

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

DAY 69 VOL 69
December 11, 2019



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

B E T W E E N:

THE CHIPPEWAS OF SAUGEEN FIRST NATION, and THE
CHIPPEWAS OF NAWASH FIRST NATION
Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA,
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO,
THE CORPORATION OF THE COUNTY OF GREY, THE
CORPORATION OF THE COUNTY OF BRUCE, THE CORPORATION
OF THE MUNICIPALITY OF NORTHERN BRUCE PENINSULA,
THE CORPORATION OF THE TOWN OF SOUTH BRUCE PENINSULA,
THE CORPORATION OF THE TOWN OF SAUGEEN SHORES, and
THE CORPORATION OF THE TOWNSHIP OF GEORGIAN BLUFFS
Defendants

Court File No. 03-CV-261134CM1

A N D B E T W E E N:

CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and
SAUGEEN FIRST NATION
Plaintiffs

- and -

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

--- This is VOLUME 69/DAY 69 of the transcript of
the trial proceedings in the above-noted
matter, being held at the Superior Court of
Justice, Courtroom 5-1, 330 University Avenue,
Toronto, Ontario, on the 11th day of December, 2019.

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

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

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.

Peter Lemmond, Esq., for the Defendant,
& Richard Ogden, Esq., Her Majesty the
Queen in Right of
Ontario.

REPORTED BY: Deana Santedicola, RPR, CSR, CRR

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I N D E X

PAGES

WITNESS: PROFESSOR PAUL GERARD McHUGH

Cross-Examination by Mr. Townshend

(Cont'd)..... 8921 - 9011

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INDEX OF EXHIBITS

NO.	DESCRIPTION	PAGE/LINE NO.
4450:	Document headed "Mr. Sheriff Smiths Account" dated 10 September 1853	9002:9

-- Upon commencing at 10:00 a.m.

THE COURT: Good morning,
Mr. Townshend.

MR. TOWNSHEND: Good morning.

THE COURT: Please go ahead.

PROFESSOR PAUL GERARD McHUGH; UNDER
PRIOR OATH.

CROSS-EXAMINATION BY MR. TOWNSHEND

(CONT'D):

Q. Good morning, Professor McHugh.

A. Good morning.

Q. Just to situate where we were
yesterday, I had taken you to paragraphs 3.74 and
3.76 of your report and read some extracts from
that. And then I asked you a question, and I am
reading from yesterday's rough transcript, and this
is a rough transcript, but it is what we have
available now.

And I asked the question:

"Question: So you would agree
that the Saugeen in the course of
Treaty 45 1/2 had expressed the
importance of their territory to
Bond Head?"

10:03:19 1 And your answer was:

16:21:05 2 "Answer: I'll accept that with
16:21:09 3 the caveat on the line of
16:21:10 4 questioning, because I need to know
16:21:12 5 where this is going so that I can be
16:21:17 6 able to put it into historical
16:21:18 7 context, if needs be."

10:03:32 8 And after that, then we got into a bit
10:03:35 9 of a snag that I want to return to and fix up.

10:03:41 10 So if we could have Exhibit 1126,
10:03:45 11 please, and if we go to the bottom of that page --
10:03:51 12 no, the bottom of the first page, and in the bottom
10:03:54 13 on the left-hand column, it explains where this is
10:03:56 14 from. It is a narrative of Reverend James Evans
10:04:03 15 which was originally published in the Christian
10:04:07 16 Guardian September 28th, 1836, November 2nd, 1836,
10:04:11 17 and January 2nd, 1837.

10:04:16 18 THE COURT: Can you keep your voice up,
10:04:18 19 please, Mr. Townshend. I can't hear you properly.

10:04:20 20 MR. TOWNSHEND: I'm sorry. Should I
10:04:21 21 repeat any of that?

10:04:23 22 THE COURT: No, I managed it, but it is
10:04:25 23 not a good going-forward approach. The microphone
10:04:30 24 is not on? Well, that certainly will be -- just
10:04:33 25 wait for a moment. We have discovered what to do

10:04:36 1 about that problem, and it shouldn't take more than
10:04:39 2 a moment.

10:04:40 3 Professor, we have since the
10:04:54 4 commencement of this trial been conducting our
10:04:57 5 trial in a construction zone. Now, I must say, it
10:05:00 6 looks less and less like a construction zone every
10:05:02 7 day, which is good, but it is still the case that
10:05:07 8 electrics and things get worked on overnight and
10:05:11 9 sometimes we have to restart things.

10:05:15 10 So that is the background.

10:05:17 11 THE WITNESS: Thank you.

10:06:45 12 THE COURT: Much better. Please go
10:06:46 13 ahead.

10:06:48 14 BY MR. TOWNSHEND:

10:06:48 15 Q. So if we now go to the top of the
10:06:50 16 first page, there is -- the "Compiler's Summary"
10:07:01 17 is:

10:07:01 18 "In the summer of 1836 [there
10:07:03 19 was] a canoe with 7 Methodist
10:07:05 20 missionaries left Coldwater and
10:07:08 21 paddled up the east side of Georgian
10:07:10 22 Bay to French River, Manitoulin
10:07:12 23 Island and down the west coast of
10:07:14 24 the Bruce Peninsula to Goderich."
10:07:17 25 Now, if you go to page 9 of that

10:07:24 1 compilation, on the part that is marked there, this
10:07:40 2 is a description. It happened they were on
10:07:43 3 Manitoulin at the time Treaty 45 and Treaty 45 1/2
10:07:47 4 took place, so that is a description of Treaty
10:07:52 5 45 1/2. Are you satisfied with that?

10:07:53 6 A. No, the last sentence is not a
10:07:56 7 description. It is a critique. It is a comment.
10:08:01 8 I wouldn't call that a description.

10:08:02 9 Q. I was just trying to establish
10:08:05 10 that he was there at Treaty 45 1/2, that this is
10:08:11 11 James Evans who is writing this; fair comment?

10:08:14 12 A. If that is all that counsel is
10:08:21 13 describing, the answer is yes, but the passage he
10:08:25 14 has referred me to contains at least one sentence
10:08:28 15 that I would not describe as a description.

10:08:32 16 Q. All right. And if we then go to
10:08:38 17 page 10, you will see, on the right-most column,
10:08:48 18 there is a heading that he is now going down the
10:08:52 19 west coast of the Bruce Peninsula, and further down
10:08:55 20 that column, on that same page, you see he is
10:09:06 21 situated at "Saugeen Indian Mission"; are you
10:09:11 22 satisfied with that, Professor McHugh?

10:09:13 23 A. Yes.

10:09:16 24 Q. Now, going to page 11, the part I
10:09:28 25 have marked there, it says Wednesday the 17th, and

1 if you go down two entries, it is Friday the 19th,
2 and it specifies this is August of 1836 we are
3 talking about.

4 So the entry for Wednesday the 17th,
5 they are leaving Saugeen and going to Goderich, and
6 he said that he is "accompanied by Brother
7 Hurlburt, the Missionary at this station". So are
8 you satisfied that Thomas Hurlburt was the
9 missionary at Saugeen in 1836?

10 A. Yes. Yes, I am happy with that.

11 Q. Now, I would like to go to Exhibit
12 2559. This is a letter from Thomas Hurlburt, and
13 unfortunately, it is a fragment of a letter. I am
14 not sure how that happened, but that is how it is
15 in the archives. And on the last page, you can see
16 it is signed by Thomas Hurlburt. Could we go to
17 the last page for a moment. And it is signed
18 "Thomas Hurlburt, 31 Years Missionary to the
19 Indians".

20 The date is not on this exhibit. It is
21 entered in the trial database as 1860. I don't
22 take any exception with that, and if no one else
23 does, so I would like to -- Professor, I would like
24 you to assume that, if it matters, that this was
25 written in 1860.

10:11:37 1 So if we can now go -- probably the
10:11:40 2 transcript part is the easiest to follow. This
10:11:44 3 reads:

10:11:45 4 "The whole Saugeen tract was
10:11:47 5 taken in 1836 by Sir Francis Bond
10:11:50 6 Head, by force without stipulating
10:11:52 7 for any remuneration. The Chiefs
10:11:55 8 and young men were intimidated by
10:11:56 9 being told that unless they
10:11:57 10 surrendered their Land, the white
10:11:59 11 people would take it by force, and
10:12:00 12 the Government could not prevent
10:12:02 13 them. By this act the Indians were
10:12:03 14 driven to desperation and talked
10:12:05 15 strongly of going to war with the
10:12:06 16 white people, merely for the purpose
10:12:08 17 of putting an end to their own
10:12:10 18 misery. When expostulated with, and
10:12:13 19 the hopelessness of such an
10:12:15 20 enterprise pointed out to them they
10:12:18 21 replied, 'We know that very well,
10:12:21 22 but do you not see that all our Land
10:12:23 23 is gone, and we must soon die, and
10:12:25 24 we may as well die first or last.
10:12:27 25 We think if we rise, and kill off a

1 few of the white people, they will
2 come and kill us all, and then there
3 will be an end of us.'"

4 So would a fair summary of this be that
5 the Saugeen had considered going to war as an
6 alternative to Treaty 45 1/2, even though they knew
7 that would lead to them being exterminated?

8 A. I think a statement that the
9 Saugeen considered going to war on the basis of
10 what you have said, I wouldn't say it was supported
11 by that document. I think that that is a rather
12 extreme interpretation to take of it. The
13 statements within this, it wasn't taken by force.
14 There was a treaty. Without stipulating for any
15 remuneration, there weren't any annuities, but
16 annuities were subsequently given.

17 They didn't take all of the land. They
18 had the Bruce Peninsula that Bond Head agreed would
19 be put in as an outcome of the negotiations and
20 discussions at the time the treaty was concluded.

21 Now, that is not to say that years
22 later there might have been certain emotional
23 feelings running within the Saugeen community, and
24 I am, of course, not an expert on that material.

25 But as someone who can read text and

10:14:09 1 can set a text against the facts of what happened,
10:14:11 2 there are issues, many, many issues that arise from
10:14:15 3 that statement.

10:14:16 4 Q. I realize that, and I wasn't
10:14:19 5 asking about that. I was asking about the Saugeen
10:14:25 6 expressed to their missionary that they considered
10:14:31 7 as an alternative to signing the Treaty to -- if
10:14:38 8 you say going to war, it's an exaggeration --

10:14:40 9 A. So you are qualifying your
10:14:41 10 earlier -- the way you put it to me, the question
10:14:44 11 before? Because this is a much more textured way
10:14:46 12 of describing how the Saugeen were than the
10:14:51 13 question I just received from you just immediately
10:14:53 14 before.

10:14:56 15 Q. The record is as the record is. I
10:15:01 16 asked a question, and you answered it. And I am
10:15:03 17 trying to clarify what I am after at this point.

10:15:06 18 A. And my response is that you are
10:15:08 19 now qualifying a statement you made in your
10:15:12 20 previous question about the Saugeen going to war.
10:15:16 21 You are now saying that they talked to the
10:15:17 22 missionaries, that they had considered something
10:15:20 23 like that, so the position is becoming more -- by
10:15:27 24 you is becoming more qualified.

10:15:29 25 Q. Sir, I am asking questions. I'm

1 not taking positions. I'm not giving evidence.

2 My question is, can you draw from this
3 that the Saugeen expressed the extreme importance
4 of their territory to their missionary?

5 A. From this statement here? Well,
6 there is an expression of importance of land.
7 There is that, of course.

8 Q. All right. And we talked
9 yesterday about Bond Head knowing the importance of
10 the territory to the Saugeen, and you agreed with
11 that with a qualification about you wanted to know
12 where I was going.

13 So would it be fair to say that, in
14 part, Bond Head changed his position from wanting
15 the Saugeen to move from Manitoulin to staying
16 north of Owen Sound because he realized how
17 important the land was to them?

18 A. And it was a concession or a
19 change he was prepared to make. Certainly it
20 indicates that he had listened sympathetically
21 because I would call the inclusion of the Bruce
22 Peninsula a sympathetic response.

23 Q. Therefore, I would suggest to you,
24 that Bond Head knew how important the protection
25 promise would be to the Saugeen?

10:17:36 1 A. He knew how important their land
10:17:40 2 was, and he returned the land to them. I don't
10:17:43 3 agree that he turned his mind directly towards the
10:17:47 4 nature and the scope of the protection promise
10:17:53 5 because he knew how important the land was to them.
10:17:59 6 He knew the land was important to them, and he was
10:18:02 7 putting it aside, and he was saying it will be
10:18:05 8 protected, but his thinking did not go beyond that,
10:18:09 9 nor could we, as I said yesterday, extrapolate or
10:18:12 10 infer beyond that, given the circumstantial
10:18:17 11 evidence that there is as to how the administrative
10:18:20 12 procedure came to view or was viewing the "forever
10:18:25 13 promise" pretty soon after it was made. That is
10:18:27 14 the view within official circles.

10:18:32 15 So I am not prepared to go to that
10:18:34 16 extent with those words.

10:18:35 17 Q. I am not asking about the content
10:18:40 18 of the protection promise. I am saying, in Treaty
10:18:49 19 45 1/2, the Saugeen gave up a million and a half
10:18:51 20 acres, and pretty much all they got in return was a
10:18:55 21 protection -- a promise of protection of the
10:18:59 22 peninsula; is that fair?

