

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

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VOL 37 DAY 37  
August 14, 2019

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1 Court File No. 94-CQ-50872CM  
2 ONTARIO  
3 SUPERIOR COURT OF JUSTICE

4 B E T W E E N:

5 THE CHIPPEWAS OF SAUGEEN FIRST NATION, and THE  
6 CHIPPEWAS OF NAWASH FIRST NATION  
7 Plaintiffs

8 - and -

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

18 Court File No. 03-CV-261134CM1

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

20 CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and  
21 SAUGEEN FIRST NATION

22 Plaintiffs

23 - and -

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

Defendants

26 -----  
27 --- This is VOLUME 37/DAY 37 of the trial  
28 proceedings in the above-noted matter, being  
29 held at the Superior Court of Justice, Courtroom  
30 5-1, 330 University Avenue, Toronto, Ontario, on  
31 the 14th day of August, 2019.

32 -----  
33 B E F O R E: The Honourable Justice Wendy M.  
34 Matheson  
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A P P E A R A N C E S:

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& Cathy Guirguis, Esq., The Chippewas of  
Saugeen First Nation,  
and the Chippewas of  
Nawash First Nation.

Michael Beggs, Esq., for the Defendant,  
& Michael McCulloch The Attorney General &  
& Barry Ennis, Esq., of Canada.

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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-- Upon commencing at 10:02 a.m.

THE COURT: Good morning.

MR. OGDEN: Good morning, Your Honour.

THE COURT: Please go ahead.

PROFESSOR JARVIS BROWNLIE; Under Prior  
Affirmation.

CROSS-EXAMINATION BY MR. OGDEN

(CONT'D):

Q. Good morning, Professor.

A. Good morning.

Q. Yesterday there was a question  
about whether or not the Colpoy's Bay Band was also  
known as the John Jones Band, and I would like to  
take you to an exhibit briefly, please. It is  
1846, and this is -- the date on this there is the  
27th of March 1851. And if you go down -- well,  
the 28th March, sorry, 1851, is the letter we are  
looking at. I think that is to the Honourable  
Bruce Toronto; is that how you read that at the  
bottom there?

A. I see Bruce, yes, Toronto, yes.

Q. And if you go down further,  
please, you'll see the author is Anderson?

A. Yes.

1 Q. So if you go up to the start of  
2 the letter, please, I'll read it, and if I am  
3 incorrect, please let me know:

4 "I have the honour to enclose  
5 an agreement entered into between  
6 the Colpoy's Bay Indians and a  
7 [...]"

8 And I am not sure if that is a Captain  
9 or --

10 A. "Mr."

11 Q. Mr. Greasson, is that Greasson,  
12 G-r-e-a-s-s-o-n?

13 A. Grearson, I think.

14 Q. Grearson, okay, yes, thank you:

15 "[...] of St. Vincent  
16 purporting to be for the erection of  
17 a saw mill at Colpoy's Bay provided  
18 it be sanctioned by this department,  
19 and which I would [...]"

20 I don't know the next part, sorry.

21 A. "Beg leave."

22 Q. "[...] beg leave," thank you,  
23 "respectfully to remark that there  
24 are not more than 40 men, women and  
25 children belonging to John Jones'



1 Band in the Bay, and unless they are  
2 joined by some of their brethren  
3 from Beausoleil, Rama and" - that is  
4 "Snake Island," I think?

5 A. Yes, that's right.

6 Q. "[...] it would be better for  
7 them to abandon that settlement and  
8 to go to Owen Sound."

9 [As read.]

10 So does that give you the comfort that  
11 the Colpoy's Bay Band was also known as the John  
12 Jones Band? Some comfort, perhaps?

13 A. Some comfort, yes, because I had  
14 noticed yesterday that I thought I saw them listed  
15 as two separate bands on one of the documents that  
16 said Colpoy's Bay and John Jones Band or something,  
17 but I haven't looked into this, so this does appear  
18 to show them being the same.

19 Q. Okay. That is a matter that can  
20 be addressed by another witness, in any case.

21 Returning to the Caughnawaga agreement,  
22 which we looked at yesterday, the agreement between  
23 the Caughnawaga and the Nawash and the Colpoy's Bay  
24 Band, I believe, I would like to turn now to  
25 Exhibit 1933, please. This is the minutes of a

1 General Council of the SON taken by Anderson at  
2 Owen Sound, 26th June 1852.

3 A. Are you sure it is Anderson? That  
4 hand looks so highly legible.

5 Q. It may be a copy, but if you go  
6 down, there is Anderson there?

7 A. Yeah, I think it is a copy.

8 Q. Okay. So then this document, if  
9 you are not familiar with it, you could read it,  
10 but it refers to the 1851 agreement with the  
11 Caughnawaga, and I think that might become apparent  
12 when we turn to page 3.

13 And this is a question:

14 "Have you any objections to  
15 give to the Mohawks such quantity of  
16 land and in such situation as your  
17 Great Father may see fit, provided  
18 they keep within the bounds of such  
19 gift or grant?"

20 And the answer is:

21 "No, we have no objection to  
22 give them land in such place as our  
23 Great Father may direct."

24 It might be helpful, actually, to go to  
25 the start of the document and to go through it, so

10:07:14 1 you can quickly have a look and satisfy yourself  
10:07:17 2 who is involved here.

10:07:18 3 A. Thank you, yes.

10:07:19 4 Q. So please scroll up as you wish.

10:07:21 5 A. [Witness reviews document.]

10:07:24 6 Scroll down, please.

10:07:38 7 Scroll down, please.

10:08:08 8 And scroll down, please.

10:08:25 9 Scroll down, please.

10:08:53 10 Scroll down, please.

10:09:21 11 Scroll down, please.

10:09:33 12 Scroll down, please.

10:09:53 13 I think this is the part we had read,  
10:09:56 14 yes.

10:09:56 15 Q. Okay. So this is Anderson asking  
10:10:00 16 them about the agreement with the Caughnawaga and  
10:10:04 17 Madwayosh replies?

10:10:08 18 A. Yes.

10:10:08 19 Q. So the words, just while we are  
10:10:11 20 here then, the words "as your Great Father may see  
10:10:15 21 fit" and then the answer is "as our Great Father  
10:10:21 22 may direct" are similar to the words in Treaty 45,  
10:10:26 23 aren't they, "under your Great Father's control"?

10:10:33 24 A. Yes, they are similar.

10:10:34 25 Q. But in this conversation, this

1 Council, the Saugeen Band are giving powers to the  
2 Crown to determine how much land the Caughnawaga  
3 would get on the peninsula and where that would be;  
4 is that what is being said?

5 A. Yes, and it seems to be also just  
6 about the general principle of whether they would  
7 be allowed to move there, but it seems to be more  
8 about rights and title, as far as I can tell from  
9 one letter.

10 Q. And from this letter then, it  
11 seems like the Saugeen Band are saying to the Crown  
12 you can determine what happens with that land?

13 A. This is where, of course, we know  
14 it is in translation and we know that this is --

15 Q. Sorry, but Anderson wrote this,  
16 didn't he?

17 A. Yes, but he would have been  
18 speaking to them in Ojibwe.

19 Q. Right.

20 A. And this is traditional language  
21 of government, so you would have to regard that  
22 with some wariness --

23 Q. Okay.

24 A. -- that they necessarily said  
25 something so -- that appears to relinquish their

1 control. I am always wary of that kind of  
2 language, especially when it is in English and  
3 recording a conversation that we know would have  
4 happened in Anishinaabemowin.

5 Q. Okay. Could we go to Exhibit  
6 1873, please, which is the agreement, and then  
7 we'll go down to the second page. Could we make  
8 that bigger, please.

9 Could you go up a little bit. Sorry.  
10 Go down then, please. This is the description of  
11 the tract of land. Down further, I think, please,  
12 and make it larger. This is the description of the  
13 parcel that was to be ceded to the Caughnawaga,  
14 which we covered yesterday but I'll read it again  
15 now:

16 "A certain tract or parcel of  
17 land being butted and bounded by the  
18 tract ceded to the Credit Indians on  
19 the south, and by the tract ceded to  
20 the Band of Indians under the charge  
21 of Chief John Jones on the west and  
22 Colpoy's Bay on the north and Owen  
23 Sound on the east."

24 [As read.]

25 A. This is the place where they seem

1 to be listed as separate bands.

2 Q. Sorry, what gives you that?

3 A. Sorry, John Jones and Colpoy's  
4 Bay.

5 Q. And so --

6 A. Oh, maybe it is just the actual  
7 Bay.

8 Q. I think if you go to the top, they  
9 are talking about the Indians of Colpoy's Bay?

10 A. Right, and then where they say  
11 "Colpoy's Bay" they mean the actual body of water,  
12 not the band.

13 Q. Yes, so --

14 A. Yes.

15 Q. That's right. So what we have  
16 then is when they say "the tract ceded to the Band  
17 of Indians under the charge of Chief John Jones,"  
18 that is the group that ultimately received the  
19 Colpoy's Bay Reserve under Treaty 72, I think, is  
20 that --

21 A. Yes, I think so.

22 Q. Okay, so that is on the west.

23 Now, we don't know at this point what  
24 the size of that tract is, but there was apparently  
25 a tract ceded at that point. We know it ended up

1 being 6,000 acres, though, under Treaty 72?

2 A. Yes. You are speaking of the  
3 Caughnawaga clan?

4 Q. No, sorry, I'm speaking of the  
5 Colpoy's Bay Band.

6 A. Yes, right.

7 Q. I think it is a reasonable  
8 assumption, isn't it, that it was somewhere around  
9 the 6,000 acres, the tracts that they ended up with  
10 in Treaty 72, they knew at the time of Treaty 72  
11 what they wanted that to be and here they are  
12 talking about a tract that had been ceded to them?

13 A. What is the date on this document?

14 Q. This is 1852, I believe. 1851,  
15 I'm sorry, August 20, 1851.

16 A. But this passage is talking about  
17 the land being ceded to the Caughnawaga, is it not?

18 Q. Well, that is describing the land  
19 ceded to the Caughnawaga, but it describes that  
20 land with reference to a tract ceded in the past  
21 tense to the Band under the charge of Chief John  
22 Jones.

23 It also talks about a tract ceded to  
24 the Credit Indians. Now, we don't know whether  
25 that was a formal cession or not, but we know that

10:15:42 1 there was some agreement between the Saugeen  
10:15:44 2 Indians and the Credit Indians and that occurred in  
10:15:47 3 1846, and then some Credit Indians came and  
10:15:50 4 surveyed it. And here we also have the description  
10:15:56 5 of something as a cession, even though it is not a  
10:15:58 6 formal cession.

10:16:01 7 Do you think it is reasonable then that  
10:16:02 8 the tract ceded to the band of Indians under the  
10:16:06 9 charge of Chief John Jones, perhaps not a formal  
10:16:10 10 cession with approval of the Crown, but was an  
10:16:11 11 agreement between the Saugeen Indians and that Band  
10:16:14 12 under the charge of Chief John Jones prior to 1851,  
10:16:22 13 the date of this agreement?

10:16:23 14 A. Yes, so you are asking if the  
10:16:24 15 Saugeen Ojibway had ceded that tract to the  
10:16:28 16 Colpoy's Bay people, to John Jones' Band?

10:16:29 17 Q. Well, ceded within the terms that  
10:16:30 18 they understood it, at least, anyway.

10:16:31 19 A. Yes. Sorry, I thought we were  
10:16:33 20 talking about the size of it, but yes.

10:16:35 21 Q. Well, we were at first, but then  
10:16:36 22 the question of the size is unknown, but there was  
10:16:39 23 a tract under Treaty 72 set aside as a reserve and  
10:16:46 24 that was the quantity of 6,000 acres. Now, we  
10:16:49 25 don't know if they are the same, but that gives



1 some indication of the size of the tract referred  
2 to here, doesn't it, in the absence of anything  
3 else?

4 A. It might.

5 Q. Sure. What is also about this,  
6 and we referred to this, I think, before, is that  
7 in 1847 the Credit Mississaugas had made their  
8 decision not to move apparently to the Saugeen  
9 Peninsula, and this is dated in 1851. But then  
10 just to note, we also looked at Keating's report  
11 from his July 1854 meeting, and then actually the  
12 minutes of the General Council in August 1853, the  
13 1854 Keating report where he mentioned Sawyer,  
14 saying that the Credit Indians apparently had some  
15 rights over the peninsula, and then in 1853 there  
16 was the SON stating they thought the Credit  
17 Mississauga might still move.

18 So it is not unusual in this context  
19 that this is still referring to a tract ceded to  
20 the Credit Indians, is it?

21 A. No, that seems reasonable to me.

22 Q. Yes, so there is another map which  
23 is Exhibit -- well, a map which is Exhibit 2449,  
24 please. Exhibit 2449, so you will see there it  
25 says "Map of the County of Bruce Lately Surveyed

1 Townships, Canada West." There is a date there  
2 that they published, and that is 1857, I think.

3 A. That looks like 1857 to me.

4 Q. So this is a map of the Townships  
5 of the peninsula, and if you could see, we could  
6 rotate it if you would like, but this is just  
7 another map. If you zoom in, this is another map  
8 and it says, I think you will agree, "Reserve of  
9 the Caughnawaga Indians" there on Owen Sound just  
10 north of the --

11 A. Yes.

12 Q. And it says "Indian Reserve"  
13 there, and that is the reserve at Owen Sound?

14 A. Right.

15 Q. And also you will see to the right  
16 there is Derby Township?

17 A. Yes.

18 Q. And then below that there is  
19 Arran, and then there is a line between them which  
20 continues up towards the peninsula.

21 So now Exhibit 2175, this is Oliphant's  
22 Treaty 72 report and associated documents, and then  
23 we have page 14 of the PDF, please. Are you  
24 familiar with this sketch map?

25 A. Yes, I think I have seen this

10:20:32 1 before.

10:20:32 2 Q. And enclosed in the materials sent  
10:20:36 3 to England, Britain, with these reports; is that  
10:20:43 4 your recollection of it?

10:20:44 5 A. Sent to England with the Treaty  
10:20:49 6 72?

10:20:49 7 Q. Treaty 72 reports and --

10:20:51 8 A. That sounds right.

10:20:55 9 Q. So this is the sketch map that  
10:20:57 10 Oliphant refers to in the report as the enclosed  
10:20:59 11 map. Now, note, please, the angle of the reserve,  
10:21:07 12 two reserves. One is where the Owen Sound reserve  
10:21:13 13 is, the north angle of that is -- the north end of  
10:21:20 14 it, at least, is more sort of northwesterly rather  
10:21:24 15 than straight east-west, according to this map, at  
10:21:27 16 least, anyway, even if you tilt your head a little  
10:21:29 17 bit to pretend that you can get north on it.

10:21:32 18 A. Yes, assuming that the straight  
10:21:35 19 lines at the side are due north.

10:21:37 20 Q. Even if you assume they are a  
10:21:45 21 little bit off, it is coming up perpendicular from  
10:21:48 22 Owen Sound? Do you agree with that, it is coming  
10:21:51 23 up perpendicular from Owen Sound, I think is the  
10:21:54 24 point there, and heading off directly towards not  
10:21:57 25 just the bottom right corner of the Colpoy's Bay

1 Reserve, but the top right corner of the Colpoy's  
2 Bay Reserve? That is where that boundary is  
3 pointing?

4 A. It looks like it on this map.

5 Q. Okay. So then that Colpoy's Bay  
6 Reserve is pointed, the bottom boundary, as it  
7 were, the southern boundary, is pointing at Owen  
8 Sound, and sort of north of Sydenham, isn't it?

9 A. Sorry, the south border of the  
10 Colpoy's Bay Reserve?

11 Q. Correct.

12 A. Is pointing?

13 Q. Towards Owen Sound and north of  
14 Sydenham?

15 A. Yes, it appears so.

16 Q. And just to contrast that, I would  
17 like to turn back to Exhibit 2401, please. So that  
18 was the sketch map that Oliphant included in his  
19 report, and then we have the survey of townships  
20 by, this is the Dennis and Boulton map --

21 THE COURT: Ms. Guirguis?

22 MS. GUIRGUIS: Your Honour, I am not  
23 sure, we have been at this I think yesterday  
24 afternoon and this morning going through different  
25 documents and comparing acreages and maps, and I am

10:23:35 1 just not clear on what the relevance is.

10:23:39 2 THE COURT: Well, the difficulty is  
10:23:44 3 that -- "difficulty" is perhaps the wrong word,  
10:23:47 4 Counsel, but it is cross-examination and there are  
10:23:55 5 two options, both of which I will entertain.

10:23:57 6 Either we can have this gentleman step  
10:23:59 7 outside of the room and I could ask examining  
10:24:03 8 counsel to explain, or we can press ahead.

10:24:09 9 Now, if you feel strongly about it, Ms.  
10:24:12 10 Guirguis, then we'll have the witness step out of  
10:24:14 11 the room.

10:24:15 12 MS. GUIRGUIS: No, Your Honour, I'm  
10:24:18 13 fine to go ahead.

10:24:19 14 THE COURT: We can go a little bit  
10:24:21 15 longer. All right, go ahead.

10:24:23 16 MR. OGDEN: Your Honour, actually,  
10:24:25 17 after my next two questions, I was going to suggest  
10:24:28 18 that we ask the witness to step out, so perhaps we  
10:24:30 19 could do that now in any case. There was a  
10:24:32 20 discussion I wanted to have, please.

10:24:34 21 THE COURT: Well, then why don't we,  
10:24:35 22 and then we can get an answer also to counsel's  
10:24:38 23 question. If you could step outside, but not go  
10:24:40 24 away, that would be helpful.

10:24:41 25 THE WITNESS: Yes.

10:24:42 1 THE COURT: Thank you, sir.

10:24:42 2 [Reporter's Note: Witness exits the  
10:24:47 3 courtroom.]

10:25:03 4 THE COURT: Well, perhaps we could  
10:25:17 5 start with the answer to Ms. Guirguis' question.  
10:25:20 6 In the highest level terms, sir, where is this  
10:25:23 7 going?

10:25:27 8 MR. OGDEN: Well, the witness's opinion  
10:25:29 9 is that the Crown's surrender proposal that became  
10:25:34 10 Treaty 72 called for a considerably larger  
10:25:38 11 surrender and a considerably smaller retention of  
10:25:44 12 reserves than had been proposed previously,  
10:25:48 13 including in August of 1854.

10:25:52 14 The opinion is also that the community  
10:25:56 15 had had insufficient time to consider the size of  
10:26:00 16 the proposed surrender and the size of the proposed  
10:26:05 17 reserves.

10:26:06 18 It should be enough to indicate the  
10:26:12 19 relevance of the reserves that the community had  
10:26:16 20 considered not three years prior to that surrender  
10:26:22 21 date.

10:26:23 22 That is the point on relevance. I have  
10:26:25 23 some other points, but --

10:26:27 24 THE COURT: Well, one thing at a time.  
10:26:29 25 Ms. Guirguis, any reply to that?

1 MS. GUIRGUIS: Your Honour, as far as  
2 that goes, Canada has already covered that  
3 extensively in their cross-examination with respect  
4 to the different proposals and -- Canada has  
5 already covered this in their cross-examination,  
6 the fact that -- or the proposition or the  
7 assertion that there were different proposals for  
8 the surrender of the peninsula leading up to it.

9 So I am not -- I would object to this  
10 line of questioning also on the basis that Ontario  
11 can't be covering the same ground as Canada did.

12 THE COURT: All right. Well, Counsel,  
13 you are right that these Defendants shouldn't ask  
14 the witness the same questions, but I don't think  
15 that extends to ruling out topics altogether, and  
16 at least as far as I have been able to tell, the  
17 more detailed subject matter is not directly  
18 overlapping.

19 And I'm satisfied that it is  
20 sufficiently relevant to come within the ambit of a  
21 broad cross-examination of an expert witness.

22 What is your second thing -- or the  
23 first thing you wished to raise, Mr. Ogden?

24 MR. OGDEN: Thank you, Your Honour.  
25 Ontario has prepared illustrations, maps

1 representing the placement and areas of different  
2 reserves and different proposed reserves and  
3 proposed cessions.

4 In my current line of questioning, I  
5 propose showing two of these to the witness, but I  
6 will propose putting the remainder later. There  
7 are eight in total. These maps were prepared by  
8 Ontario Ministry of Natural Resources and Forestry,  
9 using the same base information that was used for  
10 lettered Exhibits M, N and O.

11 The maps -- the information on the maps  
12 or on which the maps are based relies largely on  
13 facts that are already in evidence in the  
14 historical documents or in the testimony of this  
15 witness so far, but it doesn't completely. In some  
16 instances the facts describe an acreage, and we  
17 have illustrated that or depicted it on a map as  
18 indicative only, or illustrative.

19 In some instances, the evidence so far  
20 describes points or a line, for instance, and we  
21 have determined the acreage based on that.

22 I would like to show these to the  
23 witness in order to compare the different decisions  
24 made by the community and the different proposals.

25 I have spoken with Counsel about this,



1 and my understanding is that they would agree to  
2 having these marked as lettered exhibits,  
3 although --

4 MS. GUIRGUIS: Well --

5 MR. OGDEN: But I wonder if in time  
6 these might be of more benefit to the Court, and we  
7 would be prepared to -- these maps were prepared  
8 very recently and we would be prepared to call as a  
9 witness, if necessary, the person who prepared the  
10 maps. I don't think that would be a long matter.

11 An alternative, of course, is consent,  
12 and we have indicated that the acreages and the  
13 areas depicted are readily ascertainable using  
14 Google Maps.

15 Now, I understand it is not Counsel's  
16 obligation to consent to every proposed exhibit,  
17 but I think that would be reasonable in this  
18 instance.

19 In any case, that is where we find  
20 ourselves.

21 THE COURT: What is your position, Ms.  
22 Guirguis?

23 MS. GUIRGUIS: So, Your Honour, we  
24 object to these maps being put to our witness on  
25 several bases.

1 They were shared on Sunday at about  
2 8:00 p.m., so they were disclosed by -- they are  
3 based on certain items that are in exhibits and  
4 other documents, some of which I believe have been  
5 put to our witness about acreages, placement of  
6 reserve lines, which our witness has answered might  
7 be, possibly, and so on.

8 But those documents, those historical  
9 documents have been in the possession of the Crown,  
10 Ontario, for years, per disclosure and so on.

11 So this is late disclosure and this is  
12 precisely the kind of thing that we would have  
13 wanted to review with our witness beforehand and we  
14 are prejudiced by not being able to.

15 This is not simply a matter, also, I  
16 think, of a layperson looking at the description  
17 and putting it onto a map. They have used their  
18 Ministry of Natural Resources and Forestry  
19 technicians to do this work. It also involves  
20 interpreting what is said in these letters and all  
21 of these documents and then placing the lines on  
22 the map.

23 So I don't think it is as simple as  
24 pulling up a Google map.

25 And when we have looked at it, it is

1 not readily obvious that it does support the exact  
2 placement, since we have looked at it since Sunday  
3 night. And as I said, the witness has already  
4 answered in very vague terms in terms of whether or  
5 not he agrees with certain propositions that have  
6 been put by Mr. Ogden to him.

7 In addition, the bottom of these maps,  
8 it is listed that they are for illustrative  
9 purposes only, and there is a disclaimer of all  
10 responsibility for errors, omissions and  
11 inaccuracies on the map, so I'm not sure how they  
12 can be put to our witness with any kind of  
13 certainty that this is what it illustrates.

14 If my friends want to put this in  
15 through their own witness, we can have that  
16 discussion then.

17 THE COURT: Well, just while you are  
18 standing, and I am flipping at my Sopinka, but you  
19 can correct me if you disagree without me finding  
20 it, but ordinarily a party can put forward a chart  
21 or compilation or illustration, as I recall the  
22 rule, as long as two things occur.

23 One, that the underlying evidence that  
24 is required to substantiate the depiction is  
25 introduced at some point. It doesn't have to be

1 done before.

2 And secondly, that a witness who  
3 prepared the document is put forward for  
4 cross-examination.

5 MS. GUIRGUIS: Uhm-hmm.

6 THE COURT: Do you disagree with that  
7 description of the applicable law? I haven't found  
8 it in my Sopinka, but I think that is what it is.

9 MS. GUIRGUIS: No, I don't disagree  
10 with that. I just have my --

11 THE COURT: I understand you have some  
12 other objections, but leaving those aside for the  
13 moment, just narrowly looking at those two  
14 requirements, they appear to be met in Mr. Ogden's  
15 proposal.

16 The other objections are of a different  
17 character that you have made, which is late -- it  
18 is not really late disclosure, Counsel, because you  
19 can't late-disclose a document that didn't  
20 previously exist.

21 MS. GUIRGUIS: That is true.

22 THE COURT: But that you hadn't  
23 reviewed it with your witness, and I think the  
24 disclaimer is probably routine and, you know, it  
25 doesn't really change anything here if Mr. Ogden is

10:35:16 1 going to put a witness forward to be  
10:35:18 2 cross-examined.

10:35:21 3 MS. GUIRGUIS: Your Honour, if I may,  
10:35:22 4 with respect to the part that you -- the part that  
10:35:26 5 it is substantiated by the underlying evidence,  
10:35:29 6 there is underlying evidence, but because we  
10:35:31 7 haven't had the opportunity to review this prior  
10:35:34 8 with, let's say, our expert witness, we don't know  
10:35:37 9 with certainty whether it is substantiated or  
10:35:39 10 whether we would accept that it is --

10:35:41 11 THE COURT: Well, you don't have to, is  
10:35:44 12 my point.

10:35:44 13 MS. GUIRGUIS: Yes.

10:35:45 14 THE COURT: My point is I recall, just  
10:35:46 15 from memory, that at some point in the trial,  
10:35:52 16 before the end of the trial, the underlying facts  
10:35:54 17 need to be proved, but they do not need to be  
10:35:57 18 proved entirely before the document is used;  
10:36:00 19 otherwise, we would have serious logistical  
10:36:04 20 problems with the conduct of the trial.

10:36:05 21 But what do you say is the fallout from  
10:36:11 22 not late disclosure so much as the fact that you  
10:36:14 23 have only just received this I am going to call it  
10:36:18 24 an illustration, for lack of a better idea? What  
10:36:23 25 is the prejudice and what do you say should happen

10:36:25 1 about that, if anything?

