

In the Matter Of:  
The Chippewas Of Saugeen First Nation et al. v.  
Attorney General Of Canada et al

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VOL 35 DAY 35  
August 12, 2019

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1 Court File No. 94-CQ-50872CM

2 ONTARIO

3 SUPERIOR COURT OF JUSTICE

4 B E T W E E N:

5 THE CHIPPEWAS OF SAUGEEEN FIRST NATION, and THE  
6 CHIPPEWAS OF NAWASH FIRST NATION

7 Plaintiffs

8 - and -

9 THE ATTORNEY GENERAL OF CANADA,  
10 HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO,  
11 THE CORPORATION OF THE COUNTY OF GREY,  
12 THE CORPORATION OF THE COUNTY OF BRUCE,  
13 THE CORPORATION OF THE MUNICIPALITY OF NORTHERN  
14 BRUCE PENINSULA, THE CORPORATION OF THE TOWN OF  
15 SOUTH BRUCE PENINSULA, THE CORPORATION OF THE TOWN  
16 OF SAUGEEEN SHORES, and THE CORPORATION OF THE  
17 TOWNSHIP OF GEORGIAN BLUFFS

18 Defendants

19 -----  
20 --- This is the Volume 35/Day 35 of the transcript of the  
21 trial proceedings in the above-noted matter, being held at  
22 the Superior Court of Justice, 330 University Avenue,  
23 Courtroom 5-1, Toronto, Ontario, on the 12th day of  
24 August, 2019.

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B E F O R E:

The Honourable Justice Wendy M. Matheson

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REPORTED BY: Judith M. Caputo, RPR, CSR, CRR

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09:31:18 1 -- Upon commencing at 10:01 a.m.

10:04:26 2

10:04:32 3 THE COURT: Good morning, Mr. Feliciant.

10:04:34 4 MR. FELICIAN: Good morning, Your Honour.

10:04:36 5 THE COURT: Professor Brownlie, welcome back.

10:04:38 6 THE WITNESS: Good morning, thank you.

10:04:52 7 THE COURT: Just give me a minute for  
10:04:54 8 my technology to catch up.

10:04:56 9 Please go ahead.

10:05:08 10 MR. FELICIAN: Thank you, Your Honour.

10:04:43 12 PROFESSOR BROWNLIE: PREVIOUSLY AFFIRMED.

10:05:12 13 CROSS-EXAMINATION BY MR. FELICIAN:

10:05:12 14 Q. Good morning, Professor Brownlie.

10:05:13 15 A. Good morning.

10:05:14 16 Q. My name is David Feliciant, and I  
10:05:15 17 think I've introduced myself to you. I'm one of  
10:05:16 18 the lawyers for Ontario.

10:05:17 19 So I'm going to be asking some  
10:05:19 20 questions about the general practice of history and  
10:05:22 21 then -- which presumably would apply to both of  
10:05:25 22 your reports -- but then I will be asking you some  
10:05:28 23 questions about your "Long Road to Land Claims"  
10:05:30 24 report, which is Exhibit 4119.

10:05:33 25 So, to begin, are you familiar with the

1 Canadian Historical Association?

2 A. Yes.

3 Q. Can we call up document SC0821?

4 On the screen is a document called "The  
5 Statement on Research Ethics", which was pulled  
6 from the Canadian Historical Association website.

7 Are you familiar with this document?

8 A. Yes.

9 Q. Can we just go to page 3, please.

10 And you'll see at the bottom of page 3,  
11 and now, at the top of page 3, "Aboriginal  
12 Research". The heading "Aboriginal Research"; do  
13 you see that?

14 A. Yes, at the bottom of my screen,  
15 yeah.

16 Q. Are you familiar with this portion  
17 of the document?

18 A. Yes.

19 Q. Okay. And are you sufficiently  
20 familiar with it that, without having to re-read it  
21 now, you agree with its contents or would you like  
22 an opportunity to take a look at it?

23 A. I would like to take a look at it,  
24 I can only see the first two bullet points.

25 Q. If you can just let me know when



10:06:46 1 you're ready to scroll.

10:06:48 2 A. (Witness reviews document).

10:07:09 3 Yes, scroll, please.

10:07:12 4 Yes.

10:07:36 5 Q. Do you agree with its content?

10:07:39 6 A. Yes, in general.

10:07:40 7 Q. Do you try to follow its

10:07:42 8 principles?

10:07:43 9 A. Yes.

10:07:43 10 Q. Were there any in this particular

10:07:45 11 case you didn't follow for the purpose of preparing

10:07:48 12 your reports for the Plaintiff?

10:07:49 13 A. I didn't take the reports to the

10:07:55 14 community before I submitted them.

10:07:57 15 Q. Okay. And was there a reason for

10:07:59 16 that?

10:08:00 17 A. That just didn't seem appropriate.

10:08:04 18 It wasn't that kind of research.

10:08:06 19 Q. Okay. Now if we can go to page 2,

10:08:12 20 please, item number three. Page 2 of the report.

10:08:20 21 Item number three at the very bottom of the page.

10:08:23 22 You'll see there that there's a portion

10:08:27 23 of that document that reads:

10:08:29 24 "Use scholarly rigor and

10:08:31 25 integrity in obtaining, recording

1 and analyzing evidence [...]." [As  
2 Read]

3 Do you see that?

4 A. Yes, I see that.

5 Q. At the bottom it refers to the  
6 American Historical Association statement on  
7 "Standards of Professional Conduct".

8 Are you familiar with the American  
9 Historical Association?

10 A. Yes.

11 MR. FELICIAN: Could we please pull up  
12 SC0820, please -- before we do that, can we make  
13 that document an exhibit, please Your Honour, the  
14 statement of research ethics from the Canadian  
15 Historical Association?

16 THE COURT: Mr. Registrar?

17 THE REGISTRAR: Exhibit No. 4165.

18 THE COURT: Thank you.

19 EXHIBIT NO. 4165: Statement of  
20 Research Ethics from the Canadian  
21 Historical Association.

22 BY MR. FELICIAN:

23 Q. Now if I can go back to SC0820.  
24 Are you familiar with this document called "The  
25 Statement on Standard Professional Conduct (Updated

1 2019) " ?

2 A. This is from the American  
3 Historical Association, correct?

4 Q. That is correct?

5 A. Yes, I am.

6 MR. FELICIAN: Can we make that the  
7 next exhibit, please, Your Honour.

8 THE COURT: Mr. Registrar?

9 THE REGISTRAR: Exhibit No. 4166.

10 EXHIBIT NO. 4166: The Statement on  
11 Standard Professional Conduct (Updated  
12 2019) from the American Historical  
13 Association.

14 BY MR. FELICIAN:

15 Q. Now I'm going to take you to some  
16 specific statements in the document and ask if you  
17 agree with them. And you'll see under the  
18 "Profession of History" it says:

19 "History is a never-ending  
20 process whereby people seek to  
21 understand the past and its new  
22 meanings." [As Read]

23 Would you agree with that?

24 A. Yes.

25 Q. If we can go down. Then in the

10:10:08 1 second highlighted portion, it reads in the third  
10:10:11 2 paragraph under "Profession of History":

10:10:15 3 "What then distinguishes the  
10:10:17 4 professional historian from everyone  
10:10:18 5 else? Membership in this profession  
10:10:20 6 is defined by self-conscious  
10:10:26 7 identification with a community of  
10:10:28 8 historians who are collectively  
10:10:29 9 engaged in investigating and  
10:10:32 10 interpreting the past as a matter of  
10:10:34 11 disciplined learned practice." [As  
10:10:34 12 Read]

10:10:37 13 Do you agree with that?

10:10:38 14 A. Yes.

10:10:39 15 Q. If we can go to page 2, third  
10:10:42 16 paragraph, second line, please. It reads:

10:10:50 17 "[...] all historians believe  
10:10:52 18 in honouring the integrity of the  
10:10:54 19 historical record. They do not  
10:10:56 20 fabricate evidence." [As Read]

10:10:57 21 Do you agree with that?

10:10:58 22 A. Definitely.

10:11:00 23 Q. A little further down, third  
10:11:01 24 paragraph, last four lines reads:

10:11:05 25 "[...] drawing the boundary

10:11:08 1 between them" -- this is referring  
10:11:09 2 to secondary and primary sources --  
10:11:12 3 "drawing the boundary between them  
10:11:15 4 is a good deal more complicated than  
10:11:16 5 it might seem, since determining  
10:11:16 6 whether a document is primary or  
10:11:19 7 secondary largely depends on the  
10:11:21 8 questions one asks of it. At the  
10:11:24 9 most basic level, though, the  
10:11:26 10 professional practice of history  
10:11:28 11 means respecting the integrity of  
10:11:31 12 primary and secondary sources while  
10:11:34 13 subjecting them to critical  
10:11:35 14 scrutiny, and contributing in a  
10:11:38 15 fair-minded way to ongoing scholarly  
10:11:41 16 and public debates over what those  
10:11:43 17 sources tell us about the past and  
10:11:45 18 also what they fail to illuminate."  
10:11:45 19 [As Read]  
10:11:47 20 Do you agree with that statement?  
10:11:48 21 A. Yes.  
10:11:54 22 Q. If we can go to page 2 as well,  
10:11:56 23 second last paragraph, eight lines down:  
10:12:02 24 "Knowing that trust is  
10:12:03 25 ultimately more important than

10:12:05 1 winning a debate for the wrong  
10:12:07 2 reasons, professional historians are  
10:12:08 3 as interested in defining the limits  
10:12:10 4 and uncertainties of their own  
10:12:13 5 arguments as they are in persuading  
10:12:15 6 others that those arguments are  
10:12:16 7 correct." [As Read]

10:12:18 8 Do you agree with that statement?

10:12:19 9 A. Yes.

10:12:23 10 Q. So you would agree that historians  
10:12:25 11 should avoid distorting facts through exaggeration  
10:12:29 12 to advance an argument?

10:12:30 13 A. Yes.

10:12:31 14 Q. And historians should avoid  
10:12:33 15 distorting history through exaggerating the impact  
10:12:36 16 of facts on events?

10:12:38 17 A. Yes.

10:12:40 18 Q. And if we could go to page 3,  
10:12:43 19 please. And this is the first full paragraph, four  
10:12:51 20 lines down from the bottom to the start of the last  
10:12:54 21 sentence:

10:12:55 22 "[...] but the very nature of  
10:12:56 23 our discipline means that historians  
10:12:58 24 also understand that all knowledge  
10:13:01 25 is situated in time and place, and

10:13:03 1 all interpretation express a point  
10:13:07 2 of view and that no mortal mind can  
10:13:10 3 ever aspire to omniscience. Because  
10:13:12 4 the record of the past is so  
10:13:13 5 fragmentary, absolute historical  
10:13:16 6 knowledge is denied us." [As Read]  
10:13:18 7 Would you agree with that?  
10:13:20 8 A. Yes.  
10:13:22 9 Q. The second portion of that reads  
10:13:28 10 -- if we can go to page 3, second full paragraph,  
10:13:32 11 first sentence, same place:  
10:13:33 12 "Furthermore, the different  
10:13:34 13 peoples whose past lives we seek to  
10:13:36 14 understand held views of their lives  
10:13:38 15 that were often very different from  
10:13:40 16 each other and from our own. Doing  
10:13:43 17 justice to those views means to some  
10:13:46 18 extent trying (never wholly  
10:13:49 19 successfully) to see their worlds  
10:13:52 20 through their eyes." [As Read]  
10:13:58 21 Do you agree with that?  
10:13:59 22 A. Yes.  
10:14:00 23 Q. "This is especially true when  
10:14:02 24 people in the past disagree or came  
10:14:04 25 into conflict with each other, since

10:14:07 1 any adequate understanding of their  
10:14:09 2 world must somehow encompass their  
10:14:12 3 disagreements and competing points  
10:14:13 4 of view within a broader context.  
10:14:15 5 Multiple conflicting perspectives  
10:14:17 6 are among the truths of history.  
10:14:20 7 Everyone who comes to the study of  
10:14:22 8 history brings with them a host of  
10:14:24 9 identities, experiences and  
10:14:26 10 interests that cannot help but  
10:14:28 11 affect the questions that they ask  
10:14:30 12 of the past and the sources they  
10:14:32 13 consult to answer those questions.  
10:14:33 14 No single objective or universal  
10:14:35 15 account could ever put an end to  
10:14:38 16 this endless creative dialogue  
10:14:39 17 within and between the past and the  
10:14:42 18 present." [As Read]

10:14:42 19 Do you agree with that?

10:14:44 20 A. Yes.

10:14:45 21 Q. If we can go to page 3, second  
10:14:51 22 full paragraph. It's down a bit, please. I --  
10:14:57 23 sorry, page 4, second full paragraph under the  
10:15:00 24 heading "Scholarship". You'll see in the second  
10:15:03 25 full paragraph:



10:15:03 1 "Professional integrity in the  
10:15:05 2 practice of history requires  
10:15:07 3 awareness of one's own biases and a  
10:15:09 4 readiness to follow sound method and  
10:15:11 5 analysis wherever they may lead.  
10:15:14 6 Historians should document their  
10:15:15 7 findings and be prepared to make  
10:15:17 8 available their sources, evidence  
10:15:18 9 and data, including any  
10:15:19 10 documentation they develop through  
10:15:25 11 interviews." [As Read]  
10:15:25 12 Do you agree with that?  
10:15:26 13 A. Yes.  
10:15:26 14 Q. And then:  
10:15:27 15 "Historians should not  
10:15:28 16 misrepresent their sources. They  
10:15:29 17 should report their findings as  
10:15:30 18 accurately as possible and not omit  
10:15:32 19 evidence that runs counter to their  
10:15:34 20 own interpretation." [As Read]  
10:15:36 21 Do you agree with that?  
10:15:37 22 A. Yes.  
10:15:38 23 Q. If we can go to page 7, second  
10:15:47 24 full paragraph, the last sentence:  
10:15:50 25 "The desire to score points as

10:15:52 1 an advocate should never tempt a  
10:15:54 2 historian to misrepresent the  
10:15:56 3 historical record or the critical  
10:15:58 4 methods that the profession uses to  
10:16:01 5 interpret that record." [As Read]  
10:16:02 6 Do you agree with that?  
10:16:04 7 A. Yes.  
10:16:04 8 Q. Next paragraph.  
10:16:05 9 "Historians who work in  
10:16:07 10 government, corporate and non-profit  
10:16:08 11 institutions, as well as those  
10:16:10 12 occasionally entering public arenas  
10:16:13 13 as political advisors, expert  
10:16:15 14 witnesses, public intellectuals,  
10:16:15 15 consultants, legislative witnesses,  
10:16:18 16 journalists or commentators may face  
10:16:21 17 a choice of priorities between  
10:16:23 18 professionalism and partisanship.  
10:16:26 19 They may want to prepare themselves  
10:16:28 20 by seeking advice from other  
10:16:30 21 experienced professionals. As  
10:16:31 22 historians, they must be sensitive  
10:16:32 23 to the complexities of history, the  
10:16:35 24 diversity of historical  
10:16:36 25 interpretations, and the limits as

1 well as the strengths of their own  
2 points of view and experiences and  
3 of the discipline itself. In such  
4 situations, historians must use  
5 sources, including the work of other  
6 scholars, with great care, and  
7 should always be prepared to explain  
8 the methods and assumptions in their  
9 research, the relations between  
10 evidence and interpretation, and  
11 alternative interpretations of the  
12 subjects they address." [As Read]

13 Do you agree with that?

14 A. Yes.

15 Q. Have you tried to utilize these  
16 principles in the preparation of your reports?

17 A. Yes.

18 Q. Now, would you agree with me that  
19 conclusions based on reliable evidence are better  
20 and more reliable than conclusions based on  
21 conjecture or assumption?

22 A. Yes.

23 Q. And the more reliable evidence  
24 that you have available upon which to base a  
25 conclusion, the more reliable your conclusion is

10:17:35 1 likely to be?

10:17:36 2 A. Yes.

10:17:36 3 Q. And the kinds of evidence  
10:17:39 4 historians would consult would include letters,  
10:17:43 5 memoranda, diaries, oral history, photographs,  
10:17:47 6 maps, contemporaneous media reports and notorious  
10:17:52 7 events of significance; would you agree with that?

10:17:54 8 A. Yes.

10:17:55 9 Q. Now I'd like to ask you about a  
10:17:59 10 general -- can we make this -- did we make this an  
10:18:02 11 exhibit? Okay.

10:18:05 12 There's a term now I'd like to ask you  
10:18:07 13 about. That's something called "ahistorical". I  
10:18:11 14 understand sometimes historians can be accused of  
10:18:16 15 being ahistorical.

10:18:19 16 Am I correct that that means importing  
10:18:20 17 current assumptions of the modern times into the  
10:18:23 18 past? And it's not starting with the past in a  
10:18:26 19 value-free way; is that the way you would describe  
10:18:31 20 ahistorical?

10:18:32 21 A. I think it would have somewhat  
10:18:34 22 different meanings in different contexts. That  
10:18:36 23 sounds like it might be one possible meaning.

10:18:39 24 Q. What are the other meanings that  
10:18:40 25 it may have?

10:18:41 1 A. Well, it might, for instance, mean  
10:18:47 2 evaluating -- yeah, events in the past, without  
10:18:51 3 understanding their historical context, or assuming  
10:18:53 4 that things were the same then as today or as at  
10:18:57 5 some other time.

10:18:58 6 Q. Okay. There's another term that  
10:19:04 7 comes up -- "presentism". How does that differ, if  
10:19:08 8 it does, from ahistorical?

10:19:20 9 A. I would say presentism is pretty  
10:19:22 10 similar to the way we define ahistorical. It's  
10:19:26 11 assuming that people in the past lived under the  
10:19:32 12 same conditions as we do, operated under the same  
10:19:35 13 values and assumptions, would decide things on the  
10:19:38 14 same basis as we do, that kind of thing.

10:19:41 15 Q. Which can lead to a problem, I  
10:19:43 16 take it, in interpreting things presently if you're  
10:19:46 17 looking at them from the present and not through  
10:19:49 18 the eyes of the people at the time?

10:19:50 19 A. Correct.

10:19:51 20 Q. Now, I'd like to ask you some  
10:19:53 21 questions about your world view and how you  
10:19:56 22 approached your work from where you're situated as  
10:20:01 23 a historian.

10:20:02 24 So I'd like to show you an excerpt from  
10:20:04 25 your thesis, "A Fatherly Eye". It's S0302, page

1 Roman Numeral 23, so XXIII.

2 A. Excuse me. This is not my thesis,  
3 it's my book.

4 Q. It's your book. Sorry, this is  
5 your book.

6 Can we go to page XXIII, and this is  
7 PDF page 16. You'll see the blue highlighted area.  
8 You write that:

9 "I have asked questions of the  
10 sources based on my own feminist,  
11 antiracist and anti-Colonial  
12 perspective. For me this project is  
13 an attempt to engage meaningfully  
14 with my country's Colonial past and  
15 to examine how a particular group of  
16 Euro Canadians, Indian Agents,  
17 exercised power in the service of  
18 the state and of white dominance."

19 [As Read]

20 I understand this book, I take it, was  
21 based on your thesis, is that right?

22 A. Yes.

23 Q. So the same perspective that you  
24 brought to your book you would have brought to your  
25 thesis as well?

10:21:22 1 A. Well, I revised the thesis very  
10:21:25 2 extensively and it was published -- my thesis came  
10:21:31 3 out -- I finished my thesis after 1995, and the  
10:21:36 4 book came out in 2003. So that's eight years. I  
10:21:40 5 had learned a lot more in the interim.

10:21:42 6 Q. So for the purposes of the  
10:21:46 7 evidence you gave in-chief that would have sort of  
10:21:50 8 relied on your thesis, did you change those  
10:21:53 9 conclusions in your book?

10:21:54 10 A. That's a very broad question. I  
10:21:59 11 reframed the study quite a bit when I revised it to  
10:22:04 12 become a book. I took a lot -- I paid a lot more  
10:22:09 13 attention in the book to the communities themselves  
10:22:15 14 and the views of community members as best I could  
10:22:19 15 determine them.

10:22:20 16 Q. And when you talk about the  
10:22:22 17 communities themselves, you're speaking  
10:22:24 18 specifically of the communities that agents Daly  
10:22:28 19 and Lewis served; is that right?

10:22:31 20 A. That's right, the Indigenous  
10:22:33 21 communities.

10:22:36 22 Q. What does it mean when you write  
10:22:40 23 that you looked at sources from an anti-Colonial  
10:22:44 24 perspective; what does that mean?

10:22:46 25 A. It means that I'm critical of

1 Colonialism. And in the case of the documents that  
2 I was working with, most of them were Colonial  
3 documents in the sense that they were produced, for  
4 the most part, by agents of the state, the Indian  
5 Agents and other mostly officials of the Indian  
6 department who were continuing to pursue the  
7 Colonial project.

8 The Colonial project being the very  
9 long and involved process by which possession of  
10 North America was transferred from Indigenous  
11 people to the newcomers or to Euro Canadians.

12 There's no good term for that group, but actually  
13 you know who I mean.

14 Q. Is this the same perspective you  
15 brought to the work you did on your reports?

16 A. One is a lot freer when conducting  
17 academic research. The reason I included this  
18 passage in my book is that because to do so is  
19 itself a feminist practice, and its role is, its  
20 function is to acknowledge the biases that the  
21 researcher brings.

22 And the acknowledgement that every  
23 researcher does, every person does bring their own  
24 views to a subject. And that the feminist insight  
25 was in the past academics had always maintained an



10:24:28 1 illusion of objectivity. The ideal of objectivity,  
10:24:32 2 which I still hold, but with the understanding that  
10:24:37 3 it's never perfectly achievable by anyone.

10:24:40 4 And so the feminist insight was, we're  
10:24:43 5 going to acknowledge what our biases are and the  
10:24:46 6 recognition that everyone has them, but at least in  
10:24:49 7 this instance the reader understands where you're  
10:24:52 8 coming from and you're not pretending to be  
10:24:54 9 neutral, although we were attempting to be as  
10:24:56 10 balanced and fair and thorough and accurate as  
10:24:59 11 possible.

10:24:59 12 Q. So in this case, your bias, to use  
10:25:03 13 the word you used, is an anti-Colonial bias and you  
10:25:07 14 have to be careful to check for that, I take it,  
10:25:09 15 when you are doing your work?

10:25:11 16 A. Correct.

10:25:13 17 Q. Now I'd like to show you some  
10:25:17 18 posts from social media that we've located on  
10:25:22 19 Facebook in particular, if we can bring up SC0819,  
10:25:29 20 please.

10:25:29 21 And this is a document entitled:  
10:25:32 22 "Jarvis Brownlie, Facebook Posts". We've titled it  
10:25:36 23 that. Can you just confirm by looking at this  
10:25:39 24 document if these are in fact posts from your  
10:25:41 25 Facebook account? When you're ready to scroll

10:25:44 1  
10:25:45 2  
10:25:53 3  
10:25:57 4  
10:26:29 5  
10:26:59 6  
10:27:05 7  
10:27:15 8  
10:27:17 9  
10:27:17 10  
10:27:19 11  
10:27:20 12  
10:27:21 13  
10:27:23 14  
10:27:30 15  
10:27:31 16  
10:27:33 17  
10:27:34 18  
10:25:34 19  
10:27:35 20  
10:27:35 21  
10:27:41 22  
10:27:44 23  
10:27:46 24  
10:27:48 25

down, we'll scroll down?

A. Yes, we can scroll down. Yes, keep going.

Yes, yes, yes, yes, yes, yes, yes, yes, yes, yes, yes, yes, yes, yes, yes, yes. I guess you probably all know that picture, or that place, yes. Yes, yes, yes.

Q. Okay. So those are your Facebook posts?

A. They are, yes.

MR. FELICIAN: Can we make this the next exhibit, please, Your Honour.

THE COURT: Mr. Registrar?

THE REGISTRAR: Exhibit No. 4168 -- or 4167, sorry.

THE COURT: 4167?

THE REGISTRAR: Yes.

EXHIBIT NO. 4167: Jarvis Brownlie Facebook Posts.

BY MR. FELICIAN:

Q. Can we please go up to page 1. I'm not going to ask about every post, but there are a couple I'd like to ask you some questions about. In this one you write:

"In New York City in front of

1 the United Nations buildings with

2 our awesome crew of activists." [As

3 Read]

4 Now what does it mean to you to be an

5 activist?

6 A. An activist to me is someone who

7 is engaged in an active way in political

8 organizing. I'll leave that as a pretty brief

9 definition, but I'll leave that for a moment.

10 Q. And do you consider yourself an

11 activist when it comes to helping First Nations

12 communities?

13 A. Not really, no. I don't really do

14 any political organizing.

15 Q. Now if we can go down to the next

16 page, please, page 2. And you've got four maps on

17 this particular post, and if you can go down a

18 little further, please, and it looks like this is

19 something that was originally posted that you have

20 re-posted by Helene Vosters?

21 A. Yes, this was something

22 circulating on the Internet. I didn't write the

23 text.

24 Q. Do you agree with the text?

25 A. Yes.

10:29:11 1 Q. You would call modern day  
10:29:13 2 political borders irrelevant?

10:29:15 3 A. It says, "should be irrelevant".  
10:29:18 4 No, I wouldn't call them irrelevant; they're highly  
10:29:21 5 relevant.

10:29:32 6 Q. Can we go to page 4, please. This  
10:29:35 7 is something you called a public service  
10:29:37 8 announcement from Charlie Angus, so this is  
10:29:40 9 something you've reposted, I take it, from Charlie  
10:29:43 10 Angus?

10:29:43 11 A. Yes.

10:29:44 12 Q. Were the pictures yours or part of  
10:29:46 13 the post that you reposted?

10:29:47 14 A. No, I reposted the whole thing.

10:29:50 15 Q. You reposted the whole thing.

10:29:52 16 It says: "Justin Trudeau gave  
10:29:58 17 \$12 million so Galen Weston's company can fix their  
10:30:02 18 fridges --" [As Read]

10:30:02 19 THE COURT: If you can pause there,  
10:30:02 20 Mr. Feliciant.

10:30:02 21 Yes, Counsel.

10:30:03 22 MS. GUIRGUIS: We've made no objection  
10:30:05 23 to this being added as an exhibit. We have no  
10:30:07 24 issue with some of these questions, but it's not  
10:30:10 25 clear to me what the relevance of Professor

1 Brownlie's personal public postings on Facebook and  
2 so on have to do with the issues in matter here.

3 THE COURT: Mr. Feliciant.

4 MR. FELICIAN: To my mind, this goes  
5 to the manner in which Professor Brownlie expresses  
6 his views in both quite candidly how extreme they  
7 are and they're in a public forum, and as a  
8 historian he's posting these things in this way.

9 I think it's relevant how much weight  
10 you end up giving it. I can't speak to that but  
11 it's certainly to me relevant because we're  
12 examining this gentleman's reports and his  
13 conclusions and how he arrives at them, and how far  
14 he's prepared to go in making statements that may  
15 or may not be research.

16 THE COURT: Any reply?

17 MS. GUIRGUIS: Yes, Your Honour. The  
18 specific context for this is that, as a Canadian  
19 citizen, probably has -- everybody probably has  
20 opinions on things that are happening in the media,  
21 First Nations, what your government does  
22 day-to-day.

23 And how that's relevant to the issues  
24 that matter here, the question of Treaty 72 and its  
25 negotiation and so on and the history that this

1 witness has presented is still not clear.

2 THE COURT: Well, this gentleman is put  
3 forward as an expert witness. There's certain  
4 requirements of expert witnesses which are  
5 routinely tested on cross-examination with respect  
6 to impartiality. And given the wide scope of  
7 cross-examination, I'm going to permit this type of  
8 question.

9 Having said that, Counsel, if a  
10 specific question comes up that you find  
11 objectionable on a more specific ground than sort  
12 of a general exploration, please stand up and make  
13 another objection.

14 MS. GUIRGUIS: Okay, thank you, Your  
15 Honour.

16 THE COURT: Okay.

17 BY MR. FELICIANANT:

18 Q. Now, the last sentence on this  
19 particular post reads:

20 "But the Prime Minister would  
21 rather be the head butler to the one  
22 percent than to live up to his  
23 promises to build a fairer Canada  
24 for all citizens." [As Read]

25 Now, is this something that you would

10:32:22 1 actually agree with?

10:32:23 2 A. I didn't write this text. Charlie  
10:32:26 3 Angus wrote it. I was unhappy -- I agreed with the  
10:32:31 4 principle that Kashechewan should receive money to  
10:32:41 5 move their community to safe ground.

10:32:45 6 Q. If we can go to page 5, please.  
10:32:49 7 Now this is something you wrote yourself at the  
10:32:52 8 top:

10:32:52 9 "Let the character  
10:32:53 10 assassination begin, what every  
10:32:56 11 government does to effective  
10:32:58 12 Indigenous activists with the  
10:33:00 13 collusion of the media, of course."

10:33:00 14 [As Read]

10:33:02 15 Now, is this something you would have  
10:33:04 16 researched before posting a statement like that,  
10:33:06 17 that "every government fires effective Indigenous  
10:33:13 18 activists --"

10:33:16 19 THE COURT: Again, pause. Yes, Ms. Guirguis.

