did you take into account puzzlement of Kobrinsky when you prepared your report and relied upon him as he refers to in footnote 6? Did you or did you not?

A Well, I would say I took it into account but weighted it perhaps not as much as other considerations.

Q Okay. Go on to page 76, footnote 18. He states at the beginning:

> "Unfortunately, my data are insufficient at this moment to draw firm conclusions on some crucial questions concerning the traditional phratry hunting-trapping areas and their articulation with the present system of trapline 'companies'. My data consist of lists of companies and their membership and some rather uncertain statements concerning the relation of these to the traditional hunting-trapping areas. I lack sufficient genealogical information and personal phratric identities for many company members to answer some of the questions which would do much to clarify the present system."

Did you take these comments of Dr. Kobrinsky of the insufficiency of his data into account when you relied on his treatise and dissertation?

A Yes, I did.

Q Page 129, half-way down the page:

> "I have been told on several occasions by Bulkley and Babine informants alike that each phratry has its own wall during a potlatch, and the single rather sparsely attended potlatch to which I bore witness confirms it. In addition, I have recorded several versions of the specific assignments, as has Mr. James Hackler, 1958; these, of course, indicate certain variations according to which

phratry is host of the event. However, there are many apparent contradictions beyond these expected variations, and I regret that I am presently unable to define the underlying principles."

Did you take in his inability to define the underlying principles into account when you relied on Kobrinsky?

A To the extent that I wasn't investigating any relationship between a modern Bulkley River population and the protohistoric and early historic Wet'suwet'en or Gitksan, I did not take these specific problems into account.

Q Okay, thank you. You referred to Sheppard Krech, K-r-e-c-h. In fact, Shepard Krech III, and he is a scholar that you respect and you are aware of?

A I am not sure I have read extensively enough of Mr. -- of Dr. Krech's writings to yet use the word "respect" but I am certainly aware of him.

Q Well, you certainly said some good things about him in your evidence. Are you aware of his treatise in Arctic Anthropology 1980, same one in which Mr. Hosley did his treatise in which Shepard Krech in his Introduction: Reconsiderations and Ethnohistorical Research says: "Reconsideration of aboriginal social organization in the North American Subarctic"?

A Am I aware of?

Q Yes.

A Yes.

Q Have you read this?

A Not recently and I am not sure how thoroughly. I have read it.

Q And you go to page 8, his assessment, the last page, this is where -- this is his conclusion and his reference to different authors or his introduction to different authors. He said -- he says half-way down:

"Obviously, the full range of subarctic cultures is not covered; equally evident, many ethnohistorical sources remain to be analyzed."

And this is the question I am directing --

A I am not sure where you're reading.

Q Assessment.

A Yes. Half-way down?

Q Half-way down that section on assessment?

A "Obviously", yes.

Q Okay.

> "My personal bias is that primary ethnohistorical documents must be examined in detail and analyzed in order to test specific hypotheses."

Do you agree that primary ethnohistorical documents must be examined in detail and analysed in order to test specific hypotheses?

A In some cases, yes, and I would say that he is perfectly entitled to his scholarly opinion expressing his personal bias.

Q And he goes on to say:

> "Arguments depending on intuition or on comparative data, while useful, will not substitute for this type of precise ethnohistorical analysis."

Do you agree with that statement?

A Yes, and I also state that the contrary holds, too, that precise ethnohistorical analysis will not always substitute adequately for reliance on comparative data.

THE COURT: What kind of data?

A Comparative. I think comparative examples can be very insightful in investigating some of these questions.

Q But comparative data in conjunction with ethnohistorical data is even more helpful?

A Yes --

Q Is it not?

A -- depending on what kind of ethnohistorical information is being brought to bear and depending on what kinds of comparative examples are being brought to bear and what aspects of those are.

Q You know Eleanor Leacock?

A Not personally. I am aware of some of her writings.

MR. GRANT: I'd ask that the Krech article be marked at tab Exhibit 1191A --

THE COURT: 51.

MR. GRANT: 51, thank you. And I will provide tabs later.

(EXHIBIT 1191A-51 - RECONSIDERATIONS OF ABORIGINAL SOCIAL ORGANIZATION IN THE NORTH AMERICAN SUBARCTIC - KRECH)

MR. GRANT:

Q Sorry, my lord, this one doesn't seem to be punched. And the same issue of Arctic Anthropology, Eleanor

Leacock, does a reappraisal of aboriginal Athapaskan Social Organization comments. Have you read that?

A I haven't seen it yet.

Q I am sorry.

A No, I don't believe I have seen this one.

Q Okay. In her conclusion, she states on page 62, the bottom of that page, left-hand column:

> "Asch reminds us sharply that the reconstruction of native Canadian history is a matter of direct political significance. Interests opposed to the Dene will use all available pretexts to deny the Dene claim to 'aboriginal title' to their lands and ill-thought-through statements about population decimation and cultural transformation can be used against them."

Do you agree with that proposition that ill-thought-through statements about population decimation and cultural transformation can be used against the Athapascans?

THE COURT: I haven't found that passage. Where is it please?

MR. GRANT: Page 62, my lord, it would be the last full paragraph starting "Asch".

THE COURT: Yes, I see it, thank you.

MR. GRANT:

Q I am going to go on, doctor, if you could just -- I am just breaking it up. Do you agree with that statement?

A Well, you read me three sentences and now you have asked me about one specific aspect of them and I am giving it a moment of reflection if that's all right.

Q Yes. I just wanted you to read the introduction of what you say there.

A You have asked me about the part of the statement "ill-thought-through statements about population decimation and cultural transformations can be used against them". I imagine that that's so. I don't really have an opinion about it.

Q

> "That we should be sensitive to this fact and responsible in our phrasings is clear."

You would agree with Dr. Leacock on that comment?

A Well, I think we should be sensitive to that and other facts that have to do with objective scholarship.

Q

"Yet we should also note the double standard involved: no one would argue that the depopulation caused by the Black Plague in Europe negated national continuities, or that the shifting boundary between France and Germany could give some third party the right to their land. And the case is easily made that French and English cultures have changed as radically in many respects since the turn of the 17th century as have native Canadian cultures."

And you would agree with that last proposition, that French and English cultures in Canada have changed as radically in many respects since the turn of the 17th century as have native Canadian cultures, wouldn't you?

A Yes, in a very broad, broad sense. I am not sure what changes are made in the Canadian cultures Asch is suggesting are comparable or directly related to French and English Canadian -- or French and English cultural changes.

Q Yes, this is Dr. Leacock.

A So when you use comparative words like "changed as radically" and yet you don't really have specified what are the changes being compared, it's hard to agree with that kind of statement. In a broad sense it sounds all right.

Q

"Indeed, it is sheer racism to imply that somehow the latter should not have changed greatly over time, and straight chicanery to argue that since they have they are no longer the same peoples. In the end, it is more than meticulous scholarship that counts; it is an anthropologist's ability and readiness to participate in public hearings and present the native Canadian viewpoint when called upon to interpret the culture historical record."

Dr. Leacock then goes on to say:

"Meanwhile, it is in the best interest of the Dene, I would think, as well as of the Algonkian peoples to the east, for anthropologists to help reconstruct and record their history."

You would agree with that proposition in that sentence, would you?

A I am sorry, I am reflecting on the one previous to that.
Q Well, I am at --
A The "meanwhile" part.
Q

"Meanwhile, it is in the best interest of the Dene, I would think, as well as of the Algonkian peoples to the east, for the anthropologists to help reconstruct and record their history."

Would you agree with that statement with respect to the Gitksan and Wet'suwet'en?
A I would not want to speak for the Gitksan and Wet'suwet'en about what is in their best interest. I wouldn't presume to do so.

MR. GRANT: Those are all my questions.
THE COURT: Thank you. Re-examination?
MR. WILLMS: Yes, my lord. My lord, perhaps on the first point, my friend did mark a portion of Kobrinsky at 1191A-50 which corrected his earlier assertion that -- about the fieldwork that had been done, but I had noted and I had prepared the whole introduction including pages 6 and 7, and I wonder whether or not we could just put in, rather than me marking a whole new introduction, just put 6 and 7 in there and I'll take care of that over the lunch break.
THE COURT: Yes, all right.
MR. GRANT: I am not certain if my friend, is he suggesting that he is going to insert pages 6 and 7 or --
MR. WILLMS: Yes. I already have copies, I just have to pull it apart and I will take care of that.
MR. GRANT: Oh, I see.
THE COURT: Do you want to mark your empty book 1192?
MR. WILLMS: Yes, 119 --
THE COURT: 1192.

(EXHIBIT 1192 - ORANGE BINDER - RE-EXAMINATION OF DR. ROBINSON)

RE-EXAMINATION BY MR. WILLMS:
Q 1192.

Now, you will recall, Dr. Robinson, that my friend put before you a copy of The Direct Historical Approach to Archaeology?
A Yes.
Q And that's the -- if you will just check that, just check and confirm that that's the Steward article on

The Direct Historical Approach to Archaeology that was referred to in your earlier evidence?

A Yes, it is.

MR. WILLMS: All right. Could that be tab 1, my lord?

THE COURT: Yes.

(EXHIBIT 1192-1 - EVOLUTION AND ECOLOGY - STEWARD)

MR. WILLMS:

Q My friend -- you recall that my friend referred you to the work by Dr. Coupland, Dr. Coupland's dissertation?

A Yes.

Q And he -- and the first bit of evidence that I'll refer you to from my friend's note is at page 21669 volume 289, where he suggested to you that the first time that the -- do you have an objection?

MR. GRANT: No. I am just reading over your shoulder.

MR. WILLMS:

Q He talks about the work done by Coupland and suggests that it doesn't line up with the other scholars, that the work that you have done doesn't make sense if you line it up with the scholars who don't agree with you. And then he says this:

> "That's part of your testing; you have to look at those who disagree as well as those who agree?"

And then you say this:

> "Could I say one thing here. I cannot think of many scholars working in northwestern North America who disagree with the general kinds of propositions laid out by those writers to whom I have been referring. It's fairly common knowledge in anthropology, and the -- we are gaining collectively a more sophisticated knowledge through the combined work of several modern scholars about the nature of the protohistoric period and early post contact developments and so on. But there is certainly consistency in this -- in this opinion."

And then my friend said this:

> "I will give you a chance to deal with that."

And my recollection is that he didn't come back and

give you a chance to deal with it. Is there something more that you want to say about the proposition that my friend made that you looked at information that you agreed with but ignored information that you didn't agree with?

A Well, only this: That, to the best of my ability, I read as many things pertaining to the area and would intend always to do so, whether or not they agreed with a particular interpretation or point of view. And in my selection of sources that I used and cited and referred to, I did find consistency in the expression of these ideas relating to the protohistoric and early historic developments stemming from influence from European sources.

Q Now, my friend also said, and this was in specific reference to Kobrinsky at volume 290, page 21732, he said:

> "...but I ought to ask you if you could think of any scholars in the field that disputed Kobrinsky and if you looked at them? You didn't cite them."

And then you answered:

> "You might have to lead me into that area of literature because offhand I am not familiar with pieces that dispute that."

Now, when you did your research in respect of Dr. Kobrinsky, were you looking for opinions which both supported or refuted what Dr. Kobrinsky was saying?

MR. GRANT: Well, my lord, isn't this something my friend -- the paragraphs 41 to 48 of her report are all about Kobrinsky and my friend led evidence on direct about Kobrinsky and why she relied upon Kobrinsky and this was all canvassed on direct. I submit this is not something new that was as raised on cross-examination. It is not proper re-direct.

MR. WILLMS: Well, with all due respect to my friend, what is new is that during the course of the cross-examination my friend conducted the cross-examination as if he had the refutation behind his back, testing the witness, well -- and that's why the witness said there, "You might have to lead me into that area of literature" which my friend never did, "because offhand I am not familiar with pieces that dispute that". And all I want to make clear here is whether or not the witness

looked, when she did her review, looked for anything that might dispute Kobrinsky.

THE COURT: You are not seeking to introduce further learned treatises in this area?

MR. WILLMS: I am not, my lord.

MR. GRANT: And I did refer her to last night and today, we had Bishop, we had Hosley, we had Krech, and I have dealt with them but I haven't dealt with them and said now I am going back to that page, but I have put disputed matters which she hadn't referred to and hadn't looked at and hadn't seen.

MR. WILLMS: Well --

THE COURT: I think that I will allow the question only because it seems to me it can be answered with a "yes" or a "no" and doesn't open up another large area of cross-examination. It bears very directly on the credibility of the witness and I think she should have an opportunity to answer the suggestion that was made in cross-examination that I would not allow it to -- that to lead to a further long introduction or any introduction of more material about the differing views that might exist regarding Dr. Kobriansky or his work.

A My answer to your question, as much as I can remember the precise phrasing, is that to the best of my ability I read a lot of sources pertaining to this area and was certainly not seeking only to find information that supported my opinion and in reference, so I would have certainly been interested in information supporting many different points of view. And to the comments that Mr. Grant made right now, I am not satisfied that Bishop, Krech or Hosley in those articles just put before me as exhibits disagree with the basic interpretations that I have offered in my opinion reports so I don't see that they stand up as refutations.

MR. WILLMS:

Q Okay, thank you. There have been many references to your dissertation and you have referred a number of times to your chapter 3 and your chapter 4, some of the extracts have been marked, some of them haven't. Can you just confirm that the two volumes that I put before you contain your dissertation?

A Yes.

MR. WILLMS: Could that be the next exhibit please, my lord?

MR. GRANT: Well, my lord, the dissertation, why wasn't this dealt with on direct? I mean, the dissertation is

cited in her report, my friend was fully aware of it and if it was of central importance -- in fact on page 2 of her report she says her research is based on her dissertation. This is not something that came out in cross-examination with respect, my lord, and I think that it's a little late to gild the lily this way by my friend and I suspect -- I say, if he wanted to put it in, he had his opportunity when he was on direct and, if he wanted to say I am putting it in and I haven't got it copied yet, everybody would have understood that problem, but why is he doing this on cross? Now, there are certainly parts of it that I referred to, it could have been dealt with and put in on direct.