10:19:00 23 A. Well, you are now talking about
10:19:01 24 the content of the protection promise, so I am
10:19:06 25 happy to talk about the content because one can't

10:19:09 1 talk about protection without talking about the
10:19:11 2 nature of the promise to protect and how that was
10:19:16 3 viewed, and though it was ostensibly forever, the
10:19:22 4 "forever" bit did not receive any deliberative or
10:19:26 5 any conscious deliberation, thinking about,
10:19:33 6 position papers, nothing, nothing of the sort to
10:19:35 7 indicate an indication that we today could perceive
10:19:38 8 with regards to the use of the word "forever".

10:19:40 9 So that we have a protection promise,
10:19:47 10 and that is how it is being viewed, but the content
10:19:50 11 is irremovable from the nature of the protection.
10:19:52 12 I can't see how you can discuss one without having
10:19:55 13 the other.

10:19:58 14 Q. We discussed yesterday at great
10:20:02 15 length the content of the promise, so I have moved
10:20:04 16 on from that. And I am saying, regardless of how
10:20:08 17 Bond Head understood this promise, he would have
10:20:12 18 understood that it was important to the Saugeen
10:20:14 19 because that was essentially all they were getting
10:20:16 20 out of the Treaty?

10:20:18 21 A. Well, of course he understood that
10:20:19 22 the land was important to them, but Bond Head was,
10:20:23 23 of course, putting in place -- or thought he was
10:20:26 24 putting in place a new policy. So his perspective
10:20:30 25 on it is also that he is doing something that is

10:20:33 1 for their benefit, and I think he is pleased. He
10:20:38 2 has convinced himself that they can see the benefit
10:20:40 3 of what he is doing.

10:20:41 4 Now, whether or not that is true, of
10:20:43 5 course, is another story, but there is an element
10:20:47 6 of that self-satisfaction in Bond Head's behaviour.

10:20:53 7 Q. So that would mean he understood
10:20:59 8 that the promise was important to them, whatever it
10:21:04 9 was, without getting into the interpretation. He
10:21:08 10 understood that the promise was important to them?

10:21:09 11 A. Yes.

10:21:10 12 Q. Thank you. And I go to your
10:21:26 13 report at paragraph 3.89. So this is about the
10:22:10 14 Proclamation of 1847. You testified in-chief about
10:22:12 15 that.

10:22:13 16 Would you agree this is an example of
10:22:18 17 the Crown behaving in a way that is consistent with
10:22:22 18 protecting the peninsula until there was consent to
10:22:26 19 change that?

10:22:27 20 A. It is the Crown behaving in a way
10:22:31 21 that it considers consistent with its duty to
10:22:33 22 protect and the execution of the sovereign
10:22:41 23 comportment in that regard to the Saugeens. The
10:22:44 24 approach you are taking is a rights-based approach,
10:22:48 25 and the approach that I would take is an approach

1 based upon office and the performance of duties by
2 the office-holder.

3 Q. All right. You make the point in
4 here that the 1847 Proclamation was not a deed.

5 A. A deed of title.

6 Q. Was not a deed of title. Okay.
7 Are you distinguishing deed from deed of title?

8 A. Yes. Deeds can do all kinds of
9 things. Deeds are formal documents, witnessed and
10 attested, signed, sealed, and delivered between
11 parties. You can turn a gratuitous promise into an
12 enforceable one through a deed. You are probably
13 thinking of land grants, of patents, which are
14 different instruments than concerned with the
15 passing of title to land. A deed will vest a legal
16 state. Deeds perform all kinds of functions.

17 The patent will be the title to the
18 land, and that patent will be sold on through
19 various ownerships in the life of a parcel of land,
20 and so the Proclamation of 1847 certainly is not a
21 land patent. If it were, it would be amenable to
22 processes such as scire facias. It is not that
23 kind of an instrument. It is not a vesting
24 instrument in that sense. It is a declaration.

25 Q. Can we go to Exhibit 1666, please,

10:24:42 1 and I wanted to go to the bottom -- okay. This is
10:24:44 2 correspondence from the civil secretary to T.G.
10:24:48 3 Anderson on the 13th of April, 1847. And if we go
10:24:54 4 to the bottom of that, it is marked -- we have a
10:25:00 5 transcript, if you would like, but this isn't too
10:25:02 6 hard. It says:

10:25:05 7 "The deed securing the Saugeen
10:25:08 8 Reserve for the tribe forever is in
10:25:13 9 course of preparation."

10:25:15 10 [As read.]

10:25:15 11 Do you see that?

10:25:17 12 A. Uhm-hmm. Yes.

10:25:21 13 Q. Is that consistent with your view
10:25:24 14 of what the -- this is referring to the 1847
10:25:30 15 declaration, isn't it?

10:25:31 16 A. This is a statement made by a
10:25:34 17 civil servant in the course of a particular
10:25:38 18 process. I don't think it carries any weight. I
10:25:42 19 don't think it necessarily carries a great deal of
10:25:44 20 consequence or even of thought. That is how he is
10:25:48 21 seeing it. That is not what the instrument is. A
10:25:53 22 statement like that from someone like that can't
10:25:57 23 turn an instrument from something it isn't into
10:26:00 24 something else.

10:26:01 25 Q. So you are saying he has got it

1 wrong.

2 A. I am saying that it is not a
3 vesting instrument. It is a declaration. It is a
4 Proclamation. It is a Proclamation by the Crown of
5 the basis upon which the Crown is holding the land.

6 Now nobody holds it upon that basis
7 anyway. It is a declaration. It is described as a
8 declaration, if you want to use the words that are
9 describing it. It is not a vesting instrument. It
10 confers no tenure or any form of estate in land.
11 It is a declaration of an extant state of affairs,
12 which is exactly what royal proclamations -- royal
13 and otherwise on the whole generally do.

14 I would say that the format being used
15 and the terminology being used is being chosen,
16 selected quite carefully to prevent the outcome
17 that you seem to be suggesting, a deed of
18 ownership, because it is not that.

19 Q. I understand your position, and I
20 am asking you if this document is consistent with
21 that or not?

22 A. The document reflects a particular
23 view taken by an official. It doesn't reflect what
24 the instrument actually is and doing.

25 Q. So I take it you disagree with

1 what this says?

2 A. I don't disagree. I just don't
3 perceive it as being especially relevant to how we
4 are going to historically characterize the effect
5 of this instrument.

6 Q. So that amounts to saying that the
7 civil secretary has misdescribed what has happened;
8 is that fair?

9 A. That is what?

10 Q. That amounts to saying that the
11 civil secretary, who wrote this letter, made a
12 mistake in describing what was happening; is that a
13 fair statement?

14 A. Made a mistake, perhaps he just
15 didn't know. Perhaps this is just a mere
16 description -- a bureaucratic description made to
17 sign off a letter.

18 Q. Doesn't that reflect what the
19 civil secretary was thinking at the time?

20 A. He probably wasn't even thinking
21 at all when he wrote that.

22 Q. All right. Just give me a moment,
23 please.

24 Could I have Exhibit 1895, please. I
25 have the wrong -- I'm looking for the 1851

1 Proclamation. Is that not 1895?

2 THE COURT: Who are you asking? You
3 are here to ask two people questions, me --

4 MR. TOWNSHEND: I'm sorry. I was
5 asking --

6 THE COURT: Mr. Townshend, don't talk
7 at the same time as me.

8 The two people that you can ask
9 questions in this room on the record are me and the
10 witness and nobody else. So I can't help you with
11 that question, and neither can the witness. If you
12 want to quietly consult with one of your
13 colleagues, please go ahead.

14 MR. TOWNSHEND: All right. I'm sorry,
15 Your Honour.

16 THE COURT: That is all right.

17 BY MR. TOWNSHEND:

18 Q. Maybe I'll move on and come back
19 to that.

20 Can we go to paragraph 5.31 of your
21 report. 5.31. So, Professor, this is about the
22 Royal Proclamation, and you are making the point in
23 this paragraph that the Royal Proclamation was
24 followed because the Crown chose to follow it, not
25 because it had to follow it; is that fair?

10:32:54 1 A. Correct. Well, that the Crown
10:32:57 2 followed procedures identical to those in the Royal
10:33:01 3 Proclamation.

10:33:02 4 Q. All right. So you testified
10:33:16 5 Monday -- and I am paraphrasing, and I'll see if
10:33:20 6 you think this is fair -- about the reasons why you
10:33:23 7 think the Royal Proclamation is not a statute.

10:33:27 8 A. I gave two out of the eight.
10:33:29 9 There is a lot more to come.

10:33:30 10 Q. Pardon me?

10:33:30 11 A. There is a lot more reasons that I
10:33:34 12 haven't given, so this might be the opportunity for
10:33:35 13 me to --

10:33:36 14 THE COURT: The witness said he
10:33:37 15 testified about some of the reasons, which is what
10:33:39 16 he did do on Monday. The report contains
10:33:43 17 significant additional reasons which he did not
10:33:44 18 deal with. I am not sure that changes your
10:33:48 19 question, sir, but it is what happened on Monday.

10:33:51 20 BY MR. TOWNSHEND:

10:33:52 21 Q. Okay. I just didn't hear that
10:33:54 22 answer. I'm sorry.

10:33:54 23 One of the reasons -- the one I want to
10:34:02 24 ask about is that you said there were later
10:34:05 25 measures like Dorchester's instructions and the

10:34:08 1 1847 declaration to protect the Saugeen Peninsula,
10:34:13 2 had a similar effect, so they would not have been
10:34:15 3 necessary if the Royal Proclamation had the effect
10:34:18 4 of a statute. Is that a fair summary of what you
10:34:22 5 said about that point?

10:34:23 6 A. That's right.

10:34:23 7 Q. Now, one of the basic principles
10:34:33 8 of the Proclamation, the Royal Proclamation, is
10:34:36 9 that consent is required for a surrender of
10:34:38 10 Indigenous land.

10:34:40 11 A. Agreement is required, not
10:34:42 12 consent. I don't think the word "consent" appears
10:34:45 13 in the Royal Proclamation.

10:34:46 14 Q. Well, the text says something like
10:34:51 15 "inclined to dispose".

10:34:53 16 A. But that is not consent. The word
10:34:55 17 "consent" would suggest that there is a veto power,
10:34:58 18 and I don't see any suggestion of a veto power
10:35:02 19 running through the Royal Proclamation. So we need
10:35:04 20 to be careful about the exact terms we use if they
10:35:07 21 are not terms within the Proclamation itself.

10:35:10 22 Q. What is the difference between
10:35:12 23 consenting to something and agreeing to something?

10:35:14 24 A. Well, that is an interesting
10:35:16 25 question. I would say that if consent were

1 required, that it would be making the requirement
2 of consent. If it were an imposed regulatory
3 requirement, it will be making consent
4 indispensable; whereas if agreement was required,
5 and if agreement could not have been reached --
6 agreement takes two -- then perhaps a proposal
7 could occur anyway in terms of, for example, the
8 dispensing of the rules that Lord Glenelg talks
9 about in the last sentence of his instructions for
10 the Indian Department to Lord Durham.

11 So consent and agreement -- it would
12 all depend, of course, upon context and how they
13 are being used, but I don't think one could use the
14 word "consent" in that way in relation to the Royal
15 Proclamation. This is something I have thought
16 about and a practice in which I have had to make
17 myself become more consistent in terms of words to
18 be used, but that is the position that I now take.

19 Q. When we are talking about a
20 treaty, and I will say Treaty 45 1/2, did the
21 Saugeen consent to that Treaty or agree to it, and
22 is there a difference?

23 A. The Saugeen, they agreed to the
24 Treaty.

25 Q. And how is that different than

10:37:01 1 consenting to it?

10:37:02 2 A. Well, consent is something you
10:37:04 3 give or you don't give, and tick, yes, we have done
10:37:09 4 it, or no, we are not going to do it; whereas
10:37:12 5 agreement imparts a sense of mutuality of both
10:37:16 6 sides coming to an understanding. Consent is
10:37:21 7 something that is given or withheld; agreement is
10:37:23 8 something two parties do.

10:37:24 9 Q. But on the Saugeen side, if they
10:37:28 10 agree, how is that different than consenting? Yes,
10:37:34 11 you are agreeing with someone --

10:37:35 12 A. Well, they only agreed because
10:37:37 13 they sought and obtained the inclusion of the Bruce
10:37:41 14 Peninsula. They weren't given something -- what is
10:37:45 15 his name -- Bond Head had drawn up and said, Yes,
10:37:48 16 we consent. It wasn't like that. It was an
10:37:51 17 agreement. It wasn't a consent.

10:37:52 18 Q. Part of that agreement was the
10:37:56 19 surrender of a million and a half acres. Would it
10:37:59 20 not be fair to say that they consented to that
10:38:02 21 surrender?

10:38:03 22 A. If one looks at the overall
10:38:07 23 arrangement, it would have been seen at the time as
10:38:12 24 agreement. As an historical characterization, it
10:38:15 25 would have been seen as an agreement. I am not

10:38:17 1 defending it. I am explaining it.

10:38:19 2 Q. If they hadn't agreed with Bond
10:38:49 3 Head, would the Treaty have gone ahead?

