Vancouver, B.C.
April 25th, 1989.

(PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)

THE REGISTRAR: In the Supreme Court of British Columbia. Vancouver, this Tuesday, April 25, 1989. Calling the matter of Delgamuukw versus Her Majesty the Queen at bar.
I caution the witness, you're still under oath.
THE COURT: Ms. Mandell.
MS. MANDELL: My lord, we were at tab 16, and it's just been marked as an exhibit, and I have some questions here for the witness.
THE COURT: Yes. Thank you.
MS. MANDELL: Thank you.

JAMES MORRISON, Resumed:

EXAMINATION IN CHIEF BY MS. MANDELL CONTINUED:
Q Mr. Morrison, what was, in your view, the mischief which the Proclamation against settling at tab 16 was intended to address?
MR. GOLDIE: My lord, I object to that. Your lordship referred yesterday to the legislation and the rule with respect to the construction of an act of parliament, and that is what -- I think it's the rule in the Haydens case.
THE COURT: Is that the golden rule?
MR. GOLDIE: Beg pardon, my lord?
THE COURT: Is that what they call the golden rule?
MR. GOLDIE: It was a golden rule with respect to the construction of an act of parliament.
THE COURT: Yes.
MR. GOLDIE: The construction of a document does not fall within that category. The construction of a document, especially one in respect of which there is no patent or latent ambiguity, is for the court alone, and the mischief that is referred to is one that relates to the legislative history of an act of parliament. And I object to this witness being asked what is the mischief that it is entitled -- that it is about to correct. The mischief so far as it is relevant to this case, and I'm not sure that it is relevant, is apparent from the recital of the document itself.
THE COURT: What does it say? I can hardly read it. "By the Honorable William Johnson".
MR. GOLDIE: Well, are we looking at --

THE COURT: Tab -- oh.
MR. GOLDIE: 16, my lord.
THE COURT: I'm at 15.
MS. MANDELL: My lord, if my friend's excited about the word mischief I can ask the witness with respect to the background of the document.
THE COURT: Well, I think you can ask a researcher, subject to what your learned friends say, what was the historical setting in which this document was -- was promulgated. At least, I would think you could, and --
MR. GOLDIE: If your lordship wishes the assistance of Mr. Morrison in setting this in a general history of the time.
THE COURT: Yes.
MR. GOLDIE: Then I don't have an objection to that.
THE COURT: No. I think --
MS. MANDELL: I can ask the question along those lines.
THE COURT: I think that's what we're all agreed you do, Ms. Mandell.
MS. MANDELL: Thank you.
Q Mr. Morrison, what was the historical setting in which this document was promulgated?
A Well, the excerpts which just precede the Proclamation are pretty well explanatory of it. Colonel Bouquet was the military commander at Fort Pitt effectively of the Ohio country, which was part of the area that the French had been defeated. I mentioned yesterday as well about the Ohio Company of Virginia having received various land grants in the region of the Ohio Valley. And what had happened was that the Treaty of Easton with the Six Nations and Delawares, et cetera, in 1858 the series of Easton treaties, Pennsylvania had agreed, and some of the other colonies had agreed, not to settle beyond the Allegany Mountains, but Virginia and Maryland didn't recognize the treaty and were allowing people to settle in the Ohio Valley who were taking up lands under the Ohio Company grants. And various Virginia land speculators, among them George Washington, were involved in this land settlement process. And Bouquet was, as he states in the letter, just preceding of 12th of September, 1760 that as far as he was concerned, you know, Virginia and Maryland were bound by the Easton treaty. And so this Proclamation is designed to, you know, forbid any of His Majesty's subjects from settling west of the Allegany Mountains on any pretense. And it's directed at Virginia and Maryland in particular.

Q And at this time, to your knowledge, is this the first time that the prohibition settlement west of the Alleganys is declared by a Crown's representative?
A This is the first specific instance. It had been a matter of discussion at the Treaty of Easton among the Indians and the various representatives, but this idea of restraining settlement is becoming more and more to the fore.
Q Thank you. Could I ask you then to turn to the next document. This is a letter to Cadwallader Colden. Who is Mr. Colden?
A He's president of the Council of New York. He's the acting governor. He's about to become the lieutenant governor, but at the moment that Sir William Johnson is writing to him he's the acting governor of the State of New York -- sorry, Colony of New York.
Q And is there any significance in your mind to the fact that Sir William Johnson is writing to Colden at this date and at this place?
A Well, what he's outlining in the letter are a series of problems between the Indians and settlers taking up lands in New York which -- Johnson's writing from Fort Johnson. He's got headquarters in the Mohawk Valley, and these are difficulties over land which are in that region. And he in the very first bit of his letter to Colden he -- he speaks of seeing justice done to the Indians. This is in the fourth line down. It is concerning the sale of their lands, and --
MR. GOLDIE: Fourth line in what paragraph?
MS. MANDELL: This is the first paragraph.
A Very first paragraph of the letter of 20th of February, 1761. Perhaps they're out of order.
MR. GOLDIE: It's not under ours.
A At tab 17.
MS. MANDELL: You're in tab 18. It's under 17.
MR. GOLDIE: Thank you.
A And then further down he says after referring to His Majesty's instructions to his governor:

> "As there has been and still are abuses and unfair means used with them."

That is the Indians.

> "For obtaining deeds for their lands."

THE COURT: Where is that, please?

A Oh, that's about half way down the first full paragraph in that letter of 20th February where he says:

"There has been and still are abuses and unfair means."

THE COURT: I'm sorry. I can't find that.
MS. MANDELL: It begins with the line "adhered to by you", and it's about seven lines up from the bottom there.
THE COURT: Oh, yes. Yes.
A

"Used with them for obtaining Deeds for their Lands, which may not, indeed cannot be well cognisable to a Governor, I think it my Duty to give you a hint of it, and endeavor all in my power to prevent their being defrauded, as I am fully sensible that nothing can tend more to alienate their affection and attachment from His Majesty's Interest, than the pressing them to dispose of their Lands, and that often by very unwarrantable means."

And he refers to meeting with the Indians, and that the Indians had asked Johnson to write to the governor, or to the government of New York to entreat them "not to pass Patents for any Lands." This is the fourth line down on page 339.

"For any Lands that were not given or sold with the consent of their whole Castle, as they say that their Bretheren the white People, often make a few of their foolish People drunk, then get them to sign Deeds, while the rest, and those, even whose property it is, know nothing at all of the affair."

And he says that this is contrary to His Majesty's intentions. And then he details various of the land complaints, which I don't propose to read, but they're set out various of these problems between settlers and the local Indians in New York. And then on page 340, seven lines up from the bottom, he says again after saying that he's managed to calm the Indians down:

"But I fear if they are not done Justice to soon, and their grievances redressed, it may turn out a more serious affair than we are apprehensive of."

MS. MANDELL: All right.
THE COURT: Is the war over at this time?
A Yes.
MS. MANDELL: Yes.
MR. GOLDIE: Well --
A In a sense.
MR. GOLDIE: Yeah, that's better.
A I mean, the French have --
THE COURT: The fighting's over?
A The French have capitulated at Montreal effectively ending the --
MR. GOLDIE: Well, but --
A The treaty is not yet signed.
MR. GOLDIE: The treaty has not yet been signed and there was still a prospect of fighting with respect to some of the outlying areas.
THE COURT: What was the date of the capitulation in Montreal?
A September -- I forget the exact date, but 1760.
THE COURT: And the peace treaty wasn't signed until '63?
A '63.
MR. GOLDIE: There were abortive peace negotiations in 1761, my lord. And I'm sure the witness will come to that.
THE COURT: All right.
MS. MANDELL: Yes. I'd like to have that letter then marked as the next exhibit.
THE REGISTRAR: 1026-17.

(EXHIBIT 1026-17: Feb. 20, 1761 letter to C. Colden from Sir W. Johnson)

MS. MANDELL:
Q The next letter is another letter to the governor or Acting Governor Colden, and this is also by William Johnson. Could you explain what -- what is the significance of this letter?
A It's the same discussion that was in the previous letter setting out these problems involving the Indians and settlers and the way in which land grants were being taken up in New York, and that it's referring specifically, among other things, to certain lands being taken up on the west side of the Hudsons River near Lake George and Lake Champlain. And on

page 410 he refers to the -- about the 8th line down -- what the French had been telling the Indians which is that the -- the English intend to make slaves of them. Here's the line:

> "In danger of being made slaves, and having their lands..."

There's a number one in the margin, but at the bottom the original apparently had the word lands in it.

> "Taken from them at..."

And I'm not sure what that word is supposed to be. At pleasure probably.

> "Which they added, would confirm what the French have often told the Six Nations."

That the French particularly had been, partially because the French themselves were not interested, of course, in acquiring lands from the Indians, they were not settlers, unlike the English colonists, and the French dealt with the Indians through the military and were, of course, interested in trading with the Indians. And it was very -- the most important economic activity of New France, the fur trade, but they constantly tried to win the Indians to their side, of course, by pointing out the intentions of the English colonists to take away their land and deprive them of their possessions.

And at the very bottom of page 410 --

MR. GOLDIE: I think, my lord, the following is important given the context of this discussion, and bears on the question your lordship asked a few minutes ago. Sir William Johnson goes on to say:

> "Should our Bretheren begin with us in that manner, who have at the risk of everything joined them in defending their and our Country, and now thought to set down in peace."

That, my lord, I think refers to the apparent cessation of the fighting between the French and the English.

THE COURT: M'hm. All right. Thank you.
MS. MANDELL:
Q Anyways, go ahead.
A The end of page 410 when he says:

"I cannot Sir consistent with the duty I owe His Majesty and the good of the Service I am by him employed in avoid acquainting you, I am very apprehensive that pressing the Indians so much to dispose of their Lands and that in such great Quantities contrary to their Inclinations at present, will give them great umbrage and alarm all the Nations, and probably produce consequences which may be very prejudicial to His Majesty's Interest, and stop the settling of the Country, both which are now in a prosperous..."

And the omitted word is way.

"And may, by a proper conduct towards them".

And then on top of 411,

"Be continued so, but should it unhappily fall out otherwise, I am certain it will not be in my power or that of any other (without violent measures which I believe any man of reason would be avoiding if possible) to bring them back to so good a state."

MS. MANDELL: May that be marked as the next exhibit.
THE COURT: Yes. 18.
THE REGISTRAR: Thank you.

(EXHIBIT 1026-18: June 18, 1761 Letter to C. Colden from Sir W. Johnson)

MS. MANDELL:
Q Now, if you turn, please, to tab 19. This is a letter of December 2nd, 1761 from the Lords of Trade to the King, and it contains some draft instructions. Could you first advise us to whom were these draft instructions being prepared? By -- to whom were they being prepared?
A As it states in the opening paragraph of the Lords of

1 Trade's submission, they're directing these to those
2 of the colonies upon the Continent of North America,
3 "As are under your Majesty's immediate government",
4 and continuing, "And where the property of the soil is
5 in your Majesty."
6 Q And those would be the proprietary colonies?
7 A No, those are not the proprietary colonies. These are
8 the Royal colonies, the ones just as they say that are
9 under His Majesty's immediate government. And the
10 next page, page 478, you can see which colonies that
11 these are -- that they mean. Pennsylvania, for
12 example, was not included. It was a proprietary
13 colony. And Massachusetts Bay was also a proprietary
14 colony, it's not included. But here Nova Scotia, New
15 Hampshire, Virginia, the Carolinas and Georgia are all
16 Royal colonies.
17 Q All right. And why, in your view, was the
18 instructions being sent to the Royal colonies at this
19 time?
20 A Well, one, they were the most directly amenable to
21 imperial control. And, two, Pennsylvania, for
22 example, one of the proprietary colonies had actually
23 in comparison to the other colonies was behaving quite
24 well with regard to these problems of unwarranted
25 settlement on Indian lands, and various Easton
26 treaties had been worked out with Pennsylvania in
27 particular.
28 Q If you could then turn to the draft instructions and
29 advise with respect to the nature then of what was
30 being instructed of the governors?
31 A The -- on page 478 it makes reference to lands
32 which -- this is about one, two, about ten or 11 lines
33 down, you know, complaining that settlements have been
34 made and possession taken of lands, the property of
35 which the Indians have by treaties reserved to
36 themselves, and makes reference to persons claiming
37 the said lands under pretense of deeds of sale and
38 conveyance illegally, fraudulently and surreptitiously
39 obtained of the said Indians.
40 THE COURT: Where is that on page 479?
41 A 478.
42 MS. MANDELL: Inside the instructions.
43 A Inside the instructions about -- beginning about ten
44 lines down.
45 THE COURT: Yes.
46 A It's reciting why it is there -- these instructions
47 are being drafted. And a few lines further after

setting out these complaints:

"We therefore taking this matter into Our Royal Consideration, as also the fatal Effects which would attend a discontent amongst the Indians in the present situation of affairs, and being determined upon all occasions to support and protect the said Indians in their just Rights and Possessions and to keep inviolable the Treaties and Compacts which have been entered into with them".

And then it enjoins and commands these governors and other officials:

"Upon any pretense whatever upon pain of Our Highest Displeasure and being forthwith removed from your or his office, pass any Grant or Grants to any persons whatever of any lands within or adjacent to the Territories possessed or occupied by the said Indians or the Property Possession of which has at any time been reserved to or claimed by them."

And then it requires these, the governors, et cetera, to publish a Proclamation:

"Strictly enjoining and requiring all persons whatever who may either willfully or inadvertently have ceded themselves on any land so reserved to or claimed by the said Indians without any lawful authority for so doing forthwith to remove therefrom."

And it continues in the same vein.

Q All right. And were these instructions passed by the King and sent to the governors as said?

A Yes, they were officially issued. The last part of the document consists of the excerpt from the published acts of the privy council.

Q And that would be on December 3rd?

A Yes, 1761. Approving two drafts of instructions, and the first is the one just referred to.

Q All right.

A It would be on page 500.

THE COURT: What page?

1 MS. MANDELL: It's 1761, my lord. There's two inserts in this
2 tab, the one is the privy council minute and the other
3 is the draft. Could then both of those documents be
4 marked as one exhibit.
5 MR. GOLDIE: I think, my lord, that the whole of the document
6 that I sent you, of which this is a part, should be
7 marked. This is part of the order in council which
8 approves, and it's only a part of it, my lord.
9 MS. MANDELL: Well, I've got no objection to filing the whole
10 thing, but --
11 MR. GOLDIE: Well, I sent you the whole thing.
12 MS. MANDELL: Well, we also had the document. We only want this
13 particular bit of it.
14 THE COURT: You're talking now this document starts "Acts of the
15 Privy Council of England"?
16 MS. MANDELL: This is just the registrar of the various orders
17 of council that get passed. We just isolated it with
18 respect to this one instruction that we were
19 interested in. I've got nothing to hide with respect
20 to the rest.
21 THE COURT: Well, then I will just make a note the whole of the
22 document is to be included.
23 MS. MANDELL: That's fine.
24 THE COURT: All right. Thank you. And where on this page does
25 it --
26 MS. MANDELL: My lord, if you'll --
27 THE COURT: I see, on December 3rd.
28 MS. MANDELL: December 3rd, that's right.
29 THE COURT: Reported two drafts of instructions were approved.
30 Yes, all right.
31 THE REGISTRAR: 1026-19.
32 THE COURT: Yes.
33
34 (EXHIBIT 1026-19: Dec 2, 1761 Letter to King from
35 Lords of Trade with Order in Council)
36
37 MS. MANDELL:
38 Q Now --
39 MR. GOLDIE: You see, my lord, there are actually documents from
40 two separate sources under this one tab, and that's
41 what I'm concerned about.
42 THE COURT: Yes.
43 MR. GOLDIE: The facing page is not the source of the order in
44 council.
45 MS. MANDELL: No. The order in council -- I put the source page
46 in. It's the -- it's the acts of the privy council.
47 There are two source pages identified in the tab.

MR. GOLDIE: Yes. I agree with that.
THE COURT: All right. Thank you.
MS. MANDELL: All right.
MR. GOLDIE: But, as I say, the complete order in council, which is important, is not there, and I object to that.
THE COURT: All right.
MS. MANDELL: All right.
Q Mr. Morrison, before we get into the next batch of documents which deal with the enacting of the Proclamation as considered by the Lords of Trade and the King I'd like you to turn your mind to the period that we've just canvassed, which is approximately 1742 to January 1763, and I ask you, in your opinion, was there a pressing problem raised by the Indian nations which was of concern to the Crown during this period?
MR. GOLDIE: Well, I object to that, my lord. It's perfectly clear from the documents what the nature of the problem was, it's perfectly clear what we're leading up to, and presumably we are going to be getting to Pontiac's conspiracy and outbreak of Indian war which took place on the boundaries of these colonies and which immediately preceded the Royal Proclamation. But I take exception, my lord, and I say that this witness is not qualified to summarize documents which in themselves tell the story. It is a matter of argument to link these together and to submit to your lordship the nature of the problem and its relevance to the Royal Proclamation. The factual circumstances, the matrix of facts are all here.
THE COURT: Well, that's the only thing I have any concern with. It would seem to me, Mr. Goldie, that what you're saying would be -- would be correct if the opinion sought is based only on these documents that I have seen, but we are all the product of everything we experience, and I'm pursuing a line of enquiry in my mind at the moment as to whether this is just a case of wrapping up what we already know in a nice package and tying a bow on it, or whether the opinion sought is one that depends not just on what we've seen, but on everything that -- everything else that the witness knows from his historical research.
MR. GOLDIE: Well, my lord, if the witness knows anything more the documents have to be produced. As a matter of fact, this is largely a paraphrase of chapter six of Professor Slattery's thesis. As far as I'm aware most of the documents are there referred to.
MS. MANDELL: Most of them aren't.

MR. GOLDIE: Well, I'm not so sure about that. I'm making a search now of the origin of the documents from one to 17, and some of them are referred to in Mr. Morrison's summary, others are from our disclosed list of documents which Mr. Morrison acknowledges in his summary was his source, others as far as I can make out come from Professor Slattery. My point is this; dealing, as we are, with a matter in which there is no competent witness in respect of events as firsthand witnesses we must have the sources of opinions. Now, my first submission is Mr. Morrison is not qualified to express an opinion on these documents. My second submission is that it's not required. My third submission is that if he's going to express any opinion which is not based on these documents the documents must be disclosed.