10:36:27 2 MS. GUIRGUIS: I think the prejudice of  
10:36:32 3 not -- we say that the prejudice of not having seen  
10:36:36 4 this before and being able to review this with our  
10:36:40 5 witness is not having an understanding of whether  
10:36:44 6 he can speak to whether the evidence supports what  
10:36:51 7 he is about to see on the maps or what he --

10:36:53 8 THE COURT: But he doesn't have to  
10:36:54 9 speak to that. I mean, I suppose he could be asked  
10:36:57 10 if he accepts it.

10:36:59 11 MS. GUIRGUIS: Right.

10:36:59 12 THE COURT: But he doesn't have to  
10:37:01 13 accept it.

10:37:01 14 MS. GUIRGUIS: He doesn't have to, yes.

10:37:03 15 THE COURT: He can be -- it can be  
10:37:05 16 indicated to him that he should assume it is  
10:37:07 17 accurate and then it would be up to Ontario to see  
10:37:13 18 that by the end of the trial it had been proved,  
10:37:15 19 and if it hadn't been proved, then you would be  
10:37:17 20 standing up saying I should disregard all of that,  
10:37:20 21 as happens.

10:37:22 22 But he might know things, and I suppose  
10:37:25 23 it would be fair ball to ask him about them.

10:37:27 24 MS. GUIRGUIS: Uhm-hmm.

10:37:27 25 THE COURT: He seems very capable to

1 me --

2 MS. GUIRGUIS: Certainly.

3 THE COURT: -- of saying what he does  
4 and doesn't know without any hesitation, and --

5 MS. GUIRGUIS: And, sorry, I think to  
6 clarify, what I mean is I think he may have spoken  
7 to -- he may have considered this and we may have  
8 considered this in how he presented his evidence  
9 prior to closing in-chief.

10 So that would be the prejudice that I  
11 am --

12 THE COURT: Anything further?

13 All right, reply?

14 MR. OGDEN: No, Your Honour.

15 THE COURT: None? I mean --

16 MR. OGDEN: Nothing extra.

17 THE COURT: Long trials are difficult  
18 for everyone, and I am sure this will not be the  
19 last time that some document is created for  
20 purposes of the evidence and during the trial. We  
21 certainly have had documents like that from the  
22 Plaintiff.

23 I am not especially concerned about the  
24 idea that at some later date Plaintiffs' counsel  
25 would have to cross-examine someone after, if you

10:38:45 1 intend at trying to introduce these documents,  
10:38:48 2 because I think they would have time to prepare for  
10:38:50 3 that, and also consult with whomever they wanted  
10:38:52 4 to.

10:38:52 5 But I haven't seen these documents. Is  
10:39:07 6 it your intention to try and prove them through the  
10:39:09 7 witness or --

10:39:11 8 MR. OGDEN: As evidence, do you mean?

10:39:13 9 THE COURT: The underlying facts or  
10:39:15 10 is --

10:39:15 11 MR. OGDEN: Well, the underlying facts  
10:39:18 12 are largely in evidence in the historical --

10:39:20 13 THE COURT: I know, but "largely" means  
10:39:23 14 not entirely.

10:39:24 15 MR. OGDEN: Well, no, and some of them  
10:39:25 16 I have so far, some of the additional facts; some  
10:39:28 17 of them I will ask him to accept on the face of it,  
10:39:30 18 in comparison with the other maps that have been in  
10:39:32 19 evidence already, the relative sizes. If he  
10:39:34 20 doesn't accept it, that is fine.

10:39:36 21 But my intention for using them here is  
10:39:40 22 to ask him to accept that, you know, a fair  
10:39:45 23 representation of -- or fair depiction or  
10:39:49 24 illustration of the areas that have been described  
10:39:52 25 in these documents so far.



10:39:56 1 That is my intention, and as we get  
10:39:59 2 through and we compare the different proposals put  
10:40:03 3 to the SON, there will be more maps. Primarily, as  
10:40:08 4 I said, the intention is illustrative, but there  
10:40:12 5 may be some benefit later to the Court in having  
10:40:17 6 them in as evidence.

10:40:19 7 THE COURT: All right. Anything else?

10:40:23 8 MR. OGDEN: No, Your Honour.

10:40:24 9 THE COURT: All right, have a seat.

10:40:27 10 MR. OGDEN: Thank you.

10:40:33 11 [OFF THE RECORD TO RESOLVE  
10:45:02 12 EQUIPMENT/TECHNICAL ISSUE.]

10:45:02 13 THE COURT: All right, my ruling is as  
10:45:31 14 follows.

10:45:32 15 Mr. Ogden for Ontario has indicated  
10:45:34 16 that Ontario has recently prepared some maps that  
10:45:40 17 are illustrations of certain evidence. Those maps  
10:45:44 18 are based largely on evidence that is already  
10:45:49 19 admitted before the Court, but not entirely on  
10:45:52 20 evidence that is already before the Court.

10:45:54 21 Ontario's Counsel proposes to use two  
10:45:58 22 of those maps in cross-examination of this witness,  
10:46:00 23 and there are additional maps that I assume Ontario  
10:46:05 24 proposes to use later in this trial.

10:46:07 25 At least the maps or illustrations that

1 are intended to be used today were prepared  
2 recently and provided to Plaintiffs' Counsel this  
3 past Sunday, which is only three or four days ago.

4 In brief, the Plaintiffs' Counsel  
5 objects because they were just received on Sunday  
6 because, as a result, Plaintiffs' Counsel have had  
7 no opportunity to discuss them with this witness,  
8 because it appears that the maps were prepared  
9 themselves by experts to some degree and the  
10 process included interpreting evidence, and because  
11 it seems that there is some sort of disclaimer on  
12 the face of the maps.

13 I leave aside the disclaimer because  
14 Ontario submits to this Court that they do intend  
15 to rely on them in this proceeding. If they can,  
16 as they undertake to, in due course, fully prove  
17 them, including, if necessary, calling the witness  
18 who prepared them, so that that person will be  
19 available for cross-examination.

20 As for the timing, it is unfortunate,  
21 but it would be wrong to suggest that in a long  
22 trial like this that illustrations, if I can call  
23 them that, could all be anticipated prior to the  
24 commencement of this trial. And indeed, I have had  
25 a number of different sorts of compilations or

10:47:44 1 illustrations used in this trial that were  
10:47:49 2 disclosed at around the time that they were going  
10:47:52 3 to be used and, as has been the continued and  
10:47:57 4 helpful practice, Counsel have been very  
10:48:00 5 co-operative with facilitating that kind of  
10:48:04 6 information, as it is helpful to the Court.

10:48:06 7 Having considered all of the  
10:48:11 8 submissions, I make the following ruling.

10:48:14 9 I will not permit Ontario to try and  
10:48:17 10 prove the facts shown on these illustrations  
10:48:22 11 through this witness. However, I will permit  
10:48:29 12 Counsel to ask this expert witness to assume that  
10:48:32 13 the maps are accurate and ask him questions based  
10:48:37 14 on that assumption.

10:48:38 15 I make this ruling on the basis that  
10:48:44 16 Ontario shall call the witness who prepared the  
10:48:46 17 maps for cross-examination with the caveat that, of  
10:48:56 18 course, if Ontario wishes to abandon all of this  
10:48:59 19 evidence, it is open to them to do that. I am not  
10:49:03 20 suggesting that they should.

10:49:04 21 I also permit the Plaintiffs to pose  
10:49:09 22 reasonable written interrogatories to Ontario well  
10:49:14 23 before that witness testifies regarding the  
10:49:17 24 preparation process so that Plaintiffs' Counsel can  
10:49:23 25 be fairly prepared to cross-examine that witness

10:49:27 1 when the time comes.

10:49:28 2 That concludes my ruling.

10:49:31 3 Would somebody like to bring the  
10:49:34 4 witness. Yes, Mr. Ogden?

10:49:40 5 MR. OGDEN: I'm sorry, Your Honour, on  
10:49:42 6 one point I was not clear.

10:49:43 7 I said I proposed putting two maps to  
10:49:45 8 the witness. I meant to say two maps now. The  
10:49:48 9 remainder will be put to this witness in this  
10:49:50 10 cross-examination.

10:49:50 11 THE COURT: How many are there  
10:49:52 12 altogether?

10:49:52 13 MR. OGDEN: Eight.

10:49:54 14 THE COURT: Well, there is no reason in  
10:49:55 15 principle why my ruling would be different  
10:49:57 16 depending on the number of maps.

10:50:00 17 MR. OGDEN: Yes.

10:50:01 18 THE COURT: That restriction that I  
10:50:03 19 have just imposed will apply to all of them.

10:50:05 20 MR. OGDEN: Thank you.

10:50:06 21 THE COURT: All right. Is there any  
10:50:07 22 other clarifications needed, on either side, of my  
10:50:12 23 ruling?

10:50:12 24 MS. GUIRGUIS: So, Your Honour, for the  
10:50:13 25 purposes of putting it to this witness, are we

10:50:16 1 going to enter it as a numbered exhibit or a  
10:50:18 2 letter?

10:50:18 3 THE COURT: No, it would not be entered  
10:50:20 4 as a numbered exhibit. Ontario has conceded, my  
10:50:23 5 word, not theirs, that not all of the evidence  
10:50:25 6 required to demonstrate that the illustration is  
10:50:31 7 accurate has yet been put before this Court, and  
10:50:34 8 there is no consent.

10:50:35 9 So they will be marked only as lettered  
10:50:38 10 exhibits until such time as either there is a new  
10:50:43 11 development, which, you know, one can always hope  
10:50:47 12 for, consent or something else, but if not, until  
10:50:49 13 that person or persons testify and are  
10:50:53 14 cross-examined, and at that time I presume I would  
10:50:55 15 be asked to consider changing their designation.

10:50:59 16 MS. GUIRGUIS: Thank you, Your Honour.

10:51:00 17 THE COURT: All right, I invite any  
10:51:02 18 counsel, if they have any new developments on these  
10:51:05 19 maps in the fullness of time, just raise them.

10:51:08 20 So with all of that in mind, are you  
10:51:11 21 prepared to proceed, Mr. Ogden?

10:51:13 22 MR. OGDEN: Yes, Your Honour.

10:51:14 23 THE COURT: And you are clear on what  
10:51:15 24 you can and can't do?

10:51:17 25 MR. OGDEN: Yes.

1 THE COURT: All right, then can we have  
2 the witness back, please.

3 MR. OGDEN: Thank you.

4 [Reporter's Note: Witness resumes the  
5 witness stand.]

6 THE COURT: Just while we are waiting  
7 for the witness, I am confident actually that  
8 counsel don't need any help in scheduling that  
9 written interrogatory process, but I do recommend  
10 that you come to an agreement earlier rather than  
11 later about the timing so that if there is any  
12 timing issues, I can deal with them. All right?

13 MR. OGDEN: Yes.

14 THE COURT: Sir, we managed to have a  
15 technical issue in your absence, but everything has  
16 been completed now.

17 Mr. Ogden is going to proceed.

18 Please go ahead.

19 BY MR. OGDEN:

20 Q. Thank you, Your Honour.

21 And thank you, Professor Brownlie.

22 Just to return to the line of  
23 questioning before you left, in comparison to the  
24 sketch map that we showed you from Exhibit 2175  
25 where the what we call the southern boundary of the

1 Colpoy's Bay Reserve pointed towards Owen Sound and  
2 north of Sydenham, the boundary as actually  
3 surveyed points more directly south, away from Owen  
4 Sound; do you see that?

5 A. Yes, to the extent that I can  
6 compare something that I saw 15 minutes ago and  
7 can't see now.

8 Q. Well, we'll show you that sketch  
9 map.

10 A. Yes, it looks quite different.

11 Q. And then you see that the northern  
12 boundary of the Owen Sound Reserve on the sketch  
13 map is perpendicular to Owen Sound and on the  
14 survey map heads in a more east-westerly direction  
15 and is not perpendicular and it is directly lined  
16 up with the southern boundary of the Colpoy's Bay  
17 Reserve?

18 A. Yes, that is quite visible.

19 Q. So I am going to show you and ask  
20 you to look at two illustrations of areas of land  
21 on the Bruce Peninsula, and we'll pass them to the  
22 Registrar first.

23 Now, Mr. Registrar, I'll give you the  
24 SC numbers, which are 0968 and 0967.

25 THE REGISTRAR: SCs?

10:54:18 1 MR. OGDEN: Yes. Your Honour, we have  
10:54:20 2 hard copies which may assist yourself.

10:54:22 3 THE COURT: I think, yes, I see the  
10:54:23 4 size of the sheet as being bigger than a computer  
10:54:26 5 screen is. Is a hard copy available for the  
10:54:29 6 witness as well, so he doesn't have to look at only  
10:54:32 7 part of it at one time?

10:54:33 8 MR. OGDEN: Yes, there are, Your  
10:54:35 9 Honour, and we have got --

10:54:37 10 THE COURT: Rather than scrolling up  
10:54:39 11 and down.

10:54:40 12 MR. OGDEN: Yes.

10:54:41 13 THE COURT: I have got two copies. Did  
10:54:42 14 you give the Court two copies or they are  
10:54:46 15 different?

10:54:46 16 MR. OGDEN: They are actually  
10:54:47 17 different, if you see the title, Your Honour.

10:54:49 18 THE COURT: And is there something in  
10:54:50 19 front of the witness or no?

10:54:52 20 MR. OGDEN: It is coming, Your Honour.

10:55:13 21 I apologize. I said SC0967. The two  
10:55:20 22 numbers, to correct, are SC0968 and SC0969. And  
10:55:32 23 I'll identify them.

10:55:34 24 The title on them, the first one,  
10:55:38 25 SC0968, is "Illustration of tracts intended for the



1 Nawash at Owen Sound, John Jones Band at Colpoy's  
2 Bay, Caughnawaga Mohawks, and the Credit  
3 Mississaugas, based in part on Exhibits 1873,  
4 2175."

5 And the second document, SC0969, is  
6 "Illustration of tracts intended for the Nawash at  
7 Owen Sound, John Jones Band at Colpoy's Bay,  
8 Caughnawaga Mohawks and the Credit Mississaugas  
9 based in part on Exhibits 1873, 2401, 2449 and  
10 2175."

11 Could we mark these, Your Honour,  
12 please, as lettered exhibits?

13 THE COURT: Yes. So, Mr. Registrar,  
14 the document which is SC0968 will be the next  
15 lettered exhibit, which is what?

16 THE REGISTRAR: That will be lettered  
17 Exhibit K-2.

18 EXHIBIT NO. K-2: Map entitled  
19 "Illustration of tracts intended for  
20 the Nawash at Owen Sound, John Jones  
21 Band at Colpoy's Bay, Caughnawaga  
22 Mohawks, and the Credit Mississaugas,  
23 based in part on Exhibits 1873, 2175."

24 THE COURT: And the document which is  
25 SC0969?

10:56:48 1 THE REGISTRAR: That will be lettered  
10:56:50 2 Exhibit L-1.

10:56:53 3 EXHIBIT NO. L-1: Map entitled  
10:55:58 4 "Illustration of tracts intended for  
10:55:59 5 the Nawash at Owen Sound, John Jones  
10:56:05 6 Band at Colpoy's Bay, Caughnawaga  
10:56:08 7 Mohawks and the Credit Mississaugas  
10:56:09 8 based in part on Exhibits 1873, 2401,  
10:56:14 9 2449 and 2175."

10:56:55 10 THE COURT: All right.

10:56:56 11 MR. OGDEN: I wonder if the witness  
10:56:57 12 might mark the copies that he has in front of him  
10:56:59 13 as well, as I will be referring more -- it will be  
10:57:02 14 more efficient if I refer to the lettered exhibit  
10:57:04 15 number.

10:57:04 16 THE COURT: Yes. I don't know if the  
10:57:06 17 witness has a writing implement. He does, yes.

10:57:09 18 THE WITNESS: I have one, yes.

10:57:10 19 THE COURT: Did you follow the order  
10:57:12 20 there, sir?

10:57:12 21 THE WITNESS: No, I did not.

10:57:13 22 THE COURT: So the one that if you look  
10:57:15 23 at the third line of the title refers to Exhibits  
10:57:17 24 1873 and 2175 is Exhibit K-2, if you could just put  
10:57:21 25 a big "K-2" on the top, and the other one is L-1.

10:57:25 1 THE WITNESS: Thank you.

10:57:27 2 THE COURT: Thank you.

10:57:27 3 Please go ahead.

10:57:28 4 BY MR. OGDEN:

10:57:40 5 Q. Professor Brownlie, you are not  
10:57:43 6 going to be asked to accept that these are  
10:57:47 7 accurate, that the boundaries of the tracts as  
10:57:55 8 shown on the map will not determine the boundaries  
10:57:57 9 of particular tracts in any order of this Court.

10:58:06 10 What I am going to do is ask you to  
10:58:09 11 look at them and I am going to ask you general  
10:58:16 12 statements about them.

10:58:17 13 THE COURT: Well, just to be clear,  
10:58:19 14 sir, this gentleman is going to be asked to assume  
10:58:25 15 that they are accurate, without accepting that  
10:58:27 16 that's correct one way or the other, right?

10:58:30 17 MR. OGDEN: Thank you, Your Honour.

10:58:31 18 THE COURT: As an expert, he is being  
10:58:32 19 asked to make an assumption.

10:58:38 20 MR. OGDEN: Thank you, Your Honour.

10:58:39 21 THE COURT: All right.

10:58:40 22 BY MR. OGDEN:

10:58:40 23 Q. So the first map, lettered Exhibit  
10:58:43 24 K-2, we have four reserves, four areas described as  
10:58:53 25 "reserve," and this illustration is based in part

1 on Oliphant's sketch map that we just saw and also  
2 the Caughnawaga agreement. The sketch map is at  
3 2175 and the agreement is at 1873.

4 And the sketch map contains the  
5 Colpoy's Bay Reserve with an acreage of 6,000, as  
6 it was set out in that report, and was angled, as  
7 we see here, towards the south-east.

8 And then the Owen Sound Reserve, you  
9 should assume the acreage here is correct, is  
10 12,681 acres, and you will see the angle there at  
11 the northern end of it angling towards the eastern  
12 corner of the Colpoy's Bay Reserve.

13 And there are two other tracts  
14 indicated here.

15 One is "C", which is described as the  
16 Caughnawaga tract, and there the map you should  
17 assume depicts an acreage of 26,000 acres.

18 And the Credit Mississauga tract, and  
19 you can assume the acreage is as accurately  
20 depicted on the map at 6,000 acres.

21 And you said yesterday that you accept  
22 that the tract supposedly surrendered, or ceded,  
23 sorry, to the Credit Mississaugas would have been  
24 around 6,000 acres, that is at 100 acres per family  
25 and 60-odd families?

11:00:36 1 A. Yes.

11:00:37 2 Q. And you also said that the  
11:00:38 3 Caughnawaga Mohawks would have required and  
11:00:44 4 expected under the agreement made at Exhibit 1873 a  
11:00:48 5 reserve of the size of 20 to 25,000 acres at least,  
11:00:54 6 I think?

11:00:56 7 A. Yes, that is what I remember.

11:00:57 8 Q. So this you can see illustrates  
11:01:06 9 the following.

11:01:07 10 And I will return to the description of  
11:01:11 11 the area in Exhibit 1873, and if you follow with  
11:01:18 12 me, please, on the map in front of you:

11:01:22 13 "A certain tract or portion of  
11:01:24 14 land being butted and bounded by the  
11:01:26 15 tract ceded to the Credit Indians on  
11:01:28 16 the south" - and this is describing  
11:01:30 17 the Caughnawaga tract - "and by the  
11:01:32 18 tract ceded to the Band of Indians  
11:01:35 19 under the charge of Chief John Jones  
11:01:37 20 on the west and Colpoy's Bay on the  
11:01:38 21 north and Owen Sound on the east."

11:01:44 22 [As read.]

11:01:44 23 And so you have said you were not sure  
11:01:47 24 that the size of the tract ceded to the Band of  
11:01:50 25 Indians under the charge of Chief John Jones on the

1 west as described in Exhibit 1871 was 6,000 acres.  
2 We don't know that that was the amount given to  
3 that Band under Treaty 72, but we do know that the  
4 tracts for the Caughnawagas was bounded on the west  
5 by that tract, wherever that tract was.

6 And then this Caughnawaga tract is  
7 described to be bounded on the north by Colpoy's  
8 Bay, which is a fixed location, and then on the  
9 east by Owen Sound, which is a substantial distance  
10 away, and then on the south by the tract ceded to  
11 the Credit Mississaugas.

12 And we know from other evidence we have  
13 seen that the Caughnawaga tract or the Caughnawaga  
14 settlement was at least as far into Owen Sound as  
15 the northern end of the Nawash Reserve in Owen  
16 Sound; is that correct?

17 A. Sorry, how do we know that?

18 Q. Well, the surrender -- I don't  
19 know if you recall the surrenders from the 16  
20 families?

21 A. The 16 families of Caughnawaga?

22 Q. Caughnawaga, correct, and the lots  
23 in which they lived were numbered 11 through 26 on  
24 Rankin's survey?

25 A. Yes.

11:03:32 1 Q. Of the Keppel Township?

11:03:34 2 A. Yes.

11:03:35 3 Q. And then we have the Treaty 72  
11:03:36 4 reserve being described in relation to that tract  
11:03:43 5 which we take to have existed at 1854?

11:03:48 6 A. Okay.

11:03:49 7 Q. Sorry, okay, yes, you agree?

11:03:55 8 THE COURT: You have got two problems  
11:03:57 9 right now, Mr. Ogden.

11:03:58 10 One is you have lost me.

11:03:59 11 But leaving aside that, I am not -- I  
11:04:02 12 know you were to a large extent reviewing evidence  
11:04:05 13 you have already covered with this gentleman, which  
11:04:08 14 is okay, although not really necessary, and these  
11:04:15 15 questions seem to be off-side my ruling.

11:04:24 16 In other words, you have your map and  
11:04:25 17 you have asked the gentleman to assume it is  
11:04:27 18 accurate, but you now seem to be getting into why  
11:04:32 19 it might be or might not be accurate.

11:04:36 20 MR. OGDEN: Sorry, Your Honour, I  
11:04:37 21 thought I had asked him to assume that the acreages  
11:04:40 22 were --

11:04:40 23 THE COURT: Well, I have ruled that he  
11:04:42 24 is going to assume that the entire thing is  
11:04:44 25 accurate and you can ask him questions about it,

11:04:46 1 and if you have already covered it with him, you do  
11:04:48 2 not need to go over it again, obviously.

11:05:16 3 MR. OGDEN: May I have one minute?

11:05:18 4 THE COURT: Yes.

11:05:45 5 BY MR. OGDEN:

11:05:49 6 Q. Your Honour, I intend to ask  
11:05:53 7 further questions based on this map later in my  
11:05:56 8 examination. I just wish to introduce it and put  
11:06:00 9 it in front of the witness at this particular  
11:06:03 10 point. So I'll move on to the second map, thank  
11:06:06 11 you, which is lettered Exhibit L-1.

11:06:13 12 Again, assuming that this map is  
11:06:18 13 accurate, this is a different representation of the  
11:06:23 14 tract described in 1873, which I'll read again, if  
11:06:36 15 you look at the map:

11:06:37 16 "A certain tract or portion of  
11:06:39 17 land being butted and bounded by the  
11:06:41 18 tract ceded to the Credit Indians on  
11:06:44 19 the south and by the tract ceded to  
11:06:46 20 the Band of Indians under the charge  
11:06:49 21 of Chief John Jones on the west and  
11:06:51 22 Colpoy's Bay on the north and Owen  
11:06:53 23 Sound on the east."

11:06:54 24 [As read.]

11:06:54 25 And you will see that the acreage given



11:07:01 1 here for the Caughnawaga tract, "C", is larger, is  
11:07:07 2 38,013, but you will also see that this map takes  
11:07:15 3 us starting at ending points the reserves for the  
11:07:21 4 Colpoy's Bay Indians and the Nawash Reserve at Owen  
11:07:25 5 Sound as surveyed after Treaty 72.

11:07:27 6 So I'll return to these maps at a later  
11:07:30 7 date. Well, the same date, actually, later time.

11:07:36 8 If we can turn now to the October 1854  
11:07:56 9 surrender, please, and the events of that surrender  
11:07:59 10 and the assertion that Oliphant did not give  
11:08:04 11 advance notice to the SON of the Treaty Council,  
11:08:08 12 and I have some brief questions about that.

11:08:13 13 You have said in your report that it  
11:08:17 14 was clear that he did not send word because he had  
11:08:21 15 to send messengers to the Chiefs of the three  
11:08:27 16 Bands.

11:08:27 17 And I would ask you to accept -- well,  
11:08:33 18 you accept, don't you, that sending messengers is  
11:08:36 19 consistent with a general notice by Oliphant, I  
11:08:39 20 will come in mid-October for a Treaty Council?

11:08:42 21 A. I wouldn't take it as a given. I  
11:08:51 22 think that if they had been told that he was going  
11:08:53 23 to come for a Treaty Council on a certain date,  
11:08:55 24 that the Chiefs would have been there.

11:09:00 25 Q. And if he hadn't --

11:09:01 1 A. That was the usual practice in  
11:09:03 2 treaty-making.

11:09:03 3 Q. Right, but if he hadn't given a  
11:09:06 4 certain date -- sorry, if he hadn't given a certain  
11:09:08 5 date, then do you accept that having to send  
11:09:10 6 messengers is consistent with a general notice of a  
11:09:16 7 range of dates?

11:09:17 8 A. It could be.

11:09:19 9 Q. So he travelled from Montreal to  
11:09:23 10 Guelph and then to Saugeen, and he didn't know the  
11:09:26 11 exact date of his arrival, did he?

11:09:28 12 A. I don't know if he knew that. I  
11:09:31 13 do know that the general practice in making  
11:09:36 14 treaties was to tell people a certain date, and  
11:09:38 15 then in practice they couldn't always make it on  
11:09:41 16 the date stated, but the normal practice was to  
11:09:44 17 inform people ahead of time of a specific date, for  
11:09:46 18 this exact reason, that people were quite mobile  
11:09:49 19 and that they usually asked to know in advance  
11:09:53 20 because you couldn't always assemble people within  
11:09:55 21 a day either.

11:09:56 22 Q. The Saugeen Chiefs were away  
11:10:05 23 fishing when he arrived on the 12th, and Oliphant  
11:10:12 24 would not have expected them to forgo that activity  
11:10:20 25 and wait for him, would he?

