

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

DAY 80 VOL 80
February 03, 2020



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

4 B E T W E E N:

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

8 - and -

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

18 Court File No. 03-CV-261134CM1

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

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

22 Plaintiffs

23 - and -

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

Defendants

26 --- This is VOLUME 80/DAY 80 of the TRANSCRIPT
27 of the trial proceedings in the above-noted
28 matter, being held at the Superior Court of
29 Justice, Courtroom 5-1, 330 University Avenue,
30 Toronto, Ontario, on the 3rd day of February, 2020.

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

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

Cathy Guirguis, Esq., for the Plaintiffs,
& Krista Nerland, Esq., The Chippewas of
& Renée Pelletier, Esq., Saugeen First Nation,
& Jaclyn McNamara, Esq., and the Chippewas of
Nawash First Nation.

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

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

REPORTED BY: Deana Santedicola, RPR, CSR, CRR

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Q-3: Qualification Statement for the
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10319:19

09:52:38 1 -- Upon commencing at 10:05 a.m.

09:12:57 2

10:05:59 3 THE COURT: Good morning, Mr. Ogden.

10:06:01 4 MR. OGDEN: Good morning, Your Honour.

10:06:03 5 THE COURT: Give me a moment here. As
10:06:06 6 I'm sure some of you must know, we have had some
10:06:09 7 sort of major TTC delay this morning, which is
10:06:12 8 always a lovely way to start on Monday.

10:06:14 9 MR. OGDEN: Yes, Your Honour.

10:06:15 10 THE COURT: And as a result, we may
10:06:17 11 have people coming in and out at irregular times.

10:06:20 12 Are you calling Mr. Sikma?

10:06:30 13 MR. OGDEN: Yes, Ontario's next witness
10:06:32 14 is Greg Sikma.

10:06:33 15 THE COURT: Madam Registrar, are you
10:06:35 16 all set up?

10:06:36 17 THE REGISTRAR: Yes, I am, Your Honour.

10:06:38 18 THE COURT: All right. Please bring
10:06:39 19 your witness forward.

10:06:40 20 GREGORY SIKMA; SWORN.

10:07:50 21 EXAMINATION IN-CHIEF BY MR. OGDEN:

10:08:05 22 Q. Good morning, Mr. Sikma.

10:08:06 23 A. Good morning.

10:08:07 24 Q. You are employed by the Ontario
10:08:09 25 Ministry of Natural Resources and Forestry?

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A. Yes.

Q. Which office do you work in?

A. I work for the Provincial Geomatics Service Centre or the PGSC.

Q. Where is that office?

A. Peterborough.

Q. What does that office do?

A. The office provides geomatic services to the Ontario Public Service ministries and its agencies.

Q. And what is geomatics?

A. Geomatics is a discipline that concerns itself with the collection, storage, analysis, processing, presentation, and distribution of geographic information.

Q. What is GIS?

A. GIS is an acronym that stands for Geographic Information System. It is a system or framework that is used to manage and maintain tabular and spatial geographic information that references locations on the earth.

THE COURT: I am just going to interrupt you, sir. We have got a big room, and I can almost hear you easily, but I would like to hear you a little louder, please, and maybe if you

1 could just pull yourself a little closer to the
2 microphone. You don't have to crouch. That
3 microphone can be made higher. And try and keep
4 your voice up. But the lady in the very back row
5 needs to be able to hear you. All right?

6 Please go ahead.

7 BY MR. OGDEN:

8 Q. What is your job title?

9 A. Cartographic Specialist.

10 Q. And can you give the Court a brief
11 description of your responsibilities at work.

12 A. Sure. The major part of my job
13 deals with the presentation of geographic
14 information and visual communication. I will take
15 geographic information and use it to tell a story
16 or to convey certain facts about the landscape.

17 What I do to do that is I am
18 responsible for cartographic workflows and
19 standards. I will create data. I will select
20 datasets. I will create methodologies for
21 analysis. With all those things, I will produce
22 maps, charts, technical reports, technical posters,
23 and presentations.

24 Q. What is cartography?

25 A. Cartography is the study and

10:11:01 1 practice of making maps. There is both a
10:11:04 2 scientific and artistic component to the work. It
10:11:10 3 is the job of the cartographer to model reality and
10:11:18 4 to convey -- to efficiently convey and effectively
10:11:26 5 convey information about geographic facts.

10:11:28 6 Q. What training have you received in
10:11:33 7 cartography?

10:11:33 8 A. I have received two diplomas from
10:11:37 9 Sir Sandford Fleming College in cartography, one as
10:11:42 10 a Cartographic Technician and one as a Cartographic
10:11:47 11 Technologist. I have also worked for the Ministry
10:11:54 12 of Natural Resources for almost 20 years in the
10:11:55 13 capacity as a cartographer, and during that time, I
10:11:58 14 have also received additional training as well.

10:12:01 15 Q. About when did you receive those
10:12:03 16 diplomas?

10:12:04 17 A. Between 1997 and the year 2000.

10:12:09 18 Q. And you prepared a series of maps
10:12:10 19 last year relating to the Bruce Peninsula and what
10:12:16 20 have been called Indian Reserves; is that correct?

10:12:18 21 A. Yes.

10:12:19 22 Q. I would like to show you Exhibit
10:12:29 23 K2 in this trial, which is described in the record
10:12:32 24 as an "Illustration of Tracts Intended For the
10:12:35 25 Nawash At Owen Sound, John Jones Band At Colpoy's

1 Bay, Caughnawaga Mohawks and the Credit
2 Mississaugas based in part on Exhibits 1873, 2175".

3 Did you prepare this map?

4 A. Could I see the whole map?

5 Yes.

6 Q. I am going to show you other maps
7 that have been made lettered exhibits in this trial
8 and ask you whether you prepared these maps also.

9 The next is Exhibit L1 titled
10 "Illustration of Tracts Intended For the Nawash At
11 Owen Sound, John Jones Band At Colpoy's Bay,
12 Caughnawaga Mohawks and the Credit Mississaugas,
13 Based in Part on Exhibits 1873, 2401, 2449, 2175".

14 Did you prepare this map?

15 A. Yes.

16 Q. The next map is Exhibit L2,
17 "Illustration of approximate area described in
18 Exhibit 2095 (Keating's proposal to the Chiefs and
19 Principal Men, 5 July 1854)"; did you prepare this
20 map?

21 A. Yes.

22 Q. The next map is Exhibit M2,
23 "Illustration of Bruce Peninsula with Approximate
24 Acreage of North and South Regions"; did you
25 prepare this map?

10:14:27 1 A. Yes.

10:14:27 2 Q. Next is Exhibit N1, "Illustration
10:14:34 3 of Approximate Areas Described in Exhibit 2104
10:14:38 4 (Letter from Rankin to Anderson, Containing SON
10:14:43 5 Counterproposal); Exhibit 2105 (Response to Survey,
10:14:49 6 Containing SON Counterproposal)"; did you prepare
10:14:52 7 this map?

10:14:53 8 A. Yes.

10:14:53 9 Q. Next, Exhibit N2, "Illustration of
10:15:01 10 Approximate Areas Described in Exhibit 2120 (Report
10:15:05 11 to Superintendent General of Indian Affairs from
10:15:09 12 Anderson, 16 August, 1854)"; did you prepare this
10:15:14 13 map?

10:15:15 14 A. Yes.

10:15:15 15 Q. Lastly, Exhibit O1, "Treaty 72
10:15:22 16 Reserves and Caughnawaga Tract at the Start of
10:15:25 17 1856"; did you prepare this map?

10:15:26 18 A. Yes.

10:15:27 19 Q. Are those all the maps you
10:15:31 20 prepared?

10:15:31 21 A. That is seven maps. I also
10:15:34 22 produced an eighth map, but it is my understanding
10:15:36 23 that that map will not be used in Court.

10:15:38 24 Q. And who asked you to prepare these
10:15:45 25 maps?

10:15:46 1 A. My coordinator Chris Ransom
10:15:48 2 assigned this project to me. It is my
10:15:50 3 understanding that he received the request from
10:15:55 4 lawyers for Ontario.

10:15:57 5 Q. When you were making the maps,
10:15:59 6 what use did you understand would be made of them?

10:16:03 7 A. I understood that they would be
10:16:04 8 used for this trial.

10:16:06 9 Q. And at the time you were making
10:16:08 10 them, did you think that that would be -- that you
10:16:12 11 would make the maps and that would be the end of
10:16:14 12 your role?

10:16:14 13 A. I anticipated that I could be
10:16:19 14 called as a witness to testify about the maps.

10:16:21 15 Q. And do you know what the issue is
10:16:24 16 in this trial about the maps that requires you to
10:16:27 17 testify?

10:16:27 18 A. Whether or not they reasonably,
10:16:36 19 accurately convey certain underlying facts.

10:16:39 20 Q. Do you receive a salary in your
10:16:42 21 employment as Cartographic Specialist?

10:16:44 22 A. Yes.

10:16:44 23 Q. And have you received or will you
10:16:46 24 receive any additional compensation for making
10:16:48 25 these maps or testifying?

10:16:49 1 A. No.

10:16:50 2 Q. When you were making the maps,
10:16:54 3 what level of care did you take?

10:16:55 4 A. I took a considerable amount of
10:16:59 5 care, given that they would be used in Court. I
10:17:02 6 took care to document the information and
10:17:06 7 instructions I received, and as I was creating the
10:17:10 8 maps, I took careful notes and metadata about the
10:17:17 9 features that I was creating.

10:17:18 10 Q. And you made these maps using
10:17:22 11 computer programs?

10:17:23 12 A. Yes.

10:17:23 13 Q. What are the names of those
10:17:27 14 programs?

10:17:27 15 A. Esri ArcCatalog, version 10.3.1,
10:17:34 16 and Esri ArcMap, version 10.3.1.

10:17:39 17 Q. Can you spell those, please?

10:17:40 18 A. Esri, E-s-r-i, ArcCatalog,
10:17:47 19 A-r-c-c-a-t-a-l-o-g, ArcMap, A-r-c-m-a-p.

10:17:54 20 Q. Could you describe what Esri
10:17:56 21 ArcCatalog does, please.

10:17:58 22 A. ArcCatalog is a software that is
10:18:01 23 used to view and manage geographic data. In the
10:18:06 24 context of this project, I used it to set up the
10:18:09 25 project structure, build template datasets and that

1 sort of thing.

2 Q. Can you describe what Esri ArcMap
3 does, please.

4 A. ArcMap is the software that I used
5 to edit -- or sorry, to create, edit, and analyze
6 data. It is also used to publish the final map
7 products.

8 Q. And in mapping, what is a polygon?

9 A. A polygon is something that is
10 used to represent an area. So in this case, I
11 created polygons of the features that needed to be
12 mapped on the Bruce Peninsula.

13 Q. And how did you go about creating
14 those features illustrated on the maps?

15 A. I was provided certain information
16 and instructions, so I interpreted that information
17 to create the features. In doing so, I used
18 certain source data layers as a guide or a template
19 as well.

20 Q. What are source data layers?

21 A. In terms of mapping, source data
22 layers can be thought of as the building blocks of
23 the maps, so the water, the roads, that sort of
24 thing. In the context of this project, I used
25 certain data layers, in whole or in part, to help

1 me construct the areas that required mapping.

2 Q. Where did you get the source data
3 layers from?

4 A. Land Information or LIO for short.
5 LIO handles the access and sharing of geographic
6 data for the Province of Ontario.

7 Q. And what does the "O" stand for?
8 Does that stand for Ontario?

9 A. That's correct.

10 Q. Which source data layers did you
11 use?

12 A. I mainly relied on four data
13 layers, the Geographic Lot Fabric layer, the
14 Ontario Hydro Network Waterbody layer, the Ontario
15 Road Network Segment with address layer, and the
16 Indian Reserve layer.

17 Q. What is a fabric?

18 A. In GIS terms, it can be thought of
19 as a continuous surface of features. They could be
20 natural or manmade.

21 Q. So what information does the
22 Geographic Lot Fabric layer contain?

23 A. The Geographic Lot Fabric layer
24 contains the lots and concessions for the
25 geographic townships as they were originally

1 surveyed for the Province of Ontario.

2 Q. What information does the Ontario
3 Hydro Network Waterbody layer contain?

4 A. It contains polygon
5 representations of surface water, things like
6 lakes, ponds, rivers, bays, things of that nature.

7 Q. What information does the Ontario
8 Road Network Segment with Address layer contain?

9 A. It contains the centre line
10 information for roads in the Province of Ontario.
11 It is for the complete extent of the province and
12 has attributes for things like road name, road
13 classification, address range, et cetera.

14 Q. What information does the Indian
15 Reserve layer contain?

16 A. The Indian Reserve layer contains
17 the official boundaries for Federal Indian Reserves
18 as defined by Natural Resources Canada.

19 Q. What can affect the way a map is
20 drawn?

21 A. There is a number of things. The
22 cartographer's experience and training will affect
23 how a map is made, how data is collected. So in
24 some cases, data will be digitized using satellite
25 imagery or ortho-photography. Sometimes it is

1 captured using a global positioning system unit.
2 Other times, it may be interpreted using
3 instructions or through analysis. The time or
4 conditions when data is collected; for instance,
5 with waterbody information, if it is collected in
6 the spring, water levels could be higher; if it is
7 collected in summer, they might be lower. If there
8 is a certain natural event, such as a flood, it
9 could affect how the features are captured and
10 their areas, et cetera.

11 The source data that is used will also
12 affect how maps are drawn, so different information
13 is collected for different purposes and used at
14 different scales. Sometimes information is
15 generalized when it is collected. You can think of
16 that as things like if we are digitizing a
17 shoreline using relatively coarse imagery, it
18 wouldn't necessarily include all the bays and coves
19 and points, where it would be a more generalized
20 shape of the feature, where the source data comes
21 from, who has provided it, does it have appropriate
22 metadata, those sorts of things.

23 Q. And you mentioned digital data and
24 images. Are there other types of data or form in
25 which the information can come to you as you are

1 mapping it?

2 A. Sometimes it comes as instructions
3 or words that would be required -- would be
4 required for me to interpret information in order
5 to create or construct certain features.

6 Q. Are there other factors that
7 affect the appearance of the maps?

8 A. Yes. Part of the cartographer's
9 job is to present the information, and so the
10 colours that they choose, the line widths that they
11 choose, the image -- or the features that they
12 decide should stand out is a big part of what will
13 affect the appearance of a map.

14 Also, the coordinate system that is
15 chosen to represent the place on the earth as well.

16 Q. What is it about the coordinate
17 system that changes the appearance of the maps?

18 A. The coordinate system for a map is
19 made up of two parts. There is a datum and a
20 projection. The datum can be thought of as a model
21 of the shape of the earth, the sphere shape of the
22 earth, and so that is modelled in a certain way to
23 simplify it. There is different models that
24 represent that three-dimensional shape. So that is
25 what the datum represents.

1 The projection takes that 3D shape and
2 converts it into a 2D plane so that we can view it
3 on a flat piece of paper. The way that is done can
4 be to maintain certain features. Certain
5 projections will maintain the shape of things;
6 others will retain area; some will retain distance;
7 and some will retain direction.

8 Q. Did you use a particular
9 coordinate system?

10 A. This particular map uses the MNR
11 Lambert conformal conic projection.

12 Q. And with reference to the maps
13 which have been exhibited in this trial, how does
14 the coordinate system affect their appearance?

15 A. So it is meant to preserve the
16 shape of features, and also on the maps you'll
17 notice there is blue grid lines. And so those grid
18 lines run in a north-south and east-west direction.
19 So you'll see, for instance, the map on the screen,
20 you can see they are on a slight angle.

21 Q. That is Exhibit 01. Thank you.

22 Are there any other factors that affect
23 the accuracy of maps?

24 A. Yes. Maps are only as good as
25 their inputs and information that is used to create

10:27:55 1 them, so the more information and the better
10:28:00 2 information that you have, you can make a better
10:28:04 3 map product.

10:28:08 4 In this instance, we are trying to
10:28:12 5 represent historical areas or agreements through
10:28:23 6 words, which can be a challenge sometimes.

10:28:28 7 Q. And you were given instructions to
10:28:31 8 prepare these maps. How full were those
10:28:33 9 instructions?

10:28:34 10 A. They were relatively concise
10:28:41 11 instructions, I'll say. Since I have created the
10:28:48 12 maps, I have read a report prepared by Gwen Reimer
10:28:55 13 that contains corroborating details about the areas
10:29:03 14 that were mapped. In some cases, it would have
10:29:11 15 been perhaps beneficial to me to have known that
10:29:14 16 information ahead of time. It may have altered in
10:29:22 17 some cases, or I may have made minor differences in
10:29:28 18 the decisions I made regarding how the features
10:29:30 19 were created.

10:29:32 20 That said, the maps reasonably,
10:29:43 21 accurately reflect the facts within the report.

10:29:47 22 Q. Your Honour, I would like to bring
10:29:53 23 up the Reimer Maps Report, which is SC1730. It is
10:30:01 24 titled "Supplementary Report: Analysis of
10:30:05 25 Documentation Relevant to Ontario's Illustration

1 Maps Marked as Exhibits K2, L1, L2, M2, N1, N2, O1"
2 dated January 20, 2020, amended January 26, 2020.

3 Is this the document you are referring to?

4 A. Yes.

5 Q. Your Honour, when Dr. Reimer is
6 called -- is tendered as an expert witness, I will
7 ask -- or Ontario will ask that this document be
8 added as a numbered exhibit. For now, can this
9 document be marked as the next lettered exhibit,
10 please.

11 THE COURT: Any objection? Counsel, I
12 really need you to stand up.

13 MS. NERLAND: No, Your Honour.

14 THE COURT: Think of the record.

15 Thank you. That will be the next
16 lettered Exhibit, Madam Registrar.

17 THE REGISTRAR: Yes, the next lettered
18 is P-3.

19 EXHIBIT NO. P-3: Report prepared by
20 Dr. Reimer entitled "Supplementary
21 Report: Analysis of Documentation
22 Relevant to Ontario's Illustration Maps
23 Marked as Exhibits K2, L1, L2, M2, N1,
24 N2, O1" dated January 20, 2020, amended
25 January 26, 2020.

10:31:15 1 THE COURT: Thank you very much.

10:31:16 2 MR. OGDEN: Thank you.

10:31:29 3 Your Honour, Mr. Sikma has a clean
10:31:31 4 printed copy of Exhibit P-3, which I will call the
10:31:36 5 Reimer Maps Report, with him in the witness box.

10:31:41 6 THE COURT: I don't have a problem with
10:31:42 7 that, as long as there is no objection. It is up
10:31:45 8 on the screen as well.

10:31:46 9 MS. NERLAND: That is fine, Your
10:31:47 10 Honour.

10:31:48 11 BY MR. OGDEN:

10:31:48 12 Q. Thank you. I am now showing the
10:32:16 13 witness Exhibit M2, "Illustration of Bruce
10:32:25 14 Peninsula with Approximate Acreage of North and
10:32:26 15 South Regions", and Mr. Sikma, I would ask you to
10:32:29 16 refer, please, to refer to pages 19 and 20 of the
10:32:33 17 Reimer Maps Report, which, Your Honour, are also
10:32:36 18 PDF pages of this report, also 19 and 20.

10:32:38 19 And there is a table, Table 4, shown
10:32:47 20 there, which --

10:32:48 21 THE COURT: Does this mean you are not
10:32:49 22 going to be putting it up on the screen? Let me
10:32:52 23 put it this way. My copy of this report is sitting
10:32:54 24 on my desk in another building, which is not a
10:33:00 25 problem if either we can see the report or if

10:33:02 1 someone has a spare, clean copy they can provide to
10:33:06 2 me.

10:33:06 3 MR. OGDEN: We have a spare, clean
10:33:16 4 copy, Your Honour.

