

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

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VOL 36 DAY 36  
August 13, 2019

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Toronto, ON M5K 1A2  
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1 Court File No. 94-CQ-50872CM

2  
3 ONTARIO

4 SUPERIOR COURT OF JUSTICE

5  
6 B E T W E E N:

7  
8 THE CHIPPEWAS OF SAUGEEN FIRST NATION, and THE  
9 CHIPPEWAS OF NAWASH FIRST NATION

10 Plaintiffs

11 - and -

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

20 Defendants

21  
22  
23 Court File No. 03-CV-261134CM1

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25 A N D B E T W E E N:

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CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and  
SAUGEEN FIRST NATION

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA and HER MAJESTY THE  
QUEEN IN RIGHT OF ONTARIO

Defendants

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--- This is VOLUME 36/DAY 36 of the trial  
proceedings in the above-noted matter, being held at the Superior  
Court of Justice, Courtroom 5-1, 330 University  
Avenue, Toronto, Ontario, on the 13th day of  
August, 2019.

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B E F O R E: The Honourable Justice Wendy M.  
Matheson

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A P P E A R A N C E S:

Krista Nerland, Esq.,                      for the Plaintiffs,  
& Cathy Guirguis, Esq.,                      The Chippewas of  
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and the Chippewas of  
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& Michael McCulloch                      The Attorney General                      &  
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David Feliciant, Esq.,                      for the Defendant,  
& Julia McRandall, Esq.,                      Her Majesty the  
& Richard Ogden, Esq.,                      Queen in Right of  
& Jennifer Lapan, Esq.,                      Ontario.  
& Peter Lemmond, Esq.,

REPORTED BY: Deana Santedicola, RPR, CSR, CRR

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09:52:38 1 -- Upon commencing at 10:00 a.m.

10:01:46 2  
10:01:46 3 THE COURT: Mr. Beggs.

10:01:48 4 MR. BEGGS: Your Honour, before we  
10:01:49 5 begin, I wondered if I might raise two questions of  
10:01:51 6 scheduling.

10:01:52 7 The first is we were asked to speak  
10:01:55 8 with Dr. von Gernet about his availability, and we  
10:02:00 9 were finally able to reach him and it appears,  
10:02:03 10 unfortunately, that he is not available until the  
10:02:05 11 beginning of September.

10:02:06 12 We spoke with my friends, and September  
10:02:09 13 5th would be a convenient date. That is on the  
10:02:12 14 break, and I am not sure if that works or not.

10:02:16 15 THE COURT: Which day of the week is  
10:02:17 16 that?

10:02:17 17 MR. BEGGS: It is a Thursday.

10:02:19 18 THE COURT: The difficulty is that the  
10:02:21 19 reason that is not a sitting week is that is a  
10:02:26 20 judicial conference week.

10:02:26 21 MR. BEGGS: Oh, is it? Okay, I  
10:02:26 22 couldn't remember.

10:02:27 23 THE COURT: The exception is the  
10:02:28 24 Tuesday.

10:02:29 25 MR. BEGGS: Well, I can check again. I



1 think he said September 4th was his first day in  
2 the city.

3 THE COURT: All right, well, thank you  
4 for doing that. In the event that he is not  
5 available on the 3rd, which would be a date that we  
6 could sit, another option -- I mean, do we have any  
7 idea of how long you all expect to be on this voir  
8 dire?

9 MR. BEGGS: I don't believe very long.  
10 I would think is it an hour, Michael?

11 THE COURT: Well, let me put it another  
12 way. Do you expect it would not be more than, say,  
13 half a day?

14 MS. GUIRGUIS: No, I wouldn't expect  
15 that it would go longer than half a day.

16 THE COURT: All right. So if counsel  
17 are available, another option would be the 9th of  
18 September, which is the Monday after that week,  
19 after the judicial conference, and if you could  
20 perhaps look into that with the witness. If that  
21 doesn't work, then the 11th, although it would be  
22 much better for the 9th.

23 After that, we resume on the 16th, I  
24 believe, anyway, so as of the 16th, counsel could  
25 perhaps work out a date that would not interfere

1 with the Plaintiffs' witness plan.

2 All right, you said there were two  
3 things?

4 MR. BEGGS: Yes, Your Honour. The  
5 other is the matter of a relevance motion about  
6 Dr. Beaulieu's evidence.

7 That could proceed this week on Friday,  
8 I believe, and I think Mr. Townshend is available?

9 MS. GUIRGUIS: Yes, Mr. Townshend will  
10 be speaking to that, and he can be ready as early  
11 as Friday.

12 THE COURT: And have you consulted at  
13 all with Mr. Ogden about how long he expects to be  
14 and whether we'll have Friday and so forth? I  
15 mean, leaving aside that it is not just Mr. Ogden,  
16 because also the Plaintiffs may have some  
17 re-examination for this gentleman.

18 MR. OGDEN: At the moment, I think  
19 Friday will be clear, but it of course depends on  
20 how we go, and I will have a better sense at the  
21 end of today, I would think.

22 THE COURT: Okay, well, it is really  
23 more -- I mean, I am confident you will be  
24 finished, but the Plaintiffs have to finish also.

25 I have received material from both

1 Canada and the Plaintiffs. Is Ontario taking a  
2 position on that motion?

3 MR. FELICIANANT: We will not be filing  
4 any material.

5 THE COURT: All right, but you will be  
6 coming and --

7 MR. FELICIANANT: Pardon?

8 THE COURT: You may take a position,  
9 but you are not filing material, is that the gist  
10 of it?

11 MR. FELICIANANT: That's correct.

12 THE COURT: All right. Well, I think  
13 that makes a lot of sense to plan to hear what I  
14 assume would be relatively brief submissions, since  
15 I have written submissions that I looked at briefly  
16 this morning.

17 So why don't we assume that that will  
18 be at 10 o'clock on Friday, because I know that the  
19 next expert who is scheduled is starting on Monday.

20 MR. BEGGS: Thank you, Your Honour.

21 THE COURT: Okay, now, while we are  
22 doing administrative matters, did other counsel  
23 not -- did you, sir, have a chance to look at the  
24 documents that were not admitted yesterday and come  
25 to some understanding about those?

10:05:54 1 MR. FELICIAN: Yes, Your Honour. I

10:05:55 2 have spoken to my friends who have reviewed the  
10:05:57 3 authenticity agreement, and I can advise that some  
10:06:03 4 of the documents from yesterday we can now make  
10:06:07 5 exhibits and two of the documents I have to get  
10:06:10 6 some follow-up information, which should not be  
10:06:13 7 difficult but may take today to sort out.

10:06:17 8 THE COURT: That sounds like good  
10:06:19 9 progress to me. So why don't we deal now with the  
10:06:23 10 subset of documents that can be marked as numbered  
10:06:28 11 exhibits.

10:06:29 12 MR. FELICIAN: So the first one would  
10:06:34 13 be -- and sorry to look down, but I'm looking at my  
10:06:39 14 phone which has a list of these things.

10:06:41 15 THE COURT: Well, I think H-1 and H-2  
10:06:43 16 were the first two. I am not suggesting that they  
10:06:45 17 are --

10:06:45 18 MR. FELICIAN: Yes, H-1 can now be  
10:06:47 19 made an exhibit, Your Honour.

10:06:49 20 THE COURT: All right. Mr. Registrar,  
10:06:51 21 is that enough information for you?

10:06:52 22 THE REGISTRAR: I just need the SC  
10:06:54 23 number or the file number, if possible.

10:06:56 24 MR. FELICIAN: Oh, sorry, H-1 was my  
10:06:58 25 extract of questions, so that one is not being made

1 an exhibit. My apologies.

2 THE COURT: All right.

3 MR. FELICIANANT: It would be --

4 THE COURT: H-2?

5 MR. FELICIANANT: H-2 is one I am getting  
6 information on.

7 It looks to me like I-1 which is  
8 SC0826, that can be made an exhibit.

9 THE COURT: SC0826?

10 MR. FELICIANANT: Yes.

11 THE COURT: All right, Mr. Registrar?

12 THE REGISTRAR: That will be Exhibit  
13 No. 4177.

14 EXHIBIT NO. 4177: W.F. Witcher to L.  
15 Vankoughnet, September 15, 1875.

16 MR. FELICIANANT: And then J-2, SC0830,  
17 can be made an exhibit.

18 And then the next one --

19 THE REGISTRAR: That is Exhibit No.  
20 4178.

21 EXHIBIT NO. 4178: 1910 Report, Letter  
22 from Evans to McLean, December 14,  
23 1910.

24 THE COURT: That is the 1910 report?

25 MR. FELICIANANT: Yes.

10:07:49 1 THE COURT: All right.

10:07:51 2 MR. FELICIAN: Then the next one is

10:07:53 3 SC0831, which is the letter from Indian Affairs to

10:07:58 4 the Ontario Game and Fisheries.

10:08:02 5 THE COURT: Okay, Mr. Registrar?

10:08:03 6 THE REGISTRAR: Exhibit No. 4179.

10:08:07 7 EXHIBIT NO. 4179: Letter from Indian

10:08:10 8 Affairs to Ontario Game and Fisheries.

10:08:10 9 MR. FELICIAN: And the last document

10:08:11 10 is SC0832, the final report of the Ontario Game and

10:08:17 11 Fisheries.

10:08:17 12 THE COURT: All right.

10:08:18 13 MR. FELICIAN: The two that I have to

10:08:20 14 get information on are H-2 and J-1.

10:08:22 15 THE COURT: Okay, so, Mr. Registrar,

10:08:23 16 that last one would be?

10:08:24 17 THE REGISTRAR: Exhibit No. 4180.

10:08:28 18 EXHIBIT NO. 4180: Final Report of the

10:08:14 19 Ontario Game and Fisheries.

10:08:29 20 THE COURT: All right, well, thank you,

10:08:30 21 that is helpful. And when you finish your dialogue

10:08:32 22 with the Plaintiffs, you can address the remaining

10:08:34 23 lettered exhibits that came up yesterday.

10:08:36 24 MR. FELICIAN: Thank you, Your Honour.

10:08:39 25 THE COURT: Anything else before Mr.

1 Ogden?

2 MR. FELICIAN: No.

3 THE COURT: All right.

4 Please go ahead.

5 MR. OGDEN: Thank you.

6 PROFESSOR JARVIS BROWNLIE; Under Prior  
7 Affirmation.

8 CROSS-EXAMINATION BY MR. OGDEN:

9 Q. Good morning, Professor Brownlie.

10 My name is Richard Ogden. I am counsel for  
11 Ontario, and I have some questions for you.

12 I'll start by asking you about part of  
13 your opinion, and you gave evidence or your  
14 evidence is that the SON gave formal consents to  
15 Treaty 72; is that correct?

16 A. They signed it, yes.

17 Q. Well, I just want to turn up --

18 THE COURT: Just as we get started  
19 here, sir, I couldn't hear that.

20 THE WITNESS: Oh, sorry, I just said  
21 they signed it, yes.

22 THE COURT: So I don't know if you  
23 could move your chair forward or put your voice  
24 higher.

25 THE WITNESS: Yes, the mic is put

1 forward.

2 THE COURT: Thank you, sir.

3 BY MR. OGDEN:

4 Q. Your report on page 2 says, and  
5 there is the second sentence under the "Executive  
6 Summary:

7 "The midnight deal, which  
8 became known as Treaty 72, was the  
9 culmination of many efforts on the  
10 part of Crown officials to gain the  
11 Ojibway's formal consent to the  
12 appropriation of their lands for  
13 non-Aboriginal settlers."

14 I take it from that, though, that their  
15 effort to gain formal consent succeeded, as it  
16 were, in Treaty 72? That is what you say?

17 A. Yes.

18 Q. Okay. Now, you refer to the Royal  
19 Proclamation of 1763, in particular to the  
20 Dorchester Instructions. And I will turn again to  
21 your report, page 13 of your report.

22 THE COURT: Now, just I think I know  
23 what this is all about, sir, but for the record, I  
24 understand when you are dealing with the report,  
25 you are dealing with the first report, the 2013



10:10:41 1 report?

10:10:43 2 MR. OGDEN: Yes, Your Honour.

10:10:44 3 THE COURT: As opposed to the second  
10:10:45 4 report.

10:10:45 5 So can I assume, unless you say  
10:10:47 6 otherwise, that every single time you say "report",  
10:10:50 7 you are talking about the 2013 report?

10:10:52 8 MR. OGDEN: Yes, Your Honour, thank  
10:10:54 9 you. That is Exhibit 4118.

10:10:56 10 THE COURT: Thank you. And what page  
10:10:57 11 was that?

10:10:58 12 MR. OGDEN: Page 13 of the report, and  
10:11:01 13 page 14 of the PDF.

10:11:02 14 I will refer to it as the "Treaties  
10:11:07 15 report".

10:11:07 16 THE COURT: If you wish.

10:11:09 17 BY MR. OGDEN:

10:11:10 18 Q. Thank you. So page 13 of the  
10:11:12 19 report, about in the second main paragraph it  
10:11:16 20 starts, "There is [...]":

10:11:19 21 "There is no indication in the  
10:11:22 22 documentary record that government  
10:11:25 23 officials believed they were no  
10:11:26 24 longer bound by the principles of  
10:11:27 25 the Royal Proclamation of 1763. On

10:11:31 1 the contrary, recent official  
10:11:32 2 actions included a legislative  
10:11:34 3 reiteration of the Royal  
10:11:36 4 Proclamation's principle of consent  
10:11:38 5 as a prerequisite for the alienation  
10:11:43 6 of Aboriginal land."

10:11:44 7 We could check if you would like, but  
10:11:48 8 my question is to ask you to confirm that the Royal  
10:11:52 9 Proclamation does not say that consent of Indians  
10:11:54 10 is a requirement, does it?

10:11:55 11 A. Yes, I believe it does say so. It  
10:12:02 12 might not use that term, but --

10:12:03 13 Q. Well, that is my question then.  
10:12:05 14 It doesn't use the word "consent" to say what is  
10:12:09 15 required to be obtained from the Indians?

10:12:11 16 A. We would have to look at the  
10:12:12 17 document to see the exact wording, but it uses  
10:12:15 18 language that means the same thing.

10:12:17 19 Q. Well, we'll turn up Exhibit 538,  
10:12:25 20 which is the Royal Proclamation, please. I am not  
10:12:27 21 so concerned with what it does say about what is  
10:12:29 22 required but its use of the word "consent", and if  
10:12:33 23 we go to page 3, please, of the PDF, and on the  
10:12:39 24 left-hand side, about sixteen lines down, that is  
10:12:50 25 where it starts "given", just about that:

1 "[...] given express Power and

2 Direction [...]".

3 Do you see that, sir, just where the  
4 cursor is, or the mouse perhaps, actually:

5 "[...] given express Power and

6 Direction [...]"?

7 A. Yes, I see that.

8 Q. "[...] to our Governors of our

9 Said Colonies respectively, that so

10 soon as the state and circumstances

11 of the said Colonies will admit

12 thereof, they shall, with the Advice

13 and Consent of the Members of our

14 Council, summon and call General

15 Assemblies within the said

16 Governments respectively, in such

17 Manner and Form as is used and

18 directed in those Colonies and

19 Provinces in America which are under

20 our immediate Government;"

21 Now, I am going to say to you that the

22 Royal Proclamation uses the word "consent" twice

23 only, and in this context to describe the role of

24 the Privy Council in relation to the Governors of

25 the four new colonies set out in the Proclamation.

10:13:56 1 So I would ask you whether you agree  
10:13:57 2 with that, and if you would like some time to  
10:14:00 3 review the text, then please do.

10:14:02 4 A. You are asking me to agree that  
10:14:03 5 the word "consent" appears only twice?

10:14:07 6 Q. Yes, and in this context?

10:14:09 7 A. Again, I would have to look  
10:14:10 8 through the whole document to confirm that. I  
10:14:12 9 don't have it memorized.

10:14:12 10 Q. Well, could we go to the top of  
10:14:15 11 the Royal Proclamation, please.

10:14:36 12 A. [Witness reviews document.]

10:14:36 13 Scroll down, please.

10:14:46 14 Scroll down, please.

10:14:49 15 Scroll down, please.

10:14:52 16 Scroll down, please.

10:15:04 17 Scroll down, please.

10:15:22 18 Scroll down, please.

10:15:35 19 I am now into a whole different topic,  
10:15:43 20 right? I think we are now at the end of the  
10:15:46 21 sections relating to Indigenous lands?

10:15:48 22 Q. I think it might be better if you  
10:15:51 23 continue there.

10:15:52 24 A. [Witness reviews document.]

10:15:52 25 Okay, scroll down, please.

10:15:54 1 Scroll down, please.

10:15:58 2 Oh, here we are.

10:16:22 3 Scroll down, please.

10:16:44 4 Scroll down, please.

10:16:45 5 Scroll down, please.

10:17:26 6 Scroll down, please.

10:17:40 7 Yes, so the word "consent" is used only

10:18:03 8 twice, but the other language makes it clear that

10:18:07 9 assent or agreement is required. It says if the

10:18:11 10 Indians shall be inclined to, so inclined.

10:18:13 11 Q. But the word "consent" as used in

10:18:18 12 the Royal Proclamation is used to mean approval of

10:18:23 13 the Imperial Government, the King, of the specific

10:18:26 14 action by a colony; is that correct?

10:18:28 15 A. Well, I think that the first use

10:18:30 16 of it was not the consent of the King but of the

10:18:37 17 Legislative Council.

10:18:37 18 Q. Thank you. And the second use?

10:18:40 19 A. Is shortly after. I can't

10:18:43 20 remember exactly who it was referring to.

10:18:44 21 Q. It was used to describe, though,

10:18:47 22 the relationship between the governing Imperial and

10:18:53 23 colonial bodies, or the governing colonial bodies,

10:18:58 24 either?

10:18:59 25 A. Okay, I can't remember exactly

10:19:00 1 what it said.

10:19:01 2 Q. Thank you. In your evidence, you  
10:19:04 3 referred to the Dorchester Instructions and said  
10:19:08 4 there had to be consent from the correct Indigenous  
10:19:10 5 people, and so my question really is the same  
10:19:17 6 there. Do you accept that the word "consent" does  
10:19:21 7 not appear in the Dorchester Instructions?

10:19:24 8 A. I would have to read the whole  
10:19:25 9 thing again.

10:19:26 10 Q. So that is Exhibit 741, please.

10:19:46 11 A. [Witness reviews document.]

10:19:50 12 Scroll down, please.

10:20:18 13 Scroll down, please.

10:20:56 14 Oh, that is the end.

10:20:58 15 Yes, I have read the whole thing. I  
10:21:00 16 don't see the word "consent" there at all, although  
10:21:02 17 it is obvious that the public council would be held  
10:21:07 18 with great solemnity, according to the ancient  
10:21:09 19 traditions of the Indians would appear to mean that  
10:21:12 20 they would have to consent.

10:21:13 21 Q. So do you understand the word  
10:21:15 22 "consent" or does "consent" mean to you permission  
10:21:21 23 to do something?

10:21:22 24 A. That seems like a reasonable  
10:21:24 25 definition.

1 Q. And then as opposed to perhaps the  
2 word "assent", which means agreement with  
3 something?

4 A. Sure.

5 Q. So yesterday you said that  
6 Oliphant, in attending the Treaty Council in  
7 October 1854, had intended to wring some consent  
8 from the SON, however reluctant; is that correct?

9 A. Yes.

10 Q. I would like to turn to Exhibit  
11 2175, please, which is a document we'll be seeing  
12 some more of, and then page 3 of the PDF and page 4  
13 of the original, and this is a collection of the  
14 documents relating to that surrender.

15 And then we'll go to the bottom of the  
16 previous page, please:

17 "It therefore became an  
18 obligation upon the Indian  
19 Department to spare no pains in  
20 endeavouring to wring from those  
21 whom it protects, some assent,  
22 however reluctant, to the adoption  
23 of the only means by which this  
24 object could be achieved."

25 So what Oliphant said was to wring some

10:22:33 1 assent, rather than wring some consent; is that  
10:22:37 2 correct?

10:22:37 3 A. Yes, that is the word there.

10:22:39 4 Q. So the meaning that you give to  
10:22:40 5 the word "consent" and that you have agreed is the  
10:22:44 6 word "consent" is something that comes from the  
10:22:47 7 Indigenous parties, is using it in a way that is  
10:22:53 8 different from the way used by the historical  
10:22:58 9 parties in the documents that we have?

10:23:00 10 A. Can you explain what you mean?

10:23:04 11 Q. You used the word "consent" and  
10:23:09 12 the way that they use the word "consent" is  
10:23:12 13 different -- sorry, I'll ask that again in a  
10:23:19 14 different way.

10:23:19 15 The meaning that you give the word  
10:23:22 16 "consent" -- actually, just sorry, one moment.

10:23:26 17 You are using the word "consent" where  
10:23:46 18 the historical actors did not use it to describe  
10:23:51 19 what they were seeking or what should be sought  
10:23:56 20 from the Indigenous parties? So that is my  
10:24:12 21 question. Is that correct, that you were using the  
10:24:16 22 word "consent" where the historical actors did not  
10:24:21 23 use it, in a way they did not use it, to describe  
10:24:24 24 what they were seeking or what should be sought  
10:24:25 25 from the Indigenous parties?



10:24:27 1 A. It is not clear to me what you are  
10:24:32 2 arguing is the difference between consent and  
10:24:33 3 assent.

10:24:34 4 Q. I am not arguing. I am asking you  
10:24:37 5 whether the way that you are using "consent" is  
10:24:41 6 different from the way the historical actors used  
10:24:45 7 it. You conceded it was used and had a different  
10:24:49 8 meaning in the Royal Proclamation and it is not  
10:24:52 9 used in the Dorchester Instructions, and yet you  
10:24:56 10 have said that both of those say that consent is  
10:24:59 11 required.

10:25:00 12 THE COURT: I am just going to ask you  
10:25:01 13 to pause when you finish your question. Ms.  
10:25:05 14 Guirguis was standing.

10:25:07 15 MS. GUIRGUIS: Yes, I was standing,  
10:25:08 16 Your Honour. It was just the question seems a bit  
10:25:10 17 unclear in terms of who the historical actors are  
10:25:13 18 my friend is referring to. It is just confusing in  
10:25:15 19 terms of what is being asked here.

10:25:17 20 THE COURT: Okay, well, the witness can  
10:25:19 21 say if he finds it confusing, which he did say just  
10:25:23 22 a minute ago.

10:25:24 23 MS. GUIRGUIS: Yes.

10:25:25 24 THE COURT: And Mr. Ogden will have to  
10:25:28 25 deal with that. Do you want to repeat your

10:25:31 1 question, sir?

10:25:32 2 BY MR. OGDEN:

10:25:33 3 Q. Yes, thank you.

10:25:33 4 You were using "consent" differently  
10:25:37 5 from the way the authors of these documents used  
10:25:43 6 it, and so you have conceded that it was used and  
10:25:46 7 had a different meaning in the Royal Proclamation,  
10:25:48 8 the word "consent", and it is not used in the  
10:25:52 9 Dorchester Instructions, and yet you have said that  
10:25:55 10 both of those documents say that consent is  
10:25:57 11 required.

10:26:00 12 So do you accept that in those  
10:26:07 13 documents the authors used different words to  
10:26:13 14 describe what you are saying was a requirement of  
10:26:17 15 consent?

10:26:18 16 A. I would say they used different  
10:26:22 17 words and that "consent" is a reasonable word to  
10:26:26 18 use to describe what they were talking about. For  
10:26:32 19 all practical purposes, in this context I don't  
10:26:35 20 really see a difference between "assent" and  
10:26:40 21 "consent".

10:26:40 22 Q. But they did?

10:26:41 23 A. Well, I don't know that they did.

10:26:42 24 Q. Well, they used a different word.

10:26:44 25 A. Well, they didn't say, "I say this

1 word instead of consent." I mean, when you choose  
2 one word, it doesn't mean that you have decided the  
3 other one is incorrect.

4 Q. No, it means that you wish to  
5 convey the meaning in the word you have chosen,  
6 doesn't it?

7 A. It is not clear to me how you  
8 think that the Royal Proclamation effectively  
9 excludes the notion of consent or in some way  
10 implies that Indigenous consent or assent is not  
11 required, or the Dorchester Instructions.

12 Q. Well, that is not my question, but  
13 I will proceed and maybe return to this because I  
14 think some more discussion and some more documents  
15 may help.

16 Perhaps we'll move down to Exhibit 4118  
17 again, which is your report, the Treaties report,  
18 PDF page 15 and that is page 14 of your report.  
19 Right at the top, and this is referring to  
20 Anderson's August surrender proposal, and it says:

21 "Anderson lost his patience and  
22 advocated abandonment of the Royal  
23 Proclamation principle of consent."

24 Are you talking about the words that he  
25 used in his August 16th report to Oliphant?

10:28:19 1 A. Yes.

10:28:22 2 Q. So if we go back to 2175, Exhibit  
10:28:28 3 2175, please, and PDF page 11, which is page 12 of  
10:28:36 4 the original, and this is his report, isn't it? If  
10:28:50 5 you go up to the start of the report, please, just  
10:28:54 6 there.

10:28:56 7 A. Yes, thank you.

10:28:57 8 Q. And then back down to the  
10:28:59 9 paragraph starting, "Therefore, with reference  
10:29:01 10 [...]", so he sets out above it what he had done  
10:29:04 11 and then his proposal, his recommendation to  
10:29:07 12 Oliphant.

10:29:21 13 A. Sorry, and what is your question?

10:29:22 14 Q. Well, you just read this  
10:29:25 15 paragraph, haven't you, and you are familiar with  
10:29:28 16 this report?

10:29:28 17 A. The paragraph beginning "Therefore  
10:29:30 18 [...]"?

10:29:31 19 Q. Right.

10:29:31 20 A. Yes, and I am familiar with the  
10:29:36 21 report, yes.

10:29:36 22 Q. So firstly, Anderson doesn't refer  
10:29:37 23 to the Royal Proclamation in this correspondence,  
10:29:39 24 does he?

10:29:39 25 A. No, he does not, no.

10:29:41 1 Q. And he doesn't refer to a need for  
10:29:42 2 consent, in those words? He doesn't say "consent"?

10:29:45 3 A. He doesn't use the word "consent",  
10:29:49 4 no.

10:29:49 5 Q. Right, and he doesn't talk about a  
10:29:52 6 principle of anything? He doesn't use the word  
10:29:57 7 "principle" is what I am saying?

10:29:58 8 A. No, he doesn't use the word  
10:30:00 9 "principle".

10:30:01 10 Q. So he is not using the word  
10:30:07 11 "consent" at all, and in fact, he clearly did not  
10:30:15 12 believe that agreement was a requirement, did he?

10:30:19 13 A. Yes, he definitely believed that  
10:30:22 14 agreement was a requirement. That was what he was  
10:30:28 15 there to try to persuade them. Yes, at this point  
10:30:31 16 he does finally argue, yes, we should just take the  
10:30:34 17 land without their consent and sell it, which the  
10:30:37 18 government declined to do.

