

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

DAYL 68 VOL 68
December 10, 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 68/DAY 68 of the trial
28 proceedings in the above-noted matter, being held
29 at the Superior Court of Justice, Courtroom 5-1,
30 330 University Avenue, Toronto, Ontario, on the
31 10th day of December, 2019.

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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:

H. W. Roger Townshend, Esq., for the Plaintiffs,
& Krista Nerland, Esq., the Chippewas of
& Benjamin Brookwell, Esq., Saugeen First Nation,
& Cathy Guirguis, Esq., and the Chippewas of
Nawash First Nation.

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

David Feliciant, Esq., for the Defendant,
& Julia McRandall, Esq., Her Majesty the
& Peter Lemmond, Esq., Queen in Right of
& Jennifer Lepad, Esq., Ontario.
& Richard Ogden, Esq.,

REPORTED BY: Deana Santedicola, RPR, CSR, CRR

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4 4447: Document entitled "Report on 8855:10
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7 4448: Report of the United Nations 8856:14
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9 Elimination of All Forms of
10 Discrimination, Committee on the
11 Elimination of Racial Discrimination,
12 dated 21 February - 11 March, 2005.

13 4449: Document headed "Report of the 8857:8
14 Special Rapporteur on the situation of
15 human rights and fundamental freedoms
16 of indigenous people, Rodolfo
17 Stavenhagen."

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08:57:19 1 -- Upon commencing at 10:02 a.m.

09:20:37 2
10:03:56 3 THE COURT: Good morning, Mr.
10:03:57 4 McCulloch.

10:03:59 5 MR. McCULLOCH: Good morning.

10:04:00 6 THE COURT: There were a couple of
10:04:02 7 matters that I raised yesterday that I am expecting
10:04:05 8 to hear about this morning. Are you addressing
10:04:08 9 that, sir?

10:04:09 10 MR. McCULLOCH: Yes, Your Honour. In
10:04:11 11 fact, there are two matters.

10:04:14 12 One, to the best of our efforts, we
10:04:19 13 couldn't find that the Quebec Act was made an
10:04:22 14 exhibit. Rather, its proclamation was made an
10:04:26 15 exhibit, so I would like to make the Quebec Act of
10:04:31 16 1774, SC0666, a numbered exhibit.

10:04:39 17 THE COURT: Mr. Registrar?

10:04:40 18 THE REGISTRAR: Exhibit No. 4040 [sic].

10:04:44 19 EXHIBIT NO. 4440: Quebec Act of 1774.

10:04:46 20 THE COURT: Sorry, 40?

10:04:48 21 THE REGISTRAR: 4040, Your Honour.

10:04:56 22 THE COURT: I thought we were up in the
10:04:57 23 4400s, Mr. Registrar?

10:05:07 24 THE REGISTRAR: No, we are not.

10:05:08 25 THE COURT: All right. Moving forward,

10:05:11 1 Mr. McCulloch.

10:05:14 2 MR. McCULLOCH: My friend and I have
10:05:15 3 been discussing the way to address the challenge
10:05:18 4 made to portions of Professor McHugh's report. We
10:05:20 5 have made very significant progress and hope to be
10:05:23 6 able to report back after the lunch break.

10:05:25 7 THE COURT: All right, and you had
10:05:26 8 indicated that you might conclude your chief at
10:05:29 9 around that time. Is that going to interfere with
10:05:31 10 that?

10:05:32 11 MR. McCULLOCH: That is what I am still
10:05:34 12 hoping. Of course, I will certainly be finished
10:05:37 13 today. I hope to be finished by the lunch break.

10:05:40 14 THE COURT: Well, my question is, is
10:05:42 15 the ongoing discussion about these small portions
10:05:45 16 of the report going to interfere with your ability
10:05:50 17 to conclude your chief or not?

10:05:54 18 MR. McCULLOCH: No, Your Honour. The
10:05:56 19 only remaining point that requires resolution, and
10:06:01 20 I won't call it a point of disagreement, is not the
10:06:05 21 subject of the remainder of my examination
10:06:07 22 in-chief.

10:06:08 23 THE COURT: All right. Please go
10:06:09 24 ahead.

10:06:11 25 PROFESSOR PAUL GERARD McHUGH; UNDER

1 PRIOR OATH.

2 EXAMINATION IN-CHIEF BY MR. McCULLOCH

3 (CONT'D):

4 Q. Good morning, Professor McHugh.

5 A. Good morning.

6 Q. I hope you slept well.

7 I would like now to turn to the
8 specifics of what we have been referring to as
9 Treaty 45 1/2 and I would like to ask you some
10 questions about its chronology and specifically the
11 chronology of Francis Bond Head's trip to
12 Manitoulin, negotiation of the Treaty, and his
13 departure.

14 Could you tell me, Professor McHugh,
15 when did Bond Head leave for Manitoulin, leave from
16 Toronto to Manitoulin?

17 A. He left on the Monday, the 1st of
18 August 1836.

19 Q. And when did he get to Manitoulin?

20 A. He arrived in Manitoulin during
21 the service on Sunday, that is, on Sunday the 7th.

22 Q. When you said "service," what did
23 you mean by "service"?

24 A. Well, actually, it was the
25 Anglican service. Elliot was holding the service

1 at 11 o'clock, and during the service Bond Head
2 arrives and that causes great excitement, and
3 basically, from the reports we had, the service
4 breaks up, immediately the congregation rush to the
5 waterside into the lake to see Bond Head arrive.
6 And the Wesleyans were -- their noses were put out
7 by that, and the comment goes afterwards on the
8 disruptive effect of Bond Head's arrival on the
9 Sunday, Sunday morning, late morning.

10 Q. Did the Wesleyan Methodists have a
11 particular view about Sunday?

12 A. They certainly did. They had a
13 very strong belief that the Sunday should be kept
14 free of all work and all labour, and that is a
15 theme that runs through their comments on
16 proceedings subsequently.

17 Q. What happened then on Monday?

18 A. On -- well, we have to try and put
19 together an account of what happened from a number
20 of sources.

21 We have Bond Head's two dispatches to
22 Lord Glenelg. We have Bond Head's autobiography
23 called "The Immigrant," which sets out
24 recollections, including of Treaty 45 1/2, Treaty
25 45 1/2 as well as the rebellion of 1837, and "The

1 Immigrant," as a book, it is a protracted
2 "apologia," an exercise in self-justification.

3 And we also have the council of the
4 missionaries, some published in the Christian
5 Guardian and also elsewhere by a missionary called
6 Benjamin Slight, and Elliot also wrote about it.

7 So we have to -- as documentary sources
8 we have to put them together to figure out the
9 exact times when things happened and where and how,
10 and we can't really say some things with thorough
11 certainty.

12 For example, the insertion of the Bruce
13 Peninsula, because when Bond Head arrived, he had
14 intended it to be a cession of all the Saugeen land
15 and they were all going to remove to Great
16 Manitoulin Island. But in the course of the Treaty
17 proceedings, he changed his position and the
18 provision for the retention of the Bruce Peninsula
19 was inserted into the copy he had.

20 Now, we don't know the circumstances of
21 that arrangement. Was it made on the Sunday after
22 he arrived in private discussions? Was it made in
23 private discussions that he had announced publicly
24 in Council? Or was it decided in Council?

25 So we have uncertainty as to the exact

1 way in which the "forever promise" found its way
2 into the text of the Treaty, but it is there.

3 So that is an example of the difficulty
4 we have putting together a chronology.

5 Q. And when was the Treaty signed and
6 concluded?

7 A. Well, that again is not altogether
8 clear. It is dated the 9th, but there are reports
9 that would have it being agreed on the Sunday, some
10 on the Monday and signed on the Wednesday. So the
11 actual date of the Treaty itself is something that
12 is clouded and a degree of uncertainty as to the
13 actual date. But the Treaty is there. It is
14 there, so notwithstanding those features of its
15 conclusion.

16 Q. And one last chronological
17 question. When was it that Bond Head wrote and
18 asked for a copy of the Royal Proclamation of 1763?

19 A. I believe it was on the 20th of
20 August, about ten days later. Now, that letter, to
21 me, is significant because Bond Head arrives, a
22 Governor who bears the commission, has
23 instructions. Plainly, the instructions had not
24 told him about the Royal Proclamation, so if the
25 Royal Proclamation had any formal standing, it is

1 really unusual that it didn't appear in the
2 instructions. In fact, the Royal Proclamation did
3 not appear in any royal instructions after the
4 Quebec Act of 1774, so that is not surprising.

5 So Bond Head obviously knew that there
6 was a procedure followed in the province in dealing
7 with land cessions. He arrived to an Indian
8 Department that had practices and protocols, and he
9 clearly knew about them and he decided not to
10 follow them because he does make the statement that
11 the Treaty -- I'll just find it.

12 Q. Well, actually, Professor McHugh,
13 if I could ask Ms. Kirk to put Exhibit P1136 on the
14 screen. This is Bond Head's dispatch to Lord
15 Glenelg of August 1836. And if we keep on
16 scrolling -- okay. I believe the paragraph you are
17 looking for is the one that starts "Your Lordship
18 will at once perceive [...]"

19 A. Yes:

20 "Your Lordship will at once
21 perceive that the Document is not in
22 legal Form, but our Dealings with
23 the Indians have been only in
24 Equity; and I was therefore anxious
25 to show that the Transaction had

1 been equitably explained to them."

2 Q. Well, you were going to make a
3 comment about the phrase, what we can deduce from
4 the phrase "not in legal form"?

5 A. He is adverting there to -- he is
6 obviously aware of the practice within the province
7 of using forms, standard forms like deeds in order
8 to obtain cessions. So he is acknowledging there
9 he is not following the usual form. He calls it
10 "legal Form" but then he says "our Dealings with
11 the Indians have only been in Equity," so what he
12 is saying there is we use the legal form but these
13 are not instruments that take effect at law.

14 Q. For a British office-holder such
15 as Sir Francis Bond Head, what would "equity" have
16 meant in the 1830s?

17 A. Well, plainly he is adverting
18 there to the distinction that the lawyers know
19 between rights at common law and rights in equity,
20 but he is using "equity" in the broader, more fluid
21 sense, its more original sense associated with the
22 King's conscience, King's conscience particularly
23 as used in the ecclesiastical courts, conscience,
24 an order of conscience, the notion of equity as
25 fairness, justice. It is associated with an early

1 form of natural justice, of the inherent fairness
2 of the situation.

3 And that of course is what equity
4 aspired to be, but equity as a distinct
5 jurisdiction has a history from the 17th century
6 through to the 19th that is quite a remarkable one.
7 And equity in the late 18th century, through Lord
8 Elgin, through Lord Mansfield, went through a
9 period that commercial lawyers certainly know much
10 about, when equity became very much aspired under
11 Lord Elgin to become like the common law, a set of
12 rules and principles, knowable through legal
13 forensis, through cases in particular, and that was
14 Lord Elgin's mission.

15 And that mission became controversial
16 early in the 19th century and there was a reaction
17 against it. There was a belief that equity had
18 lost its true heart, its true purpose, and we find
19 various legal writers of treaties discussing equity
20 and equity going back to its pristine, pure form.

21 The point is that the course of
22 development of equity is not on a straight line.
23 Equity goes as a jurisdiction before the Judicature
24 Acts, goes through different tides and sea changes
25 in an approach towards how equity operates.

1 And of course, we also have the great
2 competition from the late Elizabethan period
3 through the Stuart period between the common law
4 and equity, and though Charles I gave the victory
5 to Lord Ellesmere over Coke, the common lawyers
6 spent most of the 17th century trying to claw back
7 at least an equivalence, if not an ascendance, over
8 the courts of equity.

9 The courts of equity were associated
10 with the prerogative, the Star Chamber, sort of the
11 ecclesiastical courts, and so the jurisdiction of
12 equity was also regarded as -- inherently as
13 somehow askance by the diehard common lawyers.

14 Now, equity jurisdiction in the
15 colonies, this is one of those areas of colonial
16 history where not a lot has been written about and
17 where I imagine in the next few years young
18 scholars will be going. Basically speaking, the
19 Governor held equitable jurisdiction because the
20 Governor held the seals of office, and it was
21 through the seals of office that equitable
22 jurisdiction was exercised. So --

23 Q. Just a moment, Professor McHugh.
24 Was there a court of equity at the time in the
25 province?

10:18:25 1 A. Upper Canada didn't get a court of
10:18:28 2 equity until the late 1830s. There was quite
10:18:33 3 intense debate over the court of equity. The
10:18:37 4 debate over courts of equity was also -- also
10:18:41 5 occurred in the North American colonies because the
10:18:46 6 debate was whether or not a Governor by exercise of
10:18:49 7 the prerogative could establish a court and himself
10:18:53 8 preside in a court of equity, as opposed to a court
10:18:56 9 being established by colonial legislation.

10:18:58 10 That is an argument that runs through
10:19:00 11 the 18th century.

10:19:02 12 So Governors in the period that we are
10:19:06 13 interested in, if we go to the 1830s, Governors in
10:19:09 14 the 1830s had equitable jurisdiction. They heard
10:19:12 15 equitable appeals. They had probate. And they
10:19:15 16 would often sit with a lawyer or with a senior
10:19:18 17 counsellor who had some experience, but Governors
10:19:21 18 were involved in the judicial system as well. You
10:19:26 19 can't apply a separation of powers model to Crown
10:19:30 20 colony government because they didn't operate
10:19:33 21 according to that kind of a model.

10:19:34 22 So Governors exercised equitable
10:19:36 23 jurisdiction as well. So Bond Head would have been
10:19:38 24 aware, undoubtedly aware of that, and so he is
10:19:43 25 there also adverting to this understanding of how a

1 Governor who was not a trained lawyer would
2 exercise a jurisdiction of equity and that would be
3 as tending towards natural justice, fairness, what
4 the equity of the case requires. And that is how
5 equity did take root in the colonies early on.

6 Q. Thank you. I would like to go
7 back now and take a very close look at Treaty
8 45 1/2, if I could ask Ms. Kirk to display Exhibit
9 1132. And if we could go to the first page of the
10 text and to the bottom of the page.

11 Now, Professor McHugh, you have made
12 references to the way in which the Sauking, as they
13 were called then, negotiated with Bond Head and got
14 him to make changes to his original proposal. So
15 I'm not going to take you through the
16 interpolations. I think you have already covered
17 them in your testimony.

18 But I would like to go through the very
19 last sentence on this page and the beginning of the
20 next sentence. If you would like to take a look at
21 it, starting from "I now propose to you [...]" and
22 read that and then read along to the next page.

23 A. [Witness reviews document.]

24 Sorry, "[...] and proper assistance
25 given to enable you [...]"

10:22:27 1 Q. Okay.

10:22:29 2 A. [Witness reviews document.]

10:22:36 3 Could we move it over slightly more?

10:22:53 4 Q. I believe it to be:

10:22:56 5 "[...] to become civilized and

10:22:57 6 to cultivate land [...]"

10:22:58 7 A. Sorry, I haven't got it all here.

10:23:00 8 I have got a corner missing of it. Yes, thank you:

10:23:04 9 "[...] to become civilized and

10:23:05 10 to [settle] [...]"

10:23:07 11 Q. "Cultivate," I think.

10:23:10 12 A. "Cultivate," sorry, yes:

10:23:11 13 "[...] cultivate land, which

10:23:13 14 your Great Father engages for ever

10:23:14 15 to protect from the encroachments of

10:23:16 16 the whites."

10:23:17 17 Just to confirm, this is what we have

10:23:19 18 been referring to as the "forever clause" or the

10:23:26 19 "forever promise"?

10:23:27 20 A. Correct.

10:23:27 21 Q. As someone who is very well-versed

10:23:29 22 in reading 19th century documents, particularly in

10:23:34 23 their manuscript, do you have an opinion on what

10:23:38 24 the antecedent of the relative pronoun "which" is?

10:23:44 25 A. Without a comma, I would say it

10:23:55 1 refers back to the "cultivate a land."

10:24:02 2 THE COURT: I didn't hear you, sir.

10:24:04 3 MR. TOWNSHEND: Your Honour, at this
10:24:05 4 point we are getting into opinion not only that we
10:24:09 5 had not had notice of, but is contrary to the
10:24:11 6 opinion stated in his report and is further
10:24:15 7 contrary to an admission made in Canada's
10:24:18 8 pleadings.

10:24:20 9 Would you like more detail?

10:24:22 10 THE COURT: Well, those are three
10:24:25 11 objections, Mr. McCulloch. What do you have to say
10:24:27 12 about that?

10:24:29 13 MR. McCULLOCH: Your Honour, we are
10:24:36 14 following here upon evidence produced in the
10:24:40 15 testimony of Professor Brownlie. I can take you,
10:24:45 16 if necessary, to the relevant pages of the
10:24:47 17 transcript. It is natural and appropriate for
10:24:52 18 evidence to evolve as more consideration is known
10:25:02 19 to specifics such as the absence or presence of
10:25:05 20 commas.

10:25:06 21 I do not agree with my friend this is
10:25:10 22 directly contrary. I am not asking Professor
10:25:17 23 McHugh for an interpretation. I am simply asking
10:25:19 24 for a question of how purely on the text the
10:25:26 25 grammar would have been construed. I am not asking

10:25:29 1 him to say what Bond Head meant. I am not asking
10:25:34 2 him to say what anyone at the time thought it was.
10:25:38 3 I am attempting to identify what is essentially a
10:25:43 4 syntactical problem.

10:25:49 5 THE COURT: Mr. Townshend, what is the
10:25:54 6 pleadings admission that you rely on?

10:25:59 7 MR. TOWNSHEND: The pleadings admission
10:26:00 8 is in paragraph 16 -- I'm sorry, paragraph 10 of
10:26:10 9 Canada's Statement of Defence reads:

10:26:14 10 "The Defendant admits that
10:26:16 11 Treaty 45 1/2 contained a statement
10:26:17 12 that the Crown would protect the
10:26:19 13 Saugeen Peninsula from encroachments
10:26:21 14 by whites."

10:26:23 15 And this witness is beginning to give
10:26:29 16 evidence that it is not the peninsula, it is just
10:26:33 17 the cultivated land.

10:26:34 18 Now, I recognize that Canada
10:26:38 19 cross-examined some of our witnesses on this point,
10:26:44 20 and because of the broad scope of
10:26:48 21 cross-examination, it didn't seem that they were
10:26:52 22 bound to maintain the scope of their pleadings.
10:26:56 23 But when they are bringing their own witness, they
10:27:00 24 are, in my submission, bound not to make -- adduce
10:27:06 25 evidence that contradicts admissions in their

10:27:09 1 pleadings.

10:27:13 2 THE COURT: Well, taking your three
10:27:23 3 objections -- well, first of all, I should ask Mr.
10:27:26 4 McCulloch if he has anything to say about that more
10:27:29 5 specific submission?

10:27:30 6 MR. McCULLOCH: Your Honour, in just
10:27:31 7 two or possibly three questions, I will be asking
10:27:35 8 Professor McHugh about a document that will make it
10:27:37 9 clear that our understanding of the events between
10:27:41 10 1836 and 1838 is entirely consistent with the
10:27:46 11 position taken in our pleadings.

10:27:50 12 MR. FELICIAN: Your Honour, just to
10:27:51 13 add my two cents, if I may, I don't think -- we
10:27:56 14 should also not lose sight of the fact that this
10:27:59 15 witness is here to assist you, and I would suggest
10:28:02 16 he is here to assist you regardless of what one
10:28:06 17 party's position may or may not have been in a
10:28:08 18 pleading, whether we are satisfied that it is
10:28:10 19 actually specific enough to cover it.

10:28:13 20 But the witness is here to assist you
10:28:15 21 and you have heard evidence about this document and
10:28:18 22 how that clause is to be interpreted, and it would
10:28:21 23 be unfortunate not to have Mr. McHugh comment on
10:28:26 24 it, given his background and abilities in this
10:28:28 25 area.

10:28:33 1

THE WITNESS: Could I say something,

10:28:34 2

Your Honour?

10:28:34 3

THE COURT: No, sir, you cannot. But

10:28:36 4

thank you for offering to help.

10:28:37 5

Mr. Townshend, accepting that this

10:29:03 6

gentleman has not done a reply report, as some

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other experts have, but nonetheless is being

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invited to reply to some expert evidence that we

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have heard in the Plaintiffs' case and you have

10:29:16 10

raised an objection based on non-disclosure,

10:29:25 11

bearing in mind that this issue is one that has

10:29:27 12

been covered a lot, are you saying that you will

10:29:29 13

have some difficulty cross-examining on this

10:29:32 14

evidence because you didn't know this was coming?

10:29:36 15

Is that your difficulty, sir, amongst other

10:29:39 16

objections?

10:29:40 17

MR. TOWNSHEND: We have now closed our

10:29:42 18

case.

10:29:42 19

THE COURT: I'm talking about

10:29:43 20

cross-examining this gentleman, sir. That was my

10:29:47 21

question. Are you saying you would have some

10:29:48 22

difficulty cross-examining this gentleman on this

10:29:51 23

subject matter?

10:29:59 24

I accept for the moment the submission

10:30:00 25

that this is in response to Professor Brownlie who

10:30:03 1 has testified, so it would seem to me that he said
10:30:07 2 what he said. I'm a little unclear on what you are
10:30:11 3 saying the problem is on that first point.

10:30:16 4 MR. TOWNSHEND: I am not saying that I
10:30:24 5 would have difficulty cross-examining Professor
10:30:26 6 McHugh. I am saying that had we known this was
10:30:30 7 going to be a live issue, it would be something we
10:30:35 8 would have gotten evidence from our experts on, and
10:30:41 9 not just evidence they would give in
10:30:42 10 cross-examination, which was a complete surprise to
10:30:46 11 us at the time.

10:30:47 12 THE COURT: All right, have a seat.

10:30:49 13 So on the objection, I rule as follows.

10:30:54 14 First, on the objection based on
10:30:57 15 non-disclosure, Mr. Townshend indicates that the
10:31:00 16 issue is not some impediment to conducting his
10:31:03 17 cross-examination of this witness on this subject
10:31:06 18 but the fact that he might have introduced other
10:31:10 19 evidence in his case, and he thus far I guess
10:31:18 20 leaves open the possibility that there is something
10:31:20 21 that has not been covered in his case.

10:31:22 22 That is a subject which I think is more
10:31:27 23 properly addressed after this witness has concluded
10:31:30 24 his evidence, and the Plaintiffs are invited, if
10:31:35 25 they wish, to make a request to call reply evidence

1 and I will deal with that if and when it occurs.

2 The second objection is that somehow
3 this may be contrary to what this gentleman has
4 said in his report, and that is the proper subject
5 matter of cross-examination, so I don't see that
6 that presents any impediment to the evidence being
7 given.

8 The third objection is that it is
9 contrary to a discovery admission in Canada's
10 pleadings at paragraph 10, which Mr. Townshend has
11 read to me. At this stage, at this question, it is
12 not clear to me that it is contrary to that
13 admission, but if it is, that will be Canada's
14 problem when it seeks to make something of this
15 evidence.

16 But given the complex nature of these
17 issues and given that we have had substantial
18 evidence from a number of Plaintiffs' experts about
19 these matters already, I am reluctant to say that
20 this gentleman should be prohibited from giving the
21 evidence at all. I will therefore permit the
22 questions, subject to any further objections that
23 Mr. Townshend may make.

24 And I will consider what weight, if
25 any, to give to the evidence, bearing in mind these

10:32:58 1 three objections as this trial unfolds and at the
10:33:01 2 final submissions that will be made at the end of
10:33:04 3 the trial.

10:33:06 4 So that is my ruling.

10:33:12 5 Going back to the question, it was
10:33:13 6 answered, so I will ask Mr. McCulloch to move
10:33:16 7 forward from the question to his next question.

10:33:20 8 Please go ahead.

10:33:21 9 BY MR. McCULLOCH:

10:33:26 10 Q. My next question, in fact, relates
10:33:28 11 to the testimony of Professor Brownlie. The
10:33:33 12 testimony was given on the 36th -- on August 10th,
10:33:43 13 2019, but I don't think we need to bring it up
10:33:48 14 because I believe Professor McHugh has reviewed it.