10:33:21 5 THE COURT: You are not hoping for this
10:33:23 6 back, I take it?

10:33:24 7 MR. OGDEN: No, Your Honour.

10:33:25 8 THE COURT: All right.

10:33:28 9 MR. OGDEN: We will be working between
10:33:30 10 the map shown on the screen and the table, and so
10:33:34 11 it is easier to have the map constantly on the
10:33:36 12 screen.

10:33:40 13 THE COURT: I heard you say January 20,
10:33:44 14 updated or amended or something like that, January
10:33:49 15 26th. This document does not have that later date
10:33:52 16 on it. Is that a problem?

10:34:12 17 MR. OGDEN: Your Honour, I apologize,
10:34:13 18 the document we just gave you is not the amended
10:34:15 19 version. If we can break for five minutes, we can
10:34:18 20 print one here at the Court and give it to you.

10:34:23 21 THE COURT: Do we need to break? Or
10:34:24 22 can one of your co-counsel just step out?

10:34:27 23 MR. OGDEN: Co-counsel can step out,
10:34:30 24 and we can proceed.

10:34:30 25 THE COURT: Let's do that. I'll use

10:34:32 1 this one until the other one arrives.

10:34:34 2 MR. OGDEN: Thank you, Your Honour.

10:35:15 3 THE COURT: All right.

10:35:23 4 MR. OGDEN: Your Honour, when the
10:35:24 5 report was shown on the screen before, the version
10:35:28 6 that was shown on the screen was not the amended
10:35:30 7 version, but the version that is placed and ready
10:35:38 8 as Exhibit P-3 is the amended version.

10:35:41 9 THE COURT: Perhaps on a break one of
10:35:42 10 your team could just speak with Madam Registrar and
10:35:45 11 make sure that she has the correct image connected
10:35:48 12 to that exhibit number.

10:35:49 13 MR. OGDEN: Yes, Your Honour.

10:35:50 14 THE COURT: Please go ahead.

10:35:51 15 MS. NERLAND: Could I ask a question?
10:35:53 16 Is the version that the witness --

10:35:54 17 THE COURT: Counsel, you are talking to
10:35:55 18 me.

10:35:56 19 MS. NERLAND: Sorry.

10:35:57 20 THE COURT: What is your question?

10:35:58 21 MS. NERLAND: My question is, is the
10:36:00 22 copy the witness has before him the amended version
10:36:02 23 or the non-amended version?

10:36:03 24 THE COURT: All right.

10:36:04 25 THE WITNESS: It is dated January 20th.

10:36:05 1 THE COURT: It is as well.

10:36:08 2 MR. OGDEN: May I check?

10:36:09 3 THE COURT: Yes, please go have a look.

10:36:40 4 Mr. Ogden, if the witness also has the incorrect

10:36:43 5 document, we can certainly take a couple of minutes

10:36:46 6 and get everybody the right document.

10:36:49 7 MR. OGDEN: We can, Your Honour. The

10:36:51 8 amendment is a minor amendment to pages which I am

10:36:56 9 not addressing --

10:36:57 10 THE COURT: Well, that is helpful. All

10:37:00 11 you need to do in that case, Counsel, is put on the

10:37:02 12 record which pages are amended so that it is clear

10:37:08 13 from the record that, when you are asking this

10:37:10 14 gentleman questions, you are not on those pages.

10:37:13 15 Can you do that?

10:37:14 16 MR. OGDEN: Yes.

10:37:14 17 THE COURT: Please go ahead.

10:37:15 18 MR. OGDEN: So those pages that are

10:37:16 19 amended, in substance is page 23. The following

10:37:23 20 pages in the report, 24 through 30, have the page

10:37:27 21 numbers amended.

10:37:29 22 THE COURT: But the substantive

10:37:30 23 amendment is on page 23 only?

10:37:32 24 MR. OGDEN: Correct.

10:37:33 25 THE COURT: All right. Now that that

1 is on the record, I think you can proceed.

2 MR. OGDEN: Thank you.

3 THE COURT: And we'll obviously learn
4 as you go whether we encounter that page.

5 Don't you love Monday mornings? I'm
6 just saying. Please go ahead.

7 MR. OGDEN: Thank you, Your Honour. I
8 don't have the benefit of a TTC delay as an excuse,
9 though.

10 THE COURT: Well, we'll just chalk it
11 up to Monday morning then and plow on ahead.

12 BY MR. OGDEN:

13 Q. Thank you.

14 Mr. Sikma, pages 19 and 20 of the
15 document you have in front of you, which is the
16 Reimer Maps Report, contains a table of assumptions
17 and inferences that Dr. Reimer has taken from
18 historical documents which relates to this map,
19 Exhibit M2. And I would ask you, please, to look
20 at the dividing line on the screen in front of you
21 on M2 between the north and south parts, and in
22 particular, at the point on the western end of that
23 line --

24 THE COURT: I'm not sure which line you
25 are referring to.

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MR. OGDEN: The dividing line, Your Honour, between the north and south parts.

THE COURT: The thing is there is more than one such line. Are you talking about between the two coloured parts?

BY MR. OGDEN:

Q. Yes, Your Honour. Sorry, the north part is in pink and labelled "B", and the southern part is in orange labelled "A". And there is a line on the left of the map to the north of the town called Oliphant heading towards the east.

Mr. Sikma, what facts, if any, in the table 4 does that point on the west of that line represent?

THE COURT: Yes, Counsel?

MS. NERLAND: Yes, Your Honour. I'm concerned that this witness hasn't been qualified as an expert, and what counsel is asking him is to opine on how well his map matches with something that he says he didn't see when he was creating the map.

I think what this witness can opine on as a fact witness is the process and inputs he used in creating his map but not sort of offer an expert opinion on whether his map matches facts provided

1 by the expert.

2 THE COURT: Mr. Ogden?

3 MR. OGDEN: Well, Mr. Sikma has not
4 been tendered as an expert. He has given evidence
5 that he made these maps based on instructions
6 provided to him, and he is not giving an opinion
7 on -- and he will not be giving an opinion on how
8 well the maps relate to these underlying facts.

9 He is, in the first part, identifying
10 which facts in the table are reflected in the map,
11 and then I will be asking the witness if he is able
12 to draw the map any differently than it has been
13 drawn.

14 THE COURT: Was able to?

15 MR. OGDEN: Is able to.

16 THE COURT: Is able to. I take it, as
17 I understand it, this gentleman is being called
18 because these, I'm going to call them
19 illustrations, were prepared and that Ontario
20 wishes to have them marked as trial evidence; is
21 that why he is here?

22 MR. OGDEN: Yes.

23 THE COURT: Okay. And he is to testify
24 about how he went about preparing them. Your
25 question was what facts, if any, in table 4 does

10:42:43 1 the point on the west of that line represent. So
10:42:49 2 you are asking him to identify -- I guess there is
10:42:54 3 four parts of this table, which of those four parts
10:43:00 4 relate to that; is that the point of your question?

10:43:06 5 MR. OGDEN: Yes.

10:43:12 6 THE COURT: Ms. Nerland, do you have
10:43:14 7 any response to that?

10:43:15 8 MS. NERLAND: Yes, Your Honour. I
10:43:18 9 think that whether one of these points is reflected
10:43:19 10 in the map is the same thing as giving an opinion
10:43:22 11 on how well Dr. Reimer's report matches the maps.
10:43:27 12 None of these, it is clear, were before the witness
10:43:30 13 when he made these maps, so it is not --

10:43:33 14 THE COURT: Is that right, none of
10:43:35 15 these five exhibits were given to him?

10:43:37 16 MS. NERLAND: Well, I'll cover that in
10:43:39 17 cross-examination, but --

10:43:40 18 THE COURT: Well, you have made that
10:43:41 19 submission, so you are going to have to cover it
10:43:43 20 now. Are you saying that none of those exhibits
10:43:46 21 listed were among the many exhibits he referenced
10:43:48 22 in his maps?

10:43:49 23 MS. NERLAND: I believe he looked at
10:43:53 24 Exhibit 2449, and it is possible he has looked at
10:43:58 25 Exhibit 2181, but I don't believe he has referred

10:44:04 1 to Exhibit -- or looked at Exhibit 2105, 2104 on
10:44:12 2 his list, from my review of his notes.

10:44:14 3 THE COURT: The difficulty I'm having,
10:44:16 4 Counsel, is a practical one. We have had this come
10:44:19 5 up in this trial before that it is perfectly
10:44:22 6 appropriate to put forward the -- I'm going to call
10:44:26 7 it illustration of evidence that is tendered in the
10:44:29 8 trial and accepted as evidence, provided that you
10:44:34 9 are prepared to bring the gentleman who prepared
10:44:36 10 the illustration for cross-examination. So here he
10:44:38 11 is.

10:44:39 12 Now, we have a long trial and a lot of
10:44:44 13 maps and relevant geographic questions that I am
10:44:49 14 going to have to address. I am concerned that if a
10:44:56 15 technical approach to the coincidence of a piece of
10:44:59 16 factual information coming along after these maps
10:45:02 17 were prepared is going to be a problem, then the
10:45:09 18 next thing I'm going to hear is, well, that is
10:45:13 19 fine, we'll prepare some more maps, and I'll have
10:45:16 20 someone else come, maybe the same person again,
10:45:19 21 because obviously to be helpful to me, it should be
10:45:23 22 as up to date as possible.

10:45:24 23 So is that where you were headed,
10:45:27 24 Counsel?

10:45:28 25 MS. NERLAND: No, Your Honour, but I

1 think the appropriate approach -- I mean, this
2 witness is a cartographer, and he placed this line
3 on the map on the basis of information.

4 THE COURT: Which he has already
5 covered, at least at one level, at a high level.

6 MS. NERLAND: Right, although my point
7 is not how he has placed this specific line, and
8 that I think is evidence that he could properly
9 give because it is factual evidence about what he
10 did, not his opinion about how well it matches the
11 expert report.

12 THE COURT: Well, this part of the
13 expert report is simply a chart that is listing a
14 number of exhibits. Now, I see on the chart it
15 also indicates certain inferences that this other
16 person believes can be drawn, and she'll be here,
17 and you will be cross-examining her about that.

18 Also, as you have indicated, the chart
19 includes certain facts that the gentleman did have,
20 and you don't yet know whether anything he is going
21 to say is really outside of the situation.

22 I am just looking for a fair and
23 practical way to deal with this evidence.

24 MS. NERLAND: Okay, Your Honour.

25 THE COURT: Do you have anything

1 further to suggest?

2 MS. NERLAND: No, Your Honour.

3 THE COURT: Mr. Ogden, do you have
4 anything to suggest?

5 MR. OGDEN: The question for the Court
6 on whether to accept these maps as evidence is
7 whether or not they reasonably, accurately
8 represent certain underlying facts, and that is a
9 question to be addressed when they are tendered as
10 exhibits.

11 And the question is not -- one way of
12 going about that, Your Honour, is to address
13 evidence as to how they were produced, and we have
14 delivered documents concerning their production,
15 where they were made, and how they were made to the
16 Plaintiffs.

17 I don't intend to go into those because
18 I do not consider them immediately -- well, I will
19 go into some of them. I apologize.

20 But what I am asking this witness to do
21 is to say how the maps that he has created
22 represent facts that he has considered. Many of
23 those facts, the amount is not in evidence -- or he
24 has said some additional facts would have been
25 useful, but he received most of those facts when he

10:48:19 1 made the maps. That is in evidence. And I don't
10:48:23 2 think it would be helpful to go through -- for me
10:48:25 3 to go through in-chief and distinguish between the
10:48:29 4 particular ones he had before him when he made the
10:48:32 5 maps. They were given to him in instructions from
10:48:37 6 counsel.

10:48:40 7 And we have him here giving evidence
10:48:44 8 about what these maps that he made represent, and
10:48:48 9 then we will call Dr. Reimer to give the underlying
10:48:52 10 facts that Ontario says these maps represent. And
10:48:57 11 that is not opinion evidence from Mr. Sikma.

10:48:59 12 THE COURT: Well, the objection wasn't
10:49:02 13 was that it was opinion evidence. The objection
10:49:04 14 was that it was factual evidence. Ms. Nerland
10:49:09 15 said, My point is not how he has placed his line,
10:49:12 16 and I think that is evidence he could properly
10:49:17 17 give, but it is factual evidence about what he did,
10:49:20 18 not his opinion about how well it matches the
10:49:22 19 expert report.

10:49:23 20 So here is what we are going to do.
10:49:27 21 This gentleman has already testified about what
10:49:30 22 data he had, and what he did with it, and you may
10:49:33 23 have more questions, which is fine. I think it is
10:49:38 24 entirely appropriate to ask if any other data is
10:49:43 25 the same or different from what he used, especially

10:49:47 1 if it is facts that came along or may come along
10:49:51 2 later because otherwise we are never going to get
10:49:53 3 through this trial.

10:49:54 4 And how far you can go with that and
10:49:59 5 conclusions based on that I am going to just leave
10:50:02 6 to see how it unfolds and what objections we get.

10:50:06 7 So it would seem to me that -- and
10:50:09 8 because this chart is an amalgam of things that he
10:50:13 9 did have before him and things that he did not have
10:50:19 10 before him, that the factual basis for his maps is
10:50:22 11 fair to ask about, and if there are differences
10:50:29 12 with more recent evidence, you can ask about that.

10:50:34 13 It is always a bit of a struggle with
10:50:36 14 an illustration because this gentleman is not being
10:50:40 15 called to prove any of the facts. That is not why
10:50:43 16 he is here. He is here to tell the Court where
10:50:45 17 they came from, and I guess, to some extent, that
10:50:50 18 might have an impact on the veracity of the
10:50:54 19 illustration and also to say how he made the maps.

10:50:59 20 I'm just talking out loud here, but it
10:51:01 21 would seem to me that if he had woken up this
10:51:03 22 morning and realized he had made a mistake, he
10:51:05 23 would be allowed to talk about that, and to some
10:51:09 24 extent, you know, some of these questions might be
10:51:11 25 similar. Did you have this data? Is it the same?

1 Is it different than what you based it on? And so
2 forth.

3 So we'll have to take it one question
4 at a time, Mr. Ogden. But perhaps you could get
5 straight to the key questions rather than the more
6 general questions that are objectionable as far as
7 the Plaintiffs' counsel are concerned because they
8 are too general.

9 I don't know if that makes any sense to
10 you, but I leave the door open for counsel to
11 object, and we'll just take it one question at a
12 time.

13 MR. OGDEN: Yes, Your Honour. Thank
14 you.

15 THE COURT: I see replacement copies
16 coming forward. Thank you, Counsel.

17 Counsel, could you do the Court a
18 favour and give this other one to my clerk, who is
19 just on my right side of the courtroom, so she
20 could have the benefit of the exhibit.

21 Do you have a sense of where you are
22 going, sir, or do you need a break?

23 BY MR. OGDEN:

24 Q. I do. I am giving the witness a
25 moment.

1 Mr. Sikma, when you made Exhibit M2,
2 and you drew the line between Lake Huron north of
3 Oliphant and to Colpoy's Bay, what point -- or what
4 did you intend the western point of that line to
5 represent?

6 A. The beginning of the western point
7 should have fell near the middle of the group of
8 Fishing Islands off the coast.

9 Q. And does it?

10 A. Yes.

11 Q. And the eastern point of that
12 line, where did you intend that to end or be?

13 A. The head of Colpoy's Bay.

14 Q. How did you determine the head of
15 Colpoy's Bay?

16 A. It is -- there is no specific
17 point. It is more of an area. What I did to --
18 are you asking what I did to construct the line?

19 Q. No. You have described the head
20 of Colpoy's Bay as being no specific point. What
21 size is the area that you would describe as the
22 head of Colpoy's Bay?

23 A. I would say here approximately an
24 area of about a kilometre or so.

25 Q. And does the eastern end of that

1 line finish or end within that area?

2 A. Yes.

3 Q. And given those two points, how
4 else did you determine where to put this line?

5 A. I somewhat based it upon the lots
6 and concessions that I had seen on a map.

7 Q. Do you recall the map that you saw
8 it on?

9 A. I saw -- I had a number of maps
10 when I was creating. Could I see visuals of some
11 of the maps?

12 Q. Well, was it a new map or an old
13 map?

14 A. It was a historical map.

15 Q. And do you recall generally what
16 was on the map?

17 A. This is the map. It is the 1856
18 map, I believe. Yes.

19 Q. This is Exhibit 2401 called "Map
20 of the Saugeen Indian Peninsula Showing the
21 Townships of Albermarle, Keppel and Amabel, July
22 31, 1856". And what in particular on this map did
23 you use to help you draw this line?

24 A. In the east, there is Colpoy's
25 Bay, and there is an area marked "Town plot of

10:56:54 1 Wiarton". To the east of that town plot, there are
10:57:00 2 lots and concessions, and one of the lines falls
10:57:05 3 very close to the centre of the town plot of
10:57:08 4 Wiarton. So I used that dividing line, and I
10:57:14 5 extended it from the west side of the town plot
10:57:20 6 until it intersected with a point in Colpoy's Bay.

10:57:25 7 Q. What is the general bearing of
10:57:31 8 that line?

10:57:31 9 A. Approximately due east.

10:57:39 10 Q. Exhibit M2 lists in the bottom
10:57:49 11 left-hand corner acreages, approximate acreages,
10:57:55 12 for the north and south areas, area "A" and "B".
10:58:01 13 Where do those acreages come from?

10:58:04 14 A. They are calculated by the
10:58:08 15 software after the features were created, the
10:58:15 16 mapping software.

10:58:16 17 Q. Could we move to Exhibit L2,
10:58:22 18 please. This is the illustration of the Keating
10:58:40 19 proposal of July 1854. And on this map, there is
10:58:46 20 an area in blue marked "A". Let's start with the
10:58:55 21 western boundary of that area and the southern end
10:58:57 22 of that western boundary. What, when you made this
10:59:01 23 map, did you intend that southern point of the
10:59:04 24 western boundary to represent?

10:59:07 25 A. The mouth of the Sauble River.

10:59:10 1 Q. And what does it represent?

10:59:14 2 A. It represents the southwest corner
10:59:18 3 of the area.

10:59:18 4 Q. What facts led you to draw the
10:59:35 5 western boundary in the manner in which you did?

10:59:37 6 A. I received instructions that
10:59:43 7 stated the plot should start in that southwest
10:59:51 8 corner, and it should follow the coastline for
10:59:59 9 approximately 10 kilometres in a northerly
11:00:06 10 direction -- or sorry, 10 miles. I apologize. I
11:00:12 11 don't have my notes here. 10 miles in a northerly
11:00:16 12 direction along the coast.

11:00:17 13 Q. And does it do so?

11:00:22 14 A. Approximately, yes.

11:00:24 15 Q. When you say "approximately",
11:00:26 16 where does it not, if at all?

11:00:29 17 A. There is a small area in the
11:00:32 18 northwest corner where it goes in a straight line
11:00:38 19 rather than follow the coast near Red Bay.

11:00:42 20 Q. Thank you. And at that point it
11:01:02 21 does not hug the coast; is that correct?

11:01:03 22 A. Yes.

11:01:06 23 Q. Now, to the -- well, based on the
11:01:18 24 instructions you had, and putting aside the
11:01:21 25 straight line just south of Red Bay, was there any

1 other way you could have drawn this western
2 boundary?

3 A. Not particularly. If we would
4 have measured the distance along the shoreline, it
5 would have been much longer, if you would have
6 totalled that up. So for instance, if we would
7 have followed in and out all of the bays and coves
8 and points, 10 miles wouldn't have gone near as far
9 up the coast. However, as I recall, the
10 instructions were to essentially draw a tract of
11 land that was approximately 10 miles by 5 miles.