THE COURT: I suppose it could not be put in in chief, could it, unless it was the plan to put it in and notice had been given?

MR. GRANT: Well --

THE COURT: If there was no plan to put it in and notice wasn't given, it could not have been put in in chief. The question then arises has the cross-examination in any way opened the door for that to be put in now when it couldn't have been put in in chief. Now, firstly, could it have been put in in chief?

MR. GRANT: Well, I think there is that problem my friend has too, and when I say that, is that he could have --

THE COURT: The problem you both have, because it answers your argument that your friend should have put it in in chief if he doesn't do it, then that answers that.

MR. GRANT: Well, I think that what my friend could put in in reply is chapter 3 because the witness did refer to chapter 3, and I think that he -- I put in part of chapter 3. If my friend thinks all of chapter 3 should go in, I have no difficulty.

THE COURT: I don't think there can be much doubt about that. Do you seek to put in more, Mr. Willms?

MR. WILLMS: Well, the only reason why I seek to put the whole dissertation in, my lord, is because not only chapter 3 was referred to but also chapter 4 was referred to and, in order to understand the approach of the dissertation, the introduction is always relevant as to what was going on. Now, certainly I could pull out portions of it but, in my submission, I have got it here, we can go through and patch-work through it. I don't understand the difficulty that my friend has in putting in the whole dissertation.

THE COURT: The parts you put in is tab 24, I think, isn't it?

MR. GRANT: 35, my lord.
THE COURT: 35? What's 24?
MR. GRANT: I am sorry, 34.
THE COURT: What is 24?
MR. GRANT: Tab 24, I am sorry, yes. A small excerpt was put in at tab 24 pages 369 and 370 and the balance was put in at tab 34.
MR. WILLMS: But the page -- if you look at the page references, my lord, it spans all the way from at tab 34 from page 74 which is part of chapter 3 all the way to references 326, 339, and 340, which I understand is chapter 4 or further along.
A I think we are in chapter 7 now. I am not sure.
THE COURT: Well --
MR. GRANT: My lord --
THE COURT: Chapter 3 starts at page 74 and we've got 74 to 77. How far does chapter 3 go beyond page 77?
MR. GRANT: To 162.
THE COURT: To 162?
MR. GRANT: Mm-hmm.
THE COURT: Well then, we are agreed that that can go in?
MR. GRANT: Yes, that can go in.
THE COURT: What is 145?
MR. GRANT: That's part of chapter 3.
THE COURT: Oh, yes. All right.
MR. GRANT: With respect to the balance, my lord, I think that the principle that you have established, for example, an interview was done with a plaintiff's witness, for example, and used in cross-examination in an effort to put in the balance of the document, you have said, well, if that document, if that balance is logically connected to the extract that has been put in cross, it can go in. And I -- in order to avoid some of the piecemealing and because the witness referred to chapter 3, I am not going to take any objection and we can deal with which part of it's relevant to the rest of it later. But just because pages 316 and 317 and 325 and 326 are in in cross-examination does not in my view -- my friend say, well, I'd like to go from 163 up to 316.
THE COURT: What chapter is 316?
MR. WILLMS: Chapter 6.
THE COURT: And where does it start?
MR. WILLMS: 295.
THE COURT: And how far does it extend?
MR. WILLMS: To 348.
THE COURT: Well, I think the rest of chapter 6 can go in.

MR. GRANT: Well, the difficulty I have, my lord, is that chapter 6 is The Significance of Northern Northwest Coast Indian Agriculture in Terms of Cultural Evolutionary Theories, starts at page 295 and goes to 348. That is, with all due respect, from my review of it, entirely irrelevant to the proceedings here except that the extracts that I have referred to which have been partly what the witness has been discussing and it's not the -- just because those pages come out of that chapter, the balance of the chapter , with respect, is not relevant at all and doesn't have a bearing on that. If my friend says there is a page or two before or after or even ten pages before that explains something the witness said in the page that I put then I have no objection to that, but this holus-bolus approach of filing the thesis isn't necessarily relevant, isn't the approach that should be taken and, with respect, I don't think it has been the approach taken in re-direct.

MR. WILLMS: My lord, I want to add one other chapter and that is my friend -- this -- he didn't mark it but he actually put at page 21886, Mr. Grant at line 31, volume 291, Mr. Grant asks -- sorry, at line 18:

> "Q What is your basis for saying the Russians began to settle there in the mid 17th century? What source did you go to? What source did you rely on?
> A If I could check the beginning of chapter 4 in my thesis, I think that possibly the source of error there or at least the reference to which I am referring to -- the beginning of which chapter was it?
> Q I think chapter 4."

Then my friend put it in front of her, said "here's chapter 4 of your thesis".

MR. GRANT: Page 165.

MR. WILLMS: And then there is a reference to footnote 2, for chapter 4 and other statements that my friend put from chapter 4, so that my friend has put extracts now from chapter 3, chapter 4, chapter 6, and chapter 7 of the dissertation. He's put those extracts to the witness and made suggestions.

Now, your lordship may recall that when I was cross-examining Dr. Galois that I put portions of the draft, and we had that interesting, if I can put it

that way, exchange between Mr. Adams and myself about whether or not if I put the draft to a witness I would then be suspect or, not suspect, but liable to see the whole thing go in later on. And it was my recollection at the time, because I didn't actually do it, I withdrew, but it was my recollection at the time that had I carried on it would have allowed the balance of the draft to go in because I had touched on parts of it since parts of the draft could be explained by other parts of the draft.

Now, rather than take the court's time in going through and linking together chapter 3 of the dissertation, chapter 6 and 7, and chapter 4 which are all expressly referred to by my friend in cross-examination, I am just suggesting that the whole dissertation be marked. To the extent that there is something irrelevant in there, we've got lots of irrelevant evidence in my submission that your lordship will have to ignore at the end of the day, and if there is something irrelevant in here then we can put that into that category. But it's so very difficult in my submission, especially in light of the cross-examination where the witness did refer to her dissertation time and time again in response to my friend's cross-examination questions that, to the extent that there is support in her dissertation rather than go through it piece by piece through her evidence, page by page, if the dissertation is in, and it's not -- my lord, I am not submitting it as a stand-alone opinion, I am submitting it as a response to my friend's question, "Where's your support?" and the witness said many times, "It's in my dissertation". Sometimes she said chapter 3, chapter 4, sometimes she didn't make a specific reference to a chapter. But it's referred to time and time again and I don't want to be caught at the end of the day, in my submission, with a submission from my friends that there is no support in the record because I have been barred from putting in the support that the witness has expressly referred to.

MR. GRANT: Well, I think that my friend is really -- he missed out his own statement when I put chapter 4 and I think this exemplifies the problem. I didn't put chapter 4 to the witness, I put -- and my friend said I said here is chapter 4 to your thesis, and Mr. Willms objects, page 165. Now, page 165 of chapter 4, and that's -- and goes on for two pages, page 165 and 166

and I have no problem with putting those pages in, they deal with the Russian fur trade which was what the question was about. Chapter 4 covers from 1786 to 1840. The other parts of chapter 4 were not even discussed in cross-examination. This is the part that was discussed. And I had to go through the dissertation to determine what was relevant and I did, and I think that those sections bearing on the comments about the Russian trade on -- pages 165, 166 are fine, no problem, but the whole dissertation should not be allowed in, it is a boot-strapping in all -- with all due respect in my view.

THE COURT: All right, thank you. Ms. Russell, do you have any submission to make?

MS. RUSSELL: I wish I did, my lord.

THE COURT: All right. Well, I think all of chapter 3 may go in. I think those parts to which the witness asked for access to in chapter 4 during her evidence and those parts related to that subject -- but not the whole of chapter 4 may go in, I think it's only two pages. I am uncertain about chapter 6 because the part that has been put in starting at page 316 and extending to 317, I don't know -- well, I am sorry, I think all of the part (d) can be put in which I understand is chapter 6, and does chapter subsection (d) extend to include 325 to 326, and 340?

MR. GRANT: Yes, it does, I believe.

THE COURT: All right: Well, I think all of chapter (d) may go in. I will not rule on the balance of chapter 6. I will ask counsel to let me know when we reconvene after lunch whether in their view any of the other parts of chapter 6 are so connected with part (d) that they are necessary to be included so as to understand the context of part (d). I don't have a submission from counsel about chapter 7. I don't remember what it was all about.

MR. WILLMS: The chapter 7, my lord, extracts from chapter 7 were marked by my friend.

THE COURT: Is that tab 24?

MR. WILLMS: I think at tab 24. Pages 369 and 370 were the pages that were marked.

THE COURT: And what is the -- what are the geographical limits of chapter 7?

MR. WILLMS: It says, "Assessing the impact of early contact with Europeans on northern Northwest Coast Indians socio-economies.

MR. GRANT: Page 349 to 426, my lord.

THE COURT: 349.
MR. GRANT: To 425.
THE COURT: All right. And how much of it was mentioned in the evidence, just these two pages?
MR. GRANT: Yes, my lord.
MR. WILLMS: Those were the two that were put to the witness.
THE COURT: Well, I'd like submission from counsel as to whether it's necessary to have any other parts put in evidence so as to explain or -- explain or give the context or otherwise connected with the two pages that had been included in tab 24 of Exhibit 1191 and I will give counsel from now until two o'clock to undertake that research.
MR. WILLMS: I should say before just so that my friend knows, he also referred to the start worksite section, page 507 which is the bibliography to the report. I don't know if my friend has an objection to the bibliography going in. He did put it in front of her.
MR. GRANT: I will consider that at two, my lord.
THE COURT: I will hear from counsel at two o'clock.
THE REGISTRAR: Order in court. Court stands adjourned until two o'clock.

(PROCEEDINGS ADJOURNED AT 12:30 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.

_____
TANNIS DEFOE, Official Reporter
United Reporting Service Ltd.

(PROCEEDINGS RESUMED PURSUANT TO LUNCHEON RECESS)

THE COURT: Yes, gentlemen.

MR. WILLMS: My lord, the specifics that your lordship referred to before the break, I have discussed those with my friend and if the next submission that I have fails then my friend and I have agreed that we don't need to take up the court's time going through Dr. Robinson's evidence and find out where she referred to her dissertation, and that if we have any problem doing that we can come back.

THE COURT: All right. Thank you.

MR. WILLMS: So that that nuts and bolts kind of process my friend and I can do out of court. But I do want -- and I wanted -- I refer to Dr. Galois, and there was a portion during Dr. Galois which does touch on this, but it wasn't the one I was thinking of. I want to clear that up. And I apologize to start with because the portion from Dr. Galois, which is at volume 241, was when I had objected to Dr. Galois' opinion report going in. Then I was marking drafts of his opinion report. And your lordship mentioned the well known Protopappas case. And then we had that discourse when I withdraw, decided not to tender the drafts. And what your lordship said on that occasion, which is at page 17748 at lines 25 to 31 with respect to me putting portions of this document in was as follows:

> "It seems to me what your position, Mr. Willms, certainly is, is that if you cross-examine and you do so sufficiently to make some parts of this exhibit admissible -- and I would think that at least the parts that you cross-examine on would become admissible -- your objection to the report must to that extent at least be compromised."

That is what I understand my friend's position is, is that the worst position he can be in is that he's compromised perhaps to the extent that he has cross-examined on portions of the report.

There's two things I would like to say about that. The first thing is that, of course, Dr. Galois' draft was a draft and wasn't something that he said he relied on. It wasn't one of his references to his report.

The second point is the extract that I handed up

to your lordship which is from Dr. Daly when my friend Mr. Grant was attempting to put in -- and this was one of the early occasions of putting in bibliography, references from a bibliography. And I think I'll just read from the bottom, my lord, where Mr. Grant at line 36 says:

> "Dr. Daly was tendered to give anthropological evidence. I could have put 20 documents that Dr. Daly relied on. I didn't see that as necessary. What I wanted is that you understand or have an appreciation of the type of thing that he was looking at. And, of course, the Brown document was an example of that. So it is like you say, an appraisal that may go in as an exhibit, but it doesn't go in to prove the truth of the second property that the man looked at. All it does is this is one of the foundations for forming an opinion. What is important here in the example that you gave is not that we prove that an 1826 Kliiyem lax haa shot a moose, but what we prove is that Dr. Daly's opinion is that in this area given that time, given that example, which I don't think is probably adept, but --"

THE COURT: Excuse me, Mr. Willms. Thanks, Mr. Willms.
MR. WILLMS: At the top.

> "That given that example that I don't think is probably adept, but given the period of time that your lordship -- anthropological opinion."

Now, down at the bottom, and this is your lordship at line 44 after a discussion about published authorities, and this is a precursor to your lordship's rulings where you did rule that the authorities, treatises, published or unpublished which are set out in a bibliography were admissible. Your lordship says at the bottom:

> "I think that's a convenient way of doing it. I'm not sure there is any magic having them marked as exhibits at the trial. I think it is a convenient collection of them. I think they can be referred to in argument whether they are marked or not."

MR. GRANT: And referred to by other witnesses."

And then later on -- neither party at that point asked your lordship for a ruling, but your lordship did go on and rule that treatises, which includes unpublished material which are listed in the bibliography delivered along with the opinion report, would be admissible, and not admissible for the purposes described in your lordship's ruling.