10:33:51 15 What is your opinion of the importance
10:33:52 16 in the context --

10:33:53 17 THE COURT: I am going to interrupt
10:33:54 18 you. Did you say August 10th?

10:33:57 19 MR. McCULLOCH: No, sorry, that was
10:33:59 20 August 10, 2019, Volume 36 of the transcript. Oh,
10:34:06 21 I'm sorry, apparently it is August 13.

10:34:08 22 THE COURT: I was going to say I don't
10:34:09 23 think we sat on August 10, so that is a problem.
10:34:13 24 August 13th, all right. Please go ahead.

10:34:18 25 BY MR. McCULLOCH:

1 Q. Would the question of what would
2 an office-holder, like Bond Head or Lord Glenelg,
3 make out of an issue of textual ambiguity in this
4 text?

5 A. The last question you asked me,
6 I'm here as -- my duty is to the Court, as we were
7 reminded. I wasn't very comfortable with that
8 question, because that question about an ambiguity
9 is not an historical question. These actors are
10 not concerning themselves with textual meaning.
11 There is no debate about commas or what these words
12 mean.

13 So I felt very uncomfortable with that
14 last question because it was asking me to deal with
15 a question of meaning that was not an historical
16 issue, because there is no argument about
17 ambiguity. Textual meaning and process are not the
18 issues with the Treaty 45 1/2. The policy of
19 removal is the controversy.

20 So this kind of an argument, for me it
21 is not an historical question. Ambiguity is an
22 issue that has been raised today, it is not an
23 historical issue.

24 Q. So just to clarify, the historical
25 issue at the time --

10:35:34 1 A. At the time.

10:35:34 2 Q. -- was a policy issue?

10:35:36 3 A. Was the policy redirection that
10:35:39 4 Bond Head was seeking to bring about, removal.
10:35:45 5 That drew most of the heat. There were some
10:35:47 6 questions raised by the Methodist missionaries
10:35:51 7 about the way in which Bond Head railroaded
10:35:56 8 through, as they depicted it, his proposal. But
10:36:02 9 against that, of course, is the concession that was
10:36:05 10 made for the Bruce Peninsula, so he was being
10:36:08 11 flexible.

10:36:11 12 And also, Elliot wrote a report.

10:36:14 13 Elliot --

10:36:15 14 Q. Just to -- Elliot was?

10:36:17 15 A. The Anglican missionary. The
10:36:22 16 report of Elliot was received. The Colonial Office
10:36:25 17 was aware of these, but the way in which Elliot
10:36:29 18 intervened is a kind of insight into the way in
10:36:33 19 which the internal procedures and the internal
10:36:36 20 monitoring operated, because had the Methodist
10:36:40 21 position gone without counter-comment, then perhaps
10:36:45 22 the Colonial Office would have taken the matter
10:36:46 23 further.

10:36:47 24 Q. Well, that actually brings me back
10:36:50 25 to my next question. What was the Imperial

10:36:54 1 response when Francis Bond Head's dispatch reached
10:37:02 2 the Colonial Office?

10:37:03 3 A. Well, Glenelg's initial response
10:37:07 4 was accepting, wasn't warmly accepting but he
10:37:11 5 accepted it. Then gradually, as the controversy
10:37:14 6 grew, he came to discern the policy and to prefer
10:37:18 7 instead the policy articulated by the Lower Canada
10:37:23 8 Executive Council report of 1837. That becomes a
10:37:25 9 very influential doctrine in terms of policy-making
10:37:27 10 within Imperial circles.

10:37:29 11 At the same time, I should have
10:37:31 12 mentioned in 1837 and after we have deputations
10:37:36 13 being sent to London by the Wesleyan missionaries
10:37:41 14 seeking Crown grants for their land to secure title
10:37:44 15 to the lands that they are cultivating with the
10:37:53 16 missions.

10:37:53 17 So information is also reaching London
10:37:56 18 through Peter Jones, through Robert Adler.

10:38:00 19 Q. Peter Jones was?

10:38:02 20 A. The Ojibwe leader, and Robert
10:38:06 21 Adler was the London representative for the
10:38:09 22 Methodists. And Adler was very good at working and
10:38:14 23 operating, and he ingratiated himself, and I say
10:38:21 24 that in the old sense of the word, with the
10:38:23 25 Colonial Office and he was certainly agreeable that

10:38:26 1 other missionaries, like, say, for example,
10:38:29 2 Dandeson Coates of the London Missionary Society,
10:38:31 3 so --

10:38:32 4 Q. Could you tell us, why were the
10:38:34 5 Methodists so upset with Bond Head?

10:38:37 6 A. Because areas of land in the
10:38:42 7 Saugeen tract they had occupied and were
10:38:45 8 cultivating were part of the cession, so they at
10:38:48 9 least had found that cultivation itself was no
10:38:52 10 protection. The protection that they were seeking
10:38:54 11 was the issue of Crown grants. This went back to
10:38:57 12 the early 1830s.

10:38:59 13 It was a long-standing petition, form
10:39:03 14 of petitioning and lobbying that they were making.
10:39:07 15 It was made on many occasions unsuccessfully,
10:39:12 16 though Glenelg did give a sympathetic response and
10:39:15 17 he indicated that records should be taken of First
10:39:18 18 Nations' cultivated land and kept at the land
10:39:21 19 office and recorded at the land office so that the
10:39:26 20 titles would be known and they would be protected
10:39:29 21 in that way.

10:39:29 22 He does that actually in the -- could
10:39:32 23 we look at it, please -- the 1838 --

10:39:35 24 Q. That would be from Lord Glenelg to
10:39:39 25 the Earl of Durham?

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10:41:02 23
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10:41:06 25

A. I believe that's right, yes.

Q. It is Exhibit 1264. Is this the document you were looking for?

A. That's correct, towards the bottom, at the very bottom of page 7.

So I'll read it from the first full sentence at the bottom paragraph beginning:

"In Upper Canada, some Insecurity [...]"

So does everyone have it?

Thank you:

"In Upper Canada, some Insecurity, and consequent Indisposition to the Cultivation of the Land, is said to have been felt by the Indians, by reason of their Want of any legal Title. Strong Objections however exist to the conferring on them saleable Titles, as being likely to expose them to the Frauds and Artifices of designing Persons. To escape this Difficulty, and at the same Time to remove every reasonable Feeling of Suspicion on the Part of the

10:41:06 1 Indians, I have lately directed Sir
10:41:09 2 G. Arthur, if he should see no
10:41:12 3 insuperable Objection to such a
10:41:14 4 Measure, to cause Title Deeds of
10:41:15 5 their Property to be drawn up in
10:41:17 6 Writing, and recorded in the Office
10:41:18 7 of the Commissioner of Crown Lands,
10:41:20 8 and to allow any Person deputed on
10:41:24 9 their Behalf to assure themselves of
10:41:25 10 the Fact of such Record. The Deeds
10:41:27 11 so recorded would be considered by
10:41:28 12 the Government as equally binding
10:41:35 13 with any other similar Documents.
10:41:44 14 And if the Indians should at any
10:41:47 15 Time desire to sell or exchange
10:41:48 16 their Lands, the Government would be
10:41:50 17 ready to listen to their
10:41:52 18 Applications, and to take such
10:41:53 19 Course as might be most consistent
10:41:54 20 with their Welfare and Feelings."
10:41:57 21 So we have there a statement that the
10:42:03 22 title is not to be given to the Indians themselves.
10:42:07 23 It is to be recorded, but they are not to get Crown
10:42:09 24 grants. They have a record, so technically the
10:42:13 25 title is still with the Crown and the protection

10:42:15 1 that they have, the legal security that is being
10:42:18 2 offered is subject always to the:

10:41:44 3 "And if the Indians should at
10:41:46 4 any Time desire to sell or exchange
10:41:48 5 their Lands, the Government would be
10:41:50 6 ready to listen to their
10:41:52 7 Applications, and to take such
10:41:53 8 Course as might be most consistent
10:41:54 9 with their Welfare and Feelings."

10:42:32 10 So any promise of looking after the
10:42:35 11 land forever means until you want to sell. That is
10:42:41 12 clearly what that statement is saying there.

10:42:43 13 So -- and through the medium of the
10:42:48 14 Crown sale.

10:42:50 15 Q. Still on the topic of the
10:42:52 16 missionaries, you have outlined that they didn't
10:42:54 17 like Bond Head's policy. Is there anything that
10:42:59 18 Bond Head wrote that would also have irritated the
10:43:03 19 missionaries?

10:43:04 20 A. Well, many things.

10:43:10 21 Q. Just a few examples might help.

10:43:12 22 A. Well, the thing that upset the
10:43:15 23 missionaries the most about the removal policy was
10:43:18 24 that it denied the common family of humanity, that
10:43:28 25 it did not accept that the Indians were men, like

10:43:32 1 the settlers, and therefore amenable to the word of
10:43:35 2 God.

10:43:36 3 So the objection to the Bond Head
10:43:44 4 proposal was that it supposed the inherent
10:43:47 5 irredeemability of the heathen soul, to put it in
10:43:52 6 the words of the time.

10:43:53 7 Now, that was the belief of the
10:43:56 8 missionaries and certainly held the ear of the
10:44:02 9 Imperial policy-makers at the Colonial Office. But
10:44:09 10 within colonies themselves, advocates of removal
10:44:15 11 you would find had much greater support from the
10:44:18 12 colonial press and from the so-called "dying
10:44:20 13 pillow" school of thought that was prevalent in the
10:44:23 14 1830s and '40s.

10:44:25 15 Q. "Dying pillow"?

10:44:26 16 A. There was a belief that Indigenous
10:44:30 17 peoples were doomed to eventual extinction and the
10:44:37 18 role of the Crown, the government authorities, was
10:44:41 19 to smooth the "dying pillow" of Indigenous peoples.
10:44:44 20 That was the term that was used in some quarters.

10:44:46 21 Of course, anything but that happened,
10:44:48 22 but that was how -- that was a belief, a perception
10:44:54 23 at the time, and it was held by a good number of
10:44:57 24 people, particularly in the colonies, but not, I
10:45:00 25 stress, by the decision-makers themselves, and the

1 missionaries successfully countered that belief.

2 And Bond Head of course is the exemplar of it.

3 Q. Just to clarify, an exemplar --

4 A. The exemplar of the dying pillow.

5 The removal policy is the dying pillow and

6 instantiated into some form of policy.

7 Q. And one more question about this

8 particular document. Does this document -- what

9 does the document, rather, say about the Colonial

10 Office's understanding of Treaty 45 1/2?

11 A. Well, this document, and when we

12 look at the circumstances of it, including the

13 statements that Bond Head made about legal form and

14 inequity and asking ten days later for the Royal

15 Proclamation, when we look -- and the lack of a

16 discussion about ambiguity that we have had today.

17 So the discussion about process is over

18 and done with quickly, once Elliot makes the

19 response. So we are not looking at a process in

20 which it was clearly governed by set, rigid

21 procedures or rules. Bond Head knew that there

22 were practices in the province, and he chose not to

23 follow them. And he was perfectly able to do that

24 because Governors' instructions were pretty

25 open-ended on the question of relations with

1 Indigenous peoples.

2 Typically, verbs were used to
3 conciliate their goodwill and affection. To use
4 the utmost means and an enlightened humanity or an
5 unremitting solicitude, you can use terms
6 associated with kindness, compassion, generosity,
7 the way in which a protector would look after those
8 he has charge over.

9 So the overall way in which I would
10 look at it is that -- I still haven't come to the
11 aftermath. Could I come to the aftermath and
12 discuss that?

13 Q. Yes, I think we have time. Could
14 you tell us, what was the aftermath?

15 A. Well, by the "aftermath" I mean
16 the Macaulay Report, the Bagot Report, the 1843,
17 the award of annuities to the Saugeen, because this
18 Treaty does not have a reserve in it, does not
19 have -- though that is what the Bruce Peninsula
20 becomes, and it does not have annuities.

21 Q. Actually, I was going to move in
22 that direction. Could I ask just again to get the
23 aftermath in the proper perspective. How did
24 Treaty 45 1/2 differ in content from other treaties
25 that the Crown had entered into before 1836?

10:48:21 1 A. Okay, let's be clear who we mean
10:48:23 2 by the "Crown." We mean the Imperial Crown, and
10:48:25 3 this is essentially the last Imperial treaty, and
10:48:31 4 the Imperial treaties kind of go out in style
10:48:36 5 because Bond Head does it in such an anomalous way.
10:48:40 6 He breaks the pattern that has been obtained until
10:48:43 7 then and he takes charge of it in a way that is
10:48:46 8 becoming impossible just a few years later on, as
10:48:49 9 responsible government is beginning to take root
10:48:51 10 and we have the lead-in to the Robinson Treaties.

10:48:55 11 So after this, after the Treaty 45 1/2,
10:49:00 12 we have the Macaulay Report, the Bagot Report, the
10:49:08 13 Robinson Treaties, including the Vidal-Anderson
10:49:12 14 Report, and then we have the discontinuation of
10:49:15 15 presents and the Pennefather Report.

10:49:17 16 Q. But I am asking about the treaties
10:49:20 17 prior to 1836. What were some of their common
10:49:23 18 features that were different from Treaty 45 and
10:49:30 19 Treaty 45 1/2?

10:49:31 20 A. Samuel Jarvis drew up a schedule
10:49:33 21 in 1837 and he showed a kind of pattern, and it is
10:49:37 22 a pattern that we are familiar with, the appearance
10:49:39 23 of annuities in 1818. Even in 1837 the appearance
10:49:45 24 of a reserves policy is not that evident. It is
10:49:48 25 only coming into, pulling into --

1 Q. Perhaps before we go any further,
2 could you explain what you mean by the term
3 "annuity" in the context of treaty-making?

4 A. An annuity is, instead of a lump
5 sum being paid at the time of a treaty, annual sums
6 being made on a capitated basis, per head, to the
7 signatory community, so annual sums.

8 Q. Was there any kind of annuity or
9 indeed any kind of -- what was the payment form, if
10 any, in Treaty 45 and Treaty 45 1/2?

11 A. Well, it is an unusual -- I was
12 going to call it a contract. It is an unusual
13 contract because it is gratuitous. There is no
14 exchange of consideration, so it is not a contract.
15 There is nothing.

16 THE COURT REPORTER: I'm sorry, Your
17 Honour, through you, could you please remind the
18 witness to please testify more slowly.

19 THE COURT: Yes. We need you to slow
20 down, sir. It is a hard process, because it is
21 artificial for you, but slow down.

22 THE WITNESS: Thank you.

23 THE COURT: You were saying that Treaty
24 45 and Treaty 45 1/2 were unusual. If you could
25 pick it up there, please.

1 THE WITNESS: They were unusual in not
2 making an annuity provision or reserve provision,
3 and by not following the format of previous
4 treaties, the instrumentation that was used to
5 house the treaty, the documentary form.

6 BY MR. McCULLOCH:

7 Q. And I believe you said something
8 about contract and consideration?

9 A. Yeah, there was -- this was -- to
10 all intents and purposes, the cession was as though
11 it were a gift to the Crown.

12 What we have after is, for want of a
13 better term, the normalization of this treaty. It
14 becomes normalized inasmuch as the Bruce Peninsula
15 provides the reserves, and also the annuity is
16 awarded.

17 What excites discussion is the policy
18 rather than the actual content of the treaty, so
19 the debate about the treaty is essentially a debate
20 about the underlying policy direction. Textual
21 meaning and process do not figure in any
22 predominant way within official circles.

23 Q. We may return to this topic later,
24 but right now I would like to ask questions about
25 the 1847 Proclamation. I believe that is Exhibit

10:52:48 1 1674.

10:53:04 2 THE COURT: Excuse me for a moment.

10:54:21 3 Go ahead, Mr. McCulloch.

10:54:23 4 BY MR. McCULLOCH:

10:54:25 5 Q. Professor McHugh, are you familiar
10:54:26 6 with this document?

10:54:27 7 A. Yes, but in transcribed form, yes.

10:54:32 8 Q. Do we have a -- I would like to
10:54:35 9 ask Ms. Kirk if we have a transcribed form
10:54:38 10 available.

10:54:41 11 This may take a moment.

10:54:42 12 I am not sure that is actually much
10:55:54 13 more legible. Professor McHugh, is this an
10:55:59 14 acceptable form of --

10:56:01 15 A. We'll manage, thank you.

10:56:05 16 THE COURT: This is Exhibit 1673? Is
10:56:11 17 that what we are looking at, sir?

10:56:12 18 MR. McCULLOCH: Yes, this is a
10:56:14 19 transcription of the Proclamation of 1847.

10:56:25 20 BY MR. McCULLOCH:

10:56:25 21 Q. And what would you like to say
10:56:30 22 about this document? What does it mean that it is
10:56:35 23 a Proclamation?

10:56:36 24 A. Well, a proclamation since 1689
10:56:41 25 cannot be an enacting measure. A proclamation

10:56:48 1 cannot make law. A proclamation can draw attention
10:56:52 2 to existing law. A proclamation can organize
10:57:02 3 prerogative authority within a recognized head, for
10:57:05 4 example, civil service, but a proclamation is
10:57:09 5 essentially an announcement of how the Crown
10:57:12 6 intends to exercise extant legal powers and
10:57:20 7 authority that it has.

10:57:22 8 This is a Proclamation. It is an
10:57:26 9 announcement. They use the word "declaration" and
10:57:29 10 I think they are using the word "declaration" there
10:57:32 11 to make it clear that that is how the Proclamation
10:57:36 12 is working and that is how Proclamations typically
10:57:39 13 operate.

10:57:39 14 This document is a Proclamation. It is
10:57:42 15 not a Crown grant. It is -- so it doesn't confer
10:57:47 16 any tenure. There is nothing tenurial about this.
10:57:52 17 It recognizes occupation, but it begins with a
10:57:57 18 statement of Crown -- underlying Crown ownership:

10:58:05 19 "Whereas the Ojibway Indians
10:58:07 20 commonly known as the Saugeen
10:58:10 21 Indians with Our permission and with
10:58:12 22 the permission of Our Royal
10:58:13 23 Predecessors have for a long time
10:58:15 24 enjoyed and possessed and still do
10:58:16 25 enjoy and possess all that Tract of

1 Land lying on the -- Shore of Lake
2 Huron [...]"

3 So there is an opening statement of the
4 constitutional position of the Crown as land-owner.
5 And so it goes:

6 "[...] it is Our Royal will and
7 pleasure that the said Ojibway
8 Indians and their posterity should
9 continue to enjoy the said above
10 described Tract of Land in such
11 manner as may be most to the
12 advantage of the said Ojibway
13 Indians and their posterity."

14 And then the Proclamation recites the
15 representations that have been made to the Crown
16 and that of course is an instance of the way in
17 which public authority was prevailed upon in the
18 period before you could go to courts, and this is
19 by petitions, petitions of grace.

20 And this is an example of a response to
21 such a petition, and that is being duly noted.
22 This is what a sovereign does when they comport.
23 They tell subjects they have heard and this is how
24 they are responding. So that is also an example of
25 sovereign comportment there.

10:59:25 1 And the Proclamation then goes on and
10:59:32 2 says that:

10:59:35 3 "[...] it is Our Royal will and
10:59:36 4 pleasure that the said Ojibway
10:59:37 5 Indians and their posterity forever
10:59:40 6 shall possess and enjoy and at all
10:59:42 7 times hereafter continue to possess
10:59:44 8 and enjoy the said above described
10:59:46 9 Tract of Land or the proceeds of the
10:59:50 10 Sale thereof [...]"

10:59:50 11 Now, "or the proceeds of the Sale
10:59:53 12 thereof" leads me to the next part of the
10:59:55 13 Proclamation, because there we have what ostensibly
10:59:59 14 is the "forever promise" and we see how the forever
11:00:04 15 promise is taken as meaning.

11:00:07 16 The reference to the monies there, of
11:00:08 17 course, is indicative, and later on that becomes
11:00:10 18 clear when the Proclamation -- can we scroll down,
11:00:14 19 please -- says that this protection, subject to the
11:00:28 20 will of the people, that they further declare or
11:00:34 21 will -- sorry, I have to get further up:

11:00:36 22 "Provided Always and We do
11:00:40 23 hereby declare Our Royal will and
11:00:43 24 mind as to be, and these presents
11:00:45 25 are made upon the express condition

11:00:47 1 that it shall at all times hereafter
11:00:50 2 be in the power of the said Ojibway
11:00:51 3 Indians to surrender and yield up
11:00:54 4 all their rights in or out of the
11:00:56 5 Tract of Land or Lands or any part
11:00:57 6 thereof to Us or to Our Heirs and
11:01:03 7 Successors or to any person or
11:01:04 8 persons appointed by Us or Our Heirs
11:01:06 9 or Successors to receive the same."
11:01:08 10 So a forever promise is attached to a
11:01:14 11 capacity to make the cession of the land to the
11:01:16 12 Crown, so "forever" means until you cede to the
11:01:22 13 Crown as it is constructed there.
11:01:23 14 And we have another provision that
11:01:25 15 follows that, finally, the one that I went to
11:01:30 16 prematurely, this last one, so if we could go up
11:01:32 17 again, please. Thank you:
11:01:34 18 "[...] and We do further
11:01:35 19 declare Our Royal will and mind to
11:01:37 20 be that no such surrender shall be
11:01:38 21 approved of or acted upon unless
11:01:41 22 resolved on or approved at a meeting
11:01:44 23 of the Sachems Chiefs or principal
11:01:49 24 men of the said Ojibway Indians held
11:01:52 25 in the presence of some Officer

11:01:53 1 appointed to superintend or to
11:01:54 2 assist in superintending Indian
11:01:57 3 affairs [...]"

11:01:57 4 So the Superintendent, an Indian
11:02:00 5 Affairs official, has to be there. Well, is that
11:02:03 6 not something that we find in the Royal
11:02:05 7 Proclamation? If the Royal Proclamation is a
11:02:06 8 statute, then that promise is needless. But we
11:02:09 9 know that Bond Head doesn't have the Proclamation,
11:02:12 10 so probably their assurance is needed.

11:02:14 11 But that is an example of a framework
11:02:21 12 in which the Royal Proclamation is not present. So
11:02:26 13 this Proclamation indicates, and this is what the
11:02:36 14 dispatch that we saw a few moments ago also
11:02:38 15 indicates, that to hold forever means until you
11:02:45 16 want to sell or give up, as long as you want to
11:02:48 17 hold it. And it doesn't mean we are going to hold
11:02:49 18 it for you forever. It means you can hold it as
11:02:54 19 long as you want.

11:02:54 20 And that, of course, is consistent with
11:02:57 21 English ideas of property. The estate in fee
11:03:00 22 simple is an estate that is capable of lasting
11:03:04 23 forever. It is an estate of inheritance, but of
11:03:07 24 course, a fee simple estate will never last
11:03:10 25 forever, except perhaps through a corporation sole,

11:03:14 1 and that is for the reason that people die or they
11:03:16 2 sell.

11:03:17 3 So forever, in an Englishman's concept
11:03:20 4 of owning property forever, that means notionally
11:03:23 5 capable of forever, until you die or more
11:03:26 6 operatively here until you decide to sell. And
11:03:30 7 there is evidence, strong evidence of that
11:03:31 8 interpretation within official circles. I am not
11:03:34 9 saying it is the interpretation within First
11:03:35 10 Nations at all, but I am saying that that is the
11:03:38 11 view held in official circles.

11:03:41 12 Q. And is there anything else you
11:03:43 13 would like to say about this Proclamation? What
11:03:48 14 documents relating to this Proclamation have you
11:03:52 15 examined?

11:03:52 16 A. Well, this Proclamation comes in
11:03:58 17 1847, so it is coming also at a time when there is
11:04:05 18 a movement into responsible government, and that is
11:04:12 19 issued by Governor Elgin who is essentially taking
11:04:16 20 a back seat in the Robinson Treaties and, though
11:04:22 21 notionally, the Imperial Government still has full
11:04:27 22 authority.