12 Q. And the northern boundary there,
13 what did you intend that to represent?

14 A. It was intended to be a straight
15 line of approximately 5 miles that went inland in
16 an easterly direction from the coast.

17 Q. And does it do that?

18 A. Yes.

19 Q. Is there another way you could
20 have drawn that line?

21 A. It could have been on a slightly
22 different angle perhaps. The instructions I had,
23 as I recall, said in an easterly direction, so
24 there is a bit of interpretation that is required
25 there. So I -- as you can see by the grid lines,

11:03:02 1 the grid lines run east-west, so it essentially
11:03:08 2 travels in an easterly direction for 5 miles.

11:03:14 3 Q. And the eastern boundary of the
11:03:17 4 tract, what is that intended to represent? What
11:03:28 5 did you intend that to represent when you created
11:03:30 6 this map?

11:03:31 7 A. Right. As I recall, the
11:03:34 8 instructions I had said it needed to be relatively
11:03:41 9 parallel to the western boundary. Now, the western
11:03:44 10 boundary is not a straight line. It follows the
11:03:46 11 coast. But I intended that line to be relatively
11:03:54 12 parallel to the coastline, and it would be
11:03:59 13 approximately 10 miles in length, as well as the
11:04:08 14 western boundary, within -- approximately.

11:04:11 15 Q. And is it approximately parallel
11:04:14 16 to the western boundary?

11:04:16 17 A. Yes.

11:04:18 18 Q. And is it approximately 10 miles
11:04:22 19 in length?

11:04:22 20 A. Yes.

11:04:23 21 Q. Now, the southern boundary, what
11:04:33 22 did you intend the western part of that southern
11:04:38 23 boundary to represent?

11:04:39 24 A. As I recall, the first part of it
11:04:43 25 was to travel along the Sauble River for a length

11:04:52 1 until it began to go south, and then it would
11:04:57 2 travel in a straight line until it met the eastern
11:05:03 3 boundary.

11:05:03 4 Q. And is that what that southern
11:05:08 5 boundary does?

11:05:09 6 A. Yes.

11:05:09 7 Q. Now to Exhibit N1, which is the
11:05:24 8 illustration of the SON counterproposal.

11:05:40 9 A. May I take off my jacket?

11:05:43 10 THE COURT: Yes, you may.

11:05:53 11 THE WITNESS: Thank you, Your Honour.

11:05:55 12 BY MR. OGDEN:

11:05:57 13 Q. You can pour yourself some water
11:05:59 14 if you would like.

11:06:08 15 A. Thank you. I'm ready.

11:06:12 16 Q. Area "C" on the right-hand side of
11:06:17 17 this map is in orange. When you made area "C",
11:06:21 18 what did you intend that to represent?

11:06:22 19 A. It was intended to represent an
11:06:35 20 area of land that was defined by a line that
11:06:44 21 travelled from Owen Sound in the south on a
11:06:51 22 northwesterly angle until it reached the head of
11:06:56 23 Colpoy's Bay.

11:06:58 24 Q. And does that line represent those
11:07:02 25 facts?

11:07:03 1 A. Yes.

11:07:03 2 Q. Given the instructions that you
11:07:14 3 received that you have just referred to, is there
11:07:19 4 any other way to draw that line?

11:07:23 5 A. To a slight degree, the line in
11:07:30 6 Owen Sound could have -- I could have chose a
11:07:36 7 starting point further north.

11:07:40 8 Q. How much further north?

11:07:41 9 A. Not far, given that it needed to
11:07:45 10 be from Owen Sound, so I would say, again, within a
11:07:50 11 few hundred metres, a kilometre, something like
11:07:53 12 that.

11:07:53 13 Q. In the bottom left of the map,
11:08:05 14 there is a list of the acreages of the areas
11:08:09 15 represented, and for area "C", it says 68,000.
11:08:22 16 Does that result from the mapping software that you
11:08:30 17 used?

11:08:30 18 A. It was a general acreage I was
11:08:32 19 aiming towards, so I would have adjusted that line
11:08:36 20 until the area "C" defined an area of 68,000 acres.

11:08:45 21 Q. And --

11:08:49 22 A. So that helps position that line
11:08:51 23 in place as well.

11:08:51 24 Q. Now, area "B" in pink, how do you
11:08:59 25 determine, or how did you -- what did you intend

11:09:04 1 the eastern boundary of that area "B" to represent
11:09:09 2 when you made this map?

11:09:10 3 A. It had to be adjacent to area "C",
11:09:15 4 so it is identical to, I will say, the western
11:09:21 5 boundary of area "C".

11:09:22 6 Q. And the western boundary of area
11:09:30 7 "B", what did you intend that to represent?

11:09:35 8 A. In the instructions I received, it
11:09:40 9 had to be a wedge or a triangular shape, and it
11:09:47 10 needed to be 60,000 acres. So I adjusted that
11:09:55 11 line. As wedge-shaped, I made it into a point at
11:10:01 12 the top, so it has kind of three defined sides to
11:10:04 13 it. And then I would have adjusted the southwest
11:10:13 14 corner of area "B". I would have angled it until
11:10:18 15 area "B" enclosed an area of 60,000 acres.

11:10:23 16 Q. So when you say "would have" done,
11:10:27 17 what do you mean?

11:10:28 18 A. Sorry, I did. I made it so that
11:10:31 19 that area "B" was 60,000 acres.

11:10:35 20 Q. Could you have drawn it
11:10:41 21 differently, area "B"?

11:10:45 22 A. Slightly. My instructions were to
11:10:48 23 keep it wedge-shaped, so this has approximately
11:10:53 24 three sides to it. I could have made the top of
11:10:57 25 the wedge blunt or -- but that would have altered

11:11:04 1 the area. I would have had to alter the line. I
11:11:07 2 could have --

11:11:08 3 Q. Which line, sorry?

11:11:09 4 A. Sorry, the northern boundary. If
11:11:12 5 I would have taken the north point of the wedge, I
11:11:17 6 could have perhaps had it extend further down area
11:11:30 7 "C", but then that would have -- because I need to
11:11:33 8 maintain an area of 60,000 acres, the southwest
11:11:36 9 boundary would have pushed further west. If I had
11:11:43 10 made it -- if I had had that northern point further
11:11:46 11 to the west, it would have pushed the southwest
11:11:52 12 corner further east in order to maintain a 60,000
11:12:00 13 acre area.

11:12:00 14 Q. And what would it have done to the
11:12:04 15 shape of area "B"?

11:12:06 16 A. It would have altered it slightly.
11:12:08 17 So if I would have moved the boundary, the top
11:12:12 18 point further -- the point further west, the wedge
11:12:17 19 would then have four sides instead of three.

11:12:20 20 Q. Now, area "A" in green, what is
11:12:29 21 area "A" intended to -- what did you intend area
11:12:35 22 "A" to represent when you created it?

11:12:40 23 A. It was to be the remainder of the
11:12:44 24 lands defined there.

11:12:50 25 Q. And how did you determine the

1 eastern boundary of area "A"?

2 A. The eastern boundary of area "A"
3 is identical to the western boundary of area "B".

4 Q. And how did you determine the
5 northern boundary of area "A"?

6 A. The northern boundary of area "A"
7 is the same line we discussed in Exhibit M2, I
8 believe.

9 Q. That is the approximate -- the
10 exhibit showing the approximate acreage of the
11 north and south regions?

12 A. That's correct. So that line
13 again in the west begins at a point near the middle
14 of the Fishing Islands, and then in the easterly
15 side, it terminates in an area of the area of the
16 head of Colpoy's Bay.

17 Q. And the western boundary, what did
18 you intend that to show?

19 A. The western boundary follows the
20 coastline.

21 Q. And does this map show the western
22 boundary following the coastline, and the northern
23 boundary with the line between the Fishing Islands
24 and the head of Colpoy's Bay?

25 A. Yes, it does.

11:14:06 1 Q. The acreage for area "A" listed on
11:14:22 2 the map is 58,468. Where does that actual acreage
11:14:32 3 come from?

11:14:32 4 A. The software calculates that area,
11:14:35 5 the mapping software.

11:14:36 6 Q. Now, area "D" in yellow at Cape
11:14:51 7 Croker, what, when you made the map, did you intend
11:14:56 8 area "D" to show?

11:14:57 9 A. It was intended to depict the
11:15:05 10 reserve lands at Cape Croker.

11:15:07 11 Q. And does it?

11:15:09 12 A. Yes.

11:15:10 13 Q. What facts did you rely on to help
11:15:18 14 you draw that area?

11:15:19 15 A. I referred to two historical maps,
11:15:25 16 and I used current source data, official source
11:15:29 17 data, for Indian Reserves.

11:15:32 18 Q. Is that the Indian Reserve source
11:15:38 19 data layer?

11:15:40 20 A. That's correct, yes.

11:15:41 21 Q. And the two historical maps, the
11:15:50 22 one you see on the screen is Exhibit 2401, which is
11:15:56 23 a map of the Saugeen Indian peninsula dated July
11:15:59 24 31, 1856. Is this one of the maps you are
11:16:01 25 referring to?

11:16:02 1 A. Yes. If you could scroll up? So
11:16:06 2 you can see the line going from Colpoy's Bay to
11:16:11 3 Hope Bay, so I just used that as a reference line
11:16:15 4 to make sure that the current layer, the Indian
11:16:19 5 Reserve layer that I used, that that polygon comes
11:16:23 6 directly from that Indian Reserve layer. I wanted
11:16:25 7 to make sure that it reflected that as well.

11:16:27 8 Q. This document you are seeing is
11:16:38 9 Exhibit 2449, which is a map of the "County of
11:16:43 10 Bruce Showing the Lately Surveyed Townships in the
11:16:50 11 Saugeen Indian Peninsula, Canada West 1857", this
11:16:50 12 is the other historical map you just mentioned?

11:16:53 13 A. Yes.

11:16:54 14 Q. N1, Exhibit N1, please, the bottom
11:17:15 15 left-hand corner lists an acreage for area "D",
11:17:18 16 15,678. Does that acreage result from the
11:17:22 17 illustration of area "D" on the map as the acreage
11:17:26 18 linked to the illustration of area "D"?

11:17:29 19 A. It results from it. Again, it is
11:17:31 20 calculated in the mapping software.

11:17:34 21 Q. Given the instructions you had, is
11:17:36 22 there any other way you could have drawn area "D"?

11:17:42 23 A. Not really, no.

11:17:44 24 Q. When you say "not really", what do
11:17:46 25 you mean?

11:17:47 1 A. You could use different datasets.

11:17:50 2 As I talked about earlier, there could be different
11:17:52 3 datasets available for Indian Reserves, and those
11:17:56 4 might be of different detail or currency, that sort
11:18:04 5 of thing. That is part of the reason I chose the
11:18:07 6 official Indian Reserve layer from Land Information
11:18:11 7 Ontario.

11:18:14 8 Q. So now to Exhibit O1, please.

11:18:20 9 This is the "Treaty 72 Reserves and Caughnawaga
11:18:22 10 Tract at the Start of 1856". And area "D" there in
11:18:34 11 green, when you created area "D", what did you
11:18:40 12 intend that to represent? This is the reserve at
11:18:49 13 Owen Sound.

11:18:50 14 A. Based on the instructions I had
11:18:56 15 and certain historical maps, I was to create an
11:19:03 16 illustration of what the Owen Sound Reserve looked
11:19:09 17 like.

11:19:10 18 Q. When you say "certain historical
11:19:13 19 maps", which maps are you referring to?

11:19:14 20 A. The two we were just previously
11:19:19 21 looking at, the one from 1856, I believe, and the
11:19:23 22 one from 1857.

11:19:27 23 Q. So Exhibit 2401 and -- this is
11:19:33 24 2401, this one?

11:19:35 25 A. Yes.

11:19:35 1 Q. And 2499 -- 2449. I apologize.

11:19:43 2 This one?

11:19:43 3 A. Yes. The one on the screen, yes.

11:19:45 4 Q. And does area "D" reflect any

11:19:55 5 source data layers?

11:19:57 6 A. Yes. I relied on the Geographic

11:20:03 7 Lot Fabric data layer and the OHN Waterbody layer

11:20:08 8 to construct the area "D".

11:20:11 9 Q. So I would like to show you a

11:20:25 10 document, which is SC1824. Do you recognize this

11:20:34 11 document?

11:20:35 12 A. Yes.

11:20:36 13 Q. Did you create this document?

11:20:39 14 A. Yes.

11:20:40 15 Q. In what context?

11:20:43 16 A. I used it as a way to help me

11:20:49 17 draft the boundary for area "D".

11:20:52 18 Q. Could I, Your Honour, add this as

11:20:53 19 the next lettered exhibit, please, described as --

11:20:59 20 THE REGISTRAR: Yes, lettered will be

11:21:01 21 Q-3.

11:21:02 22 MR. OGDEN: Greg Sikma working notes

11:21:09 23 extract re Owen Sound Reserve. Thank you.

11:21:15 24 BY MR. OGDEN:

11:21:15 25 Q. What is shown on the left-hand

1 side of the document, please?

2 A. That is a portion of the
3 historical map from 1856 showing an area near Owen
4 Sound, the waterbody Owen Sound, and the Indian
5 Reserve intended to represent area "D". Also on
6 that map, there are lot lines shown.

7 Q. And what is on the right-hand side
8 of Exhibit --

9 A. The right-hand side are the source
10 data layers I was using to construct the feature.
11 I used the -- I used this as a comparison. So in
12 looking at the historical map and comparing it to
13 the existing current data I have available for the
14 lot fabric, I was able to estimate, based on the
15 shape and appearance of the lot lines, where that
16 reserve -- where that area would have fallen.

17 So on the historical map, you can see
18 that the lot's fabric has not yet been surveyed,
19 but on the right-hand side in the data I have, it
20 is. So I could use that to interpret where the
21 reserve area for area "D" should fall.

22 MR. OGDEN: Your Honour, I apologize, I
23 asked that this be made the next lettered exhibit,
24 and I wished for it to be made the next numbered
25 exhibit, but that is not what I said.

11:23:01 1 THE COURT: Does that extend to the
11:23:03 2 prior exhibits as well?
11:23:04 3 MR. OGDEN: It does not.
11:23:05 4 THE COURT: It does not.
11:23:06 5 MR. OGDEN: This one only.
11:23:09 6 THE COURT: I'm only asking because I
11:23:12 7 guess this is -- I haven't been counting, but you
11:23:16 8 have a number of maps you have been through in some
11:23:18 9 detail. Is it your intention to ask that those
11:23:20 10 maps also be marked as numbered exhibits at this
11:23:24 11 time or not?
11:23:24 12 MR. OGDEN: It is not. They will be
11:23:27 13 put forward as lettered exhibits after the
11:23:31 14 examination --
11:23:32 15 THE COURT: They are already lettered
11:23:33 16 exhibits, Counsel.
11:23:35 17 MR. OGDEN: They will be put forward as
11:23:39 18 numbered exhibits, Your Honour, after the
11:23:41 19 examination-in-chief of Dr. Reimer and after
11:23:45 20 counsel for the Plaintiffs have had an opportunity
11:23:47 21 to test the facts put forward by Dr. Reimer.
11:23:51 22 THE COURT: All right. Ms. Nerland,
11:23:55 23 any objection?
11:23:55 24 MS. NERLAND: Yes, Your Honour. I
11:23:56 25 think this -- we still haven't had an opportunity

11:24:01 1 to test the underlying historical facts with a
11:24:04 2 historical expert about sort of the use of these
11:24:06 3 maps and how they relate, so I think it is more
11:24:08 4 appropriate to leave this as a lettered exhibit at
11:24:11 5 this time.

11:24:11 6 THE COURT: Well, Counsel, it is being
11:24:12 7 put forward as a document that is part of this
11:24:15 8 gentleman's preparation of his maps. He is not
11:24:20 9 here as a historian, so I am not sure what your
11:24:23 10 plans are, but what is your objection to it being
11:24:25 11 marked as an exhibit for what it is?

11:24:28 12 MS. NERLAND: If it is used simply as
11:24:30 13 evidence of his working notes, that is fine, Your
11:24:32 14 Honour.

11:24:32 15 THE COURT: I can't hear you, Counsel.

11:24:34 16 MS. NERLAND: Sorry.

11:24:35 17 THE COURT: You really should be at the
11:24:36 18 podium whenever you are speaking.

11:24:38 19 MS. NERLAND: If it is used simply --

11:24:39 20 THE COURT: Much better.

11:24:41 21 MS. NERLAND: -- as an example of his
11:24:42 22 underlying notes, that is fine.

11:24:43 23 THE COURT: It is not an example. It
11:24:45 24 is a document that he prepared --

11:24:49 25 MS. NERLAND: As an expert -- sorry,

11:24:50 1 Your Honour.

11:24:51 2 THE COURT: -- as part of his work in

11:24:52 3 preparing certain maps.

11:24:53 4 Do you have an objection to it being

11:24:55 5 marked on that basis?

11:24:56 6 MS. NERLAND: No, Your Honour.

11:24:57 7 THE COURT: All right. Madam Reporter,

11:24:59 8 can you remove the designation of Q-3 and give me a

11:25:06 9 new numbered exhibit?

11:25:08 10 THE REGISTRAR: So the next numbered

11:25:09 11 exhibit is 4547.

11:25:09 12 THE COURT: 4547.

11:25:15 13 THE REGISTRAR: Greg Sikma working

11:25:16 14 notes, extract regarding Owen Sound Reserve.

11:25:12 15 EXHIBIT NO. 4547: Greg Sikma working

11:25:12 16 notes, extract regarding Owen Sound

11:25:19 17 Reserve.

11:25:19 18 THE COURT: Thank you, Madam Reporter.

11:25:21 19 MR. OGDEN: Thank you, Your Honour.

11:25:23 20 THE COURT: Mr. Sikma, I promise you,

11:25:25 21 we don't usually have this many difficulties. I

11:25:28 22 attribute all of it to Monday. It has nothing at

11:25:33 23 all to do with you, sir, so we'll just carry on.

11:25:36 24 BY MR. OGDEN:

11:25:37 25 Q. Thank you, Your Honour. Given the

11:25:52 1 instructions you had and the source data layers and
11:25:56 2 the historical maps you were given, is there any
11:25:59 3 other way you could have drawn area "D"?

11:26:03 4 A. With the source data layers I was
11:26:06 5 using and the instructions I had, no.

11:26:11 6 Q. Exhibit O1 lists the acreage for
11:26:20 7 area "D" at 11,464 acres. Does that acreage result
11:26:31 8 from the illustration of area "D" on the map, or
11:26:34 9 does the acreage lead to that illustration?

11:26:36 10 A. It results from it.

11:26:37 11 Q. Now, area "E" on Exhibit O1, which
11:26:49 12 is in pink and representing the Colpoy's Bay
11:26:54 13 Reserve, when you made this map, what did you
11:26:56 14 intend area "E" to represent?

11:27:01 15 A. Area "E" was to represent the
11:27:06 16 Colpoy's Bay Reserve based on instructions I
11:27:15 17 received and historical maps I have seen.

11:27:21 18 Q. Exhibit O1 lists the acreage for
11:27:29 19 area "E" as 6,000. Does that acreage result from
11:27:33 20 the illustration of area "E" on the map, or does it
11:27:37 21 lead to that illustration?

11:27:39 22 A. It leads to it.

11:27:40 23 Q. And what historical maps does area
11:27:44 24 "E" represent?

11:27:45 25 A. The map from 1865, and the map

1 from 1867.

2 Q. Those are exhibits -- sorry, you
3 said 1865. Do you mean 1856?

4 A. Sorry, yes, that is what I mean.
5 The one that is on the screen right now, yes.

6 Q. And 1867, do you mean 1857?

7 A. Yes. My apologies.

8 Q. That is fine. Thank you. Those
9 are Exhibits 240 -- 2449 is on the screen, and that
10 is the 1857 map, and 2401 is on the screen as the
11 1856 map.