10:30:41 19 Q. How could he believe it were a  
10:30:49 20 requirement if he were proposing that they do  
10:30:52 21 something contrary to that requirement, to such a  
10:30:57 22 requirement? It is either a requirement or it is  
10:30:59 23 not, in his mind, at least?

10:31:02 24 A. He at this point had spent at  
10:31:04 25 least two years trying to persuade them to agree to

1 sell the land. On this one occasion, he does argue  
2 that the government should, as he said, assume  
3 control over this reserve and basically take the  
4 land and sell it without their consent, which as I  
5 said, the government did not do.

6 Q. So the consent that you are saying  
7 was required and your description of it as a  
8 requirement of consent is your opinion of what was  
9 required?

10 A. It is my description of the  
11 government practice.

12 Q. And your description of what is  
13 contained in the Royal Proclamation and the  
14 Dorchester Instructions?

15 A. Correct.

16 Q. And your description of it is --  
17 just to step away from that, please, you talked  
18 about Bond Head coming back from Treaty 45 and  
19 Treaty 45 1/2 and asking for a copy of the Royal  
20 Proclamation?

21 A. Yes.

22 Q. And receiving a copy?

23 A. Yes.

24 Q. And you said that this was an  
25 example of governments placing significance and

1 importance on the Royal Proclamation?

2 A. Yes.

3 Q. But doesn't it show that Bond Head  
4 decided he needed to look at the Royal Proclamation  
5 as a result of the Treaty Council?

6 A. Yes, I think he came back from  
7 taking those large surrenders and thought he better  
8 look at the Royal Proclamation.

9 THE COURT REPORTER: I'll just ask you,  
10 Professor, to try to keep your voice up, please.

11 THE WITNESS: Sorry.

12 THE COURT REPORTER: Thank you.

13 THE COURT: Sir, we really need you to  
14 put -- I mean, I assume you have a teaching voice.  
15 I haven't heard it in this courtroom, but not only  
16 I and Madam Reporter, but everyone right back to  
17 the back row should be able to hear you. So  
18 perhaps you could use your teaching voice, if you  
19 have one.

20 THE WITNESS: I will do my best.

21 BY MR. OGDEN:

22 Q. He asked for it, though, as a  
23 result of what someone said to him at the Treaty  
24 Council?

25 A. I don't think it is stated in the

1 letter why he is asking or what made him decide to  
2 ask for the Royal Proclamation. The letter is not  
3 written by him.

4 Q. You have said that adherence to  
5 the terms of the Royal Proclamation was never  
6 perfect, and written that as well, I believe; is  
7 that correct?

8 A. I'm sorry, what was the last part?

9 Q. The terms of the Royal  
10 Proclamation was never perfect, adherence to the  
11 terms?

12 A. Adherence was never perfect, yes.  
13 That is a quote from Jim Miller.

14 Q. And you agree with that?

15 A. Yes.

16 Q. I think you have said that in your  
17 testimony. And then you have said that government  
18 officials believed themselves bound by the  
19 principles of the Royal Proclamation?

20 A. Yes.

21 Q. I am hesitant to ask you to agree  
22 with this because of the time it will take, but the  
23 Royal Proclamation doesn't use the word  
24 "principle", does it?

25 A. I'll take your word for it.



10:35:04 1 Q. Well, yes, I'll take that as a  
10:35:09 2 yes, but then government officials did not say or  
10:35:15 3 believe that there was a Royal Proclamation  
10:35:18 4 principle called "consent" that bound them, did  
10:35:25 5 they?

10:35:25 6 A. I am not sure exactly what you are  
10:35:30 7 asking me.

10:35:31 8 Q. Is it your opinion, based on your  
10:35:36 9 review of the historical documents, that government  
10:35:38 10 officials understood that there was a principle of  
10:35:43 11 the Royal Proclamation called "consent" of  
10:35:49 12 Indigenous peoples or Aboriginals or whatever that  
10:35:52 13 they were required to follow?

10:35:54 14 A. Yes, I do believe they believed  
10:35:57 15 that.

10:35:58 16 Q. That --

10:35:58 17 A. I believe that the government  
10:36:00 18 officials believed that the Royal Proclamation  
10:36:02 19 required them to obtain Indigenous consent.

10:36:05 20 Q. Did they -- that wasn't my  
10:36:08 21 question, though. Did they believe there was a  
10:36:10 22 principle called "consent"?

10:36:11 23 A. I'm sorry, I'm still not really  
10:36:15 24 understanding your question. Are you asking me if  
10:36:20 25 they wrote down that there is a principle called

10:36:23 1 "consent"?

10:36:25 2 Q. Well, let's start with that. Are  
10:36:30 3 you aware of an instance where a government  
10:36:32 4 official wrote down that there are principles of  
10:36:34 5 the Royal Proclamation and one of them is called  
10:36:36 6 "consent", or along those lines?

10:36:38 7 A. I am not aware of a document that  
10:36:42 8 uses that exact sentence. The Dorchester  
10:36:44 9 Instructions are, in my mind, very clear that  
10:36:49 10 assent is required, or consent, or agreement. I  
10:36:54 11 mean, the only other interpretation would be that a  
10:36:57 12 meeting is to be called and Indigenous people are  
10:37:00 13 to be required to sign without agreeing, but for  
10:37:04 14 all practical purposes, that seems very unlikely  
10:37:07 15 and I am not aware of any instance in which that is  
10:37:10 16 what happened.

10:37:10 17 Q. They used the word "agreement",  
10:37:13 18 though?

10:37:13 19 A. They used different words.

10:37:15 20 Q. Including "agreement" but not  
10:37:19 21 "consent"?

10:37:23 22 A. They used different phrases and  
10:37:26 23 synonyms that mean consent, and their actions  
10:37:29 24 demonstrate that they believed agreement or consent  
10:37:32 25 or assent was required; in other words, that they

10:37:35 1 were not permitted to take Indigenous lands without  
10:37:40 2 Indigenous people agreeing to that in a public  
10:37:42 3 council.

10:37:42 4 Q. Do you have an explanation why  
10:37:53 5 they didn't use the word "consent"?

10:37:55 6 A. There are many ways to express the  
10:37:59 7 same idea in English.

10:38:01 8 Q. Well, why didn't you use the word  
10:38:05 9 "agreement" or something like that? You have used  
10:38:07 10 the word "consent" several times.

10:38:10 11 A. Why didn't I use the word  
10:38:11 12 "agreement"?

10:38:12 13 Q. Well, you have used the word  
10:38:14 14 "consent" several times this morning and in your  
10:38:17 15 report.

10:38:17 16 A. I used it because I believe it is  
10:38:19 17 an appropriate word.

10:38:20 18 Q. But they didn't.

10:38:21 19 A. We don't know that they didn't.  
10:38:22 20 They never wrote down, "This is not about consent".

10:38:26 21 Q. Are you aware of them writing down  
10:38:28 22 that there was a need for Indigenous consent?

10:38:30 23 A. Yes, the Royal Proclamation and  
10:38:35 24 the Dorchester Instructions make it clear that  
10:38:37 25 Indigenous people were required to agree to the

1 alienation of their land.

2 Q. Well, we'll turn to Treaty 45 1/2  
3 then, please, and I want to consider the context  
4 for the making of Treaty 45 1/2.

5 In the buildup to the Treaty-signing on  
6 August the 9th, 1836, in both public statements by  
7 Anishnawbek and the Crown support of an effort to  
8 establish what I will call a central Indian  
9 Reserve, either at Manitoulin or Saugeen; do you  
10 agree with that?

11 A. Sorry, do I agree that there were  
12 public statements by Anishnawbek supporting --

13 Q. And the Crown.

14 A. And the Crown? Certainly there  
15 were statements from the Crown supporting that. At  
16 the moment, I am not sure which Indigenous  
17 spokespersons you are talking about.

18 Q. Not necessarily a spokesperson,  
19 but we'll go through some documents and then I will  
20 ask you about the document.

21 And the first is Exhibit 1036. This is  
22 a letter from Anderson to a Colonel Givins who I  
23 believe was an assistant or adjunct to the  
24 Lieutenant Governor; is that correct?

25 A. Givins I believe was

1 Superintendent General of Indian Affairs.

2 Q. Okay, thank you. This was March  
3 7, 1833, and if we go down to the second paragraph  
4 there, it refers to Shingwaukonse. Just as an  
5 aside, he ended up signing the Robinson Huron  
6 Treaty; is that correct?

7 A. I'm sorry, did you ask if he was a  
8 signatory to the --

9 Q. Yes, do you acknowledge --

10 A. Yes, he was, yes.

11 Q. So this says:

12 "The object of Shinguaconse and  
13 Kabacanbow, two chiefs is, to go  
14 with as many of their Methodist  
15 friends as they can gain over to  
16 accompany them, and settle in Big  
17 Bay called on the Map Owens Sound a  
18 part of which appears to be in the  
19 Township of Zero; the alledged [sic]  
20 cause for wishing to change their  
21 residence is that they conceive they  
22 cannot be happy situated so near the  
23 whites as, at present, they are and  
24 they are anxious to be convenient to  
25 a good Fishery, which they would

10:41:29 1 have in the vicinity of Owen's Sound

10:41:36 2 they also think the Indians who at

10:41:38 3 present decline going from this

10:41:39 4 settlement will [illegible word]

10:41:44 5 long, follow their example and

10:41:46 6 ultimately form a large

10:41:48 7 Establishment. Ten families have

10:41:50 8 declared their intention to move in

10:41:52 9 the spring, on the opening of the

10:41:54 10 navigation, and they inform me that

10:41:55 11 it is the intention of the Snake

10:41:57 12 tribe to accompany them."

10:41:58 13 We'll move on to another.

10:42:02 14 You understood that and what they were

10:42:05 15 trying to do there? This is an example of families

10:42:15 16 at the Coldwater settlement lobbying the Crown and

10:42:17 17 other First Nations to move to Owen Sound, isn't

10:42:19 18 it?

10:42:19 19 A. Yes, or at least suggesting that  
10:42:22 20 they would.

10:42:22 21 Q. And then Exhibit 1085, please.

10:42:42 22 You will see here another letter from Coldwater

10:42:45 23 dated July 18, 1835, and this is a record -- are

10:42:51 24 you familiar with this document?

10:42:55 25 A. I don't think so, but I would have

10:42:57 1 to -- I would have to see who it is from and to.

10:43:06 2 [Witness reviews document.]

10:43:08 3 No, I don't think so.

10:43:14 4 Who was the author? Oh, Anderson.

10:43:29 5 Q. So it is a record, at least, of  
10:43:32 6 them travelling to the Indian lands in Upper  
10:43:37 7 Canada, or not Upper Canada then, announcing the  
10:43:40 8 government effort to establish a civilization  
10:43:42 9 settlement on Manitoulin Island.

10:43:48 10 Go up to the top, please.

10:43:50 11 So there is a part there where he says  
10:44:37 12 that the Inland Indians -- well, "with whom they  
10:44:41 13 often meet" at the top it says, "with whom they  
10:44:43 14 often meet", that "they without hesitation,  
10:44:43 15 accepted the offer of settling on the Manitoulin  
10:44:47 16 Island."

10:44:47 17 And do you accept that Anderson was  
10:44:52 18 suggesting that Indigenous peoples might want to  
10:44:58 19 move to settle on Manitoulin Island?

10:45:01 20 A. Yes.

10:45:03 21 Q. Exhibit 1090. Could you go to the  
10:45:17 22 bottom, please. This is a letter Colonel Givins  
10:45:24 23 dated September 23, and the original is -- is that  
10:45:26 24 J. Givins?

10:45:28 25 A. Yes, it looks like.

1 Q. And the date there is September  
2 23, 1835, and the third line is -- well, at the  
3 start, I'll read it, and if you disagree with my  
4 description, please let me know:

5 "I am directed by His  
6 Excellency the Lieutenant Governor  
7 to acquaint you for the information  
8 of the [communities] [sic] [...]"

9 A. "Commissary".

10 Q. "[...] Commissary General that  
11 he has lately made arrangements for  
12 forming an establishment at the  
13 Great Manitoulin Island with a view  
14 to the civilization and [...]"

15 What is that word?

16 A. "Religious instruction".

17 Q. "[...] of such of the  
18 neighbouring Indian tribes as can be  
19 prevailed upon to take up their  
20 residency there, under the  
21 Superintendence of Captain  
22 Anderson."

23 [As read.]

24 So this is the Lieutenant Governor  
25 approving the establishment at the Great Manitoulin



10:46:41 1 Island of an establishment of the civilization,  
10:46:43 2 isn't it?

10:46:44 3 A. Yes.

10:46:44 4 Q. And then at Exhibit 1103, please.  
10:46:54 5 This is a record or Resolutions of the General  
10:47:01 6 Council of the Chippewas, as it is described in  
10:47:04 7 this. There is a transcript of it, and then the  
10:47:08 8 original follows.

10:47:13 9 "Council held at the narrows on  
10:47:15 10 the 26th January 1836 [...]"

10:47:20 11 If we go down, please, to the sixth  
10:47:23 12 resolution, and if you go up a little bit:

10:47:34 13 "That should the government at  
10:47:35 14 any time recommend the Indians to  
10:47:37 15 form one general settlement, the  
10:47:40 16 council have unanimously come to the  
10:47:42 17 conclusion that the only tract of  
10:47:44 18 Land that they would be willing to  
10:47:46 19 remove to, is the Indian Territory  
10:47:49 20 at Sahgeeng.

10:47:52 21 7th. That this council do not  
10:47:57 22 approve of the plan of settling of  
10:47:59 23 the Indians at the Great [Manedo  
10:48:03 24 Minis?] for the following reasons:"  
10:48:06 25 And the first reason is:

10:48:08 1 "1st. The difficulty there  
10:48:10 2 would be of disposing of their  
10:48:12 3 produce, there being no market near  
10:48:13 4 the said Island.

10:48:15 5 2nd. On account of the exposed  
10:48:16 6 situation of the said Island in case  
10:48:19 7 of a war."

10:48:20 8 Now, this was prior to Treaty 45 being  
10:48:25 9 concluded and 45 1/2?

10:48:30 10 A. Yes.

10:48:30 11 Q. So Exhibit 1122, June the 6th,  
10:48:45 12 1836, the "Council held credit", and if you go  
10:48:50 13 down - and this is a one-page document - and go to  
10:48:50 14 the bottom, please, present is J. Sawyer, Joseph  
10:48:55 15 Sawyer and P. Jones, Peter Jones, Chiefs?

10:48:58 16 A. Yes.

10:48:58 17 Q. And then:

10:49:01 18 "3. That an application be  
10:49:02 19 made to the government for a deed  
10:49:04 20 for one reserve, the nature of which  
10:49:08 21 shall be hereafter determined.

10:49:14 22 4. That the Governor be asked  
10:49:17 23 his opinion about our removing to  
10:49:19 24 Saugeen."

10:49:20 25 [As read.]

10:49:20 1 Is that correct?

10:49:22 2 A. Yes.

10:49:23 3 Q. And so this is an example of  
10:49:27 4 Credit Mississauga Chiefs asking the Governor his  
10:49:30 5 opinion about removing to the Saugeen Peninsula?

10:49:33 6 A. Yes, it appears so.

10:49:38 7 Q. And Exhibit 1127, please. This is  
10:49:51 8 difficult to read, so we are going to blow it up,  
10:49:53 9 but it is a text from the Christian Guardian  
10:50:01 10 newspaper dated Toronto, Wednesday August 3rd,  
10:50:09 11 1836. And on the back page of it, which is the  
10:50:16 12 first page of the PDF, you will see on this note --  
10:50:20 13 and, Your Honour, I regret we haven't, largely due  
10:50:27 14 to my own timing, highlighted all the passages,  
10:50:29 15 most of the passages to which I will be taking the  
10:50:32 16 witness, but we will do shortly after the  
10:50:35 17 cross-examination concludes.

10:50:36 18 THE COURT: That is the arrangement  
10:50:37 19 that I understand has been reached, which is fine  
10:50:41 20 with me.

10:50:43 21 BY MR. OGDEN:

10:50:43 22 Q. Thank you, Your Honour.

10:50:44 23 And you will see the words there:

10:50:50 24 "Sawgeeng is undoubtedly the  
10:50:51 25 very best spot in this Province for

1 the permanent, safe, and prosperous  
2 settlement of the Indians."

3 And if you could go down to the bottom  
4 paragraph, please, you will see the author:

5 "A Friend to the Indians."

6 This is likely a religious friend, or  
7 perhaps a missionary; is that correct?

8 A. That would be a reasonable  
9 supposition.

10 Q. And then Exhibit 1123, please. We  
11 have been to this. You went to it in your  
12 testimony, I think. This is a letter from Chief  
13 Wawanosh?

14 A. I think it is Wawanosh.

15 Q. Wawanosh, thank you, in July 1836,  
16 and three other Chiefs at Sinclair, and it was  
17 addressed to other Anishnawbek Chiefs inviting them  
18 to move to the Saugeen territory in order to ensure  
19 that the Saugeen Indians would not have to sell  
20 their land. Do you recall this and the document?

21 A. Yes.

22 Q. So it is framed as an invitation  
23 from the Saugeen Indians, including Chief Wawanosh,  
24 who considered himself a Saugeen Chief; is that  
25 correct?

10:52:07 1 A. Yes.

10:52:08 2 Q. Thank you. And it is said that  
10:52:14 3 unless the Anishnawbek moved to the peninsula,  
10:52:16 4 these are not the words used but a description of  
10:52:18 5 it, the SON would have to sell their lands.

10:52:22 6 Now, I would like to note one more  
10:52:24 7 thing about it on page 3, please, of the PDF, which  
10:52:27 8 is halfway down, and in the middle there, "This  
10:52:30 9 location [...]", he is talking about the Saugeen  
10:52:35 10 Peninsula, I think; is that right?

10:52:36 11 A. Yes.

10:52:36 12 Q. "This location is far  
10:52:38 13 preferable to an island, because we  
10:52:40 14 can have roads from our settlements,  
10:52:42 15 the means of defence or flight in  
10:52:44 16 case of war at any future period."

10:52:46 17 And so here the authors of the  
10:52:53 18 document, the signatories or the supporters of the  
10:52:56 19 document are acknowledging the importance to them  
10:52:58 20 of roads to any settlements that they might have on  
10:53:02 21 the peninsula or that might be built on the  
10:53:05 22 peninsula; is that correct?

10:53:05 23 A. Yes.

10:53:06 24 Q. So these documents that we have  
10:53:08 25 looked at, these exhibits, demonstrate prior to

1 Treaty 45 1/2 a Crown desire to make Manitoulin  
2 Island the place for First Nations to go to live;  
3 is that correct?

4 A. Well, a place, yes.

5 Q. Yes, and they demonstrate at least  
6 some Anishnawbek desire to make the Saugeen  
7 Peninsula a place where First Nations could go to  
8 live?

9 A. Yes.

10 Q. And --

11 A. Well, the Saugeen lands. I don't  
12 think they specify the peninsula. At this time,  
13 the Saugeen still have all of their territory, so  
14 that would include all the lands south of the  
15 peninsula as well.

16 Q. And there was in government, First  
17 Nations and religious discussion a substantial  
18 consideration of Saugeen lands as a place for the  
19 First Nations to go and live?

20 A. Yes.

21 Q. So could we turn to Treaty 45 --  
22 well, I'll direct my questions now to Treaty 45 1/2  
23 itself, and in your report you say, and I don't  
24 want you to turn it up, but you say at page 5 that  
25 Treaty 72 was a violation of Treaty 45 1/2?

1 A. Yes.

2 Q. And to be clear, it is not

3 Ontario's position that Treaty 72 was a breach of

4 Treaty 45 1/2, but if Treaty 72 was a breach of

5 Treaty 45 1/2, then the SON knew that Treaty 72 was

6 contrary to Treaty 45 1/2, didn't they?

7 A. Well, I certainly think they would

8 have seen it as a betrayal of the promise to

9 protect their land from white encroachment.

10 Q. Then at the Treaty 72 Council, the

11 Treaty Council in October 1854, didn't Oliphant and

12 the SON representatives each intend to absolve the

13 Crown of that engagement under Treaty 45 1/2 to

14 protect it against the encroachment of the whites?

15 A. I believe Oliphant was -- well, we

16 don't know exactly what Oliphant knew. He had not

17 been in the country very long. I believe he had

18 been Superintendent General for four months or

19 something, so I don't know for sure what he knew

20 about previous treaties, but certainly he was

21 trying to get almost all of the peninsula for the

22 Crown.

23 The intention of the Saugeen Ojibway we

24 don't know exactly, except that we know that he had

25 expressed a great deal of opposition previously to

10:56:33 1 surrendering the whole peninsula.

10:56:34 2 Q. Would the SON have raised Treaty  
10:56:38 3 45 1/2 at the October Treaty Council?

10:56:41 4 A. Well, unfortunately, of course, we  
10:56:43 5 don't have a lot of information about what was said  
10:56:46 6 at that Council. We only have Oliphant's report  
10:56:49 7 and his later memoir, so we don't know exactly what  
10:56:53 8 was said. It seems possible they would have raised  
10:56:55 9 it.

10:56:55 10 Q. Well, if it was sufficiently  
10:56:57 11 important to them, do you think they would have?

10:57:01 12 A. I can only speculate, of course.  
10:57:02 13 It seems likely that or at least reasonable that  
10:57:05 14 they would have, but I don't know what they said.

10:57:07 15 Q. In your testimony, you were asked  
10:57:18 16 about whether Treaty 45 1/2 made the Saugeen  
10:57:21 17 Peninsula into a reserve to which other First  
10:57:24 18 Nations could relocate, and this is an important  
10:57:29 19 point, isn't it, the question of whether or not the  
10:57:31 20 Saugeen Peninsula was a reserve to which other  
10:57:35 21 First Nations could relocate? It is an  
10:57:38 22 historically important point? I don't mean for the  
10:57:42 23 purposes of this litigation.

10:57:45 24 Well, if you are thinking about it, let  
10:57:47 25 me ask you -- I will ask a couple of further



10:57:53 1 questions and we can come back to it.

10:57:55 2 Let's assume that the Treaty 45 1/2 deal  
10:57:59 3 was that the Crown would protect the Saugeen  
10:58:04 4 Peninsula and that the peninsula would be a reserve  
10:58:06 5 for all First Nations. Let's assume that that was  
10:58:08 6 the Treaty 45 1/2 agreement.

10:58:12 7 If that was the deal and other First  
10:58:17 8 Nations did not move to the peninsula, then in  
10:58:22 9 1854, October 1854, it would have been easier for  
10:58:26 10 the Crown to argue that it no longer had an  
10:58:31 11 obligation to protect the peninsula; do you agree  
10:58:33 12 with that?

10:58:34 13 A. Treaty 45 1/2 says nothing about  
10:58:38 14 other groups moving to the Saugeen Peninsula.

10:58:41 15 Q. Okay, so just stop for a second,  
10:58:42 16 please. I'm asking you to assume that Treaty 45 1/2  
10:58:48 17 said that the Crown would protect the Saugeen  
10:58:52 18 Peninsula and that peninsula would be a reserve for  
10:58:54 19 other First Nations. That is our assumption and  
10:58:56 20 that is the assumption that I am basing my question  
10:58:58 21 on, and my question is --

10:58:59 22 A. But I don't agree with that  
10:59:00 23 assumption.

10:59:01 24 Q. I am asking you to accept the  
10:59:04 25 assumption, please, and then respond to my

10:59:08 1 question, answer my question.

10:59:09 2 If that was the deal and other First  
10:59:14 3 Nations did not move to the peninsula, then it  
10:59:17 4 would have been easier for the Crown to argue that  
10:59:21 5 it no longer had an obligation to protect the  
10:59:24 6 peninsula?

10:59:29 7 THE COURT: Yes, Ms. Guirguis?

10:59:31 8 MS. GUIRGUIS: Your Honour, that  
10:59:32 9 question is highly speculative or it calls for a  
10:59:35 10 lot of speculation. The witness has already said  
10:59:36 11 that he doesn't agree with that assumption.

10:59:38 12 THE COURT: Well, this expert witness  
10:59:40 13 is obligated to accept factual assumptions, and I  
10:59:43 14 point that out to him particularly, since he seems  
10:59:46 15 disinclined to doing it.

10:59:47 16 Now, obviously, at the end of this  
10:59:49 17 trial, if a contrary assumption is unproved, that  
10:59:53 18 the evidence based on that assumption will be of no  
10:59:57 19 interest to me. But it is customary and  
11:00:00 20 appropriate to put contrary factual assumptions to  
11:00:03 21 an expert witness, require that he accept them and  
11:00:06 22 ask them questions about how that might affect  
11:00:09 23 their opinion.

11:00:10 24 That is the way the process works. I  
11:00:13 25 am sure this witness is capable of entertaining

1 alternative factual assumptions, whether he agrees  
2 with them or not.

3 Please go ahead.

4 MS. GUIRGUIS: Thank you, Your Honour.

5 BY MR. OGDEN:

6 Q. Would you like me to repeat the  
7 question?

8 A. No, I think I understand the  
9 question.

10 Your Honour, I would just like to say  
11 that this is the first time that I have been asked  
12 a counter-factual question, so I was not aware that  
13 that was --

14 THE COURT: I have no problem with the  
15 fact you could have been unaware of that, sir. It  
16 is our job, and counsel is trying to do his job  
17 and I know you are trying to fulfil your  
18 responsibilities as well. But it is not an unusual  
19 practice and it is really the only way we can  
20 marshal forward in these trials with experts where  
21 there may be disagreements about what the  
22 underlying facts might be, all right. So this is  
23 how we do it.

24 Please go ahead.

25 BY MR. OGDEN:

11:01:07 1 Q. So it might be helpful if I repeat  
11:01:09 2 the question, I think.

11:01:11 3 A. Yes.

11:01:11 4 Q. So I am asking you to assume that  
11:01:20 5 Treaty 45 1/2 said that the Crown would protect the  
11:01:22 6 Saugeen Peninsula and that the peninsula would be a  
11:01:26 7 reserve for other First Nations.

11:01:29 8 And if that was the deal and other  
11:01:31 9 First Nations did not move to the peninsula, then  
11:01:36 10 in October 1854 it would have been easier for the  
11:01:39 11 Crown or the Crown would have had a stronger  
11:01:41 12 argument to make that it no longer had an  
11:01:45 13 obligation to protect the peninsula; is that  
11:01:49 14 correct?

11:01:49 15 A. Registering again that I believe  
11:01:57 16 that to be counter-factual, as I have stated, no, I  
11:02:02 17 do not believe that that would justify the Crown in  
11:02:07 18 ceasing to protect the peninsula.

11:02:09 19 Q. Well, I am not asking whether it  
11:02:18 20 would justify the Crown. I am asking you whether  
11:02:20 21 it would make their argument to the SON easier.  
11:02:25 22 Would it be easier for them to argue that they no  
11:02:30 23 longer had an obligation to protect the peninsula?

11:02:33 24 A. I am not sure what you mean by  
11:02:37 25 "easier".