11:04:30 23 We are seeing seeds of change
11:04:32 24 occurring. So three years before this was the
11:04:36 25 Bagot Report, and after this we are going to have

11:04:39 1 the Robinson Treaties, the circumstances of that,
11:04:44 2 and the present-giving stops, the Pennefather
11:04:52 3 Report, Gradual Enfranchisement Act and the
11:04:57 4 transmission of jurisdiction in the 1860s through
11:05:01 5 legislation. So we are at the very cusp of the age
11:05:05 6 of legislation, which of course the culmination of
11:05:07 7 that is going to be the Indian Act that is coming
11:05:09 8 further along after Confederation.

11:05:12 9 But we are also leaving, exiting a
11:05:15 10 world where relations are managed through the
11:05:17 11 prerogative, and this is an exercise of the
11:05:19 12 prerogative. It is making a Proclamation. The
11:05:25 13 exercise of the prerogative is the iterative
11:05:29 14 function of this, because it is not enacting
11:05:37 15 anything and it is not making a Crown grant. It is
11:05:41 16 not something issued, a title to land issued under
11:05:46 17 the seal of province, which is a Crown grant.

11:05:50 18 Now, that is what the missionaries
11:05:51 19 wanted, because they knew that the only way in
11:05:57 20 which you could obtain something from the Crown
11:05:59 21 that would be binding on and against the Crown was
11:06:02 22 by way of a Crown grant.

11:06:03 23 A Crown grant can only be -- could only
11:06:09 24 have been upset by the writ of scire facias, which
11:06:14 25 is a writ against the record. It is an action

11:06:18 1 brought in equity. To have brought a writ of scire
11:06:21 2 facias against a Governor's land grant would have
11:06:24 3 meant that you were ultimately lodging legal
11:06:26 4 proceedings in a jurisdiction, the equitable one
11:06:29 5 where the Governor himself would be judge of his
11:06:31 6 own conduct.

11:06:32 7 Now, it may well be that the Governor
11:06:34 8 could do that where there were mistakes as to
11:06:36 9 boundary or frauds had been practiced, but to
11:06:39 10 imagine that a Governor would annul through scire
11:06:45 11 facias a grant that he or his successor had made to
11:06:47 12 First Nations on the grounds that they had got it
11:06:53 13 wrong is inconceivable. It was just so out of
11:06:59 14 conceptualization.

11:07:00 15 You don't even have that possibility
11:07:02 16 suggested because the possibility of taking what we
11:07:07 17 would today call the Aboriginal title into court is
11:07:10 18 just not there. So that logical inconsistency
11:07:14 19 doesn't even get articulated because of that.

11:07:17 20 Q. So with that understanding of the
11:07:19 21 Proclamation or declaration of 1847, I would like
11:07:22 22 to return back to your report, and if you could go
11:07:28 23 to page 55, I have a few questions to ask you about
11:07:34 24 Part 4.

11:07:36 25 I don't know what the practice is in

11:08:01 1 the United Kingdom. In modern-day legal writings
11:08:06 2 in Canada, we are discouraged from using Latin
11:08:10 3 terms, so I would ask you to explain "auctoritas"?

11:08:17 4 THE COURT: Well, I should say we also
11:08:21 5 don't have the same kind of education that would
11:08:22 6 permit us to understand them, so whether it is a
11:08:24 7 good idea or not, we need assistance in
11:08:28 8 understanding Latin terms from time to time.

11:08:31 9 You are looking puzzled, sir?

11:08:33 10 MR. McCULLOCH: As the gold medallist
11:08:36 11 in classics through Victoria College, I am not sure
11:08:41 12 I understand your remark.

11:08:42 13 THE COURT: Oh, I see. All right.
11:08:42 14 Well, Mr. McCulloch is in good shape, sir, but the
11:08:44 15 rest of us need a little bit of help. Please go
11:08:47 16 ahead.

11:08:47 17 THE WITNESS: It means essentially
11:08:51 18 office-bearing authority, the authority of an
11:08:54 19 office.

11:08:55 20 BY MR. McCULLOCH:

11:08:57 21 Q. And how does that connect with
11:09:00 22 where we started off in terms of your current
11:09:04 23 research?

11:09:04 24 A. My research is looking at the idea
11:09:11 25 of public authority as it was experienced,

1 constructed, built, argued about, resolved,
2 sometimes not resolved, within the constitutional
3 culture of the British Empire from the early 17th
4 through the 18th and most of the 19th century, and
5 in particular, looking at the importance of office,
6 of office conferring inherent power, of it being an
7 embodiment, of it occupying a particular place in
8 the social order that was recognized, of deference,
9 obedience and social order achieved through the
10 maintenance and performance of office in different
11 spheres and integrated order where -- which is
12 ecclesiastical, religious, and what we call
13 secular.

14 So it was a way of conceiving the world
15 that is quite different to the one we have now.

16 Q. I have one more classically
17 related question. Francis Bond Head or at least
18 Francis Bond Head and his contemporaries, what kind
19 of education would they have had?

20 A. The education that all Englishmen
21 had from the early Tudor period with the
22 rediscovery of the classical writers, this is
23 called humanism, the rediscovery of the classical
24 writers, in particular the influence of Cicero who
25 wrote "De Officiis," "Of Office." It was a

1 standard textbook in all the grammar schools in
2 England and in North America. All the schoolboys
3 knew their Cicero, and Cicero spoke of the
4 performance of office for the common good.

5 So office, the critique of office was
6 always articulated not through self-achievement,
7 fame and being the heroic, but through the
8 contribution you make to the common good.

9 Q. Could you clarify how a
10 Ciceronian-inspired early 19th century British
11 official would have considered the common good to
12 be?

13 A. Throughout the discussion, you
14 will find there is talk of the way which people
15 perform roles and the way in which the roles
16 impacts adversely, positively upon the Crown,
17 patriotism, religion, trade. Those are the three
18 common --

19 Q. Sorry, the last one?

20 A. Patriotism, Protestantism and
21 trade, they tended to be the elements of the common
22 good or common weal. Even merchants described
23 themselves in terms of office, the office being
24 contribution to trade is good for the country, it
25 is good for the nation, it is good for the realm.

1 So offices were formally constituted,
2 or else they were socially constituted, and the
3 officials bearing power, like the justice of the
4 peace who was the prime instrument of government in
5 the localities of England, the justice of the peace
6 was recognized by the common law as having certain
7 inherent powers.

8 Now, we don't like the idea of inherent
9 powers today because we require a power to have a
10 specific conferral by statute or, less usually, by
11 case, and we see public authorities as an
12 aggregation of those powers.

13 But that is not the way they are
14 looking at it there. They are looking at it as the
15 office holds inherent powers that are ordered
16 around the social good that that particular office
17 achieves or pursues.

18 So the JPs, because they were JPs, the
19 common law recognized them as having powers of,
20 say, commitment and bail.

21 And so that is the idea of authority
22 you have. It relies upon an acceptance of a social
23 order, deference, commitment to hierarchy,
24 obedience.

25 Q. I would like to ask you to expand

11:14:08 1 a little bit on the common good, the common weal,
11:14:15 2 in that you have told us how people holding offices
11:14:19 3 contributed to the common good. I would like to
11:14:22 4 ask you who was included in the common good, the
11:14:27 5 common weal?

11:14:27 6 A. Well, I have to say that Imperial
11:14:35 7 officials always took a very Imperial view of it,
11:14:38 8 and the loss of the American colonies was part of
11:14:41 9 the consequences of that, that they saw the common
11:14:46 10 good in terms of the mother country, trade
11:14:52 11 primarily, religion. That was the most important
11:14:58 12 thing.

11:15:00 13 And the disagreements that they had,
11:15:01 14 the English had over the purpose of empire during
11:15:05 15 the 19th century, those debates turned on whether
11:15:10 16 or not the empire was necessary for trade. Could
11:15:13 17 you have trade without an empire, because empires
11:15:15 18 were becoming costly and the British Empire was
11:15:18 19 always done on the cheap.

11:15:20 20 Q. What role did Indigenous peoples
11:15:23 21 have in the understanding at the beginning of the
11:15:27 22 19th century of the common weal or the common good?

11:15:33 23 A. Very little. They were subject to
11:15:35 24 protection, so the decision had been made for them.
11:15:38 25 That is what it was, that eventually they would be

1 civilized but that they were under Crown
2 protection.

3 So that they didn't really have a voice
4 in terms of the formation of policy, but there were
5 many who were excluded from that as well. One of
6 the features that we have been talking about here
7 of the common good, pursuit of the common good,
8 there was a dimension to that that appeared in the
9 18th century and continued into the 19th.

10 Some of it is associated with the rise
11 of political economy with Adam Smith, but it is the
12 language of police. "Police" is a specific word
13 with a specific meaning in the 18th century. It
14 means to establish the means for conceptualization
15 of the state, for the discourse of government as
16 perfection, protection and welfare.

17 So the idea of police, as the term was
18 used, was -- has been discussed by academics like
19 Chris Tomlins, Maria Valverde, Markus Drubber,
20 Canadians, and they have brought back this concept
21 of the importance of police in terms of the
22 resourcing of colonies and how one could view
23 colonial capacity at a particular stage.

24 Q. Well, perhaps that is a topic we
25 can hold off for -- for the time being.

11:17:22 1 A. Yes, but the point is we have got
11:17:25 2 the makings of states and the internal process was
11:17:33 3 very lumpy and self-government, settlers, all these
11:17:40 4 relations are part of the ongoing churning, tussles
11:17:45 5 and contests of empire.

11:17:48 6 The empire was never a single
11:17:49 7 monolithic steamroller, transoceanic steam roller.
11:17:57 8 It was something much less even, and the effort to
11:18:02 9 organize it and exercise power was done almost
11:18:05 10 entirely through the prerogative, and the
11:18:06 11 prerogative was not an absolute power and that
11:18:13 12 caused most of the scrapes that Indigenous peoples
11:18:16 13 found themselves in.

11:18:17 14 Q. Well, returning to the question of
11:18:22 15 Indigenous peoples and particularly in the context
11:18:25 16 of the Colonial Office, as you have described it as
11:18:29 17 a vehicle of protection, you mentioned the crucial
11:18:33 18 role of James Stephen as an organizer of the
11:18:40 19 Colonial Office and a believer in protection.

11:18:44 20 But he didn't stay at the Colonial
11:18:47 21 Office for the next 40 years, did he?

11:18:49 22 A. No, and he -- James Stephen
11:18:54 23 certainly had presence, but the policy of
11:18:56 24 protection had been put in place long before James
11:18:59 25 Stephen was at the Colonial Office and continued

1 long after he had gone. Protectorates were set up
2 in Australia and New Zealand that were essentially
3 like the Superintendencies in North America.
4 Protection was the policy that came into place
5 during the late 18th century, as I said, with the
6 massive extension of the territorial scope of the
7 British Empire.

8 And this protection was exercised
9 through the prerogative. I really do want to
10 emphasize the importance of prerogative here,
11 because it also indicates we are in a world where
12 prerogative is accepted without any of the
13 questioning or raised eyebrows of today.

14 Q. I was actually wanting to ask some
15 questions a little bit more institutional. If we
16 could go to page 92 of your report, could you tell
17 me about Herman Merivale?

18 A. Well --

19 Q. At paragraph 5.42.

20 A. During the 1830s, representatives
21 of the Aborigines Protection Society advanced
22 various proposals to monitor or to regulate Crown
23 relations with Indigenous peoples of the empire.
24 For example, a statutory code of Aboriginal rights
25 or a parliamentary watchdog or a gazette or to have

11:20:37 1 an Aboriginal agent in London reporting to the
11:20:42 2 parliament. All kinds of suggestions were made,
11:20:45 3 but none of them got very far at all.

11:20:48 4 And the reason why they didn't get very
11:20:50 5 far at all was because the Colonial Office was
11:20:54 6 committed to the discretion of the man on the spot.
11:20:58 7 Bond Head was the man on the spot. Governors were
11:21:02 8 the man on the spot. They were, if you like, in a
11:21:08 9 direct line between the colonists and their
11:21:10 10 assemblies and their vocal press and London. So
11:21:16 11 they were the conduits through which information
11:21:19 12 passed and through which authority was exercised.

11:21:22 13 Governors, their discretion, they had
11:21:27 14 the powers conferred by commission and the exercise
11:21:31 15 of those powers were directed primarily by
11:21:34 16 instruction, but they were also supplementary, like
11:21:38 17 the manual that I referred to.

11:21:42 18 And a lot of the political argument in
11:21:45 19 colonies revolved around the Governor and the
11:21:48 20 office of the Governor, was he performing the
11:21:50 21 office for the common good, what was the common
11:21:54 22 good, how was the Governor supporting it, and how
11:21:58 23 he was exercising his particular powers.

11:22:00 24 Everyone had an opinion on how a
11:22:02 25 Governor should exercise his powers, how he should

1 -- what land he should be releasing to the
2 settlers, how he should be releasing it to them.
3 The colonial press was very active, very vociferous
4 and unrelenting.

5 Q. But just again to return to
6 Merivale, what office did he hold?

7 A. Merivale was a Professor of
8 political economy at Oxford. He published his
9 lectures, his lectures on colonization, which
10 included his emphasis upon the primary importance
11 of the man on the spot and which rejected some of
12 the proposals that he had heard of being advanced
13 by the APS to control or to monitor more closely
14 Crown management of relations with tribal peoples.

15 Q. And what office did he have in the
16 government?

17 A. He became permanent undersecretary
18 of the Colonial Office after the retirement of
19 James Stephen and he stayed there until the 1850s.

20 It should be said that Merivale changed
21 his position on the retention of Imperial authority
22 over native affairs. The reason why he changed his
23 opinion was he became more attuned to colonial
24 self-government, and through the 1840s and 1850s
25 that became a voice or a series of voices from a

11:23:36 1 series of colonies that was heard much more loudly
11:23:39 2 and effectively than the voice of Indigenous
11:23:41 3 peoples in London.

11:23:45 4 MR. McCULLOCH: Your Honour, I don't
11:23:46 5 suppose I need to ask Professor McHugh to explain
11:23:51 6 that Permanent Under-Secretary at the time would be
11:23:54 7 the equivalent of Deputy Minister in our time, or
11:23:57 8 is that still well-known enough?

11:24:00 9 THE COURT: I think we'd better just do
11:24:03 10 it on the basis that the record is important in
11:24:07 11 this trial and it can't come from you, sir, so --

11:24:11 12 BY MR. McCULLOCH:

11:24:11 13 Q. Yes, exactly. Professor McHugh,
11:24:13 14 could you give us some understanding of what the
11:24:15 15 position of Permanent Under-Secretary of the
11:24:19 16 Colonial Office was in Merivale's time?

11:24:22 17 A. The head of that particular branch
11:24:27 18 of the civil service, so it wasn't a parliamentary
11:24:30 19 position, though sometimes Under-Secretaries were
11:24:32 20 parliamentary. James Stephen was a
11:24:35 21 non-parliamentary Under-Secretary of the Colonial
11:24:37 22 Office, so he was the senior-most official.

11:24:40 23 This is also a British civil service
11:24:46 24 that has not yet been organized on the
11:24:51 25 Northcote-Trevelyan principles of 1854.

11:24:54 1 Q. Could you explain what were the
11:24:56 2 Northcote-Trevelyan principles to explain what the
11:24:58 3 civil service was like --

11:24:59 4 A. Well, this takes me back to my
11:25:01 5 opening statements about the way in which ideas of
11:25:04 6 law changed. They also changed as ideas of the
11:25:07 7 compass and function of the state start changing
11:25:10 8 during the Victorian period, and the rise of an
11:25:13 9 independent civil service is part of that process
11:25:20 10 and it is occurring at the same time, in the mid to
11:25:23 11 late 19th century.

11:25:26 12 The Northcote-Trevelyan principles were
11:25:29 13 the basis for the structuring of the British civil
11:25:32 14 service from the late 19th through the 20th
11:25:35 15 century, independent, giving advice, continuity,
11:25:38 16 stable career structure, exams for admission, so
11:25:43 17 they are not giving sinecures to sons, as had been
11:25:47 18 the case and was the case in the Colonial Office of
11:25:51 19 Sir James Stephen.

11:25:53 20 So it was of the establishment of a
11:25:57 21 civil service as we know it today, but that is not
11:25:59 22 happening there. It is still some way ahead.
11:26:03 23 James Stephen himself was resistant to the
11:26:05 24 Northcote-Trevelyan report when it came out.

11:26:10 25 Q. Just before we take a break, just

11:26:13 1 to round that issue out, could you give us some
11:26:17 2 idea of what the pre-reform civil service is like,
11:26:24 3 again, as part of your discussion of the world
11:26:26 4 before and the world now?

11:26:29 5 A. Well, we go into what is known as
11:26:31 6 the world of old corruption where office-holders
11:26:34 7 did not hold salaries. Instead, they obtained
11:26:38 8 their income from the fees of office. Fees would
11:26:42 9 be set for certain things. For example, if you are
11:26:45 10 a Governor and any document that passed the seal of
11:26:51 11 the colony, you would charge a fee for and you will
11:26:54 12 obtain a fee. Harbour-masters would charge fees.
11:27:00 13 That was how offices obtained income.

11:27:06 14 Very frequently, an office would be
11:27:08 15 shared or there would be a deputy. The deputy
11:27:11 16 would do the work, and the actual holder would
11:27:14 17 enjoy the income. For example, the Governor of
11:27:17 18 Virginia for many years was a non-resident
11:27:23 19 official. Instead, his deputy became Lieutenant
11:27:26 20 Governor in Virginia and made an arrangement with
11:27:29 21 the office-holder as to the sharing of fees.

11:27:35 22 There were all kinds of disputes about
11:27:37 23 fees. Certain officers before that could take the
11:27:39 24 warrant of office had to pay money in advance so
11:27:42 25 that they could hold. It is a whole subterranean

1 world that when you know about it, it explains some
2 of the issues that were occurring, for example, in
3 Upper Canada.

4 Q. Are there any illustrations, I was
5 about to ask, of this old corruption in Upper
6 Canada before, say, 1850?

7 A. There isn't to speak of in the
8 19th century. On the whole, it is disappearing.
9 You have the favouritism and you have the nepotism
10 associated with the family compact, but old style
11 office-holding is beginning to disappear.

12 It begins to disappear when Imperial
13 legislation is passed requiring an office-holder to
14 be in the colony, so then you got to the other
15 problem, was that Governors were never given leave
16 of absence because someone had to be found, and so
17 Governors found themselves virtual prisoners in
18 their own colonies because they couldn't obtain the
19 release.

20 The disappearance of sinecures and
21 fee-obtaining officials and the rise of salaries is
22 part of the late 18th century, and Canada was one
23 of the jurisdictions that was most -- more in
24 advance on that, but that is another story.

25 Q. Well, that is actually the last

11:29:17 1 question that I wanted to ask before I asked Her
11:29:21 2 Honour if it was time for a break.

11:29:23 3 Speaking now of the 1820s and '30s, how
11:29:31 4 would colonial officials, potential Governors, have
11:29:37 5 viewed, on the whole, a posting to Upper Canada,
11:29:41 6 again in the 1820s or '30s.

11:29:45 7 A. Well, a woman called Helen Taft
11:29:51 8 Manning, who was the daughter of an American
11:29:53 9 President, wrote an article about the appointment
11:29:54 10 of Bond Head because no one could figure out how or
11:29:58 11 why Bond Head got the appointment. Some thought it
11:30:01 12 was a mistake of name. They couldn't quite figure
11:30:06 13 it out because he wasn't a recognized official.

11:30:10 14 On the whole, Governors tended to have
11:30:13 15 a military background and they tended to have had
11:30:17 16 service in the ranks of commissioned officers and to
11:30:21 17 have worked their way up.

11:30:22 18 Governors were, on the whole, a
11:30:26 19 conservative species and a species that tended to
11:30:29 20 be more comfortable with the military than the
11:30:32 21 civil side of their establishment.

11:30:35 22 And that feature of Governors remained
11:30:43 23 throughout the history of the empire. A few came
11:30:47 24 from what we might call a professional corps of
11:30:54 25 diplomats, but that was the exception rather than

11:30:55 1 the norm.

11:30:56 2 And then you would get occasional
11:30:59 3 figures who would sweep in, as Lord Durham did in
11:31:03 4 the late 1830s in writing his report, but that kind
11:31:07 5 of figure was the exception rather than the norm
11:31:12 6 because Governors were of some social significance.
11:31:19 7 But to be a Governor if you were an Englishman
11:31:23 8 meant you had to be out of England for a number of
11:31:27 9 years and that would have a consequence for their
11:31:34 10 standing and their income-earning capacity within
11:31:37 11 England itself.

11:31:38 12 So some didn't like to leave England on
11:31:46 13 that -- for that reason. So that also meant that
11:31:50 14 though they had a military background, they tended
11:31:53 15 not to be of a really high rank, but of the upper
11:31:56 16 middling sort.

11:31:58 17 MR. McCULLOCH: Thank you, Professor
11:31:59 18 McHugh.

11:31:59 19 May I suggest, Your Honour, that now
11:32:01 20 would be the usual time for the morning break.

11:32:04 21 THE COURT: Yes, 20 minutes.

11:32:06 22 -- RECESSED AT 11:32 A.M.

11:59:57 23 -- RESUMED AT 12:01 P.M.

11:59:57 24 THE COURT: Please go ahead.

12:00:00 25 MR. McCULLOCH: Your Honour, since we

1 have proceeded somewhat more rapidly and smoothly
2 than I anticipated, and we have not quite been able
3 to resolve during the break the outstanding issues
4 of the admissibility of certain portions of
5 Professor McHugh's report, we thought that a very
6 quick set of submissions to Your Honour would allow
7 us to settle the matter in a way such that we could
8 proceed.

9 THE COURT: Please go ahead.

10 MR. McCULLOCH: Perhaps, as it is my
11 friend who is seeking to exclude part of the
12 report, I would ask him to speak first.

13 THE COURT: Well, Mr. Townshend, I have
14 read your document, which, as you pointed out
15 yesterday, you indicated in it what the grounds
16 were for your -- have a seat, Mr. McCulloch -- for
17 your objection.

18 MR. TOWNSHEND: Yes.

19 THE COURT: And if you wish to
20 supplement what you have written here, you are free
21 to do so, bearing in mind that I have read it over
22 at this point.

23 Did you have anything you wish to add?

24 MR. TOWNSHEND: Yes, we are withdrawing
25 the objection about the ethnohistory part.

12:01:16 1 THE COURT: So it is just the policing
12:01:17 2 part then, sir?

12:01:18 3 MR. TOWNSHEND: Yes, and that is in
12:01:32 4 view of Professor McHugh disavowing ethnohistorical
12:01:35 5 expertise and his definition of what ethnohistory
12:01:38 6 is in his understanding, we are withdrawing the
12:01:41 7 objections based on ethnohistory.

12:01:43 8 The objection based on policing and
12:01:49 9 military resourcing issues we are maintaining.

12:01:53 10 THE COURT: Okay, did you want to add
12:01:55 11 anything? I now have reviewed it, but if you want
12:01:59 12 to add something, you can.

12:02:01 13 MR. TOWNSHEND: You did ask that we
12:02:03 14 mark this.

12:02:04 15 THE COURT: I will. I will have it
12:02:06 16 mark as a lettered exhibit. Do you have or can you
12:02:09 17 provide an electronic copy to Mr. Registrar?

12:02:11 18 MR. TOWNSHEND: Yes, it is SC1488.

12:02:16 19 THE COURT: All right. Lettered
12:02:18 20 exhibit, Mr. Registrar?

12:02:19 21 THE REGISTRAR: Lettered Exhibit D3.

12:02:27 22 EXHIBIT NO. D3: Plaintiffs' objection
12:02:27 23 to portion of Professor McHugh's
12:02:32 24 report.

12:02:32 25 THE COURT: Thank you, Mr. Townshend.