11:10:22 1 A. Well, again, if they had agreed,  
11:10:24 2 if he had told them he was coming on a certain day,  
11:10:27 3 which would be the usual practice, then yes, they  
11:10:30 4 would have stayed there to await the Council.

11:10:32 5 Q. In Oliphant's Treaty report, which  
11:10:51 6 is Exhibit 2175, Oliphant described his travel or  
11:10:58 7 his going to the reserve, and he said that he went  
11:11:05 8 -- this is at page 2 of the PDF and page 3 of the  
11:11:08 9 report. Actually, it starts that he had convened a  
11:11:25 10 Council, on the fourth line:

11:11:28 11 "[...] for the purpose of  
11:11:29 12 obtaining, if possible, from the  
11:11:32 13 tribes resident at Saugeen, Owen's  
11:11:35 14 Sound, and Colpoy's Bay, a surrender  
11:11:35 15 to the Crown of the greater portion  
11:11:37 16 of that tract of land [...]"

11:11:39 17 So the words "if possible" suggest that  
11:11:44 18 he wasn't certain that a surrender would occur,  
11:11:48 19 don't they?

11:11:48 20 A. Yes, they do.

11:11:49 21 Q. And then the next page of this  
11:11:54 22 report, page 4 of the report, has a quote, when he  
11:12:02 23 is talking about why he called the Council of the  
11:12:07 24 Saugeen rather than Owen Sound, and there was a  
11:12:12 25 problem, I understand, from the August negotiations

11:12:17 1 because not everyone from Saugeen could attend at  
11:12:21 2 Owen Sound; is that correct?

11:12:26 3 A. I am looking for the passage, but  
11:12:34 4 what I remember is that I am not sure it was that  
11:12:40 5 they could not attend or if it was that they  
11:12:42 6 objected to attending at the other settlement.

11:12:45 7 Q. Okay. In any case, there was a  
11:12:47 8 concern about having the Council at Owen Sound, and  
11:12:55 9 I will read this passage:

11:12:59 10 "In addition to the  
11:12:59 11 difficulties arising out of these  
11:13:01 12 combined adverse influences, there  
11:13:03 13 were others of a more complicated  
11:13:05 14 nature presented, by the conflicting  
11:13:06 15 interests of the white settlements  
11:13:07 16 at Saugeen and Owen's Sound. The  
11:13:12 17 advocates of these have lost no  
11:13:13 18 opportunity for some time past, of  
11:13:15 19 inflaming those feelings of jealousy  
11:13:18 20 which have long existed between the  
11:13:20 21 two bands, in order that in the  
11:13:21 22 event of any surrender to the Crown  
11:13:23 23 being under consideration, each  
11:13:25 24 interest might be represented in  
11:13:26 25 council by Indians, whose only

11:13:27 1 desire was to oppose the wishes of  
11:13:29 2 their rivals. Under these  
11:13:31 3 circumstances, it appeared to me of  
11:13:32 4 the highest importance that no  
11:13:34 5 arrangement should be entered into,  
11:13:37 6 which should on the one hand seem to  
11:13:39 7 the Indians to imply a partiality to  
11:13:41 8 one or other of the respective bands  
11:13:45 9 [...]"

11:13:45 10 So here Oliphant is expressing the  
11:13:49 11 concern that both of the Bands accept the surrender  
11:13:59 12 after it has been made; isn't that what he is  
11:14:03 13 saying?

11:14:03 14 A. Yes, I think so, and that they  
11:14:07 15 feel that it was fair.

11:14:11 16 Q. And considering whether the SON  
11:14:14 17 were or felt threatened, a lot depends on the  
11:14:18 18 ability of the SON to say no, doesn't it?

11:14:20 19 A. That seems reasonable.

11:14:24 20 Q. And they had said no prior to  
11:14:28 21 October 1854 on more than one occasion?

11:14:31 22 A. Yes.

11:14:34 23 Q. In 1851, in Treaty 67, the Crown  
11:14:39 24 asked for a mile surrender, and the SON said no  
11:14:42 25 initially and agreed to half a mile; is that

11:14:45 1 correct?

11:14:45 2 A. Yes.

11:14:45 3 Q. And then we'll go, please, to  
11:14:50 4 Exhibit 1843, which is a report on that Crown  
11:15:01 5 proposal of one mile written by the Indian Agent  
11:15:07 6 John Frost. Could we go down just to show the  
11:15:12 7 author, please. There he is, John Frost, who you  
11:15:17 8 recognize as the Indian Agent or an Indian Agent?

11:15:19 9 A. No, actually, I don't. I don't  
11:15:23 10 recall coming across him before.

11:15:24 11 Q. All right. Well, would you like  
11:15:26 12 to see the handwritten version of it, or are you  
11:15:28 13 happy to work with the transcript here?

11:15:29 14 A. I would like to look at the  
11:15:31 15 transcript first.

11:15:32 16 Q. Okay, could you just go up,  
11:15:34 17 please.

11:15:37 18 A. So he was an Indian Agent to whom?

11:15:38 19 Q. Well, I am not sure myself, but he  
11:15:47 20 was -- perhaps you could read this letter. It's  
11:15:51 21 not important necessarily to whom he was, but what  
11:15:54 22 this illustrates is that he presented the Crown's  
11:15:57 23 proposal to the SON.

11:15:59 24 So could you scroll up so he can read  
11:16:01 25 that.

11:16:02 1 A. [Witness reviews document.]

11:16:04 2 Scroll down, please.

11:16:24 3 Scroll down, please.

11:16:55 4 I'm sorry, just a little bit up, I  
11:17:01 5 can't see that line. Thank you.

11:17:02 6 Okay, I have read it.

11:17:09 7 Q. Okay. So to go back to the  
11:17:12 8 outlined quote, please, the letter is dated  
11:17:19 9 Sydenham, 15th March 1851, but Mr. Frost here  
11:17:24 10 describes, in trying to seek the surrender for the  
11:17:31 11 road:

11:17:34 12 "[...] made use of all the  
11:17:35 13 persuading powers I am possessed of  
11:17:37 14 to induce them to comply with the  
11:17:39 15 request of the Government, and all  
11:17:41 16 in vain [...]"

11:17:43 17 Do you accept then the SON said no in  
11:17:51 18 this instance, in spite of Crown pressure to  
11:17:54 19 surrender?

11:17:54 20 A. They didn't surrender the whole  
11:17:58 21 amount asked for. They did end up surrendering an  
11:18:02 22 amount of land.

11:18:03 23 Q. And then we have Anderson's August  
11:18:07 24 1854 proposal which the SON rejected, didn't they?

11:18:10 25 A. Yes, they made an offer --

11:18:14 1 actually, they made an offer and Anderson rejected  
11:18:17 2 their offer.

11:18:19 3 Q. After they had rejected his  
11:18:20 4 proposal?

11:18:21 5 A. Yes, I think -- yes, he had asked  
11:18:23 6 for a much larger amount of land, approximately  
11:18:27 7 100,000 acres and all the land they most wanted to  
11:18:30 8 keep, and they made a counter-offer that he then  
11:18:34 9 rejected.

11:18:35 10 So they were negotiating, but they were  
11:18:37 11 trying to retain at least a large amount of land.

11:18:44 12 Q. Anderson described his speech to  
11:18:53 13 the Saugeen and Nawash Indians. From your review  
11:18:59 14 of the documents, does he appear to have believed  
11:19:02 15 what he said to them and in his report that the  
11:19:07 16 Crown had the ability to unilaterally take the  
11:19:13 17 land?

11:19:13 18 A. It is always hard. I mean, you  
11:19:18 19 can't actually know what someone believes, but he  
11:19:21 20 did make that assertion in a Council to the Saugeen  
11:19:24 21 Ojibway and he did write a letter to his superiors  
11:19:29 22 arguing that they should do so.

11:19:34 23 Q. And so also on the question of  
11:19:39 24 whether or not there were threats and the effect of  
11:19:43 25 any threats, a lot depends on the views of



1 Alexander -- Chief Alexander Madwayosh, doesn't it?

2 A. Yes, among others.

3 Q. But I mention him because he at  
4 the Treaty Council is described as being the main  
5 opponent of the surrender, wasn't he?

6 A. He is described that way, yes.

7 Q. And so if there was a threat and  
8 that threat was to have any effect, it must have  
9 had some effect on Madwayosh?

10 A. Yes.

11 Q. I would like to go over some of  
12 the views of Madwayosh on land surrenders.

13 Your Honour, it is 11:20, but I am  
14 content to continue for a few minutes.

15 THE COURT: Well, we only break at  
16 11:30. Now, I recognize on Monday I read my  
17 various time things incorrectly, and we did break  
18 at 11:15, but that was an oversight on my part, so  
19 press ahead.

20 BY MR. OGDEN:

21 Q. Thank you, Your Honour.

22 Exhibit 2088, please. This is a copy.  
23 And at the first page there, it says "translation,"  
24 and it is "Nawash Owen Sound," is that June 7,  
25 1854?

11:21:07 1 A. It looks like.

11:21:07 2 Q. Are you familiar with this

11:21:09 3 document?

11:21:09 4 A. I can't tell yet.

11:21:16 5 Q. Okay.

11:21:17 6 A. I don't remember it.

11:21:18 7 Q. Okay. Well, I'll describe it and

11:21:22 8 you can look at it and then see if you agree. It

11:21:25 9 is a Council minutes or a memorandum from the

11:21:27 10 Nawash band to the Saugeen Band concerning the

11:21:32 11 potential surrender of an island off the coast of

11:21:36 12 Saugeen, which would be Chantry Island, wouldn't

11:21:42 13 it, which is the only island off the coast of

11:21:45 14 Saugeen?

11:21:46 15 A. I don't actually know that. I

11:21:48 16 know the fishing islands. I don't know about

11:21:51 17 Chantry Island.

11:21:53 18 Q. Okay, right. Well, if we go down

11:22:00 19 then, if you would like to read it as we go

11:22:03 20 through, please, the first page, at least.

11:22:08 21 A. [Witness reviews document.]

11:22:10 22 Scroll down, please.

11:22:27 23 Scroll down, please.

11:22:55 24 This appears to be a new document.

11:23:05 25 Q. I think this is -- if you look at

1 the top of the first page, please, do you see the  
2 date is June 7, but it says "copy translation"?

3 A. Yes.

4 Q. And then the next page, the same  
5 date, June 7, "Nawash OS," Owen Sound?

6 A. Oh, I see.

7 Q. And it is written in  
8 Anishinaabemowin, so the first page would be a  
9 translation of this page; do you agree? Likely?

10 A. It seems likely. I don't read  
11 Anishinaabemowin.

12 Q. Scroll down, please. We have a  
13 list of Chiefs, and then the next page, a further  
14 list, and that is a list of Nawash Chiefs, isn't  
15 it?

16 A. Yes, it must be.

17 Q. This is the Council minute from  
18 Nawash.

19 So in this minute, it describes the  
20 Nawash Band wishing to cooperate with the Saugeen  
21 Band in the sale of an island at Saugeen.

22 A. Yes.

23 Q. And it says except for one Chief,  
24 and the words are on the first page:

25 "There is one of our Chief will

11:24:19 1 not sign, but all that air with us  
11:24:23 2 at present sign the document [...]"  
11:24:26 3 Now, on the next page -- they don't  
11:24:29 4 list who the Chief is on this page, but you will  
11:24:32 5 see on the next page, from which it is  
11:24:35 6 translated -- well, you can see there the name --  
11:24:53 7 well, actually, we can see there is a name given in  
11:24:54 8 the original Anishinaabemowin, Chief Peter J.  
11:25:02 9 Kegedonce, and his name is not given in the  
11:25:04 10 translation for some reason, but we could assume he  
11:25:06 11 is the Chief they are talking about perhaps?  
11:25:09 12 A. This isn't the full list. Aren't  
11:25:11 13 there more names on the next page?  
11:25:12 14 Q. Well, if you look in the centre,  
11:25:13 15 not the list of Chiefs, you will see in the text  
11:25:16 16 that was translated --  
11:25:17 17 A. Oh, I see.  
11:25:18 18 Q. -- Chief Peter J. Kegedonce.  
11:25:21 19 But it is not important perhaps at this  
11:25:22 20 point who that Chief is, but you will see the list  
11:25:25 21 of Chiefs who supported the Saugeen request for the  
11:25:30 22 surrender of an island, the Nawash Chiefs  
11:25:32 23 supporting the Saugeen request for a surrender, and  
11:25:36 24 Madwayosh was the main Chief or one of the main  
11:25:38 25 Chiefs at Saugeen, wasn't he?

11:25:40 1 A. Yes.

11:25:40 2 Q. And so it appears that at June  
11:25:43 3 5th, 1854, Madwayosh is in favour of the surrender  
11:25:46 4 and sale of an island off the coast of Saugeen?

11:25:51 5 A. I can't judge that from this  
11:25:55 6 document. It appears that -- it appears from this  
11:25:58 7 document that the Saugeen agreed to surrender the  
11:26:01 8 island.

11:26:01 9 Q. Sorry, the document is Nawash --

11:26:05 10 A. Right.

11:26:05 11 Q. -- agreeing with the Saugeen  
11:26:07 12 proposal to surrender the island?

11:26:09 13 A. Right.

11:26:09 14 Q. And if you go to --

11:26:10 15 A. But it doesn't show me what  
11:26:15 16 Madwayosh's opinion specifically was on it.

11:26:17 17 Q. No, it doesn't, and so I am asking  
11:26:18 18 you to infer from the fact that he was the main or  
11:26:21 19 one of the two main Chiefs at Saugeen that he was  
11:26:25 20 aware of this, given the Nawash were aware of it,  
11:26:29 21 and the Nawash saying that they wished to cooperate  
11:26:32 22 with the Saugeen Band, that he was one of those  
11:26:37 23 wishing to make the surrender?

11:26:39 24 A. That seems like a reasonable  
11:26:42 25 inference. I would not normally draw a complete

1 conclusion on the basis of one letter, which this  
2 is all difficult for me because it is all these  
3 individual documents that I haven't seen before.

4 Q. Right. Then next we have another  
5 document, Exhibit 2095, which is dated July 5,  
6 1854, referring to and containing a proposal by  
7 Keating to the SON. Are you familiar with this  
8 proposal and with this document?

9 A. I think so. Can you scroll down,  
10 please.

11 [Witness reviews document.]

12 Yes.

13 Q. And Keating met with a joint  
14 Council of the SON to propose the surrender, and  
15 the surrender is described here, it is described  
16 as:

17 "[...] a certain tract of land  
18 contained within the limits of our  
19 present Reserve, bounded on the  
20 south by the River Sable extending  
21 Northerly ten miles along the coast,  
22 thence East five miles inland and  
23 thence parallel to the general  
24 features of the shore to the  
25 Southern limit above named."

1 So that is approximately 50 square  
2 miles, isn't it?

3 A. Yes.

4 Q. I would like then to show another  
5 illustration to you, please. This is SC0965, of  
6 which we have hard copies.

7 THE COURT: Mr. Registrar, what is the  
8 next lettered exhibit?

9 THE REGISTRAR: L-2.

10 THE COURT: L-2?

11 THE REGISTRAR: Yes.

12 THE COURT: Perhaps the witness could  
13 write L-2 on that piece of paper, before he moves  
14 forward.

15 EXHIBIT NO. L-2: Map entitled  
16 "Illustration of approximate area  
17 described in Exhibit 2095 (Keating's  
18 'proposal to the Chiefs & Principal  
19 men', 5 July 1854).

20 BY MR. OGDEN:

21 Q. Thank you. Again, I would ask you  
22 to assume that this accurately depicts the tract of  
23 land from the Sauble River, north along the coast,  
24 and then inland ten miles, and then inland five  
25 miles back down parallel to the coast ten miles.

11:29:36 1 And we will return to this. But you can see there  
11:29:39 2 the acreage described on this map is 31,000.

11:29:47 3 And at this point, Your Honour, I would  
11:29:49 4 ask if this is an appropriate time to take the  
11:29:53 5 morning break.

11:29:54 6 THE COURT: Yes, 20 minutes.

11:29:54 7 -- RECESSED AT 11:30 A.M.

11:58:11 8 -- RESUMED AT 11:58 A.M.

11:58:11 9 THE COURT: Please go ahead.

11:58:13 10 BY MR. OGDEN:

11:58:13 11 Q. Thank you.

11:58:13 12 The next document is Exhibit 2096,  
11:58:18 13 which you will see at the top is dated July 1854.  
11:58:26 14 It has two numbers, 10 and 18. I think, am I  
11:58:30 15 correct, that 10 is the date it was written, and 18  
11:58:34 16 perhaps is the date it was received?

11:58:35 17 A. That is my guess.

11:58:38 18 Q. And this says "Saugeen and Owen  
11:58:45 19 Sound Indians" report.

11:58:51 20 A. Would you like me to read it?

11:58:52 21 Q. Have you read it and can you read  
11:58:55 22 it?

11:58:55 23 A. I haven't read this document, but  
11:58:57 24 I can read this handwriting here.

11:58:59 25 Q. Yes, please.



11:59:01 1 A. "Report that it is agreed by  
11:59:04 2 the Council that the Band Council" -  
11:59:13 3 maybe - "of the Ojibway Indians that  
11:59:16 4 they will not sell any of their  
11:59:18 5 lands to Messrs. Keating, Ridout,"  
11:59:32 6 and I think that is "Company."

11:59:37 7 [As read.]

11:59:37 8 Q. Okay, thank you for that. And  
11:59:38 9 then the next page, and you will see if we can go  
11:59:44 10 down and see the author of the document, it is  
11:59:46 11 signed by the Chiefs.

11:59:49 12 This is a document with them rejecting  
11:59:53 13 that proposal, I believe. So could you go to the  
12:00:00 14 top of that, please. And the date there is July  
12:00:07 15 10, 1854. Take a moment to read it, if you would  
12:00:10 16 like. I'm not going to ask you to read it out  
12:00:12 17 loud.

12:00:12 18 A. [Witness reviews document.]

12:00:37 19 Scroll down, please.

12:00:38 20 Yes, thank you, I have read it.

12:00:47 21 Q. And so this is the SON rejecting  
12:00:51 22 the proposal; that's correct?

12:00:52 23 A. Yes.

12:00:53 24 Q. And just to note -- sorry, yes?

12:00:57 25 A. Yes.

12:00:58 1 Q. And just to note something  
12:01:00 2 further, if we could go down, I'm going to read it:  
12:01:03 3 "Read, explained and signed in  
12:01:06 4 our presence.

12:01:06 5 Moses B. Madwayosh, David Sawyer,  
12:01:17 6 interpreter."

12:01:18 7 [As read.]

12:01:18 8 And that is further evidence, isn't it,  
12:01:21 9 of David Sawyer speaking and reading English?

12:01:26 10 A. Yes, and writing it, which was  
12:01:29 11 what he was there for. That is why he came to Cape  
12:01:33 12 Croker, or Nawash.

12:01:33 13 Q. The next Exhibit, 2097, is dated  
12:01:39 14 July 11th, 1854. This is the report from Keating  
12:01:57 15 to Anderson of this proposal that could be made to  
12:01:59 16 the SON. You see there "My dear Sir," and then if  
12:02:06 17 you go down, please, to page 2, you see Captain  
12:02:15 18 Anderson, that is who it is to, isn't it?

12:02:17 19 A. Yes.

12:02:17 20 Q. So then on page 5 of the PDF,  
12:02:21 21 which is also the letter page 5, at the bottom of  
12:02:24 22 the page:

12:02:28 23 "The only Chief who showed a  
12:02:30 24 manly independence of the Missionary  
12:02:32 25 who stuck to his original intention

12:02:34 1 and openly declared his Sentiment in  
12:02:37 2 Council was Peter Jones (Kegedonce)  
12:02:40 3 who if I may be permitted to say so  
12:02:42 4 well deserves his medal especially  
12:02:47 5 [...]"

12:02:47 6 And then it continues on.

12:02:51 7 If you go down to the next page, which  
12:02:53 8 is page 6:

12:02:57 9 "Madwayosh delivered the  
12:02:58 10 decision of the Council, as he said  
12:03:01 11 with regret for he was desirous of  
12:03:03 12 selling and informed me so, but was  
12:03:06 13 compelled to give way to the  
12:03:07 14 majority."

12:03:10 15 Are you familiar with this letter or  
12:03:12 16 this document?

12:03:12 17 A. Yes, I think I have read it  
12:03:14 18 before.

12:03:14 19 Q. So you accept then this is  
12:03:17 20 Madwayosh -- it is evidence of Madwayosh being in  
12:03:23 21 favour of Keating's proposal?

12:03:25 22 A. Possibly. I say "possibly"  
12:03:30 23 because a statement of that sort can mean that he  
12:03:40 24 is in some way making a diplomatic statement,  
12:03:43 25 saying that he would be in favour but the others

12:03:45 1 aren't so he can't agree to it.

12:03:48 2 I wouldn't take that as a definitive  
12:03:50 3 statement that he would have been willing to sell  
12:03:53 4 because he could say that easily and blame it on  
12:03:56 5 the others.

12:04:03 6 Q. But do you think it is probable  
12:04:07 7 that he was desirous of selling?

12:04:09 8 A. It is possible.

12:04:10 9 Q. But not probable?

12:04:12 10 A. No, and again, I'm not trying to  
12:04:17 11 be contrary, but there is a lot of diplomacy  
12:04:20 12 happening in these kinds of negotiations where  
12:04:23 13 people are trying to maintain good relations, which  
12:04:28 14 is characteristic I think for many humans, but  
12:04:31 15 especially in Anishinaabe society, they didn't like  
12:04:35 16 saying no to people, especially directly.

12:04:39 17 And so there is a famous book on the  
12:04:42 18 history of missionization of Indigenous people in  
12:04:48 19 Canada where they talk about, and I think this is  
12:04:49 20 Anishinaabemowin, a yes that means no, the point  
12:04:56 21 being that they don't like to say "no" directly,  
12:04:58 22 and so there was actually a word, it must have been  
12:05:01 23 the equivalent, you know, when parents say to their  
12:05:04 24 children "we'll see."

12:05:08 25 Q. I do.

12:05:08 1 A. Which is really a no, but not  
12:05:10 2 directly. I take it it would be something along  
12:05:13 3 those lines.

12:05:13 4 Q. And then the next document then is  
12:05:20 5 Exhibit 2144, and we have been to this letter. It  
12:05:30 6 is a letter of the Reverend Ludwick Kribs, and if  
12:05:38 7 you see on the cover there, it says "Kniles," but  
12:05:45 8 we are confident, aren't we, that that is a  
12:05:48 9 mistake?

12:05:48 10 A. Yes.

12:05:49 11 Q. This is dated the 11th of October,  
12:05:52 12 it was written, 1854?

12:05:55 13 A. Yes.

12:05:55 14 Q. And you have said that Kribs had  
12:05:57 15 stated that the SON wanted to surrender to the  
12:06:00 16 Crown a much smaller amount of land than Anderson  
12:06:04 17 had sought? This is in respect of August 1854.

12:06:07 18 A. Yes.

12:06:08 19 Q. And that the SON wanted to see if  
12:06:11 20 they got anything from the Crown before they  
12:06:14 21 surrendered everything?

12:06:15 22 A. Yes.

12:06:15 23 Q. Now, when Kribs said that, he is  
12:06:22 24 including Madwayosh in that description, isn't he,  
12:06:24 25 that the SON, including Madwayosh, wanted to

12:06:28 1 surrender a small amount and see if they got  
12:06:29 2 anything for it before surrendering everything?

12:06:33 3 A. I remember him saying in general  
12:06:35 4 they were willing. I don't remember whether  
12:06:38 5 Madwayosh was mentioned. I would have to look at  
12:06:40 6 the text.

12:06:41 7 Q. Well, I mean --

12:06:43 8 A. He may have been just making a  
12:06:46 9 general statement.

12:06:46 10 Q. Well, even in general terms, that  
12:06:49 11 would include Madwayosh?

12:06:50 12 A. Presumably.

12:06:51 13 Q. Let's go to page 6 of the letter,  
12:06:53 14 please, which is PDF page 5, and Kribs refers to a  
12:06:58 15 letter he received from Madwayosh the day before  
12:07:03 16 Kribs wrote his letter. So the words here:

12:07:10 17 "[...] there is great danger if  
12:07:12 18 that portion now offered is not  
12:07:13 19 accepted of their being a long time  
12:07:16 20 not out of market as Chief Alexander  
12:07:18 21 says in a letter received here  
12:07:20 22 yesterday -- that if the Government  
12:07:22 23 does not now receive what they have  
12:07:23 24 offered he will never consent again  
12:07:25 25 to give up a foot."

12:07:27 1 So that is Madwayosh, isn't it, Chief

12:07:29 2 Alexander is Madwayosh?

12:07:30 3 A. Yes.

12:07:30 4 Q. And he in October was expecting  
12:07:36 5 the Crown to want to acquire land?

12:07:37 6 A. Yes.

12:07:38 7 Q. And where it says "the offer,"  
12:07:43 8 "that portion now offered," that is the SON's  
12:07:46 9 August counter-proposal, isn't it?

12:07:47 10 A. Yes, presumably.

12:07:48 11 Q. And so --

12:07:50 12 A. It must be.

12:07:51 13 Q. Sorry.

12:07:51 14 A. Sorry, it must be, yes.

12:07:53 15 Q. So Madwayosh in October is saying  
12:07:54 16 that the Crown needed -- the word used by Kribs is  
12:07:58 17 needed to "receive," if the Crown does not now  
12:08:02 18 receive the SON's land. He is not saying that he  
12:08:11 19 would refuse to give up a foot unless the Crown  
12:08:13 20 stopped bothering the SON, is he? He is saying  
12:08:16 21 unless the Crown receive what they have offered he  
12:08:19 22 will not give up another foot?

12:08:22 23 A. Yes.

12:08:22 24 Q. And he is saying that the Crown  
12:08:26 25 needed to accept the SON's offer at that time?

12:08:30 1 A. Yes.

12:08:30 2 Q. He is saying he is not prepared to  
12:08:35 3 change his terms, isn't he?

12:08:36 4 A. Well, it is probably a bargaining  
12:08:40 5 position, but it certainly is a statement that he  
12:08:45 6 wants the government to, yes, accept what they have  
12:08:49 7 offered.

12:08:49 8 Q. So as a bargaining position, he  
12:08:52 9 was expecting to engage in more bargaining about  
12:08:55 10 surrenders?

12:08:55 11 A. It sounds like it.