10:33:19 20 MS. GUIRGUIS: He's not expected to do  
10:33:21 21 actual research with respect to things posted on  
10:33:24 22 Facebook. Is the witness expected to do that and  
10:33:26 23 how is that relevant to the studies he's done here?

10:33:29 24 It is a very different forum and  
10:33:31 25 context to be requiring this expert witness has

1 done expert research before posting something on  
2 Facebook versus what he has done in his report.

3 THE COURT: The difficulty, Counsel, is  
4 first of all, I think this witness is perfectly  
5 capable of explaining why he did or didn't do  
6 things as an expert witness.

7 Secondly, there's no immutable line  
8 between media communications, electronic  
9 communications, Facebook, you name it, and you  
10 know, what this gentleman might have put in an  
11 op-ed in the Globe and Mail, and I don't think we'd  
12 be standing if he put it in an op-ed in the Globe  
13 and Mail under his professorial title, to use a  
14 different example. It's just a different  
15 electronic media.

16 So I am going to permit this.

17 MS. GUIRGUIS: Thank you, Your Honour.

18 THE COURT: I think the question was  
19 before writing this statement did you do research  
20 first. Was that the question, Mr. Feliciant?

21 MR. FELICIAN: Yes.

22 THE WITNESS: It's Facebook.

23 THE COURT: Having just had the  
24 dialogue with counsel, sir, you can't start there.

25 THE WITNESS: It was just my opening



10:34:38 1 sentence --

10:34:39 2 THE COURT: Yes.

10:34:39 3 THE WITNESS: -- although frankly I do  
10:34:41 4 think that sentence by itself is sufficient. It's  
10:34:44 5 a completely different medium. You can't compare  
10:34:47 6 an expert report for a court to Facebook. It's  
10:34:51 7 social media.

10:34:52 8 THE COURT: Just in fairness, before  
10:34:54 9 you finish, sir, you hear about Facebook in court  
10:34:57 10 all the time. It's the same -- don't interrupt me.

10:35:00 11 THE WITNESS: I'm sorry.

10:35:01 12 THE COURT: It is a common medium of  
10:35:03 13 all manner of communication.

10:35:04 14 So I want you to give a complete  
10:35:07 15 answer, so I don't have to come back four days from  
10:35:09 16 now and ask you about it. So, bearing that in  
10:35:12 17 mind, please finish your answer.

10:35:15 18 THE WITNESS: For me, Facebook is a  
10:35:18 19 social medium where people share all kinds of  
10:35:25 20 things. It's casual.

10:35:27 21 It, to me, has very little connection  
10:35:30 22 to my work as an academic, except that obviously I  
10:35:36 23 have interests that are related to my work.

10:35:41 24 And that's part of the reason that I  
10:35:43 25 became a historian because I am interested in these

10:35:45 1 issues, and I felt that I could make a contribution  
10:35:49 2 myself by becoming a careful, rigorous historical  
10:35:55 3 researcher who contributed to people understanding  
10:35:58 4 how we got to where we are today.

10:36:01 5 And so it's very important to me, in my  
10:36:04 6 work, that everything I produce be rigorous,  
10:36:09 7 carefully researched, strictly accurate to the  
10:36:11 8 extent I can ensure that it is.

10:36:15 9 Facebook is a playful medium, and no, I  
10:36:20 10 don't research everything I put on Facebook.  
10:36:23 11 Although, I would stand by the statement that  
10:36:27 12 governments frequently attack Indigenous activists  
10:36:32 13 and if you'd like I can list some recent ones who  
10:36:36 14 have experienced this.

10:36:36 15 And finally I would say that primarily  
10:36:40 16 what you're seeing from these Facebook posts that  
10:36:43 17 you extracted from the many other posts on my  
10:36:47 18 Facebook page is that I am acting as an educator.

10:36:52 19 I want to get issues out into the  
10:36:55 20 public. Sometimes I make provocative statements  
10:36:58 21 because I want people to think about things.

10:37:00 22 BY MR. FELICIAN:

10:37:01 23 Q. So how do you reconcile the view  
10:37:02 24 that you are trying to provide education with the  
10:37:05 25 view that you don't adequately research everything

10:37:08 1 that you post?

10:37:09 2 A. There's more than one kind of  
10:37:13 3 education.

10:37:15 4 Q. Okay. So other things that you  
10:37:19 5 did on the Facebook page here, if you go to page 8,  
10:37:26 6 is you are encouraging people to either make  
10:37:31 7 comments or sign petitions, we don't have to go  
10:37:33 8 through all of them, but you agree with that?

10:37:35 9 A. Yes, here I've made it available  
10:37:38 10 for people to make comments to the Trans Mountain  
10:37:41 11 pipeline review; I don't tell them what to comment  
10:37:43 12 on.

10:37:44 13 Q. And if we can go to page 10,  
10:37:48 14 please. And this is something you wrote at the  
10:37:52 15 top. It says:

10:37:53 16 "This. If you are wondering  
10:37:56 17 what you can do to help support  
10:37:58 18 Indigenous people right now,  
10:37:59 19 especially Indigenous youth who are  
10:38:01 20 feeling like they have targets on  
10:38:03 21 their backs -- read this post from  
10:38:05 22 the amazing young organizer Michael  
10:38:09 23 Champagne. His suggestions are so  
10:38:11 24 good." [As Read]  
10:38:12 25 Then the post you have reposted by

1 Mr. Champagne:

2 "If you're an ally we need more  
3 than thoughts and prayers. We need  
4 your help to protect the hearts and  
5 bodies of these young people." [As  
6 Read]

7 Would you describe yourself as an  
8 "ally" to Indigenous communities?

9 A. It is a very broad statement. I  
10 believe in justice and I would like to see  
11 Indigenous communities living in much more  
12 prosperous and safe conditions than they do live  
13 in.

14 You'll notice the sign in this picture  
15 says "Love For Tina". This is a very troubling  
16 heartbreaking time in Winnipeg at that moment.

17 Tina Fontaine had just been murdered in  
18 a very brutal way. You don't live in Winnipeg, but  
19 living in Winnipeg, the violence that Indigenous  
20 people experience is very visible and I do find it  
21 painful to watch, yes.

22 Q. The question I had asked you,  
23 though, I understand "ally" in an anti-racist  
24 discourse actually has a meaning, which you're  
25 probably familiar with; are you not?

10:39:34 1 A. It's a very contested term.

10:39:37 2 Q. So back to what I had asked you,  
10:39:39 3 would you describe yourself as an ally to First  
10:39:45 4 Nations?

10:39:45 5 A. Probably more as a sympathizer,  
10:39:49 6 but primarily as an educator.

10:39:51 7 Q. Can we go to page 11, please, the  
10:40:03 8 next page. It says here, at the top "moving an  
10:40:05 9 important piece here" which would be your writing.  
10:40:07 10 Then in brackets:

10:40:08 11 "To Canada I say, witness this,  
10:40:10 12 you have an unjust nation." [As  
10:40:10 13 Read]

10:40:12 14 Who is writing that? Is that you or  
10:40:14 15 someone else?

10:40:15 16 A. No, it's in quotes, I'm quoting  
10:40:17 17 this opinion piece from The Star.

10:40:20 18 Q. Do you believe Canada is an unjust  
10:40:23 19 nation?

10:40:23 20 A. I believe the situation in which  
10:40:26 21 Indigenous people live in Winnipeg and Manitoba and  
10:40:30 22 many other places is unjust, yes.

10:40:33 23 Q. Can we go to page 12, please.  
10:40:49 24 You've reposted something that looks like from --  
10:40:52 25 if you go down a bit further, from the national

10:41:03 1 observer.com.

10:41:04 2 Then the last paragraph, just before  
10:41:06 3 the picture, says:

10:41:08 4 "To find Gerald Stanley guilty  
10:41:11 5 would be to find him responsible for  
10:41:12 6 his actions, actions which resulted  
10:41:13 7 in the death of Colten Boushie, an  
10:41:15 8 Indian. But we don't do that in  
10:41:18 9 this country. White Canada is not  
10:41:20 10 responsible for what has happened to  
10:41:22 11 Indians." [As Read]

10:41:24 12 Again, is this something you believed  
10:41:28 13 when you wrote your reports? Is this a view you  
10:41:28 14 have?

10:41:33 15 A. This is in quotes. So again, this  
10:41:35 16 is a passage that I took from the editorial, I  
10:41:39 17 thought it was something that people should think  
10:41:41 18 about.

10:41:45 19 Q. Can we go to page 14, please. At  
10:41:53 20 the top you write:

10:41:55 21 "Here is an open letter,  
10:41:56 22 sponsored by the good folks of Idle  
10:41:59 23 No More, for Indigenous scholars and  
10:42:01 24 allies to sign calling on  
10:42:04 25 universities to do more for

10:42:05 1 Indigenous scholars, students, and  
10:42:07 2 communities and to fight racism."  
10:42:10 3 Again, it uses the word ally, but,  
10:42:12 4 again, you've clarified you're not an ally? You're  
10:42:16 5 a sympathizer?

10:42:17 6 A. Honestly, I haven't thought much  
10:42:20 7 about that term or how to label myself. I would  
10:42:23 8 say essentially that I'm a person who believes in  
10:42:26 9 justice.

10:42:27 10 Q. Can you go to page 18, please.

10:42:30 11 Now this was posted -- this is a  
10:42:35 12 picture of the Naayashamaniing where we were on a  
10:42:42 13 view, and I see it was posted June 7, 2016, and  
10:42:48 14 that was right around the time you were doing your  
10:42:51 15 interviews for your report; is that right?

10:42:55 16 A. Yes.

10:42:56 17 Q. You write:

10:42:58 18 "Unceded Anishinaabe territory,  
10:43:00 19 how land can look when it's been  
10:43:03 20 cared for by Indigenous people  
10:43:05 21 forever." [As Read]

10:43:07 22 Now is that again something I could  
10:43:09 23 call one of your biases that you brought to  
10:43:12 24 bringing -- when you were writing your report?

10:43:14 25 A. I'm not sure what you mean by

10:43:16 1 "bias" here; I thought it was a beautiful picture.

10:43:20 2 Q. Well, the commentary says it's  
10:43:22 3 more than just a picture. It says: "This is how  
10:43:25 4 land can look when it's been cared for by  
10:43:29 5 Indigenous people forever".

10:43:31 6 I'm assuming you're making a point by  
10:43:33 7 saying that, and it's not just simply saying this  
10:43:35 8 is a pretty picture.

10:43:36 9 A. What did you interpret it to mean?

10:43:38 10 Q. Well, what did you mean? I can't  
10:43:40 11 tell you what you meant. You need to tell me what  
10:43:42 12 you meant.

10:43:42 13 A. Well, I'm asking because you  
10:43:42 14 clearly have some interpretation, or you wouldn't  
10:43:45 15 be asking me about it.

10:43:46 16 Q. Well, what did you mean when you  
10:43:48 17 wrote: "How land can look when it's been cared for  
10:43:51 18 by Indigenous people forever"?

10:43:53 19 A. I meant that it was beautiful.

10:43:55 20 Q. That's all you meant?

10:43:56 21 A. Yes.

10:43:56 22 Q. One last page, if we can go to the  
10:44:05 23 last page, page 21, please.

10:44:07 24 Now this is a long passage that you  
10:44:14 25 wrote, but there's only one part of it I was going



1 to ask you a question about.

2 Starting at "Apparently", it's nine  
3 lines up:

4 "Apparently Colten" --

5 Do you see that?

6 A. Yes.

7 Q. "Apparently Colten and his  
8 friends were just doing what all the  
9 white kids their age do all the time  
10 -- including not only drinking and  
11 driving around, but also going into  
12 farm yards and taking stuff,  
13 stealing gas and horsing around."

14 [As Read]

15 So did you -- do you actually believe  
16 that all white kids drink and drive and steal from  
17 farms? That's what it suggests to me anyway?

18 A. This is loosely written. I had  
19 read 1 or 2 pieces that were circulating from  
20 locals who said that this behaviour, which sounds  
21 very unusual to those of us who don't live in that  
22 rural part of Saskatchewan, is apparently common  
23 behaviour.

24 That is the point I was making. Which  
25 I thought was relevant because that was news to me.

10:45:34 1  
10:45:36 2  
10:45:36 3  
10:45:44 4  
10:45:56 5  
10:45:59 6  
10:46:02 7  
10:46:04 8  
10:46:08 9  
10:46:12 10  
10:46:40 11  
10:46:42 12  
10:46:42 13  
10:46:44 14  
10:46:55 15  
10:46:56 16  
10:46:57 17  
10:47:01 18  
10:47:04 19  
10:47:04 20  
10:47:12 21  
10:47:13 22  
10:47:14 23  
10:47:15 24  
10:47:17 25

Q. But it certainly isn't strictly accurate?

A. Well, it's a polemic.

Q. Now, if we can bring up SC0818. This is much shorter, it's only three pages, but these are posts from your Twitter account.

If you can just identify those for me, and maybe we can scroll down a bit, you can confirm that they are posts from your Twitter account.

A. (Witness reviews document).

Q. Are they posts from your Twitter?

A. Yes.

MR. FELICIAN: Can we make this the next exhibit, please?

BY MR. FELICIAN:

Q. Now, the very first line, I take it you attended a conference in -- was it in Winnipeg --

A. No --

THE COURT: Just a moment, sir. Please go ahead.

BY MR. FELICIAN:

Q. You were attending a conference somewhere; where was it?

A. It was in Ottawa.

10:47:18 1 Q. And was it in November 2018?

10:47:21 2 A. That looks right.

10:47:23 3 Q. Okay. And you said?

10:47:30 4 "Dr. Palmater made a powerful  
10:47:36 5 kickass speech about the absolute  
10:47:39 6 insincerity and treachery of the  
10:47:43 7 federal government [...]." [As Read]

10:47:44 8 Now, in a general way, do you believe  
10:47:44 9 that the federal government is insincere and  
10:47:48 10 treacherous?

10:47:50 11 A. This was a specific situation. It  
10:47:52 12 was a symposium held by the Native Women's  
10:47:55 13 Association of Canada, in which the topic of  
10:47:59 14 discussion was citizenship and membership rules  
10:48:05 15 about First Nations.

10:48:07 16 And so this referred specifically to  
10:48:11 17 the situation in which the federal government said  
10:48:15 18 it was addressing a set of inequalities but had --  
10:48:24 19 I can't remember what state the bill was in, but it  
10:48:27 20 had multiple provisions and some of the provisions  
10:48:31 21 didn't come into force.

10:48:33 22 It was a slightly complicated  
10:48:36 23 situation, but basically the federal government was  
10:48:38 24 saying it was fixing the problems and yet the  
10:48:41 25 legislation it was passing wasn't fully coming into

10:48:45 1 force. So the comment was specifically about this  
10:48:48 2 situation.

10:48:51 3 Q. Can we go down to -- just a  
10:49:00 4 moment. This is under November 24, 2018.

10:49:05 5 "Brownlie said the only way  
10:49:07 6 Indigenous women's rights have  
10:49:09 7 improved in Canada is through  
10:49:12 8 litigation or international  
10:49:13 9 embarrassment." [As Read]

10:49:15 10 So do you generally support the use of  
10:49:17 11 litigation to improve the conditions of First  
10:49:20 12 Nations people?

10:49:20 13 A. That's not my decision. That  
10:49:25 14 comment is a historical observation that, as you  
10:49:29 15 may know, there was a very long struggle over the  
10:49:32 16 provisions of the Indian Act, which were sexist,  
10:49:40 17 which embodied sexual discrimination in that men  
10:49:43 18 who married -- men of status who married non-status  
10:49:46 19 women were able to confer their status on their  
10:49:49 20 wives, whereas women of status who married  
10:49:54 21 non-status men lost their status.

10:49:57 22 So this has been recognized in Canada  
10:49:59 23 and internationally as sexual discrimination.  
10:50:02 24 There was a long fight to change that provision.  
10:50:04 25 It took over a century and they were not able to

1 get it changed through negotiation and lobbying,  
2 which they did try.

3 It took litigation and even after that,  
4 international embarrassment to change it so this  
5 was a historical observation.

6 Q. Okay. Can we go down to page 2.  
7 It says in the first tweet this is something that  
8 actually appears in your report, and I will get to  
9 it when I'm going through your report with you.  
10 But it says, "Canada's policy has always been to  
11 get rid of Indigenous people".

12 Do you recall writing that in your Long  
13 Road to Land Claims report?

14 A. Yes.

15 Q. Okay. Is that something you said  
16 then to this conference in Ottawa?

17 A. Correct.

18 Q. Can we go down a bit, please?

19 Then it says, you say at the top:

20 "Indigenous bar association on  
21 the desperate need for reforms in  
22 our so-called justice system." [As  
23 Read]

24 Am I to take it that you have little  
25 respect for our justice system?

10:51:26 1 A. No, that was a piece of polemic.

10:51:29 2 A lot of people were upset at that time because of  
10:51:38 3 the Gerald Stanley case, because Gerald Stanley was  
10:51:38 4 completely acquitted and many people, many, many  
10:51:41 5 people, especially on the prairies, felt that was  
10:51:45 6 unjust. And I heard from a lot of lawyers and gun  
10:51:53 7 experts on that particular subject.

10:51:53 8 Q. I suppose having gone through all  
10:51:55 9 of this I'd only ask you whether you think you have  
10:51:57 10 some obligation as a historian, someone with a  
10:52:00 11 doctorate, someone who teaches, to use somewhat  
10:52:05 12 more nuanced language when posting to a wide  
10:52:09 13 audience to educate people?

10:52:11 14 A. Well, that is not always the  
10:52:13 15 strategy I follow. Sometimes I do. You have  
10:52:16 16 selected particular posts; I've posted a lot on  
10:52:20 17 Facebook.

10:52:20 18 But as a public intellectual, I do try  
10:52:23 19 to get historical information out to the public and  
10:52:26 20 even much of what you've posted here is me  
10:52:29 21 reposting editorials and so on that I thought  
10:52:35 22 people might want to read and think about.

10:52:38 23 Some of the other posts you have here  
10:52:40 24 are simply me advising the public of an academic  
10:52:45 25 forum that was being held at the law faculty at the

1 U of M. So I've used Facebook in different ways.

2 But I do sometimes say things in a  
3 blunt and provocative way because I want people to  
4 think about it. And Canadians, in general, are  
5 reluctant to think about some of the things that I  
6 think should be discussed and addressed. And so  
7 sometimes I use provocative language.

8 Q. There's one more -- I don't think  
9 it is a social media -- but one more item I'd like  
10 to draw to your attention. Did you attend the  
11 Welcome Winnipeg event with a panel of presenters;  
12 do you recall doing that?

13 A. Yes.

14 Q. When was that?

15 A. I can't really recall, honestly.  
16 Maybe last fall.

17 Q. Last fall, okay.

18 Can we pull up document SC0949. Now I  
19 have a video; the volume is not good. So I've  
20 prepared a transcript of the experts that otherwise  
21 I can show you if I have to show you, but to make  
22 it easier for everybody, I've extracted portions of  
23 what you said during the video.

24 And I'm going to ask you if you can  
25 read these portions and tell me whether they

1 accurately reflect what you said at the Welcome  
2 Winnipeg event if you're able to do that. If  
3 you're not, I'll play the video. So if you would  
4 take a look at the document.

5 A. (Witness reviews document). Okay.  
6 Please scroll down. I can't recall word for word  
7 what I said, but let's say for now that this seems  
8 accurate enough.

9 MR. FELICIAN: If we can make this the  
10 next exhibit, please, Your Honour.

11 THE COURT: Mr. Registrar?

12 THE REGISTRAR: Exhibit No. 4168.

13 EXHIBIT NO. 4168: Professor Brownlie's  
14 remarks from "Welcome Winnipeg" event.

15 BY MR. FELICIAN:

16 Q. Now, the first statement:

17 "The poverty, the violence, the  
18 violence that Canada has inflicted  
19 on Indigenous peoples and continues  
20 to inflict -- I'll have more to say  
21 about that later." [As Read]

22 Is it your view that Canada  
23 intentionally inflicts violence as opposed to  
24 perhaps failing to address harms in the way you'd  
25 like to see happen? Do you think the Government



10:55:54 1 actually intentionally inflicts violence?

10:55:57 2 A. I was primarily thinking here  
10:55:59 3 about the residential schools, and that's a  
10:56:04 4 complicated subject.

10:56:06 5 It was in a time when children were  
10:56:09 6 routinely subjected to corporal punishment by  
10:56:16 7 parents throughout the country.

10:56:19 8 But all observers at the time agreed  
10:56:21 9 that the violence that was used as a form of  
10:56:25 10 discipline in residential schools exceeded the norm  
10:56:28 11 in most families by quite a bit.

10:56:34 12 It was violent to remove children from  
10:56:37 13 their families by force, which is how it was often  
10:56:41 14 done.

10:56:41 15 So I would say, yes, that residential  
10:56:45 16 schools inflicted many forms of violence on  
10:56:49 17 Indigenous people.

10:56:49 18 Q. And so when you say "continues to  
10:56:56 19 inflict", what are you referring to there?

10:57:00 20 A. Well, there are many examples. In  
10:57:06 21 Manitoba, you showed a picture of me with the  
10:57:09 22 activists. We went to the United Nations Permanent  
10:57:17 23 Forum on Indigenous Issues. I've been working with  
10:57:19 24 them, that's a research project very much along the  
10:57:22 25 lines of the Ethical Principles in Aboriginal

10:57:24 1 Research that you showed earlier, and part of a  
10:57:26 2 large group of researchers from multiple  
10:57:29 3 universities who are working with people in  
10:57:31 4 Manitoba Indigenous communities who have  
10:57:33 5 experienced hydrodowns and the multiple effects on  
10:57:39 6 their communities and economies.

10:57:41 7 So yes, that's one example of violence  
10:57:44 8 that continues to be inflicted. The raising and  
10:57:46 9 lowering of the waters has destroyed their economy  
10:57:50 10 and has had multiple negative impacts, including  
10:57:55 11 deaths by driving their boats into floating logs  
10:57:58 12 and so on. So I think violence is an appropriate  
10:58:01 13 term.

10:58:02 14 Q. And then, finally, in the last  
10:58:07 15 couple of quotes you refer to settler Colonialism  
10:58:11 16 and the displacing of Indigenous and dispossessing  
10:58:14 17 of Indigenous people of their land.

10:58:16 18 Do you not take the view, though, that  
10:58:21 19 that was done through, at the time, what the  
10:58:25 20 Colonial government believed were voluntary  
10:58:31 21 treaties in which compensation was paid or  
10:58:34 22 provided?

10:58:35 23 A. I think that's a simplified  
10:58:38 24 description. But if we think, for instance, of  
10:58:43 25 Laurence Oliphant's own words about how he intended

1 to complete the treaty, he said that he would need  
2 to wring from them some consent, however reluctant.

3 So I don't think that it's quite so  
4 simple as to state that they, you know, that these  
5 were simply matters of ready agreement and  
6 Indigenous people being happy with the outcomes.

7 And that's not even to talk about the  
8 implementation of treaties, which has always been  
9 very imperfect.

10 Q. So now I'm going to some portions  
11 of your report and documents you cite, and ask you  
12 some questions about them.

13 And the first one I'd like to take you  
14 to is at page 8. Can we go to page 8 of  
15 Exhibit 4119, please. Now, I'm going to draw your  
16 attention to a certain passage that you wrote and  
17 then ask you some questions about it. So page 8,  
18 you write, at seven lines down:

19 "Canada was still determined to  
20 get rid of First Nations people and  
21 their inconvenient distinct rights."

22 [As Read]

23 Do you see that?

24 A. Yes.

25 Q. "As late as 1969 to 1971,

1 during the fear over the Trudeau  
2 government's white paper, federal  
3 officials sought to push through  
4 their agenda despite vigorous  
5 protests by First Nations people."

6 [As Read]

7 You see there that you cite a document  
8 at footnote 8, and you cite Sally Weaver's book  
9 entitled, "Making Canadian Indian Policy".

10 Let's go down to footnote 8 to see if I  
11 got that right. Do you see at the bottom it says:  
12 "See Sally Weaver Making Indian Policy"?

13 A. Yes.

14 Q. Can we bring up S1845, please.  
15 Now this is an excerpt from the book that you  
16 quoted, called "Making" -- or at least referred to  
17 -- "Making Canadian Indian Policy: The Hidden  
18 Agenda 1968 to 1970".

19 And then if we go down to the next  
20 page, you'll see this is the preface, and I'm going  
21 to be showing you have a portion of the preface.

22 So what I'm showing you comes from the  
23 preface, and if we can go to page Roman Numeral 12,  
24 please, XII, and I'm going to ask you some  
25 questions about this document?

11:02:02 1 MR. FELICIAN: Can we make this the  
11:02:03 2 next exhibit, please, Your Honour, first?

11:02:07 3 THE COURT: Mr. Registrar?

11:02:08 4 THE REGISTRAR: Exhibit No. 4169.

11:02:11 5 EXHIBIT NO. 4169: Preface to the text  
11:01:08 6 of "Making Canadian Indian Policy: The  
11:01:11 7 Hidden Agenda 1968 to 1970".

11:02:12 8 BY MR. FELICIAN:

11:02:12 9 Q. This is the preface to the text  
11:02:15 10 Canadian Indian policy. Now the second full  
11:02:19 11 paragraph, it says:

11:02:22 12 "It is important to underscore  
11:02:23 13 at the outset that the process of  
11:02:25 14 policy making is a complex one,  
11:02:28 15 involving formal structural features  
11:02:30 16 of the bureaucracy in the cabinet; a  
11:02:35 17 certain dynamic created by a mix of  
11:02:38 18 personalities, personal career  
11:02:40 19 motivations and career histories;  
11:02:41 20 and varying degrees of conformity to  
11:02:44 21 roles, as well as certain attempts  
11:02:46 22 to develop new rules and roles. The  
11:02:48 23 period during which Indian policy  
11:02:51 24 was developed saw far-reaching  
11:02:54 25 reforms" -- sorry -- "the period

11:02:57 1 during which Indian policy was  
11:02:59 2 developed saw structural change  
11:03:03 3 within government and considerable  
11:03:04 4 anticipation that far-reaching  
11:03:06 5 reforms might be effected under the  
11:03:08 6 new administration in many policy  
11:03:10 7 fields. It would be impossible to  
11:03:12 8 replay this period and totally  
11:03:15 9 reconstruct the intricate web of  
11:03:19 10 persons, ideas and ground rules that  
11:03:19 11 shaped Indian policy, but incomplete  
11:03:21 12 attempts are perhaps not without  
11:03:23 13 some utility. The reader must be  
11:03:25 14 the judge of this." [As Read]  
11:03:28 15 So do you agree that policy making is a  
11:03:30 16 very complex endeavour?  
11:03:36 17 A. I assume it is. It's not  
11:03:37 18 something I've had a lot of involvement in, I  
11:03:40 19 haven't researched it.  
11:03:41 20 Q. Okay. Can we now go to page Roman  
11:03:45 21 Numeral 14, please, it's PDF page 12. And the  
11:03:53 22 author writes here:  
11:03:54 23 "I owe a particular debt of  
11:03:56 24 gratitude to the many civil servants  
11:03:58 25 who tolerated my repeated interviews

11:04:00 1 and at times extended gracious  
11:04:03 2 hospitality to me in their homes.  
11:04:05 3 The book would have been impossible  
11:04:06 4 without the willingness of civil  
11:04:08 5 servants to recall the events of the  
11:04:10 6 period for me. I am also grateful  
11:04:12 7 to several of them who reviewed the  
11:04:14 8 manuscript, or parts of it, and made  
11:04:16 9 valuable corrections and comments.  
11:04:18 10 Contrary to public opinion, I found  
11:04:22 11 these officials to be dedicated and  
11:04:25 12 articulate people, many of whom were  
11:04:28 13 deeply committed to producing a good  
11:04:31 14 Indian policy that would alter  
11:04:33 15 significantly the unacceptable  
11:04:34 16 conditions of the native people.  
11:04:36 17 Furthermore, some were far more  
11:04:40 18 innovative in their approach to  
11:04:41 19 Indian policy than the politicians  
11:04:45 20 were willing to accept, particularly  
11:04:46 21 in the area of Indian  
11:04:49 22 participation." [As Read]  
11:04:49 23 Now, you don't acknowledge in your  
11:04:50 24 report that the officials in government, or at  
11:04:53 25 least some of them, were deeply dedicated

11:04:55 1 individuals who actually wanted to do good?

11:05:01 2 A. I don't think I stated that they  
11:05:03 3 weren't. They weren't my focus, but I don't think  
11:05:06 4 I said they weren't. In my book actually, I tried  
11:05:09 5 to make sure that I did acknowledge that,  
11:05:12 6 especially the Indian Agents I studied, believed  
11:05:16 7 they were doing good.

11:05:17 8 Q. I'm talking about your report  
11:05:19 9 though that you wrote. In Exhibit 4119 you didn't  
11:05:22 10 say that?