1 Mr. McCulloch, do you have anything to
2 say about that, what is a very small portion of a
3 very large report, a portion of a single paragraph
4 of a very large report?

5 MR. McCULLOCH: Yes, Your Honour,
6 because we dealt with this matter with Professor
7 Harring where we discussed the role of the
8 enforcement of order by instruments of the state in
9 some detail. As Professor McHugh has explained, he
10 is using the term "policing" in its slightly
11 archaic general sense.

12 I would, however, point out that
13 Professor Harring was allowed to give evidence
14 about what the facts on the ground were. He was
15 not allowed to talk about what the police or
16 military might have done or could have done, but he
17 was allowed to make comments about the facts on the
18 ground.

19 And it is our view that what we have
20 here are statements about policing in the broad
21 sense that Professor McHugh explained, and then
22 specific statements about the factual state of the
23 tools for law enforcement, particularly placed in
24 the context of the general Imperial experience.

25 And we feel that, again, in the spirit

1 of the ruling about Professor Harring, that these
2 statements of fact fall acceptably within the
3 expertise of a legal historian, since the
4 enforcement of the law, by whatever means, is a
5 very fundamental part of legal history.

6 THE COURT: Well, Professor Harring's
7 situation was different. You know, this was a
8 gentleman who was a U.S. law professor and he had
9 some other experience with respect to U.S. policing
10 and he had some First Nations experience, including
11 experience that wasn't limited to the United
12 States.

13 But I did make a ruling that was
14 responsive to his particular background, which was
15 not the same as this gentleman. And there have
16 since then been witnesses who have had other
17 perhaps more specific opinion evidence on elements
18 of what is conventionally known today as policing,
19 as was the evidence of Professor Harring, and I
20 guess Mr. Wentzell would be the easiest example of
21 that.

22 Looking at paragraph 4.39, which is the
23 subject of this objection, the aspect of that
24 paragraph that I paused over was the aspect that
25 dealt with resources, and the difficulty, of

12:06:03 1 course, is that these are broad subject matters
12:06:08 2 which I think this gentleman probably has expertise
12:06:11 3 about on a high level and a general level, which
12:06:15 4 may not have the same substratum as, for example,
12:06:22 5 Mr. Wentzell as a military historian, focussing on
12:06:29 6 Canada in particular.

12:06:30 7 So what do you have to say about that?
12:06:32 8 By way of example, there is an opinion that the
12:06:38 9 resources needed weren't -- and I am paraphrasing
12:06:43 10 this -- that what was needed wasn't available in
12:06:49 11 terms of resources as opposed to something else.

12:06:54 12 MR. McCULLOCH: Your Honour, I would
12:06:55 13 break that down into two issues, as we have done
12:06:58 14 before, that is to say, the question of the police
12:07:01 15 in the narrow constabulary sense and the army.

12:07:06 16 The statement about the availability of
12:07:09 17 the army is a statement about the Imperial
12:07:12 18 perspective of the availability of the Imperial
12:07:18 19 resource of the army for what would be considered
12:07:23 20 local or municipal purposes, and that falls, I
12:07:27 21 think, very clearly within Professor McHugh's
12:07:32 22 expertise about the Imperial perspective about the
12:07:37 23 enforcement of law, using Imperial means.

12:07:41 24 So I think the statement about the
12:07:45 25 scarcity of the Imperial army as a resource is a

12:07:52 1 legitimate factual statement that can be supported.

12:07:57 2 I am not, of course, saying that the --
12:08:02 3 we are asking the question of the admissibility
12:08:04 4 rather than the weight to be given to that
12:08:07 5 statement of historical fact, but I feel that it
12:08:12 6 falls within Professor McHugh's expertise as an
12:08:18 7 Imperial legal historian.

12:08:21 8 THE COURT: All right. Any reply, Mr.
12:08:23 9 Townshend?

12:08:24 10 MR. TOWNSHEND: My submission is that
12:08:31 11 the text saying that the resources that were
12:08:39 12 required were not available is a matter of opinion,
12:08:41 13 not of fact. I take exception with my friend
12:08:45 14 saying that is simply a matter of fact.

12:08:48 15 THE COURT: I didn't hear that he said
12:08:50 16 that. He said it was a matter of admissibility.
12:08:52 17 It is not the same.

12:08:53 18 MR. TOWNSHEND: He spoke, I believe, of
12:08:55 19 the fact of whether the resources were available.

12:08:59 20 THE COURT: I see, okay. Well, I did
12:09:01 21 not take his submission to be founded on the
12:09:05 22 presumption that there were no opinions offered
12:09:08 23 here, so you can proceed on that basis, sir. I
12:09:11 24 understand that there are opinions offered here.

12:09:11 25 MR. TOWNSHEND: Yes.

12:09:16 1 THE COURT: Do you have anything else
12:09:16 2 to add?

12:09:17 3 MR. TOWNSHEND: I don't -- I haven't
12:09:19 4 seen this witness have anything, any expertise
12:09:25 5 demonstrated in relation to military and policing
12:09:30 6 resources. There is just a gap there.

12:09:39 7 THE COURT: Anything else?

12:09:40 8 MR. TOWNSHEND: No, thank you.

12:09:41 9 THE COURT: Okay, Madam Reporter, my
12:12:55 10 ruling is as follows.

12:12:57 11 As all present know, in this trial, for
12:13:06 12 the most part, all expert reports are being
12:13:09 13 introduced into evidence and comprise a substantial
12:13:13 14 part of the evidence in-chief of those witnesses.

12:13:17 15 Because that is the approach the
12:13:23 16 parties, on consent, have agreed to take, there has
12:13:29 17 also been a process under which the parties let
12:13:31 18 each other know if there is any objection, and
12:13:33 19 there have been a few objections to sections of a
12:13:38 20 few reports.

12:13:39 21 In this case, one paragraph is the
12:13:44 22 subject of an objection of a report that comprises
12:13:51 23 over 100 pages. The question before me is a
12:13:56 24 question of admissibility and, more specifically,
12:14:00 25 whether this gentleman has been qualified to

12:14:01 1 testify about certain opinions he gives in
12:14:04 2 paragraph 4.39 regarding policing and military
12:14:10 3 resourcing in Upper Canada in the 19th century.

12:14:18 4 Mr. Townshend submits that this
12:14:20 5 gentleman is not qualified to give those opinions.
12:14:22 6 Counsel to Canada, Mr. McCulloch, disagrees.

12:14:27 7 Considering all submissions, it is
12:14:28 8 apparent to me that in respect of this very small
12:14:33 9 portion of this very long report, there are
12:14:37 10 differences in the manner of reading the opinion
12:14:43 11 arising from this witness's expressed view about
12:14:45 12 what he regards as policing at that time. That
12:14:50 13 evidence is different from the lens through which
12:14:58 14 certain other expert evidence has looked at
12:15:03 15 policing. In that regard, I am thinking at least
12:15:05 16 in part of Professor Harring and Mr. Wentzell, both
12:15:11 17 of whom testified about policing, using that term
12:15:15 18 in what I would call the modern, conventional
12:15:18 19 sense, although speaking about it historically.

12:15:20 20 But I agree that, if looked upon as
12:15:30 21 against other evidence, such as that of the recent
12:15:34 22 military expert Mr. Wentzell, this witness has not
12:15:37 23 that same expertise. However, he is looking at the
12:15:41 24 issue from his own different perspective and from
12:15:45 25 his own expertise.

12:15:48 1 But I am not persuaded that the topics
12:16:11 2 are entirely outside of this witness's expertise.
12:16:14 3 This is, as I said, a small part of a lengthy
12:16:16 4 report. The objection being made is similar to an
12:16:21 5 objection made to Dr. Williamson's report where a
12:16:25 6 very small, focussed part of his report was
12:16:28 7 objected to on the basis that that portion of his
12:16:32 8 report was outside of his established expertise.

12:16:35 9 I am going to address this objection in
12:16:38 10 a manner similar to the manner I addressed -- and I
12:16:43 11 can't recall if it is Dr. Williamson or Professor,
12:16:45 12 but I'll say Dr. Williamson's report. What I did
12:16:49 13 with him and I do with this gentleman is I will
12:16:51 14 mark the entire report as an exhibit, and with
12:16:54 15 respect to the opinions expressed in paragraph 4.39
12:16:57 16 that are the subject of an objection, I will take
12:17:01 17 into account this gentleman's established expertise
12:17:04 18 in assessing the weight, if any, to be given to
12:17:06 19 those opinions.

12:17:07 20 Mr. Registrar, what is the next exhibit
12:17:10 21 number?

12:17:10 22 THE REGISTRAR: The next exhibit is
12:17:16 23 4441.

12:17:16 24 THE COURT: 4441?

12:17:18 25 THE REGISTRAR: Correct, Your Honour.

1 EXHIBIT NO. 4441: Expert Report of
2 Professor McHugh entitled "Treaty 45½
3 (1836), the Crown's 'unremitting
4 solicitude' and the 'forever' promise
5 to the Saugeen Ojibway Nation: A
6 report on British imperial policy and
7 practice in Upper Canada during the
8 1830s.

12:17:22 9 THE COURT: Thank you. Please go
12:17:23 10 ahead, Mr. McCulloch.

12:17:29 11 MR. McCULLOCH: Your Honour, those are
12:17:32 12 my questions.

12:17:33 13 THE COURT: All right. Mr. Townshend,
12:17:45 14 please go ahead.

12:17:46 15 CROSS-EXAMINATION BY MR. TOWNSHEND:

12:18:05 16 Q. Professor McHugh, good morning.

12:19:00 17 A. Good morning.

12:19:00 18 Q. Or afternoon. Yesterday you
12:19:06 19 testified about changes in the 1970s that allowed
12:19:11 20 Indigenous people to seek relief in court, and you
12:19:14 21 mentioned Calder and you mentioned Delgamuukw.
12:19:19 22 Would you agree that the first time that the nature
12:19:25 23 of Aboriginal title --

12:19:26 24 A. Could I clarify the context in
12:19:29 25 which I referred to them was in the qualification

1 part of the proceedings, was it?

2 THE COURT: Sorry, what is your
3 question, sir?

4 THE WITNESS: It was in the
5 qualification?

6 BY MR. TOWNSHEND:

7 Q. Yes, it was.

8 A. Thank you.

9 Q. My question is, would you agree
10 that the first time that the nature of Aboriginal
11 title and the requirements for its proof was
12 established was in the Supreme Court of Canada
13 decision in Delgamuukw in 1997?

14 A. I think you are -- I am reading
15 that as being framed as a contemporary legal
16 question, and that is outside my sphere of
17 expertise in this particular case. I am happy to
18 give an answer on that basis.

19 THE COURT: Well, I am going to ask you
20 to pause, because it is a contemporary legal
21 question of domestic law.

22 MR. TOWNSHEND: I was trying to ask it
23 as a historical question. Maybe I can try again.

24 THE COURT: Let me just look again. I
25 mean, I did have that reaction to the question. It

12:20:34 1 does seem in its current phraseology to be asking
12:20:36 2 for an opinion about current domestic law.

12:20:41 3 BY MR. TOWNSHEND:

12:20:42 4 Q. All right, let me try again.

12:20:43 5 Would you agree that until 1997,
12:20:49 6 Canadian courts had not defined the nature of
12:20:54 7 Aboriginal title or the requirements for its proof?

12:20:56 8 A. I still regard that as a doctrinal
12:21:01 9 question that is outside my expertise. Again, if
12:21:04 10 the Court feels it would be helpful, I can answer
12:21:06 11 that question, but I do not feel that is the
12:21:10 12 expertise that I am offering in this case, in these
12:21:14 13 proceedings.

12:21:17 14 THE COURT: I am a little bit puzzled
12:21:19 15 too, Mr. Townshend. I mean, at the end of this
12:21:21 16 trial you can and may stand up and say certain
12:21:24 17 things about the law in this country, including the
12:21:27 18 answers to those two questions, which would be
12:21:29 19 borne from your legal expertise as a licensed
12:21:33 20 practitioner here in the Province of Ontario, as
12:21:36 21 opposed to from expert evidence this gentleman may
12:21:39 22 give you.

12:21:41 23 MR. TOWNSHEND: All right.

12:21:42 24 THE COURT: I had understood you wanted
12:21:43 25 to ask questions about when certain historical

1 legal things changed.

2 MR. TOWNSHEND: Yes.

3 THE COURT: But these questions are
4 formulated in a different form from that.

5 MR. TOWNSHEND: Well, I was trying to
6 ask when it changed that Indigenous people -- that
7 the law had developed to a point that Indigenous
8 people could take their cases to court, and I
9 thought last --

10 THE COURT: Well, that is a different
11 question. If you wish to pose that question, then
12 it may not be a problem.

13 MR. TOWNSHEND: I think what was said
14 yesterday about that would suffice.

15 THE COURT: All right. You can always
16 reflect on it over the lunch break if you want to
17 come back to that.

18 BY MR. TOWNSHEND:

19 Q. Could I have document SC1477,
20 please. And this is an excerpt from Professor
21 McHugh's book "Aboriginal Societies and the Common
22 Law." I would like that made an exhibit?

23 THE COURT: Could you just be more
24 specific about what it is? Is it a single chapter,
25 for example, for the record?

12:23:48 1 MR. TOWNSHEND: One moment. It is an
12:23:56 2 assortment of excerpts, would be the way to
12:24:01 3 describe it.

12:24:01 4 THE COURT: Mr. Registrar, the next
12:24:03 5 exhibit will be selected pages from the book that
12:24:07 6 was just described by Mr. Townshend. What exhibit
12:24:10 7 number is the next exhibit?

12:24:12 8 THE REGISTRAR: Exhibit No. 4442.

12:24:12 9 EXHIBIT NO. 4442: Assorted excerpts
12:24:12 10 from the book authored by Professor
12:23:34 11 McHugh entitled "Aboriginal Societies
12:23:35 12 and the Common Law."

12:24:17 13 BY MR. TOWNSHEND:

12:24:17 14 Q. All right. Now, let me go to page
12:24:33 15 155 of that, which is page 11 of the PDF, and there
12:24:41 16 is a section marked there and I will give you a
12:24:44 17 moment to review it.

12:24:45 18 A. [Witness reviews document.]

12:25:14 19 Q. Could we go to the next page.
12:25:17 20 That excerpt continues a bit.

12:25:20 21 A. [Witness reviews document.]

12:26:14 22 Q. My question is that in this
12:26:16 23 excerpt you have spoken to a different kind of
12:26:21 24 obstacle for Aboriginal people?

12:26:25 25 A. A different kind of obstacle to

12:26:29 1 what?

12:26:29 2 Q. To justiciability. This is an
12:26:31 3 obstacle of standing, to be able to seek recourse
12:26:33 4 in a court; is that fair?

12:26:40 5 A. There were a series of objections.
12:26:45 6 You don't mention -- the commensurability question
12:26:49 7 is not --

12:26:50 8 THE COURT: Sir, I'm sorry, I can't
12:26:51 9 hear you.

12:26:52 10 THE WITNESS: Sorry.

12:26:53 11 THE COURT: But that is just because of
12:26:56 12 your location as regards the microphone.

12:26:59 13 THE WITNESS: Okay, thank you.

12:27:01 14 THE COURT: So perhaps what you could
12:27:02 15 do, sir, is repeat your question, and then if you
12:27:04 16 could start your answer again, so I can hear you.

12:27:07 17 THE WITNESS: Sure.

12:27:08 18 BY MR. TOWNSHEND:

12:27:11 19 Q. I am saying that you are here
12:27:14 20 speaking of the ability of Aboriginal people to
12:27:19 21 have standing before a Canadian court, and I am
12:27:24 22 saying that is a different kind of obstacle to
12:27:28 23 having their rights vindicated, to justiciability;
12:27:33 24 is that a fair statement?

12:27:34 25 A. Correct. There were a range of

12:27:39 1 features or explanations for the disability that
12:27:43 2 came with protection. Standing, justiciability,
12:27:47 3 commensurability, there is a whole range of
12:27:50 4 interlocking. There I am explaining one of those
12:27:53 5 aspects.

12:27:54 6 Q. All right. Can we now go to page
12:28:06 7 184, which is PDF page 14, and if you could have a
12:28:15 8 look at that marked paragraph.

12:28:17 9 A. [Witness reviews document.]

12:28:22 10 I don't feel I can comment upon that
12:28:24 11 because the Indian Act is 1870, again,
12:28:28 12 post-Confederation, and it is taking me outside the
12:28:29 13 period of these proceedings so I don't feel --

12:28:31 14 THE COURT: Sir, I am going to ask you,
12:28:33 15 I appreciate you are trying to be cautious, all
12:28:35 16 right, but I am going to ask you to wait for the
12:28:36 17 question.

12:28:37 18 THE WITNESS: Okay.

12:28:37 19 THE COURT: Because we haven't heard it
12:28:39 20 yet.

12:28:39 21 THE WITNESS: True.

12:28:40 22 THE COURT: And then if you are able to
12:28:41 23 answer the question, please go ahead.

12:28:43 24 THE WITNESS: Sure.

12:28:44 25 THE COURT: All right. Mr. Townshend.

1 BY MR. TOWNSHEND:

2 Q. I was asking you to review that
3 and there is another passage about a similar topic
4 at page 259 to 60, which is PDF pages 18 and 19.

5 A. [Witness reviews document.]

6 THE COURT: All right, have you looked
7 that over, sir?

8 THE WITNESS: Yes, thank you.

9 BY MR. TOWNSHEND:

10 Q. My question is, here you are
11 describing the dominance of the Indian Agent in
12 Aboriginal communities, and I am suggesting that is
13 another type of obstacle to Aboriginal peoples
14 vindicating their rights; is that a fair statement?

15 A. In terms of obstacles that existed
16 in 1836, Indian Agents under the reserve system of
17 the Indian Act are not officials that are there.
18 So the problems that existed to bringing a cause of
19 action in the late 1830s are not the same as the
20 problems that exist in the 1870s.

21 Q. I wasn't asking --

22 A. So if I could go outside my
23 particular historical expertise in these
24 proceedings, I could comment upon that. If the
25 Court would find that helpful, I'm happy to do

12:31:08 1 that. But I am feeling that this is a question
12:31:09 2 that is not directly related to the legal and the
12:31:12 3 historical circumstances of Treaty 45. It has a
12:31:17 4 bearing more generally upon First Nations' history
12:31:20 5 of relations with the Crown in the late 19th
12:31:22 6 century, and I am happy to comment upon it, if the
12:31:27 7 Court would find that useful, but with that caveat.

12:31:30 8 THE COURT: Sir, I recognize you were
12:31:32 9 outside the room yesterday because we made you
12:31:35 10 leave, but I did, after the legal steps that are
12:31:40 11 required, qualify you to talk about matters of
12:31:45 12 legal history not only in the 18th and 19th century
12:31:52 13 but also following, so you should not feel
12:31:54 14 restricted to the time period.

12:31:55 15 THE WITNESS: Thank you.

12:31:56 16 THE COURT: Having said that, I think,
12:31:58 17 Mr. Townshend, it would be helpful if you could be
12:32:00 18 more specific. It is up to you. It is your
12:32:02 19 cross-examination. But the witness wasn't given a
12:32:05 20 time period and I think he was trying to perhaps
12:32:09 21 imagine what it is you were asking about.

12:32:13 22 So I think, just so that we get your
12:32:15 23 answer, sir, I am going to invite you to say what
12:32:20 24 you wish to say in addition in response to Mr.
12:32:27 25 Townshend's question, and I will invite him to

12:32:30 1 correct me if I have got it wrong, but the gist of
12:32:33 2 which was whether or not you agreed that the
12:32:35 3 dominance of the Indian Agent was another type of
12:32:38 4 obstacle, or words to that effect.

12:32:41 5 THE WITNESS: I am going to -- Your
12:32:43 6 Honour, I am going to try and relate this material
12:32:47 7 directly to the time frame of these proceedings
12:32:53 8 for --

12:32:53 9 THE COURT: Well, you need to not try
12:32:56 10 so much to do that as to --

12:32:58 11 THE WITNESS: If it will help the
12:32:59 12 Court, and it will certainly explain my report.

12:33:01 13 THE COURT: Okay. Sir, now that we
12:33:03 14 have entered cross-examination, as we have, there
12:33:07 15 is a wide latitude given to counsel and it is not
12:33:11 16 limited, for example, by your report.

12:33:14 17 So what I would ask you to do is rather
12:33:15 18 than trying, as many intelligent people do, to
12:33:20 19 figure out what this is all about, to simply listen
12:33:23 20 to the questions and answer them as best you can.

12:33:26 21 So this question was about certain
12:33:28 22 statements in your book which had their own time
12:33:33 23 periods attached to them in those statements. So
12:33:36 24 you shouldn't feel like you have to attach it to
12:33:38 25 the early part of the 19th century. And if you are

1 not sure what time period you are being asked
2 about, sir, the best approach is to simply ask.
3 All right?

4 Please go ahead, Mr. Townshend.

5 BY MR. TOWNSHEND:

6 Q. My question was, was it a fair
7 statement that the dominance of the Indian Agents
8 was an obstacle to Aboriginal peoples vindicating
9 their rights, and in this particular excerpt you
10 are talking about the latter part of the 19th
11 century and into the 20th century?

12 A. The statements I am making about
13 the Indian Agent, who was a creature of statute and
14 who is a representative of forms of control, had
15 been introduced by statute, by local legislatures.
16 The format of the legislation was to continue the
17 pattern of executive discretion, but this time you
18 get an array of statutory discretions that are in
19 that sense directed, but the sum of the whole is
20 still a world of official discretion.

21 The existence of these discretions -- I
22 am not saying anything here about those powers of
23 agents acting as some curb or prevention of First
24 Nations going to courts. That is an inference that
25 you have taken from my description of the range of

12:35:18 1 their powers.

12:35:20 2 My response would be that if that was
12:35:22 3 occurring in particular cases, that would need to
12:35:26 4 be on the basis of a particular First Nations
12:35:30 5 community and their set of circumstances.

12:35:31 6 What I am saying there is about the
12:35:33 7 powers they hold at large and that is an inference
12:35:37 8 you wish me to draw from the material that I don't
12:35:40 9 think the material that I am saying there can
12:35:42 10 support. I am talking about their powers. I'm not
12:35:49 11 talking about them preventing something from
12:35:51 12 happening. I'm talking about the powers they have.

12:35:53 13 Q. I intend to leave it at what you
12:35:58 14 have written in your book.

12:36:00 15 Can we now go to page 262 of that book,
12:36:08 16 which is PDF page 21 -- 20, sorry. I think there
12:36:27 17 is something a couple of pages down from that as
12:36:30 18 well that was marked. Yes.

12:36:39 19 A. [Witness reviews document.]

12:36:47 20 Q. And my question is here you have
12:36:48 21 talked about Aboriginal people not being -- not
12:36:53 22 having the vote in Canadian elections or provincial
12:36:56 23 elections. Would you agree that that is another
12:37:02 24 kind of example of political disempowerment which
12:37:07 25 affects the ability of Aboriginal people to

1 vindicate their rights?

2 A. Yes, it is an example of the civic
3 disability about which I have been speaking.

4 Q. Thank you. Can we go to section
5 2.1 of your report, and we just made that an
6 exhibit. That is Exhibit 4442.

7 THE COURT: Is there a problem, Mr.
8 Townshend?

9 MR. TOWNSHEND: We are just trying to
10 get the report up and we are --

11 THE COURT: It is 4441.

12 MR. TOWNSHEND: Yes, but we don't have
13 it organized that way.

14 THE COURT: It is W2.

15 BY MR. TOWNSHEND:

16 Q. Thank you. Can we go to section
17 2.1 of that report. So here you are -- well, I'll
18 let you look at 2.1 for a moment.

19 A. [Witness reviews document.]

20 THE COURT: Do you have a question?

21 BY MR. TOWNSHEND:

22 Q. Yes, I do. At the end of that
23 report -- at the end of that paragraph, you are
24 talking about contextualizing Treaty 45 1/2 and you
25 mention that it is necessary for that to look at

1 British relations with tribal people in other
2 regions of the world, including Southern Africa,
3 Australia and New Zealand.