12:08:57 12 Q. And so this was received by Kribs  
12:08:59 13 the day before Kribs wrote the letter, which was  
12:09:01 14 October 11, so Madwayosh's letter was received by  
12:09:05 15 Kribs on October 10, which is two days before  
12:09:08 16 Oliphant arrived in Saugeen for the Treaty Council,  
12:09:11 17 isn't it?

12:09:11 18 A. Yes.

12:09:11 19 Q. Does this affect your conclusion  
12:09:16 20 of Madwayosh had not been told that there would be  
12:09:18 21 a Treaty Council with a Crown representative in the  
12:09:24 22 coming days?

12:09:25 23 A. Did you ask if it --

12:09:27 24 Q. Does it affect your conclusion  
12:09:29 25 that --



12:09:30 1 A. No, this letter, to the contrary,  
12:09:34 2 is to my mind an enforcement of my opinion that  
12:09:37 3 they had not been told there would be a Treaty  
12:09:39 4 Council because he starts by saying something like,  
12:09:42 5 I think the opening of the letter says something  
12:09:44 6 like I have heard that you have broken off  
12:09:46 7 negotiations and there is no plan to re-open them  
12:09:50 8 or something like that, we need to go to the  
12:09:53 9 beginning of the letter, but he -- and this letter  
12:09:55 10 is dated the day before Oliphant arrived. And he  
12:09:59 11 says something like I hear the negotiation has been  
12:10:02 12 broken off and I hope you are going to resume them,  
12:10:04 13 or something like that.

12:10:05 14 Should we go to the beginning of the  
12:10:09 15 letter?

12:10:09 16 Q. I think it is just below there,  
12:10:10 17 the lines that:

12:10:13 18 "[...] if the government have  
12:10:15 19 concluded to break off negotiations  
12:10:16 20 [...]"

12:10:17 21 But that is Kribs writing, isn't it?

12:10:19 22 A. Yes, so he doesn't seem to have  
12:10:21 23 any idea that the government will come back. As I  
12:10:24 24 say, the letter opens with saying I have heard that  
12:10:29 25 the government had broken off negotiations, because

1 he -- here he says:

2 "I sincerely hope therefore,  
3 and I know there are very many who  
4 join in that hope, that if the  
5 Government have concluded to break  
6 off negotiations about these lands  
7 or that they will not accept of any  
8 without the whole they will upon a  
9 reconsideration be induced to take  
10 another course."

11 I read this as saying that he doesn't  
12 know if the government is going to resume  
13 negotiations.

14 Q. That Kribs does not know?

15 A. Correct.

16 Q. But Madwayosh, though, was  
17 prepared to sell some of the reserve at this point?

18 A. Yes, as they had said in the  
19 August Council.

20 Q. Right, and he was willing to sell  
21 an island earlier in 1854?

22 A. Possibly.

23 Q. And then willing to sell 50 square  
24 miles in Keating's proposal?

25 A. Possibly. I find that the least

12:11:28 1 conclusive, but he definitely seems to have been  
12:11:34 2 aligned with the offer in August of 60,000 acres.

12:11:40 3 Q. To sell some --

12:11:43 4 A. The so-called, yes, the so-called  
12:11:47 5 inland wedge.

12:11:48 6 Q. Right. So in August he is willing  
12:11:49 7 to sell some and then sell everything if the Crown  
12:11:53 8 is good to its word and coughs up for the sum that  
12:11:58 9 was sold first?

12:11:59 10 A. I wouldn't conclude he was willing  
12:12:01 11 to sell everything. Are you basing that on this  
12:12:03 12 letter from Kribs?

12:12:04 13 Q. Where Kribs said that the SON  
12:12:06 14 would surrender everything if they -- after they  
12:12:09 15 had seen that they have got anything?

12:12:12 16 A. Yes, he says something like I'm  
12:12:14 17 sure they would immediately hand it all over if  
12:12:17 18 they were just given a hundred dollars or  
12:12:20 19 something. That seems to me to be possibly a bit  
12:12:23 20 of an overstatement, just by the way it is phrased.

12:12:26 21 Q. Would you agree that the issue for  
12:12:29 22 Madwayosh was how much to sell, not whether to sell  
12:12:33 23 anything?

12:12:33 24 A. Yes, it appears so.

12:12:37 25 Q. So at the October Treaty Council,

1 Madwayosh was able to state to the other SON  
2 representatives that he opposed Oliphant's  
3 surrender proposal, even though the Council was  
4 called for the same evening?

5 A. I'm sorry, can you just repeat the  
6 question?

7 Q. Sure. Oliphant called the Treaty  
8 Council for the same evening that the other Chiefs  
9 arrived, but that didn't prevent Madwayosh from  
10 stating his opposition to those other Chiefs?

11 A. In the -- yes, in the Council, in  
12 the meeting, yes.

13 Q. And the Chiefs reached their own  
14 decision to agree to the surrender proposal while  
15 Oliphant was out of the church, the chapel?

16 A. Yes, apparently.

17 Q. And Madwayosh was the one who had  
18 objected the most strongly to Oliphant's proposal?

19 A. Yes.

20 Q. And so the available documents  
21 indicate that it was the other SON representatives,  
22 not Oliphant, who changed Madwayosh's mind, don't  
23 they?

24 A. I would say we have no information  
25 about what happened while Oliphant was out of the

1 Council. We don't know, for instance, whether  
2 Madwayosh had changed his mind before that or not.

3 Oliphant's own account, as I recall, I  
4 think he is speaking about the period before he  
5 withdrew for that hour or whatever the period was,  
6 he said something about disputing with Madwayosh  
7 and then he says that he steered the conversation  
8 toward a discussion of where the reserves would be  
9 located as a way of making it seem that they  
10 already reached a decision to agree to sell.

11 So, you know, I just don't feel that I  
12 know anything about how or why Madwayosh changed  
13 his mind and agreed to sign.

14 Q. In your report, and this is at  
15 page 3, you said that the Crown "badgered" the SON  
16 for a surrender; that is the word you use. And I  
17 understand this to express a concern that you gave  
18 in your testimony that the SON said no to  
19 proposals, surrender proposals, and the Crown kept  
20 asking; is that correct?

21 A. Yes.

22 Q. And you gave testimony that the  
23 SON didn't seek to have Treaty 72 declared invalid  
24 because the situation was, and this is what you  
25 said, not precisely, I'm paraphrasing, one where

12:15:49 1 the SON kept saying no, that it didn't matter how  
12:15:52 2 many times they said no, somebody came and asked  
12:15:56 3 them again; is that accurate?

12:15:57 4 A. Yes.

12:15:58 5 Q. You have also said, though, that  
12:16:01 6 the Crown's October 1854 proposal was a new and  
12:16:06 7 substantially different one that the SON community  
12:16:09 8 did not have a chance to consider?

12:16:11 9 A. Yes.

12:16:11 10 Q. So I'm asking which one is it?  
12:16:14 11 Because to me these are inconsistent. How could  
12:16:17 12 the SON already have said no if the next proposal  
12:16:20 13 was a new and substantially different one?

12:16:22 14 A. Well, given that they had said  
12:16:27 15 they were only willing to sell 60,000 acres and  
12:16:33 16 none of the rest of the peninsula, I think that is  
12:16:37 17 a fairly clear indication of where they stood in  
12:16:40 18 August.

12:16:42 19 Q. Well, if that is your answer, but  
12:16:47 20 you also just said that Madwayosh was stating a  
12:16:52 21 bargaining position and expecting more  
12:16:54 22 negotiations?

12:16:58 23 A. Yes. I don't see an  
12:17:02 24 inconsistency. They had offered 60,000 acres in  
12:17:05 25 August, which Anderson didn't accept, and berated

12:17:14 1 them and threatened to have the government take  
12:17:18 2 their lands without their consent, and then he  
12:17:23 3 wrote to Kribs saying that he wanted to continue  
12:17:26 4 negotiations about the 60,000 acres, but they  
12:17:30 5 didn't want to sell more.

12:17:32 6 I don't see an inconsistency there.

12:17:33 7 Q. Is it your view that if there had  
12:17:43 8 been a material change in circumstances that the  
12:17:47 9 Crown returning with a surrender proposal would  
12:17:54 10 have been more respectful or better in some way?

12:17:57 11 A. You mean if the Crown's behaviour  
12:18:02 12 had been different, if they --

12:18:03 13 Q. No, if there had been a material  
12:18:06 14 change in circumstances outside of the Crown's  
12:18:11 15 behaviour, that the Crown returning would then have  
12:18:15 16 been not badgering or more respectful?

12:18:17 17 A. What kind of change in --

12:18:22 18 Q. A material change.

12:18:23 19 A. -- material circumstances?

12:18:26 20 Q. A material change, a change, an  
12:18:29 21 important change, a substantial change.

12:18:30 22 A. I don't know how to answer that  
12:18:32 23 because I don't know what kind of change you mean.  
12:18:34 24 That is very vague.

12:18:35 25 Q. Can you conceive of a circumstance

12:18:47 1 in which it would have been more respectful or  
12:18:51 2 appropriate for the Crown to have returned with  
12:18:54 3 another surrender proposal?

12:18:57 4 A. Well, I can answer concretely, but  
12:19:04 5 if they, for instance, had been informed ahead of  
12:19:06 6 time that there would be a Council, that Oliphant  
12:19:09 7 would be coming to ask them to surrender the whole  
12:19:11 8 peninsula, that would seem more respectful to me.

12:19:16 9 Q. Sorry, I'm talking about  
12:19:18 10 underlying circumstances, not the manner in which  
12:19:20 11 the proposal was presented. Underlying  
12:19:25 12 circumstances, land values, a war, something like  
12:19:30 13 that. Can you conceive of either of those being  
12:19:35 14 sufficiently important as to make the Crown  
12:19:41 15 returning with the same proposal, for instance, not  
12:19:46 16 to be badgering?

12:19:47 17 A. I feel like you may have something  
12:20:00 18 specific in mind and not be asking me a leading  
12:20:04 19 question. I think at this point all I can say is  
12:20:07 20 that a general circumstance in which people  
12:20:09 21 repeatedly say no and are repeatedly asked again is  
12:20:14 22 one where I think the term "badgering" is sometimes  
12:20:18 23 appropriate. I mean, no matter how many times you  
12:20:23 24 say no, they come back and ask again, and they had  
12:20:27 25 said no to quite a few proposals.



1 Q. Madwayosh had said, though, that  
2 he would not surrender any land unless the Crown  
3 received and accepted their proposal and Madwayosh  
4 was anticipating further negotiations, or  
5 bargaining, in your words?

6 A. Yes, it does appear he was  
7 signalling a desire for more negotiation, or I  
8 guess signalling a desire for their offer of 60,000  
9 acres to be accepted.

10 Q. Another document now which I would  
11 like to show you part of is SC0801. Your Honour,  
12 this is the expert report, the Plaintiff expert  
13 report, and I would like to show the witness a  
14 quote from this.

15 So this is a witness who will be called  
16 by the Plaintiffs in a couple of months, and I  
17 think we have marked these as lettered exhibits to  
18 date and I will --

19 THE COURT: Are you asking to do so?

20 MR. OGDEN: Yes, and I would like to  
21 tender this as a lettered exhibit at this point,  
22 please.

23 THE COURT: Mr. Registrar?

24 MR. OGDEN: We can call this Driben  
25 Expert Report of 31 October 2013, revised 31

1 January 2017.

2 THE REGISTRAR: So that is 0801.

3 THE COURT: A lettered exhibit, sir?

4 MR. OGDEN: Yes.

5 THE REGISTRAR: That will be lettered  
6 Exhibit M-1.

7 EXHIBIT NO. M-1: Driben Expert Report  
8 of 31 October 2013, revised 31  
9 January 2017.

10 BY MR. OGDEN:

11 Q. So page 280, please, 280 of the  
12 report, under "The Reverend Sawyer's Observations,"  
13 and I am not sure these are the Reverend Sawyer's  
14 observations, but a quote from the report is:

15 "The fact that Saugeen leaders  
16 undoubtedly had been discussing the  
17 matter with their constituents since  
18 Anderson's visit compounded the  
19 problem."

20 Now, do you agree with the part of the  
21 statement that it was a fact that the Saugeen  
22 leaders undoubtedly had been discussing the matter  
23 with their constituents since Anderson's visit?

24 A. That seems likely to me, yes.

25 Q. In your testimony in July, on the

12:23:21 1 22nd, for reference, you said -- well, for further  
12:23:27 2 reference, pages 2968 to 2969 at line 22:

12:23:34 3 "Oral history has a particular  
12:23:35 4 character and I tend to use it for  
12:23:38 5 certain kinds of information, such  
12:23:39 6 as people's subjectivity, their own  
12:23:42 7 explanations of things.

12:23:43 8 And oral history tends not to  
12:23:45 9 refer to dates very much and tends  
12:23:47 10 to lose some detail over time.

12:23:52 11 Since I was looking at events  
12:23:53 12 that were long in the past and we  
12:23:55 13 had fairly good written records, I  
12:23:58 14 didn't feel that oral history would  
12:23:59 15 add a great deal for this report."

12:24:02 16 And there you are describing why you  
12:24:03 17 did not use oral history in your Treaties report?

12:24:06 18 A. Yes.

12:24:06 19 Q. I would ask then how do you know  
12:24:15 20 how much oral history would add without looking at  
12:24:18 21 the oral history?

12:24:22 22 A. You mean without asking people or  
12:24:24 23 without looking --

12:24:25 24 Q. Asking people or examining records  
12:24:28 25 of oral history taken in the past already?

12:24:30 1 A. Well, as that quote suggests, this  
12:24:33 2 is -- that was an assumption about the general  
12:24:35 3 nature of oral history and what I thought it might  
12:24:42 4 or might not add to an understanding of events in  
12:24:45 5 1854.

12:24:45 6 Q. What did you think it might or  
12:24:48 7 might not add?

12:24:48 8 A. I didn't think it would add that  
12:24:50 9 much. I thought the written records would add --  
12:24:56 10 would be more useful.

12:24:59 11 Q. This --

12:25:00 12 A. Yeah, I mean, I guess I was being  
12:25:02 13 asked -- for my report, I was asked to answer  
12:25:06 14 fairly specific questions like what was Peter  
12:25:09 15 Jacobs' role, like what the Crown would have  
12:25:12 16 expected -- I was asked more questions about the  
12:25:14 17 Crown, but some about the Saugeen Ojibway. And for  
12:25:19 18 those kinds of very specific questions, I have  
12:25:24 19 found that oral history doesn't tend to be helpful.

12:25:26 20 So for instance, if I had gone and  
12:25:28 21 asked them about Peter Jacobs, I don't think they  
12:25:31 22 would have been able to tell me much. I had asked  
12:25:35 23 people about Indian Agents in the 1920s and '30s,  
12:25:37 24 so that is, what, 70 years later, and had not found  
12:25:41 25 people who had, you know, specific or very much

12:25:45 1 specific information to add, only very general  
12:25:48 2 things like, oh, the Indian Agents would take us  
12:25:52 3 and that kind of thing, but nothing specific about  
12:25:54 4 specific agents.

12:25:55 5 Q. One of the questions you were  
12:26:07 6 asked was "H":

12:26:13 7 "Was the Crown's proposal for  
12:26:15 8 Treaty 72 a proposal that the SON  
12:26:17 9 had had the opportunity to consider  
12:26:19 10 prior to 13 October, 1854?"

12:26:23 11 Is this not a subject that may have  
12:26:26 12 benefitted from oral history?

12:26:28 13 A. No, I don't think so. So we saw,  
12:26:33 14 for instance, the newspaper columns written by, I  
12:26:39 15 think it was, Laurence Keeshig in the 1930s, and  
12:26:44 16 his accounts don't conform very well to the records  
12:26:53 17 we have. He combined two treaties, really. I  
12:26:57 18 mean, he talks about -- he is really talking about  
12:27:00 19 Treaty 72 and the surrender of the Owen Sound  
12:27:05 20 Reserve as if they are the same event, and he says  
12:27:09 21 that it was the Saugeen Ojibway themselves who  
12:27:13 22 initiated Treaty 72, which clearly is not the case.

12:27:18 23 So even in the 1930s, the oral history  
12:27:20 24 was not reliable on those points.

12:27:22 25 Q. Were you aware of that account

12:27:24 1 before you started your research?

12:27:25 2 A. Well, obviously not before I  
12:27:29 3 started my research. I knew it once I started the  
12:27:33 4 research.

12:27:33 5 Q. How then --

12:27:34 6 A. But I read it early on.

12:27:36 7 Q. How then could it have informed  
12:27:40 8 your decision not to look at oral history?

12:27:42 9 A. I didn't decide the very first day  
12:27:51 10 exactly what I was and was not going to do. I  
12:27:54 11 decided as I went along, although, again, in  
12:27:58 12 general, I would not expect oral history now to  
12:28:06 13 provide very specific details from 1854.

12:28:11 14 Q. If the details are not specific,  
12:28:18 15 though, they can still be of assistance, can't  
12:28:23 16 they?

12:28:24 17 A. Not necessarily. I mean, again,  
12:28:32 18 for this first report, I was being asked quite  
12:28:34 19 specific things, so the question, for instance, of  
12:28:37 20 whether or not they had seen the proposal in  
12:28:39 21 advance, as I say, Laurence Keeshig's account 80  
12:28:48 22 years ago was quite unreliable on a very related  
12:28:51 23 point, which was who initiated the Treaty  
12:28:53 24 negotiations. So it did seem reasonable to assume  
12:28:56 25 that even by then, the oral history about some of

12:29:00 1 those central details was not accurate.

12:29:03 2 Q. So you have said oral history can  
12:29:30 3 be of benefit in determining people's subjectivity  
12:29:35 4 or their own explanations of things. Does that not  
12:29:38 5 describe the perspective of the SON as to whether  
12:29:41 6 or not they felt threatened or rushed by Oliphant?

12:29:45 7 A. It would, but again, the oral  
12:29:49 8 history even by the 1930s was quite inaccurate on  
12:29:53 9 that score. At that point, they had already  
12:29:57 10 apparently decided that it was Peter Kegedonce  
12:30:01 11 Jones who would have initiated the Treaty  
12:30:02 12 proceedings, which is not accurate.

12:30:04 13 Q. Are you suggesting that this Court  
12:30:13 14 should not rely on any oral history presented to it  
12:30:17 15 from the SON?

12:30:19 16 A. No, I think my remark was a lot  
12:30:22 17 narrower than that. I said -- I'm talking about  
12:30:24 18 very specific details for a period of, what, more  
12:30:30 19 than 150 years in the past.

12:30:31 20 By contrast, when I interviewed Vernon  
12:30:36 21 Roote and Jim Ritchie and five others about things  
12:30:48 22 that happened in their lifetime and in their  
12:30:49 23 parents' lifetime, there I consider their accounts  
12:30:52 24 quite accurate and credible.

12:30:54 25 Q. Okay, sorry, I'll be more

12:30:55 1 specific. Oral history about the surrender of  
12:31:03 2 1854, that the Crown should not give any weight to  
12:31:05 3 oral history from the SON about that surrender?

12:31:08 4 A. No, I am not, because I haven't  
12:31:11 5 actually conducted oral history about the  
12:31:13 6 surrender, so I have not tested my hypothesis, that  
12:31:17 7 it would not answer my specific questions. I  
12:31:22 8 didn't say it would answer nothing about the  
12:31:24 9 Treaty. I don't know.

12:31:30 10 Of course, we are now at the point  
12:31:32 11 where many of the people who we can interview about  
12:31:36 12 oral history have knowledge gained both from oral  
12:31:42 13 history and from written records, so they may have  
12:31:47 14 corrected the oral history.

12:31:49 15 Q. What do you mean by "corrected"  
12:31:54 16 the oral history?

12:31:55 17 A. They may have revised their views,  
12:31:58 18 for instance, so that they are different from what  
12:32:03 19 Laurence Keeshig wrote in 1931 or whatever date,  
12:32:07 20 that they have a better sense of how the Treaty was  
12:32:11 21 initiated, again, those very specific details.

12:32:16 22 Q. I would like to turn to Exhibit  
12:32:25 23 3967, please. This is a transcript of a TVO  
12:32:33 24 episode concerning The Bruce is the name of the  
12:32:39 25 series, this is episode 2 called "The Last



12:32:43 1 Frontier," and it has a couple of quotes from  
12:32:51 2 Vernon Roote who you interviewed and know to be the  
12:32:54 3 former long-time Chief of the Saugeen First Nation.

12:33:02 4 And at page 26 of this, I'll read it:

12:33:06 5 "Vernon says: The days of  
12:33:09 6 hunting, fishing, survival methods  
12:33:11 7 were starting to fade, and the need  
12:33:13 8 for money to purchase goods were  
12:33:15 9 upon our people. The Saugeen  
12:33:16 10 Peninsula was surrendered for sale,  
12:33:17 11 so that our communities would be  
12:33:19 12 able to have their start in money,  
12:33:21 13 so that they could sustain  
12:33:22 14 themselves to live in a modern way.  
12:33:24 15 Unfortunately, the money that was  
12:33:26 16 put into a pot was controlled by the  
12:33:27 17 government of the day. Those  
12:33:29 18 dollars were never received by the  
12:33:31 19 people."

12:33:32 20 He is saying in this extract that the  
12:33:42 21 SON surrendered the land in order to get money to  
12:33:45 22 sustain themselves in a modern way, isn't he?

12:33:49 23 A. Yes.

12:33:49 24 Q. And that the problem with the  
12:33:51 25 surrender was that the money that was received was

1 controlled by the Federal Government and not the  
2 SON?

3 A. Yes.

4 Q. And in your report, you note at  
5 page 27 the Robinson Treaties which you describe as  
6 being made by experienced Ojibwe traders who forced  
7 the Crown to the bargaining table?

8 A. Yes.

9 Q. So I would like you to consider a  
10 statement made by another Saugeen First Nation  
11 Chief about the Treaty 72 negotiations. This is  
12 Exhibit 3984. This is a video. We are not going  
13 to go to the video, but we have the transcript from  
14 the Court record of what is in that video.

15 This is Chief -- it was in the Exhibit,  
16 it is Chief Randall Kahgee speaking to a community  
17 gathering, largely a SON community gathering about  
18 Treaty 72, and Chief Kahgee has given evidence in  
19 this trial and accepted that he made the speech  
20 recorded in the video.

21 Now, I will read to you what he said in  
22 the video:

23 "And I tell them, I said our  
24 people, they weren't duped. In  
25 fact, they were the most savvyest of

12:35:07 1 negotiators. They knew what they  
12:35:09 2 wanted to protect. They knew  
12:35:10 3 exactly. I liked that analogy Alan  
12:35:12 4 gave that these were about  
12:35:14 5 negotiations, because our people  
12:35:15 6 were savvy in their negotiations and  
12:35:17 7 they knew what they wanted to  
12:35:18 8 protect, and that was that  
12:35:20 9 relationship to the land, to waters  
12:35:22 10 and the resources, those things that  
12:35:24 11 mattered most to us because who we  
12:35:26 12 are as a people was very much  
12:35:28 13 associated with that relationship,  
12:35:31 14 our language, our culture, our  
12:35:33 15 spirituality."

12:35:35 16 [As read.]

12:35:36 17 In this video then, by this transcript  
12:35:38 18 we have the then-Chief of the Saugeen First Nation  
12:35:41 19 describing the SON as the savviest of negotiators  
12:35:45 20 who were savvy in their negotiations.

12:35:47 21 So these two statements by Chief Roote  
12:35:51 22 and Chief Kahgee suggest that the leadership of the  
12:35:56 23 Saugeen First Nation does not consider that its  
12:35:59 24 negotiators were threatened or rushed in the Treaty  
12:36:01 25 72 negotiations, doesn't it?

12:36:05 1 A. I don't see them saying that they  
12:36:09 2 weren't. They said they were savvy negotiators.  
12:36:12 3 They have said they were interested in protecting  
12:36:14 4 certain things. I didn't hear any comment that  
12:36:17 5 there was no pressure.

12:36:22 6 Q. In any case, it is relevant to  
12:36:32 7 your opinion, isn't it?

12:36:33 8 A. How so?

12:36:35 9 Q. A statement by the leadership of  
12:36:41 10 the Saugeen First Nation to long-time Chiefs  
12:36:47 11 describing the Treaty 72 surrender is relevant to  
12:36:53 12 the question you were asked:

12:36:57 13 "Was the Crown's proposal for  
12:36:59 14 Treaty 72 a proposal that the SON  
12:37:01 15 had had the opportunity to consider  
12:37:04 16 prior to 13 October 1854?"

12:37:09 17 A. No, I don't think either of those  
12:37:10 18 statements answers that question.

12:37:12 19 Q. And why is that? No, not answers,  
12:37:14 20 but was relevant to.

12:37:15 21 A. Well, it doesn't answer the  
12:37:20 22 question any more effectively than the written  
12:37:22 23 records, and it answers it less effectively than  
12:37:27 24 the written records.

12:37:28 25 Q. Well, I'm not asking you which is

12:37:31 1 more effective, the written or the oral history,  
12:37:33 2 but I am asking you if it was relevant to that  
12:37:35 3 question? Does it bear on the answer to that  
12:37:38 4 question?

12:37:38 5 A. Well, to me it doesn't  
12:37:39 6 particularly. I mean, it is not -- it is related,  
12:37:44 7 obviously, but I don't feel that -- I mean, I  
12:37:48 8 haven't had time to sit down and think about those  
12:37:50 9 remarks as I normally would do before pronouncing  
12:37:53 10 any opinion on them, but I don't feel that they  
12:37:57 11 contradict anything I have written.

12:38:01 12 Q. You have said in your testimony  
12:38:23 13 that you reviewed most of the interviews with and  
12:38:25 14 statements by community members that were listed in  
12:38:29 15 Exhibit 3931, which is the list of oral history  
12:38:33 16 sources; is that correct?

12:38:33 17 A. Yes.

12:38:34 18 Q. Just to state for the record, the  
12:38:47 19 questions asked of Professor Brownlie in preparing  
12:38:51 20 his Treaties report are at Exhibit 4131.

12:38:55 21 And that list included some statements  
12:39:10 22 or interviews with Irene Akiwenzie, or Irene Jones  
12:39:20 23 as she is alternatively known, Aunt Irene; is that  
12:39:25 24 right?

12:39:25 25 A. Yes, I remember that name.

12:39:25 1 Q. And she was the aunt of Donald  
12:39:27 2 Keeshig, were you aware of that, and the sister of  
12:39:29 3 Fred Jones, were you aware of her relationship --

12:39:31 4 A. I think I knew she was the sister  
12:39:32 5 of Fred Jones. I think I read that.