12 Does area "E" reflect any map source
13 data layers?

14 A. Yes, I would have used the Lot
15 Fabric data layer and the OHN Waterbody layer to
16 assist me in constructing that feature.

17 Q. Your Honour, I am showing the
18 witness the document at SC1825 with the heading
19 "Colpoy's Bay Reserve". Mr. Sikma, do you
20 recognize this document?

21 A. Yes, it is from my working notes.

22 Q. Your Honour, I would ask that this
23 document be made the next numbered exhibit, please,
24 described as "Greg Sikma working notes, extract re
25 Colpoy's Bay Reserve".

11:29:31 1 THE COURT: All right. Any objection?

11:29:33 2 MS. NERLAND: No, Your Honour.

11:29:34 3 THE COURT: Madam Registrar.

11:29:37 4 THE REGISTRAR: The next Exhibit is

11:29:39 5 No. 4548, Greg Sikma working notes, extract re

11:29:44 6 Colpoy's Bay Reserve.

11:29:46 7 EXHIBIT NO. 4548: Greg Sikma working

11:29:28 8 notes, extract re Colpoy's Bay Reserve.

11:29:50 9 MR. OGDEN: Your Honour, I would ask

11:29:51 10 that we take the morning break at this time,

11:29:53 11 please.

11:29:53 12 THE COURT: Yes, we can do that. Just

11:29:55 13 for the assistance of cross-examining counsel,

11:29:58 14 about how much longer do you expect to be?

11:30:01 15 MR. OGDEN: Until lunch at least, Your

11:30:04 16 Honour.

11:30:04 17 THE COURT: Okay. So a little over

11:30:08 18 your estimate then. It's okay. We had a slow

11:30:12 19 start to our day, and I am not going to have anyone

11:30:18 20 in particular responsible for that except perhaps

11:30:22 21 the TTC, which has a ripple effect in this city.

11:30:26 22 MR. OGDEN: Thank you, Your Honour.

11:30:27 23 THE COURT: We'll break for 20 minutes.

11:30:28 24 -- RECESSED AT 11:30 A.M.

11:51:49 25 -- RESUMED AT 11:50 A.M.

11:51:49 1 THE COURT: Please go ahead.

11:51:50 2 BY MR. OGDEN:

11:51:50 3 Q. Thank you. Mr. Sikma, you see in
11:51:53 4 front of you on the screen Exhibit 4548, which is
11:51:59 5 an extract from your working notes concerning
11:52:02 6 Colpoy's Bay Reserve. What is on the left-hand
11:52:05 7 side, please?

11:52:06 8 A. A portion of the historical map
11:52:13 9 from 1856.

11:52:17 10 Q. This is Exhibit 2401 we are seeing
11:52:22 11 now. Is that the historical map you are referring
11:52:24 12 to?

11:52:24 13 A. Yes.

11:52:25 14 Q. And back to Exhibit 4548, what is
11:52:31 15 shown on the right-hand side, please.

11:52:33 16 A. On the right-hand side are my
11:52:38 17 working notes. They depict the source data layers
11:52:44 18 we discussed earlier. So we are seeing the lot
11:52:47 19 fabric, the waterbody, road information -- sorry,
11:52:54 20 and road information.

11:52:55 21 Q. Given your instructions and
11:52:59 22 including the historical maps you were given and
11:53:02 23 given the source data layers and other mapping
11:53:06 24 information you had, is there any other way you
11:53:10 25 could have drawn area "E"?

11:53:13 1 A. To a small extent. I was making
11:53:20 2 this to be an area of 6,000 acres, so I could have
11:53:27 3 slightly adjusted the east, west or south boundary
11:53:34 4 to a small degree in order to achieve that 6,000
11:53:40 5 acre figure. However, I tried to keep it as close
11:53:44 6 as possible to what was represented on the
11:53:50 7 historical map.

11:53:51 8 Q. You mean Exhibit 2401? Is that
11:53:55 9 what you mean by the historical map?

11:53:57 10 A. Yes.

11:53:58 11 Q. And now to area "F", which is the
11:54:07 12 Caughnawaga tract. When you created area "F", what
11:54:11 13 did you intend that to represent?

11:54:14 14 A. Again, I received instructions for
11:54:21 15 how that should look, as well as two historical
11:54:27 16 maps for reference.

11:54:28 17 Q. Are those the 1856 and 1857 maps?

11:54:32 18 A. Yes, they are.

11:54:33 19 Q. Exhibit 2401 before you now; is
11:54:43 20 that one of the historical maps?

11:54:45 21 A. Yes.

11:54:45 22 Q. And 2449 before you now, again?

11:54:51 23 A. Yes.

11:54:52 24 Q. And does area "F", the Caughnawaga
11:54:56 25 tract, reflect any source data layers?

11:55:00 1 A. Yes. Once again, it is
11:55:05 2 constructed using the lot fabric data and the OHN
11:55:11 3 waterbody layer.

11:55:13 4 Q. I am going to show you a document,
11:55:15 5 which is SC1826. Do you recognize this document?

11:55:22 6 A. Yes. It is part of my working
11:55:23 7 notes.

11:55:25 8 MR. OGDEN: Your Honour, could I make
11:55:26 9 this the next numbered exhibit, please, called
11:55:31 10 "Greg Sikma working notes, extract re Caughnawaga
11:55:36 11 tract".

11:55:37 12 THE COURT: If there is no objection.
11:55:39 13 Madam Registrar, what is the next numbered exhibit?

11:55:42 14 THE REGISTRAR: The next number is
11:55:44 15 4549, Greg Sikma working notes, extract re
11:55:47 16 Caughnawaga tract.

11:55:50 17 EXHIBIT NO. 4549: Greg Sikma working
11:55:52 18 notes, extract re Caughnawaga tract.

11:55:52 19 BY MR. OGDEN:

11:55:53 20 Q. Thank you. Mr. Sikma, what is
11:55:54 21 shown on the left-hand side?

11:55:55 22 A. The historical map from 1856
11:55:57 23 depicting part of Owen Sound and the lot fabric
11:56:02 24 near the Caughnawaga tract.

11:56:04 25 Q. The 1856 map, is that Exhibit

11:56:09 1 2401?

11:56:10 2 A. Yes, the one that is on the
11:56:13 3 screen.

11:56:14 4 Q. And what is on the right-hand side
11:56:17 5 of your working notes, Exhibit 4549?

11:56:23 6 A. The current source data layers
11:56:25 7 that I used to construct the feature, so the OHN
11:56:31 8 waterbody and the lot fabric. The roads are there
11:56:34 9 as well.

11:56:34 10 Q. Given the instructions you had,
11:56:41 11 including the historical maps and source data
11:56:43 12 layers, is there any other way for you to draw the
11:56:49 13 Caughnawaga tract?

11:56:50 14 A. No.

11:56:51 15 Q. Exhibit 01 lists the acreage of
11:57:03 16 area "F" as 1,819 acres. Does that acreage result
11:57:09 17 from the illustration of area "F" on the map, or
11:57:12 18 does it lead to that illustration?

11:57:13 19 A. It results from it.

11:57:15 20 Q. Now, area "A" on Exhibit 01 shows
11:57:23 21 the reserve at Cape Croker. When you drew this
11:57:40 22 area, what did you intend it to represent?

11:57:42 23 A. It reflects the instructions I was
11:57:50 24 given, as well as reference to historical maps that
11:58:00 25 I was provided with.

11:58:01 1 Q. You have drawn on Exhibit N1 an
11:58:14 2 area shown as "D", the reserve at Cape Croker. Did
11:58:19 3 you draw the Cape Croker Reserve on Exhibit O1 in
11:58:27 4 any different way than area "D" on Exhibit N1?

11:58:33 5 A. No, it is exactly the same.

11:58:36 6 Q. So back to Exhibit O1, please, and
11:58:45 7 the area "B" described as Chief's Point. When you
11:58:50 8 drew this, what did you intend this to represent?

11:58:54 9 A. Again, it is meant to reflect the
11:59:00 10 instructions I was given, and it references the map
11:59:05 11 from 1856 and the map from 1857.

11:59:09 12 Q. Is that Exhibit 2401 and Exhibit
11:59:13 13 2449? This is 2401.

11:59:19 14 A. Yes.

11:59:19 15 Q. And 2449.

11:59:22 16 A. Yes.

11:59:23 17 Q. And does area "B", Chief's Point,
11:59:34 18 that you drew reflect any map data layers?

11:59:38 19 A. Similar to area "A", it comes
11:59:44 20 directly from the official Indian Reserve layer
11:59:50 21 from Land Information Ontario.

11:59:53 22 Q. And given your instructions and
11:59:56 23 the historical maps and source data layer, is there
12:00:00 24 any other way you could have drawn area "B"?

12:00:02 25 A. No.

1 Q. And Exhibit O lists the acreage of
2 area "B" as 1,451 acres. Is that the result of the
3 illustration of area "B" on the map, or does the
4 acreage lead to the illustration?

5 A. It is the result.

6 Q. Area "C" down in the southwest
7 near Southampton of Exhibit O1, when you drew this
8 area described as the Chippewas of Saugeen First
9 Nation Saugeen No. 29, what did you intend this to
10 represent?

11 A. The instructions I was given, as
12 well as reference to historical maps.

13 Q. Which historical maps?

14 A. The ones from 1856, the one on the
15 screen.

16 Q. That is Exhibit 2401?

17 A. Yes. And this one, yes.

18 Q. Exhibit 2449 on the screen?

19 A. Uhm-hmm.

20 Q. Sorry?

21 A. Yes.

22 Q. And does area "C" reflect any
23 source data layers?

24 A. Once again, this is taken directly
25 from the Indian Reserve layer from Land Information

1 Ontario.

2 Q. The acreage on area "O" for this
3 area "C" -- sorry, the acreage on Exhibit O for
4 this area "C" is 10,178 acres. Does that result
5 from the illustration of area "C" on the map, or
6 does it lead to the illustration?

7 A. It results from the illustration.

8 Q. Given the instructions you had and
9 the source data layers and the historical maps, is
10 there any other way you could illustrate area "C"?

11 A. It comes directly from the current
12 reserve data layer, so no.

13 Q. Now to Exhibit N2, please, which
14 is the illustration of Anderson's August 1854
15 proposal, talking about area "A", which is
16 described as Colpoy's Bay, when you drew area "A",
17 what did you intend area "A" to represent?

18 A. Sorry, what is the --

19 Q. Area "A", Colpoy's Bay on
20 Exhibit --

21 A. Sorry, the exhibit number?

22 Q. N2.

23 A. Again, I was following the
24 instructions I was given, and it was based upon the
25 historical maps. It is the same geometry we

12:03:37 1 discussed in the previous example.

12:03:39 2 Q. For Exhibit O1?

12:03:42 3 A. Yes.

12:03:45 4 MR. OGDEN: Your Honour, I have colour
12:03:48 5 copies bound of the amended version of Dr. Reimer's
12:03:56 6 Maps Report and have provided one to the witness
12:04:00 7 and to Madam Registrar, if you would like that.

12:04:04 8 THE COURT: I am just fine with the
12:04:06 9 screen. Perhaps at the lunch break you could
12:04:09 10 provide that, but there is no urgency. You are
12:04:12 11 saying you have it now.

12:04:15 12 MR. OGDEN: I have provided it. Madam
12:04:16 13 Registrar has it.

12:04:18 14 THE COURT: All right. That is fine.
12:04:19 15 Thank you very much.

12:04:21 16 BY MR. OGDEN:

12:04:21 17 Q. Thank you. And given the
12:04:32 18 instructions you had, including the historical maps
12:04:35 19 and the source data layers, is there any other way
12:04:38 20 you could have drawn area "A", the Colpoy's Bay
12:04:43 21 Reserve?

12:04:43 22 A. As per my previous answer, to a
12:04:49 23 very slight degree. Because I designed it to be
12:04:53 24 6,000 acres, some of the western, the eastern, and
12:05:00 25 the southern boundary could have been portrayed

12:05:03 1 slightly differently, not to a great extent.

12:05:09 2 Q. And now area "D" at Saugeen down
12:05:14 3 near Southampton depicting the Chippewas of Saugeen
12:05:20 4 Reserve, you will see the acreage there is 12,000.
12:05:24 5 Was that the result of the mapping, or does that
12:05:26 6 lead to the illustration on the map?

12:05:28 7 A. In this case, it leads to it.

12:05:31 8 Q. And what else did you intend area
12:05:39 9 "D" to depict?

12:05:40 10 A. The instructions I was given, as
12:05:42 11 well as the historical maps from 1856 and 1857.

12:05:52 12 Q. As Exhibit 2401 on the screen now
12:05:58 13 and 2449 on the screen?

12:06:01 14 A. Yes.

12:06:01 15 Q. And what in particular about the
12:06:05 16 instructions led you to draw area "D" here with
12:06:10 17 these boundaries?

12:06:12 18 A. It was to be 12,000 acres, and it
12:06:24 19 was -- sorry, with the previous example, there is a
12:06:29 20 small piece in the southwest corner that is
12:06:35 21 missing.

12:06:36 22 Q. Sorry, missing on this map or
12:06:39 23 missing in the previous map?

12:06:40 24 A. On the previous example. So this
12:06:41 25 one was to include the area down to the Sauble

1 River completely.

2 Q. Do you mean the mouth of the --
3 which river, sorry, are you talking about? You
4 said the Sauble River.

5 A. Sorry, sorry, by Southampton.
6 Sorry, I don't have the map in front of me, the
7 more detailed map. I am trying to recall. Where
8 the number 13 road shield is there on the map.

9 Q. Are you referring to the area --

10 A. Just north of the word
11 "Southampton", above the "S" and the "o".

12 Q. And your evidence is that this
13 area was not marked as a reserve on the previous
14 map we were discussing, which is Exhibit O?

15 A. That is correct because it comes
16 from the current Indian Reserve data layer.

17 Q. But the previous version?

18 A. The previous version that we were
19 discussing in Exhibit O, yes.

20 Q. Did you use any other information
21 to create area "D" other than the historical maps
22 and the other instructions you were given?

23 A. I can't recall at this time. I'm
24 sorry.

25 Q. Any mapping information?

12:08:24 1 A. Oh, sorry. Yes, I would have used
12:08:28 2 the -- I would have constructed this one, whereas
12:08:33 3 the other one is a direct representation from the
12:08:36 4 Indian Reserve layer from Land Information Ontario.
12:08:39 5 This one I constructed using the source data layers
12:08:47 6 or referencing them, so I would have used the lot
12:08:49 7 line information and the OHN waterbody layer.

12:08:52 8 Q. And given the instructions you
12:08:55 9 had, including the historical maps and the source
12:08:57 10 data layers, is there any other way you could have
12:09:01 11 drawn area "D"?

12:09:02 12 A. To a slight degree, yes. I could
12:09:07 13 have -- because I was aiming for a 12,000 acre
12:09:12 14 area, I could have had the north end of the
12:09:17 15 boundary extend a little further north up the coast
12:09:21 16 which would pull the eastern boundary further west,
12:09:27 17 or vice versa, I could have illustrated the
12:09:29 18 northern tip there further south which would have
12:09:32 19 pushed the eastern boundary further east. So to a
12:09:36 20 small degree, yes.

12:09:39 21 Q. Area "C" there in green showing a
12:09:44 22 reserve at Owen Sound lists the acreage at 12,000.
12:09:48 23 Is that acreage, did that lead you to -- does that
12:09:54 24 lead to the depiction on the map, or does it result
12:09:57 25 from the depiction on the map?

12:09:59 1 A. In this case, it leads to it.

12:10:00 2 Q. And what did you intend to depict
12:10:05 3 with area "C"?

12:10:08 4 A. The instructions that I was given,
12:10:11 5 as well as the general appearance that can be seen
12:10:18 6 on the maps from 1856 and 1857.

12:10:22 7 Q. Exhibits 2401 and 2449; is that
12:10:27 8 correct?

12:10:27 9 A. Yes.

12:10:29 10 Q. Did you use any other information
12:10:37 11 to construct area "C"?

12:10:41 12 A. Yes, I used the lot fabric data
12:10:44 13 layer and the OHN waterbody layer.

12:10:47 14 Q. How does the Owen Sound Reserve on
12:10:52 15 Exhibit N2 compare with the Owen Sound Reserve on
12:10:57 16 Exhibit O1?

12:11:01 17 A. The N2 --

12:11:12 18 Q. So we are showing you N2 on the
12:11:14 19 screen now.

12:11:14 20 A. Right. So it is 12,000 acres,
12:11:17 21 whereas the acreage on O2 was 11,464.

12:11:24 22 Q. Sorry, is that O2 or O1?

12:11:27 23 A. Sorry, O1 is 11,464 acres, while
12:11:34 24 N2 is exactly 12,000 acres.

12:11:39 25 Q. Given the instructions you had,

1 was there any other way for area "C" on Exhibit N2
2 that you could draw area "C"?

3 A. To a slight degree, yes. I based
4 it on area "D" that was constructed for Exhibit O,
5 and in order to achieve the 12,000 acres, I simply
6 moved the western boundary further west until it
7 included an area of exactly 12,000 acres. I could
8 have done that to the north or to the south or a
9 combination of all three, but in this case, I chose
10 just to move -- or just to alter one of the lines
11 which in my mind would keep it closer to the
12 representation on the two historical maps.

13 Q. Now, area "B", the Manual Labour
14 School, has an acreage of 4,600. Does that acreage
15 result from the depiction on the map, or does it
16 lead to the depiction on the map?

17 A. It leads to the depiction.

18 Q. Given that acreage, is there any
19 other way you could draw area "B"?

20 A. Yes.

21 Q. And how could it be different?

22 A. As I recall, my instructions were
23 to put it in a -- it had to be 4,600 acres within a
24 general area of about 10 to 20 kilometres within
25 the central -- near the centre, in the centre of

12:14:06 1 the map between Lake Huron and Owen Sound. It
12:14:10 2 could have been taller, it could have been wider or
12:14:16 3 narrower, but it was to encompass an area of 4,600
12:14:22 4 acres.

12:14:22 5 Q. Thank you. Now Exhibit L1, which
12:14:28 6 is the illustration of the Nawash at Owen Sound,
12:14:41 7 John Jones at Colpoy's Bay, Caughnawaga Mohawk, and
12:14:46 8 Credit Mississauga Reserves based on Exhibits 1873,
12:14:51 9 2401, 2449, 2175. Starting with area "A" in pink,
12:15:06 10 the Colpoy's Bay Reserve, when you drew area "A",
12:15:13 11 what did you intend this to represent?

12:15:15 12 A. The instructions I was given, as
12:15:21 13 well as the reference to the map from 1856 and
12:15:29 14 1857, as per the previous examples.

12:15:31 15 Q. Exhibits 2401 and 2449?

12:15:35 16 A. That's correct.

12:15:35 17 Q. And the acreage there is 6,000, at
12:15:38 18 the bottom left of this map. Did that lead to the
12:15:45 19 illustration or result from the illustration?

12:15:46 20 A. It leads to it.

12:15:47 21 Q. Given what you have said, could
12:15:50 22 you draw area "A" in any other way?

12:15:52 23 A. As with the previous two examples
12:15:56 24 we discussed for Colpoy's Bay, yes, the western,
12:16:00 25 eastern, or southern boundary could have been

12:16:04 1 adjusted to a very slight degree. I did that --
12:16:09 2 again, this was based upon the lot fabric
12:16:12 3 information we discussed before, so to a small
12:16:16 4 degree, yes.

12:16:18 5 Q. And area "B", described as the
12:16:21 6 Owen Sound Reserve, can you tell us what you
12:16:24 7 intended that to depict?