11:02:37 1 Q. In the process of discussing and  
11:02:39 2 negotiating, would they have had weight to a  
11:02:45 3 proposition, more weight to a proposition that they  
11:02:48 4 no longer had an obligation to protect the  
11:02:49 5 peninsula if other First Nations did not go?

11:02:53 6 A. I do not believe so.

11:02:56 7 Q. Well, let me ask the converse  
11:03:03 8 proposition.

11:03:04 9 You have said in your testimony that  
11:03:07 10 Treaty 45 1/2 did not make the peninsula into a  
11:03:11 11 reserve for all First Nations. Would it not then  
11:03:14 12 be more difficult for the Crown to argue that it no  
11:03:18 13 longer had an obligation to protect the peninsula?

11:03:21 14 A. I'm sorry, can you repeat the  
11:03:26 15 question?

11:03:26 16 Q. Sure. If Treaty 45, as you have  
11:03:33 17 said, did not make the peninsula into a reserve for  
11:03:36 18 all First Nations, it would be harder for the Crown  
11:03:42 19 to argue that it no longer had an obligation to  
11:03:45 20 protect the peninsula? The Crown's argument that  
11:03:49 21 it no longer had an obligation to protect the  
11:03:52 22 peninsula would carry less weight in treaty  
11:03:55 23 negotiations?

11:03:56 24 A. Perhaps. I mean, obviously it  
11:04:04 25 would mean they didn't have that argument to make.

11:04:06 1 They wouldn't have an argument to make on the basis  
11:04:08 2 of people not moving there.

11:04:10 3 Q. So this is an important point, and  
11:04:16 4 I know you have been quite strong about what your  
11:04:18 5 opinion is on this, because it is an important  
11:04:20 6 point as to whether or not that is what Treaty 45  
11:04:25 7 1/2 did; correct? Yes?

11:04:27 8 A. I think it is somewhat important.

11:04:28 9 Q. Well, it seems pretty important.  
11:04:31 10 Is it important or not important?

11:04:34 11 A. My understanding of Treaty 45 1/2  
11:04:38 12 is that there were three promises or three terms --

11:04:41 13 Q. Well, sorry, is it an important  
11:04:45 14 point or not an important point as to whether or  
11:04:48 15 not Treaty 45 made the Saugeen Peninsula into a  
11:04:51 16 reserve for other First Nations to relocate to?  
11:04:58 17 Does it matter?

11:04:59 18 A. I don't find it that important.

11:05:06 19 Q. Well, you have said in your  
11:05:11 20 testimony that, and you have said again today,  
11:05:14 21 Treaty 45 1/2 did not make the Saugeen Peninsula  
11:05:17 22 into a reserve for all First Nations, and I want to  
11:05:24 23 be clear on that point. But I would like to read  
11:05:29 24 out to you what you had said in July, the 22nd of  
11:05:34 25 July, when you were asked this question about

1 Treaty 45 1/2 and the Saugeen Peninsula. You said:

2 "And, of course, the Manitoulin  
3 Island Treaty is very unusual in  
4 that way. I'm trying to think if  
5 there's any other -- I can't think  
6 of any other treaty in Canada that  
7 had that same function, where  
8 they -- the Indigenous people  
9 surrendered it to the Crown but to  
10 be held for all Indigenous people  
11 who wanted to move there.

12 In my opinion, Surrender number  
13 45 1/2 was a completely different  
14 arrangement."

15 And then you said -- and that was page  
16 3066, line 12, for reference.

17 And then on page 3067, line 10:

18 "Based on my review of the  
19 documents, I don't agree with  
20 [Dr. Reimer's] opinion that the  
21 Saugeen Peninsula was made into a  
22 general reserve by Surrender 45 or  
23 Treaty 45 1/2.

24 That is what the Manitoulin  
25 Island Treaty, Treaty 45, did for

11:06:35 1 Manitoulin Island, but Treaty 45 1/2  
11:06:38 2 does not state that the Saugeen  
11:06:40 3 Peninsula is being made into a  
11:06:41 4 general reserve, nor do I believe it  
11:06:44 5 says anything about other First  
11:06:45 6 Nations people relocating there."  
11:06:47 7 So that was your testimony.  
11:06:50 8 You said, as you have said here, that  
11:06:53 9 Treaty 45 made Manitoulin Island into a reserve for  
11:06:56 10 all First Nations and was a completely different  
11:06:59 11 arrangement than Treaty 45 1/2.  
11:07:03 12 Now, could we turn to page 5 of your  
11:07:06 13 report, please, and this is page 6 of the exhibit,  
11:07:20 14 PDF page 6. At the top it says:  
11:07:23 15 "Finally, Treaty 72 was a  
11:07:24 16 violation of Treaty 45 1/2, the 1836  
11:07:27 17 agreement in which the Crown  
11:07:29 18 promised to protect the Saugeen  
11:07:31 19 Peninsula forever and preserve it as  
11:07:32 20 a place of refuge for Aboriginal  
11:07:34 21 people."  
11:07:40 22 THE COURT: I am looking for your  
11:07:41 23 quote, Mr. Ogden.  
11:07:46 24 MR. OGDEN: At the very top, Your  
11:07:49 25 Honour.



1 THE COURT: Okay.

2 BY MR. OGDEN:

3 Q. And then to page 2 of your report,  
4 which is the first page of it, page 3 I think of  
5 the PDF, the "Executive Summary", the first  
6 paragraph, the last sentence of the first paragraph  
7 of your report:

8 "The 1836 treaty, known as  
9 Treaty 45 1/2, also included an  
10 agreement to make the territory a  
11 place of refuge for other Indigenous  
12 groups facing the resettlement of  
13 their lands by outsiders."

14 So this question, which was of  
15 sufficient importance at least to be in the first  
16 paragraph of your report, is one on which you have  
17 changed your opinion, is that correct, between  
18 writing the report and giving your testimony?

19 A. Well, actually, clearly I  
20 contradicted myself, and first I said it did  
21 include that agreement and then I said it didn't.  
22 But that was obviously an error.

23 But my opinion --

24 Q. Sorry, which one is an error,  
25 please?

11:09:08 1 A. I --

11:09:10 2 Q. Which opinion is an error?

11:09:12 3 A. The first one. I believe that the  
11:09:14 4 text says nothing about making it a place -- sorry,  
11:09:19 5 the text of the Treaty saying nothing about other  
11:09:23 6 people moving to the territory.

11:09:24 7 Q. Is there or are there specific  
11:09:36 8 documents in the historical record you can point to  
11:09:39 9 that caused you to change your opinion?

11:09:40 10 A. Primarily the Treaty text itself.

11:09:48 11 Q. Any other documents?

11:09:51 12 A. Well, no other documents are  
11:10:06 13 coming to mind, but I mean, obviously I have looked  
11:10:09 14 at a lot of documents around the time of the Treaty  
11:10:12 15 and subsequently. There are documents showing that  
11:10:19 16 the Saugeen Ojibway wished to have other groups  
11:10:22 17 move to the territory, but I can't think of any  
11:10:25 18 documents that state that that was a condition or a  
11:10:29 19 term of Treaty 45 1/2.

11:10:32 20 Q. So did you make this change as a  
11:10:36 21 result of discussions with Counsel for the SON?

11:10:39 22 A. No, actually, we didn't discuss  
11:10:42 23 this at all. It is only just today that I realize  
11:10:46 24 that the contradiction is here.

11:10:49 25 But I wrote this report six years ago,

11:10:53 1 and this is the process of research, that you think  
11:10:57 2 about things and turn them over in your mind longer  
11:11:06 3 than in preparation for testimony. Before I began  
11:11:12 4 testifying, I refreshed my memory and looked at  
11:11:14 5 more documents -- or looked back at the key  
11:11:14 6 documents, including the Treaty text, and so the  
11:11:17 7 conclusion I have come to is that the Treaty is  
11:11:22 8 silent on this question of -- that Treaty 45 1/2  
11:11:28 9 says nothing about any other groups moving to the  
11:11:32 10 territory.

11:11:33 11 Q. I am going to ask you some  
11:11:40 12 questions about Treaty 45 1/2 and then move on --  
11:11:43 13 sorry, Treaty 45 and then move on to Treaty 45 1/2,  
11:11:50 14 and I am going to do that because, as you have said  
11:11:53 15 in your testimony, the SON representatives were  
11:11:55 16 clearly present when Bond Head made his statements  
11:12:00 17 about the reasons why the Ottawa and Ojibwe should  
11:12:06 18 surrender Manitoulin Island; is that correct?

11:12:08 19 A. Yes, it seems that way.

11:12:09 20 Q. And that is confirmed by the  
11:12:10 21 opening words of Treaty 45 1/2?

11:12:12 22 A. Correct.

11:12:13 23 Q. Which are, "You have heard the  
11:12:16 24 proposal I have just made to the Chippewas and  
11:12:20 25 Ottawas".

11:12:24 1 So I would like to turn up Exhibit  
11:12:27 2 1135, please. This has as the heading of it  
11:12:36 3 "Correspondence Respecting the Indians", but it is  
11:12:40 4 a collection of documents; this is an extract from  
11:12:41 5 a collection, isn't it?

11:12:44 6 A. Yes.

11:12:44 7 Q. And this contains there the report  
11:12:49 8 or the dispatch from Bond Head to Lord Glenelg, and  
11:12:56 9 also contains the Treaties, doesn't it?

11:12:58 10 A. Yes.

11:12:58 11 Q. So I am going to read out the text  
11:13:02 12 of what is known as the -- or what is known as the  
11:13:06 13 text of Treaty 45 and ask you about that speech.

11:13:18 14 And you will see the first paragraph:

11:13:22 15 "Since that Period [...]"

11:13:24 16 And it is referring to since the  
11:13:25 17 meeting in Niagara, which was 1764; is that right?

11:13:28 18 A. Yes.

11:13:29 19 Q. So:

11:13:30 20 "Since that Period various

11:13:32 21 Circumstances have occurred to  
11:13:33 22 separate from your Great Father many  
11:13:36 23 of his Red Children, and as an  
11:13:39 24 unavoidable Increase of White  
11:13:42 25 Population, as well as the Progress

1 of Cultivation, have had the natural  
2 Effect of impoverishing your Hunting  
3 Grounds, it has become necessary  
4 that new Arrangements should be  
5 entered into for the Purpose of  
6 protecting you from the  
7 Encroachments of the Whites.

8 In all Parts of the World Farmers  
9 seek for uncultivated Land as  
10 eagerly as you my Red Children hunt  
11 in your great Forest for Game. If  
12 you would cultivate your Land it  
13 would then be considered your own  
14 property in the same Way as your  
15 Dogs are considered among yourselves  
16 to belong to those who have reared  
17 them; but uncultivated Land is like  
18 wild Animals, and your Great Father,  
19 who has hitherto protected you, has  
20 now great Difficulty in securing it  
21 for you from the Whites, who are  
22 hunting to cultivate it.

23 Under these Circumstances I have  
24 been obliged to consider what is  
25 best to be done for the Red Children

11:14:38 1 of the Forest, and I now tell you my  
11:14:40 2 Thoughts.

11:14:41 3 It appears that these Islands, in  
11:14:44 4 which we are now assembled in  
11:14:46 5 Council, are, as well as those on  
11:14:49 6 the North Shore of Lake Huron, alike  
11:14:52 7 claimed by the English, the Ottawas,  
11:14:54 8 and the Chippewas."

11:14:56 9 And we'll skip that next paragraph  
11:14:58 10 beginning "I consider [...]" to:

11:15:02 11 "Are you therefore, the Ottawas  
11:15:05 12 and Chippewas, willing to relinquish  
11:15:06 13 your respective Claims to these  
11:15:08 14 Islands, and make them the Property  
11:15:10 15 (under your Great Father's Control)  
11:15:13 16 of all Indians whom he shall allow  
11:15:16 17 to reside on them? If so, affix  
11:15:19 18 your Marks to this my Proposal."

11:15:21 19 So I have some questions in relation to  
11:15:23 20 that text.

11:15:24 21 Your Honour, it is 11:15 for reference,  
11:15:26 22 but I can take a break or keep going. I am happy  
11:15:29 23 to keep going for a little while.

11:15:31 24 THE COURT: Yes, please go ahead.

11:15:33 25 BY MR. OGDEN:

11:15:34 1 Q. Do you agree that the following  
11:15:37 2 facts are key facts which Bond Head said are the  
11:15:41 3 reason a surrender was necessary? And if you would  
11:15:46 4 like, we can stop after -- well, I'll ask you to  
11:15:48 5 say yes after each of them, and if you want me to  
11:15:52 6 explain more, I will.

11:15:53 7 First, the unavoidable increase in  
11:15:56 8 European settlement?

11:15:57 9 A. Yes.

11:15:57 10 Q. Impoverishment of Anishinaabe  
11:16:01 11 hunting grounds?

11:16:02 12 A. Yes.

11:16:02 13 Q. The Western European conception of  
11:16:05 14 property as tied to labour, such as cultivation?

11:16:07 15 A. Yes.

11:16:08 16 Q. And I am going to say this is a  
11:16:09 17 Lockean conception?

11:16:11 18 A. Very much so.

11:16:12 19 Q. The state of difficulty that the  
11:16:14 20 Crown has in protecting land that is not  
11:16:17 21 cultivated?

11:16:17 22 A. Yes.

11:16:17 23 Q. Now, some particular questions  
11:16:21 24 about that. Would you agree that as far as Bond  
11:16:25 25 Head understood -- that is, I am not asking you

11:16:31 1 what the law was; I am asking you as far as Bond  
11:16:34 2 Head understood the laws to be in 1836 -- that the  
11:16:36 3 law, English law in what is now Canada protected  
11:16:42 4 cultivated lands from intrusion by third parties  
11:16:46 5 but did not protect Indian hunting grounds from  
11:16:51 6 intrusion by third parties?

11:16:53 7 A. I can only speculate, of course,  
11:16:57 8 because I don't know what Bond Head believed about  
11:17:01 9 the law, but what he says here is not that the law  
11:17:08 10 does not protect it. What he says is that the  
11:17:10 11 government has difficulty protecting it, which  
11:17:14 12 appears to me to imply that he thinks that the  
11:17:17 13 government should protect it but it can't.

11:17:18 14 Q. So could we go to Exhibit 1576,  
11:17:24 15 please, which is Bond Head's memoir "The Emigrant";  
11:17:31 16 are you familiar with the memoir?

11:17:32 17 A. Yes.

11:17:32 18 Q. So --

11:17:34 19 A. Excuse me, I'm sorry, I am not --  
11:17:36 20 I can't remember if I have read it or not. I  
11:17:38 21 probably did.

11:17:39 22 Q. Okay. At page 29 of the PDF,  
11:17:43 23 please, which is page 148 of the document, and we  
11:17:49 24 could go up a bit if you would like, but I don't  
11:17:51 25 know if you remember it well enough to know that he



1 is talking about his attendance at the Treaty  
2 Council on Manitoulin. Do you accept that that is  
3 what he is talking about here?

4 A. Here, yes, it appears so.

5 Q. So the words here that he says,  
6 and this is his memoir written awhile after:

7 "I assured them that their  
8 titles to their present  
9 hunting-grounds remained, and ever  
10 would remain, respected and  
11 undisputed; but that, inasmuch as  
12 their white brethren had an equal  
13 right to occupy and cultivate the  
14 forest that surrounded them, the  
15 consequence inevitably would be to  
16 cut off their supply of wild game,  
17 as I have already described."

18 So at least when he wrote this book, he  
19 was talking about rights and believes that the law,  
20 the English law, did not protect the hunting  
21 grounds from intrusion by non-Indigenous people; is  
22 that correct?

23 A. It appears so.

24 Q. And do you accept that that would  
25 have been his view in 1836, his view of the law?

11:19:25 1 A. What is the date of this memoir?

11:19:31 2 Q. It is the second edition, 1846.

11:19:34 3 A. The second edition. So we don't

11:19:38 4 know the date of the first. I think it is

11:19:41 5 reasonable to suppose that he had that same view in

11:19:45 6 1836. We can't know for sure.

11:19:48 7 Q. To go back to the speech and the

11:19:53 8 key facts, and he stated and the next one I would

11:19:57 9 ask you whether you accept is that -- there is a

11:20:02 10 reference, as we have seen, to one of the purposes

11:20:04 11 of Treaty 45 being protecting you from the

11:20:07 12 encroachment of the whites, and he states that as a

11:20:12 13 key fact, the need or the purpose of protection

11:20:16 14 from the encroachment of the whites?

11:20:18 15 A. In Treaty 45?

11:20:23 16 Q. 45, yes.

11:20:24 17 A. I'm sorry, could you just scroll

11:20:25 18 up? I have read this enough times that I should

11:20:28 19 have it memorized, but I don't.

11:20:30 20 Q. The top paragraph.

11:20:34 21 A. [Witness reviews document.]

11:20:34 22 Yes.

11:20:34 23 Q. And that is not exactly the

11:20:37 24 same words, but largely the same words as in

11:20:39 25 Treaty 45 1/2?

11:20:40 1 A. Yes, very similar.

11:20:41 2 Q. And the next fact on which he  
11:20:46 3 based his proposal was that cultivated land would  
11:20:49 4 be considered property; do you accept that?

11:20:55 5 A. Yes.

11:20:55 6 Q. And when he is talking about  
11:20:57 7 property, he is not talking about law between  
11:21:00 8 nations. He is talking about protection under  
11:21:03 9 English domestic law; is that correct? We can find  
11:21:10 10 the quote, and it is down at the bottom:

11:21:26 11 "[...] willing to relinquish  
11:21:29 12 your respective Claims to these  
11:21:30 13 Islands and make them the Property  
11:21:34 14 (under your Great Father's Control)  
11:21:35 15 of all Indians whom he shall allow  
11:21:37 16 to reside on them?"

11:21:39 17 So when he is talking about property,  
11:21:40 18 he is talking about property under English law; is  
11:21:44 19 that correct?

11:21:45 20 A. Possibly. I don't -- I am not  
11:21:52 21 trying to be contrary. I am just not sure if at  
11:21:56 22 this time he would have considered this a  
11:21:58 23 nation-to-nation agreement or whether he would have  
11:22:00 24 viewed the Ottawas and Chippewas as subjects.

11:22:05 25 Q. And in the last paragraph which we

1 are in, the words he is talking about "make these  
2 islands the Property (under your Great Father's  
3 Control) of all Indians whom he shall allow to  
4 reside on them", Bond Head was not promising here,  
5 was he, to put the interests of the Ottawa and  
6 Ojibwe signatories above the Great Father's  
7 interests when considering who should come on to  
8 the land, was he?

9 A. I'm sorry, I'm not sure if -- I'm  
10 not clear exactly what you are asking me.

11 Q. Well --

12 A. I --

13 Q. No, I'll rephrase it. I'll  
14 rephrase the question.

15 When Bond Head said that he would make  
16 the property under the Great Father's control and  
17 he said "of all Indians whom he shall allow to  
18 reside on them", in particular when he is talking  
19 about the Great Father's control, he is not saying  
20 that the Ottawa and Ojibwe signatories would have a  
21 greater say than the Great Father over who comes to  
22 live on the land?

23 A. No, he is saying that it would be  
24 under the Great Father's control.

25 Q. And by that he means that it is

11:23:48 1 the Great Father's decision?

11:23:50 2 A. It could mean that. It may imply  
11:23:56 3 that. I just say that because it is a fairly  
11:24:04 4 general phrase, but his perspective would have been  
11:24:09 5 that the British Monarch was the supreme authority.

11:24:13 6 Q. And would get to decide who came  
11:24:14 7 to live on the islands?

11:24:15 8 A. He doesn't state that directly,  
11:24:26 9 but he does state that the Great Father will have  
11:24:29 10 control.

11:24:29 11 Q. But it says "whom he shall allow  
11:24:31 12 to reside on them"?

11:24:33 13 A. Right, okay, yes.

11:24:34 14 Q. And the phrase "your Great  
11:24:36 15 Father's control", doesn't that mean that the Great  
11:24:45 16 Father decides or determines what factors are  
11:24:51 17 important in determining who comes on to the  
11:24:58 18 islands?

11:24:59 19 A. Yes, I think that is a reasonable  
11:25:01 20 interpretation, with that end of the sentence "whom  
11:25:06 21 he shall allow to reside on them".

11:25:09 22 Q. So you have said in your testimony  
11:25:12 23 that the written text of a treaty does not always  
11:25:21 24 capture the full agreement between the parties?

11:25:24 25 A. Yes.

11:25:24 1 Q. And you agree that one needs to  
11:25:27 2 look at the full record of negotiations to see what  
11:25:30 3 additional promises were made?

11:25:31 4 A. Yes.

11:25:32 5 Q. And also to see if that record  
11:25:36 6 provides additional insights into the promises made  
11:25:39 7 in the text?

11:25:40 8 A. Yes.

11:25:40 9 Q. And there were a couple of  
11:25:44 10 examples: Bond Head's oral promise to protect the  
11:25:48 11 SON's fisheries?

11:25:49 12 A. Yes.

11:25:50 13 Q. And the absence in the Treaty 45  
11:25:55 14 text of a promise of an annuity?

11:25:57 15 A. Correct.

11:25:57 16 Q. Could we turn, please, to Exhibit  
11:26:12 17 1126, and this is a document you went to in your  
11:26:18 18 testimony. This is the account in the Christian  
11:26:23 19 Guardian newspaper, although this is a  
11:26:27 20 reproduction, I believe. Is this a reproduction?

11:26:28 21 A. Yes, it is, yes.

11:26:29 22 Q. It is the accounts of the  
11:26:30 23 Methodist missionary James Evans who attended the  
11:26:35 24 Treaty 45 and Treaty 45 1/2 Councils; is that  
11:26:39 25 correct?

11:26:39 1 A. Yes.

11:26:39 2 Q. And it is a critical account,  
11:26:41 3 isn't it?

11:26:41 4 A. Yes.

11:26:41 5 Q. So could we go to PDF page 9 then,  
11:26:51 6 please, which is page 2494 at the top of the  
11:26:54 7 document, the second paragraph there, "The Indians  
11:27:01 8 [...]", on the right-hand side:

11:27:03 9 "The Indians were now called to  
11:27:05 10 a Council [...]" -- and there is an  
11:27:08 11 insert there.

11:27:08 12 "The Indians were now called to a  
11:27:10 13 Council and were, as usual, ready to  
11:27:12 14 attend. Here the Ottawas and  
11:27:13 15 Chippewas, each of whom claimed the  
11:27:16 16 Munnedoolin Island, relinquished the  
11:27:21 17 same on the condition that the  
11:27:23 18 Governor should secure it to both  
11:27:24 19 and their heirs forever."

11:27:28 20 And this appears to be an oral promise  
11:27:30 21 that Bond Head made to the Ottawa and the Ojibwe in  
11:27:32 22 the Treaty 45 negotiations, doesn't it? Or sorry,  
11:27:35 23 this appears to be a record of an oral promise made  
11:27:38 24 by Bond Head to the Ottawa and Ojibwe in the Treaty  
11:27:42 25 45 negotiations?

11:27:43 1 A. Yes.

11:27:50 2 MR. OGDEN: Your Honour, I think it  
11:27:51 3 might be -- well, actually, I have a couple more  
11:27:57 4 questions, a few more questions which I think we  
11:27:59 5 can deal with before the break.

11:28:01 6 BY MR. OGDEN:

11:28:02 7 Q. The Treaty 45 concluded and Bond  
11:28:04 8 Head turned his attention to the Saugeen  
11:28:06 9 Anishnawbek. At the Treaty 45 1/2 negotiations, the  
11:28:10 10 initial proposal that Bond Head made to the SON was  
11:28:13 11 that the SON should surrender all their lands; is  
11:28:17 12 that right?

11:28:17 13 A. Yes.

11:28:17 14 Q. And that was including the  
11:28:18 15 peninsula?

11:28:19 16 A. Yes.

11:28:19 17 Q. And they proposed that the Saugeen  
11:28:22 18 would join all Anishinaabe on Manitoulin Island,  
11:28:27 19 the one he had just secured in Treaty 45?

11:28:29 20 A. Yes.

11:28:31 21 Q. And the SON came back and said,  
11:28:33 22 they countered with a proposal that they wanted to  
11:28:35 23 retain the peninsula and surrender the lands to the  
11:28:38 24 south of it?

11:28:38 25 A. Yes.



11:28:39 1 Q. And that proposal became  
11:28:42 2 Treaty 45 1/2?  
11:28:43 3 A. Yes.  
11:28:46 4 MR. OGDEN: Okay, well, those are my  
11:28:48 5 questions before the break, Your Honour.  
11:28:50 6 THE COURT: 20 minutes.  
11:28:58 7 -- RECESSED AT 11:29 A.M.  
11:51:50 8 -- RESUMED AT 11:53 A.M.  
11:53:47 9 THE COURT: Just wait for a moment,  
11:53:48 10 please.  
11:53:51 11 MR. OGDEN: Yes.  
11:53:51 12 THE COURT: For some reason, I have a  
11:53:53 13 blank screen, which is not comforting.  
11:54:01 14 All right, please go ahead.  
11:54:02 15 BY MR. OGDEN:  
11:54:06 16 Q. Welcome back, Professor.  
11:54:09 17 A. Thank you.  
11:54:09 18 Q. In your report you have set out  
11:54:11 19 the text of Treaty 45 1/2 and you cite -- well, I  
11:54:16 20 don't need you to turn to it, but it is at page 16,  
11:54:19 21 but you cite to this document that we just looked  
11:54:22 22 at, which is Exhibit 1135, the dispatch to Glenelg;  
11:54:27 23 is that correct?  
11:54:28 24 A. Yes.  
11:54:28 25 Q. So we have here page 124 of the

11:54:34 1 original and page 3 of the PDF, which is the speech  
11:54:40 2 on 9th August, 1836, by Bond Head to the Saugeen,  
11:54:47 3 which I will read:

11:54:49 4 "My Children,

11:54:49 5 You have heard the Proposal I  
11:54:51 6 have just made to the Chippewas and  
11:54:52 7 Ottawas, by which it has been agreed  
11:54:55 8 between them and your Great Father  
11:54:56 9 that these Islands (Manitoulin), on  
11:54:59 10 which we are now assembled in  
11:55:01 11 Council, should be made the Property  
11:55:03 12 (under your Great Father's Control)  
11:55:06 13 of all Indians whom he shall allow  
11:55:10 14 to reside on them.

11:55:13 15 I now propose to you that you  
11:55:16 16 should surrender to your Great  
11:55:17 17 Father the Sauking Territory you at  
11:55:21 18 present occupy, and that you should  
11:55:23 19 repair either to this Island or to  
11:55:26 20 that Part of your Territory which  
11:55:27 21 lies in the North of Owen's Sound,  
11:55:30 22 upon which proper Houses shall be  
11:55:32 23 built for you, and proper Assistance  
11:55:34 24 given to enable you to become  
11:55:36 25 civilized and to cultivate Land,

11:55:38 1 which your Great Father engages for  
11:55:40 2 ever to protect for you from the  
11:55:43 3 Encroachments of the Whites.

11:55:44 4 Are you therefore, the Sauking  
11:55:46 5 Indians, willing to accede to this  
11:55:50 6 Arrangement? If so, affix your  
11:55:51 7 Marks to this my Proposal."