11:05:23 11 A. You mean the passage we were just  
11:05:24 12 looking at?

11:05:25 13 Q. That's right.

11:05:26 14 A. No, I didn't. It was a brief  
11:05:28 15 comment about the way that they attempted to  
11:05:33 16 implement the white paper policy.

11:05:35 17 Q. Can we go to page 3, please, under  
11:05:38 18 "Overview of the Policy". This is in the  
11:05:45 19 introduction. And in the last paragraph,  
11:05:52 20 Ms. Weaver writes:

11:05:53 21 "In some respects the recent  
11:05:55 22 history of Canadian Indian policy is  
11:05:58 23 a familiar feature of Canada's  
11:06:00 24 social and political landscape. It  
11:06:02 25 is now well-known that after a year



11:06:05 1 of consultations with Indians on the  
11:06:06 2 revision of the Indian Act, a  
11:06:09 3 process that the Minister called an  
11:06:10 4 attempt at consultative democracy,  
11:06:10 5 the federal government released its  
11:06:12 6 White Paper in June of 1969 that  
11:06:14 7 proposed the global termination of  
11:06:16 8 all special treatment of Indians  
11:06:18 9 including the Indian Act. The Act  
11:06:21 10 had been heavily criticized by  
11:06:24 11 Indians themselves; they also  
11:06:25 12 recognized that it enshrined some of  
11:06:27 13 their Charter Rights which had been  
11:06:29 14 granted or promised them prior to  
11:06:31 15 Confederation in 1867. The new  
11:06:33 16 policy was an abrupt departure from  
11:06:36 17 the traditional practice of dealing  
11:06:37 18 with Indians, even though the  
11:06:39 19 implicit long range goal of  
11:06:41 20 terminating the special treatment of  
11:06:43 21 Indians had been part of government  
11:06:44 22 policies since the 1830s." [As Read]  
11:06:49 23 So you would agree with me the language  
11:06:53 24 Ms. Weaver uses is not getting rid of Indians.  
11:06:57 25 It's terminating special treatment of Indians,

11:06:59 1 which is not quite the same thing, I suggest.

11:07:03 2 A. In practice it's the same thing.  
11:07:05 3 By getting rid of Indians -- it's more colloquial  
11:07:09 4 language than I usually use -- but Indians in law,  
11:07:12 5 are people who are subject to the Indian Act. And  
11:07:19 6 the whole goal of Indian policies since the 1830s  
11:07:28 7 has been to reduce the number of people who can  
11:07:30 8 claim Indian status.

11:07:37 9 Q. But you agree the language you  
11:07:38 10 used was somewhat colloquial?

11:07:41 11 A. Yes, it's somewhat colloquial. I  
11:07:45 12 could have said "eliminating Indians", but it does  
11:07:48 13 --

11:07:48 14 Q. You don't mean eliminating Indians  
11:07:51 15 though?

11:07:51 16 A. That's why I didn't use the word  
11:07:53 17 because it sounds even worse.

11:07:55 18 Q. You also stated in your report  
11:07:56 19 that federal officials sought to push through the  
11:07:59 20 policies despite protests.

11:08:02 21 So if we can go to page 176, this is  
11:08:08 22 again S-1845, PDF page 196, and this is the last  
11:08:25 23 paragraph -- is that page 176? No, that's 178, can  
11:08:33 24 go up to 176? One page earlier.

11:08:42 25 So this is page 176 of the book. Now

11:08:48 1 we're talking about the White Paper, which you had  
11:08:57 2 said in your report, officials sought to push it  
11:08:57 3 through:

11:08:57 4 "During this time, Chrétien  
11:08:59 5 toured the country interpreting the  
11:09:01 6 policy to provincial officials and  
11:09:04 7 attempting to allay Indian fears  
11:09:06 8 that the reserves would be  
11:09:06 9 dismantled and their lands  
11:09:08 10 amalgamated with the provincial land  
11:09:11 11 base. As opposition to the policy  
11:09:13 12 increased, he began stressing that  
11:09:15 13 the White Paper was a proposal for  
11:09:17 14 further discussion and negotiation."

11:09:17 15 [As Read]

11:09:19 16 Do you see that?

11:09:21 17 A. Yes.

11:09:23 18 Q. Now can we go -- before I ask a  
11:09:27 19 question about that -- if we can go to page 185 of  
11:09:31 20 the book. Now, this is Trudeau telling the  
11:09:49 21 audience at the point when the Red Paper was  
11:09:52 22 presented in June of 1970, Ms. Weaver writes:

11:10:00 23 "As he continued to talk,  
11:10:02 24 Trudeau's approach became more  
11:10:03 25 informal and his parting comments

1 shocked the Indian audience. And  
2 Trudeau says, 'But let me just say  
3 that we will be meeting again and we  
4 will be furthering the dialogue.  
5 And let me just say, we're in no  
6 hurry if you're not. You know, a  
7 hundred years has been a long time,  
8 and if you don't want an answer in  
9 another year, we'll take, 2, 3, 5,  
10 10 or 20. The time you people  
11 decide to come to grips with this  
12 problem, and we won't force any  
13 solution on you, because we are not  
14 looking for any particular  
15 solution.'" [As Read]

16 Then Ms. Weaver writes:

17 "These remarks were interpreted  
18 as the Prime Minister's assurance  
19 that the government would not press  
20 the White Paper on the Indians." [As  
21 Read]

22 So this is not, so far, the government  
23 forcing the White Paper on the Indians. In fact,  
24 Chrétien and Trudeau are saying, no, we are not  
25 going to force it on you.

11:11:09 1 A. The language I used was, "they  
11:11:10 2 attempted to push through the policy".

11:11:12 3 You're looking at a period here, what,  
11:11:15 4 maybe 8 or 9 months after they first introduced the  
11:11:18 5 policy; something like that.

11:11:21 6 So that's what I was getting at, is  
11:11:24 7 that they, instead of responding immediately to the  
11:11:27 8 objections raised by Indigenous people, they  
11:11:31 9 continued, as you've just showed, to tour the  
11:11:34 10 country to try to persuade them and so on.

11:11:38 11 They didn't formally withdraw the  
11:11:39 12 policy until, I think, early 1971.

11:11:42 13 So that was simply my point. They  
11:11:44 14 didn't immediately withdraw it but rather attempted  
11:11:47 15 to persuade, you know, they tried to keep the  
11:11:51 16 project alive.

11:11:53 17 But what we see here, of course, the  
11:11:56 18 quote we just looked at, is perhaps the first  
11:11:59 19 moment at which they signaled that they might not  
11:12:07 20 implement the White Paper.

11:12:08 21 Q. If we can go back to page 8 of  
11:12:11 22 your report, just quickly. Where it says:

11:12:18 23 "An internal memorandum showed  
11:12:19 24 that this retreat was largely  
11:12:22 25 tactical, as officials still

1 intended to implement the White  
2 Paper proposals." [As Read]

3 You have a footnote there, number ten,  
4 if you go down to number ten, you will see that  
5 it's an excerpt from someone named Russell Diabo.  
6 It's: "Harper Launches Major First Nations  
7 Termination Plan, Canadian Dimension, December 7,  
8 2013", from Canadian Dimension Online.

9 Now if we can pull up that document,  
10 please, it's S0480. Now who's Russell Diabo? Is  
11 he a historian?

12 A. No, he's an Indigenous activist.

13 Q. And "Indigenous Politics" -- is  
14 that just a web page, or what is that?

15 A. I believe -- what do call it?  
16 It's just signalling the topic.

17 Q. If we can go down to the memo that  
18 you refer to, and that's at page 4. This is the  
19 memo you cite in support of your statement that  
20 officials continue to push on with the policy. It  
21 says:

22 "In a memo dated April 1, 1970,  
23 David Munro, an assistant Deputy  
24 Minister of Indian Affairs on Indian  
25 consultation and negotiations,

11:13:54 1 advised his political masters Jean  
11:13:57 2 Chrétien and Pierre Trudeau as  
11:14:00 3 follows." [As Read]

11:14:00 4 It says:

11:14:01 5 "In our definition of  
11:14:02 6 objectives and goals, not only as  
11:14:04 7 they appear in formal documents, but  
11:14:05 8 also as stated or even implied in  
11:14:09 9 informal memoranda, draft planning  
11:14:11 10 papers, or casual conversation, we  
11:14:13 11 must stop talking about having the  
11:14:16 12 objective or goal of phasing out in  
11:14:17 13 five years. We can still live with  
11:14:20 14 just as much strength and sincerity  
11:14:21 15 that the White Paper policies we  
11:14:23 16 propose are the right ones [...]."

11:14:23 17 [As Read]

11:14:27 18 Anyway, my point is this memo that  
11:14:30 19 you're citing predates Trudeau's statement that  
11:14:35 20 they're not going to push through with the policy.

11:14:38 21 So isn't that important context when  
11:14:40 22 you're relying on a memo that's actually prior to  
11:14:46 23 Trudeau saying, well, we're not going to force it  
11:14:48 24 on you.

11:14:49 25 A. I don't believe so. Because this

1 memo signals that they are responding to the  
2 criticism by strategizing about how they will  
3 present their goals.

4 And what he's saying is, basically,  
5 we're going to keep the same goals, but we're going  
6 to talk about it differently and we'll change the  
7 timeline. But we're planning on doing the same  
8 thing.

9 He says, the next paragraph, says:

10 "The final proposal, which is  
11 for the elimination of special  
12 status in legislation must be  
13 relegated far into the future. But  
14 it basically, we need not change the  
15 White Paper policy content..." [As  
16 Read]

17 And so on. So he's saying how they'll  
18 talk about it, but they shouldn't abandon the  
19 ideas, the main goals and ideas of the White Paper  
20 going forward.

21 Q. But this is before Trudeau's  
22 statements in June, right?

23 A. But they're not inconsistent.

24 Q. They're not. Okay?

25 A. Right? Trudeau is just saying,



1 we're not going to force it on you; it can take 2,  
2 3, 4, 5, 10 years. It's actually similar. We'll  
3 change the timeframe, but he didn't say we're  
4 changing the goals.

5 Q. All right. So I'm going to go to  
6 another statement at page 10. I don't know how  
7 significant this one is, but I'll draw it to your  
8 attention.

9 Page 10, "Especially", you'll see where  
10 you write:

11 "Especially until the end of  
12 the 1960s, Indian Affairs officials  
13 had no sympathy with any resistance  
14 to assimilation and clearly could  
15 not fathom the choice to preserve  
16 ancient ancestral cultures and  
17 distinct Indigenous communities."

18 [As Read]

19 Now, I never read anywhere in Sally  
20 Weaver's text that officials could not fathom and  
21 had no sympathy for resistance to assimilation.  
22 Those are your words; is that right?

23 A. Yes, that's based on my research.  
24 I wasn't citing Sally Weaver there.

25 Q. So you conducted biographies on

11:17:02 1 all the officials in the Indian Department to know  
11:17:06 2 they couldn't fathom these things?

11:17:08 3 A. It's a generalization based on  
11:17:11 4 what I've seen of internal correspondence and  
11:17:14 5 Indian Agents' correspondence.

11:17:16 6 Q. Okay. Now I think you spoke about  
11:17:25 7 this in your examination in-chief. Just to be  
11:17:27 8 clear, your thesis and book focused on two case  
11:17:30 9 studies of two Indian Agents, Daly and Lewis; is  
11:17:37 10 that right?

11:17:37 11 A. Correct.

11:17:37 12 Q. Do you know how many Indian Agents  
11:17:39 13 there were in 1930?

11:17:50 14 A. No, I don't.

11:17:50 15 Q. Can we pull up SC0822, please.  
11:17:57 16 Now I'm showing you an annual report of the  
11:18:00 17 Department of Indian Affairs for the year ended  
11:18:03 18 March 31, 1930.

11:18:05 19 This is an excerpt from the report  
11:18:07 20 because the report is extremely long. And a lot of  
11:18:10 21 it doesn't pertain to what we're talking about, but  
11:18:13 22 I did want to highlight the number of agencies.

11:18:18 23 So if we can go down, please, to where  
11:18:29 24 it talks about the number of agencies. "Summary of  
11:18:33 25 Indian Affairs".

1 You weren't aware then that there were  
2 actually 133 agencies in Canada and 27 in Ontario?

3 A. I wouldn't have known the exact  
4 number. Those seem reasonable to me.

5 Q. And would you agree that each  
6 Indian Agent would have brought his own particular  
7 --

8 MS. GUIRGUIS: My friend has just said  
9 133 and 27 in Ontario. I don't see that in the  
10 document.

11 MR. FELICIAN: I counted them.

12 MS. GUIRGUIS: I'm sorry. I saw 116.

13 THE COURT: The witness hasn't  
14 disagreed with the numbers. I appreciate -- sorry,  
15 I see you just standing up but I think it's fair  
16 ball.

17 MS. GUIRGUIS: Thank you, Your Honour.

18 MR. FELICIAN: Can we go up to the  
19 number of 116.

20 THE COURT: Well, Ms. Guirguis's point  
21 was that she saw 116, the number where you said  
22 133?

23 MR. FELICIAN: My counting appears to  
24 be off.

25

11:19:42 1 BY MR. FELICIANANT:

11:19:43 2 Q. There are 116. Do you accept  
11:19:44 3 that?

11:19:44 4 A. Sure.

11:19:45 5 Q. If you count the agencies under  
11:19:49 6 the title "Ontario" there, I counted 27, but I  
11:19:51 7 might want to double check that now.

11:19:59 8 THE COURT: Are you intending to mark  
11:20:00 9 the excerpts, sir?

11:20:02 10 MR. FELICIANANT: Yes.

11:20:02 11 THE COURT: I think that would be a  
11:20:03 12 fair response to Ms. Guirguis's objection.

11:20:06 13 MR. FELICIANANT: Yes, if we can mark  
11:20:08 14 this as the next exhibit, please.

11:20:09 15 THE COURT: Mr. Registrar?

11:20:10 16 THE REGISTRAR: Exhibit No. 4170.

11:20:14 17 EXHIBIT NO. 4170: Annual report of the  
11:18:00 18 Department of Indian Affairs for the  
11:18:02 19 year ended March 31, 1930.

11:20:14 20 THE COURT: Just looking at the time.  
11:20:17 21 You don't have to pause now if you're in the middle  
11:20:20 22 of something, sir, but if you aren't, it is 11:30.

11:20:25 23 MR. FELICIANANT: I have one question  
11:20:26 24 that follows from this, and that would be brief.

25

1 BY MR. FELICIANIANT:

2 Q. You would agree each Indian Agent  
3 would have brought his or her own -- I think it was  
4 probably a man at this time -- own particular  
5 beliefs and style and approach to the job?

6 A. Yes, to a point. And that was  
7 part of the point of my case study to Indian  
8 Agents. To look at how those differences of style  
9 and so on affected their work.

10 Q. And you did not -- I'm sorry --

11 A. Well, I would just add that I read  
12 very extensively in Indian Affairs files for that  
13 work and subsequent work. I've seen comments from  
14 a lot of Indian Affairs officials. So I do feel  
15 that it's valid for me to make that generalization.

16 Q. And you did not study the Indian  
17 Agents specifically in Saugeen and Nawash through  
18 the 1930s, 1940s and 1950s?

19 A. Yes, I have seen some of their  
20 correspondence. I have looked at the records from  
21 the soldier settlement file, so I did see  
22 correspondence from the Cape Croker agents through  
23 the '20s and '30s. I've seen quite a bit of that  
24 correspondence actually.

25 Q. For the purpose of your thesis and

11:21:38 1 your book you didn't see that?

11:21:40 2 A. It was in the course of doing the  
11:21:45 3 research for thesis. It didn't make it into the  
11:21:45 4 thesis because I ended up focusing on those two  
11:21:46 5 agents. I've written another article on those  
11:21:49 6 soldier settlement files.

11:21:50 7 So, yeah, I actually looked quite a bit  
11:21:52 8 at this correspondence for the agents of Cape  
11:21:57 9 Croker.

11:21:57 10 MR. FELICIAN: Now would be a good  
11:21:58 11 time to break, Your Honour.

11:21:59 12 THE COURT: All right.

11:43:48 13 -- RECESS TAKEN AT 11:23 --

11:45:35 14 -- UPON RESUMING AT 11:49 --

11:49:51 15 THE COURT: Please go ahead, Mr.  
11:49:55 16 Feliciant.

11:49:55 17 MR. FELICIAN: Your Honour, I  
11:49:57 18 understand I had asked at one point that the  
11:49:58 19 Twitter posts at SC0818 be made an exhibit, and I  
11:50:03 20 don't think it was assigned a number?

11:50:06 21 THE COURT: Well, it wasn't. I didn't  
11:50:08 22 think you had asked. But subject to any objections  
11:50:10 23 there's no reason why we can't take care of it  
11:50:13 24 right now.

11:50:13 25 I don't see any objections.

11:50:16 1 Mr. Registrar?

11:50:18 2 THE REGISTRAR: The Exhibit No. 4171.

11:50:21 3 THE COURT: Thank you.

11:50:23 4 MR. FELICIANANT: Thank you.

11:50:23 5 EXHIBIT NO. 4171: Twitter Postings by

11:18:05 6 Professor Brownlie.

11:50:23 7 BY MR. FELICIANANT:

11:50:23 8 Q. Now if we can go to page 13 of

11:50:27 9 your report, please, at Exhibit 4119.

11:50:31 10 THE COURT: This is, again, the second

11:50:33 11 report.

11:50:33 12 MR. FELICIANANT: This is the second

11:50:34 13 report. The land claims report, the "Long Road"

11:50:42 14 report.

11:50:42 15 In particular, I understand that your

11:50:45 16 view is that:

11:50:47 17 "Treaties were one of the tools

11:50:49 18 used to provide ways for government

11:50:50 19 to monitor events, perspectives, and

11:50:52 20 developments on reserves." [As Read]

11:50:58 21 Do you see that?

11:50:59 22 A. Yes.

11:51:02 23 Q. Would you agree with me though,

11:51:03 24 the primary purpose of treaties was to secure lands

11:51:06 25 for settlement as provided by the Royal

1 Proclamation?

2 A. That was certainly their  
3 ostensible and legal purpose.

4 Q. Can you cite another scholar who  
5 suggests that treaties were not to secure lands for  
6 settlement, but rather to control the Indian  
7 population?

8 A. Not off the top of my head.

9 Q. Okay.

10 A. But I do feel I've done a great  
11 deal of research in this area.

12 Q. Neither, certainly the Royal  
13 Commission on Aboriginal Peoples doesn't say that,  
14 does it?

15 A. This section of the report was  
16 where I tried to list the main tools that I  
17 believed were important -- the tools the government  
18 had that I believed were important to explain the  
19 impediments that lay in the way of First Nations  
20 asserting their rights or trying to implement  
21 treaties.

22 So the sentence that you've extracted  
23 there was intended to summarize the effects of that  
24 whole list of things. And so in the subsequent  
25 part, I discussed the specific effects of treaties,



11:52:25 1 which of course are not always exactly the same as  
11:52:28 2 their purpose. But their effects.

11:52:32 3 Q. All right. Can we go to page 20,  
11:52:35 4 please, of your report. If you can actually go up  
11:53:11 5 one page to 19. You're talking here in your report  
11:53:16 6 about enfranchisement, and you write:

11:53:24 7 "Originally designed to be a  
11:53:26 8 voluntary process, a reward for  
11:53:28 9 successful assimilation,  
11:53:30 10 enfranchisement came with some  
11:53:32 11 significant incentives, particularly  
11:53:34 12 the payment to each enfranchised  
11:53:37 13 person of his or her per capita  
11:53:40 14 share of any Band monies along with  
11:53:40 15 a portion of the reserve to hold as  
11:53:42 16 private property. When it turned  
11:53:42 17 out that Indigenous people rejected  
11:53:44 18 the procedure en masse, the Indian  
11:53:49 19 Department had a clause inserted  
11:53:50 20 into the Indian Act permitting  
11:53:53 21 Indian Affairs officials to impose  
11:53:56 22 enfranchisement on individuals  
11:53:59 23 against their will. (This provision  
11:54:01 24 was in place from 1920-22 and again  
11:54:04 25 from 1933-51)." [As Read]

11:54:11 1 If we can go to S-1209. This is a text  
11:54:19 2 I believe you cited this in your report, by J. R.  
11:54:24 3 Miller: "Compact, Contract and Covenant". Are you  
11:54:28 4 familiar with that publication?

11:54:29 5 A. Yes.

11:54:29 6 Q. If we can go to page 238, please.  
11:54:34 7 I'll be showing you a passage that goes from 238  
11:54:38 8 over to 239.

11:54:39 9 So you'll see at the bottom there where  
11:54:42 10 we've highlighted, it says:

11:54:43 11 "In 1933, Parliament brought  
11:54:46 12 back involuntary enfranchisement for  
11:54:48 13 Indian males albeit with conditions  
11:54:52 14 that made it less threatening. It,  
11:54:54 15 too, would remain in the Indian Act  
11:54:58 16 until 1951." [As Read]

11:55:00 17 So what conditions made it less  
11:55:01 18 threatening? Because I didn't see you talk about  
11:55:04 19 that in your report?

11:55:04 20 A. I'm not sure what he's referring  
11:55:06 21 to here.

11:55:14 22 Q. If we can now pull up your thesis,  
11:55:17 23 which is Exhibit 4164, please. And I'd like to go  
11:55:21 24 to page 446; I understand the PDF is 457. I'm  
11:55:36 25 going to show you something that you wrote in your

11:55:38 1 thesis about this as well:

11:55:40 2 "The records show that, in  
11:55:41 3 practice, some of the department's  
11:55:43 4 policies received much more emphasis  
11:55:45 5 than others. There was a  
11:55:46 6 conspicuous contrast between policy  
11:55:49 7 initiatives at the highest level of  
11:55:51 8 the administration and the daily  
11:55:52 9 practice of rank and file staff.

11:55:55 10 Where Deputy Superintendent General  
11:55:57 11 Duncan Campbell Scott secured the  
11:55:59 12 passage of new legislation to impose  
11:56:04 13 compulsory enfranchisement, these  
11:56:06 14 measures were never employed. There  
11:56:08 15 is little evidence of active efforts  
11:56:10 16 in the field to further the primary  
11:56:12 17 policy goals of assimilation and  
11:56:13 18 enfranchisement, either by urging  
11:56:16 19 applications for enfranchisement or  
11:56:18 20 by promoting higher levels of  
11:56:20 21 education and the integration of  
11:56:21 22 natives into the mainstream  
11:56:24 23 population." [As Read]

11:56:27 24 Why was it that you didn't tell us in  
11:56:29 25 your report that these measures were actually never

1 employed?

2 A. Because I'm not sure that's the  
3 case.

4 Q. That's what you wrote in your  
5 thesis.

6 A. I think hopefully I have learned a  
7 few things since I wrote my thesis. I do know that  
8 they initiated efforts to impose that procedure on  
9 Frederick Loft, the Mohawk war veteran and  
10 organizer. So I did learn a few things after  
11 writing my thesis.

12 Q. How many members of SON were  
13 forced into enfranchisement?

14 A. I'm not aware of that; I haven't  
15 studied that particular issue. To my knowledge, no  
16 one has done research into this. I would say the  
17 state of knowledge at the present time is that we  
18 just don't know whether anyone was subjected to  
19 compulsory enfranchisement or not.

20 Q. You just mentioned Frederick Loft,  
21 so I actually have a couple of questions about  
22 Frederick Loft. If we can go to page 22, please,  
23 of Professor Brownlie's report.

24 Now, I was going to ask you some  
25 questions about this passage now. You write there:

11:57:59 1 "Deputy Superintendent General  
11:58:01 2 Scott had officials begin to collect  
11:58:02 3 information on successful organizer  
11:58:04 4 Frederick Loft, intending to  
11:58:07 5 prosecute him for collecting funds  
11:58:09 6 for a planned trip to England to  
11:58:11 7 press claims. Loft had created the  
11:58:13 8 League of Indians of Canada in an  
11:58:16 9 effort to press Aboriginal and  
11:58:17 10 treaty rights on the federal  
11:58:19 11 government, and Scott had been using  
11:58:21 12 a series of measures to hamper his  
11:58:25 13 organizing efforts." [As Read]  
11:58:26 14 So I'll stop there. Actually, I may  
11:58:42 15 finish. You then write about Arthur O'Meara.  
11:58:46 16 "Similarly, when Arthur  
11:58:48 17 O'Meara, the lawyer and supporter of  
11:58:51 18 the allied tribes in B.C., continued  
11:58:52 19 to raise funds for a planned trip to  
11:58:54 20 Britain, department officials began  
11:58:57 21 to collect information on him in  
11:58:58 22 hopes of prosecuting him under  
11:59:00 23 Section 141. In the end, both men  
11:59:02 24 died or ceased their activities  
11:59:05 25 before such a case could be

11:59:06 1 launched. But the department's  
11:59:08 2 preparations to charge them  
11:59:09 3 demonstrate its intention to make  
11:59:11 4 active use of the provision." [As  
11:59:11 5 Read]

11:59:16 6 So can we pull up, please,  
11:59:19 7 Exhibit 4141, which is Titley's book called The  
11:59:25 8 Narrow Vision. It's your source at footnote 48.  
11:59:32 9 If we can go to page 104, please, and we're looking  
11:59:36 10 at the third full paragraph:

11:59:42 11 "The League of Indians was also  
11:59:43 12 attracting attention in other  
11:59:45 13 quarters. Copies of Loft's circular  
11:59:47 14 fell into the hands of the  
11:59:49 15 Commissioner of the Northwest  
11:59:50 16 Mounted Police at Regina late in  
11:59:54 17 1919. The police feared that the  
11:59:57 18 league was either a scheme to  
11:59:59 19 defraud the Indians or to embarrass  
12:00:02 20 the government by stirring up  
12:00:03 21 discontent. An investigation into  
12:00:05 22 Loft's background was ordered, but  
12:00:07 23 it revealed nothing that would  
12:00:09 24 suggest criminal intent or adherence  
12:00:12 25 to revolutionary political ideology.

1 Nonetheless, the information was  
2 transmitted to Scott with the  
3 warning that 'considerable unrest  
4 was being caused.'" [As Read]

5 Now, you don't tell the reader of your  
6 report that the police were concerned that Loft was  
7 defrauding the Indians?

8 A. No, I didn't say anything about  
9 the police actually.

10 Q. No. And your report leaves the  
11 impression that Scott ordered the investigation.  
12 But according to this it was the Northwest Mounted  
13 Police?

14 A. I'd have to look at the whole text  
15 around it. I believe that it was Scott who ordered  
16 it. But I would have to look through my sources to  
17 find where I found that information.

18 Q. I believe this was the source you  
19 cited in your report, though. So I'm assuming it  
20 was your interpretation of this document that led  
21 you to what you wrote in your report?

22 A. Yes. If you read the whole book A  
23 Narrow Vision, what you see is a pretty systematic  
24 accounting of Scott's multiple campaigns against  
25 organizers like Fred Loft, like Chief Thunderwater,

12:01:31 1 like O'Meara, that he took very active measures to  
12:01:36 2 try to counteract their organizing.

12:01:39 3 Q. Well, I don't see anywhere in this  
12:01:41 4 book anyway where it says Scott intended to  
12:01:45 5 prosecute and ordered the investigation?

12:01:48 6 A. Well, possibly I got the  
12:01:50 7 information from Paul Tenant's book and the  
12:01:54 8 footnote is in error.

12:01:56 9 Q. Okay. In fact, this book suggests  
12:02:01 10 that no evidence of criminal activity was found, so  
12:02:04 11 it's probably unlikely they would have prosecuted?

12:02:07 12 A. No, it says that there was nothing  
12:02:09 13 to suggest criminal intent or adherence to  
12:02:12 14 revolutionary political ideology. That would have  
12:02:16 15 been a background into his -- investigation into  
12:02:18 16 his criminal history.

12:02:20 17 But by collecting money to travel to  
12:02:24 18 London, he was contravening Section 141 of the  
12:02:29 19 Indian Act.

12:02:31 20 Q. So with regard to, I'm just going  
12:02:35 21 to now ask you about Arthur O'Meara, who also  
12:02:39 22 appeared in your report.

12:02:40 23 I read the portion where it says there  
12:02:42 24 was a hope of prosecuting him as well. Can we just  
12:02:45 25 look at S-1709, please. And this is Chapter 8 of



1 Titley's A Narrow Vision book.

2 If we can go to page 157, please,  
3 fourth paragraph. So now we're talking about  
4 Arthur O'Meara, and they write here:

5 "And for a while it seemed that  
6 the force of the law would indeed be  
7 necessary in order to curb the  
8 agitator's activities. In October,  
9 Scott learned that O'Meara had been  
10 in the Nass Area once more and was  
11 still hoping to take the case to the  
12 Privy Council. In January 1928  
13 Ditchburn informed him that O'Meara  
14 had been in correspondence with the  
15 Nisga'a Indians asking for money.  
16 Scott encouraged him to try to  
17 acquire a copy of O'Meara's letter,  
18 saying that with reliable evidence  
19 at hand, they could invoke the force  
20 of law. A copy of the incriminating  
21 letter fell into the hands of the  
22 department in February, but before  
23 further evidence could be compiled  
24 O'Meara died." [As Read]

25

12:04:10 1 So this passage seems to me to suggest  
12:04:12 2 to me, in reading it, that Scott recognized that  
12:04:15 3 evidence was required in order to bring any kind of  
12:04:17 4 a charge; would you agree with that?