10:38:51 4 A. If they hadn't agreed, would the
10:38:56 5 Treaty have gone ahead? Well, it can't be an
10:39:02 6 agreed treaty if they haven't agreed. Agreement is
10:39:05 7 something two people do.

10:39:13 8 Q. Can we go to Exhibit 0741, please.
10:39:36 9 These are the Dorchester Instructions I believe we
10:39:39 10 have been calling them, and I would like to go to
10:39:42 11 article 6 of that. Now, article 6 says:

10:39:59 12 "The Superintendent General or
10:40:01 13 Deputy Superintendent General
10:40:03 14 negotiating the Purchase will employ
10:40:04 15 for the purpose such Interpreters as
10:40:07 16 best understand the Language of the
10:40:09 17 Nation or Nations treated with, and
10:40:11 18 during the time of the Treaty every
10:40:13 19 means are to be taken to prevent the
10:40:16 20 pernicious practice of introducing
10:40:18 21 strong Liquors among the Indians,
10:40:20 22 and every endeavour exerted to keep
10:40:23 23 them perfectly sober."

10:40:24 24 Do you see that?

10:40:24 25 A. Yes.

1 Q. So that goes beyond what the Royal
2 Proclamation says, doesn't it?

3 A. Yes, but you are omitting all the
4 areas that overlap. Of course, from one period to
5 another, a more recent document is going to
6 informed by pressures and demands that have arisen
7 in the meanwhile. You can't expect one to be
8 exactly the same or to duplicate or replicate
9 because these are the regulatory navigational
10 matters being set out for officers within a
11 particular time and context. For example, where
12 alcohol has become a problem.

13 So I don't see that that makes a
14 material difference to the proposition that this
15 activity going on -- this is an activity of a
16 broad, ostensibly comprehensive character. If the
17 Royal Proclamation was seen as retaining some
18 viability or presence, then that pattern would not
19 be there, or at least some awareness of the Royal
20 Proclamation as being part of the background to or
21 part of the legal context you are setting within
22 which these instruments issue, there would be
23 something like that. But you don't find that.

24 Now, what you do find is occasional
25 references to we should follow the Proclamation, or

1 we should make treaties. Now, I know lawyers think
2 otherwise but not all forms of normative obligation
3 will be of a legal character. Because someone says
4 we ought to do something, or it is important we do
5 something doesn't mean they are doing it because
6 they have to, because there is a law pressing them
7 to do it.

8 And that is what sovereign comportment
9 is. It is a sovereign understanding of the nature
10 of their duties and requiring they officiate to go
11 about it, and here we have instructions issued by
12 Dorchester that are broad and comprehensive and
13 made within a policy setting where the Royal
14 Proclamation has no presence.

15 Q. My point was that this contains
16 some similar provisions to the Royal Proclamation,
17 but it also contains some additional provisions
18 that aren't in the Royal Proclamation.

19 A. Well, of course.

20 Q. So that suggests to me that it
21 wouldn't be pointless to issue the Dorchester
22 Instructions if the Royal Proclamation were in
23 force because it went beyond there. I am not --

24 A. Well, you have only pointed me to
25 one clause where it goes beyond. I don't think you

10:43:12 1 can go from that particular thing to the more
10:43:16 2 general statement that you are trying to make
10:43:18 3 because these are wide and comprehensive documents
10:43:23 4 in their purport and their span, as was the Royal
10:43:25 5 Proclamation.

10:43:25 6 So if the Royal Proclamation is already
10:43:27 7 occupying the territory, then that breadth and span
10:43:29 8 will not be necessary. Of course there is going to
10:43:33 9 be a lot of changes here and there, but that
10:43:35 10 doesn't go to the more fundamental question as to
10:43:38 11 the scope and the background -- the regulatory
10:43:43 12 background within which these are issuing.

10:43:47 13 Q. Can we go to the 1847 declaration
10:44:11 14 again, please. Oh, that was the one we were trying
10:44:15 15 to go to.

10:44:36 16 THE COURT: Well, this is not 1847,
10:44:39 17 Mr. Townshend.

10:44:40 18 MR. TOWNSHEND: Pardon me, Your Honour?

10:44:42 19 THE COURT: You have said you wanted
10:44:45 20 the 1847 Proclamation, and that is not what came up
10:44:48 21 on the screen, so I make that observation so you
10:44:54 22 can locate yourself.

10:45:04 23 BY MR. TOWNSHEND:

10:45:04 24 Q. That should be Exhibit 1674. Yes.

10:45:15 25 So --

10:45:22 1
10:45:24 2
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10:46:04 17
10:46:07 18
10:46:10 19
10:46:14 20
10:46:20 21
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10:46:27 24
10:46:34 25

A. I can't see it clear. Larger,
please.
Q. Can we blow it up. More.
A. Thank you.
Q. This isn't a detailed textual
question, but this describes the particular
boundaries of the territory to which it applied,
doesn't it?
A. It describes the boundaries, yes.
The Quebec Act describes the boundaries of Quebec.
Q. But this describes the boundaries
of the particular tract of land protected for the
Saugeen.
A. It doesn't make it a vesting
instrument. It is not vesting. It is describing
the land, but it is not a vesting instrument. You
have surely read your property law to be able to
recognize that. It needs to be a Crown patent
issuing title to land, a tenure, and an estate
vested. This does not do that. The fact that it
has got boundaries to it does not turn it into that
type of an instrument.
Q. I wasn't suggesting it did. What
I am saying, it has this description, and then it
has a guarantee of possession unless they decide to

10:46:38 1 surrender it to the Crown.

10:46:40 2 A. Uhm-hmm.

10:46:40 3 Q. That is the same principle -- that
10:46:46 4 part is the same principle as is in the Royal
10:46:48 5 Proclamation?

10:46:48 6 A. It is the same principle as?

10:46:51 7 Q. As in the Royal Proclamation.

10:46:53 8 A. The Royal Proclamation requires a
10:46:56 9 cession at a Council, and here in the Proclamation
10:47:01 10 the Crown is issuing an assurance there will be a
10:47:05 11 Council to accompany a sale, a cession.

10:47:09 12 So in that respect, it is repeating a
10:47:17 13 procedural feature of the Royal Proclamation.

10:47:20 14 Q. The point I am making is that
10:47:25 15 because this has specific boundaries, it is
10:47:30 16 something that they could use to show to settlers
10:47:34 17 to show that this was their land; is that fair?

10:47:38 18 A. They wouldn't be showing it to the
10:47:39 19 settlers because they can't enforce it. They would
10:47:41 20 be getting their Superintendent, their agent to go
10:47:43 21 to the courts to show to it the settlers. So to
10:47:49 22 enforce those boundaries, the procedure that has to
10:47:52 23 be followed is through the Crown because the land
10:47:53 24 is vested in the Crown.

10:47:55 25 So the statement you have made in terms

1 of the way in which those things were done at the
2 time needs some qualification.

3 Q. Well, they asked for it so they
4 could show it to people who were coming to their
5 territory.

6 A. And then to take the next step of
7 enforcing it is something that is not in their
8 hands.

9 Q. I wasn't talking about
10 enforcement. I was talking about having a piece of
11 paper they could show to someone to say this is our
12 land.

13 A. So we are being clear what this
14 piece of paper -- the purport and the scope and the
15 natural effect of it because that is important too,
16 I think you would agree.

17 Q. So what I am coming back to is
18 that this does more in some ways than the Royal
19 Proclamation because it talks of a specific parcel
20 of land it refers to as protected for the Saugeen.

21 A. Well, the Royal Proclamation
22 creates a boundary line and it sets a great deal
23 more land aside, the other side of the boundary
24 land than this, though it is important that the
25 Saugeen is doing, so the difference between the

1 Proclamation is actually a similarity with the
2 Proclamation.

3 Q. The Proclamation does not reserve
4 land to the Saugeen specifically.

5 A. It reserves lands for Indians. It
6 is an instrument reserving land, as you have said
7 this is doing here. So the grounds on which you
8 say that the Royal Proclamation was somehow less a
9 protective measure because it didn't reserve land
10 is actually not the case because the Royal
11 Proclamation does reserve land, the western side of
12 the boundary line, and a great area of land at
13 that.

14 That is the point I am making, is that
15 it is not altogether a secure analogy that you are
16 drawing.

17 Q. The Royal Proclamation was in
18 1763. A lot happened between 1763 and 1847.

19 A. Shall we start year by year?

20 THE COURT: Well, I was going to say,
21 what happened between those two years? We don't
22 have time for that, sir.

23 MR. TOWNSHEND: No, I wasn't going into
24 that.

25 THE COURT: Well, that was your

10:50:34 1 question. Maybe I misheard your question, but I
10:50:37 2 heard the same question as the witness, which was
10:50:39 3 what happened between those two years.

10:50:44 4 MR. TOWNSHEND: Oh, I'm sorry. No. I
10:50:45 5 was, by way of introduction, saying a lot happened.

10:50:48 6 THE COURT: So we both misheard you.
10:50:50 7 Please go ahead.

10:50:51 8 BY MR. TOWNSHEND:

10:50:56 9 Q. The Royal Proclamation wouldn't be
10:50:57 10 something that would be of much use to the Saugeen
10:51:01 11 to show to someone coming into their territory
10:51:04 12 because it was in the 1840s. It was a long time
10:51:08 13 ago. You don't know what treaties had happened
10:51:10 14 since, so --

10:51:11 15 A. But we have the statement in the
10:51:13 16 Bagot Report --

10:51:14 17 THE COURT: You have to wait, sir, for
10:51:15 18 the question.

10:51:16 19 BY MR. TOWNSHEND:

10:51:19 20 Q. So the 1847 declaration is
10:51:22 21 something that would be of some practical use to
10:51:24 22 the Saugeen that the Royal Proclamation wouldn't;
10:51:28 23 is that fair?

10:51:29 24 A. I am not engaged in comparing the
10:51:34 25 two. I am simply making the observation that

1 features of it would -- if one were to be
2 consistent in applying a particular view of the
3 legal status of the Royal Proclamation, then
4 explaining those features becomes problematic.

5 Now, it is not something people were
6 losing sleep over or I am losing sleep over, but it
7 is a feature of, and it is a recurrent feature
8 throughout the pre-Confederation period.

9 Q. I am trying to loop back to your
10 argument that if the Royal Proclamation had the
11 force of a statute, the 1847 declaration would not
12 have been necessary, and I am trying to point out
13 that the 1847 declaration actually did more in
14 being more specific about the land and more
15 specific about for whom it was protected than the
16 Royal Proclamation was.

17 A. And I am not denying you that, but
18 I am referring to the assurance that there would be
19 a Council meeting before. That is the point to
20 which my observations on the relevance of the Royal
21 Proclamation -- to this 1847 Proclamation are made.
22 I am not denying any of those features of it that
23 you talk about at all. It is an observation made
24 in relation to what it discloses about the legal
25 framework as understood at the time within which

10:53:04 1 this document issues.

10:53:05 2 Q. You also said yesterday a
10:53:11 3 Proclamation could be something that just announced
10:53:13 4 the law, it didn't necessarily have to make law, so
10:53:18 5 in --

10:53:19 6 A. A Proclamation cannot make law
10:53:22 7 unless it is prerogative legislation under the rule
10:53:25 8 in Campbell v. Hall. So prerogative legislation is
10:53:29 9 not possible with that exception. So Proclamations
10:53:35 10 cannot make law.

10:53:36 11 Q. I understand that. I am asking a
10:53:38 12 hypothetical question. If the Royal Proclamation
10:53:43 13 had the force of a statute -- I understand you say
10:53:46 14 it doesn't. If it did, there still could be a
10:53:51 15 point in a Proclamation restating that. That is
10:53:54 16 not contradictory, is it?

10:53:56 17 A. Well, if there were to be, then,
10:54:01 18 as with statutes, because statutes refer to
10:54:05 19 "whereas" this statute did this, did that, the
10:54:09 20 prerogative instrument that was more likely to be
10:54:11 21 doing that kind of referencing other prerogative
10:54:17 22 instruments is the Order in Council, so not the
10:54:21 23 Proclamation.

10:54:22 24 Now, Imperial practice is not always
10:54:26 25 wholly consistent upon that until you start getting

1 into the post-Napoleonic period, 1820s and 1830s,
2 as legal advice, legal practice -- practice of a
3 legal expert becomes more consistent on this. So
4 the Proclamation and the Order in Council, you have
5 got to think about those as distinct instruments.

6 So if the Crown is to use the
7 prerogative legislative power these days -- and it
8 did this in the Chagos Islands -- it would use an
9 Order in Council. That is the regulatory form that
10 came to be used during the 19th century for
11 prerogative legislative instruments, not
12 Proclamations.

13 If you would like me to explain more
14 about the difficulties with the Royal Proclamation
15 and Campbell v. Hall, I am perfectly happy to do
16 that because it would give me the opportunity to
17 explain to you some of the problems with the Royal
18 Proclamation being regarded as a statute in this
19 historical period.

20 Q. I am not going to ask that at the
21 moment.

22 At this point, I understand you say the
23 Royal Proclamation is not a statute, but I am
24 asking you to take as a hypothetical that it were a
25 statute, and --

10:55:51 1 A. If this were a statute, it would
10:55:53 2 have formed an Order in Council.

