

Commission of Inquiry into the Decline of
Sockeye Salmon in the Fraser River



Commission d'enquête sur le déclin des
populations de saumon rouge du fleuve Fraser

Public Hearings

Audience publique

Commissioner

L'Honorable juge /
The Honourable Justice
Bruce Cohen

Commissaire

Held at:

Room 801
Federal Courthouse
701 West Georgia Street
Vancouver, B.C.

Monday, June 27, 2011

Tenue à :

Salle 801
Cour fédérale
701, rue West Georgia
Vancouver (C.-B.)

le lundi 27 juin 2011

APPEARANCES / COMPARUTIONS

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Mark East Charles Fugère	Government of Canada ("CAN")
Boris Tyzuk, Q.C.	Province of British Columbia ("BCPROV")
No appearance	Pacific Salmon Commission ("PSC")
No appearance	B.C. Public Service Alliance of Canada Union of Environment Workers B.C. ("BCPSAC")
Matt Keen	Rio Tinto Alcan Inc. ("RTAI")
No appearance	B.C. Salmon Farmers Association ("BCSFA")
No appearance	Seafood Producers Association of B.C. ("SPABC")
No appearance	Aquaculture Coalition: Alexandra Morton; Raincoast Research Society; Pacific Coast Wild Salmon Society ("AQUA")
Tim Leadem, Q.C.	Conservation Coalition: Coastal Alliance for Aquaculture Reform Fraser Riverkeeper Society; Georgia Strait Alliance; Raincoast Conservation Foundation; Watershed Watch Salmon Society; Mr. Otto Langer; David Suzuki Foundation ("CONSERV")
No appearance	Area D Salmon Gillnet Association; Area B Harvest Committee (Seine) ("GILLFSC")

APPEARANCES / COMPARUTIONS, cont'd.

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Keith Lowes	B.C. Wildlife Federation; B.C. Federation of Drift Fishers ("WFFDF")
Tina Dion	Maa-nulth Treaty Society; Tsawwassen First Nation; Musqueam First Nation ("MTM")
David Robbins Robert Janes Sarah Sharp	Western Central Coast Salish First Nations: Cowichan Tribes and Chemainus First Nation Hwlitsum First Nation and Penelakut Tribe Te'mexw Treaty Association ("WCCSFN")
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Joseph Gereluk	Métis Nation British Columbia ("MNBC")

APPEARANCES / COMPARUTIONS, cont'd.

Tim Dickson	Sto:lo Tribal Council Cheam Indian Band ("STCCIB")
Allan Donovan	Laich-kwil-tach Treaty Society Chief Harold Sewid, Aboriginal Aquaculture Association ("LJHAH")
Lee Schmidt	Musgamagw Tsawataineuk Tribal Council ("MTTC")
Ming Song Lisa Fong Benjamin Ralston	Heiltsuk Tribal Council ("HTC")

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1 Vancouver, B.C./Vancouver
2 (C.-B.)
3 June 27, 2011/le 27 juin 2011
4

5 THE REGISTRAR: The hearing is now resumed.

6 MR. MCGOWAN: Good morning, Mr. Commissioner, it's
7 Patrick McGowan, with me is Jennifer Chan. We're
8 counsel for the Commission.

9 This is the first day of a six-day block of
10 hearings focused on topics related to Aboriginal
11 fishing. Today Dr. Harris will be examined by
12 participants on a paper he has prepared for the
13 Commission. Over the subsequent five days you
14 will hear from three panels, consisting of
15 witnesses from the Department of Fisheries and
16 Oceans, and members of several of our First
17 Nations participant groups.

18 I'd like to start this morning by marking the
19 Commission's Policy and Practice Report on this
20 topic. If we could have the first page of that
21 brought up on the screen, please. Yes. Mr.
22 Commissioner, this is a Policy and Practice Report
23 prepared by Commission counsel. It's titled
24 "Policy and Practice Report, Department of
25 Fisheries and Oceans Policies and Programs for
26 Aboriginal Fishing", it's dated the 2nd of
27 December, 2010. This report was distributed to
28 participants late last year, but it has not yet
29 been entered and I'd ask that it become the next
30 PPR.

31 THE REGISTRAR: That will be marked as PPR number 18.

32
33 PPR18: Policy and Practice Report,
34 Department of Fisheries and Oceans Policies
35 and Programs for Aboriginal Fishing, December
36 2, 2010
37

38 MR. MCGOWAN: Thank you. Mr. Commissioner, we have a
39 single witness today. He's Dr. Doug Harris. You
40 see him seated at the witness table. We're going
41 to seek to have him qualified as an expert in the
42 legal history of Aboriginal fisheries in British
43 Columbia.

44 I'm going to start by taking you through some
45 of your background, sir. If we could have the
46 witness's c.v. on the screen, please.

47 THE REGISTRAR: Good morning.

2

Douglas Harris

In chief on qualifications by Mr. McGowan

1 DOUGLAS HARRIS, affirmed.

2

3

THE REGISTRAR: Would you state your name, please.

4

A Douglas Harris.

5

THE REGISTRAR: Thank you. Counsel.

6

7

EXAMINATION IN CHIEF ON QUALIFICATIONS BY MR. MCGOWAN:

8

9

Q Dr. Harris, you have a Ph.D. in Law with a focus in Legal History; is that correct?

10

11

A Yes.

12

Q And your Ph.D. dissertation was titled "Land, Fish and Law: The Legal Geography of Indian Reserves and Native Fisheries in British Columbia, 1850-1927"?

13

14

15

A Yes.

16

Q You have a Master's degree in Law focusing on Legal History?

17

18

A Yes.

19

Q You obtained that from UBC in 1998?

20

21

A Yes.

22

Q And your Master's thesis was titled "The Legal Capture of British Columbia's Fisheries: a Study of Law and Colonialism"?

23

24

A Yes.

25

Q You obtained your Law degree in 1993 from the University of Toronto?

26

27

A Yes.

28

Q And you have a Bachelor of Arts with a major in History from UBC in 1990, correct?

29

30

A Yes.

31

Q You are presently a Professor at the University of British Columbia?

32

33

A Yes.

34

Q You have been so since 2001?

35

36

A Yes.

37

Q You've taught courses in Property Law, Fisheries Law, First Nations Law, among others?

38

39

A Yes.

40

Q And am I correct you developed the course at UBC for Fisheries Law?

41

42

A Yes, I developed a particular iteration of that course. Yes.

43

44

Q Okay. You are presently the Associate Dean of Graduate Studies and Research at UBC's Faculty of Law?

45

46

A Yes, I am.

47

June 27, 2011

Douglas Harris

In chief on qualifications by Mr. McGowan

Ruling on qualifications

In chief by Mr. McGowan

1 Q You've supervised nine LL.M. and Ph.D. students,
2 including current candidates?

3 A I believe that's correct, yes.

4 Q You -- in 1995 you articulated with Swinton & Company
5 and were called to the bar of British Columbia?

6 A Yes.

7 Q And you've published books and book chapters,
8 articles and made numerous presentations on topics
9 related to Aboriginal fisheries law in Canada?

10 A Yes, that's correct.

11 Q And those are set out in your c.v., which we see
12 on the screen?

13 A Yes.

14 MR. MCGOWAN: If we could have the c.v. marked as the
15 next exhibit.

16 THE REGISTRAR: Exhibit number 1134.

17

18 EXHIBIT 1134: *Curriculum vitae* of Douglas C.
19 Harris

20

21 MR. MCGOWAN:

22 Q Yes, Mr. Commissioner, with that said, and subject
23 to any questions you or any of the other
24 participants have, I'd seek to have Dr. Harris
25 qualified as an expert in the legal history of
26 Aboriginal fisheries in British Columbia.

27 THE COMMISSIONER: Very well, thank you.

28

29 EXAMINATION IN CHIEF BY MR. MCGOWAN:

30

31 Q Dr. Harris, you were asked by the Commission to
32 prepare a paper which provides an overview of
33 significant legal and historical events which have
34 influenced First Nations access to and
35 participation in the Fraser sockeye fishery for a
36 period from initial contact to 1982; is that
37 right?

38 A Yes.

39 Q And there was several components of that in that
40 paper you were asked to specifically address, and
41 I'm going to list three of them now and then ask
42 if you agree: (1) the development of historic
43 treaties in British Columbia, including the
44 Douglas Treaties, which contained reference to
45 fisheries, and the implementation of such
46 treaties; (2) the practice of coastal reserve
47 allotments or reserve allotments adjacent to the

1 Fraser River or its tributaries; and (3) the
2 development of Canadian laws, regulations and
3 jurisprudence directly related to the Fraser
4 sockeye fishery. And you were further asked to
5 describe how these legal and historic events
6 affected the access and participation of First
7 Nations and other groups to the fishery.

8 A That is correct.

9 Q If we could have the paper brought up, Dr.
10 Harris's paper brought up on the screen, please.
11 In response to that request from the Commission,
12 you prepared this paper titled "The Recognition
13 and Regulation of Aboriginal Fraser River Sockeye
14 Salmon Fisheries, 1982 to present"; is that right?
15 Or pardon me, "to 1982".

16 A That's correct.

17 Q And that paper is January 12th, 2011?

18 A Yes.

19 Q And that's the final draft?

20 A It is.

21 MR. MCGOWAN: Mr. Commissioner, I just have a brief
22 comment before the paper goes in. This paper is
23 being tendered for its description of the facts.
24 That is the legal history surrounding such matters
25 as the allocation of reserves, signing of
26 treaties, Aboriginal participation in the fishery,
27 enactment of legislation and regulations, effects
28 of legislation and regulations on Aboriginal
29 participation in the fishery, the evolution of
30 licence conditions, et cetera. It's hoped that
31 the paper and the examination of Dr. Harris by
32 participants will provide a contextual historical
33 background for the rest of the Aboriginal fishing
34 hearings.

35 This report is not being tendered as a legal
36 opinion. Any legal opinions which may be
37 contained in the paper are not necessarily those
38 of Commission counsel, and we are not tendering
39 the paper as an opinion on the interpretation or
40 application of domestic law to the facts discussed
41 in the paper.

42 With those comments, I'd ask that this paper
43 become the next exhibit. And after the paper is
44 marked, I understand that Mr. Eidsvik has a couple
45 of comments that he'd like you to hear about the
46 paper at this time.

47 THE REGISTRAR: That will be marked as Exhibit 1135.

1 EXHIBIT 1135: Harris, The Recognition and
2 Regulation of Aboriginal Fraser River Sockeye
3 Salmon Fisheries to 1982, January 12, 2011
4

5 MR. EIDSVIK: Good morning, Mr. Commissioner, Philip
6 Eidsvik for the Area E and the Fisheries
7 Coalition, for the record.

8 We have a problem with this document, and we
9 had some discussions with Commission counsel over
10 the last few days how to resolve it, and we didn't
11 want to derail the discussions this morning by
12 raising an objection to the discussions. I did
13 have some concern with it being entered as an
14 exhibit, but in precise language probably led to
15 it this morning.

16 Our concern is the document covers a period
17 to 1982, and if you remember the last time I was
18 here we had some objection about myself, our
19 organization, entering a 1989 document. So it
20 doesn't really cover the period of the problems
21 that led to the collapse of the Fraser River
22 sockeye fishery.

23 In our view, it's also a one-sided
24 perspective, written by an author who has taken
25 one side on what's a really controversial subject,
26 and it's at odds with a number of important
27 Supreme Court of Canada and more recently a B.C.
28 Court of Appeal decision.

29 So I wouldn't object to it if it was coming
30 in as an expert witness for one of the groups who
31 support this view of history and the law. I do
32 have a problem with it coming and I think I need
33 your instructions on it. We don't mind it -- all
34 the discussion today, I don't want to derail it,
35 but certainly we'd like to make a written argument
36 precisely on an accelerated timetable at the end
37 of these, the Aboriginal section, with a view to
38 somehow dealing with what we think is an
39 inappropriate paper submitted by the Commission.

40 MR. MCGOWAN: Yes, Mr. Commissioner, with respect to
41 Mr. Eidsvik's comments as to this witness's
42 perspective, that may well be a matter he can
43 fairly pursue in cross-examination. With respect
44 to submission on the paper, we're of course in
45 your hands as to when you'd like to receive them.
46 To this point Commission counsel has taken the
47 position that submissions on matters like this and

1 the weight to be given to a particular document or
2 line of evidence ought to be handled in closing
3 submissions. I understand Mr. Eidsvik to be
4 seeking an opportunity to do that on an
5 accelerated schedule. It's obviously in your
6 hands, but today we've certainly taken the
7 position that closing submissions are the
8 appropriate time for those types of submissions.

9 MR. EIDSVIK: Mr. Commissioner, if we leave this till
10 closing submissions and weeks and weeks of legal
11 argument, this paper will be lost. And given our
12 limited time for cross-examination - I know that I
13 asked for two hours; I have 25 minutes - we can't
14 deal properly with the content of the paper in our
15 limited time for cross. And certainly if it's
16 accepted as an exhibit, which it has been, and in
17 the three weeks of argument it will simply be
18 lost. But it's too important to stand on its own.

19 MS. GAERTNER: Mr. Commissioner, Brenda Gaertner for
20 the First Nations Coalition. I just want you to
21 know that I would object to this paper being
22 treated any differently for written submissions
23 than any papers or perspectives that we've heard
24 up until now. There's been many, many
25 perspectives that have been provided by many
26 experts through this Commission, many of whose
27 perspectives are not necessarily the perspectives
28 shared by any one particular participant, and this
29 one wouldn't and should have any special
30 treatment. This is a matter for final
31 submissions.

32 THE COMMISSIONER: Thank you very much, Mr. Eidsvik,
33 and Ms. Gaertner. Mr. Eidsvik, just before you
34 return to your seat, my respectful suggestion is
35 that it would be preferable to make whatever
36 submissions you wish to make about the paper or
37 the evidence that flows today as a result of
38 cross-examinations as part of the final
39 submissions that come from your participant group.
40 I think to me that would be a preferable way for
41 you to proceed.

42 If for some reason in the weeks that follow
43 this week, you have a different view than I have
44 just suggested to you about my preference, I would
45 invite your comment in that regard, or your -- I'm
46 trying to say you could revisit your position, but
47 my preference at the moment would be for you to

1 take the paper and the evidence which flows from
2 it today, and from this week, for that matter, and
3 make that, whatever views you have and whatever
4 submissions you have, part of your final
5 submission. But as I say, if for some reason you
6 feel that I ought to hear from you again about
7 this, I certainly wouldn't deny you that
8 opportunity.

9 MR. EIDSVIK: Thank you, Mr. Commissioner.

10 THE COMMISSIONER: And thank you, Mr. Eidsvik.

11 MR. MCGOWAN: Mr. Commissioner, that concludes the
12 examination in chief on behalf of the Commission,
13 now that the paper is marked as an exhibit. Next
14 will be Mr. East for the Government of Canada.

15 MR. EAST: Mr. Commissioner, for the record, Mark East
16 for the Government of Canada. I'm here with my
17 co-counsel Charles Fugère. I have been allocated
18 25 minutes. With the kindness of counsel for
19 British Columbia I have an extra five at my
20 option, and so I won't be any longer than 10:35.

21
22 CROSS-EXAMINATION BY MR. EAST:

23
24 Q Dr. Harris, this is a rich topic and I have, as I
25 just said, about 30 minutes. So I'm going to
26 focus on one topic in particular, arising from
27 your paper and from the surrounding body of work
28 that you have prepared that fed into this paper.
29 If I have time -- and that's essentially the pre-
30 Confederation period. If I have time, I'm going
31 to jump over the intervening 100-plus years of
32 history and focus on the more recent history, but
33 we'll see how the time goes.

34 The topic I'm interested in discussing with
35 you today, and as I understand it, is your thesis
36 that colonial officials in the pre-Confederation
37 period in Vancouver Island and British Columbia,
38 and I guess Governor Douglas in particular, and at
39 least certain Crown officials in the post-
40 Confederation period, set aside lands for
41 Aboriginal peoples as reserves, not only to secure
42 access and to encourage Aboriginal people into
43 fishing, but also secured and reserved for them
44 the fisheries themselves, and that is both the
45 land from which they fished, but also, at least in
46 some places, reserved for them exclusive rights to
47 fish. Now, have I characterized that properly?

1 A Yes.

2 Q And I think in your paper, and maybe we'll go to
3 it now, it's the Exhibit 1135, you at least infer
4 in your paper that the Douglas Treaty right to
5 fish as formerly was intended to be -- intended by
6 Governor Douglas to be defined expansively, and I
7 think "expansively" is the term you used. So
8 perhaps I'll take you to the pages in question,
9 that's pages 4 and 5. So the bottom of page 4.
10 And I'm going to go through what I see is
11 essentially three statements from Governor Douglas
12 over different times and correspondence, which you
13 cite as support for this thesis, at least with
14 respect to the pre-Confederation period.

15 So in this paragraph, you refer to Governor
16 Douglas writing to the Hudson's Bay Company that:

17
18 ...he "would strongly recommend, equally as a
19 matter of justice, and from regard to the
20 future peace of the colony, that the Indians
21 Fisheress's [sic], Village Sitis [sic] and
22 Fields, should be reserved for their benefit
23 [sic] and fully secured to them by law."
24

25 And if we go over to the next page, and in another
26 letter, and when he's describing what he has done
27 with respect to his views of the Douglas Treaties,
28 he writes again to the Hudson's Bay Company:

29
30 "I informed the natives that they would not
31 be disturbed in the possession of their
32 Village sites and enclosed fields, which are
33 of small extent, and that they were at
34 liberty to hunt over unoccupied lands, and to
35 *carry on their fisheries with the same*
36 *freedom as when they were the sole occupants*
37 *of the country".*
38

39 And then further down, finally, jumping a few
40 years later to I think it's 1859, down at the
41 bottom of the page, "Five years", the last
42 sentence:

43
44 Five years after concluding the last of the
45 treaties, Douglas informed the Vancouver
46 Island House of Assembly, in similarly
47 expansive terms --

1 - that's where the term came in, "expansive" -
2

3 -- that Aboriginal peoples "were to be
4 protected in their original right of fishing
5 on the coast and in the bays of the Colony."
6

7 So is it fair to say that based on these
8 three quotes from Governor Douglas's writings,
9 that you infer, at least, that the right to fish
10 as formerly was intended by Governor Douglas to be
11 broadly construed?

12 A Yes, I think that's a fair characterization.

13 Q Okay. And I want to bring up now, your book,
14 *Landing Native Fisheries*, or excerpts from it, and
15 that's Canada's Tab 4. Now, Dr. Harris, am I
16 correct in saying your paper is very much built
17 upon and follows upon the theses that you advance
18 in your book, the book that's up on the -- well,
19 sorry, this is my list for tomorrow. There it is.

20 So am I correct in suggesting that your paper
21 that you've presented today is very much built
22 upon the book, *Landing Native Fisheries* that you
23 published I think in 2008?

24 A Yes, that and other publications.

25 Q And other publications. And in fact I think we'd
26 agree that your paper from pages 4 to 8 are very
27 similar to I think pages 21 to 27 of your book,
28 there's definitely a similarity there?

29 A I'm not sure about the exactly page numbers, but,
30 yes, the material in the paper is drawn primarily
31 from my work in the book, and in earlier
32 publications.

33 MR. EAST: Okay. Well, first, maybe I should just mark
34 this as an exhibit. I imagine, Mr. Lunn, there's
35 going to be a number of excerpts from this book
36 put in but just for this purpose can you put it in
37 as exhibit and perhaps add to it later.

38 THE REGISTRAR: That will be marked as Exhibit 1136.
39

40 EXHIBIT 1136: Harris, *Landing Native*
41 *Fisheries*, Indian Reserves and Fishing Rights
42 in British Columbia, 1849-1925, excerpts
43

44 MR. EAST: Perhaps we can go to page 24, second
45 paragraph. Sorry, is that page 24?

46 MR. LUNN: You're referring to the fifth page?

47 MR. EAST: Yes. Yes, I am sorry. It must be page 24

1 in Ringtail, sorry.

2 MR. LUNN: That's Ringtail 24.

3 MR. EAST: Electronic page 7, sorry.

4 MR. LUNN: Thank you.

5 MR. EAST: I am referring to the page numbers in the
6 book.

7 MR. LUNN: Thank you.

8 MR. EAST: Thank you for reminding me.

9 Q So the second paragraph, and we're talking --
10 you're talking here about the Douglas Treaties:

11
12 Even the terms of the written text are not
13 self-evident. It is clear, however, that
14 "fisheries" were an important part of the
15 agreement. A "fishery" or its plural,
16 "fisheries", refers not only to the act of
17 fishing but also to the places where it
18 occurs. In reserving "fisheries," therefore,
19 the Douglas Treaties reserved the right to
20 fish at the places where Native people
21 fished.

22
23 And that's consistent with what you said earlier
24 about your thesis that what Governor Douglas was
25 intending to do was not only reserve the right to
26 fish, but also the places to where the fishery was
27 to be undertaken?

28 A Yes.

29 Q I want to explore this thesis a bit further.
30 Perhaps we can go to Tab 5, Canada's Tab 5, page
31 36, again it would be page 36 of the document.
32 And in this book, and first of all, I should mark
33 this. This is your other book, *Fish, Law and*
34 *Colonialism*?

35 A Yes.

36 MR. EAST: So, Mr. Lunn, perhaps we could mark this as
37 an exhibit, as well.

38 THE REGISTRAR: Exhibit number 1137.

39
40 EXHIBIT 1137: Harris, *Fish, Law and*
41 *Colonialism*, The Legal Capture of Salmon in
42 British Columbia, excerpts
43

44 MR. EAST:

45 Q And right at the very top, talking again about the
46 Douglas Treaties:

47

1 Just as certain areas of land - village sites
2 and enclosed fields - should be reserved
3 exclusively for Natives, so should their
4 fisheries.
5

6 And again going further:
7

8 In a letter to the HBC --
9

10 - Hudson's Bay Company -
11

12 -- reporting on first nine treaties, Douglas
13 paraphrased the language used in the
14 treaties, expanding somewhat on what he had
15 promised with regard to the fishery:...

16
17 And then he talks about the quote that you have in
18 your paper. So again you're making -- and linking
19 your book to this idea that Governor Douglas
20 intended to reserve exclusively for First Nations
21 their fisheries.

22 A Yes, I think that's correct.

23 Q And just following upon that, when you say
24 reserving their fisheries exclusively for them, is
25 that suggesting that Governor Douglas intended
26 that these fisheries would be exclusive to others
27 who may want to fish in the same area?

28 A You mean that it would prevent others from
29 fishing...

30 Q Prevent others from fishing at the same place.

31 A I think what Governor Douglas, and this is the
32 language in the Douglas Treaties, the right to
33 "fisheries as formerly", and the question here
34 that I guess you're getting at is what does
35 "fisheries as formerly" mean, how are we to
36 interpret what --

37 Q Mm-hmm.

38 A -- what this very brief provision in the Douglas
39 Treaties provides. And so here I've turned to
40 Douglas's other writings, and I think what Douglas
41 is doing is, as he says he's doing, securing to
42 Native people their fisheries. Now, fisheries
43 need to be conducted in particular places. A
44 fishery isn't something that can occur in the
45 abstract. It needs to occur in particular
46 locations, and fishing is not equally good
47 everywhere. And so to secure or to protect a

1 fishery means, I think, protecting the places that
2 are of particular importance to the catching of
3 fish. And I think that is what Douglas understood
4 he was doing in the treaties. He was securing to
5 Native people their fisheries.

6 Now, does that mean that he thought no one
7 else could participate in the fisheries? No, I
8 don't think so. Douglas fully expected that an
9 incoming settler society would also have -- would
10 have access to the fisheries, but that access
11 would be in such a way as not to disturb or not to
12 prevent Native access to those prior fisheries.
13 And I think that's what Douglas is trying to do
14 here. He's trying both to secure fisheries for
15 Native people, as well as create space for an
16 incoming settler society. I think that's the
17 balance that he's trying to draw in these
18 treaties.

19 Q Okay. And that's an important clarification, and
20 what I would like to do in the time I have
21 remaining is to take you to some other
22 contemporaneous documents, especially from
23 Governor Douglas, and maybe advance a slightly --
24 perhaps slightly different hypothesis, but maybe
25 not too different from what you just articulated
26 just now.

27 Before I do that, though, I just wanted to
28 note again, and I think there was a -- I just want
29 to reference, just for context, I suppose, the
30 Supreme Court of Canada decision in *Nakal*, which
31 is B.C.'s document number 2 -- B.C.'s number 2.

32 MR. LUNN: Thank you.

33 MR. EAST: And it's at Roman numeral number XXVIII.

34 And, Mr. Commissioner, I don't propose to mark
35 the case law obviously as an exhibit, but perhaps
36 it can be marked for identification because others
37 may be referring to this document somewhat later
38 today. So it's paragraph 28. And I just want to
39 read this out, because I think it articulates what
40 the Supreme Court of Canada has said about the
41 thesis that you've advanced in your paper, and
42 it's this:

43
44 The historical evidence as to the standard
45 practice of the Crown can be conveniently
46 divided into pre- and post-Confederation
47 periods. This evidence, taken from documents

1 in the public archives, demonstrates that in
2 both periods there was a clear and specific
3 Crown policy of refusing to grant, in
4 perpetuity, exclusive rights to fishing
5 grounds. The Crown would, however, grant
6 exclusive licences or leases over particular
7 areas for a fixed period of time. Obviously
8 this practice was far from an absolute
9 assignment of a fishery right.

10
11 And you would agree this was a unanimous, on this
12 point at least, the Supreme Court of Canada was
13 unanimous?

14 A Yes, I would agree that the Supreme Court was
15 unanimous. I would not agree with this opinion,
16 however.

17 Q You don't agree with this opinion or this view of
18 the -- this decision of the Supreme Court of
19 Canada?

20 A I don't agree with this interpretation of Crown
21 policy.

22 Q Okay. Now, and maybe we'll go further on that,
23 but I guess the point here, and I guess perhaps
24 this is where this differs from your viewpoint, is
25 that there's a -- there's an argument here of
26 continuity in the Supreme Court of Canada between
27 the pre- and post-confederation periods, that
28 there was a continuous Crown policy throughout
29 this period. And is that what you disagree with?

30 A Yes. I think what the Supreme Court is reflecting
31 is the continuity from the mid to late 19th
32 Century, of the perspective of the Department of
33 Fisheries, and only that. If there were other
34 perspectives within the Crown, certainly Governor
35 Douglas's perspective, I would argue is a
36 different one. The Department of Indian
37 Affairs --

38 Q Mm-hmm.

39 A -- had a different perspective. There wasn't a
40 unified Crown policy. There were many competing,
41 or a number of competing Crown policies towards
42 the Aboriginal fishery, of which the Department of
43 Fisheries was one. And this interpretation
44 reflects the Department of Fisheries position, but
45 I don't think one can say as Justice Cory says
46 later in the callout that it was always the
47 Crown's policy and intent.

1 Q Okay. And maybe a bit further on this, perhaps we
2 can go back to your book. This is the one at Tab
3 4, *Landing Native Fisheries*.

4 MR. MCGOWAN: Mr. Commissioner, I'm just going to rise
5 for a second to suggest, I don't think it's
6 appropriate to mark cases as exhibits, but perhaps
7 for the sake of the record it might be appropriate
8 to mark the last case for identification.