This dissertation which, as I said earlier has been referred to many times by the witness in her evidence, this dissertation is in her bibliography as one of the foundations of her report. It falls within your lordship's ruling. It is not tendered by the defendants as an opinion in this case, although ample notice was given to my friends. But it's not being tendered as an opinion, but it is being tendered as the foundation for part of the opinion. And to that extent it is my submission that the dissertation as a whole, with this extensive bibliography attached, is admissible and that the question of the purposes for which it is can be left for later. And I'm not submitting -- as I'm suggesting right now I am not submitting that it goes in except as adopted by the witness in the stand as an opinion in these proceedings, but it does go in to show the underpinnings of the opinion that's been tendered. And it's my submission that there's no reason to draw a distinction between academic works that are prepared by other authors and academic works prepared by the author himself. Dr. Ray put in another document, in fact, one that post-dated his -- his opinion report, and that was marked as well. So I don't know what the distinction here that my friend is drawing between Dr. Ray who can put in all sorts of his own writing even though the formal requirements of the Evidence Act aren't complied with, but this witness can't.

THE COURT: Mr. Grant?

MR. GRANT: Well, first of all, my recollection of the article that Dr. Ray put in is it was put in in cross-examination by Mr. Willms.

MR. WILLMS: No, it was not. It's in the plaintiffs' documents, that article.

THE COURT: Well, there's been such a flurry of material and -- flurry is not the right word -- blizzard of material, and the rulings that -- I'm not sure that I can be

consistent in this. I think that I'm going to mark this, the whole thing, for identification and let's get on with other things and deal with this later. And I'm terribly conscious of the time pressure now, and I think we ought to get on to something that might be more productive than this particular question. I think I'll just mark it for identification and I'll hear from you gentlemen when we have more time.

THE REGISTRAR: For identification, my lord?
THE COURT: Yes.
MR. GRANT: I think my position is clear from what I said this morning and I need say no more in light of time constraints.
THE COURT: Yes. Thank you.
THE REGISTRAR: 1193.
THE COURT: Thank you.
MR. WILLMS: Perhaps dash one or --
THE REGISTRAR: Two volumes.
MR. WILLMS: Two volumes.
THE COURT: A and B.
MR. WILLMS: A and B.

(EXHIBIT 1193A FOR IDENTIFICATION: Report - Sheila Robinson - Volume 1)

(EXHIBIT 1193B FOR IDENTIFICATION: Report - Sheila Robinson - Volume 2)

THE COURT: I suppose I could get out my UBC library card and look at it if I wanted to anyhow. It's on file at the UBC library?

A Yes. There is one or two copies at the library.

THE COURT: I don't know what judicial pride there is in using my library card.
MR. GRANT: I'm concerned with all the other material you have to read out of this case a lot of it --
THE COURT: I don't expect I'm going to do it.

RE-EXAMINATION BY MR. WILLMS CONTINUED:

Q Dr. Robinson, do you have exhibit -- black Exhibit 1191? Could you turn to tab 7. My friend had the draft in front of you, which is six pages in, and was asking you questions about the draft. And you said that the language was reminiscent of your language. He was reading at the bottom of the page.

A Yes.

Q And that it looked like your language. Do you recall

that?

A Yes, I do.

Q And my friend then left it. And I wonder if you could turn to tab 16 and if you can possibly keep tab 7 open at the same place. You'll see at tab 16 this is your December 5th draft of the beginning of your report. And on page two of tab 16 at the very bottom:

"Protohistoric developments" --

A Sorry. Tab 16 at the bottom of page two. Yes.

Q And you'll see that if you read through it it's virtually identical except that you've changed "particularly stressed" to "particularly important" at the draft. But does that assist you if you look at the bottom of that page and over to the next page in recalling whose language is being used in the draft?

MR. GRANT: My lord, I did raise this -- the next morning my friend pointed out to me, and I did raise it, and I filed the tab 16 already, and the witness had already agreed that that's where the writing was. That's my first objection. So I did give her an opportunity to explain that. I think that nothing new arises.

The second is that the witness -- I believe the evidence was the draft was written, as is evident by Mr. Plant, and that is the draft, the earlier one at tab 7. So I would object, because I did give this witness an opportunity and corrected the position after my friend advised me of that and pointed it out to me.

MR. WILLMS: I'm just trying to clear up the fact that this is the witness' language and not Mr. Plant's language, my lord. And I take it my friend's conceding that now and we can move on to something else. I didn't know that he had by marking the second document conceded that it was, in effect, a re-arrangement, but it's the witness' language.

MR. GRANT: Well, tab -- I think it became evident in evidence that tab 16, the December 5th letter and the attachment, is a draft of the witness. That tab 7, a draft of the witness of December, '86, and that tab 7, April, '87, is a draft of Mr. Plant. And I think we can all spend a lot of time comparing them, but I think I put it in out of fairness, because what my friend pointed out to me, I think, it's obvious wording from 16 that is restated by Mr. Plant.

THE COURT: Which of these documents came first?

MR. GRANT: Tab 16.
THE COURT: Came first?
MR. GRANT: Yeah. It's December, '86.
THE COURT: Yes.
MR. GRANT: And it's with the letters, the cover letters explaining them.
THE COURT: Is that cleared up, Mr. Plant? Mr. Willms?
MR. WILLMS: I think it is.
THE COURT: All right.
MR. WILLMS: I think my friend is now conceded that there's just a re-arrangement of the witness' own language here.
MR. GRANT: I don't concede it in those words, but I think the documents speak for themselves.
THE COURT: All right. Thank you.
MR. WILLMS:

Q Can you turn in tab -- in Exhibit 1191 to tab 13, please. You'll see there is a reference at the beginning of that letter:

"Thank you for your comprehensive report dated July 30th, 1986."

And if you can just ignore the second line down, "not at the national library", but can you confirm that this is the comprehensive report that's being referred to?

A I believe it is, yes.

Q Yeah. And so when you look at the second page, which is the second page of the letter where it says:

"As for the items ranked 'D', Geoff suggests that you should review only the following:"

You look at the reference letters at the bottom of each reference; is that correct?

A Yes.

Q Okay.

MR. GRANT: I object to this going in, my lord. I had only asked the witness about Adams, Allaire, Allen, Dawn and Stuckley. This is a very truncated, edited letter that I have and it did not come -- my copy did not come with this report attached to it.
THE COURT: Well, I'm not following this. You say, Mr. Willms, that this document I'm handed which looks like a bibliography, I'm sure it is, was attached to this letter of August the 14th?
MR. WILLMS: That is what is being referred to. The letter of

August 14th, my lord, starts off with: "Thank you for your comprehensive report dated July 30", and then it says: "Our preliminary comments on your letter are as follows:" Then item 4: "As for the items ranked 'D'". Now, the only way to see what the items ranked D are is to look at this list, a go through the list to determine the items ranked D. So that the only way to provide any meaning at all to my friend's cross-examination, or any understanding, and if that's possible here, is to have this list to see what worthy items ranked D.

MR. GRANT: But that's --

THE COURT: What do these letters stand for? What does D mean? D and F. Is there a code?

A I'm trying to remember now, but I think I was ranking them in an order of importance of which ones I thought I might want to review myself.

MR. GRANT: That's one of the problems, my lord. I have no sense of the code either in the documents I had and that's why I was asking the witness about these four or five that are listed in the letter. And I wasn't asking about the meaning of D and all of the other ones in D. I say this is improper on reply. There's no need for that -- this listing of theses to go in. I was only asking about the four listed there. And Mr. Plant was at -- was it his suggestion or the witness' suggestion. She quite clearly answered it was something she had recommended. But I didn't have the code.

MR. WILLMS: Well, my lord, maybe I should have marked the code letter too. I didn't want to mark too much. My friend got the code letter. It's July 30th, 1986. It's the cover letter that enclosess this list. And the code letter says: "Ranking the theses A" --

MR. GRANT: Just a second. I object to this. Before my friend reads this coding letter out, this whole proposition of this listing of theses is not, in my view, relevant. For my friend to now start reading the covering letter with it -- and I will recheck mine. I did not recall having that. I will check my documents, but my question on cross was did Mr. Plant ask -- was he the one who recommended Adams, Allaire, Ellen, Dawn and Stuckley. The witness answered the question no, it was her recommendation. And that's the end of it, with respect, my lord. I don't think there's any need for more documents to go in on this.

MR. WILLMS: Well, my friend asked this question at page 21773,

volume 290, line 32.

> "Q The reason I suggested it was A, B, C, D is because from my review it appears there was some ranking you did, and the items arranged D, that was a listing that you did and you had done and passed on to Mr. Plant?
> A Probably, yes."

Now, my friend asked about the ranking. I'm just trying to clear this up.

THE COURT: All right. I think the price of asking questions on cross-examination is the risk that material not being tendered, and perhaps not even admissible, might become admissible. When you asked about the ranking and when you asked and you put in a letter that refers to them I think for whatever use it may be, and I think it may be zero, it may be -- I think it is competent for counsel in re-examination to put forward the list from which the selection and the ranking has been made. And I can't believe at the end of the day this is going to have any significance or importance, but I think there has been enough done in cross-examination to make the list -- to make the list admissible as a list. Not that it proves anything except that this was the list from which this ranking was prepared. And for that reason I think it becomes admissible in re-examination. That will be --

MR. WILLMS: 1192-2, my lord.

THE COURT: Yes.

(EXHIBIT 1192-2: Revised List of Theses, July 1986)

MR. WILLMS:

Q Now, turn in Exhibit 1191 to tab 17. And my friend asked you about this in volume 290 at page 21802. On page 21801 he referred to the May 4th letter and then he asked you -- and you'll note in this letter that Mr. Plant says to you:

> "You will see I have made a considerable number of revisions and deletions."

And this is in sections IV and V. And then Mr. Grant asked you at line 35:

"Q Okay. Do you remember what the changes were to sections IV and V?
A Not specifically. No.
Q Were they major -- this is the penultimate draft, as I take it, because then you send it back, and it was the May 12th report. That's what I gather."

And your answer was:

"I haven't compared it in detail with this one, and then I could tell you."

Now, I'm not going to ask you to go through and compare in detail, but could you confirm that this is the May 1st draft of your report?

A Yes, I can.

Q All right. And so in order to see what changes, if I can put it this way, were accepted by you you would just have to go compare the two?

A Yes.

MR. WILLMS: All right. Could that be the next exhibit, my lord.

MR. GRANT: I don't object to it with respect to part IV and V, my lord. That's the only reference that was made. The first three parts there were no amendments or changes made by Mr. Plant, I think.

A I might also add if there are any editorial discrepancies between this and the final draft they may have been of my own making entirely. Again, it would be hard to check unless I had the two copies side-by-side.

MR. GRANT: Part 4 starts on page 17, my lord. There were no -- to my recollection on this there were no handwritten changes, but I agree that part IV and V should go in.

MR. WILLMS: Well, if there's no changes I can't see the harm other than me having to pull staples out of every one of these to reorganize it. I can't see what the prejudice is, my lord, if my friend concedes there weren't any changes.

THE COURT: There is some virtue to consistency. Not much perhaps, but it seems to me some consistency only putting in those parts that were referred to in cross-examination, or which were relevant to cross-examination. I think parts IV and V only should go in.

MR. WILLMS: Well, my lord, part IV starts at perhaps the title

page as well. To identify the document part IV starts at page 17 and part V at 22 completing at page 23.

THE COURT: The part I've been given, I take it, is the -- that's the whole thing that was May -- we are talking about May 1st, 1987?

MR. GRANT: Yes. This is the first part, not the footnote part.

THE COURT: Yes.

MR. GRANT: I think it would be pages 17 to 23 inclusive.

THE REGISTRAR: And the cover. You want the front page?

THE COURT: Yes.

THE REGISTRAR: Tab 3, my lord.

THE COURT: Yes. All right. Thank you.

(EXHIBIT 1192-3: Draft Report - Robinson dated May 1, 1987 - Part IV and V only)

MR. WILLMS:

Q Now, Dr. Robinson, can you turn to tab 20, 1191-20, in the black book. This is the extract from Brown that my friend read to you. And you'll recall --

THE COURT: I'm sorry, Mr. Willms, you're ahead of us for a minute. Just let us catch up.

MR. WILLMS: Sorry, my lord.

THE COURT: What tab of the black book?

MR. WILLMS: Tab 20.

THE COURT: Yes.

MR. WILLMS:

Q If you turn to the second page, second written page which has a typed number 11 in the upper right-hand corner. You recall that my friend read to you from the next 2 pages?

A Yes.

Q And then he said page -- volume 291, page 21846, line 17:

> "In this reference there is no discussion or no suggestion that the Atnahs have chosen to trade at the coast because of superior relations with the 'un' superior? The Tsimshian are superior to the Athapaskans?
>
> A In this reference?
>
> Q Yes?
>
> A No, there is not.
>
> Q And Brown does not refer to that, does he? I am not talking about the --
>
> A Not that I am aware of, no."

And this was the context of the rationale for trading for the coast rather than with trader Brown. In that context do you recall that?

A Yes.

Q All right. You do note that trader Brown refers to at page 11 at the bottom he says:

> "And though these articles generally speaking are old and little."

A Worth.

Q

> "Little worth, particularly the arms, still when compared with anything we can give at the same price they appear great in the eyes of Indians who have no knowledge of the intrinsic value of property."

And then on the next page Brown also notes six lines down:

> "Besides they have recourse to means which would not do with us. For instance on their arrival at a village they ascertain if they do not know previously who have furs and the amount of them."

A On which.

Q

> "On which they go to the person's lodge, blow a parcel of swan's down upon his head, which is reckoned a mark of great honour both amongst the Carrier and Atnahs, and then commence dancing and singing a song in his praise."

Now, just with reference to "blowing the swan's down", "singing a song in his praise", "taking things with little intrinsic value", although Brown doesn't expressly state anything about the cultural trading that you talked about is there anything that you can draw from those comments?

A Well, in the first part of the comments where he's speaking of the Indians having no knowledge of intrinsic value of property I think what's being referred to there is differences in systems of value and valuing objects which Brown is recognizing without really knowing how the Indians are valuing specific

objects. The second part of the passage, the reference to blowing parcels of swan's down, I've seen other references pertaining to the northern coast where down is sprinkled in the context of a peace making or peaceable gesture.

Q And are there any conclusions that you can draw from that in respect of reasons for trade or rationale for trade?