12:04:20 5 A. Yes.

12:04:20 6 Q. And it also suggests that before  
12:04:23 7 further evidence could be gathered, O'Meara died?

12:04:28 8 A. Yes.

12:04:28 9 Q. So no decision to even commence a  
12:04:32 10 case had been made at that point?

12:04:34 11 A. Well, I would have thought that  
12:04:37 12 setting out to collect evidence would be -- I can't  
12:04:41 13 remember your exact words, but it would be  
12:04:44 14 commencing a case.

12:04:45 15 Q. So you're saying, in your view,  
12:04:49 16 the mere act of investigating is the same as  
12:04:54 17 commencing a case, in your mind?

12:04:56 18 A. They weren't just investigating,  
12:04:58 19 they were trying to get reliable evidence of his  
12:05:01 20 fundraising efforts. Scott said with that evidence  
12:05:03 21 they could invoke the force of the law. To me,  
12:05:05 22 that seems to indicate an intent to invoke the  
12:05:09 23 force of the law if they could get the evidence.

12:05:11 24 Q. If they could get the evidence.  
12:05:13 25 Okay.

12:05:14 1 Now I'm going to go on now to page 23  
12:05:17 2 of your report. And you have some discussion there  
12:05:20 3 about policing regular activities? This is  
12:05:24 4 page 24. Page 23, 24. You say there:

12:05:33 5 "As a final indication of the  
12:05:35 6 all-embracing surveillance program  
12:05:37 7 at the heart of the Indian Act,  
12:05:39 8 consider another 1927 amendment that  
12:05:42 9 called on Indian Agents to police  
12:05:45 10 the leisure activities of their  
12:05:50 11 involuntary clients." [As Read]

12:05:53 12 Now, if you go to the next page you'll  
12:05:57 13 see it reads -- it's not highlighted but it says at  
12:05:59 14 the end of the quote at the top of the page:

12:06:01 15 "These provisions are no longer  
12:06:03 16 in the Indian Act." [As Read]

12:06:06 17 Can you tell me when they were removed  
12:06:11 18 from the Indian Act?

12:06:11 19 A. No, I can't off the top of my  
12:06:13 20 head, but my guess would be 1951.

12:06:16 21 Q. So at the time, so in the 1960s  
12:06:19 22 and 1970s, they likely were not part of the Indian  
12:06:23 23 Act?

12:06:23 24 A. Not that particular provision,  
12:06:25 25 probably not. But I would have to check, I'm not

1 sure.

2 Q. Okay. Now, if we could then on  
3 page 24, you speak about agent Daly. I'm just  
4 going to read that paragraph. It says:

5 "At least one Indian Agent John  
6 Daly of Parry Sound -- " [As Read]  
7 And that's one of the people -- sorry  
8 to interrupt the quote -- that's who you studied  
9 for your thesis and your book?

10 A. Yes.

11 Q. "At least one Indian Agent,  
12 John Daly of Parry Sound, Ontario,  
13 took this clause seriously enough to  
14 patrol a local pool room. He noted  
15 with satisfaction that the  
16 Indigenous occupants all fled the  
17 room, clearly aware of some risk in  
18 being caught there. Daly then told  
19 them that, 'If they can pay for  
20 playing pool, they can pay for  
21 something to eat, and they need not  
22 come to me for relief. I would not  
23 give it to them.'" [As Read]  
24 That certainly paints a rather  
25 unsympathetic portrait of Agent Daly, doesn't it?

12:07:33 1 A. He was a complicated figure.

12:07:35 2 Q. You quote there, you'll see in  
12:07:36 3 footnote 55, if we can go down to footnote 55,  
12:07:41 4 please. You quote the Franz Koennecke Collection  
12:07:50 5 and basically the John Daly to the Department of  
12:07:53 6 Indian Affairs March 25, 1933, the letter; that's  
12:07:55 7 the cite is to the letter, that letter from John  
12:07:58 8 Daly to the DIA?

12:08:00 9 A. Correct.

12:08:01 10 Q. If we can please bring up  
12:08:04 11 Exhibit 3609, please. This is the letter you're  
12:08:06 12 citing in support of your statement and in support  
12:08:09 13 of the extracts.

12:08:10 14 So you basically took that one sentence  
12:08:12 15 out of this letter. So I'd like to you look at the  
12:08:15 16 whole letter now, and it's addressed to the  
12:08:19 17 Secretary, Department of Indian Affairs sir, dated  
12:08:24 18 March 23, 1933:

12:08:27 19 "Yours of March 23, 74-6  
12:08:30 20 received, with enclosure, copy of  
12:08:32 21 letter received by the Honorable  
12:08:34 22 Superintendent General of Indian  
12:08:34 23 Affairs from Mrs. Julia King or  
12:08:41 24 Payshegobe, a member of the  
12:08:41 25 Christian Island Band living on

12:08:41 1 Parry Island.

12:08:43 2 "In reply I have to state that  
12:08:45 3 the relief that Ms. Payshegobe or  
12:08:53 4 King, is receiving at the present  
12:08:53 5 time is according to the  
12:08:53 6 departmental letter of November 17,  
12:08:55 7 74-22. I have previous  
12:08:57 8 correspondence with the department  
12:08:58 9 about this woman. In Mrs.  
12:09:02 10 Payshegobe's letter to the Minister  
12:09:03 11 it would appear as she were getting  
12:09:05 12 a raw deal. This woman had a boy  
12:09:08 13 working at the freight sheds at  
12:09:10 14 Depot Harbour, last season. He did  
12:09:13 15 not make much but he was working,  
12:09:15 16 and she had a good garden. She has  
12:09:17 17 been a hard working woman and  
12:09:18 18 brought up her family herself, as  
12:09:20 19 her husband has not been living with  
12:09:24 20 her since before I came here and  
12:09:25 21 that is over ten years ago.

12:09:27 22 "The department has paid out  
12:09:29 23 hundreds of dollars for her family  
12:09:31 24 for medical treatment as they have  
12:09:33 25 TB glands. I am sympathetic towards

12:09:37 1 this woman, but she is the type of  
12:09:40 2 Indian that the more you give to  
12:09:42 3 her, the more she wants. Her two  
12:09:44 4 boys were here at this office on  
12:09:47 5 Wednesday the 22nd of this month,  
12:09:49 6 and asked in a very impudent manner  
12:09:52 7 for rubbers and clothing. I knew by  
12:09:54 8 their attitude that I would likely  
12:09:54 9 get word from the department that  
12:09:54 10 Mrs. Payshegobe had been writing to  
12:09:55 11 them. I gave one of the lads a pair  
12:09:55 12 of rubbers and the other a pair of  
12:09:59 13 breeches. They both wanted rubbers  
12:10:01 14 but I only had one pair to give  
12:10:04 15 them.

12:10:04 16 "I pay no attention to impudence  
12:10:06 17 and consider that is what I am here  
12:10:07 18 for, to take their impudence and put  
12:10:09 19 it down as ignorance. Mrs.  
12:10:13 20 Payshegobe has got a good square  
12:10:14 21 deal in my opinion, but knowing that  
12:10:17 22 this is the between season, that is,  
12:10:18 23 the break up is coming and the  
12:10:20 24 garden stuff pretty much all used up  
12:10:23 25 and her boys will not get any work

12:10:25 1 here before the first of May, I  
12:10:27 2 would respectfully make the  
12:10:29 3 suggestion the department would  
12:10:29 4 increase her order from \$8 to \$10 a  
12:10:33 5 month, for the months of April and  
12:10:34 6 May only." [As Read]

12:10:41 7 So you extracted a single quote that  
12:10:44 8 comes further down in the letter, but you don't say  
12:10:49 9 in the report you write that, if taken the letter  
12:10:54 10 in context, agent Daly actually gave her sons items  
12:10:57 11 that they were asking for and sought to increase  
12:10:59 12 her monthly stipend or allowance.

12:11:03 13 So why would you take the one quote,  
12:11:07 14 that paints agent Daly is being very unsympathetic,  
12:11:11 15 but not say in your report, in fairness to him, he  
12:11:15 16 did have sympathy for this particular woman and  
12:11:18 17 actually asked to increase the amount she had been  
12:11:21 18 receiving?

12:11:22 19 A. Because that wasn't the topic of  
12:11:24 20 this paragraph; the paragraph was about  
12:11:25 21 surveillance. And I just quoted the RCAP passage  
12:11:30 22 that talks about the controlling or regulation of  
12:11:33 23 pool rooms, that Indigenous people were not to be  
12:11:37 24 seen in pool rooms.

12:11:38 25 And I had found an example in the



12:11:40 1 correspondence of Daly patrolling pool rooms. So  
12:11:45 2 that was the topic of this paragraph. I wasn't  
12:11:48 3 talking about relief.

12:11:49 4 Q. Can we go to page 27 now of your  
12:11:52 5 report at Exhibit 4119. It is a discussion you  
12:11:56 6 engage in with respect to Chief Thunderwater, and  
12:12:03 7 let's see, page 27, you write here:

12:12:19 8 "One of the most telling  
12:12:19 9 indications of the goals and  
12:12:20 10 attitudes of Indian Affairs  
12:12:21 11 officials was their handling of  
12:12:24 12 Aboriginal political organizations.  
12:12:25 13 By the early 20th century, a few  
12:12:29 14 tenacious individuals were making  
12:12:31 15 efforts to create regional and even  
12:12:32 16 national organizations designed to  
12:12:34 17 foster united action, often aimed  
12:12:36 18 particularly at the securing of  
12:12:37 19 Aboriginal and treaty rights. One  
12:12:39 20 of the first such individuals was a  
12:12:40 21 man from Cleveland, Ohio, who went  
12:12:43 22 by the name of Chief Thunderwater.  
12:12:45 23 When Chief Thunderwater began  
12:12:46 24 raising issues of treaty and  
12:12:48 25 Aboriginal rights, DIA head Duncan

Campbell Scott set out to discredit  
him and destroy his organization."

[As Read]

So you cite footnote 63, if you go down  
to footnote 63 for a moment. You cite Titley, A  
Narrow Vision at pages 97 to 99; do you see that?

A. Yes.

Q. Can we pull up, please,  
Exhibit 4141. And go to page 98. In this book it  
reads:

"The Chief did take up the  
cause of Indian grievances by  
protesting to Ottawa about the  
behaviour of government agents.  
Scott, however, adopted a policy of  
ignoring him and refused to answer  
his letters. Nonetheless, the  
deputy superintendent felt obliged  
to learn more about this charismatic  
leader who was increasingly making a  
nuisance of himself. In April 1915  
he was in communication with the  
Society of American Indians, an  
organization that cooperated closely  
with Washington's Bureau of Indian

12:14:09 1 Affairs. Arthur C. Parker, the  
12:14:12 2 society's secretary treasurer,  
12:14:14 3 informed Scott that Thunderwater was  
12:14:15 4 probably an imposter. Further  
12:14:18 5 inquiries brought the revelation  
12:14:20 6 that the Bureau of Indian Affairs  
12:14:23 7 had no record of the chief's Indian  
12:14:25 8 status, and Scott readily gave  
12:14:28 9 credence to these suspicions." [As  
12:14:28 10 Read]

12:14:31 11 You don't say in your report that Scott  
12:14:33 12 had a report from the United States that this  
12:14:37 13 particular person was an imposter. We have to go  
12:14:41 14 to this document to figure that out.

12:14:42 15 A. Yes. That wasn't my point.

12:14:46 16 Q. Can we go to page 99, please. And  
12:14:58 17 go down towards the bottom. "As a consequence" --  
12:15:15 18 this isn't highlighted, but this is the point I'm  
12:15:19 19 making:

12:15:19 20 "As a consequence of Scott's  
12:15:21 21 overtures, Meighen and Prime  
12:15:21 22 Minister Borden cajoled E. Guss  
12:15:21 23 Porter, who was responsible for  
12:15:21 24 private member's bills, to withdraw  
12:15:21 25 the incorporation bill after first

12:15:30 1 reading. This was a major setback  
12:15:33 2 for Thunderwater. He was soon to  
12:15:35 3 experience further misfortune, but  
12:15:37 4 as much as a consequence of his own  
12:15:39 5 conduct as that of Scott's  
12:15:42 6 subversion. In the autumn of 1916,  
12:15:44 7 the Chief had adopted the son of  
12:15:46 8 Mary Ann George, a widow of St.  
12:15:49 9 Regis reserve, and took him to live  
12:15:51 10 in Cleveland. On a subsequent visit  
12:15:53 11 by his mother, the boy, Mitchell  
12:15:57 12 Benedict, complained of physical and  
12:15:58 13 sexual abuse and insisted on  
12:16:00 14 returning to Canada. Reports of  
12:16:02 15 this incident came to Scott's  
12:16:03 16 attention early in 1919, and he felt  
12:16:06 17 that it might be useful to stop  
12:16:08 18 Thunderwater. He ordered an  
12:16:09 19 immediate investigation and passed  
12:16:11 20 on the results to Immigration  
12:16:12 21 Superintendent W.D. Scott,  
12:16:15 22 suggesting that it might constitute  
12:16:17 23 grounds to keep the Chief out of  
12:16:18 24 Canada.  
12:16:21 25 "Immigration officials still

12:16:24 1 refused to act, and Thunderwater  
12:16:26 2 continued to operate in the country  
12:16:28 3 for another year. But even he must  
12:16:30 4 have realized that time was running  
12:16:32 5 out. Ottawa received reports from  
12:16:34 6 Cleveland that he was indeed an  
12:16:36 7 imposter whose real name was  
12:16:39 8 Mr. Palmer, and that he was of black  
12:16:41 9 ancestry. With this information and  
12:16:43 10 the news of the adoption scandal  
12:16:45 11 circulating among Indian Agents and  
12:16:47 12 opponents of the Council,  
12:16:48 13 Thunderwater's credibility was soon  
12:16:53 14 undermined." [As Read]

12:16:54 15 So again you don't tell the reader that  
12:16:57 16 in fact Chief Thunderwater wasn't Chief  
12:17:01 17 Thunderwater, that he was in fact someone else. My  
12:17:04 18 concern, and I'll let you address this, that in  
12:17:06 19 your report the focus is entirely on Scott  
12:17:09 20 investigating somebody.

12:17:10 21 And yet you don't share that that may  
12:17:14 22 have actually been justified, based on reports  
12:17:17 23 Scott had received.

12:17:19 24 A. Again, that wasn't the topic. The  
12:17:22 25 topic was the reasons that Scott was trying to

12:17:25 1 undermine and discredit Indigenous leaders. And  
12:17:28 2 that's why, if you go back a page or two, the  
12:17:32 3 paragraph just above the one that you began  
12:17:34 4 reading, it might be on the previous page -- stop,  
12:17:37 5 yes, thank you.

12:17:38 6 So that previous paragraph has the  
12:17:41 7 passage that I quoted, and this was, as Titley  
12:17:46 8 says, the real issue that Scott had, that he wanted  
12:17:51 9 to seek for the Indians, quote:

12:17:52 10 "The recovery of their alleged  
12:17:54 11 lost privileges and rights rather  
12:17:56 12 than to take their places in  
12:17:58 13 civilized communities" -- in other  
12:18:00 14 words, not to become enfranchised --  
12:18:02 15 "and to conduct their own affairs in  
12:18:04 16 the Aboriginal way, absolutely  
12:18:04 17 independent of and in defiance of  
12:18:06 18 the government." [As Read]

12:18:06 19 And that's what I quoted. And Titley  
12:18:09 20 goes on to say:

12:18:10 21 "This was the key to Scott's  
12:18:13 22 opposition, that it wasn't so much  
12:18:14 23 his own conviction that Thunderwater  
12:18:16 24 was an imposter, but rather the  
12:18:18 25 realization that the success of the

12:18:20 1 council of the tribes would weaken  
12:18:22 2 if not destroy Indian subservience  
12:18:27 3 to officialdom." [As Read]

12:18:30 4 Q. Isn't it important, though, for  
12:18:31 5 the reader of your report to have the entire  
12:18:33 6 context?

12:18:33 7 Not just that, but also the mitigating  
12:18:36 8 side of it, that there was an investigation but it  
12:18:40 9 also turned out to be that this person was an  
12:18:44 10 imposter, and the department was rightly concerned  
12:18:47 11 about the Indians, to use the phraseology of the  
12:18:50 12 day, being defrauded?

12:18:52 13 A. I would not assume from the  
12:18:55 14 information here that he was necessarily quote  
12:18:57 15 unquote "an imposter". There are black people in  
12:19:01 16 the United States who have Indigenous heritage who  
12:19:05 17 have been unable, I'm not sure of the current state  
12:19:08 18 of affairs, but you know, have -- for instance  
12:19:10 19 there are people of Cherokee and black descent who  
12:19:14 20 at some point were dispelled from the Cherokee  
12:19:17 21 tribe but previous to that were members.

12:19:20 22 There were other black people, who were  
12:19:23 23 labelled black in the U.S., who later became known  
12:19:27 24 as the Lumbee, who were of Indigenous decent. I  
12:19:32 25 believe it's more complicated, and I haven't

1 researched this particular person myself, so I  
2 don't know exactly what his status was.

3 But the fact that the American  
4 government stated that he was not a status Indian  
5 does not -- is not conclusive proof that he was not  
6 Indigenous.

7 Q. It certainly justifies some  
8 looking into, though, doesn't it?

9 A. Well, but -- I mean, I haven't  
10 looked into that myself. It's not something I've  
11 had time to do.

12 Q. Okay. If we can move on then to  
13 page 37, you make a statement in your report at  
14 page 37.

15 You say there:

16 "As far as treaties were  
17 concerned, they played no role in  
18 the practices of the Indian  
19 Department and they seem to have  
20 been viewed generally as  
21 irrelevant." [As Read]

22 In support of that statement, you go on  
23 to say:

24 "Agent John Daly of Parry  
25 Sound, for instance, wrote the



1 following: 'There has been a great  
2 unrest among the Indians, and I have  
3 endeavored to explain to them that  
4 these Treaties are past and done  
5 with.'" [As Read]

6 Now, you cite at footnote 87 the letter  
7 from Daly to the Department of Indian Affairs  
8 July 15, 1932. So that's Exhibit 3597, if we can  
9 pull that up, please.

10 Now this is the whole letter that you  
11 extracted the one line from and at the second --  
12 let's see, I'm sorry. At the bottom of that --  
13 have you read this whole letter?

14 A. I have, not in a while.

15 Q. Would you like to read it, just  
16 quickly? I won't read it out to you.

17 A. Yes, thank you. That would be  
18 helpful.

19 (Witness reviews document).

20 Could you scroll down, please. Yes,  
21 that last paragraph. Okay, please scroll down.  
22 Thank you. Yes, thank you.

23 Q. You'd agree with me the focus on  
24 this letter is not on treaties generally, but  
25 rather obtained copies of the Huron Treaty

12:23:22 1 specifically from Chief Pegahmagabou?

12:23:28 2 A. Well, that was one subject of the  
12:23:29 3 letter, but he makes several references to having  
12:23:32 4 knowledge of these treaties and so on.

12:23:34 5 So it does seem to be a little broader  
12:23:36 6 and he says, "These Treaties are past and done  
12:23:40 7 with". So he does seem to be speaking of more than  
12:23:44 8 one treaty.

12:23:45 9 Q. Well, it says here in the top that  
12:23:47 10 we have the blue highlighted.

12:23:50 11 "It is because of men such as  
12:23:52 12 Pegahmagabou and Henry Abetung of  
12:23:54 13 the Shawanaga Band having a  
12:23:55 14 knowledge of these Treaties that  
12:23:57 15 Henry Abetung has been acting in the  
12:24:01 16 union Council of Ontario Indians.  
12:24:04 17 According to what I know of Chief  
12:24:07 18 Frank Judge, if he had these Huron  
12:24:09 19 Treaties he would be starting to  
12:24:10 20 make the claims all over again  
12:24:13 21 [...]." [As Read]

12:24:13 22 So what I'm going to suggest to you is  
12:24:15 23 that the natural reading of this is we're talking  
12:24:19 24 about the Huron Treaties in this letter and that  
12:24:21 25 the concern isn't that these treaties are

12:24:24 1 meaningless, but they don't want to have to revisit  
12:24:30 2 all of the issues that were settled by those two  
12:24:30 3 treaties.

12:24:34 4 A. I'm not sure that distinction is  
12:24:36 5 too different from what I'm saying. He says, the  
12:24:39 6 quote is, "These Treaties are past and done with".  
12:24:42 7 He says the rest of the Bands don't give a hoot for  
12:24:44 8 these treaties, and these people are just trying to  
12:24:47 9 make trouble.

12:24:47 10 What that signals, which is consistent  
12:24:50 11 with the records of the department as a whole, is  
12:24:59 12 that he doesn't believe there's anything in the  
12:24:59 13 treaties that still needs to be addressed or paid  
12:24:59 14 attention to.

12:25:00 15 And the issue that these men were  
12:25:02 16 trying to raise was the fact that they had reserved  
12:25:04 17 the islands in the treaties, but the islands had  
12:25:07 18 been sold.

12:25:08 19 So, what he's basically saying is, yes,  
12:25:11 20 he doesn't want people to have copies of the  
12:25:14 21 treaties because they will raise issues based on  
12:25:17 22 the terms of the treaties, and he doesn't want to  
12:25:19 23 address those issues.

12:25:22 24 Q. But this -- certainly this one  
12:25:23 25 letter about the Huron Treaties doesn't support a

12:25:26 1 broad and sweeping statement that treaties played  
12:25:30 2 no role in the practices of the Indian Department  
12:25:34 3 and were generally viewed as irrelevant.

12:25:36 4 I'm going to suggest to you that just  
12:25:38 5 doesn't support that statement?

12:25:39 6 A. Well, based on a much broader  
12:25:41 7 reading of the records. I've studied vast amounts  
12:25:44 8 of correspondence among agents and inspectors and  
12:25:52 9 internal officials in the department. They  
12:25:52 10 virtually never mention the treaties.

12:25:52 11 What they mention is the Indian Act  
12:25:54 12 over and over again, it's according to the Indian  
12:25:55 13 Act. They never mention, well, we have to pay  
12:25:57 14 attention to these treaties. And when they do  
12:26:00 15 mention treaties, it's usually in the connection  
12:26:03 16 such as this, that people are trying to make  
12:26:06 17 trouble with knowledge of treaties.

12:26:07 18 Q. But that level of detail and all  
12:26:08 19 of those sources weren't in your report. You  
12:26:10 20 didn't say that in your report. You cited this  
12:26:12 21 particular example. So you're saying there's more,  
12:26:15 22 but you didn't tell us what that was in your  
12:26:18 23 report?

12:26:18 24 A. Yes, I didn't go into more depth.

12:26:22 25 Q. Can we now look at pages 50 to 51,

12:26:26 1 please, of your report. This is Exhibit 4119.

12:26:37 2 This is a statement you made with respect to Indian  
12:26:39 3 Agent Lewis laying vagrancy charges. And so you  
12:26:45 4 write here:

12:26:53 5 "Perhaps the most extreme  
12:26:53 6 punishment I encountered was the  
12:26:53 7 treatment meted out to a young mute  
12:26:56 8 woman who lived in Robert Lewis's  
12:26:58 9 agency. The young woman was accused  
12:27:01 10 of being sexually active outside  
12:27:03 11 marriage. It appears from the  
12:27:05 12 records that Lewis laid vagrancy  
12:27:07 13 charges against her in response to  
12:27:09 14 these transgressions, and she was  
12:27:11 15 sent to prison for six months. And  
12:27:11 16 this was not the end of her  
12:27:11 17 punishment." [As Read]

12:27:14 18 And it appears here, I'll stop reading  
12:27:16 19 because it appears here you've now quoted from an  
12:27:22 20 article you had written before. I think it was the  
12:27:24 21 "Intimate Surveillance" article. If we can go to  
12:27:27 22 footnote 127, please. So you quote from yourself,  
12:27:37 23 and you say:

12:27:39 24 "After her release, the agent  
12:27:40 25 attempted to have her committed to a

1 poorhouse, preferably one nearby.

2 When he could not locate an

3 appropriate local institution, he

4 had her committed to the Hospital

5 for the Insane in Toronto, far from

6 her home. His rather extreme

7 actions in this case appear to have

8 been shaped by his perception that

9 the girl was disabled, she was mute,

10 and therefore not fully responsible

11 for her actions. It was necessary

12 to put a stop to the immoral life he

13 claimed she was leading, and his

14 solution was incarceration, probably

15 for a lengthy period [...] although

16 Lewis's letters suggest that he

17 viewed his actions as a means of

18 protecting the young woman from

19 herself, they could only appear

20 highly punitive to her." [As Read]

21 Now if you go inside that quote where

22 you say, "he had her committed to the Hospital for

23 the Insane in Toronto", you have a footnote 126.

24 If we go down to 126, it is a letter

25 from Lewis to the Department of Indian Affairs

12:28:44 1 dated May 15th, 1933. So if we could bring up  
12:28:49 2 Exhibit 3608, which is that letter.

12:29:06 3 You've seen this letter before?

12:29:08 4 A. Yes, but not for a while. If I  
12:29:14 5 can just have a moment to read it.

12:29:15 6 (Witness reviews document).

12:29:55 7 Q. Nowhere does it say in this letter  
12:29:56 8 that I can see that Indian Agent Lewis charged her  
12:30:03 9 with vagrancy. It says she was charged with  
12:30:06 10 vagrancy. I don't see where it says agent Lewis  
12:30:09 11 charged her with vagrancy?

12:30:11 12 A. This is an ongoing problem with  
12:30:14 13 Indian Department correspondence. They use the  
12:30:16 14 passive voice to a very large extent which makes it  
12:30:20 15 very difficult at times to determine who actually  
12:30:23 16 is the actor.

12:30:25 17 So this is an assumption on my part  
12:30:33 18 because the Indian Agent would be able to do that,  
12:30:33 19 and this was the usual pattern that when there was  
12:30:34 20 an issue with quote-unquote "Indians", everyone  
12:30:39 21 considered it the responsibility of the Indian  
12:30:39 22 Agent.

12:30:43 23 And they were all ex-officio justices  
12:30:46 24 of the peace, and that tended to be the pattern:  
12:30:49 25 They would lay the charge, they would hear the

1 charge, and they would determine the sentence. But  
2 it's not clear who did it here. In most cases it  
3 would be the Indian Agent.

4 Q. You will see, though that it  
5 appears that efforts were made, leaving aside the  
6 language that we wouldn't approve of today, efforts  
7 were made to find a proper home for her whether it  
8 be a suitable institution or relative. It looks  
9 like some efforts were made?

10 A. Yes.

11 Q. Can we pull up Exhibit 3611,  
12 please. This is another letter from Indian Agent  
13 Lewis to the department dated May 15th, 1933. And  
14 it says:

15 "Sir, referring to departmental  
16 letter number 52-19 of the 14th of  
17 March last, with reference to the  
18 case of Stella Paul, who is at  
19 present in Gore Bay district jail, I  
20 have the honour to report that an  
21 effort has been made to have her  
22 placed in some institution.

23 "There is not any county home  
24 for indigents at Gore Bay and it is  
25 difficult to have her admitted to



12:32:15 1 any institution." [As Read]

12:32:16 2 I'll stop there. You'd agree they are  
12:32:19 3 not talking about jail. He's talking about an  
12:32:21 4 institution that would help people who are  
12:32:24 5 struggling?

12:32:25 6 A. Yes, she's currently in jail.

12:32:27 7 Q. No, but when he's referencing "an  
12:32:30 8 appropriate institution and there isn't one at Gore  
12:32:33 9 Bay", they're talking about an institution, not  
12:32:37 10 jail, something else, "like a county home for  
12:32:44 11 indigents"?

12:32:45 12 A. Yes, I believe that's what I said.  
12:32:47 13 I'm not sure what page of the report we're on here.  
12:32:54 14 I believe that's what I said, that he couldn't find  
12:32:54 15 a poorhouse to which she could be committed.

12:32:55 16 Q. Then I'll keep reading the letter:

12:32:58 17 "She have has been examined by  
12:32:59 18 two doctors and committed to the  
12:33:01 19 hospital for Insane at Toronto by  
12:33:03 20 police magistrate Major of Gore Bay  
12:33:07 21 [...]." [As Read]

12:33:07 22 So if we can now go back to page 51 of  
12:33:15 23 your report, you write that:

12:33:24 24 "When he could not locate an  
12:33:26 25 appropriate local institution, he

12:33:28 1 had her committed to the Hospital  
12:33:29 2 for the Insane in Toronto [...]."

12:33:29 3 [As Read]

12:33:33 4 When in fact two doctors actually did  
12:33:35 5 it. It wasn't the Indian Agent who determined she  
12:33:37 6 was unfit?