12:39:36 6 Q. Okay, and the daughter of Charles  
12:39:37 7 Kegedonce Jones? Fred Jones was the son of Charles  
12:39:41 8 Kegedonce Jones?

12:39:42 9 A. Right.

12:39:42 10 Q. And the granddaughter of Peter  
12:39:44 11 Kegedonce Jones who signed Treaty 72?

12:39:47 12 A. Yes.

12:39:47 13 Q. Correct? So the oral history that  
12:39:52 14 she states would be relevant to the question of  
12:39:54 15 whether or not the SON negotiators in Treaty 72  
12:39:59 16 were threatened or rushed or felt that they were,  
12:40:01 17 wouldn't it?

12:40:02 18 A. It might be. But I haven't seen  
12:40:07 19 the remarks you are talking about.

12:40:08 20 Q. Does it matter?

12:40:09 21 A. Well, yes, because, again, we have  
12:40:13 22 seen that in the 1930s the interpretation of what  
12:40:17 23 had happened had departed quite a bit from what the  
12:40:23 24 written records showed.

12:40:24 25 Q. Sorry, I'm confused. Are you

12:40:26 1 saying that if it doesn't match the written  
12:40:28 2 records, then we dismiss the oral history?

12:40:30 3 A. That depends. That is -- you have  
12:40:35 4 to consider many factors when deciding what oral  
12:40:42 5 history or written records do and do not prove and  
12:40:47 6 how reliable they are or are not.

12:40:49 7 Q. Okay. Well, in this --

12:40:54 8 A. Written records are very similar  
12:40:56 9 to oral records in that sense. Of course, written  
12:41:00 10 records can be, like the memoir of Oliphant, not  
12:41:04 11 very reliable.

12:41:05 12 Q. But I think you said about oral  
12:41:06 13 history that you try to compare them or match them  
12:41:08 14 or to determine their --

12:41:10 15 A. Yes, as one does with written  
12:41:13 16 records.

12:41:16 17 Q. All right. In your report, second  
12:41:22 18 report, "The Long Road to Land Claims," you cite an  
12:41:28 19 article by John Borrows called "John Borrows, A  
12:41:32 20 Genealogy of Law: Inherent Sovereignty and First  
12:41:35 21 Nations Self-Government," and this is document  
12:41:38 22 S0269, and it appears in the Osgoode Law Journal of  
12:41:55 23 1992, pages 291 to 354.

12:41:59 24 I would like to describe this and  
12:42:01 25 tender it as article of John Borrows, Genealogy of

1 Law, for an exhibit, please, Your Honour.

2 THE COURT: Mr. Registrar?

3 THE REGISTRAR: Lettered exhibit?

4 THE COURT: No.

5 THE REGISTRAR: That will be Exhibit  
6 4187.

7 EXHIBIT NO. 4187: An article by John

8 Borrows entitled "John Borrows, A

9 Genealogy of Law: Inherent Sovereignty  
10 and First Nations Self-Government."

11 BY MR. OGDEN:

12 Q. Thank you. So you read this  
13 before preparing your Long Road report, didn't you?

14 A. Yes.

15 Q. Did you read it before preparing  
16 your Treaty 72 report?

17 A. I can't recall.

18 Q. So your footnote 232 in the Long  
19 Road report is at pages 87 to 88, and that Long  
20 Road report is Exhibit 4119, if we could go to  
21 that, please, 87 to 88.

22 And the footnote 232, the text  
23 accompanying that footnote, please -- this is,  
24 sorry, I apologize, this is at the bottom of page  
25 88, and you say:



1 "As renowned legal scholar (and  
2 member of the Chippewas of Nawash)  
3 John Borrows notes [...]"

4 As you know, Professor Borrows is a  
5 renowned legal scholar. Do you accept that he is  
6 an authority on the question of Indigenous oral  
7 history in legal proceedings such as this?

8 A. I cannot say for sure how much  
9 oral history he has done, but I think so. He is  
10 certainly an excellent legal scholar.

11 Q. If we could go to a new document,  
12 please, and that is SC0838. This is another  
13 article in the Osgoode Hall Law Journal, "Listening  
14 For a Change: The Courts and Oral Tradition," by  
15 John Borrows.

16 Now, this document, this version, Your  
17 Honour, is the published version of a document  
18 produced by the Plaintiffs. I am putting forward  
19 the published version here. I don't understand  
20 there to be any substantial differences, at least  
21 not with respect to the passages I am going to take  
22 the witness to, there are no differences, but I did  
23 notice one minor typo and a citation correction  
24 from the produced version.

25 THE COURT: Well, I don't see any

12:45:52 1 objection, nor would I expect one.

12:45:55 2 MR. OGDEN: I would like to add --

12:45:57 3 THE COURT: I hope to look at the final  
12:46:00 4 published version.

12:46:00 5 MR. OGDEN: I would like to add this as  
12:46:02 6 the next exhibit then, please, Your Honour, as  
12:46:04 7 article of John Borrows, "Listening for a Change."

12:46:08 8 THE COURT: Mr. Registrar?

12:46:09 9 THE REGISTRAR: Exhibit number 4188.

12:46:12 10 EXHIBIT NO. 4188: Article in the  
12:45:10 11 Osgoode Hall Law Journal entitled  
12:45:12 12 "Listening For a Change: The Courts  
12:45:14 13 and Oral Tradition," by John Borrows.

12:46:26 14 BY MR. OGDEN:

12:46:27 15 Q. So at page 2 of the article, which  
12:46:30 16 is page 4 of the PDF, at the bottom of the page,  
12:46:33 17 and I'll read it:

12:46:34 18 "Aunt Irene's narrative became  
12:46:38 19 the background of the Master's  
12:46:40 20 thesis I was working on at the time,  
12:46:41 21 a genealogical legal history of the  
12:46:46 22 Cape Croker Indian Reserve."

12:46:47 23 And the citation there, citation 1, is  
12:46:51 24 to his Genealogy of Law article, which is now  
12:46:53 25 Exhibit 4187.

1 On the next page, 3, which is 5 of the  
2 PDF, the first paragraph, in the fourth line:

3 "I later triangulated her  
4 stories with those of my great-uncle  
5 Fred, John Nadjiwon, 'Chick',  
6 (Walter Johnson) Aunt Norma, and my  
7 mother, and with the archival  
8 materials I had been working with to  
9 fill in the details of the work."

10 Firstly, "Fred" is Fred Jones, isn't  
11 it, his great uncle Fred?

12 A. Yes, it sounds like it.

13 Q. And "triangulated" means checked  
14 oral histories against each other for consistency;  
15 is that what it means?

16 A. I think so.

17 Q. Now, the second paragraph:

18 "For example, Aunt Irene told  
19 me information about my  
20 great-great-grandfather's  
21 treaty-making activities that were  
22 not available in the written  
23 record."

24 That suggests that the oral history  
25 that John Borrows might possess was relevant to

12:48:00 1 that question, doesn't it?

12:48:01 2 A. Yes, it could be.

12:48:06 3 Q. And you didn't speak to Professor  
12:48:08 4 Borrows for this litigation, I take it?

12:48:11 5 A. No, I didn't.

12:48:11 6 Q. Back then to Exhibit 4187, which  
12:48:20 7 is the Genealogy of Law article, and page 8 of the  
12:48:26 8 PDF, page 298 of the article:

12:48:39 9 "First, as a descendant of a  
12:48:41 10 lineage in which there has been a  
12:48:42 11 chief for the past five generations,  
12:48:44 12 I have access to information about  
12:48:46 13 my family's lives in this area of  
12:48:48 14 study."

12:48:50 15 And then footnote 28, and if we go to  
12:48:53 16 footnote 28, please, and there it is:

12:48:56 17 "The chronological order of  
12:48:57 18 chiefs in my immediate lineal family  
12:49:00 19 is Kegedonce, 1770-1831 (my  
12:49:04 20 great-great-great-grandfather);  
12:49:07 21 Peter Kegedonce Jones, 1812-1907 (my  
12:49:11 22 great-great-grandfather); Charles  
12:49:15 23 Kegedonce Jones, 1852-1952 (my  
12:49:19 24 great-grandfather); Alfred Jones (my  
12:49:23 25 grandfather's brother); and Howard

12:49:25 1 Jones, 1947-present (my uncle)."

12:49:36 2 Alfred Jones, do you understand him to  
12:49:39 3 be Fred Jones' brother?

12:49:48 4 A. Yes, looks like.

12:49:48 5 Q. And Howard Jones you interviewed  
12:49:48 6 for your Long Road report?

12:49:50 7 A. Yes.

12:49:50 8 Q. And he gave evidence at this  
12:49:52 9 trial. You are aware of that, I think?

12:49:54 10 A. I think I knew that.

12:49:58 11 Q. At the top of the page then back,  
12:50:01 12 it says:

12:50:02 13 "Therefore, I am able to  
12:50:04 14 achieve an insight into my  
12:50:06 15 ancestors' perspectives and  
12:50:07 16 experiences through the written and  
12:50:08 17 oral information about their lives  
12:50:10 18 which has been passed down to me."

12:50:11 19 This demonstrates that Borrows relied  
12:50:17 20 on oral history in writing the article and in  
12:50:20 21 making the statements that he makes in it about the  
12:50:22 22 Treaties, doesn't it?

12:50:23 23 A. Yes.

12:50:23 24 Q. And in that context, would you  
12:50:25 25 consider John Borrows' article about his First

1 Nations oral history a reliable source of oral  
2 history evidence?

3 A. Yes.

4 Q. And the statements that he makes  
5 in it as oral history, based on oral history, are  
6 relevant to establishing the facts concerning the  
7 1854 surrender?

8 A. Yes, presumably.

9 Q. At page 37 of the PDF, which is  
10 page 327 of the article, I am going to read some  
11 long quotes to you:

12 "Oliphant engaged in many  
13 irregularities while securing the  
14 surrender of the Saugeen Peninsula.  
15 The vital question for this  
16 narrative is, how did our people  
17 preserve self-government given the  
18 disregard that Oliphant had for our  
19 leadership and our desires as they  
20 concerned our land? The answer is  
21 that, even though the Crown engaged  
22 in dubious conduct, we made a treaty  
23 that we thought protected our  
24 earlier expressed terms and  
25 conditions."

12:51:49 1 And the "we" in "we made a treaty" is  
12:51:55 2 highlighted:  
12:51:56 3 "Our chiefs and principal men  
12:51:58 4 from Saugeen and Nawash - including  
12:52:00 5 my ancestor Peter Kegedonce Jones -  
12:52:04 6 affixed their signatures to Treaty  
12:52:05 7 No. 72. This determination was an  
12:52:07 8 exercise of self-government;  
12:52:09 9 although, in retrospect, the  
12:52:11 10 decision may have been a poor one  
12:52:13 11 because of the government's  
12:52:14 12 subsequent denial of our conditions  
12:52:16 13 for surrender.  
12:52:17 14 We attempted to consult amongst  
12:52:19 15 ourselves in the exercise of our  
12:52:21 16 sovereignty. We held General  
12:52:24 17 Councils to agree on principles that  
12:52:25 18 were to direct our dealings with our  
12:52:26 19 land. When given the opportunity,  
12:52:28 20 we talked with one another to decide  
12:52:31 21 how we would deal with proposals  
12:52:34 22 that were put to us. In fact, our  
12:52:35 23 internal government caused the  
12:52:37 24 Indian Department much frustration  
12:52:39 25 because '[our] affairs [were]

12:52:43 1 governed by the voice of the people,  
12:52:45 2 hence the difficulty experienced by  
12:52:46 3 the Indian Department.' Thus, while  
12:52:49 4 Treaty No. 72 has not always been  
12:52:51 5 interpreted with reference to the  
12:52:52 6 conditions that we stipulated, it  
12:52:53 7 was our decision, reached through  
12:52:55 8 several domestic councils, to  
12:52:57 9 release our land to the Crown.

12:52:59 10 To affirm that the surrender of  
12:53:02 11 the Saugeen Peninsula was an  
12:53:03 12 exercise of self-government on the  
12:53:05 13 part of the Nawash, one needs to  
12:53:07 14 explore my ancestors' subsequent  
12:53:09 15 correspondence."

12:53:11 16 And there is another quote on page 62  
12:53:14 17 of the PDF, page 352 of the article, on the right:

12:53:28 18 "Peter Kecedonce Jones also  
12:53:30 19 participated with his people on the  
12:53:31 20 preservation of sovereignty through  
12:53:33 21 entering into treaties with settler  
12:53:35 22 society that were intended to  
12:53:36 23 improve our material circumstances  
12:53:38 24 and shield us from the imposition of  
12:53:39 25 external control. From our



12:53:41 1 perspective, Treaties No. 72 and No.  
12:53:44 2 82 were negotiated as an exercise in  
12:53:46 3 self-government to provide for the  
12:53:48 4 continued sovereignty and prosperity  
12:53:50 5 of our Band."

12:53:53 6 Firstly, you will note that Borrows  
12:53:58 7 described Oliphant's conduct as dubious, and that  
12:54:00 8 is a perspective informed by oral history, isn't  
12:54:02 9 it?

12:54:02 10 A. I don't know. I can't remember  
12:54:07 11 what the footnote said. It could be either.  
12:54:12 12 Obviously, the written records lead one to the same  
12:54:15 13 conclusion.

12:54:16 14 Q. In another statement, Borrows  
12:54:22 15 indicates that the SON had sufficient time to  
12:54:24 16 consider the terms of Treaty 72.

12:54:27 17 A. Where do you find that?

12:54:28 18 Q. Page 37 of the PDF, the next page  
12:54:53 19 down, please, the paragraph there:

12:55:07 20 "[...] it was our decision,  
12:55:08 21 reached through several domestic  
12:55:11 22 councils, to release our lands to  
12:55:12 23 the Crown."

12:55:14 24 A. Yes.

12:55:14 25 Q. Is that a yes in answer to my

12:55:18 1 question?

12:55:18 2 A. Sorry, what was the question  
12:55:19 3 again?

12:55:20 4 Q. The question, this indicates that  
12:55:22 5 the SON had sufficient time to consider -- well,  
12:55:26 6 let me change it and ask you a different question.

12:55:28 7 This indicates that the SON had  
12:55:30 8 sufficient time to consider a surrender of their  
12:55:34 9 land?

12:55:37 10 A. Yes, what he is stating here is  
12:55:40 11 that they had held several Councils to discuss land  
12:55:44 12 surrenders, releasing land to the Crown, as he  
12:55:48 13 calls it.

12:55:48 14 Q. And he also said that in  
12:55:52 15 retrospect, the decision may have been a poor one  
12:55:55 16 because of the government's subsequent denial of  
12:55:58 17 our conditions for surrender. This suggests,  
12:56:00 18 doesn't it, that from the perspective of those  
12:56:02 19 living at the time, that the decision was not a  
12:56:05 20 foolish decision, doesn't it?

12:56:07 21 A. Can you repeat the question?

12:56:13 22 Q. Well, the statement is:

12:52:09 23 "[...] in retrospect, the  
12:52:11 24 decision may have been a poor one  
12:52:13 25 because of the government's

12:52:14 1 subsequent denial of our conditions

12:52:16 2 for surrender."

12:56:25 3 The key point there is in retrospect it

12:56:28 4 may have been a poor one, and I am asking whether

12:56:31 5 this suggests that, as viewed from those living at

12:56:35 6 the time the Treaty was made, it wasn't a foolish

12:56:38 7 decision?

12:56:40 8 A. I don't see that statement as

12:56:45 9 necessarily proving that corollary. He doesn't say

12:56:50 10 only considered in retrospect. He doesn't really

12:56:53 11 -- he doesn't make a statement about whether it was

12:56:55 12 a good decision at the time. He does say that, his

12:56:59 13 point and what he is focussing on is

12:57:02 14 self-government and interpreting his people's past

12:57:06 15 and decisions in the light of self-government and

12:57:10 16 the extent to which they were able to continue

12:57:13 17 self-governing.

12:57:16 18 Q. Well, I will read more of the

12:57:18 19 quote:

12:52:06 20 "This determination was an

12:52:07 21 exercise of self-government;

12:52:09 22 although, in retrospect, the

12:52:11 23 decision may have been a poor one

12:52:13 24 because of the government's

12:52:14 25 subsequent denial of our conditions

12:52:16 1 for surrender."

12:57:30 2 A. I still don't see how that is an  
12:57:32 3 endorsement of the decision at the time.

12:57:34 4 Q. My question was not is that an  
12:57:36 5 endorsement. My question is does this suggest that  
12:57:38 6 the decision at the time was not seen at the time  
12:57:42 7 to be a foolish decision?

12:57:44 8 A. I don't really see it as  
12:57:50 9 conclusive in that sense. It doesn't --

12:57:53 10 Q. I'm not asking if it is  
12:57:55 11 conclusive. I'm asking if it suggests that? Does  
12:57:59 12 it indicate that? Is it helpful -- or not helpful.  
12:58:07 13 Does it -- well, I'll just leave it as does it  
12:58:12 14 suggest it. I'm not asking if it is conclusive.  
12:58:14 15 Does it suggest that those at the time thought that  
12:58:18 16 it wasn't foolish?

12:58:18 17 A. It could.

12:58:26 18 MR. OGDEN: Your Honour, I'm about to  
12:58:29 19 start a new section, and I think I would suggest we  
12:58:32 20 break for lunch, if you desire, if the Court  
12:58:37 21 desires.

12:58:39 22 THE COURT: Just out of curiosity, what  
12:58:40 23 time is it?

12:58:41 24 MR. OGDEN: It is 12:58, Your Honour.

12:58:43 25 THE COURT: All right. Yes, we can

12:58:45 1 break for lunch.

12:58:46 2 MR. OGDEN: Thank you.

12:58:47 3 THE COURT: 2:15.

12:58:50 4 -- RECESSED AT 12:59 P.M.

14:18:39 5 -- RESUMED AT 2:17 P.M.

14:18:39 6 MR. OGDEN: Your Honour, at one point  
14:18:40 7 this morning I had referred to Exhibit 1843 and  
14:18:48 8 described the author, John Frost, as an Indian  
14:18:51 9 Agent, which was incorrect. Mr. Frost is noted in  
14:18:57 10 our cast of characters, which is at lettered  
14:19:02 11 Exhibit D, as a justice of the peace who assisted  
14:19:13 12 on occasion. That is a correction. Thank you.

14:19:19 13 BY MR. OGDEN:

14:19:24 14 Q. Could we go to Exhibit 4181,  
14:19:27 15 please, which is Professor Brownlie's chapter  
14:19:33 16 "First Nations Perspectives and Historical Thinking  
14:19:35 17 in Canada," which we looked at yesterday. On page  
14:19:51 18 37 of the chapter, PDF page 39, which is the same  
14:19:58 19 part we looked at, that is PDF 39 -- PDF 19, this  
14:20:11 20 is the extract we looked at, and we went down,  
14:20:15 21 two-thirds of the way down the page but we didn't  
14:20:17 22 read this part:

14:20:19 23 "Nonetheless, all parties,"

14:20:21 24 which would be Aboriginal and

14:20:22 25 non-Aboriginal writers from history,

14:20:26 1 "agree on the deceptive language  
14:20:29 2 used by government negotiators, the  
14:20:30 3 pressure they placed on First  
14:20:32 4 Nations to sign, the prevalence of  
14:20:33 5 'outside promises' made verbally but  
14:20:36 6 left out of written treaties, and  
14:20:39 7 the excessively narrow, legalistic  
14:20:41 8 interpretations that the federal  
14:20:43 9 government applied in implementing  
14:20:44 10 them."

14:20:45 11 But "all parties" necessarily includes  
14:20:50 12 you as an historian of treaty surrenders; do you  
14:20:55 13 agree?

14:20:55 14 A. Yes.

14:20:56 15 Q. So this was your view in 2009 and  
14:21:03 16 is it your view now?

14:21:08 17 A. It is a generalization, obviously,  
14:21:13 18 so it is saying that all these things occurred at  
14:21:16 19 least on some occasions.

14:21:18 20 Q. I am reading this as saying that  
14:21:29 21 all parties agree on the deceptive language used by  
14:21:35 22 all government negotiators; is that not what it  
14:21:37 23 says?

14:21:37 24 A. No, it doesn't say all government  
14:21:43 25 negotiators.

14:21:43 1 Q. Or is that the meaning it is  
14:21:44 2 intending to convey?

14:21:46 3 A. No, it is listing a number of  
14:21:47 4 problems that occurred at times in the making of  
14:21:50 5 treaties.

14:21:54 6 Q. I would like to go to Exhibit  
14:21:59 7 2218, please. This is the statement of James Ross,  
14:22:10 8 MPP, which we went to yesterday, and in paragraph 1  
14:22:13 9 he says:

14:22:15 10 "I recollect that Peter Jacobs,  
14:22:17 11 Indian Missionary who acted as an  
14:22:20 12 interpreter on the occasion [...]"

14:22:22 13 And I emphasize the word "an" there.  
14:22:26 14 Could this suggest that Jacobs was not the only  
14:22:29 15 interpreter?

14:22:29 16 A. Well, it doesn't rule it out  
14:22:32 17 definitely, but I haven't seen any records that  
14:22:36 18 mentioned another interpreter, but it is possible,  
14:22:38 19 yes.

14:22:38 20 Q. You have confirmed in your  
14:22:47 21 testimony that there were other Anishnawbek  
14:22:49 22 attendees who spoke English, David Sawyer and  
14:22:52 23 Charles Keeshig, and accepted that Charles Keeshig  
14:22:57 24 was educated, went to Upper Canada College and was  
14:23:02 25 for a time one of Nawash's interpreters and

14:23:05 1 writers?

14:23:06 2 A. Yes.

14:23:06 3 Q. And accepted that David Sawyer was  
14:23:09 4 originally appointed to the Nawash Band as  
14:23:14 5 secretary and interpreter?

14:23:15 6 A. Yes.

14:23:15 7 Q. John Beaty we referred to before,  
14:23:23 8 and I think you said you hadn't seen him referred  
14:23:26 9 to as an interpreter. So I would like to go to  
14:23:27 10 Exhibit 4100, please, which is a letter from John  
14:23:34 11 Johnson of Nawash to Anderson dated June 23, 1856.  
14:23:49 12 This is difficult to read. At the top you will see  
14:23:57 13 there, "We the Chiefs and Warriors of this Band and  
14:24:06 14 General Council"?

14:24:09 15 A. I think so, yes.

14:24:10 16 Q. And it is talking about 1856 and  
14:24:16 17 1857. In the middle or so on the right side, and  
14:24:23 18 I'll read it and you let me know if I'm getting it  
14:24:26 19 wrong, please:

14:24:27 20 "We therefore inform to our  
14:24:28 21 Great Father that in our General  
14:24:31 22 Council [...]" --

14:24:32 23 Is that "know" or "now unanimous have"?  
14:24:38 24 The second line there.

14:24:39 25 A. Maybe "have," "in our General



1 Council have unanimously," yes, I think "have."

2 Q. "Have," thank you:

3 "[...] have unanimously  
4 released our writer Moses Madwayosh  
5 from his office on account of his  
6 bad conduct and disagreeing [...]"

7 A. "Disgracing" it looks like.

8 Q. "Disgracing," thank you:

9 "[...] our community, and by  
10 our General Council appointed  
11 [W.J.H.] Beaty from the Band of  
12 Colpoy's tract as our interpreter  
13 and writer."

14 Is that, do you think, the same John  
15 Beaty who was present at the Treaty 72 Council?

16 A. Yes, probably. A small  
17 correction. It is not "W.J.H."; it is "Mr."

18 Q. Oh, thank you.

19 A. You have to know the writing of  
20 the time to recognize that.

21 Q. All right, so at least as of 1856,  
22 he could speak and write English, Beaty could?

23 A. Yes.

24 Q. Probably did in 1854 then?

25 A. Seems likely.

14:25:40 1 Q. And do you accept that Moses  
14:25:42 2 Madwayosh spoke and wrote English?

14:25:44 3 A. Well, this certainly makes it  
14:25:45 4 appear that he did, since he had been their writer.

14:25:48 5 Q. And there was another document  
14:25:49 6 that we looked at earlier, Keating's proposed  
14:25:54 7 surrender. If you recall, that is Exhibit 2096, it  
14:25:59 8 says that the rejection of the Chiefs was read,  
14:26:03 9 explained and signed in the presence of Moses  
14:26:05 10 Madwayosh, and then it also said David Sawyer?

14:26:08 11 A. Yes.

14:26:08 12 Q. In your cross-examination by  
14:26:16 13 Canada, you were taken to Exhibit 4160, which is  
14:26:20 14 one of the requests to pay bearer, the bearer of  
14:26:27 15 the document, Peter Jacobs. This one was dated  
14:26:29 16 March 3rd, 1854. And we see in that document, the  
14:26:48 17 witnesses were -- or the witness was Moses  
14:26:51 18 Madwayosh and he witnessed for Alexander Madwayosh  
14:26:55 19 and John Kaduhgekwun; is that right?

14:27:03 20 A. Yes.

14:27:03 21 Q. Those latter two were two of the  
14:27:07 22 leading Chiefs of the Saugeen Band, weren't they?

14:27:09 23 A. Yes.

14:27:10 24 Q. And this shows Moses playing an  
14:27:12 25 important role prior to Treaty 72, doesn't it?

14:27:15 1 A. It shows him witnessing this and I  
14:27:20 2 can't tell who wrote it for sure, but it looks like  
14:27:23 3 his hand and he signed it, so he can obviously  
14:27:26 4 write.

14:27:29 5 Q. And the use of him to write it and  
14:27:32 6 sign it indicates that he was trusted to perform  
14:27:41 7 these functions by his father, and his father is  
14:27:44 8 Alexander Madwayosh?

14:27:45 9 A. I don't know that for sure.

14:27:47 10 Q. But by Alexander Madwayosh and the  
14:27:50 11 other Chief, John Kaduhgekwun?

14:27:54 12 A. Yes, it certainly appears that he  
14:27:58 13 was trusted at this point.

14:28:01 14 Q. In your testimony, you accepted  
14:28:03 15 that the Treaty 72 Council was attended not just by  
14:28:07 16 Chiefs who signed but by at least some warriors and  
14:28:12 17 perhaps by others who could be described as young  
14:28:14 18 men of the Tribe. Is it probable that Moses  
14:28:19 19 Madwayosh attended the Treaty Council in Saugeen?