4 Now, I have counted 57 references in
5 your report to New Zealand; does that sound right?

6 A. Probably, yes, that's right. I
7 accept your figures.

8 Q. So I want to ask a little bit
9 about the overall structure of Aboriginal law in
10 New Zealand. And I am not wanting a lot of detail
11 here. I am really wanting you just to tell me if I
12 have got it right or not. I know there is much
13 more detail that you have written about.

14 And perhaps we could make an exhibit
15 your "Aboriginal Title" book, and then if you wish,
16 you can say, well, there is much more detail in the
17 book.

18 THE COURT: This is historical New
19 Zealand law you are asking about, sir?

20 MR. TOWNSHEND: At this point, yes. So
21 that is Exhibit SC1476. This is assorted excerpts
22 from Professor McHugh's book "Aboriginal Title" and
23 I would like that added as an exhibit.

24 THE COURT: Mr. Registrar?

25 THE REGISTRAR: Exhibit No. 4443.

EXHIBIT NO. 4443: Assorted excerpts
from the book authored by Professor
McHugh entitled "Aboriginal Title."

BY MR. TOWNSHEND:

Q. I am putting that in at the moment
just to say I am not asking you to go into that
level of detail, but it is there. I have read your
book. The Court can now read these parts of your
book. So you don't need to repeat what is in your
book.

I am just asking a question about the
rough outlines of Aboriginal law in New Zealand.

THE COURT: When?

MR. TOWNSHEND: I am going to start
with 1840.

THE COURT: All right, please go ahead.

BY MR. TOWNSHEND:

Q. Which was, you talked yesterday, I
believe, about the Treaty of Waitangi?

A. Yes, correct.

Q. And that has become a founding
principle of --

A. Yes, but that is not the starting
point of Aboriginal law in New Zealand. The
starting point would have been some ordinances

12:41:55 1 passed by the New South Wales Assembly,
12:41:59 2 proclamations made by Governor George Gipps
12:42:01 3 indicating that the Crown would not recognize
12:42:04 4 direct purchases of land by British settlers
12:42:06 5 already settled in the New Zealand islands.

12:42:09 6 So the process of establishing a
12:42:14 7 regulatory regime through the Crown begins before
12:42:17 8 the cession of sovereignty, which is on the 6th of
12:42:20 9 February 1840, by the Treaty of Waitangi. And that
12:42:24 10 is not actually -- the actual Proclamation of
12:42:29 11 sovereignty comes some months later from the south
12:42:31 12 island and from the north island.

12:42:33 13 Q. So leaving aside -- you mentioned
12:42:39 14 yesterday differences between the English text and
12:42:43 15 the te reo Maori text. Leaving aside those
12:42:48 16 differences, would you agree that the Treaty of
12:42:50 17 Waitangi is not a land cession treaty?

12:42:53 18 A. This is not a land cession treaty.
12:43:00 19 It is a cession of sovereignty.

12:43:02 20 Q. So acquisition of land by the
12:43:04 21 Crown is something that came later; is that right?

12:43:07 22 A. That's correct.

12:43:08 23 Q. So yesterday I believe you
12:43:12 24 referred to a case called Symonds, which was an
12:43:21 25 1847 decision of the New Zealand Supreme Court, and

1 my understanding of that case is it did recognize
2 Aboriginal title, called it "native title" at
3 common law; is that fair?

4 A. How? How did it do that?

5 THE COURT: Sir, you just have to
6 answer the questions if you --

7 THE WITNESS: No, it didn't. What it
8 recognized was that the Maori could not confer a
9 title upon direct purchases that could be enforced,
10 the Crown. That is not a recognition of Aboriginal
11 title. That case recognizes that settlers cannot
12 confer a title, have a title conferred upon them by
13 direct purchase from Maori. That is the authority
14 of the case, that if it is a choice of title under
15 Crown grant or title by direct purchase, Crown
16 grant will prevail.

17 BY MR. TOWNSHEND:

18 Q. Yesterday you spoke -- I don't
19 want to get too deep into this. I'll leave it at
20 that, in that case.

21 After that there was a line of cases in
22 New Zealand that arose that did not recognize
23 common law Aboriginal title, and I am thinking of
24 Wi Parata; for example?

25 A. There's some cases immediately

1 surrounding Symonds that --

12:44:46 2 Q. Pardon me, I'm having trouble
12:44:48 3 hearing you.

12:44:48 4 A. Sorry, there are some cases
12:44:50 5 immediately surrounding Symonds, so it is not just
12:44:53 6 Wi Parata which comes in 1879. About 30 years
12:44:57 7 after Wi Parata, in fact, there is a constellation
12:44:59 8 of other cases. These cases have been brought to
12:45:01 9 light by recent scholarship, for example, in a
12:45:04 10 series of articles Mark Hickford wrote in the
12:45:09 11 Victoria Law Review, New Zealand has its Lost Cases
12:45:13 12 Project.

12:45:14 13 So more cases have come to light which
12:45:16 14 show substantially the position was that the Maori
12:45:19 15 were under a protective arrangement. They couldn't
12:45:22 16 bring an action themselves on their Aboriginal
12:45:25 17 title. The title was protected by and through the
12:45:27 18 Crown. And Wi Parata confirms that and gives it
12:45:34 19 particular phrases that are used that become
12:45:39 20 embedded in the jurisprudence.

12:45:43 21 Q. Now, in the meantime there were
12:45:46 22 statutes starting with the Native Lands Act in
12:45:49 23 1865?

12:45:50 24 A. 1862.

12:45:58 25 THE COURT: Yeah, it is a challenge in

12:45:59 1 this room, sir, because you have both Mr. Townshend
12:46:01 2 to pay attention to, who is over there, and then I
12:46:05 3 who needs to hear you, along with everyone else,
12:46:07 4 and then a very tiny area to work in in your
12:46:11 5 witness area.

12:46:12 6 So slowing down has helped a lot, but
12:46:15 7 if you could also try and move closer to the
12:46:17 8 microphone, and those two things together, we'll
12:46:22 9 manage. I appreciate your patience with our
12:46:24 10 facilities' challenges.

12:46:26 11 Please go ahead, Mr. Townshend.

12:46:27 12 BY MR. TOWNSHEND:

12:46:28 13 Q. All right, I was asking you about
12:46:29 14 the Native Lands Act that started in the 1860s.
12:46:34 15 They recognized something called Maori customary
12:46:38 16 land which I believe is something similar to
12:46:42 17 Aboriginal title, and that can be an exclusive
12:46:47 18 right if the appropriate custom was proven?

12:46:50 19 A. It is a statutory form of tenure,
12:46:54 20 Maori customary title. That is how Lord Davey and
12:46:58 21 the Privy Council described it, as a statute that
12:47:02 22 presumes a species of tenure known by lawyers and
12:47:05 23 discoverable by them. So customary title is a
12:47:12 24 statutory form of tenure.

12:47:15 25 Q. Okay.

12:47:17 1 A. It is not the equivalent of
12:47:19 2 Aboriginal title. It is a statutory form.

12:47:23 3 Q. I believe you said it is
12:47:25 4 similar -- you have written that it is similar to
12:47:27 5 Aboriginal title?

12:47:27 6 A. Well, it covers an aspect of
12:47:30 7 common law Aboriginal title many, many years later
12:47:34 8 that would come to cover, and it is what in Canada
12:47:37 9 would be called Aboriginal title as opposed to a
12:47:42 10 form of Aboriginal title that was non-exclusive,
12:47:47 11 which here is called Aboriginal rights, in New
12:47:49 12 Zealand had become called non-territorial rights.

12:47:55 13 So customary title reflects one
12:47:59 14 dimension of a native title, and that is the
12:48:02 15 exclusive end of it. But --

12:48:05 16 Q. But I'll ask --

12:48:07 17 A. But it is wholly a creature of
12:48:09 18 statute because it occurs at a time when common law
12:48:13 19 Aboriginal title has never been heard of.

12:48:16 20 Q. I just missed what you were
12:48:18 21 saying.

12:48:20 22 A. Customary title --

12:48:23 23 THE COURT: Sorry, sir, you can just
12:48:24 24 pause for a moment. Mr. Townshend was reading the
12:48:27 25 record.

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THE WITNESS: Oh, sorry.

THE COURT: It is all right.

BY MR. TOWNSHEND:

Q. What this says is that:

"So customary title reflects one dimension of a native title, and that is the exclusive end of it."

Is that what you said? I just didn't hear it.

A. You are suggesting there is a causal relationship between the statute and Aboriginal title. There isn't, because this is a customary recognition that years later, when the common law does recognize an Aboriginal title, gets characterized in that way.

But at a time that the native title and the native lands legislation is passed, there was no common law title to set it against. So you are engaging essentially in a current exercise of comparing a common law with a statutory, and I'm saying that is fine but that is not happening at that time. You just have to remember that. So I am distinguishing contemporary law from the legal history and how a particular legal instrument would have been understood in its time.

12:49:34 1 Q. Can we go to page 202 of this book
12:49:54 2 that is now on the screen, which is PDF 32. And
12:50:04 3 keep going, keep going down a bit. It is the pages
12:50:09 4 following. The next page.

12:50:10 5 Right after footnote 50, it says:

12:50:22 6 "Maori 'customary title' thus
12:50:28 7 became seen as a statutory
12:50:29 8 counterpart to territorial
12:50:31 9 Aboriginal title, half-twins
12:50:32 10 bolstering one another, but their
12:50:34 11 legal being varying slightly because
12:50:35 12 of their different parentage."

12:50:38 13 THE COURT: What is the question? One
12:50:39 14 of the problems we are having is we have got lots
12:50:42 15 of reading with less questions. Before this
12:50:44 16 gentleman answers a question, I would like to hear
12:50:47 17 the question.

12:50:48 18 BY MR. TOWNSHEND:

12:50:49 19 Q. So I would -- I had understood
12:50:51 20 that as saying that what the statutes in New
12:50:56 21 Zealand called "Maori customary title" is somewhat
12:51:00 22 similar to what is now called Aboriginal title?

12:51:02 23 A. Well, this passage just makes the
12:51:05 24 point exactly that I have been saying, that that
12:51:08 25 occurs in a world where Aboriginal title exists

12:51:15 1 where that form of retrospection is possible from
12:51:17 2 that legal juncture, so that is how that happens.
12:51:20 3 So we in the modern world have common law
12:51:23 4 Aboriginal title. They have territorial and
12:51:25 5 non-territorial forms. We look back into the past.
12:51:28 6 We see a statute and we say that statute recognizes
12:51:33 7 the territorial form and calls it "Maori customary
12:51:37 8 title."

12:51:37 9 So from a perspective in the present,
12:51:39 10 we look back and we characterize a past statute.
12:51:42 11 That is the modern approach. But if we are in that
12:51:44 12 time and we are considering the Native Titles Act
12:51:50 13 in 1865, it is completely statutory because it
12:51:55 14 inhabits a world where the common law has not given
12:51:58 15 the spectrum that the Supreme Court of Canada gives
12:52:04 16 or that the recognition of Aboriginal title becomes
12:52:07 17 in the Ngati Apa case.

12:52:09 18 So Ngati Apa, that statement there
12:52:14 19 occurs in a world where common law has recognized
12:52:17 20 and has been articulating Aboriginal title for
12:52:22 21 several years, and that is the New Zealand location
12:52:27 22 of that in time and place.

12:52:29 23 So I just want to repeat the point that
12:52:33 24 how we view particular legal instruments will
12:52:36 25 always be a function of time and place, and so that

12:52:40 1 comparison is possible in an early 21st century
12:52:43 2 time and place.

12:52:45 3 The perspective of an 1865 statute has
12:52:52 4 to be 1865 or anywhere along a time after that and
12:52:56 5 will always be the perspective of that time and the
12:52:58 6 legal possibilities that exist or don't exist.

12:53:05 7 Q. Professor McHugh, you can answer
12:53:06 8 these questions as you like. I mean, you are
12:53:09 9 answering questions I am not asking you, but --

12:53:11 10 A. Well, it is important to
12:53:12 11 establish --

12:53:13 12 Q. That is fine --

12:53:14 13 A. I wanted to make the points about
12:53:16 14 method.

12:53:17 15 Q. I understand. I am just saying.
12:53:19 16 So you mentioned Ngati Apa a minute ago. That was
12:53:23 17 a decision of the New Zealand Court of Appeal in
12:53:26 18 2003; is that right?

12:53:27 19 A. Correct.

12:53:27 20 Q. That was at the time the highest
12:53:31 21 court in New Zealand, wasn't it?

12:53:33 22 A. Well, there were appeals to the
12:53:35 23 Privy Council.

12:53:36 24 Q. That's right.

12:53:37 25 A. But in New Zealand, yes.

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Q. And those appeals to the Privy Council have since been discontinued?

A. That's right. We have the New Zealand Supreme Court.

Q. And the New Zealand Supreme Court established?

A. Correct.

Q. And all of the judges who sat on Ngati Apa have been on the Supreme Court of New Zealand?

A. That's right.

Q. So Ngati Apa, I believe you have even mentioned in your report that it accepted the possibility of common law Aboriginal title to the foreshore and seabed?

MR. FELICIAN: Your Honour, are we now, it seems to me, straying into the area of contemporary law? This was a decision from 2003, and the cases - I think we have sort of had this discussion before - speak for themselves and can be presented to the Court.

THE COURT: Mr. Townshend?

MR. TOWNSHEND: I don't need to ask a question about Ngati Apa. It forms part of a narrative I am trying to get at. We talked

12:54:40 1 yesterday about a couple of New Zealand statutes
12:54:42 2 and I wanted to try to explain the sequence of
12:54:48 3 events which started with Ngati Apa and led to, you
12:54:53 4 know, the first of these statutes and/or other
12:54:56 5 legal events that interceded that came to the
12:54:59 6 second statute.

12:55:00 7 I wanted to give a narrative of that.
12:55:04 8 Is that absolutely necessary? I mean, probably
12:55:06 9 not, but this witness is here and I thought that
12:55:09 10 this would be the kind of focussed and relatively
12:55:12 11 brief inquiry that we could have.

12:55:17 12 THE COURT: Well, the specific question
12:55:19 13 was a question that called for a legal opinion
12:55:23 14 about the judicial decision itself as opposed to a
12:55:32 15 narrative. But I appreciate if you are trying to
12:55:37 16 tell a story, that that might be a helpful step.

12:55:40 17 The two statutes are going in on
12:55:43 18 consent and they speak for themselves, so I am not
12:55:49 19 sure -- I am not sure what you are planning on. I
12:55:55 20 have some reservations, as I indicated in my ruling
12:55:58 21 yesterday, about the extent to which we want to be
12:56:03 22 getting into some of these matters, which has
12:56:07 23 nothing to do with you, sir, but to do with the
12:56:09 24 rules of this Court.

12:56:11 25 What I am going to do is I'm going to

12:56:15 1 take the lunch break now. Before I adjourn, I will
12:56:19 2 ask you to look at those questions that you had
12:56:26 3 hoped to ask about this and ask yourself two
12:56:29 4 questions.

12:56:29 5 One, is it really asking questions
12:56:35 6 about the current domestic law of New Zealand
12:56:41 7 rather than historical facts. And I know the line
12:56:46 8 is difficult to draw sometimes.

12:56:47 9 And the other is what it is you are
12:56:55 10 hoping to get from all of this.

12:56:56 11 So I am going to permit you to proceed
12:56:59 12 as you see fit, subject to, you know, any
12:57:02 13 objections to the questions that you may ask, but
12:57:07 14 it does concern me somewhat because -- well, for
12:57:14 15 the reasons I have given yesterday, which have
12:57:16 16 nothing to do with this gentleman at all but with
12:57:20 17 our evidentiary rules here in Canada.

12:57:21 18 So we'll break for lunch now.

12:57:23 19 Now, sir, our rules in this Court
12:57:30 20 require that any witness under cross-examination,
12:57:32 21 as you now are, has a very clear and comprehensive
12:57:42 22 restriction that you are not permitted to engage
12:57:46 23 yourself in any way or talk to anyone here or
12:57:49 24 elsewhere about the subject matter of your
12:57:53 25 evidence, nothing. Okay?

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THE WITNESS: Yes.

THE COURT: I am sure you have many other things you wish to converse about. I have permitted witnesses in cross-examination to lunch with the counsel who called them and, having done that with Plaintiffs' witnesses, I am going to continue to permit that because I know that counsel on this case are very familiar with their ethical obligations and will not engage you or invite you to engage in a discussion about any aspect of these proceedings.

So I just want to remind you of that, sir. I have been reminding other witnesses as well.

And we'll resume at 2:15.

-- RECESSED AT 1:00 P.M.

-- RESUMED AT 2:18 P.M.

THE COURT: Before we begin or continue, sir, I just wanted to -- I have thought about it over lunch, just to recap for the benefit of our expert, a couple of things before we continue.

First of all, our expert should be reassured that, subject to an objection, if he is able to answer a question, he should go ahead and

14:20:47 1 do so.

14:20:50 2 So, Professor, you need not be the
14:20:52 3 person who is managing the boundaries of your
14:20:55 4 testimony, okay. So if you are able to answer a
14:20:57 5 question, please go ahead and do so.

14:20:59 6 THE WITNESS: Thank you.

14:21:00 7 THE COURT: The second thing I wanted
14:21:01 8 to point out is that if someone stands up in the
14:21:03 9 audience, one of the lawyers, that is the
14:21:06 10 indication of an objection, and at that point you
14:21:10 11 should pause until a ruling has been made.

14:21:12 12 The third thing I want to say is my
14:21:16 13 understanding, Mr. Townshend, is this sort of area
14:21:19 14 is not the main focus of your cross-examination, as
14:21:22 15 you told me yesterday, and obviously it is up to
14:21:28 16 you how you proceed, but I hope it doesn't become
14:21:33 17 the main focus of your cross-examination.

14:21:36 18 So please go ahead.

14:21:38 19 BY MR. TOWNSHEND:

14:21:38 20 Q. Thank you, Your Honour. I have
14:21:39 21 re-jigged the way I wanted to approach this.

14:21:42 22 Can we go to Professor McHugh's report,
14:21:45 23 please, and to paragraph 1.4. So in the middle of
14:22:02 24 that paragraph it says:

14:22:06 25 "I returned to this (first)

14:22:11 1 field of contemporary common law
14:22:13 2 Aboriginal title during the
14:22:15 3 foreshore and seabed controversy in
14:22:18 4 New Zealand when the Court of Appeal
14:22:19 5 (2003) endorsed a suggestion I had
14:22:21 6 made years earlier that there
14:22:23 7 remained unextinguished customary
14:22:25 8 property rights along the
14:22:27 9 coastline."

14:22:27 10 Is that referring to Ngati Apa?

14:22:29 11 A. Yes.

14:22:29 12 Q. Now I would like to -- we have
14:22:33 13 talked earlier about the two pieces of legislation
14:22:36 14 that followed Ngati Apa, and I have had consent to
14:22:39 15 make those exhibits, so I would like to do that.

14:22:42 16 First is SC1461. This is the New
14:23:00 17 Zealand Foreshore and Seabed Act 2004, and I would
14:23:03 18 like that made an exhibit.

14:23:04 19 THE COURT: Mr. Registrar?

14:23:09 20 THE REGISTRAR: Exhibit No. 4444.

14:23:00 21 EXHIBIT NO. 4444: New Zealand
14:23:00 22 Foreshore and Seabed Act 2004.

14:23:13 23 THE COURT: Thank you.

14:23:17 24 MR. TOWNSHEND: And the second one is
14:23:19 25 document SC1465.

14:23:30 1 THE COURT: Can you describe that for
14:23:31 2 the record, please?
14:23:32 3 MR. TOWNSHEND: That is the Marine and
14:23:33 4 Coastal Area (Takutai Moana) Act 2011 of New
14:23:41 5 Zealand.
14:23:41 6 THE COURT: Mr. Registrar?
14:23:42 7 THE REGISTRAR: Exhibit No. 4445.
14:23:33 8 EXHIBIT NO. 4445: Marine and Coastal
14:23:34 9 Area (Takutai Moana) Act 2011 of New
14:23:48 10 Zealand.
14:23:48 11 BY MR. TOWNSHEND:
14:23:48 12 Q. I would like to go to the preamble
14:23:50 13 of that second Act, which is on PDF page 7. Your
14:24:00 14 Honour, this is the one I have talked about a
14:24:04 15 narrative. This is essentially the narrative, as I
14:24:07 16 understood it.
14:24:07 17 THE COURT: But if the narrative is in
14:24:09 18 the Act, why is it that you are trying to elucidate
14:24:11 19 it a second time?
14:24:13 20 MR. TOWNSHEND: There are -- no, I'm
14:24:14 21 not.
14:24:14 22 THE COURT: All right.
14:24:15 23 MR. TOWNSHEND: I have a couple of
14:24:18 24 questions about the meaning of some words and --
14:24:20 25 THE COURT: Please go ahead. We'll

1 take it one question at a time.

2 MR. TOWNSHEND: Okay. I was hoping to
3 exhibit the documents it refers to. The first
4 thing it refers to Ngati Apa.

5 THE COURT: Is it necessary to do so?
6 I mean, if you wish to --

7 MR. TOWNSHEND: It may not be, but --

8 THE COURT: Is there any objection to
9 doing so?

10 MR. McCULLOCH: No, Your Honour.

11 THE COURT: In that case, please go
12 ahead.

13 MR. TOWNSHEND: That is document
14 SC1459.

15 THE COURT: Mr. Registrar?

16 THE REGISTRAR: Exhibit No. 4446.

17 EXHIBIT NO. 4446: Decision in the New
18 Zealand Court of Appeal in Ngati Apa,
19 et al. v. The Attorney General, et al.

20 THE COURT: All right.

21 BY MR. TOWNSHEND:

22 Q. If we could go back to the
23 preamble to the 2011 Act, the second item refers to
24 the Waitangi Tribunal.

25 Oh, I'm sorry, let me do something else

14:25:32 1 first.

14:25:32 2 On the third to the bottom line of
14:25:37 3 paragraph 2, it refers to three te reo Maori words
14:25:44 4 which I would like Professor McHugh to define. And
14:25:47 5 despite the way it is spelled, I am told that is
14:25:50 6 pronounced "whanau," "hapu" and "iwi," so can you
14:25:58 7 tell us what those words mean?

14:25:58 8 A. "Whanau" means a small, contained
14:26:00 9 family, I guess what we would call the nuclear
14:26:00 10 family.

14:26:01 11 "Hapu" is an extended group.

14:26:03 12 And "iwi" is the tribe.

14:26:08 13 Q. Thank you. Now, it refers to the
14:26:10 14 Waitangi Tribunal. Now, my understanding is that
14:26:13 15 is a permanent Commission of Inquiry in New
14:26:17 16 Zealand; is that right?

14:26:18 17 A. It is a specialist tribunal to
14:26:21 18 hear claims, historical and contemporary, against
14:26:25 19 the Crown.

14:26:25 20 Q. And it is made up of Maori land
14:26:29 21 claim -- land court judges and others?

14:26:32 22 A. And others. The hearings are
14:26:34 23 chaired by judges of the Maori Land Court.

14:26:36 24 Q. So the Waitangi Tribunal decision
14:26:43 25 which it refers to --

14:26:45 1 A. The Waitangi Tribunal issues
14:26:46 2 recommendations, not decisions. It only has the
14:26:49 3 power of decisions in relation to decisions that
14:26:53 4 were made into Crown forestries under previous
14:26:56 5 provisions that are now spent. The Tribunal makes
14:27:00 6 recommendations.

14:27:02 7 Q. It is a report on the Crown
14:27:04 8 foreshore and seabed policy as mentioned there.

14:27:07 9 A. Uhm-hmm.

14:27:11 10 MR. TOWNSHEND: That is at document
14:27:13 11 SC1462. Can we make that an exhibit?

14:27:22 12 THE COURT: What is the date of the
14:27:23 13 document?