12:33:38 7 A. Well, no, but he's taking care of  
12:33:40 8 the case. He's clearly working with other  
12:33:43 9 authorities to determine what happens to her when  
12:33:45 10 she leaves jail.

12:33:46 11 Q. So you're not then -- what you're  
12:33:49 12 saying is, you're not trying to suggest that Indian  
12:33:52 13 Agent Lewis made the medical determination that she  
12:33:55 14 needed to be committed, because the letter says it  
12:33:57 15 was two doctors?

12:33:59 16 A. Yes, he, presumably he had the two  
12:34:03 17 doctors examine her.

12:34:04 18 Q. Okay. But you're not saying he  
12:34:05 19 directed the two doctors what to say?

12:34:08 20 A. No, but, I mean, we see the  
12:34:13 21 process of events here. He feels that she cannot  
12:34:16 22 be left with her family.

12:34:21 23 He previously said in another letter  
12:34:22 24 that he tried leaving her with her grandfather, but  
12:34:25 25 that he couldn't control her. Then the uncle

12:34:28 1 stepped up, but then he withdrew. So, yes, first  
12:34:31 2 he would have liked her to be under the control of  
12:34:34 3 her family and when those fell through then he  
12:34:38 4 looked for a poorhouse and couldn't find one and  
12:34:40 5 then he worked with other authorities to find  
12:34:42 6 another institution to have her committed to.

12:34:45 7 Was she insane? We don't know if he  
12:34:48 8 thought that. His first choice was a poorhouse.  
12:34:51 9 And so then he had the doctors examine her. I mean  
12:34:56 10 clearly this was all part of his effort to find a  
12:35:02 11 place that he found suitable for her.

12:35:04 12 Q. That answer, that you just gave  
12:35:08 13 was far more detailed, and I would suggest  
12:35:12 14 balanced, than what you wrote in your report, which  
12:35:15 15 was clearly to suggest at least to me, that Indian  
12:35:21 16 Agent Lewis charged her with vagrancy, wanted her  
12:35:24 17 to spend time in jail and actually had her  
12:35:27 18 committed himself.

12:35:30 19 Don't you think the answer you just  
12:35:31 20 gave is more nuanced and probably more accurate  
12:35:34 21 than what your report says?

12:35:35 22 A. I think my report says the same  
12:35:38 23 thing, that he had her committed to jail, right?  
12:35:41 24 Someone laid vagrancy charges against her. The  
12:35:45 25 letter is written in the passive voice, so we don't

12:35:48 1 know for sure who did it, but it appears to have  
12:35:50 2 been Lewis. And that is the likeliest scenario.

12:35:57 3 And I think I said much the same thing  
12:35:59 4 in the report. That he attempted to have her  
12:36:01 5 committed to a poorhouse, preferably one nearby.  
12:36:02 6 And when he couldn't locate an appropriate local  
12:36:04 7 institution, he had her committed to the Hospital  
12:36:06 8 for the Insane in Toronto.

12:36:08 9 Q. Maybe I'm being naive. But you  
12:36:11 10 would have to agree with me, he didn't have her  
12:36:14 11 committed. I'm trying to be specific. It was the  
12:36:17 12 doctors that evaluated her and had her committed.  
12:36:20 13 Don't you think that's more accurate?

12:36:22 14 A. Yeah, I guess. It just seems like  
12:36:24 15 semantics to me, honestly.

12:36:27 16 Q. Okay. Finally, none of the  
12:36:31 17 secondary sources that you cited in your report  
12:36:36 18 addressed specifically the question of the ability  
12:36:40 19 of the Saugeen Nawash communities to commence  
12:36:47 20 litigation.

12:36:48 21 So in other words, none of the report  
12:36:50 22 -- none of the secondary sources had as its focus --

12:36:55 23 A. Secondary sources?

12:36:56 24 Q. Yes. That you cited in your  
12:36:59 25 report had as its focus the ability of the Saugeen

1 Ojibwe Nation to commence litigation?

2 A. I don't believe there is any such  
3 secondary literature.

4 Q. Thank you. Can we please bring up  
5 Exhibit 4127, which is Miller's text entitled  
6 "Compact, Contract, and Government", Exhibit  
7 No. 4127. If we could go to PDF page 6, but it's  
8 page 102 of the report.

9 So if we can start at the bottom,  
10 you'll see the blue highlighting:

11 "During the second major phase  
12 of treaty making in Upper Canada  
13 after 1818, First Nations  
14 demonstrated in treaty negotiations  
15 that they understood and were  
16 concerned about the changes going on  
17 all around them. One sign was that  
18 occasionally First Nations began to  
19 mention a desire for guarantees  
20 about continuing rights to hunt and  
21 fish. Another indication that First  
22 Nations were feeling hard pressed by  
23 settlement was that in some  
24 negotiations they asked that the  
25 creation of reserves be included in

12:38:20 1 the treaty." [As Read]

12:38:22 2 Do you agree with that statement by  
12:38:24 3 this author?

12:38:27 4 A. Yes.

12:38:29 5 Q. Can we go to a document S0662,  
12:38:39 6 please. Now, we've seen this document before.  
12:38:46 7 It's entitled As Long As the Sun Shines and the  
12:38:51 8 Water Flows, but this is a different chapter.

12:38:53 9 This is Chapter 9. The chapter is  
12:38:55 10 entitled "The Politics of Indian Affairs". And if  
12:38:59 11 we can go -- you've cited this, I think at footnote  
12:39:03 12 19. Maybe this chapter -- you cited this at  
12:39:09 13 footnote 19 in your report?

12:39:11 14 A. I'm pretty sure I did cite this  
12:39:17 15 document, yes.

12:39:18 16 Q. This book was published in 1983;  
12:39:20 17 is that right?

12:39:20 18 A. That's right. This document is  
12:39:22 19 actually an extract from the Hawthorn Report, which  
12:39:27 20 is from 1966, I believe.

12:39:31 21 Q. So if we can go to page 173, and  
12:39:37 22 you'll see the highlighted portion. It reads:

12:39:52 23 "The previous section  
12:39:53 24 implicitly assumed that only the  
12:39:55 25 national political system was of

12:39:57 1 concern to Indians. Two decades ago  
12:40:00 2 this was a reasonable assumption.  
12:40:02 3 However, with the increasing  
12:40:04 4 involvement of the provinces in  
12:40:05 5 service provision for Indians, the  
12:40:07 6 existence of pressures to extend  
12:40:09 7 that involvement, and the  
12:40:10 8 availability of the franchise to  
12:40:13 9 Indians in all but one province,  
12:40:15 10 this is no longer the case.

12:40:17 11 "In the past Indians have had an  
12:40:20 12 especially strong relationship with  
12:40:21 13 the federal government and a weak  
12:40:24 14 and tenuous link with the provincial  
12:40:26 15 governments. As Indians move into  
12:40:28 16 the provincial framework of  
12:40:30 17 administration and services in  
12:40:31 18 education, welfare, community  
12:40:33 19 development, selected aspects of  
12:40:36 20 local government and resource  
12:40:37 21 exploitation, the importance of  
12:40:39 22 provincial policy decisions becomes  
12:40:41 23 increasingly germane to the terms of  
12:40:44 24 their existence.

12:40:45 25 "This development raises the

12:40:46 1 whole question of the nature of the  
12:40:47 2 provincial political system, the  
12:40:49 3 role which Indians and groups which  
12:40:51 4 speak on their behalf can play in  
12:40:53 5 that system, and whether or not any  
12:40:55 6 special sanctions or safeguards are  
12:40:57 7 required as Indians become  
12:40:59 8 increasingly subject to the  
12:41:00 9 decisions of provincial policy  
12:41:02 10 makers who hitherto have had little  
12:41:05 11 experience in dealing with them.  
12:41:07 12 These questions, it must be said,  
12:41:09 13 share the dubious honour of being  
12:41:12 14 simultaneously of exceptional  
12:41:13 15 complexity and of exceptional  
12:41:14 16 importance. Their importance  
12:41:20 17 springs from the fact that one of  
12:41:22 18 the most basic tendencies of  
12:41:24 19 contemporary Indian administration,  
12:41:26 20 the relinquishing of the special and  
12:41:28 21 exclusive relation Indians have  
12:41:30 22 enjoyed with Ottawa, rests on the  
12:41:32 23 assumption that normal provincial  
12:41:34 24 services are just as appropriate for  
12:41:37 25 Indians as for non-Indians, and



1 provincial governments can be  
2 trusted to play an honourable and  
3 progressive role with respect to  
4 Indians.

5 "The complexity of these  
6 questions relates simply to the  
7 absence of empirical data by means  
8 of which various hypotheses could be  
9 tested. In contrast to the  
10 century-long federal involvement in  
11 Indian administration is the fact  
12 that the provinces have only  
13 commenced to play an important role  
14 in service provision for Indians in  
15 the past 15 years." [As Read]

16 Now, keeping in mind that this was --  
17 the book was published in 1983 -- you're saying the  
18 extract was 1966 -- would you agree with the  
19 contents of that and if not, is there anything that  
20 you don't agree with?

21 A. These are matters that I haven't  
22 researched myself. The comments appear reasonable  
23 to me.

24 Q. So the role of the province  
25 vis-à-vis the Indians and particularly SON was not

1 something you specifically researched?

2 A. Only in connection with SON's  
3 attempts to negotiate with the province.

4 Q. Negotiate with the province  
5 around?

6 A. Lands.

7 Q. Okay. And what time period are we  
8 talking about?

9 A. I guess from the 1950s on.

10 Q. When you say negotiate with the  
11 province around lands, you're referring  
12 specifically to the Treaty 72 lands, or what lands  
13 are we talking about?

14 A. I think it would be all lands on  
15 the Bruce Peninsula.

16 Q. Okay. Thank you.

17 Now, I'd like to ask you some questions

18 --

19 THE COURT: Since you glanced at the  
20 clock, I want to remind everybody that due to the  
21 reflection of the lights in this room I can't  
22 actually read that clock. I think the morning  
23 break was early because the time on my computer is  
24 so small that I don't think a font would be  
25 attached to it, a font size.

12:44:03 1 So any help any counsel could give me,  
12:44:06 2 including telling me I might be wrong on the time,  
12:44:08 3 might be appreciated.

12:44:09 4 MR. FELICIAN: It's a quarter to one  
12:44:11 5 right now.

12:44:11 6 THE COURT: Thank you for telling me  
12:44:13 7 that. I can't actually see that. Go ahead.

12:44:15 8 MR. FELICIAN: It's quarter to one.  
12:44:16 9 I'm about to go into a big new area.

12:44:19 10 THE COURT: Are you pausing because  
12:44:20 11 you'd like to stop now? Which I'd be prepared to  
12:44:23 12 do as long as we can resume at 2 o'clock and not  
12:44:29 13 lose any time.

12:44:30 14 MR. FELICIAN: That would be fine.

12:44:31 15 THE COURT: We'll rise for lunch at  
12:44:33 16 this time. Because it's Monday and we're resuming  
12:44:36 17 today I remind the witness of the complete  
12:44:40 18 restraint that he's obliged to show during this  
12:44:43 19 process and he's nodding his head as I'm sure he  
12:44:46 20 remembers that from our prior week. 2 o'clock.

12:44:51 21 MR. FELICIAN: Thank you, Your Honour.

12:44:52 22 -- RECESS TAKEN AT 12:45 --

02:01:30 23 -- UPON RESUMING AT 2:00 --

02:01:30 24 THE COURT: Please go ahead.

02:01:32 25 MR. FELICIAN: Thank you.

02:01:33 1 MR. FELICIAN: There were three  
02:01:35 2 documents, Your Honour, I referred to this morning  
02:01:37 3 that I neglected to make exhibits. If I can do  
02:01:40 4 that now before I start the next section.  
02:01:42 5 One was the article from Russell Diabo dated  
02:01:48 6 December 7, 2013, S-0480?

02:02:02 7 THE COURT: Mr. Registrar?

02:02:02 8 THE REGISTRAR: That would be Exhibit  
02:02:05 9 No. 4172.

02:02:05 10 EXHIBIT NO. 4172: Article by Russell  
11:12:40 11 Diabo, entitled "Harper Launches Major  
11:12:42 12 First Nations Termination Plan,  
11:12:44 13 Canadian Dimension", December 7, 2013,  
11:12:47 14 from Canadian Dimension Online.

02:02:06 15 MR. FELICIAN: And the next one was  
02:02:09 16 Chapter 8 of Titley's A Narrow Vision. And that  
02:02:13 17 was S-1709.

02:02:17 18 THE COURT: Mr. Registrar?

02:02:19 19 THE REGISTRAR: Exhibit No. 4173.

02:02:23 20 EXHIBIT NO. 4173: Chapter 8 of A  
02:02:23 21 Narrow Vision by Brian Titley.

02:02:23 22 MR. FELICIAN: And then the last one  
02:02:25 23 was S-0662, "The Politics of Indian Affairs",  
02:02:33 24 Chapter 9 in As Long As the Sun Shines and River  
02:02:37 25 Flows.

02:02:40 1 THE REGISTRAR: Exhibit No. 4174.

02:02:43 2 EXHIBIT NO. 4174: "The Politics of

02:02:32 3 Indian Affairs", Chapter 9 in As Long

02:02:34 4 As the Sun Shines and River Flows.

02:02:43 5 THE COURT: Thank you.

02:02:44 6 MR. FELICIANANT: Thank you.

02:02:45 7 BY MR. FELICIANANT:

02:02:45 8 Q. Now, Professor Brownlie, I'm going

02:02:49 9 to now turn our attention to the interviews you

02:02:51 10 conducted with members of SON.

02:02:54 11 Did you conduct the interviews alone?

02:02:57 12 A. Yes.

02:02:58 13 Q. And did you research and prepare

02:03:03 14 your reports for the Plaintiffs on your own?

02:03:07 15 A. Yes, I had one research assistant

02:03:12 16 for a while. For one of them.

02:03:15 17 Q. For which one, do you remember?

02:03:17 18 A. I don't. I think it was the

02:03:21 19 first.

02:03:22 20 Q. Okay. Can we just pull up for a

02:03:24 21 moment -- I have a specific question on this

02:03:27 22 topic.

02:03:27 23 Can we pull up the interview of Howard

02:03:30 24 Jones at Exhibit No. 3922, please.

02:03:38 25 Sorry, my monitor is not on. And if we

1 could go to page 6, please. You'll see the  
2 highlighted portion, "JB" is yourself. You say:

3 "Okay, you've addressed a lot  
4 of things there, which is great.  
5 This is all the information we  
6 need." [As Read]

7 And I was interested in knowing who  
8 "we" referred to. Was that you and Mr. Townshend?  
9 Who is the "we"?

10 A. You know, this is just talk in  
11 conversation. I don't think I meant anyone in  
12 particular. I was just encouraging him.

13 Q. Okay. Can we now look at the  
14 interview questions at Exhibit 4081. How did you  
15 go about preparing these questions?

16 A. I thought about the kinds of  
17 issues that I wanted to ask them about, and framed  
18 the questions in those ways, intending them to be  
19 quite broad and not leading, questions that allowed  
20 them to answer in the ways that they saw fit.

21 Q. Did you consult with anybody about  
22 how you would construct the question?

23 A. I might have talked it over with  
24 Roger Townshend.

25 Q. Did you present them to the

02:05:38 1 community for approval before, or the communities,  
02:05:44 2 for approval before beginning the interviews?

02:05:48 3 A. No.

02:05:48 4 Q. Now you said a moment ago you  
02:05:50 5 didn't think these questions were leading. I was  
02:05:55 6 actually going to suggest to you they are leading.  
02:05:58 7 So do you know what a leading question is?

02:06:00 8 A. I have a general idea; I'm not an  
02:06:03 9 expert in law.

02:06:04 10 Q. So based on your understanding of  
02:06:07 11 the leading question as a historian conducting  
02:06:09 12 interviews, how would you define a leading  
02:06:12 13 question?

02:06:12 14 A. I would think it is a question  
02:06:19 15 that tells the listener to answer in a certain way.

02:06:24 16 Q. And your questions introduce  
02:06:26 17 certain ideas to the person you're interviewing;  
02:06:29 18 don't you agree?

02:06:29 19 A. Certain things that they would  
02:06:31 20 already have been familiar with, yes.

02:06:33 21 Q. And so you introduced the idea  
02:06:35 22 that there were factors that hampered the SON with  
02:06:39 23 respect to asserting rights?

02:06:40 24 A. Yes.

02:06:40 25 Q. And you introduced the idea that

02:06:45 1 their rights included lands and waters?

02:06:48 2 A. Yes, it wouldn't have been a new  
02:06:51 3 idea to them.

02:06:53 4 Q. You introduced the idea that there  
02:06:56 5 were barriers to hiring lawyers?

02:06:58 6 A. Sorry, I can't see all the  
02:07:02 7 questions.

02:07:03 8 Q. Sorry, can you go down?

02:07:04 9 A. I can only see up to "Do you know  
02:07:07 10 when the SON began to hire lawyers" -- oh, I asked  
02:07:13 11 if they were aware of any barriers.

02:07:15 12 Q. That's right.

02:07:16 13 And you didn't ask any questions with  
02:07:21 14 respect to what conditions may have existed to  
02:07:26 15 mitigate any of those factors or barriers?

02:07:28 16 A. No.

02:07:29 17 Q. And why is that?

02:07:31 18 A. I guess I figured that they would  
02:07:43 19 answer in their own way to talk about the barriers  
02:07:46 20 that there were, and how they operated, which would  
02:07:48 21 include discussing how serious the barriers were.

02:07:52 22 Q. So that was an assumption you made  
02:07:55 23 at the time?

02:08:02 24 What stands out to me, one of the  
02:08:07 25 things -- you ask questions pretty much of every



02:08:10 1 witness that sat on Council at a period of time,  
02:08:11 2 for a period of time; isn't that right?

02:08:13 3 A. Yes.

02:08:17 4 Q. Why didn't you actually ask the  
02:08:19 5 direct question: Why didn't you commence the  
02:08:22 6 action sooner than you did?

02:08:24 7 A. That's a sort of adversarial  
02:08:33 8 framing which I didn't want to adopt.

02:08:37 9 Q. What's adversarial?

02:08:39 10 A. I would call that -- because the  
02:08:41 11 premise of that question is that they didn't start  
02:08:44 12 soon enough.

02:08:45 13 Q. But isn't that what your report is  
02:08:48 14 about: When the action was started, why it wasn't  
02:08:52 15 started sooner?

02:08:53 16 A. Well, that's one way of looking at  
02:08:55 17 it. But I was trying to get at the barriers that  
02:08:59 18 they faced and the ways that they tried to -- the  
02:09:07 19 ways that they tried to assert their rights, which  
02:09:10 20 I knew to be a great variety of methods.

02:09:15 21 Q. So is there a reason you didn't  
02:09:18 22 ask any questions that were more specific to Treaty  
02:09:22 23 72, as opposed to making it broader around rights  
02:09:25 24 generally?

02:09:27 25 A. Yes, that's because this -- in

02:09:31 1 this report I was asked a set of questions by Roger  
02:09:36 2 Townshend, who commissioned the report. And it was  
02:09:41 3 broadly, as I recall -- the questions weren't  
02:09:46 4 specific to Treaty 72, they were broader.

02:09:52 5 Q. So you took your lead from the  
02:09:54 6 instructions that Mr. Townshend sent you?

02:09:59 7 A. Yes, I was following -- yeah, I  
02:10:01 8 was answering the questions I was asked.

02:10:03 9 Q. Were you aware that in the 1980s,  
02:10:06 10 the late 1980s, the Plaintiffs commenced  
02:10:09 11 proceedings against Canada in Federal Court and  
02:10:12 12 against Ontario in the Superior Court, then known  
02:10:15 13 as the Ontario Court General Division?

02:10:17 14 A. I think I knew that.

02:10:19 15 Q. Why did you not ask any questions  
02:10:22 16 about how and when they decided to pursue those  
02:10:26 17 claims?

02:10:26 18 A. I was not asked to pursue  
02:10:39 19 questions about, you know, how and when specific  
02:10:44 20 suits or claims came to be.

02:10:49 21 Q. You'd agree, though, that it's  
02:10:51 22 relevant to understanding when the First Nations  
02:10:53 23 were able to commence claims?

02:10:56 24 A. No, actually, I wouldn't really.  
02:11:00 25 Because what I was looking at really was the period

02:11:03 1 up to -- about the 1970s, to think about why, you  
02:11:12 2 know, what ways were pursued before then to try to  
02:11:17 3 assert rights, essentially prior to the beginning  
02:11:21 4 of litigation.

02:11:24 5 Q. So why would you have limited your  
02:11:27 6 inquiry up to the 1970s?

02:11:30 7 A. Because after the 1970s, the  
02:11:33 8 community was taking active political and legal  
02:11:38 9 steps.

02:11:38 10 Q. Okay. You also testified  
02:11:42 11 in-chief, I believe, that the people you  
02:11:44 12 interviewed were selected by Mr. Townshend; is that  
02:11:49 13 right?

02:11:49 14 A. Yes, he suggested them.

02:11:50 15 Q. Do you know how he selected the  
02:11:52 16 people whom you were to interview?

02:11:54 17 A. We just talked about speaking to  
02:11:57 18 the people who would be most knowledgeable.

02:12:07 19 Q. As a researcher, are you not  
02:12:11 20 concerned that the people that Mr. Townshend would  
02:12:13 21 have selected would have been the people, in his  
02:12:17 22 view, best supported his clients' case?

02:12:21 23 A. By the time I went to conduct the  
02:12:25 24 oral histories, I had a pretty good idea of who had  
02:12:30 25 been involved. So I felt that the people I was

02:12:37 1 interviewing would provide me with the kind of  
02:12:39 2 information I was looking for, which was not that  
02:12:43 3 detailed. It was largely in the nature of  
02:12:47 4 supplementary material because I already had a lot  
02:12:50 5 of other oral history and written documents that  
02:12:54 6 covered a lot of this.

02:12:56 7 Q. And the other oral history you  
02:13:01 8 referred to were what? The interviews that were  
02:13:07 9 conducted in the 1990s, 1980s?

02:13:10 10 A. Yes. And I think even as early as  
02:13:13 11 the 1970s, I believe.

02:13:15 12 Q. You would agree with me though,  
02:13:18 13 that those interviews were not focused on the  
02:13:21 14 question that you were focused on, which was the  
02:13:26 15 issue of when the communities were in a position to  
02:13:29 16 assert their rights. They had other focuses?

02:13:32 17 A. They did. But they covered a lot  
02:13:35 18 of issues, including some of the issues I was  
02:13:38 19 pursuing for this report.

02:13:39 20 Q. And none of those interviews -- in  
02:13:43 21 none of those interviews did the interviewers ask  
02:13:48 22 the community members why a claim was not brought  
02:13:51 23 sooner than it was?

02:13:52 24 A. I don't think so. We don't have  
02:13:55 25 the questions -- I don't think we have the

02:13:58 1 questions for many of those interviews so we don't  
02:14:02 2 know for sure what they asked them.

02:14:04 3 Q. You didn't see the transcripts  
02:14:06 4 from the interviews?

02:14:06 5 A. Some of them have the questions on  
02:14:08 6 them but some don't.

02:14:09 7 For instance, the book of community  
02:14:12 8 oral histories called "We Have Spoken" it's just a  
02:14:16 9 text, you know, it's edited, so we don't know what  
02:14:20 10 the questions were.

02:14:21 11 Q. But again, none of those directly  
02:14:24 12 address the question of when the claim regarding  
02:14:27 13 Treaty 72 was brought?

02:14:28 14 A. No.

02:14:29 15 Q. Okay.

02:14:32 16 A. They addressed questions like the  
02:14:34 17 Indian Agent system, how it functioned, the kind of  
02:14:37 18 economics of the communities, other issues that  
02:14:40 19 were germane.

02:14:41 20 Q. Was it your intention to ask the  
02:14:44 21 same questions of each interviewee?

02:14:46 22 A. Yes.

02:14:47 23 Q. Can we pull up a document, SC0941,  
02:14:52 24 please.

02:14:59 25 Now this is a document that I prepared

02:15:03 1 which I've entitled "Interview Questions Chart".

02:15:07 2 At the top I've repeated the questions,  
02:15:10 3 and at the bottom, tried to see which questions  
02:15:13 4 were asked of which interviewee. And in brackets  
02:15:20 5 is a page number that refers to another document  
02:15:22 6 I'm going to show you in a minute.

02:15:26 7 So if we can go down, for example, to  
02:15:29 8 the next page, please, page 2. You'll see question  
02:15:36 9 four:

02:15:36 10 "When did SON take legal action  
02:15:38 11 regarding lands and waters?" [As  
02:15:38 12 Read]

02:15:42 13 From what I could read in the interview  
02:15:44 14 transcripts, you only asked that question of two  
02:15:47 15 witnesses, Howard Jones and Darlene Johnston; were  
02:15:53 16 you aware of that?

02:15:54 17 A. No, I never went through the  
02:15:55 18 interviews to see exactly what I had asked when.

02:15:59 19 Q. So, looking at this document --  
02:16:01 20 can we go down again? You'd agree with me that you  
02:16:05 21 didn't actually in the end ask all of the witnesses  
02:16:08 22 all of the questions?

02:16:09 23 A. I'm pretty sure that what happened  
02:16:12 24 was that if I didn't ask a question directly, they  
02:16:15 25 had probably already answered it.

02:16:17 1 Q. So you're suggesting that with  
02:16:27 2 respect to: When did SON take legal action  
02:16:29 3 regarding lands and waters in question number four,  
02:16:31 4 the other interviewees had answered it, so you  
02:16:35 5 didn't have to ask it?

02:16:37 6 A. That is the likeliest thing that  
02:16:40 7 happened. When you're doing these interviews, if  
02:16:42 8 you're alone, as I was, you are making sure the  
02:16:46 9 tape is running, and following the conversation,  
02:16:50 10 and trying to keep an eye on the questions.

02:16:52 11 So most of your attention is on paying  
02:16:55 12 attention to what the speaker is saying, so that  
02:16:59 13 you know what has been addressed and the topic  
02:17:04 14 we're at, and so on.

02:17:06 15 So I would periodically look at the  
02:17:09 16 questions and try to make sure they've all been  
02:17:12 17 answered. So I believe the reason I didn't  
02:17:14 18 specifically ask some of them that particular  
02:17:16 19 question is that I believed they'd already answered  
02:17:21 20 it.

02:17:21 21 MR. FELICIAN: Can we make this the  
02:17:22 22 next exhibit, please, Your Honour.

02:17:24 23 THE COURT: Mr. Registrar?

02:17:26 24 THE REGISTRAR: Exhibit No. 4175.

02:17:29 25 EXHIBIT NO. 4175: Interview Questions

02:15:07 1 Chart - excerpt of questions asked by  
02:17:30 2 Professor Brownlie.

02:17:30 3 BY MR. FELICIANANT:

02:17:30 4 Q. Now, can we pull up SC0869,  
02:17:34 5 please.

02:17:41 6 Now I had referenced in paragraph  
02:17:44 7 numbers on the last document, a page number. It's  
02:17:47 8 the page number to this document that it refers to.

02:17:49 9 Now this is a document which I also  
02:17:53 10 prepared, which simply contains all of your  
02:17:56 11 statements and comments and questions to the  
02:17:58 12 witnesses for each interviewee.

02:18:04 13 So if you can scroll through that,  
02:18:06 14 please, just to give a sense, there's Jim Ritchie,  
02:18:09 15 and these are everything you said in the context of  
02:18:13 16 the interview. So it doesn't include anything the  
02:18:16 17 witness said, this is just you.

02:18:18 18 And then it will go on to the next  
02:18:22 19 person, Vernon Roote, June 2nd, and so forth. If  
02:18:26 20 we can go back up to the top, please?

02:18:28 21 The numbers in brackets on the document  
02:18:30 22 that I just made an exhibit refer to the page  
02:18:32 23 numbers on this document, where the question was  
02:18:34 24 actually asked.

02:18:35 25 Are you satisfied by looking at this,



02:18:38 1 if you can just quickly glance at it, are you  
02:18:41 2 satisfied that this accurately represents your  
02:18:43 3 statements made to witnesses?

02:18:46 4 A. Well, I can't really answer that  
02:18:48 5 obviously.

02:18:50 6 THE COURT: Ms. Guirguis.

02:18:51 7 MS. GUIRGUIS: With respect to I  
02:18:52 8 suppose the last one and this one -- the last  
02:18:54 9 document that's added as an exhibit, and this one,  
02:18:57 10 this is 39 pages long.

02:18:59 11 If we're going to be asking specific  
02:19:00 12 questions, if Mr. Feliciant has specific questions  
02:19:02 13 about the accuracy of it, I think we would like to  
02:19:05 14 also take a moment to look through it as well.

02:19:09 15 MR. FELICIAN: That would be fine. It  
02:19:12 16 seems to me that I don't need the witness to  
02:19:14 17 confirm it, it could be dealt with in  
02:19:16 18 re-examination in the end if I'm inaccurate.

02:19:18 19 I'm not going to ask a lot of questions  
02:19:21 20 specific to this document other than general  
02:19:23 21 questions.

