

J.A. LOVISEK (for Defendant)
In chief by Mr. Mackenzie

Vancouver, B.C.
13 June 2007

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(Proceedings commencing at 10:05 a.m.)

THE REGISTRAR: Order in court. In the Supreme Court of British Columbia at Vancouver, this 13th day of June, 2007, recalling the matter of the Lax Kw'alaams Indian Band, and others, versus the Attorney General of Canada, my lady.

MR. MACKENZIE: My lady, I have three housekeeping matters before we continue with the evidence of Dr. Lovisek. The first item is, we have provided the working file cross-examination documents to Mr. Rich this morning as ordered, as directed by your ladyship.

The second item is an information item. In the references, which we have handed to your ladyship, Dr. Lovisek's references, your ladyship will recall there are 11 volumes and the last tab in the 11th volume is Tab 175. That does not appear in the index and that is Volume 2 of William Beynon's notes that we have provided to my friends at their request, and we added those, we added those as Tab 175 to the 11th volume. So, if your ladyship could just check to see whether your ladyship has that tab in Volume 11 please.

THE COURT: Yes, I do.

MR. MACKENZIE: Thank you, my lady. We are not going to be referring to it, but I just wanted to note that on the record, that that is in that location.

THE COURT: Hm-hmm.

MR. MACKENZIE: And the third housekeeping item, the Hudson's Bay Company references, as indicated, we provided a full copy of the Hudson's Bay Company Post records to my friends earlier when we provided the report, and now we have put the references with the tab number, with the footnote number of concordance, we put the HBC references is what I mean, in two binders for ease of convenience of reference, if anyone wanted to actually go and look at the original document as referred to by Dr.

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44 Lovisek. Generally speaking, Dr. Lovisek would
45 often put the citation right into her, that is, the
46 quotation from the records, right into her report,
47 but we have the originals here, which I would like

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1 to hand up to your ladyship to be marked as
2 exhibits, as we discussed yesterday. And as your
3 ladyship mentioned, it would probably be prudent to
4 mark those as a separate exhibit, since, in their
5 numbering, they're different, a different numbering
6 sequence from the original 11 volumes of references
7 to Dr. Lovisek's report.

8 THE COURT: All right.

9 MR. MACKENZIE: So, my lady, may we request that your
10 ladyship give a numeric number to those two HBC
11 binders, a numeric exhibit number?

12 THE COURT: Yes. The next exhibit number is what, Madam
13 Registrar?

14 THE REGISTRAR: Exhibit 267, my lady.

15 THE COURT: 267?

16 THE REGISTRAR: Yes.

17

18 (EXHIBIT NO. 267-1: One white binder with bright
19 salmon cover page, titled on spine and cover "HBC &
20 Port Simpson Journals Footnote References Dr. Joan
21 A. Lovisek Final Report Provided on February 8,
22 2007" Volume 1 of 2, containing a five-page index
23 and Tabs 1 to 50)

24

25 (EXHIBIT NO. 267-2: One white binder with bright
26 salmon cover page, titled on spine and cover "HBC &
27 Port Simpson Journals, Footnote References, Dr. Joan
28 A. Lovisek, Final Report Provided on February 8,
29 2007" Volume 2 of 2, containing five-page index and
30 Tabs 51 to 81)

31

32 THE COURT: These will be marked collectively as Exhibit
33 267.

34 THE REGISTRAR: Okay.

35 MR. MACKENZIE: Thank you, my lady.

36 Q Now, my lady, Dr. Lovisek, yesterday we finished off
37 with, on Page 125 of your report discussing the
38 topic, prekinship, precontact kinship and exchange.
39 So, precontact, kinship and exchange. Now I would

40 like to refer to a passage at the bottom of that
41 Page 125 please. Here you refer to Kipp and
42 Schortman. This is the last paragraph on Page 125.

43

44 Kipp and Schortman restrict the term "trade" to
45 "entrepreneurial behaviour, a form of exchange
46 qualitatively different from those entailed by
47 personal obligation." They note that many

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1 writers have used trade: "as broadly
2 synonymous with exchange, using these terms
3 interchangeably"... The word, trade has been
4 used to denote a wide range of exchange
5 relationships, and there is little to
6 distinguish between long distance trade
7 embedded in interpersonal chiefly relations and
8 trade for the market. They state that it is
9 imperative to observe the different ways
10 "trade" appears in archeological theories, and
11 when discussing trade, scholars are frequently
12 discussing different phenomena.

13

14 So, you cite, you cite those authors and I take
15 it that you agree with their comments. Is that a
16 fair summary?

17 A Yes, I do.

18 Q Can you comment, elaborate for her ladyship on what
19 the significance of those comments is for the Coast
20 Tsimshian and your report in this case?

21 A The significance is that many ethnographers and
22 archaeologists in particular, use the word "trade"
23 and don't define the context of that exchange. So,
24 they use the word "trade" when they may mean
25 exchange between kinship. They can't distinguish
26 between the two, and this is particularly
27 significant for archaeologists because they're
28 relying on material evidence. So, the caution that
29 Kipp and Schortman provide is that when the word
30 "trade" or related words, like "buy" or "sell"
31 appear in the ethnographic records, or in the
32 literature, that caution must be taken to establish
33 what type of exchange was actually occurring,
34 whether it was a commercial type or a kinship-based
35 exchange.

36 Q We have, we have been talking about kinship
37 relations and I am going to ask you one more
38 question on that subject at the bottom of Page 126.
39 In the last paragraph, the third sentence, you say:

40
41 The significance of kinship obligations also
42 reduced the development of commercial exchange,
43 for barter was carried out within the kinship
44 relationship.

45
46 Now, this is an elementary question and you
47 have been speaking about kinship, but could you

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1 elaborate on that distinction for her ladyship?

2 A Again, the distinction of commercial exchange is
3 what I had defined in this report as the exchange of
4 large volumes of product between unrelated peoples,
5 or an impersonal exchange. And the theme that runs
6 through the ethnographic data and historical data,
7 that exchanges were primarily between kin-related
8 individuals, and in some of the examples in the
9 Hudson's Bay Company records, where there is an
10 example of exchange between apparently non-kinship
11 related people, this often is very limited to
12 individuals and it also can often lead to conflict
13 between the two individuals which then escalates to
14 group hostility.

15 Q At Page 127, you speak, start to speak about
16 ethnographic examples of exchange in trade, and you
17 refer to some of the ethnographies, some of the
18 narratives. Can you summarize for her ladyship what
19 the narratives, what the ethnographic accounts tell
20 us about Tsimshian exchanges and trade?

21 A Well, the narratives, and particularly I am
22 referring to the Gwenhoot narratives that were part
23 of the Barbeau collection, and these primarily date
24 postcontact and they refer to individual barter of a
25 few species, halibut, for example, I identify in
26 there, between interpersonal groups. So -- not
27 interpersonal groups, but between persons,
28 individuals.

29 Q So, can you say, as a result of your review of the
30 narratives and the references in the narratives to
31 buy, sell or trade, what, what these, how you would

32 use that material in your -- how you use that
33 material in your research and coming to your
34 conclusions?

35 A Yes. As I referred to in the Kipp and Schortman
36 caution about seizing words like "trade" or "buy" or
37 "sell" as indicative of commercial exchange, one
38 needs to assess the date of the document. In many
39 cases, the Beynon documents were well into the
40 contact period when they were collected and they're
41 referring to a postcontact period. But the use of
42 those words alone does not indicate the type of
43 exchange which occurred.

44 Q At Pages 130 to 132 you talk about ethnographer R.L.
45 Olson and his work with the Chilcat Tlingit. You
46 mentioned already Oberg, his work with the Tlingit,
47 but can you tell us what his, Olson's, what the

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1 relevance of Olson's research and publications are
2 to Tsimshian exchanges and the practices?

3 A Well, Olson, like Oberg, was looking at the Chilcat
4 Tlingit for examples of trade and he was able to
5 reconstruct an actual trading exchange which
6 occurred postcontact dating to the 1860s and '70s.
7 And what he observed, although this is well into the
8 postcontact period, he observed what I think
9 continued to be the basic practice of entering into
10 kinship relationship with a group that, one, they
11 start to trade European goods, but also that that
12 exchange included a lot of food exchanges given as
13 gifts between kin.

14 Q Carrying on, continuing this theme, on Page 132, in
15 the third -- fourth paragraph, in the fourth
16 paragraph, I think you really summarize your, some
17 of your research and your conclusions. In this
18 paragraph, you say:

19
20 Precontact "trade" was personal and negotiated
21 between kin structured relations on a phratry
22 or clan basis of familial relationships. The
23 production and distribution of material goods
24 are organized by transactional principles
25 distinctly different from market exchange.

26
27 Can you elaborate, explain what that second

28 sentence means? Perhaps you have already done that.
29 A Yes. The second sentence is really a reiteration of
30 the content of the first sentence, which states that
31 precontact trade, and I am putting quotes around the
32 word "trade", was an exchange between kin-related
33 people, and that could take various forms, such as
34 gifts, tribute, sharing, uhm, and other elements
35 that would be associated between kin-related people.
36 Q On Page 133 you deal with the precontact political
37 organization. On that page, in the third paragraph
38 under that heading, you say:

39
40 The emergence of a post contact larger
41 political unit such as that of a "tribe",
42 developed during the second half of the 19th
43 century and was a response to conflict and
44 depopulation and the fur trade.

45
46 Can you summarize the evolution of a concept of
47 a tribe, of not only the concept, but the use of the

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1 word "tribe" in respect to Coast Tsimshian groups?
2 A Well, the ethnographic literature often uses the
3 word "tribe" to describe a collective which emerged
4 postcontact and particularly around the
5 establishment of Fort Simpson, but the basic social
6 organizational unit was the local group. And again,
7 as I caution throughout a lot of the statements that
8 I have made, sometimes ethnographers, and in
9 particular, Beynon, will use the word "tribe" and he
10 is relying on the contemporary social political
11 organization and projecting that back in time as if
12 that level of organization existed precontact. And
13 in fact, in some of Beynon's work, he precisely says
14 that, "I am using the term 'tribes' to identify
15 these groups but these groups did not exist
16 earlier." And that was his convenience or
17 convention that he, he chose to, to use. So, that's
18 where the caution must be relayed, that the type of
19 political organization that developed postcontact
20 cannot be simply transferred or used as a basis to
21 interpret precontact political organization.
22 Q On Page 134, the last paragraph, the first sentence,
23 is that what you have just said?

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The existence of a "tribal" chief was a post contact development but has been arbitrarily extrapolated backwards in time by some scholars to represent the political organization during the precontact period.

A Yes.

Q Then on Page 135, you deal with property and ownership. I would like to ask you a couple of questions on that. Referring to Page 136, in the last, second-last paragraph, you have a, a citation from David Archer:

Access to territories was commonly granted to others, either on the basis of kinship, or in return for a share of the products collected.

Can you explain to her ladyship how nonowners of sites, territories, could come to have access to those sites and to use resources?

A Well, in this passage, David Archer is citing from the earliest ethnographers, Boas and Garfield, and he is referring to the fact that people related by kin could have access to the resources from other

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1 territories. There were other means of obtaining
2 resources, and that could include raiding and taking
3 resources, but also it could include asking
4 permission and receiving consent to, to use those
5 resources. This might entail tribute of that
6 resource being provided to the title holder or chief
7 of that territory.

8 Q At Page 137, the last paragraph refers to a subject
9 we've heard a fair amount about, and you say:

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The eulachon fishery illustrates how native groups like the Coast Tsimshian could hold rights to resources in a variety of locations, not all of which fall into a conventional idea of geographically contiguous territory.

Could you explain to her ladyship or elaborate for her ladyship on what the nature was of the Coast Tsimshian rights in the eulachon fishery?

20 A Well, the rights to use the eulachon fisheries
21 seemed to be based on kinship-established relations.
22 We can see from examples that groups that no longer
23 are not associated in the ethnographic records to
24 using the site, like the Haida, for example, did
25 have rights at some times when they had kinship
26 relations and were given those rights. So, the
27 rights were related to groups who could establish
28 and use the rights, but the right was limited to the
29 exploitation of eulachon and for the production of
30 oil usually, but not to other resources in the area.

31 Q And what geographical area are we speaking about?

32 A The Nass River.

33 Q On Page 139, you have further comments on
34 territories and the abandonment of territories.

35 On Page 140, you deal with the theme that we
36 have mentioned once or twice already in your
37 evidence. In the second full paragraph, you say:

38
39 Warfare would have been antithetical to free
40 trade on the Northwest Coast.

41
42 You have told us, you have told us about this
43 already. Can you just summarize what we know or
44 what you know about warfare in the precontact period
45 and its effect, if any, on the exchanges between
46 aboriginal groups?

47 A Well, certainly we know from archeological data that

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1 warfare occurred in this area dating from about 1000
2 A.D. Whether it increased postcontact or not is
3 difficult because of quantitative issues, of how to
4 establish those changes, although we can identify
5 some of the conditions that lead to warfare more so
6 from the postcontact period.

7 One of the points that Paul Prince brings out
8 is that warfare was a means of raiding for food from
9 other groups and that this was, as I mentioned
10 earlier, a means of obtaining resources from other
11 territories.

12 Q And the final topic is on Page 141. This is where
13 you talk about the potlatch. We haven't discussed
14 that in your evidence so far. You speak about the
15 potlatch on Page 141 and about wealth on Page 143.

16 And on Page 141, just under that heading "Precontact
17 Potlatch", that paragraph, the second sentence, you
18 say:

19
20 What is important is that the precontact
21 potlatch was substantially different than that
22 described in the ethnographic literature,
23 which, for the most part, describes a post
24 contact florescence.

25
26 Can you elaborate on that for her ladyship
27 please?

28 A Yes. In the same respect that many characteristics
29 that appear in the ethnographic data are arbitrarily
30 extended to the precontact period without
31 appreciating the changes which have occurred over
32 time, some anthropologists, in this case Robert,
33 excuse me, Philip Drucker and Robert Heizer, and
34 others like Helen Codere, whom I think I cite in
35 this report, are trying to establish what the
36 precontact or the earliest form of potlatch was.
37 And in their determination, once they have excluded
38 fur trade goods from the potlatch, they determined
39 that the potlatch would have been less frequently
40 participated in and would be primarily a feasting
41 ceremonial involving resources from one's own
42 territory, because one of the, excuse me, one of the
43 primary features of the potlatch is to establish
44 one's territorial prerogatives, and by providing
45 food, including salmon, from that territory, one was
46 able to exercise and demonstrate that prerogative.

47 Q And on, as I say, on Page 143, you refer to wealth

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Cross-exam by Mr. Rich

1 and you say, as you have just mentioned, in the
2 first sentence under that heading:

3
4 For the precontact Tsimshian, wealth was a
5 commodity that derived from one's territories
6 and could be distributed for prestige.

7
8 Explain to her ladyship what wealth was in the
9 precontact Tsimshian society and what role it
10 played.

11 A Well, as I just mentioned, the ability to
12 demonstrate one's supernatural relationship to the
13 marine resource spirits, let's say, is demonstrated
14 through the ability of a title holder to obtain
15 certain resources, and these resources were in that
16 title holder's territory. These were the resources
17 that that title holder would share and distribute at
18 feast and potlatch, which was a means of
19 establishing that title holder's territorial
20 prerogative to those resources.

21 Q Now, you say in Page 143 in the second paragraph
22 under "Wealth":

23
24 Wealth for the precontact Tsimshian included
25 elk skins, coppers, slaves and canoes.
26

27 Now, how does that relate to exchanges of
28 marine resources?

29 A Well, the evidence that comes from the ethnographic
30 sources, as well as the historic sources, identify
31 these types of objects, like, elks, canoes, coppers,
32 slaves, but the only marine resource that's
33 identified with any form of frequency is eulachon
34 oil. Certainly salmon is not identified in the
35 records that I, excuse me, that I examined.

36 Q So, what significance does that statement have for
37 exchange of marine resources?

38 A Well, from the basis that there is no evidence in
39 the sources that describe what the wealth items are,
40 it doesn't appear to be that salmon was perceived as
41 a wealth object.

42 Q What about other marine resources?

43 A As I mentioned, the eulachon one is cited.

44 Q What about other marine resources?

45 A Uhm, there are no other marine resources that were
46 cited other than the ones that I have identified
47 here, in the report.

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Cross-exam by Mr. Rich

1 Now, there is some data, but it's based on the
2 mythologies of Franz Boas, whom I have explored with
3 you earlier about the limitation, about deriving
4 factual evidence about salmon use, and there are
5 mythological stories that identify a trade in

6 salmon, but the mythological story is based on a
7 description of a feast and it associates that salmon
8 exchange coming from a group in the Kitselas Canyon
9 area.
10 Q Now, when I say "other marine resources", I mean
11 other kinds of fish.
12 A They're not identified as a form of wealth. They're
13 not identified in the ethnographic literature as a
14 form of wealth.
15 Q Do you have evidence about exchanges of other, other
16 fish, other types of fish?
17 A In the records?
18 Q Yes.
19 A In the records they're -- in Hudson's Bay Company
20 records, there are exchanges of halibut, that
21 appears, but that's in the postcontact period. And
22 as I identified, they're interpersonal exchanges of
23 a very small commodity.
24 Q Those are my questions, my lady.
25 Now, Dr. Lovisek, Mr. Rich will be
26 cross-examining you please.
27

28 CROSS-EXAMINATION BY MR. RICH:

29
30 Q Dr. Lovisek, you have your report in front of you
31 and in that report, you have a section on your CV
32 and dealing with your various clients and the work
33 you've provided. Could I ask you to turn to Page
34 165 and that's Exhibit 259 for the record. Now,
35 we've than gone through, or you have gone through
36 this with Mr. Mackenzie yesterday but I would just
37 like to confirm a few things.
38 If we were to turn to Page 166 please, this
39 identifies your various clients, and going in
40 reverse chronological order, under 2006, the first
41 item, that's the case, the present case we're
42 dealing with?
43 A Yes.
44 Q That's right? And you have stated with regard to
45 Gillespie, et al, that you testified in that case,
46 and it's a case about salmon fishing in the BC
47 interior; is that right?