14:28:22 20 A. It would certainly be possible.

14:28:25 21 Q. Well, would you go to probable?

14:28:28 22 A. Sure.

14:28:28 23 Q. And you accept, based on the  
14:28:36 24 Treaty text and Oliphant's report, that the text  
14:28:40 25 was read to the SON Chiefs prior to their signing

14:28:43 1 it; is that right? I think you have said that in  
14:28:44 2 your testimony.

14:28:46 3 A. Okay. I'm sorry, I have seen so  
14:28:49 4 many documents, I can't remember exactly what they  
14:28:51 5 all say, but that sounds right.

14:28:52 6 Q. Well, I'm not asking you about  
14:28:54 7 what was in the document, but I am asking you  
14:28:56 8 whether you accept that you have said that before.  
14:28:58 9 But for reference, anyway, we'll proceed as on July  
14:29:02 10 25th, and accepted that it was translated to the  
14:29:06 11 SON Chiefs from the English prior to their signing  
14:29:09 12 it?

14:29:09 13 A. Yes.

14:29:10 14 Q. And so we have Sawyer and Charles  
14:29:15 15 Keeshig, at least, and you have said that that  
14:29:17 16 meant there were at least some people capable of  
14:29:20 17 checking Jacobs' translations?

14:29:23 18 A. Yes.

14:29:23 19 Q. And then we have got Beaty, and  
14:29:26 20 the likely or probable presence of Moses Madwayosh,  
14:29:30 21 making it even more likely that Jacobs'  
14:29:33 22 translations were checked.

14:29:35 23 So it is implausible, isn't it, that  
14:29:39 24 Jacobs translated in a misleading way?

14:29:42 25 A. Yes. I wouldn't expect that he

14:29:46 1 would have done that anyway, and yes, I agree that  
14:29:53 2 there were others who could probably check it.

14:29:55 3 Q. And it is implausible that Jacobs  
14:29:58 4 translated in a way that was substantively  
14:30:03 5 inaccurate?

14:30:04 6 A. Yes, it is unlikely, given -- and  
14:30:14 7 I will just add the caveat that it is always  
14:30:16 8 difficult to translate between languages and that  
14:30:19 9 Anishinaabemowin lacked a number of the key  
14:30:21 10 concepts that were used in treaty-making, in  
14:30:27 11 land-based treaties.

14:30:28 12 Q. Well, we can conclude, though,  
14:30:29 13 that there was no misunderstanding by the SON's  
14:30:32 14 representatives at the Treaty Council about what  
14:30:35 15 they were agreeing to that would have arisen from  
14:30:40 16 an error of translation, taking into account what  
14:30:45 17 you have just said about necessary difficulties in  
14:30:48 18 translation?

14:30:49 19 A. Yes, and the documents afterwards  
14:30:53 20 also, I haven't seen anything that made me think  
14:30:57 21 they felt they had misunderstood, except of course  
14:31:00 22 the thing about actual settlement conditions.

14:31:05 23 Q. If we could look again at the  
14:31:11 24 receipt of the payment to Jacobs, which is Exhibit  
14:31:16 25 2469, please. Thank you. This is the cover page.

14:31:30 1 The second page, on the third line it says:

14:31:43 2 "In payment for my services  
14:31:45 3 rendered, Mr. Oliphant, late  
14:31:47 4 Superintendent General in procuring  
14:31:49 5 a surrender of the Saugeen  
14:31:51 6 Peninsula."

14:31:51 7 And just to clarify, the procuring  
14:31:54 8 there is described as being done by Oliphant, not  
14:31:58 9 Jacobs; is that right?

14:31:59 10 A. I had read it as referring to  
14:32:05 11 Jacobs' services I guess because it paralleled the  
14:32:12 12 language of the previous document that said in  
14:32:16 13 obtaining a surrender.

14:32:17 14 Q. And so it doesn't say, though --  
14:32:24 15 the reason I ask that is because it doesn't say --  
14:32:27 16 it would be clearer to say, though, wouldn't it, to  
14:32:30 17 say "and in procuring," "for my services rendered  
14:32:36 18 Mr. Oliphant and in procuring a surrender of the  
14:32:39 19 Saugeen Peninsula," or it would be also be clearer  
14:32:43 20 "while I was procuring the surrender of the Saugeen  
14:32:45 21 Peninsula"?

14:32:46 22 A. Yes, I agree there are a number of  
14:32:50 23 ways it could be made clearer. The procuring here,  
14:32:52 24 it isn't definitely clear to which of them it  
14:32:55 25 refers.

14:32:56 1 Q. And Jacobs doesn't say -- or he  
14:33:03 2 signs this document, this is not written by him  
14:33:06 3 perhaps, but that the payment was for his services  
14:33:11 4 as an interpreter, does it?

14:33:15 5 A. No, exactly, it doesn't say that.

14:33:17 6 Q. And you noted in your testimony  
14:33:21 7 that Jacobs signed as missionary, not as  
14:33:24 8 interpreter, of the Treaty document?

14:33:26 9 A. Yes.

14:33:27 10 Q. And you suggested this meant his  
14:33:31 11 role was more expansive than just interpreter; do  
14:33:38 12 you recall saying that?

14:33:38 13 A. Yes, I do.

14:33:39 14 Q. So doesn't this -- well, this  
14:33:44 15 indicates Jacobs was not trying to hide his role,  
14:33:48 16 doesn't it?

14:33:48 17 A. Yes.

14:33:49 18 Q. You also said in your testimony of  
14:33:54 19 July 25th that Donald Smith is a very thorough  
14:34:00 20 researcher and that you would put a lot of reliance  
14:34:02 21 on his analysis of Jacobs' financial situation at  
14:34:06 22 the time; do you recall that?

14:34:07 23 A. Yes.

14:34:08 24 Q. And in your report, page 36, you  
14:34:10 25 note, and you don't need to turn it up because the

1 quote is not important here, but you note that  
2 Donald Smith says that Jacobs sought to avoid the  
3 breaking out of violence, but you didn't give your  
4 view on this point.

5 Do you agree with Smith that Jacobs  
6 sought to avoid the breaking out of violence?

7 A. I wasn't convinced on that point.  
8 I thought Don was trying to make it kind of  
9 positive. I thought it was potentially a little  
10 bit of a stretch.

11 Q. Was his analysis of Jacobs'  
12 financial situation along the same lines, trying to  
13 make Jacobs' actions positive?

14 A. No, because that is more concrete,  
15 right. He had a sense of what kind of money -- he  
16 probably had a sense of what kind of money Jacobs  
17 was earning. There was documents showing that he  
18 had to send his children to -- am I going too fast  
19 -- that he had to send his children to, you know, a  
20 residential school and so on.

21 So that is fairly concrete.

22 Whereas, it is always difficult to  
23 determine anyone's inner feelings or motivations.  
24 I mean, actually, we can't, right? We can guess  
25 and muse what evidence there is, but we can never



14:35:43 1 really know definitively what someone was intending  
14:35:48 2 or what their motives were.

14:35:49 3 Q. You have accepted that he was a  
14:35:55 4 Methodist -- Jacobs was a Methodist minister and  
14:35:59 5 likely encouraged the SON to give up hunting and  
14:36:02 6 fishing and encouraged farming; is that right?

14:36:04 7 A. Yes, that is likely.

14:36:06 8 Q. And it was noted in  
14:36:09 9 cross-examination that the negotiations took place  
14:36:12 10 for Treaty 72 in the church in which he preached on  
14:36:17 11 Chippewa Hill?

14:36:19 12 A. Yes.

14:36:20 13 Q. So it was probable that Jacobs  
14:36:23 14 thought that what he was doing was the right thing  
14:36:25 15 for the SON?

14:36:25 16 A. Yes, I would say that is quite  
14:36:29 17 probable.

14:36:30 18 Q. In fact, it is probable that if  
14:36:37 19 Jacobs was not -- even if he was not, as the  
14:36:42 20 allegation is, pecuniarily interested in the  
14:36:46 21 surrender, he would have been in favour of the  
14:36:49 22 surrender?

14:36:56 23 A. It is likely, because that was  
14:36:57 24 usually the missionary point of view.

14:36:58 25 Q. And he likely would have advised

14:37:00 1 the SON to make the surrender?

14:37:01 2 A. He may have.

14:37:02 3 Q. Well, he may have, but is it --  
14:37:07 4 based on his view of what was in their best  
14:37:11 5 interests and his involvement in the surrender  
14:37:19 6 process, is it not likely that he would have  
14:37:20 7 advised them to do it?

14:37:23 8 A. Yes, it is.

14:37:23 9 Q. And he probably would have advised  
14:37:27 10 them -- he probably would have -- well, no, I am  
14:37:32 11 not going to ask that. Thank you.

14:37:33 12 There is a suggestion that Jacobs  
14:37:40 13 stayed, though, and participated in SON's  
14:37:42 14 discussion after Oliphant left for awhile during  
14:37:45 15 the surrender Council. There is no suggestion that  
14:37:50 16 SON members excluded him at all or attempted to  
14:37:53 17 exclude him, is there?

14:37:54 18 A. Not that I know of.

14:37:58 19 Q. And it appears he was there for  
14:37:59 20 the whole time, well, from the little that we have,  
14:38:05 21 during which Oliphant was gone; is that right?

14:38:07 22 A. I think that is based solely on  
14:38:12 23 the memoir, is that correct?

14:38:14 24 Q. Yes. All of this is solely based  
14:38:21 25 on the memoir, I think.

14:38:27 1 A. Yes, that may be true. Yeah, as I  
14:38:30 2 have registered, I have serious reservations about  
14:38:33 3 the accuracy of the memoir. For instance, I  
14:38:39 4 personally don't believe that a fistfight would  
14:38:41 5 have occurred, much less that Peter Jacobs would  
14:38:45 6 have taken part in it. Sorry, I'm laughing, but  
14:38:48 7 the thought of a Methodist missionary in 1854  
14:38:51 8 taking part in a fistfight is -- you know, that  
14:38:56 9 would have been very seriously frowned on by the  
14:38:59 10 Methodist Church.

14:39:02 11 So the memoir says, yes, that Jacobs  
14:39:04 12 advised Oliphant to withdraw and I think it also  
14:39:09 13 says that he advised him to come back, right, when  
14:39:14 14 he believed that it was a favourable moment.

14:39:17 15 Q. But I would like to talk more  
14:39:18 16 about the memoir, I think, though, now. You called  
14:39:26 17 it problematic earlier, and as we have noted, it  
14:39:28 18 says that when Oliphant arrived at the chapel,  
14:39:33 19 everyone was -- the mouths of the Tribe were  
14:39:36 20 present there, and that is contrary to the report,  
14:39:38 21 isn't it?

14:39:38 22 A. Yes.

14:39:39 23 Q. And it says that he was almost  
14:39:42 24 wrecked on a boat on Lake Huron on the way, but  
14:39:44 25 that is also contrary to his report and a

14:39:47 1 subsequent letter from the Nawash Chiefs?

14:39:48 2 A. Right.

14:39:49 3 Q. And you accept that it is possible  
14:39:52 4 that Oliphant did not actually remember who Jacobs  
14:39:54 5 was when he wrote the memoir. You pointed out that  
14:39:59 6 it was a colourful account and its purpose was to  
14:40:02 7 entertain. And you have also suggested it may have  
14:40:07 8 been ghost-written or had some intervention by an  
14:40:09 9 editor.

14:40:10 10 There are facts in there which you have  
14:40:13 11 said seem fictionalized. The fistfight was one, to  
14:40:20 12 repeat that.

14:40:21 13 But I would like to -- you were asked  
14:40:24 14 by Canada about your familiarity with the  
14:40:27 15 Dictionary of National Biography and asked whether  
14:40:31 16 it was relatively reliable.

14:40:33 17 A. Is it the Dictionary of National  
14:40:39 18 Biography or Canadian biography?

14:40:40 19 Q. The Dictionary of National  
14:40:43 20 Biography, I recall.

14:40:45 21 A. I ask because the dictionary of  
14:40:47 22 Canadian biography is a very highly reputable  
14:40:53 23 academic source, but the Dictionary of National  
14:40:57 24 Biography I don't think I'm as familiar with, but I  
14:40:59 25 believe it was shown to me, was it not?

14:41:01 1 Q. That's right, yes. It was the  
14:41:03 2 Oxford Dictionary of National Biography that was  
14:41:06 3 shown to you.

14:41:06 4 A. Oh, okay, yes --

14:41:08 5 Q. Do you recall that?

14:41:08 6 A. I would place some reliance on  
14:41:10 7 that source.

14:41:10 8 Q. Okay. I would like to show you a  
14:41:16 9 new document then, which is S0068, and that is the  
14:41:21 10 entry to the Oxford Dictionary of National  
14:41:25 11 Biography for Laurence Oliphant. And Your Honour,  
14:41:27 12 to make this an exhibit, please, Oxford Dictionary  
14:41:34 13 of National Biography - Laurence Oliphant.

14:41:38 14 THE COURT: Mr. Registrar?

14:41:39 15 THE REGISTRAR: That will be Exhibit  
14:41:41 16 No. 4189.

14:41:43 17 EXHIBIT NO. 4189: Entry to the Oxford  
14:41:22 18 Dictionary of National Biography for  
14:41:25 19 Laurence Oliphant.

14:41:44 20 BY MR. OGDEN:

14:41:45 21 Q. Thank you. Page 2 of this, ten  
14:41:54 22 lines down, please, just to confirm it was the  
14:41:58 23 Oliphant we are talking about here:

14:42:02 24 "Oliphant acted as secretary to  
14:42:04 25 Lord Elgin during the negotiation at

1 Washington of the reciprocity treaty  
2 with Canada [...]"

3 And then we'll go to page 4, please,  
4 the second paragraph:

5 "In 1865 Oliphant was elected  
6 as Liberal MP for Stirling Burghs."

7 It refers to Gladstone, and this is in  
8 Britain, isn't it?

9 A. Yes.

10 Q. And then at page 5, 1865 -- well,  
11 actually, sorry, go back up to page 4, please, I  
12 think, and then down to the bottom of the page:

13 "In 1867 Oliphant resigned his  
14 seat in parliament, and joined  
15 Harris's community," and there was a  
16 reference to Harris earlier, Thomas  
17 Lake Harris, "Harris's community at  
18 Brockton, or Salem-on-Erie in New  
19 York State, where the leader was in  
20 the habit of casting out devils and  
21 forming magnetic circles among his  
22 disciples. Oliphant was renamed  
23 Woodbine by Harris and became his  
24 spiritual slave."

25 And we'll go now then to page 5 -- or,

14:43:19 1 no, sorry, page 7. I am going to read this whole  
14:43:29 2 text here down to his death, so starting at the  
14:43:32 3 top, please --

14:43:36 4 THE COURT: Well, just before you  
14:43:37 5 embark on this, is it necessary that you read this  
14:43:39 6 out loud? It is in clearly legible type. The  
14:43:43 7 witness is capable of taking a minute or two and  
14:43:46 8 reading it to himself. I don't want to interfere  
14:43:48 9 with your cross-examination, but it is fully an  
14:43:51 10 entire page.

14:43:52 11 BY MR. OGDEN:

14:43:52 12 Q. It is not necessary, Your Honour.

14:43:54 13 And so I would ask the witness to read  
14:43:57 14 it. Thank you.

14:43:59 15 A. [Witness reviews document.]

14:44:32 16 Okay, I have read everything down to  
14:44:35 17 "Character."

14:44:36 18 Q. Yes, thank you.

14:44:39 19 So it starts in 1887 when Oliphant's  
14:44:44 20 wife died and his belief that she soon came back to  
14:44:51 21 him in spirit and sent messages through him to her  
14:44:54 22 friends, which he believed that her presence was  
14:44:56 23 shown by these strange convulsive movements.

14:45:02 24 And then he returned to England. He  
14:45:05 25 was much broken. He wrote a series of papers that

14:45:10 1 Blackwood's published in 1887, the same year as  
14:45:14 2 "Episodes in a Life of Adventure or Moss from a  
14:45:18 3 Rolling Stone," and that is the memoir, isn't it?

14:45:19 4 A. Yes.

14:45:20 5 Q. And then in 1888, the following  
14:45:26 6 year, he published a book in which he assumed the  
14:45:32 7 mantle of a spiritual leader and then later in 1888  
14:45:41 8 died.

14:45:43 9 Having read this, can we place any  
14:45:49 10 weight on the memoir?

14:45:53 11 A. Well, I actually find these  
14:46:01 12 comments consistent with my sense of the memoir.  
14:46:07 13 It seems -- you know, this kind of spiritualism  
14:46:15 14 rings very strange in our world today, but it was  
14:46:19 15 really quite common at the time. Many people  
14:46:23 16 believed in these kinds of things, especially, you  
14:46:27 17 know, communicating with the dead, the dead loved  
14:46:31 18 ones and so on.

14:46:34 19 And it says "he was much broken, though  
14:46:37 20 he could still often talk with his old brightness."  
14:46:43 21 This doesn't seem to cast doubt on all of these  
14:46:45 22 books, you know, in toto, so to speak.

14:46:51 23 But it is consistent with my sense of  
14:46:53 24 the memoir that there is a good deal of  
14:46:58 25 fictionalizing and dramatizing.



14:47:00 1 Q. So you would continue to place at  
14:47:03 2 least some weight on the memoir?

14:47:04 3 A. I believe I only used it really in  
14:47:11 4 terms of the role of Peter Jacobs and, if it hadn't  
14:47:15 5 been for the 50-pound payment that is documented,  
14:47:19 6 even there I would have been quite wary. But since  
14:47:24 7 they correspond with each other, and certain other  
14:47:26 8 things correspond as well, of course, as we noted  
14:47:28 9 when we discussed this before, so I don't dismiss  
14:47:33 10 the entire thing but I think it is appropriate to  
14:47:37 11 approach it with wariness and to look, if one was  
14:47:42 12 going to rely on it for information, to look for  
14:47:45 13 any corroborating evidence elsewhere.

14:47:47 14 Q. I would like to discuss this a bit  
14:47:49 15 more because I'm determined to get some clarity  
14:47:52 16 over how you used the memoir, for myself, at least.

14:47:57 17 There are certain facts within it which  
14:48:03 18 are not found elsewhere, for instance, the  
14:48:05 19 fistfights, Jacobs staying, there is a reference to  
14:48:12 20 a pipe ceremony, a proposition that a Chief other  
14:48:20 21 than Madwayosh spoke at a Treaty Council. They are  
14:48:24 22 all of the same type of fact, aren't they, in that  
14:48:28 23 they are found in the memoir but not in those terms  
14:48:32 24 as stated found elsewhere; is that right?

14:48:34 25 A. Yes, I believe all those things

14:48:36 1 you listed are found only in the memoir.

14:48:37 2 Q. So are you taking a fact stated in  
14:48:42 3 the memoir and using that as a starting point and  
14:48:47 4 looking for corroboration outside of the memoir?  
14:48:51 5 Is that what you do with Jacobs?

14:48:53 6 A. Yeah, that is probably a fairly  
14:48:59 7 accurate description. I looked at those two  
14:49:02 8 accounts. You know, I did all this work six and  
14:49:07 9 seven years ago, so I can't remember in exactly  
14:49:10 10 what order I did things, but I looked at those two  
14:49:13 11 accounts and compared them. And of course, some  
14:49:16 12 elements of the memoir do correspond with the  
14:49:20 13 report, the location, the timing of the meeting and  
14:49:24 14 so on.

14:49:24 15 So yeah, and then I learned that he had  
14:49:30 16 received this 50-pound payment.

14:49:31 17 The fact that he gave so much attention  
14:49:34 18 to Jacobs was noteworthy, and so I guess I looked  
14:49:41 19 for corroboration of anything of note or of  
14:49:46 20 importance that he stated in the memoir, and there  
14:49:53 21 is this document showing the 50-pound payment.

14:49:58 22 Q. So the pipe ceremony then, that  
14:50:07 23 appears in the memoir and also appears in the book  
14:50:14 24 Oliphant wrote in 1855 "Minnesota and the Far  
14:50:18 25 West," which is Exhibit 2175, in which he described

1 a pipe ceremony at the Treaty Council.

2 And you have said that the description  
3 in that 1855 book didn't match your understanding  
4 of how pipe ceremonies are usually held. It  
5 referred to a lot of tobacco.

6 A. Yes, I think that is one where he  
7 says there were lots of pipes and they were all  
8 smoking away and that sort of thing.

9 Q. So you are looking at it and  
10 saying, from what I know of treaty ceremonies, this  
11 doesn't correspond with a pipe ceremony, and then  
12 you use that to dismiss the facts stated in the  
13 memoir; is that an accurate statement by me?

14 A. That seems reasonably accurate,  
15 yes.

16 Q. So from your knowledge of treaty  
17 surrender Councils, you would know that pipe  
18 ceremonies are important; correct?

19 A. Yes.

20 Q. And it is unlikely, isn't it, that  
21 the SON would have signed a treaty land surrender  
22 without first conducting a pipe ceremony, isn't it?

23 A. I don't want to pronounce on that  
24 because I haven't researched that particular issue  
25 for that particular group. Certainly that was the

14:51:47 1 case in the 1870s for the Cree and Anishnawbek on  
14:51:56 2 the prairies.

14:51:58 3 Q. But you know enough about them to  
14:52:00 4 say that they didn't smoke in the pipe ceremony in  
14:52:04 5 the way that Oliphant describes them the year after  
14:52:06 6 the surrender?

14:52:07 7 A. I don't believe they would have,  
14:52:08 8 but again, I am adding the caveat that I wouldn't  
14:52:12 9 present myself as an authority on pipe ceremonies  
14:52:16 10 among the Anishnawbek at that time.

14:52:18 11 Q. Is it part of your expertise?

14:52:20 12 A. No, I wouldn't.

14:52:23 13 Q. Would you mind --

14:52:26 14 A. I'm sorry, no, I would not.

14:52:29 15 Q. I would like to turn now to the  
14:52:31 16 time that the SON had to consider the Crown's  
14:52:36 17 surrender proposal at the 1854 October Treaty  
14:52:42 18 Council, and we have a memoir which says that  
14:52:46 19 Jacobs called Oliphant back after an hour when the  
14:52:49 20 SON had reached an internal agreement.

14:52:51 21 But we seem not to be using that as a  
14:52:57 22 reliable statement, so the formal Treaty report is  
14:53:05 23 Exhibit 2175, and page 4 of this, page 3 of the  
14:53:12 24 PDF, please, and this is Oliphant says:

14:53:26 25 "As soon as the discussion was

14:53:27 1 fairly diverted from the question of  
14:53:28 2 the propriety of the surrender to a  
14:53:31 3 consideration of the limits of the  
14:53:32 4 reserves, I retired for an hour, in  
14:53:35 5 order to allow time for a private  
14:53:37 6 debate."

14:53:37 7 So this here, firstly, we can be  
14:53:43 8 reasonably confident it was an hour, can't we?

14:53:45 9 A. Yes, all evidence points to that,  
14:53:46 10 and I think it is consistent with the time at the  
14:53:48 11 beginning of the Council and the time at which they  
14:53:51 12 began to finalize the agreement.

14:53:52 13 Q. And the purpose of Oliphant  
14:53:54 14 leaving was to allow time for private debate --

14:53:56 15 A. Yes.

14:53:58 16 Q. -- amongst the SON?

14:54:00 17 A. Yes.

14:54:01 18 Q. But this statement doesn't tell us  
14:54:03 19 why it was an hour, does it?

14:54:05 20 A. No.

14:54:05 21 Q. We have lost -- sorry.

14:54:08 22 A. No, it doesn't.

14:54:09 23 Q. So it could be an hour, because  
14:54:11 24 that is how long it took them to decide, or it  
14:54:13 25 could be an hour because Oliphant only gave them an

14:54:16 1 hour?

14:54:16 2 A. Yes, we don't know.

14:54:18 3 Q. So we looked to the evidence, and  
14:54:24 4 we could look to the memoir, which says that Jacobs  
14:54:28 5 called them back once they had decided?

14:54:30 6 A. Yes.

14:54:31 7 Q. Now, your testimony was that  
14:54:41 8 Oliphant appears to have given insufficient time  
14:54:45 9 here for the SON community to have made up their  
14:54:51 10 mind; is that correct?

14:54:52 11 A. Yes, an hour is a very short time  
14:54:55 12 for such an important decision.

14:54:56 13 Q. And you were asked by Council for  
14:55:01 14 the SON about the ordinary amount of time or range  
14:55:04 15 of times a First Nation might take to come to a  
14:55:07 16 decision about a land surrender like this one. And  
14:55:10 17 your evidence was that, in general, an hour is not  
14:55:14 18 enough time for the ordinary cultural practices of  
14:55:17 19 Anishnawbek to be followed; do you recall that?

14:55:19 20 A. Yes.

14:55:19 21 Q. So I am going to ask you whether  
14:55:22 22 you agree with some propositions that I am going to  
14:55:25 23 put to you relating to that opinion.

14:55:27 24 First, do you agree that treaty-making  
14:55:30 25 was highly situational?

14:55:32 1 A. Yes.

14:55:34 2 Q. And do you agree that the amount  
14:55:37 3 of time spent in Council could vary depending on a  
14:55:39 4 number of factors?

14:55:40 5 A. Yes.

14:55:40 6 Q. For example, the number of First  
14:55:45 7 Nation participants?

14:55:45 8 A. Yes.

14:55:47 9 Q. The extent of prior experience in  
14:55:50 10 land cessions and other treaties?

14:55:52 11 A. Yes.

14:55:55 12 Q. The nature of the relationship, if  
14:55:57 13 any, between a First Nation and the Crown?

14:56:00 14 A. Yes.

14:56:00 15 Q. The type of land cession being  
14:56:01 16 negotiated?

14:56:02 17 A. Yes.

14:56:02 18 Q. The extent of exposure to other  
14:56:06 19 treaties in adjacent areas?

14:56:08 20 A. Yes.

14:56:08 21 Q. The particular socio-economic  
14:56:11 22 circumstances and objectives of the First Nation or  
14:56:15 23 Nations engaged in negotiations?

14:56:17 24 A. Yes.

14:56:18 25 Q. Do you agree that reaching an

14:56:21 1 opinion such as the one you gave would require a  
14:56:26 2 detailed examination of evidence related to these  
14:56:32 3 factors for each treaty?

14:56:35 4 A. Yes, for -- you mean for a  
14:56:38 5 researcher or whatever to come to that --

14:56:40 6 Q. Yes.