12:16:25 8 A. Again, the instructions I was
12:16:29 9 given, as well as the maps from 1856 and 1857.

12:16:35 10 Q. The Exhibits 2401 and 2449; is
12:16:40 11 that correct?

12:16:40 12 A. That's correct.

12:16:41 13 Q. And how does area "B", the Owen
12:16:48 14 Sound Reserve on this Exhibit L1, compare with the
12:16:52 15 Owen Sound Reserve on Exhibit O1, which is shown as
12:17:00 16 area "D"?

12:17:01 17 A. They are identical.

12:17:06 18 Q. And did you construct them in any
12:17:16 19 different way? We are seeing Exhibit O1 at the
12:17:21 20 moment. Area "D" is the Owen Sound Reserve.

12:17:24 21 A. Uhm-hmm.

12:17:24 22 Q. And Exhibit L1, area "B", is also
12:17:30 23 the Owen Sound Reserve. And you said they are
12:17:32 24 identical; is that right?

12:17:33 25 A. That's right.

12:17:33 1 Q. And why are they identical?

12:17:39 2 A. Because the instructions I
12:17:42 3 received for them were the same. They referenced
12:17:47 4 the same historical maps. I constructed the
12:17:56 5 geometry once and used it again, as the
12:18:00 6 instructions were very similar.

12:18:01 7 Q. Now, area "C", the Caughnawaga
12:18:08 8 tract, and I would ask you to look at the east side
12:18:20 9 of the Caughnawaga tract there.

12:18:22 10 A. Yes.

12:18:23 11 Q. What do you intend -- what did you
12:18:26 12 intend the east side of the Caughnawaga tract to
12:18:28 13 represent?

12:18:28 14 A. It was to follow the shoreline of
12:18:33 15 the waterbody of Owen Sound.

12:18:36 16 Q. And does it?

12:18:37 17 A. Yes.

12:18:37 18 Q. And how far down south in Owen
12:18:43 19 Sound does that east boundary travel?

12:18:48 20 A. Only as far as the north boundary
12:18:57 21 of the Owen Sound Reserve.

12:18:58 22 Q. And the northern boundary now of
12:19:01 23 the Caughnawaga tract, what did you intend that to
12:19:03 24 represent?

12:19:04 25 A. It was to follow the shoreline of

1 Colpoy's Bay until it reached the Colpoy's Bay
2 Reserve.

3 Q. Does it follow the shoreline of
4 Colpoy's Bay?

5 A. Yes, it does.

6 Q. As far as -- does it go as far as
7 the Colpoy's Bay Reserve?

8 A. Yes. They are adjacent.

9 Q. What did you intend to show with
10 the south boundary of the Caughnawaga tract?

11 A. The south boundary of the
12 Caughnawaga tract, as we discussed, had to border
13 the northern boundary of the Owen Sound Reserve, as
14 well as the boundary of the Credit Mississauga
15 Reserve.

16 Q. And the acreage listed on Exhibit
17 L1, the Caughnawaga tract, is 38,013. Does that
18 acreage lead to the illustration of the Caughnawaga
19 tract or result from the illustration?

20 A. It results from the illustration.

21 Q. Now, area "D", the Credit
22 Mississauga tract, what did you intend that to
23 represent?

24 A. It was intended to represent an
25 area of 6,000 acres that bordered the Caughnawaga

1 tract on the north and the Owen Sound Reserve on
2 the east.

3 Q. And so the 6,000 acres then, does
4 that lead to the illustration or result from the
5 illustration on the map?

6 A. It leads to the illustration.

7 Q. And given these instructions, is
8 there any other way you could have illustrated area
9 "C", the Caughnawaga tract?

10 A. Yes. I'm sorry, Richard, could
11 you repeat the question in its entirety, please?

12 Q. Yes, Mr. Sikma. Given the
13 instructions you had, is there any other way you
14 could have illustrated area "C", the Caughnawaga
15 tract?

16 A. Yes, it perhaps could have been
17 smaller had the Mississauga tract at the north
18 boundary from the Mississauga tract been further
19 north or of a different shape, perhaps if that
20 northern line wasn't straight, or if it was arched
21 or something of that nature, or if the one -- I
22 guess if the -- at the point where -- in the
23 southwest corner of the Caughnawaga tract where it
24 meets the Colpoy's Bay Reserve, if that point was
25 further north, it would have adjusted the shape.

12:22:57 1 Q. And could you have drawn area "D"
12:23:01 2 differently, the Mississauga tract?

12:23:04 3 A. For the same reasons just
12:23:08 4 mentioned, yes, but it would have had to still
12:23:13 5 border the Caughnawaga tract.

12:23:32 6 Q. Now to Exhibit K2, please, the
12:23:44 7 illustration of tracts intended for the Nawash at
12:23:47 8 Owen Sound, John Jones Band at Colpoy's Bay,
12:23:52 9 Caughnawaga Mohawks, and the Credit Mississaugas,
12:23:55 10 based in part on Exhibits 1873 and 2175. Can you
12:24:17 11 tell us what, if any, historical maps you relied on
12:24:22 12 to make this exhibit?

12:24:26 13 A. I referenced what I know is
12:24:28 14 Oliphant's map.

12:24:34 15 Q. I am going to show you Exhibit
12:24:37 16 2175. This is page 13 of the exhibit but page 14
12:24:50 17 of the PDF. So page 15, sorry, of the exhibit but
12:25:09 18 page 14 of the PDF, is this the map you are
12:25:18 19 referring to?

12:25:18 20 A. Yes, it is.

12:25:19 21 Q. And did you rely on any other
12:25:26 22 historical maps to create Exhibit K2?

12:25:33 23 A. For this particular example, not
12:25:38 24 in particular, no.

12:25:38 25 Q. On this sketch map in Exhibit

12:25:47 1 2175, which is described as Oliphant Treaty Report,
12:25:54 2 November 3, 1854, and the sketch on PDF page 14,
12:26:02 3 can you describe or give us, please, your
12:26:04 4 description of the Colpoy's Bay Reserve as
12:26:09 5 depicted?

12:26:10 6 A. Right. So in this example, you'll
12:26:17 7 note that there is no lot fabric as was evident on
12:26:22 8 the other examples, and so in the other maps, the
12:26:29 9 eastern and western boundaries ran more in a
12:26:35 10 north-south direction, whereas these, the
12:26:40 11 boundaries for the Colpoy's Bay Reserve represented
12:26:43 12 here, are on an angle, and if we are starting at
12:26:54 13 the southwest corner, the angle runs in a
12:27:01 14 north-westerly direction.

12:27:03 15 Q. Are you describing the western
12:27:04 16 boundary there?

12:27:04 17 A. That's correct, yes. So starting
12:27:10 18 at the bottom, it runs in a north-westerly
12:27:13 19 direction.

12:27:14 20 Q. Can you describe the eastern
12:27:15 21 boundary, please.

12:27:16 22 A. It is very similar. So again, it
12:27:20 23 is parallel to the western boundary, and starting
12:27:25 24 in the southeast corner, it travels, again, in a
12:27:32 25 north-westerly direction towards Colpoy's Bay.

12:27:35 1 Q. And then the southern boundary?

12:27:42 2 A. The southern boundary connects the
12:27:45 3 two parallel boundaries.

12:27:47 4 Q. And what direction does that
12:27:50 5 travel in?

12:27:53 6 A. Starting in the southwest corner,
12:27:58 7 it angles in a north-easterly direction.

12:28:02 8 Q. Moving then to the Owen Sound
12:28:06 9 Reserve depicted on Exhibit 2175, PDF page 14, can
12:28:12 10 you describe for us the northern boundary of that
12:28:16 11 reserve?

12:28:16 12 A. Right. It is -- the northern
12:28:22 13 boundary, again, runs on a different angle than was
12:28:29 14 represented in the previous maps. So on the
12:28:32 15 previous historical maps, it shows that northern
12:28:35 16 boundary running in a relatively east-west
12:28:40 17 direction, whereas this boundary starting at the
12:28:47 18 north-east corner runs in a north-westerly
12:28:53 19 direction.

12:28:53 20 Q. And you mentioned it runs on a
12:28:57 21 different angle than the previous maps. Which maps
12:28:59 22 are you referring to?

12:29:00 23 A. The maps from 1856 and 1857 with
12:29:05 24 the lot fabric on them.

12:29:07 25 Q. Exhibits 2401 and 2449 that we are

1 showing you now; is that correct?

2 A. Yes.

3 Q. Thank you. Could we go back to
4 Exhibit K2, please. Now, area "C", the Caughnawaga
5 tract, can you tell us, please, what you intended
6 to represent as the eastern boundary of this tract?

7 A. The eastern boundary of the tract
8 needed to follow the coastline of the surface water
9 of Owen Sound.

10 Q. And does it?

11 A. Yes.

12 Q. And how far down south into Owen
13 Sound does that eastern boundary travel?

14 A. Until it meets the northern
15 boundary of the Owen Sound Reserve.

16 Q. And the northern boundary of the
17 Caughnawaga tract, what did you intend that -- what
18 did you intend to represent when you drew the
19 northern boundary of the Caughnawaga tract?

20 A. It was to follow the shoreline of
21 Colpoy's Bay until it reached the Colpoy's Bay
22 Reserve.

23 Q. And does it?

24 A. Yes.

25 Q. Also on K2 then, area "A" is

1 described as the Colpoy's Bay Reserve and has an
2 acreage of 6,000 acres. Does that acreage lead to
3 the illustration or result from the illustration?

4 A. It leads to it.

5 Q. And what other facts did you
6 intend to represent when drawing area "A"?

7 A. What I received in the
8 instructions, as well as reference to Oliphant's
9 map, and it needed to be 6,000 acres, and it would
10 border the Caughnawaga tract.

11 Q. And when you are talking about
12 Oliphant's map, it is PDF page 14 on Exhibit 2175;
13 is that correct?

14 A. Yes.

15 Q. What about that sketch map are you
16 trying to represent on Exhibit K2?

17 A. We are trying to represent the
18 different angle of the reserve and the different
19 general shape.

20 Q. When you said "the angle", what
21 are you referring to in particular?

22 A. The western and the eastern and
23 the southern boundaries.

24 Q. And is that what it represents?

25 A. It is supposed to, yes.

12:32:15 1 Q. Sorry, it does or --

12:32:16 2 A. Yes, it does.

12:32:17 3 Q. And similarly, for area "B", the
12:32:27 4 Owen Sound Reserve on Exhibit K2, what does the
12:32:34 5 northern -- what did you intend the northern
12:32:38 6 boundary of area "B" to represent?

12:32:40 7 A. It was supposed to be similar to
12:32:46 8 that shown on Oliphant's map.

12:32:51 9 Q. Just showing you now PDF page 14
12:32:56 10 of Exhibit 2175.

12:32:58 11 A. Yes.

12:32:58 12 Q. And what about the northern
12:33:00 13 boundary on this page did you intend to represent?

12:33:05 14 A. The different angle of the
12:33:10 15 northern boundary, and again, it is not running in
12:33:15 16 an east-west direction. It is running in more of a
12:33:19 17 north-westerly direction.

12:33:23 18 Q. And did you represent that on
12:33:28 19 Exhibit K2?

12:33:29 20 A. Yes.

12:33:30 21 Q. What did you intend area "D" to
12:33:36 22 represent?

12:33:36 23 A. Area "D" was to represent the
12:33:39 24 instructions I received for mapping the Credit
12:33:48 25 Reserve.

12:33:49 1 Q. What did you intend the northern
12:33:54 2 boundary of the Credit Reserve to represent?

12:33:57 3 A. It was to be adjacent to the
12:34:00 4 Caughnawaga tract.

12:34:01 5 Q. And how did you determine the
12:34:05 6 southern boundary of the Caughnawaga tract?

12:34:06 7 A. The southern boundary of the
12:34:10 8 Caughnawaga tract would have been determined --

12:34:17 9 Q. Sorry, when you say "would have
12:34:18 10 been determined" --

12:34:20 11 A. Sorry, it was determined based on
12:34:22 12 the area of the tract itself.

12:34:26 13 Q. Which was what?

12:34:27 14 A. 6,000 acres.

12:34:30 15 Q. Sorry, which tract are you talking
12:34:32 16 about?

12:34:32 17 A. I am talking about -- sorry, I
12:34:35 18 thought you were asking about the Credit.

12:34:38 19 Q. Sorry, I'm asking about the
12:34:39 20 southern boundary of the Caughnawaga tract, what
12:34:42 21 determines that?

12:34:42 22 A. Sorry, I apologize.

12:34:44 23 Q. That is fine. Thank you.

12:34:45 24 A. The southern boundary of the
12:34:47 25 Caughnawaga tract needs to be adjacent to the

12:34:52 1 northern boundary of the Owen Sound Reserve and the
12:34:57 2 northern boundary of the Credit Reserve.

12:35:01 3 Q. And you have an acreage for the
12:35:07 4 Caughnawaga tract of 26,000 acres.

12:35:09 5 A. Yes.

12:35:10 6 Q. How does that relate to the
12:35:16 7 area -- or to the depiction of the Caughnawaga
12:35:20 8 tract on area "C"?

12:35:23 9 A. It led to the depiction.

12:35:29 10 Q. And area "D" has an acreage of
12:35:36 11 6,000 acres for the Credit Mississauga tract. Did
12:35:42 12 that lead to the illustration or result from the
12:35:44 13 illustration?

12:35:45 14 A. It leads to the illustration.

12:35:46 15 Q. Given the instructions you had,
12:35:52 16 including the historical map you referred to, and
12:36:01 17 any other mapping information you may have used,
12:36:06 18 could you have drawn Exhibit K2 any differently
12:36:13 19 and, if so, how?

12:36:15 20 A. The angles could be slightly
12:36:20 21 different on the Colpoy's Bay Reserve or the Owen
12:36:29 22 Sound Reserve, which would have slightly altered
12:36:33 23 the shape and area of the Caughnawaga tract.

12:36:36 24 Q. Sorry, when you say "the angles",
12:36:38 25 what are you referring to?

12:36:39 1 A. I'm referring to the western
12:36:43 2 boundary of the Colpoy's Bay Reserve, the fact that
12:36:45 3 it is running in a -- it doesn't run in a
12:36:49 4 north-south direction, and the fact that the Owen
12:36:55 5 Sound Reserve, that that northern boundary doesn't
12:36:56 6 run in an east-west direction.

12:36:59 7 Q. And how much could you have
12:37:02 8 altered the direction of those boundaries, given
12:37:04 9 the instructions you had?

12:37:07 10 A. Given the instructions and the
12:37:11 11 historical map that I was provided, to a slight
12:37:17 12 degree it could have been altered. The angles
12:37:22 13 could have been slightly different, but they would
12:37:23 14 have to generally represent the shapes depicted on
12:37:30 15 Oliphant's map.

12:37:32 16 Q. And if you had adjusted the
12:37:35 17 boundaries of the Colpoy's Bay Reserve to make
12:37:38 18 them -- to move them to the right, as it were, what
12:37:44 19 would that have done to area "C"?

12:37:46 20 A. So if the angle moved to the right
12:37:53 21 of Colpoy's Bay or to the east, it would have made
12:37:57 22 the area of the Caughnawaga tract smaller.

12:38:02 23 Q. And would that have been
12:38:03 24 consistent with your instructions?

12:38:04 25 A. No. It needed to be an area of at

12:38:10 1 least 26,000 acres, I believe.

12:38:12 2 Q. And could you have drawn area "D"
12:38:16 3 any differently?

12:38:17 4 A. To a certain extent, yes. It
12:38:25 5 needed to be bounded on the east by Owen Sound and
12:38:31 6 on the north by the Caughnawaga tract. So the
12:38:38 7 configuration or the shape of it could have
12:38:39 8 changed, but it needed to be 6,000 acres.

12:38:47 9 Q. Thank you. Thank you, Mr. Sikma.

12:39:00 10 Your Honour, those are my questions.

12:39:02 11 THE COURT: All right. Ms. Nerland,
12:39:04 12 please go ahead.

12:39:16 13 MS. NERLAND: Your Honour, I wonder if
12:39:17 14 I might ask for the Court's indulgence to take the
12:39:19 15 lunch break a little early so I can shorten up my
12:39:22 16 cross.

12:39:22 17 THE COURT: Counsel always say that,
12:39:24 18 and if you can shorten it to 20 minutes -- well,
12:39:34 19 that won't work. You want to stop now. How long
12:39:36 20 is it going to be after lunch, Counsel?

12:39:39 21 MS. NERLAND: I think substantially
12:39:40 22 less than half an hour, Your Honour.

12:39:42 23 THE COURT: All right. So on that
12:39:45 24 basis, we will resume at 2:15.

12:39:46 25 Sir, so you are going to be asked

12:39:49 1 questions by Plaintiffs' counsel after lunch, and
12:39:54 2 there is some rules associated with the Court
12:39:57 3 process, which mean that in the meantime, between
12:40:00 4 now and then, you should not talk about the subject
12:40:03 5 matter with anybody. That is fine, you can go for
12:40:08 6 lunch and talk about the Super Bowl or whatever you
12:40:11 7 prefer, but this topic is off limits. All right?

12:40:14 8 THE WITNESS: Yes.

12:40:16 9 THE COURT: All right. So is there any
12:40:17 10 point in coming -- well, is that your next witness
12:40:24 11 I see sitting in the back row?

12:40:28 12 MR. LEMMOND: It is, Your Honour.

12:40:29 13 THE COURT: It is. And are you
12:40:30 14 prepared to proceed with him this afternoon?

12:40:32 15 MR. LEMMOND: Yes, Your Honour.

12:40:33 16 THE COURT: All right. Okay. So is
12:40:37 17 cross-examining counsel for the next witness in the
12:40:39 18 courtroom?

12:40:42 19 MS. GUIRGUIS: Yes, Your Honour, we'll
12:40:43 20 be bringing back Renée Pelletier.

12:40:46 21 THE COURT: So she is on deck?

12:40:47 22 MS. GUIRGUIS: Yes, Your Honour.

12:40:48 23 THE COURT: All right. And I think
12:40:49 24 since she is not presently in the courtroom, we had
12:40:51 25 better stick with the normal 2:15 return time after

12:40:56 1 lunch. You will make sure that she gets over here.

12:40:59 2 MS. GUIRGUIS: Yes, Your Honour.

12:41:00 3 THE COURT: All right. We'll adjourn

12:41:01 4 to 2:15.

12:41:02 5 -- RECESSED AT 12:41 P.M.

14:16:26 6 -- RESUMED AT 2:16 P.M.

14:16:26 7 THE COURT: Please go ahead.

14:16:34 8 CROSS-EXAMINATION BY MS. NERLAND:

14:16:36 9 Q. Good afternoon, Mr. Sikma. My

14:16:38 10 name is Krista Nerland. I am going to be asking

14:16:40 11 you some questions on behalf of the Plaintiffs this

14:16:42 12 afternoon. So you testified to my friend earlier

14:16:45 13 this morning that you were instructed to draft

14:16:48 14 lettered exhibits K2, L1, L2, M2, N1, N2, and O1 in

14:16:58 15 this litigation. You are not a historian; correct?

14:17:01 16 A. That's correct.

14:17:02 17 Q. So during the drafting of these

14:17:04 18 maps, you did not do your own independent

14:17:08 19 interpretations of historical letters or petitions

14:17:11 20 or minutes or treaty reports or other similar

14:17:15 21 documents?

14:17:15 22 A. I followed the instructions that I

14:17:17 23 was given.

14:17:18 24 Q. By Ontario counsel?

14:17:19 25 A. The -- it would have been provided

14:17:22 1 to me through them, yes.

14:17:24 2 Q. Did you ever have access to or
14:17:27 3 communication with Dr. Gwen Reimer to assist you
14:17:31 4 with interpreting documents for formulating these
14:17:33 5 maps?