10:55:55 3 Q. I get that, but just as a
10:55:58 4 hypothetical, take that as an assumption. It would
10:56:01 5 not somehow be inconsistent for a later
10:56:07 6 Proclamation, like the 1847 declaration, to repeat
10:56:13 7 what is the law as laid down in there?

10:56:15 8 A. But to wholly occupy the field is
10:56:17 9 another matter. Remember that these are
10:56:21 10 instruments -- this is an isolated, a particular
10:56:24 11 procedural example, but the Dorchester Instructions
10:56:27 12 are as broad and comprehensive in their scope and
10:56:32 13 purport as the Royal Proclamation directed towards
10:56:38 14 the Crown's offices and the approach at large to be
10:56:41 15 taken to Indian cessions.

10:56:47 16 Q. I'll try one final cut at this.
10:57:26 17 Is it inconsistent to have a declaration that
10:57:31 18 repeats what the law is?

10:57:32 19 A. None of these are instruments that
10:57:38 20 purport to be of that kind. They are -- they issue
10:57:44 21 within a void wherein there is no sign by those
10:57:49 22 drafting the instruments or drafting treaties even
10:57:52 23 of the presence of the Royal Proclamation. It is
10:57:56 24 absent. And when does it get written back in?
10:58:01 25 After 1982.

1 Q. Let's go to paragraph 5.31 of your
2 report. There is a quote from the Bagot Commission
3 there, and the end part of that quote says:

4 "Since 1763 the Government,
5 adhering to the Royal Proclamation
6 of that year, have not considered
7 themselves entitled to dispossess
8 the Indians of their lands without
9 entering into an agreement with them
10 [...]"

11 Do you see that?

12 A. Yes. I see the word "agreement"
13 is there rather than "consent".

14 Q. Sorry, I didn't hear that.

15 A. The word "agreement" is there
16 rather than "consent", so that is an example of
17 what you raised with me before.

18 Q. So this is the Bagot Commission
19 saying that the government has adhered to the Royal
20 Proclamation since 1763; is that not right?

21 A. "Adhering" means that they have
22 adopted the practices that are consistent with what
23 the Crown, their sovereign, has said, or would like
24 them to do. Adhering to means that they have
25 adopted the process, and they are following it.

1 Now, this is where fundamental mistakes
2 are made because an administrative practice is
3 adhering to instructions that might be given. The
4 word "adhering" to does not necessarily impart a
5 causality between the issue of the Proclamation and
6 the imperative character of the response.

7 They are doing this because the Crown
8 requires it, the Crown is sovereign, not because
9 the law externally imposes it, but because they
10 are, another word, an employer. The Crown has told
11 them, the officers, it must do that.

12 Now, there could be any number of
13 explanations for that, and it does not need a legal
14 imperative. So --

15 Q. What it says later in that quote
16 is:

17 "[...] have not considered
18 themselves entitled to dispossess
19 [...]"

20 A. Well, we need to read those words
21 carefully because we believe that words will be
22 used for a reason, not just any sloppy old words.
23 They have said:

24 "[...] have not considered
25 themselves entitled to dispossess

11:01:04 1 the Indians without entering into an
11:01:06 2 agreement [...]"
11:01:07 3 Now, they haven't said "have considered
11:01:11 4 themselves unable". They have chosen words that
11:01:17 5 are very careful. "Have not considered themselves
11:01:22 6 entitled to dispossess", self-restraint is what it
11:01:26 7 is referring to. It is not referring to legal
11:01:29 8 restraint, but it is referring to measures taken, a
11:01:32 9 position taken within the Crown. "Have not felt
11:01:35 10 themselves entitled to dispossess", self-restraint.
11:01:40 11 We are talking about procedures internal to the
11:01:43 12 Crown there, and they know it, and those words
11:01:47 13 indicate that they know it because they are careful
11:01:49 14 words.

11:01:50 15 Q. You don't see "entitled" as being
11:01:56 16 stronger than just you can do it or you can't do
11:01:59 17 it?

11:01:59 18 A. I see the words "entitled to
11:02:03 19 dispossess" referring to a capacity that is not
11:02:08 20 being exercised perhaps but of a recognition of
11:02:13 21 constraint, and the Crown taking a position of the
11:02:18 22 Crown disciplining its discretion,
11:02:22 23 self-disciplining its discretion.

11:02:24 24 It is not a constraint being externally
11:02:28 25 imposed at law. Those words do not describe that

1 kind of an obligation resting upon the government.

2 It is not talking of rules, in short, that have
3 some kind of statutory effect.

4 Q. Could I have Exhibit 4123, please.

5 THE COURT: Just while that is coming
6 up. Sir, I am going to take the morning break a
7 little earlier than 11:30 today, so if you could
8 locate it at a convenient moment for your questions
9 but perhaps, you know, sometime more in the nature
10 of 11:15 or so and what works for your questions.

11 BY MR. TOWNSHEND:

12 Q. Okay. This is an extract from the
13 book "As Long As the Sun Shines and Water Flows",
14 and if you scroll down to the next page, it is the
15 chapter called "Protection, Civilization,
16 Assimilation: An Outline History of Canada's
17 Indian Policy", by John L. Tobias.

18 A. Could we clarify for the Court,
19 please, the year of publication of the book?

20 THE COURT: I was looking for it. It
21 doesn't seem to be on the cover, but is there an
22 inside cover? The next page?

23 MR. TOWNSHEND: I don't believe it is
24 on this extract.

25 THE COURT: Perhaps --

11:04:14 1 THE WITNESS: It is 1972, I think, Your
11:04:17 2 Honour. It is a book from the early '70s.

11:04:21 3 THE COURT: The witness thinks it is
11:04:23 4 1972, but whoever has access to a computer just
11:04:26 5 check what it is listed as.

11:04:30 6 MS. NERLAND: 1983, Your Honour.

11:04:33 7 THE COURT: 1983. Very good. Please
11:04:34 8 go ahead.

11:04:36 9 BY MR. TOWNSHEND:

11:04:36 10 Q. Are you familiar with John L.
11:04:38 11 Tobias?

11:04:40 12 A. I know of his work, yes.

11:04:41 13 Q. Do you consider him a reliable
11:04:43 14 historian of Crown-Indigenous relationships?

11:04:47 15 A. I consider him a historian of the
11:04:49 16 relationship.

11:04:49 17 Q. So if we could go to page 40,
11:04:57 18 which is the next page there, at the end of the
11:05:01 19 second paragraph -- maybe blow that up a little
11:05:05 20 bit. At the end of the second paragraph, it says:

11:05:10 21 "These policies, adopted in the
11:05:11 22 period 1745-1761, were made law when
11:05:17 23 they were incorporated into the
11:05:18 24 Royal Proclamation of 7 October
11:05:23 25 1763."

11:05:24 1 And continuing in the next paragraph:

11:05:26 2 "Adherence to the principles of
11:05:27 3 the Royal Proclamation of 1763
11:05:29 4 remained the basis of Britain's
11:05:31 5 Indian policy for more than half a
11:05:33 6 century and explains the success of
11:05:35 7 the British in maintaining the
11:05:37 8 Indians as allies in Britain's wars
11:05:40 9 in North America during that
11:05:41 10 period."

11:05:43 11 So I take it you disagree with what he
11:05:48 12 is saying --

11:05:49 13 A. Well, yes, and Alword, the
11:05:53 14 authority that he cites, certainly doesn't support
11:05:56 15 that. The Alword book refers carefully -- refers
11:05:59 16 to the Royal Proclamation as policy.

11:06:00 17 Tobias is a non-lawyer who is accepting
11:06:09 18 legal argument as though it were historical
11:06:12 19 argument. James Morrison is an example of another
11:06:15 20 historian who does the same. He talks of the Royal
11:06:17 21 Proclamation as omnibus legislation, and it is not
11:06:20 22 omnibus legislation. It is not even legislation.

11:06:23 23 So that is wholly wrong. What it is
11:06:29 24 doing is it is creating. It is building a
11:06:31 25 narrative of Crown obligation to enter into

1 treaties as part of the way in which a narrative of
2 Crown liability is being constructed in the early
3 1980s in the aftermath of patriation, section 35.

4 So that is the context within this kind
5 of bad history is occurring, because it is not
6 lawyers, and it is not interrogating the nature of
7 the legal instrumentation that it is being used,
8 how it could have had an effect. He is saying here
9 that a Proclamation is making law. Well, any first
10 year public law student knows that there are issues
11 with that kind of proposition. And these guys
12 aren't even questioning it. They are just saying
13 it is law.

14 Q. Can we go to document S1209,
15 please. This is from J.R. Miller's book "Compact,
16 Contract, Covenant, Aboriginal Treaty-Making in
17 Canada", and I would like to go to page 70, which
18 is PDF page 44.

19 A. Again, could we have the year of
20 this book, please?

21 THE COURT: Is this the entirety of the
22 book, sir?

23 MR. TOWNSHEND: I think this is an
24 extract.

25 THE COURT: Well, can you put on the

1 record what it is we are looking at first before
2 you ask questions. So we have a start, the author,
3 the name of the book. Is it the whole book, and
4 when it was it published?

5 MR. TOWNSHEND: Yes. If you could go
6 back to the title page, it is by J.R. Miller,
7 "Compact, Contract, Covenant, Aboriginal
8 Treaty-Making in Canada".

9 THE COURT: Yes, we had that.

10 MR. TOWNSHEND: And I am told that was
11 in 2009.

12 THE COURT: And you are saying it is
13 the entirety of the book or an excerpt? It is 200
14 pages. It could still be an excerpt.

15 MR. TOWNSHEND: I believe it is an
16 excerpt because the PDF image is a lower number
17 than the page number.

18 THE COURT: Well, that won't help me.
19 If you say it is an excerpt -- and are you asking
20 that anything be done with this document?

21 MR. TOWNSHEND: No, I was going to read
22 a portion and get the witness's comments on it.

23 THE COURT: Oh, I see. You are not
24 asking that it be made an exhibit?

25 MR. TOWNSHEND: No.

11:09:15 1 THE COURT: No. All right. Please go
11:09:19 2 ahead.

11:09:19 3 BY MR. TOWNSHEND:

11:09:19 4 Q. If we could go, yes, back there
11:09:21 5 and expand that a bit, starting on line 3 of that
11:09:26 6 page:

11:09:29 7 "To counter frauds and abuses
11:09:30 8 over Indian territory, the
11:09:32 9 Proclamation laid down rigid
11:09:34 10 requirements governing acquisition
11:09:35 11 of Indian lands."

11:09:39 12 And then in the middle of the second
11:09:40 13 paragraph:

11:09:42 14 "Historically it has become
11:09:43 15 even more important as the
11:09:45 16 foundation of Britain's
11:09:46 17 treaty-making policy in Canada. The
11:09:48 18 limitation that only the Crown or
11:09:51 19 its representative could treat with
11:09:52 20 First Nations for land, that
11:09:54 21 negotiations about acquiring Indian
11:09:56 22 lands must take place publicly, and
11:09:58 23 that other members of the First
11:10:00 24 Nation community should be aware of
11:10:02 25 what was being considered would

1 evolve over time into the protocol
2 that was generally followed by the
3 British and later Canadian
4 governments in negotiating with
5 First Nations for land. The Royal
6 Proclamation, as a result, became a
7 vitally important document in the
8 history of treaty-making."

9 Do you see that?

10 A. I do.

11 Q. Do you agree with that?

12 A. I would say there is a more
13 careful and guarded way of characterizing, and the
14 strength of that extract there, I have no
15 difficulties with it. Of course, we have to see
16 what is said throughout the course of this
17 particular essay because the author might depart
18 from that or might extend it in a more general
19 sense.

20 He says there it was the foundation of
21 Britain's treaty-making policy in Canada. We have
22 got to remember that in Canada treaty-making was
23 limited to mid-Canada, to the Great Lakes region,
24 and to the Prairies. It wasn't a Canadian policy
25 in the sense of post-Confederation Canada because

11:11:00 1 there was 14 treaties in southern Vancouver Island
11:11:06 2 and treaties nowhere else; in Lower Canada, not
11:11:12 3 there; the north, British Columbia, Maritimes, no
11:11:15 4 treaties.

11:11:16 5 So the vast majority of Canadian
11:11:18 6 territory was granted to settlers or alienated out
11:11:25 7 of the Crown ownership through Crown grant without
11:11:29 8 a treaty process.

11:11:30 9 So treaty-making is not a national
11:11:34 10 policy. It is a regional policy in Canada and in
11:11:38 11 Canada's history.

11:11:39 12 Q. I think I forgot to ask you about
11:11:42 13 J.R. Miller. Do you recognize him as a
11:11:46 14 reputable historian, a --

11:11:48 15 A. I recognize him as a historian.

11:11:49 16 Q. Pardon me?

11:11:50 17 A. I recognize him as a historian,
11:11:52 18 yes.

11:11:52 19 Q. So I was looking at what starts on
11:11:56 20 line 3. It talks about the Proclamation laying
11:12:00 21 down rigid requirements governing acquisition of
11:12:03 22 Indian land?

11:12:03 23 A. Well, that's part, I mean, where
11:12:05 24 one starts to see -- we have a statement there
11:12:08 25 that, from my perspective, is unexceptionable and

1 then a practice or a policy becomes hardened
2 mysteriously into something that is rigid, and by
3 implication, inferentially is imperative, is
4 required, and so the Proclamation is still
5 performing a version of the statutory effect. And
6 one needs to be careful about that and needs to
7 correct and address.