11:55:53 8 That is the Treaty text as understood,  
11:55:58 9 isn't it?

11:55:58 10 A. Yes.

11:55:58 11 Q. Sorry, the one you rely on in your  
11:56:01 12 report?

11:56:01 13 A. Yes.

11:56:02 14 Q. So what we have here is a  
11:56:05 15 description of the areas in which the SON can live  
11:56:08 16 under the Treaty; they are the peninsula and  
11:56:10 17 Manitoulin Island, both of those, correct?

11:56:11 18 A. Yes.

11:56:14 19 Q. Yes, and there is a housing and  
11:56:18 20 cultivate land promise in respect of those lands?

11:56:22 21 A. Yes.

11:56:23 22 Q. And there is the engagement to  
11:56:29 23 protect forever as well that is there, and that  
11:56:35 24 appears to be also in relation to those lands; is  
11:56:39 25 that correct?

11:56:39 1 A. What is that, the engagement to  
11:56:42 2 protect?

11:56:43 3 Q. Yes.

11:56:44 4 A. Yes.

11:56:44 5 Q. And there we see there is a comma  
11:56:52 6 after "civilized and to cultivate Land", so it  
11:56:57 7 says:

11:56:57 8 "[...] civilized and to  
11:56:58 9 cultivate Land, which your Great  
11:57:01 10 Father engages for ever to protect  
11:57:02 11 [...]"

11:57:03 12 And so that comma there separates the  
11:57:06 13 housing and protect land promise from the  
11:57:11 14 engagement to protect forever; is that right?

11:57:13 15 A. I am just reading:

11:55:23 16 "[...] repair either to this  
11:55:24 17 Island or to that Part of your  
11:55:27 18 Territory which lies in the North of  
11:55:29 19 Owen's Sound, upon which proper  
11:55:31 20 Houses shall be built for you, and  
11:55:33 21 proper Assistance given to enable  
11:55:35 22 you to become civilized and to  
11:55:37 23 cultivate Land [...]"

11:57:40 24 Yes, the three terms are all separated  
11:57:43 25 as written here with commas. Of course, in the

1 spoken form the commas would not be present.

2 Q. So if you took away that comma  
3 then, the engagement to protect forever would run  
4 on from the housing and cultivate land promise; is  
5 that right? Well, to put it another way then, the  
6 engagement to protect forever would not refer back  
7 to the Manitoulin Island and the peninsula?

8 A. I think as spoken without -- the  
9 commas wouldn't be there, it would be ambiguous.

10 Q. Could we go to Exhibit 1132,  
11 please, which is the signed version of Treaty 45  
12 1/2, and if we go to the bottom, please, you can see  
13 the signatures and dodems and this struck-out the  
14 paragraph about hunting rights. In fairness, this  
15 is the signed version, or a copy of the signed  
16 version; correct?

17 A. Yes.

18 Q. And if we go up to the previous  
19 page, please, which is page 2 of the PDF, and  
20 enlarge, and down into the second paragraph, so we  
21 see there, and I am going to read the bottom two  
22 lines:

23 "[...] and proper assistance  
24 given to enable you", and the next  
25 page, please, "to become civilized

11:59:40 1 and to cultivate land which your  
11:59:44 2 Great Father engages for ever to  
11:59:46 3 protect for you from the  
11:59:47 4 encroachment of the whites."

11:59:51 5 [As read.]

11:59:51 6 So there is no comma there after  
11:59:57 7 "land", is there?

11:59:57 8 A. No, not on this copy.

12:00:00 9 Q. Well, this --

12:00:01 10 A. The original, yes.

12:00:02 11 Q. And so your evidence then is that  
12:00:03 12 original is ambiguous as to what land the  
12:00:06 13 encroachment of the white's engagement refers to?

12:00:09 14 A. Yes, and of course, what the  
12:00:11 15 Saugeen Ojibway would have heard was the  
12:00:14 16 translation into Ojibwe, Anishinaabemowin.

12:00:19 17 Q. And the Saugeen negotiators,  
12:00:54 18 already having heard the Treaty 45 speech and  
12:00:58 19 negotiations, will have understood the words or the  
12:01:03 20 translation from "encroachment of the whites" with  
12:01:06 21 reference to the discussion had between Bond Head  
12:01:10 22 and the Ottawa in Ottawa, the signatories; is that  
12:01:17 23 correct?

12:01:17 24 A. Possibly. Of course, what this  
12:01:20 25 speech obscures is that there were oral

1 negotiations that preceded it.

2 Q. But there were --

3 A. They had several meetings with  
4 the -- I'm sorry, he had several meetings with the  
5 Saugeen in which this matter was discussed.

6 Q. But the words "encroachment of the  
7 whites" are the same wording that it used in the  
8 purpose of Treaty 45?

9 A. Yes, in English.

10 Q. In English, correct --

11 A. Yes.

12 Q. -- which we assume was translated  
13 to them. Now, this encroachment of the whites in  
14 Treaty 45 was caused by the unavoidable increase in  
15 the European population which resulted in more  
16 cultivated lands and fewer hunting grounds, is that  
17 correct, Treaty 45?

18 A. Yes.

19 Q. So that indicates, doesn't it,  
20 that the SON knew what Bond Head meant by  
21 "encroachment of the whites"? He meant the same  
22 things as he had said in the preamble to Treaty 45?

23 A. Yes, assuming that the translator  
24 used the same language, that is a reasonable  
25 assumption.

12:02:33 1 Q. So Bond Head meant encroachment  
12:02:50 2 caused by unavoidable increase in European  
12:02:53 3 population, by the progress of cultivation which  
12:02:57 4 leads to loss of hunting, and so when he made his  
12:03:01 5 speech to the SON and said that the Crown engaged  
12:03:05 6 forever to protect land from the encroachment of  
12:03:08 7 the whites, it is more likely, isn't it, that he  
12:03:12 8 was speaking in relation to land which had been  
12:03:14 9 cultivated?

12:03:17 10 A. I don't believe that that is how  
12:03:18 11 the Saugeen Ojibway would have understood it.

12:03:20 12 Q. Is that how Bond Head would have  
12:03:23 13 meant it?

12:03:24 14 A. I would say the text is ambiguous.

12:03:27 15 Q. Yes, you have said that, but based  
12:03:36 16 on the other information we have about the facts  
12:03:39 17 that he gave in relation to Treaty 45 for the  
12:03:43 18 surrender and the meaning that that attributes to  
12:03:48 19 "encroachment of the whites" and the same wording  
12:03:50 20 used in Treaty 45, is it likely that Bond Head  
12:03:57 21 referred his engagement to protect the land to  
12:04:02 22 cultivated land?

12:04:03 23 A. It is possible that he meant his  
12:04:09 24 language to imply that. That said, if it really  
12:04:14 25 was only restricted to cultivated lands, that would



12:04:16 1 essentially be just reserve settlements, which is  
12:04:20 2 not how the Treaty was constructed. Cultivated  
12:04:24 3 lands would be a small area.

12:04:26 4 Q. Well, but that is circular, isn't  
12:04:35 5 it, because we are looking at how the Treaty is  
12:04:37 6 constructed. So it is difficult to say, well, that  
12:04:42 7 would be contrary to how the Treaty is constructed  
12:04:44 8 because we are trying to determine how the Treaty  
12:04:47 9 is constructed?

12:04:51 10 A. Okay, the Treaty -- the speech  
12:04:56 11 that we call the Treaty text says you shall repair  
12:05:03 12 either to the Great Manitoulin Island or to your  
12:05:06 13 lands north of Owen Sound, which would appear to  
12:05:10 14 signify the entire peninsula, and that is the area  
12:05:13 15 that was always treated as the Treaty territory  
12:05:19 16 thereafter.

12:05:21 17 So constructing the meaning of this  
12:05:25 18 text as restricting the protected lands to  
12:05:29 19 cultivated land doesn't -- is not consistent with  
12:05:33 20 the way the Treaty territory was treated thereafter  
12:05:38 21 by both government officials and the Saugeen  
12:05:43 22 Ojibway.

12:05:43 23 Q. But it is consistent with what we  
12:05:45 24 know Bond Head said to the attendees at Manitoulin  
12:05:47 25 Island?

12:05:47 1 A. I would still say that his  
12:05:51 2 language in this particular text is ambiguous. It  
12:05:54 3 could allow either interpretation.

12:05:55 4 Q. And do you have a view on which is  
12:06:01 5 the more likely interpretation, based on what you  
12:06:03 6 have said?

12:06:04 7 A. Yes, I believe that the more  
12:06:07 8 likely interpretation is that he meant the entire  
12:06:10 9 peninsula.

12:06:10 10 Q. And that is based on what happened  
12:06:12 11 afterwards or what happened at Manitoulin?

12:06:15 12 A. I would say both.

12:06:18 13 Q. Well, can we leave out what  
12:06:20 14 happened afterwards because Bond Head wasn't there  
12:06:22 15 afterwards, so who knew what Bond Head said.

12:06:28 16 Just relying on what Bond Head said in  
12:06:30 17 the Treaty 45 1/2 speech and the meaning that he  
12:06:33 18 gave to "encroachment of the whites", is it more  
12:06:36 19 likely that that is what he meant when he said  
12:06:38 20 "encroachment of the whites" to the Saugeen  
12:06:41 21 negotiators?

12:06:42 22 A. No, I don't think it is more  
12:06:44 23 likely, because if that is what he meant, he would  
12:06:47 24 essentially have only been setting aside small  
12:06:50 25 reserves, but instead the Treaty text says you

12:06:54 1 shall repair either to Manitoulin or to your lands  
12:06:59 2 lying north of Owen Sound.

12:07:01 3 Q. So could we go up a page, please,  
12:07:04 4 of the original Treaty document, and we can see the  
12:07:08 5 inserts, and we see written in on the fourth line  
12:07:13 6 from the bottom the word "either" after "should  
12:07:18 7 repair", and then on the end of that fourth line  
12:07:20 8 there is an asterisk and that refers to an asterisk  
12:07:23 9 on the left of the page which says:

12:07:30 10 "To that part of your territory  
12:07:33 11 which lies on the north of Owen  
12:07:35 12 Sound."

12:07:36 13 So the original text, without these  
12:07:42 14 inserts, reads:

12:07:44 15 "Surrender to your Great  
12:07:45 16 Father, the Sauking Territory you at  
12:07:48 17 present occupy and that you should  
12:07:50 18 repair to this island, upon which  
12:07:53 19 proper houses shall be built for you  
12:07:55 20 and proper assistance given to  
12:07:55 21 enable you to become civilized and  
12:07:57 22 to cultivate land which your Great  
12:07:59 23 Father engages forever to protect  
12:08:01 24 for you from the encroachment of the  
12:08:02 25 whites."

1 [As read.]

2 That is the original text, isn't it,  
3 before the inserts?

4 A. Yes, that was what Bond Head  
5 originally wanted to achieve.

6 Q. And that is the original proposal  
7 they made to the SON?

8 A. Yes, which they rejected.

9 Q. And then the inserts were added  
10 after that?

11 A. So it appears.

12 Q. So this explicit promise to build  
13 houses and provide assistance towards civilization,  
14 just to step aside from the Treaty for a minute,  
15 your testimony was that the SON were promised  
16 houses in the British style that would be  
17 considered superior and that this meant settled  
18 permanent housing; do you recall that?

19 A. Yes, I do.

20 Q. And later you were taken to  
21 Exhibit 1142 which recorded a statement by Chief  
22 Metigwob, the SON Chief, at the General Council on  
23 September 13, 1836. If we could go down to page 3  
24 of the PDF and we have the last -- he is describing  
25 what Bond Head had said to him:

12:09:35 1 "That after they had selected a  
12:09:37 2 place for their future settlement,  
12:09:39 3 he would be glad to see them at  
12:09:40 4 Toronto and then he would inform  
12:09:44 5 [one inserted word:] them more  
12:09:46 6 particularly what he would do for  
12:09:48 7 [them?] in the way of assisting them  
12:09:50 8 to [build?] log huts and furnishing  
12:09:53 9 them with farming utensils."

12:09:55 10 So doesn't this -- this contradicts  
12:09:59 11 your opinion that Bond Head promised houses in the  
12:10:04 12 British style, doesn't it?

12:10:06 13 A. Well, first of all, I would call  
12:10:08 14 log huts more a British style. Indigenous people  
12:10:10 15 did not live in log huts.

12:10:12 16 Secondly, what we see here, of course,  
12:10:16 17 is Metigwob's -- it is another translation, of  
12:10:22 18 course, of what Metigwob said in Anishinaabemowin,  
12:10:25 19 but I think what we are seeing here, of course, is  
12:10:31 20 a version of what the interpreter said so that the  
12:10:36 21 interpreter must have said something that meant  
12:10:39 22 something like log huts. And this is the problem  
12:10:42 23 with translations. And furnishing them with  
12:10:46 24 farming utensils, that of course looks like a  
12:10:49 25 narrower promise than teaching them to cultivate.

1 One can only assume that this reflects  
2 the way that the interpreter was able to render  
3 these concepts in Anishinaabemowin.

4 Q. But doesn't that problem apply to  
5 the determination that -- well, actually, no,  
6 sorry, I'm not going to ask that question.

7 I have a different question. There is  
8 no housing promise in the Treaty 45 text, is there?

9 A. I don't think so.

10 Q. And it is not clear from the  
11 documents why this housing promise is in the  
12 written Treaty 45 1/2 text but not the written  
13 Treaty 45 text, is it?

14 A. I agree, it is not clear.

15 Q. Now, this housing and assistance  
16 for civilization promise was in the original Treaty  
17 45 1/2 draft before reference to the peninsula was  
18 added, right?

19 A. Yes, so it appears.

20 Q. And so the promise did not result  
21 from negotiations with the Saugeen Indians?

22 A. So it appears.

23 Q. And so Bond Head's intention in  
24 his first proposal to the SON was that they, the  
25 Saugeen Indians, would get houses and the

12:12:18 1 civilization assistance on Manitoulin Island?

12:12:20 2 A. Yes, that was what he wanted.

12:12:22 3 Q. And there is nothing in the  
12:12:26 4 record to indicate that when Bond Head made that  
12:12:43 5 first proposal to the SON, he thought he was  
12:12:45 6 offering them anything greater than he had already  
12:12:49 7 offered to the Manitoulin Indians about housing and  
12:12:53 8 civilization on Manitoulin Island?

12:12:58 9 A. Probably not, although, as you  
12:13:01 10 noted, there is no mention of the houses in Treaty  
12:13:06 11 45. But we know that this all related to the  
12:13:11 12 planned settlement on Manitoulin Island, at  
12:13:16 13 Manitowaning, that had already been -- I think it  
12:13:20 14 had already been founded as an Anglican settlement.

12:13:26 15 Q. So there is nothing to indicate  
12:13:31 16 that Bond Head thought that the Saugeen Indians on  
12:13:34 17 Manitoulin would get housing and civilization  
12:13:36 18 assistance but the Manitoulin Indians on Manitoulin  
12:13:40 19 would not get that assistance?

12:13:41 20 A. There is nothing to indicate that.  
12:13:46 21 It is unclear.

12:13:47 22 Q. And there is nothing on the record  
12:13:51 23 to indicate that the Saugeen, on receiving Bond  
12:13:55 24 Head's initial proposal to live on Manitoulin  
12:13:59 25 Island, thought that the Crown would build them

12:14:01 1 houses and give them civilization assistance there  
12:14:05 2 but would not build houses or give civilization  
12:14:08 3 assistance to other First Nations who came to live  
12:14:12 4 there?

12:14:12 5 A. Sorry, can you just repeat the  
12:14:18 6 question?

12:14:18 7 Q. Certainly.

12:14:19 8 A. I just want to make sure I have it  
12:14:21 9 right.

12:14:21 10 Q. So there is nothing in the record  
12:14:23 11 to indicate that the Saugeen, on receiving Bond  
12:14:28 12 Head's initial proposal to live on Manitoulin  
12:14:31 13 Island, thought that the Crown would build them  
12:14:33 14 houses and give them civilization assistance there  
12:14:37 15 on Manitoulin Island but would not build houses or  
12:14:41 16 give civilization assistance for the parties to  
12:14:46 17 Treaty 45 or other First Nations who came to live  
12:14:49 18 there?

12:14:50 19 A. I agree, and the tendency was for  
12:14:53 20 Indigenous people to assume and/or argue for the  
12:14:58 21 same terms for everyone.

12:14:59 22 Q. So now we have - sorry, the next  
12:15:07 23 page, please - the engagement to protect forever  
12:15:13 24 for the encroachment of the whites, and you will  
12:15:18 25 recall that it was given in Treaty 45 as a purpose



12:15:23 1 for the making of Treaty 45, and notes that this  
12:15:25 2 engagement to the SON was in the original Treaty 45  
12:15:29 3 1/2 text before reference to the peninsula was  
12:15:32 4 added; is that correct?

12:15:33 5 A. So it appears.

12:15:34 6 Q. And so it was there in the first  
12:15:37 7 proposal to the SON?

12:15:38 8 A. It appears so.

12:15:39 9 Q. And the proposal was that they  
12:15:41 10 move to Manitoulin Island?

12:15:43 11 A. The initial proposal, yes.

12:15:45 12 Q. And it was not added as a result  
12:15:48 13 of hard negotiating by the Saugeen Indians or any  
12:15:56 14 negotiating body?

12:15:57 15 A. That would be true if this is the  
12:16:01 16 very first version that he wrote down, which we  
12:16:04 17 don't know for sure.

12:16:05 18 Q. Well, I think you have said that  
12:16:08 19 this is the proposal that he put to them and that  
12:16:12 20 the inserts were added after that proposal.

12:16:17 21 A. And this is why I have been saying  
12:16:19 22 "so it appears", just simply because we do know  
12:16:22 23 from other records that he proposed first that they  
12:16:25 24 move to Manitoulin Island, but I don't think the  
12:16:27 25 other sources get more specific about the other

1 terms of the original proposal.

12:16:33 2 Q. So his first proposal to the SON,  
12:16:45 3 assuming that this is the document that records his  
12:16:48 4 first proposal based on the fact that inserts were  
12:16:56 5 added to it referring to the Saugeen Peninsula, his  
12:17:04 6 first proposal was that the Crown would engage  
12:17:07 7 forever to protect the Saugeen from the  
12:17:09 8 encroachment of the whites on Manitoulin Island?

12:17:11 9 A. Yes, I think so.

12:17:13 10 Q. And there is nothing in the record  
12:17:14 11 to indicate that Bond Head originally intended that  
12:17:18 12 the Crown would protect Saugeen Indians on  
12:17:20 13 Manitoulin Island forever from the encroachment of  
12:17:24 14 the whites while the Ottawa and Ojibwe there under  
12:17:28 15 Treaty 45 would not be protected forever? I can  
12:17:32 16 repeat that if you would like.

12:17:35 17 A. Yes, please.

12:17:36 18 Q. There is nothing in the record to  
12:17:37 19 indicate that Bond Head originally intended that  
12:17:40 20 the Crown would protect Saugeen Indians on  
12:17:42 21 Manitoulin Island forever from the encroachment of  
12:17:46 22 the whites while the Ottawa and Ojibwe there under  
12:17:50 23 Treaty 45 would not be protected forever?

12:17:52 24 A. No, the text seemed to imply that  
12:17:56 25 they would all be protected from the encroachments

1 of the whites.

12:18:01 2 Q. And then we also have evidence of  
12:18:15 3 account, don't we, or record of an oral promise  
12:18:19 4 that the Manitoulin Island Indians would be  
12:18:21 5 protected forever?

12:18:22 6 A. That the Manitoulin Island --

12:18:25 7 Q. Yes.

12:18:26 8 A. I believe so.

12:18:26 9 Q. We went over that before the  
12:18:29 10 break.

12:18:30 11 A. Sorry, I had it in my mind that  
12:18:32 12 that was referring to the promise to the Saugeen  
12:18:35 13 Ojibway.

12:18:35 14 Q. The one before the break?

12:18:37 15 A. Yes.

12:18:37 16 Q. That is Exhibit 1126, PDF page 9,  
12:19:36 17 please, page 2494 of the original. Perhaps that is  
12:19:44 18 not the page, but it is page 9 of the PDF, the  
12:19:47 19 paragraph there:

11:27:03 20 "The Indians were now called to  
11:27:05 21 a Council and were, as usual, ready  
11:27:12 22 to attend. Here the Ottawas and  
11:27:13 23 Chippewas, each of whom claimed the  
11:27:16 24 Munnedoolin Island, relinquished the  
11:27:21 25 same on the condition that the

11:27:23 1 Governor should secure it to both  
11:27:24 2 and their heirs forever."

12:20:03 3 So that is the oral promise referring  
12:20:05 4 to Manitoulin Island, isn't it?

12:20:07 5 A. Yes.

12:20:08 6 Q. So there is nothing in the records  
12:20:09 7 to indicate that when Bond Head made the proposal  
12:20:14 8 to the Saugeen Indians to protect them forever on  
12:20:17 9 Manitoulin Island, he thought he was offering more  
12:20:19 10 to them than he had offered in Treaty 45 to the  
12:20:23 11 Manitoulin Indians?

12:20:25 12 A. I think that is correct.

12:20:27 13 Q. Nothing on the record to indicate  
12:20:31 14 that when Bond Head made that proposal, that the  
12:20:35 15 Saugeen Indians thought they were being offered  
12:20:37 16 more protection on Manitoulin Island than the  
12:20:40 17 Ottawa and Ojibwe parties to Treaty 45 were  
12:20:45 18 promised?

12:20:45 19 A. Probably not. I don't know that  
12:20:48 20 they thought about it much because they rejected  
12:20:50 21 the whole thing.

12:20:52 22 Q. Well, there is nothing on the  
12:20:53 23 record to indicate that they thought that?

12:20:54 24 A. Yes, correct.

12:20:58 25 Q. So the words of Treaty 45 -- and

12:21:00 1 could we go back to that, please. This is the  
12:21:19 2 wording of Treaty 45:

12:21:22 3 "Are you therefore, the Ottawas  
12:21:23 4 and Chippewas, willing to relinquish  
12:21:26 5 your respective Claims to these  
12:21:28 6 Islands, and make them the Property  
12:21:30 7 (under your Great Father's Control)  
12:21:33 8 of all Indians whom he shall allow  
12:21:35 9 to reside on them?"

12:21:36 10 Now, there is no indication that when  
12:21:39 11 Bond Head made his initial proposal to the SON, he  
12:21:44 12 intended or they understood that they would not on  
12:21:47 13 Manitoulin Island be subject to the Great Father's  
12:21:51 14 control, including control over whom he shall allow  
12:21:56 15 to reside there?

12:21:57 16 A. I would agree with that.

12:21:58 17 Q. And he was not proposing to the  
12:22:01 18 Saugeen that they would somehow be protected  
12:22:04 19 differently on Manitoulin Island than the Ottawa  
12:22:07 20 and Ojibwe parties to Treaty 45?

12:22:09 21 A. Yes, that seems correct.

12:22:12 22 Q. So we'll turn to Treaty 72,  
12:22:26 23 please, not the text but as a general topic.

12:22:30 24 On page 27 of your Treaties report,  
12:22:34 25 Exhibit 4118, the first paragraph:

1 "In short, obtaining the  
2 surrender of the entire Saugeen  
3 Peninsula seems to have been a  
4 crucial element of Oliphant's plan  
5 to fund the Indian Department wholly  
6 from Aboriginal monies, a plan that  
7 was likely to bring him significant  
8 career benefits."

9 To address the first part of that last  
10 clause, the plan, you are not suggesting that  
11 having a plan and acting on it was unusual or out  
12 of the ordinary for a civil servant, are you?

13 A. No.

14 Q. Or is somehow indicative of malign  
15 intent?

16 A. No.

17 Q. And to the second part, it is  
18 common, isn't it, for people to obtain significant  
19 career benefits from doing their job well?

20 A. Yes.

21 Q. And Oliphant was sent by his  
22 superior, Lord Elgin, wasn't he?

23 A. Yes, he was.

24 Q. And so he would have gone to seek  
25 a surrender regardless of whether obtaining one on

12:23:54 1 favourable terms might advance his career?

12:23:56 2 A. Yes, he would have been obliged to  
12:23:58 3 follow his orders.

12:24:00 4 Q. So not going would have been  
12:24:01 5 adverse to his career?

12:24:02 6 A. Indeed.

12:24:03 7 Q. Now, in Treaty 72 the SON were not  
12:24:11 8 promised an annuity but instead the market value of  
12:24:16 9 their surrendered land on the sale, minus a  
12:24:19 10 commission, essentially; is that correct? And  
12:24:27 11 carrying costs, perhaps, I guess if you want to add  
12:24:29 12 those.

12:24:30 13 A. I would have to look at the exact  
12:24:31 14 wording, but it sounds -- I think they were charged  
12:24:34 15 for the survey or something like that. I can't  
12:24:36 16 remember the exact arrangements.

12:24:37 17 Q. The point is that the amount was  
12:24:43 18 to be calculated from the market value of the lands  
12:24:46 19 and not as an annuity?

12:24:47 20 A. Correct.

12:24:48 21 Q. And that was unusual, wasn't it,  
12:24:49 22 for a surrender of hundreds of thousands of acres  
12:24:57 23 of Indian land in the mid-19th century?

12:25:00 24 A. Yes, that was unusual.

12:25:01 25 Q. And so relative to other Ontario

12:25:03 1 First Nations that made surrenders of a large  
12:25:09 2 scale, hundreds of thousands of acres, in the  
12:25:12 3 mid-19th century, the SON got a favourable  
12:25:17 4 financial deal in Treaty 72?

12:25:19 5 A. Both Anderson and Oliphant argued  
12:25:29 6 that they would obtain significant amounts of money  
12:25:34 7 from the sale of the lands, although it is also  
12:25:38 8 true that previous experience with such land sales  
12:25:45 9 did not justify the calculations that Oliphant  
12:25:51 10 argued about how much money they would obtain, for  
12:25:55 11 instance, his claim that 100,000 livres would be  
12:25:59 12 collected in five years or so.

12:26:01 13 Q. On the terms of the Treaty on the  
12:26:08 14 face of the promise, that money would be calculated  
12:26:13 15 on the market value of the land, the deal was more  
12:26:17 16 favourable than given to others, other Ontario  
12:26:21 17 First Nations at the time?

12:26:22 18 A. Here is why I am hesitating.  
12:26:33 19 Other groups at this time received annuity  
12:26:38 20 guarantees in perpetuity, so that was a defined and  
12:26:47 21 certain amount; whereas promising them the market  
12:26:51 22 value of the lands was a more speculative  
12:26:55 23 proposition, and so it was less certain, although  
12:27:00 24 they did paint it as a good deal. The officials  
12:27:04 25 did paint it as a good deal, yes.



12:27:06 1 Q. Okay. In addition to Oliphant's  
12:27:11 2 personal motivations, there were broader Crown  
12:27:17 3 interests at stake, weren't there?

12:27:18 4 A. Yes.