14:17:33 6 A. No.

14:17:34 7 Q. And you did not have access to or
14:17:38 8 communication with any other historian?

14:17:41 9 A. No.

14:17:41 10 Q. And so at no time when you were
14:17:45 11 preparing these maps did you discuss the documents
14:17:48 12 you were relying on or how they should be
14:17:50 13 interpreted with Dr. Reimer?

14:17:53 14 A. No.

14:17:53 15 Q. Or any other historian?

14:17:54 16 A. No. I mean, that is correct, I
14:17:58 17 didn't discuss that.

14:17:58 18 Q. And nor did you refer to any
14:18:01 19 report by Dr. Reimer during the process of
14:18:03 20 generating these maps?

14:18:04 21 A. No, I did not.

14:18:06 22 Q. Or a report by any other expert
14:18:09 23 historian?

14:18:09 24 A. No.

14:18:10 25 Q. So your only communication was by

1 way of counsel for Ontario?

2 A. By the instructions I received.

3 Q. So you relied on these
4 instructions from counsel for Ontario about how to
5 represent the various parcels on the map; is that
6 right?

7 A. I interpreted the instructions and
8 drafted the maps.

9 Q. I would like to open now SC1818.
10 Are you familiar with this document? Would you
11 like us to scroll through so you can see?

12 A. Sure.

13 [Witness reviews document.]

14 THE COURT: You are going to go through
15 96 pages, Counsel?

16 BY MS. NERLAND:

17 Q. No, Your Honour. Let me know if
18 this is looking familiar to you or not, sir.

19 A. Yes.

20 Q. I understand this is a copy of
21 your working notes for this project; is that right?

22 A. Yes.

23 MS. NERLAND: Your Honour, I would like
24 to add this as the next exhibit, please.

25 THE COURT: It is a redacted copy of

14:19:18 1 this gentleman's working notes?

14:19:20 2 MS. NERLAND: Yes.

14:19:21 3 THE COURT: Madam Registrar, what is
14:19:22 4 the next Exhibit?

14:19:23 5 THE REGISTRAR: The next exhibit is
14:19:25 6 4550, paginated version of SC1719.

14:19:29 7 EXHIBIT NO. 4550: Redacted copy
14:19:18 8 of Gregory Sikma's working notes,
14:19:26 9 paginated version of SC1719.

14:19:31 10 BY MS. NERLAND:

14:19:37 11 Q. And I would like to go to page 36
14:19:38 12 of this document now. Can you scroll out a little
14:19:46 13 bit, please, Mr. Shoal. Thank you. And we will
14:19:49 14 scroll back in. I just want you to have a chance
14:19:52 15 to see the whole thing before I ask you questions.

14:19:54 16 THE COURT: Well, you need to be more
14:19:55 17 specific. Do you mean the whole page?

14:19:58 18 MS. NERLAND: Yes, the whole page.

14:19:59 19 THE COURT: Well, the witness can speak
14:20:00 20 for himself, but I can tell you I can't read
14:20:03 21 anything on that page because the type looks like a
14:20:06 22 4-point or something like that.

14:20:08 23 MS. NERLAND: Can we scroll back in,
14:20:10 24 please, Mr. Shoal.

14:20:11 25 THE COURT: The witness will speak for

14:20:12 1 himself.

14:20:13 2 BY MS. NERLAND:

14:20:14 3 Q. I think probably a little further.

14:20:16 4 Yeah, that is great. Thank you.

14:20:17 5 This is a chart that explains how you
14:20:19 6 created the different elements of each map you
14:20:22 7 produced for Ontario; is that right?

14:20:24 8 A. It was part of my working notes to
14:20:26 9 help me organize some of my thoughts, yes.

14:20:27 10 Q. And so each row on this map -- on
14:20:31 11 this chart, excuse me, represents a particular
14:20:34 12 parcel that you represented on one of the maps?

14:20:37 13 A. I believe so, yes.

14:20:41 14 Q. So for example, if we look at the
14:20:43 15 first two rows here, they are labelled "Map 1",
14:20:47 16 "Illustration of Bruce Peninsula with approximate
14:20:51 17 [...] north and south regions"?

14:20:53 18 A. Yes.

14:20:54 19 Q. This is a reference to Exhibit M2,
14:20:56 20 which is the map you produced that divides the
14:20:58 21 peninsula between north and south?

14:20:59 22 A. Yes.

14:20:59 23 Q. So in row 1, you describe what you
14:21:02 24 used and how you went about creating the south
14:21:05 25 parcel marked on the map; is that right?

14:21:06 1 A. I would have to scroll across. It
14:21:09 2 was August when I did this.

14:21:11 3 Q. That is fine. Can you scroll
14:21:13 4 across slowly for him, please. You let us know if
14:21:16 5 it is going too quickly.

14:21:19 6 A. [Witness reviews document.]

14:21:35 7 Yes.

14:21:35 8 Q. So in row 1, that is a reference
14:21:38 9 to how you went about creating the south parcel on
14:21:42 10 map M2?

14:21:46 11 A. Sorry, can you repeat the
14:21:47 12 question?

14:21:47 13 Q. Certainly. Row 1, and, Dan, can
14:21:50 14 we scroll back over to the --

14:21:52 15 THE COURT: Counsel.

14:21:55 16 MS. NERLAND: Yes, Your Honour.

14:21:57 17 THE COURT: I understand you need to
14:22:00 18 give off the record instructions to your assisting
14:22:06 19 technology person, but if you mix them in with your
14:22:08 20 question, it is hard to follow your question.

14:22:10 21 MS. NERLAND: I apologize, Your Honour.

14:22:12 22 THE COURT: I only raise it because the
14:22:14 23 witness has asked you to repeat the question, so we
14:22:16 24 are better off getting it clear the second time.

14:22:19 25 BY MS. NERLAND:

14:22:20 1 Q. Is row 1 a reference -- or a
14:22:22 2 series of notes that describe how you went about
14:22:25 3 representing the south parcel on map M2?

14:22:30 4 A. Row 1, it includes some of my
14:22:35 5 notes. It doesn't include the instructions I
14:22:38 6 received. It includes some of the notes that I
14:22:42 7 would have taken regarding the source data layers I
14:22:48 8 used, that sort of thing.

14:22:49 9 Q. And we'll go to the different
14:22:52 10 columns, but just generally speaking, row 1 is
14:22:54 11 about the south parcel?

14:22:55 12 A. Yes.

14:22:56 13 Q. And row 2 is about the north
14:22:58 14 parcel?

14:22:59 15 A. Yes.

14:23:00 16 Q. Okay. I would like to go now to
14:23:04 17 the fourth column from the left, which is "Feature
14:23:07 18 Label" up there on the screen. And this identifies
14:23:11 19 the parcel on the map that the rest of the notes in
14:23:14 20 the row are in relation to; is that right?

14:23:16 21 A. For map 1, yes. It may have
14:23:28 22 changed. The feature label could have been a
14:23:31 23 working title I was working with at the time or
14:23:34 24 working label.

14:23:35 25 Q. If we go to the second column from

14:23:40 1 the left, it is labelled as "Map Title". Now the
14:23:44 2 labels in this column are references to the
14:23:46 3 eventual title of each map that has become a
14:23:49 4 lettered exhibit in this litigation?

14:23:51 5 A. I believe that they would have
14:23:55 6 been a placeholder for that. I am not sure if they
14:23:57 7 are still the same or not or precisely the same.

14:24:00 8 Q. Now, these titles and the eventual
14:24:07 9 lettered exhibits reference exhibits that are part
14:24:11 10 of this trial, and these exhibits are to various
14:24:16 11 historical records and reports. So from my review
14:24:19 12 of your notes, you did rely on Exhibit 2401, which
14:24:23 13 is the map of the surveyed Saugeen Peninsula dated
14:24:25 14 1856?

14:24:27 15 A. Yes.

14:24:27 16 Q. And you did rely on Exhibit 2449,
14:24:31 17 which is a map of the surveyed peninsula dated
14:24:35 18 1857?

14:24:35 19 A. Yes.

14:24:36 20 Q. And you also relied on the Treaty
14:24:40 21 map drafted by Oliphant at the last page, I think
14:24:44 22 page 15 of Exhibit 2175; is that right?

14:24:48 23 A. Yes.

14:24:48 24 Q. Okay.

14:24:49 25 A. I believe so.

14:24:50 1 Q. But you have confirmed that you
14:24:52 2 didn't review any other historical documents beyond
14:24:55 3 these maps?

14:24:56 4 A. I don't believe so.

14:25:00 5 Q. Okay. And so you didn't look at
14:25:02 6 the other exhibits mentioned in the titles of these
14:25:04 7 maps? And we can go to them one by one, if that
14:25:08 8 would help.

14:25:09 9 A. I would need to see them.

14:25:12 10 Q. Okay. Let's start by opening
14:25:15 11 Exhibit 2120, and this is "Report to Superintendent
14:25:21 12 General of Indian Affairs" from Anderson dated 16th
14:25:24 13 of August, 1854. And you didn't rely on this
14:25:31 14 document? Would you like us to scroll through it
14:25:33 15 before I ask, actually?

14:25:35 16 A. Yes, please.

14:25:36 17 Q. Just the transcript copy is
14:25:39 18 probably sufficient.

14:25:40 19 A. [Witness reviews document.]

14:25:46 20 I don't believe I have seen this
14:25:47 21 document.

14:25:47 22 Q. Okay. Can we open Exhibit 1873,
14:25:53 23 please. Thank you. And this is entitled "Articles
14:26:03 24 of Agreement between Saugeen Indians and
14:26:06 25 Caughnawaga" dated August 20th, 1851. And do you

1 recognize this document?

2 A. Can you continue to --

3 [Witness reviews document.]

4 I don't believe so.

5 Q. Can we open Exhibit 2095, please.

6 And this is Keating's Proposal to the Chiefs and
7 Principal Men dated July 5th, 1854. Can you scroll
8 through it?

9 A. [Witness reviews document.]

10 Q. And you didn't refer to this
11 exhibit in making your maps either?

12 A. I don't believe so, no.

13 Q. Can we open, please, Exhibit 2104.

14 And this is Letter from Rankin to Anderson, August
15 2nd, 1854.

16 A. [Witness reviews document.]

17 Q. Did you refer to this exhibit in
18 creating your maps?

19 A. I don't believe so, no.

20 Q. And one last one, Exhibit 2105,
21 please, and this is David Sawyer, Response to
22 Survey, August 2nd, 1854. Did you refer to this
23 exhibit in preparing your maps?

24 A. No.

25 Q. Can we please return to Exhibit

14:27:48 1 4550 and page 36 again. Can we scroll over to the
14:28:05 2 right side of the page, please. On the third
14:28:10 3 column from the right is a heading called "Date".
14:28:14 4 Is this column a reference to the date you were
14:28:17 5 given the task of producing each map?

14:28:18 6 A. Yes.

14:28:19 7 Q. And the column next to that to the
14:28:27 8 left is called "Source Description", and this
14:28:30 9 column gives a description of the material you used
14:28:32 10 and the instructions you received to help create
14:28:34 11 your draft of this portion of the map; is that
14:28:37 12 right?

14:28:37 13 A. It was to help me keep track of
14:28:40 14 some of the documents and things like that.

14:28:42 15 Q. So if we see something listed
14:28:44 16 here, we can expect that this is a document you
14:28:46 17 referred to in creating the map, or instruction
14:28:56 18 perhaps is more accurate?

14:28:57 19 A. I believe so, yes, or it could
14:29:01 20 have been some of my working notes as well.

14:29:04 21 Q. Generally, though, this column
14:29:06 22 sets out materials and instructions provided to you
14:29:09 23 by counsel from Ontario?

14:29:10 24 A. To a degree, yes.

14:29:20 25 Q. And your own notes about those

14:29:24 1 instructions? And it would also include your notes
14:29:29 2 from those instructions, is that what is giving you
14:29:30 3 pause?

14:29:31 4 A. Well, it doesn't include the full
14:29:33 5 instructions I was given. It is more notes for me
14:29:38 6 to keep track.

14:29:40 7 Q. Right. So it gives you -- excuse
14:29:42 8 me. It gives you the headings for the notes that
14:29:46 9 you --

14:29:46 10 A. Right.

14:29:47 11 Q. -- had received from Ontario.

14:29:49 12 Okay. So I would like to go now two
14:29:53 13 columns to the left of that, the column "Map
14:30:00 14 Notes". Now, does this refer to notes about
14:30:04 15 changes you made to your maps during the process of
14:30:06 16 drafting them?

14:30:06 17 A. It would have been notes to myself
14:30:20 18 about -- yeah. As I was creating the maps, yes.

14:30:24 19 Q. And some of these changes were
14:30:28 20 made in response to comments on drafts by counsel
14:30:31 21 from Ontario?

14:30:32 22 A. In some cases, yes.

14:30:36 23 Q. I would like to turn to page 11 of
14:30:40 24 this document now. On this page and following are
14:30:47 25 a number of Google maps which run to about page 31,

1 I believe. Do you recall seeing these maps?

2 A. I have seen this map before, yes.

3 Q. And was this map provided to you
4 by counsel for Ontario?

5 A. Yes.

6 Q. And do you want to -- let's scroll
7 through the subsequent maps so you can take a look.

8 A. [Witness reviews document.]

9 Q. And so were all of these maps that
10 we looked at at pages 11 to 31 of this document
11 provided to you by counsel for Ontario?

12 A. I believe so, yes.

13 Q. And they were part of the
14 instructions that you received about how to
15 represent the various tracts on your maps?

16 A. They came along with them, yes.

17 Q. And can we please turn now back to
18 page 37. So if we look at row 1 on page 37, this
19 deals with how you represented the Colpoy's Bay
20 Reserve on what became map K2; is that right?

21 A. I'm sorry, could you repeat the
22 question?

23 Q. Certainly. This row, row 1, deals
24 with how you became --

25 THE COURT: Well, just -- I don't have

1 a --

2 THE WITNESS: There is no row
3 reference.

4 THE COURT: -- row 1.

5 BY MS. NERLAND:

6 Q. The top row.

7 A. Okay.

8 Q. Deals with how you represented the
9 Colpoy's Bay Reserve?

10 A. I believe so, yes.

11 Q. And if we look at the title, the
12 title is "Illustration of tracts intended for the
13 Nawash at Owen Sound, John Jones Band at Colpoy's
14 Bay, Caughnawaga Mohawks, and the Credit
15 Mississaugas, based in part on Exhibits 1873,
16 2175". And if we open map K2 -- can you scroll up
17 to the top of the map, please -- it has the same
18 title.

19 A. Yes.

20 Q. So that is a reference to how you
21 plotted Colpoy's Bay on map K2?

22 A. I would have been provided the
23 titles for the maps, yes.

24 Q. Can we go back to Exhibit 4450,
25 please. And if we look under the heading "Source

1 Description", which is the fourth column from the
2 right, it says:

3 "Based on areas depicted in:
4 Map 5.pdf (CLOC, [redacted])".

5 A. Uhm-hmm.

6 Q. And so that map 5, that is a
7 reference to one of the Google maps?

8 A. I believe so, yes.

9 Q. And so it was one of the items you
10 used to plot the Colpoy's Bay tract on map K2?

11 A. It would have been part of the
12 reference material I received, yes.

13 Q. And you would have relied on it?

14 A. I would have looked at it, yes.

15 Q. And for most of the other maps you
16 produced, you relied on Google maps provided to you
17 by counsel as well?

18 A. Yes.

19 Q. And they are identified in your
20 source description notes here as numbered maps, map
21 1, map 2, map 3?

22 A. Yes.

23 Q. My friend asked you a number of
24 times this morning if a parcel that you had
25 represented could have been differently

14:35:03 1 represented?

14:35:04 2 A. Yes.

14:35:04 3 Q. And I just want to be clear about
14:35:05 4 what you meant in your answers this morning.

14:35:07 5 A. Uhm-hmm.

14:35:07 6 Q. You were explaining only whether
14:35:09 7 each parcel could or could not have been different
14:35:12 8 in light of what Ontario instructed you to do; is
14:35:15 9 that right?

14:35:15 10 A. I was given a level of
14:35:18 11 interpretation of the instructions I had. There
14:35:22 12 were certain specifics, like the size of the area,
14:35:28 13 things like that.

14:35:29 14 Q. Right. So you were given a set of
14:35:30 15 parameters?

14:35:31 16 A. Yes.

14:35:31 17 Q. And the question that you were
14:35:32 18 answering this morning was, if I obeyed the
14:35:35 19 parameters given to me by Ontario, could these maps
14:35:38 20 have been different?

14:35:41 21 A. If -- sorry, repeat that last
14:35:43 22 part.

14:35:43 23 Q. You were given a series of
14:35:47 24 parameters.

14:35:48 25 A. Yes.

14:35:48 1 Q. Including the acreage of the
14:35:51 2 tract, its position in some cases, the various
14:35:53 3 Google maps that you received.

14:35:55 4 A. Yes.

14:35:55 5 Q. The geographic features, whatever
14:35:57 6 it may have been in a particular case.

14:35:58 7 A. Uhm-hmm.

14:35:59 8 Q. And when you were answering if the
14:36:01 9 map could have been different, you were answering
14:36:04 10 in relation to if you had followed all of those
14:36:06 11 parameters?

14:36:07 12 A. Or my interpretation of the
14:36:14 13 parameters I was given or the descriptions as well,
14:36:15 14 yes.

14:36:16 15 Q. Thank you. Your Honour, those are
14:36:19 16 my questions.

14:36:21 17 THE COURT: Mr. Ogden?

14:36:25 18 RE-EXAMINATION BY MR. OGDEN:

14:36:31 19 Q. Mr. Sikma, these Google maps that
14:36:33 20 you have been shown and have been referred to, how
14:36:36 21 did you use those in preparing the exhibit maps?

14:36:39 22 A. I used them as a reference to,
14:36:46 23 along with the descriptions I was provided and the
14:36:48 24 historical maps, to help position these features on
14:36:52 25 the landscape.

14:37:08 1 Q. Thank you. What do you mean by a
14:37:09 2 "reference"?

14:37:09 3 A. Just like a general area.

14:37:16 4 MR. OGDEN: Those are my questions.
14:37:17 5 Thank you.

14:37:18 6 THE COURT: You are still standing,
14:37:27 7 Mr. Ogden. Is there a reason for that, or are
14:37:29 8 you --

14:37:30 9 MR. OGDEN: No. Does Your Honour
14:37:31 10 have -- no, there is not.

14:37:36 11 THE COURT: Sir, I have a question, and
14:37:38 12 then after my question, counsel are permitted to
14:37:42 13 ask you more questions, so you are not done yet.

14:37:43 14 THE WITNESS: Okay.

14:37:44 15 THE COURT: I am just trying to think
14:37:54 16 about how to formulate the question. We have had a
14:37:55 17 lot of evidence in this trial that you need not
14:37:57 18 concern yourself about, so I am just going to give
14:37:59 19 you a hypothetical. All right?

14:38:01 20 Hypothetically, say we have a piece of
14:38:06 21 historical factual evidence that a certain
14:38:09 22 geographic area was a certain number of square --
14:38:14 23 I'm not sure what -- I think you used acreage; is
14:38:18 24 that correct?

14:38:18 25 THE WITNESS: Yes.

14:38:19 1 THE COURT: So you have these two maps
14:38:22 2 you were using, but apart from maps, there is a lot
14:38:26 3 of other evidence.

14:38:29 4 THE WITNESS: That's correct.

14:38:30 5 THE COURT: So I take it that the sort
14:38:32 6 of thing that you might have been told is to assume
14:38:35 7 that there were, say, 60,000 square acres and that
14:38:40 8 you were mapping that geographic area.

14:38:43 9 THE WITNESS: Yes.