9 MR. EAST: Sorry, that's what I intended. Thanks.

10 THE REGISTRAR: That will be marked for identification
11 as GG, double "G".
12

13 GG FOR IDENTIFICATION: **R. v. Nikal**
14

15 MR. EAST:

16 Q So if we go to Canada's Tab 4, *Landing Native*
17 *Fisheries* book at page 194 in the text, I think
18 that's the third from the last page in the
19 Ringtail. And here as you can see, you begin to
20 discuss the Supreme Court of Canada decision in
21 **Nikal** and **Lewis** in particular, and you say:
22

23 The Supreme Court's conclusions about the
24 authority of the reserve commissioners and
25 the intent of the Crown are more difficult to
26 sustain.
27

28 And just for the record, these cases were about
29 questions around reserve allocations in the post-
30 Confederation period; is that right?

31 A Yes.

32 Q And in this paragraph you essentially articulated
33 what your answer was just now about how it was the
34 view of the Department of Fisheries that -- that
35 informed the decision of the Supreme Court of
36 Canada in **Nikal** and **Lewis**.
37

37 A That's correct.

38 Q And over on the next page, perhaps we can go now,
39 just -- you make the linkage in the first full
40 paragraph to the Douglas Treaties, and you say,
41 perhaps in the first line you say:
42

43 Although Fisheries articulated its vision of
44 limited Native fishing privileges most
45 forcefully, it was never the only view, even
46 in the late nineteenth century.
47

1 And you discuss the perspective of Native peoples
2 in the next line. And then in the third line, and
3 this is what interests me:

4
5 The fisheries clause in the Douglas Treaties
6 - the right to "fisheries as formerly" -
7 provides some evidence that colonial
8 officials in British Columbia also understood
9 that Native fishing rights emanated from past
10 practice, not the Crown, and that those
11 rights were broadly construed.
12

13 So again that's consistent with the evidence
14 you've given thus far about what Governor Douglas
15 viewed the extent of the right to fish as
16 formerly.

17 A Yes, and I think this is the really important
18 point, that the Department of Fisheries understood
19 the fishing rights of Native people as being
20 granted by the Crown, and only granted by the
21 Crown, and then hence its position that the public
22 right to fish prevented the Crown from allocating
23 exclusive fisheries.

24 I think what I'm saying here is that within
25 that frame the position may be correct, that is,
26 that the public right to fish limited exclusive
27 allocations of fisheries, but that the frame is
28 wrong, that what was happening here was not the
29 granting of fishing rights to Native people, but
30 rather the recognition of existing rights, or at
31 least the recognition of the existing patterns of
32 use in management of the fishery.

33 Q Right.

34 A And if one understands the frame as the
35 recognition of rights, then the public right to
36 fish doesn't act as a limit on the Crown's
37 prerogative.

38 Q Okay. I want then to take you to some other
39 correspondence in the time I have remaining, by
40 Governor Douglas, and then perhaps I'm going to
41 advance a different hypothesis, by doing that, or
42 least a variation of this hypothesis. If we go to
43 Canada's Tab 53, please. This is a letter from
44 Douglas to the Colonial Secretary, the Duke of
45 Newcastle. It's not referred to in your paper,
46 but I believe you refer to it in your book. And
47 is that, perhaps we can go to...

16
Douglas Harris
Cross-exam by Mr. East (CAN)

1 So this is a letter from -- dated 1860, and I
2 believe it's also referred to in the **Nikal** case.
3 do you recognize this letter?

4 A I can't say that I do immediately, but...

5 MR. EAST: Well, I'll take you to perhaps in your book
6 where it is. But first of all, I want to take you
7 to this document. I'll mark it as an exhibit,
8 perhaps. This is a letter from -- letter from
9 Governor Douglas to the Duke of Newcastle.

10 THE REGISTRAR: That will be Exhibit number 1138.

11
12 EXHIBIT 1138: Excerpt of 62-page dispatch
13 from Governor Douglas to Duke of Newcastle
14 dated October 9, 1860

15

16 MR. EAST:

17 Q Now, if you can go to page 4 and 5 in Ringtail on
18 this document, please. Start with page 4. And I
19 think when I read it, you will probably recognize
20 it. I think this is an oft-cited clause. Right
21 where it says "I also explained". So this is, as
22 I understand it, is a meeting that Governor
23 Douglas -- a recounting of a meeting he had with
24 Aboriginal people in the B.C. Interior, at a
25 meeting in the town of -- what is now the town of
26 Lillooet, and he says this:

27

28 I also explained to them that the Magistrates
29 had instructions to stake out and reserve for
30 their use and benefit, all their occupied
31 village sites and cultivated fields, and as
32 much lands in the vicinity of each as they
33 could till, or was required for their
34 support, and that they might fully exercise
35 and enjoy the rights of fishing the Lakes and
36 Rivers, and of hunting over all unoccupied
37 Crown lands in the Colony...

38

39 Do you recognize this quote now?

40 A Yes.

41 Q And actually, is that -- back in your book at Tab
42 4, Canada's Tab 4 at pages 25, because you had
43 something very interesting, you stated something
44 very interesting about this passage.

45 MR. LUNN: Did you say page 25?

46 MR. EAST: Page 25 in the text.

47 MR. LUNN: Thank you.

June 27, 2011

1 MR. EAST:

2 Q This is *Landing Native Fishery*, Canada's Tab 4.
3 So at the bottom of page 25, you're referring to
4 the quote and in the very last line and over the
5 next page:

6
7 Although clearly echoing the language in the
8 treaties --

9
10 - and these are the Douglas Treaties -

11
12 -- the characterization of the rights to hunt
13 and fish was somewhat narrower. The right to
14 hunt extended only to "unoccupied *Crown*
15 lands" and, without any reference to prior
16 rights or to "fisheries as formerly", the
17 promise that "they might freely exercise and
18 enjoy the rights of fishing" was little more
19 than what Douglas would have told a non-
20 Native audience.

21
22 And then you say:

23
24 The end of the treaties marked the end of
25 Douglas's formal recognition of Native title,
26 and perhaps, by 1860, he was being more
27 circumspect in his recognition of rights to
28 hunt and fish as well.

29
30 I'm going to stop here, and I'm going to suggest
31 that just up to your last sentence, I would
32 suggest that your interpretation of what Governor
33 Douglas was saying here was correct. Governor
34 Douglas intended that people, all Crown subjects
35 would enjoy the same rights to hunt and fish in
36 the territory, and that's perhaps a slightly
37 different hypothesis than the one that you're
38 suggesting in your paper and in your books. Do
39 you agree with that?

40 A No. I think incoming settlers had rights to the
41 fisheries based on the public right to fish. They
42 did not have rights as recognized in the Douglas
43 Treaties to fisheries as formerly. Now, exactly
44 what Douglas was meaning by "fisheries as
45 formerly" is what I'm trying to work out. But I
46 think it's wrong to say that those with treaty
47 rights had the same rights as everybody else. I

1 think that's incorrect.

2 And I also think that while it's important to
3 get at what Douglas was trying to do with the
4 treaties, we need to remember that treaties are a
5 two-sided agreement, and that what Douglas was
6 trying to understand and do with the treaties,
7 there's only one side. There's this whole other
8 equation, how Native people understood what they
9 were doing incoming to these agreements. And it's
10 clear that fisheries were crucially important.
11 It's also clear that fisheries were the central
12 source of wealth, of economic activity, pivotal
13 markers in a cultural and broader social makeup.

14 And so, well, yes, I think Douglas clearly
15 thought he was protecting Aboriginal fisheries and
16 securing them broadly and securing them in a
17 different way than non-Natives would have access
18 to the fishery. There's a very real question of
19 what Native people thought they were doing, as
20 well, in coming to these agreements.

21 Q And I don't disagree at all with your last
22 statement there. I think you would agree that as
23 a matter of law when interpreting treaties, you
24 have to look at the intention of both sides, as
25 you just said. And so it's crucial for us to have
26 a good understanding of what Governor Douglas
27 intended when entering into these agreements.
28 Would you agree?

29 A Yes.

30 Q In interpreting these in treaties. So I want to
31 go now to a couple of other documents. One is Tab
32 8 of Canada's documents, and this is a letter that
33 you have referred to in your paper. And this is
34 the one where you refer to the fact, or Douglas --
35 Douglas refers to the fact that Native tribes had:

36
37 ...to be protected in their original right of
38 fishing on the Coasts and in the Bays of the
39 Colony...

40
41 I'd like to go a little further, though. And he
42 continues to say, and I'm just starting to read
43 this. Could you blow it up a little bit, please,
44 Mr. Lunn, at the very bottom.

45
46 ...and of hunting over all unoccupied Crown
47 Lands; and they were also to be secured in

1 the enjoyment of their village sites and
2 cultivated fields.

3
4 Next page.

5
6 These rights they have since enjoyed in
7 full --

8
9 - this is 1859 now -

10
11 -- and the Reserves of land covering their
12 Village sites and cultivated fields have all
13 been distinctly marked on the maps and
14 surveys of the Colony, and the faith of
15 Government is pledged, that their occupation
16 shall not be disturbed.

17
18 For that reason the Government will not cause
19 them to be removed, because it is bound by
20 the faith of a solemn engagement to protect
21 them in the enjoyment of those Agrarian
22 rights.

23
24 Now, I find it interesting here that in this
25 document there's no discussion of anything other
26 than their lands. There's no reference to
27 fisheries, and protecting them in their occupation
28 of fisheries. in this document. Would you agree?

29 A No. I think the very first sentence says they
30 would be protected in their original right of
31 fishing, on the previous page.

32 Q But there's no reference here to their
33 reservations of fishing sites or fishing grounds
34 or fishing stations in this document,
35 specifically.

36 A They were "to be protected in their original right
37 of fishing on the Coast and in the Bays of the
38 colony", I mean, there's even a specific
39 geographical location being indicated. So, no, I
40 think there's quite clearly reference to fishing.
41 The "original right of fishing", now, that phrase,
42 what's Douglas meaning there?

43 Q Yes.

44 A The original right of fishing, well, originally
45 Native people were the only fishers. They had
46 exclusive fisheries. Does he mean that they were
47 to have exclusive fishing rights? Well, perhaps

1 in particular locations.

2 Q All right.

3 A In the bays of the colony.

4 Q All right.

5 A So I think there is a clear intent here on
6 Douglas's part to secure the Native people their
7 fisheries, which means to secure a fishery without
8 securing the locations is meaningless.

9 MR. EAST: All right. Now, I'm going to juxtapose
10 that, then. I see your point there. I'm going to
11 juxtapose that, in my time remaining, I'm just
12 going to bring up a couple more documents. One
13 that you refer to in your paper, and that's the
14 prospectus for settlers, and that -- I'll go, and
15 rather than go to the original document, in the
16 interests of time I'll go back to the paper at Tab
17 4. Yes, thank you. I should mark this last
18 document as an exhibit.

19 THE REGISTRAR: Exhibit 1139.

20
21 EXHIBIT 1139: Proceedings of the First House
22 of Assembly, February 8, 1859
23

24 MR. EAST:

25 Q So your paper at page 7, and you refer to the
26 prospectus that was provided by Hudson's Bay
27 Company, and I'll just read it out. The line that
28 interests me is this:

29
30 *... "every freeholder shall enjoy the right of*
31 *fishing all sorts of fish in the seas, bays,*
32 *and inlets of, or surround, the said island."*
33

34 And if I understand your interpretation correctly,
35 that is a reference to the public right to fish in
36 tidal waters.

37 A Yes, I think the holders of land were being
38 granted the same rights that the public enjoy at
39 large, which is -- which is the public right to
40 fish.

41 Q And isn't it striking that it's very similar to
42 language used later in 1859 when Governor Douglas
43 said, and again it's quoted in your paper,
44 Aboriginal peoples were:

45
46 *...to be protected in their original right of*
47 *fishing on the Coasts and in the Bays of the*

1 Colony.

2
3 And I guess my question is how is it that both the
4 freeholders, the settlers, and the Aboriginal
5 peoples are being granted essentially the same
6 right over the bays and inlets and the coast of
7 the colonies.

8 A Well, I think they're not, because I don't think
9 both rights are being granted. So the public
10 right to fish is a limit on the Crown's
11 prerogative to allocate exclusive fisheries. it's
12 a common law doctrine which say that the Crown
13 does not have within its prerogative the right to
14 grant exclusive fisheries.

15 Now, Aboriginal people had pre-existing
16 rights to fisheries, rights that preceded the
17 British assertion of sovereignty, that preceded
18 the introduction of the common law to this
19 territory. And so to characterize those rights as
20 being rights that were being granted by the Crown
21 I think is erroneous. I think what's happening is
22 that Douglas is recognizing prior rights to the
23 fisheries. And in that context, the public right
24 to fish doesn't act as a limit on what the Crown
25 can do. The Crown isn't granting these fisheries
26 to Aboriginal people, it's recognizing the prior
27 fact of these fisheries, fisheries that preceded
28 the assertion of sovereignty, fisheries that
29 preceded the application of the public right to
30 fish. Just as in England, fisheries that preceded
31 the **Magna Carta** were not subject to the public
32 right to fish.

33 So just as in Eastern Canada, fisheries that
34 had been granted -- exclusive fisheries that had
35 been granted by the French Crown, prior to the
36 British assertion of sovereignty, were not subject
37 to the public right to fish. So Aboriginal
38 fisheries, exclusive Aboriginal fisheries, that
39 preceded the British assertion of sovereignty are
40 not subject to the public right to fish. So the
41 public right to fish acts as a limit on what the
42 Crown can do. It says you can't grant exclusive
43 fisheries. I think that's not what's happening in
44 the Aboriginal fishery. What's happening is a
45 recognition of prior fisheries.

46 Q I'm nearing the end of my time and I had all sorts
47 of documents that I wanted to bring to your

1 attention that would advance perhaps this thesis
2 which I'm going to put to you, and then I'll leave
3 it. And that is what was happening in the 1850s,
4 this being a colony of Victorian England, was that
5 Governor Douglas was primarily focusing on opening
6 up the colony for settlement and to build trading
7 relationships with the Aboriginal people and
8 others. To the extent that he was negotiating
9 treaties with Aboriginal people at that time, he
10 was encouraging them in their pursuits of fishing,
11 but that the intention of Governor Douglas at this
12 time and of colonial officials and post-
13 Confederation officials subsequently, was not to
14 grant landed property rights to any Crown subject
15 in the fishery, whether that's inland or tidal.
16 Would you agree that that's a reasonable, or at
17 least an arguable hypothesis?

18 A That Douglas was not intending to grant...?

19 Q Exclusive fisheries to any Crown subject, in 1849,
20 until his -- end of his tenure as the governor of
21 -- governor of the colony?

22 A I can recall no instance where he did grant an
23 exclusive fishery to -- to an immigrant.

24 Q Well, I'm saying a Crown subject, and in the eyes
25 of Governor Douglas would include Aboriginal
26 people.

27 A Well, so here one needs to bear in mind Douglas's
28 first statement before the treaties were signed,
29 which is the Native village sites and fisheries
30 should be fully secured to them in law. Now, this
31 isn't a statement about a general public right to
32 fish, but rather a specific statement about
33 Aboriginal fisheries being fully secured to them
34 in law. I think that Douglas was intending to
35 treat Aboriginal fisheries differently. I think
36 this is the reason that -- one of the reasons,
37 anyway, why the right to fisheries as formerly,
38 suggesting prior practice, is in the -- in the
39 Douglas Treaties.

40 I think also that Douglas was operating in a
41 context of abundance, and so that it was less
42 important to clearly define the boundaries between
43 Aboriginal fisheries and non-Aboriginal fisheries.
44 But I don't think that means Douglas wasn't
45 intending to secure Aboriginal fisheries. I think
46 he says quite clearly that he was, and I think the
47 Douglas Treaties indicate quite clearly that he

Douglas Harris

Cross-exam by Mr. East (CAN)

Cross-exam by Mr. Tyzuk (BCPROV)

1 did.

2 Q I'm just going to leave it with this, but I'm out
3 of time. Would you agree that this is a live and
4 controversial area of both law and in history, and
5 that to properly engage in a discussion of this
6 subject matter, we would need a full panoply of
7 evidence, the analysis of expert witnesses like
8 yourself, and a full opportunity to make
9 submissions in a court of law, or to a commission
10 of inquiry to fully get a full analysis of these
11 issues. Would you agree with that?

12 A I would agree that the right to fisheries as
13 formerly has not been definitively interpreted in
14 a Canadian court.

15 MR. EAST: Thank you. Those are my questions, Mr.
16 Commissioner.

17 MR. TYZUK: Commissioner, Boris Tyzuk for the Province
18 of British Columbia.

19
20 CROSS-EXAMINATION BY MR. TYZUK:

21
22 Q Good morning, Dr. Harris.

23 A Good morning.

24 Q I just want to follow on that point. You said
25 when asked whether this is a controversial area
26 and whether there would be a need for, in effect,
27 a full trial, a full hearing of this, I didn't --
28 you said it hadn't been defined. So do you agree
29 it's a controversial area? Are there differing
30 points of view from yours?

31 A I think this is an unresolved area, and, yes, I
32 think there are differing perspectives.

33 Q Okay, thank you. And I'd just like to sort of get
34 into that, because in your paper you've got a
35 specific area, and, Mr. Lunn, if we could turn to
36 pages -- I think it starts on page 25 of the paper
37 by Dr. Harris and goes on. You talk, the heading
38 there is "Indian Reserves and Fisheries", and you
39 go on for about four or five pages on this. And
40 the thing that I note is that in those four or
41 five pages there are no references to either **Nikal**
42 or **Lewis**. The only reference in **Lewis** to your
43 paper is footnote 91 in the "Conclusion". Why is
44 that?

45 A Because this was not intended as an analysis of
46 contemporary Canadian case law, but rather a
47 historical analysis of the Aboriginal regulation

1 of -- or at least of the regulation of the
2 Aboriginal fisheries.

3 Q But both those cases, in this description, and
4 albeit it is very brief and you were limited in
5 what you could do in here, you do make references
6 to your book. But you make references to what
7 some comments of what the Indian Reserve
8 Commissioners Sproat and O'Reilly did. And their
9 approach, their mandate were matters that were
10 specifically dealt with by the Supreme Court of
11 Canada in **Nikal** and **Lewis**, were they not?

12 A Yes.

13 MR. TYZUK: They were. Mr. Lunn, just to get
14 housekeeping matters out of the way, I think B.C.
15 document number 1 is the **Lewis** case. Could we get
16 that marked for identification, please.

17 THE REGISTRAR: That will be marked for identification
18 HH, double "H".

19
20 HH FOR IDENTIFICATION: **R. v. Lewis**

21
22 MR. TYZUK:

23 Q I'm going to go through some of the cases. Mr.
24 Commissioner, there are references to documents
25 here, but given the limited amount of time we
26 have, I would note that a fair number of the ones
27 referred to by the Supreme Court of Canada are in
28 Canada's document list, but we just don't have
29 time to go through it.

30 So what I heard you say is that -- now, if we
31 go to **Nikal**, which is Exhibit GG, in answer to my
32 friend's question, you believe that the -- at
33 paragraph 28, that that, contrary to what the
34 Supreme Court of Canada says, your view is that
35 was -- that was the policy of the Department of
36 Marine and Fisheries and not necessarily the
37 government.

38 A Yes. I think what the Supreme Court has done in
39 these two cases is take the position, the
40 particular perspective of the Department of
41 Fisheries as the statement of Crown policy, and
42 has not recognized the competing interpretations,
43 the contemporary competing interpretations,
44 meaning the different ways in which the different
45 branches of the Crown understood Fisheries policy
46 in the late 19th Century. And here I think it's
47 important to -- like now we're accustomed to

1 thinking of a unified Crown, at least unified
2 federally and unified provincially. There are
3 many examples in the historical record of the
4 Department of Fisheries and Department of Indian
5 Affairs being at loggerheads and quite publicly at
6 loggerheads, appearing in trials on opposite sides
7 of issues. It's not something that happens now.
8 It's something that was common in the late 19th
9 Century. The Crown was not a unified entity, it
10 was --

11 Q Yes, but the court found that they were.

12 A And I guess I think that this is an erroneous or a
13 misrepresentation of Crown policy. It's an
14 accurate reflection of what the Department of
15 Fisheries understood the policy to be, but it's --
16 it was one perspective that was current in the
17 late 19th Century.

18 Q It was one perspective that was current. And
19 let's just go to some parts of that, because if we
20 go to paragraph at -- Mr. Lunn, to paragraph 37.
21 I'm having to remember my Roman numerals, and on.
22 We start to talk about "The Mandate of the Reserve
23 Commissioners" in *Nikal*. And in your paper you
24 refer to specifically on page 29 -- and I'm sorry,
25 Mr. Lunn, I'm going back and forth, and about
26 halfway down that large paragraph, we say here:

27
28 At the enormously productive Aboriginal
29 salmon fisheries above and below the
30 confluence of the Bridge and Fraser
31 rivers,...

32
33 And then it goes on:

34
35 ...just north of Lillooet, O'Reilly allotted
36 not only reserve land, but also the exclusive
37 right of fishing along a seventy kilometre
38 stretch of the Fraser [River].
39

40 Now, the mandate of the Reserve Commissioners is a
41 matter -- and you quote there, I think, something
42 from one of O'Reilly's notes, but there is no
43 discussion of what the Supreme Court of Canada set
44 out in terms of what the mandate of the Reserve
45 Commissioners were, including Sproat and O'Reilly.

46 A That's correct.

47 Q That's correct. Because what they say, starting

1 at paragraph 37, and then going on under the
2 heading "The Mandate of the Reserve Commissioners"
3 is:

4
5 Accordingly, when Reserve Commissioners were
6 appointed a few months later with the mandate
7 to allocate reserves in British Columbia,
8 they were certainly not either specifically
9 authorized or by inference empowered to grant
10 exclusive rights in the fishery.
11

12 A So I think this is a limited view of the
13 instructions that the Reserve Commissioners
14 received. If I may just point you to page 41 of
15 my report, which is the map of what Peter O'Reilly
16 was doing when in 1881 he was travelling through
17 the middle Fraser.

18 Q That's the case, yes, and that is your view. But
19 if you go on to paragraphs 38, and we have some
20 quotes here from -- that the Supreme Court of
21 Canada refers to. The first in paragraph 38 is:

22
23 In a letter from D.C. Scott, Deputy
24 Superintendent General of Indian Affairs to
25 D.H. MacDowell, Commissioner, Royal
26 Commission on Indian Affairs for the Province
27 of British Columbia, dated May 2, 1916, it
28 was stated:

29
30 And those two paragraphs:

31
32 ... I do not think that former
33 Commissioners could grant special
34 fishing privileges as distinct from
35 fishing stations and reserves. The
36 Department has no record of confirmation
37 of such by the Department of Marine and
38 Fisheries.
39

40 And later on he says:

41
42 ... I cannot find that Mr. O'Reilly had
43 power to grant any fishing privileges
44 whatever.
45

46 And then they go on to the next quote from Robert
47 Sedgewick, who is the Deputy Minister of Justice.

1 And he goes on to say:
2

3 The Indian Reserve Commissioner appears to
4 have power to mark out reserves, but it does
5 not appear that the Governor in Council, or
6 any other authority ever gave or purported to
7 give him authority to deal with the right of
8 fishery.
9

10 And then they miss out some and they say:
11

12 I have therefore to state that the Indian
13 Reserve Commissioner has not the power to set
14 apart for the exclusive use of the Indians
15 any of the waters of British Columbia.
16

17 And then there's a quote that comes from J.D.
18 McLean, for the Department of Indian Affairs,
19 which I think may get closer to what your thesis
20 might be, where they say:
21

22 As to fishing rights in British Columbia it
23 should be stated that under the arrangement
24 come to with the Government of that Province
25 in 1876, by which reserves were to be set
26 aside for the Indians, no special mention was
27 made of fishing privileges; but the Reserve
28 Commissioner has from time to time allotted
29 Indians certain fisheries, and the Department
30 of Marine & Fisheries has been advised of
31 these, and asked to confirm them; but, so far
32 as the correspondence shows, that Department
33 has not confirmed them, and has objected to
34 exclusive fishing privileges being granted to
35 Indians...
36

37 A So I would agree that the Department of Fisheries
38 certainly thought that it had the jurisdiction to
39 grant exclusive fisheries, and that it was not
40 prepared to grant exclusive fisheries to Native
41 people. I would also agree that the Department of
42 Indian Affairs eventually came around to this
43 position and acquiesced in the Department of
44 Fisheries position. But would it be possible to
45 bring up the map that I have in my report on page
46 41, just to provide a little bit of context about
47 -- about what was going on here.

1 So this is Peter O'Reilly in 1881, and this
2 is his first work in the field as an Indian
3 Reserve Commissioner. He's appointed, and he
4 heads to the Middle Fraser just north of Lillooet
5 with a mandate to allot reserves. And this is
6 what he does. He allots these reserves, shown as
7 the shaded on the banks, either side of the Fraser
8 River, and then he also allots exclusive fishing
9 rights. And so up at the top of the map to the
10 High Bar on both sides of the river, the exclusive
11 fishing right; to the Clinton, a right of
12 exclusive fishing that extends beyond their
13 reserve boundaries; same to the Pavilion, that
14 long stretch of river, exclusive fishing rights on
15 both sides of the Fraser.

16 Now, Peter O'Reilly was not known for his
17 sympathy towards Native people. He was a very
18 effective efficient colonial servant, who did
19 exactly what and no more than what he thought he
20 had been instructed. This is clear in the
21 historical records and over the 20 years that
22 Peter O'Reilly is acting as Indian Reserve
23 Commissioner.

24 Now, when word of these exclusive fishing
25 grants comes back to the Department of Fisheries,
26 the Department of Fisheries demands an
27 explanation. It asks where has the authority come
28 from to allocate these exclusive fisheries? And
29 the Prime Minister, John A. Macdonald, who was
30 also the Superintendent of Indian Affairs, in a
31 letter from December 20th, 1881, says "I
32 instructed him that it was proper and expedient",
33 I think are his words, "it was proper and
34 expedient for him to set aside their fishing
35 grounds." And that's what O'Reilly understood his
36 instructions to be, and that's what he's doing
37 here. And that's also what he does when he goes
38 later in 1881 up to the Nass and sets aside
39 reserves and exclusive fisheries for the Nisga'a.

40 And so I think what O'Reilly's work reflects,
41 and it's what the earlier Reserve Commissioner,
42 Gilbert Malcom Sproat was trying to do, is to
43 recognize that the questions of land and fish were
44 inseparable. That land grants here were
45 meaningless unless there was secure access to the
46 fishery. And he understood his instructions as
47 including the setting aside of exclusive Native

1 fisheries, and that's what he's doing.

2 Now, the Department of Fisheries reacts, yes.
3 Yes, the Department of Indian Affairs much later,
4 1890, and by 1900 certainly eventually acquiesces
5 in this position. But it's not the only position
6 that's out there. And of course all of this is in
7 the frame of understanding what the Reserve
8 Commissioner is doing is as granting fishing
9 rights. The Department of Fisheries is objecting
10 because it says the Reserve Commissioner has no
11 authority to grant fishing rights.

12 Well, I think that's a misconstrual of what's
13 happening here. The Reserve Commissioner is
14 allotting reserves, yes. He's allotting exclusive
15 fishing rights, yes. But those are, what's
16 happening here is a recognition of the prior fact
17 of Aboriginal occupation of this territory and use
18 and management of the fishery.