THE COURT: Well, perhaps, Ms. Mandell, you can explore the matter further with the witness and find out for me if -- if the opinion you're asking the witness for is based upon the documents that are before me or --

MS. MANDELL: Right.

THE COURT: Or them and something else.

MS. MANDELL: I'll explore that. I might advise, my lord -- all right. I'll do that.

MS. MANDELL:

Q In reviewing the period between 1742 to 1763 did you make reference to Jack Stagg, Anglo-Indian Relations in North America, a thesis published by him in 1980?

A Yes. Among other works, certainly.

Q And did you also with respect to this period read and make reference to Brian Slattery's thesis, The Land Rights of Indigenous Canadian People as Affected by the Crown's Acquisition of Their Territory, doctoral thesis of 1979?

A Yes.

Q And did you also review the sources referred to by Jack Stagg and Dr. Slattery?

A Yes, I did, and have. And there, of course, are a number of other historical works and documentary sources that I canvassed as well.

Q Did you also refer to Frances Jennings' work, The Ambiguous Iroquois, published in 1984?

A The Ambiguous Iroquois Empire, yes.

Q And did you also refer to Frances Jennings' The History and Culture of the Iroquois Diplomacy, his book published in 1985?

A Well, he edited that book, and an excerpt from it I

1 referred to yesterday in an article by Professor
2 Fenton and glossary of terms from Treaty Diplomacy.
3 Q And did you also refer to Dr. Hurley's work Children
4 or Bretheren Aboriginal Rights and Colonial Iroquois,
5 a doctoral thesis of 1985?
6 A Iroquoia, yes.
7 Q And did all of the authors whom I've just referred to
8 write about and deal with the subject matter which is
9 being testified to before this court involving the
10 period between 1742 and 1763?
11 A Yes, in part. I mean, that wasn't the only period
12 that they dealed with.
13 Q And apart from those major sources did you consult any
14 other general references with respect to this period?
15 A Well, the -- certainly the standard historical works
16 on the period and topic. I could mention, for
17 example, Jack M. Sosin, White Hall in the Wilderness,
18 which is a well-known and acknowledged work on this
19 period and a history of some of this period and
20 setting.
21 Q And were the documents which we've already referred to
22 from tab 1 to 19 a selection of documents which --
23 which was done by you with respect to some of the
24 major issues of this period as you understood them?
25 A Yes, it's a selection from among -- there are an
26 enormous number of historical documents from the
27 period and I selected ones which I felt were
28 important. There are many, many documents. I mean,
29 the William Johnson papers alone run to some 15, 16
30 volumes of printed versions that are, you know, many
31 manuscript sources and many other printed collections
32 of documents. It's obviously a selecting process has
33 to go on.
34 THE COURT: Well, I think we now have ourself into a position
35 where I think I have to deal with Mr. Goldie's
36 objection that the sources having been disclosed, the
37 witness' role as a researcher does not permit him to
38 go on and express an opinion on the period under
39 consideration. Does that fairly state your position,
40 Mr. Goldie?
41 MR. GOLDIE: Yes, my lord. It's a matter of argument. Stagg,
42 Slattery, Jennings all write about this thing. In my
43 submission, your lordship can weigh what they have to
44 say from the treatises that they have published. The
45 opinion of Mr. Morrison one step removed from Mr.
46 Stagg or Professor Slattery is of no assistance to
47 your lordship, or should not be, if I may put it that

way. It is a question of whether -- I don't propose to cross-examine Professor Slattery at second-hand through Mr. Morrison, because Mr. Morrison expresses a point of view based upon Mr. Slattery. And by Mr. Slattery I refer to all of the secondary sources that he speaks of. It's not that those sources can't be referred to, it is simply that it is not a fit subject for sworn evidence. I'm, of course, directing this argument to the qualifications which, in my submission, Mr. Morrison possesses.

THE COURT: Well, what I'm troubled by, Ms. Mandell, is the test for expert testimony which I deferred to state, amongst others, in the Mazur case. I don't see these authorities cited in Sengbusch, which I think preceded Mazur, but it doesn't seem to be in this collection that somebody handed me earlier in this trial. Let me see if -- no, it's not here. The question that troubles me is the authorities that are cited in Mazur, and no doubt other cases, where it was said that expert testimony would only be received if the court required their assistance to understand the evidence. I don't understand why I can't find what I'm looking for. This may not be a complete report. There were a number of authorities, Supreme Court of Canada, now I think I -- Anderson is here which is one of them. I cited all the authorities in Mazur and -- well, you can never find what you're looking for. My recollection simply is if I can figure out what the evidence means I can't have a witness tell me what it means.

Now, if this material is all laid out before me, as the witness has laid it out before me, and if it's all in the learned publications of these other people and it doesn't require scientific training and skill and knowledge why do I need an expert to tell me what the situation was as disclosed by all these documents?

MS. MANDELL: Well, I've got two things, my lord, if this could have -- if this could assist you. The first is that your lordship is probably aware the volume of material which has been written with respect to this period. Taking one source alone, take Mr. Stagg's work is approximately three or 400 pages of thesis much of which is dedicated to the period before your lordship. Brian Slattery is another large thesis, Jennings there is two volumes, Hurley writes much of this -- much of this pertains to this area, some of it does, some of it doesn't.

1 The first point I wanted to say is I doubt very
2 much that your lordship is going, nor should counsel,
3 in our view, ask your lordship to attempt the same
4 volume of reading which would be done by an historian
5 or somebody expert in a particular area to comb
6 through the various sources of historical works
7 assembled with respect to a particular time period.
8 And this, I say, is the value of an historian. And
9 certainly if my friend wishes to comb through the same
10 sources with the aid of their expert and put to Mr.
11 Morrison countervailing themes which may also appear
12 in this reference material then it's up to him, and he
13 can do that. But it saves your lordship, I say, an
14 impossible task of doing the same scope of reading as
15 somebody who's involved in the period and will read
16 what is written as and when it is and stays on top of
17 the debate that is pertaining to these years.
18 THE COURT: Why can't this be done by a summary? Why is it
19 necessary to relive every moment in history, and why
20 is it necessary to turn over every historical stone.
21 The problem that existed in the 1742 to 1763 period
22 can probably be summarized by a person in a paragraph.
23 Why is it necessary to -- to go as far as you're
24 suggesting, that if you can't give -- can't have this
25 summary to me I've got to read all these documents.
26 Is that -- is that a non sequitur?
27 MS. MANDELL: Well, I hoped it wasn't. I was trying to address
28 your lordship's problem of why can't you do it.
29 THE COURT: Why can't you in the material before me and in an
30 argument say the situation in the years 1761 and years
31 prior to Proclamation was simply -- the situation was
32 simply this, that the Indians had been -- had been
33 treated by both sides in the war, and the French and
34 the English, and there the arrangements were made at
35 these conferences which had the knowledge going before
36 him give assurances to Indians, and when the war was
37 over some of the colonies, Virginia and Maryland in
38 particular, were encroaching upon the Ohio Valley and
39 it had to be stopped. It can be summarized quite
40 succinctly. I don't have to write a history text to
41 decide the issues in this case, you know. Does it go
42 beyond what I have said? I mean, you fill it in, of
43 course.
44 MS. MANDELL: With respect to the first question I was about to
45 ask I think that there's summary which can be done,
46 but the -- but the position which I think your
47 lordship is close to denying to the court is the

1 advantage of having an historian who has dedicated a
2 great deal of life -- of his life to understanding a
3 period and can bring to your lordship his considered
4 view. He's an ethno historian.
5 THE COURT: It's my view that has to count, not his.
6 MS. MANDELL: Well, it's true that your view in the end is what
7 has to count, but in considering the questions before
8 your lordship it's particularly because your lordship
9 will recall that for the first document that you were
10 introduced to, I don't believe that it is the kind of
11 document, as many others aren't, which can be read on
12 its face. It requires a form of decoding which the
13 witness was capable of taking your lordship into, and
14 I believe that especially with respect to these old
15 documents as we get closer to the modern period this
16 problem is not as prevalent, but there are quite a
17 number of instances where in order to actually read
18 what was going on in that period it requires something
19 other than an untrained person, in this case an
20 Iroquoia, to understand exactly what it is that
21 appears on the face of the document. And I say it's
22 those two features, one, there's this body of material
23 there that your lordship isn't going to read and an
24 historian does, and secondly, some of that material is
25 readable to somebody uniquely trained to do that which
26 makes valuable the opinion which might be developed
27 from that, and it's for that reason I say that Mr.
28 Morrison should be entitled to form his opinion and
29 your lordship can take of it what you will.
30 THE COURT: Is there anything that he can say that you can't say
31 in argument? Surely his evidence is based upon these
32 documents. Why can't you say to me when the time
33 comes what you want him to say now. You can read from
34 his -- his summary if you want, but it seems to me we
35 are at risk here of turning a trial into an historical
36 search for perfect exposure of every historical
37 moment, and we don't need that.
38 MS. MANDELL: Well, I --
39 THE COURT: All I need to know is what was the factual
40 underpinning of the Proclamation of 1763, if even
41 that's an issue in the case.
42 MS. MANDELL: Yes, it is.
43 THE COURT: Mr. Goldie says it isn't and you say it is. It may?
44 It has to be one or the other. I think when you're
45 talking about technical matters that judges are not
46 trained to understand there's more scope for an
47 expert, but when you're talking about reconstructing a

1 period from documents I'm not sure an historian is any
2 better than a judge is once the historian has laid the
3 documents before a judge, and I have in mind if I let
4 you do it I've got to let him do it, or her.
5 MS. MANDELL: The only advantage to your ruling here -- I see --
6 see the advantage that it works both ways --
7 THE COURT: Sure it does.
8 MS. MANDELL: -- But I do want to say that I think that it's
9 dangerous as a general rule to state the proposition
10 as boldly as Mr. Goldie has done, and that is that
11 none of these opinions -- opinions about none of this
12 material is within the scope or for the benefit of the
13 court or within the expertise of the witness. I think
14 that certainly with respect to what Crown policy was
15 at various points your lordship will not have the body
16 of material which would allow you to assess, in our
17 view, what Crown policy is, and that this policy is
18 going to be an opinion woven together by the volume of
19 material which has been written historically, and how
20 the witness chooses to illustrate it to the best of
21 his ability to your lordship, and I think that
22 certainly certain of the questions may be of a general
23 nature and I can do it in argument and others, in my
24 view, especially issues with respect to Crown policy,
25 are ones which, in our view, we would press strongly
26 that an opinion is required.
27 Now, the question I asked is one where I agree
28 with your lordship if push comes to shove we could put
29 it into -- I think it's been illustrated and I pull
30 back on to it I can go on to the next one, but the
31 next one doesn't involve a question of Crown policy,
32 and it's my view that those kinds of questions are
33 required to have an opinion formed by an historian,
34 and that it's not enough. We're not trained, in my
35 view, to understand what a policy is. One woven
36 together by a whole matrix of facts and documents,
37 that they have been applied, and it's not, in our
38 view -- my view, an expedient way to get this
39 information before your lordship to try and create
40 that web through a document book.
41 THE COURT: Well, I must say that I think I already have a very
42 clear picture of what happened in 1742 to 1763. That
43 may be an unpardonable conceit, but, you know, the
44 picture's pretty clear to me. I don't think it takes
45 an historian to look at just the samplings I've got
46 unless there's information to the contrary, which in
47 due course Mr. Goldie will show me if it exists, but

on the basis of the sampling I've received it doesn't take an expert to tell me what was happening in 1763, or up to 1763.

I haven't heard from Ms. Koenigsberg.

MS. KOENIGSBERG: Well, your lordship has heard from me on this subject before. Your lordship was looking for the Mazur case which isn't here, but I do think you do set out the authorities in the Sengbusch case.

THE COURT: Where?

MS. KOENIGSBERG: It's tab 6. There are not all the authorities here, but I think that the very matter that your lordship is concerned with is covered here. The -- it's covered generally in the Kelliher and Smith citation on page 39 of Sengbusch.

> "To justify the admission of expert testimony two elements must co-exist:
>
> The subject matter of the enquiry must be such that oridinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge."

Two, and that's an and:

> "The witness offering expert evidence must have gained his special knowledge by a course of study or previous habit which secures the habitual familiarity with the matter at hand."

My lord, I think with this witness, and I think perhaps distinct from at least parts of the other expert witnesses who have been proffered to you, and you have heard similar objections from defence counsel with regard to them, but with regard to this witness essentially as I understand it he is being proffered to provide your lordship with an historical context to interpret a document, the Royal Proclamation. Your lordship, in my submission, is extremely well equipped by your training and your function to interpret that document from the documents which form that matrix of facts, if I can use that quotation. We are clearly into argument. There is nothing that precludes my friend, and I venture to say there will be nothing to preclude my friend at the end of this case, to argue

the evidence of this witness. It is valuable. In fact it is perhaps expedient to bring forward a witness like this and present to your lordship a body of documents, the product of an educated search. But the way in which these documents support the position put forward in my submission is the essence of legal argument. And it is legal argument, and the function of the judiciary to determine what the Royal Proclamation means and to where and what it applied from the documents. And, in my submission, it isn't a matter that your lordship requires expert assistance in the interpretation of. And the two issues slide into one and another, in my submission. That is that this witness does not have the competence specifically to draw those conclusions, but it is essentially because it is legal argument.

Those are all my submissions.

THE COURT: All right. Thank you. You wish to make any reply to Ms. Koenigsberg, Ms. Mandell?

MS. MANDELL: No.

THE COURT: Mr. Goldie?

MR. GOLDIE: I have nothing further.

THE COURT: Thank you. Well, I'm persuaded that I should not have the witness summarize his conclusions based upon this documentary material. I do not base that ruling on any lack of qualifications on the part of the witness. I don't think you have to have a PhD in history as opposed to years of experience in research to express an historical opinion in proper circumstances, but what I have here is a situation that our American friends have grappled with and have solved the problem for their purposes by the Brandeis brief. If they have a problem of this kind they pack all the background together and they dignify it by the name of a brief, and it's given to the judge and he can look at it or he can refer to it while counsel make their submissions based upon matters of learning which are not in dispute. And sometimes it happens that you have two briefs and the matters may still be in dispute and the judge has to do the best he can, but I do not think the judicial process is designed or expected or intended to have collections of material placed before it which are readily understandable after having the assistance of counsel and then to add to that the wrap-up opinion of someone who based upon the same information has the chief -- will give his views on what it all means. I think the courts have

gotten along very well with the underlying facts and the submissions of counsel, and I think that that's as far as we need to go. When counsel come to argue I'm aware from experiences they often phrase their arguments in the terms of the expert advice they receive, and that's a perfectly proper way to put the argument, but it isn't necessary that that argument be previously sworn viva voce or otherwise during the evidentiary part of the trial. I think that without purporting to plagiarize the American experience, if counsel want to give me the Brandeis brief -- I once referred to it as reading the Brandeis briefly -- I would be glad to have whatever other historical material counsel think I should have on which they want to make their argument. I think I've almost got it from the litany of references that I have been referred to such as Stagg, Slattery, Jennings, Hurley, et cetera, but I do not endeavor for the reasons I deferred to state in Sengbusch and Mazur, and Justice Bruce Macdonald stated in the Emil Anderson case, that it is necessary or permissible to have these matters summarized. I think the role of the experts should be confined as the English Court of Appeal did in R v. Turner (1975) Q.B. 834 to matters where the evidence is of a scientific character which is likely to be outside the experience and knowledge of a judge or jury. They went on to say that if on the proven facts a judge or a jury can form their own conclusions without help then the opinion of the expert is unnecessary. I think that's the situation. Thank you.

MS. MANDELL: Okay.

Q If we could then turn to tab 20. This is a letter from the Earl of Egremont to Jeffrey Amherst. Could you explain at this date who the Earl of Egremont is -- was?

A The Earl of Egremont is a privy councillor, the secretary of state for the Southern Department, and he's writing to Jeffrey Amherst who's the commander in chief of His Majesty's forces in North America.

THE COURT: I'm sorry. Now, Egremont is?

A Secretary of state for the Southern Department.

THE COURT: Southern part of what?

A Southern Department. There were two secretaries of state charged with foreign relations, and the Southern Department referred originally to the southern part of Europe really, and/or in the main, but it came to

include North America, the colonies in North America as part of its purview, and the Northern Department dealt with northern countries of Europe.

THE COURT: All right. Now, the letter is to whom?

A It's to Jeffrey Amherst, who's the commander in chief of the military forces in North America.

MS. MANDELL:

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

MR. GOLDIE: Well, I object to any suggestion the Royal Proclamation is evolving. That's pure argument, my lord.

THE COURT: I think in view of my ruling you should ask the witness, Ms. Mandell, what parts of the letter he thinks I should pay particular attention to.

MS. MANDELL: All right. I'll ask the question as it's just been asked by you.

THE COURT: And give an explanation of anything that isn't patent on the face of it.

A The first letter refers in part to what follows, which is a separate letter from the Earl of Egremont to Thomas Fitch, who's the governor of Virginia, and what the --

THE COURT: I'm sorry. Governor Fitch is who?

A Thomas Fitch down below. He's the governor of Virginia. And in the second letter, which is dated the same day, there's reference made to, and it explains what is set out in the covering letter to Amherst, explains that some people from Connecticut have been under pretended purchases from the Indians, that is making -- have been settling in the neighbourhood of the Susquehannah and Delaware Rivers, which settlements -- this is in the letter from Egremont to Fitch -- which settlements appeared to be contrary to the Indians, and such settlement threatens Indian war. In the covering letter --

THE COURT: What does that last line say in that letter, you seem sensible --

A Sensible that a controversy.

THE COURT: Controversy?

A Yes.

THE COURT: Controversy with the --

A The last line has been cut off, but I don't propose to rely on it --

THE COURT: Yes.