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1 A That's correct.

2 Q So, that's not -- and the Indians in the BC
3 interior, or aboriginal people in the BC interior
4 are not considered to be Northwest Coast in terms of
5 anthropology; is that right?
6 A They're considered to be Plateau.
7 Q And the next item is related to the Ahousaht case;
8 is that correct?
9 A That's right.
10 Q So I won't ask you anything about that.
11 Now, your presentation to the National Parks
12 and Historic Sites, I understood you to say that
13 this was an invitation because of your work on oral
14 history in litigation?
15 A That's correct.
16 Q And related to your publications and conference
17 presentations on that subject?
18 A Yes.
19 Q And that takes us into, back, going backward into
20 2005, and the next item, Department of Justice, BC
21 Regional Office, preparation of a seminar, that
22 relates to this case; is that correct?
23 A Uhm, well, that was prior to this case. It was
24 before any questions or, or Plaintiffs were
25 identified. It was just a preliminary overview.
26 The data wasn't prepared for any specific question.
27 Q All right. And you were -- this was an invitation
28 for you to come and present to the Department of
29 Justice?
30 A Yes, that's correct.
31 Q And you were explaining the current state of
32 understanding in the literature on the Coast
33 Tsimshian?
34 A I was providing an overview of some of the
35 ethnographic sources that describe some of the
36 issues for our Coast Tsimshian. Well, not, probably
37 not just limited to Coast Tsimshian, but all
38 Tsimshian groups.
39 Q Okay. And then the next item, Department of
40 Justice, Department of Fisheries and Oceans, this is
41 regarding the Haida use of dogfish; is that right?
42 A Yes, it is.
43 Q And was that prepared for use in court?
44 A Yes, it was.
45 Q And did you attend court to testify?
46 A The trial was cancelled just before I was to --
47 Q Yes, I'm sorry, it says that, yes. But you prepared

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Cross-exam by Mr. Rich

- 1 the report --
- 2 A Yes.
- 3 Q -- with the purpose of testifying?
- 4 A Yes, yes.
- 5 Q And in preparing that report, it's correct that you
- 6 considered Tsimshian material; is that right?
- 7 A As they were tangential to the issue of dogfish, but
- 8 yes, I considered some of the ethnographic data and
- 9 some of the Hudson's Bay Company documents that
- 10 related to the Tsimshian.
- 11 Q And you were doing that because of the similarity of
- 12 Northwest Coast cultures; is that right?
- 13 A No, the, the purpose was that the Haida were
- 14 claiming that they relied on spiny dogfish as a
- 15 principal oil which they then traded to the Hudson's
- 16 Bay Company and that they had a precontact right to
- 17 produce this fish and this oil for commercial
- 18 purposes. And it was apparent that, when you look
- 19 at the Hudson's Bay Company records, that the oil
- 20 which is appearing is eulachon oil, not dogfish. So
- 21 it was a matter of establishing counter to the
- 22 Plaintiffs' or the defence expert who was suggesting
- 23 that the oil, which appears in the Hudson's Bay
- 24 Company records, was spiny dogfish oil.
- 25 Q The next item then is Department of Justice and this
- 26 is relating to the Ahousaht case; is that right?
- 27 A Yes. Well, it's related in the sense that I had no
- 28 -- it was a preview. There were -- there was no
- 29 contract established on my doing or undertaking any
- 30 work on that matter, similar to this case.
- 31 Q All right. So, if we move back to 2004, the first
- 32 work there, "preparation of an expert opinion for
- 33 the Department of Justice", that was to do with the
- 34 Kwagiulth First Nation?
- 35 A Yes.
- 36 Q Am I right?
- 37 A Yes, it is.
- 38 Q And the rest of the items on this page deal with
- 39 matters in Ontario; is that right?
- 40 A Yes, that's right.
- 41 Q As does the, the first entry on Page 168. And then
- 42 we go to 2003 and yesterday you testified that, you
- 43 testified in this first item, department, for the

44 Department of Justice, the Douglas, Quipp matter?
45 A Yes, I did.
46 Q And that's, those people are Sto:lo people?
47 A Yes, they are.

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Cross-exam by Mr. Rich

1 Q Located in the Fraser Valley, in the Fraser Canyon?
2 A No, these are, these are not that far north up the
3 river. They are mid-river.
4 Q Mid-river. Okay.
5 A Mid Fraser River.
6 Q Thank you. The next two deal with Ontario, under
7 2003; is that right?
8 A That's correct.
9 Q And then in 2002, you had another retainer from the
10 Department of Justice, Department of Fisheries and
11 Oceans, and that was again to do with the Kwagiulth?
12 A Yes.
13 Q And then moving to Page 169, the first item is work
14 relating to the Carrier people in the interior of
15 BC?
16 A That's correct.
17 Q In terms of anthropology, what, how are the Carrier
18 people classified?
19 A Well, the Carrier are Athapaskan groups. They're
20 not Coast groups, if that's your question.
21 Q Yes, thank you. Then the next two are dealing with
22 Ontario. And then to 2001, the first issue is
23 related to fishing for a Salish group; is that
24 right?
25 A That's correct.
26 Q Now, the next one deals with the Heiltsuk First
27 Nation. They're in the vicinity of Bella Bella, BC,
28 on the coast?
29 A Yes.
30 Q Now, did I understand you to say that that work was
31 similar to the next item which deals with Kitkatla?
32 You did a preliminary anthropological opinion
33 relating to the Kitkatla?
34 A Well, similar in the sense that they were
35 preliminary -- no, actually in the Heiltsuk Band
36 case, the Reid case v. Gladstone, I examined all the
37 historical Hudson's Bay Company records and the
38 ethnographic data, but I provided only an oral
39 opinion. There was no written opinion associated

40 with that.

41 In the second case, the one you are referring
42 to with Kitkatla, there was a preliminary opinion
43 and then there was a sworn affidavit associated with
44 the type of research that would be necessary to, to
45 investigate the allegation, and that matter was not
46 pursued by the Kitkatla.

47 Q Right. And I understand that this preliminary

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1 opinion ran two, three pages?

2 A Well, actually that's probably an error, because the
3 three pages refers to the affidavit, the pages of
4 the preliminary opinion, which I just provided to
5 the Crown this morning I believe, because it was
6 requested. I think it was more than three pages.

7 Q I see. Thank you. Sorry, I wasn't aware of that.
8 I will be soon.

9 A Oh, yeah. I think it may be nine. I'm not sure.

10 Q Yes. Now, the last one on Page 169 is, again, a
11 Coast Salish report; is that right?

12 A Yes, that was -- yes.

13 Q Now, my review of your client work, going back from
14 2001, so that that would be the year 2000 and prior,
15 there is no more work in British Columbia; is that
16 correct?

17 A That's correct.

18 Q Now, if we move in your CV then to Page 174, we see
19 your publications. And then at Page 176, you have
20 conference papers; is that right?

21 A Yes.

22 Q Okay. And then at Page 177, you have a series of
23 book reviews that you identify.

24 A Yes.

25 Q Maybe we could start with the conference papers that
26 are listed beginning at Page 176. I counted 23
27 conference papers here and most of them deal with
28 the Eastern Canada matters. Would you agree with
29 that?

30 A I would agree with that.

31 Q Now, perhaps we can look at some of the individual
32 papers. If we take the one at the top of the list,
33 they're not numbered, but Problems of Proof, that's
34 an article which is about the legal acceptance of
35 oral history, is it not?

36 A Yes, it is.
37 Q And you presented that at the Algonquian, or I may
38 be mispronouncing it, Algonquian?
39 A Algonquian conference.
40 Q Algonquian is the correct pronunciation?
41 A Algonquian.
42 Q Okay, thank you.
43 Now, a few farther down, we have Oral History
44 on Trial, that again, is a paper presented dealing
45 with the legal issues in oral history; is that
46 right?
47 A Yes.

00015

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 Q And that would be the same for the Delgamuukw paper,
2 three from the bottom?
3 A Yes.
4 Q Oh, and I skipped one, sorry, Transmission
5 Difficulties, which is five from the bottom. Is
6 that, again, about the legal issues in the use of
7 oral history?
8 A Not exclusively, no.
9 Q Not exclusively. Okay. So, we have the two
10 conference papers which later become publications,
11 and the fourth one from the top, Aboriginal Warfare
12 on the Northwest Coast, and the fifth, Northwest
13 Coast Human Trophy Taking, which relate to the West
14 Coast; is that right?
15 A Yes.
16 Q Okay. And other than the ones I've mentioned, I
17 read the rest of the list, the other 23, all to be
18 dealing with Eastern Canada.
19 A Yes.
20 Q So, to summarize, 17 of the 23 conference papers
21 deal with matters in Eastern Canada, three of 23
22 deal with the legal implications of the use of oral
23 history; is that right?
24 A Well, I haven't counted the pages.
25 Q I'm sorry, then maybe I should -- maybe I am not
26 being fair. I don't mean to confuse you with this.
27 THE COURT: Actually four. Four.
28 MR. RICH: Well, the witness hesitated on the fourth.
29 THE COURT: Ah.
30 MR. RICH: And it was only partially, so I was going to
31 get to that.

32 Q But perhaps I should go ahead and make it easier to
33 understand. I do not want to be trying to confuse
34 you.
35 We identified three papers that were to do with
36 legal issues and the use of oral history.
37 A Yes.
38 Q That was the first one, Problems of Proof; it was
39 the middle of the page, Oral History on Trial; and
40 the third from the bottom, Delgamuukw.
41 A Well, I would just like to correct, that when I say
42 they deal with the legal issues, they do address
43 some of the legal concerns but they attempt to apply
44 them to what we know about ethnographic groups and
45 their different types of oral history and tradition.
46 So it's not on its face exclusively on legal, on
47 legal uses of oral history. But that is a major --

00016

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 Q Or the appli -- so it's the legal, the legal uses
2 and the application of the law to the different
3 systems?
4 A Yes, as it has, has appeared. Except for, as I
5 mentioned, the Transmission Difficulties is, is more
6 related to how groups can invent their own
7 traditions and how one must be cautious about using
8 traditions.
9 Q All right. And then we've identified two of the
10 group, the, the fourth and fifth in the list,
11 Aboriginal Warfare and Northwest Coast Human Trophy
12 Taking as relating to the West Coast?
13 A Yes.
14 Q And other than the ones we've discussed now, the
15 rest deal with Eastern Canada?
16 A Yes.
17 Q And so, if there are 23, that means that there are
18 17 of the 23 are dealing with Eastern Canada?
19 A If there are 23, there would be six papers that --
20 Q Yes.
21 A Yes.
22 Q Okay. Now, the book reviews, you didn't mention the
23 book reviews in your evidence in chief, but I see
24 that you have done a number of book reviews from
25 2003 to the present, and that they're all done for
26 the same publication?
27 A Yes.

28 Q So, I take it that you have some business connection
29 or professional connection with that organization,
30 The Canadian Book Review Annual?
31 A I'm a reviewer.
32 Q And I notice with your conference papers, that a
33 number of them, quite a large number of them, are
34 presented at various of the annual conferences of
35 the Algonquian conference. As I say, it appears
36 they have an annual conference and you are a
37 frequent presenter; is that right?
38 A In some cases, yes.
39 Q Well, if we go from the top of the list at Page 176,
40 the first two are the Algonquian Conference; is that
41 right?
42 A Yes.
43 Q And then if we go down to the middle of the page,
44 the one beginning, Distinguishing the Aboriginal,
45 that's an Algonquian conference?
46 A Yes.
47 Q And so are the next two?

00017

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 A Yes.
2 Q And the one second from the bottom?
3 A Yes, it is.
4 Q So, that's six on that page.
5 A Okay.
6 Q And then on the next page, Page 177, the second and
7 third are both presented at Algonquian conferences?
8 A Sorry, you said second and --
9 Q "Cultural Leprosy", --
10 A Oh, yes.
11 Q -- the 27th Conference?
12 A Yes, indeed. Yes.
13 Q Ojibwa Reservations, that's another -- yes, that's
14 also at the 27th?
15 A Yes.
16 Q And then if we skip a couple, we get to 'Stout
17 Athletic Fellows': The Ojibwa During the 'Big-Game
18 Collapse' and 'Deprived of Part of Their Living':
19 Colonialism and Nineteenth Century Flooding of
20 Ojibwa Lands, those are both at Algonquian
21 conferences?
22 A Yes.
23 Q And then at the end of the section, the two above

24 "Book Reviews", the Lac des Mille Lacs, again, about
25 the Ojibwa, and The Political Evolution of the
26 Boundary Waters Ojibwa, those are both presented at
27 Algonquian conferences?
28 A Yes.
29 Q So there are six on that page. So that's a total of
30 12 at the Algonquian conferences?
31 A I'll accept your numbering of it.
32 Q So, this suggests that you are quite a specialist in
33 Ojibwa culture; is that right?
34 A Well, my specialty is ethnohistory. I have applied
35 it primarily to Algonquian groups, and since moving
36 to British Columbia about ten years ago, I've been
37 applying it in British Columbia.
38 Q Well, maybe we could move to your publications
39 please. They begin on Page 174 and end at the top
40 of Page 176, and they -- perhaps as Mr. Mackenzie
41 did, we can go in chronological order for a moment.
42 At the top of Page 176, the 1979 publication, I take
43 it to be your Master's thesis; is that right?
44 A A Master's paper.
45 Q A Master's paper?
46 A Yes.
47 Q Thank you. Then the next, 1991, at the bottom of

00018

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 Page 175, is your Ph.D. dissertation; is that right?
2 A Yes.
3 Q And that's on the Algonquian people?
4 A Yes.
5 Q Now, in Eastern Canada, precontact is much earlier
6 than it is in Western Canada; is that right?
7 A Yes.
8 Q So, a lot of your work would have been in a
9 situation where you were able to work with both
10 historical documents and ethnographic material; is
11 that right?
12 A I would be working with ethnohistorical materials
13 which involves archeological, historical and
14 ethnographic.
15 Q And you would have had quite a supply of historical
16 documents because of the longevity of the contact?
17 A Well, it depends on the period one is looking at.
18 So, if one is only looking at a certain period, that
19 would depend on those documents which were

20 available.

21 Q When was contact with the Algonquian people?

22 A Well, the Algonquian people as a people

23 geographically cover from the East Coast, both

24 Canada and northern, the United States, and come

25 across right into California. So, the period of

26 contact would vary depending on which Algonquian

27 group one is looking at. Generally in the area that

28 I was looking at in my dissertation, it was about

29 1609.

30 Q All right. The publications above, on Page 179, are

31 all dealing with Eastern Canada; is that right?

32 A Yes.

33 Q And on Page 175, most of them are either publication

34 of the proceedings of conferences or they're derived

35 from conferences; is that right, from conference

36 presentations?

37 A Yes.

38 Q Are there any exceptions on Page 175 to that?

39 A No, these papers were given at conferences before

40 being published.

41 Q Okay. Then if we turn back to Page 174, again,

42 adopting the reverse chronological method, going up

43 from the bottom of the page, four, from 2001 down to

44 1998, are all dealing with Eastern Canada; is that

45 right?

46 A Yes.

47 Q The 1999 entry is dealing with your contribution to

00019

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 the Encyclopaedia of Canada's People?

2 A Yes.

3 Q And the other three are, again, from conference

4 papers; is that right?

5 A Sorry, the other three which ones?

6 Q The bottom, the four at the bottom of Page 174. So,

7 let's do them one at a time so we don't, so I don't

8 make it confusing. 2001, The Ojibwa vs. the

9 Gerrymander?

10 A Yes.

11 Q I take it that is, is -- that's a paper from a

12 conference; is that right?

13 A Yes, it was delivered at a conference.

14 Q And then published in the proceedings of the

15 conference?

16 A Uhm, yes.
17 Q Now, the two 1998 papers, I understand they were
18 delivered at a conference but they were published
19 elsewhere; is that right?
20 A Uh, I believe that was given at a conference, and
21 yes, I believe those two papers were given at the
22 conference and then published.
23 Q Oh, as part of the conference proceedings?
24 A No, it --
25 Q Separately?
26 A Yes.
27 Q Okay. Then under 2002, so, in the middle of the
28 publication section, Transmission Difficulties, this
29 is a publication relating to the legal issues in
30 oral history?
31 A Well, that's the paper that I identified earlier.
32 That refers not only to the legal issues but refers
33 to --
34 Q That's the one that refers to both?
35 A It refers to, yes, the invention of traditions and
36 elements of tradition.
37 Q Then the entry above that, right against 2002, that
38 is the revision or updating of your encyclopaedia
39 article?
40 A Well, no, it was the same article that appears in
41 1999, but the publisher decided to produce a single
42 handbook or an introductory workbook, sorry, not
43 workbook, introductory study to aboriginal peoples
44 of Canada. So, it was taken out of a massive
45 encyclopaedia and separately published.
46 Q I see. So it's the same article then?
47 A Yes.