19 But this is not the granting. This is the
20 important difference between what's happening with
21 the Crown and an immigrant society and what's
22 happening with the Crown and Aboriginal peoples.
23 These aren't grants. These are recognitions of
24 centuries, probably millennia of use, of pre-
25 existing rights. And as a result, Fisheries
26 objection to these grants is premised on the fact
27 that they conflicted with or were not consistent
28 with the public right to fish, but --

29 Q Which of course is your view, and I'm sorry, I
30 don't mean to cut you off.

31 A And but that's -- the Crown isn't granting, or at
32 least one conception, one understanding of what's
33 happening here is that the Crown is granting
34 rights. I don't think that's the best conception.
35 I think the best conception is of the recognition
36 of rights.

37 But even if one understands this as a grant
38 of a right, Fisheries opposition was premised on
39 the public right to fish. The public right to
40 fish only applies in tidal waters. These waters
41 are clearly not tidal. And so the legal
42 foundation for the Department of Fisheries
43 objection is -- is based on a misunderstanding, a
44 misapplication of the public right to fish.

45 Q But that, now, and you mention that in your paper,
46 but as I understand Canadian jurisprudence, up to
47 1921, prior to the Privy Council decision, up to

1 the Supreme Court of Canada, they accepted the
2 fact that the public right of fishing included
3 navigable non-tidal waters. Is that not the case?

4 A That's not the case. No, that's not the case,
5 so --

6 Q And okay, but -- and yet you have others, and Mr.
7 Wright, in his paper, and I believe it's Area E's
8 document number 6, Mr. Lunn. And if you go to
9 page 345. And it starts with the paragraph
10 "Modelled after", and he says this:

11
12 While the Judicial Committee of the Privy
13 Council would later (in 1921) confine its
14 ambit to the fisheries of tidal waters, or to
15 the fisheries "so accessible from the sea as
16 to make them natural adjuncts to these
17 fisheries," pre-Confederation officials
18 neither intended nor considered it to be so
19 restricted. Like the common law public
20 right, they believed it to apply to all
21 fisheries in the navigable waters of the
22 province.

23
24 So you disagree with that point of view?

25 A No.

26 Q Thank you.

27 A But this is of the province in reference to
28 Ontario. So there is a line of cases in the mid-
29 19th Century which suggests when Ontario was
30 Canada West, so not yet part of the Canadian
31 Confederation, there is a line of cases which
32 suggests that the public right to fish applies in
33 navigable waters, understood as navigable waters.
34 So in England the public right to fish applied to
35 navigable waters, understood in law to mean tidal
36 waters.

37 Now, the question in North America was does
38 the public right to fish apply in navigable
39 waters, understood in law to mean navigable
40 waters. In other words, does it apply to the
41 Great Lakes? And there are a line of cases from
42 Canada West, which suggests that the public right
43 to fish did apply in navigable non-tidal waters,
44 like the Great Lakes.

45 That is not the law in British Columbia, and
46 this is revealed in the 1880 case of **The Queen v.**
47 **Robertson**. It's a New Brunswick case. The judge

1 in that case knows -- clearly knows of these
2 Ontario or Canada West decisions, has referred to
3 them in an earlier case of his. In that case
4 involving New Brunswick, he turns not to the body
5 of law that's been developed in Canada West, but
6 rather to England, and says that the body of law
7 that applies in New Brunswick in 1880 is the body
8 of law from England. So the public right to fish
9 understood is applying to navigable waters meaning
10 tidal waters. And that is the body of law that
11 then is carried through in the late 1890s and the
12 early 20th Century that applies to British
13 Columbia.

14 Q That's your view.

15 A And I have set it out at length in Chapter 4, I
16 think, in *Landing Native Fisheries*.

17 MR. TYZUK: Okay. Could we get that Wright paper
18 marked as an exhibit, please.

19 THE REGISTRAR: That will be marked as Exhibit number
20 1140.

21
22 EXHIBIT 1140: Wright, The Public Right of
23 Fishing, Government Fishing Policy, and
24 Indian Fishing Rights in Upper Canada
25

26 MR. TYZUK: And I just have --

27 MR. LOWES: Mr. Commissioner, I rise to perhaps --
28 perhaps my friend for the Commission ought to be
29 rising. I understood this witness to be tendered
30 not to give a legal opinion, and a statement such
31 as "that is not the law in British Columbia" is
32 far outside the scope of the expertise that this
33 witness was accepted as being, as holding.

34 MR. MCGOWAN: Yes, Mr. Commissioner, the witness was
35 qualified as an expert in the legal history of
36 Aboriginal fisheries in British Columbia, and I
37 think we ought to make every attempt to keep the
38 evidence focused on the historical context and the
39 factual underpinning that is set out largely in
40 the paper and the context surrounding it.

41 MR. TYZUK:

42 Q I see my time. I just have two points. One is
43 just on the general question of the instructions
44 given to the Reserve Commissioners. If we could
45 go to the **Lewis** case. And it again here, and this
46 is another unanimous decision of the court. At
47 paragraph 34 they again make the statement and

1 rely on **Nikal** that:
2

3 The historical evidence shows the authority
4 and mandate of Indian Reserve Commissioners,
5 as representatives of the Crown, were limited
6 to the allocation of land to the Indians, but
7 they could only recommend an allocation of an
8 exclusive fishery that would then have to be
9 approved by the Department of Marine and
10 Fisheries:...

11
12 And they refer to **Nikal** in those paragraphs,
13 paragraph 38 to 54.

14 Then if we just turn to paragraph 41 of that
15 case, they said:

16
17 All three Indian Reserve Commissioners
18 received the following general instructions
19 in relation to the point of reserve
20 location:...

21
22 And they talk -- and again here, granted it's
23 about reserve locations, but what they focus here
24 on, is you'll see, is they reference the fishing
25 stations throughout.

26 And I guess I just want to finish on this.
27 Dr. Harris, it's clear, this is a controversial
28 area, both in the law and in the history, is it
29 not?

30 A This is a very controversial area, and did you
31 have a -- could I respond to your observation
32 about paragraph 38?

33 Q Sure, please do.

34 A So paragraph 38 suggests that the Commissioner,
35 the Reserve Commissioner could only recommend the
36 fisheries to be reserved. Well, in fact, the
37 Commissioner -- the Commissioner's mandate was
38 only to recommend the land that could be set
39 aside, as well as recommend the fisheries that
40 were to be set aside. It was for the provincial
41 and the federal governments later to confirm those
42 recommendations. So in fact, this statement about
43 the Reserve Commissioners' jurisdiction in the
44 fisheries is really no different from their
45 jurisdiction over -- over land. Their role was to
46 recommend. And in this, the Department of Indian
47 Affairs conceded that point. The Reserve

Douglas Harris

Cross-exam by Mr. Tyzuk (BCPROV)

Cross-exam by Mr. Eidsvik (SGAHC)

1 Commissioners had no jurisdiction to do anything
2 other than recommend, but the Department of Indian
3 Affairs fully expected that the Department of
4 Fisheries would act on these recommendations, just
5 as it expected the Lands Departments of the
6 Province and the Federal Government to act on the
7 recommendations of the -- of the reserve
8 allotments regarding land.

9 Q Okay. So when we go to paragraph 29 of your
10 paper, and that line that I referred to you in the
11 middle of the paragraph where it says:

12
13 ...O'Reilly allotted not only reserve land
14 but also the exclusive right of fishing along
15 a seventy kilometre stretch...

16
17 In effect really what he did was make
18 recommendations as to both. He did not allot
19 anything, given what you've just said.

20 A Yes.

21 MR. TYZUK: Thank you. Those are my questions. Thank
22 you very much for answering my questions.

23 MR. MCGOWAN: Mr. Commissioner, Mr. Eidsvik will be
24 next.

25 MR. EIDSVIK: Good morning, Mr. Commissioner. Philip
26 Eidsvik for Area E and the B.C. Fisheries Survival
27 Coalition.

28
29 CROSS-EXAMINATION BY MR. EIDSVIK:

30
31 Q And good morning, Dr. Harris.

32 A Good morning.

33 Q In your introduction you make a couple of points
34 of interest to me, and the first one is that no
35 species was more important in the territory that
36 became British Columbia than the Fraser River
37 sockeye salmon. And if I could go to Tab 25, Mr.
38 Lunn.

39 MR. LUNN: Off your list of documents?

40 MR. EIDSVIK: Yeah, out of our list of documents,
41 please.

42 Q Now, this is a letter from the Kwakiutl Chief to
43 the Inspector of Fisheries dated 1912. And you go
44 partway down that first page and perhaps I can
45 read it, and if I get it wrong, you can correct
46 me:
47

1 We have been very anxious about our fish the
2 Dog Salmon. We heard that the Cannery here
3 is going to fish these fish and we have asked
4 the Indian Department to help us in this
5 matter of the Dog Salmon, which is the staple
6 food of all the Indians around here.

7
8 So dog salmon's pretty darn important to the
9 Kwakiutl.

10 A Yes.

11 Q Perhaps I can go to Tab 26, Mr. Lunn. Now, Wayne
12 Suttles is a pretty well-known, well-respected
13 commentator on Aboriginal issues --

14 A Yes.

15 Q -- in British Columbia?

16 A More than a commentator. One of the most well-
17 respected anthropologists.

18 Q Yes. Perhaps you can go to the second page, Mr.
19 Lunn. And I'm sorry, you have to twist it
20 sideways. And I think his comment here is
21 interesting. He's about one -- the second
22 paragraph down the page he says, "It should also
23 be noted that" -- there we go, at the bottom of
24 the screen, that paragraph, Mr. Lunn:

25
26 It should also be noted that not all species
27 of salmon, perhaps not even all populations
28 of the same species, keep equally well. My
29 Salish informants say that fatter fish last
30 longer and thus sockeye and dog salmon are
31 their favorites. Other species may not last
32 through the winter months.*

33
34 And there's an asterisk there, if we could go down
35 to the footnote, Mr. Lunn. And as you'd expect
36 from Mr. Suttles, who corrects his errors, he
37 says:

38
39 I was quite wrong about this. As
40 Curtis...reported for the Kwakiutl, it is the
41 leaner fish that preserve longer. Sockeye
42 are relished for their fat but do not last as
43 long; "dog salmon"...are lean and last
44 longer.

45
46 So another comment that dog salmon are an
47 important species, not sockeye.

1 And perhaps if I could go to Tab 29, Mr.
2 Lunn. And this is testimony -- testimony before
3 the Dominion of Canada.

4 MR. MCGOWAN: Just I rise, I have a couple of
5 comments. The first is just procedural. I'm not
6 sure if Mr. Eidsvik wishes to mark the exhibits
7 he's referring to.

8 MR. EIDSVIK: Yes, thank you, Mr. --

9 MR. MCGOWAN: The second is the last couple of
10 exhibits, Mr. Eidsvik has read from but has not
11 posed a question to the witness. This is an
12 opportunity to ask questions, not to read from
13 documents and make --

14 MR. EIDSVIK: I thought I had posed a question when I
15 asked him if he thought that sockeye and dog
16 salmon were important. But I'll continue on. I
17 wonder if I could have tab --

18 MR. MCGOWAN: Well, perhaps before Mr. Eidsvik
19 continues on, if the witness could be given an
20 opportunity to answer the last question, then, if
21 one was in fact put.

22 MR. EIDSVIK: Perhaps I can get Tab 25 marked as an
23 exhibit first.

24 THE REGISTRAR: That will be Exhibit number 1141.

25
26 EXHIBIT 1141: Letter from Chief Jimmy
27 Douglas for the Kawkiutl people to Inspector
28 of Fisheries dated July 14, 1912

29
30 MR. EIDSVIK: And Tab 26 marked as an exhibit, please.
31 THE REGISTRAR: Exhibit 1142.

32
33 EXHIBIT 1142: Suttles, *Coast Salish Essays*,
34 excerpt

35
36 MR. EIDSVIK:

37 Q Now, did you have a comment on that, Dr. Harris,
38 on Dr. Suttles' comments about -- that he was
39 wrong about sockeye being as important as dogs?

40 A I don't have a comment about that.

41 Q Perhaps we can go to Tab 29. This is a record of
42 proceedings of the B.C. Salmon Fisheries
43 Commission in 1892, and if we could go into the
44 first part, Mr. Lunn, where the transcript is.
45 You can see at the bottom there, it highlights,
46 refers to "Charlie Caplin" who is the Chief of the
47 Musqueam Indian Band. And then perhaps we can go

1 to page 131 at the very bottom of the page. And
2 this is a question to the Musqueam Chief, and he's
3 asked, because they're going through an
4 interpreter:

5
6 Ask him whether as a tribe do they consider
7 the spring salmon or the sockeye the best for
8 ther (sic) own use?
9

10 Excuse my reading. And the answer is:

11
12 They would rather have the spring salmon for
13 their food than the sockeye - some Indians
14 will not look at the sockeye to eat - they
15 don't like them.
16

17 Do you believe that the Musqueam Chief knew what
18 he was talking about at that time?

19 A I'm sorry, but I don't really know the context of
20 either the question or the answer. and nor do I
21 have a particular expertise to comment on this.

22 Q Well, I'm just -- in your paper you said that no
23 species was more important than sockeye in the
24 introduction to your paper.

25 A And I would stand by that, yes.

26 Q This Musqueam Chief may disagree, at least in the
27 case of certain people?

28 A This testimony appears to indicate that there were
29 certainly other species of salmon that were
30 important.

31 Q Thank you. Now, I want to go to page 4 of your
32 paper where you talk about the Douglas Treaties,
33 and a couple of quick questions. Between 1850 and
34 1854, when the Douglas Treaties were signed,
35 Douglas was the Governor of Vancouver Island, not
36 the Mainland, correct?

37 A That's correct. He was actually the Chief Trader
38 of the Hudson's Bay Company, and then later Chief
39 Trader and Governor of the proprietary colony of
40 Vancouver Island.

41 Q No jurisdiction over the Fraser River. He became
42 Governor of British Columbia in 1858, some eight
43 years after the Douglas Treaties; is that correct?

44 A I beg your pardon, who?

45 Q He became Governor --

46 A That's correct.

47 Q -- of British Columbia.

1 A Yes.

2 Q So at the time he signed the Douglas Treaties, he
3 had no jurisdiction over the Fraser River.

4 A He was the Chief Trader and the Governor of the
5 Colony of Vancouver Island, that's correct.

6 Q Which does not include British Columbia, the
7 Mainland.

8 A Which does not include the Mainland.

9 Q Thank you. At page 5 of your paper, you refer to
10 Douglas when he writes about his understanding of
11 what transpired, and I think this is a helpful
12 comment, and I'm glad you included it. Partway
13 down through the page he says:

14
15 *...to carry on their fisheries with the same*
16 *freedom as when they were the sole occupants*
17 *of the country.*

18
19 And you'd agree with me that the fishery today
20 looks a lot different than when the Douglas Treaty
21 signatories were the sole occupants of the
22 country.

23 A Yes.

24 Q And you could interpret "fishing as formerly",
25 according to Governor Douglas here, as when they
26 were the sole occupants of the country?

27 A Yes.

28 Q No Hudson's Bay Company then.

29 A I think, as I said earlier, what Douglas is trying
30 to do is to -- is to secure the Aboriginal people
31 their fishing rights. It's a recognition of the
32 importance of the fisheries to Aboriginal cultures
33 and economies in the mid-19th Century, and that's
34 reflected in the right to fisheries as formerly --

35 Q Okay.

36 A -- in the Douglas Treaties.

37 Q Thank you. On the next page, page 6, at the end
38 of the top first paragraph, you say:

39
40 *...the treaties were concluded in a context*
41 *of well-established and ongoing commercial*
42 *activity...involving the HBC and Aboriginal*
43 *peoples.*

44
45 Now, the Supreme Court of Canada dealt with the
46 contract and activities between Aboriginal peoples
47 on the Fraser River and the Hudson's Bay Company

1 in a case called *Van der Peet*, did they not?

2 A Certainly the question of Aboriginal rights to
3 commercial fisheries was the subject of the
4 court's attention in *Van der Peet*.

5 Q And the court concluded that the HBC trade with
6 Sto:lo did not give rise to an Aboriginal right to
7 sell or even to trade and barter; is that correct?

8 A The Supreme Court determined that the First Nation
9 had to -- had to establish that the activity was
10 integral to a distinctive pre-contact culture.

11 Q And they concluded that trade with the Hudson's
12 Bay Company was not integral?

13 MR. MCGOWAN: Mr. Commissioner, it appears we're
14 straying again into asking the witness for a legal
15 opinion.

16 MR. EIDSVIK: I'll move on, Your Honour, Commissioner,
17 thank you. If we could go to Tab 24, Mr. Lunn,
18 that would be helpful.

19 THE COMMISSIONER: Mr. Eidsvik, that Tab 29, I don't
20 know whether or not that's been marked.

21 MR. EIDSVIK: I'm sorry. Thank you again,
22 Commissioner. Could we make Tab 29 an exhibit, as
23 well.

24 THE REGISTRAR: That will be marked as Exhibit 1143.

25
26 EXHIBIT 1143: British Columbia Salmon
27 Fisheries Commission 1892 Record of
28 Proceedings, excerpt
29

30 THE COMMISSIONER: I apologize, which tab are you at
31 now?

32 MR. EIDSVIK: I'm at Tab 24.

33 THE COMMISSIONER: Of your binder?

34 MR. EIDSVIK: Pardon?

35 THE COMMISSIONER: Of your documents?

36 MR. EIDSVIK: Of my documents, the Area E documents,
37 Tab 24.

38 Q Now, this is an expert opinion by Wayne Suttles to
39 the Musqueam Band, and perhaps I could go to page
40 2 of that document. In the second paragraph, he
41 says:

42
43 Some features of the exchange system have
44 been indicated above. Food was simply shared
45 around within the family.
46

47 And skipping down:

1 However, it is important to note that this
2 was not a market system. There was no all-
3 purpose money. It was not possible to take a
4 surplus of food and simply peddle it.
5

6 Do you agree with Dr. Suttles' interpretation,
7 referring to the Musqueam pre-European contact?

8 MS. GAERTNER: I'm not sure if he's been qualified as
9 an anthropologist in this hearing, Mr.

10 Commissioner, and it sounds like that that's the
11 nature of the question, or at least that's how
12 I've heard it. And so if he's asking for an
13 anthropological expertise, that should perhaps be
14 clarified. It doesn't look like legal history.

15 MR. EIDSVIK: I'm simply asking -- Dr. Harris commented
16 on the qualifications of Dr. Suttles earlier on,
17 and this is an opinion of Dr. Suttles.

18 Q Do you believe that Dr. Suttles was in error when
19 he said this, perhaps?

20 A Well, so reading the paragraph as a whole:

21
22 Some features of the exchange system have
23 been indicated above. Food was simply shared
24 around within the family. The families
25 within a house and the households with a
26 village engaged in reciprocity. Families in
27 different villages, through ties of marriage
28 and kinship, engaged in exchanges of food and
29 wealth and exchange of access to each others'
30 resources.
31

32 I think that's all -- I would not disagree with
33 any of that, yes.

34 Q No market system that we have today at that time.
35 no money.

36 A That's correct.

37 Q And it is an interesting point, if we're talking
38 sockeye, and the sockeye hit the Fraser River, the
39 Musqueam actually couldn't sell it to the Sto:lo
40 because they had sockeye, right?

41 A I'm not -- so they could certainly have traded
42 with whomever they wished.

43 Q Well, would they have traded sockeye with the
44 Sto:lo? The Sto:lo obviously had sockeye.

45 A It seems unlikely that they would have, but it's
46 quite conceivable that they might have.

47 Q Okay, thank you. I think we'll move on to the

1 public right to fish, Mr. Commissioner, at Tab 1,
2 Mr. Lunn, that would be helpful, Tab 1 of our
3 documents again. And we're going to skip into
4 page -- these are Royal Instructions to British
5 Colonial Governors from 1670 to 1776.

6 Now, Mr. Commissioner, I regret to say that
7 with Mr. Suttles I did not make that an exhibit
8 and I should have. Thank you.

9 THE REGISTRAR: Which one is that again?

10 THE COMMISSIONER: Tab 24.

11 THE REGISTRAR: Tab 24.

12 MR. EIDSVIK: Yes.

13 THE REGISTRAR: That will be marked as 1144.

14

15 EXHIBIT 1144: Letter from Dr. Wayne Suttles
16 to Davis & Company Re: Regina v. Ronald
17 Sparrow, November 27, 1984

18

19 MR. EIDSVIK: And if I could make this an exhibit right
20 straight off so I don't forget again, Mr.
21 Commissioner.

22 THE REGISTRAR: Tab 1 will be 1145.

23

24 EXHIBIT 1145: Royal Instructions to British
25 Colonial Governors 1670-1776, excerpts

26

27 MR. EIDSVIK:

28 Q Now, if we could go to Tab -- sorry, Mr. Lunn,
29 page 691 of this document. Now, these are
30 instructions to British Colonial Governors in parts
31 of the United States and Canada, and if we're at
32 the -- 956, this is the Placentia Garrison. Do
33 you know where Placentia is, Dr. Harris?

34 A In Newfoundland?

35 Q That's correct. And these are the instructions to
36 the Governors there, and they say:

37

38 You shall strictly enjoin both the present
39 and future garrison of Placentia and all his
40 Majesty's officers and soldiers and other
41 persons whatsoever belongs thereto not to
42 concern themselves in the fishery there, not
43 to interrupt the fishermen in the curing of
44 their fish, not to take up for themselves any
45 beaches, stages, or cook-rooms upon any
46 pretense whatsoever upon pain of his
47 Majesty's highest displeasure.

1 Probably when you get an order like that from the
2 King or Queen back that time, the Majesty's
3 highest displeasure was pretty serious. You would
4 take that very seriously if you were governor?

5 A I would presume so. Although this is a very
6 difficult document for me to comment on. I don't
7 know the author. I don't know the date. It's
8 from a different coast and a different era, so I'm
9 not -- I can agree that "upon pain of his
10 Majesty's highest displeasure" sounds awfully
11 uncomfortable, but beyond that I'm not really able
12 to provide much insight.

13 MR. EIDSVIK: I think that's well said, Dr. Harris. If
14 we could go to Tab 65 in our documents, please,
15 Mr. Lunn. These are the Accounts and Papers, when
16 we get to it, relative to the British Colony of
17 Vancouver Island, and other colonies, and could I
18 make this an exhibit, please, Mr. Commissioner.

19 THE REGISTRAR: Exhibit 1146.

20
21 EXHIBIT 1146: Accounts and Papers: Vancouver
22 Island, 1849
23

24 MR. EIDSVIK:

25 Q Now, if we switch over to the second page or the
26 first page of writing past the title page, partway
27 down the page, Mr. Lunn, you'll note, there we go,
28 the report at the Court of Windsor. This is the
29 Colonial Committee dealing with the grant to the
30 Hudson's Bay Company. Now, I note the people on
31 the Colonial Committee, we have the Queen, we have
32 her husband, Prince Albert, do you know that the
33 Lord Chancellor was the most senior official in
34 England and senior member of the Privy Council,
35 the Judicial Committee, Dr. Harris?

36 A I did not know that.

37 Q Did you know that the Duke of Norfolk was the
38 premier duke in English Peerage?

39 A I did not know that.

40 Q Did you know that Lord John Russell was the Prime
41 Minister at the time?

42 A No.

43 Q Did you know that Viscount Palmerston was the
44 Leader of the Opposition and the next Prime
45 Minister?

46 A No.

47 Q Well, at the bottom of the page -- and I have made

1 that an exhibit? I think I have, haven't I?
2 Thank you. At the bottom of that page, they refer
3 to the grant to the Hudson's Bay Company, and on
4 the next page they refer to some conditions that
5 should be removed. And partway down, about the
6 fourth line they say:

7
8 ...That the grant of the fishing of all sorts
9 of fish in the seas, bays, inlets and rivers
10 within or surrounding the said island be
11 omitted from the said draft grant.
12

13 So a deliberate attempt, a deliberate decision by
14 the Queen, her most senior advisors in -- and I
15 believe the date is 1848 to strike the fishery
16 from the proposed grant to the Hudson's Bay
17 Company. That's correct?

18 A Yes, that's correct. In an earlier draft of the
19 grant it had included the fishery, that the
20 Hudson's Bay Company would take the fishery as a
21 proprietary interest, and that was removed.

22 Q And if we could move to my -- to the next tab in
23 that section, it would be Tab 66, Mr. Lunn.

24 MR. MCGOWAN: I'm sorry, I just missed the exhibit
25 number for that last exhibit. Was it in fact
26 marked?

27 THE REGISTRAR: Yes, 1146.

28 MR. EIDSVIK:

29 Q So now we have a -- and I'm sorry for the quality
30 of this document, it's the next page, Mr. Lunn, we
31 have the decision to exclude the fishery from the
32 grant, and it might be easier for me to read it.
33 And I apologize for the copy. Mr. Commissioner,
34 I'll try and provide a better copy when we -- in
35 short order. It says:

36
37 By the draft of the charter as then proposed,
38 the whole of the fisheries in the
39 neighbourhood of Vancouver's Island would
40 have been exclusively confined to the
41 company. It was perfectly monstrous that the
42 Colonial Office for a moment have entertained
43 such a demand, and still more so that Earl
44 Grey should have approved of such a
45 proposition. We have before us a copy of his
46 letter approving of this monstrous monopoly.
47 Why, it was a wonder that they did not call

1 upon the Government for powers to exclude the
2 colonists from the very air they breathed.
3 This provision has now been altered, and the
4 fisheries are left as free as is the air.
5

6 So that gets us to 1848. Obviously a lot of
7 interests with the Colonial Committee and in
8 Parliament about maintaining and protecting the
9 public right to fish.

10 A Yes, the Hudson's Bay Company does not receive a
11 proprietary grant to the fishery. That's correct.

12 Q So these events are an important part of the legal
13 context of the Douglas Treaties, they took place
14 two years before Governor Douglas signed the
15 Douglas Treaties.

16 A The Hudson's Bay receives its grant in 1849, and
17 the Douglas Treaties, the first of the Douglas
18 Treaties are signed the following year.

19 Q So any doubt in your mind whatsoever that Governor
20 Douglas was fully aware of the decision of the
21 Queen, the Colonial Committee and the response in
22 Parliament?

23 A I'm quite certain that Douglas was aware of the
24 limits of the Hudson's Bay Company's grant, yes.

25 Q And then I think you're quite familiar with the
26 papers, and I won't bring you to it, the Hudson's
27 Bay Company then sent out a prospectus advertising
28 that everybody would have equal free access to the
29 fishery; is that correct?

30 A The prospectus indicated that landholders would
31 have access to the fisheries, that's correct.

32 Q And a grant of an exclusive commercial fishery by
33 Douglas to the Treaty Bands would be inconsistent
34 with the decision of the Colonial Committee, the
35 response of Parliament, and the prospectus of the
36 Hudson's Bay, would it not?

37 A Not necessarily. This prospectus applied to an
38 incoming settler society. It didn't apply to
39 Aboriginal peoples who were here already.

40 Q Those are the controversial issues.

41 A I think that's quite clear, the prospectus was
42 intended as a document to attract settlers
43 primarily from the British Isles, and it was
44 intended as a document to attract those settlers.
45 It was a statement of the rights that they would
46 enjoy. It was no reflection of the rights that
47 Aboriginal people would enjoy.