8 Q. So I take it you disagree with
9 what --

10 A. If I could actually see it,
11 please. I can't see it on my screen here.

12 Q. I am talking about the third line
13 on the screen, and I am asking you if you disagree
14 with his statement that:

15 "[...] the Proclamation laid
16 down rigid requirements governing
17 acquisition of Indian lands."

18 I can't see that on my screen. Oh,
19 sorry. Yes, it didn't lay down rigid requirements.
20 And no private persons were allowed to make any
21 purchase. Well, it said that, but it didn't create
22 any penal consequence from it because it couldn't.
23 And the same with direct purchases.

24 What it effectively says is those
25 direct purchases will not be recognized and any

1 title derived from them will not be recognized by
2 the Crown. So ultimately the consequences of the
3 ostensible prohibitions that are being made is
4 civil because it needs penal legislation to turn
5 direct purchases crossing the Proclamation line
6 into an offence, and that legislation, on the
7 whole, is not forthcoming.

8 So when we are talking about rigid
9 requirements and how they become, we need to be
10 talking about things like that, and that is not
11 occurring in any of the historiography of the
12 Proclamation except mine.

13 MR. TOWNSHEND: Your Honour, this would
14 be a good time for a break.

15 THE COURT: We'll take a 15-minute
16 break, and if another break is needed, that would
17 allow time for that this morning.

18 -- RECESSED AT 11:15 A.M.

19 -- RESUMED AT 11:30 A.M.

20 THE COURT: Please go ahead.

21 BY MR. TOWNSHEND:

22 Q. Professor McHugh, you recognize
23 Brian Slattery as a leading scholar of Aboriginal
24 rights in Canada?

25 A. Yes.

1 Q. And in your book, you refer to his
2 thesis as "ground-breaking and highly influential"?

3 A. That's right. Correct.

4 Q. And you also mention that it was a
5 blend of history and law?

6 A. I beg your pardon?

7 Q. It is a blend of history and law.

8 A. I wouldn't describe it as that. I
9 would describe it as law. I could give you reasons
10 if you would --

11 Q. All right. I am going to take you
12 to some parts of it which appear to me to be about
13 history, but we can see.

14 A. Well, I would be happy to explain
15 it.

16 Q. Pardon me?

17 A. I would be quite pleased to do
18 that, if it would help the Court.

19 Q. So can we have document S1579.
20 This is the "Land Rights of Indigenous Canadian
21 Peoples, As Affected By the Crown's Acquisition of
22 Their Territories", by Brian Slattery, Wadhan
23 College, Oxford, a thesis for his Ph.D. in 1979.

24 Could I have page 310, which is PDF
25 page 333. If you scroll up a bit, just to get the

1 heading, he is talking about private purchases and
2 the Royal Proclamation, and in the part marked
3 here, Professor Slattery says:

4 "Fortunately, the authorities
5 have adopted a uniform point of view
6 [...]"

7 A. Could we just take those words
8 because --

9 THE COURT: Sir, you really have to
10 wait for the question.

11 THE WITNESS: Sorry. Yes.

12 THE COURT: You may well be correctly
13 anticipating it, but if you aren't, then we are
14 going to have confusion.

15 Please go ahead with your question,
16 sir.

17 BY MR. TOWNSHEND:

18 Q. The portion -- I just wanted to
19 portion here:

20 "Fortunately, the authorities
21 have adopted a uniform point of
22 view, holding, in effect, that the
23 Proclamation characterizes the
24 Indian Title as inalienable, except
25 to the Crown or its delegates, so

1 that the purchases of Indian land by
2 private parties are invalid."

3 Do you agree with that?

4 A. It is a statement of law. It is
5 not a historical statement, which is why you
6 have -- or how you have been referring me to
7 Professor Slattery's work.

8 So in terms of the way in which you are
9 presenting Brian's work to me, that is a legal
10 statement. It is not a historical statement.

11 "[...] the authorities have
12 adopted a uniform point of view,
13 holding [...]"

14 Those are legal words. That is what
15 lawyers do in cases, authorities adopting a uniform
16 point of view, holding. That is legal reasoning.
17 That is not historical.

18 "[...] the Proclamation
19 characterizes", present tense, "the
20 Indian Title as inalienable, except
21 to the Crown or its delegates, so
22 that the purchases of Indian land by
23 private parties are invalid."

24 Now, that statement "are invalid" is
25 incomplete inasmuch as they are invalid in terms of

11:37:25 1 the Crown's willingness to recognize their
11:37:27 2 effectiveness.

11:37:28 3 "The same reasoning has been applied to
11:37:31 4 long-term leases", leasing was a phenomenon common
11:37:38 5 in New Zealand, as well as Upper Canada, by which
11:37:41 6 the state of direct purchases of Aboriginal land,
11:37:43 7 there would be leases from them.

11:37:44 8 This is legal argument. If you go
11:37:48 9 through the authorities Brian uses, he uses
11:37:54 10 authorities. There is never any reference to how
11:37:56 11 the Proclamation is received, acted upon, the
11:38:00 12 social life of the Proclamation, and the extent to
11:38:04 13 which it has been adopted in practice.

11:38:10 14 Brian just runs through cases. He goes
11:38:14 15 through the Marshall cases. He goes through
11:38:17 16 Connolly v. Woolrich. It is a legal argument. I
11:38:19 17 know this thesis very, very well, and I admire it
11:38:22 18 immensely. It comes from a particular period in
11:38:25 19 the history of common law Aboriginal title when a
11:38:27 20 strong legal argument was necessary, and this is
11:38:29 21 the document that does it. It is an argument for
11:38:33 22 the extant Aboriginal title, and 300 pages doing
11:38:38 23 that, and he uses historical material, but he uses
11:38:41 24 it probatively in terms of a legal argument that is
11:38:45 25 being made.

11:38:45 1 And I do the same in New Zealand. We
11:38:50 2 are lawyers here, not historians.

11:38:52 3 Q. Well, I want to take you to what
11:38:56 4 he says about the authorities which appear to me to
11:38:59 5 be historical authorities. So if I could go to
11:39:02 6 page 335 of the PDF, which is page 312 of his
11:39:06 7 thesis. At the top there, he says:

11:39:17 8 "In R. v. Lady McMaster [...]"

11:39:23 9 THE COURT: I am just going to
11:39:24 10 interrupt you for a moment. I may have misheard
11:39:26 11 you. I thought you were about to embark in a
11:39:37 12 different direction. These are cases. You are
11:39:39 13 saying that they are not legal authorities?

11:39:42 14 MR. TOWNSHEND: They are --

11:39:48 15 THE COURT: The gentleman just
11:39:48 16 explained at some length that they are legal
11:39:51 17 authorities, and I am looking at a decision of the
11:39:53 18 Exchequer Court of Canada. How is that not -- I am
11:39:58 19 confused, sir.

11:39:59 20 MR. TOWNSHEND: It is a legal
11:40:01 21 historic -- yes, it is a legal authority from 1926.
11:40:13 22 So in that event, I thought it would fall within
11:40:15 23 legal history. It is certainly not current.

11:40:20 24 THE COURT: Well, that is an
11:40:21 25 interesting proposition, sir. Please ask your

1 entire question, and if there is no objection, I
2 may well let you ask it, but if you are suggesting
3 that I should regard a case that wasn't decided in
4 the last couple of years as history because it is
5 older, I am going to be struggling with that a
6 little bit. The common law doesn't work that way.

7 But let's hear the question. I may
8 have misunderstood. I took it that you were
9 basically saying this is not legal authority, and
10 you were going to demonstrate why. So perhaps I
11 misunderstood your question.

12 MR. TOWNSHEND: No, it is legal
13 authority, and I am suggesting that being legal
14 authority from 1926 gives it a different flavour
15 than legal authority from this decade.

16 THE COURT: Well, I have some
17 difficulty with that, sir.

18 THE WITNESS: Yes.

19 THE COURT: I mean, we still talk about
20 Donoghue v. Stevenson, and that was quite some time
21 ago, but that is not history. That is legal
22 authority.

23 THE WITNESS: Authority.

24 MR. TOWNSHEND: You are thinking of --

25 THE COURT: I am just going to allow

1 Mr. Ogden to make his submission.

2 MR. OGDEN: I won't make a submission.

3 I'll just make an objection, Your Honour, on the
4 basis that the question is asking for an opinion as
5 to the state of law in Canada at the present time
6 and is outside the tendered expertise -- the
7 accepted expertise for this witness.

8 THE COURT: Okay. Thank you for your
9 submission.

10 Mr. Townshend can respond to that as
11 well as whatever he wanted to say in response to
12 me.

13 MR. TOWNSHEND: I was not about to go
14 into the reasoning of the case, which would be law.
15 I was going to what the result of the case was,
16 which I view in some measure as an event.

17 THE COURT: But is that not a
18 cross-examination on domestic law?

19 Now, I am going to let you re-ask your
20 question because I think I may have misunderstood
21 it because I had the impression that you were
22 suggesting that this passage, which clearly is
23 legal authority, was not legal authority and
24 somehow that was your road to getting into this.

25 You have clarified that this passage is

11:43:17 1 legal authority but that somehow, because it isn't
11:43:22 2 from the recent past, you thought it was legal
11:43:24 3 history.

11:43:25 4 Now, I appreciate, sir, that in this
11:43:30 5 area there is some overlap. I will use the word
11:43:37 6 "overlap" because legal history at some point will
11:43:42 7 come up to recent days, but as I said in my ruling,
11:43:47 8 that does not give an open licence to
11:43:51 9 cross-examining on domestic law.

11:43:53 10 Now, I am troubled by the idea that the
11:43:55 11 age of the case is the test. Perhaps it's a
11:44:00 12 relevant aspect of it, but I still would ask that
11:44:03 13 you repeat your question. The witness can pause.
11:44:05 14 I am going to, first of all, ask if Mr. Ogden
11:44:09 15 maintains his objection or not after you have
11:44:11 16 finished your question and then I can make a ruling
11:44:13 17 about it.

11:44:14 18 Please go ahead.

11:44:15 19 BY MR. TOWNSHEND:

11:44:20 20 Q. I want to start with something
11:44:21 21 different then.

11:44:23 22 THE COURT: Well -- I'm sorry?

11:44:27 23 BY MR. TOWNSHEND:

11:44:27 24 Q. The cases referred to, I would
11:44:37 25 suggest, represent the law as it stood in the 1920s

11:44:41 1 and '30s, not the law today; would you agree with
11:44:46 2 that?

11:44:47 3 A. Well --

11:44:49 4 THE COURT: Don't answer the question,
11:44:50 5 sir. Remember I said don't answer the question.

11:44:53 6 The next step, Mr. Ogden, you have had
11:44:56 7 the question. Do you maintain your objection?

11:44:58 8 MR. OGDEN: Well, yes, the question is
11:45:04 9 asking the witness to comment on what the law is
11:45:09 10 today, suggesting that they represent the law as it
11:45:14 11 was in the 1920s and 1930s and not the law today.
11:45:18 12 So he is asking whether these cases are still good
11:45:22 13 law.

11:45:23 14 THE COURT: All right. Mr. Townshend?

11:45:26 15 MR. TOWNSHEND: I am trying to find a
11:45:30 16 way to frame this, and this is how the law
11:45:34 17 developed --

11:45:36 18 THE COURT: Well, why do you need --

11:45:38 19 MR. TOWNSHEND: -- as opposed to what
11:45:39 20 the law is.

11:45:40 21 THE COURT: Explain to me how --

11:45:45 22 MR. TOWNSHEND: The question I want to
11:45:46 23 ask is if Professor McHugh agrees with this
11:45:48 24 paragraph. That is really what I want.

11:45:50 25 THE COURT: This paragraph, which is a

1 statement of what certain cases provided for?

2 MR. TOWNSHEND: Yes.

3 THE COURT: And what they said?

4 MR. TOWNSHEND: Yes.

5 THE COURT: And how will his view of
6 that be helpful to me? I mean, the cases say what
7 they say, and this says what it says, and I suppose
8 you and I can both read them.

9 What does this witness add?

10 MR. TOWNSHEND: Well, the witness has
11 said that the Royal Proclamation is not a statute,
12 and these cases seem to say --

13 THE COURT: He said that in the time
14 period, which is not, I might say, today, that it
15 was not a statute, yes. And you have
16 cross-examined at some length about that, and you
17 are welcome to continue cross-examining about that.

18 BY MR. TOWNSHEND:

19 Q. Well, then I would ask if, in the
20 1920s and 1930s, the Royal Proclamation was treated
21 as a statute?

22 A. We need to look at these
23 authorities --

24 THE COURT: Can you speak up, sir.

25 THE WITNESS: Sorry. Thank you.

11:47:09 1 THE COURT: And slowly.

11:47:09 2 THE WITNESS: Thank you.

11:47:10 3 We need to look at these authorities

11:47:14 4 carefully.

11:47:17 5 THE COURT: And just -- I am just

11:47:20 6 wanting to understand why it's -- how it was

11:47:24 7 regarded in 1930 is relevant to this trial. Maybe

11:47:27 8 it is. Can you explain that to me?