00020

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 Q All right. And the first two on the list are those
2 that are in press and they are relating to the
3 Northwest Coast generally; is that right?
4 A They relate to the coastal areas of the Northwest
5 Coast, and I believe that one of them has already
6 been published now at the end of May, Human Trophy
7 Taking, and Aboriginal Warfare should be coming out
8 shortly.
9 Q Okay. Now, I noticed that several of your
10 publications are co-authored with a couple of
11 individuals, Leo Waisberg and Tim Holzmann (sic),

12 and on Page 175, one, two, three, four, five, six,
13 the first six on Page 175 are all co-authored with
14 Leo Waisberg and Tim Holzmann?
15 A It's Holzkamm.
16 Q Oh, I'm sorry. I apologize. But that --
17 A Yes, that's true.
18 Q So you had a professional relationship with these
19 people --
20 A Yes.
21 Q -- or an academic relationship?
22 A A professional relationship.
23 Q Now, we've talked about your publications and
24 conferences. You have another section on reports
25 and manuscripts. I take it these reports relate to
26 the client work that we've gone through a few
27 minutes ago; is that right?
28 A I'm just flipping through now to, to be sure that's
29 the case. Not all of it relates to client work.
30 Excuse me, the last page, Page 183, Rites of
31 Passage: an Ethnohistory of the Georgian Bay Ojibwa
32 refers to reports that I had prepared while
33 undertaking salvage ethnology for the Canadian
34 Museum of Civilization, and my field notes and final
35 report, additional field notes and final reporting.
36 Q All right, thank you. Maybe then just to, to break
37 this down a bit. If we were to turn to Page 180, go
38 to the middle of Page 180, the entry would be
39 Historical Research concerning the "Memorandum of
40 agreement" between the three Governments of Canada;
41 do you see where I am?
42 A Yes.
43 Q From there down to the end of this section, which is
44 the page that you had brought my attention to a
45 moment ago, Page 183, my read of this is that all of
46 these matters relate to Eastern Canada, pretty much
47 all Ontario; is that correct?

00021

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 A Well, no, because -- oh, sorry, are you saying after
2 that point?
3 Q Yes, I am saying after that point.
4 A Sorry, I lost my page.
5 Q Yeah, I'm at the middle of Page 180. It's difficult
6 when you go chronologically sometimes and reverse
7 chronologically sometimes, but I am really looking

8 to go back to the end of this section.
9 A Excluding those items on Page 183, yes.
10 Q So, your field notes, don't they relate to --
11 A Oh, sorry, I thought you meant that they related to
12 the clients. Yes, those relate to Eastern Canada.
13 Q Yeah. My point, just to be perfectly clear, is that
14 from, prior to 2001, your work on publications
15 relates to your work in Eastern Canada. Excuse me,
16 these are not publications. These are reports and
17 manuscripts.
18 A Yes. Except that I have -- there are opinions there
19 that relate to 2001, which are not, but only
20 starting from historical research --
21 Q Okay.
22 A -- that you identified.
23 Q Yes. So, when you say they are the same things from
24 2001, that would begin, if we start at the middle of
25 Page 179 -- no, I'm sorry. Now I am confused. I
26 apologize. The middle of Page 180, and move up,
27 we're in 2001, and you're working on a report on the
28 Coast Salish and the interior Salish and the
29 Kitkatla. Now, that Kitkatla, that's the report
30 that I will be off to look at because it's been
31 delivered.
32 A Okay.
33 Q Then the two above that are Ontario. And then at
34 the previous page, working up from the bottom, we've
35 got, the bottom one is Kwagiulth, then Ontario, then
36 BC Carrier and the BC Interior, then Ontario. Are
37 you with me on this?
38 A Yes, I am.
39 Q Okay. Please just interrupt me if I've got it
40 wrong. And above that, we've got the Douglas Quipp,
41 that's Sto:lo in the Fraser Valley?
42 A Yes. No, mid Fraser River.
43 Q Mid Fraser River. Okay, thank you. And then the
44 next two above that are Ontario? Then in the middle
45 of the page, the draft expert opinion for James
46 Wapus, et cetera, is a Kwagiulth again?
47 A Yes.

00022

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 Q Then the two above that are Eastern Canada?
2 A Uhm, something is missing here. I have the Conflict
3 on the Plateau and Great Basin.

4 Q Is that not Eastern Canada?
5 A No, that's Plateau. That's interior.
6 Q Oh, the interior of BC?
7 A Yes, it is.
8 Q Okay, I'm sorry.
9 A I think I mention in this description that this
10 paper had been requested for publication and then
11 was, for editorial decisions, not, related to the
12 length of the book, was excluded, but it relates to
13 the interior warfare area of British Columbia.
14 Q Right. I notice that the editor, or one of the
15 editors, is Richard Chacon -- I don't know if I'm
16 pronouncing it --
17 A Chacon.
18 Q Chacon. And he is -- what's his field?
19 A His field is anthropology.
20 Q And does he have a specialty?
21 A He works on South American issues.
22 Q Okay. And he is the editor who has selected this
23 but he is also the editor who selected the two
24 articles that are marked as "in press" in your
25 publications; is that right?
26 A Well, this paper was originally to go into that
27 publication which is now in press, if not published,
28 but was excluded on the basis that I had written one
29 paper, that was the one on the Northwest Coast, and
30 for length, reasons of length, it was excluded.
31 Q Yes?
32 A This relates to the Plateau --
33 Q So, all three of these papers are though published,
34 or would have been published, in works edited by
35 Richard Chacon?
36 A Uhm, and Ruben Mendoza, yes.
37 Q Right.
38 A These papers were given at the -- this paper was not
39 given, but the other paper was given at the American
40 Anthropological Association.
41 Q Right. And Ruben Mendoza, what is -- is he an
42 anthropologist?
43 A Yes, he is.
44 Q And what's his specialty?
45 A I don't know what his specialty is. I can't tell
46 you that.
47 Q All right. So, now, we're at Page 179 working

00023

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

- 1 upward above the Conflict on the Plateau paper. The
2 one above that is the Haida paper that we discussed
3 in your client work?
- 4 A Yes.
- 5 Q That was a report for the Court?
- 6 A A report prepared for the Court but was, the trial
7 was cancelled as the ex -- as the Defendant pled
8 guilty.
- 9 Q Okay. And the one above that is about the interior
10 Salish and we talked about that already?
- 11 A The Shuswap.
- 12 Q That is the Deneault --
- 13 A That's a Shuswap group.
- 14 Q And at the very top is the Ahousaht case which we
15 won't discuss.
- 16 Now, you haven't done any field work with the
17 Tsimshian; is that right?
- 18 A Uhm, my field work as an ethnohistorian is in
19 archival data.
- 20 Q Well, other than what you have reviewed for this
21 report, you haven't done archival research for the
22 Tsimshian; is that right?
- 23 A I have looked at archival data that pertains to the
24 Tsimshian in the Davidson case; and I reviewed
25 materials related to the Tsimshian in my research
26 for the Aboriginal Warfare and the Human Trophy
27 Taking papers.
- 28 Q And so, having access to that material that you have
29 reviewed for Davidson, that was in 2005, Davidson?
30 A 2005.
- 31 Q Having reviewed that material, you had it available
32 when you began this project; is that right?
- 33 A I had parts of that data available, except that they
34 were fragments of Hudson's Bay Company records. I
35 subsequently ordered the complete records, because
36 that was a very selective area of inquiry, in the
37 Davidson case.
- 38 Q And then the, you say you, for the Aboriginal
39 Warfare research, for the paper you gave, which is
40 now being published, you also looked at Tsimshian
41 material?
- 42 A Some of the explorer's records that related to
43 warfare or human trophy taking were consulted at
44 that time.
- 45 Q So you had that available to you in --

46 A As part of my library source.

47 Q So, you then, in taking on this report, the one you

00024

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 have in your hand, reviewed material that you had
2 seen before in preparing a general paper on welfare
3 (sic) and material that you had for Davidson and
4 then you made a collection of material which you
5 either used or identified as not used? Am I correct
6 there?

7 A No. The procedure that one uses in ethnohistory is
8 to identify all sources and review a lot of the
9 available sources and then start identifying sources
10 that would be pertinent or relevant to answering the
11 questions that I was asked to answer by the Crown.

12 Q Well, okay. I had understood from your evidence
13 yesterday that, and perhaps from reading your
14 report, that you had put the material you used into
15 a bibliography, which is part of your report, and
16 you took the material that you had reviewed and not
17 used into a list, and we were provided, you provided
18 us through counsel I guess with a copy of it, a list
19 of documents consulted but not used in the expert
20 report?

21 A Yes. The bibliography, which is attached to this
22 report, contain references that I cite in this
23 report. If I researched sources that I did not use
24 and cite in the report, then they appear in my
25 "sources consulted but not used".

26 Q So, then the "sources consulted but not used" may
27 well be good sources of information about the
28 Tsimshian but you just did not choose to use them;
29 is that right?

30 A No, I didn't choose -- well, I chose not to use them
31 because there wasn't any information that was
32 relevant to the questions that I was answering.

33 Q Now, perhaps we could have -- perhaps I could show
34 you this list of documents, just to make sure that
35 we know what we are talking about, the list of
36 documents consulted but not used.

37 THE COURT: I note the time. Perhaps this is an
38 appropriate time.

39 MR. RICH: Oh, I'm sorry, my lady.

40 THE COURT: All right.

41 THE REGISTRAR: Order in court. This court stands

42 adjourned for morning recess.

43

44 (Proceedings adjourned at 11:20 a.m.)

45 (Proceedings resumed at 11:39 a.m.)

46

47 MR. RICH:

00025

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 Q Dr. Lovisek, I am interested in the basis for your
2 report, and before the break, I was referring to the
3 two lists, one being your bibliography and the other
4 being a list of documents consulted but not used in
5 the expert report?

6 A Yes.

7 Q Now, I've handed a copy of that up. I wonder if it
8 could be shown to the witness please.

9 A Thank you.

10 Q Do you recognize this as the list of documents that
11 you consulted but did not use in the preparation of
12 your report?

13 A Yes.

14 Q Okay. May this be marked please?

15 THE COURT: Yes. That will be Exhibit 268.

16 THE REGISTRAR: Exhibit 268, my lady.

17

18 (EXHIBIT NO. 268: Nine-page List of Documents
19 Consulted but not Used in the Expert Report of Joan
20 A. Lovisek, dated February 12, 2007)

21

22 MR. RICH:

23 Q Now, Dr. Lovisek, my understanding is that your
24 opinion expressed in your report and the material in
25 your report is based on the material in the
26 bibliography as well as the list of documents
27 consulted; is that right?

28 A The opinion is based on -- this is the corpus of the
29 research that I undertook in attempting to draft
30 this report. The sources that I rely on are the
31 sources that are cited in the bibliography. This is
32 the product -- the sources consulted but not used,
33 is the product of the sources that I consulted but I
34 decided that it had no relevance to the questions I
35 had been asked to respond to in the report.

36 Q So, you, you referred to the two together,
37 bibliography and this list, which is Exhibit 268, as

38 the corpus of your research?
39 A It is the corpus of the research. This process of
40 listing documents consulted but not used is standard
41 practice for ethnohistorians because it's incumbent
42 upon anyone reviewing the report to see what sources
43 were consulted and to see which ones were omitted.
44 So, it assists in that kind of assessment of the
45 report.
46 Q So, anything, any articles or books or other sources
47 that aren't on either the consulted but not used

00026

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 list or your bibliography, were not part of the
2 research that you did?
3 A Generally, that's correct. I mean, I may have
4 omitted something, but I think we made reference to
5 the Beynon Volume 2, which appeared in my
6 bibliography but not in my -- or appeared in this
7 but not in the other, and that was an omission just
8 by volume and --
9 Q Right. So, other than slips, which may or may not
10 have occurred, the, the universe from which you drew
11 your report and opinion is comprised by these two
12 lists, bibliography and documents not consulted?
13 A Yes.
14 Q And I understand that you began the collection of
15 this material in March of 2006; is that right?
16 A I believe that's the date that I started looking at
17 it. I guess I would have to see -- I believe that's
18 the date.
19 Q And you have mentioned that you followed the
20 ethnohistorical method in researching and providing
21 your answers to the questions in the report; is that
22 right?
23 A Yes.
24 Q And do you always use that method?
25 A Uhm, it depends -- I always use the method, but in
26 certain cases, the ethnohistorical method doesn't
27 yield the kinds of answers that a question may
28 require.
29 Q And then you would have a different method?
30 A No. I would still use the ethnographic method --
31 sorry, the ethnohistorical method, but more weight
32 would be attached to ethnographic data versus
33 historical documents.

34 Q And is that, is that what you would do where there
35 is an absence of historical documents, for instance?
36 A Yes.
37 Q So, just to, to conclude this, and summarize I hope,
38 the report is based on the material in the
39 bibliography; is that right?
40 A Yes.
41 Q And the answers to the questions, the opinion and
42 answers to the questions in the report are based on
43 the report; is that right?
44 A The answers to the questions are in the report.
45 Q There are questions in the report and you have
46 answered them in the report and then you have a body
47 of, of material in the report?

00027

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 A Yes.
2 Q Which is intended, I take it, to support those
3 answers?
4 A Well, the intended sections are indicated by
5 footnotes and those footnotes should be represented
6 in the bibliography.
7 Q Right. But are there any, any of the questions in
8 the report that are answered without supporting
9 material in the report itself within the Pages 1 to
10 170 odd?
11 A If they are, they're indicated without a footnote.
12 Q Uhm, without a footnote?
13 A I'm sorry, I understood your question to be, are
14 there parts of the report that aren't supported by
15 documents?
16 Q Now, that's not what I meant, but maybe that's what
17 I said. So, I will ask you that question, because I
18 was going there. So, are there parts of the report
19 that are not supported by documents that are in your
20 bibliography?
21 A Oh, the documents that are supported -- the
22 documents that are cited in the report should be in
23 the bibliography and they would be indicated by the
24 footnote reference.
25 Q Okay. Then are there statements in the report that
26 are not supported by a reference?
27 A Yes, there are statements in the report unsupported
28 by a reference. They are the conclusion drawn, that
29 I have drawn from the data.

30 Q So statements that are not footnoted are generally
31 your conclusions?
32 A Generally that's the case. There may be omissions,
33 but generally that's the case.
34 Q Right. Now, back to what I was trying to get at,
35 not very effectively, is that Mr. Mackenzie set out
36 a number of questions that are identified as 1.1.
37 and so on, and you have answered those with specific
38 answers at the beginning and end of the report?
39 A Yes.
40 Q And are those answers based on the material that is
41 found within the covers of the report?
42 A Yes.
43 Q Dr. Lovisek, I would like to refer to your 2005
44 "Overview of the Lax Kw'alaams Marine Resource Use".
45 Dr. Lovisek, do you recognize this as being the
46 outline of the oral presentation you did in 2005?
47 A Yes.

00028

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 Q It is dated June 2nd, 2005; is that right?
2 A That's correct.
3 Q Okay. Now, was the purpose of this presentation for
4 you to obtain a contract with the Department of
5 Justice on this case?
6 A No.
7 Q But it was related to this case, was it not?
8 A It was related to this case only in general. I had
9 no knowledge, I believe, of any of the questions or
10 interests at that time.
11 Q So, you didn't realize that there was a claim for
12 fishing rights by the Lax Kw'alaams?
13 A Oh, I think I had knowledge that there was, but this
14 was considered a separate, just to provide an
15 overview of the ethnographic and published sources
16 about the use of marine resources.
17 Q Right. And you have a footnote at the bottom of the
18 page that clarifies that it does not necessarily
19 constitute your opinion.
20 A Yes.
21 Q But you had had occasion to review the literature in
22 order to, previously, in order to prepare this, or
23 did you do a specific literature review for the
24 purpose of this presentation?
25 A I did a specific literature review for the purpose

26 of this.
27 Q Now, the statements in here, the observations and
28 descriptions, which I see are not your opinion, but
29 the statements and descriptions are at variance with
30 the opinions you have expressed in your report that
31 you have submitted in court here; is that right?
32 A I don't know which specific, uhm, areas that you
33 indicate.
34 Q Okay. Well, we can go to that.
35 A Okay.
36 Q But have you had occasion to look at this since you
37 did it or --
38 A No, I did not because this is based on an overview
39 of published ethnographic sources and was prior to
40 my undertaking my investigation of the ethno-
41 historical sources, which is the principal means of
42 deriving the report and the report answers.
43 Q Okay. Well, I must say that your footnote says it's
44 an overview of the published literature, not
45 ethnographic sources.
46 A Yes. I just wanted to make that clear. And in
47 addition, this was an oral presentation in which I

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 use various slides to give an overview of marine
2 resource use.
3 Q But you are not, surely, telling me that you only
4 reviewed ethnographic literature?
5 A Well, I reviewed what is cited in the -- there are a
6 few references to Vancouver and other historical
7 sources.
8 Q Well, perhaps we should have a look then at the
9 references. They're at Page 21. When I read your
10 footnote, which says that it's an overview of the
11 published literature, I didn't understand that to be
12 restricted to ethnographic sources.
13 A Hm-hmm.
14 Q And if we just -- are you at Page 21, Dr. Lovisek?
15 A Yes.
16 Q The second entry, Ames, Peoples of the Northwest
17 Coast, Their Archaeology and Prehistory?
18 A Yes, that's a published source.
19 Q But it's not, that's not ethnography?
20 A Well, I use ethnographic to describe any description
21 of using ethnographic sources and their

22 interpretation and certainly Ames and Maschner are
23 talking about archaeology and prehistory, but
24 they're providing an ethnographic description of
25 people.
26 Q Okay. All right. So, you are, when you say
27 ethnographic, and I guess this may explain --
28 A Well, ethnographic means a description of a culture
29 of people.
30 Q And that's what you set out to do in this 2005
31 report?
32 A Well, this is not a report. This is an oral
33 presentation. This is the written form of that oral
34 presentation in which I was using slides.
35 Q Right. This is an overview of the published
36 literature?
37 A It's an overview of the published literature and
38 basically to examine or to describe the marine
39 resources by the Lax Kw'alaams.
40 Q It includes -- so it includes archaeology, where the
41 archaeology is used to interpret the culture; is
42 that --
43 A Yes, it primarily focuses on published sources that
44 were available to me.
45 Q Right. And some of those are about historical
46 sources? I am looking at the sixth-down bullet,
47 Clarence, he is writing about the conversion of the

00030

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 Fort Simpson Tsimshian?
2 A Yes, it's a published source.
3 Q That is, it --
4 A Historical --
5 Q -- relies on the historical material.
6 So, are the views expressed in the published
7 sources that, the published literature that you
8 reviewed, the generally accepted views in the
9 anthropological community respecting the Coast
10 Tsimshian?
11 A Uhm, well, it's hard to say, but are all the views
12 of each of the writers of these articles generally
13 accepted. They are published. They are, in many
14 cases, cited. But they are an overview of some of
15 the readily available sources that one could examine
16 to provide an overview, but not to provide,
17 obviously, I'm not providing an ethnohistorical

18 study of this issue.
19 Q Yes. But insofar as your opinion is now different
20 from the overview, which you took from others, it
21 would be because you have determined different
22 information or come to different conclusions on the
23 basis of the material in your bibliography?
24 A Well, if it is different from the findings that I
25 identify in my report, it is because what drives my
26 report is the ethnohistorical data and because, as I
27 have expressed earlier, it's imperative to subject
28 many of the published sources and the ethnographic
29 sources to dating, to ethnohistorical scrutiny more
30 or less, and that's what the report is based on --
31 Q But --
32 A -- in this --
33 Q Excuse me. But these, in themselves, the material
34 that you relied on to provide this oral
35 presentation, this overview, is in itself
36 ethnohistoric material; is that right? Or ethno-
37 graphic material? Or I'm sorry, I'm using the wrong
38 word.
39 A It's not ethnohistorical, no.
40 Q It's ethnographic?
41 A Ethnographic.
42 Q And so, insofar, and we'll go through this, but
43 insofar as you do come to different conclusions,
44 after your ethnohistorical approach in the current
45 report, the report in this case, it's because you
46 have found that these, this published information is
47 deficient in some way?