- 1 Q Thank you. I'd like to move on to page of your
2 document, and you're discussing the prosecution of
3 a couple of -- a certain amount of Aboriginal
4 fishermen fishing, who signed on with one cannery
5 and then left to a different cannery. Now, in
6 that, up a little bit higher you say there's 600
7 to 700 licence holders, almost all Aboriginal, in
8 the first paragraph of that page. So if you look
9 at it over a ten-year period, you've got about six
10 thousand to seven thousand relationships,
11 contractual relationships with Aboriginal
12 fishermen?
- 13 A I'm not quite sure that that all follows. But,
14 yes, in the 1880s --
- 15 Q A very large number.
- 16 A -- the fleet was primarily made up of Aboriginal
17 fishers, who were selling their fish to the
18 canneries from New Westminster south or downstream
19 along the Fraser, and --
- 20 Q Yes.
- 21 A -- and the point that I was making there was that
22 the nature of the relationship had changed, a
23 relationship that had been based on trade, Native
24 people had taken advantage of the opportunity the
25 Hudson's Bay Company presented to sell fish to the
26 Hudson's Bay Company. It was a trading
27 relationship. The relationship that had once been
28 based on trade had now become by the 1880s one
29 based on employment law. That what Aboriginal
30 people were selling was no longer their fish, but
31 rather their labour. And as the sellers of the
32 labour, they were subject to the employment law of
33 the day, and the employment law of the day was the
34 law of master and servant, and the law of master
35 and servant provided criminal sanctions for breach
36 of employment contract. And so Native people were
37 being jailed for breaching a -- for, as I say,
38 acting as traders, rather than acting as
39 employees.
- 40 Q I understand. I looked at your -- you say:
41
42 In a series of cases in the mid-1870s,
43 several fish processors...
44
45 I went to your footnote and I found four cases in
46 1887 brought by a single fish processor.
47 A 1877.

- 1 Q Or, sorry, yes, 1877. Was there more cases than
2 there was listed in your footnote?
- 3 A Those are the only ones that I'm able to identify.
- 4 Q So then "a series of cases in the mid-1870s,
5 several fish processors" would be an error in your
6 paper?
- 7 A No.
- 8 Q But you don't have any evidence that anybody else
9 was prosecuted?
- 10 A Well, so I believe I have evidence of four cases,
11 that is several -- involving several different
12 fish processors, and several different Native
13 people, some of whom were jailed as the law of
14 master and servant allowed for an employee who
15 breached his employment contract.
- 16 Q You don't remember that your footnote only listed
17 the Herring processor as the one processor who
18 brought charges against four? We don't have -- we
19 don't have to go to it. You can probably fill in
20 some other stuff while you're looking. Was it
21 also accurate that another fish processor provided
22 legal counsel? Okay, you can't -- can't remember?
- 23 A I can't remember the parties exactly involved. I
24 know a fellow, Samuel Herring, and another fellow,
25 Henry Holbrook, both of whom were fish processors,
26 both of whom were --
- 27 Q Thank you. If we could quickly move -- I'm
28 running out of time, Mr. Commissioner. If we
29 could quickly move to page 11. You note that by
30 this time there was licence limitation, a lot of
31 licences were controlled by canneries, and not
32 that many independent licences; is that correct?
- 33 A Which time are you referring to?
- 34 Q Well, we're at page 11, and you write:
35
36 Of these, most of these worked under a
37 cannery licence. According to the testimony
38 of Captain George of Chehalis...only forty
39 Aboriginal fishers held independent
40 licences...
41
- 42 While we're doing that, if we can go to Tab 45 of
43 our documents, please, Mr. Lunn.
- 44 A So --
- 45 Q So this is the time when there was a limited
46 number of independent licences. Have I got that
47 correct?

- 1 A So in 1889 the Department of Fisheries introduced
2 the first limited licence regime on the Fraser
3 River. There were to be 450 licences, no more, of
4 which I believe it was 300 were to be allocated to
5 the -- or 400 to be allocated to the canneries and
6 100 to independent fishers. So at this moment,
7 and it's a brief window, three years, there's a
8 limited licence regime. During that brief window,
9 most of the licences on the Fraser are held by the
10 canneries.
- 11 Q Yes.
- 12 A Most of the licences on the Fraser are held by --
13 but not all are held by the canneries.
- 14 Q Yeah.
- 15 A And after that, and before that the licences are
16 held by independent fishers.
- 17 Q And Captain -- at page 45 of that document,
18 please, Mr. Lunn. And as Captain George --
- 19 MR. MCGOWAN: Mr. Commissioner, I'm sorry to interrupt
20 Mr. Eidsvik. I rise because Mr. Eidsvik has been
21 allotted 25 minutes. He has now gone just a
22 little bit over that. We are very tight for time
23 and I regret that we really don't have any wiggle
24 room today. I'm going to suggest that we take a
25 short break, if that's agreeable, Mr.
26 Commissioner.
- 27 MR. EIDSVIK: If I could finish the point first, Mr.
28 Commissioner.
- 29 THE COMMISSIONER: Yes, if you would finish that,
30 please, thank you.
- 31 MR. EIDSVIK: At Tab 45 -- or sorry, Tab 45 and page
32 45, now, you note that Captain George of the
33 Chehalis is very unhappy with the lack of
34 independent licences, but I note in here you don't
35 say anywhere else that anyone else is unhappy.
36 Yet at page 45 --
- 37 MR. LUNN: I'm sorry, I'm not following the page
38 numbers.
- 39 MR. EIDSVIK: I think in the expedition of time, if I
40 could list this -- enter this document as an
41 exhibit, please.
- 42 THE COMMISSIONER: What is the document, Mr. Eidsvik,
43 please.
- 44 MR. EIDSVIK: It's Ralston, Tab 45.
- 45 THE COMMISSIONER: Before you do that, Tab 66 you
46 referred to. I don't know that you marked it.
- 47 MR. EIDSVIK: Yes, please.

1 THE REGISTRAR: Tab 66 will be marked as 1147. Tab 45
2 will be 1148.

3
4 EXHIBIT 1147: Hansard's Parliamentary
5 Debates, England, 1849, excerpt

6
7 EXHIBIT 1148: Ralston, The 1900 Strike of
8 Fraser River Sockeye Salmon Fishermen, April
9 1965, excerpt

10
11 MR. EIDSVIK:

12 Q Now, I'd bring you there if we had more time, but
13 Ralston also talks about these appearances before
14 this committee, and he refers to a parade of
15 fishermen, both White and Indian, complaining
16 about the lack of independent licences. But I
17 note that you don't mention anywhere else that
18 anyone other than Aboriginals was affected or
19 complained. Why would that be? It was -- it
20 seems to me it was a victory for all fishermen
21 when they got that restriction removed, White,
22 Aboriginal, Japanese, they got away from the
23 canneries.

24 A Which restriction, that when the Department of
25 Fisheries ended the experiment with limited
26 licences?

27 Q That's correct.

28 A Yes, I think it's fair to say that then
29 independent fishers of whatever background now had
30 access to a fisheries licence.

31 Q So it wasn't just Aboriginal fishermen that were
32 disturbed by the policy, it was virtually all the
33 people who wanted to be independent.

34 A That's correct.

35 MR. EIDSVIK: Yes. Mr. Commissioner, it is the time
36 for the break, and I've gone over my time. Thank
37 you. I'm about a quarter of the way through what
38 I had to do today, and it's one of the reasons why
39 I had problems with entering the document, because
40 a serious document like this, I just can't deal
41 with in 25 minutes. Thank you, Mr. Commissioner.

42 THE COMMISSIONER: Thank you very much, Mr. Eidsvik.
43 We'll take the break, then.

44 THE REGISTRAR: The hearing will now recess for ten
45 minutes.

46
47 (PROCEEDINGS ADJOURNED FOR MORNING RECESS)

(PROCEEDINGS RECONVENED)

1 THE REGISTRAR: Hearing is now resumed.

2
3 MR. HARVEY: Mr. Commissioner, it's Chris Harvey for
4 the Area G Trollers and the United Fishermen and
5 Allied Workers Union. Mr. Eidsvik wishes to say
6 something.
7

8 MR. EIDSVIK: Mr. Commissioner, very quickly, that last
9 tab should have been Tab 69, I'm sorry, not 66,
10 69.

11 THE COMMISSIONER: Sixty-nine.

12 MR. EIDSVIK: Thank you.

13 THE COMMISSIONER: So Exhibit 1147 then is Tab 69.

14 Thank you.

15 THE REGISTRAR: 1148?

16 MR. LUNN: I think it's 1148.

17 THE COMMISSIONER: 1148?

18 THE REGISTRAR: Yes.

19 MR. HARVEY: Mr. Commissioner, the last document which
20 Mr. Eidsvik referred to I believe was Tab 45. I
21 think what he meant to refer to he's now saying is
22 Tab 69. So I'm going to suggest we just replace
23 the last exhibit, remove what was accidentally
24 entered and replace it with Mr. Eidsvik's document
25 number 69.

26 THE COMMISSIONER: Thank you.

27 THE REGISTRAR: That will be so done.

28 THE COMMISSIONER: Sorry, Mr. Harvey.

29 MR. HARVEY: Mr. Lunn, could we have Exhibit GG up,
30 it's the **Nikal** case.

31 MR. LUNN: Certainly.
32

33 CROSS-EXAMINATION BY MR. HARVEY:
34

35 Q Dr. Harris, you had -- in earlier testimony you
36 had something to say about what you took the
37 intent of Governor Douglas to be with respect to
38 Indian fishing rights. At paragraph 29 of this
39 **Nikal** case, there's an excerpt from the dispatch
40 from Governor Douglas to the Duke of Newcastle
41 which Mr. East referred you to. You quote from
42 part of this excerpt in your book, but not the
43 final part of it, so I would like to read all of
44 it from the middle, where it refers to fisheries,
45 it says:
46

47 ...and that they might freely exercise

1 and enjoy the rights of fishing the
2 lakes and rivers, and of hunting over
3 all unoccupied Crown lands in the
4 colony; and that on their becoming
5 registered free miners they might dig
6 and search for gold, and hold mining
7 claims on the same terms precisely as
8 other miners; in short, I strove to make
9 them conscious that they were recognized
10 members of the commonwealth...

11
12 Now, that last part serves to clarify the intent
13 of Governor Douglas, does it not? In other words,
14 he was ensuring that the aboriginal inhabitants
15 had the same rights as other members of what he
16 refers to as the commonwealth, other members of
17 the body politic and no lesser rights but no
18 greater rights either; is that not the true
19 meaning that Governor Douglas was seeking to
20 establish?

21 A I think it's fair to say that Governor Douglas
22 understood aboriginal peoples as subjects of the
23 Crown and that they had no lesser rights than
24 other subjects. It's interesting that he refers
25 in the context of mining that they would --
26 aboriginal peoples would have precisely the same
27 rights as other miners but doesn't say that in the
28 context of hunting and fishing. And so there is,
29 I think, the possibility that he understood them
30 to have certainly no lesser rights and, quite
31 conceivably, greater rights than other subjects,
32 but they were all equally subjects. Not all
33 subjects have the same rights however.

34 Q So you don't accept that the proper interpretation
35 of this long sentence is that they are recognized
36 members of the commonwealth, along with everyone
37 else with the same rights?

38 A Certainly they're recognized members of the
39 commonwealth. They're recognized as subjects of
40 the Crown. It doesn't indicate that they have the
41 same rights.

42 Q All right. Well, this is -- then in the next
43 paragraph, paragraph 30, the Supreme Court of
44 Canada says this. It's Mr. Justice Cory's
45 judgment:

46
47 An even earlier example of the same concept

1 is expressed in a letter dated April 16, 1845
2 from W.H. Draper, Attorney General, Province
3 of Canada...
4

5 Et cetera. The Attorney General wrote -- so this
6 is his -- the Attorney General's legal opinion.
7

8 Sir
9

10 In reply to your reference of the 10th
11 February last calling for my opinion
12 whether a fishery in the waters of Lake
13 Huron around and adjacent to certain
14 islands which are within the British
15 territory, but have not been formally
16 ceded to the Crown by the Indians, is to
17 be considered the property of the Crown
18 or of these Indians, I have the honor to
19 report my opinion, that the right to
20 fish in public navigable waters in Her
21 Majesty's dominions is a common public
22 right -- not a regal franchise -- and I
23 do not understand any claim the Indians
24 can have to its exclusive enjoyment.
25

26 I think you do not agree that that is the same
27 concept that Governor Douglas was conveying, or do
28 you?

29 A No, I don't agree. So this --

30 Q All right.

31 A -- this document was created in the context of
32 another colony of Canada West and in Canada West,
33 as I mentioned earlier, there were a line of cases
34 which indicated that the public right to fish
35 applied to navigable, meaning navigable waters
36 which was different from the law in England which
37 was navigable meaning --

38 Q Yes.

39 A -- tidal. And it was that latter that applied in
40 British Columbia, not the former.

41 Q All right. Well, this case speaks for itself. It
42 is a case of the Supreme Court of Canada. You are
43 a professor of law at UBC, that's correct, is it
44 not?

45 A I am. But the case isn't making the point that
46 this document is making.

47 Q Well, the case determines that in British Columbia

1 navigable -- waters that are navigable in fact
2 such as the waters at Moricetown in this case, are
3 waters in which a public right exists. Do you not
4 accept that?

5 A Can you point me to the provision of -- the
6 paragraph where the court says that?

7 Q No. I think I'll leave it in the interests of
8 time. That's calling for a legal analysis and a
9 legal interpretation, but I'll leave that for
10 final argument.

11 Dr. Harris, I wanted to ask you this, whether
12 in your historical studies, you have been able to
13 determine any estimate of the harvest in pre-
14 contact times in the Fraser River system by, of
15 course, aboriginal persons?

16 I've heard the number 40 million mentioned.
17 I can't remember where I've heard that, but do you
18 have any number at all that you could put on the
19 pre-contact harvest?

20 A So here I rely on the work of anthropologists and
21 others who've studied this and I don't think that
22 there is any definitive figure that anyone can put
23 on the extent of the harvest. The harvest would
24 have depended on the size of the population and
25 even that figure, there are widely divergent
26 estimates of how many people lived in this
27 territory prior to contact, prior to the exotic
28 diseases that decimated the population here. So
29 there's great uncertainty about the population
30 levels and as a result there's considerable
31 uncertainty about the extent of the harvest.

32 That said, it's clear that from those sources
33 that along the Fraser sockeye were the principal
34 source of sustenance and wealth and that the
35 harvest was very extensive. I would hesitate to
36 put any number --

37 Q Yes. All right.

38 A -- and it's something that I would rely on as the
39 secondary literature to -- for.

40 Q All right. The harvest was very extensive and
41 then also what's called in modern terminology
42 total allowable -- or total mortality was even
43 greater, was it not, because in a lot of areas
44 weirs or barricades were used as a traditional
45 means of fishing? And those effectively blocked
46 the passage of a large number of salmon which,
47 although not harvested, were effectively killed.

1 A It's certainly true that weirs, fish weirs, were
2 one of the forms of fishing technology that
3 aboriginal people used. It's also clear though
4 that on some rivers, take the Cowichan River as an
5 example, as many as 15 to 20 weirs might have been
6 used in any one season which suggests a fairly
7 comprehensive understanding of the life cycle and
8 of fisheries management.

9 Q Yes.

10 A If any one weir could have blocked the fish, then
11 one has a problem. But if 15 or 20 weirs are
12 operating, it suggests that fish are being allowed
13 through and that there's an understanding that
14 fish need to be allowed through.

15 Q And these are -- these weirs are quite often
16 wickerwork kind of fences. There's a photograph
17 of one on the cover of your book, Fish Law and
18 Colonialism marked Exhibit 1137?

19 A That was a demonstration weir that was built in
20 the 1970s.

21 Q Oh, I see. But the -- the ones we get from the
22 records are described as -- well, let me just look
23 at one of the records. This is Tab 59 in, I
24 think, Mr. Eidsvik's collection of documents. If
25 we could have that up, Mr. Lunn? This is -- if we
26 could just look at the second paragraph, this
27 relates, I believe, to the Stuart River
28 barricades. The letter which is from the -- for
29 the Superintendent of Fisheries dated 1910 reads:

30
31 The great objection, as you are no doubt
32 aware, to barricading by the Indians is not
33 only are all the fish prevented from
34 ascending the River during the time that the
35 Indians are capturing them in quantities to
36 suit their own needs; but in nearly every
37 instance the Indians carelessly leave the
38 barricades after their fishing is completed,
39 and as a consequence salmon during the whole
40 season are prevented from getting beyond it
41 in any numbers.

42
43 That's a fairly common report that you get in
44 these early records; is it not?

45 A I would agree that fish weirs had the potential to
46 block all of the salmon returning to a river, and
47 I would agree that the Department of Fisheries was

1 very concerned about fish weirs.

2 Q Yes.

3 A But that that concern arose in a context where the
4 Department of Fisheries was doing everything it
5 could to protect the industrial commercial fishery
6 at the mouths of the rivers and so this concern
7 about fish weirs was not emerging in a vacuum. It
8 was emerging in the context of a particular
9 question of allocation, about who should have
10 access to the fish.

11 Q Well, I'm sorry. The reading that I take from
12 this document is that they're concerned about the
13 fish, the future of the fish, and preventing
14 extermination of the fish; is that not the
15 interpretation you put on it?

16 A It is. It certainly -- and as, again, fish weirs
17 had the potential to be a devastating technology
18 and it certainly is the case that Fisheries was
19 concerned. But what I'm providing is the context
20 for that concern and the context for the concern
21 was a question of for whom are the fish to be
22 conserved.

23 Q Yes.

24 A And Fisheries, the Department of Fisheries'
25 particular concern was for the industrial
26 commercial fishery at the mouths of the Fraser or
27 the Skeena Rivers.

28 Q Well, they were concerned also for the well-being
29 of the aboriginal inhabitants, weren't they? In
30 other words, they would -- could continue to
31 obtain their food.

32 A Their concern for the aboriginal well-being is
33 much less evident in the historical record.

34 Q Well, let's just look at this document, for
35 example, page -- it's the fourth page in. It's
36 marked 601 in the upper right-hand corner. The
37 upper paragraph, the latter part of the upper
38 paragraph, I'll start reading about eight lines
39 from the bottom:

40
41 ...and if these are not allowed --

42
43 Or, let's see. It talks about the -- et cetera.

44
45 ...and if these are not allowed to spawn the
46 extermination of the Salmon fishery must
47 necessarily be only a matter of time, and

1 therefore the method is clearly not in the
2 permanent interests of the Indians
3 themselves, as the result will be that in the
4 course of time they will have to find some
5 other means of obtaining supplies of food.
6

7 Well, the document speaks for itself. I wonder if
8 we could have that marked, please.

9 THE COMMISSIONER: What exactly is the document, Mr.
10 Harvey?

11 MR. HARVEY: It's a document -- it's a letter
12 containing a memorandum relating to barricading
13 the Stuart and Fraser Rivers by the Stuart
14 Lake/Fraser Lake and Stoney Creek Indian Bands.

15 THE REGISTRAR: Marked as Exhibit 1149.
16

17 EXHIBIT 1149: Letter containing a memorandum
18 relating to barricading the Stuart and Fraser
19 Rivers by the Stuart Lake/Fraser Lake and
20 Stoney Creek Indian Bands
21

22 MR. HARVEY: Yes. I'm now encroaching on Mr. Lowes'
23 time, but the point -- the point is just this
24 point, Dr. Harris. The aboriginal people arrived
25 in this part of the world around about the same
26 time as the salmon arrived after the last Ice Age,
27 I think, is that in general terms correct?

28 MR. MCGOWAN: We might be getting to the periphery of
29 Dr. Harris' expertise.

30 MR. HARVEY: This really is history.

31 Q All right. Well, I'm just -- all right. The
32 point is, and I'll just leave it as a comment,
33 that the salmon have been cropped heavily during
34 pre-contact times.

35 A Certainly, and I think this is clear in my report,
36 sockeye salmon were the principal source of
37 sustenance and wealth for aboriginal peoples in
38 this part of the world and, yes, the fishery was
39 exploited heavily by them.

40 Q Yes. All right.

41 A And for many centuries.

42 Q If I could turn next to document number 93 from
43 the Heiltsuk list of documents. This, I think, is
44 a paper that you wrote along with Peter Millerd;
45 is that correct?

46 A That's correct.

47 Q Page 99 of this paper, there's a discussion in the

1 middle of the page, the paragraph beginning --
2 this is page 99, paragraph beginning:
3

4 Second, with respect to the modern management
5 of the fisheries, an allocation of fish for a
6 particular purpose is a significant
7 complicating factor. A food fishery requires
8 the regulation not just of the act of
9 fishing, but also of the uses of the fish
10 caught. Regulating the fisheries themselves
11 is a difficult enough task without also
12 regulating how the fish are used. This second
13 layer of regulation is difficult, intrusive,
14 and the source of considerable antagonism
15 between Aboriginal peoples and the federal
16 government. Conversely, a lack of enforcement
17 implies a failure of the rule of law and
18 creates resentment within the commercial and
19 sports fisheries and, in some instances,
20 within the larger Aboriginal community.
21

22 That last reference to resentment in some
23 instances within the larger aboriginal community,
24 that's a reference, I think, to the lack of
25 enforcement of the prohibition of sale which, in
26 some instances, has interfered with the ability of
27 the aboriginal people to get their food fish, food
28 social and ceremonial fish; am I drawing the right
29 inference from that?

30 A What I'm saying here is that it's crucially
31 important to recognize the food fishery and the
32 Indian food fishery as a legal construct and not
33 as a reflection of past aboriginal practice. It's
34 a construct that's created in the late 19th
35 Century and carries through in Canadian law to the
36 present, this category --

37 Q Yes.

38 A -- of Indian food fishing. And my argument there
39 with Peter Millerd is that it's a problematic
40 characterization because it requires not only the
41 regulation of the catching of fish, but also
42 regulation of the use of fish, and --

43 Q Yes.

44 A -- that yes, this is -- the regulating of fishery
45 is difficult enough without also having to
46 regulate the use of fish, which is almost an
47 impossibility or at least requires a level of

- 1 enforcement that becomes enormously difficult --
2 Q Yes.
3 A -- and expensive and does create resentment both
4 within aboriginal communities and beyond.
5 Q Yes. My point is, and perhaps you've seen this
6 discussed in the *Globe & Mail* recently too, that
7 if there's not proper enforcement on the
8 prohibition of sale, those members of aboriginal
9 communities who actually catch the fish will have
10 an incentive to sell it and will, in fact, sell it
11 rather than distributing it amongst the members of
12 the band.
- 13 MR. MCGOWAN: Perhaps before the witness answers, I
14 wonder again if we're sort of outside this
15 witness' area of expertise and getting into
16 speculation or conjecture.
- 17 MR. HARVEY:
18 Q Well, you're proposing effectively that there be a
19 merger between a right to sell fish and the food,
20 social, ceremonial right, correct?
21 A I think that the simplest allocation is the best,
22 that there should just be an allocation of fish or
23 a recognition of a right to a certain percentage
24 of the total allowable catch and a right to
25 participate in the management of that fishery, but
26 that a bright line is preferable to a right based
27 on the use of fish.
28 Q Yes. But what I'm suggesting to you is the
29 Government of Canada has a fiduciary obligation to
30 ensure that whatever regime is in place permits
31 members of aboriginal communities to obtain their
32 food, social and ceremonial fish and the
33 Government of Canada would not be able to deliver
34 that surely if your suggestion were adopted and
35 the commercial and the food, social right were
36 effectively merged.
37 A I think it's clear that --
38 Q Sorry. Would you answer the question? I'm
39 just...
40 A I think it's clear that after *Sparrow*, aboriginal
41 people have a right and a priority to a food,
42 social and ceremonial fishery. This argument was,
43 in part, a critique of that construct.
- 44 MR. HARVEY: Yes. Okay. I've got to sit down now
45 because Mr. Lowes wishes to have five minutes of
46 his time and I've eaten into it too much already.
- 47 MR. MCGOWAN: I'm just not sure, was that last document

57
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1 marked?

2 MR. HARVEY: Oh, yes. Could that be marked, please?

3 THE REGISTRAR: Be Exhibit 1150.

4

5

6

7

8

9

EXHIBIT 1150: Food Fish, Commercial Fish,
and Fish to Support a Moderate Livelihood:
Characterizing Aboriginal and Treaty Rights
to Canadian Fisheries

10 MR. LOWES: Yes, J.K. Lowes for the B.C. Wildlife
11 Federation and the B.C. Federation of Drift
12 Fishers.

13

14

CROSS-EXAMINATION BY MR. LOWES:

15

16

Q Dr. Harris, you are aware of a decision of the
17 Court of Appeal in **Lax Kw'alaams Indian Band v.**
18 **Canada?**

19

A Yes.

20

Q And Lax Kw'alaams is L-a-x separate word K-w-a-l-
21 a-a-m-s. And one of the claims in that case is
22 for rights, fishing rights, based on the reserve
23 creation process; is that right?

24

A I'm not entirely certain. I believe so, but I'm
25 not entirely certain of that fact.

26

Q I notice that you haven't cited that case in your
27 report; is there any particular reason for that?

28

A I was asked for a report on the history of the
29 regulation of the aboriginal fishery up to 1982.

30

Q Yeah. You cited the **Lewis** and **Nikal** cases because
31 of their relevance to the question of implications
32 which are to be drawn or not to be drawn from the
33 reserve creation process; is that correct?

34

A Yes. I cited them as -- as a -- I cited them
35 because I thought their interpretation was
36 incomplete.

37

Q And you did not cite the **Lax Kw'alaams** case?

38

A I did not.

39

Q And was there some reason for that? Why did you
40 distinguish between that case and the **Nikal** and
41 **Lewis** cases?

42

A I responded to the **Nikal** and the **Lewis** cases
43 because they are Supreme Court of Canada
44 decisions --

45

Q Yes?

46

A -- unlike **Lax Kw'alaams**.

47

Q Are you aware that **Lax Kw'alaams** was argued in the

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1 Supreme Court of Canada in February?

2 A Yes. Or at least I understood that it was being
3 appealed to the Supreme Court of Canada. I didn't
4 know that it was February.

5 Q I see.

6 A I responded to **Nikal** and **Lewis** in part because
7 they're Supreme Court decisions and in part
8 because it's in those two cases where the issue of
9 the connection between reserves and Fisheries is
10 squarely before the court. My understanding of
11 **Lax Kw'alaams** is that the connection between
12 reserves and Fisheries is one of a number of
13 arguments, including aboriginal title, including
14 aboriginal rights to fish and that the question of
15 reserves and Fisheries is not to the fore in that
16 case. It may be one among a number of arguments,
17 whereas in **Nikal** and **Lewis** it was central.

18 Q Yes. I agree with you that you're right, that
19 it's one of a number of arguments. But on that
20 particular argument, the **Lax Kw'alaams** is even
21 stronger against your theories than the **Nikal**
22 case; isn't that correct?

23 A I don't know.

24 MR. LOWES: I have no more questions. I don't have a
25 copy of the decision with me, Mr. Commissioner. I
26 will produce it this afternoon or tomorrow and
27 have the exhibit marked.

28 THE COMMISSIONER: Thank you, Mr. --

29 MR. LOWES: I can afford -- I can advise you that the
30 case was argued on February the 17th and we are
31 awaiting judgment.