14:27:26 14 MR. TOWNSHEND: It is --

14:27:29 15 THE COURT: Mr. McCulloch?

14:27:31 16 MR. McCULLOCH: Your Honour, here we
14:27:33 17 are dealing with not a traditional decision, not a
14:27:36 18 statute, but a recommendation. I think we are
14:27:39 19 moving to the area beyond documents that can speak
14:27:43 20 for themselves, and therefore, I would object to
14:27:46 21 this document as not acting as the basis for any
14:27:50 22 legitimate question for the witness, given his
14:27:54 23 tender.

14:27:58 24 MR. TOWNSHEND: Your Honour, I wasn't
14:27:59 25 planning to ask a question about it. It was

14:28:01 1 referred to in the preamble to the Act and I just
14:28:04 2 wanted to make it an exhibit.

14:28:05 3 THE COURT: Well, Mr. McCulloch, the
14:28:08 4 relevance of this material may be the subject of
14:28:12 5 argument, but I don't think there is any question
14:28:14 6 that it is what it says it is and I am going to
14:28:17 7 permit it to be marked as an exhibit. What is the
14:28:19 8 next number, sir?

14:28:20 9 THE REGISTRAR: Exhibit No. 4447.

14:28:20 10 EXHIBIT NO. 4447: Document entitled
14:28:20 11 "Report on the Crown's Foreshore and
14:28:29 12 Seabed Policy."

14:28:29 13 MR. TOWNSHEND: Later on in paragraph 2
14:28:36 14 it speaks of a decision by the United Nations
14:28:40 15 Committee on the Elimination of Racial
14:28:49 16 Discrimination, and that is at document SC1463.
14:29:02 17 Can we make that an exhibit?

14:29:05 18 MR. FELICIAN: Your Honour, my concern
14:29:06 19 now is with relevance. I think how is this
14:29:10 20 relevant to any of the matters that you have to
14:29:12 21 decide? Simply because it is referred to within a
14:29:19 22 document that has already been marked as an exhibit
14:29:22 23 doesn't necessarily mean that every document that
14:29:24 24 it references is then somehow relevant to what you
14:29:27 25 have to decide.

14:29:28 1 THE COURT: There's a number of
14:29:29 2 possible problems, among others being why this
14:29:34 3 gentleman is needed for any of this. Mr.
14:29:41 4 Townshend, it isn't customary to mark a bunch of
14:29:44 5 law this way as evidence in a trial.

14:29:48 6 Having said that, I am perfectly able
14:29:51 7 to treat it for what it is, and I would like this
14:29:54 8 to move forward so we can get to questions for this
14:29:56 9 gentleman, as opposed to this process, which I hope
14:29:59 10 is coming to a quick and speedy end.

14:30:02 11 MR. TOWNSHEND: It is.

14:30:02 12 THE COURT: All right. Mr. Registrar?

14:30:04 13 THE REGISTRAR: Exhibit No. 4448.

14 14 EXHIBIT NO. 4448: Report of the United
15 Nations International Convention on the
16 Elimination of All Forms of
17 Discrimination, Committee on the
18 Elimination of Racial Discrimination,
14:30:15 19 dated 21 February - 11 March, 2005.

14:30:15 20 MR. TOWNSHEND: And I have one final
14:30:17 21 document which is referred to in that paragraph, is
14:30:21 22 a Report of the United Nations Special Rapporteur,
14:30:27 23 that is document SC1464.

14:30:32 24 THE COURT: Is there a date for that
14:30:33 25 document?

14:30:44 1 MR. TOWNSHEND: Yes, that is 2006.

14:30:46 2 THE COURT: I'm assuming, Mr.

14:30:47 3 Feliciant, that you have the same objection?

14:30:49 4 MR. FELICIAN: I do.

14:30:50 5 THE COURT: And I make the same ruling.

14:30:52 6 Mr. Registrar?

14:30:52 7 THE REGISTRAR: Exhibit No. 4449.

14:30:52 8 EXHIBIT NO. 4449: Document headed

14:30:52 9 "Report of the Special Rapporteur on

14:30:52 10 the situation of human rights and

14:30:52 11 fundamental freedoms of indigenous

14:31:09 12 people, Rodolfo Stavenhagen."

14:31:09 13 BY MR. TOWNSHEND:

14:31:09 14 Q. That concludes my section on New

14:31:10 15 Zealand, I'm sure you'll be happy to hear.

14:31:14 16 I go back to Professor McHugh's report

14:31:16 17 -- or, no, not to his report, back to Professor

14:31:20 18 McHugh's book "Aboriginal Societies" which was

14:31:26 19 SC1477 and now is Exhibit 4442.

14:31:55 20 THE COURT: Can you make the top of the

14:31:56 21 page appear, please?

14:32:01 22 BY MR. TOWNSHEND:

14:32:01 23 Q. Yes, I am going to page 153. No,

14:32:07 24 that is the wrong book. The other one. It was

14:32:25 25 1477, at page 153, please, which is PDF 9. Yes, on

14:32:52 1 page 153, the part I have marked:

14:32:57 2 "After 1812 the Indians

14:32:57 3 [...]" --

14:33:03 4 It is speaking here about Upper Canada,
14:33:05 5 that is why the previous page was there:

14:33:07 6 "After 1812 the Indians had

14:33:10 7 learned to negotiate terms so that

14:33:12 8 the rivers and forests remained open

14:33:14 9 and they might continue to hunt and

14:33:16 10 fish. However, those terms tended

14:33:17 11 not to find their way into the

14:33:19 12 documentary record."

14:33:20 13 And I want to take you to one other
14:33:23 14 excerpt before I ask a question, and that is at
14:33:25 15 page 243, PDF 17 of the same book, the part
14:33:40 16 highlighted there:

14:33:41 17 "As commented earlier, the

14:33:43 18 Crown's officials regarded these as

14:33:45 19 real estate transactions but for the

14:33:46 20 First Nations they signified a

14:33:48 21 limited consent to settlement.

14:33:50 22 Certainly they did not agree to any

14:33:52 23 change to their traditional

14:33:54 24 life-style."

14:33:54 25 And then you have a fairly lengthy

1 quote from the Royal Commission on Aboriginal
2 Peoples.

3 So my question, Professor McHugh, is
4 would you agree that Crown officials in Upper
5 Canada in the mid-19th century understood that
6 Indians expected to continue harvesting and their
7 traditional way of life?

8 A. I wouldn't accept that because
9 that is too broad. I would -- the book was written
10 in the early 2000s. My position today would be
11 that arrangements are going to be
12 community-specific and they are going to be
13 location-specific, so to talk about reservation of
14 rights, one has to talk about particular relations
15 with the Crown in which those are occurring.

16 I certainly wouldn't speak in such
17 sweeping terms because one has to -- the Maori term
18 is "take" which means cause of action, and that is
19 not meant in the legal sense. It is meant as the
20 cause that you have with the Crown.

21 You have got to respect the "take" of
22 particular New Zealand "iwi," of nations, by
23 recognizing the individuality and the particular
24 circumstances that give rise to it.

25 So if you are making general statements

14:35:20 1 like that, then these days -- because my
14:35:24 2 familiarity with Canadian material is much, much,
14:35:27 3 much deeper since that book was written, and that
14:35:30 4 is a book that has a very long, arched history.

14:35:34 5 So that would be my position in the
14:35:37 6 particular context that I am sitting in today.

14:35:55 7 Q. Let's go to Professor McHugh's
14:35:57 8 report and paragraph 3.29. Now, this is the text
14:36:36 9 of Treaty 45 1/2?

14:36:38 10 THE COURT: Well, we are not there yet.

14:36:42 11 MR. TOWNSHEND: Sorry.

14:36:42 12 THE COURT: I heard 3.29, is that --

14:36:44 13 BY MR. TOWNSHEND:

14:36:44 14 Q. Yes, 3.29. This is the text of
14:37:01 15 Treaty 45 1/2 which we have been talking about at
14:37:03 16 some length today and we'll be talking about some
14:37:06 17 more. And the second paragraph contains what you
14:37:13 18 have been calling the "forever promise."

14:37:16 19 So I want to leave aside the forever
14:37:19 20 aspect of the promise for a moment and look at what
14:37:26 21 you said in other places of your report about this
14:37:31 22 Treaty.

14:37:32 23 If we could go to paragraph 3.31. Am I
14:38:02 24 in the right -- pardon me for a moment.

14:38:09 25 Ah, yes, at the end of the second line

14:38:22 1 it is saying:

14:38:25 2 "[...] yet the wording simply
14:38:26 3 promised that the Crown would
14:38:28 4 protect the retained land from white
14:38:29 5 encroachments."

14:38:30 6 And later on:

14:38:34 7 "The Treaty did not conflate
14:38:35 8 the Saugeen's present retention of
14:38:37 9 the Peninsula under Crown protection
14:38:45 10 with a promise that it would remain
14:38:47 11 theirs forever [...]"

14:38:49 12 And if you keep that in mind, and I
14:38:51 13 want to go to paragraph 3.33, and in that paragraph
14:39:09 14 it includes the words:

14:39:11 15 "[...] the Saugeen certainly
14:39:12 16 and rightfully regarded the
14:39:15 17 Peninsula as their land at this time
14:39:18 18 [...]"

14:39:18 19 Still keeping that in mind, if we go to
14:39:24 20 paragraph 3.77 and in the middle of that paragraph
14:39:49 21 it says:

14:39:50 22 "Certainly, the Saugeen were
14:39:52 23 spared removal to Manitoulin Island
14:39:54 24 and their present rights over the
14:39:55 25 Peninsula were assured."

14:39:57 1 So, Professor McHugh, leaving aside the
14:40:01 2 temporal scope of the promise, do you agree that
14:40:07 3 Lieutenant Governor Bond Head at Treaty 45 1/2
14:40:10 4 promised to protect the peninsula from white
14:40:12 5 encroachment for the Saugeen?

14:40:14 6 A. Could you say that again, please?

14:40:18 7 Q. Do you agree that Bond Head at
14:40:24 8 Treaty 45 1/2 promised to protect the peninsula from
14:40:27 9 white encroachment for the Saugeen?

14:40:28 10 A. Yes.

14:40:30 11 Q. Now, moving to the temporal aspect
14:40:48 12 of that promise, you have given the opinion and it
14:40:54 13 is in your report and you have said it today, that
14:40:57 14 the protection promise was intended to be temporary
14:41:01 15 by the Crown?

14:41:03 16 A. Not that it was intended to be
14:41:04 17 temporary, but that the capacity to determine what
14:41:08 18 "forever" would mean was with the First Nations.
14:41:13 19 Temporary suggests that it was the Crown deciding
14:41:15 20 it wasn't going to last very long, whereas the way
14:41:18 21 in which it was conceived was that a decision could
14:41:23 22 be made by the Saugeens when it was presented to
14:41:27 23 them but it was the decision for them to take.

14:41:32 24 So I don't agree with the statement as
14:41:35 25 you presented it. I wouldn't explain it that way.

14:41:40 1 Q. Okay, I want to talk about Bond
14:42:00 2 Head's intentions. If we go to paragraph 3.36 of
14:42:09 3 your report, so this is from Bond Head's
14:42:30 4 Memorandum, which we have and you have been
14:42:32 5 discussing at some length, and one of the things
14:42:37 6 that this says about Bond Head is he thought that
14:42:42 7 the Indians could not be taught to farm?

14:42:45 8 A. Sorry?

14:42:45 9 Q. He thought Indians could not be
14:42:47 10 taught to farm; is that fair?

14:42:49 11 A. He expressed that, yes, correct.
14:42:56 12 He said generally speaking, so --

14:42:58 13 Q. Yes. And if we go to 3.37, Bond
14:43:16 14 Head essentially wanted them out of the way of
14:43:19 15 settlement, which he is expressing here in this
14:43:22 16 quote as for their benefit; is that a fair
14:43:28 17 statement?

14:43:28 18 A. I wouldn't quite agree. I
14:43:35 19 wouldn't put it the way you did because that
14:43:37 20 suggests that Bond Head's motives were entirely
14:43:41 21 cynical. I think he honestly believed that this
14:43:47 22 would be the best policy. Implicitly he is taking
14:43:52 23 a dying pillow approach, and I am certainly not
14:43:55 24 defending his position --

14:43:56 25 Q. Sir, I am having trouble hearing

14:43:59 1 you. Please slow down.

14:44:00 2 A. I think to say that he wanted them
14:44:03 3 out of the way, as you said, is taking a cynical
14:44:05 4 view, because when one reads his account, it is
14:44:10 5 also considered and he believes it is a principled
14:44:13 6 approach and that it has the best interests of
14:44:17 7 First Nations as well as of Imperial interests.

14:44:22 8 So he is not taking a cynical view of
14:44:26 9 it. I think that is the way in which modern eyes
14:44:30 10 would read it.

14:44:31 11 Q. I wasn't intending to express that
14:44:34 12 he was being cynical about it. I was asking that
14:44:38 13 he wanted them out of the way of the settlement and
14:44:40 14 he thought that was for their benefit?

14:44:42 15 A. Well, to say they want someone out
14:44:44 16 of the way like that, it carries a cynical
14:44:47 17 overtone.

14:44:47 18 Q. All right. What he said --

14:45:03 19 A. He said:

14:45:04 20 "[...] the greatest kindness we
14:45:06 21 can do them is to induce them, as I
14:45:08 22 have done, to retreat before what
14:45:09 23 get nay justly term the acursed
14:45:15 24 Progress of Civilization [...]"

14:45:17 25 Q. Yes, that was the point. And in

14:45:22 1 3.28 he also mentions that that is also to the
14:45:30 2 benefit of settlers. Just past the middle of that
14:45:54 3 he said that the surrender of the Saugeen tract
14:45:59 4 "has long been a Desideratum in the Province."

14:46:02 5 A. And he adds his confidence that
14:46:04 6 the Indians:

14:46:05 7 "[...] when settled by us in
14:46:06 8 the Manner I have detailed, will be
14:46:08 9 better off than they were, that the
14:46:11 10 Position they will occupy can bona
14:46:14 11 fide be fortified against the
14:46:15 12 Encroachments of the Whites [...]"

14:46:15 13 So he was also believing it was in the
14:46:17 14 First Nations' best interests as well.

14:46:20 15 That is what he is writing, so one
14:46:24 16 takes it that he genuinely believed that.

14:46:27 17 Q. So in order to fulfil that
14:46:37 18 purpose, he generally picked places that were
14:46:39 19 unsuited for agriculture. If we can go to 3.27 --

14:46:50 20 A. Could you repeat that question
14:46:51 21 again, the statement you just made?

14:46:53 22 Q. I'll take you to 3.27.

14:46:55 23 THE COURT: Yes, I didn't understand it
14:46:59 24 either. Perhaps you could repeat it after you go
14:47:01 25 to your document. Paragraph 3.27.

14:47:05 1 BY MR. TOWNSHEND:

14:47:05 2 Q. 3.27, and in the middle of that
14:47:10 3 paragraph he is talking about Manitoulin here, but
14:47:14 4 he said it had:

14:47:16 5 "the double Advantage of being
14:47:19 6 admirably adapted to them," being
14:47:21 7 Aboriginal people, "(inasmuch as it
14:47:23 8 affords Fishing, Hunting,
14:47:25 9 Bird-shooting, and Fruit), and yet
14:47:26 10 in no Way adapted to the White
14:47:28 11 Population."

14:47:28 12 My point is that he picked places for
14:47:31 13 Aboriginal people to go according to his removal
14:47:34 14 policy, as you have been describing this morning,
14:47:38 15 that were unsuited for agriculture?

14:47:40 16 A. He is not framing it that way. He
14:47:45 17 is framing it in terms of its advantage to them,
14:47:49 18 which is it affords fishing, hunting, bird-shooting
14:47:52 19 and fruit, so he is not terming it -- framing it in
14:47:55 20 terms of an absence of land for agriculture so much
14:47:58 21 as the presence of fishing, hunting, bird-shooting
14:48:03 22 and fruit.

14:48:05 23 Q. And right after that he says:

14:48:08 24 "[...] and yet in no Way
14:48:10 25 adapted to the White Population

14:48:11 1
14:48:11 2
14:48:12 3
14:48:24 4
14:48:26 5
14:48:27 6
14:48:37 7
14:48:42 8
14:48:48 9
14:48:49 10
14:48:51 11
14:48:53 12
14:48:56 13
14:49:00 14
14:49:02 15
14:49:03 16
14:49:05 17
14:49:08 18
14:49:16 19
14:49:19 20
14:49:19 21
14:49:23 22
14:49:26 23
14:49:30 24
14:49:33 25

[...]?"

A. Correct.

Q. Now, if we go to paragraph 3.30 --

THE COURT: You mean 3.30?

BY MR. TOWNSHEND:

Q. Yes. You are quoting here an account from Evans, and in the middle of that, in that paragraph, and he is describing the peninsula, he speaks of:

"[...] the granite rocks, and bog land of the Northern peninsula."

So I am suggesting that the peninsula is one of those places that had a considerable amount of land that was not suited to agriculture?

A. If we are going to rely upon this statement, we need to recognize the context in which those words are being said. They are being said by a missionary with an ax to grind about the effect of the cession on lands in the Saugeen tract.

So the angle that he is taking is based upon a particular attitude towards what has occurred in Treaty 45 1/2.

Q. Are you suggesting that the northern part of the peninsula, that that doesn't

14:49:35 1 describe the northern part of the peninsula?

14:49:36 2 A. Well, we have the Stinson account
14:49:38 3 that follows and that talks of some much excellent
14:49:45 4 lands, good fisheries. So the quality of the land
14:49:54 5 is -- they had been sent to land that, the evidence
14:50:00 6 suggests, the officials felt was acceptable for the
14:50:05 7 purposes of the policy. There is some that put a
14:50:12 8 negative spin, some put a positive spin on it.

14:50:14 9 To say that they were deliberately sent
14:50:21 10 to poor or second-rate land, as I am detecting in
14:50:26 11 the way in which you are presenting these
14:50:29 12 questions --

14:50:30 13 Q. Well, Professor McHugh, please
14:50:31 14 don't try to anticipate my questions. Wait until I
14:50:33 15 have asked them --

14:50:34 16 THE COURT: Well, allow the gentleman
14:50:35 17 to finish his answer and then --

14:50:37 18 BY MR. TOWNSHEND:

14:50:37 19 Q. I'm sorry.

14:50:38 20 A. When questions are framed they
14:50:43 21 wanted to get rid of First Nations, that to me is a
14:50:45 22 loaded statement because it suggests the intention
14:50:48 23 was primarily to that end, that that was his
14:50:55 24 governing intention, and the words that you are
14:50:58 25 using in describing what is happening are not

14:51:02 1 consistent with that being an overriding or a
14:51:05 2 dominant intention of the Governor, Lieutenant
14:51:10 3 Governor at the time.

14:51:11 4 So I feel I need to address that
14:51:13 5 because the historical evidence does not show or
14:51:18 6 does not support an approach like that. And people
14:51:26 7 criticized Bond Head, but I think we also have to
14:51:29 8 give him some due where possible where we might see
14:51:41 9 that it is owed.

14:51:42 10 Q. Professor, this is not intended as
14:51:46 11 a criticism of Bond Head. I am asking you about
14:51:49 12 the character of the land, and we have evidence
14:51:55 13 discussing the northern part of the peninsula as
14:51:58 14 being "granite rocks and bog land," and we have
14:52:02 15 Stinson speaking of some good land. Those could
14:52:07 16 both be true: the northern is not good for
14:52:10 17 agriculture, the southern is; is that fair?

14:52:15 18 A. That is my point, the land is
14:52:17 19 mixed. The quality of the land is not the
14:52:21 20 governing factor or feature. Comments occur, but
14:52:28 21 it is not -- the nature of the land is not
14:52:33 22 operating determinatively in the way in which
14:52:40 23 officials are thinking.

14:52:45 24 Q. Can we go back to 3.28.

14:53:16 25 THE COURT: I keep correcting you, sir,

14:53:18 1 because I'm anxious that the record be easy for
14:53:20 2 other people to read.

14:53:23 3 MR. TOWNSHEND: 3.28.

14:53:25 4 THE COURT: Thank you. This particular
14:53:26 5 report doesn't go that long, but some of them do,
14:53:28 6 and we don't want to be confused.

14:53:30 7 BY MR. TOWNSHEND:

14:53:38 8 Q. And near the end of that
14:53:44 9 paragraph, this is Bond Head added his confidence
14:53:50 10 that the Indians:

14:46:05 11 "[...] when settled by us in
14:46:06 12 the Manner I have detailed, will be
14:46:08 13 better off than they were, that the
14:46:11 14 Position they will occupy can bona
14:46:14 15 fide be fortified against the
14:46:15 16 Encroachments of the Whites [...]"
14:54:04 17 That particular point I am making.

14:54:08 18 So I am suggesting, considering that
14:54:11 19 and considering Bond Head's belief that the Indians
14:54:15 20 would be hunting and fishing and trapping for a
14:54:19 21 long time, that he would have considered, that Bond
14:54:23 22 Head would have thought that the peninsula would be
14:54:26 23 protected for them in the long term, shall we say?

14:54:31 24 A. He might have thought that. We
14:54:32 25 don't know what he might have thought, but what we

14:54:36 1 do know is that he thought that at the time they
14:54:38 2 were well settled and that they were better off by
14:54:41 3 that arrangement. His thoughts as to the duration
14:54:46 4 of the relationship remain speculative.

14:54:48 5 Q. Well, he said "forever"?

14:55:08 6 A. Well, at the time no one was
14:55:12 7 thinking about, no one was arguing about, no one
14:55:14 8 was contesting what "forever" meant. It wasn't
14:55:18 9 regarded as an issue or as problematic, certainly
14:55:24 10 within official circles, because if it was, there
14:55:26 11 would have been discussion about that.

14:55:27 12 And so he is happy with the arrangement
14:55:31 13 as it stands, and we see from other material that
14:55:36 14 "forever" means as long as or until they wished to
14:55:39 15 sell. The same principle applies to European
14:55:43 16 ownership of property.

14:55:44 17 So they would think that. So I can't
14:55:49 18 speculate on how long he would have thought it was
14:55:51 19 going to last because there is no evidence to base
14:55:58 20 an assessment of attention on, but there is
14:56:03 21 statements about how well it fits the present
14:56:07 22 situation. You can certainly see that he says
14:56:14 23 that.

14:56:15 24 Q. Well, let's go to paragraph 3.74
14:56:21 25 of your report, and down near the bottom of that

14:56:51 1 page, you speak of:

2 "[...] the facility with which
3 Bond Head attuned his speech 'to the
4 Idiom of the Indian language',
5 capturing 'their Attention and
6 Confidence' in a way that would
7 'doubtless be remembered and
8 frequently repeated in the Depths of
14:57:12 9 the Wilderness.'" 10

14:57:12 10 A. Right.

14:57:13 11 Q. So he was trying to speak to them
14:57:17 12 in a way they would understand, and that would be
14:57:21 13 in order to get them to agree to the Treaty; fair?

14:57:23 14 A. What I am describing there is the
14:57:29 15 impression that he made upon the missionaries that
14:57:31 16 were there and these are the accounts of how Bond
14:57:35 17 Head presented it.

14:57:35 18 Now, the impact of that one can
14:57:41 19 imagine, but we have a record of the impact that it
14:57:45 20 made upon his colleagues, and so that is what I am
14:57:47 21 recording. I am not saying that he actually
14:57:52 22 performed that way. These are accounts. They
14:57:54 23 might not be accurate in terms of the effectiveness
14:57:57 24 of his statement, but he was reported, he is
14:58:02 25 reported as having done that.

14:58:04 1 So I would say that there is a report
14:58:08 2 of what he did. I am reporting. I am not saying
14:58:13 3 he spoke well. I wasn't there.

14:58:14 4 Q. I am suggesting to you that when
14:58:22 5 he said "My Children, I will protect your lands for
14:58:26 6 you forever," he would have meant, he would have
14:58:34 7 expected that to mean the long term? Now, I am not
14:58:38 8 trying to get into a question of whether the
14:58:41 9 Saugeen could decide otherwise later. That is not
14:58:43 10 the point of my question.