14:56:40 7 A. Yes, I do agree.

14:56:42 8 Q. Which would be lengthy, a lengthy  
14:56:45 9 research process?

14:56:46 10 A. A lengthy research process to  
14:56:48 11 determine?

14:56:49 12 Q. To reach a conclusion.

14:56:53 13 A. I'm sorry, could you just restate  
14:56:54 14 the question?

14:56:54 15 Q. I will, sorry. The previous  
14:56:57 16 question was that reaching an opinion would require  
14:57:00 17 a detailed examination of evidence related to any  
14:57:05 18 or all of these factors for each --

14:57:09 19 A. Yes, yes.

14:57:09 20 Q. So the next question was, you said  
14:57:12 21 -- you referred to the research process, and I said  
14:57:14 22 that the research process would be lengthy,  
14:57:16 23 wouldn't it?

14:57:17 24 A. Probably.

14:57:17 25 Q. Do you agree that the outcome of



14:57:20 1 that process would result in no definite conclusion  
14:57:24 2 about an ordinary time required by Anishnawbek to  
14:57:29 3 reach a consensus on a land surrender?

14:57:32 4 A. Yes, I don't think you could say,  
14:57:35 5 you know, it would normally be 2.5 hours or -- no.

14:57:39 6 Q. Well, by "definite conclusion" I  
14:57:43 7 mean a -- no, sorry, that is fine.

14:57:45 8 The next proposition, in many cases an  
14:57:49 9 examination of the evidence prior to the Treaty  
14:57:51 10 Council would reveal that the First Nation had been  
14:57:53 11 considering the surrender for days, weeks, months  
14:57:57 12 or even years before the Council at which they  
14:58:01 13 signed the deed of surrender? I can repeat that if  
14:58:05 14 you would like.

14:58:06 15 In many cases, an examination of the  
14:58:08 16 evidence prior to the Treaty Council would show  
14:58:12 17 that the First Nation had been considering the  
14:58:14 18 surrender for days, weeks, months or even years  
14:58:18 19 before the Council at which they signed the deed of  
14:58:21 20 surrender?

14:58:22 21 A. Yes, there were definitely cases  
14:58:25 22 in which that was true.

14:58:26 23 Q. Do you agree that there are  
14:58:30 24 serious methodological limitations in relying  
14:58:35 25 solely on accounts of Council proceedings in order

14:58:38 1 to assess the degree of consensus among Anishnawbek  
14:58:42 2 to the terms of a treaty?

14:58:46 3 A. Oh, yes, but a report like this --  
14:58:49 4 well, these reports don't say anything about how  
14:58:53 5 they achieved consensus.

14:58:54 6 Q. And serious substantive  
14:58:58 7 limitations in relying solely on the accounts of  
14:59:02 8 Council proceedings? So substantive as opposed to  
14:59:09 9 methodological limitations. I think you answered  
14:59:11 10 the first question and the second question with the  
14:59:16 11 answer to your first. So I might repeat them.

14:59:18 12 A. Please.

14:59:19 13 Q. Do you agree that there are  
14:59:21 14 serious methodological limitations to relying  
14:59:25 15 solely on accounts of Council proceedings to assess  
14:59:27 16 the degree of consensus among Anishnawbek?

14:59:32 17 A. Yes, one would certainly prefer to  
14:59:39 18 have information from the actual signatories, if  
14:59:43 19 possible.

14:59:44 20 Q. And do you agree that there are  
14:59:45 21 serious substantive limitations for relying solely  
14:59:50 22 on accounts of Council proceedings?

14:59:52 23 A. Do you mean relying solely on a  
14:59:56 24 report like Oliphant's? You have said --

14:59:59 25 Q. Yes.

15:00:00 1 A. -- relying on Council proceedings.

15:00:03 2 Q. Yes.

15:00:03 3 A. You mean authored by a government

15:00:05 4 official?

15:00:05 5 Q. Written accounts, yes. Yes.

15:00:10 6 A. Yes.

15:00:16 7 Q. Thank you. Your evidence is that

15:00:22 8 in a matter as serious as surrendering land, all

15:00:25 9 remaining land was the consideration, Anishnawbek

15:00:30 10 Chiefs did not have the authority to make the

15:00:33 11 decision on their own; do you recall that?

15:00:35 12 A. Yes.

15:00:35 13 Q. So those Chiefs would know this,

15:00:41 14 wouldn't they?

15:00:41 15 A. Well, I would say they wouldn't

15:00:43 16 ordinarily have had the authority. It would depend

15:00:45 17 on what had happened before. They could have been

15:00:50 18 authorized in advance, but normally at some point a

15:00:54 19 community decision-making process would be

15:00:59 20 expected, would be necessary.

15:00:59 21 Q. So the negotiators would know what

15:01:03 22 authority they needed and what authority they had,

15:01:07 23 wouldn't they?

15:01:07 24 A. The Anishnawbek negotiators?

15:01:10 25 Q. Yes.

15:01:10 1 A. Yes, they would.

15:01:11 2 Q. So the SON Chiefs would have known  
15:01:14 3 what authority they had or needed at the October  
15:01:18 4 Treaty Council?

15:01:18 5 A. Yes. Although they may -- yeah.

15:01:23 6 Q. Well, and yet they agreed to the  
15:01:26 7 Treaty, though, didn't they? So there is no  
15:01:30 8 evidence that they were in fear of their personal  
15:01:33 9 safety at that Treaty, is there, that Treaty  
15:01:35 10 Council?

15:01:35 11 A. I wouldn't say I have evidence  
15:01:38 12 either way, but I don't -- I haven't seen anything  
15:01:40 13 that suggests that.

15:01:41 14 Q. So either they acted within what  
15:01:45 15 they understood was their authority or they acted  
15:01:48 16 outside of what they understood was their  
15:01:50 17 authority; do you agree?

15:01:51 18 A. Yes, I think those are the only  
15:01:54 19 two possible options.

15:01:56 20 Q. Right. So it is more plausible,  
15:01:58 21 isn't it, that they acted within the authority that  
15:02:00 22 they understood they had rather than that they  
15:02:03 23 acted outside of the authority they understood that  
15:02:05 24 they had?

15:02:05 25 A. Yes, I would say that is more

15:02:12 1 likely.

15:02:13 2 Q. Now, to be precise, overall the  
15:02:18 3 Chiefs had more than one hour to consider the  
15:02:20 4 proposal, didn't they, from the start to the end of  
15:02:26 5 the Treaty Council, for instance?

15:02:27 6 A. From -- you know, from 7:00 p.m.  
15:02:29 7 on, you mean?

15:02:30 8 Q. Correct.

15:02:30 9 A. Right, so maybe more like three  
15:02:34 10 and four hours.

15:02:34 11 Q. Right. They were left alone for  
15:02:37 12 one hour, but we don't know when that hour  
15:02:40 13 occurred?

15:02:40 14 A. Right. Well, I think we have some  
15:02:44 15 idea, don't we, because he says they -- I think he  
15:02:47 16 says it was around midnight.

15:02:49 17 Q. Around midnight?

15:02:50 18 A. Yes.

15:02:50 19 Q. Although I think --

15:02:56 20 A. That is probably in the memoir,  
15:02:57 21 but it is consistent with the timing that we -- the  
15:03:02 22 timing of the signing.

15:03:03 23 Q. Right. And Madwayosh, who  
15:03:09 24 according to this report was the one who offered  
15:03:12 25 substantial opposition, had been given the proposed

1 terms during the afternoon of that day before the  
2 Treaty Council, hadn't he?

3 A. Yes.

4 Q. In reaching your conclusion about  
5 whether or not an hour was enough time for an  
6 Anishnawbek community to reach a consensus, you  
7 said that you were not aware of any other treaty  
8 negotiation in which an hour was allowed for  
9 discussion without the Crown representatives; do  
10 you recall that?

11 A. Yes.

12 Q. So you are not aware of any other  
13 treaty negotiation in which the Anishnawbek took  
14 one hour of private discussion without the Crown  
15 representatives; is that right?

16 A. Correct. Any other negotiation of  
17 which I have more detailed knowledge involved much  
18 longer time for discussion without the Crown  
19 representatives.

20 Q. So I would like to turn now to  
21 document SC0982, a document you may be familiar  
22 with. It is the Treaty Commission's Report for  
23 Treaty 9 which I would like to make the next  
24 exhibit, please?

25 THE COURT: Mr. Registrar?

15:04:45 1 THE REGISTRAR: Exhibit No. 4190.

15:04:48 2 EXHIBIT NO. 4190: Treaty Commission

15:04:50 3 Report for Treaty 9.

15:04:50 4 BY MR. OGDEN:

15:04:51 5 Q. Are you familiar with this

15:04:51 6 document?

15:04:52 7 A. Yes.

15:04:52 8 Q. Could we then turn to page 15,

15:04:55 9 please, and the fourth paragraph:

15:05:18 10 "We left for Mattagami on the

15:05:21 11 morning of July 4. The Fort was

15:05:24 12 reached about ten on the morning of

15:05:28 13 July 7, when a cordial welcome was

15:05:30 14 given us by Mr. Joseph Miller [...]"

15:05:34 15 The next paragraph, third sentence,

15:05:36 16 talking about the Mattagami:

15:05:39 17 "They gave a cheerful hearing

15:05:41 18 to the terms of the proposed treaty,

15:05:43 19 which was fully explained to them

15:05:44 20 through Mr. Miller, who acted as

15:05:46 21 interpreter. They, like the other

15:05:47 22 Indians visited, were given an

15:05:49 23 opportunity to ask any questions or

15:05:50 24 to make any remarks they might

15:05:52 25 desire with reference to the

15:05:53 1 propositions made to them.

15:05:55 2 The Indians held a short  
15:05:57 3 conversation among themselves, and  
15:05:59 4 then announced through Joseph  
15:06:02 5 Shemeket, one of their number, that  
15:06:04 6 they were fully satisfied with the  
15:06:06 7 terms of the treaty, and were  
15:06:08 8 prepared to have it signed by  
15:06:09 9 representatives of the band. The  
15:06:11 10 treaty was, therefore, at once  
15:06:13 11 signed and witnessed. Payments were  
15:06:15 12 begun and concluded in the  
15:06:17 13 afternoon, and preparations made for  
15:06:17 14 the feast."

15:06:18 15 The next page, please, is page 16, at  
15:06:27 16 the bottom:

15:06:32 17 "New Brunswick House was  
15:06:32 18 reached on the afternoon of the  
15:06:34 19 25th, [...]

15:06:38 20 The Indians were assembled in the  
15:06:42 21 evening and the terms of the treaty  
15:06:43 22 explained to them. On being asked  
15:06:45 23 whether they had any questions to  
15:06:46 24 ask or any remarks to make, they  
15:06:48 25 replied through Mr. J.G. Christie,



1 Hudson's bay Company's officer, that  
2 they were perfectly satisfied with  
3 what they were to receive under the  
4 treaty, and were willing to sign at  
5 once. The signatures of the  
6 commissioners and of five of the  
7 leading men were therefore affixed  
8 to the treaty, as well as that of  
9 six witnesses."

10 So do you accept these are two examples  
11 of very short periods of consideration by First  
12 Nation Chiefs of a surrender proposal?

13 A. Yes, this was a place where they  
14 had been asking for a treaty for years, in the area  
15 of Treaty 9.

16 Q. In your testimony you said that  
17 the best evidence of whether an hour was  
18 satisfactory or not was internal to the Treaty  
19 document and that Oliphant had repeatedly rushed  
20 the proceedings?

21 A. Yes.

22 Q. You recall? So could we turn to  
23 that, Exhibit 2175, please. Page 11 of the  
24 document, page 10 of the PDF, contains a copy of  
25 Anderson's report to Oliphant dated August 16,

1854, concerning the August 2nd negotiations, and  
at the top of the next page, although this is page  
11 of the PDF and page 12 of the report:

"The Saugeen band having  
arrived, I opened the council, and  
brought the subject before them on  
the 1st instant.

They at first declared they would  
not sell an inch, but having pointed  
out to them the folly of their  
retaining so large a tract of land,  
from which they were deriving no  
advantage, the possibility of the  
whites taking possession of it,  
without their deriving half of  
profit they would from the  
Government, and in which arguments I  
was supported by the Rev. Mr. Cribs  
(a Congregational Minister from  
Colpoy's Bay), Mr. Surveyor Rankin,  
Chief Peter Jones, Kegedonce and  
Mr. Charles Keeshick, and opposed by  
the chiefs and their band from  
Saugeen, and Chief John Thomas  
Wahbatick, Nawash and their

15:09:21 1 adherents at Owen Sound; at length,  
15:09:24 2 however, they began to waver, and  
15:09:26 3 requested leave to consult amongst  
15:09:28 4 themselves for an hour, and on their  
15:09:30 5 return to the council they agreed to  
15:09:36 6 cede all except those parts marked  
15:09:38 7 on the map in pencil 'Limits  
15:09:41 8 proposed by the Indians'. Having  
15:09:43 9 thus far succeeded, and knowing from  
15:09:45 10 what had already occurred at the  
15:09:46 11 council, that further argument would  
15:09:48 12 be of no avail, I told them [...]"  
15:09:56 13 et cetera.

15:09:57 14 So this is a clear description, isn't  
15:09:58 15 it, of the SON Chiefs asking for an hour to  
15:10:01 16 deliberate without the Crown to consider Anderson's  
15:10:03 17 proposal, isn't it?

15:10:05 18 A. Yes.

15:10:05 19 Q. And it is a clear description of  
15:10:07 20 the SON Chiefs needing only an hour of deliberation  
15:10:11 21 without the Crown?

15:10:12 22 A. Yes, it appears so.

15:10:15 23 Q. And during that time they  
15:10:17 24 determined not only to reject Anderson's request,  
15:10:20 25 but to make their own counter-offer of surrender,

15:10:23 1 didn't they?

15:10:23 2 A. Yes.

15:10:24 3 Q. And they had made up their mind so  
15:10:28 4 obviously in that time that Anderson thought that  
15:10:30 5 more negotiation would not achieve any change. He  
15:10:35 6 says "further argument would be of no avail"; isn't  
15:10:38 7 that right?

15:10:39 8 A. Yes, that is what he says he  
15:10:41 9 judged.

15:10:42 10 Q. And he said "having thus far  
15:10:44 11 succeeded," so he thought he had succeeded because  
15:10:48 12 the SON had agreed to a substantial surrender; is  
15:10:51 13 that right?

15:10:51 14 A. Yes.

15:10:51 15 Q. So this document is evidence from  
15:10:54 16 two months before the October surrender that one  
15:10:57 17 hour of discussion without the Crown  
15:10:59 18 representatives or representative was sufficient  
15:11:02 19 for the SON Chiefs to decide not only to refuse a  
15:11:06 20 Crown surrender proposal, but to make their own  
15:11:08 21 surrender counter-proposal, isn't it?

15:11:11 22 A. Yes, surrendering a lot less land.

15:11:20 23 Q. So if the land surrender size had  
15:11:32 24 been around about the same time, your opinion would  
15:11:34 25 be that one hour was ample; is that correct?

15:11:36 1 A. Sorry, can you repeat the  
15:11:40 2 question?

15:11:40 3 Q. If the reserve sizes and the  
15:11:46 4 surrender proposal -- sorry, if the surrender  
15:11:50 5 proposal, in particular the reserve sizes, were  
15:11:53 6 approximately the same, then your opinion would be  
15:11:58 7 that an hour was enough for them to consider the  
15:12:01 8 proposal?

15:12:01 9 A. I am not clear on what you are  
15:12:04 10 saying. Do you mean if Oliphant had proposed this  
15:12:07 11 same bargain that they were proposing here?

15:12:10 12 Q. Well, the same, about the same.  
15:12:12 13 You have said that -- you made a point that the  
15:12:16 14 October proposal was for a different size.

15:12:19 15 A. Yes, for 60,000 acres.

15:12:21 16 Q. Right, so if it had been for the  
15:12:23 17 same size, then you would think an hour would be  
15:12:26 18 enough; does that follow from what you are saying?

15:12:29 19 A. Right, if Oliphant had come back  
15:12:31 20 two months later and accepted the offer they had  
15:12:33 21 made in August, yes, I am -- well, obviously they  
15:12:36 22 had already decided that they were in favour of  
15:12:38 23 that.

15:12:38 24 Q. So that is the other part of the  
15:12:50 25 complaint about insufficient time, is that the

15:12:54 1 proposal was a new proposal, isn't it; the other  
15:12:57 2 side of that is that it was new?

15:12:59 3 A. That it was new and that it was  
15:13:00 4 almost all of their land.

15:13:21 5 Q. In your testimony on July 23rd,  
15:13:23 6 you said that Oliphant did not advise the SON,  
15:13:27 7 quote:

15:13:27 8 "That they were going to be  
15:13:28 9 asked officially by an important  
15:13:31 10 government figure."

15:13:32 11 Do you recall that?

15:13:33 12 A. Yes.

15:13:33 13 Q. And are you suggesting that the  
15:13:35 14 Crown's behaviour was not appropriate not just  
15:13:39 15 because of the size of the surrender or the time to  
15:13:41 16 consider it but because the Crown sent a  
15:13:46 17 representative of too high a status?

15:13:47 18 A. No.

15:13:52 19 Q. I am not sure what to make of it  
15:13:54 20 then. What do you mean -- sorry, what do you mean  
15:13:57 21 by they were going to be asked officially by an  
15:14:01 22 important government figure?

15:14:02 23 A. I believe that was a spoken  
15:14:07 24 statement of mine, right, while testifying?

15:14:09 25 Q. In testimony, yes.

15:14:10 1 A. As best I can reconstruct what I  
15:14:12 2 was thinking at that moment, I think I was just  
15:14:16 3 trying to summarize the whole package of things  
15:14:20 4 that would have been significant to them, so one  
15:14:24 5 was that they were being asked for the whole  
15:14:26 6 peninsula; another was that they didn't know in  
15:14:30 7 advance that this was going to happen; and another  
15:14:34 8 was that they had previously dealt with Anderson  
15:14:38 9 and now they were being faced by the top official  
15:14:43 10 in the Indian Affairs Department whom they had not  
15:14:49 11 met before.

15:14:52 12 So I didn't mean to imply that he was  
15:14:54 13 too high ranking, only that they would have  
15:14:57 14 considered him an important figure, possibly a  
15:15:01 15 little intimidating.

15:15:02 16 Q. And you said, so when Laurence  
15:15:18 17 Oliphant arrived unannounced to present a proposal  
15:15:21 18 that they surrender the entire peninsula, this was  
15:15:23 19 the first time that they were presented with a  
15:15:24 20 formal proposal, I believe, in which they were  
15:15:27 21 being asked to surrender the entire peninsula?

15:15:30 22 A. Yes.

15:15:31 23 Q. So I take it you are not  
15:15:33 24 suggesting -- you are not suggesting, are you, that  
15:15:36 25 Oliphant's proposal was the first time that the

15:15:39 1 Crown sought a surrender of the entire peninsula?

15:15:42 2 A. I think it was the first time the  
15:15:50 3 Crown sought a surrender of the whole peninsula,  
15:15:54 4 although some of the previous occasions were either  
15:15:59 5 generally stated to them or at least generally  
15:16:02 6 stated in the correspondence.

15:16:03 7 So I'm thinking, for instance, of  
15:16:06 8 Anderson's reports in which he twice recorded  
15:16:09 9 having said to them, I asked you previously about  
15:16:13 10 surrendering the land; what do you now think of it?  
15:16:18 11 So in those instances he doesn't specify how much  
15:16:20 12 land he was suggesting that they surrender.

15:16:23 13 Q. Well, we'll go to your report on  
15:16:27 14 page 3, please, your Treaties report, page 3,  
15:16:31 15 please. So there in the paragraph in front of us:

15:17:14 16 "Indian Superintendent T.G.

15:17:16 17 Anderson and others repeatedly tried  
15:17:18 18 to persuade the Ojibway to surrender  
15:17:21 19 their remaining territories - the  
15:17:22 20 same lands they had been promised in  
15:17:24 21 1836 would be protected for them  
15:17:26 22 forever."

15:17:27 23 So two parts to this. "Their remaining  
15:17:30 24 territories" means the whole peninsula, doesn't it?

15:17:33 25 A. It appears to, but that is not



15:17:37 1 my -- it was parts of their remaining territories.

15:17:40 2 Q. Well, you also say, though, the  
15:17:42 3 same lands that had been promised in 1836, which is  
15:17:45 4 the peninsula, isn't it?

15:17:46 5 A. Yes, but it should have said to  
15:17:50 6 surrender parts of their remaining territories.

15:17:52 7 Q. Well, at pages 26 and 27 of your  
15:17:58 8 report, please, the bottom, the second to last  
15:18:12 9 line:

15:18:12 10 "Superintendent T.G. Anderson  
15:18:13 11 had been working for several years  
15:18:14 12 to try to persuade the Saugeen  
15:18:16 13 Ojibway to surrender their peninsula  
15:18:18 14 or parts of it."

15:18:19 15 This again is -- it is not really an  
15:18:23 16 either/or, is it, or is it? Are you saying there  
15:18:29 17 that Anderson had been trying to get a surrender of  
15:18:31 18 the whole peninsula on occasion and parts of it on  
15:18:35 19 occasion, or are you casting a wide net?

15:18:41 20 A. It looks like a wide net. I guess  
15:18:43 21 what I was thinking of there is that there is at  
15:18:45 22 least one letter from Anderson in which he says  
15:18:47 23 something like well, yes -- I think he is  
15:18:49 24 corresponding with, it might be, Alexander McNabb  
15:18:53 25 or one of the other men in the area who had been

1 working with him on the project of trying to get  
2 lands in the peninsula surrendered. And he says  
3 something like, well, yes, if they will surrender  
4 the peninsula, that would be good, or if they will  
5 surrender parts of the shore and so on, it will be  
6 all well.

7 So there he -- in that letter I think  
8 he appears to mention the whole peninsula, but he  
9 was writing to another person, not to the Saugeen  
10 Ojibway.

11 Q. There is another quote I would  
12 like to go to just in this series, your report at  
13 page 39 down at the bottom -- actually, no, sorry,  
14 not the bottom, at the end of the middle paragraph,  
15 the last sentence talking about Anderson:

16 "In July 1854 he wrote [...]"

17 That is to Oliphant, isn't it?

18 A. Yes, I believe so.

19 Q. Okay:

20 "In July 1854 he wrote that he  
21 had 'repeatedly endeavoured' to  
22 effect the 'cession of their  
23 Reserve.'"

24 A. Yes.

25 Q. Not a part of their reserve, but

1 the reserve, and the only reserve they held was the  
2 Saugeen reserve, the whole of the Bruce Peninsula,  
3 wasn't it?

4 A. Yes.

5 Q. And in your testimony, and to  
6 repeat what I have said before, you have said that  
7 Oliphant's proposal in October was the first formal  
8 proposal to seek the surrender of the entire  
9 peninsula; is that right?

10 A. Yes.

11 Q. I take it then your opinion is  
12 that Anderson's August 1854 proposal was not formal  
13 enough; is that correct?

14 A. Well, in August he seems to have  
15 been trying to get 130,000 acres.

16 Q. What would you consider to be  
17 formal in this context?

18 A. An official coming and saying, my  
19 proposal is that you surrender your whole  
20 peninsula. In August I think would have been a  
21 formal proposal, but he was asking, as far as I can  
22 tell, Anderson in August apparently was asking for  
23 130,000 acres.

24 Q. So Anderson was a government  
25 official then whose proposal would be sufficiently

1 understood to be a formal government proposal?

2 A. Yes. The main reason I made that  
3 distinction is that we have these documents from  
4 Anderson from the previous few years in which he  
5 has, as I said, said things like last spring I  
6 asked you about surrendering your land and what do  
7 you think of it?

8 And because we don't really know  
9 exactly what he was asking them or how specific it  
10 was, I guess I was sort of denoting that as sort of  
11 unofficial, because he was more sounding like he  
12 was saying what do you think of this? He wasn't  
13 saying will you sell this to me now. He was  
14 saying, please think about it.

15 Q. If we could go to Exhibit 2004,  
16 please, which is Anderson's report of the July 1853  
17 General Council of the SON, so it is a report that  
18 he made to his superior, which you noted in your  
19 report at the same page we were looking at, page  
20 39.

21 And in your report, though, just to --  
22 well, you note this paragraph in your report at  
23 page 39. Well, sorry, we'll go to page 39 of your  
24 report. In the middle of that middle paragraph, on  
25 the right-hand side:

1 "The following August he

2 inquired again of the people if they

3 were willing to surrender land,

4 using the following phrase: 'On a

5 former occasion I informed you that

6 the Govern't recommended you ceding

7 this tract of land to be sold for

8 your benefit, reserving at the same

9 time an ample quantity for the

10 [sic] of the Indians. What do you

11 think of it now?'"

12 And again, firstly, he is referring to

13 this tract of land being the reserve, but the whole

14 reserve, wasn't he?

15 A. Well, I find that phrase a bit

16 ambiguous, "this tract of land." He doesn't say

17 your reserve. He says "this tract of land."

18 Q. "Reserving at the same time an

19 ample quantity"?

20 A. Right.

21 Q. Right?

22 A. So what was the ample quantity?

23 This as phrased here, it is vague. I don't know if

24 he is -- I don't know, for instance, if he

25 literally said to them something like reserving an

1 ample quantity, or if he made a specific proposal  
2 about exactly what lands it would be. But if this  
3 is a reflection of what he said, "ceding this tract  
4 of land, reserving an ample quantity," they might  
5 have thought an ample quantity was, for instance,  
6 all the shoreline.

7 Q. So is your opinion that the  
8 October proposal, to use the words in your report,  
9 was new because it called for greatly reduced  
10 reserves?

11 A. Yes, it called for quite small  
12 reserves and definitively surrendering the whole  
13 rest of the peninsula.

14 Q. And those were the two things that  
15 were new?

16 A. Right, and in the eyes of the  
17 Saugeen Ojibway, I don't think the phrase "an ample  
18 quantity" would have meant -- I don't think they  
19 would have understood an ample quantity to be only  
20 the amount of land they ended up receiving as  
21 reserves in Treaty 72.