00031

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 A Well, the published information is only relating to
2 descriptions of marine resource use. It isn't
3 attempting to put it into chronological periods or
4 determine -- or nor is it being expressed to respond
5 to any of the questions that I have been
6 subsequently asked to respond to.
7 Q All right. Well, maybe we should just have a look
8 at the overview, at the oral overview at Page 1.
9 The first paragraph says:

10

11 The Lax Kw'alaams are classified by
12 anthropologists as Tsimshian --

13

14 And then you describe the linguistic group that
15 has four major language variants: Nisga'a, Gitksan,
16 Coast Tsimshian and Southern Tsimshian?

17 A Yes.

18 Q Now, do you agree that that is correct, the correct
19 description?

20 A Yes.

21 Q Than you then say that:

22

23 The Lax Kw'alaams are also known as the Coast
24 Tsimshian, Fort Simpson Tsimshian and the
25 Metlakatla Tsimshian.

26

27 Is that correct?

28 A Yes.

29 Q

30 Precontact the Coast Tsimshian had winter
31 villages on the coast and resource harvesting
32 territories on the Lower Skeena River below the
33 canyon.

34

35 Is that correct?

36 A Yes. As a general statement, yes.

37 Q Okay.

38

39 The Coast Tsimshian occupied the Lower Skeena
40 River drainage area upriver as far as the
41 Kitselas canyon.

42

43 Is that right?

44 A Yes.

45 Q

46 They also occupied the coastal area north of
47 the mouth of the Skeena River to the Nass

00032

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 River.

2 Is that correct?

3 A That's the general description of them in the
4 ethnographic data, yes.

5 Q Have you come to change your view of that? Is that
6 not correct in your view?

7 A Uhm, that isn't something that I explored in my
8 report as to the entire territories that were
9 occupied. Only those territories that are

10 identified in the report that refer to the Coast
11 Tsimshian occupation.

12 Q So, are you telling me that you have no opinion as
13 to whether the Coast Tsimshian occupied the coastal
14 area north of the mouth of the Skeena to the Nass
15 River?

16 A Well, as a general statement, we can see that, from
17 my report, there are changes in group occupancy at
18 various different times. So, this is a general
19 statement about the ethnographic period which hasn't
20 been subjected to the ethnohistorical data.

21 Q So, then you disagree with this last sentence in the
22 --

23 A No, I don't. What I am saying is that this is a
24 description based on what the ethnographies have
25 generally described as a feature of the Coast
26 Tsimshian and that's the material I was relying on
27 at that time, at the time of preparing this oral --

28 Q And, and those materials identify the occupation of
29 the area between the mouth of the Skeena and the
30 mouth of the Nass as being before 1787; is that
31 correct?

32 A No, they don't specify a date at all.

33 Q None of these, none of the materials that you
34 reviewed, as listed beginning at Page 21, will
35 specify that it was before contact with Europeans?

36 A Uhm, I will have to review this. This has been a
37 while since I looked at this.

38 Q Well, surely you are aware that there are many, many
39 statements in the published material that say that
40 the Coast Tsimshian were in their coastal
41 territories long before Europeans.

42 A Sorry?

43 Q Have you not noticed that? Many of the sources
44 which you referred to in your bibliography make
45 reference to the Coast Tsimshian having been in
46 their territories before contact with Europeans; do
47 you agree with that?

00033

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 A There are, there are sources cited in my
2 bibliography which attest to that. My approach has
3 been to examine whether those sources have validity
4 based on the ethnohistorical and archaeological
5 data. That's the whole purpose of the report. So

6 that those sources exist in the bibliography doesn't
7 necessitate that I am relying on that unless it's
8 stated in my report.

9 Q Right. So, you are choosing not to rely on parts of
10 those sources that say the Coast Tsimshian, before
11 Europeans, were occupying the coastal area between
12 the Skeena and Nass?

13 A I'm not choosing to. I think, as I have expressed
14 to this court, it's important to subject the
15 ethnographic data to ethnohistorical scrutiny, and
16 that means trying to put descriptions into their
17 historical chronological period and then making, or
18 drawing conclusions or making inferences from that.

19 Q So, are you, at some point, going to be able to show
20 me material that says that this last sentence about
21 the coast, between the Skeena and Nass being
22 occupied by Coast Tsimshian precontact is wrong?

23 A Uhm, well, as my report indicates, there are
24 migrations, and in the 18th century, and there is
25 occupation indicated by the archeological sources
26 and the Tsimshian narratives that provide some
27 information that the Tlingit were occupying portions
28 of that.

29 Q Your report says that the Tlingits were occupying
30 Dundas Island; is that right?

31 A Yes.

32 Q That is what your report says?

33 A But there is also information in the report which I
34 have referred to by Archer and by the Tsimshian
35 narratives which refers to the Tlingit having
36 occupied areas within this general geographic area
37 between the Skeena River and the Nass River.

38 Q But if we were to consider what Archer said, he said
39 that that was a long time ago with the exception of
40 possibly Dundas Island, didn't he?

41 A He said it was a long time ago. He didn't date it,
42 so it's impossible to say from that when it
43 occurred. But any piece of information needs to be
44 assessed from other pieces of information to assess
45 what particular time period it referred to.

46 Q Okay. Well, if we have the starting point here of
47 the overview of the published literature, that the

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J.A. LOVISEK (for Defendant)
Cross-exam by Mr. Rich

1 Coast Tsimshian were, were occupying this coastal

2 area between the mouths of the Nass and Skeena, and
3 if you don't accept that as a general proposition, I
4 would expect you could tell me that there is some
5 work done by some scholar that makes that statement,
6 that says this is wrong.

7 A Uhm, the premise on which this description is made
8 is from the ethnographic data which refers to, as I
9 said, a period called the "ethnographic present" and
10 that is the mid-19th century in many cases. So, to
11 apply this to the precontact period is -- would be
12 relying on information and not dating it properly.

13 Q Okay.

14 A So the information that I rely on for other groups
15 to have occupied this area are the information from
16 the Tsimshian narratives which relates to the
17 Tlingit occupation and those scholars who have
18 suggested that the Tlingit have occupied that area
19 at some point.

20 Q And that's Dundas Island?

21 A Well, Dundas Island is one of them, but there is,
22 there are references in my report to various parts
23 as far south as Kitkatla.

24 Q Well, we'll get to your report and then we can see
25 what they're based on, I guess.

26 If we carry on on Page 1, it says, at the
27 beginning of the last paragraph:

28
29 The Coast Tsimshian originally comprised ten
30 independent local groups known as --
31

32 And then there are the names of the ten groups,
33 which I won't try to pronounce. Do you agree with
34 that?

35 A This, again, is from the ethnographic data that
36 describes that kind of organization and does not
37 represent or necessarily represent the precontact or
38 protocontact groups.

39 Q But it's the consensus of the published literature
40 or it was in 2005?

41 A It was a consensus of literature which has not
42 examined the ethnohistorical sources.

43 Q So, you don't agree with the statement, "the Coast
44 Tsimshian originally comprised ten independent local
45 groups"?

46 A Well, we can see now from Martindale's work that he
47 had difficulties locating some of these named groups

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

- 1 along the Skeena River.
- 2 Q So you rely on Martindale to refute this?
- 3 A As -- I rely on the chronology of historical and
- 4 archeological data to assess what time period these
- 5 kinds of statements from the ethnographic record
- 6 apply to.
- 7 Q Well, do other people, other than Martindale,
- 8 dispute that these 10 groups were there at contact?
- 9 A Uhm, the problem with making a statement that they
- 10 were there at contact is that the ethnographic
- 11 sources don't state specifically that these groups
- 12 were there at contact. They are describing them
- 13 based on ethnographic data and memory culture, which
- 14 may pertain to any particular period but not
- 15 necessarily to the precontact, and that's been the
- 16 major theme of the undertaking for the
- 17 ethnohistorical approach.
- 18 Q All right. But the consensus of the published
- 19 literature seems to go along with the proposition
- 20 that these 10 groups were there at the time of
- 21 contact with Europeans; is that right?
- 22 A I'm sorry, it doesn't say anything about being there
- 23 at the time of contact.
- 24 Q Well, I am asking you if they were.
- 25 A Well, I have provided that information in my report
- 26 about the group names and those names that are
- 27 absent from the Skeena River which could not be
- 28 identified with the village site, primarily from the
- 29 Martindale study.
- 30 Q So, you have pointed out that it doesn't say
- 31 "precontact", and I suppose I misinterpreted the
- 32 word "originally". What did you mean when you wrote
- 33 "Coast Tsimshian originally"?
- 34 A Well, I wrote originally because these relate to the
- 35 ethnographic sources, the descriptions of culture
- 36 based on ethnographic record, not on the
- 37 ethnohistorical sources.
- 38 Q But it's a reasonable inference that these
- 39 published, the published literature, if it supports
- 40 originally comprised, mean precontact. What else
- 41 could "originally" mean?
- 42 A Well, I guess it depends what you mean by precontact
- 43 as well. Given the definitions that I provide in

44 the report, uhm --
45 Q Well, I mean pre, for the purposes of our
46 discussion, pre-1787.
47 A Well, the ethnographic sources, as I've informed in

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 my testimony, refer to a period of time which can't
2 be dated, is often referred to as "the ethnographic
3 present", and this period has not been confirmed or
4 subjected to ethnohistorical scrutiny. And this is
5 what is important about the ethnographic sources, is
6 that they pertain to a period of time which was
7 prior to contact in the sense that it is based on
8 memory culture.

9 Q Well, but you have prepared this report. You have a
10 list of references at Page 22 -- 21, 22, 23 and 24.
11 There is over 50 references. Reputable scholars
12 over a hundred years have written about this. You
13 have concluded, for the purposes of making an
14 overview presentation, that the Coast Tsimshian
15 originally comprised, and now you are suggesting
16 that "originally" doesn't have any significance and
17 that you were only referring to some ethnographic
18 present, not on the published literature by, I don't
19 know if it's 50 different scholars, but there are
20 over 50 references; is that right?

21 A I'm referring to the ethnographic sources and to
22 these sources that generally describe these groups
23 by that name, by those names.

24 Q Okay. Well, I will carry on. At the last line on
25 Page 1, it begins at the middle of the line:

26
27 Each of the local groups controlled resource
28 territories which were the property of a
29 segment of a matrilineal descent group or clan.
30

31 Do you agree with that?

32 A Sorry, we are on Page 1?

33 Q At the very last line of Page 1, at the middle of
34 that line, the sentence beginning "each of the local
35 groups" and it goes over to Page 2.

36 A Yes.

37 Q Is that correct?

38 A Uhm, well, it's correct to this, to the description
39 of an ethnographically. We now know, by looking at

40 the ethnohistorical data, that originally they
41 probably comprised of two clans, and not four, and
42 that later was elaborated and that's in the report.
43 Q And when you say "originally", is that the
44 ethnographic present or does that mean something?
45 A Ethnographic present. It means ethnographic
46 present.
47 Q So, at the same time that there were four clans,

00037

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 there are two clans? I mean, you use "originally"
2 in this context to mean something. You're talking
3 about way back, aren't you?
4 A I'm using "originally" to mean the ethnographic
5 present, which is how it is construed in the
6 ethnographic material.
7 Q So, is there a sequence, in your view, between being
8 two clans and four clans?
9 A Yes, from the literature, and it is reported in my
10 report, about the two clans to the four clans.
11 Q And so when did that occur?
12 A That's estimated to have occurred sometime in the
13 past. It could be precontact. But I believe it's
14 Marjorie Halpin's work that I cite in the report
15 that refers to that. Some of this configuration
16 with the additional two clans is as a result of
17 migration.
18 Q Okay. And you say here the primary purpose of the
19 four clans, and I'm at the top of Page 2, the
20 primary purpose was to regulate marriage; is that
21 correct?
22 A Yes.
23 Q Now, if we go to Page 3 of your overview, we may get
24 some clarity on what "originally" means. You say
25 here:
26
27 Precontact, the Coast Tsimshian were divided
28 into ten named local groups which resided in
29 territories on the Skeena River and occupied
30 camps and summer locations on the coast
31 particularly around the islands of Digby and
32 Kaien.
33
34 I'm at Page 3, the bottom paragraph. Do you agree
35 with that?

36 A Yes.
37 Q Okay. And the next sentence, the third line of that
38 final paragraph on Page 3, is:

39
40 At some unspecified date, simply described as
41 prehistoric, the local groups extended their
42 territories coastward into the archipelago of
43 islands and built new winter villages on the
44 islands of Venn (Metlakatla) Pass, where the
45 weather was milder.

46
47 Do you agree with that?

00038

J.A. LOVISEK (for Defendant)
Cross-exam by Mr. Rich

1 A Yes.

2 Q Then it continues, your report, excuse me, your
3 overview continues:

4
5 They continued, however to return to their
6 resource territories on the lower Skeena River
7 in the summer and fall for salmon fishing,
8 hunting and other resources.

9
10 Do you agree with that?

11 A Yes.

12 Q And then beginning at the very last line at the end:

13
14 The local groups followed a seasonal cycle of
15 residential mobility between their interior
16 territories in the lower Skeena watershed and
17 coastal villages in and around Metlakatla in
18 Prince Rupert Harbour.

19
20 Do you agree with that?

21 A Well, we now know from archeological evidence that
22 some of the descriptions about season mobility based
23 on Garfield's work and Boas's work, is subject to
24 some revision. So, again, because I'm just
25 describing a general description of residential
26 mobility, this is a general statement, so it can
27 rely -- it can apply to various time periods, in
28 fact, even though it's indicated as precontact.

29 Q Right. And so, now -- but I'm saying, I'm
30 suggesting that this statement actually does refer
31 to precontact, looking at the, the paragraph as a

32 whole. So, is this a correct statement for
33 pre-1787?
34 A Well, we know now from Martindale's work that there
35 was a precontact occupation of the Skeena River, and
36 we don't know how long that occupation was, whether
37 it was seasonal or not, because of the transition to
38 the settlement patterns on the Skeena River later.
39 Q So, you are suggesting then that this statement is
40 not correct for pre-1787, the statement beginning
41 "the local groups followed a seasonal cycle"?
42 A Could you repeat that please?
43 Q Okay. You have a statement here that says:
44
45 The local groups followed a seasonal cycle of
46 residential mobility between their interior
47 territories in the lower Skeena River watershed

00039

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 and coastal villages in and around Metlakatla
2 in Prince Rupert Harbour.
3
4 And I am asking, is that true, in your opinion,
5 from, in the period pre-1787?
6 A Uhm, it appears to apply to the period, to the
7 precontact period, but not necessarily to the
8 protocontact period, based on the work by
9 Martindale. So, it could apply to the pre-1787 in
10 the sense that is pre-1700, my protocontact period,
11 but not necessarily pre-18 -- 1787, because groups
12 were then shifting to the Skeena River and
13 establishing larger villages.
14 Q Now, are their other sources other than Martindale
15 that you rely on to --
16 A Well, Martindale was the only archeologist to have
17 examined the material evidence from the Skeena
18 River, and his work is supported by Prince's, who is
19 another archeologist who was looking at sites on the
20 upper Skeena River and seeing the same transition in
21 settlement pattern.
22 Q All right. On Page 4 of your overview, the next
23 paragraph refers to a map, which we don't have I
24 don't think, but that carries on then, the middle of
25 the first line of the first full paragraph on Page
26 4:
27

28 ... during the precontact period three groups,
29 (Gitwilgiots, Gitzaklalth and Ginakangeek)
30 controlled large portions of the coast, such as
31 the Dundas Island group and the Stephen Island
32 group in Chatham Sound (near the Portland
33 Canal) in addition to their lower Skeena River
34 resource territories.
35

36 Do you agree with that?

37 A Yes. Again, using precontact to, in this case, it's
38 referring to the protocontact period, pre-1787.
39 Unfortunately, I don't believe that I distinguish
40 between these three historic periods, being the
41 precontact, the protocontact and the postcontact,
42 but in this statement, which is a general statement,
43 it's referring to the protocontact period, sorry, to
44 the, to the precontact meaning pre-1787 period.