32 THE COMMISSIONER: Thank you very much.

33 MR. MCGOWAN: I believe Mr. Janes is next.

34

35 CROSS-EXAMINATION BY MR. JANES:

36

37 Q I plan to take you --

38 THE REGISTRAR: Microphone, please.

39 Q Thank you.

40 THE REGISTRAR: And name?

41 MR. JANES: Robert Janes for the Te'mexw Treaty
42 Association part of the Western Coast Salish First
43 Nations group.

44 Q And I plan to take you a little bit away from the
45 rather engaging discussion you've been having
46 about exclusive fisheries and I want to talk a bit
47 about the Douglas Treaties and, in particular, the

1 commercial fishing aspects of the Douglas Treaties
2 and your approach to interpreting these.

3 And you may recall this morning you were
4 asked certain questions about Governor Douglas'
5 letters and the read of those letters. When you
6 formed your opinions that you stated both in your
7 book, *Landing Native Fisheries* and in your opinion
8 or in your report for this proceeding, did you
9 confine yourself to just the letters and the
10 particular words of the treaty when forming your
11 opinion about what the aboriginal people and
12 Governor Douglas intended?

13 A No.

14 Q Could you just discuss with me some of the other
15 factors you considered in arriving at your view
16 that there was a commercial component to the
17 Douglas Treaty fishing rights as recognized in the
18 1850s?

19 A I guess my conclusion is that the Douglas Treaties
20 were negotiated and concluded in a context where
21 native people were actively involved in a
22 commercial trading relationship with the Hudson's
23 Bay Company, and that my sources for this
24 conclusion are -- are -- lie in the records of the
25 colonial correspondence and the records of the
26 Hudson's Bay Company, all of which established
27 that -- well, that by the 1830s, salmon was the
28 principal export of the Hudson's Bay Company from
29 this part of the world, was sending salted barrels
30 of salmon across the Pacific and that aboriginal
31 people were the principal catchers and providers
32 of that salmon and that trade continued through
33 the 1830s, 1840s, 1850s, through when the Douglas
34 Treaties were signed and so the Douglas Treaties
35 were conducted in a context of an important
36 commercial trading relationship between the
37 signatories, and that it would have been very
38 unlikely that the signatories had understood that
39 they were securing only access to a food fishery
40 or a food fishery constructed in some narrower
41 terms when the treaties were negotiated in the
42 context of an important commercial trading
43 relationship.

44 Q And I take it when you say important, it's not
45 just important to the aboriginal people, but also
46 to the Hudson's Bay Company, as well?

47 A Salmon were the principal export item. Hudson's

1 Bay Company had a much more diversified trade west
2 of the Rocky Mountains than it did east of the
3 Rocky Mountains. East it was focused on furs.
4 Here a great many things, but principal among them
5 was salmon. And native-caught salmon, the
6 Hudson's Bay Company tried for a time to have its
7 own employees catch salmon and that experiment
8 lasted for a very brief window and the Hudson's
9 Bay went back to purchasing the fish from
10 aboriginal traders.

11 Q And in your looking at this, did -- this
12 background, did you see Douglas in any of his
13 correspondence or in his dealings with the
14 legislature, his dealings with the aboriginal
15 people making a distinction between food fisheries
16 and commercial fisheries in any way?

17 A No. No. There's no -- there's no sense that the
18 fishery was limited to a food fishery. And again,
19 in the context of a thriving commercial
20 relationship it would have been very unlikely that
21 such a categorization would have even entered the
22 mind of either the aboriginal signatories or the
23 Hudson's Bay Company.

24 Q And when we're talking about this, we're not just
25 talking at Fort Langley on the Fraser. I take it
26 your comments apply to the area where the Douglas
27 Treaties were signed at Fort Victoria, for
28 example?

29 A That's correct.

30 Q Okay. And did you see anything in the
31 correspondence, you know, you've -- we've all seen
32 the sentence "may carry on their fisheries as
33 formerly" and "the sole occupants of the land" and
34 all this stuff. Did you see anywhere where
35 Governor Douglas suggested that they would have to
36 stop their commercial -- the aboriginal people
37 would have to stop their sale of fish or their
38 trade in fish?

39 A No.

40 Q And after the Douglas Treaties, do we see Governor
41 Douglas then introduce any concept or restriction
42 on the aboriginal people limiting them to a food
43 fishery rather than a commercial fishery?

44 A No.

45 Q That's after the Douglas Treaty?

46 A No. So there's some activity by the Hudson's Bay
47 Company to limit the entrance of competitors into

1 the trade of salmon, so they won't sell barrels
2 where the fish are packed in salt and shipped
3 overseas to competitors. But these are
4 immigrant/settler competitors. There's no sense
5 that the Hudson's Bay Company is acting to
6 restrict an aboriginal fishery in any way.

7 Q And when do we see this concept of a food fishery
8 as opposed to a commercial fishery start to come
9 into the regulatory framework in dealing with
10 aboriginal people?

11 A So it appears first in British Columbia in the
12 Regulations that are specific to the province and
13 so the first time where a food fishery is
14 mentioned specifically in the regulations dealing
15 with British Columbia is 1888.

16 Q So this then appears to be quite a ways after the
17 Douglas Treaties were signed?

18 A Yes.

19 Q And in your view in the work that you've done,
20 what do you attribute this, the purpose for
21 introducing this concept of the food fishery into
22 regulations and applying it to aboriginal people?

23 A So the food fishery as a legal construct was a way
24 of containing an aboriginal presence in the
25 fishery or perhaps a way of containing claims of
26 aboriginal rights to the fisheries that might have
27 given rise to access to the fisheries that other
28 people didn't have. The food fishery was a legal
29 construct really intended to confine the
30 aboriginal fishery and by that I mean the
31 aboriginal fishery that was distinct and different
32 from the other fisheries to a small fragment of
33 prior aboriginal use of the fisheries.

34 So my argument in the paper and in my work is
35 that the food fishery was really performing the
36 same work in the fisheries as the Indian reserve
37 was on land. The questions of in land of
38 aboriginal title we're being ignored or at least
39 pushed aside, instead what was being imposed on
40 British Columbia was a postage stamp Indian
41 reserve geography that gave native people toeholds
42 in their traditional territory.

43 In the fishery, the food fishery is playing
44 that same role. It's giving native people a
45 toehold, providing them some very limited
46 protection for a small fishery and, in effect,
47 opening the rest of the fishery up to non-native

1 use and exploitation. It just is the reserves
2 were providing some limited protection for
3 aboriginal people on land in opening up the rest
4 of the province to non-native use and settlement.
5 Same in the fishery. Same as the food fishery for
6 the fishery.

7 Q And as I understand it, even with the food fishery
8 am I right that the Department of Fisheries and
9 Oceans really tried to approach this even as a
10 permissive matter, rather than really respecting
11 it as a right; is that fair?

12 A The Department of Fisheries, yes, that's fair.
13 The Department of Fisheries understood this as a
14 privilege, rather than a right. You see comments
15 that this is bestowed as an act of grace on
16 aboriginal people. The Department of Fisheries
17 having constructed this category then does its
18 utmost to minimize the category and so from its
19 initial creation, from the creation of an Indian
20 food fishery, the department then adds layers of
21 regulations that allow for the Department of
22 Fisheries to limit the times and the places and
23 the means by which the food fishery can be
24 conducted and the Department of Fisheries' goal, I
25 think it's fair to say, is to eventually to
26 eliminate that food fishery. And you see this in
27 the 1930s, the efforts by the Department of
28 Fisheries to ship commercially-produced fish
29 products into the Interior, so that aboriginal
30 people can eat these commercially-produced
31 products and not catch fish for their food.

32 Q And did aboriginal people react to this with
33 gratitude or indifference?

34 A The program was abandoned very quickly.
35 Aboriginal people simply refused to eat the
36 commercially-produced product and continued their
37 fisheries.

38 Q And in terms of this general pressure to limit or
39 turn into a permissive fishery, the food fishery,
40 how did the aboriginal people react to this?

41 A I think it's fair to say that the reaction was --
42 presented itself in a number of different ways.
43 The Department of Fisheries would issue permits,
44 food fishing permits, and many aboriginal people
45 applied for and received those permits and the
46 process was that the Department of Indian Affairs
47 would provide a list of people who were eligible

1 for a food fishing permit to the Department of
2 Fisheries who would then issue the permit. Many
3 aboriginal people fished under a food fishing
4 permit. It's quite clear that many aboriginal
5 people fished anyway, permit or not. It's also
6 quite clear that in the historical record that
7 many fish caught under this aboriginal food
8 fishing permit were being sold.

9 Q I want to move now to a slightly different topic
10 and it comes to this question about jurisdiction
11 in a way. But looking at Southern Vancouver
12 Island and the people at Songhees and Sooke and
13 places like that, is there evidence that they also
14 harvested Fraser River sockeye and how did they do
15 that?

16 A So the tribes on the South Coast of Vancouver
17 Island fished with the technology that's called
18 reef netting and they fished primarily on islands
19 that are now south of the 49th parallel or at
20 least in the United States they would set up a
21 series of reef nets along the southwestern shore
22 of the San Juan Islands and these reef nets were a
23 fishing technology that involved nets and canoes
24 in paths where salmon traditionally frequently
25 were known to migrate. And you'll see in my in
26 Landing Native Fisheries I reproduce a map or I
27 produce a map based on the work of John Lutz that
28 shows those reef net sites, the sites where they
29 were intercepting migrating salmon.

30 Q These are the sites on the San Juan Islands; is
31 that right?

32 A These are the sites on the San Juan Islands.

33 Q And as I understand it is that -- so then if we
34 were to look at the total aboriginal catch from
35 the Fraser River, we'd have to look beyond just
36 that that occurred at the Fraser, at the mouth of
37 the Fraser, but also look at the take on the ocean
38 in the Strait of Juan de Fuca and I guess
39 presumably in the Georgia Strait, as well; is that
40 fair?

41 A That's correct.

42 Q And I take it that in due course they had to leave
43 that fishery because of the border being imposed
44 but as I understand it, aboriginal people on
45 Southern Vancouver Island continued at least for
46 some time to participate in that Fraser River
47 fishery as -- on an interception basis using more

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1 modern techniques; is that fair? Such as boats
2 and gillnetting and things like that?
3 A So I don't know the details of ways or degree of
4 participation by Southern Vancouver tribes in the
5 modern fishery, but I have every reason to believe
6 that it did continue in some form.

7 MR. JANES: Thank you very much.

8 MR. MCGOWAN: Yes, Mr. Commissioner, David Robbins.

9 MR. ROBBINS: Thank you.

10

11 CROSS-EXAMINATION BY MR. ROBBINS:

12

13 Q Dr. Harris, you were asked by --

14 THE REGISTRAR: Your name, please?

15 THE COMMISSIONER: Could you identify yourself for the
16 record?

17 MR. ROBBINS: Sorry. David Robbins for the Cowichan
18 Tribes, Chemainus, Hwlitsum and Penelakut,
19 pursuant to leave of June 2nd to cross-examine Dr.
20 Harris separately from the Te'mexw Treaty
21 Association.

22 Q Dr. Harris, I don't have much time before lunch,
23 but I wanted to pick up on something counsel had
24 asked you about pre-contact harvest levels. You,
25 in answer to a question to Mr. Harvey, you'd
26 indicated that in that regard you'd relied on
27 secondary sources. And on the very first page of
28 your paper in the first paragraph, you cite in
29 footnote 2, to a document by Hewes, Gordon Hewes,
30 I believe.

31 A Yes.

32 Q It's a 1973 paper, Indian Fisheries Productivity
33 in the Pre-Contact Times in the Pacific Salmon
34 Area. Is this one of the sources you're referring
35 to?

36 A Yes.

37 MR. ROBBINS: Okay. I just would like to have that
38 entered as an exhibit. It's document 20 in the
39 Western Central Coast Salish list of documents.

40 THE REGISTRAR: Marked as 1151.

41

42 EXHIBIT 1151: Indian Fisheries Productivity
43 in the Pre-Contact Times in the Pacific
44 Salmon Area - 1973

45

46 MR. ROBBINS:

47 Q Now, for the remainder of my examination, which if

1 we're stopping at 12:30 will continue after lunch,
2 I did want to ask about the portion of your paper
3 pages 8 to 12 where you're discussing the
4 expansion, rapid expansion, of the industrial
5 commercial salmon fishery in the last 25 years of
6 the 19th Century. You had indicated at page 8 in
7 your paper there's a rapid increase in
8 exploitation and that there -- in association with
9 that there was a large cluster of canneries were
10 on the stretch of the river from New Westminster
11 to Steveston. Okay. Steveston, of course, is on
12 the main channel of the river. And over on -- at
13 the bottom of page 10, you indicated that as the
14 exploitation grew, concerns with sustainability
15 developed and over on page 11, you were talking
16 about what you referenced earlier, the first
17 limited licence regime from 1889 to 1992 directed,
18 in part, at trying to regulate for sustainability
19 reasons.

20 So you have indicated in your paper that 350
21 licences were issued, mostly to the canneries.
22 There was initially 450 independent licences and
23 as of 1890 there were 150. And you talk at the
24 bottom of page 11 about 40 of the 150 apparently
25 going to aboriginal fishers and then what's of
26 particular interest to me is at the top of page 12
27 with respect to the Cowichan. You state that when
28 Cowichan fishers applied for independent licences
29 on the Fraser in 1889 and 1890, Fisheries refused
30 on the grounds they were not members of a resident
31 tribe.

32 Now, in footnote 30 there you have a pair of
33 documents. One is a letter from the Indian Agent
34 W.H. Lomas on January 16th, 1892, and the second
35 is a response letter from the Fisheries officer,
36 John McNab, to the Deputy Minister of Department
37 of Marine Fisheries February 29th, 1862. I do
38 want to get those into evidence but before I do
39 that, I want to take you to some of your work in
40 your previous publication, Fish Law and
41 Colonialism because I understand those two
42 documents are, in fact, a series of four documents
43 in the correspondence of 1892.

44 THE COMMISSIONER: Mr. Robbins, I note the time and
45 rather than break up --

46 MR. ROBBINS: I think that would be appropriate.

47 THE COMMISSIONER: -- this group of documents, now I

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1 wonder, is it convenient for commission staff and
2 counsel to return at 12:50? Is that convenient?

3 MR. MCGOWAN: Did you mean 1:50, Mr. Commissioner?

4 THE COMMISSIONER: I'm sorry. I apologize.

5 MR. MCGOWAN: But we're in your hands if 12:50 is the
6 preference.

7 THE COMMISSIONER: I meant 1:50. Is that convenient?

8 MR. MCGOWAN: Yes.

9 THE COMMISSIONER: Thank you very much.

10 THE REGISTRAR: Hearing will now recess till 1:50.

11

12 (PROCEEDINGS ADJOURNED FOR NOON RECESS)

13 (PROCEEDINGS RECONVENED)

14

15 THE REGISTRAR: Hearing is now resumed.

16 THE COMMISSIONER: Mr. Robbins?

17

18 CROSS-EXAMINATION BY MR. ROBBINS, continuing:

19

20 Q Dr. Harris, just before the break we were at page
21 12 of your paper and I plan to stay there with my
22 remaining questions, which I understand I have
23 about 20 minutes for. We had just discussed how
24 in 1889 Fisheries had introduced a limited licence
25 regime, in part aimed at sustainability of the
26 sockeye fishery and in doing so had excluded the
27 Cowichan from that, from those licences, on the
28 grounds of not being members of a resident tribe.
29 We had looked -- we had noted that in footnote 30
30 you referenced a pair of historical documents and
31 before we went to those, I was taking you to your
32 Fish Law and Colonialism citation in footnote 32,
33 so that's where I'd like to take you now. It's
34 the document I want to go to is 21 in our list of
35 documents.

36 MR. ROBBINS: I should perhaps have this excerpt marked
37 as the next exhibit.

38 THE REGISTRAR: Exhibit 1152.

39

40 EXHIBIT 1152: Excerpt of Fish Law and
41 Colonialism by Doug Harris

42

43 MR. ROBBINS:

44 Q Thank you. Now, at the bottom of page 144 is what
45 I understand you're citing to, at footnote 32 of
46 your paper. In the paragraph that begins:

47

1 When Fisheries limited the number of licences
2 on the Fraser in 1889 to 450, 350 of which
3 went to cannery boats, the Cowichan, who had
4 fished with their own boats and nets and sold
5 their catch to the canneries could no longer
6 purchase licences. Vigorous protest from the
7 independent fishers increased the available
8 licences for non-cannery boats to 150 but the
9 Cowichan would not receive any. Lomas --

10
11 Who you've identified as the Indian agent.

12
13 -- requested licences for the Cowichan --

14
15 And there's footnote 67 there That's included in
16 the exhibit. That's a citation to the January
17 26th, 1892 document, which is also in your paper.
18 Carrying on:

19
20 -- but John McNab, the new Inspector of
21 Fisheries, replied that the Cowichan earned
22 "a good livelihood" from selling fish to the
23 local markets in Victoria and Nanaimo and did
24 not need a Fraser River licence.

25
26 So footnote 68 is to the February 29th, 1892
27 letter, also cited in footnote 30 of your paper.
28 And from here on is the two additional documents I
29 wanted to get to.

30
31 Indian Agent Lomas wrote again stating that
32 the Cowichan had been fishing on the Fraser
33 for generations, that they had paid for
34 licences in the past, and that some owned
35 boats and nets worth several hundred dollars.
36 Would Fisheries reconsider?

37
38 Your footnote there is to March 31st
39 correspondence, 1892, from Indian Agent Lomas and
40 then continuing on:

41
42 Ignoring the long-established Cowichan
43 fishery on the Fraser, McNab replied that if
44 the Cowichan received licences, then Natives
45 from around the province would insist on
46 licences for the Fraser as well. The
47 Cowichan were "favourably situated" on

1 Vancouver Island and had no need of Fraser
2 salmon, which were to be reserved for "the
3 Fraser River Indians" and so that "freezing
4 establishments and other fish curing
5 industries may be systematically and
6 successfully conducted".
7

8 That's footnote 70. It's a piece of
9 correspondence from John McNab April 21st, 1892.
10 So with that, I just want to take you to document
11 22 on our list of documents, which is excerpts
12 from an affidavit of Dr. Barbara Lane. I want to
13 take you to page 10, in particular paragraph 39.
14 Just ask you to review that paragraph beginning on
15 January 26th.

16 So you recognize this discussion was about
17 the same four letters you've been discussing?

18 A Yes.

19 Q Okay. Now, I believe I have these letters listed
20 as documents 23, 24, 25 and 26, so I'd like to
21 take you to document 23 on our list of documents.
22 Here's the letter at the top dated January 26th,
23 1892. It's beginning:
24

25 On behalf of several Indians of this agency,
26 I request that some of the Fraser River
27 licences be allotted to them.
28

29 And over the page you'll see it's by Indian Agent
30 Lomas to John McNab, the Fisheries Inspector. And
31 this is the document cited at footnote 30 in your
32 paper, correct?

33 A Yes.

34 Q Okay. And then document 24 on our list --
35 MR. ROBBINS: I should get that marked as the next
36 exhibit, if I may, Commissioner.

37 THE COMMISSIONER: Sorry, which document is that?

38 THE REGISTRAR: That will be --

39 MR. ROBBINS: The --

40 THE REGISTRAR: Which one are you referring to?

41 MR. ROBBINS: The January 26th letter, 1892.

42 THE REGISTRAR: You started with Tab 22 and then you
43 went to 23.

44 MR. ROBBINS: Yes, I just want 23.

45 THE REGISTRAR: Now you're at 24. Which one do you
46 want marked?

47 MR. ROBBINS: Just 23.

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1 THE REGISTRAR: Just 23?

2 MR. ROBBINS: Yes.

3 THE REGISTRAR: Tab 23 will be marked as 1153.

4

5 EXHIBIT 1153: Letter of January 26, 1892
6 from Indian Agent Lomas to John McNab

7

8 MR. ROBBINS:

9 Q So what you should have before you is our twenty-
10 fourth document. At the top of the page is a
11 letter dated 29th February 1892. It's a one-page
12 letter closing with the caption:

13

14 I cannot therefore recommend the request of
15 Mr. Agent Lomas be granted.

16

17 And it's by John McNab to the Acting Deputy
18 Minister of Fisheries. This is a copy of the
19 document you referenced at footnote 30 of your
20 paper, correct?

21 A Yes.

22 Q Thank you. And then you should have the next
23 document, document 25 on our list. It's -- you
24 see at the top it's from March 31st, '92 and at
25 the bottom of that first page, it's to A.W. Vowell
26 the Indian Superintendent. And then over the page
27 on the document it closes with -- indicating it's
28 from Indian Agent Lomas. And the end of the
29 second-to-last full paragraph, it says:

30

31 I would therefore still urge upon the
32 government the advisability of encouraging
33 them and, at any rate, giving them a chance
34 of obtaining a licence.

35

36 This is the document at footnote 69, of Fish Law
37 and Colonialism?

38 A Yes.

39 MR. ROBBINS: Thanks. Next exhibit, please. In fact,
40 Exhibit -- the documents 24 and 25 should be the
41 next two exhibits.

42 THE REGISTRAR: Number 24 will be marked as 1154,
43 number 25 will be marked as 1155.

44

45 EXHIBIT 1154: Correspondence from John McNab
46 to Acting Deputy Minister of Fisheries

47

1 EXHIBIT 1155: Correspondence between Lomas
2 and Vowell
3

4 MR. ROBBINS: Thank you.

5 Q And then the last of this series of
6 correspondence, Dr. Harris, is our document number
7 26 and it's a -- at the top of this document
8 you'll see it's dated New Westminster, 21st April
9 1892 and at the bottom it's signed John McNab
10 again to Bauset, the Acting Deputy Minister of
11 Fisheries. And over the page for ease of reading,
12 'cause it's not the greatest quality, is a close-
13 up of the document. And this would be a copy of
14 the historical document being referenced at
15 footnote 70 in Fish Law and Colonialism?

16 A Yes.

17 Q Thank you. Now, if I can take you back to page 12
18 of your paper, at the top --

19 MR. MCGOWAN: That last document should be marked?

20 MR. ROBBINS: Thank you, counsel.

21 THE REGISTRAR: 1156.
22

23 EXHIBIT 1156: Letter from John McNab to
24 Acting Deputy Minister of Fisheries dated
25 April 21, 1892
26

27 MR. ROBBINS:

28 Q So at the top of page 12 of your paper you go on
29 to make a number of points about the Cowichan who
30 DFO had excluded from the sockeye fishery in 1889
31 further to measures aimed at, in part, at
32 sustainability and one of the points you make is
33 that "every summer they cross the Strait of
34 Georgia to fish sockeye near the mouth of the
35 Fraser River".
36

37 This seasonal round long predated the canning
38 industry and --
39

40 You -- there's cite to footnote 31 which you can
41 see from the bottom of the page is to Mackie,
42 Trading Beyond the Mountains at pages 219 to 223
43 specifically. And that is document number 1 on
44 our list of documents.

45 I'd ask first, Dr. Harris, that if you could
46 just identify this as the document you're citing
47 at footnote 31 in your paper?

1 A Yes.

2 MR. ROBBINS: Okay. Could I have it marked as the next
3 exhibit, please?

4 THE REGISTRAR: 1157.

5

6 EXHIBIT 1157: Excerpt from Trading Beyond
7 the Mountains

8

9 MR. ROBBINS:

10 Q If I can take you to page 222 of this document
11 which is in part what you cite to, in the
12 paragraph at the bottom of the page, second
13 sentence:

14

15 Vancouver Island people fished at the river
16 and had extensive summer villages there;
17 indeed, in 1825 McMillan had recorded that
18 the Native name for the Fraser was Cowichan.

19

20 That would be McMillan, the Hudson Bay Company
21 expedition leader, correct?

22

A Yes.

23

Q

24

"With the coming of the sockeye in July"
25 ethnographer Homer Barnett wrote:

26

27 All the able-bodied Cowichans left for
28 the Fraser for two months. They were
29 camped on Lulu Island in the south arm
30 of the river. They dried their salmon
31 there before returning to the island for
32 the winter.

33

34 And over the page, in the second full paragraph
35 beginning:

36

Fort Langley's records...

37

38

39

There's a sentence that begins:

40

41

The native fishery centred on the production
42 of dried salmon for winter use and for the
43 first two years McMillan traded dried salmon
44 from the Cowichan on the return from the
45 fishery at the canyon.

46

47

That would be the Fraser canyon, correct?

1 A I think so.

2 Q Okay. Thank you. Now, turning back to page 12 of
3 your paper, the top of the page, you reference
4 here the Cowichan had a "fishing village on the
5 Fraser River". And I just want to take you back
6 to page 8 of your paper at the top. Page 8.
7 Here. Here you say:

8

9 The mid-Island signatories --

10

11 That would be the Douglas Treaty.

12

13 -- the Synuneymuxw --

14

15 Which would be the Nanaimo, if I'm understanding
16 you. Correct?

17

A Yes.

18

Q The Nanaimo had a fishing village on the Fraser
19 just downstream from Fort Langley and you cite to
20 footnote 17, which is a map within the publication
21 *Ft. Langley Journals* edited by Morag Maclachlan.
22 That is document 3 on our list of documents, if I
23 could have that pulled up now. Page 8. And I
24 will require a rotation.

25

26 So if we could focus in on page 8, yes, on --
27 there's four -- five details to this map. Now,
28 detail number 4, to begin with, please? Here you
29 see the Ft. Langley inscription is the Nanaimo
30 village you're talking about the other village --
31 or the village indicated on this map?

31

A So I can't make out the notation.

32

Q Okay.

33

A I believe it is or the next one downstream. I'm
34 not --

35

Q Okay.

36

A I'm not absolutely certain. But the -- but on the
37 original it's --

38

Q Okay.

39

A -- it's clear.

40

Q Now, if we could zoom back out, what I'm
41 interested in particular is going to the detail
42 number 2, and if we could focus in a little more
43 on the south shore of Lulu Island downriver from
44 Annacis Island.

45

A Yes.

46

Q Now, the inscription there is Cowichan villages.

47

When you speak at page 12 of your paper of the

1 Cowichan having a fishing village on the Fraser,
2 this is the village you're talking about, correct?
3 A No. So I'm referring on page 12 to the village at
4 the mouth of the Fraser River.

5 Q Okay. If we could zoom out a bit, do you have
6 your bearings on this map?

7 A Oh, there. Okay.

8 Q This is all --

9 A Yes. Yes.

10 Q Okay. So this is the village you were referring
11 to on the --

12 A This is the village I'm referring to.

13 Q -- on the main channel of the South Arm.

14 A Yes.

15 Q Thank you. Now, Captain Simpson, who made this
16 map, made it in travelling up the arm to establish
17 Fort Langley and if I can -- if we can go down to
18 page 21 of this same document - and I should pause
19 to have it entered as an exhibit.

20 THE REGISTRAR: 1158.

21

22 EXHIBIT 1158: The Fort Langley Journals -
23 1827-30
24

25

MR. ROBBINS:

26 Q At page 21, Dr. Harris, there's a small caption
27 discussing George Barnston. In fact, I should go
28 to page 20. Simple question. You understand
29 George Barnston was the first keeper of the Fort
30 Langley Journal, correct?