A -- In any way. But in that letter from Egremont to

1 Fitch on the second page of it he refers in the
2 beginning first full paragraph on that second page
3 that His Majesty has received certain information that
4 these people are persisting in the project of making
5 the said settlement, although the Indians appear as
6 much averse to it as ever, and the King has commanded
7 Lord Egremont to express to Governor Fitch, "His
8 surprise at this behavior as well as His Displeasure
9 to find."
10 THE COURT: Does the letter say where this settlement is?
11 A Yes. It's on the -- it says in the neighbourhood of
12 the Susquehannah and Delaware Rivers, in that sort of
13 triangle of land.
14 THE COURT: Where does it say that?
15 A In the letter of Egremont to Fitch about the fourth --
16 third and fourth lines down under pretended.
17 THE COURT: Oh, I see.
18 A Making settlements in the neighbourhood.
19 THE COURT: I see. Yes.
20 A So the river is running inland from --
21 THE COURT: And where is the confluence of the Susquehannah and
22 Delaware?
23 A They flow up into what's now -- like the big bays on
24 the east coast of the United States. There is
25 Chesapeake Bay and Delaware Bay, and the rivers that
26 flow out of these bays flow inland into -- well,
27 Susquehannah flows up into Pennsylvania.
28 THE COURT: Actually, they flow down.
29 A What am I saying? Flow down. You can float up the
30 river and flow down. The drainage areas of the two
31 rivers encompassed Virginia, Delaware, Pennsylvania,
32 Maryland, all the colonies on the eastern seaboard or
33 that part of the eastern seaboard.
34 THE COURT: There is no confluence of the two rivers then?
35 A I'd have to look at a map to see.
36 THE COURT: They both flow into Atlantic bays, do they?
37 A Yes. Chesapeake Bay and Delaware Bay respectively.
38 THE COURT: It isn't likely there's a confluence?
39 A Further inland. I'm not sure where the head waters
40 are. They perhaps take their rise in the same place.
41 I would have to consult a --
42 THE COURT: Thank you.
43 A But on the -- continuing with the letter of Egremont
44 to Fitch, he's referring to what may flow, the
45 consequences of such an undertaking, and he's, of
46 course, alludes to, among other things, the horrors
47 and calamities of an Indian war. And then he goes on,

and I quote -- this is about half way, two-thirds of the way down in that first full paragraph on the second page.

> "Just at the Time, that His Majesty has actually under consideration such Precautions as may most effectually prevent so great an evil."

THE COURT: Yes.
A And then he orders Fitch to:

> "Exert every legal Authority over the People in your Government, and employ your utmost Influence to prevent the Prosecution of any such Settlement."

THE COURT: None of this would be east of the Alleganys?
A This is east of the Alleganys.
THE COURT: East of the Alleganys?
A I believe. And in the first letter from Egremont to Amherst, two-thirds of the way down, Amherst as Commander in Chief, the statement begins:

> "The King trusts, that you will, at least, be able to prevail with the People concerned in this pretended Purchase, to suspend, for the present..."

This particular settlement until the King has been informed about what's going on. And then it continues. In order that His Majesty can form an opinion as to:

> "What farther Orders it may be expedient to prevent effectually any Hazard of an Indian War."

And it continues:

> "His Majesty having it much at heart to conciliate the Affection of the Indian Nations, by every Act of strict Justice, and by affording them His Royal Protection from any encroachment on the Lands they have reserved to themselves, for their hunting Grounds, and for their own Support and

1 Habitation..."
2
3 And here, again, he informs Amherst that a plan
4 for this is desirable and is actually under
5 consideration.
6 THE COURT: All right. 1026-20.
7 THE REGISTRAR: Yes, my lord.
8
9 (EXHIBIT 1026-20: January 27, 1763 Letter to J.
10 Amherst from Earl of Egremont)
11
12 MS. MANDELL:
13 Q All right. If I could ask you to turn to the next
14 tab. This is a document which has been entitled
15 "Hints". I'm wondering if you could advise what the
16 view is of who prepared this document and for viewing
17 by whom?
18 A In the previous document there was reference to a plan
19 of some sort being under consideration, and the -- of
20 this next document the one entitled "Hints relative to
21 the Division and Government of the conquered and newly
22 acquired Countries in America", it's generally
23 accepted that the author of this document was Henry
24 Ellis who was at that time, this was early 1763, the
25 governor designate. He hasn't gone out yet to take up
26 the office of Nova Scotia, and had been, or was a
27 previous governor of the Colony of Georgia in the
28 south. And in this document, as the title is quite
29 self-explanatory, he is suggesting what should be done
30 with the conquered and newly acquired countries of
31 America. And the first suggestion he makes because --
32 this is in the first full paragraph -- of the hints,
33 the country called Canada is of such vast extent, and
34 he's suggesting dividing it into two Provinces, and he
35 makes a number of other suggestions for dealing with
36 the French inhabitants and for the Government of those
37 parts of what had been French territory. And then on
38 page 371, the last full paragraph on the page
39 beginning:
40
41 "It might also be necessary to fix upon some
42 Line for a Western Boundary to our ancient
43 provinces, beyond which our People should
44 not at present be permitted to settle."
45
46 And he goes on to suggest that instead that they
47 would emigrate to Nova Scotia, which is soon to become

Ellis' area of jurisdiction, or to the provinces on the southern frontier, namely Georgia, for example, and the colonies in the south. And he alludes here to an ongoing debate in British colonial policy, and that was what the role of colonies was to be in the imperial order. That is one scheme of thought held, that the colonies should be confined to the coasts, because if they planted themselves, as Ellis states here, in the heart of America out of the great difficulty of procuring European commodities they would be compelled to commence manufacturers, and the one view of the economy of the -- of the imperial order that colonists existed to consume European manufacturers and they didn't want them setting up on their own.

MR. GOLDIE: I wonder if the witness can tell us the date of this, my lord.

A It's early 1763. I don't believe that it has been officially dated, partly because the authorship has been, you know, determined by a number of historians looking into the circumstances of the production of the document. The first couple of months of 1763 I believe is the generally accepted time in which it was produced.

THE COURT: 1026-21.

MS. MANDELL: My lord, there's another passage.

A One more line I meant to refer to. That's at the very bottom of page 371 just after that reference to mercantilism as an economic thought.

> "All the country to the Westward of this Boundary may be put..."

And the missing words are:

> "Under the immediate Protection and Care of the Officers commanding at the distant posts."

And that goes onto page 372. And he goes on to say that as many of the King's subjects will necessarily have occasion to go beyond this line for trade and other purposes, and he suggests that in cases of disputes among themselves or with the Indians that such differences be cognizable by law in the neighbouring provinces.

MS. MANDELL: Okay.

THE COURT: All right.
MS. MANDELL: If that could be marked then.
THE COURT: Yes. Thank you.
THE REGISTRAR: 1026-21.

(EXHIBIT 1026-21: "Hints Relevant to Division and Government")

THE COURT: All right.
THE REGISTRAR: Order in court. Court will 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.

1 (PROCEEDINGS RESUMED AT 11:33 a.m.)
2
3 THE REGISTRAR: Order in court.
4 THE COURT: Miss Mandell.
5
6 EXAMINATION IN CHIEF BY MS. MANDELL: (Continued)
7 Q Thank you. If we could turn to tab 22, please. Could
8 you explain to the court the context of the document
9 which is contained here in tab 22?
10 A This is a submission from Egremont, the Secretary of
11 State, to the Lords of Trade, to the Board of Trade,
12 and it is dated May 5 of 1763, and it refers to -- in
13 the very opening line that the Treaty of Peace has
14 been with France and Spain, has been brought to a
15 happy conclusion and that it goes on to recommend
16 fixing his Majesty's attention on what is to follow
17 from the peace. And on page 94, the second page of
18 the document, after the second very brief paragraph:
19
20 "By what Regulations, the most extensive Commercial
21 Advantages may be derived from those Cessions..."
22
23 which are the cessions made by France and Spain, New
24 France, proportion of Louisiana, east of the
25 Mississippi and Spanish Florida now falling under
26 British dominion. And then further down, the
27 questions relating to North America in general to be
28 considered are, which new governments, what military
29 establishment and towards the very bottom of the page
30 with regards to the Security of North America, the
31 first is -- and this is in the end of the second line:
32
33 "The first is, the Security of the whole..."
34
35 that is of North America:
36
37 "...against any European Power. The next is the
38 Preservation of the internal Peace and Tranquility
39 of the Country against any Indian Disturbances.
40 Of those Two Objects, the latter appears to call
41 more immediately for such Regulations and
42 Precautions as Your Lordships shall think proper
43 to suggest."
44
45 And then Egremont goes on to suggest that:
46
47 "It may become necessary to erect some forts in the

1 Indian Country, with their Consent, yet his
2 Majesty's Justice and Moderation inclines Him to
3 adopt the more eligible Method of conciliating the
4 Minds of the Indians by the Mildness of His
5 Government."
6
7 And then the top of page 95:
8
9 "...by protecting their Persons and Property and
10 securing to them all the Possessions, Rights and
11 Privileges they have hitherto enjoyed and are
12 entitled to, most cautiously, guarding against any
13 Invasion or Occupation of their Hunting Lands, the
14 Possession of which is to be acquired by fair
15 Purchase only."
16
17 And he always -- he goes on to allude to King's
18 Commands in this regard which have already been sent
19 to, in particular, the royal provinces of Virginia,
20 two Carolinas and Georgia, and then Fisheries by
21 making certain recommendations for particularly the
22 fishery in Newfoundland and for the organization of
23 Florida.
24 MS. MANDELL: Could that then be marked as the next exhibit?
25 THE COURT: Yes, 1026-22.
26 THE REGISTRAR: Yes, my lord.
27
28 (EXHIBIT 1026-22 - MAY 5, 1763 LETTER TO LORDS OF
29 TRADE FROM EGREMONT)
30
31 MR. GOLDIE: My lord, it is probably not necessary but just so
32 that it's in the record at this point, having regard
33 to some of the marginal notes, I think the source of
34 this document ought to be given so that there is no
35 misunderstanding about the relationship or the
36 marginal notes to the text that is being there.
37 THE WITNESS: This document is taken from constitutional
38 documents respecting the history of Canada. I forget
39 the exact word for word title but edited by Messrs.
40 Shortt and Doughty, and the footnoting at the bottom
41 of the pages are by Shortt and Doughty and the
42 marginal notes, some appear to be taken from the
43 original but the source of comments, for example, that
44 certain documents are missing, are those of the
45 editors, of course.
46 MS. MANDELL:
47 Q All right, thank you. Could you then turn to tab 23.

This is a document which is marked Appendix, and I wonder whether you could explain the general opinion as to what this document is, its source, and who wrote it?

A The -- and part of it is explained in the footnote number 2 at the bottom of the first page, but this is what is sometimes known as Mr. Pownall's sketch of a report or simply the sketch, and it was found --

THE COURT: P-o-w-n-e-l-l?

THE WITNESS: Yes, P-o-w-n-a-l-l. And that's a reference to John Pownall, who was the secretary to the Board of Trade, and I suppose an analogous position in modern parlance would be like Deputy Minister. He was the secretary to the Board and sort of chief bureaucrat I guess you would say connected with the Board, and his brother Thomas Pownall had been Governor of Massachusetts. John Pownall was considered to be very familiar with North American matters. And this particular manuscript had been found among the Shelburne papers and it's a draft which is couched in the words by their constant references to "we" as if it were to be presented by the Board of Trade. It was never so presented but it represents what appear to be Mr. Pownall's suggestions for what to do with the recent cessions. And he includes the discussion of those cessions in Africa as well as in America. And on page 259, the second page of Pownall's sketch, he, in the first full paragraph beginning:

> "The first consideration necessary to be attended to..."

and this is regarding what to do with the new acquisitions:

> "...is, the true interest and policy of this kingdom, in reference to its colonies, either as that interest and policy arises from their nature and situation in general, or relatively to our commerce and political connections with the various nations and tribes of Indians now under your Majesty's dominion and protection."

And this is a reference to both formerly hostile Indians who had been in alliance with France or those who inhabited territories which the French and the Spanish had ceded to Britain by the treaty.

"Both which cases do, in the present object, by a happy coincidence of circumstances meet together in the same point, and form an exact union of system. For as in the one case the permitting the colonies, for the present at least, to extend their settlements beyond the heads and sources of those rivers and waters which do directly discharge themselves into the Atlantic Ocean or Gulf of Mexico."

And then goes on to make this standard mercantilist argument about this would involve these remote settlements of engaging in the production and manufacture which they shouldn't, which should be manufactured in the mother country. And then, as well:

"Such settlements would not be made or colonizing allowed without a manifest breach of our general engagements with the Indians which would naturally excite in them jealousy and disgust which might prove a fatal consequence."

And then he goes on that he doesn't want to continue, you know, elaborating the various principles upon which this policy is founded but then he alludes to, it has been -- this is in the fourth line down:

"It has been fully proved in the case of the Indians by the many opinions which have been reported to your Majesty and your royal predecessor by this board; by the orders given in consequence of such reports; by the effect of those orders; by the stipulations of various treaties held at Easton and Lancaster in the years 1756 and 1760, and at the Detroit in 1762."

And the last is a reference to Sir William Johnson's various councils with the Indians of really the lower Great Lakes at Detroit.

"And lastly by the representation, made by Sir William Johnson, of what passed at these meetings, and of the present temper and disposition of the Indians in general, which reports treaties and representations have already been laid before your

Majesty."

And summarizing these various -- as the imperial government had taken over more direct control of Indian affairs in North America. And at the very bottom of the page, the declaring it to be in actual fact Pownall's opinion, what to do about the old colonies:

> "In so far as that consideration applies itself to extension of settlements and Indian interests, the limits of their settlements and jurisdictions should not, for the present, extend beyond the sources of those rivers and waters which discharge..."

This is at the top of 260:

> "...discharge themselves directly into the Atlantic Ocean on the one side, and the Gulf of Mexico on the other; and that all the country lying between the ridge of the Apalachian mountains and the river Mississippi as low down to the Gulf of Mexico as the settlements and claims of the Indians extend, as also all the country lying around the Great Lakes as far as the heads of every river or water that falls into them, should be considered as lands belonging to the Indians, the dominion of which to be protected for them by forts and military establishments in proper places, and with full liberty to all your Majesty's subjects in general to trade with the said Indians upon some general plan and under proper regulation and restrictions."

And he is here linking this proposed Indian country with the provision for trade with those very same Indians under, of course, proper regulation. And his reference to the -- ascribing the river Mississippi in respect a western boundary by the Treaty of Peace, the Mississippi River had become the international boundary between British possessions and what had been French Louisiana but was now Spanish Louisiana. France had secretly ceded to Spain in the course of negotiations.

MR. GOLDIE: Well, excuse me, my lord, the witness says in the course of negotiations. I think he should acknowledge

that that was not known to the negotiators at the time.
MS. MANDELL: Well, I will lead the witness with respect to the area between the capitulation Montreal and the Treaty of Paris if I choose, my lord.
THE COURT: I am sorry, if you choose?
MS. MANDELL: Yes. If it is going to be an area for evidence, then we will direct it as we do.
MR. GOLDIE: You say it will be an area of evidence?
MS. MANDELL: I say if it is.
MR. GOLDIE: I assumed it was not and that's why I thought the witness would be glad to acknowledge the point as we went along but if -- I will leave it as it is.
THE COURT: I have just had two trains go by me in difference directions and I am not sure what it was all about.
MS. MANDELL: I thought Mr. Goldie was asking the witness to comment upon an area of history that I haven't led him into at this point and, if I do, I say that we should do it according to how we choose to do it and not here and according to questions which I may or may not direct.
MR. GOLDIE: I quite agree with that. I did not understand. I thought the witness made an observation in passing about the Treaty of Paris.
THE COURT: He said that Mississippi was the international boundary by the Treaty of Paris.
MR. GOLDIE: That's right. And then the witness went on to say that France had secretly ceded the Louisiana -- what was then Louisiana to Spain. That fact was not known so far as I am instructed at the time the Treaty of Paris was signed. It took place as I understand it during the negotiations as the witness stated but it was not known to the British at that time.
THE WITNESS: Oh, I quite agree. It wasn't--
MR. GOLDIE: That's all that I wanted clarified. Thank you.
THE COURT: Thank you.
THE WITNESS: So after making this suggestion again on page 260, the author Mr. Pownall refers to although this is a general rule about setting up this in effect boundary line between Indian country and the areas zoned for settlement that there are particular exceptions and, in the next paragraph, he mentions a number of them, that, for example, the -- some of the southern tribes, the Creeks and Cherokees, among them have claims on this side, ie, the Atlantic side of the mountains:

"And the Six Nations also upon the Susquehanna

which it would be unjust to violate, so on the other hand some settlements have actually been made under the Government of Virginia; beyond the great mountains in the forks of the Ohio."

And this is of course referring to the Ohio company settlements in the Ohio Valley.

"...which do not yet interfere with any claims of the Indians and which it would be equally unjust and impolitic to break up and destroy."

And then he says that these are, he believes, the only cases so far as an exception to the general rule.

And then he goes on to talk about the claims and pretensions of Nova Scotia, New York, and New England colonies to what will become the boundaries of Canada. And the -- goes on with a lengthy discussion of what the boundaries of Canada should be, and then continues with Florida and what should be done with the Floridas, and on page 263 in the second full paragraph beginning:

"We have now laid before your Majesty..."

And it refers to again the topic of discussion in this paper, and then:

"...and humbly beg leave to refer your Majesty to the annexed chart of North America on which we have marked the limits..."

THE COURT: I am sorry, where is this?
THE WITNESS: This is in the second full paragraph on page 263, paragraph beginning --
THE COURT: Thank you.
THE WITNESS: And he is referring to annexed chart of North America:

"...on which we have marked the limits of the new colonies and what we propose should remain as Indian lands agreeable to the verbal description of them in our report, so that by comparing one with the other, your Majesty will be enabled..."

to deduce from these various propisitions. The -- so far as anyone has been able to determine, there was no

annexed chart with the document in the Shelburne papers and no one is exactly sure what map was referred to by Mr. Pownall in connection with this report at least. But it appears that he either prepared one or was about to prepare one.