45 Q Yes. What you were calling protocontact?

46 A Uhm, protocontact is between 1700 and 1787. Pre --
47 sorry, protocontact period.

00040

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 Q Yes. I realize we have perhaps conflicting
2 terminologies, because I am asking you about
3 pre-1787 and I understand you to say that you agree
4 with that if, if precontact means 1787.

5 A Yes. And we also know now that the parts of Dundas
6 Island in particular were also occupied by the
7 Tlingit.

8 Q Oh, I suggest we don't know that.

9 A Well, we know that from my report, which is based on
10 archeological evidence and ethnographic evidence.

11 Q It's your opinion?

12 A Yes, it is, based on evidence.

13 Q Then the next sentence in that paragraph says:

14

15 The map illustrates that the ten named local
16 groups held resource territories on the lower
17 Skeena River and that some held winter village
18 locations along the coast.
19

20 Is that correct?

21 A Well, unfortunately, I don't have the map in front
22 of me to see which map I had relied on for this.

23 Q You're quite right. It's a very poor question.

24 Do you agree that the ten named local groups
25 held resource territories on the lower Skeena River
26 and that some held winter village locations along
27 the coast?

28 A Well, as I said, from Martindale's work, he was
29 unable to find associated villages with all ten
30 named local groups, and that's a finding that is
31 reported in my report.

32 Q Okay. I would ask you to go along to Page 6 please.
33 At the bottom of Page 6, the last paragraph on the
34 page, it, again, refers to a map, but then the
35 sentence continues:

36
37 ... the Skeena River was used to transport
38 trade items during the precontact period.

39
40 Do you agree with that?

41 A Uhm, precontact period meaning?

42 Q For my questions, until I tell you otherwise, I mean
43 pre-1787.

44 A Well, we know now from, again, Martindale's work,
45 and supported by Prince's work, that this area being
46 used for transporting trade items -- oh, yes, I
47 remember where the slide came from. This slide

00041

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 refers to the -- I'll just look at the bibliography.
2 Yes, I think the slide that was up at that time was
3 the MacDonald, Coupland and Archer, the Coast
4 Tsimshian ca 1750, from the historical atlas. And
5 based on the information from that slide, they were
6 suggesting that these goods are being transmitted up
7 the Skeena River precontact, and that's the
8 information that I relied on to -- by showing that
9 slide. What we know now is that, from other
10 archeological sources, as well as site material that
11 I cite in my report, that this date is referring to
12 a date that was probably provided by Boas and
13 actually refers to the postcontact period, because
14 the shift to the Skeena River to transport goods was
15 postcontact.

16 Q And that's because of Martindale's work?

17 A Again, it's because of Martindale's work, but it
18 also is, as I mentioned, it's supported by Prince's
19 work, and it also is supported by the Hudson's Bay

20 Company documents, which refer to the same kind of
21 goods that are identified in the map by the atlas of
22 Canada as appearing in exchange with the Tsimshian
23 who were the middlemen at the post, at the Hudson's
24 Bay Company Post at Fort Simpson.

25 Q Well, just because they appeared in the 1830s or
26 1840s doesn't mean they weren't appearing in the
27 1730s or 1740s, does it?

28 A Well, not without evidence. I mean, we can see the
29 example of those goods coming in as surplus from
30 groups who wanted to participate in the trade.

31 Q So, you're saying that it's your -- having reviewed
32 this material, the assertions by Coupland and
33 MacDonald were without evidence?

34 A Well, in looking at the historical map, if there is
35 a reliance on the Tsimshian narratives and on Boas's
36 work that I think inform that map, and there was no
37 testing as to what historical period -- I see no
38 reference to use of the Hudson's Bay Company
39 records, for example, that they are estimating a
40 date and applying that as if it existed in the
41 precontact.

42 Q If we move to Page 8 of the report -- try to finish
43 this up -- at the top of Page 8, your overview says:

44
45 However, both the ethnographic data and the
46 archaeological data support a settlement
47 pattern characterized by residence in permanent

00042

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 villages in the winter and a reliance on stored
2 salmon.

3

4 Do you agree with that?

5 A Yes, and as I continue in the next paragraph:

6

7 Archeological data from post contact sites
8 shows a dramatic increase in the number of
9 villages...

10

11 And this comes from Martindale's work.

12 Q Okay. So, in presenting this overview, you were
13 already aware of Martindale's work?

14 A I was aware, not of his thesis, which, and I will
15 just look through the bibliography, but, uhm, that,

16 the Martindale's work was his published source and
17 not his full study based on his Ph.D., which I rely
18 on in my, in my expert report.

19 Q Then you say "the interior sites" -- at the bottom
20 of Page 8, excuse me:

21
22 The interior sites along the Skeena River
23 watershed suggest that the Coast Tsimshian
24 relied upon subsistence obtained from their
25 resource territories until about the 1840s,
26 when they shifted their economy to rely more on
27 the fur trade.

28

29 Do you agree with that?

30 A That's from Martindale and is a published article as
31 I recall.

32 Q Okay.

33

34 In both the ethnographic and archaeological
35 data, the critical subsistence resource was
36 salmon.

37

38 Do you agree with that?

39 A Yes, except the ethnographic and archaeological data
40 that I am referring to are those that are cited in
41 this report. So many of the faunal studies that I
42 cite in my expert report have uncovered a diversity
43 of resources, not just salmon.

44 Q All right. My lady, I see the time. Perhaps -- I'm
45 not going to get through this in short order, so if
46 we could take the break.

47 THE COURT: All right.

00043

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 THE REGISTRAR: Order in court. This court stands
2 adjourned until 2 p.m.

3

4 (PROCEEDINGS ADJOURNED AT 12:30 P.M.)

5 (PROCEEDINGS RESUMED AT 2:07 P.M.)

6

7 THE REGISTRAR: Order in court.

8 MR. RICH: My lady, before proceeding with the
9 questioning on the oral presentation, I would like
10 to have it marked if I may.

11 THE COURT: Yes. Yes, we will mark that.

12 THE REGISTRAR: Exhibit 269, my lady.

13 THE COURT: Thank you.

14

15 (EXHIBIT NO. 269: 24-page document entitled
16 "Overview of the Lax Kw'alaams Marine Resource Use,
17 Oral Presentation, Joan A. Lovisek, Ph.D., M.E.S.,
18 Lovisek Research")

19

20 MR. RICH:

21 Q Dr. Lovisek, just before lunch, we were looking at
22 your oral presentation from 1985 and we had got
23 through it to Page 9. So, just turning to Page 10.
24 Do you have that document?

25 A Page 10, yes.

26 Q At the paragraph in the centre of the page, it
27 begins "Eulachon were cited as the second important
28 fish to the Coast Tsimshian"; do you agree with
29 that?

30 A That eulachon were cited as the second important
31 fish, according to the literature that I examined,
32 yes.

33 Q All right. And now do you agree that it's true that
34 the eulachon were the second important fish to the
35 Coast Tsimshian?

36 A Uhm, it's not clear that it was the fish or the oil
37 that was of importance to it, but it was certainly
38 an important marine resource.

39 Q So, it may have been the processed fish that was
40 important?

41 A Yes, in some cases. In other cases, it was the
42 fish.

43 Q Now, at the end of that paragraph, the sentence
44 says:

45

46 Production of a surplus for barter or trade
47 depended upon a large labour force to prepare

00044

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 and preserve the marine resources.

2

3 Do you agree with that?

4 A Uhm, yes.

5 Q

6 Wealthier local groups relied upon slaves to
7 create a surplus.

8
9 Do you agree with that?
10 A Yes.
11 Q Then at the bottom of the page there is a reference
12 to eulachon oil, at the end of the last full
13 paragraph.
14
15 Eulachon oil was considered superior to the
16 alternative sources of oil and was integral to
17 the preservation and storage of various foods
18 through the winter months, for consumption and
19 trade.
20
21 Do you agree with that?
22 A Yes.
23 Q And going over to Page 11, you say that intensive
24 fishing of the -- excuse me, the first full
25 paragraph:
26
27 Intensive fishing of the eulachon fisheries on
28 the Nass River probably did not occur until the
29 introduction of the funnel shaped eulachon net
30 which was introduced just prior to the historic
31 period.
32
33 Is that your view?
34 A Yes, I believe I cite that in my report with the
35 appropriate source.
36 Q Now, prior to the historic period would mean prior
37 to 1787?
38 A It would be during the protocontact period, which
39 would be between 1700 and 1787.
40 Q But you also say:
41
42 Before this time, herring rakes were used.
43
44 Is that your understanding?
45 A Yes, it's my understanding.
46 Q And do you agree that herring rakes could be a very
47 efficient way of collecting eulachon?

00045

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 A It was considered to be an efficient way of
2 collecting eulachon.
3 Q Now, the next paragraph says:

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The Coast Tsimshian bartered boxes of eulachon oil, dried salmon and halibut at the Nass fisheries.

Do you agree with that?

A No, I don't. I wish I had put footnote sources so that I contribute that source to the dried salmon and to the halibut. We have good data of the bartering of eulachon oil but we don't have any that relates to dried salmon and halibut at the Nass fisheries. When -- as I said, I wish I had put footnotes, but this was an oral presentation and it was an overview study. The one source that I recall that referred to the exchange of dried salmon, it wasn't specifically at the Nass fishery, is the source which is the first on Page 21, Allaire, Louis, "A Native Mental Map", and Dr. Allaire I believe cited some of the Boas mythologies to identify dried salmon as a trade good or exchange good.

Q And so you are saying that, although you included it, it was really an oversight on your part?

A Well, anything in this report, in this overview, which was an oral presentation, that's inconsistent with my report findings, is either an oversight or an inaccuracy.

Q Okay. So, it wasn't your considered opinion?

A No. My considered opinion is in the report.

Q All right. Now, if we go to Page 13, you say this, again, without tying it to the Nass. You say:

The ethnographic sources indicate that the Coast Tsimshian traditionally traded eulachon (grease and flesh) salmon and halibut.

A Hm-hmm.

Q Is that right?

A That's what I state there. I mean, it's right, that is what I state there.

Q And it's true, that ethnographic sources indicate the Coast Tsimshian traditionally traded eulachon grease and flesh, --

A Well, as I say, --

Q -- salmon and halibut?

00046

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

- 1 A -- the ethnographic source which cites that is the
2 Allaire citation, and as I recall, on the Allaire
3 citation of mental maps, he is relying on a feast,
4 which was described by Boas, and the group that is
5 identified as selling dried salmon is one group and
6 that group occupied the area of the Kitselas Canyon.
7 So, technically, they weren't part of the Coast
8 Tsimshian. They were at least the Plaintiffs group.
- 9 Q On Page 14, at the top, there is a reference to the
10 year 1787 as the date of first contact for the Coast
11 Tsimshian, but you note, as you have already, that
12 it was actually Southern Tsimshian who were
13 contacted. And I just want to confirm, your
14 evidence is that the, in your opinion, the date of
15 first contact between the Coast Tsimshian and
16 Europeans was actually 1792; is that right?
- 17 A Well, it would correspond more with the visit of
18 Caamano than it would with Kitkatla, but I also
19 stated that it was an arbitrary date because of
20 protocontact period, which is the period of indirect
21 contact with Europeans.
- 22 Q Right. Now, having, taking that view, you might say
23 that it's a date which is too early rather than too
24 late. Do you agree with that?
- 25 A Uhm, which date is too early?
- 26 Q 1787 may be too early to really consider contact to
27 have been a significant event?
- 28 A No. 1787 would have been too late.
- 29 Q So, in your view, protocontact ends with actual
30 contact?
- 31 A Yes, whatever that date is. It is, it's, as I
32 indicated, these are general dates which correspond
33 with certain events which occurred and which have
34 been generally accepted and, and described in the
35 literature.
- 36 Q So, you are saying, if we look in the literature, we
37 are going to find other people who have the same
38 view of protocontact as you?
- 39 A In the literature, protocontact?
- 40 Q Yes.
- 41 A They will have a view of the protocontact period,
42 but the dates will vary depending on whether they
43 examine the historical sources or whether they
44 relied on only archaeological data to divide their
45 appropriate periods.

46 Q Moving on then to Page 15, you have a statement at
47 the top of Page 15 which may be relevant to this
00047

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 point. Beginning at the second line:

2

3

4

5

6

7

8

9

10 Has that further research been conducted?

11 A I have conducted it in my report.

12 Q You have researched the maritime fur trade?

13 A The maritime fur trading reports that I cite in my
14 report refer to earlier dates than 1831.

15 Q And they refer to the Coast Tsimshian?

16 A Yes, they refer to the groups along the, between the
17 Nass River and the Skeena River, and I am thinking
18 primarily of the maritime fur trade reports that
19 date 1811, 1810.

20 Q All right. Then in the middle of the Page 15, you
21 have a discussion of the Hudson's Bay Company coming
22 to the coast. At the third line of that middle
23 paragraph, you say:

24

25

26

27

28

Then you carry on:

29

30

31

32

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35

36

Is that still your opinion?

37

38

39

40

41

A Well, I would like to see the source that I relied
on for that. It's not particular to my report
findings and I'm not examining or verifying with
historical sources where those fisheries were. So,
I'm sorry, I just can't refer to the --

42 Q So, this is just from the published literature --
43 A It's from the published literature.
44 Q Okay. And you carry on in that paragraph, a couple
45 of lines further down:

46
47 After one of the principal Coast Tsimshian

00048

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 chiefs, Legeex, offered his daughter in
2 marriage to Dr. Kennedy who was working for the
3 Hudson's Bay Company on the Nass River, the
4 Hudson's Bay Company reestablished their fort
5 in 1834 at McLoughlin Harbour or Lax Kw'alaams,
6 meaning, "Place of small wild roses."

7 A Yes, I think, I think that source that I relied on
8 there was Galois, Marsden and Galois, and upon
9 examining that and relating it to the archaeo --
10 sorry, the historical source, it's not as clear that
11 that marriage had occurred either before or at the
12 time of the establishment of the post at McLoughlin
13 Harbour.

14 Q So you have found some historical source that says
15 that Dr. Kennedy was not married to Legaic?

16 A Oh, no, not that he was not married. There was
17 evidence that there was a marriage. They certainly
18 refer to that in historical sources. It's just the
19 dating of the event.

20 Q So your point is that the dating is not clear or you
21 found a date that is post 1834?

22 A No, the date is not clear, whether the marriage had
23 been engaged in prior to the Hudson's Bay Company
24 moving from the Nass River to Fort McLoughlin or
25 whether it occurred at Fort McLoughlin, which would
26 be 1834.

27 Q And had that occurred, it would be in the records of
28 the journal I assume?

29 A Well, the records aren't reporting marriages but
30 they are referring to Legaic as being the son-in-law
31 of a fur trader, at the Hudson's Bay Company Post.
32 So one can't date that marriage specifically to the
33 post reports but one can certainly find evidence
34 that that marriage had occurred. And by marriage, I
35 mean marriage that's used, it's called marriage a la
36 facon de pays, which means marriage according to the
37 country rules by -- meaning that by the rules of

38 non-Christian marriages at that time. Indian
39 marriages that are often referred to in the records.
40 Q And so had that marriage or quasi marriage occurred
41 in 1834, that's to say that Dr. Kennedy had taken a
42 wife on some uncertain terms in 1834, that would not
43 have been reported in the journal?
44 A Uh, it, I'm not sure that it was reported in the
45 journal but that the event had happened is in the
46 journal, and I'm trying to think to the John Work
47 journal, as to whether he reports that situation.