31 A I had forgotten that, but...

32 Q There he is. George Barnston, who kept the
33 journal. So what I'm interested in showing you is
34 an early entry in the journal on page 27,
35 particularly Monday the 23rd.
36

37

38 This morning all hands were employed towing
39 across to the other side of the River. At 3
40 P.M. sail was set on a Breeze springing up
41 from the South west, and we passed the
42 Cowitchen Villages Saumause [Somenos]
43 Pinellahutz [Penelakuts] & Quomitzen
44 [Quamichan] about 6 O'clock, and anchored
45 about a mile above them, two hundred yds.
46 from the north Bank. Scanawa was on board
47 all day, but went on shore at night. The
Population of the Cowitchen Villages may be

1 at a rough guess nearly 1500 Souls.

2

3 Do you recognize this as an observation in 1827 of
4 the Cowichan villages of which you spoke of in
5 your paper at page 12?

6 A Yes.

7 Q Thank you. Now, Dr. Harris, as a legal historian,
8 you're obviously aware of the Oregon Boundary
9 Treaty of 1846 between the British and the
10 Americans?

11 A Yes.

12 Q You're aware that the British and the Americans
13 established a Boundary Commission to survey the
14 47th Parallel pursuant to that treaty?

15 A Yes.

16 Q Okay. I want to bring up document 22, in
17 particular page 9 paragraph 35. Now, again this
18 is an excerpt from the affidavit of Dr. Lane and
19 she -- this reads:

20

21 On 7th May 1869 J.L. Hawkins, Colonel R.
22 Eng., H.R.M., Commissioner, as a
23 representative of Britain and Archibald
24 Campbell, Commissioner, as a representative
25 of the United States, signed two maps as part
26 of the work of the British-American Northwest
27 Boundary Commission. The first map, labelled
28 "Sheet No. 1", and the second map, labelled
29 "Northwest Boundary Sheet No. 7", both show
30 the location of "COWITCHEN (Indian Village)"
31 on the north short of the south channel of
32 the Fraser River. True copies of these two
33 maps are attached as Exhibits "Q"...

34

35 I'd like to -- Q and R, I should say. I'd like
36 to bring up Exhibit Q which is 27 on our list of
37 documents and needs to be rotated. If we could
38 zoom in a bit, you see this is a map of British
39 Columbia in the north and Washington Territory in
40 the south and in the -- if we could focus in on
41 the main channel of the Fraser at Lulu Island in
42 the top left of the map, possibly even a little
43 more. There.

44

45 Now, this is -- again, you see the notation
46 for Annacis Island as on the Simpson map in 1827
47 and the notation there is "Cowitchen (Indian
Village)". This, again, is the village to which

1 you refer at page 12 of your paper, correct?

2 A Yes. So I have not seen this map before but that
3 appears to be the same village as the one I refer
4 to on page 12, yes.

5 Q Thank you. And in closing, I just note that you
6 finish your discussion in -- at page 12 of your
7 paper noting that:

8
9 ... the site of their fishing village on the
10 Fraser had been sold to absentee owners
11 before the Dominion and provincial
12 governments allotted Indian reserves at the
13 mouth of the Fraser, and when the Indian
14 reserve commissioners did arrive in 1876,
15 they did not allot another site. Without a
16 reserve on the Fraser, the Cowichan could not
17 get fishing licences.

18
19 If I could take you back to document 22 page 10
20 paragraph 38. Here Dr. Lane discusses a memo of
21 Gilbert Malcolm Sproat, Commissioner for the Joint
22 Indian Reserve Commission and the memo is dated
23 January 20th. It's a well-known memo. She
24 discusses how the Cowichan made five complaints
25 and number 5:

26
27 They complained that they had heard that
28 white men had bought the fishing station on
29 the Lower Fraser where they had always been
30 accustomed to get their winter food. At a
31 later place Sproat wrote, "...it is stated to
32 be true that the old fishery station on the
33 Fraser known as the "Cowichan Fishery" and
34 annually used by them from time immemorial in
35 getting fish for winter food, has been sold
36 many years ago...

37
38 Are you familiar with this --

39 A Yes.

40 Q -- memo of Sproat? Thank you. Can I just show
41 you it as a final document and this number 28 on
42 our list?

43 THE REGISTRAR: Do you wish 22 marked?

44 MR. ROBBINS: I'll finish with -- well, I'll do 28
45 first. Document 28 we can have exhibited, please,
46 if Dr. Harris confirms the memo.

47 A Yes.

1 MR. ROBBINS: As the next exhibit, please.

2 THE REGISTRAR: Twenty-eight?

3 MR. ROBBINS: Yes.

4 THE REGISTRAR: Yes, it'll be marked as 1159.

5

6 EXHIBIT 1159: Sproat memorandum

7

8 MR. ROBBINS: And if we could mark document 22 as the
9 final exhibit.

10 THE REGISTRAR: 1160.

11

12 EXHIBIT 1160: Affidavit of Barbara Lane
13 dated December 2, 2009

14

15 MR. ROBBINS: Those are all my questions, Dr. Harris.

16 Thank you very much.

17 MS. GAERTNER: Good afternoon, Commissioner. It's
18 Brenda Gaertner for the First Nation Coalition and
19 with me, Leah Pence and I have 20 minutes of my
20 own time and I've been advised by Krista Robertson
21 on behalf of the Musgagmagw Tsawataineuk tribal
22 council that I have ten minutes of hers. So I
23 have a total of a half an hour, and I think I can
24 easily, hopefully, conclude the work that I'd like
25 to do with Dr. Harris this afternoon.

26

27 CROSS-EXAMINATION BY MS. GAERTNER:

28

29 Q Beginning first of all quite generally, Dr.
30 Harris, in the work that you do as a historian,
31 not only as a basis for the report that you've
32 provided but for the books that you've written and
33 either -- can you confirm that you rely on both
34 primary sources, for example, very early
35 historical records of the Hudson Bay Company,
36 historical records surrounding the work of James
37 Douglas, the Teit records, the Sproat records,
38 O'Reilly's Minutes of Decision and onward?

39 A Yes.

40 Q And do you also rely on secondary sources, and I
41 notice from both your book and the footnotes in
42 your materials that you've read extensively of a
43 number of notable anthropologists including Wayne
44 Suttles, Nancy Turner, Ann Garabaldi, Daniel
45 Boxberger, Kennedy and Bouchard and others?

46 A Yes.

47 Q In addition, you've had access to secondary

- 1 sources of oral histories - I see those quoted in
2 numerous places in your paper?
- 3 A Yes.
- 4 Q Is it correct to say that -- or can you confirm
5 that in the modern age that most of these primary
6 and secondary sources, including your books that
7 summarize and reference those materials are easily
8 available to the federal Crown when completing due
9 diligence for strength of claim analysis?
- 10 A Yes.
- 11 Q I heard in the evidence earlier today both in
12 questions raised by Crown federal and in questions
13 raised by the Crown provincial that they are
14 suggesting that there's some controversy over some
15 of the matters that you have given evidence, in
16 particular some controversy over what Douglas
17 Treaty rights might mean in law today, that was
18 mentioned earlier today. I'll have to get you to
19 say "yes" or "no" --
- 20 A Yes.
- 21 Q -- so -- thank you. And then I also heard the
22 Crown provincial suggest there's some controversy
23 over the authority of the reserve commissioners
24 and what they were able to do. We mentioned that
25 controversy. You'll recall that evidence?
- 26 A Yes.
- 27 Q Can you confirm with me that it's not
28 controversial on the basis of the review of your
29 -- the primary and secondary sources that First
30 Nations all along the migratory route of the
31 Fraser River sockeye used extensively and occupied
32 extensively the lands and waters necessary to
33 access their fishing sites?
- 34 A I do not believe that is controversial.
- 35 Q That from your review it is not controversial,
36 that they used actively the lands and waters
37 surrounding their fishing sites?
- 38 A That's correct.
- 39 Q Thank you. Now I want to turn briefly to a
40 description in your questions and answers to
41 Robert Janes, we dealt with the reef net
42 fisheries. Specifically I wanted to speak on
43 behalf of three clients that I represent, the
44 Snuneymuxw and Tsawout and Tsartlip First Nations.
45 You can confirm that they are signatories of
46 Douglas Treaties?
- 47 A Yes.

1 Q And I wanted to take you to your map on page 37 of
2 your report where you set out the boundaries of
3 the Douglas Treaty. Am I right that what you're
4 doing there is setting out the land boundaries and
5 not the marine boundaries or the fishery sites of
6 those First Nations that signed Douglas Treaties?

7 A Yes. These boundaries are derived from the
8 material available in the federal treaty
9 repository so this is -- those boundaries are
10 derived from the --

11 Q Clearly from your own work, they reflect
12 boundaries that are more akin to the land
13 boundaries and not the waters that were used by
14 the signatories to Douglas Treaties?

15 A That's correct, yes.

16 Q And can you also confirm that the extensive reef
17 net fishery in the Southern Vancouver Islands and
18 their surrounding islands that you were speaking
19 about include also the reef net fisheries of the
20 Tsawout and Tsartlip peoples?

21 A Yes.

22 Q Now, I want to go next you -- in your paper you
23 refer to three very specific old fishing methods,
24 the reef net fisheries, and I won't spend more
25 time on that since we've had a little bit of time
26 on that today. But I'm going to turn now to the
27 dip net fisheries and the weir fisheries that you
28 mention.

29 And let's go first to the dip net fisheries.
30 From the historical and anthropological records
31 that you've had a chance to review over your work
32 can you give the commissioner a rough description
33 of the areas that are described within that record
34 for the use of dip net fisheries and access to the
35 Fraser River sockeye salmon?

36 A So dip net fisheries, the dip net is a technology
37 that is a bag-like net on the end of a long pole
38 with a drawstring to bring the bag-like net to a
39 close. The dip net was used extensively on the
40 main stem of the Fraser from rocky promontories or
41 from board/plank promontories extended out from
42 the bank of the Fraser, often in a back eddy or
43 where the water was moving somewhat less quickly.
44 The dip was deployed in the water and fish
45 migrating upstream were scooped up in the dip net.

46 Q Can you advise also that the -- whether the
47 historical record and the anthropological record

- 1 that you reviewed also confirms the presence of
2 drying racks and fish racks and smoking shacks or
3 smokehouses on the land typically in close
4 proximity to the fish nets that dip net fisheries
5 were using?
- 6 A Yes. And so it's extensive photograph and other
7 archival evidence that shows numerous drying racks
8 adjacent to these fish catching platforms.
- 9 Q And these are drying racks in locations that are
10 on the land generally adjacent to the access
11 points for those dip nets; is that correct?
- 12 A That's correct.
- 13 Q And from your review - and actually, can I take
14 you to Figure 4 of your report. Earlier in the
15 evidence today you were describing the recommended
16 allotments for exclusive fisheries for the high
17 bar and in the pavilion, but you also agree that
18 that map reflects recommended exclusive fisheries
19 at the mouth of the Bridge River and at the mouth
20 of the Cayuse Creek also; is that correct?
- 21 A That's correct.
- 22 Q And to your knowledge from your review of the
23 historical record, for example, in the Bridge
24 River area were there large drying rack sites
25 located all throughout that area?
- 26 A Yes. The mouth of the Bridge River was one of the
27 focal points of the salmon fishery, of the
28 aboriginal salmon fishery, that and at the mouth
29 of the Fraser Canyon, just upstream from Yale.
- 30 Q And those are -- that's information that's all
31 well-documented in the historical record?
- 32 A It is.
- 33 Q And are you also familiar with the archaeological
34 site records of these areas?
- 35 A Through the secondary literature.
- 36 Q Yes. And are you aware of the large
37 archaeological sites that are located in lands
38 adjacent to the Bridge River?
- 39 A Yes.
- 40 Q We also represent the Upper Fraser Fisheries
41 Conservation Alliance which includes the Carrier
42 Sekani. The commissioner, in evidence earlier,
43 heard evidence from Chief -- former Chief Thomas
44 Alexis of the Stellat'en Nation whose grandfather
45 was one of the signatories of the Barricade
46 Treaty, and I don't believe we've heard much about
47 the Barricade Treaty today or in your paper, but

1 you are familiar with this treaty; is that
2 correct?

3 A So there's several, some on the -- at the
4 headwaters of the Skeena and some in the
5 headwaters of the Fraser.

6 Q Yes. And I'm referring to the ones in the Babine
7 River area --

8 A Yes.

9 Q -- and the ones that the signatories there -- no
10 -- is that right? The ones that the Carrier
11 Sekani would have been signatory to at the
12 headwaters of the Fraser.

13 A On -- yes.

14 Q Yes. We'll confirm we've got the right spot now.
15 Now, can you describe the history of this
16 Barricade Treaty and from your perspective what
17 led up to the efforts by the federal Crown, in
18 particular the Department of Fisheries and Oceans,
19 to close down the weirs in that area?

20 A So the Lake Babine people lived along and fished
21 on the -- on Babine River and Babine Lake. Babine
22 River and Babine Lake are tributaries of the
23 Skeena. They had fished with a number of methods,
24 but primarily with fish weirs.

25 In the early 20th Century, the Department of
26 Fisheries targeted these fish weirs as a
27 conservation hazard and sought to dismantle the
28 fish weirs. This was at a time when the
29 industrial/commercial fishery at the Coast was
30 demanding action from the Department of Fisheries
31 to dismantle these fish weirs. And the demand was
32 -- emanated from -- for two reasons. First, the
33 canners wanted the fish that were being caught by
34 the Babine in the headwaters; and second, they
35 wanted the labour. Aboriginal labour was
36 crucially important, particularly on the North
37 Coast and the industrial commercial fishery -
38 native women working in the canneries, native men
39 working on the fish boats. And so the effort to
40 dismantle the fish weirs in the headwaters was
41 both an effort to secure the fish for the
42 canneries on the coast, but also to secure a
43 labour force.

44 There were various attempts by the Department
45 of Fisheries officials to dismantle the fish
46 weirs. The Babine resisted these efforts,
47 including a physical altercation between fisheries

- 1 officers that arrived to dismantle the weirs and a
2 collection of Lake Babine women who stopped them.
3 The result was -- of this dispute was
4 eventually a trip to Ottawa by the -- by two of
5 the Lake Babine chiefs accompanied by a
6 missionary. Negotiations with the Department of
7 Fisheries ensued in Ottawa and a result was an
8 agreement that the Lake Babine would dismantle the
9 weirs; in exchange Department of Fisheries would
10 provide additional reserves, would provide nets,
11 would provide implements for farming, would
12 provide an industrial school and so these were the
13 terms of the Lake Babine Treaty. The Lake Babine
14 then, for a number of years afterwards, tried to
15 fish with the nets that they were provided from
16 the Department of Fisheries. The net fishery was
17 unsuccessful. The catch was insufficient and so
18 several years later in the early 1910s when the
19 Royal Commission arrived in Lake Babine territory
20 they found a desperately poor people who were no
21 longer able to build their weirs, who had an
22 insufficient net fishery to support themselves and
23 no prospect of a viable economy by another source.
24 Q Just briefly to describe the weirs themselves,
25 often the weirs include a pole structure and a
26 rock structure that's used in the river itself to
27 channel -- or in the tributary to channel the
28 salmon into a specific area; is that correct?
29 A So a fish weir is a latticework fence that crosses
30 a river, usually just upstream from a rapids.
31 Behind the weir is a pen. The fish are channelled
32 into this pen where they can be easily scooped out
33 and brought to shore. And in the Lake Babine case
34 where they would then have been smoked.
35 Q And they're often left in the water for a long
36 time and they're repeatedly used in the same area?
37 A Yes.
38 Q All right. I want to take you to Exhibit 1137
39 which are excerpts of your book, Fish Law and
40 Colonialism and I want to take you -- if you
41 could, Mr. Lunn, just go through the actual book
42 pages 18 to 20 to show him. I'm going to take Dr.
43 Harris to a quote on page 20 but I just want to
44 refresh his memory in case he doesn't have every
45 page of this book memorized --
46 A Thank you.
47 Q -- on what he's discussing in that section. And

1 in that section you have a discussion on the
2 native fisheries in particular, and if you can
3 just scroll through and see what you've got
4 covered and then on page 20, about -- right after
5 the quote of the story from Nuu'Chah'Nulth you
6 have an important line. It's -- from my read of
7 it, which is you say:

8
9 In this way, ownership of the fisheries
10 blurred with management.
11

12 And I wonder if you could take a moment and
13 describe to the commissioner how historically and
14 perhaps even all the way up to 1982 or otherwise
15 from an aboriginal perspective, ownership of the
16 fisheries blurred with management?

17 A So in this part of the book I'm relying on a
18 secondary anthropological literature. I'm also
19 relying on a close reading of the colonial record,
20 the archival text, where I found evidence of
21 aboriginal fisheries law or evidence of claims of
22 ownership of the fishery. And what is in that
23 secondary record and in the historical record, is
24 -- are many strong statements from aboriginal
25 people and -- that the fisheries were not simply
26 open access, that they were owned spaces that --
27 stretches of rivers that particularly good fishing
28 places were owned.

29 They might have been owned by a family. They
30 might have been owned by a larger kin group. They
31 might have been owned by a village, but that they
32 were owned and that this ownership followed the
33 names of the hereditary chiefs so that the chief
34 who held a particular name would with that name
35 also have ownership of a particularly important or
36 a collection of particularly important fishing
37 sites. And those fishing sites could be very
38 minutely defined. It could be the right to fish
39 from a particular rock with a particular
40 technology at a particular time of year for a
41 particular species of fish. So the level of
42 detail of local knowledge and of detail was
43 extensive.

44 Now, what does ownership of these fisheries
45 mean? Well, here I think -- and here again I draw
46 on anthropological literature. I think that the
47 language of ownership is, while accurate, does not

1 equate precisely with how in an English common law
2 system we would understand private property. Yes,
3 these were owned sites. Yes, there was a right to
4 exclude others, but that the holder of that right
5 or the owner of that right didn't themselves have
6 the exclusive right to fish, that in fact, what
7 they were were stewards of a resource in a
8 particular territory.

9 And so the concept of ownership, I think,
10 merges quite nicely with the concept of
11 stewardship, that there was not just rights but
12 also responsibilities associated with ownership,
13 responsibilities reflected in this notion of
14 stewardship. And these responsibilities would
15 include -- would varyingly include a
16 responsibility to ensure that members of the
17 community had sufficient access for their needs, a
18 responsibility to ensure that the resource was
19 managed on a basis that would allow it to continue
20 to be used by the community for it to be managed
21 sustainably.

22 And so what I'm getting at here is that by
23 saying ownership of fisheries blurred with
24 management, this idea that ownership and
25 stewardship were really combined together in a
26 form of governing the human relationship to a
27 resource or the -- or in governing the relations
28 between people with respect to a resource, in this
29 case the fishery.

30 Q Thank you. I don't want to spend more time on
31 that, your book and that excerpt does well for
32 that and we have that as an exhibit.

33 I want to turn now to a couple of more
34 general questions, one on asking a few questions
35 about how history informs the present and then I
36 want to take you to your concluding paragraph in
37 your paper. You report at the bottom of page 18
38 and over onto page 19, you mention that
39 approximately 120 years ago, in 1892, Department
40 of Fisheries established a commission to report on
41 the state of fishery in B.C. and make
42 recommendations for its regulation. Have I got
43 that right?

44 A Yes.

45 Q And at page 18 and 19 of your report you refer to
46 two aboriginal witnesses who gave evidence at that
47 commission, Chief Caplin of Musqueam and Captain

1 George of Chehalis; is that correct?

2 A Yes.

3 Q And you noted at page 19 that Captain George
4 testified that the commission of 120 -- at the
5 commission of 120 years ago, that fisheries
6 officers were restricting Chehalis' people
7 abilities to access food fishing and that there
8 was insufficient access to commercial licences; is
9 that right?

10 A Yes.

11 Q Now, we represent the Chehalis in this inquiry and
12 the commissioner has met and heard evidence from
13 the current chief of Chehalis, Chief Willie
14 Charlie, and at page 2 of Exhibit 279 is a copy of
15 Chief Charlie's witness summary. You can bring
16 that into -- have a -- take a look at it, but I
17 just want to point out that it says that Chief
18 Charlie explains about how three years ago, the
19 Department of Fisheries came in and tried to
20 define Chehalis' FSC needs and limit the Chehalis
21 fishery. And will you agree with me that there
22 seems to be -- it's at the bottom, right there.
23 Sorry. I'm perhaps going too fast. It is my want
24 in this commission to go fast.

25 Do you agree with me that there's some strong
26 similarities between the concerns that were raised
27 by Captain George 120 years ago and the concerns
28 Chief Charlie is bringing forward to this
29 commission, i.e., their insufficient access to
30 food, social and ceremonial fisheries and
31 insufficient access to fish?

32 A So I don't know the details of the particular
33 dispute that Chief Charlie is speaking of here
34 but, yes, I do think that the issues around the
35 allocation of fish are still very much with us as
36 they were in the late 19th Century and in the
37 early 21st.

38 Q All right. So using these two book ends, I'm
39 going to ask this question. From your review of
40 the record and keeping in mind these two -- what
41 is found in the historical record that explains
42 from your perspective this continued inadequate
43 access by First Nations to the fish that they have
44 historically relied upon? And I know we don't
45 have a lot of time but -- so you're not going to
46 go into all detail, but I want you to frame it for
47 the commissioner so that he gets the foundations

1 of your review as to why there is this continued
2 inadequate access.

3 A So here I think most of my work has focused on the
4 particular role of law in the dispossession of
5 aboriginal people, of their fisheries. And what I
6 can say about the role of law is a number of
7 things. First, that the imposition of common law
8 legal regime on top of an existing aboriginal
9 regime had the effect of erasing the prior forms
10 of aboriginal ownership and management, so that
11 the common law doctrine of the public right to
12 fish, although purportedly opening the fishery up
13 to everybody and creating the fishery as a -- or
14 at least preventing the Crown from granting
15 exclusive fisheries, by constructing the fishery
16 as common property, that had the effect of erasing
17 prior forms of aboriginal ownership and of
18 governance.

19 So that's the first thing I would say, that
20 the imposition of law of **Fisheries Act** and
21 Regulations and of a body of common law displaced
22 the prior forms of law, that it surrounded and
23 constructed aboriginal fisheries.

24 The second thing I would say is that that
25 body of law was designed primarily to reallocate
26 fish to an industrial commercial fishery and in
27 some cases on some rivers to a sport fishery. So
28 that the focus of the **Fisheries Act** and the
29 Regulations under it were really to open the
30 resource up to that industrial commercial fishery
31 and, as I said, in some cases a sport fishery.
32 And that what was left and set aside for
33 aboriginal people and on an increasingly marginal
34 basis was this constructed category of an
35 aboriginal food fishery, a category, as I said
36 before lunch, that was constructed in law in the
37 late 19th Century, that was not constructed on the
38 basis of prior aboriginal use or regulation of the
39 fishery, but rather was a colonial construct and
40 performing the same work as the Indian reserve did
41 on land, which was to set aside a small fragment
42 of a resource for aboriginal people and open the
43 rest to non-aboriginal interests.

44 And in this process, native voices were
45 consistent in their opposition. They had some
46 allies in the colonial governments. The
47 Department of Indian Affairs was a consistent,

1 although somewhat ambivalent and occasionally
2 faltering ally in putting forward the native
3 position. So were some of the missionaries. But
4 they were very much the weaker cousin in the
5 hierarchy of government departments in Ottawa. It
6 was the Department of Fisheries with its mandate,
7 a mandate again directed at opening up the fishery
8 to the industrial commercial fishery that held
9 sway.

10 And so to the extent that native people were
11 able to participate in the fishery, they were able
12 to participate not as -- as owners, but as labour,
13 and they were a crucially important part of the
14 labour force in the early industrial fishery.
15 Their labour was essential. Without that labour,
16 there would have been no industrial commercial
17 fishery in British Columbia in the 1870s and early
18 1880s.

19 But when it was only their labour that they
20 had to sell, when there were other sources of
21 labour available, the industrial complex turned to
22 those other sources and native people were left
23 without any recognition beyond this rump of a food
24 fishery of their prior fisheries and an
25 increasingly limited capacity to participate in
26 the industrial commercial fisheries. Not that
27 none did; certainly some did. Many did in the
28 early years and certainly some were able to
29 continue through the 20th Century. But that would
30 be the bounds of their capacity to participate.

31 So I think in broad brush strokes, and in
32 terms of the role of law in defining who has
33 access and when, I think that that's the story
34 that I'm telling here.

35 Q Thank you. I just have one more question. In the
36 interests of time, I'd like to take you to the
37 concluding paragraph of your paper that's found at
38 page 35 and over to 36, which you refer to the
39 laws and policies of the 19th and 20th Centuries
40 which you've just spoken of and then you refer to
41 the constitutional entrenchment of aboriginal
42 treaty rights in 1982. But for the purposes of
43 this commission and Mr. Commissioner, I'm
44 particularly thinking of your role in looking at
45 the sustainability of the fisheries, I'd like to
46 take Dr. Harris to your concluding sentence when
47 you refer to the emerging framework, and by that

1 you're referring to the emerging framework after
2 1982:

3
4 ... must be constructed with knowledge of the
5 history of the fisheries, including prior
6 legal regimes and their effect on fishing
7 communities, if it is to contribute to
8 building sustainable and justly distributed
9 fisheries.

10
11 And I'm wanting you to expand on it, that
12 conclusion, if you may and tell us why you believe
13 that in order to build sustainable and justly-
14 distributed fisheries we need to include the
15 history of the fisheries and their prior legal
16 regimes?

17 A Yeah. So I think there is a great deal more to a
18 well-managed fishery than simply a set of
19 technical or scientific or biological questions. I
20 think that a well-managed fishery is only possible
21 if it's a justly managed fishery. I think for me
22 anyway, a well-managed fishery includes a sense of
23 a fair distribution, of a fair allocation.

24 So when I think of a well-managed fishery, I
25 think of a fishery that is not only sustainable
26 but also just. For me, that's part and parcel of
27 a well-managed fishery. But I think also if we
28 think of a well-managed fishery solely in terms of
29 technical or scientific or biological terms, that
30 -- and this is a somewhat more instrumental view,
31 fisheries are notoriously difficult to manage,
32 particularly in a territory like British Columbia.
33 Its vast extent. That a well-managed fishery is
34 only possible with a participation of the
35 communities that are doing the fishing, that are
36 living in the territories where the fish are being
37 caught, that are participating in the fishery. I
38 think -- I think that to try and construct a well-
39 managed fishery without the participation of the
40 fishing communities is a flawed undertaking, and
41 that that participation is only going to come or
42 at least is going to come much more fully if those
43 fishing communities believe that the fisheries
44 have been justly distributed and that they have an
45 appropriate role in the governance and management
46 of the fishery.

47 And I think most of my work has revolved

1 around what I see as a significant historical
2 injustice which has been the restricted access
3 that aboriginal peoples have had to the fisheries
4 that they used and managed before the rest of us
5 arrived in this territory. I think the injustice
6 is a function of a failure of the Canadian State
7 to recognize a prior property interest in the
8 fishery.

9 But I don't think that this is the only
10 access of injustice. As I look through the
11 historical record, the Japanese fishers were
12 targets of extensive racism, a transparently
13 racist policy tried to keep the Japanese
14 communities out of the fishery. And this sense of
15 injustice doesn't only cleave along ethnic lines,
16 as well. I know that various gear types have been
17 very upset about the result of the renegotiation
18 of the Pacific Salmon Treaty.