14:58:44 11 A. But that is speculation about what
14:58:46 12 he would have believed, and anyone can make that
14:58:49 13 speculation. You don't need to be an expert to do
14:58:51 14 that. But it is not historical evidence because
14:58:58 15 you read something someone says and anyone can
14:59:01 16 speculate on what intentions are harboured within a
14:59:06 17 statement like that.

14:59:06 18 Q. Well, I would suggest to you if he
14:59:09 19 didn't mean the long term and he said "forever,"
14:59:13 20 that would have been deceitful?

14:59:15 21 A. They weren't thinking about the
14:59:17 22 term, that's the point. We don't have any evidence
14:59:19 23 to show what they were thinking of the duration of
14:59:23 24 the promise. They certainly weren't going and
14:59:30 25 saying it would be next week or next month, but

14:59:32 1 they had no concept. It was until they wanted to
14:59:35 2 sell, is the indication that we do get from the
14:59:38 3 documentary record that we can say -- from which we
14:59:42 4 can construct some idea of the official conception
14:59:45 5 of the span.

14:59:48 6 But reading statements into "my
14:59:51 7 children" and from "my children" extrapolating
14:59:55 8 "forever" means a long, long time, I am not
14:59:57 9 prepared to do that because that is reading into
15:00:02 10 statements more than their ultimate weight can
15:00:11 11 bear. There is nothing in the statement "my
15:00:14 12 children" that suggests it would be a very long
15:00:16 13 time. There has to be something more and something
15:00:20 14 he says for that to be a conclusion based upon
15:00:23 15 evidence.

15:00:23 16 Q. He said "forever."

15:00:26 17 A. Yes, but what did "forever" mean,
15:00:29 18 and we have the surrounding --

15:00:31 19 Q. Well, I am trying --

15:00:32 20 A. "Forever" means until you are
15:00:35 21 willing to sell.

15:00:36 22 Q. That is not the point I am trying
15:00:38 23 to make. We can get to that in a minute. I am
15:00:44 24 talking about Bond Head's intention at the time.
15:00:49 25 When he said "forever" --

15:00:51 1 A. Someone has to --

15:00:53 2 THE COURT: Sir, you have to wait until
15:00:55 3 he finishes the question.

15:00:56 4 BY MR. TOWNSHEND:

15:00:57 5 Q. When he said "forever" in the
15:00:58 6 context of trying to get them to agree to a Treaty,
15:01:04 7 either he meant that was a long time or he was
15:01:07 8 deceiving them, and you are saying you don't know
15:01:09 9 which that is?

15:01:10 10 A. You are putting it in terms of an
15:01:18 11 either/or, which is not how I am seeing it and how
15:01:22 12 I am describing in my report, so that is a
15:01:23 13 reductive approach.

15:01:26 14 When he said it will be yours forever,
15:01:33 15 there was no discussion or conceptualization of how
15:01:41 16 long forever would be. It was not problematized at
15:01:46 17 the time. Now, you could say it would have been
15:01:48 18 expected that would have been a long time, and I
15:01:50 19 think generally people might have agreed, well, it
15:01:52 20 is not going to be this year, next year, but they
15:01:54 21 are not thinking in terms of how far ahead or what
15:01:56 22 the future is going to bring many years hence
15:02:02 23 because "forever" is taken as meaning until you
15:02:07 24 wanted to sell.

15:02:09 25 And that becomes clear in the Macaulay

1 Report and in the documentation that we saw this
2 morning, and that was the understanding that the
3 official records, the archives, disclose, so much
4 as we can extract one.

5 Q. I am trying to tease apart Bond
6 Head's intentions and --

7 A. Well, there is limited evidence.

8 Q. I am trying to tease apart Bond
9 Head's intentions and the intentions of colonial
10 officials more generally. Now, I am not sure if
11 you make that distinction in your report or not.
12 Do you see those things as the same or different?

13 A. Well, Bond Head was appointed to
14 be the instrument of Imperial policy. As it was,
15 he went off on his own course because he wanted --
16 he decided that the policy needed redirecting and,
17 of course, he advocated the policy of removal.

18 If he is thinking about anything, that
19 is what he is thinking about. He is not thinking
20 about how long forever is because that is a
21 concession he has made and he is still pursuing
22 what for him is the main aim, the bigger prize,
23 which is the settlement on Great Manitoulin Island
24 and the removal policy.

25 Now, even with this, one can see that

15:03:47 1 it is beginning to come undone, but that is Bond
15:03:51 2 Head's overriding concern.

15:03:54 3 Now, the context in which Bond Head is
15:03:58 4 considering this policy is coming in a decade in
15:04:02 5 which policy for First Nations has been, so to
15:04:05 6 speak, on the table. It has been on the table in
15:04:08 7 the Select Committee in Westminster. It has been
15:04:13 8 on the table in the report of the Lower Canada
15:04:17 9 Executive Report that Glenelg relies upon and comes
15:04:21 10 very soon after the Treaty 45 and soon after
15:04:27 11 Macaulay will be writing.

15:04:29 12 So it is a period when options are
15:04:31 13 being discussed, and so he seems -- he obviously
15:04:36 14 felt that this was an initiative that is consistent
15:04:41 15 with that type of activity, except Governors can't
15:04:45 16 do that. Governors don't introduce policy like
15:04:50 17 that, and that soon becomes discovered.

15:04:55 18 The response that Glenelg takes is
15:04:57 19 initially accepting, cautious, and that changes.
15:05:02 20 Bond Head realizes he needs to mount a defence.
15:05:07 21 His August dispatch is pretty perfunctory, not rich
15:05:12 22 on detail, and then in November he sends along a
15:05:19 23 dispatch, a report that is essentially a
15:05:23 24 justification for what he has done and for the
15:05:26 25 policy. It makes no reference to questions of

1 textual meaning, what does "forever" mean, or to
2 process. Process and textual meaning are not being
3 contested at that time.

4 The historical issue is the policy, the
5 question of removal.

6 Q. I understand your report -- the
7 way I understand it, it is mostly about saying what
8 the colonial understanding of "forever" would be.
9 Now, I am trying to tease apart if you thought, if
10 you have an opinion on whether what Bond Head
11 intended was different in that respect than what
12 the colonial officials in London thought?

13 A. You are trying to find an
14 intention where substantially none exists, because
15 there is no evidence that attention was turned
16 towards thinking about what "forever" was going to
17 mean.

18 Q. I am not talking about what
19 happened afterwards.

20 A. Well, at the time.

21 Q. I am talking about at the Treaty,
22 he said "forever"?

23 A. He said "forever" but there is no
24 discussion of what "forever" meant. So it wasn't
25 regarded as problematic. It is problematic to us

15:07:03 1 now, but not to them. So because it wasn't an
15:07:07 2 issue with them, there's no emitting conduct,
15:07:16 3 statements that would disclose what is an issue for
15:07:20 4 us today but which was not an issue for them at the
15:07:23 5 time.

15:07:23 6 Q. Now --

15:07:24 7 A. Now, that might be unsatisfactory
15:07:27 8 for us, but they don't give us the answer, so we go
15:07:29 9 in and we look for intention and we try and develop
15:07:32 10 a concept of intention, but historically speaking,
15:07:37 11 they didn't turn their minds to the question of
15:07:39 12 what does "forever" mean, how long is it going to
15:07:41 13 be. That is not a question that is exercising
15:07:46 14 their thinking at the time.

15:07:47 15 Q. Who is the "them" and "their"? I
15:07:51 16 am confused.

15:07:52 17 A. Well, "them," I mean the circle,
15:07:54 18 the official circle, Bond Head in particular. And
15:08:00 19 even the missionaries, they seemed to have an idea
15:08:04 20 that forever is longer, but there is no actual
15:08:09 21 focussing of Bond Head on what "forever" means, and
15:08:15 22 that is because the Bruce Peninsula is brought in
15:08:17 23 later on, and for him it is the question of the
15:08:22 24 removal policy at large. That is the policy goal
15:08:25 25 he is pursuing.

1 Q. If there is no discussion of what
2 "forever" means, wouldn't that be because everybody
3 took that at face value?

4 A. Well, no, because "forever" meant
5 until you were willing to sell. The basic concept
6 of English property ownership, estate in fee
7 simple, notionally it can run forever and it
8 doesn't, because of the reasons I explained this
9 morning.

10 To say that they would have undertaken
11 a responsibility to hold on to it forever in the
12 face of First Nations' wish to sell, would they
13 have done that? Would they have been required to
14 do that? They weren't thinking that way, no
15 indication that those questions presented
16 themselves, and in the light of thinking about
17 those questions, they developed a position that
18 they, Bond Head and those of his circle and the
19 Executive Council, developed a position on what
20 "forever" meant. They didn't.

21 Q. All right. You have said for some
22 time that the intention of the Crown is that the
23 land be protected until or unless the Saugeen
24 wanted to sell?

25 A. Well, I think that the word

15:10:09 1 "forever" is a word we all hear. I'll love you
15:10:13 2 forever. Now, most people know in that context
15:10:18 3 "forever" is a word to be taken with great caution,
15:10:21 4 in the ordinary run of human affairs, of human --
15:10:25 5 the way we live. "Forever" is a concept that lives
15:10:34 6 at most in an ideal world, but not in most people's
15:10:39 7 real world.

15:10:39 8 So I would say that aspect about
15:10:42 9 "forever" as well, but that is not an expert
15:10:46 10 attribution of meaning. That is a meaning
15:10:49 11 generally that we all might see in the word
15:10:52 12 "forever."

15:10:53 13 Q. I'll try one more question on
15:11:00 14 this. Would it not have been reasonable for Bond
15:11:04 15 Head to believe that when he said "forever," the
15:11:09 16 Saugeen would take that at face value?

15:11:13 17 A. Well, you are asking me to give an
15:11:17 18 account of how the Saugeen would have interpreted
15:11:20 19 or received, and I am not an expert of that kind.
15:11:23 20 I am not in a position to give evidence on how a
15:11:28 21 statement from an official was received and treated
15:11:31 22 within First Nations circles.

15:11:33 23 Q. That wasn't my question, sir. I
15:11:35 24 had asked --

15:11:36 25 THE COURT: Well, in fairness to the

1 witness, I don't know how you could ask a question
2 about what the Saugeen would take at face value
3 without asking the witness to know what the Saugeen
4 would take at face value. So if you could explain
5 to me how that isn't an answer to the question, and
6 maybe I have missed it altogether, but --

7 BY MR. TOWNSHEND:

8 Q. I am saying would it not be
9 reasonable for Bond Head to assume that the Saugeen
10 would take his words literally if he is going to
11 say it?

12 A. That requires us to speculate as
13 to what he believed his impression on them was.
14 That is certainly one way of looking at it.
15 Whether or not Bond Head actually felt or thought
16 that, I don't think you can make any definitive
17 statements.

18 Q. I'll leave it at that. So I am
19 going back to your position that there is a Crown
20 intention to protect the peninsula until or unless
21 the Saugeen consented to something different.

22 Now, if we go to paragraph 3.31 of your
23 report, that is just where it is said there, among
24 other places, at the end of that paragraph:

25 "It is also consistent with the

1 terms of the 1847 Proclamation which
2 I discuss below and wherein there is
3 a clear recognition that the Crown
4 would protect the Saugeen land until
5 they were willing to surrender it to
15:13:43 6 the Crown."

15:13:43 7 Now, if we can go to paragraph 3.26,
15:13:56 8 the closing lines of that paragraph is that Bond
15:14:02 9 Head stressed his careful compliance with the
15:14:05 10 underlying principle of informed consent.

15:14:13 11 So would you agree that the intent to
15:14:18 12 protect the peninsula unless or until the Saugeen
15:14:22 13 decided to consent to something else, that that
15:14:26 14 consent would have needed to be a free and informed
15:14:29 15 consent?

15:14:30 16 A. You are applying contemporary
15:14:35 17 principles of the law of contract there. The way
15:14:37 18 in which you would think about it was informed
15:14:39 19 consent was that we are talking about a procedure
15:14:42 20 internal to the Crown where the Crown determines
15:14:46 21 whether or not the practices, procedures and
15:14:47 22 protocols that it has put in place to protect and
15:14:53 23 to ensure the collective interest of First Nations
15:14:58 24 has been observed and fulfilled by the Crown.

15:15:03 25 So informed consent, whether or not the

1 consent has been regarded as informed is not
2 something a court does or something that is subject
3 to objective determination by some external
4 authority. It means if, in the assessment of the
5 Crown's officers, the consent is informed, then it
6 will be regarded as such.

7 Now, we might criticize that. We are
8 in the 19th century. We are in a different world,
9 a different way of looking at authority and of how
10 authority explains and justifies itself. So we can
11 be critical of that, but that is how they thought,
12 in a deferential age, a paternalistic age, where
13 that kind of assessment would have been made.

14 And Bond Head, when he writes to
15 Glenelg, he talks of -- he goes to lengths to
16 explain that in his view there has been informed
17 consent. So he is not talking about some
18 requirement imposed externally by statute but by a
19 requirement the Crown has set itself and which its
20 officials assess and determine as having been
21 satisfied.

22 Q. I wasn't asking you about the
23 enforceability of that. I was --

24 A. You raised a question about
25 informed consent and whether or not there was

1 informed consent. The way you raised the question
2 was distinctly in the sense of informed consent
3 being an objective requirement that was somehow
4 apart from the assessment of the officials.

5 So I needed to put you historically
6 into a place where we could understand the nature
7 of public authority and be sure what is meant by
8 that term "informed consent" and how we gauge
9 whether or not it is present and who does the
10 gauging.

11 And this is through office and it is
12 the Governor himself. So I wanted to be clear on
13 that.

14 Q. I wasn't asking about informed
15 consent about Treaty 45 1/2. I was asking in your
16 formulation that "forever" would mean until or
17 unless the Saugeen decided otherwise, if their
18 consent otherwise, if we are in 1836, I am talking
19 about intention, I'm not talking about
20 enforceability, in 1836 if the thought was it is
21 until they decide, until they consent otherwise, I
22 am saying would that consent have to be an informed
23 consent?

24 A. As I have stressed, they have not
25 considered what "forever" means. What "forever" --

15:17:49 1 the meaning of "forever" becomes evident pretty
15:17:52 2 soon after in official practice. "Forever" is not
15:17:55 3 a question of textual meaning that is debated and
15:17:59 4 discussed or thought about elaborately by Bond
15:18:03 5 Head, the author of the Treaty, because it is not
15:18:06 6 what the parties are concerning themselves with.

15:18:09 7 So in 1836 there is not that informed
15:18:15 8 view of until they wanted to sell. That is
15:18:16 9 implicit, and it becomes evident, as unarticulated,
15:18:21 10 unrealized, and it becomes evident later in
15:18:24 11 official conduct in the processes of clarification
15:18:28 12 and of the institutional, for want of a better
15:18:33 13 word, reception of the Treaty, its integration into
15:18:36 14 the body of treaties administered by the Indian
15:18:42 15 Department and given annuities, what have you, so
15:18:47 16 -- after 1843.

15:18:55 17 So that meaning is not explicit or
15:18:57 18 consciously there in 1836, but that meaning becomes
15:19:05 19 evident subsequently. I am not defending that. I
15:19:12 20 am explaining that.

15:19:13 21 Q. I am confused now. I thought you
15:19:26 22 have been trying to elucidate the meaning of
15:19:28 23 "forever" was until the Saugeen decide to
15:19:36 24 surrender, and I was asking you, if that is the
15:19:45 25 meaning, would it be understood that that consent

15:19:47 1 would be a free and informed consent?

15:19:50 2 A. We need to identify the time when
15:19:52 3 that meaning was, so to speak, present or when it
15:19:57 4 appeared, because the meaning is not there in the
15:20:02 5 circumstances of 1836, but we have soon after
15:20:08 6 official practice which indicates at least how in
15:20:11 7 official circles "forever" was being regarded.

15:20:15 8 So meaning has to be directed and it
15:20:22 9 has to occur at a particular time. Meaning isn't
15:20:24 10 eternal. It is not some enduring verity that
15:20:28 11 applies. Meaning is always contextual and in 1836
15:20:35 12 Bond Head is not giving -- is not directing his
15:20:39 13 thoughts towards what "forever" means.

15:20:40 14 And then we see in the documents we
15:20:42 15 looked at this morning how the official perception
15:20:46 16 is that well, it is until they want to sell and
15:20:51 17 that becomes embodied in the 1847 Proclamation.

15:20:57 18 So the meaning of "forever" in that
15:21:00 19 sense becomes apparent or, if not apparent, then it
15:21:06 20 becomes implicit from the official understanding,
15:21:10 21 as expressed at the highest level.

15:21:14 22 Q. Are you telling me that you don't
15:21:18 23 know what Bond Head's intention in August of 1836
15:21:22 24 was?

15:21:22 25 A. I don't know what his --

1 intentions have to have a form. What were his
2 intentions? That is just a general question at
3 large which needs to be specific. His intentions
4 with reference to the duration of the "forever"
5 promise, not there. He had other kinds of
6 intentions about removal and what have you, but his
7 intentions specifically towards the time span, the
8 duration of "forever," no evidence to indicate he
9 had any particular idea of what that would mean or
10 for how long.

11 Q. Okay, so this idea of "forever"
12 meaning until the Saugeen decide to surrender is
13 something that happened later, after the Treaty?

14 A. Well, it becomes evident in the
15 statements from Glenelg, for example, that we saw,
16 and the 1847 Proclamation. It is not a conscious
17 process because "forever" has not been
18 problematized. No one is sitting there thinking,
19 oh, what does "forever" mean; how long is that
20 going to be.

21 This question of textual meaning is not
22 an historical issue, is not something that is
23 exciting or exercising the actors at this time.

24 Q. So at whatever point the meaning
25 crystallizes to -- "forever," in your view,

1 crystallizes to until the Saugeen decide to sell,
2 would that decision be expected to be an informed
3 consent?

4 A. Well, the informed consent is to
5 the Treaty, and again, you are using "informed
6 consent" exactly the way I said was historically
7 inappropriate because informed consent is something
8 that the Governor decides at the time of the
9 Treaty. It is not an objective, abstracted
10 principle that is brought to bear upon a set of
11 circumstances in the way that you are doing.

12 So this idea of informed consent that
13 you are using is an idea that comes from the modern
14 law of contract or of public law, of an objective
15 standard, rather than it being what it was, a
16 determination made by the Crown's offices as to
17 whether or not the Crown had met the standards and
18 practices that it had set for itself and its
19 officials to follow in relations with First
20 Nations.

21 THE COURT: Sir, I am going to
22 interrupt you for two reasons.

23 One, because we can have an afternoon
24 break, we don't have to have it right now, but I am
25 also having some difficulty with your questions

15:24:10 1 that use that phrase "informed consent" or you used
15:24:13 2 the phrase "free and informed consent," because
15:24:17 3 this witness earlier and again now explained what
15:24:22 4 in his opinion that meant in the relevant time
15:24:25 5 period, but it also has a legal meaning today which
15:24:33 6 is, at least according to this witness, his
15:24:35 7 evidence, quite different.

15:24:37 8 And in your questions, and I don't mean
15:24:40 9 to fault you because I know you are trying to get
15:24:42 10 somewhere, but you are not specific about whether
15:24:44 11 you are asking him about informed consent as he has
15:24:48 12 indicated it was used in the relevant time period
15:24:54 13 or whether you are asking him about informed
15:24:56 14 consent in today's conception.

15:24:58 15 I don't know which it is, but I would
15:25:01 16 ask you to consider over the afternoon break that
15:25:05 17 if you wish to continue this line of questions,
15:25:07 18 that you need to be specific, because if I don't
15:25:11 19 know which of those two things you are talking
15:25:12 20 about, I don't know what I am going to do with the
15:25:14 21 answer either.

15:25:15 22 All right?

15:25:18 23 MR. TOWNSHEND: I would be happy to
15:25:19 24 take a break now.

15:25:20 25 THE COURT: All right, we'll take 20

1 minutes.

2 -- RECESSED AT 3:26 P.M.

3 -- RESUMED AT 3:50 P.M.

4 THE COURT: Please go ahead.

5 BY MR. TOWNSHEND:

6 Q. We are still there at 3.26. All
7 right, Professor McHugh, I was using the words
8 "informed consent" because you used them in 3.26,
9 but let's go to Bond Head's words about that and we
10 have got that at footnote 58 on that page, if we
11 could go down.

12 A. Yes, the sense in which I was
13 using informed consent was in the manner --

14 THE COURT: Sorry, one thing at a time
15 here.

16 Footnote 58?

17 MR. TOWNSHEND: Yes.

18 THE COURT: All right.

19 BY MR. TOWNSHEND:

20 Q. And this is Bond Head to Glenelg
21 on the 20th of August:

22 "Your Lordship will at once
23 perceive that the Document is not in
24 legal Form, but our dealings with
25 the Indians have been only in

1 Equity; and I was therefore anxious
2 to show that the transaction had
15:50:50 3 been equitably explained to them."

15:50:50 4 Now, I want to unpack if at the point
15:51:01 5 that you say "forever" became crystallized into
15:51:08 6 until the Saugeen decide to surrender --

15:51:13 7 A. "Crystallized" is your word.

15:51:15 8 Q. Pardon me?

15:51:17 9 A. It is not a word I use to describe
15:51:19 10 because --

15:51:19 11 THE COURT: He said it was your word,
15:51:21 12 sir, because you did use different words, I
15:51:24 13 presume, from the ones that the witness had used.
15:51:28 14 Again I am going to ask the Professor to wait
15:51:32 15 until --

15:51:34 16 THE WITNESS: I'm sorry.

15:51:34 17 THE COURT: I am not saying you are
15:51:37 18 wrong, sir, but you should wait until the question
15:51:39 19 is completed.

15:51:40 20 Please go ahead.

15:51:40 21 BY MR. TOWNSHEND:

15:51:41 22 Q. Okay. So at the time that you are
15:51:44 23 saying the forever promise came to be interpreted
15:51:52 24 as until the Saugeen have surrendered --

15:51:55 25 A. I wouldn't use the phrase --

15:51:57 1 Q. I haven't asked the question yet,
15:51:59 2 sir.

15:51:59 3 A. Because that suggests --

15:52:00 4 THE COURT: Well, you have got a red
15:52:02 5 flag with your question, but let the gentleman
15:52:04 6 finish his question, Professor.

15:52:06 7 THE WITNESS: Sorry.

15:52:12 8 BY MR. TOWNSHEND:

15:52:12 9 Q. When that understanding arose,
15:52:15 10 until the Saugeen had decided otherwise, the same
15:52:22 11 principle of it being equitably explained to them
15:52:27 12 would apply; do you agree with that?

15:52:29 13 A. Could you say that again, please?

15:52:31 14 Q. I'm looking at this equitably
15:52:38 15 explained -- I'll go at it at a different angle.

15:52:42 16 "Equitably explained," let unpack what
15:52:49 17 that means. This is Bond Head's words. Does that
15:52:52 18 include it being explained fully and fairly?

15:52:56 19 A. Well, the first thing we have to
15:52:58 20 do is look at who is doing the explaining before we
15:53:01 21 decide what "equitably" means because who is doing
15:53:04 22 the explaining in this case will be the person who
15:53:06 23 will be determining whether or not it has been done
15:53:10 24 equitably, because equitably explained is like
15:53:14 25 informed consent.

1 It is not an abstract, objective
2 principle that is brought to bear upon the
3 interpretation of particular circumstances. It is
4 something that is done by the Crown's officers and
5 who determine whether or not they have equitably
6 explained and performed the duty of protection in
7 this particular exercise, which is the cession, or
8 the particular context in which it is arising.

9 So the problem we need to start with is
10 who is doing the explaining before we get to the
11 equitably, if we want to take an historical view of
12 it.

13 Q. I wasn't asking about
14 enforceability or who would decide that. I was
15 asking about the meaning of what Bond Head says
16 when he says "equitably explained to them" that you
17 have interpreted as being informed consent. What
18 does that mean?