14:38:44 10 THE COURT: Yes. All right. I take
14:38:56 11 it, sir, that in the mapping, when you speak about
14:38:59 12 having some room for interpretation, that would not
14:39:03 13 be an example of room; you would do your best to
14:39:09 14 make sure the amount of acreage was in fact 60,000?

14:39:15 15 THE WITNESS: That's correct.

14:39:16 16 THE COURT: Thank you, sir. Mr. Ogden?

14:39:18 17 MR. OGDEN: I have no questions.

14:39:19 18 THE COURT: All right. Counsel is all
14:39:21 19 the way in the back of the room. Ms. Nerland?

14:39:23 20 MS. NERLAND: I'll just step forward so
14:39:24 21 you can hear me. No questions, Your Honour.

14:39:26 22 THE COURT: Sir, thank you very much
14:39:27 23 for coming to assist in this matter. You can step
14:39:30 24 down out of the witness box.

14:39:57 25 You are still standing, Counsel?

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MS. NERLAND: I am, Your Honour. I
have one administrative matter to deal with.
THE COURT: Okay.
MS. NERLAND: It is just an Agreed
Statement of Fact. Would you prefer to deal with
it now, or would you --
THE COURT: No, that is a good idea, as
counsel for Ontario are orienting themselves in the
back of the courtroom. I was advised previously
that there was another Agreed Statement of Fact.
Is that the same one, Counsel?
MS. NERLAND: Yes, Your Honour.
THE COURT: All right. And does Madam
Registrar have the image associated with it?
MS. NERLAND: We can bring it up now.
It is SC1717.
THE REGISTRAR: Yes, I have it.
So the next number is 4551.
EXHIBIT NO. 4551: Document titled "ASF
Regarding Indian Agents,
Superintendents, and Officers-in-Charge
At Saugeen and Nawash".
THE REGISTRAR: This will be titled
"ASF Regarding Indian Agents, Superintendents, and
Officers-in-Charge At Saugeen and Nawash".

14:41:11 1 THE COURT: Madam Registrar, you said
14:41:12 2 4551?
14:41:14 3 THE REGISTRAR: Yes.
14:42:02 4 THE COURT: Who is on? Is it you,
14:42:05 5 Mr. Lemmond, calling the next witness?
14:42:07 6 MR. LEMMOND: Yes, Your Honour.
14:42:13 7 THE COURT: Please go ahead.
14:42:15 8 MR. LEMMOND: I would ask Mr. Graves to
14:42:20 9 please come forward.
14:42:27 10 DONALD EDWARD GRAVES; SWORN.
14:43:24 11 THE COURT: So, sir, I don't recall if
14:43:28 12 you were here this morning, I doubt it, when I told
14:43:30 13 the last witness the same thing I'm about to tell
14:43:32 14 you, which is it is a very big room. Everyone
14:43:36 15 right to the back needs to hear you. That
14:43:38 16 microphone that you are currently sitting a great
14:43:41 17 distance away from will help, and you must keep
14:43:44 18 your voice up, sir. All right?
14:43:46 19 THE WITNESS: Okay.
14:43:47 20 THE COURT: Do your best. Please go
14:43:49 21 ahead, Mr. Lemmond.
14:43:50 22 EXAMINATION IN-CHIEF BY MR. LEMMOND (ON
14:43:51 23 QUALIFICATIONS):
14:43:51 24 Q. Good afternoon, Mr. Graves. I
14:43:54 25 would first ask Ms. Benson to, please, call up your

1 CV, the CV for Mr. Graves, and that is SC1732.

2 THE COURT: And Mr. Lemmond is going to
3 straighten out the microphone so that will be
4 better to pick up his voice.

5 MR. LEMMOND: Thank you, Your Honour.

6 THE COURT: That is much better.

7 BY MR. LEMMOND:

8 Q. So, Mr. Graves, do you see on the
9 screen before you the image of your professional
10 resumé?

11 A. I do.

12 Q. And that is your professional
13 resumé?

14 A. Yes.

15 Q. Did you prepare that resumé,
16 Mr. Graves?

17 A. I did, and it was reformatted by
18 your staff, I think.

19 Q. Okay.

20 A. Tidied up and reformatted.

21 Q. Thank you, Mr. Graves.

22 Mr. Graves, you prepared a report in
23 this case that was delivered in September 2015,
24 with a revised version following November 2015; is
25 that correct?

14:44:55 1 A. I did.

14:44:56 2 Q. Mr. Graves, could you tell us in
14:44:59 3 broad terms what the basic topics you addressed in
14:45:03 4 that report are?

14:45:05 5 A. Well, I reviewed and commented on
14:45:08 6 a report by Professor Hinderaker and a second
14:45:13 7 report by a Professor Harring, and I examined
14:45:17 8 documents that had been included in the Plaintiffs'
14:45:21 9 Statement of Claim.

14:45:22 10 Q. Okay. That first part dealing
14:45:25 11 with Mr. Hinderaker's report, Mr. Graves, what was
14:45:28 12 the subject matter?

14:45:30 13 A. The subject matter was the
14:45:32 14 involvement of the Anishinaabe people in the
14:45:36 15 Pontiac conflict of 1763 and their control of the
14:45:45 16 Upper Lakes from 1763 to 1815, and that was about
14:45:52 17 it.

14:45:53 18 Q. Okay. And, Mr. Graves, what was
14:45:55 19 the subject matter of the second section of your
14:45:58 20 report dealing with Dr. Harring's report?

14:46:01 21 A. I examined the -- generally
14:46:07 22 examined the problem with squatting in the Saugeen
14:46:10 23 Peninsula and in more detail went into the civil
14:46:12 24 and, if necessary, military organizations that
14:46:21 25 could have been brought into play.

14:46:22 1 Q. Thank you, Mr. Graves. Now,
14:46:25 2 Mr. Graves, rather than going through your resumé
14:46:28 3 point by point by point, what I am going to do is
14:46:30 4 ask you some questions where I'm going to ask you
14:46:33 5 to relate your education on the one hand and then
14:46:36 6 your professional experience and publications to
14:46:41 7 these topics, the substantive areas that you
14:46:44 8 addressed in your report. Okay?

14:46:47 9 A. Okay.

14:46:47 10 Q. And what I will do for the sake of
14:46:52 11 convenience, Mr. Graves, I'll refer to them as the
14:46:56 12 Hinderaker section of your report, the Harring
14:46:59 13 section of your report, and the titled Statement of
14:47:03 14 Claim section of your report.

14:47:04 15 A. Okay.

14:47:06 16 Q. Now, to start with, Mr. Graves,
14:47:07 17 you have an honours bachelor of arts and an MA in
14:47:10 18 history. How does your education relate to the
14:47:13 19 work that you did in preparing the Hinderaker
14:47:16 20 section of your report?

14:47:16 21 A. Well, basically it is a basic
14:47:20 22 professional background as a historian. It gave me
14:47:26 23 the knowledge to analyze -- to review, analyze, and
14:47:28 24 comment on Dr. Hinderaker's work.

14:47:31 25 Q. How do your career experience,

14:47:39 1 professional activities, and publications relate to
14:47:41 2 the work that you did in preparing the Hinderaker
14:47:43 3 section of your report?

14:47:44 4 A. I spent a couple of years as an
14:47:47 5 archivist in the -- at that time the Public
14:47:50 6 Archives of Canada, specifically in the Manuscripts
14:47:54 7 Division. The Manuscripts Division holds all
14:47:58 8 pre-Confederation records of colonial governments;
14:48:00 9 that is, French, British. So all the major record
14:48:03 10 groups, the Archives des Colonies, War Office 1, 2,
14:48:10 11 3, 17, Colonial Office 42 and 43, RG, Record Group
14:48:14 12 8, 1, which is operational records of the military.
14:48:18 13 I was very familiar with all these record groups,
14:48:20 14 and I was able to use a lot of that knowledge to
14:48:22 15 bring that to bear on Dr. Hinderaker's report.

14:48:25 16 Q. How about your publications,
14:48:29 17 Mr. Graves?

14:48:29 18 A. Well, I have done a fair bit on
14:48:31 19 the Seven Years' War. I edited a new edition of CP
14:48:35 20 Stacey's classic work on the siege of Quebec. That
14:48:40 21 got me interested in the whole concept of combined
14:48:44 22 opportunity of amphibious warfare in the 18th
14:48:47 23 century. I have written a couple of articles on
14:48:49 24 that.

14:48:49 25 Q. So when you say military history,

14:48:53 1 does that include for you also amphibious
14:48:57 2 operations and naval operations?

14:48:58 3 A. It does. This resumé is only
14:49:00 4 about two-thirds of my work because I did a lot of
14:49:04 5 20th century military history, specifically naval
14:49:06 6 history, but I didn't put it in the CV because I
14:49:10 7 didn't think it was relevant to this case.

14:49:11 8 Q. So to be clear, Mr. Graves, your
14:49:13 9 professional resumé, as you have it before you, is
14:49:16 10 focussed upon publications and work experience
14:49:19 11 relating to the 18th and 19th century, not the 20th
14:49:22 12 century; is that correct?

14:49:23 13 A. Yes, yes.

14:49:25 14 Q. And also, to be clear, Mr. Graves,
14:49:33 15 in terms of discussing your publications, what has
14:49:38 16 been the geographical scope of your focus in the
14:49:42 17 work that you have published?

14:49:43 18 A. About three quarters of it has to
14:49:47 19 do with the Great Lakes Basin conflicts, and the
14:49:51 20 Great Lakes Basin and the St. Lawrence River
14:49:55 21 system, the Atlantic coast of Canada.

14:49:58 22 Q. And how does that relate to the
14:49:59 23 region of the upper Mississippi, Mr. Graves?

14:50:03 24 A. Well, I regard the Mississippi,
14:50:05 25 the headwaters of the Mississippi, as part of the

1 Great Lakes Basin, in my opinion. It may not be
2 the opinion of a geographer, but historically, I
3 think they are.

4 Q. And, Mr. Graves, in terms of a
5 temporal focus in your publications, is there a
6 particular period within the 18th and 19th century
7 that is the primary focus of your published works?

8 A. Well, I am known as a historian of
9 the War of 1812. I have written or edited about
10 seven or eight books - I can't remember, they are
11 in here somewhere - and written a lot of articles,
12 given a lot of papers, and I sat on an American
13 scholarly committee created by the Secretary of
14 Heritage -- I would have to get that -- or
15 Secretary of National Parks. I sat on a committee
16 that was struck for the Bicentenary of the War of
17 1812 by the Minister of Canadian Heritage.

18 So I guess I'm known as a historian of
19 the War of 1812.

20 Q. And which are your major -- what
21 would you identify as your major war of 1812
22 publications?

23 A. Well, I did a trilogy of three
24 books over 20 years on three of the major battles;
25 Chrysler's Farm 1813, Lundy's Lane 18 -- Chippewa

1 and Lundy's Lane 1814, and the Siege of Fort Erie
2 and the Battles of Plattsburgh in 1814.

3 Q. In those books, Mr. Graves, do you
4 describe and analyze both military and naval
5 operations?

6 A. Yes.

7 Q. So I want to turn to the section
8 of your report now, Mr. Graves, dealing with
9 Dr. Harring's report. How does your education
10 relate to the work that you did in preparing the
11 Harring section of your report?

12 A. The Harring section?

13 Q. Yes, the Harring section.

14 A. Okay. Well, my thesis -- which,
15 by the way, I left out of my CV. My thesis is on a
16 very unique group of Canadians who fought for the
17 Americans during the War of 1812 and that led me
18 into the whole field of military and civil law,
19 civil disobedience, treason, et cetera, so that got
20 me interested in that.

21 I wrote a book on the Battle of the
22 Windmill, but it got a little bit -- the scope got
23 broadened, and again, I got involved in marshall
24 law, treason, traitors, armed insurrection,
25 invasion, and the legal consequences, and of

14:53:01 1 course, my War of 1812 and my work on the 1837
14:53:05 2 rebellions, I became very knowledgeable about the
14:53:09 3 militia system in Canada, in Upper Canada.

14:53:15 4 Could you repeat that question again,
14:53:17 5 just the last part?

14:53:22 6 Q. I was just asking you, Mr. Graves,
14:53:24 7 how your education related to the Harring section
14:53:28 8 of your report.

14:53:29 9 A. Okay. I think I have answered
14:53:31 10 that.

14:53:31 11 Q. Okay. And I'll ask you the same
14:53:33 12 question -- I think we were starting to get there,
14:53:35 13 actually, Mr. Graves -- with respect to your career
14:53:39 14 experience, your professional activities, and your
14:53:42 15 publications, if you could just clarify for us how
14:53:45 16 those aspects of the work that you have done relate
14:53:47 17 to the work that you did on the Harring section of
14:53:50 18 your report. I think you have already mentioned,
14:53:53 19 for example, War of 1812 publications and your 1838
14:53:57 20 book "The Battle of the Windmill".

14:53:59 21 A. Are we talking about the Harring
14:54:01 22 report or the Hinderaker report?

14:54:02 23 Q. Harring.

14:54:03 24 A. Harring.

14:54:04 25 Q. Harring.

14:54:05 1 A. I thought we just went through
14:54:08 2 Harring.

14:54:08 3 Q. No, we went through Hinderaker,
14:54:10 4 and now we are into Harring.

14:54:13 5 A. Well, the answers I gave you were
14:54:14 6 for Harring, but I can give you Hinderaker now.

14:54:17 7 Q. No, no. Sorry, Mr. Graves, let's
14:54:17 8 just pause for a moment.

14:54:17 9 A. Okay.

14:54:18 10 Q. You gave me one answer with
14:54:19 11 respect to your education about Mr. Harring, so
14:54:22 12 Mr. -- sorry, Dr. Harring's section of your report;
14:54:25 13 that is, his report is the subject of your report,
14:54:28 14 and you were describing --

14:54:31 15 A. I mentioned the War of 1812,
14:54:34 16 militia, military-civil relations, civil law,
14:54:39 17 military law, et cetera.

14:54:41 18 Q. So I think you touched on it
14:54:42 19 already to some degree. One more particular
14:54:44 20 question, Mr. Graves, which is you mentioned your
14:54:47 21 book about the Battle of the Windmill in relation
14:54:50 22 to some understanding of the intersection between
14:54:54 23 military and civil affairs.

14:54:57 24 A. Yes.

14:54:57 25 Q. Could you explain to us why that

14:54:59 1 book in particular would be relevant to that topic.

14:55:01 2 A. Well, the book is about the Battle
14:55:05 3 of the Windmill, which was an invasion by, oh, for
14:55:10 4 want of a better word, rather inept American
14:55:13 5 terrorists, but it has a broader expanse. I
14:55:19 6 expanded the subject matter in the sense that I
14:55:22 7 went into the punishment of these men, most of whom
14:55:24 8 were captured and how they were tried. They were
14:55:29 9 tried in civil courts. People forget this. And
14:55:31 10 how they were punished.

14:55:33 11 So in that sense, I had to do a fair
14:55:35 12 bit of work on civil-military law, civil-military
14:55:40 13 relations.

14:55:40 14 I have become quite interested in that
14:55:43 15 subject. I wrote an article called "Worthless are
14:55:47 16 the laurels soaked with female tears". This is
14:55:52 17 about an incident that occurred at Hampton,
14:55:54 18 Virginia, where a British unit -- actually they
14:55:58 19 were French in British service, ran amuck and
14:56:00 20 looted, robbed, raped, and murdered civilians, and
14:56:04 21 how that was treated both within the army legal
14:56:10 22 system and how they were punished. And I did an
14:56:14 23 article on why the White House was burned, which
14:56:19 24 had quite a bit to do with the laws of war as they
14:56:22 25 were known in the early 19th century, and the

14:56:24 1 destruction of civilian property, et cetera.

14:56:26 2 So it is a subject that has interested
14:56:32 3 me over the years.

14:56:33 4 Q. And Mr. --

14:56:34 5 A. Oh, yes, one more. I did a
14:56:36 6 paper -- and I think an article resulted -- on the
14:56:40 7 best means of repressing the growing evil, and the
14:56:44 8 thesis here was that during the War of 1812,
14:56:48 9 British commanders in Upper Canada wore two hats.
14:56:51 10 They were military commanders, but they were also
14:56:53 11 the senior -- for want of a better term, they were
14:56:56 12 the Lieutenant Governors, although they weren't
14:56:59 13 called that. They were called the administrators
14:57:01 14 of presidents. So they wore two hats. They were
14:57:04 15 the supreme civil power and the supreme military
14:57:06 16 power.

14:57:07 17 Now, you would think of a soldier --
14:57:09 18 soldiers will always complain about civilian
14:57:13 19 interference when there is a war on, and you would
14:57:16 20 think that they would only have been too glad to
14:57:18 21 push the paper to the other side of the desk and
14:57:20 22 stamp it, approve it. Actually, what happened was
14:57:24 23 pulling a civilian appointment affected their
14:57:28 24 military decision-making. They were more reluctant
14:57:31 25 to do what -- for instance, to declare marshall

14:57:35 1 law. They were very reluctant to do that. It was
14:57:38 2 done in a very limited fashion.

14:57:40 3 So that was a -- as part of that
14:57:43 4 interest I had on civil-military legal
14:57:47 5 relationships and interrelationships.

14:57:48 6 Q. Mr. Graves, could you explain how
14:57:54 7 your published work relates specifically to the
14:57:57 8 topic of the militia in the mid-19th century in
14:58:04 9 Upper Canada and then Canada West.

14:58:07 10 A. Well -- in the mid-19th century?

14:58:13 11 Q. Mid-19th century.

14:58:15 12 A. Yeah, I am just -- the book I'm
14:58:17 13 working on right now, I have had to go over all the
14:58:20 14 Militia Acts starting in 1794 up until 1855, which
14:58:24 15 is a major Act, so we are 1808, 1812, 1823, '41,
14:58:32 16 '46, and '55, and each of these Acts changed the
14:58:36 17 organization slightly. They don't always improve
14:58:40 18 it.

14:58:40 19 But it is not until 1855 where you get
14:58:44 20 a major change. You know, for the first time the
14:58:49 21 militia are paid in peacetime and are uniformed by
14:58:55 22 the Crown and armed by the Crown.

14:58:58 23 Q. To what extent, Mr. Graves, do you
14:59:00 24 deal with the militia in your trilogy on the War of
14:59:03 25 1812?

14:59:03 1 A. Quite a bit, if they played a
14:59:07 2 major role. Mostly they don't because the trilogy
14:59:11 3 is -- concentrates on battles, battles between
14:59:18 4 trained regular troops, and the militia played an
14:59:23 5 auxiliary role in most of these engagements.

14:59:25 6 Q. To what extent, Mr. Graves, do the
14:59:27 7 militia figure in your work on the Battle of the
14:59:30 8 Windmill?

14:59:30 9 A. Oh, well, a lot more in that case,
14:59:35 10 and again, there is several different kinds of
14:59:39 11 military organizations. You have your basics of
14:59:45 12 entry in the militia, which is every male from the
14:59:46 13 ages of 16 to 60. And then you have volunteer
14:59:49 14 militia, a little more active guys. And then you
14:59:53 15 have provincial units, which are called out for six
14:59:56 16 months, eight months. And then you have fencible
14:59:59 17 units, and finally you have regular British army.

15:00:03 18 Q. Mr. Graves, to what extent do
15:00:09 19 regular military forces figure in your work on the
15:00:11 20 War of 1812?

15:00:13 21 A. Quite a bit.

15:00:14 22 Q. To what extent does the regular
15:00:18 23 army figure in your work on the Battle of the
15:00:21 24 Windmill?

15:00:21 25 A. Not so much because there weren't

15:00:24 1 as many present, but in the end, they had to come
15:00:27 2 and clean up the mess, if you want to refer to it
15:00:31 3 that way, the infestation.