22 Q. Right. At page 4 of your report,  
23 this is consistent with that, I think, you say:

24 "It does not appear that the  
25 Ojibwe had an opportunity to

15:26:06 1 consider the specific terms of the  
15:26:07 2 Treaty in advance."  
15:26:09 3 That is page 4.  
15:26:11 4 A. Right.  
15:26:26 5 MR. OGDEN: Your Honour, it is 3:26.  
15:26:30 6 This might be an appropriate time for the afternoon  
15:26:31 7 break.  
15:26:32 8 THE COURT: Okay, 20 minutes.  
15:26:33 9 -- RECESSED AT 3:26 P.M.  
15:50:40 10 -- RESUMED AT 3:50 P.M.  
15:50:40 11 THE COURT: Please go ahead.  
15:50:42 12 BY MR. OGDEN:  
15:50:43 13 Q. Thank you. This is Exhibit 1930,  
15:50:48 14 which is Anderson's report of travels through the  
15:50:58 15 summer -- well, through June 1852, and that is a  
15:51:07 16 report he makes to Bruce, isn't it? Are you  
15:51:13 17 familiar with this document?  
15:51:14 18 A. I don't think so.  
15:51:17 19 Q. Let's go down to the second page,  
15:51:23 20 please. Well, actually, keep going until we find  
15:51:29 21 Anderson's name. Thank you, "Respectfully  
15:51:36 22 submitted T.G. Anderson S.I.A."?  
15:51:41 23 A. Yes.  
15:51:41 24 Q. And then up to page 2, and then on  
15:51:43 25 the left-hand side of the document are dates on

15:51:49 1 which he spoke with different communities; correct?

15:51:52 2 A. Yes.

15:51:53 3 Q. Okay, so here he says, and this is  
15:51:58 4 his report so he is speaking to Bruce and there is  
15:52:04 5 a quote there that you may have seen about  
15:52:07 6 referring to the peninsula "as a harbour for  
15:52:11 7 musketoos [sic] and snakes without yielding to the  
15:52:13 8 owners one penny of profit"?

15:52:15 9 A. Yes, I remembered it when I saw  
15:52:18 10 that.

15:52:18 11 Q. Yes, and it continues:

15:52:20 12 "[...] whereas if they were to  
15:52:22 13 hand it over to the Government to be  
15:52:23 14 sold for their benefit they would in  
15:52:25 15 a short time have a large amount of  
15:52:27 16 interest coming in that would [one  
15:52:31 17 inserted word:] be very acceptable  
15:52:33 18 and enable them to supply the want  
15:52:38 19 of presents - they could if they saw  
15:52:40 20 fit reserve say 6 miles square at  
15:52:42 21 each of their three villages, viz.  
15:52:46 22 Saugeeng, Owens Sound and Colpoy's  
15:52:49 23 Bay, also the tract to be granted to  
15:52:51 24 the Mohawks.

15:52:51 25 - they appeared to think



15:52:53 1 favorably of this and will resume  
15:52:54 2 the subject at the time of issuing  
15:52:56 3 the Presents."

15:52:58 4 So Anderson is talking about seeking a  
15:53:01 5 surrender of the peninsula as a whole here, isn't  
15:53:06 6 he, in talking to Bruce?

15:53:07 7 A. Yes, it looks like it.

15:53:11 8 Q. And he refers to a suggestion or  
15:53:21 9 that reserves of 6 miles square be kept. Now, he  
15:53:31 10 doesn't mean 6 square miles, does he? He means 6  
15:53:37 11 miles by 6 miles; is that your understanding?

15:53:39 12 A. Yes, that seems right to me, which  
15:53:42 13 is larger, right? 6 miles in each direction.

15:53:45 14 Q. That is my reading of it.

15:53:47 15 A. Yes. Yeah, I think so.

15:53:49 16 Q. Which is 36 square miles?

15:53:51 17 A. Right.

15:53:52 18 Q. And you know, I take it, from your  
15:53:55 19 numbered treaties that a square mile is 640 acres?

15:53:59 20 A. Right.

15:54:00 21 Q. And I won't ask you to calculate  
15:54:03 22 it, but do you accept that is 23,400 acres, 36  
15:54:09 23 square miles? For now you --

15:54:13 24 A. I will definitely take your word  
15:54:14 25 for that.

1 Q. Thank you. And times three, there  
2 is almost 70,000 acres of reserves?

3 A. Okay, yes.

4 Q. Yes, plus the Mohawk tract, which  
5 is the Caughnawaga tract, isn't it?

6 A. Yes.

7 Q. And this was an offer that was put  
8 to the SON; is that right?

9 A. Yes.

10 Q. And it is one that they took  
11 seriously and considered seriously, isn't it? You  
12 might not see it in this document. I am asking you  
13 if you accept that?

14 A. Yeah, that is not what I am sure  
15 about, because he just says that they appear to  
16 think favorably of this.

17 Q. Okay.

18 A. That is all he says.

19 Q. Okay. Exhibit 1943, please. This  
20 is Anderson's note of the Council with the SON  
21 concerning the land in August 1852. This may be a  
22 copy. But if we go down --

23 A. Just a question.

24 Q. Sure.

25 A. What is the date of the previous

15:55:32 1 document we had just seen?

15:55:33 2 Q. The previous document, Exhibit  
15:55:36 3 1930, we have June 27th at Owen -- they arrived on  
15:55:48 4 the 28th.

15:55:51 5 A. June?

15:55:51 6 Q. Yes.

15:55:52 7 A. June 1852?

15:55:54 8 Q. Yes.

15:55:55 9 A. Thank you.

15:55:56 10 Q. And then Exhibit 1943, page 4,  
15:56:04 11 please, of the PDF, and halfway down on the left we  
15:56:16 12 see the Superintendent, is that Anderson?

15:56:20 13 A. Yes.

15:56:21 14 Q. I am going to read this again and  
15:56:24 15 ask you to correct me if you think I made a  
15:56:29 16 mistake:

15:56:29 17 "Last spring I suggested to you  
15:56:31 18 the benefit you would derive from  
15:56:33 19 disposing of a part of your reserve.  
15:56:37 20 What have [you] been [...]"

15:56:43 21 A. "What have been your reflections."

15:56:45 22 Q. Thank you:

15:56:47 23 "What have been your  
15:56:48 24 reflections in that subject?"

15:56:50 25 [As read.]

1 Counsel for Canada asked you about this  
2 in July as to whether "last spring" -- this is in  
3 your testimony in cross-examination, whether "last  
4 spring" was that June 27 meeting just noted, and  
5 you said it was possible?

6 A. Yes.

7 Q. So to continue then in this  
8 document, John -- and that is John Johnston; is  
9 that right?

10 A. Yes.

11 Q. "John Johnston for Owen Sound  
12 said that, Father, I will say a few  
13 words about it. We have considered  
14 the subject. It was brought in  
15 Council, and we have talked a great  
16 deal about it. We think the 6 miles  
17 square which you propose we should  
18 reserve for each of our tribes would  
19 not be enough for our children's  
20 children. We believe they will  
21 increase in numbers and become more  
22 industrious."

23 [As read.]

24 So the repetition of 6 miles square  
25 shows us that the offer of last spring was the June

1 27th offer; is that correct?

2 A. Yes, I would say.

3 Q. And that is the offer in which  
4 Anderson proposed that the SON surrender the  
5 peninsula but for three reserves of 6 miles square  
6 plus the Caughnawaga tract?

7 A. Yes.

8 Q. And 6 miles square is a specific  
9 reserve size, isn't it?

10 A. Yes.

11 Q. And the SON took the proposal  
12 seriously because it was brought to Council?

13 A. Yes.

14 Q. And they said:

15 "And we have talked a great  
16 deal about it."

17 Which indicates they considered the  
18 proposal seriously?

19 A. Yes.

20 Q. Back to Exhibit 1930, please, to  
21 Anderson's June 1852 report, at page 2 and then  
22 down to the words in the middle:

23 "As far as I am informed on the  
24 subject I do not see any objections  
25 to the Mohawks retaining the part

15:59:13 1 (south of Colpoys Bay) originally  
15:59:15 2 given to them by the Owens Sound  
15:59:19 3 band, particularly in the event of  
15:59:20 4 their selling the Reserves [in]  
15:59:23 5 which case a line may be so drawn  
15:59:25 6 from Owens Sound to Colpoy's Bay, as  
15:59:30 7 to include all the reserves for the  
15:59:31 8 Indians at two points viz. Saugeen &  
15:59:36 9 Owens Sound."

15:59:38 10 So the first point is he notes that the  
15:59:41 11 tract for the Mohawks was given to them, not sold  
15:59:44 12 to the Mohawks; do you agree with that?

15:59:46 13 A. Yes.

15:59:47 14 Q. And Anderson is saying there could  
15:59:50 15 be two main areas of reserve, one at Saugeen and  
15:59:54 16 one to the east of a line from Owens Sound to  
16:00:01 17 Colpoy's Bay; this is his proposal to Bruce?

16:00:03 18 A. Sorry, east of a line from Owens  
16:00:08 19 Sound to Colpoy's Bay?

16:00:09 20 Q. Right, so:

16:00:13 21 "[...] [in] which case a line  
15:59:24 22 may be so drawn from Owens Sound to  
15:59:29 23 Colpoy's Bay, as to include all the  
15:59:30 24 reserves for the Indians at two  
15:59:32 25 points viz. Saugeen & Owens Sound."

16:00:28 1 A. Yes, I'm always bad at picturing  
16:00:32 2 these geographic spatial things without a map, but  
16:00:36 3 so:

16:00:37 4 "[...] the Mohawks retaining  
16:00:38 5 the part [...] originally given to  
16:00:40 6 them [...] particularly in the event  
16:00:41 7 of their selling their Reserves  
16:00:45 8 [...]" - it is not clear who "they"  
16:00:47 9 is - "[in] which case a line may be  
16:00:50 10 so drawn from Owens Sound to  
16:00:53 11 Colpoy's Bay, as to include all the  
16:00:54 12 reserves for the Indians at two  
16:00:57 13 points viz. Saugeen & Owens Sound."

16:01:03 14 Q. Well, if it helps just for now to  
16:01:05 15 look at the two maps in front of you, lettered  
16:01:07 16 Exhibits K-2 and L-1, you can see Colpoy's Bay and  
16:01:10 17 Owen Sound.

16:01:12 18 A. Right. So it is just that sort of  
16:01:16 19 peninsula there.

16:01:16 20 Q. Okay. As shown on the map from  
16:01:26 21 Wiarton. Wiarton is marked there through Owen  
16:01:30 22 Sound?

16:01:31 23 A. Yes.

16:01:31 24 Q. Now, there was a letter written by  
16:01:37 25 Anderson to McNabb on December 7, 1853, which was

1 discussed in your testimony previously. That is  
2 Exhibit 2037. And for reference, although we are  
3 not going to go to it, McNabb's letter is 2036.

4 In your testimony you described that in  
5 this letter Anderson proposed to McNabb the  
6 surrender of much of the peninsula and specific  
7 places for reserves and that Anderson had said if  
8 the SON do not accept the proposal that Anderson  
9 might make, that Anderson would then propose a  
10 surrender of a two-mile strip along the coasts; do  
11 you recall that?

12 A. Yes.

13 Q. Now, on the first page of the PDF  
14 here, on the second page of the letter, page 2  
15 there:

16 "I am of opinion that if they  
17 would agree to Reserve at Saugeeng,  
18 say from the N.W. corner of the  
19 'Strip' (already ceded) to the line  
20 dividing Arran and Derby, thence  
21 Northerly 3 or 4 miles thence  
22 westerly until the line would strike  
23 the Lake, thence along the Lake  
24 Shore Southerly to the mouth of the  
25 Saugeeng River, which would be more



16:03:09 1 than they will ever Cultivate, then  
16:03:11 2 the Neywash [sic] people to Reserve  
16:03:14 3 all East of a line drawn from the  
16:03:17 4 N.E. Corner of the 'Strip' to the  
16:03:19 5 head of Colpoy's Bay, which would  
16:03:20 6 embrace the Colpoy's Bay Caughnawaga  
16:03:23 7 and Newash settlements and have  
16:03:25 8 plenty of space for emigrants, I  
16:03:27 9 would also Reserve about 600 acres  
16:03:30 10 at the Riviere aux Sable immediately  
16:03:34 11 adjoining and north of [sic] 'Strip'  
16:03:37 12 for a Manual Labor School.

16:03:40 13 If they would be Satisfied with  
16:03:42 14 such Reserves and Cede the remainder  
16:03:44 15 to the Crown for Sale, they would  
16:03:45 16 soon be in the receipt of a large  
16:03:47 17 income arising out of the interest  
16:03:49 18 whereas in its present state it is  
16:03:51 19 of no use to them."

16:03:57 20 Now, in this letter there is no mention  
16:04:02 21 of a north-south division in the reserve, is there?  
16:04:10 22 Anderson does not divide the reserve into north and  
16:04:13 23 south?

16:04:15 24 A. No. You mean the Owen Sound  
16:04:19 25 reserve?

1 Q. No, sorry, the existing Saugeen  
2 reserve on the peninsula.

3 A. Oh, I see, the whole peninsula?

4 Q. Yes.

5 A. No, he doesn't.

6 Q. Sorry. So Anderson appears to  
7 have intended, stated his intention to seek a  
8 surrender of all the reserve but to keep some  
9 reserves, in this letter?

10 A. To McNabb.

11 Q. Yes.

12 A. Yes, that is one of the things he  
13 is -- one of the proposals he is pondering or  
14 wishing for.

15 Q. Well, there is no proposal with a  
16 2-mile strip --

17 A. Right.

18 Q. -- on the coast, but there is no  
19 reference to a potential reserve at Cape Croker  
20 here, is there?

21 A. No, I don't see one.

22 Q. Which suggests that Cape Croker  
23 was not then Anderson's plan for a surrender?

24 A. It is certainly not mentioned  
25 here.

16:05:20 1 Q. At this date at least?

16:05:21 2 A. Yes. I'm sorry, is this 1853 now?

16:05:25 3 Q. Yes, December 7, 1853.

16:05:30 4 A. Thank you.

16:05:30 5 Q. He talks about three reserves, one

16:05:47 6 from the western edge of the 1851 strip and east to

16:05:55 7 Arran and Derby, the line between Arran and Derby

16:05:59 8 Townships, then north and then west to the lake.

16:06:02 9 So we might actually pull up an exhibit, please.

16:06:12 10 This is Exhibit 2449, and I noted

16:06:29 11 earlier this is a survey of the County of Bruce

16:06:34 12 lately surveyed townships. And we see there Arran

16:06:52 13 and Derby Townships, and just to help us look at it

16:07:06 14 a little bit, we are going to rotate it 90 degrees

16:07:09 15 clockwise where we have Arran and Derby and a line

16:07:23 16 between them that continues north into the

16:07:24 17 peninsula and that appears to be what Anderson is

16:07:36 18 talking about here as a reserve he was going to

16:07:39 19 propose, isn't it?

16:07:41 20 He says the line:

16:07:55 21 "[...] from the [northwest]

16:07:56 22 corner of the 'Strip' (already

16:07:57 23 ceded)," which is the southern

16:07:59 24 boundary of the reserve, "to the

16:08:03 25 line dividing Arran and Derby,

16:08:07 1 thence Northerly 3 or 4 miles thence  
16:08:11 2 westerly until the line would strike  
16:08:13 3 the Lake [...]"

16:08:15 4 A. Sorry, what was the first  
16:08:17 5 reference point?

16:08:18 6 Q. The northwest corner of the strip.

16:08:19 7 A. And where is the strip on here?  
16:08:21 8 Or is it not shown?

16:08:22 9 Q. It is not identified, but you may  
16:08:24 10 agree that it is the line of lots bordering the  
16:08:26 11 southern -- on the southern end border of the  
16:08:30 12 reserve?

16:08:31 13 A. So that would be what is marked  
16:08:33 14 here as Amabel Township or just north of Arran?

16:08:41 15 Q. It is just north of Arran. You  
16:08:43 16 see the line between Saugeen, Chippewa Hill on the  
16:08:48 17 Saugeen River and to Owen Sound, that line straight  
16:08:53 18 across, and then just to the north of that are lots  
16:08:59 19 in a parallel line?

16:09:00 20 A. Yes.

16:09:01 21 Q. And between those two parallel  
16:09:04 22 lines is the strip. You don't need to agree with  
16:09:10 23 that fact, but if it helps you appreciate all of  
16:09:15 24 Anderson's December intention, then that is what  
16:09:21 25 appears to be the strip.

16:09:22 1 A. Yes.

16:09:23 2 Q. So north along the line dividing  
16:09:26 3 Arran and Derby, through into the Saugeen Reserve  
16:09:29 4 and west, or left on this current rotation of the  
16:09:34 5 map, to the lake.

16:09:38 6 A. So it is not what is marked in  
16:09:40 7 white on this map?

16:09:41 8 Q. Correct.

16:09:42 9 A. It is much bigger?

16:09:43 10 Q. Correct. This is an 1856 map.

16:09:46 11 A. Right, just to help visualize.

16:09:51 12 Q. To determine where the line  
16:09:53 13 between Arran and Derby is, to help visualize,  
16:09:57 14 since maps can be of assistance.

16:10:01 15 Now, one reserve there. The second  
16:10:07 16 reserve Anderson intended to propose was the 600  
16:10:12 17 acres at the Sauble River immediately adjoining a  
16:10:15 18 land north of the strip for a manual labour school.

16:10:22 19 You can see -- can you see the Sauble  
16:10:26 20 River from Chief's Point trending southeasterly and  
16:10:31 21 then south, crossing over the strip?

16:10:35 22 A. Yes, it is sort of in a messy  
16:10:40 23 curve.

16:10:41 24 Q. Yes, passing by the letter "U"?

16:10:44 25 A. Yes, thank you.

1 Q. And then a third reserve, I want  
2 to move the map away for a brief time, was the  
3 northeast corner of the 1851 strip. Actually, can  
4 you bring it back up. And we see where the strip  
5 ends there on this survey map, to the west of Owen  
6 Sound?

7 A. Yes.

8 Q. And then that was to go to  
9 Colpoy's Bay and to include the Nawash, Colpoy's  
10 Bay and Caughnawaga settlements.

11 So what he says, though, about that  
12 third reserve is that "it would have plenty of  
13 space for emigrants"; is that right? Do you  
14 recall?

15 A. Yes.

16 Q. So he is referring to other First  
17 Nations coming to the peninsula?

18 A. Yes, presumably.

19 Q. Of which Caughnawaga was an  
20 example?

21 A. Right.

22 Q. And he intended at this point,  
23 December 1853, that this eastern tract would be a  
24 place for other First Nations to come and settle  
25 and have their own reserves?

1 A. Yes.

2 Q. And this description of this area  
3 on this peninsula between Colpoy's Bay and Owen  
4 Sound is generally the same as the one he proposed  
5 in his 1852 report to Colonel Bruce at Exhibit  
6 1930?

7 A. Is that the 6 miles square?

8 Q. Yes.

9 A. Yes.

10 Q. 1854 then, we have noted Keating's  
11 proposal in July 1854, Exhibit 2095, which had 50  
12 square miles as a proposal north of the Sauble  
13 River.

14 And you were taken also, by my friend,  
15 to Exhibit 2066, which was a letter dated March 18,  
16 1854 from Anderson to Charles Keeshig, and you  
17 agreed that in this letter Anderson was definitely  
18 trying to obtain a surrender of the whole  
19 peninsula?

20 A. Is that the one where he asks to  
21 be paid more?

22 Q. I don't think so. We'll go to the  
23 Exhibit, please, 2066. This is a letter from  
24 Anderson to Charles Keeshig dated March 18. You  
25 might be able to read this more quickly than I can,

1 and it might be worth actually coming back to this,  
2 once we have found the specific reference point.

3 A. Yes, so you are proposing coming  
4 back to this?

5 Q. We'll come back to this one, I  
6 think.

7 A. Okay.

8 Q. You were also taken to Exhibit  
9 2094, which is Anderson's letter to Oliphant dated  
10 June 28, 1854. But we might be able to avoid  
11 coming back to Exhibit 2066. Do you recall a  
12 letter from Anderson to Charles Keeshig in which  
13 Anderson was trying to obtain a surrender of the  
14 whole peninsula? Regardless of what Keeshig was  
15 suggesting, Anderson was suggesting a surrender of  
16 the whole peninsula?

17 A. I'm sorry --

18 Q. That is fine, we will return to  
19 it.

20 A. I don't remember exactly what is  
21 in it.

22 Q. Thank you. So Exhibit 2094, 28  
23 June 1854, and these were the -- sorry, this is a  
24 letter from Oliphant to Anderson where Oliphant  
25 tells the Governor General -- tells Anderson that



16:15:44 1 the Governor General wants a surrender of the  
16:15:47 2 reserve at Saugeen. Do you want a minute to read  
16:15:52 3 this to refresh your memory?

16:15:53 4 A. Yes, please.

16:15:54 5 [Witness reviews document.]

16:16:04 6 Scroll down, please.

16:16:23 7 Okay, yes, I have read it now.

16:16:24 8 Q. And these are instructions from  
16:16:26 9 the Governor General to Oliphant who was passing  
16:16:29 10 them on to Anderson; correct?

16:16:30 11 A. Yes.

16:16:31 12 Q. And Anderson would likely have had  
16:16:33 13 these instructions in his mind at the August 2  
16:16:38 14 negotiations or the August Treaty negotiations?

16:16:41 15 A. Yes.

16:17:08 16 MR. OGDEN: Your Honour, before I close  
16:17:10 17 off this point, I think it would be helpful to take  
16:17:12 18 the witness to the letter, Exhibit 2066, or to find  
16:17:17 19 the reference in his testimony, and then after  
16:17:20 20 that, I have a line of questions to take me to the  
16:17:28 21 conclusion of my questions about the August and  
16:17:34 22 October surrender proposals, which would be more  
16:17:36 23 profitably heard by this Court in one go.

16:17:39 24 I am about five-sixths of the way  
16:17:44 25 through, which leads me to believe that we will be

1 done by lunch tomorrow, and I ask that we break  
2 now, please.

3 THE COURT: Well, leaving aside the  
4 profitability of it, it has been a long day for the  
5 witness with all these documents, so I think it is  
6 a good idea to stop a few minutes early, and he  
7 would also be fresher in the morning.

8 So yes, that is fine.

9 MR. OGDEN: Sorry, Your Honour, that is  
10 what I meant by my comment.

11 THE COURT: That is what you meant, all  
12 right. That sounds good.

13 Sorry, is that all you had to say, Mr.  
14 Ogden?

15 MR. OGDEN: Yes, thank you.

16 MR. BEGGS: Your Honour, I just wanted  
17 to --

18 THE COURT: One person at a time. If  
19 you could come up to the podium, sir, if you want  
20 to say something, Mr. Beggs.

21 MR. BEGGS: Yes, Your Honour, I just  
22 wanted to advise you that we have contacted  
23 Professor von Gernet and September 9th would be  
24 fine for his --

25 THE COURT: That is very helpful. I'll

1 make arrangements to make sure we are geared up to  
2 sit that day.

3 MR. BEGGS: Thank you.

4 THE COURT: Just give me a moment.

5 Sir, you can have a more comfortable  
6 seat, if you wish, while we are dealing with a few  
7 matters here.

8 THE WITNESS: Thank you.

9 THE COURT: So September 9th for the  
10 voir dire then? Mr. Beggs, September 9th for the  
11 voir dire?

12 MR. BEGGS: Yes, Your Honour.

13 THE COURT: Okay.

14 All right. Yes, Counsel?

15 MS. GUIRGUIS: I also wanted to advise  
16 that Mr. Townshend says that if we are finishing by  
17 mid-day tomorrow, he can be ready to speak to the  
18 relevance motion and the position regarding  
19 documents tomorrow afternoon, if you please, and  
20 Professor Benn is available to start Friday, if you  
21 would like to do that.

22 THE COURT: Well, it is a very  
23 attractive suggestion. My difficulty is that  
24 having just received the motion material on Monday,  
25 and I did spend some time on it last night, but

1 enough time to know that given the need to  
2 concentrate on this witness, I don't think there is  
3 going to be enough time between today and tomorrow  
4 afternoon to review all of your written material  
5 properly, and so despite the excellent nature of  
6 your suggestion, I think we are going to have to  
7 stick with our previous plan, which is to do the  
8 motion on Friday morning.

9 MS. GUIRGUIS: Not a problem. Thank  
10 you, Your Honour.

11 THE COURT: Now, just on the subject of  
12 next week's witness, if there is any prospect that  
13 he can't be completely finished next week, we could  
14 still bring him in on Friday.

15 Do you have a sense of that, Counsel?  
16 Have you had a chance to talk to other Counsel  
17 about that?

18 MS. GUIRGUIS: Yes, Your Honour, he  
19 could be ready to start tomorrow afternoon, if you  
20 wanted that, or he could start Friday afternoon.

21 THE COURT: That is not really my  
22 question. My question has more to do with whether  
23 the time we have set aside for that gentleman is  
24 still regarded by Counsel as sufficient. It may be  
25 not just a question for you.

16:20:48 1 MS. GUIRGUIS: Uhm-hmm.

16:20:48 2 THE COURT: But for the other -- let me  
16:20:50 3 do it this way, all right.

16:20:51 4 If Counsel, I mean all of you, could  
16:20:56 5 just caucus about whether or not there is any  
16:21:04 6 uncertainty about Professor Benn and how long he is  
16:21:10 7 going to take, it would seem to me we could start  
16:21:12 8 him on Friday afternoon for a couple of hours and  
16:21:15 9 get ahead of things.

16:21:18 10 Or if you think that even though there  
16:21:20 11 is lots of time, you might like a week from Friday  
16:21:23 12 as a non-sit day, that would be the other  
16:21:25 13 advantage.

16:21:25 14 Mr. Lemmond who has appeared this week  
16:21:28 15 for the first time is busy nodding and shaking his  
16:21:30 16 head in the back row, which I actually, sir,  
16:21:33 17 appreciate the spirit of it, but isn't all that  
16:21:35 18 helpful.

16:21:36 19 So if you would all just caucus over  
16:21:41 20 Professor Benn and if for either of those two  
16:21:45 21 reasons you feel like it might be good to get him  
16:21:49 22 started on Friday afternoon, I think that is a good  
16:21:52 23 idea too. Okay?

16:21:54 24 Especially as we draw to the end of the  
16:21:59 25 summer and I expect that people have obligations

1 that are related to the end of the summer.

2 All right, is there any other thing  
3 that anyone wants to pop up and ask about? We have  
4 got three so far.

5 All right, 10 o'clock tomorrow morning.

6  
7 -- Adjourned at 4:22 p.m.  
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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 26th day of August, 2019



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