19 A. The -- you used the phrase "the
20 meaning" as though -- the concept of "the meaning"
21 can have different perspectives to it. We have to
22 be careful to understand that in a world where we
23 have Crown officers exercising prerogative
24 authority in a highly stratified, hierarchical,
25 Christianized, established church setting, that the

1 way in which powers will be exercised and who by
2 and in what manner will be quite different to the
3 processes that we are more used to in our
4 democratic culture.

5 So "equitably explained," explained by
6 the officers of the Crown in a manner that
7 satisfied the First Nations that they were being
8 treated equitably and the determination of whether
9 or not the Crown had fulfilled the standards and
10 practices it had set itself was for the
11 determination of its officers and for them to
12 demonstrate it in their communications with London.

13 And that is what we see Bond Head doing
14 in a rather, if not rushed, then in a less full
15 manner in the first dispatch and then more
16 comprehensively, at least in his own mind, in the
17 second one.

18 Q. Bond Head says he is anxious to
19 show that "the transaction had been equitably
20 explained to them," that is to the Saugeen?

21 A. Uhm-hmm.

22 Q. So I am trying to unpack what Bond
23 Head meant by "equitably explained" to the Saugeen.
24 I am not talking about who decided whether it had
25 been done or not. I'm talking about what that

15:56:40 1 means .

15:56:41 2 A. Well, is he also saying that it
15:56:43 3 has been done in this manner? And he is the
15:56:46 4 representative of the Crown who has done it in that
15:56:49 5 manner, so it is also a statement about the
15:56:53 6 performance of office.

15:56:54 7 Q. Are you saying that that phrase
15:57:13 8 doesn't have any -- reflect any objective things
15:57:16 9 that happened on the ground, that Bond Head saying
15:57:20 10 it makes it true?

15:57:21 11 A. Not at all. Not at all. What I
15:57:24 12 am saying is that the officer who makes that
15:57:27 13 determination and who sets and establishes the
15:57:31 14 standards and the practices is the Governor, and
15:57:33 15 that is precisely what he is doing.

15:57:35 16 You are bringing to bear a contemporary
15:57:38 17 idea of the way in which public authority is
15:57:41 18 exercised, and we need to step inside an historical
15:57:44 19 one of office and persona and performance of the
15:57:53 20 requirements of office, and that is what he is
15:57:55 21 doing.

15:57:56 22 Now, to -- the suggestion you are
15:58:01 23 making in a modern sense would mean that someone
15:58:04 24 could stand up and say it wasn't equitably done,
15:58:06 25 you haven't followed the right procedure. That is

15:58:08 1 not happening. But he is consciously conducting
15:58:13 2 himself, or seemed to be, but we don't have a lot
15:58:16 3 of detail about it, but the detail that we have
15:58:19 4 indicates that he is conducting himself with the
15:58:23 5 bearing of the Crown and ensuring or at least being
15:58:29 6 seen to ensure that the standards of fairness and
15:58:36 7 equity have been set.

15:58:37 8 The concept of equity is not equity in
15:58:40 9 the fiduciary or in the equitable jurisdiction
15:58:44 10 Court of Chancery sense. It is equity in the sense
15:58:48 11 of natural justice, fairness and good conscience.

15:58:53 12 And so he is, as you like, the master
15:58:58 13 of ceremonies, the one who sets the procedure, and
15:59:02 14 who then says to the Crown, here, this is the
15:59:05 15 procedure I followed; this is how I did it; it was
15:59:08 16 equitably done; you can rest assured that this was
15:59:12 17 a fair transaction.

15:59:13 18 That is what Governors did. That is
15:59:15 19 the performance of role.

15:59:17 20 Now, we today can be critical of
15:59:21 21 aspects of it, and that is our entitlement, but if
15:59:25 22 we want to understand historically how or why this
15:59:31 23 person is behaving, there are idiosyncratic
15:59:37 24 individual features of it that show that even in
15:59:41 25 office, the individual was still there, but there

1 is also that aspect to it.

2 He is a Governor performing his office
3 and showing that he has done it by the way in which
4 he treats First Nations and in the report that he
5 gives to his masters in London. It is not an
6 objective standard that is being applied and
7 brought to bear, but it is the Governor
8 orchestrating, overseeing, as I say, being the
9 master of ceremonies and showing and displaying how
10 he has done that.

11 Q. You are saying he is giving the
12 assurance that it was a fair transaction. Now,
13 that must reflect some objective things that
14 happened on the ground at the time; is that fair?

15 A. Well, of course, because if it was
16 a rip-off -- no one was a rip-off, and there is no
17 suggestion within official circles that this
18 transaction was unfair. It was regarded as
19 anomalous and it was unusual because there weren't
20 the annuities and the reserve, so features weren't
21 there, features of other treaties were absent, and
22 those get addressed and corrected.

23 But the cession itself wasn't rejected
24 by Glenelg, so the content is accepted. And even
25 as the missionary societies are making complaints

1 and Glenelg says, well, we may have to make an
2 inquiry into this, and the name of I think it is
3 Bonnycourt, some officer that was suggested as
4 being the appropriate one to investigate, the
5 suggestion is raised and in the end, as I
6 understand, nothing comes of it.

7 But that is to make the point that we
8 are talking about deliberations inside the Crown
9 that are not perfunctory, that are not
10 self-legitimizing, that are sincere in their own
11 light, even if today they are nowhere near as
12 rigorous or what we would see as balanced today.

13 I am not defending them. I want to
14 stress I am not defending, but I am explaining how
15 the historical actors regarded the way in which
16 they were conducting themselves.

17 Q. I am not trying to get you to
18 admit that there was something unfair in the
19 transaction. I am trying to flesh out what it
20 means and what it meant on the ground for the
21 transaction to be fair.

22 A. Well, one clear way in which it
23 would have been fair was in terms of fairness as
24 applied across First Nations, and that was so that
25 there was evenness and consistency. The

1 requirements of good government are requirements
2 that sovereigns in all ages will have, and they
3 will organize their exercise of their sovereign
4 discretions through their official offices, if they
5 are a non-arbitrary despot, like the British Crown.

6 And so the desirable features such as
7 consistency, evenness, regularity of treatment so
8 that procedures are the same more or less, these
9 are good administrative practices. And Bond Head
10 is anomalous and doesn't quite fit the pattern of
11 the others, and so it is brought into that pattern.
12 It becomes the last Imperial treaty.

13 After that, the possibility of a
14 Governor taking their own lead, going off on a
15 policy angle of their own becomes virtually
16 impossible. And so that is also a feature of Bond
17 Head, that in his last moment when the theoretical
18 possibilities of the Governor going off on their
19 own has a form of realization, because after that
20 they are getting into responsible government,
21 bureaucratic and institutional procedures and
22 practices that preclude what we see Bond Head
23 imagining he is able to do in setting off --
24 setting about it in Treaty 45, Treaties 45 and
25 Treaty 45 1/2.

1 Q. Would it be fair to include that
2 the Treaty was explained fully and accurately?

3 A. That presupposes that it wasn't.

4 Q. No, I am not asking you that, sir.
5 I am saying is that not what --

6 A. Well, my response is that Bond
7 Head believed that it had been.

8 Q. I am not questioning that. I am
9 saying is that what it means? If something is
10 fair, does that mean it had to be explained fully
11 and accurately?

12 A. Well, Bond Head didn't come into
13 this with a closed mind. He made the amendment.
14 The Bruce Peninsula was written in, as we have
15 seen. So he listened and that would have been part
16 of his assessment of fairness.

17 So fairness on the ground, I see Bond
18 Head doing something that to me resembles it.

19 Q. Again, that really wasn't my
20 question. I am trying to say is a full and
21 accurate explanation of the Treaty an important
22 part of it being fair in the sense we are talking
23 about?

24 A. Well, you are making it sound like
25 that is a distinct procedural requirement, and

16:06:22 1 natural justice, fairness, there's all kinds of
16:06:24 2 requirements which would include explanation of its
16:06:28 3 consequence, of course. But that is just part of a
16:06:32 4 general process to say that -- you are suggesting
16:06:35 5 that it is an objective, quantifiable requirement,
16:06:42 6 and I am very cautious of that because of the
16:06:44 7 nature of the power that we are dealing with and
16:06:47 8 its location inside from a prerogative of power and
16:06:52 9 the way in which it was internally organized.

16:06:55 10 So we always have to keep that
16:06:57 11 perspective in mind and who -- through whose eyes
16:07:03 12 fairness and the equitable treatment is seen and
16:07:07 13 explained from the official mindset, which is of
16:07:13 14 course the Governor. I am not speaking of First
16:07:16 15 Nations.

16:07:16 16 Q. Well, I am confused now. That
16:07:20 17 seems to suggest to me if the Governor thinks
16:07:23 18 something is fair, it is fair, and that is the end
16:07:25 19 of the story?

16:07:26 20 A. Well, that presupposes the
16:07:27 21 Government is going to rip people off, and
16:07:31 22 governments don't necessarily do that because this
16:07:33 23 government is showing -- this was -- the underlying
16:07:40 24 tone I'm detecting is some doubt about the
16:07:42 25 sincerity of the actors, the Crown actors, the

16:07:46 1 representatives in this episode.

16:07:49 2 Now, we can have that doubt, but that
16:07:51 3 doubt is judged by the results, by the outcomes, so
16:07:56 4 it is hindsight. These guys don't have hindsight
16:07:59 5 when they are doing it, and so we have to read
16:08:02 6 their motives and their intentions at the time in
16:08:05 7 terms of the material that is available to us.

16:08:07 8 And Bond Head honestly believes it is
16:08:14 9 in the First Nations' best interests. The terms he
16:08:17 10 is using are not language that someone who wants to
16:08:24 11 get rid of the Indians, words you used, wants to do
16:08:29 12 that. He believes it is in their best interests
16:08:31 13 and that this will be the best for everyone.

16:08:34 14 Now, hindsight might prove that -- does
16:08:38 15 prove lots of things wrong about this from a long
16:08:41 16 distance point of view, but to understand, to put
16:08:45 17 ourselves in the position to understand
16:08:46 18 historically how they are thinking, we have to
16:08:52 19 focus upon, from the official mindset point of
16:08:58 20 view, upon the source of the power, who is
16:09:00 21 exercising it, who they are reporting it to and how
16:09:03 22 it is brought about.

16:09:06 23 And fairness is a large part of it, of
16:09:08 24 course it is, but to say that government officials
16:09:17 25 clearly believe it is there and there is no major

16:09:21 1 indication that anyone thought otherwise apart from
16:09:26 2 the complaints made by the two missionaries that
16:09:30 3 are counter-balanced by Elliot, that is not the
16:09:35 4 discussion that is going on.

16:09:35 5 You want to draw me into a discussion
16:09:39 6 about process and textual meaning that are not
16:09:42 7 discussions that are going on at the time. And so
16:09:45 8 those are modern concerns, not historical concerns.

16:09:50 9 Q. At the moment, I am still trying
16:09:53 10 to flesh out what you say Bond Head meant when he
16:10:00 11 said the transaction had been equitably explained
16:10:05 12 to them. Does that not mean he believed he had
16:10:08 13 fully and accurately explained it to them?

16:10:10 14 A. Well, he certainly believed that,
16:10:17 15 and then you are going to say, but "forever"
16:10:19 16 means -- what does the "forever" word mean. The
16:10:24 17 explanation that he has given to them is without
16:10:28 18 any problematizing of the word "forever." So I am
16:10:37 19 not going to venture into a critique of his
16:10:40 20 intentions on the meaning of the word "forever"
16:10:42 21 because it makes an issue of a meaning of a word
16:10:46 22 that Bond Head is not making himself.

16:10:51 23 Q. I wasn't asking you about
16:10:54 24 "forever" at this point. That is in the past. I
16:10:57 25 am trying to get "equitably explained to them"

16:11:01 1 fleshed out, and it seems to me that if a treaty --
16:11:09 2 I mean, it doesn't -- I am not even trying to ask
16:11:11 3 about Treaty 45 1/2. I am saying if a Crown
16:11:15 4 official says it is important that the transaction
16:11:20 5 be equitably explained in the mid-19th century,
16:11:25 6 would that not mean it had to be explained fairly
16:11:29 7 and accurately?

16:11:31 8 A. And there is no indication that he
16:11:33 9 didn't do that.

16:11:34 10 Q. That wasn't my question.

16:11:36 11 A. That's right. Well, there is no
16:11:38 12 indication he didn't do that, so --

16:11:42 13 THE COURT: Sir, I am just going to
16:11:43 14 interrupt you because I think the two of you are in
16:11:46 15 a circle.

16:11:46 16 THE WITNESS: Yes.

16:11:47 17 THE COURT: The question was, and I am
16:11:50 18 going to re-read the question. They are very long
16:11:56 19 questions and I realize that that makes it more
16:11:59 20 difficult, and this one is a half a page. But I am
16:12:04 21 going to take the end of it and say that the
16:12:06 22 question was:

16:12:10 23 "If a Crown official says that
16:12:11 24 it is important that the transaction
16:12:13 25 be equitably explained in the

16:12:14 1 mid-19th century, would that not
16:12:16 2 mean that it had to be explained
16:12:18 3 fairly and accurately?"

16:12:19 4 That is the entire question, sir.

16:12:22 5 THE WITNESS: Sure.

16:12:22 6 THE COURT: It is not about the forever
16:12:24 7 promise particularly, and I think you answered --
16:12:26 8 well, maybe you didn't answer that question. Can
16:12:28 9 you answer just that one question, sir? Do you
16:12:31 10 want me to read it again, Professor?

16:12:32 11 THE WITNESS: Please. Thank you.

16:12:35 12 THE COURT: "If a Crown official says
16:12:39 13 that it is important that the
16:12:40 14 transaction be equitably explained in
16:12:43 15 the mid-19th century, would that not
16:12:46 16 mean that it has to be explained fairly
16:12:47 17 and accurately?"

16:12:48 18 That is the question. Not about this
16:12:52 19 Treaty, sir, just the general question.

16:12:54 20 THE WITNESS: There is something
16:12:55 21 imperative in the statement "it has to be" because
16:12:59 22 comportment --

16:13:00 23 THE COURT: "Had to be explained," it
16:13:02 24 is the same thing. Please go ahead.

16:13:03 25 THE WITNESS: Comportment is that it

1 will be explained to them and the officials will
2 demonstrate that they have done this.

3 So how you come at -- the way in which
4 you pitch the question is the way in which you
5 shape the answer, and in this setting, when you
6 have Crown officials who are the masters of
7 ceremony, you have to pitch the question in a way
8 that acknowledges the situation that they are in by
9 their own reasoning and conceptualization of
10 authority.

11 So the answer is that there is an
12 obligation incumbent upon them to demonstrate that
13 they have conducted themselves in a way that shows
14 that the First Nations have been equitably treated
15 and matters have been explained to them, but this
16 is an obligation incumbent upon the office-holder,
17 not an objective or an external standard that is
18 brought to bear but a demonstration that they have
19 conducted and comported with the requirements
20 through the way in which they have done it.

21 So this is something that is required
22 of the person themselves as an emanation from their
23 office, not as something that is imposed externally
24 upon them that they have to do.

25 So that is why I'm being cautious about

16:14:32 1 that question, because it carries connotations of
16:14:37 2 an approach that is not the one that the senior
16:14:42 3 officers of the Crown would recognize.

16:14:46 4 BY MR. TOWNSHEND:

16:14:55 5 Q. I am left with that answer seeming
16:14:57 6 to say that there is no objective reality behind
16:15:01 7 something being fair?

16:15:03 8 A. Not at all. Not at all. These
16:15:11 9 officers are responsible for it and they
16:15:13 10 demonstrate it and they show it. It is not as if
16:15:16 11 they are conjuring it up. They are at ceremonies
16:15:21 12 and involved in processes in which it is manifest,
16:15:26 13 in which they make it manifest because that is what
16:15:30 14 their office requires them to do.

16:15:33 15 Q. Would they view their office
16:15:35 16 requiring them -- as requiring them to explain a
16:15:42 17 treaty fully and accurately?

16:15:43 18 A. It would require them to? Of
16:15:48 19 course it would require them to explain what a
16:15:50 20 treaty was doing and the consequences for them, as
16:15:55 21 that meaning was understood at the time that those
16:15:58 22 promises and assurances are being made.

16:16:04 23 Q. And would their view of their
16:16:09 24 office also require that they get a consent without
16:16:17 25 coercion?

16:16:18 1 A. They get consent, you make it
16:16:21 2 sound like it is a requirement that has to be made,
16:16:25 3 and that is not the way in which I have represented
16:16:27 4 the nature of Crown conduct in obtaining cessions
16:16:36 5 of land through the 18th and 19th century and
16:16:40 6 through treaty-making.

16:16:41 7 Treaty-making was not something that
16:16:42 8 had to be done, and your suggestion of informed
16:16:46 9 consent as something that had to be obtained is
16:16:51 10 inviting that kind of equivalence and that is an
16:16:55 11 equivalence that is not historically supportable.
16:16:57 12 So that, as a writer, I wouldn't make that.

16:17:07 13 Q. I was asking what their view of
16:17:10 14 their office would cause them to feel required to
16:17:15 15 do, and would one of those things be not to coerce
16:17:21 16 First Nations in making a treaty?

16:17:24 17 A. Well, amongst many things, the
16:17:27 18 negative side, of course.

16:17:32 19 Q. Okay, I'll move to a different
16:17:50 20 area. Now, we have said a number of times you are
16:17:56 21 not an ethnohistorian. In this trial we have had
16:18:00 22 extensive ethnohistorical evidence and we'll have
16:18:04 23 some more, so I'm asking you to assume for the
16:18:08 24 purpose of the next few questions that the Saugeen,
16:18:14 25 it was extremely important to the Saugeen to --

16:18:18 1 their territory was extremely important to the
16:18:21 2 Saugeen for reasons both of it being central to
16:18:23 3 their economy and because of their spiritual
16:18:25 4 connection to the land. And I am asking you to
16:18:27 5 assume that, that we have ethnohistorical evidence
16:18:32 6 about that.

16:18:32 7 Now, can we go to your report at
16:18:37 8 paragraph 3.74, and I am looking at the quote in
16:18:59 9 the middle of that paragraph. This is Evans'
16:19:06 10 account. In the third line down of that:

11 "It was likewise proposed to
12 the Chippewas from Saugeeng that
13 they should relinquish all title to
14 their extensive territory on Lake
15 Huron, retaining only the peninsula
16 between the said lake and Georgian
17 Bay, the line to commence at the
18 bottom of Owen's Sound, and to
19 extend directly across the
20 peninsula. Thus the Indians again
21 were removed from the spot to them
22 dearest on earth and constrained to
23 give place to those who, receiving
24 greater encouragement, make
16:19:41 25 consequently greater improvement."

1 Now, what followed that, they were
2 asked to surrender their whole territory and move
3 to Manitoulin, and you go through this in these
4 paragraphs. They said no, they won't do that. And
5 Bond Head then proposed they stay north of Owen
6 Sound.

7 And then going over to paragraph 3.76,
8 at the end of the quote it says, and this is from
9 Stinson:

10 "To this proposal the poor
11 Indians did readily accede with
12 tears in their eyes - their hopes
13 revived, and their countenances
14 beamed with joy. This was what they
15 wanted, land secured to them from
16 which they could not be removed - on
17 which they would have help to build
18 houses and settle their families,
19 and rest their bones."

20 So would you agree that the Saugeen in
21 the course of Treaty 45 1/2 had expressed the
22 importance of their territory to Bond Head?

23 A. I'll accept that with the caveat
24 on the line of questioning, because I need to know
25 where this is going so that I can be able to put it

1 into historical context, if needs be.

2 Q. Let's go to Exhibit 2559, please.

3 This is a letter from Thomas Hurlburt, and are you
4 familiar with Thomas Hurlburt?

5 A. No.

6 Q. Okay. Well, then let's go to
7 Exhibit 1126 for a minute. And if you go to the
8 end of page 11 of that PDF, it is page 11 of the
9 document and of the PDF, and this is Evans writing
10 and he is here -- the entry is Wednesday the 17th:

11 "Accompanied by Brother

12 Hurlburt, the Missionary at this
13 station [...]"

14 And what he is talking about is at this
15 point he is at Saugeen.

16 THE COURT: Can you just scroll to the
17 top of the page so that I can see the context? Oh,
18 there is nothing there. The front of the document
19 then, the first page of this document.

20 MR. TOWNSHEND: This is a reprint of
21 Christian Guardian articles which are very hard to
22 read, but this is a 20th century re-issue of that.
23 You see --

24 THE COURT: Well, the first page says
25 1836, but is there a date? You have said there are

16:23:20 1 articles, plural. Am I to take it that these were
16:23:24 2 all 1836 articles?

16:23:26 3 MR. TOWNSHEND: I think one was --

16:23:27 4 THE COURT: Well, let me ask it this
16:23:29 5 way. I need to understand before you cross-examine
16:23:31 6 on this document which article you choose to
16:23:35 7 cross-examine on, at least the time period of the
16:23:38 8 article that you are cross-examining on.

16:23:43 9 MR. TOWNSHEND: Well, the events are
16:23:45 10 1836.

16:23:45 11 THE COURT: I am not talking about the
16:23:47 12 events, sir. I am talking about the document that
16:23:49 13 you wish to cross-examine on. You have described
16:23:51 14 it as a collection of articles from the Christian
16:23:55 15 Science Monitor. Is that what you said?

16:23:57 16 MR. TOWNSHEND: Christian Guardian.

16:23:59 17 THE COURT: Christian Guardian. Are
16:24:01 18 they all 1836, as the first page indicates, or is
16:24:04 19 it --

16:24:05 20 MR. TOWNSHEND: I think that is -- if
16:24:06 21 you scroll down, I think there is a footnote that
16:24:09 22 explains that.

16:24:20 23 Bear with me for a moment.

16:24:21 24 THE COURT: Well, looking at this --
16:24:28 25 and perhaps you should have gone to the bottom of

16:24:30 1 the page about which you wish to ask a question to
16:24:32 2 get the date, instead of the top.

16:24:36 3 MR. TOWNSHEND: Okay.

16:24:37 4 THE COURT: So if you could go to the
16:24:38 5 bottom of I think it was page 11.

16:24:40 6 MR. TOWNSHEND: Page 11, yes. Ah,
16:24:45 7 there is where it came from.

16:24:52 8 THE COURT: Well, this -- well, there's
16:24:56 9 a lot of different --

16:24:57 10 MR. TOWNSHEND: There are.

16:24:58 11 THE COURT: -- dates on this page.

16:24:59 12 MR. TOWNSHEND: It has been re-printed
16:25:01 13 a number of times. That is what has happened.

16:25:05 14 THE COURT: All right. Well, it
16:25:06 15 appears from the bottom of the page that 1836 seems
16:25:09 16 to apply, so unless anyone has a problem with that,
16:25:16 17 I'll permit you to proceed. It says Wednesday the
16:25:30 18 17th, but it doesn't say a month.

16:25:49 19 I am sure someone is trying to be
16:25:51 20 helpful by seemingly randomly scrolling through
16:25:54 21 this, but I am not finding it helpful.

16:25:57 22 Given the time, Mr. Townshend, can I
16:25:58 23 ask you, unless it is a problem, and if you want to
16:26:01 24 continue I'll let you, perhaps you could more
16:26:03 25 carefully review the provenance of this piece of

1 paper and begin with it tomorrow?

2 MR. TOWNSHEND: I would be happy to do
3 that.

4 THE COURT: All right, thank you, so
5 we'll adjourn.

6 Sir, before we do so, that restriction
7 I mentioned at the luncheon applies until you are
8 finished here.

9 THE WITNESS: Yes, thank you.

10 THE COURT: Which will give you a lot
11 of time to deal with other interesting matters, I
12 am sure.

13 THE WITNESS: Thank you.

14 THE COURT: All right, tomorrow at 10
15 o'clock.

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17 -- Adjourned at 4:25 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 17th day of December, 2019



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