12:27:19 5 Q. And I will run through some and  
12:27:21 6 ask you whether you agree that these were Crown  
12:27:23 7 interests. Some of them you have covered, but I  
12:27:25 8 would like to address these questions, please.

12:27:31 9 The Crown needed land to respond to an  
12:27:38 10 increasing settler population?

12:27:41 11 A. Yes.

12:27:41 12 Q. And the need for land was real?

12:27:45 13 A. Certainly in their eyes, yes.

12:27:47 14 Q. And pressing?

12:27:48 15 A. In their eyes, yes.

12:27:50 16 Q. And urgent?

12:27:51 17 A. Sure.

12:27:52 18 Q. And of considerable import?

12:27:55 19 A. To the government, yes, and to the  
12:27:58 20 settlers, yes.

12:27:59 21 Q. And was the major colonial policy  
12:28:02 22 issue of the day?

12:28:03 23 A. Certainly one of them.

12:28:04 24 Q. Was it a major one?

12:28:05 25 A. Sorry, what does "it" refer to?

12:28:11 1 Q. The need for land.

12:28:12 2 A. Oh, the need for land in general,  
12:28:14 3 yes.

12:28:14 4 Q. And as you note in your testimony  
12:28:21 5 and specifically in your report at page 22, it is a  
12:28:26 6 very brief sentence:

12:28:27 7 "By far the largest area of  
12:28:30 8 unsurrendered arable land and timber  
12:28:32 9 lands in Upper Canada was the  
12:28:34 10 remaining territory of the Saugeen  
12:28:36 11 Ojibway."

12:28:37 12 A. Yes.

12:28:38 13 Q. In terms of population expansion,  
12:28:43 14 the Crown could not in the modern sense close the  
12:28:47 15 colony's borders, could it?

12:28:49 16 A. Are you suggesting that it was  
12:28:55 17 incapable of doing so?

12:28:56 18 Q. Of closing -- yes, of closing the  
12:29:01 19 colony's border. They couldn't close the colony's  
12:29:04 20 borders?

12:29:04 21 A. Why not?

12:29:06 22 Q. Well, I'm asking you. Do you  
12:29:09 23 agree with that proposition or not? In the modern  
12:29:16 24 sense, to close the borders in the modern sense,  
12:29:18 25 the Crown could not do that in the mid-19th

12:29:21 1 century?

12:29:21 2 A. So what do you mean "in the modern  
12:29:24 3 sense"? Do you mean stop acquiring land?

12:29:29 4 Q. No, I mean stop people from coming  
12:29:31 5 into the colony. Sorry, I don't mean expansion of  
12:29:37 6 the colony. I mean stop people from coming into  
12:29:39 7 the colony.

12:29:40 8 A. It had the authority to do so and  
12:29:43 9 theoretically would have had the power to do so,  
12:29:44 10 but it had no wish to.

12:29:46 11 Q. In practical terms, though,  
12:29:57 12 immigrants generally arrived as they were able and  
12:30:01 13 as they pleased?

12:30:03 14 A. That is how the system was set up.  
12:30:08 15 The Crown wanted to increase population and  
12:30:11 16 settlement and that was the whole plan.

12:30:15 17 Q. That is the nature of a colony,  
12:30:21 18 isn't it?

12:30:22 19 A. A settlement colony, yes.

12:30:24 20 Q. And on the other side of that  
12:30:31 21 equation were Indigenous peoples and their land  
12:30:34 22 interests, and the main threat to these land  
12:30:36 23 interests was from squatting by non-Indigenous  
12:30:40 24 settlers; is that correct?

12:30:45 25 A. Yes, although settlement in

12:30:46 1 general also affected their economies.

12:30:48 2 Q. Right, and specifically squatting  
12:30:50 3 on the Saugeen Peninsula was a real threat?

12:30:54 4 A. Yes.

12:30:54 5 Q. And was a pressing issue for the  
12:30:58 6 SON and for the Crown?

12:30:59 7 A. Certainly for the SON, yes.

12:31:01 8 Q. Could we go to Exhibit 2175,  
12:31:09 9 please.

12:31:11 10 THE COURT: Could we just pause for a  
12:31:13 11 moment.

12:31:14 12 MR. OGDEN: Yes. I reference it is  
12:31:16 13 12:30, Your Honour.

12:31:17 14 THE COURT: No, I am not looking at the  
12:31:19 15 clock because there is no point to that.

12:31:21 16 Just give me a moment.

12:32:02 17 Please go ahead.

12:32:04 18 BY MR. OGDEN:

12:32:04 19 Q. Thank you.

12:32:04 20 2175, page 3, PDF page 2 and so 3 of  
12:32:14 21 the original, PDF page 2, and this is Oliphant's  
12:32:20 22 report of 1854 and he talks about his journey to  
12:32:29 23 the peninsula to negotiate Treaty 72, and at the  
12:32:31 24 bottom there, the immigrants, quote:

12:32:32 25 "[...] threatened, in my

12:32:38 1 presence, to settle upon the Indian  
12:32:40 2 reserve in defiance of the  
12:32:41 3 Government."

12:32:42 4 Do you accept that immigrants  
12:32:44 5 threatened in front of Oliphant to settle upon the  
12:32:46 6 Saugeen Peninsula in defiance of the government?

12:32:49 7 A. It is plausible. I hesitate only  
12:32:53 8 because, again, this is the document in which  
12:32:57 9 Oliphant explains and justifies his actions.

12:33:00 10 Q. Which actions --

12:33:01 11 A. It is entirely plausible that  
12:33:03 12 settlers would have made that threat.

12:33:05 13 Q. The action -- which action is he  
12:33:08 14 trying to justify with this statement?

12:33:10 15 A. The making of the Treaty.

12:33:12 16 Q. He was sent there by Elgin,  
12:33:14 17 though, wasn't he?

12:33:15 18 A. Yes, but he was explaining how he  
12:33:17 19 had obtained agreement to the Treaty.

12:33:19 20 Q. Well, on this particular point,  
12:33:20 21 though, Elgin sent him to obtain the surrender in  
12:33:27 22 the Treaty, and he is explaining that he did that  
12:33:33 23 with reference to immigrants threatening in his  
12:33:39 24 presence to settle on it, so he is not providing  
12:33:44 25 additional justification to Elgin than Elgin surely

12:33:50 1 would have understood and appreciated?

12:33:52 2 A. Yes, I think that is fair to say.

12:33:55 3 Q. If squatters took possession of  
12:33:58 4 the Saugeen Peninsula or any part of it, that part  
12:34:03 5 would not be sold at full market value, would it?

12:34:08 6 A. Probably not.

12:34:09 7 Q. And that would mean less capital  
12:34:12 8 gain for the SON?

12:34:13 9 A. Yes.

12:34:15 10 Q. And the Crown understood that?

12:34:17 11 A. Yes.

12:34:18 12 Q. And the Crown was also concerned  
12:34:21 13 about squatting because it might lead to violence;  
12:34:24 14 is that correct?

12:34:28 15 A. He says that. He says, in fact,  
12:34:30 16 that there had been murders.

12:34:33 17 Q. And also lawlessness?

12:34:39 18 A. Yes, I mean, squatting wasn't --  
12:34:44 19 was in a somewhat ambiguous category there since  
12:34:48 20 squatting did in the end lead to property rights.  
12:34:51 21 But, yes, I would agree it was concerned about  
12:34:55 22 lawlessness.

12:34:55 23 Q. And the Crown wished to prevent  
12:34:58 24 violence and lawlessness?

12:34:59 25 A. Yes.

1 Q. Which it thought might occur if  
2 there were no surrender?

3 A. Yes.

4 Q. And so avoiding violence and  
5 lawlessness were one of the motivations for the  
6 Crown in seeking this surrender?

7 A. Yes.

8 Q. So I think as you accepted in your  
9 testimony, there was some potential for violence  
10 against non-Indigenous settlers -- amongst, I'm  
11 sorry, non-Indigenous settlers and also the  
12 potential for violence against the SON. Do you  
13 agree that there were those potentials?

14 A. His account refers to violence by  
15 squatters against other squatters, and he doesn't  
16 mention a concern about violence against the  
17 Saugeen Ojibway, but it is not impossible.

18 Q. Okay. You recognize in your  
19 report that the avoidance of squatting was an  
20 important issue and that the Crown took steps to  
21 avoid it, so I am going to list some steps in law  
22 that the Crown took to address the issue of  
23 squatting on Indian land which you noted in your  
24 report. I am not going to go to these, but I'll  
25 list them.

1 The 1839 Act for the Protection of the  
2 Lands of the Crown in this province from trespass  
3 and injury?

4 A. Yes.

5 Q. The 1847 Royal Declaration for the  
6 reserve?

7 A. Yes.

8 Q. The 1850 Indian Lands Protection  
9 Act?

10 A. Yes.

11 Q. And then in 1851, a Royal  
12 Proclamation issued extending the operation of the  
13 1850 Act to the Saugeen Reserve?

14 A. Yes.

15 Q. And you accepted in your testimony  
16 that by 1854, Anderson had been appointed a  
17 Commissioner with powers to protect Indian lands?

18 A. Yes.

19 Q. And so you accept that these were  
20 Crown efforts to prevent and discourage squatting  
21 on the Saugeen Reserve?

22 A. Yes.

23 Q. And do you agree that the Crown  
24 was paying attention to the problem of squatting on  
25 the Saugeen Reserve?



12:37:28 1 A. Yes, in this location it was.

12:37:29 2 Q. And you had said --

12:37:31 3 A. It wasn't stopping it, but it was  
12:37:33 4 paying attention.

12:37:34 5 Q. And you accept that there was  
12:37:35 6 no -- well, there wasn't -- there was no pattern of  
12:37:44 7 Crown inattention to the problem of squatting on  
12:37:47 8 the Saugeen Reserve?

12:37:52 9 A. Well, I would say there were  
12:37:53 10 legislative enactments, but not very much  
12:37:54 11 enforcement.

12:38:00 12 Q. If we could turn to another  
12:38:03 13 document, that is SC0800. This is the report of  
12:38:16 14 Sidney Haring in this litigation, and I would like  
12:38:24 15 to read a passage from it and put it to the  
12:38:27 16 witness.

12:38:27 17 And it might be appropriate to mark  
12:38:28 18 this as an exhibit at this point, if there is no  
12:38:30 19 objection, Your Honour.

12:38:31 20 THE COURT: And I see no objection.  
12:38:41 21 Ms. Guirguis?

12:38:42 22 MS. GUIRGUIS: Your Honour, is this the  
12:38:43 23 most recent one? I don't know what the date is of  
12:38:46 24 the most recent one.

12:38:46 25 MR. OGDEN: I believe it is.

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THE COURT: September 2, 2013.

MS. GUIRGUIS: Sorry, I just don't have it in front of me.

THE COURT: Just a moment. So just for the record, is it Mr. or Professor Haring? We haven't had him yet. Is it a him?

MS. GUIRGUIS: Yes, it is a him, Professor Haring.

THE COURT: Okay, is an upcoming expert witness testifying for the Plaintiffs' case, and I have a note that there is some potential issue about the scope of his evidence which hasn't been the subject of submissions or a ruling.

However, if all counsel agree that at this time the report can be marked as a trial exhibit, then they should do so advisedly, because I don't know what impact, if any, that will have on the voir dire.

It would have to be on consent; otherwise, we can mark it as a lettered exhibit and it could be dealt with when Professor Haring is here.

Mr. Beggs?

MR. BEGGS: I guess at this time we would ask for it to be a lettered exhibit.

12:40:09 1 THE COURT: Yes, it would seem prudent  
12:40:10 2 to me, sir.

12:40:11 3 MR. OGDEN: Yes, Your Honour.

12:40:13 4 THE COURT: And also we need to ensure,  
12:40:15 5 as Ms. Guirguis has said, that it is in fact the  
12:40:17 6 right document.

12:40:18 7 MS. GUIRGUIS: Yes. I believe that it  
12:40:21 8 is, Your Honour. We have to look it up just to  
12:40:22 9 make sure because I think that there was --

12:40:23 10 THE COURT: Okay, just take a moment to  
12:40:25 11 do that before we go further.

12:41:01 12 MS. GUIRGUIS: I believe it is fine,  
12:41:02 13 Your Honour.

12:41:02 14 THE COURT: Thank you.

12:41:03 15 So, Mr. Registrar, we'll mark the  
12:41:10 16 Harring report dated September 2, 2013, as the next  
12:41:13 17 lettered exhibit.

12:41:14 18 THE REGISTRAR: That is going to be  
12:41:16 19 lettered Exhibit K-1.

12:41:19 20 EXHIBIT NO. K-1: Expert Report of  
12:41:10 21 Professor Harring dated September 2,  
12:41:13 22 2013.

12:41:22 23 BY MR. OGDEN:

12:41:22 24 Q. Thank you.

12:41:22 25 So to page 8 of the report and the PDF,

12:41:26 1 please, and I am going to read it and then ask you  
12:41:31 2 about part of it and whether you agree with part of  
12:41:33 3 it:

12:41:36 4 "The combination of the  
12:41:37 5 political and economic benefits of  
12:41:38 6 squatting allowed Upper Canada to  
12:41:40 7 rapidly develop between the 1820s  
12:41:42 8 and the 1850s at a reduced  
12:41:44 9 administrative cost, keeping  
12:41:45 10 government expenditures for land  
12:41:48 11 allocation low, but the process had  
12:41:50 12 an inherent limitation: Once the  
12:41:53 13 land was fully allocated, there  
12:41:56 14 could be no more squatting. As land  
12:41:57 15 became increasingly allocated, more  
12:41:59 16 and more conflicts arose between  
12:42:01 17 squatters and each other, legitimate  
12:42:03 18 owners, and the Crown. By the  
12:42:05 19 1850s, when most land in Ontario was  
12:42:06 20 allocated, squatting was coming to  
12:42:08 21 an end. Here the history of the  
12:42:10 22 orderly development of the Canadian  
12:42:12 23 frontier begins.

12:42:15 24 There was no room in this chaotic  
12:42:18 25 frontier land settlement policy for

12:42:21 1 Indians, already marginal to Upper  
12:42:23 2 Canadian society. Crown policy  
12:42:25 3 dictated that the Indian nations  
12:42:26 4 would give way to white settlement,  
12:42:29 5 'protected' on 'reserves' by the  
12:42:32 6 Crown until they either assimilated,  
12:42:35 7 found some place within the frontier  
12:42:36 8 social order, or moved beyond the  
12:42:39 9 line of settlement. Lieutenant  
12:42:40 10 Governor Bond Head said as much in  
12:42:42 11 his Treaty 45 and 45 1/2  
12:42:44 12 negotiations. While there were  
12:42:45 13 differences within the British  
12:42:46 14 Colonial government over various  
12:42:48 15 aspects of Indian policy, there was  
12:42:49 16 no clear solution to what was a set  
12:42:51 17 of difficult choices. But central  
12:42:52 18 to any land process was that once  
12:42:55 19 the Crown had taken Indian land  
12:42:56 20 through its treaty policy, it was  
12:42:59 21 'Crown land', ultimately to be  
12:43:01 22 opened to settlement -- legal or  
12:43:03 23 illegal, not as Indian land, but as  
12:43:05 24 'Crown land'. That is what happened  
12:43:07 25 to the 1,5000,000 acres of land

12:43:10 1 ceded to the Crown by Treaty 45 and  
12:43:13 2 45 1/2 in 1836 and also to the  
12:43:15 3 450,000 acres opened up by the  
12:43:16 4 Treaty 72 in 1854."

12:43:19 5 So here Professor Harring is discussing  
12:43:22 6 frontier land policy between the 1820s and 1850s,  
12:43:26 7 and there is a sentence here:

12:43:29 8 "While there were differences  
12:43:30 9 within the British Colonial  
12:43:31 10 government over various aspects of  
12:43:33 11 Indian policy, there was no clear  
12:43:35 12 solution to what was a set of  
12:43:37 13 difficult choices."

12:43:38 14 Do you agree with that opinion, no  
12:43:44 15 clear solution to what was a set of difficult  
12:43:46 16 choices about frontier land settlement policy  
12:43:50 17 between the 1820s and 1850s?

12:43:53 18 A. I would say that the circumstances  
12:44:04 19 he is discussing here were of the Crown's own  
12:44:07 20 making. It had established a settlement colony,  
12:44:13 21 encouraged people in Britain to consider the land  
12:44:16 22 open to settlement, and in many ways had fostered  
12:44:22 23 immigration to North America and settlement.

12:44:26 24 So by the 1820s, it had created this  
12:44:33 25 situation in which squatting was widely tolerated

12:44:37 1 and British people had been taught to believe that  
12:44:40 2 the land in North America was theirs essentially by  
12:44:44 3 birthright.

12:44:45 4 It was a set of circumstances that were  
12:44:48 5 of the Crown's own making, and then once it had  
12:44:51 6 established those circumstances, it did face a set  
12:44:54 7 of difficult choices.

12:44:55 8 Q. Of which there was no clear  
12:44:57 9 solution; would you agree with that part as well?

12:45:01 10 A. Well, I think it found a clear  
12:45:04 11 solution, namely, treaties and reserves and moving  
12:45:12 12 Indigenous people off most of their territories  
12:45:13 13 onto small reserves.

12:45:14 14 Q. Dr. Reimer's report, which is an  
12:45:30 15 exhibit now, I believe, and which I'll get the  
12:45:35 16 Exhibit number shortly, is critical of one aspect  
12:45:38 17 of your analysis that I would like to turn to. I  
12:45:41 18 am not going to turn up the report, but she says at  
12:45:47 19 page 136 of the third volume, which is the volume I  
12:45:49 20 am referring to, that your report, quote,  
12:45:53 21 "attributed little agency of the Treaty  
12:45:58 22 decision-making process to the SON".

12:45:59 23 And then at page 202 of the same  
12:46:04 24 exhibit or report, she says that you, Dr. Driben  
12:46:09 25 and Dr. Harring, quote, "failed to attribute agency

1 to the Saugeen Nawash Chiefs and Principal Men in  
2 the Treaty decision-making process."

3 So do you agree with that assessment of  
4 your report?

5 A. No, I don't.

6 Q. You do accept that the SON had  
7 their own reasons to surrender their land in Treaty  
8 72?

9 A. I accept that they had a set of  
10 goals and interests of their own which they were  
11 mindful of and were pursuing.

12 Q. Dr. Reimer's third volume is a  
13 lettered exhibit, G-1.

14 I would like to turn to a chapter you  
15 wrote for a 2009 book, and that is document SC0839.  
16 The book was titled "First Nations, First  
17 Thoughts: The Impact of Indigenous Thought in  
18 Canada", edited by Annis May Timpson, and the  
19 chapter, your chapter, Chapter 1, which is the next  
20 page, is called "First Nations Perspectives and  
21 Historical Thinking in Canada". This is your  
22 chapter, isn't it?

23 A. Yes, it is.

24 MR. OGDEN: Your Honour, I would like  
25 to exhibit this chapter perhaps as Brownlie 2009



12:47:43 1 chapter "First Nations Perspectives and Historical  
12:47:47 2 Thinking in Canada".

12:47:48 3 THE COURT: Mr. Registrar.

12:47:50 4 THE REGISTRAR: That is Exhibit No.  
12:47:54 5 4181.

12:47:55 6 EXHIBIT NO. 4181: Brownlie 2009

12:47:45 7 chapter "First Nations Perspectives and  
12:47:46 8 Historical Thinking in Canada".

12:47:56 9 BY MR. OGDEN:

12:47:57 10 Q. Thank you. And this chapter  
12:47:58 11 examines and says, and it actually uses the word  
12:48:03 12 "Aboriginal", but Indigenous interventions into  
12:48:06 13 historical thought and writing in Canada; is that  
12:48:08 14 correct?

12:48:08 15 A. Yes.

12:48:10 16 Q. At page 37 of the original, which  
12:48:14 17 is page 19 of the PDF, please, I am going to read a  
12:48:20 18 part of it to you:

12:48:23 19 "There is also a fundamental  
12:48:25 20 cleavage between the way Aboriginal  
12:48:26 21 writers such as Howard Adams and  
12:48:30 22 Daniel Paul and non-Aboriginal  
12:48:31 23 historians approach issues of  
12:48:33 24 responsibility and agency. Adams  
12:48:34 25 and Paul place a strong emphasis on

12:48:36 1 the wrongs of colonialism and white  
12:48:38 2 society and tend to portray  
12:48:40 3 Aboriginal people historically as  
12:48:42 4 more or less powerless victims."  
12:48:48 5 And then it continues further down:  
12:48:55 6 "This image of Aboriginal  
12:48:57 7 treaty participants as  
12:48:59 8 unsophisticated and unaware, as  
12:49:00 9 tricked or coerced into signing  
12:49:03 10 treaties by the officials of a  
12:49:04 11 powerful state, is common in  
12:49:06 12 Aboriginal public discourse. In  
12:49:07 13 contrast, non-Aboriginal writers on  
12:49:09 14 this subject tend to stress treaty  
12:49:12 15 negotiations in which chiefs like  
12:49:15 16 Mawedopenais, Peau de Chat,  
12:49:22 17 Mistawasis, and Ahtahkakoop  
12:49:27 18 demonstrated an awareness of coming  
12:49:28 19 changes such as mass immigration and  
12:49:30 20 their own inability to halt the  
12:49:32 21 invasion. Both sets of perspectives  
12:49:38 22 accurately reflect historical  
12:49:40 23 realities, but they present the  
12:49:41 24 treaty process in distinctly  
12:49:43 25 different lights."

1 Now, Chief Peau de Chat was Chief of  
2 what is now the Fort William First Nation; is that  
3 correct?

4 A. That sounds right.

5 Q. And that is at Thunder Bay?

6 A. Yes.

7 Q. Yes, Fort Williams.

8 A. Yes.

9 Q. And he was a primary negotiator  
10 for the Anishnawbek in the Robinson Superior Treaty  
11 of 1850?

12 A. Yes.

13 Q. So this point is made with  
14 reference to non-Aboriginal writers stressing  
15 treaty negotiations in which Chiefs like Peau de  
16 Chat demonstrate an awareness of coming changes  
17 such as mass immigration and their own inability to  
18 halt the invasion.

19 Does the same point hold for Ontario  
20 treaties other than the Robinson Superior Treaty?  
21 So let me ask it this way. Do non-Aboriginal  
22 scholars say that Ontario Aboriginal treaty  
23 participants demonstrated their awareness of coming  
24 changes such as mass immigration and the inability  
25 of their own people to halt the invasion?

12:50:54 1 A. This is one of those matters that  
12:51:06 2 is specific to time and place. So writings on  
12:51:12 3 especially the early 19th century treaties, you  
12:51:18 4 know, up to 1818, say, tend to analyze Ojibwe  
12:51:29 5 actions as not being fully aware of the long-term  
12:51:39 6 consequences of a treaty or of the British  
12:51:44 7 understanding of the treaties as wholesale, you  
12:51:51 8 know, surrenders and alienations of land.

12:51:53 9 By the 1850s, in general, I would say  
12:52:01 10 that the pattern was clearer to the Ojibwe people,  
12:52:05 11 and of course, even in 1836 we see Wawanosh and  
12:52:15 12 other Chiefs talking about their desire to have the  
12:52:18 13 quote/unquote "scattered Ojibwe" settle on the  
12:52:21 14 Saugeen territory so they don't have to sell their  
12:52:23 15 lands.

12:52:23 16 So that does, of course, show an  
12:52:24 17 awareness of concern about losing the land to  
12:52:27 18 settlement, white settlement.

12:52:29 19 Q. And do you accept that your report  
12:52:39 20 does not demonstrate the awareness by the SON  
12:52:42 21 negotiators of coming changes such as mass  
12:52:45 22 migration and awareness of their own inability to  
12:52:48 23 halt the invasion?

12:52:49 24 A. Can you please just repeat the  
12:52:53 25 question?

1 Q. Sure. Do you accept that your  
2 report does not demonstrate the awareness by the  
3 SON negotiators of coming changes such as mass  
4 migration and awareness of their own inability to  
5 halt the invasion?

6 Actually, I might rephrase it to make  
7 it slightly clearer and easier, changing a word.

8 Do you accept that your report does not  
9 demonstrate an awareness by the SON negotiators of  
10 coming changes such as mass migration and awareness  
11 of their own inability to halt the invasion?

12 A. I believe I do address this point  
13 at least in terms of attempts by the Saugeen  
14 Ojibway to attract other groups to their territory,  
15 which I do see in the context of their hope of  
16 retaining the territory.

17 Q. Do you agree that it is important  
18 to ascribe agency to the SON in 1854 and to their  
19 negotiators?

20 A. Yes.

21 Q. So the SON knew that non-SON  
22 Indigenous people were on the Saugeen Peninsula  
23 against the wishes of the SON in 1854, didn't they?

24 A. Non-Indigenous people?

25 Q. Yes.

12:54:56 1 A. Yes.

12:54:56 2 Q. And they understood it to be a  
12:54:58 3 real and substantial problem?

12:55:00 4 A. Yes.

12:55:00 5 Q. Yes, and that was one of the  
12:55:02 6 reasons they made Treaty 72, was to address that  
12:55:05 7 problem?

12:55:05 8 A. I would not say that. I would say  
12:55:09 9 that they had other solutions in mind.

12:55:13 10 Q. Do you agree that the SON were in  
12:55:22 11 fear of whites encroaching on their territory when  
12:55:27 12 they made Treaty 72?

12:55:32 13 A. Yes, and they were unhappy about  
12:55:37 14 experiencing white encroachment on their territory.

12:55:39 15 Q. Could we turn to Exhibit 2175,  
12:55:45 16 please, and this is Oliphant's report and  
12:55:55 17 associated documents, page 12, please, and  
12:56:03 18 Anderson's speech of August 2nd which is reporting  
12:56:08 19 on the speech. If we could go up a little bit,  
12:56:12 20 please, so it is page 13 of the PDF and page 12 of  
12:56:16 21 the document.

12:56:21 22 So at the very bottom of -- no, sorry,  
12:56:24 23 it is the previous page, at the bottom of that.  
12:56:43 24 This is Anderson, and he says in the second -- or  
12:56:46 25 the last paragraph there, the second that we can

1 see:

2 "You complain that the whites  
3 not only cut and take your timber  
4 from your lands, but that they  
5 [...]" --

6 Is that "land" or "lands"? I don't  
7 think it actually matters but if you --

8 A. I think it is "lands".

9 Q. "You complain that the whites  
10 not only cut and take your timber  
11 from your lands, but that they are  
12 commencing to settle upon it, and  
13 you cannot prevent them [...]"