02:19:23 22 But if the witness would like a moment  
02:19:25 23 and counsel would like a moment, I have no  
02:19:28 24 objection to that.

02:19:29 25 THE COURT: The transcripts are all in

02:19:30 1 evidence; is that correct?

02:19:31 2 MR. FELICIAN: Of the interviews, yes.  
02:19:36 3 I simply extracted --

02:19:38 4 THE COURT: Ms. Guirguis, I'll hear you  
02:19:39 5 if you want something. But if Mr. Feliciant asks a  
02:19:45 6 question and on careful examination the statement  
02:19:48 7 isn't in the transcript, then the answer and the  
02:19:50 8 question will both be readily ignored because it  
02:19:55 9 won't have any value.

02:20:02 10 May I suggest to Ms. Guirguis that we  
02:20:04 11 have the questions and answers, after which, if you  
02:20:08 12 want something, you can indicate that.

02:20:13 13 MS. GUIRGUIS: Certainly, Your Honour,  
02:20:14 14 that sounds good.

02:20:16 15 THE COURT: All right.

02:20:17 16 MR. FELICIAN: Thank you.

02:20:20 17 BY MR. FELICIAN:

02:20:22 18 Q. Would you agree with me that as  
02:20:26 19 you can see, the questions and comments fill 39  
02:20:30 20 pages?

02:20:31 21 You would agree that you engaged with  
02:20:33 22 the witness well beyond simply asking questions?

02:20:38 23 A. No, I don't think I would agree  
02:20:40 24 with that.

02:20:45 25 Q. I'm going to take you to a couple

02:20:46 1 of --

02:20:47 2 A. If I can finish.

02:20:48 3 Q. Go ahead?

02:20:49 4 A. Conducting oral history is a  
02:20:54 5 challenging practice. It takes a lot of practice,  
02:21:01 6 and your role as an interviewer is multi-faceted.

02:21:08 7 The main thing you're trying to do  
02:21:11 8 while you're interviewing someone is encourage them  
02:21:14 9 to continue. So a lot of my comments were  
02:21:19 10 encouraging them to continue, in the ways that one  
02:21:22 11 ordinarily does that in conversation.

02:21:24 12 Which is not limiting yourself to  
02:21:25 13 asking a question and silently waiting for their  
02:21:28 14 response because that can be quite off putting.

02:21:31 15 Q. So would you agree with me that  
02:21:33 16 the primary reason anthropologists interview  
02:21:39 17 members of communities, or historians, for that  
02:21:41 18 matter, is to get their accounts of their lives in  
02:21:45 19 their communities?

02:21:46 20 A. I'm not anthropologist, so I don't  
02:21:50 21 practice anthropology but in my case, I interviewed  
02:21:56 22 people, yes, in order to get their understandings  
02:22:00 23 of what happened as they see it.

02:22:02 24 Q. And it's important to get the  
02:22:04 25 community members' description of their history in

02:22:07 1 their own words; is that right?

02:22:09 2 A. It's certainly helpful, yes.

02:22:12 3 Q. You would agree it wouldn't be  
02:22:13 4 appropriate for a researcher, in your case a  
02:22:17 5 historian, to dictate to interviewees how they  
02:22:20 6 should describe their own history?

02:22:21 7 A. No.

02:22:22 8 Q. Okay. If I can leave that  
02:22:26 9 document aside for the moment and if we can please  
02:22:30 10 bring up SC0814.

02:22:34 11 I appreciate you said you weren't an  
02:22:42 12 anthropologist, but this is a well-known text I  
02:22:47 13 understand by Bernard Russell entitled Research  
02:22:49 14 Methods in Anthropology. Are you familiar with  
02:22:52 15 this document?

02:22:52 16 A. No, I am not.

02:22:53 17 Q. I'm going to show you a chapter  
02:22:55 18 from it. Although you're not familiar with it, I'm  
02:22:59 19 going to ask you whether or not you agree or  
02:23:00 20 disagree with the statements as it may pertain to  
02:23:03 21 you as a historian.

02:23:04 22 Can we go to page 215, please?

02:23:18 23 THE COURT: Ms. Guirguis?

02:23:19 24 MS. GUIRGUIS: He already said he  
02:23:20 25 doesn't recognize the document and is not familiar

02:23:22 1 with it. So I'm not sure, I'm going to object that  
02:23:26 2 this is isn't a proper cross-examination.

02:23:29 3 THE COURT: Mr. Feliciant?

02:23:30 4 MR. FELICIAN: It seems to me that  
02:23:32 5 if -- this is a more efficient way of doing what I  
02:23:34 6 could otherwise do, which is, extract these  
02:23:37 7 statements and simply ask him what they are and  
02:23:41 8 whether he agrees with them.

02:23:43 9 All I'm doing is, in an efficient way,  
02:23:46 10 saying, here is an author that wrote about  
02:23:49 11 interviewing, and do you agree with this from the  
02:23:51 12 perspective of a historian? And if it's different,  
02:23:53 13 how would it be different?

02:23:55 14 And it seems to me he could answer that  
02:23:57 15 question if he's someone who conducts interviews.

02:24:04 16 MS. GUIRGUIS: Your Honour, I'm not  
02:24:05 17 sure if my friend is saying he wants to put general  
02:24:08 18 interview principles and why it would be from a  
02:24:10 19 text that the witness has already said that he's  
02:24:12 20 not familiar with, what --

02:24:17 21 THE COURT: I don't think it matters  
02:24:18 22 what the source of the questions is, as long as  
02:24:20 23 it's not misleading. The witness has already been  
02:24:25 24 taken to the source.

02:24:26 25 As I understand, the questions are very

02:24:29 1 specifically with respect to how the statements  
02:24:32 2 might pertain to this gentleman as a historian and  
02:24:36 3 I think that's a proper subject matter.

02:24:40 4 Please go ahead.

02:24:42 5 MR. FELICIAN: Thank you.

02:24:44 6 BY MR. FELICIAN:

02:24:45 7 Q. So, the first passage I'd like to  
02:24:48 8 take you to, the author here writes:

02:24:52 9 "There are some important steps  
02:24:53 10 to take when you start interviewing  
02:24:54 11 someone for the first time. First  
02:24:56 12 of all, assure people of anonymity  
02:24:59 13 and confidentiality. Explain that  
02:25:01 14 you simply want to know what they  
02:25:02 15 think, and what their observation  
02:25:10 16 are --" [As Read]

02:25:11 17 I'll stop there. And then if we go  
02:25:13 18 down, I'll ask you a question:

02:25:15 19 "If people say that they really  
02:25:16 20 don't know enough to be part of your  
02:25:18 21 study, assure them that their  
02:25:20 22 participation is crucial and that  
02:25:23 23 you are truly interested in what  
02:25:26 24 they have to say. And you'd better  
02:25:28 25 mean it, or you'll never pull it

02:25:30 1 off. Tell everyone you interview  
02:25:32 2 that you are trying to learn from  
02:25:33 3 them. Encourage them to interrupt  
02:25:35 4 you during the interview with  
02:25:37 5 anything they think is important.  
02:25:39 6 And always ask for permission to  
02:25:40 7 record personal interviews and to  
02:25:42 8 take notes. This is vital. If you  
02:25:44 9 can't take notes --" [As Read]  
02:25:45 10 Then it goes on.

02:25:46 11 But the emphasis -- you'll see this  
02:25:47 12 author emphasizes what you're attempting to achieve  
02:25:50 13 by interviewing is to obtain what the interviewees  
02:25:56 14 think, and what their observations are, with an  
02:25:59 15 emphasis on ensuring it's information that is their  
02:26:01 16 information.

02:26:01 17 Would you agree with that as a  
02:26:03 18 historian conducting the interviews?

02:26:03 19 A. No.

02:26:05 20 Q. How is it different?

02:26:06 21 A. It's very different.

02:26:07 22 Q. Okay.

02:26:08 23 A. First of all, while in an ordinary  
02:26:11 24 oral history project, I would offer people  
02:26:19 25 anonymity and confidentiality. In this case,

02:26:21 1 obviously, that was not possible.

02:26:22 2 I told them instead that I was  
02:26:25 3 interviewing them in connection with the land  
02:26:26 4 claims case, and that the interviews were very  
02:26:30 5 likely going to be entered as evidence. So  
02:26:33 6 obviously there was no question of anonymity.

02:26:36 7 And in general, as a historian we want  
02:26:38 8 to talk to people -- we don't try to achieve  
02:26:46 9 anonymity. That's a social science goal and  
02:26:50 10 relates to a radically different type of project.

02:26:53 11 Q. In terms of the emphasis, though,  
02:26:57 12 on obtaining the interviewee's knowledge and  
02:27:02 13 experiences, that portion you'd agree with?

02:27:05 14 A. No.

02:27:06 15 Q. Okay. What --

02:27:07 16 A. Again I would not agree especially  
02:27:10 17 when interviewing Indigenous people, you will often  
02:27:12 18 hear from them things that they have learned from  
02:27:15 19 other community members or relatives and so on.

02:27:20 20 And I would not want them to limit  
02:27:23 21 themselves to this idea of what they think their  
02:27:28 22 observations are. That's not how oral networks  
02:27:32 23 work in Indigenous societies.

02:27:34 24 They'll often tell you they heard  
02:27:37 25 something from so and so, then they'll name who



02:27:39 1 that was and that's intrinsic to Indigenous oral  
02:27:42 2 history.

02:27:42 3 Q. Okay. What I would suggest,  
02:27:46 4 though, is that the interviewer, and the point  
02:27:49 5 that's being made is that the interviewer does not  
02:27:52 6 seek to impose his or her world view on them; would  
02:27:55 7 you agree with that?

02:27:56 8 A. Yes, I would.

02:27:57 9 Q. And can we go to page 216, please.  
02:28:03 10 And here it person states, the author  
02:28:13 11 states:

02:28:13 12 "The rule is get people on a  
02:28:15 13 topic of interest and get out of the  
02:28:17 14 way. Let the informant provide  
02:28:19 15 information that he or she thinks is  
02:28:21 16 important." [As Read]

02:28:22 17 Would you agree with that, as a  
02:28:25 18 historian conducting interviews?

02:28:26 19 A. It's a very short statement and  
02:28:28 20 lacking in nuance. So as it is written, I would  
02:28:32 21 not. It's much more complicated, especially for  
02:28:35 22 the interviews that I was doing for this case,  
02:28:38 23 since I had very specific topics I wanted to ask  
02:28:41 24 them about.

02:28:43 25 Q. Okay. Can we go to page 217,

02:28:46 1 please. And here there is a discussion about  
02:28:59 2 probing:

02:29:01 3 "The key to successful  
02:29:03 4 interviewing is learning how to  
02:29:04 5 probe effectively. That is to  
02:29:06 6 stimulate a respondent to produce  
02:29:09 7 more information without injecting  
02:29:11 8 yourself so much into the  
02:29:12 9 interaction that you only get a  
02:29:14 10 reflection of yourself in the data.  
02:29:16 11 Suppose you ask: Have you ever been  
02:29:18 12 away from the village to work? And  
02:29:20 13 the informant says yes. The next  
02:29:23 14 question, the probe, is: Like  
02:29:25 15 where? Suppose the answer is: Oh,  
02:29:26 16 several different places. The  
02:29:28 17 correct response is not: Pachuco,  
02:29:32 18 Quetero, Mexico City? But, like,  
02:29:33 19 where? Could you name some of the  
02:29:34 20 places where you've gone to get  
02:29:36 21 work." [As Read]

02:29:41 22 As a historian, would you agree with  
02:29:43 23 that statement?

02:29:48 24 A. Not really. Again, it's that  
02:29:50 25 social science approach in which the effort is to

02:29:53 1 try to make the researcher a completely neutral  
02:29:59 2 figure.

02:30:00 3 The fact is the researcher never is a  
02:30:02 4 completely neutral figure; there's no way to  
02:30:04 5 achieve that. And so I don't try to be a blank  
02:30:10 6 screen.

02:30:10 7 I try to be as non-directive as  
02:30:13 8 possible, but I don't try to be a blank screen;  
02:30:16 9 they'll project onto you anyway. They'll decide  
02:30:20 10 who you are and answer accordingly anyway.

02:30:30 11 Q. Can we go to page 220, please.  
02:30:42 12 The author deals here with leading questions by  
02:30:47 13 probing:

02:30:47 14 "After all this, you may be  
02:30:49 15 cautious about being really  
02:30:51 16 directive in an interview; don't be.  
02:30:53 17 Many researchers caution against  
02:30:55 18 leading an informant. Loft in 1976,  
02:30:59 19 for example, warns against questions  
02:31:01 20 like, don't you think that? And  
02:31:03 21 suggests asking, what do you think  
02:31:04 22 about? He is, of course, correct.  
02:31:07 23 On the other hand, any question an  
02:31:09 24 interviewer asks leads an informant.  
02:31:12 25 You might as well learn to do it

02:31:14 1 well." [As Read]

02:31:14 2 Certainly in terms of questions like  
02:31:16 3 "don't you think that", which also would follow  
02:31:19 4 with a suggested answer, is not as appropriate as  
02:31:22 5 simply asking "what do you think about something"?

02:31:26 6 A. Yes, I would agree with that.

02:31:37 7 Q. Now, can we pull up Exhibit 3918,  
02:31:45 8 which is the Jim Ritchie interview. And this is --  
02:31:55 9 if we can go to page 21. If we can go down a bit,  
02:32:15 10 please.

02:32:16 11 So here Mr. Ritchie tells you some  
02:32:22 12 information -- just up a bit, or forward -- and you  
02:32:22 13 say:

02:32:28 14 "Did you know that growing up?

02:32:29 15 "Yeah, I knew that."

02:32:30 16 And then so you say:

02:32:32 17 "Yeah, I knew that."

02:32:32 18 And then you say:

02:32:33 19 "So that was another piece of  
02:32:34 20 information that was passed down."

02:32:40 21 [As Read]

02:32:40 22 And then the interviewee says:

02:32:45 23 "Yeah, yeah, because my  
02:32:48 24 grandfather -- I mean, if he knew he  
02:32:50 25 couldn't fish off the reserve, why

02:32:52 1 would he do it? And why would he  
02:32:54 2 take me there if he knew he couldn't  
02:32:57 3 do it, because we'd all get in  
02:32:59 4 trouble. So he knew he could do it.  
02:33:01 5 So we would go there and fish  
02:33:03 6 there."

02:33:04 7 And then you suggest:

02:33:05 8 "So actually there was a kind  
02:33:07 9 of unspoken agreement, it seems."

02:33:07 10 [As Read]

02:33:10 11 Now as a researcher, is it up to you to  
02:33:13 12 suggest that kind of language or impression, such  
02:33:18 13 that -- that's not what he said. The witness  
02:33:22 14 didn't say "unspoken agreement"; you've fed him  
02:33:27 15 that language. Is that appropriate?

02:33:29 16 A. I think in this case it was. He  
02:33:31 17 was speaking -- people are often not that clear or  
02:33:36 18 specific when they're speaking aloud, and the  
02:33:41 19 section you read, that answer from Jim Ritchie is  
02:33:44 20 like that.

02:33:45 21 He's making some statements but it  
02:33:48 22 wasn't clear what -- it wasn't clear to me what he  
02:33:51 23 was trying to get at. He said:

02:33:54 24 "My grandfather knew he  
02:33:54 25 couldn't fish off the reserve, why

02:33:54 1 would he do it?"

02:33:54 2 He doesn't answer the question.

02:33:54 3 "Why would he take me there if  
02:33:57 4 he knew he couldn't do it, because  
02:33:57 5 we'd all get in trouble? So he knew  
02:34:00 6 he could do it." [As Read]

02:34:04 7 He didn't explain how the grandfather  
02:34:06 8 knew he could do it. So I was trying to get at  
02:34:08 9 that question of -- so it's a probing question.  
02:34:10 10 And you see there that he feels perfectly free to  
02:34:13 11 contradict me. I said: "There was kind of an  
02:34:16 12 unspoken agreement, it seems?"

02:34:19 13 And he says: "No, no it's been  
02:34:21 14 written." So that tells you that the interaction  
02:34:23 15 was going as it should. He felt free to say what  
02:34:25 16 he needed to say to answer that probe, or that  
02:34:27 17 prompt in the way that he saw fit.

02:34:31 18 Q. Okay. Can we go to page 23 now,  
02:34:33 19 please. And then down a little bit, you'll see  
02:34:44 20 where it says "unclear" in roughly the middle of  
02:34:48 21 the page.

02:34:49 22 "Say 36, 1836 and 36 is 72,  
02:34:52 23 right? So there's two forevers  
02:34:55 24 there now. And you go another  
02:34:57 25 36 years, another -- and we're still

02:34:59 1 going through forever. But the --"

02:35:03 2 Then you interrupt and say:

02:35:05 3 "Yeah, that's a very short

02:35:06 4 forever." [As Read]

02:35:08 5 Again, is that appropriate for an

02:35:11 6 interviewer or a researcher to suggest that -- you

02:35:13 7 actually now are reinforcing their view. Is that

02:35:18 8 something researchers or interviewers are supposed

02:35:20 9 to do, reinforce the views of people giving you the

02:35:23 10 answer?

02:35:24 11 A. It was perfectly normal. I was

02:35:26 12 kind of summarizing what he said. I was basically

02:35:28 13 just summarizing what he'd just said.

02:35:30 14 Q. Okay. If we can go to page 6 of

02:35:47 15 the Vernon Roote interview, which is Exhibit 3919,

02:36:09 16 and this would have been page 8 of the document

02:36:09 17 that I created.

02:36:17 18 Sorry, I'm trying to find the portion I

02:36:53 19 was intending to quote. It's on page 6 of the

02:37:01 20 actual interview, we were talking about the burning

02:37:04 21 of the papers -- go down a bit, please.

02:37:12 22 Where it says in the middle:

02:37:16 23 "Vernon Roote talks about -- it

02:37:19 24 might have been oral at the time" --

02:37:21 25 in the middle of the page -- "but

02:37:23 1 the Indian Agent situation that we  
02:37:25 2 have, there were a lot of papers  
02:37:27 3 burnt. They were destroyed from the  
02:37:29 4 Indian Agent situation." [As Read]

02:37:30 5 Then you said:

02:37:31 6 "Jim Ritchie mentioned that as  
02:37:33 7 well and this is a story I had not  
02:37:35 8 heard before from other places about  
02:37:37 9 the Indian Agent burning papers."

02:37:37 10 [As Read]

02:37:40 11 I'm curious to know, again, whether or  
02:37:43 12 not it's the role of a researcher to provide  
02:37:47 13 additional information to what you're being  
02:37:49 14 provided by the interviewee?

02:37:55 15 A. I don't really see that as having  
02:37:56 16 a large impact here.

02:38:00 17 Q. My question, though, is as a  
02:38:02 18 matter of practice, is that something you are  
02:38:04 19 supposed to do as a researcher? Provide additional  
02:38:07 20 information to people you're interviewing?

02:38:09 21 A. That wouldn't normally be a  
02:38:11 22 problem.

02:38:12 23 Q. Okay. Can we go to page 9 of the  
02:38:20 24 interview now, please. And if you can go down,  
02:38:28 25 please. And it says under "okay" there's a "VR":



02:38:40 1 "So I started working on the  
02:38:41 2 Band after that, and their  
02:38:43 3 structures. And that's where all  
02:38:44 4 the infrastructure started coming  
02:38:47 5 in. Fire halls, roads" -- and it  
02:38:49 6 says 'unclear' -- "all that  
02:38:51 7 infrastructure, even water. We had  
02:38:53 8 water coming into the community.  
02:38:54 9 All the '70s was just a booming age,  
02:38:57 10 I guess. Housing --" [As Read]  
02:38:59 11 And then he went on to say something,  
02:39:01 12 but you interrupted him.

02:39:07 13 To me, that is a positive statement.  
02:39:08 14 He's saying something positive about his community  
02:39:11 15 that it was a booming age; do you see that? Would  
02:39:14 16 you agree with that?

02:39:15 17 A. Yes.

02:39:16 18 Q. But then you say:

02:39:20 19 "So you were catching up,  
02:39:21 20 basically, to the rest of the  
02:39:23 21 country?" [As Read]

02:39:24 22 Which to my mind, is imposing a  
02:39:26 23 negative idea on something that he's saying is  
02:39:30 24 positive. He's talking about a booming age and  
02:39:34 25 you've now switched it around and said, well you

02:39:35 1 were catching up basically to the rest of the  
02:39:37 2 country.

02:39:38 3 Why would you do that?

02:39:40 4 A. I would have to listen to the  
02:39:41 5 tape, because all these responses are made in the  
02:39:47 6 context of the exchange that is happening. So I  
02:39:52 7 couldn't say without listening to the tape, you  
02:39:54 8 know, how we were talking about this.

02:39:58 9 Q. Okay. So if we can go down to  
02:40:01 10 page 10 of the actual interview, six items from the  
02:40:04 11 bottom. Vern Roote says:

02:40:24 12 "Over the years it was in the  
02:40:25 13 hands of Band Council and they tried  
02:40:28 14 using the Indian Commission of  
02:40:30 15 Ontario to move things along for  
02:40:32 16 them. But in terms of actual  
02:40:34 17 legality, in terms of having to hire  
02:40:38 18 -- we hired a couple of guys --" [As  
02:40:38 19 Read]

02:40:41 20 Then you interrupted him and said:

02:40:42 21 "So they then first went to the  
02:40:44 22 Indian Commission of Ontario. So  
02:40:46 23 they were trying not to go to court,  
02:40:48 24 right?" [As Read]

02:40:49 25 How is that appropriate, to say, "So

02:40:52 1 They were trying not to go to court"? That is not  
02:40:55 2 what this person said.

02:40:56 3 A. Again, I was trying to interpret  
02:40:58 4 what he was saying. Again, his language is very  
02:41:01 5 general.

02:41:01 6 "It is in the hands of Band  
02:41:03 7 Council, and they tried using the  
02:41:06 8 Indian Commission of Ontario to move  
02:41:08 9 things along for them." [As Read]

02:41:09 10 So again, I was trying to clarify. If  
02:41:11 11 he meant that they tried using the Indian  
02:41:15 12 Commission instead of going to court, that was my  
02:41:17 13 interpretation of what he was saying. That's when  
02:41:20 14 he says, "in terms of actual legality". You see,  
02:41:24 15 it's very unspecific phrasing.

02:41:26 16 So I was trying to figure out what he  
02:41:28 17 meant by saying "in terms of actual legality", and  
02:41:32 18 by saying: They were trying to get the Indian  
02:41:35 19 Commission of Ontario to move things along for  
02:41:38 20 them.

02:41:38 21 Q. Isn't a non-leading way of doing  
02:41:42 22 that simply asking, "what do you mean by that?"

02:41:42 23 A. It could be. You're not perfect  
02:41:45 24 when trying to maintain a conversation and trying  
02:41:47 25 to get at things.

02:41:49 1 Q. Can we go to page 12, please.

02:41:57 2 This is going to stretch over a couple  
02:41:59 3 of pages, I call it the invitation issue. You'll  
02:42:04 4 see in the middle of the page Vernon Roote has a  
02:42:08 5 long passage about being charged for fishing out of  
02:42:12 6 season in Willow Creek; do you see that?

02:42:14 7 A. Yes.

02:42:14 8 Q. Saying "it was the MNR that  
02:42:18 9 charged us". Then at the bottom of that passage he  
02:42:22 10 says:

02:42:24 11 "And they said, okay. The  
02:42:25 12 judge at the time, I clearly  
02:42:27 13 understand the judge saying, I don't  
02:42:29 14 know enough about the rights of  
02:42:30 15 people in the Bruce Peninsula. I am  
02:42:32 16 going to charge the driver \$100. If  
02:42:34 17 you wish to pursue this further to  
02:42:35 18 another court, you may do so." [As  
02:42:35 19 Read]

02:42:38 20 And then you asked:

02:42:39 21 "He said that to you? Or to  
02:42:41 22 the driver?"

02:42:44 23 Vern Roote said:

02:42:45 24 "He said that to our group, to  
02:42:47 25 my father to my -- now --"

02:42:50 1 Then I guess you interjected and said:

02:42:52 2 "That sounds to me like a bit  
02:42:54 3 of an invitation to you, to take it  
02:42:57 4 further." [As Read]

02:42:58 5 Now before I ask about this I'll take  
02:43:01 6 you to the next place it comes up, if we can go to  
02:43:05 7 page 16.

02:43:18 8 And in the middle there, so you're  
02:43:22 9 asking -- you say:

02:43:24 10 "Right. So there was a  
02:43:25 11 question I wanted to ask you earlier  
02:43:27 12 and I forget -- I forgot. I want to  
02:43:29 13 come back to it. When the judge  
02:43:31 14 fined the driver, when all of you  
02:43:33 15 were fishing and just the driver got  
02:43:35 16 fined \$100 and the judge said to you  
02:43:37 17 something about, he didn't really  
02:43:39 18 know about native rights --"

02:43:44 19 Vernon Roote said:

02:43:45 20 "He didn't know enough about  
02:43:46 21 the rights."

02:43:47 22 "JB: But if you wanted to take  
02:43:49 23 it further --

02:43:50 24 "VR: Yes."

02:43:51 25 And you said:

02:43:52 1 "You know, basically at the  
02:43:53 2 time you didn't understand that it  
02:43:54 3 was an invitation.

02:43:56 4 "VERN ROOTE: Well, he didn't say  
02:43:58 5 that specifically to me. He said  
02:43:59 6 that to all of us, that was his  
02:44:01 7 findings."

02:44:03 8 And then you say:

02:44:03 9 "Which does sound like an  
02:44:05 10 invitation for you to take it  
02:44:07 11 further." [As Read]

02:44:08 12 The concern I have reading this is that  
02:44:10 13 you're imposing your view of what happened on  
02:44:13 14 Mr. Roote, that he's telling you what he thinks.  
02:44:17 15 And you're saying, well, no, I think it's an  
02:44:20 16 invitation.

02:44:20 17 I'm trying to understand if that's  
02:44:22 18 appropriate as a researcher interviewing someone.

02:44:26 19 A. I believe he had already said it.  
02:44:28 20 Could we please go back to the first instance?

02:44:33 21 Q. Page 12.

02:44:33 22 A. There we go. So here is what he  
02:44:33 23 says:

02:44:43 24 "They charge the driver \$100.

02:44:43 25 And he said, okay, the judge at the

02:44:47 1 time. I clearly understand the  
02:44:49 2 judge saying, I don't know enough  
02:44:51 3 about the rights of people in the  
02:44:53 4 Bruce Peninsula. I am going to  
02:44:55 5 charge the driver \$100. If you wish  
02:44:57 6 to pursue this further to another  
02:44:58 7 court, you may do so." [As Read]

02:45:01 8 I thought calling that an invitation  
02:45:04 9 was pretty uncontroversial, given what he just  
02:45:10 10 said. He just said that the judge had said, "I  
02:45:13 11 don't know enough about rights" so he had raised  
02:45:15 12 the issue of rights of people in the Bruce  
02:45:17 13 Peninsula.

02:45:19 14 He decided to charge only the one  
02:45:22 15 person and he then invited them -- I mean, I think,  
02:45:25 16 "If you wish to pursue this further to another  
02:45:28 17 court, you may do so", I think that would be called  
02:45:30 18 an invitation.

02:45:31 19 Q. But isn't it more about what Vern  
02:45:35 20 Roote thinks, not about what you think?

02:45:37 21 A. He's the one who just said it.

02:45:39 22 Q. Okay. Then we'll try a different  
02:45:53 23 exhibit now. This is Paul Jones interview ay  
02:45:53 24 Exhibit 3920.

02:46:00 25 If we can go to page 5, and go down a

02:46:13 1 bit. It says -- this is you speaking now. Jarvis  
02:46:27 2 Brownlie, "JB":

02:46:27 3 "No, no, this is all -- it's  
02:46:29 4 all good. So I'm trying to reframe  
02:46:32 5 my questions a little bit because of  
02:46:34 6 the way that you have framed the  
02:46:36 7 issue, and I think that's a really  
02:46:39 8 important framing of the story, is  
02:46:40 9 that in fact you have these, the  
02:46:41 10 Anishinaabe have these rights that  
02:46:43 11 they've always had, these things  
02:46:44 12 they've always done, and the  
02:46:46 13 conflict came when Canada came and  
02:46:49 14 started saying, 'No, you can't do  
02:46:50 15 those things' as opposed to the  
02:46:54 16 Anishinaabek standing up and saying,  
02:46:56 17 'Yes, we have these rights.'" [As  
02:46:56 18 Read]

02:46:58 19 Paul Jones agrees with you:

02:46:59 20 "Yeah, you're right."

02:47:00 21 You suggest:

02:47:01 22 "So Canada starts the problem.  
02:47:02 23 And Ontario starts a bit later." [As  
02:47:02 24 Read]

02:47:05 25 I'm not sure -- the witness, the



02:47:08 1 interviewee, has not mentioned Ontario. And I'm  
02:47:13 2 again -- do you not see this as somehow not only  
02:47:19 3 interjecting your own views into the interview but  
02:47:22 4 also leading?