11:47:29 9 MR. TOWNSHEND: Well, if it changed

11:47:30 10 between the time we have been talking, the mid-19th

11:47:34 11 century and the 1930s, I would like to know when

11:47:37 12 and how.

11:47:37 13 THE COURT: Okay. You didn't ask those

11:47:39 14 questions. I think I previously said you probably

11:47:41 15 could ask those questions. Is this just another

11:47:44 16 way of doing that?

11:47:46 17 MR. TOWNSHEND: Yes.

11:47:46 18 THE COURT: Well, I think you'll draw

11:47:51 19 less objections if you ask the questions that you

11:47:54 20 just did rather than picking time periods and

11:47:57 21 asking what the status was.

11:47:59 22 But let me invite you to ask a question

11:48:03 23 and see how we do.

11:48:08 24 BY MR. TOWNSHEND:

11:48:08 25 Q. Did the law respecting the nature

1 of the Royal Proclamation change between the
2 mid-19th century and the 1920s?

3 A. I believe not. We see in these
4 cases an argument made of the Proclamation having a
5 particular legal effect, and the legal effect is
6 directed towards not the Proclamation at large but
7 to the facts in these cases, and these cases
8 concerned private arrangements made with Aboriginal
9 occupants, and the outcome in these cases is that
10 these direct purchases -- we'll call them both --
11 were not recognized.

12 Now, you don't need the Royal
13 Proclamation to get that effect because the
14 Crown -- as the landowner, the Crown has the power
15 of election, and the Crown made it clear that its
16 courts were not going to recognize this. This
17 position had been taken before the Royal
18 Proclamation. The Royal Proclamation was an
19 announcement of it. It is not a legislative
20 action, so the courts are incorrect in saying this,
21 to say that private purchasers of Indian lands are
22 ineffectual. You don't need -- there is not a
23 legislative enactment needed to create that result.

24 Now, these cases relate to an argument
25 that arose after Confederation. It was never made

11:49:46 1 in the period 1763 to 1867 concerning the status of
11:49:50 2 the Proclamation. It is directly a result of the
11:49:54 3 terms and the framework of the British North
11:50:00 4 America Act 1867, a federal argument concerning the
11:50:03 5 effect of an Indian cession upon -- because of the
11:50:08 6 distinction in the BNA Act between underlying
11:50:10 7 ownership, which remained in the old provinces, and
11:50:14 8 the management of Indian Affairs, and the obtaining
11:50:18 9 of cessions, section 91(24) of the BNA Act.

11:50:27 10 So the argument is particularly
11:50:29 11 associated with the Dominion, with John A.
11:50:32 12 MacDonald becoming a great advocate of an absolute
11:50:36 13 Indian Title because it would mean the treaties
11:50:39 14 vested the title in the Dominion rather than the
11:50:41 15 province.

11:50:44 16 So it is at this juncture that a new
11:50:47 17 argument arises about the Proclamation, and this is
11:50:50 18 the argument that the Indian provisions are somehow
11:50:53 19 severed. Well, even if that argument has traction
11:50:59 20 from the 1880s onwards, it is not an argument that
11:51:07 21 is being run in the period before, in the
11:51:10 22 pre-Confederation period.

11:51:11 23 So the statement of John -- the
11:51:15 24 position John A. MacDonald is taking about the
11:51:18 25 absolute character of Indian Title is a statement

1 of a current legal position he is arguing for,
2 ultimately unsuccessfully. It is not a statement
3 of historical truth about how the Proclamation was
4 viewed in the intervening period. A position -- a
5 political position taken in 1880 is not an
6 historical statement of behaviour in the
7 intervening period.

8 Now, these cases concern private
9 purchases. They don't concern grants made while
10 still in Indian occupancy or lands taken without a
11 treaty by the Crown. These are directed towards
12 settlers and the titles that settlers have as a
13 consequence of such conduct. These are not cases
14 saying it is a statute binding upon the Crown.
15 Statutes at large, how do they bind the Crown?
16 Well, they need express reference. So how can a
17 Proclamation bind the Crown when it doesn't have
18 the formula for statutes that will.

19 There is all kinds of problems with
20 this approach being taken then, and the reference
21 to the Proclamation having statutory force, it is
22 extra. It is not necessary for the judgments being
23 made.

24 Now, these cases do not establish that
25 the Royal Proclamation was a statute. We have

1 statements of judges saying it has some statutory
2 effect in this particular relation, the relation of
3 settlers and titles derived directly from
4 Aboriginal needs. You can't extrapolate out from
5 there. Even if you take it from that perspective,
6 you can't extrapolate outwards.

7 These are cases at a particular
8 juncture in Canadian federal relations as they are
9 working out the effect of the St. Catharines
10 Milling case and struggling to build co-operative
11 federal relations between Ontario and Canada on
12 this question.

13 I don't think that gets resolved until
14 1921. So that is what is going on here, and so to
15 say that Canadian courts have adopted the same
16 position, well, what same position? That the Royal
17 Proclamation had the effect of a statute. This is
18 Brian Slattery. Brian Slattery's argument now is
19 that it was prerogative legislation under the rule
20 in Campbell v. Hall. Now, I have got a lot to say
21 about that if you want me to, but this particular
22 box that you have given to me is -- there is a lot
23 to be said about it, and when you start picking it
24 apart, then one comes up with a much, much more
25 qualified position than simply to say here are

1 Canadian courts recognizing it as a statute.

2 And one day maybe a Canadian court will
3 go through with the rigour that is required to
4 correct a misleading view of the Proclamation that
5 inhibits proper understanding of conduct
6 particularly in the pre-Confederation period.

7 Q. You testified in the case of
8 Chippewas of Sarnia.

9 A. Correct.

10 Q. I would like to go to that case,
11 not for its law, but for its factual findings. So
12 can I have document SC1470. This is the Chippewas
13 of Sarnia Band v. Attorney General of Canada et
14 al., 51 O.R. (3d) 641. I want to go to what it
15 says about the evidence and to paragraph 201.

16 THE COURT: Perhaps your assistant
17 could be given page numbers as other counsel have
18 done because it is -- distracting is the wrong
19 word, but it is giving me difficulty having all
20 this text whizzing past me at length.

21 BY MR. TOWNSHEND:

22 Q. It is PDF 49. Oh, you are already
23 there.

24 That says:

25 "On the other hand, the

11:56:09 1 evidence shows that while the Royal
11:56:10 2 Proclamation was a unilateral
11:56:13 3 declaration of the Imperial Crown,
11:56:18 4 historically, it had become a formal
11:56:19 5 part of the treaty relationship with
11:56:21 6 the Indian nations. In reviewing
11:56:23 7 the evidence, we have already
11:56:25 8 alluded to the fact that the Crown
11:56:27 9 took extraordinary steps to make the
11:56:28 10 First Nations aware that the policy
11:56:30 11 set out in the Royal Proclamation
11:56:31 12 would govern Crown-First Nations
11:56:34 13 relations and the importance
11:56:35 14 attached to the Royal Proclamation
11:56:37 15 by First Nations as their Charter.
11:56:39 16 There can be little doubt from
11:56:43 17 aboriginal perspective, the Royal
11:56:45 18 Proclamation was perceived as an
11:56:47 19 authoritative and enduring statement
11:56:50 20 of the principles governing their
11:56:52 21 relationship with the Crown. We
11:56:53 22 also note in the record evidence
11:56:54 23 that government officials considered
11:56:55 24 that the Indian land provisions in
11:56:58 25 the Royal Proclamation were still in

11:57:00 1 effect even after the passage of the
11:57:01 2 Quebec Act. Moreover, the Royal
11:57:03 3 Proclamation is expressly referred
11:57:04 4 to in the Canadian Charterer of
11:57:06 5 Rights and Freedoms."
11:57:14 6 THE COURT: What is your question?
11:57:17 7 BY MR. TOWNSHEND:
11:57:17 8 Q. My question is, do you agree with
11:57:17 9 the facts as found by the Court there?
11:57:19 10 THE COURT: Okay. I am going to
11:57:21 11 interrupt you, okay, because that thing you read is
11:57:23 12 an amalgam of facts and statements of law, and so a
11:57:33 13 general question like that isn't going to help me.
11:57:36 14 Is there a specific fact that you wish
11:57:38 15 to ask this gentleman about?
11:57:41 16 BY MR. TOWNSHEND:
11:57:42 17 Q. All right. I will do that.
11:57:43 18 We'll take the sentence:
11:56:53 19 "We also note in the record
11:56:54 20 evidence that government officials
11:56:55 21 considered that the Indian land
11:56:57 22 provisions in the Royal Proclamation
11:56:59 23 were still in effect even after the
11:57:00 24 passage of the Quebec Act."
11:58:02 25 THE COURT: Again, you are asking this

1 gentleman to say whether he agrees whether certain
2 evidence was in the record of another trial that he
3 happened to testify in, and this is an expert
4 witness, so you need to satisfy me that he is even
5 qualified to answer that factual question or that
6 it is admissible from him.

7 I am just struggling with how it would
8 be either thing as a matter of fact as you have
9 asked your question.

10 MR. TOWNSHEND: The sentence is about
11 what government officials considered.

12 THE COURT: Let me find it again. Hold
13 on:

14 "We also note in the record
15 evidence [...]"

16 Is that the one?

17 MR. TOWNSHEND: Yes.

18 THE COURT: So the Court of Appeal is
19 observing that there is evidence in the record from
20 that trial to that effect, and you asked if he
21 agreed with the fact.

22 Well, the fact is that there was
23 evidence in that trial to that effect, and it is my
24 job to make sure that experts talk about things
25 that they are needed for and qualified to talk

11:59:10 1 about. And how is this gentleman qualified to talk
11:59:14 2 about what was in the record at that trial? I
11:59:20 3 mean, you could try and lay a foundation for that,
11:59:22 4 and we'll see where we end up, but being a witness
11:59:27 5 in a trial is not adequate to satisfy me that the
11:59:32 6 individual is familiar with the entirety of a
11:59:34 7 record in another trial. I mean, look at the
11:59:38 8 record in this trial. It is enormous.

11:59:42 9 So, you know, it is my job to make sure
11:59:45 10 we are sticking with the proper role of this expert
11:59:49 11 witness.

11:59:59 12 BY MR. TOWNSHEND:

12:00:05 13 Q. Let me go to a different paragraph
12:00:06 14 then, paragraph 198, which is just on the page
12:00:11 15 above it.

12:00:16 16 THE COURT: 198?

12:00:20 17 MR. TOWNSHEND: Yes.

12:00:21 18 THE COURT: And I am going to ask the
12:00:22 19 witness to pause again before answering, and let me
12:00:25 20 hear the question.

12:00:26 21 BY MR. TOWNSHEND:

12:00:30 22 Q. It says:

12:00:31 23 "In light of our findings on
12:00:33 24 the evidence before us that whatever
12:00:34 25 the formal legal status of the Royal

1 Proclamation subsequent to the
2 passage of the Quebec Act, the Crown
3 continued to recognize Indian rights
4 in their land, continued to require
5 that those rights be surrendered
6 only to the Crown on consent, and
7 continued to regard those rights as
8 communal and surrenderable by a
9 public manifestation of First
10 Nations consent on surrender [...]"

11 So do you agree with the facts as found
12 at that paragraph -- in that sentence?

13 THE COURT: Okay. First of all, I am
14 going to ask if there is any objection to that
15 question.

16 MR. McCULLOCH: Your Honour, the
17 witness is being asked to deliver an opinion on a
18 legal finding by a court. I do not consider that
19 falls within his expertise and is inadmissible as a
20 question about what is very clearly current
21 domestic law.

22 THE COURT: Well, it would seem to me,
23 Mr. Townshend, that if you want to try and isolate
24 specific facts as opposed to lengthy excerpts from
25 a case such that this witness could fairly be asked

12:01:49 1 if they agreed that that fact is, from his
12:01:54 2 perspective as a historian, accurate, then I am
12:01:57 3 going to let you try and do that, but that was a
12:02:00 4 very, very long excerpt which includes many
12:02:06 5 generalities which I would struggle to sort out
12:02:13 6 what to do with the answers, including -- I mean,
12:02:18 7 if you ask the individual questions, I think you
12:02:22 8 would be obliged to indicate at what time and in
12:02:24 9 what context and so on.

12:02:25 10 Are there individual facts you would
12:02:32 11 like to put to this witness as opposed to --

12:02:37 12 BY MR. TOWNSHEND:

12:02:38 13 Q. Let me try one more.

12:02:39 14 Further down in that paragraph, it
12:02:41 15 says:

12:02:41 16 "We have found that those
12:02:42 17 responsible for First Nations
12:02:44 18 relations after 1776 continued to
12:02:46 19 follow the central policies
12:02:49 20 underlying the Royal Proclamation
12:02:53 21 [...]"

12:02:53 22 Do you agree with that finding of the
12:02:57 23 Court of Appeal that those responsible for First
12:03:00 24 Nations relations after 1776 continued to follow
12:03:04 25 policies underlying the Royal Proclamation?

1 MR. McCULLOCH: Again, Your Honour, he
2 is being asked to comment on a finding by the
3 Court.

4 THE COURT: I am going to permit that
5 question. I think it is focussed enough. Now, you
6 are not being asked, I don't think, sir, to comment
7 on the legal context. You are being asked as a
8 factual matter, as a historian, do you agree with
9 the statement.