00049

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 Marriages which occurred in the form that I
2 described were common, so this was not something
3 that --
4 Q So, it might not have been reported?
5 A It might not have been reported but there would be
6 references to Legaic, for example, being the
7 son-in-law of the fur trader.
8 Q So, we know that there was a marriage of some sort.
9 We know that it was Legaic's relative married to Dr.
10 Kennedy.
11 A Yes.
12 Q We, on the basis of the journals, do not know
13 whether that occurred before or after 1834.
14 A We don't know if it happened between 1831 and 1834.
15 Q Well, all right. It may have happened between 1831
16 and 1834?
17 A That's correct.
18 Q The journals don't shed any light on that.
19 A No. I would have to consult the journal which
20 refers to the marriage having had occurred in the
21 sense that Legaic was the son-in-law of the fur
22 trader.
23 THE COURT: Isn't it the other way around?
24 MR. MACKENZIE: Yes.
25 THE COURT: You keep saying that, but you might want to
26 just clarify that.
27 MR. RICH:
28 Q My understanding is he was the father-in-law.
29 A Sorry, excuse me, you're quite correct, the
30 father-in-law.
31 Q So, the situation is, we have a couple of scholars
32 who have stated that is their view. They have
33 written it in literature that was considered to be

34 worthy of reference by you in providing an overview.
35 Is that right?
36 A I have cited the sources, the published sources to,
37 to make that statement. I did not consult the
38 Hudson's Bay Company records to confirm that.
39 Q And now you have consulted them?
40 A Yes.
41 Q And you are no wiser than you were before you
42 consulted them because you haven't found anything
43 that bears on that?
44 A No, the point is -- if I make a mention, if I make
45 mention of it in my report, the point is whether
46 that's significant to the findings in my report, not
47 that reciting it. This overview had no relationship

00050

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 to the findings in my report which were directed at
2 specific questions. I wasn't looking for the
3 marriage of Legaic, to Legaic's daughter. Sometimes
4 it's referred to not as his daughter, but as another
5 relative that was married, which creates confusion
6 in identifying who the individuals were.
7 Q Well, that's just an indication of how questionable
8 a source the Hudson's Bay journals are, isn't it?
9 A No, it isn't. The company, if the Hudson's Bay
10 Company sources are describing activities that occur
11 at the time that they're reporting them, then one
12 can rely on that date as being, as an indicator of
13 that activity having occurred. That they don't
14 record the marriage because marriage, as I said,
15 mariage a la facon de pays refers to marriages that
16 are common and were occurring amongst various fur
17 traders and other groups.
18 Q Well, if the Hudson's Bay Company didn't bother to
19 report something as significant as one of the few
20 people who were members of their core --
21 A No, that would not be an unusual event.
22 Q So, they may well not have --
23 A It was --
24 Q -- reported many things about the aboriginal people
25 who were in the vicinity?
26 A Well, one can deal with what they do report in the
27 documents, not what they don't report. And one can
28 look at other data to try to establish what dates an
29 activity may have been identified in an ethnographic

30 source or from oral tradition.
31 Q But they might have missed it altogether?
32 A Well, it isn't a matter of missing it, because
33 marriages between fur traders and aboriginal peoples
34 was common.
35 Q Okay. So, we've got some scholars who say it
36 happened before 1834. I think the reason we're
37 dealing with this is because you expressed doubt
38 about that.
39 A Yes, uhm, --
40 Q But you have no reason for the doubt?
41 A Sorry?
42 Q But you have no reason for the doubt?
43 A No, my doubt is whether I can attribute that
44 marriage to 1831 or 1834 before the Nass moved, the
45 Nass, the fort moved from Nass to, to McLoughlin
46 Harbour to the Fort Simpson side. An issue -- even
47 if there was a debate as to whether it occurred

00051

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 between 1831 and 1834, it would not have been
2 significant.
3 Q All right. Then the paragraph at Page 15, the
4 second-last sentence, is:
5
6 This was a camping location used by Legeex en
7 route to the Nass River eulachon fishery.
8
9 Do you agree with that?
10 A Well, actually there is historical evidence relating
11 to the establishment of the post of the Hudson's Bay
12 Company at Fort Simpson, which rejects that
13 information that it was a camping spot by Legaic and
14 that is cited in my report.
15 Q So, you are, you say that's wrong because of what
16 you cite in the report?
17 A Yes. I'm saying that these descriptions that come
18 from secondary sources are published sources without
19 being verified in some way with the ethnohistorical
20 record, where that record exists, or having support
21 from archaeological, ethnographic and
22 ethnohistorical data opens it up to some forms of
23 scrutiny and re-examination.
24 Q So, of those two points in that paragraph, one of
25 them you have re-examined and come to a conclusion,

26 that's the latter point, about the camping location,
27 you have come to a different conclusion on the basis
28 of your research, but the former one about the
29 connection with Legaic and his daughter being
30 married to Dr. Kennedy, you have not followed up?
31 A Uhm, I do believe I refer to that reference to the
32 Hudson's Bay Company as to Kennedy being the --
33 Legaic being the father-in-law, but there are, as I
34 mentioned, at least two different versions as to
35 whether it was a daughter or another relative that
36 was married.
37 Q Two different versions in the journal?
38 A Uhm, in the records that I cite in the report.
39 Q So, one, the journal, and one something else? Is
40 that what you mean?
41 A It might be. I just can't recollect --
42 Q You don't remember.
43 A -- right now.
44 Q Well, I guess we'll get to that.
45 A Okay.
46 Q Then on Page 16, the top paragraph, the first four
47 lines, at Line 3, you say:

00052

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1
2 The Tsimshian traded marine resources such as
3 halibut, cod, eulachon, salmon and herring roe
4 to the fur traders at Fort Simpson.
5
6 Is that right?
7 A Yes.
8 Q Did the fort buy herring roe?
9 A Uhm, there seemed to be more of an exchange to First
10 Nations. This was the middleman role of the
11 Tsimshian individuals, such as Legaic, would receive
12 herring spawn from other groups and then transport
13 that up the Skeena River. But sometimes the fur
14 traders would exchange or trade herring roe to trade
15 to other First Nations.
16 There is references, for example, I recall in
17 the Hudson's Bay Company records, to the Kitkatla
18 bringing up herring roe, even though they weren't
19 interested, the Kitkatla weren't interested in the
20 herring roe, and exchanging that to the fur traders
21 who would then exchange it to others who were

22 interested.
23 Q Perhaps we can look for that later.
24 At Page 18, at the full paragraph at the top,
25 the last four lines, you say:
26
27 It would be important to compare the reserve
28 locations requested by the Port Simpson and
29 Metlakatla Bands during the Reserve Commission
30 with the locations of Coast Tsimshian marine
31 resource use on the coast and in the resource
32 territories on the Skeena River.
33
34 Did you carry on and do that comparison?
35 A Uhm, well, no, this is an overview. This is
36 something that was suggested. It wasn't relevant,
37 those questions weren't relevant to the final set of
38 questions that I was asked by the Crown.
39 Q All right. Then the balance of this page may not be
40 either. You mention at the next paragraph, in the
41 middle of the page, some of the local groups being
42 identified in the Hudson's Bay Company journals
43 until 1865.
44 A Yes.
45 Q Is that the case, that these local groups, that some
46 of the ten named local groups --
47 A Yes, and I believe I cited when they were identified

00053

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 in the records, when they first appear in the
2 records and their names, so that it can be
3 attributed to a historic period.
4 Q And then at the bottom of the page, you discuss the
5 aboriginal people getting wage work, and it's third
6 line from the bottom, from commercial fishing,
7 cannery work, sealing. Is that relevant to your
8 opinion?
9 A Uhm, this particular period is not relevant to my
10 opinion because my opinion is focused on the
11 precontact period.
12 Q All right. Then we just have the conclusion, which
13 is on Page 19, and the first sentence there is that:
14
15 Marine resources were a major component of all
16 Coast Tsimshian local groups' subsistence and
17 trade, although the group territories had

18 differential productivity and access to
19 specific resources.

20

21 Now, do you agree with that statement?

22 A Yes. We know from the archaeological data, that
23 some groups had access to eulachon, others didn't.
24 Some groups had more access to land mammals than
25 other groups.

26 Q Okay. Then you say in the next sentence, and you
27 have made this point:

28

29 ... the archaeological record shows a greater
30 diversity ... during the contact period, the
31 principal resources appear to be salmon and
32 eulachon, followed by herring and halibut.

33

34 Do you agree with that?

35 A Yes, I'm referring to the contact period.

36 Q Yes, I take that.

37 A And then I state that:

38

39 Whether these resources were traded precontact
40 requires ethnohistorical research...

41

42 Which was then the product of my report.

43 Q You say on the next page, Page 20, the first
44 paragraph:

45

46 Precontact the Coast Tsimshian had winter
47 coastal villages where they obtained marine

00054

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 resources and subsisted on stored salmon and
2 other products, most of which were obtained
3 during the summer and fall at their interior
4 resource territories along the lower Skeena
5 River watershed.

6

7 Do you agree with that?

8 A Well, I, I agree that the salmon, it's probably not
9 clear, but the salmon was the principal marine
10 resource that was taken from their interior resource
11 territories. The other products, we know from
12 archaeological evidence, that it includes berries in
13 particular.

14 Q All right. Then the -- that's the conclusion of
15 your overview and -- except for the references.
16 Now, there are several pages of references here,
17 Page 21 through 24. Now, in choosing these
18 references, is it correct that these are scholars
19 who were generally cited and regarded as authorities
20 on the Coast Tsimshian?
21 A Well, these, these are the sources that were
22 consulted in the preparation of the oral report.
23 They're similar to the separate entry that we have
24 for sources consulted but not used. This isn't a
25 bibliography, so it isn't -- I'm not citing any of
26 these sources in particular, but it forms the corpus
27 of the sources that I consulted in preparing the
28 oral overview. So, I can't say, because I don't
29 have the footnote references to an oral presentation
30 here, which ones I relied on more than the others or
31 which I rejected, because I didn't find, uhm,
32 corroboration with other sources at the time. So, I
33 can't say.
34 Q Well --
35 A I can say -- I mean, if we went through them
36 individually, you know, I might be able to express
37 that view. But you can see, by certain references,
38 like Allaire, which I have referred to, and Boas's
39 work, that there are issues that come up when one
40 subjects them to ethnohistorical scrutiny.
41 Q In selecting these works, you had some prior
42 knowledge of the Coast Tsimshian because you had
43 done a report a few months previously for the Court;
44 is that not right?
45 A Uhm, I can't --
46 Q The report on the Haida where you referred to the
47 Coast Tsimshian, or the Tsimshian?

00055

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 A Yes.
2 Q Okay. So, these authors, at the time you chose
3 them, would have been chosen by you as authorities
4 in the field; is that right?
5 A Well, these were readily available sources. They're
6 readily available in the sense of being published,
7 and they, they related specifically, or as much as
8 possible, to the Coast Tsimshian.
9 Q And the vast majority of them found their way into

10 your bibliography for the report that's in front of
11 us in this case? Do you agree with that?

12 A Well, I would have to just quickly review these to
13 see which ones I relied on.

14 Q Well, perhaps we can come back to that. May I ask
15 you, if I may, do any of these use the -- any of
16 these authors use the ethnohistorical method?

17 A Uhm, Dean uses a version of the ethnohistorical
18 method in the article he published, "These Rascally
19 Spackaloids". I certainly rely on Dean's thesis and
20 his, his article. Galois, "Colonial Encounters" is
21 relying on ethnohistorical data. Galois, "A Voyage
22 to the North West Coast"; the Journals of James
23 Colnett, that is relying on ethnohistorical data.

24 And perhaps I should clarify that the
25 ethnohistorical method is not just used by
26 anthropologists. It's used by historical --
27 historians as well as historical geographers, and
28 Robert Galois is a historical geographer. The
29 method is somewhat different in that the reliance on
30 anthropological theories or principles may be
31 different for a historical job if we are using the
32 ethnohistorical method.

33 Grumet, somewhat, but not a lot.

34 I'm not sure if MacDonald, George MacDonald and
35 Jerome Cybulski rely on some ethnographic sources in
36 addition to their -- or whether they rely on some
37 historical sources. I can't recall on that article.

38 In the Marsden, Susan and Robert Galois, "The
39 Tsimshian, the Hudson's Bay Company and the
40 Geopolitics", they are consulting the Hudson's Bay
41 Company records.

42 Q Excuse me, does that mean they're using the
43 ethnohistorical method?

44 A In part they're using the historical method, because
45 they're also relating it to the ethnographic records
46 such as the Tsimshian narratives. But as I
47 mentioned to you, Robert Galois is a historical

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 geographer.

2 Martindale is relying on some secondary sources
3 for the ethnohistorical record, particularly when he
4 attempts to date Legaic's prominence in the fur
5 trade, which he dates to the postcontact period.

6 I can't recall offhand about James McDonald's
7 work. I believe they cite some historical sources.
8 Uhm, Mitchell's work, Donald Mitchell, who has
9 done so much work on the eulachon and on the
10 fisheries on the Northwest Coast, in his article,
11 "Tribes and Chiefdoms", I think he's relying almost
12 exclusively on the Hudson's Bay Company record, if
13 that is the record I think it is.

14 Stewart's archeological work is comparing
15 archeological data with ethnographic data, but not
16 using a lot of historical sources.

17 Q So, does that bring it within the --

18 A No. Although archeologists try to use a method
19 called the "direct historical approach", which is a
20 method which preceded ethnohistory, and in some
21 cases, will rely on a selected number of historical
22 sources and in conjunction with archeological
23 findings, and also consult the ethnographic record.

24 I can't recall. I think the Stewart and
25 Stewart article is principally archeological data.

26 "Vancouver" is a historical source. And
27 Walbran is not -- it's relying on some historical
28 sources, but it's not, it's not particularly -- it's
29 not an article which is particularly relevant to
30 marine resource use.

31 Q So, hearing your review there, I get the impression
32 that, to fall within the ethnohistorical method,
33 it's a matter of using historical sources. Am I
34 right on that?

35 A The historical method, properly applied,
36 particularly to aboriginal rights, aboriginal and
37 treaty rights research, involves the use of
38 archeological, historical and ethnographic data.
39 And depending on the questions that are asked, that
40 require some clarification, the emphasis may be more
41 on the archeological data and maybe less on other
42 sources because the questions relate to data that
43 may be derived from one of the three principal
44 sources of materials. But in its purest form, it
45 relies on the ethnographic, historical and the
46 archaeological.

47 Q If all three exist?

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 A If all three exist. Often more weight gets put on

2 one or the other, depending on the issue at hand.
3 Q All right. Well, I would like to move along then to
4 the expert report you did for the Haida prosecution
5 we've referred to earlier. Now, do you recognize
6 that report, Dr. Lovisek?
7 A Yes, I do.
8 Q And that was, as you have testified, that was done
9 for the Court, with the intention that it would be
10 put in front of the Court?
11 A Yes.
12 Q So, accuracy was important?
13 A I certainly hope so, yes.
14 Q Did you use the ethnohistorical method in preparing
15 this?
16 A I, I, I believe so. I'm just going to quickly
17 review it to look at the dates which were involved.
18 Yes, in this report, I relied on primary source
19 materials such as the Hudson's Bay Company records,
20 some maritime fur trading reports, some
21 archeological data and ethnographic data.
22 Q So, one of the questions at Page 1 of the report
23 specifically refers to the Tsimshian and it asks:
24
25 Was there any dietary, social, cultural, and
26 ceremonial significance of Dogfish and Dogfish
27 products to the Tlingit, Tsimshian, Nisga'a and
28 other North Coast aboriginal people?
29
30 Do you see that? That's, excuse me, that's Question
31 1.2 at Page 1 right in the middle of the page.
32 A Yes.
33 Q So, I just want to confirm that you specifically
34 were tasked with looking into the Tsimshian culture?
35 A Well, I was specifically tasked to look at whether
36 dogfish was of ceremonial or social or dietary
37 significance to the Tlingit, Tsimshian and Nisga'a
38 and other North Coast cultures, but the principal
39 purpose of the report was to establish whether the
40 Haida used dogfish precontact for commercial
41 purposes. And these groups were addressed as,
42 because I think they were identified as potential
43 partners of which -- whom they would have traded
44 with. I think that was the reason those groups were
45 put in there. But the focus of the research was on
46 the Haida.
47 Q Right. But --

J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 A Because it was a Haida claim, put forth by the
2 Haida.

3 Q But you were asked to look into the Tsimshian
4 situation?

5 A From the point of view of whether the Haida would
6 have exchanged dogfish oil with other First Nations,
7 the other neighbouring First Nations were Tsimshian,
8 Tlingit and Nisga'a.

9 Q Okay. Well, perhaps we can look at what you have to
10 say about those things. The first mention I see of
11 the Tsimshian comes at Page 5. At the last full
12 paragraph in the middle of the page, it says:

13

14 The dogfish crest originated with the Tsimshian
15 after a mythical human encounter with a
16 supernatural being in the guise of dogfish.

17

18 So, this is a crest which has gone to the Haida
19 from the Tsimshian? Is that my understanding? Or
20 excuse me, is that -- am I correct in my
21 understanding?

22 A Yes.

23 Q You then, on the next page, begin a section on
24 precontact use of dogfish, and on Page 7 refer to
25 archeological evidence, and that's at the first full
26 paragraph. And you, at the fourth line down, say:

27

28 For example, flatfish, salmon and dogfish were
29 the most numerous species represented zoo-
30 archeology [I'm sorry] zooarchaeologically at
31 the Boardwalk site ...

32

33 And that's in Prince Rupert Harbour; is that right?

34 A Yes.

35 Q And it was exploited there from, for thousands of
36 years; is that right?

37 A Uh, that's what comes from the archeological work of
38 Stewart, Frances and Kathlyn Stewart.

39 Q Okay. And if we go along to Page 10, this is under
40 the ethnographic section, at the second full
41 paragraph on Page 10, it says:

42

43 The high protein diet of the Haida (and of the

44 neighbouring Tsimshian and Tlingit) was derived
45 from dried and preserved marine resources and
46 relied heavily on oil as a necessary condiment
47 and preservative. The principal oil used was

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 eulachon, which was obtained by the Haida and
2 Tlingit in trade from the Tsimshian.

3

4 Is that correct?

5 A That's what it states there, yes.

6 Q Well, this, unlike the overview, --

7 A Hm-hmm.

8 Q -- is your opinion.

9 A Yes.

10 Q Was your opinion. Is it correct?

11 A Yes.

12 Q And at the last line of that paragraph, it says:

13

14 ... the Haida obtained eulachon from the
15 Tsimshian.

16

17 And you agree with that?

18 A The Haida obtained eulachon from the Tsimshian, yes.

19 And what's interesting about this, this report was
20 produced in 2005, and since looking at the maritime

21 fur trade reports, which I cite in this report, I
22 uncovered reports from maritime fur traders in 1810

23 which refers and describes the trade between the

24 Haida and the Tsimshian or Nisga'a on the Nass

25 River, and that trade is described as involving

26 European trade goods for eulachon oil. And from

27 this early period, those records were not available

28 to me at the time of preparing this report. So,

29 that puts the precontact association between the

30 Haida exchanging goods for eulachon oil,

31 particularly when they're exchanging European trade
32 goods, to a much later period.