THE COURT: Thank you.

MS. MANDELL: Thank you. Could that be marked then as the next exhibit?

THE COURT: Yes, 1026-23.

THE REGISTRAR: Thank you.

(EXHIBIT 1026-23- "APPENDIX" FROM SHELBURNE PAPERS)

MS. MANDELL:

Q If you could turn to the next tab, could you advise the court with respect to this document, its background, and what it is?

A This is the actual -- actual enclosure from the Lords of Trade to the Secretary of State, Lord Egremont. The preceding document, although drafted in such a form, appeared to have been authored by the secretary of the board, this is the one that was -- or a report in response to Egremont's May 5th letter which was filed with Egremont and dealing with the various topics of what to do with the newly acquired territories, and after setting out a number of items including again items as various as fisheries in Newfoundland and the boundaries of Nova Scotia. At the very bottom of page the 99, the very, very bottom:

> "The next obvious Benefit acquired by the Cessions made to your Majesty is the Fur and Skin Trade of all the Indians in North America. The first of these Articles before the present Cession was enjoyed by the French almost entirely. The only part left in the hands of your Majesty's Subjects, being that carried on by the Exclusive Company of Hudson's Bay and a very inconsiderable Quantity through the Province of New York."

And he alludes or the board alludes here to the French having taken possession contrary to the Treaty of Utrecht which was in 1713, of all the lakes in North America, communicating with the River Saint Lawrence and the board refers to the various territorial claims of the Six Nations of Indians acknowledged by the French to be your Majesty's subjects in that treaty.

And then a little further on after referring to navigation in those lakes:

> "But this Trade which the French with the utmost Industry had carried to the greatest Extent, by means of numerous well chosen Posts and Forts sufficient, as well to overawe as to supply all the Indians upon that immense Continent, is now fallen entirely and exclusively into the Hands of your Majesty's Subjects and may be secured and communicated to all your Majesty's Colonies according to the Industry of each, by means of those Posts and Forts with proper Regulations for the Trade with the Indians, under the Protection of such a Military Force as may preserve their Tranquility, not only against Indian Incursions but be ready for their Defence against any European Attack."

And then the next paragraph, it refers to:

> "Another obvious Advantage of the Cession, will be the supplying of all the Indian Tribes upon the Continent of North America with European Commodities immediately through the Hands of English Traders."

And this is alluding of course to the Indian status as consumers. Just like the colonists themselves, the Indians were consumers of European manufacturers. And then the next paragraph down:

> "Another Advantage attending the late Treaty is the secure settling of the whole Coast of North America, as its produce may invite, or Convenience for Settlement may offer, from the Mouth of the Mississippi to the Boundaries of the Hudson's Bay Settlements, with the whole Variety of Produce which is capable of being raised in that immense Tract of Sea Coast, either by the Industry of Emigrants from Europe, or from the Overflowing of your Majesty's ancient Colonies."

And on page 101 again after outlining more provisions with respect to trade and fisheries of the -- begin the discussion at the bottom of 101 of the establishment of regular governments in the ceded

1 territories, and the securing the old inhabitants, ie,
2 former French and Spanish inhabitants and the
3 enjoyment of the rights and privileges reserved to
4 them by the Treaty. And on page 102, about a third of
5 the way down, after recommending that -- or referring
6 to Senegal in Africa:
7
8 "And such we apprehend will be the Case of that
9 territory in North America which in your Majesty's
10 Justice and Humanity as well as sound Policy is
11 proposed to be left under your Majesty's immediate
12 Protection, to the Indian tribes for their hunting
13 Grounds; where no Settlement by planting is
14 intend, immediately at least, to be attempted; and
15 consequently where no particular form of Civil
16 Government can be established. In such Territory
17 we should propose, that a free Trade with the
18 Indian Tribes should be granted to all your
19 Majesty's Colonies and Subjects under such
20 Regulations as shall be judged most proper for
21 that End, and under the protection of such
22 Military Force, to be kept up in the different
23 Posts and Forts in the Indian Country as may be
24 judged necessary, as well for the Protection of
25 Trade and the good Treatment of the Indians as the
26 Maintenance of your Majesty's Sovereignty and the
27 general defence of North America."
28
29 And like the earlier documents it's linking this
30 Indian hunting territory, Indian country, with the
31 proposal for a free trade. And then the next
32 paragraph, the further details will await reports from
33 the commander in chief and the Indian agents in
34 America. They continue, though, about half-way down
35 that paragraph there is no particular inconvenience in
36 delaying:
37
38 "...since, if your Majesty shall be pleased to
39 adopt the general proposition of leaving a large
40 Tract of Country around the Great Lakes as an
41 Indian Country, open to Trade, but not to Grants
42 and Settlements, the Limits of such Territory will
43 be sufficiently ascertained by the Bounds to be
44 given to the Governors of Canada and Florida on
45 the North and South, and the Mississippi on the
46 West."
47

And he is referring or they are referring here to the Mississippi of course and to the eastern limits of this Indian territory being bounded by the proposed new boundaries of Quebec -- of Canada and the Floridas. And by the -- it continues:

> "And by the strict Directions to be given to your Majesty's several Governors of Your ancient Colonies for preventing their making any new Grants of Lands beyond certain fixed Limits to be laid down in the Instructions for that purpose."

And the stage they are still proposing implementing a number of these measures by way of instructions to the governors. And in the last paragraph on page 102, with regard to this important point of the Indian country they suggest that immediate orders be sent to the commander in chief and the agents for Indian Affairs who of course report to the commander in chief for various information. And on page 103:

> "Canada as possessed and claimed by the French consisted an of immense Tract of Country including as well the whole Lands to the westward indefinitely which was the Subject of their Indian Trade."

And this is a reference to the French trade out into what's now the Prairie provinces of Canada which have been carried on before the conquest and, depending on which historians or documents one consults, may have extended as far as the foothills of the Rocky Mountains.

> "...as all that Country from the Southern Bank of the River Saint Lawrence where they carried on their Encroachments."

And then they continue:

> "It is needless to state with any degree of precision the Bounds and Limits of this extensive Country, for We should humbly propose to Your Majesty that the new Government of Canada should be restricted, so as to leave on the one hand, all the Lands lying about the great Lakes and beyond

the Sources of the Rivers which fall into the River Saint Lawrence from the North, to be thrown into the Indian Country."

And on the other hand they are referring to the areas bordering on New England. And they then propose certain boundaries, quite limited boundaries, for Canada, extending among other places to Lake Nipissin on the Ottawa River, and then the next paragraph down, they state:

"In order however that Your Majesty may judge with the greater precision of the Limits of Canada as above described and also of those We shall propose for Florida, and of the Country we think right to be left as Indian Territory, we humbly beg leave to refer to the annexed Chart in which those limits are particularly delineated, and of which Your Majesty will have a clearer Conception than can be conveyed by descriptive words alone."

And as the footnote notes, the report had been accompanied by a printed map of North America by Emanuel Bowen, and certainly Mr. Brian Slattery and Dr. Jack Stagg in their works on this period agree that a particular Bowen map was the so-called annexed chart found in the colonial office records in London.

Q If I could ask you to turn to the map that's been placed here, can you identify the map that's on the board?

A The --

MR. GOLDIE: Excuse me, what is this map?

THE WITNESS: The Bowen map.

MR. GOLDIE: I know what it says but where did this document come from?

THE WITNESS: This is a copy of the map that is in the colonial office records in London.

MR. GOLDIE: Well, it's coloured, isn't it?

THE WITNESS: It is -- well, this is a black and white version of the -- this is not a colour reproduction of the original map.

MR. GOLDIE: And it is not that scale, is it?

THE WITNESS: I believe it is or close to it, yes.

MR. GOLDIE: I am sorry, my lord, I want to understand --

THE WITNESS: But --

MR. GOLDIE: -- what this document is because my instructions are -- is that it is a coloured map.

THE WITNESS: Yes, this is a black and white reproduction of a coloured map.
MS. MANDELL:
Q A colour-coded map?
A Yes, and --
MR. GOLDIE: I take it, if I may just finish --
THE WITNSSS: Sure.
MR. GOLDIE: -- the witness did not obtain this from the colonial office?
THE WITNESS: No, no. I have not been to the colonial office directly. I have consulted records on microfilm in Ottawa, but both Professor Slattery and Dr. Stagg consulted those records and, you know, determined the origin of that particular map.
MR. GOLDIE: Well, I take it then that the witness' belief and understanding --
THE WITNESS: It is my belief that this is the map. It is entitled An Accurate Map of North America describing and distinguishing the British, Spanish and French Dominions on this Great Continent according to the definitive treaty concluded at the Paris, 10 February, 1763, and it is ascribed to Emanuel Bowen, geographer to His Majesty.
MS. MANDELL:
Q All right.
A And on the map as well, although it is not as well picked up by the black and white reproduction, there are some heavy lines which correspond to colouring as I understand it on the original map.
Q All right. Could you first identify the place where the map would indicate that the colonies would end?
A The map has a line and it is again difficult to distinguish exactly but you can see that it runs from -- they have marked out what is proposed to be and what ended up being the colony of East Florida, basically the panhandle, and then they have also marked out what ended up being the colony of West Florida, the Gulf Coast of what's now Florida and Alabama over to the mouth of the Mississippi with a line several miles inland extending across to the Mississippi, and then they have also drawn a line following the various ridges of mountains up the east coast up through the country of the Six Nations Indians. You note that they have Tuscaroraes on the one side and United marked on the other. And then they have marked the proposed boundaries for the colony of Canada extending up the Ottawa River

stopping at Lake Nipissin and then continuing up into the north shore of the Saint Lawrence and also taking in the Gas Bay Peninsula, and these corresponded more or less to the boundaries or boundary of Quebec as set out in the Royal Proclamation later that year.

Q Is there a western boundary indicated?

A The -- not as such, but the reference in the document to the Mississippi River which runs -- which in its lower stretches runs north-south and it sort of curves upwards, and they have got -- on the map Mr. Bowen has marked what appears to be Lake of the Woods which is now in the northwest of Ontario and its connections by water going back down to Lake Superior, and on the map as well is marked the southern boundary of Hudson's Bay Company territories settled by commissaries after the Treaty of Utrecht which is a bit of a misnomer historically because, although there were discussions among the commissaries that boundaries between France and England, the boundaries were never settled as such and the both sides, both the French and English, continue to proffer certain claims where the boundaries of the charter company, the Hudson's Bay Company, descended.

Q Is there a northwest boundary indicated?

A Well, on this map and on -- I should say on a number of other contemporary maps, and certainly ones after the proclamation of 1763, the reference was made in a report to the French trade extending indefinitely westward and there are contemporary historical maps showing certain vague ideas of the geography of the internal parts of the continent but this map sort of cuts off at the reference. In the top left-hand corner there is a sort of map of Hudson Bay itself, a smaller map, and then up at the top it says "parts unknown" under the -- above the southern boundary of Hudson's Bay Company. So on this map --

THE COURT: Above --

THE WITNESS: Yes, above the southern boundary. Now, this -- the other insert map refers only to the immediate environs of Hudson Bay, particular map of that and the Hudson's Bay, so it is including a part which is above -- would be above the top part of the map.

THE COURT: What does that say?

THE WITNESS: This is --

THE COURT: The insert?

THE WITNESS: It says the lake is from 20 to 60 fathoms deep, and is up off Baffin Bay and way up by the Arctic

Circle or the --
THE COURT: Lac De --
THE WITNESS: Fonte.
THE COURT: F-o-n-t-e?
THE WITNESS: And this is a reference to the alleged discoveries made by the admiral DeFonte and who apparently -- or at least according to one theory had also discovered the northwest passage between the Arctic and the Pacific Coast and his alleged discoveries which of course turned out to be geographically untrue are shown on a number of contemporary maps as well.
THE COURT: Not meant to be Lake Athabaska or anything like that?
THE WITNESS: Well, have to consult it.
THE COURT: All right.
THE WITNESS: I should say as a final remark on the map that on the Bowen map, the one comment is written in at the head of the Mississippi River because at that time they -- no one particularly knew where the Mississippi River had its source and it says that the Mississippi River, its head very uncertain, situated according to the Indians in a very marshy country about the 50th degree of latitude which would be above where the sort of source of the Mississippi is marked on the map so there is actually a marginalia written in suggesting that it took its source about the 50th degree of latitude.
MS. MANDELL: All right. My lord, I propose that the letter of June 8 be marked as the next exhibit and that the Bowen map be marked as the exhibit which I have it identified to be marked in our tab 27, and so perhaps out of maintaining the order of things, if it could be given the number exhibit -27, it will keep the sequence of the exhibits.
MR. GOLDIE: My lord, the index to my friend's volume states date 8 June 1763. I wonder if the witness could identify -- find for us that date on the exhibit.
MS. MANDELL:
Q Well, I might -- if he does, it's it would be sheer luck. It was our office that added the date and I did it only because it was attached to the June 8th letter, so perhaps it could be amended. I don't know if there is a June 8 date on it.
A I don't believe there is a June 8th date on it.
MR. GOLDIE: No, I was going to say I'd be surprised but I prepared to be surprised, so I think it ought to be marked said to be the map that accompanied the letter

of June 8th.
THE COURT: All right.
MR. GOLDIE: And by said to be, I am referring to the witness' evidence.
THE COURT: Yes, all right. The map then can be Exhibit 1026-27.
THE REGISTRAR: Yes.

(EXHIBIT 1026-24 - ENCLOSURE TO EGREMONT FROM LORDS OF TRADE DATED JUNE 8, 1763)

(EXHIBIT 1026-27 - MAP ACCOMPANIES JUNE 8 LETTER - BOWEN'S N. AMERICA)

MS. MANDELL:
Q If we could turn to tab 25. This is a letter from Sir William Johnson to Lords of Trade on July 1, 1763. Would you explain the background in the points in this letter which you started to your lordship?
A This is the -- Johnson is communicating to the Lords of Trade really the first concrete reports of troubles in the Interior which came to be known as the Pontiac Rebellion, and he refers in his first paragraph to, "as acts of hostility", this is the fourth line down:

> "...have actually been commenced by the Ottawa Indians inhabiting the environs of Lake Erie with which you will doubtless be acquainted before the Receipt hereof."

He goes on to mention why in his view he thinks the Indians are upset. The next paragraph, he refers to the insinuations of French missionaries and others who had persuaded them, that is the Indians, that we propose their entire Extirpation, to which they in a great measure give credit from our occupying some old posts, that is old French posts, and erecting new ones throughout their country, the necessity of which they could not discover since the reduction of Canada unless they were to promote the design which they suspected was in agitation. Of course at about this time the Indians in actual fact had captured most of those interior posts, although it would appear that the Lords of Trade and the imperial authorities were not yet aware of it.
MR. GOLDIE: My lord, I take exception to that. The document itself says, "acts of hostility with which you will

1 doubtless be acquainted". Unless the witness is going
2 to direct us to some other source, I don't think it is
3 competent for him to offer that speculation.
4 THE COURT: It says, "which you will be acquainted before the
5 receipt hereof."
6 MR. GOLDIE: Yes.
7 MS. MANDELL:
8 Q That's right.
9 A It would appear and, again, here I would -- Dr. Stagg
10 in his book on -- or his thesis on the topic refers in
11 some detail to when it was that the imperial officials
12 began to be made aware of the capture of the interior
13 posts and at least according to Dr. Stagg it was not
14 until August that they were fully apprised that some
15 of these posts had actually been captured by the
16 Indians here. Certainly they were aware that
17 hostilities had started. And the -- Johnson refers to
18 measures that he had taken to try to disabuse the
19 Indians of these notions when he met with them at
20 Detroit on Lake Erie and he, on the next page, page
21 526, the -- he refers to the attempts made by the
22 Misisagas and Chipewaghs have lately attempted to
23 surprise Detroit and how blockade the same. And they
24 have likely likewise totally defeated the detachment
25 of a hundred men were on their way from Niagara for
26 that place and Sandousky on Lake Erie which is
27 southeast of Detroit, it is on the south -- it is a
28 peninsula sticking up on the south side of Lake Erie,
29 has likewise been taken and destroyed. And then he
30 refers to some Delawares on Ohio have infested the
31 communication Fort Pitt, now Pittsburgh, Pennsylvania,
32 destroyed several settlements, murdered many traders
33 and others, spreading an universal panic throughout
34 the Frontiers. And he goes on to refer to what Sir
35 Jeffrey Amherst has been attempting to do to deal with
36 this situation. And he warns about potential -- this
37 is in the last full paragraph on page 526, fearing
38 that the inhabitants in Frontier settlements which
39 must be entirely cut off to the great detriment to the
40 several provinces in case of a defection of the Six
41 Nations who has yet remain attached to us and have
42 sent to acquaint me that they rejected the invitation
43 made them by the Western Indians, and this is a
44 reference to the Ottawas and various other -- the
45 Chipewaghs, Misisagas, the various others he's
46 referred to, and the -- talks about, you know, prudent
47 management with the Indians in order to maintain them

on the British side. And he refers again on page 527 at the end to the steps -- this is the first full paragraph on page 527:

> "The steps which the Mohocks have taken to preserve the peace."

And of course the Mohocks are the eastern most of the Six Nations and historically the most loyal in that sense to the British. William Johnson himself lives in Mohock territory in Fort Johnson and has very, very close connections by this point by marriage as well with the Mohocks, but as reference is made clear, he says:

> "The Onondagas likewise discover a great attachment to us."

But his previous references suggest that the more westerly of the Six Nations including the Seneca are in real danger of going over to the Indian rebellion.

MS. MANDELL: All right. Could that then be marked, my lord, as the next exhibit.

THE COURT: Yes.

THE REGISTRAR: 1026-25.

(EXHIBIT 1026-25 - JULY 1, 1763 LETTER TO LORDS OF TRADE FROM JOHNSON)

MS. MANDELL:

Q And could you identify then the next one?

A This is a submission from Lord Egremont, the Secretary of State to the Lords of Trade dated July 14, 1763, and he is answering their report of June 8 and stating that the report has been laid before the King and that the King approves of erecting the three new governments in North America, namely Canada, East Florida and West Florida, and then it refers to -- with regard to the limits of these governments as described in the report and marked out in the chart there unto annexed and that's a reference, I believe, to the Bowen map with its markings.