A Well, this is one example which might go to support an argument that there's probably something in existence like a trading partnership or a formal kind of relationship between two people from different cultural groups coming into contact and exchanging properties in the context of specific peaceable social relations, which is not uncommon in the context of what I know about northwest coast, northern northwest coast and some of the adjacent interior groups where they did have trading partnerships.

MR. WILLMS: Can you turn in the black book 1191 to tab 35. Now, at the beginning of the book at the extract there is -- and the numbers are 12 -- 13. There are some extracts from the introduction, a portion of the introduction to Dr. Adams' report. And what I've put before you is the introduction all the way through to page 18. And, my lord, I'll try to clear this up in a minute, but the page numbers that my friend has on his don't line up with the typed page numbers here, and that's why I'm putting in the whole extract. But you will see, for example, if you turn at tab 35 to the first page which is numbered 12 and then turn at the extract that I have put before you you'll see it coincides with page nine, the page numbered nine.

THE COURT: Where are the numbers? Oh.

MR. WILLMS: The numbers are typed in the upper right-hand corner.

THE COURT: Some of them are.

MR. WILLMS: Some of them are, my lord. The first four pages of the precis plus the table of contents and acknowledgments are not numbered, but then starting from the introduction on --

THE COURT: Yes.

MR. WILLMS: -- It's one, two -- and I have handed -- given the witness all the way to page 18, and I'm just asking her now to look at page -- it's page numbered 12 at tab 35, but it correlates with the typed nine in the typed dissertation.

A Yes.

Q Do you have that?
A Yes.
Q And my friend talked to you about historical information collected by Dr. Adams and then he read down to "this constitutes our basic documentation".

MR. GRANT: What page?

THE COURT: Where is this? I have that Mr. Grant read that whole main paragraph on that page.

MR. GRANT: Yes, I did.

MR. WILLMS: Oh, from "informant interviews" as well? I only have marked off that he read "our strategy" all the way down to "this constitutes our basic documentation".

MR. GRANT: I've got the whole --

THE COURT: I've got it all underlined. I may have been underlining ahead of him and he stopped on me.

MR. GRANT: I certainly -- that's my record too. I marked what I read. I may not have read it all at one time, maybe that's why my friend got confused.

THE COURT: Anyway, what do you want to ask the witness?

MR. WILLMS: Then on the next page -- I'm just -- my note is that he read from "it was very easy to fill our notebooks" down to "all these guests turned out to be right but nobody volunteered the information". Now, does that accord with everybody's notes?

THE COURT: Yes.

MR. GRANT: Yes.

MR. WILLMS: All right.

Q You'll see that my friend doesn't have the next page in, but you'll see that what Dr. Adams then went on to say is:

> "The result is impersonal, but accords with the natives' own model of their society. We can interview using it with no difficulty except that we apparently know far more about basic tensions in the culture and about the ways of manipulating it than informants will readily admit."

And then there is a discussion about direct questions that follow about the model. But in the anthropological context, and my friend was suggesting to you, as I understood it, that Dr. Adams was inventing the culture and then testing it out. But does that statement help from the anthropological point of view when you're determining the reliability

of that testing?

A Yes, it does. I think it's quite a frank admission of a methodology and how Dr. Adams approached the research in this area. And it's not unusual, in my opinion, for anthropologists to talk about model building, because what they are doing or inventing, because what they're doing is constructing an approximation, a reality that they're investigating, but they don't report that that construction is the same as the reality. And to that extent it might be a bit of a contrivance, but the words invention and model are used quite often in anthropology.

Q Now, if you turn to the next page that -- not the page numbered 15, but the page numbered 17, my friend there put to you the portion "I have built-in an assumption about equal resources", and then also the proposition:

> "In any case the lines as we know them today were drawn up to regulate the fur trade which is post-contact and was not a means of subsistence: the pelts were brought home, but the meat was cached or discarded."

And now in the same section under Ecological that lines up with the typed page 14 in the extract that I handed to you. But in this same section of Ecological Assumptions, Subsistence and Prestige if you turn over to typed page 17 at the bottom Dr. Adams says:

> "It is the potential value of the claims against the Government which creates the interest in traplines now, which in turn provides the stimulus necessary for the Gitksan to maintain those parts of their aboriginal social organization which regulated the use of the land."

And my question simply is when you're looking at Dr. Adams' suggestions about the lines being drawn up to regulate the fur trade which is post-contact is it also important to note his comment about the value of the claims at pages 17 and 18?

MR. GRANT: Well, my lord, with respect I object, because the page 17, that is my page 17 reference, the page 14 reference was where I took the witness back from her footnote. She had footnoted part of that. She footnoted, in any case, I believe the lines I took her

back to, "the built-in assumptions", that's why the question was there. This witness has not footnoted, nor was it raised in direct with her about pages 17 and 18 of the typed portion. With all due respect, I don't think it arises out of my friend's cross-examination. It's my friend's effort to put in what he now finds of interest, but he could have done that on direct or it could have been put in and footnoted in her report if it was that important.

THE COURT: Ms. Koenigsberg?

MS. KOENIGSBERG: I don't think I can add anything very useful here.

THE COURT: Thank you.

MR. WILLMS: My lord --

THE COURT: Mr. Willms, this goes to the question of -- of the dating of the boundaries and social organization which was part -- which was the burden of your evidence in chief.

MR. WILLMS: No. But, my lord, the point that my friend -- and this is the point, if the witness agrees with me, I wanted to tie together. My friend read a section where he deals with Adams' assumptions and methodology, and that the traplines differ in length and accessability, and then the statement about the lines being drawn up to regulate the fur trade which is post-contact and then he stopped there. And he stopped just before a portion that the witness quoted in her report, or referred to in her report. And all that I'm asking is that when you're reading that built-in assumption that Dr. Adams is working with, and his frank discussion of what he was doing under Ecological Assumption, Subsistence and Prestige do you also have to take into account his statement in the same section later on at pages 17 and 18. If the witness says no, you don't, it stands alone, my friend is right. If the witness says yes, you do, you have to look at the whole thing, then in my submission it links to something that my friend has asked questions about.

MR. GRANT: I don't think it's up to the witness to decide this linkage at this late stage of my friend's examination.

THE COURT: Mr. Grant, the problem I'm having when I see this passage where it says on your page 17 how much the territories may have changed since the coming of the whites is unknown.

MR. GRANT: That's the witness' footnote. That is in the witness' own report. It's one --

THE COURT: Yes. And in challenging that you put this to her presumably to get the advantage of I had -- in this passage I have built-in the assumption. And when you do that do you not risk putting in also the passage that your friend now refers to which is -- which you left out of yours and which you talk about. Where did I find that?

MR. GRANT: Page 17.

THE COURT: Yeah. The potential value of the claims against the Government which creates an interest in traplines now. Maintain these social organization. That does seem then to me to be closely connected with the passage on your page 17 that how much the territories may have changed since the coming of the whites is unknown.

MR. GRANT: But that which you're referring to there is what the witness quoted in her footnotes. And why if there is a connection then my friend could have led it either on direct that there's another part of Adams that ties to this and she would have directed him to that. But it's not the modeling. What I was dealing with there was that where he says that it's part of what he's talking about Ecological Assumption, Subsistence and Prestige. My lord, what does it do to help Adams own view unsubstantiated except by his statement here now parrotted in this way?

THE COURT: The trouble is that she did not in chief repeat or mention chapter and verse everything that was in her footnotes.

MR. GRANT: Well, no. Her report went in and her footnotes -- she spoke of them without having to speak it.

THE COURT: And if -- if you hadn't cross-examined that's where it would have remained, but you tackled her on Adams and you put these passages from Adams in, but you didn't put them all in. And it seems to me that having put some of them in the question then arises are there other parts of what you put in which are so connected that they relate to the parts you put in and perhaps add a note of explanation or further explication of a part that you put in. And that's what I always understood to be the risk of -- the risk of cross-examination on documents, is that when you start putting parts in you run the risk that you have the whole thing put in.

MR. GRANT: Or at least those parts logically connected. But what I'm saying is that my friend is saying -- my friend partly agrees with me if he says if the witness doesn't agree with his suggestive question then I'm

right. If she says there is no connection I'm right and that's the end of it. If she does agree with his suggestion then I'm wrong. It's not for the witness. You now have it. He's read it to you. And I say without hearing what the witness has to say it doesn't connect. And that's my argument. And if you find that it does connect then I think it can go in without the witness' comment.

THE COURT: At the moment -- you can persuade me otherwise. At the moment it seems to me how much the territories may have changed since the coming of the whites is unknown is connected with the passage:

> "It is the potential value of the claims against the Government which creates the interest in traplines now, which in turn provides the stimulus necessary for the Gitksan to maintain those parts of their aboriginal social organization which regulated use of land."

That seems to me --

MR. GRANT: Yes. I agree how much the territories comment there may be connected. And what I say, my lord, is that that statement how much the territories changed is -- was led in direct evidence in the form of the written report. It was led. The report was marked for identification. It was led. Instead of having her read it all it was led. So it's nothing new out of cross, and it's not appropriate at this point to raise it out of cross. My friend could have taken her to that footnote and said isn't there something else in Adams that connects to that. I, of course, would have no objection to it. It's not something arising out of the cross. What I did in cross was take some other part of his report, not touch on how much the territories have changed. That was already in her footnote. She's given evidence on that throughout the --

MR. WILLMS: Here's my friend's question at the bottom of 21998, line 36.

> "Q You do agree, on going back to your own footnote -- if you can put that aside for a moment. Going back to your own footnote A on page 32. Do you agree with Adams' statement:

'How much the territories may have changed since the coming of the whites is unknown.'."

That is right in the context of my friend putting these extracts to the witness. And he put that directly to her.

MR. GRANT: And she agreed with it and that was the end of it.

THE COURT: Well, I'm not sure that I understand what separates this, because it has been my view when a witness such as Dr. Robinson gives evidence through a report, and what she footnotes, that those references can be used in argument anyway.

MR. GRANT: Her footnotes, for example.

THE COURT: Yes. So that the argument Mr. Willms would be able to say is well, she relied on the statement of Adams. And apart from this dialogue we're having now he could dig out Adams' document and say look what he said at this new page 17.

MR. GRANT: And that may well be the case, but that's not -- that doesn't mean it's a question for reply of what Dr. Robinson said. This connects and that doesn't, I don't think it's a proper question for reply, or re-direct, I should say.

THE COURT: Well, do you disagree with what I have just stated about the use that counsel can make of referenced supporting material in argument? Maybe that's an unfair question to ask at this point.

MR. GRANT: Well, I think that that was one of the aspects of what you dealt with in dealing with the treatises, my lord. And I don't have your decision right in front of me, but I think that certainly was an aspect of it.

THE COURT: All right.

MR. GRANT: And I think you gave guidance to counsel on this. I'm saying it's an improper question to ask the witness on re-direct. It doesn't do anything more for my friend of what the witness thinks on it.

THE COURT: All right. I don't think I'm going to add more paper to the record, Mr. Willms. I think you can use this in argument. At least that's my present view. And I don't think it needs to be -- needs to be marked as an exhibit.

MR. WILLMS: My lord, the only other reason for marking it -- and I'm aware of your lordship's ruling that it could be used in argument. You also said earlier on it could be marked as an exhibit. But because my friend has picked extracts out and left pages missing and

pagination is confusing it's helpful to have a witness to confirm this is indeed the document she referred to.

THE COURT: I think you can put that to her.

MR. WILLMS: Which I did, and have her confirm these are the first 18 pages of Adams, and line it up and argue about it later.

THE COURT: You can do that. At the moment I'll mark it for identification so we can argue about it another time if we have to.

MR. WILLMS: All right. That's fine. Thank you, my lord.

Q You can confirm that, Dr. Robinson?

A Yes, I can.

MR. WILLMS: Perhaps we can mark that.

THE COURT: Tab 4.

MR. WILLMS: Tab 4.

THE COURT: And this is -- this is the complete text of 1191-35. Thank you.

THE REGISTRAR: For identification, my lord?

THE COURT: Is it -- I'm sorry. Yes, it's tab 4.

THE REGISTRAR: That's for identification?

THE COURT: For identification.

(EXHIBIT 1192-4 FOR IDENTIFICATION: The Politics of Feasting Among the Gitksan - Adams)

MR. WILLMS: And I was going to make the suggestion, now I have some more pages, my lord, that fit in immediately before and after pages that my friend -- my friend has extracted -- maybe I'll just take them one at a time. Do you still have --

MR. GRANT: My lord, I would propose this with respect to this. If my friend -- and this is how we are going to deal with the dissertation. If my friend has pages before and after that he thinks are logically connected, to save a bit of court time unless he has some specific question to ask the witness if he advises me which of those pages they are, and they connect to the pages I put in, I can review them and possibly deal with this by agreement without any -- and just have them filed. And that seems to me to be a more expeditious way of dealing with the matter. And I'm prepared to deal with it in that way. Of course, if there is an issue with one that isn't connected we can deal with it and maybe save some time.

MR. WILLMS: I have questions on all of them save for this short one, my lord, I don't have any questions. But, my

lord, if you turn to the page that's got a handwritten 33.

THE COURT: On which tab?

MR. WILLMS: At tab 35.

THE COURT: Oh, same one.

MR. WILLMS: Same one.

THE COURT: Handwritten 33.

MR. WILLMS: Handwritten 33, my lord.

THE COURT: Yes, I have it.

MR. WILLMS: And I have just handed to the witness the typed pages 27, 28 and 29 and you'll see --

THE COURT: Yes.

MR. WILLMS: -- That 29 ends off. It starts off with the leading crests. It also helps explain what is going on on the page that my friend marked.

THE COURT: Yes.

MR. WILLMS: But it's just the first couple of pages. And it's my suggestion it would be convenient just to put it into Exhibit 1191-35 at the right place so it's all understandable.

THE COURT: That seems clear. Is it, Mr. Grant?

MR. GRANT: Yeah. Page 29 I have no problem with.