14 Is it probable that the SON did make  
15 that complaint to Anderson?

16 A. Yes, probably asking him to help  
17 them.

18 Q. And you were taken to that in your  
19 examination in-chief, I believe, and you were also  
20 taken to Oliphant's report, and so this is the same  
21 document, 2175, to page 4, which is page 3 of the  
22 PDF. I am going to read the part to you that I am  
23 looking to find and hopefully we'll find it  
24 shortly:

25 "The evidence of their own

12:58:19 1 senses was sufficient to bear me out  
12:58:32 2 in the truth of my assertions [...]"  
12:58:33 3 We have actually found it now. It is  
12:58:35 4 in the second paragraph you can see there, on the  
12:58:38 5 right-hand side, on the second line:

12:58:43 6 "The evidence of their own  
12:58:44 7 senses was sufficient to bear me out  
12:58:47 8 in the truth of my assertions in  
12:58:51 9 reference to the avidity with which  
12:58:53 10 the neighbouring lands were taken up  
12:58:56 11 by whites. They were compelled to  
12:59:00 12 admit that squatters were, even  
12:59:01 13 then, locating themselves without  
12:59:03 14 permission either from themselves or  
12:59:07 15 the department upon the reserve. I  
12:59:10 16 represented the extreme difficulty,  
12:59:12 17 if not impossibility, of preventing  
12:59:14 18 such unauthorized intrusion."

12:59:18 19 Two questions.

12:59:20 20 Is it probable that the SON said that  
12:59:25 21 squatters were locating themselves without  
12:59:27 22 permission on their lands to Oliphant?

12:59:30 23 A. Is it probable that they said  
12:59:32 24 that? It is possible, although in this instance it  
12:59:37 25 appears that he raised the issue.



12:59:41 1 Q. Regardless of who raised it, is it  
12:59:44 2 probable that they said that squatters were  
12:59:49 3 locating themselves without permission on their  
12:59:52 4 lands, either whether he said do you agree and they  
12:59:55 5 said yes or they made --

12:59:58 6 A. Yes, whoever said it, I am sure  
13:00:02 7 the Saugeen Ojibway would have agreed.

13:00:03 8 Q. And is it probable that Oliphant  
13:00:06 9 said it was extremely difficult, if not impossible,  
13:00:09 10 to prevent such unauthorized intrusion?

13:00:13 11 A. Oh, yes, that is very likely.

13:00:17 12 MR. OGDEN: Your Honour, it is 1:00  
13:00:18 13 p.m., and perhaps now would be a good time to break  
13:00:21 14 for lunch.

13:00:22 15 THE COURT: 2:15.

13:00:35 16 -- RECESSED AT 1:00 P.M.

13:56:49 17 -- RESUMED AT 2:18 P.M.

14:18:08 18 THE COURT: Mr. Feliciant.

14:18:09 19 MR. FELICIAN: Before Mr. Ogden  
14:18:10 20 resumes, Your Honour, we obtained the information  
14:18:13 21 that Ms. Guirguis had asked for, and I can now  
14:18:17 22 advise that the two lettered exhibits that were  
14:18:20 23 remaining can now be made exhibits.

14:18:22 24 THE COURT: And those are?

14:18:23 25 MR. FELICIAN: H-2, which is document

14:18:25 1 SC0824.

14:18:32 2 THE COURT: 0824.

14:18:34 3 MR. FELICIANANT: And the other one is --  
14:18:38 4 oh, sorry, I'll wait for the Registrar.

14:18:41 5 THE COURT: Yes.

14:18:42 6 THE REGISTRAR: One second.

14:18:43 7 THE COURT: And that is an 1855 letter  
14:18:46 8 from Mr. Nettle.

14:18:54 9 MR. FELICIANANT: That's right,  
14:18:55 10 Mr. Nettle, I believe.

14:18:56 11 THE REGISTRAR: That is Exhibit No.  
14:18:59 12 4182.

14:19:00 13 EXHIBIT NO. 4182: Letter from Richard  
14:19:00 14 Nettle to Edward Head, September 5,  
14:19:02 15 1855.

14:19:02 16 MR. FELICIANANT: And the other document  
14:19:03 17 is lettered Exhibit J-1, SC0829.

14:19:18 18 THE COURT: And that is an 1866 letter.

14:19:20 19 MR. FELICIANANT: And I believe that is  
14:19:21 20 the opinion of James Cockburn, Solicitor-General.

14:19:24 21 THE REGISTRAR: Exhibit No. 4183.

14:19:28 22 EXHIBIT NO. 4183: Memorandum of James  
14:19:30 23 Cockburn, March 8, 1866.

14:19:30 24 THE COURT: All right, thank you. And  
14:19:31 25 thank you, Ms. Guirguis, as well.

14:19:37 1 Go ahead, Mr. Ogden.

14:19:39 2 BY MR. OGDEN:

14:19:39 3 Q. Thank you, Your Honour.

14:19:40 4 Professor Brownlie, the next topic then  
14:19:45 5 is the question of money. The SON knew that they  
14:19:50 6 could receive money from the surrender of their  
14:19:51 7 lands, didn't they?

14:19:53 8 A. Yes.

14:19:53 9 Q. And this was another motivation  
14:19:55 10 for the Treaty 72 surrender, to receive money from  
14:20:06 11 their lands?

14:20:13 12 A. They did want to receive money for  
14:20:15 13 their lands, but they wanted to surrender a smaller  
14:20:19 14 portion of them, as revealed by their Council in  
14:20:29 15 August with T.G. Anderson.

14:20:31 16 THE COURT: Sir, you have fallen back  
14:20:32 17 into your habit of talking into your hand. If you  
14:20:34 18 could perhaps try to avoid that by putting your  
14:20:37 19 chin in your hand.

14:20:38 20 THE WITNESS: I will try, Your Honour.

14:20:41 21 BY MR. OGDEN:

14:20:44 22 Q. The SON were engaged in the money  
14:20:46 23 economy, weren't they?

14:20:49 24 A. To some extent, I believe so.

14:20:54 25 Q. And the SON community itself

1 occasionally had debts?

2 A. I know that there were debts. I  
3 am not sure if they were individual or if they were  
4 collective.

5 Q. Do you recall the requests, the  
6 documents made out in favour of Peter Jacobs, the  
7 requests to pay bearer that we looked at --

8 A. Yes.

9 Q. -- Exhibits 4160, 4161 and 4162?

10 A. Those are the ones where it said  
11 that he had advanced money, that he paid something  
12 for them and they wanted to pay him back? Are  
13 those the right documents?

14 Q. Yes, those are the ones we went to  
15 in your testimony.

16 A. Yes, yes.

17 Q. So they indicate the community had  
18 had debts at some point in that year, 1854?

19 A. That they owed money, yes, that  
20 they were paying for some service, I believe. I  
21 can't remember the details.

22 Q. Exhibit 2218, please, and this is  
23 a document from 1854. It is a statement of James  
24 Ross. There is a -- it contains a statement of  
25 James Ross MPP who attended the surrender, and this

14:22:23 1 is a transcript and then the original I think is  
14:22:29 2 down at the bottom. And there is a statement of  
14:22:37 3 James Ross MPP given to I believe the Legislative  
14:22:47 4 Council or the Legislature. Are you familiar with  
14:22:48 5 this document?

14:22:49 6 A. I don't remember it.

14:22:51 7 Q. Okay, well, we'll go to page 1,  
14:22:56 8 and this is of the PDF, and in the fourth paragraph  
14:23:03 9 down and we'll start above it:

14:23:10 10 "I also recollect that  
14:23:12 11 Mr. Oliphant did [not] without  
14:23:13 12 hesitation decline to confirm the  
14:23:17 13 conditional sale referred to [...]"

14:23:23 14 THE COURT: Could you start that again,  
14:23:24 15 sir? I think you inserted a word without realizing  
14:23:27 16 it.

14:23:28 17 BY MR. OGDEN:

14:23:28 18 Q. Okay, I'll start at the top, Your  
14:23:34 19 Honour, for the new section:

14:23:35 20 "I was present at Saugeen in  
14:23:37 21 company with L. Oliphant Esquire on  
14:23:39 22 the occasion of the Surrender of the  
14:23:44 23 Indian Lands referred to in the  
14:23:46 24 annexed [paper?].

14:23:48 25 I recollect that Peter Jacobs,

14:23:50 1 Indian Missionary who acted as an  
14:23:53 2 Interpreter on the occasion, did  
14:23:54 3 communicate to Mr. Oliphant the  
14:23:56 4 desire which he said existed with  
14:23:57 5 the Chiefs that a conditional Sale  
14:24:00 6 which they had made to Patrick John  
14:24:02 7 Hamilton Esquire in which I  
14:24:05 8 understood Mr. [J?] Jardine was also  
14:24:10 9 interested should be approved of and  
14:24:12 10 confirmed by the Indian Department.

14:24:14 11 I also recollect that  
14:24:16 12 Mr. Oliphant did without hesitation  
14:24:18 13 decline to confirm the conditional  
14:24:20 14 sale referred to and explained that  
14:24:22 15 the regulations of the Indian  
14:24:24 16 Department left him no other course  
14:24:26 17 but to decline [confirmation?]  
14:24:30 18 required.

14:24:33 19 Mr. Jacobs then went into  
14:24:36 20 explanations, in the course of which  
14:24:37 21 he stated that the Indians with  
14:24:39 22 consent of their Chiefs, had  
14:24:40 23 received supplies necessary for  
14:24:42 24 their health and comfort, amounting  
14:24:43 25 to a considerable sum, from [them?]

14:24:47 1 on account of the conditional Sale  
14:24:49 2 of land; the amount of which [one  
14:24:54 3 inserted word:] advances they  
14:24:59 4 desired should be paid by the Indian  
14:25:03 5 Department, and it being manifest  
14:25:04 6 that such desire was unanimous  
14:25:06 7 amongst the Chiefs and Indians at  
14:25:07 8 the Council, Mr. Oliphant consented  
14:25:11 9 to recommend payment of the amount  
14:25:12 10 to claimants, Hamilton and Jardine."

14:25:16 11 So this is a record of the SON at the  
14:25:19 12 1854 Treaty Council seeking to trade some of their  
14:25:23 13 land for relief of the debt that they had; is that  
14:25:28 14 an accurate description of it?

14:25:29 15 A. It appears to me a little bit  
14:25:34 16 different. If I am reading it correctly, it seems  
14:25:37 17 that they had arranged an advance and they were to  
14:25:40 18 receive these goods in exchange for the land.  
14:25:45 19 Possibly I'm misreading it, but that is what I  
14:25:48 20 understood as you read it.

14:25:55 21 "[...] the Indians with the  
14:25:56 22 consent of their Chiefs, had  
14:25:58 23 received supplies necessary for  
14:26:00 24 their health and comfort, amounting  
14:26:02 25 to a considerable sum from [them?]",

14:26:05 1 I guess that would be Hamilton and  
14:26:07 2 Jardine, "on account of the  
14:26:12 3 conditional Sale of land."

14:26:14 4 Q. And what they were requesting  
14:26:15 5 through Jacobs of Oliphant was that the Crown  
14:26:18 6 confirm the sale of the land in order to pay off --  
14:26:26 7 exchange for the goods that they had received?

14:26:29 8 A. Yes.

14:26:30 9 Q. For which they were in debt?

14:26:35 10 A. Sure. I would word -- I am not  
14:26:43 11 sure that "debt" is the right word. I mean, they  
14:26:46 12 had made a bargain.

14:26:46 13 Q. The SON was in need of money to  
14:26:52 14 supplement their other sources of survival, either  
14:27:05 15 to supplement food from farming and their income  
14:27:08 16 from farming and their traditional harvesting  
14:27:11 17 activities, didn't they? Those activities were  
14:27:15 18 insufficient on their own to support the SON? I'll  
14:27:22 19 ask the question again a different way, sorry.

14:27:25 20 The SON engaged in farming from which  
14:27:26 21 they obtained food and they sold some of the  
14:27:32 22 produce from their farming and they engaged in  
14:27:35 23 traditional harvesting activities, but those  
14:27:38 24 activities were insufficient on their own to  
14:27:41 25 support them; is that correct?



14:27:44 1 A. I can't say that I have seen  
14:27:50 2 evidence showing that their regular activities were  
14:28:00 3 on an ongoing basis insufficient to support them.  
14:28:05 4 They had, for instance, their fisheries and would  
14:28:11 5 have been able to sell fish.

14:28:12 6 Q. And the peninsula as a whole was  
14:28:30 7 more than the SON could productively farm at the  
14:28:37 8 time? The farm land on the peninsula or what could  
14:28:43 9 become farm land was more than the SON would be  
14:28:47 10 able to farm as of 1854; is that correct?

14:28:51 11 A. They did limited farming at the  
14:28:56 12 time. Of course, they could always have leased the  
14:29:00 13 land then to other farmers and made income that  
14:29:02 14 way.

14:29:02 15 Q. But in terms of selling their  
14:29:15 16 land, they were aware that their land had a value  
14:29:19 17 as money, didn't they, or wouldn't they?

14:29:22 18 A. Yes.

14:29:23 19 Q. And that value had gone up  
14:29:29 20 substantially in recent years; is that correct?

14:29:34 21 A. I don't feel I could comment on  
14:29:40 22 that. I haven't really researched it.

14:29:43 23 Q. In 1854, the SON wanted to take  
14:29:52 24 advantage of speculation in land sales, didn't  
14:29:55 25 they?

14:29:55 1 A. They used that term, that a spirit  
14:30:00 2 of speculation or something is getting up amongst  
14:30:03 3 us.

14:30:03 4 Q. Now, there were reasons, some of  
14:30:14 5 which we have gone through, that the SON desired a  
14:30:17 6 surrender, and then there are reasons that they  
14:30:20 7 wished to avoid a surrender, and two of them I  
14:30:25 8 would like to ask you about.

14:30:26 9 First is the establishment of a -- they  
14:30:31 10 wished to keep land for the establishment of a  
14:30:33 11 manual labour school, and then the second, that  
14:30:36 12 they wished to keep land for other First Nation  
14:30:38 13 communities to come and live on. Do you agree that  
14:30:42 14 those were reasons to keep land?

14:30:44 15 A. Yes, those were two of the  
14:30:48 16 reasons.

14:30:48 17 Q. Two of the reasons, yes. And the  
14:30:53 18 first proposition in relation to keeping land for a  
14:30:57 19 manual labour school, it is also true, isn't it,  
14:31:04 20 that one of the reasons they wanted a manual labour  
14:31:07 21 school was to encourage other First Nation  
14:31:09 22 communities to move there?

14:31:10 23 A. Yes, I believe so.

14:31:11 24 Q. And the SON took steps to  
14:31:14 25 encourage the development of a school?

14:31:16 1 A. Yes.

14:31:16 2 Q. Including approving a plan to  
14:31:23 3 provide land and help to pay for a school?

14:31:25 4 A. Yes.

14:31:26 5 Q. And they kept this goal at least  
14:31:30 6 as late as July 1853?

14:31:32 7 A. That sounds right.

14:31:33 8 Q. But ultimately, the Crown decided  
14:31:36 9 not to build a school on the peninsula, but instead  
14:31:40 10 near Rice Lake?

14:31:42 11 A. That sounds right too.

14:31:43 12 Q. And this was a disincentive for  
14:31:49 13 other First Nations against moving to the  
14:31:50 14 peninsula?

14:31:50 15 A. Possibly.

14:31:51 16 Q. In July we had talked about the  
14:32:03 17 SON welcoming other First Nation groups to the  
14:32:06 18 peninsula, and one reason for this was that the SON  
14:32:11 19 believed that having other First Nations move there  
14:32:14 20 would provide them with a better argument for  
14:32:16 21 keeping the land; do you recall that?

14:32:18 22 A. Yes.

14:32:19 23 Q. And because there would be more  
14:32:21 24 heavy use of it, in European terms at least?

14:32:25 25 A. Yes, that is probably part of the

14:32:29 1 thought.

14:32:29 2 Q. And do you agree that the  
14:32:33 3 possibility that other First Nations might move to  
14:32:35 4 the peninsula was one of the SON's main reasons for  
14:32:39 5 not surrendering -- main arguments, I apologize.  
14:32:43 6 I'll restate it.

14:32:43 7 Do you agree that the possibility that  
14:32:45 8 other First Nations might move to the peninsula was  
14:32:48 9 one of the SON's main arguments against  
14:32:51 10 surrendering?

14:32:51 11 A. Yes, they made that argument a  
14:32:53 12 number of times.

14:32:54 13 Q. Could we turn to Exhibit 2004,  
14:33:03 14 please. This is a record of a Council between  
14:33:08 15 Anderson and the SON of August 1853, and to the top  
14:33:15 16 of page 3 of the transcript, the PDF, and it is  
14:33:22 17 page 12 of the original document. The page numbers  
14:33:24 18 are on the right side there.

14:33:26 19 And the Superintendent on the top left,  
14:33:29 20 that is Anderson; is that right?

14:33:31 21 A. Yes, I think so.

14:33:32 22 Q. And he said:

14:33:34 23 "To all, on a former occasion I  
14:33:36 24 informed you that the Gov  
14:33:38 25 recommended your ceding this Tract

14:33:40 1 of Land to be sold for your benefit;  
14:33:43 2 reserving at the same time an ample  
14:33:46 3 quantity for the of the [sic]  
14:33:52 4 Indians. What do you think of it  
14:33:54 5 now?"

14:33:55 6 And then answering by "A. Madwayosh,  
14:34:03 7 Saugeeng Chief":

14:34:05 8 "Repeated what had occurred at  
14:34:07 9 the Treaty made with Sir Francis  
14:34:10 10 Bond Head - then said, we have had  
14:34:13 11 repeated Councils of the surrounding  
14:34:16 12 Bands of Indians who wish to come  
14:34:17 13 and live here and we therefore do  
14:34:19 14 not wish to give it up as there is  
14:34:19 15 not too much for them & our  
14:34:22 16 Children."

14:34:22 17 And then another response from "J.P.  
14:34:26 18 Kegdonse, Owens Sound Chief", who I take to be and  
14:34:30 19 do you agree is Peter Kegeponce Jones?

14:34:33 20 A. Yes.

14:34:33 21 Q. Who said:

14:34:34 22 "I wish to answer in a few  
14:34:35 23 words - I follow what my Chief has  
14:34:37 24 said - We expect Indians from all  
14:34:39 25 points of the Compass and wish to

14:34:41 1 keep this reserve for them -"

14:34:46 2 So here in response to Anderson asking  
14:34:48 3 them if they would cede this tract of land, the  
14:34:51 4 main argument they made was that they were keeping  
14:34:56 5 the land for other First Nations to come and live  
14:35:00 6 on; do you agree with that?

14:35:03 7 A. Looking at what is recorded of  
14:35:07 8 what Madwayosh said, he says:

14:35:14 9 "[...] there is not too much  
14:35:15 10 for them & our Children."

14:35:16 11 But he also in quotes here, what this  
14:35:18 12 says here is:

14:35:19 13 "Repeated what had occurred at  
14:35:21 14 the Treaty made with Sir Francis  
14:35:24 15 Bond Head."

14:35:24 16 Unfortunately, they don't spell out  
14:35:26 17 what he said there, but one possible argument he  
14:35:30 18 made there was that they had promised -- been  
14:35:33 19 promised the land to be protected from white  
14:35:35 20 encroachment.

14:35:36 21 Q. And if it wasn't their main  
14:35:39 22 argument, then it was one of their two main  
14:35:41 23 arguments?

14:35:41 24 A. Or three.

14:35:42 25 Q. The third one, sorry, is?

14:35:44 1 A. Their children's needs.

14:35:56 2 Q. Okay. The SON had held this goal  
14:36:03 3 of attracting other First Nations for about two  
14:36:05 4 decades prior to the 1854 surrender; is that  
14:36:09 5 correct?

14:36:09 6 A. Yes.

14:36:09 7 Q. And so it is not a goal that arose  
14:36:11 8 in the 1850s in response to Crown approaches for  
14:36:16 9 surrender at that time, is it?

14:36:17 10 A. I agree.

14:36:18 11 Q. Would you agree that it was a long  
14:36:21 12 and deeply held with goal of the SON at that time?

14:36:24 13 A. Yes.

14:36:24 14 Q. And we have covered the evidence,  
14:36:31 15 the general invitation made by Wawanosh in July  
14:36:36 16 1836 and then the SON in 1845, and there were also  
14:36:43 17 general invitations by the General Council of  
14:36:48 18 Anishnawbek Chiefs, which included the SON, the  
14:36:54 19 resolutions or petitions that the peninsula be a  
14:36:57 20 general reserve; are you familiar with them in  
14:37:04 21 1836, June 1836, 1840, 1846, 1849?

14:37:10 22 A. That sounds right. I'm sorry, I  
14:37:13 23 don't have a list in my head of the documents, but  
14:37:14 24 that sounds right.

14:37:15 25 Q. In addition to these general

14:37:24 1 invitations, they made specific invitations, and  
14:37:28 2 one was in relation to the Mississaugas of the  
14:37:32 3 Credit River, which you noted in your testimony,  
14:37:37 4 and we have already noted the resolution by Joseph  
14:37:41 5 Sawyer and Peter Jones. And there were other  
14:37:44 6 documents, but I don't think we need to go to it at  
14:37:56 7 this point, coming from the Credit Indians.

14:38:03 8 But I would like to go to Exhibit 1655,  
14:38:05 9 please, which is a petition from the SON to the  
14:38:10 10 Governor General and reference to a manual labour  
14:38:13 11 school, dated March 25, 1847.

14:38:34 12 So if you could go back up to the top,  
14:38:41 13 so PDF page 2, and this is it here, the second  
14:38:52 14 paragraph, this is the petition that is about the  
14:38:58 15 SON, and the previous page is talking about the  
14:39:00 16 manual labour school. In the second paragraph  
14:39:05 17 here:

14:39:05 18 "That your petitioners are very  
14:39:06 19 anxious that the land ceded by us to  
14:39:08 20 our Credit Brethren, [sic] and  
14:39:11 21 surveyed by them last summer, should  
14:39:13 22 be secured for ever to the Credit  
14:39:15 23 People, It shall be free to them  
14:39:19 24 they are welcome to it."

14:39:21 25 So this indicates that in the summer of



14:39:23 1 1846, the SON in their words ceded the tract of  
14:39:30 2 land to the Credit Indians, doesn't it?

14:39:32 3 A. Yes.

14:39:32 4 Q. And that the Credit Indians then,  
14:39:36 5 in the words of the SON, surveyed the land?

14:39:41 6 A. Yes.

14:39:41 7 Q. But we don't have -- or are you  
14:39:44 8 aware of a document recording the size of that  
14:39:51 9 supposed cession?

14:39:59 10 A. No, I am not.

14:40:00 11 Q. And the Royal Declaration of 1847  
14:40:04 12 was in the course of preparation in March 1847 when  
14:40:09 13 the Credit Mississaugas decided not to move to the  
14:40:12 14 Saugeen; is that correct?

14:40:12 15 A. Yes.

14:40:13 16 Q. But the preparation continued of  
14:40:14 17 the Royal Declaration?

14:40:16 18 A. Yes.

14:40:17 19 Q. And that is because it was  
14:40:23 20 intended not to be just for the SON, but also for  
14:40:27 21 other Indigenous communities who were considering  
14:40:30 22 moving there? Sorry, let me rephrase that.

14:40:33 23 It was intended to be of use to and  
14:40:39 24 benefit for other Indigenous communities who might  
14:40:42 25 move there?

14:40:43 1 A. You have used the passive voice  
14:40:48 2 "it was intended". Who do you mean intended this?

14:40:51 3 Q. The colonial officials who drafted  
14:40:55 4 the document intended that it would be relied on by  
14:41:02 5 other Indigenous communities to assist them in  
14:41:10 6 deciding whether to move to the Saugeen Peninsula?

14:41:12 7 A. I am not aware of a specific  
14:41:18 8 mention of that in the Royal Declaration.

14:41:21 9 Q. No, I am not asking that within  
14:41:22 10 the Royal Declaration. I am asking about your  
14:41:26 11 understanding, based on your review of the  
14:41:29 12 documents, of the intention of those drafting and  
14:41:33 13 promoting the completion of the Royal Declaration  
14:41:36 14 that they intended that it not only be of benefit  
14:41:41 15 to the SON and then the Credit Indians for awhile,  
14:41:46 16 but to other Indigenous communities who might wish  
14:41:49 17 to move there, that they might see the Royal  
14:41:54 18 Declaration and rely on it in deciding whether to  
14:41:56 19 move to the Saugeen Peninsula?

14:41:59 20 A. I haven't seen any evidence about  
14:42:03 21 the intentions of those who framed that  
14:42:08 22 declaration, and I am a little hesitant because --  
14:42:15 23 well, I guess I would just say I don't really know  
14:42:22 24 that government officials were at that point  
14:42:26 25 fostering the idea of moving other people to the

14:42:30 1 Saugeen Peninsula.

14:42:31 2 Q. Okay, so let's turn to Exhibit  
14:42:39 3 1659, please, and this is minutes of a Council held  
14:42:45 4 at the Credit, a Council of the Mississaugas of the  
14:42:49 5 Credit dated March 29, and in the middle of the  
14:42:57 6 page there:

14:42:57 7 "Minutes of Council held at the  
14:42:59 8 Credit March 29th, 1847.

14:43:10 9 Convened by Capt. Anderson on the  
14:43:17 10 subject of the removal of the Credit  
14:43:21 11 Indians memorial to the Governor  
14:43:34 12 General [had] [...]" --

14:43:35 13 A. "Was read".

14:43:37 14 Q. Thank you:

14:43:39 15 "[...] was read and explained  
14:43:41 16 as also a letter from Mr. Marden.  
14:43:49 17 In reply to the petition the  
14:43:53 18 Governor General sanctions their  
14:43:56 19 removal to the west.

14:44:01 20 Each family was asked separately  
14:44:04 21 whether they were for the west or  
14:44:07 22 Owen Sound. 51 families were for  
14:44:10 23 the west, 9 [...]"

14:44:18 24 Do you know what that word is after

14:44:19 25 "9", please?

14:44:20 1 A. I can't make it out either. It  
14:44:22 2 looks like "d-o", which could be ditto, but it  
14:44:26 3 doesn't make sense there.

14:44:28 4 Q. "[...] 9 were absent.  
14:44:35 5 2 remain at the Credit.  
14:44:37 6 1 removed to Owen Sound.  
14:44:41 7 63 total."

14:44:43 8 [As read.]

14:44:43 9 Are you familiar with this document at  
14:44:45 10 all?

14:44:46 11 A. I don't remember it, but I may  
14:44:48 12 have seen it before.

14:44:50 13 Q. But it shows the poll of 63 Credit  
14:44:55 14 families?

14:44:55 15 A. Yes.

14:44:56 16 Q. Well, there were some absent who  
14:45:00 17 weren't polled, but 63 in total were understood to  
14:45:03 18 be members of the Credit of the Mississaugas.

14:45:06 19 And if we go down further, there is  
14:45:22 20 minutes of the Council held at the Credit Village,  
14:45:29 21 March 30th, 1847:

14:45:31 22 "Chief Sawyer stated that  
14:45:33 23 having heard that it was the  
14:45:34 24 intention of the Chiefs of the Six  
14:45:36 25 Nations on the Grand River to invite

14:45:38 1 the tribe to come and settle on  
14:45:41 2 their tract of land which they would  
14:45:43 3 give without any charge. The  
14:45:49 4 Council took the [...]" -- is that  
14:45:53 5 "boat"?

14:45:53 6 A. "Subject".