> "Although his Majesty entirely concurs in your Lordship's idea of not permitting any grant of lands..."

THE COURT: I am sorry, where are you reading from?
THE WITNESS: At the bottom of page 147, the last two lines on the page.
THE COURT: Yes.
THE WITNESS:

> "...of not permitting any grant of lands or new settlements to be made for the present, beyond the Bounds proposed by your Lordships."

And then goes on to suggest some difficulties that might arise if the tract beyond those bounds was left without being subject to the civil jurisdiction of some governor, and suggests as one of the reasons for want of such civil jurisdiction, it might be difficult to bring justice, criminals and fugitives who might take refuge in that country. The King therefore is of opinion, and this is further down on the opening part of page 148:

> "...that, in the Commission for the Governor of Canada, all the lakes, viz, Ontario, Erie, Huron, Michigan, and Superior, should be included, with all the country as far North and West as the limits of the Hudson's Bay Company and the Mississippi; and also that all lands whatsoever ceded by the late Treaty, and which are not already included within the limits of His Majesty's ancient Colonies, or intended to form the Governments of East and West Florida, as described in your Lordship's Report, be assigned to the Government of Canada."

And here they are, of course, proposing a very much larger boundary for the province of Canada than the narrow boundary marked on the map which had been attached and describe in the Lord of Trades report. And then further down in the next paragraph, after discussing the extent of new governments, Lord Egremont repeats, this is the third line:

> "That His Majesty entirely concurs in your Lordships Idea, of not permitting, for the present, any Grant of Lands, or New Settlements, beyond the bounds proposed in your Report; and that all the Countries, beyond such Bounds, be also, for the present, left unsettled, for the Indian Tribes to hunt in; but open to a free Trade

for all the Colonies. And the King would have the Instructions to the Three New Governors in North America, formed so, as to contain the strongest Injunctions and Restrictions for this Purpose."

And at this stage of course they are still considering promulgating these measures by way of commission and instructions to the colonial governments or governors, rather. And on page 149, now with regard to the ancient colonies, the older British colonies, the king approves extending Georgia and making additions to Nova Scotia and these two are done by way of instructions to governors. But in that first full paragraph on page 149, the instructions are for these ancient colonies, their governors:

"...for preventing their making any New Grants of Lands beyond certain fixed limits to be therein laid down for that purpose."

And then the next full paragraph:

"His Majesty thinks it highly proper, that the Agents for Indians Affairs should correspond with Your lordships in regard to the Indian Country, and should transmit such Information on this Subject, as your Lordships shall require from them."

And suggests acquiring further information and about the necessary military force and Garrisons, the bottom of that paragraph, necessary to be kept up:

"...for the security of the Indian Trade."

MS. MANDELL: My lord, if that could be marked as the next exhibit.
THE COURT: Yes, 1026-26.
THE REGISTRAR: Yes.

(EXHIBIT 1026-26 - JULY 14, 1763 LETTER TO LORDS OF TRADE FROM EGREMONT)

THE COURT: Shall we adjourn until two o'clock? Thank you.

THE REGISTRAR: Order in court. This court will adjourn until two.

(PROCEEDINGS ADJOURNED AT 12:32 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: I understand you're all anxious to sit until 5:00 o'clock tonight.
MS. MANDELL: I think the word anxious overstates it.
THE COURT: Does madam reporter --
MS. MANDELL: She is right.
THE COURT: You will let your staff know, will you, madam reporter, so somebody won't get stuck for two hours in a row.
MR. GOLDIE: I'm going to be asked to be excused at quarter to five as I have a telephone call from the east, but Ms. Sigurdson will be here.
THE COURT: I can tell counsel I can sit even longer tomorrow night. I can only sit to 5:00 o'clock on Thursday night. If counsel want to do that, make those arrangements, I'll be happy to oblige, particularly if that might save us sitting Saturday. I can sit Saturday if necessary. I should tell counsel I can't sit next week.
MS. MANDELL: No.
THE COURT: Even to finish a witness.
MS. MANDELL: No. Good.
THE COURT: Not so good, I'm in the Court of Appeal, so -- but I have to be somewhere. All right.
MS. MANDELL: Thank you. My lord, tab 28 is out of order sequentially so I'd ask that the witness turn to tab 29.
Q Could you identify. There is two letters in this tab. Actually, there is several letters in this particular tab and I wonder if you could first --
THE COURT: In tab 29?
MS. MANDELL: Yes.
THE COURT: Oh, yes. All right.
MS. MANDELL:
Q If you could first deal with the letter of August 5th which is contained in the first page there on.
A Yes. The first in this series of correspondence is a representation of the Lords of Trade enclosed in this letter of August 5th, 1763 to the secretary of state, Lord Egremont, and it's in reference to the discussion about including various countries within the Government of Canada. And beginning on page 151 is the actual representation, again also dated August 5th, 1763, and it states at the beginning in reference to -- referring back to Egremont's communication of the 14th of July with reference to:

"The large tract of Country bounded by the Mississippi and the Limits of the Hudson Bay Company on the one hand and on the other by the Limits of Canada, East and West Florida and His Majesty's ancient Colonies, should for the present be made subject to no grants of Lands nor to any Settlements."

And then referring to the discussion of whether or not it should be under some civil jurisdiction they say that they have taken this subject into their consideration, and they agree with His Majesty, that propriety of putting this country under a particular government. Second full paragraph on page 151, "By a commission under Your Great Seal". So they're still discussing doing this by way of commission.

"With a most precise Description of its Boundaries, in Order to ascertain the actual possession of its property, and with such Powers as may be necessary, as well to maintain and secure the free Exercise of the Indian Trade..."

And they make further reference to that, and then they list a number of objections against annexing the above referred to country to any particular government, especially to that of Canada. And the first ground they give is that they mention the -- that they're apprehensive that on some future occasion it might be supposed that His Majesty's title to the area had arisen solely from the cessions made by France. And here they refer to the claim of the Six Nations Indians to the lakes and circumjacent territory, and they say that this rests on a more solid, even a more equitable foundation. And they refer to the minds of the Indians where if they thought themselves under the Government of Canada.

Then, second, they refer to that if the area became subject of the laws of a particular government or province that province might have an advantage in respect of the whole of the Indian trade which is to be left as open as possible to all subjects.

And in the third, that the powers of such government could not be carried properly in an execution unless by means of the garrisons at the different posts and forts in that country, and that

consequently the Governor of Canada would be virtually commander in chief and there would be a lot of conflict between him and the actual commander in chief.

And so then they propose that a commission under the great seal for the government of this country in question be given to the commander in chief of His Majesty's troops for the time being adapted to the protection of the Indians and the fur trade, excuse me, of your Majesty's subjects. And they suggest that, you know, whether any inconveniences would arise there which would not equally arise from a like commission to any other governor. And then they suggest delaying the issuing of such commission and instructions, particularly because they require a great deal of information with respect to the management of the Indian tribes and trade which can only be had from the commander in chief and from the agents of Indian Affairs.

And further down in that paragraph they say:

"And we flatter Ourselves..."

This is in reference to delaying.

"That no such delay will produce any bad Consequences, either in Respect to this Country's being considered as derelict, while Your Majesty's Troops are in the actual possession of every Post and Fort formerly enjoyed by the French, or in respect of Criminals or Fugitives, taking refuge in this Country with impunity, and as this may be easily prevented by an instruction to the present commander in Chief."

What's interesting about this particular passage is that as of August 5th, 1763 the board of trade don't seem to be aware that all of the posts in the interior country, except Detroit, have been captured by the Indians as of about early July, that the Michelamac (phonetic) and Fort Charlotte and the various posts on the Illinois River have all been taken by the Indians.

And then they continue:

"In the meantime We humbly propose that a Proclamation be immediately issued by Your Majesty as well on Account of the late complaints of the Indians, and the actual Disturbances in Consequence, as of Your Majesty's fixed Determination to permit no grant of Lands nor any settlements to be made within certain fixed Bounds, under pretense of Purchase or any other Pretext whatever, leaving all that territory within it free for the Hunting Grounds of those Indian Nations Subjects of Your Majesty, and for the free trade of all your Subjects, to prohibit strictly all Infringements or Settlements to be made on such Grounds, and at the same time to declare Your Majesty's Intentions to encourage all such Persons who shall be interested to commence new Settlements from Your old Colonies."

And they continue with a list of the amount of land to be granted to such people.

And the next letter which is from -- dated September 19, 1763 and begins at the bottom of that page and it's from the Earl of Halifax to the Lords of Trade, and the Earl of Egremont who was secretary of state for the Southern Department died at the end of August and Halifax has replaced him, and so he is picking up the thread of the discussion and referring the matter back to the Lords of Trade. And I believe, at least in my copy, that these pages are duplicated. There are two pages that may only be in my copy.

Q That's correct. It's duplicated throughout. Perhaps you could just pull out the second of the key pages.

A Halifax informs the Lords of Trade that the King has basically dropped the idea of:

"Including within the Government of Canada, or any established Colony, the Lands which are to be reserved, for the present, for the Use of the Indians."

And that the definition of Canada, which is to be stated in a commission to James Murray who's about to become the governor, or will become the governor of the new colony of Canada be exactly as marked out in the report of the 8th of June, which is the narrowly

circumscribed boundary for the Province of Canada.
And then the first full paragraph on that page:

> "His Majesty approves Your Lordship's Proposition of issuing immediately a Proclamation, to prohibit for the present any Grant or Settlement within the Bounds of the Countries intended to be reserved for the Use of the Indians."

And mentioning Royal bounty in terms of land to reduced officers and soldiers. And then here you get the suggestion that a number of other items might be provided for at the same time. That this proposed Proclamation might include some other topics, so that, for example, the speedy settlement of the new colonies might be promoted, the friendship of the Indians more speedly and effectually reconciliated, and provisions be made for preventing any inconveniences which might otherwise arise from the want of civil jurisdiction in the interior and reserved countries. And then they suggest extending the Proclamation to make known the limits of the new colonies and the additions to be made to old ones, to declare the constitution of the new governments and the powers the governors will have of granting lands, to prohibit private purchases of lands from Indians, to declare a free trade for all His Majesty's subjects with all the Indians under license, security and proper regulations, and to empower all military officers and agents for Indian Affairs within the reserved lands to seize criminals and fugitives who might take refuge there and to send them back to be tried in the old colonies.

And Then Halifax asks their lordships to prepare and transmit to him the draft of such a Proclamation as may cover these various points mentioned. And they also -- he also suggests right towards the very end, second to last paragraph, that he refers to:

> "The General Plan, upon which His Majesty's Subjects are to carry on a free Trade with all the Indians of North America, should be established as soon as possible."

And suggests that they avail themselves of information, and that they create a system of regulations.

The next page of the document is a reply of the Lords of Trade to Lord Halifax dated October 4th, 1763. And they have prepared and transmit to Halifax the draft of a Proclamation conformable to the directions mentioned. And they state that merely that in order to save time they fix the limits of East Florida.

And just after that there's an excerpt from the proceedings in the privy council for the 5th day of October in which they discuss this draft of a Proclamation, and it's approved, and it's ordered to be prepared -- this is on page 158, ordered to be prepared for His Majesty's signature, and as it notes in the margin that Proclamation was signed, this is on page 158, top left-hand corner, the Proclamation was signed by His Majesty and dated the 7th of October.

THE COURT: I'm sorry. This is what date, the 5th?

A This is the 5th, yes.

THE COURT: I see, and then on the 5th they said it would be signed?

A Be prepared for His Majesty's signature.

THE COURT: Signature.

A And the margin notes indicates that, as indeed happened, it was actually signed by his Majesty on the 7th, two days later.

THE COURT: Yes.

A And at the same time draft commissions for the governors of the three new provinces were prepared and approved.

THE COURT: The three new provinces are?

A Quebec.

THE COURT: Quebec.

A East Florida and West Florida. East Florida being the Panhandle. These are all on the North American continent.

THE COURT: It's not Canada, it's Quebec?

A It's now called Quebec, yes, that's one of the changes which has been made. The new colony out of what had been Canada is to be called Quebec rather than Canada.

THE COURT: Yes. All right. And it's a colony, is it?

A A province. A new province.

THE COURT: Province of Canada. Oh.

A It is to be the Province of Quebec.

THE COURT: Okay. All right.

MS. MANDELL: My lord, I ask that those bundle of letters be marked tab 29.

THE COURT: Yes. 1026-27.

THE REGISTRAR: 29, my lord.
THE COURT: Oh, 29.

(EXHIBIT 1026-29: Aug. 5, 1763 Lords of Trade to Egremont)

MS. MANDELL: 27 is the map and 28 I'm going to turn to now.
THE COURT: I am -- I'm sorry, I'm not with you. What is the number?
MS. MANDELL: We would just hopefully have marked tab 29.
THE COURT: Yes. All right.
MS. MANDELL:
Q If you could turn to tab 28, and for the sake of continuity of that could you identify that document?
A It's a printed version of -- it's, in effect, minutes of the privy counsel or of the committee of the privy council which was meeting to consider the report of the board of trade and the draft Proclamation for the idea of issuing a Proclamation, and it's at the Lodgings at St. James'. It's the Court of St. James. 16 September 1763, and various privy counsellors present are listed.

And on page 318, the second page of the document, Lord Halifax reads the report from the board of trade, which we've just discussed, relative to putting the Indian country not included in any of the other provinces under the Government of Canada, and the various objections which are raised to doing so. And that report of the board of trade is approved and then the notes, and these are taken from a manuscript of the Grenville papers, some objections were made to this.

MR. GOLDIE: Excuse me. As I understand it, the minutes of the privy council do not include what the witness is about to read.
A I believe that's correct, yes. These objections are from Grenville himself who was, if I remember correctly, secretary of state for the Northern Department, and that these -- this is a printed version of material which comes from his own private manuscripts, and so that what appears in brackets is from Grenville himself making notes of what occurred, but the actual privy council minutes do not include this section. But that according to Grenville:

"Some objections were made to this plan of not including all the territory ceded by the

1 late Treaty to Great Britain in some of the
2 governments and likewise to the line beyond
3 which the lands for the present are reserved
4 to the Indians which is to be declared by
5 Proclamation issued here but as these doubts
6 were raised by Mr. Grenville only and
7 against Lord Halifax's opinion as well as
8 that of the other Lords they were no further
9 insisted upon."
10
11 THE COURT: All right.
12 MS. MANDELL: Could that then be marked as the next exhibit.
13 THE COURT: Yes.
14 MR. GOLDIE: If it's tendered, my lord, as the minutes of the
15 privy council meeting of 16 September '63 what is in
16 brackets should be removed. If it's tendered as an
17 historical document with Lord Grenville's addition I
18 have no objection.
19 MS. MANDELL: Yes, as the second.
20 THE COURT: The latter. All right. 1026-28.
21 THE REGISTRAR: Yes, my lord.
22
23 (EXHIBIT 1026-28: Sept. 16, 1763 Minutes of Privy
24 Council)
25
26 MS. MANDELL: If you could turn to tab 29. My lord, there's two
27 documents in this tab. The first is a handwritten
28 document, and the second -- both of them are
29 handwritten. One is signed by Mr. Yorke and the other
30 is entitled "By the King".
31 THE COURT: Are you sure about that?
32 MS. MANDELL: I'm sorry. It's tab 30.
33 THE COURT: Tab 30. Thank you.
34 MS. MANDELL:
35 Q I'd like to deal with the first document first, and
36 could you identify for the court that document and its
37 context?
38 A The draft Proclamation had been referred by the board
39 of trade to the law officers of the Crown, and Yorke
40 who signs this document dated October 3rd, 1763 is, I
41 believe, the solicitor general. The law officers
42 being the attorney general and solicitor general. And
43 he simply states that he has passed and considered the
44 enclosed draft of a Proclamation and he's of the
45 opinion that it contains nothing contrary to law and
46 that it's properly prepared in form.
47 Q All right.

A And what follows is the draft of the Proclamation.
Q If I could turn you in that draft to page 188. The numbers, I might add, are not the numbers of the draft for the purposes of our accessing them, we just chronologically added numbers to the top of the page --
THE COURT: Yes.
MS. MANDELL: -- To try and make sure that we could -- that we may -- we still find we have some problems, but the numbers on the -- the numbers have been added and too late to draft.
MR. GOLDIE: Well, if we are talking about the addition of numbers, my lord, the number 1216 on the right-hand corner of the top page indicates that it's a document disclosed by the Province.
THE COURT: I see. All right. Well, you're looking at the red 188, are you?
MS. MANDELL: Yes.
THE COURT: Yes, I have that. Thank you.
MS. MANDELL:
Q This is to deal -- this is dealing with the paragraph describing the unsurrendered lands. Could you indicate the correction which has -- is indicated here in the draft?
A In the draft it originally read that with reference to the several nations or tribes of Indians, et cetera, should not be molested or disturbed in the possession of such parts of our dominions and territories as, and it originally read as "or occupied by or reserved to them as their hunting grounds", and in the margin that section has been changed to read as in quotes, "not having been ceded to or purchased by us."
THE COURT: Is that yet or is that crossed out?
A Not having been -- yes, I believe the "yet" has been crossed out. "Not having been ceded to or purchased by us are reserved to them or any of them."
MS. MANDELL: All right.
THE COURT: I'm sorry. Not having been ceded to?
A Ceded to or purchased by us.
THE COURT: Ceded to by us.
A Are reserved to them or any of them.
THE COURT: Of them as their hunting ground.
A Then it goes back into the text as their hunting ground.
MS. MANDELL:
Q And if you could turn over the next page and describe the --

A The section then again which had forbid governors or commanders in chief in any of the colonies of Quebec, East Florida or West Florida from -- forbiding them from passing patents or warrants or granting warrants of survey beyond the bounds. Then it also -- as also that no governor or commander in chief of any other colonies or plantations in America, you presume, and then before it continues with the words "grant, warrants of survey" the margin has been added "for the present", and it originally said "as aforesaid", which is crossed out, and then it says, "and until our further pleasure is known." So those words have been added with respect to the prohibition on granting these warrants of survey or passing guns for land. And further down in the same paragraph.