THE COURT: All right. Thank you.

MR. WILLMS: It's section "Ranking of Crests" 27, 28 and 29.

THE COURT: Yes. They can be added.

MR. WILLMS: All right. Now, the next one -- the next one that follows, my lord, there is a page entitled "Population Shifts and Conflict" with a numbered 61 in the upper right-hand corner.

THE COURT: 61?

MR. WILLMS: It's got a 61 in the upper right-hand corner. And that coincides with typed 58. And I've just handed to the witness 59 and 60, which is the balance of the section called "Population Shifts and Conflict" from Adams.

THE COURT: It follows the handwritten 61.

MR. WILLMS: It follows the handwritten 61. And it's my suggestion those 2 pages go in. And I do have one question arising.

Q My friend asked you if you knew what Adams meant, and this is from a later reference, above the words st'o'owilp. S-T-'-O-'-O-W-I-L-P.

A Yes.

Q You'll see right there by the three whole punch in the middle there is Dr. Adams' definition of what it is?

A Yes.

Q All right.

MR. GRANT: Well, I don't know what the point of that was. The question was if she knew, and she didn't know.

THE COURT: That is true. It has -- it has a double dimensional value. One, this fills in the context, and the usefulness or otherwise of her not knowing is still extant.

MR. WILLMS:

Q And then, finally, my friend asked you about specific references to houses. I think he asked you about sociopolitical disorganization of houses split or houses merge?

A Yes.

Q Fission and fusion. All right. Now, if you look at this page here. The last page that my friend filed at 1191-35 has got a 75 in the upper right-hand corner. It's really typed 72. And I put before you 73, 74, 75, 76 and 77. And I wonder if you can --

MR. GRANT: Well, I object to this, my lord. I don't even believe I asked her a question out of 75, to my recollection.

THE COURT: Yes. I have a note that you asked her about the second line:

> "Allies from outside one's village have an additional advantage in that they are only half-citizens within one's own village, hence cannot take over one's lands so easily."

I had that underlined.

MR. GRANT: That's right. That is from the witness' footnote. The reason I put in 75 is because the footnote did not include the two sentences or one sentence before that -- the two sentences before that under heading of "Alliance Factions". That's the only reason I put it in. And if my friend has a theory that material can go in because it's chronologically the next few pages I object. I did not ask the witness about this "Division of Gitsegyukla By Houses c1900-1910". I asked the witness about names of plaintiffs. I object. I don't think any of that was raised in cross.

MR. WILLMS: Well, with all due respect, on the very next page, the next page that my friend didn't put in, he does -- he did put in these alliance networks and asked about those. And on the very next page there is a description by definition of what Dr. Adams is talking about starting:

"Tensions within a House are magnified by these alliance networks (or factions)."

A discussion of witchcraft and then a discussion of the village of Gitsegyukla splitting in 1900 to 1910 by houses. Exactly the thing that my friend was challenging the witness on. Fissioning and fusioning of a house. And here's a case study of the fissioning and fusioning or fusing of a house. Following the extract my friend referred to the alliance networks and alliance factions. This merely completes the section on alliance factions and then it does go --

THE COURT: Well, Mr. Willms, this page that you handed me, and the number which I can't read on it, what page number is this document you've just given me?

MR. WILLMS: The page number is 73 in the upper right corner.

THE COURT: Where does it go with relation to your friend's page 75?

MR. GRANT: Right after it. Immediately following.

THE COURT: This follows after?

MR. WILLMS: Yes. It follows after:

"The lines of fission in the society are within Crests and when groups divide they tend to attract their affines with them."

That carries on.

"This presupposes, of course, that the affines are potentially fissionable, too, and further that their affines have made alliances more or less exclusively with one side or other of the group which divides."

And discussion of the Gitsegyukla division. And then I've also put in the summary of the whole section at pages 76 to 77 which talks again about fissioning and fusioning. I should stop inventing words. Fusing. But it is my submission, my lord, that when you pick extracts out of context that it is open to put the context back together again to make it understandable, and that's all that I'm trying to do here.

THE COURT: Well, what about whatever follows your page 77, shouldn't I have that?

MR. WILLMS: It's a new chapter.

THE COURT: That's a new chapter.

MR. WILLMS: Brand new chapter. That's why it ends there.
THE COURT: Page 75 looks like a different typing from page 74.
MR. WILLMS: Well, it may have been retyped on the dissertation, but this is from the --
THE COURT: All right. Well, I'm going to -- I'm going to mark these pages as 1193 -- I'm sorry 1193 -- 1192 tab 5 for identification, because I'm not sure. If it becomes important I'll decide it later.

(EXHIBIT 1192-5 FOR IDENTIFICATION: Extract from John Adams Dissertation - Politics of Feasting Among the Gitksan)

Can we take the afternoon adjournment, please.
THE REGISTRAR: Order in court. Court stands adjourned for a short recess.

(PROCEEDINGS ADJOURNED)

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

_____
Peri McHale, Official Reporter
UNITED REPORTING SERVICE LTD.

(PROCEEDINGS RESUMED AT 3:25 p.m.)

THE REGISTRAR: Order in court.
THE COURT: Mr. Wills.

RE-EXAMINATION BY MR. WILLMS: (Continued)

Q Dr. Robinson, my friend referred you to a dissertation entitled The Introduction of Infectious Diseases Among the Indians of the Pacific Northwest by Robert Boyd?

A Yes.

Q Do you recall that? And he put some conclusions to you but -- and at volume 292 my friend said this: At line 5 and this was about the table of contents and this has been marked, parts of it have been marked, my lord, at tab 28, 1191 tab 28. My friend read to you, and I won't read it except he says here at line 11:

> "Now, of course, you have not done that type of research..."

referring to the research that Dr. Boyd did:

> "...have you?"

And your answer was:

> "No, but I say that in 40 odd pages it's unlikely that he's able to cover about 2,000 miles of coastland and about a hundred and fifty years at least of history. That's what I mean that the data are insubstantial to be discussing the impact of European diseases in any meaningful way, and certainly it's the sort of subject that requires a very detailed treatment rather than an overview that sweeps across the whole coast."

And then later on my friend then put another -- put Dr. Gibson to you and you again referred to the evidence, this is at page 21946, line 9, where you say:

> "...I do dispute Gibson's findings, vis-a-vis Robin Fisher's findings, when it comes to the study of population changes as a result of European diseases because I've said several times the data is problematic and scanty."

Now, I put before you the extract from the Boyd dissertation chapter 6 where he deals with -- and my friend has put in the conclusions in chapter 6 at tab 28, and the conclusions of chapter 6 are 263 -- at pages 263 and on. And what I have put before you is the whole chapter, and I wonder if you could turn to page 239 where Boyd says this at page 239 on Tsimshian statistics:

> "Population figures for the Tsimshian in the first half of 1800's are very limited. For the pre-epidemic period there is only Jonathon Green's aforementioned '5,500 speakers of the Nass language', which certainly includes only the more accessible coastal Tsimshian. The HBC's Fort Simpson census dates from approximately the same time as the Tlingit census. It also was printed in Kane's Appendix with the date 1846, so must refer to the period prior to that time."

And then he then refers to the 1842 and the Hudson's Bay census, and then says at the very bottom:

> "The inland Gitksan were not formally enumerated until 1889..."

And I will go back to the two tables, but if you carry on to page 243:

> "...the south coast Sabassas (the contemporary name for the Kitkatla, Kitkiata, and Kitasoo) were counted in the Fort McLoughlin census and will be considered later."

Now, you will see on the two tables, for example, that in the census figures that he's given, there is no enumeration for the Gitksan, page 240?

A Yes. I see that.

Q And then on the next page you will see that the first enumeration given for the Gitksan is under column 1858 Duncan and the reference to 2500, and it's in respect of that 1858 first estimate, if you'd turn back to page 243 and pick up where I stopped reading. He said:

> "A second detailed census for the Fort Simpson Tsimshian was taken by the Revrend William Duncan

shortly after his arrival to establish a mission in 1858."

Just pausing there, are you aware of whether or not Duncan in 1858 went to any of the Gitksan villages?

A I am not aware that he did.

Q All right. Now, is this just for this particular time period an example of the scanty information that you were talking about in your evidence?

A Yes, and I note on the page 241 that there is one figure given by Duncan for all of the Gitksan and it's a rounded-off figure.

Q Yes. If you turn to page 260, you'll see under the heading 1860 - 1890 statistics, the very first line:

"The first complete and trustworthy census of the central British Columbia peoples after 1842 is the 1889 Northwest Coast Indian Agency census."

Is that a proposition that you accept?

A To the extent that I know about the area, yes.

MR. WILLMS: All right. Could that be the next tab, 1192- 6, my lord.

THE COURT: Yes.

(EXHIBIT 1192-6 - INTRODUCTION OF INFECTIOUS DISEASES AMONG THE INDIANS OF THE PACIFIC NORTHWEST, 1774-1874)

THE COURT: Can somebody remind me where was Fort McLoughlin? We heard about it earlier.

A Bella Bella.

THE COURT: Pardon me?

A Bella Bella, my lord.

THE COURT: Bella Bella, that's right. Yes.

MR. WILLMS: Could you turn in the black book 1191 to tab 31 please and turn to page --

THE COURT: I am sorry, which tab?

MR. WILLMS: Tab 31.

THE COURT: Yes.

MR. WILLMS: And turn to page 8, maybe it's not -- does your lordship have a page 9?

THE COURT: Yerbury.

MR. WILLMS: Yes.

THE COURT: Wait a minute, I don't have page 9. I jump from 8 to 10.

MR. GRANT: I am sorry, my lord, page 9 was intended to be in. If my friend is filing it, I don't object, it can go

right in there.

MR. WILLMS:

Q And you will note in the page that we've just added, you know, the paragraph "ethnohistorical data"?

A Yes.

Q You will see that Dyen and Aberle is cited in the second line and you will recall being cross-examined on that. And then you will see Yerbury says:

> "Linguistic data based on the distribution of kinship innovations support archivally based interpretations that the Canadian Athapascans were severely disarranged by contact."

And then:

> "For example, the Hare, a population contiguous to the Kutchin, bear slight linguistic resemblance to them, but show a relatively close relationship with the more blance Beaver."

And then a cite of Dyen and Aberle. And I take it it that, although you are not a linguist, that data supports some of your proposition?

MR. GRANT: I object, my lord. He's -- it's quite clear what Yerbury is talking about here is the subarctic. He is talking about the Kutchin and the Hare, and the witness, when I examined her this morning on Yerbury, she was very cautious about her knowledge about the Kutchin and the Hare, and I object. She has not read this book in detail. I find the question is very leading.

MR. WILLMS: Well --

THE COURT: It was that.

MR. WILLMS: My lord, all -- it's just somebody else interpreting Dyen and Aberle consistently with what the witness did, so I will leave it.

THE COURT: Thank you.

MR. WILLMS: The last thing that I would like to do is mark -- the report has been marked as 1189-1 and -2 for Identification, and I submit that it --

THE COURT: 1189.

MR. WILLMS: 1189-1 is the report.

THE COURT: Yes.

MR. WILLMS: And they were both marked because my friend had an objection, for identification, and it is my submission that they should be an exhibit proper at this time.

THE COURT: Yes. They may now be marked as exhibits.

(EXHIBIT 1189-1 - REPORT OF DR. ROBINSON - VOL. 1)

(EXHIBIT 1189-2 - REPORT OF DR. ROBINSON - VOL. 2)

THE COURT: Let me find out where that was. 1189, yes, all right. All right. Thank you. I think you are excused. Thank you, Dr. Robinson.

A Thank you.

THE COURT: You are welcome to stay if you wish.

A Thank you.

(WITNESS ASIDE)

THE COURT: I think that I would like to have a brief discussion with counsel about scheduling. What would counsel see as a reasonable objective for us to set for ourselves? You are on your feet, I think, aren't you, Mr. Goldie?

MR. GOLDIE: Well, I am not sure that I am programmed to speak about scheduling, my lord.

THE COURT: I mean for the balance of your case.

MR. GOLDIE: Yes. No, I'm -- my intention is to proceed with reading and a couple of other matters tomorrow morning. We have, tomorrow, what we have been calling euphemistically loose ends; we intend to tender some affidavits. I hope that will not take too long and then I would occupy Friday and possibly Saturday with completing the documents filing. I keep saying I am going to be much faster. I see one place ahead where I can redeem that promise but I have a lot of documents to cover and I have made some arrangements to do it more expeditiously, but I think that I would probably take Friday and another day. Whether it's done Saturday or any other time is not a matter of concern to me.

THE COURT: Well, I don't know if anyone else wants to say anything about this. It's really in Mr. Goldie's court at the moment, is it not?

MR. GRANT: Maybe I can throw something in.

THE COURT: Yes.

MR. GRANT: Last Friday, late last Friday afternoon, Ms. Sigurdson directed a couple of letters to me and to Mr. Rush and I, as you know, have been involved in the cross-examination of Dr. Robinson. One was with respect to exhibits for identification in which they listed a proposal relating to a large number of them,

and I advised I have not had a chance to respond in writing. There are certainly certain ones now that I can deal with and I mentioned this to Mr. Plant who was here before but not all of them.

The difficulty I had when I went back to them is that some of them -- some of them I have up north and I would propose that I will respond tomorrow morning in writing as to all of those that there is no difficulty but, with respect to the others, I want an opportunity to look at those exhibits and the transcript references prior to responding. There is a whole different type of issues they have raised, some that's just a matter of certification or it is illegible documents, and that's no problem. Others they are asking us to agree that they should go in in any event. And the spectrum runs in between. So I would be asking that that issue be stood over to a convenient time in the week of the 20th, and it can be dealt with, and I think it can expedite it that I can provide a list as Ms. Sigurdson had requested. There were certain ones that they had requested for us to file with respect to quite a while ago and we have corresponded relating to those, but this is a much larger number and I would be asking in terms of my own scheduling that the court take that into account and it appears --

THE COURT: Is that a problem Ms. Koenigsberg?