33 Q So, you think if you had known that at the time you
34 wrote this, you might not have concluded that the
35 trade was occurring precontact?

36 A That's correct.

37 Q All right. So, just looking at your statement,
38 which you made for the Court:

39

40 The high protein diet of the Haida (and of the
41 neighbouring Tsimshian and Tlingit) was derived
42 from dried and preserved marine resources and
43 relied heavily on oil as a necessary condiment
44 and preservative.

45
46 Now, can you tell me what possible explanation
47 European trade goods would have for making oil a

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 necessary condiment to traditional foods?
2 A Well, oil, in this I'm referring to oil and grease.
3 Because the First Nations people of the Northwest
4 Coast, because they depended on preserved food, they
5 relied on grease to, to consume dried fish,
6 particularly during the wintertime. Most groups, if
7 they could get access to eulachon oil, preferred
8 that as the preferred oil. Other groups did not
9 have access to eulachon oil, but still needed
10 grease. And in certain areas, such as in Vancouver
11 Island, and the West Coast, they relied on whale's
12 oil, whale oil. In other areas, they relied on
13 grease from sea mammals. That would be the source
14 that they would use. Other groups would rely on
15 dogfish oil, if they had to, but not particularly,
16 as there isn't a lot of evidence that it was used
17 for consumption, more for softening skins and other
18 purposes. But there are alternate uses or alternate
19 sources of oil or grease for preserving food and
20 consuming dried fish, but eulachon oil was
21 considered the luxury ultimate item to have. So,
22 groups that didn't have access to eulachon oil still
23 used grease or oils, but it just was dependant on
24 their own sources of, of mammal or animal.
25 Q The fact that the Haida may have been using European
26 trade goods to purchase eulachon oil in 1810 says
27 nothing about whether they would have been using
28 something else in 1710 or 1780.
29 A No, no. And it doesn't, it also doesn't express
30 whether they used eulachon oil then either. And we
31 also see in the maritime fur trade records that the,
32 as soon as the maritime fur traders discovered that
33 there was a market for eulachon oil, they would
34 proceed to purchase volumes of it from the Nass
35 River and exchange it with First Nations people.

36 Q So, isn't that a case of the maritime traders
37 engaging and becoming participants in indigenous
38 trade in that --
39 A Well, that can't be clarified because we don't know
40 from the precontact sources whether there was a, a
41 trade extensively in eulachon oil with the Haida in
42 this particular case. But if there was, they
43 certainly participated, the maritime fur traders
44 participated in that trade.
45 Q Well, we couldn't know about the precontact
46 situation from any written records, could we?
47 A Well, yes, you can, because if you have the earliest

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 historical records, referring to a practice that
2 they're observing, if they're observing a trade in
3 eulachon oil between First Nations or a trade in
4 salmon between different First Nations peoples, and
5 there is no evidence of European trade goods being
6 exchanged at the same time, then one can infer that
7 the period prior to that was also characterized by
8 this kind of exchange.
9 Q The Haida had goods that were in demand by the
10 Tsimshian that were indigenous goods; is that right?
11 A Well, the Haida were contacted by Europeans and
12 maritime fur traders prior to the Tsimshian. In
13 fact, the Haida tried to control that market with
14 Europeans. So, the trade that we can establish in
15 the historical records between the Haida and the
16 Tsimshian is the Haida exchanging European trade
17 goods with the Tsimshian for furs. Those furs and
18 skins would then be traded to the maritime fur
19 traders, and this precedes the appearance of the
20 maritime fur traders amongst the Tsimshian.
21 Q Well, the example we were just talking about had the
22 Haida at the Nass River purchasing eulachon oil from
23 the Tsimshian, and they were using European trade
24 goods, but that in no way suggests they wouldn't
25 have used other things to purchase eulachon oil
26 precontact, does it?
27 A No, we don't have any evidence as to what they would
28 have exchanged if that was the case.
29 Q So, had the traders written down that they saw Haida
30 trading some indigenous product, dentalia, for
31 eulachon oil, you would then say we could be

32 confident that precontact, that activity was going
33 on. Do you agree with that?
34 A Uhm, I don't know that dentalia would be the best
35 example, because by the time that trade was going on
36 and cited in the records, which is 1811, the
37 dentalia trade, in which the maritime fur traders
38 were trading dentalia from the West Coast of
39 Vancouver Island to other groups preceded it, was
40 occurring in the 1790s. So, if you gave me another
41 example of another marine resource, if there was an
42 observation by maritime fur traders and for
43 ethnohistorical purposes, if you have two
44 independent reliable witnesses who have observed
45 those activities, then ethnohistorians have to put
46 weight on that.
47 Q So, your preferred inference is if something was

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 observed in 1811, dentalia in trade, where the
2 dentalia might have been imported by traders, that
3 that is -- ought to be -- that ought to be the
4 assumption, that the traders imported it?
5 A One has to consider that as a variable, that those
6 dentalia may have been imported by fur traders, and
7 one would have to look deeply into the account
8 records to determine that. But that, because we
9 have evidence that they were trading dentalia, then
10 we have to consider that.
11 Q Okay. And for the time before contact, where we
12 have no historical records, because, by definition,
13 I take it that there is no way that we can find that
14 this sort of trade occurred?
15 A No. As I've expressed, from an ethnohistorical
16 point of view, if you have two independent reliable
17 witnesses, such as two maritime fur traders who have
18 observed and report their observation of First
19 Nations peoples exchanging native goods between
20 themselves, that would be -- there would be evidence
21 there probably of a, of a precontact trade or
22 exchange. Then, one would be subjecting that data
23 to whether those exchanges were within kinship
24 parameters, and one would be looking at the Hudson's
25 Bay Company records, to determine the continuity of
26 that practice. This is why ethnohistory is used by,
27 to both support as well as assess First Nations'

28 claims, because there is a means of establishing
29 that from a historical point of view.
30 Q Well, they can establish things, but they can't
31 establish that things didn't happen?
32 A Well, that's correct, they can't. But this is -- it
33 would be significant information if those
34 observations had been made.
35 Q All right.
36 A And since they observed other activities of
37 exchanges, then we do have records that refer to, to
38 that.
39 Q You would agree there are a great number of, or a
40 great number of things in the activities of the
41 Coast Tsimshian and other aboriginal peoples that
42 are not recorded in the Hudson's Bay journals?
43 A In the Hudson's Bay journals or the maritime fur
44 trades?
45 Q I am asking the Hudson's Bay journals.
46 A Uhm, I am sure there are activities that are not
47 recorded in the Hudson's Bay Company journals but

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 activities that relate to trade or have commercial
2 value are usually recorded because Hudson's Bay
3 Company traders were commercial traders.
4 Q Things that had value to the Hudson's Bay Company?
5 A No. Well, things that would have value to their
6 observations of Indians at the time, which they were
7 required to report on as part of the business
8 records of the company. They needed to know how
9 groups, how native people in the area subsisted and
10 what resources they subsisted on, because often the
11 Hudson's Bay Company fur traders relied on sources
12 from First Nations or were required to support
13 themselves from sources, resources that were
14 available in the area. These were, these were
15 records that are in almost every Hudson's Bay
16 Company Post journal, because they're required
17 records by the company, anywhere in Canada.
18 MR. RICH: My lady, I see the time.
19 THE COURT: All right. We will take the afternoon break.
20 THE REGISTRAR: Order in court. This court stands
21 adjourned for an afternoon recess.

22

23 (Proceedings adjourned at 3:00 p.m.)

24 (Proceedings resumed at 3:20 p.m.)

25

26 THE REGISTRAR: Order in court.

27 MR. RICH:

28 Q Dr. Lovisek, we were going through your Haida expert
29 report at about Page 10. Now, Donald Mitchell was
30 one of the people you mentioned a few minutes ago as
31 someone whose method met your approval; is that
32 right?

33 A No, Donald Mitchell used historical Hudson's Bay
34 Company records to determine when Legaic would have
35 been trading off the Skeena River. That's what he
36 used those sources for. He wasn't comparing it with
37 archeological evidence, or I don't believe any
38 ethnographic or Tsimshian narratives, as I recall.

39 Q All right. Then I guess I got it wrong. I had
40 understood --

41 A He is using historical.

42 Q -- him to be somebody who used, used the method you
43 recommend, the ethnohistorical method.

44 A Well, because the question he was addressing was the
45 trading by Legaic, he looked through the Hudson's
46 Bay Company records and documented when it would
47 appear, and he was looking at a very focused

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 question and trying to resolve it using historical
2 documents. He wasn't relating it to whether Legaic
3 did it precontact or whether there were other
4 questions that he was addressing, as I recall in
5 that, in that article.

6 Q I'm not going to ask you about Legaic, but I was
7 really asking you about Donald Mitchell. I'm
8 getting the impression that all of these scholars
9 don't fundamentally adopt your approach of the
10 ethnohistorical method.

11 A Well, it's not my approach. It's an approach that's
12 the accepted method in both supporting, asserting
13 and assessing aboriginal rights and treaty rights
14 claims in Canada, and the method developed because
15 of dating difficulties with ethnographic data and
16 because so many issues raise the precontact as a
17 time period which requires examination.

18 Q Now, is that -- then is there a description of the
19 ethnohistoric method, other than your own

20 description, in the material you cite?
21 A Well, Bruce Trigger, who is an archaeologist, a
22 professor emeritus, is probably the most renowned
23 ethnohistorian in Canada, and he is, he is the
24 premier source on developing the method of
25 ethnohistory and of using it to assess oral
26 histories and ethnographies and by, and by requiring
27 that corroboration between sources is, is necessary
28 to establish whatever the precontact or contact
29 existence was, whatever activity is being asserted.
30 Q So, now I guess it's Dr. Trigger, would have been
31 writing about matters in Eastern Canada rather than
32 the Northwest Coast?
33 A Yes. And also, I mean, there is a society of
34 ethnohistorians who produce a journal called
35 "Ethnohistory" and have come up with various
36 definitions of ethnohistory. And as I mentioned, it
37 attracts writers who are, by discipline,
38 anthropologists, historians and historical
39 geographers primarily.
40 Q And you have a bibliography in your report with 175,
41 approximately, entries, many of them are the same
42 authors, but perhaps a hundred scholars are referred
43 to in your bibliography, and yet, it appears that
44 none of them expressly adopt your method.
45 A Uhm, the method, as I mentioned, is a method that
46 developed out of specific claims and aboriginal
47 rights and treaty rights research. The method

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 developed in the east, and has been slow I think,
2 other than some historical geographers, like Robert
3 Galois and Arthur Ray, who is a professor of history
4 and historical geography at UBC, who use the
5 historical, ethnohistorical model or the method.
6 The reason for I think for the absence of this
7 approach being applied in British Columbia is
8 related to the lack of treaties in British Columbia.
9 It hasn't developed into the expertise to respond to
10 certain questions that arise as a result of
11 treaties.
12 Q So, what you are describing is a litigation
13 approach; is that right?
14 A No, it's a specific claims approach. The approach
15 is used, and I have used it, certainly, the method

16 as I apply it, developed by working for First
17 Nations for almost a decade, is the method I
18 continue to use today, to both support and assess
19 issues that involve historical issues. And as I
20 mentioned to you, there is a method or a means in
21 the ethnohistorical approach to provide the kind of
22 evidence that can support or reject, I'm using a
23 poorly phrased word, aboriginal claims.

24 Q Okay. Is Donald Mitchell an acceptable scholar, in
25 your view?

26 A Donald Mitchell has worked closely with historical
27 sources and he's also worked with I think some
28 archeological sources. In particular, he cites or
29 has provided information about various fishing
30 technologies and political organizations and social
31 organizations related to marine resource use on the
32 Northwest Coast. So, he has considered that
33 literature from its practical applications.

34 Q So, do you consider him to be an authority?

35 A I consider him to be an authority. Although, as you
36 mentioned, if he is selecting one area of research,
37 it has to be considered within that spectrum. If
38 it's only the Hudson's Bay Company records he is
39 examining, then one needs to relate it to, what does
40 the archeological evidence say? What does the
41 ethnographic evidence say? And only by these three
42 lines of evidence can one can come up with a
43 reasonable explanation about what happened in the
44 past.

45 Q You are saying that's the only way one can come up
46 with a reasonable explanation?

47 A That's, that's the ethnohistorical method.

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 Q It's very limited, isn't it, because there is often
2 not three independent ways of coming to a
3 conclusion?

4 A No. But, as I mentioned, for, and as we were
5 describing before the break, when you indicated how
6 or what would the evidence look like that would
7 support a precontact trade in, let's say, salmon,
8 and I indicated to you that if you found two
9 independent reliable witnesses who observed the
10 exchange of salmon between two different First
11 Nations, then that would be considered very weighty

12 information that would support a precontact exchange
13 of salmon.

14 The other sequential test that would be applied
15 to that would be, does it appear, does this exchange
16 continue and is it recorded in the Hudson's Bay
17 Company records, and is that exchange limited to
18 kinship relations?

19 And by using the three lines of evidence,
20 sometimes the archeological evidence is better to
21 support certain aspects of the claim, sometimes the
22 ethnographic data is better, and it's always a
23 balancing between the three.

24 Q All right. Let's go back to your report, your
25 expert opinion at Page 11. This is the Haida
26 opinion. At the third full paragraph, which begins
27 with the word "dogfish", beginning on the second
28 line at the end, the sentence is:

29
30 The central aboriginal trading centre for the
31 Tsimshian, Tlingit, Gitksan and Haida was at
32 the mouth of the Nass River, which was occupied
33 during the eulachon fishery in early spring.

34
35 Do you see that?

36 A Yes.

37 Q All right. The reference for that, the note 55 is
38 Donald Mitchell and Leland Donald.

39 A Yes.

40 Q Now, do you agree that that statement is correct?

41 A I agree that that is what Mitchell and Donald have
42 expressed. I cite Mitchell and Donald in my report.
43 The evidence that provides some historical context
44 to what they say is now in the marine, or maritime
45 fur trading reports of 1810, which are included in
46 my report.

47 Q Now, when you made this statement, you cited them,

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 but that was your statement, it was your opinion for
2 the Court; --

3 A Yes. It says --

4 Q -- do you agree?

5 A -- it was documented in the ethnographic record,
6 yes.

7 Q And the ethnographic record here is Mitchell, and

8 you found Mitchell to be reliable?
9 A Yes.
10 Q Now, do you no longer find Mitchell to be reliable?
11 A No. It's Mitchell and Donald. It isn't one author.
12 It is Mitchell and Donald. It is a co-authored
13 paper.
14 Q Well, I don't know what relevance that has, but --
15 A Well, you are asking me if I considered Mitchell
16 reliable when Mitchell and Donald wrote the paper.
17 Q Excuse me. You've cited this paper and perhaps I
18 was hasty, the co-authored paper. In 2005, you
19 considered it reliable sufficiently to make a
20 statement for the Court; is that right?
21 A Yes.
22 Q Now, have you changed your view on the worthiness of
23 that paper?
24 A Not on the worthiness of the paper. I changed my
25 view given that the maritime fur trade records,
26 which I have now had an opportunity to review, in
27 conjunction with the Beynon transcripts, or sorry,
28 the Beynon narratives, which identify this trading
29 mart as being after contact, seemed to provide some
30 kind of context to the descriptions that, that
31 Mitchell and Donald provide. Mitchell and Donald
32 are not looking at the historical sources. They're
33 looking at the ethnographic sources in making this
34 determination. That was the available source at the
35 time that I wrote this opinion.
36 Q So, the two things that have perhaps changed your
37 view, or "perhaps" isn't the right word, but the two
38 things that have changed your view are, one, that
39 you have looked at maritime records and you have
40 described what they said. They said that they
41 observed trade in 1911, excuse me, 1811, with the
42 Haida trading European goods to obtain eulachon oil.
43 A Yes. I'm not sure. It might be 1810. 1810 or
44 1811.
45 Q That's one of the things. And the other thing is
46 that you have cited something from Beynon that you
47 say makes the trade at the Nass postcontact?

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J.A. LOVISEK (for Defendant)
Cross-exam by Mr. Rich

1 A Uhm, yes. And in conjunction with that evidence,
2 there is the evidence put forth by archaeologists
3 who state that the netting devices were post, were

4 just prior to the historic period that would have
5 been used for mass harvesting.

6 Q But they were prior to the historic period?

7 A Well, prior to the historic period could mean during
8 the protocontact period. Sometimes writers use
9 prior to the historic period when they're referring
10 to a period just before contact and not within,
11 within an earlier time frame.

12 Q And you have already acknowledged that, if they
13 didn't have the nets, they could use the rakes very
14 efficiently?

15 A They can use rakes very efficiently. I don't know
16 of any studies, and often there are studies that
17 describe how many fish can be obtained by using
18 herring rakes and how many can be processed into oil
19 and how many boxes can be produced and how many
20 surplus boxes can be produced for sale.

21 Q All right. Well, let's just go through these three
22 reasons why you might doubt your opinion. One of
23 them is the statement about the development of the
24 net, which, in any event, was pre-1787. Do you
25 agree with that?

26 A Well, when the term is used "prehistoric", it's not
27 clear as to what term the author was using. It's
28 just referred to prehistoric times. So, prior to --
29 some, some archaeologists describe the contact
30 period as extending to the 1830s, not just 1787.
31 They use large quantum of time. So that's
32 difficult to determine.