19 So I think, although my work has been focused
20 on the injustice that's been perpetrated on
21 aboriginal peoples, it's not the only form. But I
22 think it goes to my larger point, which is that a
23 well-managed fishery is only possible if it's a
24 just fishery and to the extent that I've been able
25 to do this work, what's motivated me, I guess, is
26 my sense that understanding the historical and the
27 legal background to what is still very much a
28 contemporary, a current conflict over fish, is
29 part of a process of coming to - we may not ever
30 reach it, but we can always be trying to reach it
31 - of a just allocation in the fishery.

32 So I think that's what I'm trying to point to
33 in this last sentence.

34 Q Thank you. And just one final follow-up question
35 on that. When you refer to the including prior
36 legal regimes, were you referring both to the
37 colonial and to the aboriginal legal regimes and
38 the benefit of having the benefit of the
39 aboriginal legal regimes in the management of the
40 fishery?

41 A Yes. So that the prior legal regimes is -- yes, a
42 nod to the fact that the fisheries weren't simply
43 an open access resource prior to the arrival of
44 Europeans, that these were -- that these were
45 owned and managed and that that ownership and
46 management may have important lessons for the
47 modern management of the fishery.

1 MS. GAERTNER: I think those are all my questions, Mr.
2 Commissioner, and I've managed to keep well within
3 my time.

4 THE COMMISSIONER: Thank you, Ms. Gaertner.
5 Mr. Robbins?

6 MR. ROBBINS: Mr. Commissioner, before the next counsel
7 proceeds, I just wanted to attend to an oversight
8 on my part in the previous examination of Dr.
9 Harris. There was a document that did not get
10 exhibited. It was the map of May 7th, 1869,
11 document 27 on the Western Central Coast Salish
12 list of documents on which the Cowichan Village
13 was identified on the main arm of the river. If
14 we could have that exhibited, I'd be grateful.

15 THE REGISTRAR: Marked as Exhibit 1161.

16 MR. ROBBINS: Thank you.

17

18 EXHIBIT 1161: Map dated May 7, 1869

19

20 THE COMMISSIONER: Thank you, Mr. Robbins. Mr.
21 Dickson?

22 MR. DICKSON: Yes, Mr. Commissioner, it's Tim Dickson
23 for the Sto:lo Tribal Council and the Cheam Indian
24 Band. And I've been allotted 25 minutes.

25

26 CROSS-EXAMINATION BY MR. DICKSON:

27

28 Q Professor Harris, in your report you state that
29 the food fishery must be understood as a legal
30 construct and you discuss that concept at some
31 length in your report. And I'd like to take you
32 to another of your papers and that's your Arctic
33 Law Review paper which Mr. Lunn has been --
34 admitted as Exhibit 1150. And I'd like to take
35 you specifically to page 99 of that article and
36 that's page 18 electronically, Mr. Lunn.

37 We've gone to this page already in this
38 article, Professor Harris. Mr. Harvey was asking
39 you questions about it. And on this page you set
40 out two main criticisms of the limitation of a
41 constitutional right to fish to the food fishery.
42 And the first is again that it is a legal
43 construct and you say there that it, quote:

44

45 ... should not be understood to provide an
46 accurate description of the Aboriginal
47 fisheries at some point in the past.

1 And indeed, you've testified a number of times
2 today that the purpose of that construct, if I
3 understand it, was to minimize the aboriginal
4 fishery and to contain it to a small fragment of
5 its prior scope; is that a fair summary?

6 A Yes.

7 Q And then you say in this first paragraph on this
8 page further:

9

10 Fish were crucially important as food in many
11 Aboriginal societies in North America, but
12 also facilitated the accumulation of wealth.

13

14 And I'm interested in the last portion of that
15 sentence. Could you give the commissioner a bit
16 more of a sense of what you mean by that phrase,
17 that fish also facilitated the accumulation of
18 wealth?

19 A So fish, and salmon in particular, were the single
20 most important -- or was the single most important
21 resource in the territory for aboriginal peoples,
22 and this territory supported as large and as dense
23 a pre-industrial non-agrarian population as
24 existed anywhere in the world. There was a
25 remarkable -- well, a remarkably dense
26 sophisticated political society here that was
27 built around the fishery, and a society that
28 included a social hierarchy with nobility at the
29 top and slaves at the bottom; a hierarchy that
30 allowed for an enormous cultural production, a
31 society rather that allowed for enormous cultural
32 production.

33

34 All of this was made possible because
35 aboriginal people and the cultures that they built
36 were specialists in the catching and processing of
37 fish. These weren't hunter gatherer societies as
38 understood hunter gatherer societies on the
39 plains. They were sedentary, established
40 political communities and again, no one quite
41 knows how many people lived here, but in the
42 territory that is now British Columbia the
43 estimates are that there were between two hundred
44 and 400,000 people living here. It was well into
45 the 20th Century before we get back to that
46 number, a population that was decimated by exotic
47 diseases, by smallpox, by measles, by venereal
disease.

1 There was this society, dense population,
2 that existed prior to contact that was built
3 around the fishery and I guess in longer form,
4 that's what I'm trying to say with this sentence.

5 Q And in that testimony that you've just given
6 there, that's based on anthropological,
7 archaeological social science literature, is it?

8 A Yes.

9 Q And perhaps you could give the commissioner some
10 sense of the scope of that literature. I mean, is
11 it -- do we have many, many anthropologists,
12 archaeologists writing in this field?

13 A So the secondary record is increasingly voluminous
14 and anthropologists, archaeologists,
15 ethnographers, historians.

16 Q And in the middle of this first paragraph on page
17 99, you go on to make the point that you do in
18 your report that the food fishery emerged as a way
19 of setting aside a small proportion of the
20 fisheries for aboriginal peoples and you say it's
21 part of a colonial history of dispossession. And
22 you've spoken more about that with Ms. Gaertner.
23 And just a corollary of that, I suppose, is that
24 much of the regulation of aboriginal fishing has
25 not been driven by conservation, I take it, but
26 rather by this motivation to consign aboriginal
27 fishing to the margins; is that a fair statement?

28 A So I think conservation has been an important
29 thread through much of the Department of Fisheries
30 management of the fishery, but I think the
31 question of conservation always has to be followed
32 by another question which is for whom. Right?
33 For whom are fish being conserved. And I think
34 the food fishery was part of a legal apparatus
35 that was -- that was reallocating fish and
36 reallocating fish to an industrial commercial
37 fishery. And the food fisheries is part, and I
38 think an important part, so this was the way in
39 which a prior aboriginal fishery was confined or
40 consigned to the margins.

41 Q And then your second criticism is down the page a
42 bit and that is that the food fishery construct
43 complicates fisheries management. It poses a
44 difficulty, I think, for the efficacy of fisheries
45 management, because it requires regulation not
46 just of the act of fishing but also of the uses of
47 the fish that are caught, as you say. And you

1 state that this second layer of regulation is
2 difficult, intrusive and a source of considerable
3 antagonism between aboriginal peoples and the
4 federal government. And you've spoken of this a
5 little bit with Mr. Harvey, but I just wondered
6 whether you had any elaboration that you could
7 provide on those -- on your statements there that
8 it's difficult, intrusive and the source of
9 considerable antagonism?

10 A So I guess I'm trying to do two things here, which
11 is to say first we have now after *Sparrow*, a
12 constitutional priority for a food, social and
13 ceremonial fishery that is an important category
14 in Canadian aboriginal law. What I'm doing here
15 is trying to raise some caution. Yes, it's an
16 important category. We need to work within it at
17 the moment, but it's a category that has a
18 particular colonial history and that's what I'm
19 trying to reveal. And so if it is a category that
20 we want to continue to use, we need to do so with
21 the awareness of the role that this category
22 performed in the past. We need to be cautious
23 about using it moving forward.

24 And my second point is really the problems
25 that defining rights in terms of the use of fish
26 poses for the management of the fishery, which is
27 that managing a fishery is a difficult enough task
28 without also having to manage the uses of fish.
29 And so rights that are framed in terms of food
30 fish or even rights that are framed in terms of a
31 moderate livelihood are both rights that require
32 not only the regulation of the act of catching,
33 but also the act -- but also the using of fish.
34 And it's that second layer of regulation on top of
35 the first, the regulation of the catching of fish,
36 that I think is particularly problematic, that is
37 intrusive, that requires a level of surveillance
38 of people's lives, and is just enormously
39 difficult. And so it complicates the management
40 of the fisheries significantly.

41 Q And a further consideration in that vein is one
42 that you point out in the middle of that
43 paragraph, you say:

44
45 Moreover, so far as conservation is
46 concerned, it makes no difference whether the
47 fish are caught for food or for sale.

1 And I take it you mean there that once a fish is
2 caught, what is done with it does not raise a
3 direct conservation concern, is it?

4 A That's correct.

5 Q Is that fair? And I'd like to see if you'll agree
6 that there might be a third problem with the food
7 fishery construct, which is that there are avenues
8 to achieving constitutional protection for more
9 than just use for food, social and ceremonial
10 purposes and that's litigation and treaty. But
11 these are difficult and often impracticable
12 options. Do you agree and could you elaborate?

13 A So to establish an aboriginal right to a
14 commercial fishery has proven to be exceptionally
15 difficult. Until very recently the Heiltsuk on
16 the Central Coast were the one community who was
17 able to establish an aboriginal right to a
18 commercial fishery. More recently the Ahousaht
19 have been able to establish an aboriginal right to
20 a commercial fishery. But in many years of
21 litigation and in many years of treaty
22 negotiation, those are the only examples of
23 constitutionally-protected rights to commercial
24 fisheries, the one exception being that the
25 Nisga'a have in their treaty a right to a fishery
26 and it's not defined as a food fishery.

27 So, yes, I think it has been difficult to use
28 what I would describe as the general category. A
29 right to fish commercially is in effect a general
30 category. The fish can be used for whatever
31 purpose. It's not an allocation that's defined in
32 terms of the use of fish. It's simply an
33 allocation.

34 Q I want to turn now, if I can, to some questions
35 revolving around co-management. And you've
36 indicated that you read and use anthropological,
37 archaeological, ethnographical resources,
38 secondary literature in your work. Can you tell
39 us whether there is a body of social science
40 literature that demonstrates, shows, points to,
41 historical pre-contact practices of First Nations
42 in managing salmon stocks as part of their
43 fisheries?

44 A Yes.

45 Q And could you give us a sense of the scope of that
46 literature and the -- and perhaps the scope of the
47 management practices that it points to?

1 A So there's a growing literature often produced
2 within the frame of traditional ecological
3 knowledge, TEK as it's known, which has and is and
4 increasingly has documented the ways in which
5 aboriginal people or indigenous communities or
6 traditional communities have known about their
7 territories, have known and interacted with
8 resources and how that body of knowledge has been
9 used to manage those resources. Again, the
10 starting point is that these fisheries or these
11 other resources were managed resources, that it
12 wasn't simply a community using or exploiting a
13 resource willy-nilly, but rather making very
14 conscious and particular decisions about when fish
15 would be caught, how many, at what times and so
16 on.

17 Now, there's I think significant evidence -
18 in my example on the Cowichan, for example, is a
19 good example of management at the scale of a river
20 system. A single weir has the capacity to fish
21 out the Cowichan river. In any single year, 15 to
22 20 weirs might have been operating. That level of
23 fishing technology can only operate if there is a
24 management regime.

25 Now, is it a management regime that we would
26 recognize as a modern management regime? Probably
27 not. Certainly on the scale of a river system
28 like the Fraser was there a management regime, a
29 self-conscious management regime that operated to
30 allocate fish, almost certainly not.

31 But were there cultural practices, were there
32 reciprocal responsibilities between the human and
33 natural world? Were there ways of living with
34 that natural world that had evolved over
35 millennia, that contributed to the effective
36 management of the resource so that people could
37 continue to use it and sustain themselves in this
38 place, I think the evidence is strong and
39 unequivocal that yes, that was the case.

40 Q Thank you. And Mr. Lunn, if you could bring up
41 Tab 16 from the Sto:lo list of documents, please.
42 Professor, this is an article by Campbell and
43 Butler, Archaeological Evidence for Resilience of
44 Pacific Northwest Salmon Populations and the
45 Socioecological System over the Last 7500 Years.
46 And can you just identify this as one article in
47 that social science literature which you were just

1 speaking to?

2 A Yes. So I'm not an archaeologist or an
3 anthropologist but this is one among the type of
4 resources that are -- or secondary literature that
5 I know and have used, yes.

6 MR. DICKSON: And I'd ask that be marked as the next
7 exhibit please.

8 THE REGISTRAR: Exhibit 1162.

9

10 EXHIBIT 1162: Archaeological Evidence for
11 Resilience of Pacific Northwest Salmon
12 Populations and the Socioecological System
13 over the Last 7500 Years by Campbell and
14 Butler

15

16 MR. DICKSON:

17 Q I now want to turn to another of your articles and
18 that's the Boldt Decision in Canada and it's
19 document number 1 on our list, Mr. Lunn. This is
20 your article, is it, Professor?

21 A Yes.

22 MR. DICKSON: And I'd just ask that that be entered as
23 the next exhibit.

24 THE REGISTRAR: 1163.

25

26 EXHIBIT 1163: The Boldt Decision in Canada

27

28 MR. DICKSON:

29 Q And in this paper you discuss the influence of the
30 Boldt decision, the American Washington State
31 based Boldt decision on Canadian case law. And
32 the Boldt decision involved the interpretation of
33 treaties in Washington with Washington tribes
34 called the Stevens Treaties and as I understand
35 substantively it had two main elements: first, an
36 allocation element; and second, a right of
37 management. And could you just give a brief
38 description of those two elements if you can?

39 A So that the Boldt decision as counsel suggested
40 involved an interpretation of the Stevens
41 Treaties. The Stevens Treaties were
42 contemporaries of the Douglas Treaties. They were
43 concluded in the mid-1850s. And the treaties
44 included a fisheries provision, a right to fish in
45 common was the language, instead of fisheries as
46 formerly to fishing in common. And in the late
47 1960s and early 1970s the federal government in

1 the U.S. and a number of the treaty tribes
2 together sued the State of Washington for its
3 failure to honour the treaty terms, an interesting
4 -- in the Canadian context, an interesting example
5 of the federal government suing a state government
6 for its failure to honour treaty obligations.

7 And Judge Boldt in the decision and later
8 confirmed by the U.S. Supreme Court, determined
9 that the fishery would be divided in two, that the
10 right to fish in common meant that not that
11 aboriginal people had the same rights to
12 participate in the fishery as everybody else did.
13 That was making a mockery of a treaty right. But
14 rather, that they had a right to 50 percent of the
15 catch. Non-aboriginal fishers had a right to the
16 other 50 percent of the catch. And that the
17 aboriginal fishers had a right to manage their 50
18 percent of the catch.

19 The decision at the Supreme Court, the U.S.
20 Supreme Court level, is modified a little bit so
21 that the 50 percent is not -- the fishery is
22 divided in two, but that aboriginal tribes have a
23 right up to 50 percent, up to 50 percent in
24 support of a moderate livelihood. And that's
25 incidentally where the moderate livelihood
26 language comes from in the interpretation of later
27 treaties in Canada.

28 But the decision at its core divided the
29 fishery in two - 50 percent to aboriginal fishers,
30 50 percent to non-aboriginal fishers and divided
31 the management of the fishery in two, that each
32 was responsible for the management of their share.

33 Q Thank you, Professor. And this morning, in answer
34 to one of Mr. Harvey's question I believe you
35 testified that your view is that the simplest
36 model for allocating fish is a better regime. I
37 think you said that you favour an approach that
38 allocates a certain amount of tuck to First
39 Nations coupled with a right to manage the
40 resource. I think you said that this represents a
41 more effective approach than does a food fishery
42 construct; do you recall that?

43 A Yes. And this is, I guess, a reiteration of what
44 I said earlier, but I think that a simple
45 definition of the right is preferable to one
46 that's defined in terms of use. Defining rights
47 in terms of use creates a whole set of secondary

1 problems that the simplest articulation of the
2 right is the better. And the Boldt decision is
3 one example of a simple articulation of the right
4 that a fishery needs to be divided in two. And I
5 guess my point about a simple articulation of the
6 right about the problems that a food fishery
7 creates is not to suggest that the fisheries
8 should be exclusively aboriginal. That's not the
9 point I'm trying to make. The point I'm trying to
10 make is that the definition of the right, if it's
11 to contribute to an effective management regime,
12 ought to be a simple one that the right to the
13 fish ought to be defined in terms of a bright
14 line. And how the fish are used should be up to
15 the communities for whom the allocation is held.

16 Q Thank you. And in Washington State I understand
17 that the tribes have established the Northwest
18 Indian Fisheries Commission in relation to the
19 management of the fisheries. I understand that it
20 provides technical support to the tribes and the
21 management of the fisheries but that the right of
22 management remains with the tribes. Is that your
23 broad understanding?

24 A Yes.

25 MR. DICKSON: Mr. Lunn, if you could pull up our
26 document number 2, please. This is just a print-
27 out, a web page from the website of the Northwest
28 Indian Fisheries Commission, just the general
29 "about us" page. I don't know that you can
30 identify it, but may I have it entered as the next
31 exhibit?

32 THE REGISTRAR: Exhibit number 1163.

33 MR. DICKSON: Thank you. And document number 3,
34 please, Mr. Lunn? This is the Northwest Indian
35 Fisheries 2011 annual report and if I could have
36 that entered as the next exhibit?

37 THE REGISTRAR: I'm sorry, I just misquoted that last
38 one. It should be 1164.

39 MR. DICKSON: Yes.

40
41 EXHIBIT 1164: Northwest Indian Fisheries
42 Commission "About Us" page
43

44 THE REGISTRAR: And Tab 3 will be 1165.

45
46 EXHIBIT 1165: Northwest Indian Fisheries
47 2011 annual report

1 MR. DICKSON: Thank you, Mr. Registrar.

2 Q Last, in my remaining time, I'd just like to take
3 you to document 4 on our revised list and this is
4 Reuben Ware's Five Issues Five Battlegrounds and
5 are you familiar with this text, Professor?

6 A Yes, I am.

7 Q And what is your view of Mr. Ware's research and
8 his work in general in this text?

9 A So Reuben Ware was one of the first to get into
10 the archival and the legal record on the
11 regulation of the fishery and it's really his
12 work, I think, where I first came across this idea
13 of the food fishery as a legal construct. I think
14 this was an opening up of an archival repository
15 and of a way of thinking about the fishery and the
16 regulation of the fishery that was important in
17 its day.

18 Q And if you could give the commissioner a sense of
19 your view of the quality of the work?

20 A I think it's very strong.

21 MR. DICKSON: And I'd ask that that be entered as the
22 next exhibit, please.

23 THE REGISTRAR: Exhibit 1166.

24
25 EXHIBIT 1166: Five Issues Five Battlegrounds
26 by Reuben Ware
27

28 MR. DICKSON:

29 Q And then, Mr. Lunn, I'd like to go to electronic
30 page 37, if I could, just for my last question.
31 And in the second paragraph here, Mr. Ware is
32 asserting that the fact that Indian food fishing
33 was set up in the **Fisheries Act Regulations** is
34 being at the permission of the minister, and that
35 the minister could change the terms of that
36 fishing, is, quote:

37
38 ...the root of the protracted struggle since
39 the 1880s to protect Indian fishing rights.
40

41 Is that a statement with which you would agree and
42 perhaps you could explain why, if you do?

43 A Well, so I think what he's saying here is that
44 what's at the root is -- of a protracted struggle,
45 what's at the root of a conflict is the perception
46 within the Department of Fisheries that the Indian
47 food fishery was one that it had the privilege of

1 permitting or withholding and that was very much
2 at odds with the perception of aboriginal peoples
3 who understood their access to the fisheries based
4 not on permission being granted from the Crown but
5 rather a product of their long history in this
6 territory and their long use of the resource. I
7 think that's what's really at conflict here is a
8 sense of either a Crown-granted right or of a
9 privilege and of an inherent right.

10 MR. DICKSON: Thank you, Professor. Those are my
11 questions.

12 MR. MCGOWAN: Might be an appropriate time for the
13 break.

14 THE REGISTRAR: We will now recess for ten minutes.

15

16 (PROCEEDINGS ADJOURNED FOR AFTERNOON RECESS)

17 (PROCEEDINGS RECONVENED)

18

19 MR. DONOVAN: Mr. Commissioner, Allan Donovan for the
20 Laich-kwil-tach Treaty Society. The Laich-kwil-
21 tach Treaty Society is comprised of Weiwaikum,
22 Wewaikai and Kwiakah, up in the Eastern Vancouver
23 Island-Johnston Strait area.

24

25 CROSS-EXAMINATION BY MR. DONOVAN:

26

27 Q If we could go to our Tab 1, which was exhibit for
28 identification R2. Professor Harris, this is the
29 report from the Government of British Columbia on
30 the subject of Indian Reserves dated August 1875,
31 and that's a document you're familiar with?

32 A Yes.

33 MR. DONOVAN: Could we have that marked as the next
34 exhibit, please. And if we turn to a portion of
35 that article at -- it's about six pages in, it's
36 small Roman numeral iii at the top.

37 THE REGISTRAR: Excuse me, before you go ahead, you're
38 talking about for identification R2, that was for
39 identification?

40 MR. DONOVAN: R2, yes.

41 THE REGISTRAR: Okay. That will be now marked as
42 Exhibit number 1167.

43

44 EXHIBIT 1167: Report of the Government of
45 British Columbia on the Subject of Indian
46 Reserves (formerly marked as R2 for
47 identification)

1 MR. DONOVAN: Thank you.

2 Q So, Professor Harris, at the bottom of -- towards
3 the bottom of this page, small Roman numeral iii,
4 the report says:

5
6 In order to deal intelligently with the
7 subject of Reserves it appears desirable that
8 the habits and pursuits of our natives should
9 be duly considered, with a view of
10 determining some general principles upon
11 which in future a fair distribution of public
12 lands may be based.

13
14 And turning the page, the report states that:

15
16 Apart from tribal divisions and differences
17 of dialect, the Indians may be divided into
18 three classes: -

- 19
20 1. Fishermen and hunters;
21
22 2. Stock-breeders, and farmers on a
23 small scale;
24
25 3. Labourers.

26
27 The first class materially constitutes a very
28 large proportion of the Indian population.
29 It includes about 30,000 "Coast Indians", who
30 live on the seaboard, besides two or three
31 thousand Indians who live in the interior and
32 in the southern parts of the Province.

33
34 So is this the type of policy that you are saying
35 informed the reserve creation process?

36 A Yes, I am. This document was a document produced
37 by or written by the Attorney General for the
38 Province of British Columbia in the context of
39 negotiations with the federal government over
40 exactly how the questions of Aboriginal title or
41 reserve land would be dealt with in British
42 Columbia. And here the Attorney General is
43 setting out the Province's position, and yes, I
44 think it's clear that the Attorney General is
45 recognizing that the fisheries are crucially
46 important.

47 Q Thank you. And dropping down a few lines, the

1 document states:
2

3 The long experience and acquired skill of
4 both fishermen and hunters might instead be
5 diverted to other purposes, be turned to
6 excellent account by qualified Indian Agents
7 resident amongst them. No good reason exists
8 why "Fisheries", such as those established by
9 our merchants on Fraser River for curing and
10 exporting salmon, and other merchantable
11 fish, should not be erected in suitable
12 places for the benefit of the Indians, and
13 be...profitably controlled and conducted by
14 themselves.
15

16 So essentially a recognition of the involvement of
17 Indians in the commercial fishery and a suggestion
18 of why it's good to continue that?

19 A Yes, and I might even go further. So again this
20 document is part of the negotiations between the
21 federal and provincial government over how to deal
22 with the question of Aboriginal title and how
23 extensive reserves should be. The federal
24 government at this time is negotiating treaties
25 with tribes across the prairies. The province is
26 refusing any notion of treaties in British
27 Columbia. The federal government is allocating 80
28 acres per family on the prairies. In British
29 Columbia the province wants to allocate ten acres
30 per family. And here it's attempting to justify a
31 small reserve allotment on the grounds that
32 Aboriginal peoples are fishing peoples.

33 And what's interesting further here, is that
34 that last sentence that you read is that the
35 provincial government is suggesting not only that
36 they should be able to participate in the fishery,
37 presumably as commercial fishers, but also that
38 they, the sentence:
39

40 No good reason exists why "Fisheries", such
41 as those established by our merchants on
42 Fraser River for curing and exporting salmon,
43 and other merchantable fish, should not be
44 erected in suitable places for the benefit of
45 the Indians,...

46
47 Also suggesting not only that they be involved in

1 the act of catching, but also that they be -- that
2 they have access to the capital necessary for
3 creating canneries, processing fish.

4 Q Thank you. Now, the next document I'd like to
5 refer to is at our Tab 2, which is a letter from
6 Indian Reserve Commissioner Powell to the
7 Superintendent General of Indian Affairs. Is that
8 a document you're familiar with, as well,
9 Professor Harris?

10 A Yes.

11 MR. DONOVAN: And could I have that marked as the next
12 exhibit, please.

13 MR. DONOVAN: That document formerly for identification
14 as R3 will now be marked as Exhibit 1168.

15
16 EXHIBIT 1168: Sessional Papers No. 9, Report
17 of the Deputy Superintendent General of
18 Indian Affairs, excerpt (formerly marked as
19 R3 for identification)
20

21 MR. DONOVAN: Thank you.

22 Q So on the second page of that document, on the
23 third full paragraph, the document states:

24
25 They earn very little for, and their
26 knowledge of agriculture, is exceedingly
27 limited. Indeed, their facilities for
28 obtaining support, and even plenty, from
29 other and more profitable means are so great,
30 and the extent of cultivable land is so
31 limited, that Nature has furnished these rude
32 savages --
33

34 - in the words of the document -
35

36 -- with every requisite to take them what
37 they really are, "Toilers of the Sea", and
38 happily so -- for placed where they are, they
39 can never become tillers of the soil.
40

41 Is that reflective of the general policy?

42 A So this is -- the author here is I.W. Powell, who
43 was the first Indian Commissioner in British
44 Columbia, reporting back to the Department of
45 Indian Affairs in Ottawa, and, yes, I think this
46 also reflects a sense that Aboriginal people in
47 British Columbia are primarily a fishing people,

1 and not farmers. Although I think he probably
2 downplays the extent of knowledge of agriculture.
3 It's the agriculture that's being practised here
4 is not one that he's recognizing as agriculture.
5 I think he may be downplaying that. But the basic
6 sentiment that these are primarily a fishing
7 people is one that was widely held among colonial
8 officials, yes.

9 Q This would be the Coastal Indians and the Indians
10 on the Fraser would be the -- what Canada and B.C.
11 conceived as the ones completely dependent on
12 fishing.

13 A And along the other major rivers of the Interior.

14 Q Right, thank you. Okay. The next document is our
15 Tab 3, which is an Annual Report from the
16 Department of the Interior for the year dated June
17 30, 1876. And is that a document you're familiar
18 with, Professor Harris?