THE COURT: That's until, is it?

A Until our further pleasure be known. It's spelled with two L's in the style of the time.

THE COURT: Yes. All right.

MS. MANDELL: And --

A And the end of that paragraph had originally said, "After extending that prohibition to lands beyond the heads or sources of any of the rivers which fall into the Atlantic Ocean from the west and northwest", it continued, "or upon any lands whatever", and then this part had been removed, "which are occupied by or reserved to any of the Indians in alliance with us or any of our colonies and which have not yet been sold or ceded to us by them or any of them, and all of that has been removed and in the right hand margin the additions have been made, namely, "Not having been ceded to or purchased by us as aforesaid are reserved to the said Indians or any of them."

MS. MANDELL:

Q I was going to ask you, as Mr. Goldie raises it now too, do you know anything about the asterisk and the circled 2?

A No, it's not my handwriting. I don't know what it is referring to.

THE COURT: Down the page was that amendment?

A Further down, yes. This is where it's leading into the section where a described territory is to be reserved and -- for the Indians, and right after the words where it says "to reserve" have been added the words "for the present as aforesaid." Then it goes on "for the use of the said Indians all the lands and territories", this is on page 190, "not included

1 within these limits, but that reserve is to be for the
2 present as aforesaid". And then right at the end of
3 that paragraph when it forbids, this is on page 190 as
4 pencilled in, where it forbids all the loving subjects
5 from making any purchases or settlements whatever or
6 taking possession of any of the lands above reserved
7 in the margin has been added the words, "without our
8 especial leave and license for that purpose first
9 obtained."
10 THE COURT: That comes at the end, does it? Oh, yes.
11 A There's a little asterisk where it's to come after the
12 statement.
13 THE COURT: Yes. All right. What do you understand that all
14 these amendments were made before the solicitor
15 general gave his opinion or afterwards?
16 A It's -- as the document at tab 31 is simply -- I'm
17 just explaining by way of explanation, is a historical
18 article about the drafting of the Proclamation by, I
19 forget his first name, Humphries, and it establishes
20 that the -- these changes to the draft, John Pownall,
21 secretary to the board, was the author of them. That
22 appears at page 254 of the article. And all that's --
23 that Mr. Humphries seems to establish is not entirely
24 clear whether Pownall was going over the draft at the
25 same time, but whether his additions were made after,
26 and it is the Attorney General, not the solicitor
27 general, I apologize, Charles Yorke, we've proven, or
28 whether they were done before is not entirely clear,
29 but it does indicate that it was Pownall that made
30 these various insertions.
31 THE COURT: Okay.
32 MS. MANDELL:
33 Q All right. What's the historical background of the
34 assertion made "for the present and until our further
35 pleasure be known" on page 198?
36 MR. GOLDIE: I take it my friend is asking for the documents
37 that provide that?
38 THE COURT: Well, are you Ms. Mandell?
39 MS. MANDELL: No.
40 THE COURT: Well, is there historical material which either
41 answers or bears on that question?
42 MS. MANDELL: Well, you've been referred to some of it, my lord,
43 and I think that we'll be referring to some more of
44 it, but at this point, in my view, it's a proper
45 question to understand why that phrase is being
46 inserted now.
47 THE COURT: Well, what you're asking the witness to explain is

1 why those phrases were added?
2 MS. MANDELL: Yes.
3 THE COURT: Does -- will the witness say that his source of his
4 information is other documents he looked at?
5 MS. MANDELL: He -- yes. But not -- you'll have some of those
6 documents placed before you now and tomorrow, so it's
7 not as if your lordship, it's true, can't see it
8 yourself, but I think there is an historical reason
9 why those phrases are being put in at this time, and
10 the witness will know it.
11 MR. GOLDIE: Well, my lord, if the witness knows it's so and
12 it's historical it must be in a document. The witness
13 wasn't there.
14 THE COURT: I don't think he was there.
15 MR. GOLDIE: Not as far as I'm aware.
16 A Not as far as I'm aware.
17 MR. GOLDIE: So we might as well have the sources of the
18 information.
19 THE COURT: I'd be much more comfortable in dealing with the
20 objection if I knew how complete or incomplete these
21 sources are.
22 MS. MANDELL: That you have.
23 THE COURT: No, the totality of them. You say I've got some and
24 I will have some others -- I'm going to get some more.
25 MS. MANDELL: Yes, you'll get some more tomorrow.
26 THE COURT: Are you going to ask that question after we've done
27 that and I can deal with -- deal on a more certain
28 basis with Mr. Goldie's objection.
29 MS. MANDELL: All right. Yes.
30 THE COURT: Thank you.
31 MS. MANDELL: All right. I'd ask that the tab 30, both
32 documents, be marked as one tab.
33 THE COURT: Yes. All right. That's tab 30, isn't it?
34 THE REGISTRAR: Yes.
35 THE COURT: That will be -- those documents will be Exhibit
36 1026-30.
37
38 (EXHIBIT 1026-30: Oct. 3, 1763 Letter of C. Yorke and
39 Proclamation)
40
41 MS. MANDELL: And tab 31, I'd also ask that that be marked.
42 MR. GOLDIE: Well, what's the basis of that? Are we now marking
43 parts of the Brandeis brief? I know this is an old
44 story, my lord.
45 THE COURT: Yes.
46 MR. GOLDIE: But some of these things have been marked as purely
47 on the basis of this is what the witness has referred

to.
THE COURT: Yes.
MR. GOLDIE: This is one of his references. I draw a distinction between anything that is preceded and a witness who is testifying as to history, and unless the -- this is a document that is argument. He's speculating, he's doing everything that historians do, but he's not before your lordship.
MS. MANDELL: Is Mr. --
THE COURT: The problem we have here is that up to now the witness has not been giving historical opinions, he's been -- he's been describing source information. If this document is to be marked in keeping with what we've been doing in the past it would be to identify a document he relied upon in supporting his opinion. He's not giving an opinion here yet. I dare say we are going to have some more discussion about this. I think for the moment I'd just like to mark this as an exhibit for identification, and we'll drag these things out at the end.
MS. MANDELL: Perhaps I should ask a few more questions about it then just to establish what it is.
THE COURT: Yes. All right.
MS. MANDELL:
Q Where is this document taken from?
A It's, I guess you'd say, one of the first articles which dealt with the subject of the Royal Proclamation of 1763. And, as I say, I apologize because I can't remember Mr. Humphries first name. I believe he's long dead. And it deals with the genesis of the Royal Proclamation, and my only purpose here for referring to it is to identify John Pownall as the author of the changes in the draft of the Proclamation which are in the margins.
MS. MANDELL: All right. I've got no further questions and we'll leave it marked for identification.
THE COURT: Identification then.
THE REGISTRAR: 1026-31.
THE COURT: Identification.

(EXHIBIT 1026-31 FOR IDENTIFICATION: "Lord Shelburne and the Proclamation of 1763")

MS. MANDELL:
Q Could you turn to the next document found at tab 32. Can you identify this document?
A This is another representation from the Lords of Trade

to His Majesty through the Earl of Shelburne, who is now secretary of state, and it's from five years after -- about five years after the Proclamation. It's dated March 7th, 1768. And it deals at length with a number of issues which have arisen in the intervening time in that five year period, and the -- it's -- my main purpose here that I intended to refer to is what happens to the boundary line established by the Proclamation, but I would propose to refer to several topics which are discussed in this representation. It's summarizing five years of historical events in North America after the promulgation of the Royal Proclamation of 1763.

THE COURT: Well, Ms. Mandell, it seems to me that it would be useful to have the witness point out the things that are significant.

MS. MANDELL: Yes.

THE COURT: And I'm happy to have him go that far. I think if it's a summary of five years of historical events I don't need an expert.

MS. MANDELL: I'm not going to give you the full five years.

THE COURT: I'd be glad to have indications or references to the important passages.

A On internal page 186 there's the second full paragraph beginning:

> "To maintain a good Correspondence with the Indians is undoubtedly an Object of great Importance: and upon a careful Examination into the State of Indian Affairs after the Conclusion of Peace, it appears, that the two principal Causes of the Discontent, that still rankled in the Minds of the Indians and influenced their Conduct, were the Encroachments made upon Lands which they claimed at their Property, and the Abuses committed by Indian Traders and their Servants. The Necessity which appeared in the then state of our Interest with the Indians of making some immediate provisions against these Two Causes of their Discontent, induced the Proclamation of October 1763, which very prudently restrained all persons from Trading with the Indians without License; and forbid, by strongest prohibitions, all Settlement beyond the Limits therein described as the

1 Boundary of Indian hunting Ground, putting
2 both their Commerce and Property under the
3 protection of Officers here acting under
4 Your Majesty's immediate Authority, and
5 making their Intervention necessary in every
6 Transaction with those Indians."
7 And then he continues -- or the board of trade
8 continues.
9
10 "These however being, as we have before
11 observed, mere provisional Arrangements,
12 adapted to the Exigence of the time, it is
13 become now necessary to consider, what may
14 be more..."
15
16 And then he goes on about a more permanent
17 measures to deal with these matters they have just
18 discussed. And then on page 187:
19
20 "The giving all possible redress to the
21 Complaints of the Indians in respect to
22 Encroachments on their Lands, and a steady
23 and uniform Attention to a faithful
24 execution of whatever shall be agreed upon
25 for that salutary purpose, is a
26 consideration of very great Importance: It
27 is a Service of a general Nature, in which
28 Your Majesty's Interest, as Lord of the Soil
29 of all ungranted Lands which the Indians may
30 be inclined to give up, is deeply and
31 immediately concerned, and with which the
32 general Security of Your Majesty's
33 Possessions there is in some Measure
34 connected."
35
36 And they go on to state that this is not something
37 quote three lines later:
38
39 "To which the separate Authority and
40 Jurisdiction of the respective Colonies is
41 not competent, and it depends upon
42 Negotiation, which has always been carried
43 on between Indians and Officers acting under
44 Your Majesty's immediate Authority, and has
45 reference to Matters, which the Indians
46 would not submit to the Discussion of
47 particular Colonies."

1
2 And then they state that for those reasons the
3 board is of the opinion that:
4
5 "The execution of all Measures and Services
6 respecting the Complaints of the Indians
7 touching their Lands, should be continued to
8 be entrusted to the Superintendents who are
9 acting under Commission from the Crown..."
10
11 And then it -- reserving to the particular
12 colonies a right to interpose their advice and making
13 their concurrence necessary to the ratification of
14 every compact that shall be provisionally made until
15 Your Majesty's pleasure shall be known upon it.
16 And it makes reference to what became known as the
17 plan for future management of Indian Affairs of 1764
18 which though it was never officially adopted was used
19 by Sir William Johnson and the commander in chief, the
20 Indian superintendents as a guide for regulating
21 Indian Affairs, and one of the things that plan had
22 spoken of was establishing a boundary line, that is
23 negotiating a boundary line. And beginning on page
24 188 their lordships make reference to several treaties
25 which had been made after the Proclamation with
26 various Indian nations and tribes, both in the south
27 and in the north, respecting the alteration of the
28 boundary line as it had been laid down in the Royal
29 Proclamation at 1763. And they refer to an appendix
30 to their report which, this is on page 188:
31
32 "Contains a description of the several Lines
33 as agreed upon in the Negotiations to which
34 we refer."
35
36 And the -- in reference to the middle colonies,
37 this is the bottom of page 188, that the middle
38 colonies now have room to spread.
39
40 And that upon the whole one uniform and
41 complete line will be formed between the
42 Indians and those ancient Colonies, whose
43 Limits not being confined to the Westward
44 have occasioned that extensive Settlement,
45 which, being made without the Consent of the
46 Indians, and before any line was settled,
47 produced the Evil complained of."

And on page 189, the second page -- they're discussing the treaty which has been made with the Six Nations, which is actually the treaty known as the Treaty of Fort Stanwicks. And they described its bounds which extend over to various portions of the Ohio River, and beyond the boundary line set out in the 1763 Proclamation. And then they suggest -- this is page 189, second paragraph --

THE COURT: Before you go there.

A Yes, sir.

THE COURT: What do you say are the middle colonies?

A Oh, the middle colonies are the Pennsylvania, New York. The southern colonies are, you know, Virginia, the Carolinas and Georgia. The ones between New England and the --

THE COURT: Would you put Maryland in the middle colonies?

A Maryland I believe is in the middle colonies. Pennsylvania, and what would become Delaware later, and New York.

THE COURT: And Delaware?

A I'm not even sure if Delaware was in existence at this time, but --

THE COURT: All right. Thank you.

THE COURT: And 189 you say?

A And 189, the second paragraph, they state:

> "That it will be greatly for Your Majesty's Interest as well as for the Peace, Security and Advantage of the Colonies, that this Boundary line should be as speedly as possible, be ratified by Your Majesty's Authority, and that the Superintendents should be instructed and empowered to make Treaties in Your Majesty's Name with the Indians for that purpose."

And then they also say that when doing this, this is in the same paragraph at the end:

> "That the Agreement for a Boundary line be left open to such Alterations, as, by the common Consent, and for the mutual Interests of both Parties, may hereafter be found necessary and expedient."

And they suggest:

"That the Colonies should be required to give every Sanction to the measure in their power, and to provide by proper Laws for the punishment of all Persons, who shall endanger the public peace of the Community, by extending Settlements or occupying Lands beyond such Line."

And on page 190 while still discussing the proper duties of the Indian superintendents, the officers charged with that responsibility, they list some other duties which they think should fall to those individuals. Among them, about half way through that first full paragraph:

"These are ones which cannot be provided for by Provincial laws; Such are the renewal of ancient Compacts or Covenant-Chains made between the Crown and the principal Tribes of Savages in that country; the reconciling Differences and Disputes between one body of Indians and another; the agreeing with them for the sale or Surrender of Lands for public purposes not lying within the limits of any particular Colony; and the holding Interviews with them for these and a variety of other general Purposes, which are merely Objects of Negotiation between Your Majesty and the Indians."

And they summarize that these are duties for the Indian superintendents and their subordinate officers. Then on page 191 they go into discussing the various measures which had been proposed in 1764 and adopted by the superintendents regarding the Indian trade, and --

THE COURT: I'm sorry. What page?

A This is at page 191.

THE COURT: Oh, 191. Oh, fine. Thank you.

A And the bottom of page 191 they point out that as far as they have been able to determine there are varying Indian interests involved, and then they state, secondly, and the 1764 plan had confined trade to certain posts and places in the interior country, so they say with this regard, that while -- this is on page 192 while this actually worked in respect to the

southern Indians, that is those inhabiting the back parts of the Southern colonies, it is doubtful with respect to those Indians more particularly connected with New York and Pennsylvania, and they go on:

> That it is evidently disadvantageous, inconvenient, and even dangerous with respect to the much larger body of Indians, who possess the country to the Westward, and with whom Your Majesty's Subjects in Quebec in particular do carry on so extensive a commerce."

And this is a reference to the trade which by now the fur traders from Quebec are carrying out with Indians who had during the French period been trading with the French as far away as Western Canada.

And they proposed -- the Lords of Trade proposed that the regulation of the trade, however, be entrusted with colonies again both as a way of saving money, and they claim that the new regulations which have been put in effect have stopped these abuses.

And on page 194 at the bottom they mention that in "The northern District...", this is North America:

> "The principal Indians formed themselves into two great Confederacies; the one composed of the Six Nations and their Allies and Dependants, the other, called the Western Confederacy, composed of a great Variety of powerful Tribes, occupying that extensive Country, which lies about the Lakes Huron, Michigan and Superior, and to the West and North West."

And I believe the context of the reference here, the northwest when they had previously mentioned the -- this is in reference to the Indians with whom the Quebec traders in particular are trading. Now, through the lakes and rivers leading northwest from Lake Superior.

And page 198 they again return to the subject of -- they're dealing with this -- the subject of confining settlements to the sea coasts, and the various problems and advantages connected with that. And I note at the bottom of page 198 that:

"This motive, though operating in a less degree, and applying to fewer objects, did, as we humbly conceive, induce the forming the Colonies of Georgia, East Florida and West Florida to the South; and making those provisional Arrangements in the Proclamation in 1763, by which the interior Country was left to the possession of the Indians."

And the page -- they go on to discuss the progress of settlement throughout the colonies. And on page 210 they set out -- there is a debate going on about colonizing in the interior. The counter argument, of course, is the one that had always been advanced that settlement should be confined to the coast, but they here list the basic arguments which have been made by the proponents of interior settlement, and there were a very large number of them lobbying extensively in London with imperial officials. And that, among other things, you know, interior colonies would actually promote population and increase the demands for and consumption of British manufacturers, and that they would, among other things, they would be a defence and protection to the old colonies against the Indians. And they, the Lords of Trade, at the bottom, suggest an orderly process of opening up areas for settlement. At the bottom of page 201, that in order:

"To prevent Manufacturers, it is necessary and proper to open an Extent of Territory for Colonization proportioned to the Increase of People..."

And then they say, of course, because if people are cooped up within narrow limits they will be compelled to their convert their attention and industry to manufacturers.

And they go on basically to disagree with the proposal for interior settlement, but they mention part way down page 202 that there are "extensive Tract of Sea Coast hitherto unoccupied", then they say:

"Which, together with the Liberty that the Inhabitants of the middle Colonies will have (in consequence of the proposed boundary Line with the Indians) of gradually extending themselves, backwards, will more

1 effectually and beneficially answer the
2 Object of encouraging Population and
3 Consumption, than the Erection of new
4 Governments. Such gradual Extension, might,
5 through the medium of a continued
6 Population, upon even the same Extent of
7 Territory, preserve a Communication of
8 mutual Commercial Benefits between its
9 extremist Parts and Great Britain."
10
11 And they go on -- they go on to discuss and
12 basically reject some of the other proposals which
13 have been made for settling in the interior.
14 THE COURT: Could we take the afternoon adjournment now,
15 Ms. Mandell?
16 MS. MANDELL: Yes. Thank you.
17 THE REGISTRAR: Order in court. This court will recess.
18
19 (PROCEEDINGS ADJOURNED)
20
21 I hereby certify the foregoing to be
22 a true and accurate transcript of the
23 proceedings herein to the best of my
24 skill and ability.
25
26 _____
27 Peri McHale, Official Reporter
28 UNITED REPORTING SERVICE LTD.
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

(PROCEEDINGS RESUMED AT 3:20 p.m.)