02:47:23 5 A. So first of all, the longer  
02:47:25 6 section that you read where I said "No, no, this is  
02:47:28 7 all -- it's all good [...]". That's all  
02:47:31 8 summarizing what he had already said.

02:47:33 9 I posed -- I began by posing my  
02:47:36 10 standard question, which is something like, when  
02:47:40 11 did the Saugeen Ojibway begin to assert their  
02:47:44 12 rights over the territory, something like that.

02:47:46 13 He said, we'd have to go up to see it.  
02:47:49 14 He answered something like, no, no it is the other  
02:47:51 15 way around. We've always had these rights and  
02:47:54 16 Canada came along and started to question them.

02:47:56 17 I don't remember the language he used,  
02:48:00 18 but he reframed the whole question. This is what  
02:48:02 19 I'm addressing here. He sort of turned my question  
02:48:03 20 upside down. So I was trying to go with him in the  
02:48:06 21 way that he had already led us.

02:48:09 22 Q. All right.

02:48:09 23 A. So that five-line passage of what  
02:48:13 24 I said was just me summarizing what he had already  
02:48:16 25 said. So then I said:

02:48:19 1 "So Canada starts and Ontario  
02:48:20 2 starts a little bit later."  
02:48:22 3 That was a prompt. I was asking him to  
02:48:25 4 talk about Ontario.  
02:48:25 5 Q. You're suggesting Ontario started  
02:48:27 6 anything. Couldn't you have just asked, what about  
02:48:29 7 Ontario?  
02:48:30 8 A. I could have.  
02:48:31 9 Q. Okay. And so two down from there  
02:48:34 10 you say:  
02:48:35 11 "So these are inherent rights" --  
02:48:38 12 which is your language -- "in your  
02:48:40 13 framing."  
02:48:40 14 Then you ask:  
02:48:41 15 "How has Canada violated those  
02:48:43 16 rights?" [As Read]  
02:48:43 17 You'd agree with me that is a leading  
02:48:46 18 question?  
02:48:46 19 A. No, he had already said Canada  
02:48:48 20 violated their rights.  
02:48:49 21 Q. Oh. Did he use the language  
02:48:58 22 "violated", or is that your language?  
02:49:00 23 A. I was summarizing what he had  
02:49:01 24 said. That Canada came and started saying, no, you  
02:49:05 25 can't do those things.

02:49:06 1 THE COURT: Sorry, I didn't hear the  
02:49:07 2 answer.

02:49:07 3 THE WITNESS: Sorry.

02:49:08 4 THE COURT: The question was whether  
02:49:09 5 the witness, the interviewee -- sorry, we have a  
02:49:12 6 witness in the witness box -- whether the  
02:49:13 7 interviewee used the language "violated", or  
02:49:19 8 whether the interviewer introduced that word?

02:49:21 9 A. He might not have used the word  
02:49:23 10 "violated" but he had said something to that  
02:49:26 11 effect. We would have to go to the beginning of  
02:49:31 12 the interview to see exactly what he said.

02:49:35 13 Q. If you want to take a moment to  
02:49:38 14 look if you want to scroll up. How far up do you  
02:49:48 15 need to go?

02:49:49 16 A. I think it's in the very  
02:49:51 17 beginning. (Witness reviews document).

02:49:58 18 Here we go, so, yes, the section that's  
02:50:01 19 at the bottom, the long section at the bottom of  
02:50:04 20 the screen here. Where it's Paul Jones talking:

02:50:07 21 "I always think that it's been  
02:50:09 22 a long process that's been ongoing."  
02:50:13 23 I'm skipping over a little bit.

02:50:14 24 "I think in terms of saying,  
02:50:15 25 well, we got hunting and Aboriginal

02:50:18 1 rights and hunting rights and treaty  
02:50:19 2 rights is that that's just a belief  
02:50:21 3 that's always been there. So it's  
02:50:22 4 the government fighting us, as  
02:50:24 5 opposed to us fighting the  
02:50:24 6 government. Because we just believe  
02:50:27 7 we have these rights and they're  
02:50:28 8 inherent rights. That's what we  
02:50:31 9 believe, they're inherent. That's  
02:50:32 10 not what the government of Canada or  
02:50:34 11 any other government can come in and  
02:50:36 12 say, this is how you're going to  
02:50:38 13 live." [As Read]  
02:50:38 14 And so on.

02:50:39 15 "So, we're just up to live and  
02:50:40 16 it's them fighting us about what  
02:50:42 17 they think we should have the  
02:50:43 18 ability to do. We know what we can  
02:50:45 19 do, and what we need to do, and what  
02:50:47 20 we believe we have a right to do,  
02:50:48 21 and it's the government the other  
02:50:50 22 way that's coming back." [As Read]  
02:50:51 23 And there you can see how imprecise  
02:50:53 24 people's language is.

02:50:54 25 But what you can see he's doing is, is

02:50:57 1 saying that, you know, we didn't start the problem.  
02:50:58 2 We've always had these rights, we have always  
02:51:02 3 exercised them. And, you know, it's the government  
02:51:04 4 coming back asserting rights against us,  
02:51:06 5 essentially is what he's saying.

02:51:08 6 Q. But you've introduced the word  
02:51:11 7 "violated"; it wasn't Paul Jones's language?

02:51:13 8 A. No, he didn't use the word  
02:51:16 9 "violated".

02:51:17 10 Q. Okay. You'd agree with me that a  
02:51:24 11 number of the interviewees that you spoke to, with  
02:51:29 12 the exception of stories related to hunting and  
02:51:31 13 fishing, a number of the interviewees relied on  
02:51:36 14 their own research into the history of their  
02:51:40 15 communities when they were providing their  
02:51:42 16 information to you?

02:51:42 17 A. Yes, partly, yes.

02:51:44 18 Q. You never asked witnesses to  
02:51:48 19 identify what their communities, traditions were or  
02:51:52 20 are now with respect to maintaining and  
02:51:54 21 transferring oral history; is that correct?

02:51:57 22 A. No, I didn't.

02:51:59 23 Q. And why not?

02:52:00 24 A. Because I was asking him about  
02:52:05 25 their own experiences. I was asking them about,

02:52:08 1 you know, their experiences of land claims. So,  
02:52:11 2 when you ask about traditions of passing on, oral  
02:52:15 3 history, that's when you're trying to get at  
02:52:18 4 questions from a much earlier date that the people  
02:52:21 5 you're interviewing didn't live through.

02:52:23 6 But in this case I was primarily  
02:52:26 7 interviewing them about events that they  
02:52:28 8 participated in their own lifetime.

02:52:32 9 MR. FELICIAN: And before I move on,  
02:52:34 10 if we could make the document SC0869 the next  
02:52:43 11 exhibit, please. That's the document with the  
02:52:46 12 statements and comments that I've created.

02:52:48 13 THE COURT: Ms. Guirguis, now is your  
02:52:51 14 chance. You're smiling. It's not your first  
02:52:53 15 chance but anyway.

02:52:54 16 MS. GUIRGUIS: It's one chance.

02:52:56 17 Your Honour, that is, I think, simply a  
02:52:59 18 compilation of the questions that are pulled from  
02:53:02 19 the transcripts and we have the transcripts already  
02:53:04 20 in the record I'm not sure why we would make this  
02:53:07 21 as an exhibit as well, pulling it from the context;  
02:53:11 22 I'm not even sure it's entirely complete.

02:53:13 23 THE COURT: I understand you haven't  
02:53:14 24 had a chance to satisfy yourself.

02:53:16 25 Mr. Feliciant, is a "compilation" a

02:53:20 1 good word of evidence before the court? Is there  
02:53:22 2 any reason why it wouldn't be more appropriate to  
02:53:25 3 mark it as a lettered exhibit because it was used  
02:53:27 4 in the courtroom?

02:53:28 5 MR. FELICIAN: That's fine, Your  
02:53:30 6 Honour.

02:53:30 7 THE COURT: Is that satisfactory,  
02:53:31 8 Ms. Guirguis?

02:53:31 9 MS. GUIRGUIS: Yes, Your Honour.

02:53:32 10 THE COURT: Mr. Registrar?

02:53:35 11 THE REGISTRAR: Sorry, Counsel, that  
02:53:37 12 was SC0869?

02:53:43 13 MR. FELICIAN: Yes, it was.

02:53:45 14 THE REGISTRAR: It's Exhibit No. 4176.

02:53:47 15 THE COURT: Sorry, Mr. Registrar.  
02:53:49 16 We're going to mark this as a lettered exhibit.

02:53:53 17 THE REGISTRAR: Sorry about that. That  
02:54:00 18 will be lettered Exhibit H-1.

02:54:03 19 THE COURT: H-1?

02:54:06 20 THE REGISTRAR: Yes.

02:54:06 21 EXHIBIT NO. H-1: Compilation of  
02:54:06 22 Statements and Comments from interviews  
02:54:07 23 by Professor Brownlie.

02:54:07 24 THE COURT: Thank you. Go ahead, Mr.  
02:54:09 25 Feliciant.

1 BY MR. FELICIANIANT:

2 Q. We're going to switch topics now  
3 and I'd like to ask you some questions about  
4 hunting and fishing.

5 So, are you familiar with someone named  
6 Richard Nettle?

7 A. I don't believe so.

8 Q. Can we pull up a document SC0823?

9 A. Now this is a letter that  
10 Mr. Nettle wrote to the Governor General in  
11 Council, and it's a memorial to the Governor  
12 General in Council. And he says:

13 "The Memorial of the  
14 undersigned most respectfully shows  
15 that your memorialist" -- in other  
16 words, the person writing it -- "has  
17 been a member of the civil service  
18 since 1857; prior to which he was in  
19 Her Majesty's Navy and subsequently  
20 on the Ashburton Treaty Boundary  
21 Commission on service in Canada."

22 [As Read]

23 Then he goes on to say, talking about  
24 himself, if this refreshes your memory:

25 "That having devoted many years



02:55:34 1 to the study of the economy of  
02:55:35 2 fisheries, both in England and  
02:55:37 3 Canada and having seen the utter  
02:55:39 4 disregard of any kind of active  
02:55:41 5 protection in the fisheries [...]."

02:55:41 6 [As Read]

02:55:43 7 It goes on. This is someone of a  
02:55:45 8 member of the civil service in 1850s and studied  
02:55:49 9 fisheries in England and Canada; is that someone  
02:55:52 10 you're familiar with?

02:55:53 11 A. I don't remember him, but it may  
02:55:55 12 be a document that I looked at.

02:55:59 13 Q. Okay. We'll come back to that in  
02:56:00 14 a moment.

02:56:01 15 If we can go to SC0824. If we can go  
02:56:11 16 down, this is unfortunately handwritten, but this  
02:56:15 17 was a letter written by Richard Nettle to the  
02:56:19 18 Governor General Head on September 5th, 1855, on  
02:56:26 19 the protection of fisheries.

02:56:31 20 You'll see in the next paragraph --  
02:56:36 21 have you seen this letter before?

02:56:38 22 A. If I have, I don't remember it.

02:56:40 23 Q. Maybe if we can just give you an  
02:56:42 24 opportunity to read the letter. In fact, maybe if  
02:56:47 25 you read it out loud it will be helpful to

02:56:52 1 everybody, because it's hard for us to read  
02:56:54 2 handwritten documents?

02:56:54 3 A. I'll do my best. Is this from the  
02:56:57 4 same author?

02:56:58 5 Q. Richard Nettle to Government  
02:57:01 6 General Head.

02:57:01 7 A. Was he also at this time also a  
02:57:03 8 member of the civil service?

02:57:05 9 Q. I believe he was.

02:57:06 10 A. Okay. Québec, September 5, 1855,  
02:57:10 11 to Sir Edmund Head, Governor General.

02:57:18 12 MS. GUIRGUIS: Excuse me, Your Honour.

02:57:19 13 THE COURT: Yes, Ms. Guirguis.

02:57:21 14 MS. GUIRGUIS: These documents are part  
02:57:23 15 of documents that were newly disclosed by Ontario  
02:57:25 16 before the break, so we haven't had the opportunity  
02:57:27 17 to review them with the witness.

02:57:28 18 I'm not saying we need to, but in terms  
02:57:30 19 of saying he's refreshing his memory, he may need  
02:57:33 20 more time to review them if he's going to be asked  
02:57:36 21 questions on them.

02:57:37 22 THE COURT: Well, here is the thing,  
02:57:39 23 Ms. Guirguis. This witness seems very capable of  
02:57:42 24 speaking up for himself.

02:57:43 25 MS. GUIRGUIS: Yes.

02:57:44 1 THE COURT: He's also said many times  
02:57:46 2 in this courtroom about the many documents he's  
02:57:48 3 looked over. So unless the witness has a problem,  
02:57:52 4 my preference is to let him march on ahead.

02:57:55 5 I did pause myself, but it was over a  
02:57:58 6 different question, which is that if the witness is  
02:58:01 7 not familiar with this document, which is different  
02:58:03 8 from whether he's seen it before, having him read  
02:58:07 9 aloud for the record seemed odd to me, Mr.  
02:58:11 10 Feliciant. But that doesn't seem to be of concern  
02:58:13 11 to anyone else.

02:58:14 12 I don't know if that was part of your  
02:58:19 13 underlying concern, Ms. Guirguis?

02:58:20 14 MS. GUIRGUIS: That is part of my  
02:58:22 15 underlying concern of familiarity.

02:58:24 16 THE COURT: So I'm not saying this  
02:58:25 17 witness is incapable of doing it; he probably is.

02:58:28 18 But Mr. Feliciant, if you really want  
02:58:31 19 it to be read on the record because it's hard to  
02:58:33 20 read, it's an odd thing to ask this gentleman to do  
02:58:37 21 that. But I suppose if he -- he can speak for  
02:58:42 22 himself if he doesn't think he can.

02:58:44 23 MR. FELICIAN: The content of the  
02:58:46 24 letter is relevant to the line of questions.

02:58:48 25 THE COURT: I assume it would

02:58:51 1 potentially be, or it wouldn't be up in front of  
02:58:54 2 us.

02:58:54 3 Could I suggest, sir, without  
02:58:56 4 interfering with your cross-examination that  
02:58:57 5 perhaps the witness can read to himself the letter,  
02:59:02 6 so that he has familiarized or re-familiarized  
02:59:06 7 himself with it. And then we can move forward and  
02:59:11 8 if you wish to ask him to read the entire letter  
02:59:15 9 aloud --

02:59:16 10 MR. FELICIAN: That would work, Your  
02:59:18 11 Honour. That's fine.

02:59:18 12 THE COURT: I think we should begin at  
02:59:20 13 least by allowing him to read it to himself. If he  
02:59:23 14 has trouble, he'll say so. Actually it looks  
02:59:27 15 better than many of the documents we've seen in  
02:59:30 16 this courtroom.

02:59:31 17 BY MR. FELICIAN:

02:59:32 18 Q. So if you would just tell us when  
02:59:33 19 you need to scroll as you need to read, that would  
02:59:38 20 be great.

02:59:38 21 A. Thank you. Thank you, Your  
02:59:41 22 Honour.

02:59:41 23 (Witness reviews document).

02:59:43 24 Scroll down, please. Scroll down,  
03:01:40 25 please. There is a phrase here I can't read, just

03:02:29 1 above the second blue marking: "[...] offered were  
03:02:33 2 exposed for sale in the lower town market, each  
03:02:36 3 fish had been -- speared?"

03:02:41 4 "[...] and to use my informant's  
03:02:43 5 language were literally" -- could it be --  
03:02:47 6 "swimming in their spawn" --

03:02:56 7 MR. FELICIAN: "In their spawn".

03:03:00 8 THE COURT: Is that an important  
03:03:01 9 feature as a standpoint from your questions,  
03:03:04 10 Mr. Feliciant?

03:03:05 11 MR. FELICIAN: No, that particular  
03:03:13 12 sentence.

03:03:45 13 A. "Hence the necessity for" --

03:03:48 14 BY MR. FELICIAN:

03:03:49 15 Q. "Legislative enactments".

03:03:52 16 A. Thank you. Scroll down, please.  
03:04:08 17 (Witness reviews document).

03:04:10 18 Scroll down, please. Scroll down,  
03:05:20 19 please. Do I need to read the rest?

03:05:23 20 Q. Likely not, just to see at the  
03:05:25 21 bottom that it's from Richard Nettle. Although  
03:05:28 22 it's hard to read on this particular page.

03:05:31 23 A. I'll take your word for it.

03:05:32 24 Q. If we can go up now to the first  
03:05:40 25 blue highlighted area. "The protection of the

03:05:45 1 salmon fisheries --"

03:05:47 2 So you'll agree with me that Mr. Nettle  
03:05:51 3 is concerned about the disruption of the fishery  
03:05:53 4 and he spoke of netting, spearing and torch fishing  
03:05:57 5 as being in vogue?

03:05:58 6 A. Yes.

03:06:00 7 Q. And he wrote on page 2 of the  
03:06:08 8 letter that:

03:06:08 9 "The rivers of England,  
03:06:08 10 Scotland and Ireland abounded with  
03:06:09 11 salmon, but for the cupidity and  
03:06:12 12 avarice of man that totally  
03:06:13 13 destroyed them, hence the necessity  
03:06:15 14 of artificial propagation, hence the  
03:06:18 15 necessity for legislative  
03:06:21 16 enactments." [As Read]

03:06:22 17 So you'd agree at that time, people  
03:06:24 18 were already talking about artificial propagation  
03:06:29 19 -- I take it that means introducing fishing farms;  
03:06:32 20 is that right?

03:06:34 21 A. I think it means hatcheries and  
03:06:36 22 adding the fish to the stocking, I think it's  
03:06:39 23 called.

03:06:39 24 Q. And again, hence the necessity of  
03:06:41 25 legislative enactments and laws to protect the

1 fisheries; is that right?

2 A. Yes, yes.

3 Q. And he cited the stringent  
4 legislative enactments passed and enforced in the  
5 lower province for the protection of the fishery.  
6 And then at the end he asked, at the bottom:

7 "Should we not take a lesson  
8 from France and the mother country  
9 and protect for ourselves that of  
10 which with proper care would soon  
11 become a source of direct and  
12 indirect revenue scarcely  
13 conceivable." [As Read]

14 So you'd agree that there is concern  
15 not only with the fishery itself, but also the  
16 economic value of it?

17 A. Yes.

18 Q. Okay. Now Mr. Nettle wrote  
19 another letter to the Governor General -- if we can  
20 make that the next exhibit, Your Honour?

21 THE COURT: Ms. Guirguis?

22 MS. GUIRGUIS: The witness hasn't been  
23 able to identify if he knows who Richard Nettle is.  
24 I don't know from this document or the last  
25 document, or what this letter is.

03:07:41 1 I don't know if he can properly  
03:07:43 2 identify it for it to be added as an exhibit. All  
03:07:46 3 he's been able to agree to is that there's -- that  
03:07:50 4 this is what it says.

03:07:51 5 THE COURT: Yes, as of now the only way  
03:07:53 6 we're marking this if there is consent. Is there  
03:07:58 7 consent?

03:07:58 8 MS. GUIRGUIS: No, Your Honour. We  
03:08:00 9 object to it.

03:08:00 10 THE COURT: All right. We can mark it  
03:08:02 11 as a lettered exhibit for Identification, Mr.  
03:08:05 12 Feliciant. But that's it for now.

03:08:07 13 MR. FELICIAN: Thank you, Your Honour.

03:08:08 14 THE COURT: All right.

03:08:09 15 MS. GUIRGUIS: Thank you.

03:08:15 16 THE COURT: Mr. Registrar, the next  
03:08:18 17 lettered exhibit?

03:08:20 18 THE REGISTRAR: Exhibit H-2.

03:08:24 19 THE COURT: Thank you.

03:08:25 20 EXHIBIT NO. H-2: Letter from Richard  
03:08:25 21 Nettle to Governor General Head  
03:08:25 22 Regarding Protection of Fisheries.

03:08:25 23 BY MR. FELICIAN:

03:08:34 24 Q. Sorry, Your Honour. I may move  
03:08:38 25 past a couple of things, just a second.



03:08:44 1 Are you familiar with someone named  
03:08:46 2 William Adamson, who I understand was the Chaplain  
03:08:50 3 and Librarian of Parliament?

03:09:02 4 A. No, I am not.

03:09:03 5 Q. Are you familiar with  
03:09:11 6 Mr. Witcher, who was the Superintendent of  
03:09:14 7 Fisheries for Canada?

03:09:14 8 A. I have seen documents with that  
03:09:18 9 name on it.

03:09:19 10 Q. Could we pull up SC0826, please.  
03:09:38 11 This is another document. Unfortunately it's  
03:09:38 12 handwritten and it's hard to read.

03:09:40 13 I have a typed version of a transcript  
03:09:43 14 that I was going to make use of myself, but would  
03:09:46 15 be happy to provide the witness to assist him, and  
03:09:49 16 it might speed things up?

03:09:51 17 THE COURT: Do you have copies for Ms.  
03:09:53 18 Guirguis and others?

03:09:55 19 MR. FELICIAN: I have two more copies.

03:09:57 20 THE COURT: Well, that's a start.

03:09:59 21 Ms. Guirguis, have you had a chance to  
03:10:01 22 look at this transcript?

03:10:02 23 MS. GUIRGUIS: Not at the transcript,  
03:10:05 24 Your Honour, and I wasn't able to read the text.

03:10:07 25 THE COURT: What we're going to do is

03:10:09 1 take the afternoon break now so Plaintiffs' counsel  
03:10:13 2 can look over your transcript. And provided she  
03:10:15 3 does not object, she can then tell you that you can  
03:10:19 4 hand a copy of it to her witness.

03:10:21 5 MR. FELICIAN: I have a copy.

03:10:22 6 THE COURT: Yes, but wait to hear from  
03:10:24 7 Ms. Guirguis and hopefully you can get that all  
03:10:27 8 done over the afternoon break including the witness  
03:10:30 9 looking at it if it gets that far, all right?

03:10:34 10 MR. FELICIAN: Yes.

03:10:35 11 THE COURT: Take 20 minutes.

03:10:51 12 -- RECESS TAKEN AT 3:10 --

03:32:35 13 -- UPON RESUMING AT 3:32 --

03:32:37 14 THE COURT: How did it go, Mr.  
03:32:41 15 Feliciant?

03:32:42 16 MR. FELICIAN: I understand that  
03:32:44 17 Professor Brownlie has now had an opportunity to  
03:32:46 18 review the transcript.

03:32:48 19 THE COURT: All right.

03:32:49 20 BY MR. FELICIAN:

03:32:49 21 Q. So if we can bring up the original  
03:32:51 22 document we were looking at, SC0826.

03:32:58 23 Now, what we're looking at is a letter  
03:33:01 24 from W.F. Witcher of the fisheries branch to -- if  
03:33:06 25 you go to the bottom of the letter?

03:33:09 1 A. Sorry, it's not Whitcher, is it?

03:33:12 2 Q. Of the fisheries branch, W.F.

03:33:15 3 Whitcher? And then it says "to" at the bottom

03:33:20 4 there, Laurence Vankoughnet, deputy Superintendent

03:33:25 5 General of Indian Affairs?

03:33:27 6 A. It's not this Richard Nettle?

03:33:28 7 Q. No, this is W.F. Whitcher of the

03:33:30 8 fisheries branch, this is 1875.

03:33:33 9 A. All right, it's later.

03:33:34 10 Q. So you're familiar with Laurence

03:33:40 11 Vankoughnet?

03:33:40 12 A. Yes.

03:33:40 13 Q. You see on the first page of the

03:33:42 14 letter, Your Honour, it might -- I don't know if my

03:33:45 15 friends would have an objection.

03:33:47 16 I can provide the transcript back to

03:33:48 17 the witness. He gave it back to me. And I could

03:33:51 18 provide a transcript to you, so you can follow

03:33:55 19 along provided nobody objects at this point?

03:33:57 20 MS. GUIRGUIS: No objection.

03:33:58 21 THE COURT: No objection, go ahead.

03:34:31 22 BY MR. FELICIAN:

03:34:31 23 Q. Now you'll see that the context of

03:34:33 24 this letter to Laurence Vankoughnet is that it

03:34:42 25 appears that the Minister had received a letter

03:34:44 1 from the Honourable Mr. Mills representing that the  
03:34:48 2 present fishing regulations seriously interfered  
03:34:51 3 with the Indians of Ontario.

03:34:53 4 Then if you see at the last sentence of  
03:34:56 5 the first paragraph, and we can probably also see  
03:34:59 6 it on the original document on the screen as well,  
03:35:03 7 although it's hard to read -- you'll read that:

03:35:07 8 "The Minister desires me to  
03:35:08 9 ascertain in what particulars it has  
03:35:11 10 been that the fishery laws unjustly  
03:35:13 11 and injuriously affect the Indians  
03:35:15 12 and what are the specific  
03:35:17 13 modifications desired in their  
03:35:20 14 behalf." [As Read]

03:35:25 15 So you'd agree with me it appears that  
03:35:27 16 the Minister has actually asked the author to  
03:35:31 17 examine the question of how the fishery laws impact  
03:35:37 18 the Indians?

03:35:37 19 A. Yes.

03:35:38 20 Q. And on page 2 of the original  
03:35:45 21 letter, and I believe on this one as well on the  
03:35:49 22 transcript I've got here, he writes that:

03:35:52 23 "The protection of certain  
03:35:53 24 kinds of fish during their breeding  
03:35:56 25 time has proved a great public

03:35:58 1 benefit to the whole country as well

03:36:00 2 to the Indians themselves." [As

03:36:00 3 Read]

03:36:02 4 So that's this author's opinion to

03:36:08 5 Mr. Vankoughnet?

03:36:14 6 A. Yes.

03:36:14 7 Q. Could we make this the next

03:36:16 8 exhibit, please?

03:36:17 9 MS. GUIRGUIS: Your Honour, we'd object

03:36:18 10 to this being an exhibit. I don't think that the

03:36:21 11 witness has sufficiently authenticated it.

03:36:26 12 THE COURT: You otherwise object to it --

03:36:29 13 MS. GUIRGUIS: Yes, pardon me?

03:36:32 14 THE COURT: Mr. Feliciant.

03:36:33 15 MR. FELICIAN: Perhaps I could ask the

03:36:34 16 witness one more question to see if I can do that.

03:36:37 17 THE COURT: Yes.

03:36:37 18 BY MR. FELICIAN:

03:36:37 19 Q. Are you familiar with W.F.

03:36:39 20 Whitcher of the fisheries branch?

03:36:41 21 A. I would say I've seen the name. I

03:36:45 22 couldn't say no more about him.

03:36:47 23 Q. Would you be satisfied that this

03:36:48 24 is a letter from him to Laurence Vankoughnet?

03:36:53 25 A. I don't want to be contrary, but

03:36:56 1 not having seen it myself in its context I'm a  
03:37:00 2 little reluctant to do that.

03:37:02 3 MR. FELICIAN: So perhaps we'll make  
03:37:04 4 it a lettered exhibit, Your Honour.

03:37:05 5 THE COURT: Mr. Registrar?

03:37:07 6 THE REGISTRAR: Lettered Exhibit I-1.

03:37:13 7 THE COURT: And, Mr. Registrar, can we  
03:37:15 8 also make the unofficial transcription of this  
03:37:20 9 letter the next lettered exhibit so they can stay  
03:37:23 10 together in the record?

03:37:25 11 THE REGISTRAR: So you want them both  
03:37:28 12 separate lettered exhibits?

03:37:29 13 THE COURT: I think you'll need an  
03:37:31 14 image of it but can we reserve a letter for it?

03:37:35 15 THE REGISTRAR: Is it uploaded on to  
03:37:37 16 the --

03:37:38 17 THE COURT: Not yet. But it can be, so  
03:37:40 18 can we reserve a letter for it?

03:37:43 19 THE REGISTRAR: Sure.

03:37:44 20 THE COURT: What letter would that be?

03:37:46 21 THE REGISTRAR: I-2.

03:37:48 22 THE COURT: I'm sure counsel will get  
03:37:50 23 you an image in due course.

03:37:52 24 EXHIBIT NO. I-1: Letter from W.F.

03:33:03 25 Whitcher of the fisheries branch to

1 Laurence Vankoughnet, Deputy  
2 Superintendent General of Indian  
3 Affairs.

4 EXHIBIT NO. I-2: Unofficial  
5 Transcription of Letter from W.F.  
6 Whitcher to Laurence Vankoughnet.

7 BY MR. FELICIANANT:

8 Q. Now we may have the same issue  
9 here, but I'll show you the document and you can  
10 answer accordingly. If we can bring up SC0827.

11 If we can scroll down, this is the 1875  
12 report on the fisheries, if we can go down one  
13 page. This is a report from the -- of the  
14 Commissioner of Fisheries for the year ended  
15 December 31st, 1875.

16 And if we can go down to the next page,  
17 you'll see this is the report of W.F. Whitcher,  
18 Commissioner of Fisheries for 1875?

19 Are you familiar with this report?

20 A. I'm certainly familiar with these  
21 annual reports of different departments within the  
22 sessional papers, yes.