19 A It's one among a number that I'm familiar with.
20 I'm not sure who the author of this particular
21 report is. The Department of the Interior, as
22 with the other Departments, did receive an annual
23 report, and this looks to be --

24 Q Thank you.

25 A -- the one from 1876.

26 MR. DONOVAN: Could we have that marked as the next
27 exhibit, please.

28 THE REGISTRAR: Former document for identification R4
29 will now be marked as Exhibit number 1169.

30

31 EXHIBIT 1169: Annual Report of the
32 Department of the Interior, June 30, 1876,
33 excerpt (formerly marked as R4 for
34 identification)

35

36 MR. DONOVAN: Thank you.

37 A And I should just add that the Department, that
38 the Bureau of Indian Affairs was within the
39 Department of the Interior.

40 Q Thank you. So on the first page of that towards
41 the end of the fourth paragraph, it's talking
42 about the three Commissioners, the three joint
43 Reserve Commissioners at that point, that:

44

45 They were to have special regard to the
46 habits, wants and pursuits of each Indian
47 nation, to the amount of territory available

1 in the country occupied by them, as well as
2 to the claims of the White population.
3

4 Now, in the case of the Coastal First Nations, the
5 habits and pursuits, or at least one of the
6 important ones that they'd be considering would be
7 the livelihood of fishing; is that correct?

8 A That's correct.

9 Q And over on the next page, just below the middle:

10
11 The Commissioners were, moreover, warned
12 against making any attempt to cause any
13 violent or sudden change in the habits of the
14 Indians, or to divert them from any
15 legitimate pursuits and occupations in which
16 they might be profitably engaged, but rather
17 to encourage them in any branch of industry
18 in which they were employed.
19

20 This was the sentiment that justified the rather
21 small Indian reserves granted up and down the
22 Coast?

23 A Yes, and so again, as context, what this document
24 is reviewing are the instructions that were
25 provided to the Joint Indian Reserve
26 Commissioners, and the Joint Indian Reserve
27 Commission was the body established by the
28 province and the federal government in 1876 to
29 tour the province, and to allot reserves. it was a
30 compromise that the province and the federal
31 government entered into to resolve the land
32 question in British Columbia.

33 Q Thank you. The next document is our Tab 4, and
34 this is a memorandum of Instructions to the
35 Dominion Commissioner on the British Columbia
36 Indian Land Question, dated 25th of August, 1876.
37 So, Dr. Harris, this is the -- these are the
38 directions of the Federal Commissioner?

39 A Yes.

40 MR. DONOVAN: And could we have that marked as the next
41 exhibit, please.

42 THE REGISTRAR: Document marked as for identification
43 R5 now will be marked as Exhibit number 1170.
44
45
46
47

1 EXHIBIT 1170: Memorandum of Instructions to
2 the Dominion Commissioner on the British
3 Columbia Indian Land Question, August 26,
4 1876 (formerly marked as R5 for
5 identification)
6

7 MR. DONOVAN: Thank you.

8 Q And the document indicates the same preoccupation
9 with protecting village sites, hunting sites and
10 fishing sites, in order not to disturb the Indians
11 from their traditional occupations; is that
12 correct? I'm looking in particular at the middle
13 of the second page.

14 A Yes, and especially not to disturb the Indians in
15 possession of any villages, fishing stations for
16 trading posts, and so on. Yes.

17 Q Thank you. Now, for completeness I just would
18 like to mark our next exhibit, which is our Tab 5,
19 and that's the instructions to the Provincial
20 Reserve Commissioner, dated October 23, 1876. So
21 this was the counterpart to the Federal
22 Commissioner on the Joint Reserve Commission; is
23 that correct, Dr. Harris?

24 A No. So Gilbert Malcolm Sproat was the Joint
25 Commissioner, so --

26 Q Okay. This was the joint, yes.

27 A So the first set of instructions is to A.C.
28 Anderson, the Federal Commissioner, a fellow named
29 McKinley was the Provincial Commissioner and
30 Gilbert Malcolm Sproat was the one jointly
31 appointed by the Province and the Dominion.

32 Q So this document is the set of instructions to the
33 Joint Commissioner.

34 A Yes.

35 MR. DONOVAN: Okay. could we have that marked as the
36 next exhibit, please.

37 THE REGISTRAR: The document formerly marked as R6 for
38 identification will now be marked as Exhibit 1171.
39

40 EXHIBIT 1171: Instructions to Sproat Issued
41 by Provincial Secretary, October 23, 1876
42 (formerly marked as R6 for identification)
43

44 MR. DONOVAN:

45 Q After the Joint Reserve Commission wrapped up its
46 work, British Columbia proceeded to a sole Reserve
47 Commissioner, first Gilbert Sproat, and then onto

1 O'Reilly, is that your understanding of it?

2 A That's correct.

3 Q And if we could turn to the next document, which
4 is our Tab number 6. And looking at this,
5 Professor Harris, these are the Minutes of
6 Decision and covering letter for the reserves
7 allotted to the First Nations that comprise our
8 client, Laich-Kwil-Tach First Nations. So right
9 at the top of the letter he says:

10
11 I have the honor to inform you that I visited
12 the Laich-quil-tach, (or Eu-claw-taw)
13 tribe...
14

15 And the tribe was divided into four bands at that
16 time, "Kah-kah-mat-sis", "We-way-a-kum", "Kwe-ah-
17 kah", and "We-way-a-kay". So is that a document
18 you're familiar with?

19 A Yes.

20 MR. DONOVAN: Could we have that one marked as an
21 exhibit, as well, please.

22 THE REGISTRAR: For identification document R9 will now
23 be marked as Exhibit number 1172.
24

25 EXHIBIT 1172: Minutes of Decision and
26 covering letter for the reserves allotted to
27 Laich-Kwil-Tach (formerly marked as R9 for
28 identification)
29

30 MR. DONOVAN:

31 Q Okay. Professor Harris, towards the bottom of the
32 first page, Commissioner O'Reilly says:
33

34 They have made no effort to cultivate, nor is
35 there much to tempt them to do so, as the
36 country they inhabit is, for the most part,
37 worthless; and though a small portion might
38 be made productive, it cannot be done without
39 a great expenditure of labor.
40

41 Then dropping down a bit he notes that he's talked
42 to some of the First Nations member assembled:
43

44 ...and I pointed out to them the advantages
45 they would derive from having lands so set
46 apart, which would virtually give them the
47 control of their fisheries.

1 So without getting into the question that was
2 canvassed repeatedly this morning about exclusive
3 fisheries, is this the more of the general
4 practice, land that's relatively worthless, but
5 made acceptable as reserves because of its
6 significant connection with the livelihood of
7 fishing.

8 A Yes. And you see language like this all through
9 the records of the Reserve Commission, "barren
10 outcropping useful only as a camping site en route
11 to a fishery", "rocky outcropping useful only for
12 fishing purposes", this is again and again in
13 the --

14 Q Throughout the record.

15 A -- record of the Reserve Commission, and this is
16 -- this is typical.

17 Q Thank you. And in the document he lists ten
18 reserves. I see that the first one he says:

19
20 ...is capable of producing an immense supply
21 of that fish.

22
23 The reserve being Salmon River. And then the next
24 one:

25
26 The land is very worthless, but the stream
27 which flows through it supplies several
28 families with salmon...

29
30 And the next one:

31
32 ...a limited supply of fish...

33
34 And so on, through these -- through the document.
35 Is that typical, as well, on the Coast?

36 A Yes.

37 Q And some of these, like IR No. 10, number 10
38 Reserve, is the reserve that they have their
39 winter village on. Now, fish is not explicitly
40 mentioned there. Could that be one of the
41 reasons, though, that the First Nation asked for
42 it?

43 A Yes. There's a number of examples in the
44 historical record where a fishery is clearly an
45 important part of the local economy where a
46 reserve is being allocated, but that fish are not
47 made mention of in the allotment of the reserve.

1 So this is true, take for example, the Cowichan,
2 the large Cowichan Reserve at Duncan. So there's
3 no mention of that as being allocated for fishing
4 purposes. That's where the major winter village
5 sites are. But there were fish weirs in the
6 Cowichan River all along that reserve.

7 Same with Heiltsuk territory, the Bella
8 Bella. The village site at Bella Bella, there's
9 no mention of fishing in the allotment of that
10 particular reserve, but clearly part of a network
11 of other reserves that are being allocated to
12 secure access to fish.

13 Q Now, in your report at page 42, there's a map of
14 Vancouver Island and the West Coast of the
15 Mainland. I wonder if we could have a look at
16 that one. And is -- if I'm correct about this,
17 the reserves you marked on there aren't the only
18 reserves allotted, but they're the ones that have
19 a connection noted in the Minutes of Decision to
20 fishing?

21 A Almost. So these are only reserves that were
22 explicitly allotted for a fishing purpose, and
23 that purpose may be reflected in the Field Minutes
24 or the Minutes of Decision, or the maps that the
25 Reserve Commissioners made when they were
26 travelling about the province, allocating
27 reserves. Or a reference to fisheries appears in
28 the Report of the Royal Commission on Indian
29 Affairs to the Province of British Columbia in
30 1916. So these are all reserves for which there
31 has been formal recognition by a Reserve
32 Commission of the connection between the land
33 allotted and fish.

34 Q Okay. Could we zoom in just one zap or so to get
35 the upper portion of the map, starting from where
36 it says "Wei Wa Kum" and north, in other words,
37 Campbell River and north to the including Johnston
38 Strait. Yeah, that's perfect. Thank you. So
39 basically we've got these almost a river way of
40 interstices between the islands and the -- and
41 Vancouver Island and the Mainland, the small
42 channels, and there seem to be fisheries -- this
43 is where basically a good deal of the Johnston --
44 or the salmon go, if I'm right. The ones who
45 choose to take the left turn rather than the right
46 turn at the top of the Island. Is that -- is that
47 correct?

1 A Yes, that's my understanding.

2 Q And throughout there we've got -- we've got
3 fisheries sites noted and allotted accordingly.

4 A Yes. So each triangle represents a reserve that's
5 been expressly allotted in connection to a
6 fishery.

7 MR. DONOVAN: Okay, thank you. Now, on the next -- my
8 next tab is Tab 7, and these are excerpts from the
9 Annual -- sorry, Indian Affairs Annual Reports.
10 And I wonder if we could have that marked as the
11 next exhibit.

12 THE REGISTRAR: R10 formerly marked for identification
13 will now be marked as Exhibit 1173.

14
15 EXHIBIT 1173: Indian Affairs Annual Reports,
16 1864-1990, excerpts (formerly marked as R10
17 for identification)

18
19 MR. DONOVAN:

20 Q And a few pages in, Professor Harris, halfway
21 down, Indian Agent Pidcock of the area notes that:

22
23 The Kwahkewlths --

24
25 - of who the Laich-Kwil-Tach are a portion -

26
27 -- with the exception of a few potato patches
28 cultivate no land, but their wealth in canoes
29 and all sorts of fishing gear is considerable
30 and they live altogether on the products of
31 the sea.

32
33 So is that typical of First Nations in this -- in
34 this era in this area? This is mid-1880s.

35 A Yes, and it's certainly a common comment by Indian
36 Affairs officials in this era.

37 MR. DONOVAN: Okay. And the -- if we could go to the
38 next document, because I'm running out the clock
39 here, but on Tab 8. It's another Report from
40 Indian Agent Pidcock of the Kwak-Kewlth Agency,
41 and could I have that one marked as an exhibit,
42 please.

43 THE REGISTRAR: Former document R11 marked for
44 identification will now be marked as Exhibit 1174.

45
46
47

1 EXHIBIT 1174: Dominion of Canada Annual
2 Report of the Department of Indian Affairs,
3 31st December 1887, excerpt (formerly marked
4 as R11 for identification)
5

6 MR. DONOVAN: Okay. And just so I can get, make sure
7 to ask all the questions I wanted to, I'm going to
8 just skip to our Tab number 10, and that's a
9 letter from the Inspector of Indian Agencies to
10 the Supervisor of Fisheries, dated February 17th,
11 1934. Could I have that one marked as an exhibit,
12 as well.

13 THE REGISTRAR: Former document R17 for identification
14 will now be marked as Exhibit number 1175.
15

16 EXHIBIT 1175: Letter from Inspector of
17 Indian Agencies, British Columbia to
18 Supervisor of Fisheries (formerly marked as
19 R17 for identification)
20

21 MR. DONOVAN:

22 Q And I won't take you to that, Professor Harris,
23 but within it there's a reference to the idea of
24 promoting or keeping the Indians in the fishing
25 industry because they can't do much else, given
26 the geography and their small reserves, but also
27 to keep them off of the public purse, as the
28 document put it. Is that a common theme that
29 comes up in the historical documents?

30 A Yes, it is, and so just reading through this
31 document quickly, from an Indian Agent or the
32 Inspector of Indian Agencies, it reflects, I
33 think, much of what was going on within the
34 Department of Indian Affairs, which is a sense we
35 see in the middle of that first big paragraph,
36 there's a reference to the moral right. Indian
37 Affairs has a sense that there is rights, it
38 hasn't characterized them here as legal rights,
39 but that Aboriginal people have rights to the
40 fisheries.

41 There's also a sense that because of the way
42 in which the reserves have been allotted,
43 primarily to secure access to fish, Native people
44 should be secured that access. But then finally
45 the argument that Indian Affairs is a department
46 with budgetary limitations, and that if Native
47 people don't have a way to sustain themselves, the

1 cost of sustaining them is going to fall on the
2 Department of Indian Affairs.

3 And so there's a number of motivations
4 wrapped up in here that reflect some of the
5 thinking within the Department of Indian Affairs.

6 Q I just have two more quick questions, Dr. Harris,
7 and then I'll leave you be. In your report at
8 page 16, you say:

9
10 Whatever the reasons, Aboriginal communities
11 which had once had the fisheries to
12 themselves, and then had dominated the
13 commercial Fraser River sockeye fleet in the
14 early industrial fishery, were, by the 1920s,
15 peripherally engaged in an industry that
16 continued largely without them on the south
17 coast.

18
19 Now, our clients are further to the north in more
20 of the Johnston Strait and eastern Vancouver
21 Island area, and I wonder if you could comment on
22 their -- whether this time period, the 1920s,
23 applies to them, or whether they continued to
24 thrive considerably after that?

25 A So my comment here about the south coast is
26 referring primarily to the gillnet fleet at the
27 mouth of the Fraser River, so that fleet began as
28 an Aboriginal fleet. By the 1920s the Aboriginal
29 presence in that fleet was almost insignificant.
30 But elsewhere on the Coast, really north of the
31 Strait of Georgia, the Aboriginal presence in the
32 commercial fishery lasted much longer. So that
33 Aboriginal fishers are an important part of the
34 industry in Johnston Strait north of through to
35 the mouth of Skeena and Nass much longer.

36 Q Thank you. And my last question is this: to what
37 extent would you say that the conditions that gave
38 rise to the small reserve policy on the coast in
39 the late 1800s, are conditions that are still in
40 play today in 2011?

41 A Well, what were the conditions in the late 19th
42 Century. They were that Aboriginal people were
43 only going to get a small land base, and given the
44 geography of this province, a small land base
45 would only sustain a viable local economy with
46 secure access to the fisheries, and so long as the
47 land base remains small today, that remains the

Douglas Harris

Cross-exam by Mr. Donovan (LJHAH)

Cross-exam by Ms. Song (HTC)

1 case.

2 MR. DONOVAN: Thank you, Mr. Commissioner. Thank you,
3 Professor Harris.

4 MS. SONG: Commissioner, Ming Song for Heiltsuk Tribal
5 Council. I have with me my colleagues, Lisa Fong
6 and Benjamin Ralston.

7 Mr. Lunn, can I please have document number
8 95 and could I please have that entered as an
9 exhibit.

10 THE REGISTRAR: That will be Exhibit 1176.

11

12 EXHIBIT 1176: Bella Coola Agency Detailed
13 Report, Royal Commission on Indian Affairs
14 for the Province of British Columbia, 1913,
15 excerpts
16

16

17 CROSS-EXAMINATION BY MS. SONG:

18

19 Q So Professor Harris, on the screen here we have
20 excerpts of the Bella Coola Agency Final Report
21 dated 1913. And if we could please go to page 3,
22 Mr. Lunn. Oh, you'll have to rotate that. Now,
23 in the top left corner, there's a reference to
24 "Bella Bella" as identified as the tribe or the
25 band. Can you please confirm for me whether or
26 not the Heiltsuk Tribal Council or the Heiltsuk
27 Nation is in a Bella Bella Tribe?

28

A Yes.

29

30 Q Thank you. Now, if you turn to the next page,
31 which is Table C, it shows the "Analysis of
32 "Evidence", of "Population", and if you could move
33 that a little bit more so I can read that,
34 "Population, Social Conditions, Etc." If you
35 notice with the whole list of the reserves that
36 were set aside, the descriptions state that for
37 the majority of them, if not all of them, that
38 they're for fishing and trapping, fishing
39 stations, hunting, trapping, and the majority,
40 except for actually just one, which is a burial
41 ground, was for the purpose of fishing; is that
42 correct?

42

A Yes.

43

44 MS. SONG: Thank you. Mr. Lunn, can you please turn to
45 document number 87, and enter that as an exhibit,
46 as well.

46

THE REGISTRAR: Exhibit 1177.

47

1 EXHIBIT 1177: Harris, Landing Native
2 Fisheries, Indian Reserves and Fishing Rights
3 in British Columbia, 1849-1925, excerpts
4

5 MS. SONG: Thank you.

6 Q Professor Harris, this is certain excerpts of your
7 book, *Landing Native Fisheries*, and if we could
8 please turn to pages 96 and 97, starting with page
9 96, it says, and I refer to the following
10 paragraph, which is the first full paragraph at
11 the bottom:
12

13 Later in August, O'Reilly arrived in Heiltsuk
14 territory on the central coast. His work
15 there provides another good example of what
16 he was doing along the coast. Of the twelve
17 reserves allotted to the Bella Bella
18 (O'Reilly divided the Heiltsuk into Bella
19 Bella and Kokyet), the first secured their --
20

21 - turn to the next page -
22

23 -- principal village site and the others were
24 intended to secure access to salmon, halibut,
25 and seal fisheries.
26

27 What is the source of this information, Professor
28 Harris?

29 A So this is from my review of the records of the
30 Reserve Commissioners. And so this language is
31 from either the Minutes of Decision or the Field
32 Minutes, or the maps that the Reserve Commissioner
33 generated in their work. And so this one was from
34 Peter O'Reilly's visit to Heiltsuk territory.

35 Q Okay, thank you. And would it be safe to say that
36 this is consistent with your conclusion regarding
37 importance of the connection between fisheries and
38 reserve allocations?

39 A Yes.

40 Q Thank you. Now, the next document I'd like to put
41 before you is the exhibit number 1135, and in
42 particular page 3. And this is your paper that
43 you submitted for the Salmon Commission. And so
44 on the second paragraph, second sentence, it says:
45

46 Most reserves in British Columbia, ...
47

1 MR. LUNN: Third paragraph.

2 MS. SONG: Oh, third paragraph. Thank you.

3

4 Most reserves in British Columbia, including
5 many throughout the Fraser River Basin, were
6 allotted to support either the catching or
7 the processing of fish; indeed, these
8 reserves were allotted to secure access to
9 the fisheries.

10

11 Do these findings as you have set out in this
12 paragraph also apply to Heiltsuk?

13 A Yes.

14 Q And what is the basis for your finding? Is it
15 also again the minutes of --

16 A Yes, so the --

17 Q -- field notes and...

18 A -- the page that you just pointed the Commission
19 to from my book, so this general conclusion is
20 derived from my review of the records of the
21 Reserve Commission, the Minutes of Decision, the
22 Field Minutes and the maps, and then from the work
23 of the Royal Commission on Indian Affairs to the
24 Province of British Columbia, which produced that
25 table that you showed earlier. And it's in there
26 that one sees that reserves are being expressly
27 allotted to secure access to the fisheries.

28 Q Thank you. Now, Mr. Lunn, can you please turn to
29 page 24 of that document, and in particular the
30 last paragraph. It states that:

31

32 The Indian food fishery was a legal
33 construction, intended on the one hand to
34 provide some limited protection for
35 Aboriginal fisheries, but, on the other, to
36 contain the impact of a separately designated
37 Aboriginal fishery on the commercial
38 fisheries. In effect, the Indian food
39 fishery --

40

41 - if you could turn to the next page -

42

43 -- performed the same role in the fisheries
44 as the Indian reserve did on land. The
45 intent and effect of these legal instruments
46 was to set aside fragments of traditional
47 territories and fisheries for Aboriginal

1 peoples, opening the remainder to immigrants.

2

3 Do these findings, as you have set out in this
4 paragraph also apply to Heiltsuk?

5

A Yes.

6

Q Thank you. Turning to page 26, and the first full
7 paragraph, I'm just going to -- I'm going to set
8 out this again:

9

10 This unusual Indian-reserve geography is
11 explicable only if one understands the
12 connections between reserved land and the
13 fisheries. Most of the Indian reserves in
14 British Columbia were allotted to secure
15 access to the fisheries. This is
16 particularly evident along the coast and the
17 province's major river systems where the
18 large majority of reserves - for some
19 communities more than 90 percent - were
20 fishing stations. Moreover, to the extent
21 that the Dominion and provincial governments
22 sought to justify the parsimonious land
23 grants, they did so on the grounds that the
24 Aboriginal peoples of British Columbia were
25 fishing peoples who did not need a large land
26 base, only secure access to the fisheries.

27

28 Now, does this finding also apply to Heiltsuk?

29

A Yes, it does. And I should just add that the
30 sentence that's cut off at the top describes the
31 unusual Indian reserve geography, and I think it's
32 worth emphasizing that British Columbia's reserve
33 geography really is highly unusual. There's no
34 other reserve geography like it anywhere in North
35 America. It's many small scattered reserves.
36 There are just over 1,500 of them, that together
37 amounted to one-third of one percent of the land
38 area. So they were postage stamps. How does one
39 understand that reserve geography, which again is
40 unique in North America? Well, my argument, and I
41 think the evidence is pretty clear, that the best
42 way to understand it is that these reserves were
43 really securing access to the fishery first and
44 foremost, that land was almost secondary and that
45 fish were first. And the Heiltsuk are as clear --
46 the reserves that are allotted to the Heiltsuk are
47 as clear an example of that as anywhere on the

1 coast.

2 Q Thank you. If we could turn to page 30, the first
3 full paragraph. Yes. So:

4
5 Figures 5a and 5b --

6
7 - which you referred to -

8
9 -- depict all the coastal Indian reserves
10 that were explicitly allotted to secure
11 access to the fisheries. Most of these
12 reserves, many of them along the migration
13 route of returning Fraser River sockeye
14 salmon...were allotted by O'Reilly, but in
15 the 1880s.

16
17 And if we could please go to page 43, which shows
18 Figure 5B, the coastal B.C. north. And if you can
19 please rotate that. And if you could put it up,
20 further up, and then to my left, because Heiltsuk
21 is on the far right bottom.

22 So, Professor Harris, can you please confirm
23 the reserves there that were identified as
24 Heiltsuk reserves in 5B, those are those right
25 there.

26 A Yes, so it's the cluster of reserves under the --
27 under the "Heiltsuk" notation.

28 Q Thank you. And in particular, there are two
29 reserves, your map here indicates two reserves on
30 Goose Island, which is 11 and 12, which is
31 Yellertlee and Werkinellek; is that correct?

32 A Yes, those were allotted to the Heiltsuk.

33 Q Okay, thank you. So I just have one last question
34 for you. Today you gave evidence regarding the
35 connection between reserve allotment process and
36 First Nation fisheries, and in your various papers
37 and the evidence that you've given today, you've
38 regarded what you considered to be the unjust
39 treatment of First Nations, during and subsequent
40 to the reserve allocation process. If you could
41 please answer this, sir: why does all this matter
42 to this Commission?

43 A I think I would go back to my earlier remarks that
44 I think a well-managed fishery is really more than
45 just a technical or scientific or biological
46 exercise, that there is an important element of
47 fairness or justness that needs to be incorporated

1 into a well-managed fishery. I think it needs to
2 be incorporated within the definition of a well-
3 managed fishery, that one can't think of a well-
4 managed fishery without some sense that the
5 fishery has been fairly distribute. But I also
6 think that if the aspiration is for a well-managed
7 fishery, then it's absolutely essential that the
8 communities who are fishing feel that the
9 allocation is just or fair, or at least as close
10 as we can get in an imperfect society to just and
11 to fair. And that it's only with that sense that
12 they're part of a process, both of allocation and
13 of management, that they will fully participate in
14 that process of managing a fishery. And it's only
15 with that full participation that we can expect to
16 come anywhere close to a well-managed fishery.

17 And so I guess, again, my work has been an
18 attempt to reveal one of the particular axes of
19 unfairness or injustice that I think has existed
20 in the fishery. And I think that it is one that
21 remains, that this is -- that the conflict over
22 salmon between Aboriginal peoples and the state
23 hasn't arisen out of thin air. It's arisen out of
24 a long history of conflict. And that if we are to
25 aspire to a well-managed fishery, then dealing
26 with these issues of allocation of space in the
27 fishery for the participants, and for them to
28 participate in the management of the fishery, is
29 absolutely crucial.

30 And I don't think -- my work again has
31 focused on the Aboriginal fisheries. I don't
32 think this comment is exclusive of Aboriginal
33 fisheries. I think it's a general comment. But I
34 do think that the Aboriginal fisheries have been
35 one of the principal axes of unfairness in the
36 management of the fishery, and to achieve or to
37 come closer to achieving a well-managed fishery,
38 we need to grapple with and address this
39 particular instance of injustice.

40 MS. SONG: Thank you very much. Those are my questions.

41 MR. MCGOWAN: Thank you, Mr. Commissioner. I believe
42 that concludes the examinations for today.

43 Mr. Lowes has provided a copy of the **Lax Kw-**
44 **alaams** case, which he said he would. I don't know
45 if it's necessary to exhibit it, given that it's
46 cited in PPR1. But if you'd like it marked for
47 identification, we can accomplish that.

1 THE COMMISSIONER: I think it could be marked for
2 identification. Thank you.
3 MR. McGOWAN: Certainly.
4 THE REGISTRAR: Marked for identification would be
5 double "I", I-I.
6

7 II FOR IDENTIFICATION: ***Lax Kw'alaams Indian***
8 ***Band v. Canada (Attorney General)***
9

10 THE COMMISSIONER: Yes, Dr. Harris, thank you very much
11 for attending here today to speak to your paper
12 and to answer the questions of counsel. I'm
13 grateful that we were able this afternoon to
14 complete the examination of Dr. Harris, and we
15 move tomorrow to a different topic; is that
16 correct, Mr. McGowan?

17 MR. McGOWAN: Yes, within the Aboriginal fishing
18 hearings --

19 THE COMMISSIONER: Yes.

20 MR. McGOWAN: -- we move to a new panel tomorrow at
21 10:00 a.m., Mr. Commissioner.

22 THE COMMISSIONER: Thank you very much.

23 THE REGISTRAR: The hearing is now adjourned for the
24 day and will resume at ten o'clock tomorrow
25 morning.
26

27 (PROCEEDINGS ADJOURNED TO JUNE 28, 2011 AT
28 10:00 A.M.)
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I HEREBY CERTIFY the foregoing to be a true and accurate transcript of the evidence recorded on a sound recording apparatus, transcribed to the best of my skill and ability, and in accordance with applicable standards.

Pat Neumann

I HEREBY CERTIFY the foregoing to be a true and accurate transcript of the evidence recorded on a sound recording apparatus, transcribed to the best of my skill and ability, and in accordance with applicable standards.

Susan Osborne