14:45:54 7 Q. Oh, "subject", thank you:

14:45:55 8 "[...] subject into  
14:45:56 9 consideration, and when the vote was  
14:45:57 10 taken, there appeared 14 men for the  
14:46:01 11 Grand River and 16 against it, so  
14:46:05 12 that there was a majority of one  
14:46:06 13 against it. The nays were for  
14:46:16 14 Munceytown."

14:46:16 15 [As read.]

14:46:16 16 But they didn't move to Munceytown in  
14:46:20 17 the end, did they; they moved to Grand River?

14:46:22 18 A. Correct.

14:46:22 19 Q. We note there that the offer that  
14:46:27 20 went from the Six Nations was of land without any  
14:46:28 21 charge?

14:46:28 22 A. Yes.

14:46:29 23 Q. At Exhibit 1663, please, this is  
14:46:35 24 minutes of a Council meeting between the Six  
14:46:38 25 Nations and Mississaugas of the Credit of April 7,

14:46:44 1 1847, it says 7th April, 1847. And then if we go  
14:46:49 2 to page 4 of the PDF, please, the bottom, again in  
14:46:53 3 handwriting and difficult to read the words:

14:47:01 4 "I beg to inform [...]"

14:47:04 5 That is in the last paragraph, please.

14:47:10 6 There we go.

14:47:12 7 "I beg to inform you that our  
14:47:15 8 brethren of the Chippewa Indians of  
14:47:21 9 Owen Sound heard our situation and  
14:47:24 10 invited who might wish to come and  
14:47:27 11 take a part of their lands, [the]  
14:47:38 12 looking over these lands they [...]"

14:47:40 13 A. I think it is "on looking over  
14:47:42 14 these lands".

14:47:42 15 Q. Thank you:

14:47:43 16 "[...] on looking over these  
14:47:44 17 lands they [...]"

14:47:46 18 What is that?

14:48:00 19 A. I am struggling to make it out  
14:48:04 20 too.

14:48:04 21 Q. Well, we'll come back to that, the  
14:48:11 22 unknown word --

14:48:12 23 A. Oh, I think it is "were found".

14:48:16 24 Q. Oh, yes.

14:48:17 25 A. "[...] they were found not to be

14:48:21 1 such as were good for farming

14:48:22 2 purposes."

14:48:23 3 [As read.]

14:48:23 4 Q. Right, and this is a description  
14:48:24 5 of members of the Credit Indians going to the  
14:48:28 6 peninsula and deciding they didn't like the land on  
14:48:32 7 the peninsula?

14:48:33 8 A. Yes.

14:48:33 9 Q. So there is no information to  
14:48:46 10 suggest, is there, that the SON were planning to  
14:48:49 11 sell their land to the Credit Mississaugas?

14:48:52 12 A. No.

14:48:53 13 Q. They were likely going to give it  
14:48:56 14 to them?

14:48:56 15 A. Yes, I believe so.

14:48:57 16 Q. Do you know approximately the size  
14:49:04 17 of the reserve of the Credit Mississaugas at the  
14:49:09 18 Grand River?

14:49:10 19 A. I don't.

14:49:10 20 Q. Your Honour -- well, let's bring  
14:49:18 21 up document SC0975. This is a new document, Your  
14:49:28 22 Honour. This is a printout from a web page of  
14:49:39 23 Indigenous and Northern Affairs Canada showing the  
14:49:43 24 size in hectares of the New Credit Reserve for the  
14:49:51 25 community Mississaugas of the Credit.

14:49:53 1 And I would like to make this the next  
14:49:57 2 exhibit, Your Honour.

14:49:58 3 THE COURT: Mr. Registrar.

14:50:00 4 THE REGISTRAR: Exhibit No. 4184.

14:50:03 5 EXHIBIT NO. 4184: Web page from

14:50:03 6 Indigenous and Northern Affairs,

14:50:03 7 Canada, Reserves/Settlements/

14:50:06 8 Villages Mississaugas of the Credit.

14:50:06 9 BY MR. OGDEN:

14:50:11 10 Q. I am assuming you don't know off  
14:50:13 11 the top of your head the ratio of hectare to acre;  
14:50:17 12 is that correct?

14:50:18 13 A. I am afraid not.

14:50:19 14 Q. Do you accept that it is 2.47  
14:50:21 15 acres per hectare?

14:50:23 16 A. I'll let you be the guide on that.  
14:50:28 17 It sounds right.

14:50:29 18 Q. Thank you. And that then 2,392  
14:50:34 19 hectares is approximately 5,900 acres, based on the  
14:50:41 20 ratio I have given you?

14:50:42 21 A. We'll go with that.

14:50:44 22 Q. So that is close to 6,000 acres?

14:50:50 23 A. That sounds right.

14:50:51 24 Q. So this is the land that the  
14:51:01 25 Mississaugas of the Credit received from the Six



1 Nations instead of moving to Saugeen?

2 A. Yes.

3 Q. And that provides an estimate of  
4 the number of acres that the SON supposedly ceded  
5 to them in 1846, doesn't it?

6 A. Are you suggesting that the amount  
7 of land on the Six Nations reserve would have been  
8 the exact same as what the SON were offering them?

9 Q. No, the word I used was an  
10 estimate, a guide, perhaps? The amount of land  
11 that the Mississaugas of the Credit agreed to  
12 receive from the Six Nations provides an estimate  
13 of the number of acres they agreed to obtain from  
14 the Saugeen?

15 A. I don't see that that is -- I  
16 don't see how that is a guide. I mean, that seems  
17 to me a fairly large assumption. I don't know what  
18 it is based on.

19 Q. Well, we know there were 63 Credit  
20 Mississauga families in 1847, and that works out at  
21 approximately 100 acres per family in terms of the  
22 land that they got at Grand River.

23 We might come back to this then. We'll  
24 come back to this.

25 Even though the Credit Mississaugas

14:53:12 1 decided to move to the Six Nations Reserve at the  
14:53:16 2 Grand River in 1847 or so, the SON didn't give up  
14:53:22 3 hope that the Credit Mississaugas might move to the  
14:53:26 4 Saugeen Reserve; is that correct?

14:53:27 5 A. I think that is right, yes.

14:53:28 6 Q. Exhibit 2012, minutes of a General  
14:53:38 7 Council of Anishinaabe Chiefs or Anishnawbek Chiefs  
14:53:45 8 perhaps, August 29, 1853 is the transcript, held at  
14:53:51 9 Saugeen Peninsula. On the second page of the PDF,  
14:53:58 10 please, on the fourth paragraph:

14:54:08 11 "A letter bearing date 18th  
14:54:10 12 August 1853 from the Rice Lake Band  
14:54:16 13 written by M.G. Paudush was read --  
14:54:20 14 proposing to emigrate [sic] to this  
14:54:22 15 part of the country, and asking for  
14:54:24 16 land suitable for them to settle  
14:54:26 17 upon."

14:54:26 18 And then Chief Madwayosh:

14:54:33 19 "In reply, Chief Alexander  
14:54:35 20 Madwayosh stated with great  
14:54:37 21 pleasure, he would comply with their  
14:54:38 22 wish, and that their request having  
14:54:40 23 been made a long time previous to  
14:54:41 24 the application made by the Iroquois  
14:54:44 25 Band was the cause of his not being

14:54:46 1 willing to grant them their request  
14:54:47 2 for more land and that he felt  
14:54:52 3 highly pleased, to know that the  
14:54:55 4 Rice Lake Band, wish to settle among  
14:54:57 5 us.

14:54:59 6 The other chiefs and principal  
14:55:02 7 Indians present, also expressed  
14:55:04 8 their delight in the prospect of the  
14:55:05 9 Rice Lake emigrating, to our part of  
14:55:07 10 the country and expressed their  
14:55:09 11 willingness to freely comply with  
14:55:10 12 their request in granting their land  
14:55:12 13 to settle upon.

14:55:14 14 A letter from Rev. Peter Jones on  
14:55:16 15 behalf of the Credit Band was also  
14:55:18 16 read requesting, that land may be  
14:55:21 17 kept for the future settlement of  
14:55:23 18 their children. It was Resolved  
14:55:24 19 that, if the Credit Band wish to  
14:55:27 20 settle among us now, we will be  
14:55:28 21 happy to give them land for that  
14:55:30 22 purpose but we do not think it still  
14:55:32 23 practicable, to pledge ourselves, to  
14:55:34 24 furnish to their children with farms  
14:55:36 25 here after."

14:55:40 1 So what this is showing is that there  
14:55:43 2 was a letter in August 1853, from Reverend Peter  
14:55:48 3 Jones of the Credit Mississaugas giving the SON  
14:55:51 4 reason to hold out hope that they might move to the  
14:55:54 5 Saugeen Peninsula?

14:55:55 6 A. Yes.

14:55:56 7 Q. And that at the same time, August  
14:56:00 8 1853, the SON thought that the Rice Lake Band might  
14:56:03 9 move to the peninsula?

14:56:04 10 A. Yes.

14:56:04 11 Q. And the SON were willing to grant  
14:56:07 12 them that?

14:56:07 13 A. Yes.

14:56:08 14 Q. And then Exhibit 2097, please.  
14:56:24 15 This is a letter report from Keating to Anderson on  
14:56:32 16 Keating's proposal to the SON dated July 11, 1854.  
14:56:44 17 In the second paragraph it gives the outline of the  
14:56:52 18 proposal, but I wish to turn to page 5 of the PDF,  
14:56:54 19 please, and we'll come back to this document at  
14:56:58 20 some point, and it says:

14:57:06 21 "From what Sawyer said also it  
14:57:08 22 would appear that the Credit and  
14:57:09 23 other Indians possess similar rights  
14:57:11 24 over this peninsula to the actual  
14:57:13 25 residents, in fact that it was

14:57:15 1 intended as a general place of  
14:57:17 2 refuge, and that when all the  
14:57:19 3 Reserves scattered thro. [sic] the  
14:57:23 4 province were sold by the present  
14:57:25 5 holders, they could claim their  
14:57:26 6 share here & come & live in Comfort  
14:57:29 7 on their annuities."

14:57:31 8 So this is David Sawyer, I presume?

14:57:36 9 A. Probably. I'm sorry, who is  
14:57:42 10 writing this? Is this Keating still?

14:57:45 11 Q. Yes.

14:57:46 12 A. Okay, yes, writing to Anderson?

14:57:53 13 Q. Correct.

14:57:54 14 A. Yes.

14:57:55 15 Q. Who David Sawyer --

14:58:01 16 A. Sorry, did you ask me a question?

14:58:03 17 Q. Well, this was David Sawyer who  
14:58:05 18 was living at Saugeen at the time saying to Keating  
14:58:07 19 that it would appear that Credit and other Indians  
14:58:11 20 possess similar rights? This is what Sawyer was  
14:58:15 21 saying. I am not asking you whether they do  
14:58:18 22 possess similar rights. I am asking you that  
14:58:20 23 Sawyer was saying this to Peter?

14:58:21 24 A. Yes, it looks like it.

14:58:22 25 Q. The Colpoy's Bay Band are an

14:58:30 1 example of an Indigenous community that did make  
14:58:32 2 the move to the peninsula?

14:58:33 3 A. Yes.

14:58:33 4 Q. And they came from the Coldwater  
14:58:37 5 Narrows farming settlement?

14:58:38 6 A. Yes.

14:58:39 7 Q. And they are also known as the  
14:58:41 8 John Jones Band; is that correct?

14:58:43 9 A. I am not sure I knew that.

14:58:48 10 Q. There is a question in this that  
14:58:51 11 has been raised about the role of John Beaty at  
14:58:54 12 Treaty 72, at the Council, and in July you were  
14:58:58 13 taken to a letter from Reverend Van Dusen, which  
14:59:03 14 was Exhibit 2255, June 30, 1855.

14:59:21 15 If we could go to the last page of the  
14:59:24 16 document, you can see there "C. Van Dusen"?

14:59:35 17 A. Yes.

14:59:36 18 Q. And then in the third or fourth  
14:59:47 19 line it talks about the Council, and then at the  
14:59:51 20 sixth line down on the left:

14:59:55 21 "[...] were discussed and no

15:00:03 22 notice whatever of the Council was

15:00:05 23 given to the Band at Colpoy's Bay.

15:00:08 24 One Indian from the Band happened to  
15:00:10 25 be present, but it also happened

15:00:13 1 that he was not (and perhaps never  
15:00:15 2 will be) a member of this Tribe. He  
15:00:21 3 has no share in their annuities or  
15:00:23 4 their lands, yet by Mr. Oliphant he  
15:00:28 5 is named in the Treaty as a  
15:00:30 6 representative of that Band."

15:00:31 7 [As read.]

15:00:32 8 So Beaty described -- that is talking  
15:00:36 9 about Beaty, isn't it?

15:00:38 10 A. Yes.

15:00:38 11 Q. And he is described as a member of  
15:00:40 12 the Band but not a member of the tribe. Is Van  
15:00:48 13 Dusen here saying that he is a member of the  
15:00:49 14 Colpoy's Bay Band? When he says "Band", does Van  
15:00:54 15 Dusen mean the Band at Colpoy's Bay?

15:00:58 16 A. Yes.

15:00:58 17 Q. And when he talks about the  
15:01:00 18 "Tribe", he is talking about the SON Tribe?

15:01:03 19 A. Yes, that makes sense.

15:01:06 20 Q. Beaty signed the Treaty 72  
15:01:09 21 surrender document, which is contained in Exhibit  
15:01:12 22 2175, page 13 of that, which is page 12 of the PDF.  
15:01:37 23 There it is, the opening words of the Treaty are:

15:01:41 24 "We the chiefs, sachems and  
15:01:46 25 principal men of the Indian tribes,

15:01:48 1 resident at Saugeen, Owen Sound

15:01:50 2 [...]"

15:01:51 3 So it doesn't mention Colpoy's Bay,

15:01:52 4 does it?

15:01:53 5 A. No, it doesn't.

15:01:54 6 Q. And then on the next page it gives

15:01:57 7 the text of the -- or there, sorry, and then on the

15:02:03 8 next page of the reserve descriptions, so first:

15:02:10 9 "For the benefit of the Saugeen

15:02:11 10 Indians we reserve [...]"

15:02:13 11 And then on the second page, second:

15:02:20 12 "We reserve for the benefit of

15:02:21 13 the Owen Sound Indians [...]"

15:02:25 14 And then third:

15:02:27 15 "We do reserve for the benefit

15:02:28 16 of the Colpoy's Bay Indians [...]"

15:02:30 17 The "we" that is doing the reserving

15:02:34 18 there and also the surrendering in this document is

15:02:36 19 the Saugeen and Owen Sound Indians, isn't it?

15:02:38 20 A. Yes, I believe so.

15:02:39 21 Q. Not the Colpoy's Bay Indians?

15:02:42 22 A. Yes, I think that is right.

15:02:44 23 Q. So this suggests that the Crown

15:02:49 24 and Indigenous Treaty signatories did not consider

15:02:54 25 that the Colpoy's Bay Indians had a claim to



1 ownership of the peninsula that could be  
2 surrendered to the Crown, doesn't it?

3 A. I'm sorry, can you repeat the  
4 question?

5 Q. Yes. This suggests that the Crown  
6 and Indigenous Treaty signatories did not consider  
7 that the Colpoy's Bay Indians had a claim to  
8 ownership of the peninsula that could be  
9 surrendered to the Crown or should be surrendered  
10 to the Crown?

11 A. I would say it is a little bit  
12 ambiguous for two reasons. First, when Oliphant  
13 arrived, he sent for the Chiefs of all three Bands,  
14 and second, they mentioned Beaty as represented and  
15 they mentioned the Colpoy's Bay Indians.

16 So it is a little bit ambiguous, but it  
17 is true that at the beginning they only list  
18 Saugeen and Owen Sound.

19 Q. So Beaty signed it, but I am not  
20 sure it says in this Treaty surrender document that  
21 he is representing the Colpoy's Bay Indians, does  
22 it?

23 A. Well, can we look again at the  
24 provision on reserving land for Colpoy's Bay? It  
25 mentions him.

15:04:22 1 Q. Oh, yes.

15:04:23 2 A. With the concurrence of John  
15:04:25 3 Beaty, who represents the Tribe.

15:04:27 4 Q. Okay, thank you. The fact that  
15:04:47 5 Oliphant sent for the Chiefs and the three Bands is  
15:04:50 6 not in the surrender document, though, in this  
15:04:54 7 original Treaty text?

15:04:55 8 A. In the text we just looked at?

15:04:58 9 Q. Yes.

15:05:01 10 A. The Treaty text?

15:05:05 11 Q. Yes.

15:05:05 12 A. I don't think it is. I don't  
15:05:07 13 think it mentions sending for them at all, or  
15:05:11 14 sending for any of them.

15:05:13 15 Q. Are you familiar with the Chantry  
15:05:16 16 Island surrender?

15:05:16 17 A. No, I can't say I am.

15:05:18 18 Q. So that is at Exhibit 2148.

15:05:29 19 You see there "Saugeen 13th October  
15:05:34 20 1854". So it says and I will read it then:

15:05:58 21 "We the undersigned Chiefs and  
15:06:00 22 Councillors of the Saugeen, Owen  
15:06:03 23 Sound and Colpoy's Bay Indians and  
15:06:05 24 Council assembled do hereby  
15:06:07 25 relinquish and surrender to her

15:06:11 1 Majesty, her heirs and successors  
15:06:14 2 forever the island called Chantry  
15:06:19 3 Island near the mouth of the Saugeen  
15:06:21 4 River for the express purpose of  
15:06:22 5 having it sold to Alexander McNabb  
15:06:25 6 of Southampton upon payment of the  
15:06:28 7 sum of [100] [...]"

15:06:33 8 A. I think it is 200.

15:06:34 9 Q. 2, you are right, sorry, that is  
15:06:36 10 not the figure:

15:06:38 11 "[...] 200 pounds currency,  
15:06:40 12 Saugeen, 13th October 1854".

15:06:43 13 And then it says "Chiefs", John Thomas  
15:06:47 14 Wahbahdick, Peter Jones, and "Councillors" and it  
15:06:52 15 lists some Councillors, including Alex Madwayosh.  
15:06:55 16 But on the left of the page, it says "Witness",  
15:06:58 17 Peter Jacobs, David Sawyer, and there is some  
15:07:04 18 writing that is not clear, but that is John H.  
15:07:11 19 Beaty, isn't it?

15:07:12 20 A. Yes.

15:07:12 21 Q. And on the right side under -- oh,  
15:07:20 22 sorry, Madwayosh was listed under "Saugeen Chiefs",  
15:07:23 23 isn't he?

15:07:24 24 A. Yes.

15:07:24 25 Q. But do you recognize any of the

1 Chiefs or Councillors on the right side as being  
2 from Colpoy's Bay?

3 A. I recognize several of those  
4 Chiefs from Saugeen and Nawash, but I really  
5 haven't looked at the Colpoy's Bay Band. I  
6 couldn't actually state who the Chief was or Chiefs  
7 were at this time.

8 Q. Peter Jacobs and David Sawyer did  
9 not have a traditional claim to the Saugeen  
10 Peninsula; is that correct?

11 A. Correct.

12 Q. And they are there as witnesses  
13 with John Beaty, and this suggests that Beaty was  
14 not seen as having a traditional claim to Chantry  
15 Island?

16 A. Yeah, I agree it looks that way.

17 Q. And you have noted that the  
18 Colpoy's Bay Reserve was surrendered in 1861 in  
19 your testimony?

20 A. Yes.

21 Q. And that the Band then moved to  
22 Christian Island?

23 A. I thought they moved to Nawash,  
24 but...

25 Q. That is fine, we'll turn to

1 Exhibit 2607, please. This is an extract from a  
2 collection of land surrenders, and on page 2 of the  
3 PDF, and it is page 233 of the original text, but  
4 it has the text of Surrender 93 which was dated  
5 August 16, 1861, "In witness whereof [...] 16th day  
6 of August, 1861".

7 And I am going to read the text to you:

8 "Know all men by these presents  
9 that we, the undersigned Chiefs and  
10 principal men of the band of Indians  
11 known as the Colpoy's Bay Band, now  
12 residing at Colpoy's Bay [...]"

13 And it goes on.

14 At the bottom of that paragraph, the  
15 same paragraph, and in the last clause there,  
16 second-to-last line of the paragraph:

17 "[...] which said tract of land  
18 was set apart for us and reserved to  
19 our sole use by the Chippewa Indians  
20 of Saugeen and Owen Sound."

21 So this is the surrender of the  
22 Colpoy's Bay Reserve by the Colpoy's Bay Band?

23 A. Yes.

24 Q. And then Exhibit 2456, please,  
25 another extract from a collection of land

1 surrenders, page 209 of that collection and the  
2 second page of the PDF, Surrender No. 80, and the  
3 date is 16th of January, 1857, and at the start of  
4 the document:

5 "Know all men by these presents  
6 that we, the undersigned Chiefs,  
7 Headmen, and Warriors of the  
8 respective bands of Ojibwe Indians,  
9 located at the villages of Saugeen  
10 and Nawash, on the Saugeen  
11 Peninsula, that for and in  
12 consideration of the natural love  
13 and affection which we have for our  
14 Indian brothers located on the  
15 reserve on Colpoy's Bay, on said  
16 Peninsula, have hereby agreed to  
17 give, grant, alien, release and  
18 confirm, and by these presents we do  
19 give, grant and bequeath unto our  
20 Indian brothers on the said reserve,  
21 and to their heirs and assigns  
22 forever, all and singular our  
23 interest in that certain parcel or  
24 tract of land situate, lying, and  
25 being at the head of Colpoy's Bay,

1 on the said Peninsula, now in  
2 occupation of our Indian brothers,  
3 known as the Colpoy's Bay Band of  
4 Indians [...]"

5 And in the second paragraph:

6 "We, the aforesaid Chiefs,  
7 Headmen and Warriors, do make this  
8 gift subject to the approval of our  
9 Great Father the Governor General."

10 Now, by this document, Surrender 80,  
11 this is the SON relinquishing any claim they might  
12 have to the Colpoy's Bay Reserve, isn't it?

13 A. Yes, it looks like it, to the  
14 Colpoy's Bay Band.

15 Q. Right, so these two documents,  
16 Surrender 93 and Surrender 80, indicate that when  
17 Treaty 72 set aside the Colpoy's Bay Reserve for  
18 the Colpoy's Bay Band, that that Colpoy's Bay Band  
19 and its members were not the traditional owners of  
20 any of the Saugeen Peninsula, doesn't it?

21 A. Yes, I think that is true. They  
22 had moved there from Coldwater Narrows.

23 Q. And these documents taken together  
24 suggest that the presence of Beaty at the Treaty 72  
25 negotiations was to agree to take the Colpoy's Bay

1 Reserve as a reserve for the Colpoy's Bay Band?

2 A. That seems reasonable. I haven't  
3 seen any written explanation of his presence.

4 Q. But he --

5 A. Except for Van Dusen's complaints,  
6 but that seems reasonable.

7 Q. It also appears that Beaty was not  
8 at the Treaty Council to purport to surrender any  
9 other part of the peninsula to the Crown?

10 A. Yes, that seems correct.

11 MR. OGDEN: It is 3:15, but I'll  
12 continue for awhile, Your Honour.

13 THE COURT: Is this a natural point to  
14 take a break, sir?

15 MR. OGDEN: I think it could be a  
16 break. I'm about to start a new section.

17 THE COURT: All right, well, we'll take  
18 the afternoon break at this time.

19 MR. OGDEN: Thank you.

20 -- RECESSED AT 3:15 P.M.

21 -- RESUMED AT 3:40 P.M.

22 THE COURT: Go ahead, please.

23 BY MR. OGDEN:

24 Q. This is Exhibit 1604, minutes of  
25 Council held at the Credit on the 15th June, 1846.



15:40:28 1 "First, it is the wish of this

15:40:29 2 Council that the lands assigned for

15:40:32 3 our people at Owen Sound be surveyed

15:40:35 4 into farm lots as soon as possible

15:40:37 5 so that each family may at once

15:40:40 6 commence making improvements on

15:40:41 7 their own lots of 100 acres each."

15:40:47 8 [As read.]

15:40:50 9 Do you accept that this is an

15:40:56 10 indication of the Credit Mississaugas desiring land

15:41:01 11 equivalent to 100 acres per family?

15:41:03 12 A. Yes, it does say 100 acres each.

15:41:16 13 Q. And --

15:41:17 14 A. It doesn't seem like much, but...

15:41:21 15 Q. And there were 63 families times

15:41:24 16 100 acres is 6,300 acres?

15:41:28 17 A. Yes.

15:41:28 18 Q. And likely they would desire more

15:41:32 19 land than that?

15:41:33 20 A. One would think.

15:41:38 21 Q. Okay, well, we'll turn now to the

15:41:50 22 Caughnawaga, and you noted them briefly in your

15:41:52 23 report and in your testimony. I want to turn to

15:41:55 24 Exhibit 1873, please. This is the Articles of

15:42:04 25 Agreement dated August 20, 1851, an agreement made

1 by the Nawash and Colpoy's Bay Bands with the  
2 Caughnawaga. Are you familiar with this agreement?

3 A. I don't think I have seen it  
4 before.

5 Q. Could we turn to the second page  
6 of the PDF, please, and make it larger. It says  
7 "Copy" on the top of that, and there is handwritten  
8 page number "626". We unfortunately are going to  
9 have to read through a large part of this, if you  
10 are not familiar with it.

11 So we'll get started, and if I make a  
12 mistake, please correct me, if you are not happy  
13 with -- or if you do not believe I have read it  
14 accurately:

15 "Articles of Agreement made at  
16 Sydenham [...]"  
17 Which is present-day Owen Sound, isn't  
18 it?

19 A. I think so, yes.

20 Q. "[...] this twentieth day of  
21 August in the year of our Lord one  
22 thousand eight and fifty-one,  
23 between the Chiefs, Warriors and  
24 Indians of the Chippewa Tribe  
25 resident at Nawash and Colpoy's Bay

15:43:55 1 in the Indian territory bounded by  
15:43:58 2 Owen Sound and Lake Huron of the  
15:44:00 3 first part and a Deputation of Grand  
15:44:04 4 Chiefs from the Mohawk Tribe  
15:44:06 5 resident at Caughnawaga in Lower  
15:44:10 6 Canada of the second part.

15:44:14 7           Whereas, the said Deputation of  
15:44:17 8 Grand Chiefs were sent on a mission  
15:44:21 9 from their Tribe to select a  
15:44:24 10 suitable location for the said Tribe  
15:44:27 11 to remove to, a Council meeting was  
15:44:30 12 held this day at Nawash of the  
15:44:32 13 parties aforesaid, when it was  
15:44:35 14 agreed by the said parties of the  
15:44:37 15 first part to cede to their brethren  
15:44:41 16 of the Mohawk Tribe at Caughnawaga  
15:44:48 17 'a certain tract or portion of land  
15:44:50 18 of the said territory, the said  
15:44:53 19 tract or parcel of land being butted  
15:45:00 20 and bounded by the tract ceded to  
15:45:02 21 the Credit Indians on the south, and  
15:45:05 22 by the tracts ceded to the Band of  
15:45:08 23 Indians under the charge of Chief  
15:45:11 24 John Jones on the west, and Colpoy's  
15:45:16 25 Bay on the north, and Owen Sound on

15:45:19 1 the east.'