10 THE WITNESS: The factual basis for a
11 reassessment or a more searching historical inquiry
12 into the status -- legal status of the Royal
13 Proclamation, the scholarship was not available at
14 that time. The scholarship was beginning but not
15 done, and so the full material on this question has
16 never been before a higher Canadian court.

17 So the Court is cautious in what it
18 says about the status of the Royal Proclamation
19 because it is aware that this is an argument -- at
20 that stage, it was a fairly jejune argument, and it
21 is one, I think you may have an inkling today in
22 court, the last couple of days, that has become
23 considerably more sophisticated, texted, and
24 documented, and some of the documents that are
25 indicated as indicative of a position are documents

12:04:35 1 presented by historians, not lawyers or legal
12:04:39 2 historians, in which obligation is referred to
12:04:43 3 without interrogation of the document to see if it
12:04:44 4 is a legal or some kind other kind of obligation.

12:04:47 5 So there was still much work to be done
12:04:53 6 at the time the Court of Appeal was saying this.
12:04:54 7 That is what I would say.

12:05:10 8 BY MR. TOWNSHEND:

12:05:10 9 Q. If we could go to your report at
12:05:13 10 paragraph 4.38. In this paragraph, you are talking
12:06:02 11 about an 1839 statute for protection of the lands
12:06:08 12 of the Crown, and you say, "authorized
12:06:12 13 Commissioners to inquire into complaints about
12:06:14 14 settlers 'illegally possessing' Indian land."

12:06:17 15 So do you want to see the Act, or can I
12:06:24 16 ask --

12:06:25 17 A. How do you want me to react?

12:06:29 18 Q. Pardon me?

12:06:29 19 A. Do you want me to react to the --

12:06:31 20 Q. No, no. I am saying do you want
12:06:33 21 to see the Act, or could I ask a question about
12:06:36 22 what is in it?

12:06:36 23 A. Yes, could I see the Act, please.

12:06:38 24 Thank you.

12:06:40 25 Q. That is Exhibit 1301. This is the

1 1839 statute which you called an "Act for the
2 Protection of Lands for the Crown". And can we go
3 to article 2, which is on PDF page 3, and just have
4 a look at that Article II.

5 A. [Witness reviews document.]

6 Q. So that provides for a
7 Commissioner issuing a warrant to a sheriff to
8 direct him to eject or remove a person from Indian
9 land.

10 A. Correct.

11 Q. And if we drop down to article
12 III.

13 A. Yes.

14 Q. That provides that a Commissioner
15 can direct a person to be found guilty of occupying
16 Indian lands or stealing timber to be fined or
17 jailed.

18 A. So it creates a penal offence for
19 trespassing on Indian land. I am glad you brought
20 this to our attention --

21 THE COURT: Wait for the question, sir.

22 THE WITNESS: Sorry.

23 THE COURT: Yes.

24 THE WITNESS: Thank you.

25 BY MR. TOWNSHEND:

12:08:20 1
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12:10:10 25

Q. Now, I want to go to the 1850

Act --

THE COURT: Was there no question? Did I miss it?

MR. TOWNSHEND: The question was -- I was asking him to confirm that it provides the Commissioner can direct a person found guilty of occupying Indian lands or stealing timber be fined or jailed, and Professor McHugh answered it created a penal offence.

THE COURT: All right.

BY MR. TOWNSHEND:

Q. So can I go to Exhibit 1784. This is usually referred to as the 1850 Indian Land Protection Act. So if we look at the preamble to that Act on the next page, so this is defining the purpose of the Act of dealing with interference with Indian possession of land.

A. Correct. It refers to:

"[...] more summary and effectual means for the protection of such Indians in the unmolested possession and enjoyment of the lands and other property in their use or occupation".

12:10:14 1 "More summary and effectual means", the
12:10:18 2 1839 and the 1850 legislation, the legislation that
12:10:20 3 I have referred to the Royal Proclamation as
12:10:23 4 contemplating, of creating the penal provisions,
12:10:30 5 and it is creating a prohibitory legal framework
12:10:36 6 through local legislation controlling the settlers'
12:10:40 7 incursions onto native land.

12:10:44 8 This is -- remember that the former
12:10:48 9 protection until then is the prerogative, the Crown
12:10:52 10 title. Crown title alone doesn't do much; it is
12:10:57 11 not effective. "More summary and effectual means",
12:10:57 12 in my evidence in-chief I referred to a
12:10:59 13 Proclamation by Carleton as Governor of Quebec in
12:11:04 14 which he says persons trespassing on Indian land
12:11:09 15 will be treated as disturbers of the peace. He was
12:11:11 16 relying upon a common law offence because there was
12:11:14 17 no colonial statute, penal statute, that would give
12:11:20 18 him the legal wherewithal.

12:11:22 19 This comes in Canada in 1939, so that
12:11:25 20 is the historical significance. It is legislation
12:11:27 21 passed because it understands that the Proclamation
12:11:29 22 was a Proclamation, could not create penal
12:11:34 23 offences, was not a legislative instrument.

12:11:35 24 So the 1839, the 1850 legislation, what
12:11:40 25 they are doing and what they're talking about with

12:11:41 1 the prerogative goes directly to the points I have
12:11:43 2 been making in my evidence in-chief.

12:11:46 3 Q. So if you look at Section II of
12:11:59 4 that, if you could blow it up a bit. Following on
12:12:07 5 that, it provides that it is a misdemeanour to
12:12:14 6 purchase or lease lands from the Indians without
12:12:17 7 proper consent.

12:12:18 8 A. It is a penal provision. It is a
12:12:20 9 penal provision.

12:12:21 10 Q. And if we look at Section X?

12:12:55 11 A. [Witness reviews document.]

12:12:56 12 It is creating a more textured set of
12:13:01 13 penal provisions relating to occupationally
12:13:03 14 squatting on Indian land, and it is also
12:13:06 15 symptomatic of movement into the age of
12:13:08 16 legislation. The age of legislation is the age of
12:13:09 17 colonial jurisdiction because the legal source that
12:13:14 18 was used in the Imperial era was the prerogative.
12:13:19 19 Here you have legislation being used.

12:13:21 20 Legislation is the constitutionally
12:13:23 21 appropriate mode of doing this because you are
12:13:25 22 having responsible ministries that are changing
12:13:28 23 from time to time, so you can't rely upon executive
12:13:31 24 control of its own bureaucracy. You have got
12:13:34 25 changing ministries, and legislation is the

12:13:37 1 constitutionally regular way in which you manage
12:13:41 2 and order those kinds of matters.

12:13:45 3 So it also recognizes the
12:13:47 4 constitutional changes that are occurring within
12:13:49 5 Canada as well as -- that is part of the general
12:13:51 6 framework. And the more textured legalism becomes
12:13:56 7 the trend of the 19th century as well, legislation.

12:13:59 8 Q. And that section makes it possible
12:14:03 9 for Commissioners, under the 1839 Act we just saw,
12:14:07 10 to issue warrants to the sheriff on complaint of
12:14:10 11 squatting that direct the sheriff to remove the
12:14:12 12 squatter?

12:14:13 13 A. Correct.

12:14:13 14 Q. And if there is no sheriff, the
12:14:18 15 warrant can be directed to any literate person?

12:14:20 16 A. Correct.

12:14:21 17 Q. Now, if we could go down to
12:14:53 18 Section XI.

12:14:57 19 A. [Witness reviews document.]

12:14:58 20 Q. And move to the next part of XI on
12:15:00 21 the next page as well.

12:15:11 22 A. [Witness reviews document.]

12:15:15 23 Q. So this section deals with people
12:15:16 24 who have been removed and then returned to the land
12:15:20 25 where they were.

12:15:21 1 A. Uhm-hmm.

12:15:21 2 Q. And such a person --

12:15:23 3 A. And sleeping on the roads and
12:15:26 4 squatting on roadsides as well.

12:15:30 5 Q. And such a person can be committed
12:15:32 6 to jail for up to 30 days.

12:15:34 7 A. It is a penal provision. It also
12:15:35 8 reflects part of the way of thinking at the time of
12:15:38 9 the Royal Proclamation, and after was that -- penal
12:15:42 10 legislation, it is appropriately local because
12:15:46 11 there will be variations, as for example the
12:15:48 12 reference to the roads that one finds here because
12:15:50 13 the local presumably will be aware of the ways in
12:15:55 14 which these encroachments are occurring and how to
12:15:58 15 deal with it, a local matter.

12:16:00 16 And so that is the flavour entirely of
12:16:04 17 this legislation. So again it goes to underline
12:16:08 18 the point I have been making about the Royal
12:16:11 19 Proclamation not being legislative, because when
12:16:13 20 legislation comes along, you recognize it.

12:16:16 21 Q. And if we look at Section XII of
12:16:21 22 that Act.

12:16:25 23 A. [Witness reviews document.]

12:16:26 24 Q. That is again a penal provision
12:16:32 25 about cutting timber on Indian lands?

12:16:36 1 A. That's right. So we see a range
12:16:38 2 of penal provisions being established by statute,
12:16:39 3 not by Proclamation, by statute, to deal with
12:16:44 4 encroachments and related problems with Indian
12:16:48 5 lands.

12:16:48 6 Q. And it is the Commissioners under
12:16:52 7 the 1839 Act who trigger the enforcement of this?

12:16:55 8 A. Correct.

12:16:56 9 Q. Now, if we go to Section IX of
12:17:14 10 that Act, that, among other things, makes
12:17:28 11 Superintendents in the Indian Department justices
12:17:32 12 of the peace?

12:17:33 13 A. Correct. This is the paradigmatic
12:17:40 14 English Imperial way of policing the localities,
12:17:46 15 justices of the peace, with the powers of
12:17:48 16 commitment and bail, recognized by the common law
12:17:51 17 as well. So justices of the peace is a very
12:17:55 18 important status, and notice there also the use of
12:17:58 19 office, by virtue of their office and appointment
12:18:01 20 be justices of the peace.

12:18:03 21 Q. So yesterday you mentioned T.G.
12:18:06 22 Anderson who was Indian Superintendent for the
12:18:09 23 Saugeen in the early to mid-19th century.

12:18:14 24 A. Uhm-hmm.

12:18:15 25 Q. So he would have been a

1 Commissioner by virtue of his office?

2 A. So he would have had the powers of
3 justice of the peace.

4 Q. Yes.

5 MR. TOWNSHEND: Your Honour mentioned
6 the possibility of another break. Were you wanting
7 to take a break?

8 THE COURT: Well, I am suggesting --
9 and I am speaking for Madam Reporter, she is not
10 speaking for herself, but I think that the evidence
11 is a challenging job, and I was hoping to give at
12 least Madam Reporter a little bit of a respite from
13 that without her having to ask for it.

14 So we can. I would limit it to ten
15 minutes. All right.

16 -- RECESSED AT 12:20 P.M.

17 -- RESUMED AT 12:30 P.M.

18 THE COURT: Please go ahead.

19 BY MR. TOWNSHEND:

20 Q. I would like to go to Exhibit
21 4408. This is a Magistrate's Manual for Upper
22 Canada, and it is dated 1851. If we can go to page
23 181 of that, which is PDF page 8. This is talking
24 about a constable, if you could look at that.

25 A. [Witness reviews document.]

12:32:42 1 Q. So this provides that justices of
12:33:06 2 the peace appoint constables?

12:33:10 3 A. Sorry?

12:33:10 4 Q. This provides that justices of the
12:33:12 5 peace can appoint constables?

12:33:15 6 A. Uhm-hmm.

12:33:15 7 Q. And we have talked about T.G.
12:33:18 8 Anderson being a justice of the peace before we
12:33:23 9 broke, so he could have appointed constables?

12:33:27 10 A. That is a statement that is made
12:33:34 11 in the air. As a statement made to an expert that
12:33:39 12 is a historical witness, I would like to know the
12:33:42 13 documents you are connecting that possibility to so
12:33:45 14 that we might look at them and discuss. Yes, he
12:33:48 15 could have, and what does that mean in terms of the
12:33:53 16 documentary record and an historical account of
12:33:57 17 Anderson?

12:34:00 18 Q. The point I am asking right now is
12:34:01 19 he had the power to appoint constables.

12:34:03 20 A. Well, he had the power to appoint
12:34:06 21 constables, and did he exercise that power? If he
12:34:08 22 didn't, why not? If he didn't, then he didn't
12:34:11 23 think about it. There is all kinds of questions
12:34:14 24 that arise from presentation of a power.

12:34:16 25 Q. I am going to talk a bit about the

12:34:34 1 cost of constables. Can we have document SC1409.

12:34:47 2 This is "Mr. Sheriff Smiths Account", and this was
12:34:55 3 from one of our productions in this litigation.

12:34:56 4 A. I am taking it you are withdrawing
12:34:58 5 your earlier reservations about my expertise in
12:35:02 6 resourcing matters?

12:35:03 7 Q. Well, if the --

12:35:07 8 THE COURT: Yeah, I don't think that
12:35:08 9 Mr. Townshend is withdrawing anything. I also sort
12:35:10 10 of wondered why you were getting into this, sir,
12:35:13 11 having taken the position that this gentleman had
12:35:15 12 no expertise about certain things.