MS. KOENIGSBERG: I don't think so. I think our case continues, we hope to contract and not expand, and I think we will be well within -- can't predict cross-examinations but we will be well within our time limits from our point of view.

THE COURT: Yes, all right. Well, that solves that problem then. Well, as counsel will recall, if they have good memories, if they can recall as far back, we weren't really expecting to be sitting today and tomorrow and I have a matter at five o'clock that would make it inconvenient to sit late tonight. I can sit until five o'clock if there is any need to do so. I cannot start until 10:30 tomorrow morning. Subject to that, I would like to propose that we sit on Saturday and see if we can finish the plaintiff's case. Does that cause a problem to anyone?

MR. GRANT: The defendant's case.

THE COURT: I am sorry, the defendant Provinces'case.

MR. GOLDIE: Certainly not for me, my lord. We do have a number of other things. Mr. Grant has spoken about the

matter raised in Ms. Sigurdson's letter of November 3, and we of course are hopeful that he can indeed deal with them in substance before we have to come before your lordship and, if that is to be done on the 20th, that's fine but there are other things which we intend to deal with and they are set out in Ms. Sigurdson's second letter of November 3, and the first matter is the one that my friend, Mr. Grant, has referred to but there are 11 other -- ten other matters. We propose dealing with those tomorrow morning.

MR. RUSH: My lord, just to add to Mr. Goldie's comments, there are some other matters of the plaintiff's which remain outstanding and it seemed like an appropriate opportunity to try and deal with as many of those as possible as well.

THE COURT: Tomorrow?

MR. RUSH: Yes.

MR. GOLDIE: I wonder if my friend could tell us what he has in mind.

MR. RUSH: Yes, I can. There were some documents that were disclosed as a result of the cross-examinations of certain of the custodial affiants, and there is an issue between, in one case, Mr. Adams and Mr. Plant and, another case, I believe between Mr. Plant and I as to the admissibility of these documents. Your lordship ordered the disclosure of certain documents as a result of, I believe it was a Dr. Bandy, one of the witnesses, I thought it to be Dr. Bandy. Those documents were disclosed. We have looked at them and that's our intention to file one of them.

There are certain matters pertaining to documents -- pre-emption documents, documents relating to the special vote, documents relating to Antonio Mills, these are all questions that I have corresponded at one time or another or that my friends understand are outstanding.

I have some indexes to file. Really, they are very much in the form of housekeeping matters. Just for further clarification on the question of the outstanding documents between Mr. Adams and Mr. Plant, that's four service reports, they apparently were put to Mr. Harding and we intend to deal with those. We join issue on a number of the points raised in Ms. Sigurdson's letter and I think to the best of my recollection those are the items.

I think we have a submission on the amendment to the Statement of Claim, shall advise your lordship of

that. There is a Notice to Admit regarding Mr. Sterritt's feast notes which we intend to file. There are certain questions, my friends had proposed that certain questions for cross-examination of certain of the plaintiff -- excuse me, the cross-examination on discovery of certain of the plaintiffs be tendered and we have certain further explanatory questions which we think appropriate ought to accompany that list. I think that does it.

THE COURT: All right. Well, I am sure these things will all be -- will all unfold themselves seriatim tomorrow. Is it useful, Mr. Goldie, to sit until 5:00 tonight? Is it necessary to do so?

MR. GOLDIE: I am concerned about doing everything within the time we have got and I would prefer to deal with that.

THE COURT: Yes, all right.

THE COURT: Then I think we should do so.

MR. GOLDIE: I should say first that we will be tendering --

THE COURT: Excuse me, Mr. Goldie. Madam reporter, will you be all right to sit until five o'clock?

THE REPORTER: Yes, my lord.

THE COURT: If you need a break, you will let me know?

THE REPORTER: Yes, my lord.

MR. GRANT: Before my friend proceeds, my lord, my schedule -- I had anticipated, of course we all anticipated being finished earlier, but I may not be here tomorrow. There was one matter in Ms. Sigurdson's letter of November 3 that I had intended to deal with as I had been corresponding with Ms. Sigurdson, Mr. Goldie and Mr. Plant regarding -- that was the affidavit of Michael Morrell and this was the affidavit relating to the fishing sites you may recall. And the only statement in it is in -- the letter is number five affidavit, Michael Morrell. I spoke earlier with Mr. Plant and he said that although it wasn't -- the position wasn't taken, it was that he was just to be going to confirm that the defendants were not -- had waived their position in terms of the right of cross-examination. If that's the case, there is no problem with Mr. -- in Mr. Rush dealing with it or we can deal with it now. If there was something more to it than that, it was something I would prefer if my friends could deal with it. But I understood from Mr. Plant outside of court that that was really what he was talking about.

MR. GOLDIE: My lord, Mr. Plant was going to deal with that. My understanding is that it was not proposed to

cross-examine Mr. Morrell but that was subject to maintaining our right to object to hearsay in his affidavit, and that if there is -- and the basic objection to his affidavit was that he was -- he was purporting to state what other people told him and they are all -- there is no question but what it was hearsay, so we do not propose to cross-examine but we maintain our right to object.

MR. GRANT: That's consistent with the correspondence also that we can join issue with that at the time that that's dealt with --

THE COURT: All right.

MR. GRANT: -- in argument.

THE COURT: All right.

MR. GOLDIE: I am also -- since Mr. Grant won't be here tomorrow, I am advised that he was going to speak to the question of our tendering affidavits of Mr. Gordon and a Mr. Woloshyn. We intend to tender those affidavits in proof of the fishing licences which have been marked for identification. They are part of our case, they will be tendered as part of our case. If my friend wishes to cross-examine Mr. Gordon, arrangements can be made to that effect. Mr. Woloshyn, coincidentally we were advised some time ago, is going to be called by Canada as part of -- in its case in chief and we are -- our suggestion is that the cross-examination on Mr. Woloshyn's affidavit takes place when he is in the courtroom but we wish to tender the affidavits and I can do so now, my lord.

MR. GRANT: Yes, I did intend to speak to that matter. We do not object to numbers being reserved for these but we do object at this time -- we intend to cross-examine Mr. Woloshyn, we anticipate will be a witness, and at the conclusion of his cross-examination but, of course, he is a witness in the control of the Federal Crown and the Province is relying on the fact that the Federal Crown intends to call him. The Federal Crown thus far has confirmed that that is their intention. The Federal Crown has changed their position regarding some other witnesses. Once he has been cross-examined, he has been tendered by the Federal Crown and he has been cross-examined, then that affidavit can go in and if my friends, to be consistent, want to reserve a number for it now that is appropriate. We do not object as well to the reserving of a number for the affidavit of Mr. Gordon. We, in terms of the decision of whether or not we

would cross-examine Mr. Gordon, that will probably be a decision that we would like to consider and it may be in light of the cross-examination of Mr. Woloshyn who's available to cross-examine in any event.

We see no point in having cross-examinations if they are not necessary or regarding these two witnesses. So what we propose is that at this time numbers be reserved so that it is within the numbering of the Provincial case, but that not -- these exhibits not be filed until the cross-examinations or the right to cross-examine has been made.

THE COURT: All right, thank you.

MR. GOLDIE: My lord, I am tendering as an exhibit the affidavit of Mr. Woloshyn dated the 29th of September, and I am tendering as an affidavit, that of Laurence Victor Gordon.

THE COURT: Just a moment please.

MR. GOLDIE: And it is dated the 2nd of October.

THE COURT: What's this again, the affidavit of --

THE REGISTRAR: W-o-l-o-s-h-y-n.

MR. GRANT: Well, my friend -- I am not sure if my friend didn't understand or thought that what I had to say was of little merit, but I am saying that they should not be tendered as exhibits now. That's the position that we take.

MR. GOLDIE: Well --

MR. GRANT: And that's why I am asking that they be -- we not mark these as exhibits until these witnesses have been cross-examined, but the numbers can be reserved for them.

THE COURT: That will be 1193.

MS. SIGURDSON: 1194.

MR. GRANT: 1194, I believe.

THE COURT: Is it?

THE REGISTRAR: Yes, 1194. Is that being reserved?

THE COURT: Yes, yes, that number is being reserved.

MR. GOLDIE: I wish to speak to that, my lord, just to make sure that my friend doesn't think that I put so little value on his words. I am tendering these now as part of the Province's case. They stand on their own feet. The fact that Mr. Woloshyn is being called by the Federal Government has got nothing to do with us other than to relieve my friend of cross-examining him out of court, but these -- I want it clearly understood that these documents have nothing to do with the Federal case. They are part of our case.

THE COURT: Yes, I understood that. Well, I suppose there is a

difference between reserving a number and having it tendered and marked for identification for the moment.

MR. GOLDIE: That is correct.

THE COURT: All right. Well, it can be an exhibit for identification.

(EX. 1194 FOR IDENT. - AFFIDAVIT OF PETER WOLOSHYN SEPT. 29, 1989)

MR. GOLDIE: Thank you, my lord.

THE COURT: And is there another one, Mr. Gordon?

MR. GOLDIE: Yes. The second one is that of Laurence Victor Gordon, whose affidavit is sworn the 2nd day of October, 1989, and I tender that as Exhibit 1195 for Identification.

(EX. 1195 FOR IDENT. - AFFIDAVIT OF LAURENCE GORDON OCT. 2, 1989)

THE COURT: All right, Mr. Goldie, whenever you are ready.

MR. GOLDIE: Yes, my lord. I propose dealing with volume 3 of the so-called Calder Proclamations and I believe a number has been reserved for this, 1187.

THE COURT: Yes. Have you started on this book?

MR. GOLDIE: No, I don't believe I had, my lord.

THE COURT: What Calder number does this have?

MR. GOLDIE: Number 3 coincidentally. And it has a long history which I will try and keep as short as possible. Under tab 1 is the Proclamation of 4th of January, 1860, and I refer to the second paragraph of the preamble:

> "Whereas, it is expedient, pending the operation of the survey of agricultural lands in British Columbia, to provide means whereby unsurveyed agricultural lands may be lawfully acquired by pre-emption in British Columbia by British subjects, and in certain cases to provide for the sale of unsurveyed agricultural land in British Columbia by private contract."

And then paragraph numbered 1 provides British subjects that:

> "British subjects and aliens who shall take the oath of allegiance to Her Majesty and Her successors, may acquire unoccupied and unreserved, and unsurveyed Crown land in British Columbia (not being the site of an existent or proposed town, or

auriferous land available for mining purposes, or an Indian Reserve or settlement) in fee simple, under the following conditions."

And then those conditions are set out. The background to that proclamation and to the amendments to that proclamation occupy the next sequence of tabs.

Tab 2 is an extract from the -- from the Papers relating Part 1 and it is in here for the Proclamation of the 28th of December, 1857, in which Douglas publicly notified and declared that without authority anybody who took gold or other ore, who dug or disturbed the soil in search of the gold, metal or ore would be prosecuted. Tab 3.

THE COURT: When you say without authority, are you talking about the Governor Douglas had no authority to do this or that he was issuing a proclamation with respect to persons who without authority dug for gold?

MR. GOLDIE: He was issuing -- he was issuing -- he had no authority, but he was also telling -- making a proclamation -- issuing a proclamation that -- and I make reference to the second paragraph where he says:

> "I further notify and declare, that such regulations as may be found expedient will be prepared and published, setting forth the terms on which licences will be issued for this purpose, on the payment of a reasonable fee."

THE COURT: Yes, all right.

MR. GOLDIE: Under tab 3 is Douglas' despatch of June 10, 1858, and he has proceeded up the Fraser River to inspect some of the diggings, and your lordship will recall from the other despatches that this is early on in the period of the gold rush into British Columbia. And at page 14, paragraphs 20 to 23 which I referred to when I was dealing with the papers relating contain these words, Douglas':

> "My own opinion is, that the stream of immigration is setting so powerfully towards Fraser's River that it is impossible to arrest its course, and that the population thus formed will occupy the land as squatters, if they cannot obtain a title by legal means."

And then he says in paragraph 23:

"Either that plan..."

referring to the Hudson's Bay Company:

"...or some other better calculated to maintain the rights of the Crown and the authority of the laws, should, in my opinion, be adopted with as little delay as possible, otherwise the country will be filled with lawless crowds, the public lands unlawfully occupied by squatters of every description, and the authority of Government will ultimately be set at naught."

What we will see as we go along, my lord, the concern of the governor was that that -- the stream of immigration was providing a demand for land. The view in London was that no land should be alienated until it was surveyed, and Douglas was finding the surveyors were quite unable to lay out lands and he was moving towards what he ultimately did, namely, making provision for the acquisition of land before survey.

Tab 4 is again from papers relating, it is -- my reference is to Lytton's despatch to Douglas of July 31, 1858, it is numbered 6, and on page 45 is the paragraph at the bottom of the page numbered 3, begins with the words:

"I have to enjoin upon you to consider the best and most humane means of dealing with the Native Indians."

I can say to your lordship that this particular paragraph was relied upon by Mr. Justice Hall in the Supreme Court of Canada. And I believe I have read the whole of that paragraph before.

Tab 5 is Douglas' despatch to Lytton of October 11, 1858, which acknowledges the despatch under tab 4, and his acknowledgement is of course in paragraph 1. And then in paragraph 8, he says:

"The disposal of public lands and also of town lots, as suggested in your Despatch, will, I think, prove a prolific source of revenue, besides having the effect of opening the country for permanent settlement. In my late excursion to Fraser's River, of which I will soon forward an

account, the most urgent appeals were made to me by intending settlers, on the prospect of approaching winter, for the purchase of town lots at Fort Yale and Fort Hope; but having no legal authority to make sales of land, or to grant sufficient titles, I could only meet their wishes by giving leases of the desired lots, at a monthly rent of 41 shillings, to be continued, with a pre-emption right to the holder, until the land is finally sold."