THE REGISTRAR: Order in court.
THE COURT: Miss Mandell.
MS. MANDELL: Thank you. I'd like to have tab 32 marked as the next document and then to move on to tab 33.
THE COURT: All right, thank you, 1026-32.
THE REGISTRAR: Yes.

(EXHIBIT 1026-32 - MARCH 7, 1768 - LORDS OF TRADE ON STATE OF INDIAN AFFAIRS)

THE WITNESS: The document at tab 33 is known more popularly as the treaty of Fort Stanwix and --
THE COURT: How do you spell that, please? S-t-a-n --
THE WITNESS: -- w-i-x. It is in western New York state. It is about where Rome, New York now is.
THE COURT: Where?
THE WITNESS: Rome, New York, in the Six Nations country. And it's one of the agreements involving the boundary line which occurred after the Proclamation and a number of which are referred to in the preceding document by the Lords of Trade, and in the recital in the Treaty of Fort Stanwix, after naming the various nations who are involved and have been convened by Sir William Johnson. In the fifth line down, it states that:

> "Whereas his Majesty was gracioulsy pleased to propose to us in the year 1765 that a Boundary Line should be fixed between the English and us to ascertain and establish our Limits and prevent those intrusions and encroachments of which we had so long and loudly complained and to put a stop to the many fraudulent advantages which had been so often taken of us in Land affairs which Boundary appearing to us a wise and good measure we did then agree to a part of a Line and promise to settle the whole finally when soever Sir William Johnson should be fully empowered to treat with us for that purpose."

And it goes on to state that William Johnson has received orders to complete the said boundary line and that he's convened the chiefs and warriors of our respective nations,

> "...who are the true and absolute Proprietors of

lands in question and who are here now to a very considerable Number."

And it refers to various apprehensions that the line might not be strictly observed on the part of the English, and that they have now come together to agree before -- this is further down:

"Before Sir William Johnson and in the presence of His Excellency, the Governor of New Jersey, the Commissioners from the Provinces of Virginia and Pennsylvania and sundry other Gentlemen by which lines so agreed upon a considerable Tract of Country along several Provinces is by us ceded to His said Majesty which we are induced to and do hereby ratify and confirm to His said Majesty."

And it continues in the same vein and then defines a boundary, and on page 136 about eight lines down states that: Now therefore know ye that we the Sachems and Chiefs aforementioned Native Indians and proprietors of the lands herein after described for and in behalf of ourselves and the whole of our confederacy for various considerations do acknowledge and various words confirm and grant, bargain, sell, release, et cetera, all that tract of land situate in North America at the back of the British settlements bounded by a line which we have now agreed upon and do hereby establish as the boundary between us and the British colonies in America, and a description follows and it takes in lands going over as far as the Ohio River. And then further down extending eastward from every part of the said line as far as the lands formerly purchased so as to comprehend the whole of the lands between the said line and the purchased lands or settlements. And the rest of the wording continues in standard legal form and, on page 137, the signatures of the Six Nations Indians are attached to the deed.

MS. MANDELL: Could that be marked then as the next exhibit.

THE REGISTRAR: 1026 --

THE COURT: 1026-33 and the date is the 5th of November, 1768.

(EXHIBIT 1026-33 - DEED - BOUNDARY LINE BETWEEN WHITES AND INDIANS)

MS. MANDELL: And at that time tab 34 --

THE COURT: Is it possible to summarize the demise premises? What is the area that's --
THE WITNESS: The area itself is in the -- I confess it is a secondary source at tab 35 which is from an article by Kenneth M. Narvey and the reason I had intended to refer to this is that he includes a series of maps beginning at page 144 which -- this is the map at page 144, is the map which had accompanied the representation of the Lords of Trade in 1768 which was at tab 32. And on it, the subsequent pages, Mr. Narvey has marked the boundary lines discussed in that representation showing where it's cut inwards and on page 158 --
THE COURT: I am sorry, it runs more or less up the Mississippi to the north boundary of North Carolina?
THE WITNESS: On page 144, he hasn't added any boundaries as such but the boundaries that the Lords of Trade have mentioned, yes, runs up the back of the British settlements above sort of cutting through Virginia and over to the Mississippi. It's been added and --
THE COURT: Skirts around the easterly end of --
THE WITNESS: Yes.
THE COURT: -- Lake Erie and Lake Ontario?
THE WITNESS: The -- on page 144, it goes up there, yes. It's not entirely clearly marked.
THE COURT: Yes, all right.
THE WITNESS: But on page 158, this shows the boundary of the -- the boundary agreed upon at Fort Stanwix in November of 1768 and Lake Ontario is at the top and Lake Erie is just below it, and the boundary runs more or less from northeast to southwest down along the Ohio River, and you can see the Alleganys Mountain chain which had been the Proclamation line of 1763 is sort of in the middle and the boundary has extended over that and down the Ohio River in a southwesterly direction so that that has now become the boundary, and then on page 159, the same boundary is shown eastward as it comes down into Pennsylvania and as it crosses the mountains.
THE COURT: What is that word?
THE WITNESS: Which?
THE COURT: Looks like Allegany, is that mountain?
THE WITNESS: Yes.
THE COURT: All right.
THE WITNESS: And basically that the Indians had agreed to extend -- to surrender lands in a more or less southwesterly direction from the mountain chain down

1 the Ohio River.
2 THE COURT: And then down the Mississippi?
3 THE WITNESS: And not -- and then down the Mississippi later but
4 at this stage --
5 THE COURT: Not at this time?
6 THE WITNESS: Not at this time.
7 THE COURT: All right, thank you.
8 MS. MANDELL:
9 Q Thank you. If we could turn to tab 34 and just
10 complete this part of the evidence?
11 A This is a series of excerpts from the published acts
12 of the privy council on colonial series, and it deals
13 with subject of Vandalia which was a proposal made in
14 the late 1760s for establishing a colony in the
15 interior of America and, on page 202, left-hand column
16 part way down under the heading 4th August which would
17 be 1769, there is reference there to a petition --
18 this is at page 202, a petition which had come to the
19 Board of Trade from Thomas Walpole and others for a
20 grant of 2,400,000 acres of land at the back of
21 Virginia sold by the Six Nations and other Indians to
22 His Majesty. And the conflict going on -- this is a
23 historical background at the time again about whether
24 settlement should be allowed in the interior of
25 America. There were imperial officials among them,
26 Lord Hillsborough who was variously president of the
27 Board of Trade and secretary for the southern
28 department who was adamantly opposed to interior
29 settlements partly because he was a very large land
30 owner in Ireland and he didn't want Ireland
31 depopulated to --
32 MR. GOLDIE: Well, my lord, I think that this is going -- we are
33 after the date of the Royal Proclamation anyway. I am
34 not sure what relevance this has but the background of
35 this is quite apparent from the documents itself and
36 my friend -- the witness talked about a debate before
37 the adjournment. Well, the other name for that is the
38 American Revolution.
39 THE WITNESS: Well, what all I am establishing here is that in
40 this instance and, if you follow through these
41 excerpts dealing with this proposal for a grant of
42 this Vandalia colony on lands purchased from the Six
43 Nations Indians, that the -- there was a great deal of
44 debate but that -- and this is on internal page 208,
45 the Privy Council in 1772, this is 14th August,
46 approved making this settlement because it states in
47 the left-hand side orders for carrying into execution

the proposals of the committee report at 1st July and for apprising the Indians of the intention to form a settlement on the lands purchased from them in 1768. And that as I suggested, because there was this debate that, in this instance, the Crown officials did approve one of these interior settlements.

MS. MANDELL:

Q This is the land which was in -- at page -- internal page 208, the land referred to there is referring to the land that was ceded with the Treaty of Fort Stanwix?

A In part, yes. And it is referred to on page 202. It is among the lands purchased from the Six Nations Indians but it is in the interior below the Ohio River in the back of Virginia.

MR. GOLDIE: I assume my friend is going to draw to the court's attention the fact that this colony never got off the ground because of the American Revolution.

THE COURT: I don't recall it in the last time I heard the roll-call of the states.

THE WITNESS: No, it is quite true, it was never carried through but my only point in raising it is it was approved and that other events intervened of course and the area was of course eventually settled as one of the states of the United States of America after the Revolution.

THE COURT: Which state would that be?

THE WITNESS: It is in Tennessee -- Kentucky. Tennessee, Kentucky or both.

MS. MANDELL: My lord, I propose then to mark tab 34 as the next exhibit.

THE COURT: Yes, 34.

THE REGISTRAR: Thank you.

(EXHIBIT 1026-34 - ACTS OF PRIVY COUNCIL OF ENGLAND - EXCERPTS)

MS. MANDELL: And I suspect that tab 35 will attract the same argument as the Shelburne documents so we can either mark at this stage just the maps or the whole tab for the -- just the maps as an exhibit or my preference is to mark the whole tab for identification and we will argue it all out another day.

THE COURT: All right. It will be 1026-35 for Identification.

THE REGISTRAR: Thank you.

(EXHIBIT 1026-35 FOR ID. - ROYAL PROCLAMATION OCT. 7, 1763)

THE COURT: Where was this article published?
MS. MANDELL: It was published in Saskatchewan Law Review. I can get you the --
THE COURT: That's fine, thank you.
MS. MANDELL: It is probably in the index.
THE COURT: Thank you.
MS. MANDELL: My lord, I am going to distribute another volume.
THE REGISTRAR: Volume 3.
MS. MANDELL: Yes, I'd like it to be given the next exhibit number.
THE COURT: We don't have volume 2.
MS. MANDELL: Volume 2, we may excise because of the time problems -- excise from, sorry.
THE REGISTRAR: I have volume 2 here.
THE COURT: Is this volume 2 or volume 3 then?
MS. MANDELL: You should have volume 3.
THE REGISTRAR: Yours is 3.
THE COURT: Yes, all right.
MS. MANDELL: The first question which we'll be addressing with respect to these documents at the beginning of this volume, my lord, is the territory which the British Crown got by the Treaty of Paris in 1763, and if I could turn you to the first tab.
THE REGISTRAR: Do you want to give it a number?
MS. MANDELL: Perhaps this could be given the next exhibit number as well.
THE COURT: 1027.
THE REGISTRAR: 1027.

(EXHIBIT 1027 - PLAINTIFF BOOK 3 - DOCUMENTS JAMES MORRISON)

THE COURT: Yes.
THE WITNESS: This is the English translation of the Treaty of Paris, 10th February 1763, between Britain, France, Spain and with the addition of Portugal. And the -- by Article 4 at page 115, His Most Christian Majesty, this is the King of France, renounces his pretensions to Nova Scotia or Acadia and then the fourth line down:

> "Moreover, His Most Christian Majesty cedes and guarantees to his said Britannick Majesty, in full right, Canada, with all its dependancies."

MS. MANDELL:
Q All right.

A And at page 116 by Article 7, it states that:

> In order to re-establish peace and to remove forever all subject of dispute with regard to limits of the British and French territories on the continent of America, it is agreed that, for the future, the confines between the dominions of his Britannick Majesty and those of His Most Christian Majesty in that part of the world shall be fixed irrevocably by a line drawn along the middle of the River Mississippi, from its source to the River Iberville."

And it continues with various rights to the River Mississippi and Mobile, and what's now Alabama.

MS. MANDELL: And what in tab 7 is the subject of dispute which is herein referred to?

MR. GOLDIE: Well --

THE COURT: I understand it was The Seven Year War, wasn't it?

MR. GOLDIE: Well, surely that's a matter of --

THE WITNESS: Well, I mean obviously the overall question is the Seven Years War. Some of the specifics, though, I believe, related to the fact that in the lengthy negotiations that went on, the French officials, including the Duke Desoiseau (phonetic) kept trying to establish to the great shock, horror and dismay --

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

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

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

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

THE WITNESS: They were trying to establish that what was not Canada was Louisiana, and they were attempting to argue that Louisiana had extended as far as -- well, really the area of northeastern Ontario where I presently live but certainly a long way away from any

area that had ever remotely been considered part of Louisiana and because Canada was being ceded by the French, that, as I say, the French were --

THE COURT: I see. What's the source of it?

THE WITNESS: I can name any number of secondary sources; particularly, W.J. Eccles' book on France in America or Jack M. Sosin's book, Whitehall in the Wilderness. These negotiations are set out in --

THE COURT: They describe all these negotiations?

THE WITNESS: Yes. They describe all these negotiations and the historical facts, I am attempting to use a background.

THE COURT: All right, thank you.

MS. MANDELL: If you could turn then -- if that could be marked -- Treaty of Paris marked as the next exhibit.

THE COURT: 1027-1.

THE REGISTRAR: Thank you.

(EXHIBIT 1027-1 - THE TREATY OF PARIS DATED FEBRUARY 10, 1763)

MS. MANDELL:

Q If you could turn then to tab 2?

A These are just a couple of excerpts from a secondary source, namely, the Dictionary of Canadian Biography Volume 1, and they deal with geographical knowledge of North America, and I note on the first page it is a biography, short biography of Francis Drake, suggesting that he may have been the first British subject to sight the coast of -- the Pacific Coast of what's now Canada; that he at least seemed to have been up above San Francisco and this just sets out the historical facts on which Mr. Lamb's short biography is based.

Q All right. If that can be marked as the next exhibit?

A And the second one is the famous Bartholomew DeFonte, and on the Bowen map which was looked at earlier, there was the reference to the Lac DeFonte, and DeFonte was a nonexistent person but his apocryphal account of the Geography of North America had considerable influence and had appeared on several 18th century maps including -- a small portion of it appears on the Bowen map, these lakes and interior areas which didn't exist.

MS. MANDELL: If that could be marked as the next exhibit.

THE COURT: Yes.

(EXHIBIT 1027-2 - DICTIONARY OF CANADIAN BIOGRAPHY)

MS. MANDELL:
Q At tab 3?
A Tab 3 is just an excerpt from various papers and historical documents which were filed in the extensive discussions respecting the northern and western boundaries of Ontario in the 1870s and continued into the 1880s but I am noting here just a sort of catalogue of what the French considered Canada to have consisted of and the -- there are several references on page 53; for example, they quote from History of New France, and this is from a 1617 edition, by L'Escarbot and the translation reads -- it is about the middle of the paragraph:

"Thus our New France has for our limits..."

THE COURT: I am sorry?
THE WITNESS: This is the middle paragraph:

"...on the western side the lands as far as the sea called the Pacific, on this side the Tropic of Cancer; on the south, The Islands of the Atlantic Sea; in the direction of Cuba and the Island of Hispaniola; on the east by the Northern Sea which bathes New France; and on the north that land called Unknown, towards the icy sea as far as the Arctic Pole."

And it refers here to a map engraved in 1757 purporting to show New France extending as far as the Pacific Ocean. And it refers of course to various expeditions which have been sent out by New France to Western Canada and the -- on page -- after going through again various of these listings, on page 55 --
THE COURT: Where does the quotation end? As I see they have reference here to the Columbia River.
THE WITNESS: This appears to be an editorial, you know, explanation because of course in Mr. de la Verendrye's accounts of his explorations he doesn't refer specifically to the Pacific Ocean and the Columbia, although he does refer to the western sea, La Mer du la West, and the river of the west.
THE COURT: All right.
THE WITNESS: And that's I believe an editorial comment and what was meant by those statements. And on page 55, at the bottom there is a reference from 1761 volume by Thomas Jefferys, a well-known cartographer, and the volume

had been titled A Description of New France or the French Dominions in North America. And it states:

> "Canada, according to the English accounts, is bounded on the North by the Highlands which separates it from the country about Hudson's Bay, Labrador, or New Britain, and the country of the Eskimeaux, and the Christinaux; on the East, by the River St. Lawrence; and on the South, by the Ontawai River, the country of the Six Nations, and Louisiana; its limits towards the West, extending over countries and nations hitherto undiscovered."

And the European powers of course were in the habit of claiming enormous --

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

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

MR. GOLDIE: I hope so.

MS. MANDELL: I wonder if that could be marked as the next exhibit.

MR. GOLDIE: I am expressing a formal objection to Unofficial Descriptions of the Boundaries because of the word "unofficial".

THE COURT: These are statutes, documents and papers regarding northern boundaries of the province of Ontario, are they? Are you pressing for this, Miss Mandell?

MS. MANDELL: Well, I do think that it does form a part of the argument which we make and I don't think that there is anything inaccurate about the fact that the government hasn't made a part of what today would look like the King's printer; it is a collection in the most reputable source compiling this information describing at that time what was known.

THE COURT: Well, if we are going to have an argument on this, I think we will mark it for identification and we will deal with it at some other time until I hear something further on it.