23 Q. Have you ever read any of these  
24 reports for the purposes of doing any of your  
25 research for these reports or other reports you've

03:39:12 1 seen?

03:39:12 2 A. I've read Indian Affairs annual  
03:39:15 3 reports, not the fisheries branch reports.

03:39:19 4 Q. So to the extent that W.F.  
03:39:27 5 Whitcher describes in this report that the fishery  
03:39:29 6 is an important branch of Canadian industry; would  
03:39:33 7 you be able to agree that the government considered  
03:39:36 8 the fishery to be an important branch of Canadian  
03:39:39 9 industry?

03:39:39 10 A. Definitely.

03:39:52 11 Q. I'll take you to the next page of  
03:39:52 12 the document, I believe this would be page 2. If  
03:39:53 13 we can blow up the blue highlighted area.

03:40:00 14 You'll see that in this report, he  
03:40:04 15 writes about riparian claims. You'll see:

03:40:12 16 "Claims of riparians to fishing  
03:40:16 17 rights connected with the four  
03:40:18 18 shores have been frequently  
03:40:20 19 adjudicated upon in the Courts of  
03:40:22 20 Ontario, Quebec, New Brunswick and  
03:40:26 21 Nova Scotia. These Tribunals have  
03:40:31 22 invariably maintained that the soil  
03:40:33 23 of public navigable waters belongs  
03:40:35 24 to the Crown and the right of  
03:40:37 25 fishing belongs to the public. [As



03:40:37 1 Read]

03:40:39 2 Now as a matter of history, and the  
03:40:39 3 government's understanding of the soil of public  
03:40:41 4 navigable waters, does this conform to your  
03:40:44 5 understanding of how the government perceived the  
03:40:47 6 ownership of the soil of public navigable waters?

03:40:59 7 A. This is not a matter that I've  
03:40:59 8 researched myself. I have read secondary sources  
03:40:59 9 on the topic but I have not researched it myself.

03:41:04 10 MR. FELICIAN: So perhaps we can make  
03:41:06 11 this as a lettered exhibit, Your Honour.

03:41:09 12 THE COURT: What is this? Why? It's  
03:41:14 13 an official report of the government of Canada. I  
03:41:19 14 don't -- Ms. Guirguis isn't standing up, there's a  
03:41:22 15 few sections of the Evidence Act that would cover  
03:41:24 16 it.

03:41:24 17 MR. FELICIAN: That's true.

03:41:25 18 THE COURT: Mr. Registrar, what is the  
03:41:28 19 next numbered exhibit?

03:41:29 20 THE REGISTRAR: 4176, sorry.

03:41:39 21 THE COURT: 4176?

03:41:41 22 THE REGISTRAR: Yes.

03:41:42 23 EXHIBIT NO. 4176: Excerpt of the 1875  
03:41:48 24 Commissioner of Fisheries report.

03:41:43 25 THE COURT: Would you give a brief

03:41:45 1 description? It's an excerpt.

03:41:46 2 MR. FELICIAN: Excerpt of 1875 report  
03:41:49 3 on fisheries.

03:41:53 4 THE COURT: Thank you.

03:42:02 5 BY MR. FELICIAN:

03:42:03 6 Q. Now if we can bring up SC0829,  
03:42:10 7 please.

03:42:13 8 Now this is a opinion of the solicitor  
03:42:36 9 general, Alexander Cockburn, dated March 8, 1866.

03:42:42 10 And if you can go down to the bottom of the  
03:42:45 11 document, you'll see, "Signed James Cockburn  
03:42:52 12 Solicitor General". Are you familiar with James  
03:42:57 13 Cockburn?

03:42:57 14 A. No.

03:42:57 15 Q. So you've never read this or seen  
03:43:00 16 this document before?

03:43:00 17 A. I don't believe so.

03:43:06 18 Q. All right. If you can go to the  
03:43:11 19 top of the document again, where Mr. Cockburn  
03:43:20 20 writes in his opinion to the Crown Lands  
03:43:23 21 Department.

03:43:23 22 With reference to Mr. Witcher's  
03:43:25 23 memorandum relating to the claim of the Indians to  
03:43:28 24 exclusive fishing rights:

03:43:29 25 "My opinion is that they have

03:43:30 1 no other or larger rights over the  
03:43:32 2 public waters of this province than  
03:43:34 3 those which belong at common law to  
03:43:37 4 Her Majesty's subjects in general."  
03:43:37 5 [As Read]  
03:43:40 6 Again, I'm not asking you to comment on  
03:43:42 7 legal opinion, but simply as a matter of history  
03:43:45 8 are you familiar with this view on the part of the  
03:43:48 9 government that Indians would have no other or  
03:43:53 10 larger rights over the public waters than those  
03:43:56 11 which belong at common law to Her Majesty's subject  
03:43:59 12 in general?  
03:44:00 13 Is that something you're familiar with?  
03:44:02 14 A. It was a very common assertion  
03:44:05 15 from especially officials involved with the  
03:44:08 16 department of fisheries. Not everyone agreed.  
03:44:11 17 Q. All right.  
03:44:14 18 MR. FELICIAN: Would you make that a  
03:44:16 19 lettered exhibit, Your Honour?  
03:44:19 20 THE COURT: Mr. Registrar?  
03:44:20 21 THE REGISTRAR: Lettered Exhibit J-1.  
03:44:25 22 EXHIBIT NO. J-1: Letter from Solicitor  
03:44:25 23 General Alexander Cockburn to Crown  
03:44:26 24 Lands Department.  
03:44:26 25 THE COURT: Sir, oh, you asked for a

1 lettered exhibit?

2 MR. FELICIAN: Yes, I assumed an  
3 objection if I asked for a numbered.

4 THE COURT: And you assumed correctly.

5 MS. GUIRGUIS: Yes.

6 THE COURT: J-1.

7 BY MR. FELICIAN:

8 Q. Could we bring up Exhibit 3220,  
9 this is a document already and you'll see that this  
10 is a memo by J.D. McClean, secretary of the  
11 Department of Indian Affairs in 1897, and you're  
12 familiar with J.D. McClean?

13 A. Yes.

14 Q. Can we go to page 8, please? And  
15 you'll see that J.D. McClean quotes from James  
16 Cockburn and he writes:

17 "I beg to inform you that the  
18 treaty to which the ancestors of  
19 these Indians were parties is that  
20 of 1822 [...]."

21 I'll stop there. We're talking about  
22 the Alderville Band of Indians --

23 "Of 1822 and there's no mention  
24 of any right to fishing or hunting  
25 being reserved to the Indians.

03:46:02 1 However, I find when a similar  
03:46:04 2 question was raised in 1866 the  
03:46:07 3 Honorable James Cockburn, the then  
03:46:09 4 solicitor general, expressed the  
03:46:11 5 opinion that the Indians have no  
03:46:13 6 other or larger rights over public  
03:46:14 7 waters than those of which belong in  
03:46:17 8 common law to Her Majesty's subjects  
03:46:20 9 in general [...]." [As Read]

03:46:22 10 So you'll see the Department of Indian  
03:46:24 11 Affairs has adopted at this point in time that view  
03:46:30 12 of James Cockburn.

03:46:35 13 A. I have to look at my records to  
03:46:36 14 see when that shift took place. The Indian  
03:46:41 15 Department did for a time try to defend Indigenous  
03:46:45 16 hunting and fishing rights, which in some cases, as  
03:46:45 17 you know, were guaranteed under treaty, as in the  
03:46:48 18 Robinson Huron and Superior Treaties.

03:46:51 19 The Indian Department doesn't have a  
03:46:53 20 great record of defending that principle, and they  
03:46:59 21 did at some point capitulate to the provinces on  
03:47:03 22 hunting and fishing rights.

03:47:05 23 BY MR. FELICIANANT:

03:47:05 24 Q. And if we could go to page 11 at  
03:47:08 25 the bottom, you'll see he also writes in terms of

1 game :

2 "The Indians are therefore,  
3 subject to the game laws of Ontario  
4 and are only exempted in the manner  
5 indicated by those laws." [As Read]

6 So in other words, I have take it what  
7 McClean here is saying here Indians are subject to  
8 the game laws of Ontario; is that right?

9 A. McClean is saying that at this  
10 point in any case. It wasn't always entirely  
11 agreed upon among the officials of the department.

12 Q. We better move ahead in time a  
13 little bit. If we can go to SC0830.

14 Now, I'm showing you a letter here from  
15 Kelly Evans dated December 14, 1910. And he is the  
16 Ontario -- of the Ontario Game and Fisheries  
17 Commission, and he's writing to the Deputy  
18 Superintendent of Indian Affairs, J.D. McClean.

19 Are you familiar with this letter from  
20 Kelly Evans to J.D. McClean?

21 A. I don't think so.

22 Q. Basically what this letter is, and  
23 I'll let you have an opportunity to read it, the  
24 Ontario Game and Fisheries Commission is asking  
25 JD McClean specifically what rights the Indians had

03:48:55 1 to hunt and fish.

03:48:58 2 And he specifically asks in the third  
03:49:02 3 paragraph:

03:49:03 4 "[...] but not wanting to clash  
03:49:07 5 with the policy of the Dominion."

03:49:07 6 [As Read]

03:49:18 7 Is that a good enough copy for you to  
03:49:18 8 be able to read?

03:49:18 9 A. Well, there are some words that I  
03:49:20 10 can't make out.

03:50:00 11 (Witness reviews document).

03:50:00 12 THE COURT: Mr. Feliciant, I'm not sure  
03:50:02 13 if this gentleman isn't waiting for a question.

03:50:05 14 MR. FELICIAN: I thought he was  
03:50:07 15 reading the letter. I'm sorry, Your Honour.

03:50:09 16 THE COURT: Well, he may be. He said  
03:50:10 17 he couldn't make it out.

03:50:12 18 BY MR. FELICIAN:

03:50:14 19 Q. Professor Brownlie, are you  
03:50:14 20 reading the letter at the moment?

03:50:16 21 A. I'm doing my best. (Witness  
03:50:16 22 reviews document).

03:50:48 23 I think I've got through the first four  
03:50:51 24 paragraphs anyway.

03:50:52 25 Q. You've probably read enough so

03:50:54 1 that I can ask the question I'm going to ask.

03:50:56 2 It certainly appears from its face that  
03:50:59 3 at least Ontario at this point through the  
03:51:01 4 fisheries commission is making inquiries with  
03:51:07 5 respect to hunting and fishing rights of Indians  
03:51:10 6 under treaty or otherwise?

03:51:12 7 A. It does. I've never seen a letter  
03:51:14 8 similar to it.

03:51:15 9 Q. Okay.

03:51:15 10 A. Most of the time the province is  
03:51:17 11 just insistent.

03:51:20 12 Q. So, do you know Kelly Evans? You  
03:51:25 13 haven't seen this letter before?

03:51:26 14 A. No, I haven't.

03:51:27 15 MR. FELICIAN: Perhaps we'll make this  
03:51:31 16 a lettered exhibit, Your Honour.

03:51:33 17 THE COURT: Mr. Registrar?

03:51:34 18 THE REGISTRAR: Lettered Exhibit J-2.

03:51:40 19 EXHIBIT NO. J-2: Letter dated  
03:48:15 20 December 14, 1910, from Kelly Evans of  
03:48:19 21 the Ontario Game and Fisheries  
03:48:20 22 Commission to Deputy Superintendent of  
03:48:25 23 Indian Affairs J.D. McClean.

03:51:41 24 BY MR. FELICIAN:

03:51:41 25 Q. Now J.D. McClean actually



03:51:44 1 responds to this letter. If we can bring up  
03:51:47 2 SC0832 -- yes, SC0831, sorry.

03:51:54 3 You'll see this is December 6, 1910,  
03:52:14 4 and you'll notice that he's writing -- if you go to  
03:52:18 5 the bottom of the letter, you'll see that this is a  
03:52:21 6 letter to Kelly Evans of the Office of the  
03:52:23 7 Commissioner of Game and Fisheries. Do you see  
03:52:27 8 that?

03:52:27 9 A. Yes.

03:52:27 10 Q. Okay. And go to the very bottom  
03:52:30 11 of the letter -- it's not a good letter in the  
03:52:33 12 middle -- but go to the very bottom and you'll see  
03:52:37 13 that it's from "your obedient servant, Assistant  
03:52:42 14 Deputy Superintendent General and Secretary of  
03:52:44 15 Indian Affairs" who at that time would have been  
03:52:46 16 J.D. McClean; is that right, in 1910?

03:52:49 17 A. 1910, that sounds right.

03:52:52 18 Q. If we go up to the top of the  
03:52:54 19 letter. So I'll see he's responding, acknowledging  
03:52:58 20 receipt of the letter. It says:

03:53:03 21 "I beg to acknowledge the  
03:53:04 22 receipt of your letter of the 14th  
03:53:12 23 instant and in reply to inform you  
03:53:12 24 that in consequence of the great  
03:53:13 25 existing uncertainty as to the

03:53:15 1 application of game and fish  
03:53:16 2 provincial legislation to the  
03:53:18 3 Indians, it is difficult to furnish  
03:53:20 4 you with any very exact information,  
03:53:21 5 but the department has much pleasure  
03:53:24 6 in answering your inquiries to the  
03:53:26 7 best of its ability as follows." [As  
03:53:26 8 Read]  
03:53:29 9 And then he goes on and answers the  
03:53:31 10 questions. If we can go to the end, please, of the  
03:53:34 11 letter. He says, "Speaking generally" -- I'm going  
03:53:47 12 to start at the top of the paragraph:  
03:53:49 13 "Speaking generally, however,  
03:53:50 14 the department is of the opinion  
03:53:52 15 that in view of the fact that the  
03:53:53 16 Indians are perhaps more interested  
03:53:56 17 in preservation of fish and game  
03:53:58 18 than any other claims of the  
03:54:00 19 community --" [As Read]  
03:54:02 20 A. Sorry. "Class of the community".  
03:54:03 21 Q. "-- class of the community, it  
03:54:04 22 is fit and proper that so far as it  
03:54:06 23 can be properly done they should be  
03:54:08 24 made to conform to the same laws and  
03:54:10 25 regulations as white men. There

03:54:12 1 are, however, many Bands of Indians  
03:54:15 2 who are very largely dependent for  
03:54:18 3 the issue of -- for the --"

03:54:21 4 A. "Means of existence".

03:54:22 5 Q. "-- means of existence upon  
03:54:24 6 fish and game, and the department  
03:54:26 7 considers that it would be only just  
03:54:27 8 to supply Indians with licenses to  
03:54:32 9 fish, hunt or trap without the  
03:54:34 10 imposition of any fee for this --  
03:54:37 11 for the same, insofar as concerns  
03:54:40 12 the supply of their own domestic  
03:54:45 13 purposes." [As Read]

03:54:45 14 So here you have two letters. One from  
03:54:48 15 Kelly Evans of Ontario asking for information about  
03:54:51 16 the rights of Indians pursuant to treaty, and then  
03:54:55 17 you have the response of J.D. McClean, which was  
03:54:58 18 sent back to the province; does that appear to be  
03:55:01 19 what's happening?

03:55:01 20 A. Yes, it does.

03:55:03 21 Q. All right. And are you -- have  
03:55:07 22 you ever seen the final report of Kelly Evans dated  
03:55:14 23 March 7th, 1911, where he took up the suggestion  
03:55:18 24 and made a recommendation about not imposing a fee;  
03:55:23 25 did you ever see that report?

03:55:24 1 A. I don't think I did in connection  
03:55:27 2 with the work for this litigation. I may have in  
03:55:32 3 the past or have read about it. Because this is a  
03:55:36 4 sort of watershed moment when I think the  
03:55:39 5 Department of Indian Affairs completely gives up  
03:55:43 6 defending Indigenous hunting and fishing rights.

03:55:44 7 Or maybe it gets these sort of licenses  
03:55:47 8 as a matter of, what do you call it, grace or  
03:55:51 9 something so they don't have to -- no one has to  
03:55:54 10 acknowledge any real rights.

03:55:56 11 Q. Can we bring up SC0832, please. I  
03:56:29 12 understand it's loading.

03:56:52 13 Now this is the final report of the  
03:56:54 14 Ontario Game and Fisheries Commission. It's a very  
03:56:57 15 long document, and unfortunately I'm only going to  
03:57:00 16 ask you to look at a couple of the pages. But it's  
03:57:04 17 the whole document that went in.

03:57:06 18 Have you ever seen this document  
03:57:10 19 before?

03:57:10 20 A. I'm not sure, I don't believe I  
03:57:14 21 have.

03:57:14 22 Q. Can you scroll down just to see  
03:57:16 23 what it was about?

03:57:17 24 A. I believe I have read in the past  
03:57:22 25 about this process that led to this report.

03:57:26 1 Q. And if we would go down to the  
03:57:37 2 first page. And you'll see that this is presented  
03:57:48 3 to the Lieutenant Governor for the Province of  
03:57:51 4 Ontario. And the report was:

03:57:54 5 "The undersigned, appointed by  
03:57:57 6 Commission under the great seal of  
03:57:59 7 the Province bearing date the 17th  
03:58:00 8 day of July AD 1909, to make  
03:58:04 9 inquiries, take evidence and report  
03:58:06 10 generally upon all matters  
03:58:09 11 pertaining to the game fish -- the  
03:58:11 12 fisheries and the game of the  
03:58:12 13 Province of Ontario which may  
03:58:13 14 injuriously affect the same and any  
03:58:15 15 methods possible to increase their  
03:58:17 16 economic and other value to the  
03:58:19 17 masses of the people, begs leave  
03:58:21 18 herewith to submit his final  
03:58:24 19 report." [As Read]

03:58:30 20 So on page 7 of this document, you'll  
03:58:40 21 see in the last paragraph, the report finds and it  
03:58:45 22 deals with the decrease in fish:

03:58:47 23 "The decrease, however, far  
03:58:49 24 from having yet reached its limit,  
03:58:52 25 continues marked throughout almost

03:58:54 1 all the whitefish areas of the  
03:58:56 2 provincial waters as the following  
03:58:58 3 short tables will show, and it is  
03:59:00 4 this alarming state of affairs which  
03:59:02 5 so strengthens the belief, as almost  
03:59:05 6 to make it a certainty, that unless  
03:59:08 7 stringent remedial measures are  
03:59:10 8 applied without delay, the fisheries  
03:59:13 9 will be not merely depleted but  
03:59:17 10 irredeemably destroyed." [As Read]

03:59:20 11 In your research, were you aware that  
03:59:22 12 when you discussed hunting and fishing and the  
03:59:25 13 different regulations that applied to SON and other  
03:59:27 14 communities in Ontario, that the genesis of those  
03:59:31 15 regulations was a concern that the fishery, if not  
03:59:34 16 protected could irredeemably destroyed?

03:59:38 17 A. Yes, I was.

03:59:57 18 Q. Can we go to pages 43 and 44,  
03:59:57 19 please? You'll see "Under the Powers of the  
04:00:18 20 Dominion and Provincial Governments in relation to  
04:00:22 21 the Commercial Fisheries of the Great Lakes".

04:00:23 22 On pages 43 and 44 there's a discussion  
04:00:28 23 of federal and provincial jurisdiction. It says,  
04:00:28 24 the last paragraph:

04:00:33 25 "Insofar as the fisheries were

04:00:35 1 concerned, whether maritime or  
04:00:36 2 inland, the attitude was taken by  
04:00:39 3 the Dominion government that these  
04:00:40 4 were national and consequently to be  
04:00:43 5 administered by federal authority.  
04:00:44 6 This view was ultimately accepted  
04:00:46 7 both by British Columbia and the  
04:00:47 8 maritime provinces [...]." [As Read]  
04:00:50 9 Then we'll go down. It says -- next  
04:00:54 10 sentence:  
04:00:55 11 "The Canadian fisheries of the  
04:00:56 12 Great Lakes, however, are  
04:00:59 13 coterminous with the southern  
04:01:02 14 boundaries of Ontario, and as these  
04:01:04 15 fisheries developed in value and  
04:01:06 16 more citizens of the province became  
04:01:09 17 engaged in their exploitation, it  
04:01:11 18 followed that Ontario's interest in  
04:01:11 19 these fisheries considerably  
04:01:14 20 augmented [...]"  
04:01:15 21 And if we can go down it says:  
04:01:16 22 "Using this system, the  
04:01:18 23 Dominion government may, generally  
04:01:20 24 speaking, be said to regulate the  
04:01:22 25 conditions under which the fisheries

04:01:23 1 are conducted, while the proprietary  
04:01:25 2 rights in relation to the fishers  
04:01:26 3 who are vested in the Provincial  
04:01:28 4 government, which issues licenses to  
04:01:30 5 those desirous of engaging in  
04:01:34 6 fishing operations. It is not  
04:01:35 7 within the scope of this report to  
04:01:37 8 discuss the merits of this system,  
04:01:38 9 or to attempt to interpret in detail  
04:01:40 10 those points which, through the  
04:01:41 11 decision of the Privy Council, still  
04:01:43 12 remain open to doubt and contention.  
04:01:46 13 But in view of the fact that glaring  
04:01:48 14 evils do exist in connection with  
04:01:50 15 the fisheries, which only very  
04:01:52 16 drastic measures can adequately  
04:01:54 17 remedy, it is necessary in this  
04:01:55 18 report to investigate carefully the  
04:01:58 19 extent to which provincial  
04:02:00 20 legislation could alone institute  
04:02:01 21 such measures without encroaching on  
04:02:03 22 the prerogative of the Dominion  
04:02:05 23 government, and to what extent it  
04:02:07 24 would be necessary to include the  
04:02:08 25 aid of the Dominion government in



04:02:10 1 order to carry them into effect."

04:02:10 2 [As Read]

04:02:12 3 So were you aware, as a matter of  
04:02:17 4 history, that there was a dispute between the  
04:02:20 5 provinces and eventually Ontario and the federal  
04:02:22 6 Government with respect to the jurisdiction over  
04:02:25 7 fisheries?

04:02:27 8 A. Yes, I think I was.

04:02:28 9 Q. And was it your understanding that  
04:02:32 10 was resolved by a decision of the Privy Council in  
04:02:36 11 1898 called "the Ontario fishery reference". Is  
04:02:41 12 that something that you're familiar with?

04:02:42 13 A. I can't really remember, I'm  
04:02:44 14 pretty sure I've read about it in the past.

04:02:47 15 Q. And has it been a subject of study  
04:02:52 16 for you, the sort of rationale, motivation of the  
04:02:58 17 government in passing hunting and fishing laws? Is  
04:03:01 18 that something you're familiar with?

04:03:03 19 A. I've read a number of secondary  
04:03:05 20 sources on it, yes.

04:03:06 21 Q. And is that something that was the  
04:03:09 22 subject of your attention for the purposes of  
04:03:11 23 preparing your reports for this case?

04:03:16 24 A. When you say "that", what are you  
04:03:19 25 referring to? I'm not quite clear.

04:03:21 1 Q. The motivation behind the creation  
04:03:23 2 and passing of the fishing laws and regulations,  
04:03:27 3 and game laws and regulations. Was that something  
04:03:30 4 that you directed your attention to for the purpose  
04:03:33 5 of preparing your reports?

04:03:34 6 A. Not particularly for these  
04:03:35 7 reports.

04:03:35 8 Q. Okay. So you'd agree with me,  
04:03:42 9 from at least some of the documents that we've  
04:03:44 10 looked at, that the government of Ontario and the  
04:03:50 11 federal government did turn its mind to the issue  
04:03:53 12 of what rights the Indians had to hunting and  
04:03:59 13 fishing?

04:04:00 14 A. Ostensibly, yes.

04:04:02 15 Q. All right. And when you say  
04:04:05 16 "ostensibly", you mean it wasn't a sincere effort  
04:04:10 17 to consider the issues? Or what do you mean by  
04:04:12 18 that?

04:04:13 19 A. The record on these matters  
04:04:17 20 involves much more, of course, than the few  
04:04:21 21 documents that we've viewed here, and it's a bit  
04:04:25 22 complicated.

04:04:25 23 I can't remember if I addressed this in  
04:04:27 24 my report; I may not have. But the work of Frank  
04:04:31 25 Tuft, I have cited one of his writings in this

04:04:36 1 report, but he has shown the ways that Ontario was  
04:04:41 2 able to contest with the federal government over  
04:04:47 3 the right to regulate hunting and fishing and to  
04:04:53 4 contest -- see, to contest with the Department of  
04:04:56 5 Indian Affairs, which initially did try to argue  
04:04:59 6 for Indigenous rights of hunting and fishing.

04:05:02 7 And it essentially lost the argument.  
04:05:04 8 And it's a very complicated question, because as  
04:05:07 9 you may know, there were many matters of contention  
04:05:10 10 between the two governments over a long period.

04:05:14 11 And another thing that Frank Tuft was  
04:05:17 12 able to show was that, in this time period, I can't  
04:05:20 13 tell you the exact date, but it was somewhere in  
04:05:23 14 the first or second decade of the 20th century, one  
04:05:29 15 or more Indigenous groups did take hunting rights,  
04:05:33 16 I believe it was, to court, arguing that they, they  
04:05:36 17 were guaranteed by treaty.

04:05:38 18 And what happened was, the Court  
04:05:40 19 actually declined to rule on the issue, and it  
04:05:43 20 appears from the records we do have, that the judge  
04:05:46 21 in question felt that the treaty clearly did  
04:05:48 22 guarantee those rights, but he did not want to  
04:05:52 23 pronounce on that and guarantee those rights.

04:05:57 24 Well, his argument was, as we've seen  
04:06:00 25 here, that conservation benefited Indigenous people

04:06:03 1 as much as everybody else. The only problem was  
04:06:06 2 that it also made their loggers a lot less full.

04:06:13 3 MR. FELICIAN: Thank you, Your Honour.

04:06:15 4 Those are the questions that I have for  
04:06:18 5 you that pertain to your The Long Road to Land  
04:06:21 6 Claims report. My colleague, Mr. Ogden, has  
04:06:24 7 questions with respect to your second report.

04:06:27 8 Thank you very much, Your Honour.

04:06:28 9 THE COURT: Before you sit down,  
04:06:32 10 Mr. Feliciant. After the break this afternoon, I  
04:06:33 11 refreshed my memory as to the agreement between the  
04:06:35 12 parties about authenticity and admissibility, which  
04:06:40 13 may have not been at the forefront of anybody's  
04:06:44 14 mind today.

04:06:44 15 But I would ask counsel, I guess it's  
04:06:47 16 really a question for Plaintiff's counsel, if you  
04:06:52 17 want to do it tonight, to review that agreement and  
04:06:55 18 consider whether or not to maintain your objection  
04:06:57 19 to the marking of, I guess, about a half a dozen  
04:07:02 20 documents this afternoon.

04:07:04 21 And perhaps you could indicate to  
04:07:09 22 Ontario's counsel whether or not you maintain the  
04:07:12 23 objection after looking that over.

04:07:13 24 MS. GUIRGUIS: Yes, Your Honour.

04:07:14 25 THE COURT: All right.

04:07:14 1 MR. FELICIANANT: Thank you, Your Honour.

04:07:15 2 THE COURT: All right. So we're moving  
04:07:18 3 on to your co-counsel.

04:07:22 4 MR. FELICIANANT: Yes.

04:07:22 5 THE COURT: Can I get a fresh estimate,  
04:07:25 6 sir, of whether you're going to require that we sit  
04:07:30 7 the next 20 minutes, which we can, or whether  
04:07:32 8 you're so confident that we will finish that we  
04:07:36 9 will rise at this point?

04:07:38 10 I only say that because I don't know  
04:07:40 11 about the rest of you, I'm finding it warm again in  
04:07:42 12 this room. We really tried everything, and what  
04:07:44 13 we're left with is soldiering on.

04:07:48 14 So what do you think, sir?

04:07:53 15 MR. OGDEN: I think it would be  
04:07:55 16 advisable to pause.

04:07:56 17 THE COURT: You will still be done  
04:07:58 18 within the time allotted?

04:08:00 19 MR. OGDEN: With the freshness of  
04:08:01 20 this evening, I am make sure that we are,  
04:08:03 21 Your Honour.

04:08:03 22 THE COURT: So, we'll resume tomorrow  
04:08:07 23 morning and that will give counsel a few extra  
04:08:10 24 minutes to look over that agreement as to  
04:08:12 25 authenticity and admissibility that I mentioned a

04:08:14 1 few moments ago.

04:08:16 2 MR. OGDEN: Thank you, Your Honour.

04:08:18 3  
4 -- Court adjourned at 4:08 p.m.  
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REPORTER'S CERTIFICATE

I, JUDITH M. CAPUTO, RPR, CSR, CRR,  
Certified Shorthand Reporter, certify;

That the foregoing proceedings were  
taken before me at the time and place therein set  
forth at which time the witness was put under oath  
by the court registrar;

That the testimony of the witness and  
all objections made at the time of the examination  
were recorded stenographically by me (Note: Not  
all quotes have been verified against source  
document, but transcribed as read into the record);

That the foregoing is a Certified  
Transcript of my shorthand notes so taken.

Dated this 14th day of August, 2019.



NEESON COURT REPORTING INC.

PER: JUDITH M. CAPUTO, RPR, CSR, CRR

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