15:45:22 2 The condition of their cession  
15:45:31 3 by the said party of the first part  
15:45:34 4 is, that their brethren of the  
15:45:37 5 Mohawk Tribe at Caughnawaga shall  
15:45:40 6 remove to and settle on and improve  
15:45:42 7 the said tract or parcel land, said  
15:45:51 8 removal to said tract to commence if  
15:45:55 9 possible in the fall of this present  
15:45:57 10 year, and the whole Tribe or a  
15:46:02 11 majority of said Tribe to complete  
15:46:05 12 their removal within two years from  
15:46:11 13 the date [aforesaid] [...]"

15:46:16 14 A. "Of these presents", "the date of  
15:46:24 15 these presents".

15:46:25 16 Q. Sorry, "the date of these  
15:46:25 17 presents", thank you.

15:46:28 18 "[...] the Deputation aforesaid  
15:46:31 19 will on their return to their Tribe  
15:46:43 20 [...]"

15:46:44 21 A. "Submit".

15:46:46 22 Q. "[...] submit to the Chiefs,  
15:46:49 23 Warriors and young men of said Tribe  
15:46:51 24 what they shall have done in the  
15:46:58 25 [...]"

15:47:00 1  
15:47:04 2  
15:47:07 3  
15:47:09 4  
15:47:11 5  
15:47:15 6  
15:47:19 7  
15:47:28 8  
15:47:30 9  
15:47:31 10  
15:47:32 11  
15:47:33 12  
15:47:35 13  
15:47:38 14  
15:47:40 15  
15:47:42 16  
15:47:47 17  
15:47:49 18  
15:47:52 19  
15:47:55 20  
15:48:00 21  
15:48:04 22  
15:48:08 23  
15:48:13 24  
15:48:16 25

A. "Premises".

Q. Perhaps "premises".

"[...] and if this agreement shall be approved of by the said Chiefs, Warriors and young men and be sanctioned by his Excellency the Governor General, that then [...]"

A. I think it is "then the said Chiefs".

Q. Yes, thank you:

"[...] that then the said Chiefs shall notify the said parties of the first part; namely, the Chiefs of Nawash and Colpoy's Bay.

And the said parties of the first part, if the cession of the said tract or a parcel of land shall be sanctioned and approved of by his Excellency the Governor General will give to their Indian brethren the said parties of the second part a conveyance of the said land made or under the hand and seal of the Chief and Warriors of the said party of the first part, confirming and

15:48:19 1 [approving] [...]" -- is that  
15:48:21 2 approving?  
15:48:22 3 A. I think it is a double "s".  
15:48:25 4 Q. "Assuring"?  
15:48:26 5 A. "Assuring", yes.  
15:48:27 6 Q. "[...] assuring to the said  
15:48:29 7 Mohawk Tribe a right of inheritance  
15:48:32 8 in the said parcel or tract of land  
15:48:35 9 hereby agreed to be ceded co-equal  
15:48:37 10 and co-extensive with the right of  
15:48:39 11 the said parties of the first part  
15:48:40 12 to the surrounding land and the said  
15:48:44 13 parties of the first part [forever]  
15:48:48 14 agree to bind themselves that no  
15:48:51 15 cession shall be made of any of the  
15:48:53 16 said territory."  
15:48:54 17 A. I'm sorry, I think it is "further  
15:48:56 18 agree", not "forever agree".  
15:49:04 19 Q. Right:  
15:49:04 20 "[...] and the said parties of  
15:49:07 21 the first part further agree to bind  
15:49:09 22 themselves that no cession shall be  
15:49:11 23 made of any of the said territory  
15:49:11 24 [...]"  
15:49:16 25 [As read.]

15:49:16 1 I'll just pause for a second there. A  
15:49:18 2 territory is different from land or parcel or  
15:49:21 3 tract. So the territory there is the whole  
15:49:24 4 peninsula, is it, the Saugeen Reserve? So far that  
15:49:26 5 would be your conclusion?

15:49:27 6 A. Yes, that seems reasonable.

15:49:31 7 Q. "[...] and now ceded or agreed  
15:49:34 8 to be ceded to the Governor, without  
15:49:37 9 the consent of their brethren of the  
15:49:39 10 Mohawk Tribe from Caughnawaga.

15:49:46 11 In witness whereof, the parties  
15:49:49 12 to the presents have hereunto set  
15:49:55 13 their hands and seals for on behalf  
15:50:02 14 their respective Tribes [this] day  
15:50:10 15 and year [...]"

15:50:11 16 [As read.]

15:50:11 17 A. "The day and year first above  
15:50:13 18 written", I think.

15:50:14 19 Q. Okay. And I don't think we need  
15:50:18 20 to continue, but it says "signed, sealed and  
15:50:21 21 delivered", and there are signatures. And we see  
15:50:29 22 on the left I could make out Charles Keeshig?

15:50:33 23 A. Yes, and Abner Elliott, below him  
15:50:39 24 Richard it looks like Carny.

15:50:44 25 Q. And then also on the right Peter

1 Jones Kegedonce, John Jones, and three others, and  
2 above that, sorry, John Thomas Wahbahdick, I think,  
3 and there are three dodems there?

4 A. Yes.

5 Q. Okay, and that is the end of the  
6 document. So this is the Articles of Agreement  
7 dated August 20, 1851, by which the Nawash and the  
8 Colpoy's Bay Band purport to cede a tract of land  
9 conditionally to the Caughnawaga Tribe; is that  
10 correct?

11 A. What -- conditionally?

12 Q. The condition was that they move  
13 within two years.

14 A. Yes, and I think they said the  
15 complete Tribe.

16 Q. Right. And there is nothing in  
17 the document indicating that the Caughnawaga were  
18 expected to pay the SON for the land; is that  
19 correct?

20 A. No, I don't see anything.

21 Q. The intention, though, as you have  
22 pointed out -- well, not as you pointed out, but  
23 you agree, though, that the intention was that the  
24 whole Caughnawaga Tribe would move?

25 A. Yes.



1 Q. Are you aware of the size of that  
2 community at 1851?

3 A. You mean the Caughnawaga?

4 Q. The Caughnawaga community, yes.

5 A. No.

6 Q. So a new document then is SC09953,  
7 a Plaintiff production, and so this document I wish  
8 to tender as an exhibit and describe as 1849 Census  
9 of Indians, and you will see at the top it says  
10 "Numerical Return of Indians", but I think we could  
11 describe it as a census of Indians.

12 THE COURT: Mr. Registrar.

13 THE REGISTRAR: Exhibit No. 4185.

14 EXHIBIT NO. 4185: 1849 Census of  
15 Indians.

16 THE COURT: Okay.

17 BY MR. OGDEN:

18 Q. So this is going to take a bit of  
19 attention because the pages are facing pages and  
20 there is a table, and so pages 2 and 3 of the PDF  
21 face each other.

22 But if we see the sixth line over here,  
23 the sixth -- well, it is the sixth or seventh,  
24 depending on how you look at it, but you can see  
25 "Mississaugas (of the Credit)" on the left?

15:53:54 1 A. Oh, on the left? Yes, yes, I see  
15:53:58 2 that.

15:53:58 3 Q. Okay, and then below it  
15:54:01 4 "Mississaugas Rice and Mud Lakes"?

15:54:06 5 A. Yes.

15:54:07 6 Q. Okay, so let's call that the  
15:54:11 7 Mississaugas of the Credit would be the seventh  
15:54:13 8 line down, because the top two appear to be two  
15:54:18 9 separate lines.

15:54:20 10 So if we go to page 3 of the PDF, this  
15:54:24 11 is the facing page of the table, and if we go down  
15:54:30 12 to the seventh number, the seventh row, which we  
15:54:36 13 would have as the Mississaugas of the Credit, the  
15:54:39 14 total on the right-hand side is 244 Mississaugas of  
15:54:44 15 the Credit, and then below that 272 which was the  
15:54:49 16 Rice and Mud Lakes.

15:54:51 17 And so do you accept that that was the  
15:54:53 18 census total at that time of the Mississaugas of  
15:54:56 19 the Credit and the Mississaugas of the Rice and Mud  
15:55:02 20 Lakes?

15:55:02 21 A. Yes, as far as I am following you.  
15:55:08 22 I was a bit confused because the first few columns  
15:55:11 23 are empty, so that it appears that they are only  
15:55:16 24 counting Chiefs, Warriors, boys and girls.

15:55:19 25 Q. Well, there is a third line after

15:55:21 1 that that says "Chiefs" and "Warriors", and I think  
15:55:24 2 is that women?

15:55:25 3 A. Oh, yes, it could be.

15:55:26 4 Q. So do you accept then that the 244  
15:55:33 5 is the population of the Credit Mississaugas in  
15:55:37 6 1849?

15:55:38 7 A. Yes.

15:55:38 8 Q. The recorded population?

15:55:39 9 A. Yes, it appears so, yes.

15:55:41 10 Q. And 272 is the recorded population  
15:55:44 11 of Rice and Mud Lakes?

15:55:46 12 A. Yes.

15:55:47 13 Q. So page 4 of the PDF has "Canada  
15:55:56 14 East", which is now Quebec, and we have "Nations",  
15:56:04 15 "Residence", and we have on the sixth line there is  
15:56:17 16 "Iroquois" and "Caughnawaga".

15:56:21 17 And if we go down a further page in the  
15:56:25 18 PDF, please, which is the facing page of the table,  
15:56:30 19 on the sixth line down the total is 1,032?

15:56:36 20 A. Yes.

15:56:36 21 Q. And then you will also see on the  
15:56:38 22 left of that row it appears to be Chiefs are 7, and  
15:56:47 23 sub-Chiefs and Warriors, perhaps, is 296, is that  
15:56:54 24 correct, for Caughnawaga?

15:56:55 25 A. Yes.

1 Q. And then there is no heading given  
2 for that third column, but if we take it to be  
3 women, which would be reasonable, it says, based on  
4 the total size, it says 324?

5 A. Yes, that would fit.

6 Q. So there were over 300 adult men  
7 there, though? 296 plus 7 is over 300 adult men?

8 A. Yes.

9 Q. But not all would have had their  
10 own family, probably?

11 A. Yes, probably not.

12 Q. And then 324 adult women. It is  
13 reasonable to assume that -- well, I am going to  
14 assume, and I will ask you whether you accept it,  
15 that there were 5 people in each family or an  
16 average of 5; is that a reasonable assumption?

17 A. I think that is fair for an  
18 estimate.

19 Q. Well, we had the Credit  
20 Mississauga in 1847 at 63 families, and the  
21 population there was 244, which is about 4 per  
22 family, isn't it?

23 A. Yes.

24 Q. So 1,000 of the Caughnawaga  
25 divided by 5 is 200, isn't it, approximately, or at

15:58:35 1 least perhaps 200 families?

15:58:36 2 A. Yes.

15:58:36 3 Q. Maybe up to maybe 250, maybe more,  
15:58:40 4 families; is that right?

15:58:41 5 A. Yes, I am not sure. It is  
15:58:45 6 possible that they might have categorized males as  
15:58:49 7 men when they married, but we don't know for sure.

15:58:53 8 Q. Okay, we'll go to Exhibit 2068,  
15:59:03 9 please. This is a document you addressed in your  
15:59:10 10 July testimony.

15:59:18 11 Well, actually, sorry, this actually  
15:59:34 12 was transcribed and entered, and the transcribed  
15:59:38 13 version was entered at 4124, which I am showing you  
15:59:44 14 now. And this is the document you addressed in  
15:59:46 15 July, and this is the letter with Colonel Bruce  
15:59:49 16 objecting to the Caughnawaga Mohawks moving to the  
15:59:54 17 peninsula between Owen Sound and Colpoy's Bay; do  
15:59:59 18 you remember this?

15:59:59 19 A. Yes, I do.

15:59:59 20 Q. And at the bottom of this main  
16:00:03 21 paragraph here, he says he objects to this but he  
16:00:10 22 says that they can stay. If they sell, though,  
16:00:15 23 they only get the value of a 100-acre lot; do you  
16:00:18 24 recall that?

16:00:18 25 A. Yes.

1 Q. And you are familiar, I think you  
2 have said, with the numbered Treaties 1, 2 and 5 of  
3 the second half of the 19th century?

4 A. Yes.

5 Q. And the reserve sizes in those  
6 Treaties were calculated on the basis of 160 acres  
7 per family?

8 A. Yes.

9 Q. Could I take you also to Exhibit  
10 2622, please. This is an extract from a  
11 collection, the collection of land surrenders in  
12 Canada.

13 And here we have Surrender No. 94. Are  
14 you familiar with this surrender? Could you go up  
15 to the top and give him a chance to --

16 A. Well, it appears to be dated 1861.

17 Q. Oh, sorry, I think that might be  
18 the previous one.

19 A. Ah, yes.

20 Q. So there we have the date the 6th  
21 of October and it says "in the year first above  
22 written", and I apologize, this is a document that  
23 we pulled up during the afternoon recess.

24 But if we go to the start of the  
25 document and we look through it, we will see - here

1 we go - "the sixth day of October, Anno Domini,  
2 1862", is in the third line there?

3 A. Yes.

4 Q. And:

5 "Articles of Agreement and  
6 convention made and concluded at  
7 Manitowaning, or the Great  
8 Manitoulin Island in the Province of  
9 Canada [...]"

10 And in the second paragraph:

11 "Whereas, the Indian title to  
12 said island was surrendered to the  
13 Crown on the Ninth August, Anno  
14 Domini, 1836, under and by virtue of  
15 a treaty made between Sir Francis  
16 Bond Head, then Governor of Upper  
17 Canada, and the Chiefs and Principal  
18 Men of the Ottawas and Chippewas  
19 then occupying and claiming title  
20 thereto, in order that the same  
21 might 'be made the property (under  
22 their Great Father's control) of all  
23 Indians whom he should allow to  
24 reside thereon'."

25 I think it might be worth giving you a

1 minute to read it, but what I am going to ask you  
2 to accept is that this is a surrender of Manitoulin  
3 Island, and I would like you to pay attention to  
4 the second clause down there. The first clause is  
5 saying that there should be a surrender -- or,  
6 sorry, a survey as soon as possible, and the second  
7 clause:

8 "The Crown will, as soon as  
9 conveniently may be, grant by deed  
10 for the benefit of each Indian being  
11 the head of a family and residing on  
12 the said island, one hundred acres  
13 of land; to each single person over  
14 twenty-one years of age, residing as  
15 aforesaid, fifty acres of land; to  
16 each family of orphan children under  
17 twenty-one years of age containing  
18 two or more persons, one hundred  
19 acres of land, and to each single  
20 orphan child under twenty-one years  
21 of age, fifty acres of land to be  
22 selected and located under the  
23 following rules and condition:"

24 And perhaps just to speed things up,  
25 then there is a paragraph that starts "And whereas



16:04:41 1 [...] at the top there:

16:04:43 2 "And whereas a majority of the  
16:04:46 3 chiefs of certain bands residing on  
16:04:48 4 that portion of the island easterly  
16:04:50 5 of Heywood Sound and the Manitoulin  
16:04:54 6 Gulf, have expressed their  
16:04:56 7 unwillingness to accede to this  
16:04:58 8 proposal as respects that portion of  
16:04:59 9 the island, but have assented to the  
16:05:02 10 same as respects all other portions  
16:05:03 11 thereof, and whereas the Chiefs and  
16:05:05 12 Principal Men of the bands residing  
16:05:07 13 on the island westerly of the said  
16:05:10 14 sound and gulf, have agreed to  
16:05:11 15 accede to the said proposal."

16:05:13 16 I'm sorry, that doesn't necessarily  
16:05:14 17 help us.

16:05:15 18 Would you like a minute to read it to  
16:05:17 19 confirm that this is a surrender of part of  
16:05:19 20 Manitoulin Island and that, as a condition of it,  
16:05:23 21 the Crown was to survey the land in the ratio of  
16:05:31 22 100 acres of land per family?

16:05:33 23 A. I know this Treaty fairly well --

16:05:36 24 Q. I apologize, I should have asked  
16:05:37 25 you that first then.

16:05:38 1 A. Well, you did, and then we got  
16:05:39 2 distracted.

16:05:40 3 Q. Thank you.

16:05:40 4 A. But yes, I do know it, so I  
16:05:43 5 certainly agree with the two things that you just  
16:05:46 6 said, those conditions.

16:05:47 7 Q. Thank you. And this is consistent  
16:05:51 8 with the per-family acreage that the Credit  
16:05:55 9 Mississaugas accepted at Six Nations and desired at  
16:06:01 10 Owen Sound, isn't it?

16:06:03 11 A. I'm sorry, I just lost my  
16:06:07 12 attention. Can you please repeat that?

16:06:08 13 Q. I apologize. It is a long day.

16:06:11 14 This 100-acre ratio per family is  
16:06:16 15 consistent with the ratio that the Credit  
16:06:29 16 Mississaugas desired at Owen Sound and consistent  
16:06:32 17 with the ratio of land that the Credit Mississaugas  
16:06:39 18 obtained at the Grand River, so consistent with is  
16:06:43 19 my question?

16:06:47 20 A. Yes.

16:06:47 21 Q. And the 100 acres per family was a  
16:06:52 22 common ratio, not necessarily the only ratio but a  
16:06:55 23 common ratio for calculating reserve size in the  
16:06:58 24 19th century? You have already indicated that the  
16:07:06 25 numbered reserves were 160 acres per family?

1 A. Yes, the first -- well, 1, 2 and  
2 5, and then all the other numbered treaties were  
3 actually 640 acres per family of 5.

4 Q. Right, so at least 100 acres is  
5 sort of the minimum that was expected per family?

6 A. Yes. It is on the low side, I  
7 would say.

8 Q. So if there were at least 250  
9 Caughnawaga families in 1849, perhaps 250 families,  
10 then in 1851 the Nawash, Colpoy's Bay and  
11 Caughnawaga were expecting that the Caughnawaga  
12 would need at least 20,000 acres on the peninsula?

13 A. Right, 20 to 25,000 I think it  
14 would be, yes.

15 Q. And that was their intention in  
16 the 1851 agreement that we looked at before?

17 A. Yes.

18 Q. So let's return to that -- well,  
19 no, Exhibit 2175, please, PDF page 13, the Treaty  
20 72 surrender. Just in the second, and this gives  
21 the description of the reserve at Owen Sound, and I  
22 am going to read it because it is not  
23 straightforward:

24 "We reserve for the benefit of  
25 the Owen Sound Indians all that

16:09:00 1 tract bounded on the south by the  
16:09:02 2 northern limit of the continuation  
16:09:04 3 of the strip recently surrendered  
16:09:08 4 [...]"

16:09:09 5 And I will pause there. That is the  
16:09:13 6 Treaty 67 half-mile surrender, isn't it, "the  
16:09:17 7 strip"?

16:09:17 8 A. Yes. Yes.

16:09:18 9 Q. "[...] on the north-west by a  
16:09:24 10 line drawn from the north-easterly  
16:09:26 11 angle of the aforesaid strip (as it  
16:09:29 12 was surrendered in 1851 in a  
16:09:31 13 north-easterly direction)."

16:09:34 14 And I will pause again. "Angle" there,  
16:09:37 15 that was a surveying term at least in the 19th  
16:09:40 16 century for a corner I think colloquially it would  
16:09:42 17 be?

16:09:42 18 A. Yes, I believe so.

16:09:44 19 Q. Okay, so:

16:09:45 20 "[...] from the north-easterly  
16:09:47 21 angle of the aforesaid strip (as it  
16:09:48 22 was surrendered in 1851 in a  
16:09:51 23 north-easterly direction); on the  
16:09:54 24 south-east by the Sound extending to  
16:09:57 25 the southern limit of the

1 Caughnawaga settlement, on the north  
2 by a line two miles in length, and  
3 forming the said southern limit; and  
4 we also reserve to ourselves all  
5 that tract of land called Cape  
6 Croker [...]"

7 So to return then to the Owen Sound  
8 reserve, the "said southern limit" is referring to  
9 the southern limit of the Caughnawaga settlement,  
10 isn't it?

11 A. Yes, I think so.

12 Q. Now, the Caughnawaga settlement is  
13 not a Treaty 72 reserve, is it?

14 A. You mean that it wasn't created by  
15 Treaty 72?

16 Q. Correct.

17 A. Yes, I would agree with that. It  
18 already existed.

19 Q. Yes, so the surrender did not  
20 purport to reserve the Caughnawaga settlement from  
21 the surrender to the Crown in Treaty 72?

22 A. No, it seems to be silent on the  
23 matter.

24 Q. But the surrender assumes that the  
25 Caughnawaga settlement existed prior to Treaty 72?

16:11:26 1 A. Yes.

16:11:27 2 Q. It is not defined by Treaty 72, is

16:11:30 3 it?

16:11:30 4 A. No, it is treated as already

16:11:35 5 existing, yes.

16:11:35 6 Q. Right, and the other way around --

16:11:37 7 A. Which it was.

16:11:38 8 Q. Right, the Treaty 72 reserve is

16:11:41 9 defined by the Caughnawaga settlement?

16:11:45 10 A. Yes.

16:11:45 11 Q. So the northern limits of the

16:11:47 12 Nawash Reserve at Owen Sound is the southern limits

16:11:50 13 of the Caughnawaga settlement at 1854?

16:11:54 14 A. Yes.

16:11:54 15 Q. If we could go to Exhibit 2401,

16:12:00 16 please, this is a map of the peninsula by Dennis

16:12:10 17 and Boulton, 1856.

16:12:33 18 A. Is this just so I can see Dennis

16:12:36 19 and Boulton?

16:12:38 20 Q. That's correct.

16:12:39 21 A. Yes, thank you, I did see it.

16:12:41 22 Q. Okay, good. And then so this

16:12:51 23 shows a survey of the peninsula in 1856, and on the

16:12:56 24 right, north of the northern limit of the Owen

16:13:02 25 Sound Nawash Reserve, there is an area of land

16:13:06 1 described as "Reserve of the Caughnawaga Indians";  
16:13:11 2 do you see that?

16:13:11 3 A. Yes.

16:13:12 4 Q. This is another document, SC0954,  
16:13:25 5 please. This is a production of the Plaintiffs  
16:13:37 6 described -- well, I would describe it as a plan of  
16:13:41 7 Keppel Township, surveyed by Rankin 1856, which I  
16:13:49 8 would like to make an exhibit, please.

16:13:51 9 THE COURT: Mr. Registrar.

16:13:53 10 THE REGISTRAR: Exhibit number 4186.

16:13:57 11 EXHIBIT NO. 4186: Plan of Keppel  
16:13:43 12 Township, surveyed by Rankin, 1856.

16:14:02 13 BY MR. OGDEN:

16:14:02 14 Q. And again, here we can see above  
16:14:17 15 the Owen Sound Nawash Reserve a block of land, and  
16:14:25 16 I think we can count them, lots 11 through 26?

16:14:31 17 A. Yes, I see that.

16:14:34 18 Q. Yes, thank you, Caughnawaga  
16:14:36 19 Indians, so you see that there, 16 lots in total.

16:14:45 20 Back then to -- well, no, to a new  
16:14:55 21 exhibit, 2420, please, an extract from Indian  
16:15:13 22 Treaties and Surrenders, the second page of the  
16:15:21 23 PDF, please, and this is Surrender No. 331, 1856,  
16:15:36 24 and this is -- are you familiar with this document?

16:15:38 25 A. I don't think I have seen it

16:15:40 1 before.

16:15:41 2 Q. This is a surrender to the Crown  
16:15:47 3 by 13 Caughnawaga families of the reserve which I  
16:15:56 4 just showed you to be marked on the Dennis and  
16:15:59 5 Boulton map and the Rankin survey. So perhaps take  
16:16:03 6 a minute to read it, please.

16:16:04 7 A. [Witness reviews document.]

16:16:35 8 Thank you, I have read it.

16:16:38 9 Q. Okay. So you will see the bit  
16:16:41 10 where it says in the first paragraph, four lines  
16:16:45 11 from the bottom:

16:16:47 12 "Saving and excepting and  
16:16:49 13 always reserving out of the same  
16:16:51 14 Three hundred acres of land (for the  
16:16:53 15 benefit of three families of the  
16:16:54 16 said Band of Indians (intending  
16:16:59 17 residents on the same) [...]"

16:17:07 18 There seems to be a typo with the  
16:17:10 19 brackets there, but you'll see there three  
16:17:16 20 families, 300 hundred acres, and that is 100 acres  
16:17:19 21 a family?

16:17:20 22 A. Yes.

16:17:21 23 Q. And then if we go down to page 3,  
16:17:23 24 please, there we have the letter from Anderson  
16:17:28 25 dated September 6th, 1856, two days after the



1 Surrender 331:

2 "Sir - I have the honour to  
3 report to you that in obedience to  
4 your instructions of the 2nd Instant  
5 I proceeded to Owen Sound and have  
6 now to Enclose a quit claim from the  
7 Caughnawaga Indians, signed by  
8 thirteen of the Heads of families,  
9 releasing to the Dept. all their  
10 right and title to that part of the  
11 Saugeen Peninsula which had been  
12 reserved for their use and benefit.  
13 Excepting Three hundred Acres from  
14 which Three families decline  
15 removing, such Three hundred Acres  
16 to be allotted to them in such part  
17 as the Dept. may see fit."

18 So we had 16 lots in the Keating plan,  
19 and 13 families surrendered and three did not, and  
20 that totals 16, doesn't it?

21 A. Yes.

22 Q. And I don't know if you recall, do  
23 you, that those three families that decided to  
24 remain ended up joining the Nawash community; do  
25 you recall that?

1 A. No. I haven't really looked  
2 particularly at the history of this group.

3 Q. So if we go back to Exhibit 1873,  
4 please -- and I am pausing, Your Honour, and I am  
5 just wondering if there is something that I am  
6 about to get into that might be properly put over  
7 to tomorrow, and I am making good pace.

8 THE COURT: All right. Do you want to  
9 be more specific about your promise or your  
10 estimate of what that means?

11 MR. OGDEN: Well, my current estimate,  
12 Your Honour, yes, and I did promise I would return  
13 to it, is to be done at least before lunch on  
14 Thursday.

15 THE COURT: All right, so we'll adjourn  
16 until tomorrow morning at 10 o'clock.

17 MR. OGDEN: Thank you.

18  
19 -- Adjourned at 4:20 p.m.  
20  
21  
22  
23  
24  
25

REPORTER'S CERTIFICATE

I, DEANA SANTEDICOLA, RPR, CRR,  
CSR, 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 me;

That the testimony of the witness  
and all objections made at the time of the  
examination were recorded stenographically by me  
and were thereafter transcribed;

That the foregoing is a true and  
correct transcript of my shorthand notes so taken.

Dated this 15th day of August, 2019



NEESON COURT REPORTING INC.

PER: DEANA SANTEDICOLA, RPR, CRR, CSR  
CERTIFIED REAL-TIME REPORTER

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