12:35:17 13 MR. TOWNSHEND: Well, I was thinking if
12:35:21 14 the paragraph is still in, I should cross-examine
12:35:23 15 on it. That is the position that there is not a
12:35:31 16 lot of expertise, but he has made these statements,
12:35:33 17 and I would like to cross-examine on it.

12:35:38 18 THE COURT: I am just trying to -- I
12:35:40 19 don't have my ruling in front of me. Well, my
12:35:48 20 recollection is that I agreed with you up to a
12:35:51 21 point, but I will permit you to cross-examine. The
12:36:06 22 more you do, obviously I'll have to take all that
12:36:09 23 into account when considering that opinion that you
12:36:12 24 originally asked me not to consider.

12:36:16 25 MR. TOWNSHEND: Can you give me a

1 moment?

2 THE COURT: Sure.

3 MR. TOWNSHEND: I would like to finish
4 with this document and then I'll move on without
5 the rest of what I had here.

6 So I would like that made an exhibit.

7 THE COURT: Mr. Registrar.

8 THE REGISTRAR: Exhibit No. 4450.

9 EXHIBIT NO. 4450: Document headed
10 "Mr. Sheriff Smiths Account" dated 10
11 September 1853.

12 THE COURT: Can you describe it again
13 for the record, please, Mr. Townshend.

14 MR. TOWNSHEND: It is "Mr. Sheriff
15 Smiths Account" dated 10 September 1853.

16 THE COURT: This is a transcription, is
17 it?

18 MR. TOWNSHEND: Yes. If you want to go
19 to the original that follows that.

20 THE COURT: Well, it needs to be
21 accurately described for the record, so I am
22 looking to you to do that, sir.

23 MR. TOWNSHEND: This is "Mr. Sheriff
24 Smiths Account receipted for services and
25 disbursements executing into [...]" pardon me. I'm

1 just having trouble reading that at the moment.

2 "[...] executing writs against squatters on the
3 Indian Reserve".

4 THE COURT: All right. That will be
5 Exhibit 4450.

6 BY MR. TOWNSHEND:

7 Q. Now, if we go to this, this is a
8 sheriff's account executing writs against squatters
9 on the Indian Reserve, and we see that he has a
10 charge for -- the first item is sheriff fees,
11 mileage and et cetera, constables and special
12 bailiffs on service 106 days, and some other
13 incidental expenses, the total of which is about
14 118 pounds; is that right?

15 A. Correct.

16 Q. So I am suggesting to you that
17 this is a fairly significant amount of time
18 enforcing trespass on Indian Reserve. It was not
19 an extraordinary amount of money at that point.

20 A. Well, to be able to answer that
21 question, I would have to have the expertise and to
22 have embarked upon an inquiry into the
23 administration of and execution of writs against
24 squatters in 1853, which is beyond the period
25 anyway that I have been looking at the Saugeen

1 Nation.

2 So I would like to know what other
3 writs there were, comparing this with others. I
4 would want to have embarked upon a more detailed
5 inquiry armed with more expertise than I have when
6 I look at a document like this, because looking at
7 it in isolation, yes, it seems to be a large amount
8 of time, but were there others during this amount
9 of time, what were the causes of it? So I have no
10 historical context of what this was or, to be
11 frank, expertise.

12 Q. I'll be happy to leave it at that.

13 Let's go to your report at paragraph
14 5.46. So I am asking first a general question
15 about the 5.46, 5.47 and 5.48. You are describing
16 an explosive emigration from Britain, leading to
17 unquenchable demand for land and intense pressures
18 on Governors to make land available; is that a fair
19 summary?

20 A. I have inverted "explosively"
21 because I am associating it with the work of an
22 important Imperial historian called James Belich,
23 and that is the term he uses, "explosive
24 colonization", so hence the inverted commas. So
25 that's right, yes.

12:42:02 1 Q. Was my summary a fair statement?

12:42:04 2 A. Could you say that again, please?

12:42:05 3 Q. That explosive emigration from

12:42:09 4 Britain leading to unquenchable demand for land and

12:42:13 5 intense pressures on Governors to make land

12:42:14 6 available; that is what you are talking about?

12:42:14 7 A. Well, that is your summary.

12:42:16 8 Q. Yes.

12:42:16 9 A. "Unquenchable", that is not a word

12:42:18 10 I am using.

12:42:20 11 Q. Does that capture the essence of

12:42:28 12 what you are saying?

12:42:28 13 A. Well, they are your words, not

12:42:30 14 mine. My words are set out in those paragraphs.

12:42:33 15 Q. Is there any substantive

12:42:35 16 difference other than the words?

12:42:37 17 A. I am using different words to you,

12:42:43 18 and I have put my position using my words in the

12:42:45 19 report.

12:42:45 20 Q. At the second line of paragraph

12:42:56 21 5.47, you say:

12:43:00 22 "Spreading white Anglo

12:43:02 23 settlement of the North American

12:43:03 24 continent, southern Africa and

12:43:05 25 Australia (Australia and New

12:43:08 1 Zealand) gave rise to an almost
12:43:11 2 unquenchable demand for land [...]"

12:43:13 3 A. Well, there is the word then.
12:43:14 4 Thank you.

12:43:16 5 Q. In the quotation in 5.46, you
12:43:23 6 mention, among other things, the Highland
12:43:27 7 clearances.

12:43:28 8 A. I cite an author who is referring
12:43:31 9 to the Highland clearances, yes.

12:43:33 10 Q. And that says they were a
12:43:39 11 significant source of emigration to North America?

12:43:43 12 A. That's right. And in the
12:43:47 13 literature -- though there was a time when
12:43:49 14 emigration was banned, and so the problem became
12:43:52 15 more accentuated within the British Isles, so we
12:43:57 16 need to perhaps be a little more specific on our
12:44:02 17 dates with that.

12:44:03 18 Q. Could I have Exhibit 4286, please.
12:44:18 19 This is a "History of the County of Bruce" by
12:44:22 20 Norman Robertson printed in 1906. I would like to
12:44:33 21 go to page 418 of that, which is page 441 in the
12:44:39 22 PDF. The paragraph marked describes 109 families
12:44:49 23 from Scotland, in particular, the Island of Lewis,
12:44:54 24 ending up in one particular township in Bruce
12:44:57 25 County; do you see that?

12:44:58 1 A. Yes.

12:44:59 2 Q. And if you go to PDF 445, this is
12:45:09 3 the same author saying:

12:45:12 4 "There were many Highland
12:45:14 5 Scotch settled in Huron other than
12:45:17 6 those from Lewis."

12:45:19 7 Do you see that?

12:45:20 8 A. Yeah.

12:45:25 9 Q. So given the mention of Highland
12:45:29 10 clearances, I just wanted to put a little bit on
12:45:32 11 the record about the context of that. I hope this
12:45:34 12 will be very short. I just want to understand what
12:45:36 13 it is we are talking about. You agree that this
12:45:41 14 was -- what was happening was the Scottish landed
12:45:45 15 gentry were evicting small farmers who had been
12:45:50 16 there for generations to make room for sheep
12:45:52 17 farmers, in broad terms?

12:45:53 18 A. Yeah, the modern historiography of
12:45:57 19 the clearances is very textured, and the histories
12:46:04 20 of the clearances themselves and histories of the
12:46:12 21 narratives, of the narrating, and the mythologizing
12:46:19 22 to some extent of the clearances is another
12:46:23 23 historiographical theme.

12:46:25 24 So when we talk of the clearances, when
12:46:29 25 we talk of them as a historical phenomenon, we need

12:46:34 1 to be quite specific how and in what way we are
12:46:36 2 referring to them. So I'll just say that at the
12:46:42 3 moment.

12:46:42 4 Q. All right. I am not really trying
12:46:45 5 to get into the nuances, but just as a general
12:46:48 6 understanding of what they were. And they took
12:46:50 7 place from about the late 18th century and first
12:46:54 8 half of the 19th century; is that fair?

12:46:56 9 A. Substantially. I wouldn't go that
12:47:01 10 far into the 19th century, but substantially, yes.

12:47:05 11 Q. And the landowners used a variety
12:47:07 12 of methods. Some were incentives and some were
12:47:10 13 coercive; is that a fair statement?

12:47:12 14 A. Correct. But the clearances were
12:47:21 15 a private initiative. They weren't a
12:47:23 16 state-sponsored clearance.

12:47:24 17 Q. Would it be fair to say that, in
12:47:26 18 the mid-19th century, Highland clearances were
12:47:31 19 common knowledge in Scotland?

12:47:32 20 A. They were.

12:47:33 21 Q. Now, it seems to me that there is
12:47:37 22 a paradox here, that people are evicted from
12:47:41 23 Scotland because the landowners wanted them to
12:47:44 24 move. Many of them came to Ontario, but here they
12:47:49 25 are suddenly considered an unstoppable force; is

12:47:52 1 that a fair comment?

12:47:53 2 A. You have picked out the Highland
12:47:58 3 Scotts, but you could mention the Huguenots, the
12:48:04 4 puritans. They were in an era during the 18th
12:48:11 5 century of large-scale movements of populations on
12:48:15 6 a scale that hasn't been seen before, and it
12:48:19 7 becomes accentuated with technological
12:48:24 8 developments, the railroad, screw propeller for
12:48:30 9 ships.

12:48:30 10 So we are in an Imperial setting where
12:48:37 11 there is a lot of movement and demographic change,
12:48:40 12 and a lot of it involves large communities, like
12:48:43 13 the Huguenots, for example, or some German settlers
12:48:47 14 in Pennsylvania, and there are other distinct
12:48:50 15 groups. And the Scotts -- there is not just the
12:48:54 16 Scotts. There is the Scotch Irish and the
12:48:58 17 Lowlanders as well. They all have a distinct
12:49:02 18 presence.

12:49:02 19 The Highland clearances are certainly
12:49:04 20 known about, but what is also well-known is the
12:49:07 21 mobility of the Scottish people and their
12:49:09 22 contribution to empire and their prominence in
12:49:13 23 Imperial governance.

12:49:14 24 So that is the period we are in, and if
12:49:19 25 you are going to put the Scotch into an Imperial

12:49:22 1 setting -- and there is a big, big historiography
12:49:25 2 on it. It is in the context that can become quite
12:49:30 3 specific and quite particular, like the back
12:49:32 4 country of Pennsylvania, or to some of the politics
12:49:35 5 of South Carolina. That is how you start looking
12:49:39 6 at those histories.

12:49:40 7 So I'm not going to -- I can't
12:49:43 8 speculate generally.

12:49:44 9 Q. I think that is sufficient. We'll
12:49:53 10 be getting into too much of a tangent to go further
12:49:56 11 on that point.

12:49:57 12 I was just about to start another
12:50:08 13 section. Do you want me to start, or should we
12:50:11 14 break for lunch?

12:50:12 15 THE COURT: How are we doing on the
12:50:13 16 schedule, sir?

12:50:14 17 MR. TOWNSHEND: Oh, I'll finish by the
12:50:17 18 afternoon break.

12:50:18 19 THE COURT: Well, in that case, I think
12:50:20 20 everyone would probably benefit from a little extra
12:50:22 21 time over the lunch and give you a chance to look
12:50:25 22 over your documentation as well.

12:50:26 23 So we'll rise until 2:15.

12:50:28 24 -- RECESSED AT 12:50 P.M.

12:50:31 25 -- RESUMED AT 2:15 P.M.

14:16:57 1 THE COURT: Please go ahead.

14:16:59 2 MR. TOWNSHEND: Your Honour, over the
14:17:01 3 lunch break I had a chance to look over my notes,
14:17:02 4 and I decided I don't need to ask anymore
14:17:06 5 questions.

14:17:07 6 THE COURT: Thank you, sir.
14:17:07 7 Any re-examination, Mr. McCulloch?

14:17:10 8 MR. McCULLOCH: No, Your Honour.

14:17:11 9 THE COURT: All right. Well, that
14:17:12 10 concludes your testimony, sir. I hope you have a
14:17:14 11 smooth trip home.

14:17:15 12 THE WITNESS: Thank you, Your Honour.
14:17:17 13 Thank you for your kindness.

14:17:18 14 THE COURT: And you are free to step
14:17:19 15 down from the witness box at this time.

14:17:21 16 Counsel, I got an email this morning
14:17:24 17 from, I believe, Ontario with particulars for
14:17:27 18 Friday. I would ask -- and maybe you could
14:17:31 19 communicate this to the bigger group -- if there is
14:17:34 20 any other topics other than the schedule that
14:17:41 21 anyone wishes to raise, if they could give me a
14:17:44 22 heads-up in an email before the case conference,
14:17:46 23 that would be helpful.

14:17:47 24 And I assume someone has communicated
14:17:50 25 to the Municipalities that I am expecting some sort

1 of scheduling information in advance of Friday.

2 MR. McCULLOCH: Yes, Your Honour.

3 THE COURT: It was Mr. Beggs who said
4 he would do that, Mr. McCulloch.

5 I think you are trying to be helpful by
6 standing, or you think we are done?

7 MR. OGDEN: Just trying to be helpful.

8 THE COURT: Is there anything anyone
9 wishes to raise before we adjourn to Monday of next
10 week, subject to our meeting on Friday?

11 No? All right.

12
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14 -- Adjourned at 2:20 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 18th day of December, 2019.



NEESONS, A VERITEXT COMPANY

PER: DEANA SANTEDICOLA, RPR, CRR, CSR

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