And then on page -- the next page, paragraph 16, is the paragraph in which he acknowledges the direction or the comment of Lytton with respect to the Native Indian tribes, and I believe I have referred to this but I will read it again at this point. Paragraph 16:

"I shall not fail to give the fullest scope to your humane consideration for the improvement of the native Indian tribes, and shall take care that all their civil and agrarian rights be protected. I have in fact already taken measures, as far as possible, to prevent collisions between those tribes and the whites, and have impressed upon the miners the great that the law will protect the Indian equally with the white man, and regard him in all respects as a fellow subject. That principle being admitted will go far towards the well-being of the Indian tribes, and securing the peace of the country."

Tab 6 is Lytton's despatch to Douglas of August 14, 1858, and Lytton introduces the numbered paragraphs in that despatch with these words, and I quote:

"In the meantime you will take the following Provisional Rules to guide you:-
1. With regard to the very important subject of the disposal of land, you are authorized to sell land merely wanted for agricultural purposes (whenever a demand for it shall arise) at such upset price as you may think advisable."

And then goes on to discuss the upset price. And then paragraph 2 which again was referred to by Mr. Justice Hall in Calder, reads as follows:

"To open land for settlement gradually; not to sell beyond the limits of what is either surveyed or ready for immediate survey, and to prevent, as far as in you lies, squatting on unsold land. Mineral lands will require special care and forethought, and I request your views thereon."

Tab 7 is Douglas' despatch of October 27, 1858, acknowledging receipt of the despatch to which I have just referred under tab 6, and he says:

"I hasten to attend to your requisition for information on the subject of the disposal of land in British Columbia to companies or private individuals."

And then he makes reference to a memorandum which he had asked the surveyor of Vancouver Island to draw up and he says that they imbody his views on the subject of land sales, except in one or two points.

In paragraph 8, he says, and I quote:

"I beg also to assure you that we shall attend to the instructions contained in your said Despatch, concerning the disposal of land; preventing persons from squatting on the public lands; keeping separate accounts of all revenue derived from the sale of land, and its application at present to the purposes of survey and communication, and the necessary accounts will be furnished," et cetera.

Tab 8 is Lytton's despatch to Douglas of February 7, 1859, and it acknowledges receipt of Douglas' despatch which is under tab 7, and he opens his discussion by stating:

"I have had under my consideration your Despatch No. 7 of the 27th of October, on the disposal of public land in Vancouver's Island and in British Columbia."

And then over the page, he says, in the third paragraph from the bottom:

"The time at which a trigonometrical survey may be

commenced consistently with any more urgent demands on the surveyors for the practical wants of settlers, is a question which will best be determined by you on the advice of Colonel Moody."

Tab 9 is Douglas' despatch of July 4, 1859, reporting on information received from the gold diggings and, in paragraph 15, he says, and I am going to refer to paragraphs 15 to 18:

"The regular settlement of the country by a class of industrious cultivators is an object of the utmost importance to the colony, which is at present dependent for every necessary of life, even to the food of the people, on importation from abroad.

16. It is thus drained of its wealth, and its progress retarded; evils which must exercise a depressing influence on the country at large until it possesses a fixed population and produce of its own.

17. The mining population are proverbially migratory and unsettled in their habits, seldom engaging in any other than their own absorbing pursuits; and, therefore, it is he who tills the soil - the industrious farmer - who must clear the forest, bring the land into cultivation, and build up the permanent interests and prosperity of the colony.

18. We are for that reason most anxious to encourage the actual settlement of the country, and that the process should commence on the sea coast, and spread from thence, as much as possible, continuously along the course of the great rivers into the interior."

Your lordship will appreciate from that, that Mr. Douglas is referring exclusively to the mainland of British Columbia. And then over the page on page -- at paragraph 26:

"Colonel Moody is making great efforts to bring surveying parties rapidly into the field, but the survey of the site of Queensborough, and other necessary work, has led to unavoidable delays, and no country land has as yet been brought into market. There is much popular clamour on that

account, and should the pressure for land be great, I think it will be advisable to meet the emergency by establishing some temporary system of occupation, which would enable settlers to hold and improve certain specified tracts of land under a pre-emption right until the surveys are completed, when it might cease to be in force."

Under tab 10 is Douglas' despatch of October 18, 1859, and reporting on his tour of the mainland and, at paragraph 24, he says, and I quote:

"The colony is yet destitute of one highly important element, it has no farming class, the population being almost entirely composed of miners and merchants. The attention of Government has been very anxiously directed to the means of providing for that want by the encouragement of agricultural settlers, a class which must eventually form the basis of the population, cultivate and improve the face of the country, and render it a fit habitation for civilized man."

And then at the next page, paragraphs 26 to 28:

"At Douglas and Hope, various applications were made to me for rural land, by persons who had taken a fancy to the country, and in some instances, made valuable improvements. They asked to be secured in the ownership of any land they might improve, at the upset price of ten shillings an acre; and that it should not be exposed to public sale, with a value enhanced by their own labour and outlay, as in that case they would either have to purchase their own improvements or see their property pass into other hands.
27. There was nothing unreasonable in their proposal, and as meeting their views would, I felt assured, have the effect of promoting the settlement of the country; I had every wish to do so, but there was a difficulty in accomplishing the object, for the reason that no country land had been surveyed in those districts, nor could surveys be completed before next year, when the petitioners would probably all have left the colony in disgust. I therefore had recourse to an expedient which fully met the case, without

> sacrifice to the Government, and to the perfect satisfaction of the public, by issuing a circular addressed to the Assistant Commissioners of Crown lands at Hope, Yale, Douglas, Lytton and Cayoosh, directing them to permit all persons being at the time British subjects, and all persons who have recorded their intention of becoming British subjects, to hold tracts of unsurveyed Crown land, not being town sites, nor sites of Indian villages, and not exceeding 160 acres in extent, with a guarantee that the same would be fully conveyed to the holder when the land is surveyed, at a price not to exceed 10 shillings an acre."

And then the next -- first part of the next sentence in the next paragraph:

> "This is in fact the basis of a pre-emption law founded on occupation and improvement."

And then under tab 11, my lord, is a letter of Captain Clarke's whom you heard during Dr. Lane's evidence. Captain Clarke's letter is dated 18th of October, 1859, which coincidentally is the same date as Douglas' despatch under tab 11 -- tab 10, and this is the letter from Captain Clarke in which he enclosed his views on how things should be done in British Columbia in the form of the very long draft Order in Council. I refer to the minutes which are those of the officers of the colonial office and I should say, my lord, that under the first blue separater is a photocopy of the colonial office document, and I am reading, however, from the typescript which precedes it.

THE COURT: Precedes it?

MR. GOLDIE: Yes. Your lordship will see --

THE COURT: I see, yes.

MR. GOLDIE: And it is possible, although with some difficulty, to follow what I am going to be reading from the typescript which is from the -- which is from the despatch, the photocopy of the despatch itself and I am referring to the page number at the upper right-hand corner C.O. 60/6 page 434, refers to the pagination in the original document. And I am referring to the minutes which begin on page 434, the first one is Mr. Blackwood's minute addressed to Mr. Elliott, and then the next minute beginning in page

435 dated the 8th of November, 1859, headed Disposal of Lands in British Columbia is a long minute of Mr. Elliott's, and he says:

> "At Mr. Blackwood's suggestion I have looked into this matter, and have reperused for my own satisfaction all the despatches from the Governor and all the reports of the Land Board which we possess on the subject.
>
> The single practical question however at this moment pending is what notice to take of a casual remark made by Governor Douglas. In the course of a report on the general state of affairs, he laments the slow progress of Surveys, and throws out the idea that perhaps it may oblige him to permit the occupation of Lands, without their being surveyed, on licence:

The casual remark is made under tab 9, my lord, that I read a few minutes ago and I think it is paragraph 30, that it may be advisable to meet the emergency by establishing some temporary system of occupation. And then Mr. Elliott goes on to say:

> "Mr. Murdoch has pointed out that this course has been followed by evil consequences elsewhere. Upon the question so raised, some weighty and interesting remarks have been made in the Minutes in our Office. Captain Clarke (formerly of Victoria)..."

If I may pause there, that's obviously a state in Australia, not the city:

> "Captain Clarke formally of Victoria having mentioned that he had some experience of licences was asked for further information; and he has answered by sending in no less than the draft of a long draft of an Order to be passed by Her Majesty's Council, consisting of many Chapters and Sections, and minutely regulating the whole treatment of land in British Columbia.
>
> Captain Clarke should doubtless be thanked for the great labour which this task must have cost him, but whatever may be the merit in other respects of his views, I think it will probably be agreed that the idea of regulation by Order in

Council should be dismissed. For legislation of the proposed kind from an office in Whitehall would be certain to excite a spirit of resistence in the Colony and to be condemned in this Country as an unwise dictation in matters of detail."

And he goes on to say:

"My own experience in such matters has led me to be humble in my anticipations of what can be effected, and yet it has been somewhat extensive. It is rather more than 30 years since I wrote an abstract of effects at that period of licences of occupation in New South Wales. The same paper also reviewed the first land regulations, and the reports of their operation in New South Wales and Tasmania and in the North American Colonies. Since that time I have seen the creation of the Colonies of Western Australia, South Australia, Port Phillip, New Zealand, and also such smaller or more exceptional settlements as the Falklands, Hong Kong and Labuan. In the larger of those Colonies three quarters of a Million of Englishmen are now settled upon many millions of acres, which, at the date to which I refer, were either desert or inhabited only by Native Tribes. I can well remember the devising of the several land regulations for these places;- the hopes with which we saw enterprising adventures start for them;- the complaints which we received from many who were disappointed; and above all the numerous reports both upon those parts of the successive regulations which were found to be beneficial, and upon those others which proved to be injurious."

And then goes on to set out on the next page in the second complete paragraph:

"...I believe that the truths about land which are worth enouncing from England are extremely few and elementary. The following are perhaps the chief of them:-
That land should be disposed of by sale and not

by grants;-
That it should be sold (unless under some overruling necessity) for cash and not for credit.
That lots in Towns or in the neighbourhood of Towns should always be sold by competition."

And so on. And then he comments again on the difficulties of occupation, that's at the bottom of the page, and the last five lines I refer to:

"The Governor, conscious of the evils that would attend is being able to put Settlers promptly on their lands, naturally contemplates the simplest and most obvious remedy. Mr. Murdoch on the other hand with equal propriety points out that this remedy is in other cases being followed by very injurious effects."

Now, my lord, you may recall asking me about the Land Board and the Immigration Board, and I have looked into that and I will be able to tell your lordship with greater precision just exactly what that was but basically they were offices to which the colonial office referred colonial legislation dealing with land. They reviewed colonial statutes, and either one or both of Messrs. Murdoch and Elliott had I believe served in the Immigration Board or the Land Board as it was called from time to time. And then Mr. Elliott concludes his minute, beginning at page -- I am referring to page 440, the first complete paragraph:

"Acknowledge his despatch. Say that the Duke of New Castles attention has been attracted by his report of the inevitable delay in bringing Country lots into the market,- that His Grace fully concurs with him in the importance of finding means to place Settlers promptly on their lands,- say that it is natural that it should occur to his mind, in case the surveys cannot be advanced with sufficient rapidity, to try the expediency of permitting occupation on licence. Remark that he will probably have perceived from the tenor of former despatches to him, that there is no desire to fetter him..."

And so on. Now, my lord, this is the his -- in acknowledge his despatch is Governor Douglas. And then he says:

> "Transmit to him an extract of Mr. Murdoch's report, shewing the serious inconvenience which has followed in other Settlements from having recourse to the plan of allowing the occupation of lands upon licence."

And at the bottom he said:

> "I should say that Colonel Moody's experience will doubtless leavd him to place a due value on the most urgent necessities of the Colony and that the Secretary of State will merely remark that the laying out of a reasonable extent of Country lots in eligible situations appears the most desirable object to which the strength of the Surveying Staff can in the first instance be directed."

Now, as I have said, under the -- then follows a blue separater and then there is the actual letter of Clarke's and then the minutes which begin in page 435, the handwritten minutes, and that continues through -- Mr. Elliott's minutes continues through to page 443 and then follows the proposalal of Captain Clarke, and I'll come back to that in a minute. There is a typescript of that later on.

Now, Dr. Lane put in material in her Exhibit 1058 from the Public Archives of British Columbia but this document as your lordship will see is from the Colonial Office and is a photocopy of the microfilm of the original. The comment that she relied upon is -- can be ascertained at page 443. I am referring to the page numbers which are in the upper right-hand corner.

THE COURT: Yes.

MR. GOLDIE: Very faint at times, but that's where Clarke's proposition begins.

THE COURT: Where, it begins at 443?

MR. GOLDIE: Yes, immediately following the completion of Elliott's minute.

THE COURT: Oh, yes, I see it. And the comment that she relied upon is found in the left-hand column.

THE COURT: Page 443?

MR. GOLDIE: Yes, two columns.

THE COURT: Yes.
MR. GOLDIE: And one is his, as I understand it, is his draft Order in Council and the other consists of his -- of his comments.
THE COURT: And you say there was a typescript of this somewhere.
MR. GOLDIE: Yes, I did, my lord. Yes. It's what follows the last blue binder, the last blue separater, and it's Clarke's letter where he says:

> "I send you a Report on the British Columbian Papers in which I now return.
> I have written this Report in the form of a proposed Order in Council under the second Section of the Act of 1858."

And then over the page is the typescript of what I have been referring to at page 448, I am sorry, 443, and it reads as follows, and this is his explanation:

> "The Auction system to be established as the rule.
> Selection and temporary occupation of Crown lands - the exception.
> I must at the outset remark that the proposed scheme is suggested under the impression that no claims or rights have arisen to the soil of British Columbia excepting isolated claims of the Hudson's Bay Company not yet decided, other than those of the Crown and that no Indian title exists or if any that it has just been extinguished, and Separate provision made for them."