33 Q And they use prehistoric in that way?

34 A Who does?

35 Q Well, I asked you about the prehistoric and you have
36 talked about the contact period.

37 A Yes. Sometimes the contact period, we can see with
38 Martindale's work, that he uses large frames of time
39 to mark periods, which is characteristic of
40 archeological dating.

41 Q But if it was prehistoric, that really means
42 pre-1787?

43 A Well, not necessarily, because some people associate
44 contact with when there is settlement or sustained
45 contact. So, it's difficult to determine from the
46 terms that they use in the record when they don't
47 identify the dates.

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 Q Okay. A second reason why you would doubt this
2 statement now is the statements from Beynon that
3 suggest that the trade mart was postcontact; is that
4 right?

5 A That's part of it, yes.

6 Q And the, the third reason, which was the first you
7 gave, were the trading -- traders' comments or
8 observations, recorded observations, in 1810 or
9 1811?

10 A Yes.

11 Q Okay. And if it weren't for those things, this
12 statement would still be your opinion; is that
13 right?

14 A That would still be my opinion.

15 Q You then carry on to say that:

16

17 Exchange and trade were facilitated through
18 formal trading partnerships.

19

20 Do you agree with that?

21 A Yes, because that's a key element of exchange being
22 through kinship partnerships. And it actually
23 extends to the example you had raised earlier about
24 Legaic and Kennedy being his father-in-law. That's
25 a kinship relationship which establishes the
26 exchange.

27 Q All right. Turning to Page 12, we have a heading:
28 "Tlingit Use of Dogfish", but then in that first
29 paragraph, you talk about other fish, and at the
30 second sentence, you refer to the Tlingit having
31 access to eulachon "prized for their delicious flesh
32 and fine oil". Do you see that at the fourth line?

33 A Yes.

34 Q Okay. Then the next line, a sentence begins:

35

36 However, because these runs were not sufficient
37 for their own use or for their trade with
38 Athapaskans, the Tlingit imported eulachon oil
39 from the Tsimshian.

40

41 Do you agree with that?

42 A Well, I am looking at the source that I'm citing,
43 which is from De Laguna, and without looking again
44 to see that that relates to the precontact period
45 and not an ethnographic period, uhm, I would like to

46 look at that.

47 Q All right. At the next page, Page 13, you say that,

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 at the top of the page:

2

3

4

5

6

7

8

Do you agree that that's true of the Tlingit?

9 A No, I don't. And I cite Oberg there and that, I
10 don't know that that comes from Oberg, because
11 Oberg, the position that there was no precontact
12 barter for the Tlingit.

13 Q Well, you are wrong in one place or another, aren't
14 you?

15 A Yes, I have -- yes, I would have to look at that
16 source again.

17 Q You may well --

18 A Because I describe --

19 Q -- be wrong in this --

20 A -- I describe further in the paragraph about gift
21 exchanges and -- yes.

22 THE COURT: Mr. Rich, can I just ask you to clarify
23 something? You are predicating your questions, I
24 take it, as all being precontact use?

25 MR. RICH: I am predicating them on that.

26 THE COURT: All right. Because, I mean, there is a
27 section on precontact use in the report, but that
28 section appears to end on Page 8. So, that's why I
29 want to clarify with you that you're suggesting that
30 this is precontact and the responses of the witness
31 are directed to that and not something else.

32 MR. RICH: I should be more explicit, my lady. So, the
33 witness may not understand. My intention is to be
34 asking about precontact. My understanding is that
35 this is the ethnographic material which, as the
36 witness has said, may, may involve postcontact but
37 it is intended to describe an ongoing practice. As
38 I understand, that's what Oberg did, that he wasn't
39 talking about the post -- he was intending to talk
40 about the Tlingit on an ongoing basis, but perhaps
41 we need to be more explicit. Well, not perhaps, I

42 take your point, my lady.
43 THE COURT: Yes, I think so.
44 MR. RICH:
45 Q So, Dr. Lovisek, perhaps I'll just go back to the
46 "Tlingit Use of Dogfish" heading on Page 12. I'm
47 taking this point. I think you have already said

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 you would want to look at De Laguna to determine
2 whether it was pre or postcontact?
3 A Yes, I would. Because, from the description of
4 where it appears in my report, I would like to, to
5 determine whether it is pre or post. But I suspect
6 these are ethnographic descriptions, because the
7 source, being the handbook, and in particular, by De
8 Laguna, was describing mostly ethnographic
9 descriptions. That's an introductory overview of
10 the Tlingit.
11 Q And Oberg, who you cite at Footnote 66 at the top of
12 Page 13, is, this is "The Social Economy of the
13 Tlingit Indians 1973", this is what you testified
14 about yesterday, is it not?
15 A Yes.
16 Q And yesterday, your evidence was that this was
17 authority for the proposition that the Tlingit
18 didn't trade?
19 A Well --
20 MR. MACKENZIE: Sorry, my lady, I have to object to that.
21 That's a misstatement of the evidence, in my
22 submission.
23 MR. RICH: Well, I'll withdraw that.
24 Q When you referred to Oberg yesterday, were you
25 referring to the precontact situation or the
26 postcontact situation?
27 A Uhm, I was referring to the precontact situation
28 where he refers to the absence of barter, which is
29 why it puzzled me when I read this section that you
30 raised.
31 Q Well, this is your section.
32 A Sorry, but you mention that trade was not -- but was
33 a purely economic transaction, and that contradicts
34 what Oberg said and what I said he said about being
35 the precontact period, which makes me think that
36 this section was written about the ethnographic
37 period, if it's on there.

38 Q All right. Then under "Tsimshian Use of Dogfish",
39 recognizing that your report may be dealing with pre
40 or postcontact, that's what the ethnographic
41 material would be talking about; is that right?
42 A Yes, until it's tested as to which period it relates
43 to, it can refer to either or both.
44 Q Either or both. Okay. So, under "Tsimshian Use of
45 Dogfish", it says that the coast, or you say:
46
47 The Coast and Southern Tsimshian had a monopoly

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 on eulachon fishing which were eaten fresh,
2 dried or processed into grease or oil.
3
4 So, is that correct, pre or postcontact?
5 A Yes.
6 Q And if it's postcontact, it would have had to have
7 occurred at some time after 1787; would you agree
8 with that?
9 A Yes, that's postcontact.
10 Q And are you aware of any event that provided the
11 Tsimshian with this monopoly, from your review of
12 the trading records and other evidence?
13 A The evidence suggests that the Tsimshian were,
14 certainly had rights to use areas of the Nass River
15 for eulachon fishing, but at various times, and it
16 appears to be related to kinship and dowry
17 exchanges, other groups also had rights, including
18 the Haida and the Tlingit. So, there were many
19 groups using the Nass River, but the Coast Tsimshian
20 are certainly described as using the Nass River for
21 eulachon.
22 Q Well, they're described by you, Coast and Southern
23 Tsimshian, as having a monopoly, and the only thing
24 that's uncertain about that --
25 A Yes.
26 Q -- is when they had the monopoly?
27 A That's correct.
28 Q And if it was a monopoly that came into being
29 postcontact, you would know about it, wouldn't you?
30 A Well, looking at the source that I cited, again, is
31 the introductory section on the Tsimshian people
32 from "The Handbook of North American Indians", and
33 knowing that those sources that are cited are

34 ethnographic principally and not historically
35 primarily, that may suggest that this reference is
36 to the ethnographic material as the subsection
37 describes it.
38 Q Right. But you were prepared to make this
39 statement, as part of your opinion for the Court.
40 So, at the time you made it, you must have believed
41 it to be true?
42 A For the ethnographic -- yes.
43 Q And now the question has arisen as to whether this
44 was the case before contact, before 1787, after
45 1787, or both. And I'm saying, as a matter of
46 logic, given your research, if the monopoly arose
47 after contact, you would know about it arising; is

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 that right?
2 A Well, because it's based on ethnographic data, it
3 can be either, as we said, before or after. There
4 is nothing in the ethnographic data that says that
5 it has to arise at a certain point in time, only
6 that it is a description that has been collected by
7 ethnographers of the Coast Tsimshian as the source
8 support.
9 Q But you have now studied the records of the traders
10 in the Hudson's Bay Company. So, on what I
11 understand to be your evidence, you would have
12 discovered, because of their observations, that this
13 monopoly arose.
14 A Uhm, I -- the maritime fur traders and the records
15 that I rely on relate to the area between the Nass
16 River and the Skeena River, not activities on the
17 Nass River. They are referring to specific groups
18 that they describe who are exchanging eulachon to
19 the Haida as is noted in the record, and they are
20 purchasing eulachon from the groups up the Nass
21 River. They call them the Nass Indians. They don't
22 distinguish between Nisga'a or Tsimshian.
23 Q So, on that basis, it seems more likely this
24 monopoly was in place precontact. Do you agree with
25 that? And continued on?
26 A No, I can't say that because the, the sources don't
27 say whether it is the Nass or the Tsimshian who were
28 occupying that area and exchanging eulachon with the
29 Haida and with the maritime fur traders. They don't

30 distinguish between those two groups. They describe
31 them as the Nass River Indians, the Nass Indians.

32 Q All right. On Page 14, the middle paragraph, you
33 say:

34
35 The Tsimshian bartered boxes of eulachon oil,
36 carved spoons of mountain-goat horn and bighorn
37 sheep horn, wool and woolen blankets to the
38 Haida for canoes.

39
40 Now, that clearly has got some postcontact
41 element to it, because they're woolen blankets. But
42 other than that, do you agree that's the case?

43 A Well, it's interesting, the source cited is Boas and
44 it's based on the mythologies and information
45 extracted from the mythologies. When I examined the
46 Tsimshian records and looked for evidence of a trade
47 in canoes, for example, there seems to be evidence

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 that canoes were exchanged relatively late in the
2 historic record, from the 1850s, not earlier. And I
3 think we have discussed some of the concerns about
4 an exchange in dentalia, particularly as maritime
5 fur traders were, in the 1790s, exchanging dentalia
6 between First Nations groups. So, this is based on
7 an ethnographic source and it is describing an
8 ethnographic condition, which is, as I have
9 mentioned before, often a time period.

10 Q But in 2005, two years ago, this was authority
11 sufficient for you to tell the Court this was the
12 case. Do you agree with that?

13 A Yes. And as I mention, the purpose of this opinion
14 was to establish whether the Haida exchange dogfish
15 oil to other groups and does that dogfish oil appear
16 in any of the records associated with the Tsimshian,
17 the Tlingit and any neighbouring groups, and that
18 was the direction of the research and that direction
19 led to the ethnographic record.

20 Q Surely your assessment of what the object of the
21 case was didn't permit you to be careless with the
22 evidence?

23 A No, the evidence pertains to the Haida. That was
24 the direction of the, of the research.

25 Q But this paragraph says the Tsimshian.

26 A Yes, it does.
27 Q It carries on to say that other things were
28 important in intertribal trade, including dried
29 salmon, halibut and other kinds of staple food. Do
30 you agree it says that?
31 A Yes, it says that.
32 Q So, whether it was pre or postcontact, intertribal
33 trade involved dried salmon.
34 A Uhm, the dried salmon that's referred to by Boas, is
35 also the subject of the article which I referred to
36 earlier, the first author in the bibliography of the
37 overview study, and that is based on information
38 that Boas obtained from myths, and that information
39 came from a description of a feast in which groups
40 from the Kitselas Canyon exchanged dried salmon.
41 So, in that general sense, that the salmon, that the
42 Tsimshian traded salmon, originates from this
43 description associated with the Kitselas Canyon
44 group people. That's the only evidence that Boas
45 provided.
46 Q If the Coast Tsimshian or the Tsimshian traded
47 salmon in one context, isn't it reasonable to

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 suppose they would trade salmon in other contexts?
2 A The context of this one description comes from a
3 mythological story about different peoples
4 exchanging different products as part of a potlatch
5 or feast, and the only attribution of a marine
6 resource of any kind is associated with the Kitselas
7 Canyon Tsimshian.
8 Q And you just learned that since 2005?
9 A Yes, I did, because some of the ethnographic
10 sources, like Barbeau, and the ethnographic and
11 ethnohistorical sources, clearly demonstrate the
12 limitations of relying on mythological evidence to
13 support a marine resource use including trade.
14 Q All right. On the next page, Page 15, the last
15 paragraph on that page says:
16
17 For the Tsimshian, Haida and Tlingit, eulachon
18 was the key resource for trade and subsistence.
19
20 Do you agree with that?
21 A Again, this is the ethnographic period that's being

22 described and it certainly was important in the
23 postcontact period.

24 Q It then says:

25
26 Between five and 10 tons of eulachon were
27 estimated as the required amount to supply the
28 requirements of each household.

29
30 Is that right?

31 A Yes, the estimates are coming from observations,
32 observations of the Nass fishery and they were taken
33 postcontact.

34 Q All right. But that's accurate in terms of the
35 requirements?

36 A Well, that's accurate based on the source that I
37 cite, that has described how many -- I'm looking at
38 the source now which is referred to -- Collison,
39 "The Oolachan Fishery", and I believe he is
40 reporting on this number, if not in the 1860s,
41 around that period. I just can't remember.

42 Q Well, in the 1860s, households would have been
43 smaller than at 1787, right?

44 A Uhm, it depends. I mean, epidemics obviously
45 affected the population of the Coast Tsimshian
46 groups. But often, after an epidemic, like, a
47 virgin soil smallpox epidemic, within so many years,

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 there is a rebound in population. So, that
2 population may be, may have returned to its original
3 or had, have been increased substantially.

4 Q So, I will have to look more carefully at your
5 report. I understood you to say in your report that
6 household size got smaller after contact.

7 A Yes. It doesn't mean that the population generally
8 got smaller. It means, and I think if you are
9 referring to what I think you are referring to,
10 which is the Martindale materials that relate to
11 settlement pattern, is that larger groups would be
12 living in one house and, precontact, and postcontact
13 they would be living in smaller houses, in smaller
14 communities. One of the estimated reasons for that
15 was epidemic that may have reduced the population,
16 or that they had moved elsewhere and are just
17 accommodated in smaller houses, as they were

18 influenced by European fur trade.
19 Q All right. But if we've got five to ten tons of
20 eulachon required for a household, and that may have
21 been in the mid or later 19th century, there is no
22 reason to believe that wouldn't be applicable at an
23 earlier time, because, if anything, the households
24 were bigger?
25 A Well, I can't, I can't say from -- without going to
26 data to support that. That would be a speculation
27 on my part. I would need to know the date that this
28 was, and the household size that was being referred
29 to.
30 Q So -- all right. The final sentence there is:
31
32 Eulachon oil was considered superior to the
33 alternative sources of oil and was integral to
34 the preservation and storage of various foods
35 through the winter months, for consumption on
36 its own and for trade.
37
38 Do you agree with that?
39 A Yes. Again, describing the -- I cite from the
40 Kwakiutl source in Footnote 85, but that describes
41 the ethnographic situation, postcontact situation.
42 Q Dr. Lovisek, I think you cite Oberg in Footnote 85.
43 A But if you notice, I have MacNair, Peter,
44 "Descriptive Notes on the Kwakiutl Manufacture of
45 Eulachon Oil" included in Footnote 85.
46 Q Okay. So there are two cites?
47 A Yes. There are three, I think there are three

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J.A. LOVISEK (for Defendant)

Cross-exam by Mr. Rich

1 citations.
2 Q Anyway, you agree with that?
3 A Yes. And MacNair in particular is describing
4 contemporary eulachon harvesting. He published that
5 in 1975 and, sorry, 1971, and is I think relying on
6 a 1969 description, if I recall properly.
7 Q So you're saying that you think that maybe what you
8 were telling the Court in this final sentence here
9 that we've been dealing with, that in the 20th
10 century, eulachon oil was integral to the
11 preservation and storage of various foods?
12 A Well, in the ethnographic period, certainly that
13 applied to it. But the purpose of providing this

14 information was to indicate that the Haida did not
15 engage in a precontact trade of dogfish oil because
16 there was no market for dogfish oil, and that
17 eulachon oil would have been an oil that they may
18 have had, or would have had more interest in than
19 dogfish oil.

20 MR. RICH: My lady, I see the time. I'm basically
21 through this. If we could break.

22 THE COURT: Okay.

23 THE REGISTRAR: Order in court. This court stands
24 adjourned until Thursday, June 14th, 2007 at 10
25 a.m.)

26

27 (PROCEEDINGS ADJOURNED AT 4:00 P.M.)

28

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

34

35

36

37

Gabriele Heise, RPR
Official Reporter, BCSRA No. 399
Realtime Certified Reporter
United Reporting Service Ltd.

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EXHIBITS

NO.	DESCRIPTION	PAGE
	(EXHIBIT NO. 267-1: One white binder with bright	2

salmon cover page, titled on spine and cover "HBC & Port Simpson Journals Footnote References Dr. Joan A. Lovisek Final Report Provided on February 8, 2007" Volume 1 of 2, containing a five-page index and Tabs 1 to 50) 2
(EXHIBIT NO. 267-2: One white binder with bright salmon cover page, titled on spine and cover "HBC & Port Simpson Journals, Footnote References, Dr. Joan A. Lovisek, Final Report Provided on February 8, 2007" Volume 2 of 2, containing five-page index and Tabs 51 to 81) 25
(EXHIBIT NO. 268: Nine-page List of Documents Consulted but not Used in the Expert Report of Joan A. Lovisek, dated February 12, 2007) 43
(EXHIBIT NO. 269: 24-page document entitled "Overview of the Lax Kw'alaams Marine Resource Use, Oral Presentation, Joan A. Lovisek, Ph.D., M.E.S., Lovisek Research")

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