(EXHIBIT 1027-3 FOR ID. - STATUTES, DOCUMENTS AND PAPERS - NORTHERN AND WESTERN BOUNDARIES)

MS. MANDELL:
Q Before we pass, I think I should establish more information then in respect to this document. What if anything further do you know as to the manner in which the descriptions were compiled in the places where you've referred us to?
A Simply this -- you mean the document at tab 3?
Q Yes.
A It is from a published compilation which was used -- I mean a similar one was when the dispute over the Labrador boundary, various historical documents were collected and bound together and printed as an aid when the -- in this case, this particular discussion went all the way to the privy council or the Judicial Committee of the Privy Council, and a number of these historical documents and et cetera were bound together as material used in those cases and it was a -- it involved Canada, Ontario, Manitoba, in particular.
Q This was the Labrador boundary?
A No. This one right here, the northern and western boundary of Ontario involved the Ontario boundary where the Ontario boundary was in relation to Manitoba and --
MR. GOLDIE: These were boundary commissions, and my submission was that these were collected for the purpose of settling a boundary which was unsettled. We are dealing with a boundary that is settled by the document in question.
THE COURT: Well, I marked it for identification.
MS. MANDELL:
Q Thank you. All right. If you could turn to tab 4?
A Tab 4 is one of the documents on which the French base their claims to North America or large portions of North America and the first two pages of it are the English translation and the last three is actually the original from the French archives.
THE COURT: Is this where they were claiming the extended boundaries of Louisiana?
THE WITNESS: No. This is where -- this is from 1671, and it's quite apparent on its face, it's the Sieur de Saint Lusson, S-a-i-n-t-L-u-s-s-o-n two words, had been delegated by the intendants of New France, second in command of the French colony on the Saint Lawrence River to search for the copper mine in the countries, and then names various Indian nations, discovered and to be discovered in North America near Lake Superior or the Fresh Sea. And that's a reference of course to

the Lake Superior, and it takes place at Sault Ste. Marie, which is both in Ontario and the state of Michigan, the Rapids, the Saint Marie's River between Lake Superior and Lake Huron, and a large number of Indian tribes are there and, according to the French account on page 804, the French thereby in a variety of ways the text states after reading out the name of King Louie the XIV about nine lines down, it states: We take possession of the said place of, in English, Saint Mary of the Falls, actually it is still known as Sault Ste. Marie, as well as of Lakes Huron and Superior, the island of -- and this is Manatoulin Island (phonetic) and Lake Huron, and then -- and of all other countries, rivers, lakes and tributaries contiguous and adjacent thereunto, as well discovered as to be discovered, which are bounded on the one side by the northern and western seas, and on the other side by the south sea, including all its length and breadth, or breadth, excuse me. And three lines further on, the declaration makes it apparent that, according to the document the various Indian Nations, were dependent on his Majesty subject to be controlled by his laws and to follow his customs, and then in return his Majesty promises them, "All protection and succor on his part against the incursion or invasion of their enemies. And then it declares unto all other powers that they cannot or ought not seize on or settle in any place in said country, and it's dated 14 June 1671.

Q And therein what is the reference to the South Sea?

A The reference to the South Sea is to the Pacific Ocean, the rest --

MR. GOLDIE: My lord, if this isn't tendered for the truth of the matter stated therein, why are we concerned about it?

THE COURT: Well, what is its relevance, Miss Mandell?

MS. MANDELL: Well, my lord, the issue in law which you will hear about in the year is in part what is the territory which was claimed by the French and by the British, and then your lordship will then interpret the scope of the Treaty of Paris as to what the British got when they began to deal with their new acquisitions and you have heard now much about how they have considered that --

THE COURT: But isn't that subtle and conclusive when you term it?

MS. MANDELL: That they got everything the French had or

1 claimed, yes, but the question --
2 THE COURT: Mississippi.
3 MS. MANDELL: No, that's not conclusively settled. You are
4 referring to Article 6, the one -- there is two
5 articles that you were referred to, my lord. One is
6 Article 4.
7 THE COURT: Treaty of Paris.
8 MS. MANDELL: By the Treaty of Paris. One is Article 4, where
9 the French cedes virtually everything that they have
10 to the British and then Article 6 is a more particular
11 article with respect to the area -- I am sorry, it is
12 7 with respect to the area which is now going to be
13 defined between the Mississippi and eastwards, and
14 there will be an argument made to you that the -- by
15 both sides debating on it, I am sure, as to what the
16 scope of the Treaty of Paris is, and with respect to
17 your final judgment as to what Article 4 means, that
18 is what all did the French cede, what did they have to
19 cede and what did the British and the French both
20 believe they received by the Treaty of Paris, you're
21 going to have to have evidence before you as to what
22 each of them claimed to have because, in the end,
23 Britain got everything France claimed and France
24 relinquished her claims to everything that she did so
25 it is going to be part of the argument with respect to
26 the breach of that treaty.
27 THE COURT: All right. Well, I am not sure that I follow all
28 that and I am not sure that I have to but maybe I
29 will, and I really don't think that there is going to
30 be much difficulty or prejudice with the document and
31 I think a course of caution will be to mark it for
32 whatever purpose it later turns out to have which at
33 the moment is a matter some uncertainty but we will
34 see in due course. Should we take a short
35 adjournment?
36 MS. MANDELL: All right.
37
38 (EXHIBIT 1027-4 - NEW YORK COLONIAL MANUSCRIPTS -
39 EXTRACTS)
40
41 THE REGISTRAR: Order in court.
42
43 (PROCEEDINGS ADJOURNED AT 4:03 p.m.)
44 (PROCEEDINGS RESUMED AT 4:15 p.m.)
45
46 THE REGISTRAR: Order in court.
47 THE COURT: Ms. Mandell.

1 MR. GOLDIE: My lord, before my friend starts, in order to save
2 a little time, if my friend is prepared to state that
3 the documents that she's now dealing with are
4 documents which she wishes to have available to her to
5 support the argument that she described to your
6 lordship, then I will state very briefly that I have
7 an objection and then we won't have to have any
8 interruptions with the rest of them but, if my friend
9 can state what the purpose is, then I can -- of the
10 documents in this volume, as it appears to me from a
11 quick review that they are all related to the question
12 of that she described, I don't want to characterize
13 her argument, but as I understood it she said there is
14 an ambiguity or something akin to that in the Treaty
15 of Paris and I will be making a submission and I want
16 to have these documents. I can agree to their
17 authenticity, that's not a problem; I object to their
18 being entered as exhibits in this case on the grounds
19 that they are irrelevant and that they are argument
20 disguised -- they are disguised as argument. The
21 opinion -- I should say, disguise -- argument
22 disguised as opinion, but as to the -- if that's what
23 they are in for, then that's my objection. They can
24 be all marked without any further adieu.
25 THE COURT: Well, all right. Are you able to state what --
26 firstly, do they all fall in the same category?
27 MS. MANDELL: No. I mean not with respect to the problem is it
28 a Treaty of Paris. The documents that relate to the
29 specific point as to what it is that the British got
30 with the Treaty of Paris and what there is to be said
31 further about that end at tab 9, and then the rest are
32 dealing with a further point as to the intention of
33 the found with respect to its application of the Royal
34 Proclamation.
35 THE COURT: All right. Well, let's deal with the first set, tab
36 4 to 8 inclusive, are these documents ones that you
37 wish to have in evidence so as to support an argument
38 regarding the proper construction to be placed upon
39 some -- upon an ambiguous provision in the Treaty of
40 Paris?
41 MS. MANDELL: Yes. That's 1 to 9, yes.
42 THE COURT: Well then, if your friend says that he has no
43 objection of it being marked as exhibits, it will be
44 available to you for that purpose. We can go with
45 that.
46 MS. MANDELL: Go at least to tab 9.
47 THE COURT: Well, let's deal with that then so we will say

1 Exhibit 1027, tabs 4 to 8 inclusive, are admitted as
2 authentic and available for argument on ambiguity,
3 Treaty of Paris.
4 MR. GOLDIE: Of course I don't admit there is ambiguity but
5 that's what they are there for.
6 THE COURT: If any, if any. From the Treaty of Paris, all
7 right. Now, what about tabs 9 on?
8 MS. MANDELL: Tabs 10 onwards.
9 THE COURT: 10 onwards or 9 onwards?
10 MS. MANDELL: Tab 9 is with respect to the first.
11 THE COURT: 4 to 9 inclusive, all right. Those tabs may be
12 marked 1027 and the appropriate tab number.
13 MS. MANDELL: And tab 10, I am sorry.
14 THE COURT: And 10, all right. 1027, 4 to 10 inclusive. All
15 right.
16
17 (EXHIBIT 1027-5 - A VIEW OF HISTORY POLITICS 1763)
18
19 (EXHIBIT 1027-6 - SECOND CHARTER OF VIRGINIA 1609)
20
21 (EXHIBIT 1027-7 - NATIVE RIGHTS - K. McNEIL)
22
23 (EXHIBIT 1027-8 - ORDERS IN COUNCIL RE HUDSON'S BAY
24 CO.)
25
26 (EXHIBIT 1027-9 - TREATY OF UTRECHT 1713)
27
28 (EXHIBIT 1027-10 - WHITEHALL AND THE WILDERNESS J.M.
29 SOSIN)
30
31 THE COURT: Now, from tab 11 on, they are for the purpose of
32 showing the Crown's intention with respect to the
33 operation of the Royal Proclamation?
34 MS. MANDELL: That's right.
35 MR. GOLDIE: Well, on what principle is my friend tendering
36 those and on what principle is my friend relying on
37 tendering it on that basis?
38 THE COURT: You are advancing to prove the intention?
39 MS. MANDELL: Yes, and prove -- that's right.
40 THE COURT: Are they capable of proving that intention? I
41 haven't read any of them. Never seen any of them
42 before.
43 MS. MANDELL: I hope you will agree with us that they are. This
44 is -- your lordship is going to be asked to interpret
45 the phrase, the Indians with whom we are connected and
46 to live under our protection, and that phrase is one
47 which, in our submission, in interpreting that phrase

1 you are going to be drawn to how the Crown interpreted
2 it themselves in their dealings with the Indian
3 Nations subsequent to 1763 and, in our view, when you
4 do interpret that phrase in light of the documents
5 which you're going to have presented to you, you are
6 going to be urged into a view as to the territorial
7 reach of the Proclamation.
8 THE COURT: Does it go any further than the category that we
9 just dealt with; that is, that you want these
10 documents in a classification or status where you can
11 use them to support an argument?
12 MS. MANDELL: Yes. I would use them to support an argument.
13 But, you know, my lord, I also say that a great many
14 of these documents must in our submission be seen in
15 their historical context. It is not the document
16 simply on its face that we intend to rely.
17 THE COURT: Well, that doesn't trouble me because I have the
18 view that counsel are just as competent to give me the
19 historical context as the witness is even if the
20 counsel is reading from a historical opinion. I mean,
21 there is nothing magic about having these words
22 mouthed in the witness box if they don't come from the
23 personal and unique knowledge of the witness, unless
24 they fall within that category of scientific matters
25 that a mind of a judge can't understand, and I think I
26 can be as convinced by counsel as I can by a witness
27 of what the documents mean and I think that every road
28 should be paved for the ease of counsel in having the
29 documents available from which to make the argument,
30 but I must confess to some serious temptations to
31 short-circuit the need for viva voce evidence to
32 establish what I think counsel can do on their own. I
33 mean, what is the advantage that you, for which you
34 contend in having the witness who obviously has made
35 the selection of documents for you, in having him
36 describe them and you argue from them again using the
37 same descriptions? He selected them; he's put you in
38 a position to put them before me and if I somehow
39 either mark them as exhibits for this purpose or I
40 give you leave to put them in a separate brief that
41 can be used in argument, what's then lacking in the
42 presentation of your case?
43 MS. MANDELL: Well, my lord, there is connection to be made
44 between the documents which in my submission somebody,
45 especially when we get into the documents which we are
46 going to get into now, which deal with the operation
47 of the fur trade in America. I mean, you say that

1 counsel is in a position to be able to give what a
2 historian could do with respect to the context. I say
3 that maybe or maybe not, but the connections there are
4 there to be made by somebody who's seeped their life
5 in the history of the fur trade.
6 THE COURT: Why can't that expert, that consultant, tell you
7 what that connection is and you tell me?
8 MS. MANDELL: Well --
9 THE COURT: Why do we have to do it twice?
10 MS. MANDELL: I don't believe we are going to do it twice in
11 that sense. I think we are going to get from the
12 expert the background that he brings to the discussion
13 in light of the document, and from counsel you're
14 going to get how or in what way that document may fit
15 into a matrix of legal argument framed on one legal
16 point or another, and I don't believe that they are
17 identically the same thing. If I did, then there
18 would be no purpose in calling an expert with respect
19 to any of the historical matters. I mean, if your
20 lordship's view is that all history could be done by
21 lawyers, then I say that in my view at least we are
22 cutting the line in a way that is probably way too far
23 into presuming knowledge that lawyers have or can know
24 for the --
25 THE COURT: When you are dealing with the question of history
26 there is no limit to how much history there is.
27 MS. MANDELL: Well --
28 THE COURT: If counsel have the facility to rely on the
29 documents to support an argument, and that problem is
30 cleared away, it seems to me there is no advantage to
31 having the witness go through them seriatim
32 laboriously. For example, if I marked all these
33 exhibits for the purpose of being used for argument
34 and I say, all right, I want written argument, you
35 could have the witness write the argument and you
36 write the opening sentence and the last sentence, and
37 we have accomplished a whole -- as much as we can hope
38 to accomplish I think.
39 MS. MANDELL: Well, my lord, I think that there is two separate
40 issues: One is what the historical context is within
41 which the Proclamation was applied by the Crown, and
42 that is something that was -- this witness is in a
43 position to give. The second argument is an opinion
44 as to what that tells us regarding Crown policy. I
45 have hoped that that would also come from the witness.
46 And the third argument is once that Crown policy is
47 understood, what effect, if any, does it have with

1 respect to the way that the law is to be interpreted
2 to the Indian people of British Columbia? And that
3 area I agree is going to be completely a matter of
4 legal argument but I say that the -- perhaps the
5 secondary is one that will have to be left to counsel
6 although I don't at this stage agree that it is
7 appropriate and the first area, that is the historical
8 context within which these events played themselves
9 out in my mind is, and I submit is a matter for -- it
10 could be if your lordship -- if your lordship sees the
11 historical period as simply a chain of documents, then
12 I understand that we may end up having to refer to
13 them in legal argument alone but, in my view, the
14 historical period is taken from the documents, they
15 both state them, and they also can explain it, and
16 that's what we are here to advance to your lordship.
17 THE COURT: Miss Mandell, you are much too young to be so set in
18 your ways. Surely we have to, in a case like this,
19 find a way to deal with these things other than by the
20 witness going over documents in this way. We just
21 have to find a better way to do these things. And it
22 seems to me that this is in a matter of history. If
23 we were talking about physics or chemistry, which I
24 don't understand and can't expect to understand even
25 by the written word, I would say that it would have to
26 be explained by a witness, but history is far too
27 vast, far too unspecific and far too unmanageable to
28 have it explained in the witness box. It has to be
29 proven by documents and it has -- or by -- in the case
30 of an oral history by those who remember it, and
31 explained by counsel, and I see no harm to anyone by
32 taking that easier route.
33 I am not going to foreclose the matter. I'd like
34 to hear whether Ms. Koenigsberg has anything to
35 suggest in this area.
36 MS. KOENIGSBERG: I don't know that I can be of really further
37 assistance, my lord. I fail to see the value,
38 particularly when it is, in my submission, a matter of
39 appropriate legal argument to have the witness read
40 out the documents. There have been from time to time
41 some editorial comment which I suppose I would have to
42 say thankfully has been brief, and there is an issue I
43 suppose about its admissibilities, but essentially
44 what we are engaged here and have been engaged in for
45 a day and a half is a collection of documents from
46 which the witness is reading and then saying this was
47 significant and this one goes with that one and, in my

1 submission, my friend is not only entitled but
2 undoubtedly will do the same in argument, and I do
3 fail to see how their can be anything lacking, any
4 evidence before your lordship if it were to be dealt
5 with other than through the witness in this matter.
6 THE COURT: Thank you. Mr. Goldie, anything else you want to
7 say?
8 MR. GOLDIE: Nothing further, my lord.
9 THE COURT: All right. Miss Mandell, you have heard what Ms.
10 Koenigsberg says and you heard what Mr. Goldie doesn't
11 say. Have you anything else you want to say?
12 MS. MANDELL: My lord, I want to, if I could ask your lordship
13 to summarize the proposition more clearly. I hope
14 that I have -- I understand it but I may not.
15 THE COURT: Well, when you have a situation where you have a
16 body of knowledge which counsel wish to place before
17 the court and it is something that a -- a mind
18 untrained in that discipline cannot be expected to
19 understand it, then it becomes necessary to have
20 opinion evidence and technical assistance. When you
21 are dealing with a matter of history where the
22 evidence flows from documents and which the witness
23 does not have personal knowledge of but is merely
24 using his intellectual advantages to make the
25 selection and explain the significance of them, then
26 it seems to me that the sensible course to follow is
27 to give counsel opportunity to ensure that the right
28 documents are identified, either by being marked as
29 exhibits or by being collected together in some way
30 and identified in that way, and for the significance
31 and the connection between them to be explained by
32 counsel in argument, keeping in mind that counsel in
33 such circumstances is at liberty to read from a
34 briefing paper or opinion of an expert. There is no
35 advantage to be gained as I presently see it in having
36 the person who collects the documents explain them to
37 me when it is going -- when it is inevitably going to
38 be done again by counsel in argument.
39 Now, I confess that there is some advantage in
40 having myself exposed to what the witness says about
41 them; for example, where he was able to say that Lord
42 somebody was the Secretary of State for the southern
43 department and he will explain what that was and who
44 somebody's brother was and where Lord Grenville came
45 from because he hadn't appeared until poor old, not
46 Egmont but --
47 THE WITNESS: Egremont.

MR. GOLDIE: Egremont.
THE COURT: Egremont died, but it seems to me those things can also be given to me by counsel who would have at the time of an argument probably the expert with them anyway, and it can be given to me by counsel and, therefore, my conclusion is that I don't see any advantage in the witness going through the documents seriatim and having them laboriously identified and marked the way we have been going, interesting as it has been, when I know full well it is all going to be done by counsel again in argument.

My conclusion, therefore, to which I have driven myself is that I should only be concerned at this stage in ensuring that the documents are in some suitable way made available for you in argument and that is, as I say, that's what I am driven to. I think however that having regard to the time of day, that it might be useful if, having stated what I have just said, we were to adjourn and resume this tomorrow morning because counsel will have a chance to think about it and to perhaps approach it differently and persuade me that what I am posing is an impermissible shortcut. Will that be a reasonable way to perceive it?
MS. MANDELL: I think so.
THE COURT: I will be glad to hear you further on it in the morning. Ten o'clock then. Thank you.
THE REGISTRAR: Order in court. Court will adjourn until 10:00 a.m.

(PROCEEDINGS ADJOURNED AT 4:40 p.m. TO APRIL 26, 1989 at 10:00 a.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.