And then there follows after that what is found in the Public Archives of British Columbia, Exhibit 1058.
THE COURT: 1058.
MR. GOLDIE: Yes, that's correct.
THE COURT: And that's from Dr. Lane's evidence?
MR. GOLDIE: Yes. The minute of Mr. Elliott on the whole of Captain Clarke's suggestion was as what I have read earlier, namely, the single practical question, however, at this moment pending is what notice to take of a casual remark made by Governor Douglas.
Tab 12 records the transmittal to Douglas on January 7, 1860 of a copy of the letter of Captain Clarke. I ask your lordship to word -- note the word

"copy" because as you will see the original was sent to the Land Board for its comments. That is apparent from tab 17 which begins with the typescript of the letter to the Immigration Commissioners of the 24th of February, 1860, beginning with the words:

> "With reference to the reports which you have from time to time made on the disposal of lands in British Columbia, I am directed by the Duke of New Castle to transmit to you, for your information the accompanying extract of a private letter from Captain Clarke, Royal Engineers, formerly Surveyor General of the Colony of Victoria, and a further letter from Captain Clarke setting forth in great detail the views which have occurred to him on the best mode of meeting the urgent want which has been felt of land for occupation in British Columbia."

And then over the page as Captain Clarke's draft of the Order in Council is sent in original:

> "I am to request that it may be returned after you have perused it."

And then follows an extract from Captain Clarke's letter to the Times of the 8th of September, 1859, going back to tab 12, which is dated January 7, 1860 and transmits a copy of the Clarke's letter to the Colonial Office. Tab 13 is Douglas' despatch of January 12, some five days later of 1860 and given the mails at the time these two despatches must be read as crossing. And Douglas returns, makes further reference to the problems of settlement in the mainland colony. He says in the first paragraph:

> "In my report on the affairs of the Colony of British Columbia, of the number and date noted in the margin..."

My lord, that despatch is under tab 10:

> "...I did myself the honour of laying before your Grace a statement of the expense, inconvenience, uncertainty, and delays to which emigrants were exposed in making purchases of

land in that colony."

And then he says in paragraph 4:

> "I now forward here with a Proclamation giving to my previous instructions the force of law, and also providing for the purchase, with the same limitation og the ultimate price, of larger tracts of unsurveyed country land in addition to the land pre-empted, as may be desired by persons of larger means,"

Et cetera. Paragraph 5:

> "This Act has been reviewed with much anxious consideration, and every precaution has been taken to adapt its machinery to the state of the colony, and to divest it of unnecessary forms, expense, and delay."

Paragraph 7:

> "The object of the measure is solely to encourage and induce the settlement of the country; occupation is, therefore, made the test of title, and no pre-emption title can be perfected without a compliance with that imperative condition."

Paragraph 8:

> "The Act distinctly reserves, for the benefit of the Crown, all town sites, of auriferous land, Indian settlements, and public rights whatsoever."

And then the enclosure is the Proclamation in question. So at this point your lordship will see that Douglas has followed up what he intended to do and while the matter was still being debated in London.

Under tab 14 are the minutes of the Colonial Office on that despatch. And it's first directed to Mr. Elliott who wrote the long minute on Clarke's proposal, and his minute to Mr. Merivale reads, and I quote:

"The Governor has carried into effect, formally, his intention of allowing occupation of Crown Land, with right of pre-emption.
I suppose the first step will be to refer this to the L & E Commissioners."

And that should be Land and Emigration Commissioners for report. TFE 6 March. And then Mr. Merivale's signature and Mr. Fortescue and finally the Duke of New Castle. And then follows the typescript of the despatch which I have just read from and attached to it is the printed copy, very faint, of the Proclamation.

THE COURT: Is that what's at tab 1?

MR. GOLDIE: This is all under tab --

THE COURT: No, but is that document that Proclamation at the back of tab 14?

MR. GOLDIE: Is the tab 1, yes. It's Calder 3.

THE COURT: Yes.

MR. GOLDIE: And tab 15 is the comments of the Immigration office and there's a typescript preceding the original and it's addressed to Mr. Merivale and it is signed by Mr. Murdoch and Mr. Rogers who later became Sir Frederick Rogers, and he acknowledges the letter enclosing a despatch from Mr. Douglas. That's under -- that's the despatch under tab 10, and then he refers to that at some length. And then over the third page in, he makes reference to the Governor's concern over unsurveyed land and the difficulties that that provides in the way of settlement. On the third page in the paragraph that's on page 62 ends with these words:

"We continue to adhere to the opinions there stated, and we therefore, think it matter for regret that Governor Douglas should have adopted the course he now reports."

And over the page a reference to the so-called Canadian System, and then there is a minute of the Colonial Office on that letter which starts at page 65, and it's Mr. Blackwood's notes:

"Mr. Elliott. This matter and the previous papers, I fancy are in your hands."

And then Mr. Elliott says:

"None of the Governor's despatches remain in my hands. From paragraph 4 and 5 of this report it appears that he has permitted occupation of land with a right of pre-emption. This, the Commissioner's regret, but their views on the subject in their former report were not adopted at this Office and therefore this regret cannot be expressed to the governor."

THE COURT: I don't see that, Mr. Goldie.
MR. GOLDIE: Oh, it's a typed page in the upper right-hand corner, it's in the typescript and up in the upper right-hand corner, there is page 65.
THE COURT: Yes. I see it.
MR. GOLDIE: It is the corresponding page from the original. Under tab 16 is the despatch from the Duke of New Castle to Douglas of February 18 in which he says, this is the second paragraph:

"I may take the present opportunity of cautioning you (although the caution is perhaps unnecessary), that in transmitting to you in my recent Despatch No. 3 of the 7th of January, Captain Clarke's scheme for the disposal of lands, you are not to suppose me to have done so as a preliminary towards carrying such a scheme into execution by the instrumentality of an Order of Her Majesty in Council. I think that the subject is not one fit to be dealt with by that authority, and any that attempt to frame in this country regulations entering so much into detail would be misplaced. My object was merely to put you in possession of the views of a gentleman of great ability, who formerly occupied a high position in Australia, and enjoyed the confidence of the colonists, upon the best means of meeting difficulties such as he had himself encountered..."

Et cetera. Now, that date, of course, February 18, 1860 would be before the Proclamation was received in London.

And tab 17, as I have referred to before, it's dated the 24th of February, 1860, and it refers to the Emigration Commissioners, Clark scheme.

Tab 18, this is the report of the Emigration

Commissioners of the 3rd of March, 1860, in which they say:

> "We have to acknowledge your letter of 24th instant transmitting for our information extracts of letters received from Captain Clarke, Royal Engineers, formerly Surveyor General of Victoria,"

Et cetera. Paragraph 2:

> "In obedience to the directions in the last paragraph of your letter we return the sketch of an Order in Council which accompany Captain Clarke's second letter. As this sketch has been referred for Governor Douglas' report we abstain from offering any observations on it. But we may be allowed to point out that an arrangement which might be inevitable in Victoria, where the population rose in less than two years from 77,000 to 151,000 would not have the same justification in British Columbia where at the latest date the population did not exceed 5,000."

That number, of course, would have to be taken as referring to minors and non-Native people.

THE COURT: Would that be the population of the mainland as well?

MR. GOLDIE: That is just the mainland, my lord. It is not Vancouver's Island.

THE COURT: I see, yes.

MR. GOLDIE: The Victoria to which he refers is the state in Australia.

THE COURT: Oh, yes.

MR. GOLDIE: Tab 19. Now, this is the Emigration office's comment on the Proclamation, the letter is dated the 31st of March, 1860.

> "We have to acknowledge your letter of 14 instant enclosing a Despatch from the Governor of British Columbia with a Proclamation issued by him, to prescribe the conditions on which unsurveyed Agricultural Lands may be occupied in that Colony on a system of pre-emption."

And they refer to Governor Douglas' comments on the

difficulty in providing surveyed lands and proposed as a means of escape the establishment of system of occupational land surveyed pre-emption.

> "The Duke of New Castle having sanctioned that proposal the Proclamation now transmitted has been issued to carry it into effect."

And then there is a long observation on the terms of the Proclamation and instances in which it could be improved or in which it leaves something to be desired. And paragraph 8 at the bottom of the third page, it states in these words:

> "Except in these respects we conceive that the Proclamation may be approved."

And then the minute of the Colonial Office is adopting the Commissioner's advice, and that's Mr. Elliott of the 4th of April, and then Mr. Fortescue and on the 5th, and the Duke of New Castle on the 6th.

Now, under tab 20 and 21 and 22 are the documents which record that the Proclamation was laid before Parliament, the House of Commons on the 30th of April, and the House of Lords on the 3rd of May. And I won't deal with each one of those. They are similar to ones I dealt with in the case of other documents.

Under tab 23 is the Duke of New Castle's acknowledgement of the 7th of May, 1860, is despatched to Douglas acknowledging receipt of Douglas' despatch of the 12th of January enclosing a proclamation issued by you prescribing the conditions on which unsurveyed agricultural lands may be occupied in British Columbia and making again reference to the difficulties which Douglas had referred to and stating that the Proclamation has been laid before Parliament in compliance with the provisions of the Act 21, 22 Victoria, but then he goes on to say, and I quote:

> "But I shall delay to convey to you any final decision upon it until I shall have received your report upon the scheme of Captain Clarke for the disposal of the Crown Lands of British Columbia which I have forwarded to you with my Despatch No. 3 of the 7th of January which has crossed your despatch now under acknowledgement.

> In the meantime it may be useful to communicate to you the enclosed observations of the Emigration Commissioners in which some necessary amendments of the Proclamations issued by you are pointed out."

And then follows the extract from the reports of the Emigration Commissioners to which I have referred.

Under tab 24, Douglas to New Castle of the 8th of May, 1860.

> "I have the honour to acknowledge the receipt of Your Grace's Despatch No. 9 of the 18th February."

Now, although he deals with this despatch first, it is in fact New Castle's second despatch and it's tab 16. And this is clear from the following words:

> "Explaining that Your Grace's object in transmitting to me Captain Clarke's scheme for the disposal of land was merely to put me in possession of the views of a gentleman..."

Et cetera, et cetera. And he says at the bottom of the page:

> "I was not led from the tenor of Your accompanying despatch, to think that you had done so as a preliminary towards carrying such a scheme into execution in a formal manner, and without regard to the Laws regulating the sale of Crown Land now in force in British Columbia."

Tab 25 is Douglas of the 8th of May acknowledging the first despatch from New Castle on the subject of Clarke's proposals, and stating that he will forward his opinion on them. And then tab 26, a despatch from the Colonial Office dated the 16th of July, 1960, authorizing the reduction and the price of -- the upset price of country lands in Vancouver Island and in the sixth line down, he says:

> "By the present despatch I have the honour to authorize you to apply the same course of proceeding to the public Lands in British

Columbia.

So far as regards the occupation of land with a right of pre-emption, you are aware from the Duke of New Castle's Despatch No. 23 of the 7th of May that His Grace has suspended his opinion until receiving a report expected from you on the subject of Captain Clarke's scheme."

Tab 27.

THE COURT: Lewis is who again?

MR. GOLDIE: Lewis is an official in the Colonial Office, my lord.

Under tab 27 are the Parliamentary papers indicating that there was laid before Parliament the despatches which are under tabs 10, 11, 12 and 16.

THE COURT: Yes.

MR. GOLDIE: Same thing -- 27 is the House of Commons. 28 is the House of Lords. 29 is Douglas of the 24th of August, 1860, on Captain Clarke's scheme and, again, I am referring to the typescript and the original is found following that. Paragraph 2, Douglas states:

> "The scheme has, I may premise, merits of a high order, and indicates the large experience, and, on many points, liberal views of the writer; I fear however its introduction, would not, without modification, be attended with any immediate or ultimate advantage."

And then the second to last line he makes reference to:

> "It is inapplicable to a Colony like British Columbia,"

And in paragraph 3, in the next page:

> "In principle, however, Captain Clarke's scheme is not widely different from the Laws now regulating the disposal of land in British Columbia."

And he -- in effect, he comments. His comments make reference to the sections of Clarke's scheme. He makes no comment on Clarke's observation with respect to Indian title. On page -- the page which has at the upper right-hand corner 76, comment on Section 12,

Clarke's proposal, is set out in Section 12, and then Douglas' comment states -- begins with the words:

> "The Law of British Columbia is somewhat different in this respect,"

And he goes on to say why he favours what is done in British Columbia. And at the bottom of that page, 77d, he says:

> "I may further remark, that the emigration to British Columbia, has, in most cases, been of the poor and labouring classes, some of whom were men of small means, but the great majority had not a farthing their arrival.
>
> Those men are, however, the bone and sinew of the State, and if they can be induced to till and cultivate the soil, they will soon produce a sensible effect upon the country.
>
> The whole of that class would, however, be excluded from purchasing land by enforcing the system of prompt payment; its effect would be to place the Colony in a false position, there being on the one land no capitalists disposed to purchase land, while on the other hand the stringency of the terms would virtually amount to a rejection of the only class who are desirous of settling in the Colony."

And over on the next page in the mid page under the paragraph under the words under the figures 83, first full paragraph:

> "The Crown Lands should, I think, be treated as a means of aiding the progress and development of the Country, and not merely as a source of revenue. If the increase of population is admitted to be the paramount object of consideration, then I conceive the settlement of the Country should be encouraged through the only means in our power, the cheap and easy acquisition of land: That being probably the greatest, and almost sole attraction which new countries possess."

And so on.

THE COURT: Would it be convenient to adjourn now, Mr. Goldie?

Read In by Mr. Goldie

Proceedings

MR. GOLDIE: Yes, my lord.
THE COURT: All right, thank you. Then we will resume at 10:30 tomorrow morning.
THE REGISTRAR: Order in court. Court stands adjourned until 10:30 tomorrow.

(PROCEEDINGS ADJOURNED AT 4:50 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.

_____
TANNIS DEFOE, Official Reporter
United Reporting Service Ltd.