15:00:32 4 Q. So turning to the last section of
15:00:39 5 your report, Mr. Graves, dealing with the titled
15:00:43 6 Statement of Claim paragraph, 19, could you,
15:00:46 7 please, tell us how your education relates to the
15:00:48 8 work that you did in that portion of your report?

15:00:51 9 A. Well, my education is basic
15:00:56 10 professional training as a historian, and in that
15:01:00 11 part of my report, I was just doing a basic
15:01:02 12 examination of the documents brought forth, what
15:01:08 13 they actually said, what was claimed that they
15:01:14 14 said, sort of like your basic analysis of the
15:01:16 15 document. Is this relevant? Is this correct?
15:01:18 16 Et cetera, et cetera.

15:01:20 17 Q. And, Mr. Graves, how does your
15:01:27 18 professional experience and publication experience
15:01:30 19 relate to the same topic; that is, the title
15:01:35 20 Statement of Claim portion of your report?

15:01:38 21 A. Well, I have been through this
15:01:41 22 exercise before because I have testified in two
15:01:43 23 other cases and both of them had a similar
15:01:51 24 exercise, the Crown v. Vincent, and I don't know
15:01:55 25 whether it is "versus" or "against" - I can never

1 get that straight - and Mitchell v. MNR, the
2 Minister of National Revenue. I had to do a lot of
3 this work then.

4 The problem is they saw it as what --
5 in both cases, the other side, opposing counsel,
6 were just dumping a lot of documents on the Court
7 and not tying them together with a thesis or a
8 narrative, and that was one of the things I had to
9 do in those cases, and I did it again here.

10 Ma'am, can you hear me properly?

11 THE COURT: I can. I appreciate your
12 effort, sir.

13 THE WITNESS: Okay.

14 THE COURT: It is the people with low
15 voices who have to work harder.

16 THE WITNESS: I have been told I have a
17 low voice.

18 THE COURT: You do.

19 MR. LEMMOND: Your Honour, I would ask
20 for Mr. Graves' resumé to be made an exhibit.

21 THE COURT: Madam Registrar?

22 THE REGISTRAR: Yes, Exhibit 4552.

23 EXHIBIT NO. 4552: Professional Resume
24 and Bibliography of Mr. Donald E.
25 Graves.

1 THE REGISTRAR: Professional resumé and
2 bibliography of Mr. Graves.

3 MR. LEMMOND: Thank you. Your Honour,
4 I have asked Ms. Benson to pull up the proposed
5 qualification statement. I understand there is no
6 objection to it. And we would ask Mr. Graves to be
7 qualified as follows:

8 "Historian capable of giving
9 opinion evidence on the military and
10 naval history of the Great Lakes/St.
11 Lawrence region in the 18th and 19th
12 centuries, including in relation to
13 the provision of military aid to the
14 civil power for the purposes of law
15 enforcement and maintaining public
16 order in Upper Canada and Canada
17 West."

18 THE COURT: All right. Ms. Pelletier,
19 any objection?

20 MS. PELLETIER: No objection, Your
21 Honour.

22 THE COURT: Thank you. Madam
23 Registrar, can we mark this document as the next
24 lettered exhibit.

25 MR. LEMMOND: Thank you, Your Honour.

15:04:23 1 THE COURT: One step at a time, sir.

15:04:25 2 THE REGISTRAR: Exhibit 4553.

15:04:28 3 THE COURT: 4553?

15:04:33 4 THE REGISTRAR: Yes.

15:04:33 5 THE COURT: Lettered exhibit.

15:04:34 6 THE REGISTRAR: Sorry, that will be

15:04:36 7 Q-3.

15:04:37 8 THE COURT: Q-3.

15:04:39 9 EXHIBIT NO. Q-3: Qualification

15:04:39 10 Statement for the testimony to be

15:04:47 11 provided by Mr. Donald Graves.

15:04:47 12 THE COURT: All right. That is

15:04:48 13 satisfactory, Mr. Lemmond.

15:04:50 14 EXAMINATION IN-CHIEF BY MR. LEMMOND:

15:04:51 15 Q. Yes. Thank you, Your Honour.

15:04:52 16 Now, Mr. Graves, I have asked

15:05:11 17 Ms. Benson to pull up your redacted report. It

15:05:16 18 should be on the screen before you. Do you

15:05:17 19 recognize this as your report?

15:05:19 20 A. Yes, I do.

15:05:19 21 Q. And you prepared this report for

15:05:22 22 this case?

15:05:23 23 A. Yeah, in September 2015, and we

15:05:26 24 revised and corrected it. Some of the citations

15:05:32 25 weren't accurate, so we corrected those in November

1 2015.

2 Q. And you understand that it was
3 redacted in January of this year?

4 A. Yeah, yes.

5 Q. And you have seen those
6 redactions?

7 A. Yes, I have.

8 THE COURT: Just for the record,
9 Counsel, can you, please, put the page numbers of
10 the redactions on the record.

11 MR. LEMMOND: Yes, Your Honour. It is
12 on page 12 of the report.

13 THE COURT: I saw that, but I thought
14 you just used the plural.

15 MR. LEMMOND: Oh, sorry, Your Honour,
16 it is a singular. It is two sentences.

17 THE COURT: All right. Thank you.

18 MR. LEMMOND: I would ask, Your Honour,
19 for this report to be entered into evidence.

20 THE COURT: All right. Madam Reporter.

21 THE REGISTRAR: Yes, it will be Exhibit
22 4552.

23 THE COURT: 4552?

24 THE REGISTRAR: Sorry, 53.

25 THE COURT: 53.

1 MR. LEMMOND: And I would suggest as a
2 title, Madam Registrar, "Expert Report of Mr. D.
3 Graves, revised and corrected November 2015,
4 redacted January 2020."

5 THE REGISTRAR: Thank you.

6 EXHIBIT NO. 4553: Expert Report of
7 Mr. D. Graves, revised and corrected
8 November 2015, redacted January 2020.

9 THE COURT: Now, sir, as I have told
10 other expert witnesses -- and you may have been
11 told this already -- your report has just become
12 evidence in this trial, so counsel is not embarking
13 on the project of having you repeat every last line
14 in your report. He will have questions for you --

15 THE WITNESS: Yes.

16 THE COURT: -- on areas he wishes to
17 focus on. All right? Whenever you are ready,
18 Mr. Lemmond.

19 BY MR. LEMMOND:

20 Q. Thank you, Your Honour.

21 A. Do you think I might have a copy,
22 a hard copy of my report?

23 Q. You don't have a copy with you,
24 Mr. Graves?

25 A. I don't have one with me. It is

15:07:34 1 in my briefcase.

15:07:36 2 Q. Okay. And, Your Honour, I have
15:07:58 3 asked Ms. Benson to bring up the list of secondary
15:08:00 4 sources that we propose to make as -- to put in the
15:08:02 5 record as exhibits on consent.

15:08:05 6 THE COURT: And you have got a -- is
15:08:09 7 that what you are handing to Madam Registrar?
15:08:11 8 Please hand Madam Registrar two copies.

15:08:16 9 Now, Madam Registrar, I am not sure if
15:08:21 10 Mr. Registrar explained this to you or not, so I am
15:08:26 11 going to do it.

15:08:27 12 What we have done, in order that we
15:08:29 13 don't take up a lot of trial time, is that we have
15:08:33 14 asked in this case you to go through and read the
15:08:35 15 JV number followed by assigning the exhibit number,
15:08:38 16 without being obliged to read the document title,
15:08:42 17 and then you can enter them in the database as a
15:08:46 18 separate step so that we can proceed.

15:08:49 19 So if you would just loudly for the
15:08:52 20 record go down each document and assign an exhibit
15:08:56 21 number to it, please.

15:08:57 22 THE REGISTRAR: Yes, Your Honour. So
15:09:02 23 number S0390 will be Exhibit 4554.

15:09:09 24 S0391 will be Exhibit 4555.

15:09:15 25 S0816 will be 4556.

15:09:20 1 S0863 will be Exhibit 4557.
15:09:26 2 S0864 will be Exhibit 4558.
15:09:32 3 S1118 will be Exhibit 4559.
15:09:38 4 S1119 will be Exhibit 4560.
15:09:44 5 S1543 will be Exhibit 4561.
15:09:50 6 S1684 will be Exhibit 4562.
7 EXHIBIT NO. 4554: Table showing the
8 number of officers and men employed in
9 each year, as stated in the preambles
10 to the Mutiny Acts, from 1721 to 1866,
11 both inclusive.
12 EXHIBIT NO. 4555: Action in aid of the
13 Civil Power.
14 EXHIBIT NO. 4556: Troop Strength of
15 the British Army in North America,
16 1812-1814 (Appendix 3) - Canadian
17 Military Units, Upper and Lower Canada,
18 1812-1815 (Appendix 4).
19 EXHIBIT NO. 4557: Officers of the
20 British Forces in Canada during the War
21 of 1812-1815 (Appendix 4).
22 EXHIBIT NO. 4558: The Indian
23 Department.
24 EXHIBIT NO. 4559: Chapter 24 - The
25 County and its Development - Early

1 Sessions of the County Council.

2 EXHIBIT NO. 4560: Capter 36 - Military
3 History of the County of Grey.

4 EXHIBIT NO. 4561: Constabulary - The
5 Rise of Police Institutions in Britain,
6 the Commonwealth and the United States.

7 EXHIBIT NO. 4562: Atlas of Great Lakes
8 Indian History - Distribution of Indian
15:09:56 9 and White Settlements c. 1830, Map 22.

15:09:56 10 THE COURT: Thank you. And Madam

15:09:57 11 Registrar, may we have the next lettered exhibit to
15:09:59 12 be assigned to this list that you just read from.

15:10:02 13 THE REGISTRAR: Yes, the next lettered
15:10:04 14 exhibit will be R-3.

15:10:13 15 THE COURT: R-3.

15:10:14 16 THE REGISTRAR: Yes.

15:10:16 17 THE COURT: Thank you, Madam Registrar.

15:10:17 18 Please go ahead, Mr. Lemmond.

15:10:20 19 EXHIBIT NO. R-3: Document titled

15:10:20 20 "Donald Graves - Documents to be made
15:10:24 21 exhibits on consent"

15:10:24 22 BY MR. LEMMOND:

15:10:24 23 Q. Thank you, Your Honour. So

15:10:25 24 Mr. Graves, I'm going to discuss your report with
15:10:27 25 you now. And to begin with, I would like to ask

1 you what were your instructions in relation to this
2 report?

3 A. Well, my instructions were to
4 review and comment on the two reports of Professor
5 Hinderaker and Professor Harring and to examine the
6 section 19 of the Plaintiffs' Statement of Claim.
7 That is it in a nutshell.

8 Q. And, Mr. Graves, how did you go
9 about preparing your report?

10 A. Well, the first thing I did was
11 read the report carefully, then I examined the
12 footnotes and looked at the sources themselves on
13 which the argument was based. So there was the
14 author's argument and the evidence on which the
15 author based that argument. I wanted to make sure
16 that they teed up, okay, that the author had a
17 factual basis for his statements.

18 Q. And once you had done that,
19 Mr. Graves, how did you continue to work in
20 preparing your report?

21 A. Well, again, the Harring and
22 Hinderaker parts of my exercise are different from
23 the others, so I'll deal with those first, if that
24 is okay with you.

25 If I found an anomaly or if I found

15:11:53 1 what I thought was a factual error or an
15:11:56 2 exaggeration, I pointed it out. I think overall
15:12:04 3 both authors were fairly good, but there were some
15:12:11 4 problems with some of the things they stated and
15:12:13 5 wrote, and I pointed these out in the report.

15:12:16 6 Q. Did you do further archival
15:12:19 7 research yourself, Mr. Graves?

15:12:20 8 A. Yes. Yes, I did. I either did it
15:12:23 9 myself or PHI, Public History Incorporated, is
15:12:29 10 that -- PHI, a research firm in Ottawa undertook
15:12:36 11 research in the National Archives on my direction.

15:12:38 12 Q. Okay. And how did that work?

15:12:40 13 A. It worked very well, very well
15:12:42 14 indeed. They are very good people.

15:12:44 15 Q. Now, just to be clear on that
15:12:51 16 point, Mr. Graves, to what extent did you direct
15:12:54 17 their research?

15:12:56 18 A. Well, I would simply say I need
15:13:00 19 this and I need that. I would give them a
15:13:02 20 citation, if I could, a citation coming -- that
15:13:05 21 came out of a source note of one of these reports,
15:13:09 22 and I would say I would like to look at it. A lot
15:13:11 23 of the citations were actually on the internet, but
15:13:14 24 then you have got to be very careful about internet
15:13:18 25 material, because if it is a transcription, it

15:13:24 1 could be something dropped. So whenever possible,
15:13:26 2 when I use the internet, I want the original
15:13:29 3 source, an accurate reproduction of the original
15:13:31 4 source.

15:13:31 5 Q. And once you had materials from
15:13:37 6 PHI, both those that you directed to be collected
15:13:39 7 and those that you had in relation to the reports,
15:13:43 8 what did you do?

15:13:44 9 A. Well, I sat down and wrote the
15:13:46 10 report, and I also looked at other evidence too.
15:13:53 11 No, that would be after this report. No, once I
15:13:56 12 had everything, and I had it, I sat down and wrote
15:13:58 13 a report, broke it down. I tried to break it down
15:14:00 14 into as many subsections as possible because that
15:14:04 15 is the best way to do this. So I used -- various
15:14:09 16 subjects were broken down chapter by chapter.

15:14:13 17 Q. So, Mr. Graves, you have said this
15:14:15 18 was your approach in relation to the Harring and
15:14:17 19 Hinderaker sections of your report.

15:14:18 20 A. Yeah.

15:14:19 21 Q. What was the approach that you
15:14:20 22 used in relation to the portion of your report
15:14:22 23 dealing with section 19 of the Plaintiffs'
15:14:25 24 Statement of Claim?

15:14:26 25 A. Well, that was a whole different

1 thing. That was a more basic exercise. I wanted
2 to see, as I said, whether in effect the documents
3 quoted and cited and included were actually the
4 right ones. And once I had ascertained that,
5 whether they actually said what the Plaintiff felt
6 they said, and once I had ascertained that, if
7 there was any problems, I noted them down.

8 One thing I did do -- and I did this
9 quite deliberately because this case is about the
10 Saugeen Nawash people, the Saugeen Peninsula. If
11 an event or an action was cited, I made a point of
12 saying how far it was away from that peninsula. I
13 think this is important. I'm very big on physical
14 reality for a historian. I'm -- you know, I like
15 to bring things back to earth.

16 Q. Thank you, Mr. Graves. Now, after
17 you completed your report, that was, just to be
18 clear again, September and then November 2015; is
19 that right?

20 A. I think I got the report done in
21 August, and I dated it early September. There were
22 a few problems that were pointed out, and I found a
23 few, and so we just revised it slightly actually,
24 just corrected citations mostly.

25 Q. Okay. What did you do after that

1 in relation to this case?

15:15:51 2 A. I thought I was done. You gave me
15:16:00 3 a report by Dr. Benn, which was a review of my
15:16:04 4 report, and that would have been late 2016 or early
15:16:10 5 2017. So I then looked at that and went through
15:16:13 6 the same exercise again. I reviewed it. I
15:16:19 7 commented on it to you. I asked PHI to get me some
15:16:25 8 documents. I chased up a lot of documents myself.
15:16:27 9 And of course, I did some new research,
15:16:31 10 particularly in the American records.

15:16:39 11 For my sins, when I was researching my
15:16:41 12 masters thesis, because it was about a unit in the
15:16:44 13 American army, and there was very little on these
15:16:49 14 people in Canada, I had to read the correspondence
15:16:52 15 of the Secretary of War from 1811 to 1816. It was
15:16:59 16 66 reels of microfilm. I can't swear I read every
15:17:02 17 letter, but the way filing was done in those days,
15:17:05 18 you would have the document, and then you would
15:17:06 19 have a cover sheet, very much like the head notes
15:17:09 20 in a legal case, so that the cover sheet would say
15:17:12 21 something like A to B date, wants more money, wants
15:17:16 22 more troops, or C to D date, reporting on battle at
15:17:21 23 date, and you go through the head notes, and then
15:17:23 24 from there, you can see -- you can ascertain
15:17:26 25 whether you need to look at the document.

15:17:28 1 It took me six months to do that, and I
15:17:31 2 made copious notes when I did it, which I still
15:17:33 3 have. As far as I know, there is only four
15:17:37 4 historians who have done that exercise, and I am
15:17:39 5 the only Canadian.

15:17:42 6 So this gave me in a lot of ways a leg
15:17:45 7 up because I noticed with Dr. Benn, most of his
15:17:51 8 primary source archival research was using
15:17:54 9 published sources, whereas I could go right to the
15:17:57 10 original document on microfilm. The complete
15:18:01 11 series is contained in Queen's University in their
15:18:05 12 archives. They have the only collection in Canada.

15:18:09 13 Q. So, Mr. Graves, after you reviewed
15:18:15 14 and commented on Dr. Benn's report and collected
15:18:18 15 documents in relation to Dr. Benn's report, what
15:18:22 16 further work did you do in relation to this matter?

15:18:24 17 A. Well, I read the transcripts of
15:18:27 18 the direct and cross-examinations of
15:18:31 19 Dr. Hinderaker, Harring, Benn, Major Wentzell,
15:18:45 20 Mr. Chartrand, Dr. McCalla, and, oh, yes, Dr. von
15:18:50 21 Gernet.

15:18:50 22 Q. Did you review the report or
15:18:55 23 transcripts of the evidence of Dr. Beaulieu?

15:18:59 24 A. Yes. I'm sorry, I forgot him. I
15:19:02 25 forgot Dr. Beaulieu. I did.

1 Q. Did you do any further preparation
2 for this case, Mr. Graves?

3 A. Yeah, I did. I read secondaries,
4 parts of secondaries. I discussed quite a bit with
5 you, and also I began to change my mind about
6 things in my report that I had written in my
7 report.

8 Q. Mr. Graves, did any of the further
9 materials that you reviewed for preparing for your
10 evidence include documents related to Mica Bay or
11 correspondence from T.G. Anderson in 1846?

12 A. Yeah, that's right, this came up.
13 PHI got me a list of documents related to the
14 incidents in Mica Bay, and I also saw the letter
15 written by T.G. Anderson about organizing an Indian
16 militia. So I'm sorry, I forgot to add that.

17 Q. So, Mr. Graves, I am now going to
18 take you to your report starting with the section
19 dealing with Dr. Hinderaker's report. And one of
20 the first topics you address in your report is the
21 use of the Great Lakes by the British from the
22 mid-18th century.

23 A. Yes.

24 Q. Could you, please, give us a brief
25 summary of the views that you express on this topic

15:21:01 1 in your report?

15:21:02 2 A. Basically, what I am saying,
15:21:05 3 except for possibly a couple of months in the
15:21:10 4 summer of 1814, Britain controlled the Upper Lakes
15:21:16 5 from 1764 to 1815 and beyond. And I have given
15:21:21 6 evidence of the number of ships involved,
15:21:25 7 et cetera, et cetera, et cetera. I have talked
15:21:28 8 about -- right, and also I examined the Indian
15:21:38 9 Department's efforts to keep the Indigenous nations
15:21:43 10 onside just prior to the War of 1812, and why, I
15:21:48 11 discussed why they wanted that.

15:21:51 12 Q. Mr. Graves, I want to focus
15:21:53 13 particularly on the front end of that period, so
15:21:56 14 mid-18th century, at the time of the Pontiac
15:21:59 15 conflict.

15:21:59 16 A. Yeah.

15:21:59 17 Q. What are the views that you
15:22:01 18 express in relation to the Pontiac conflict? What
15:22:03 19 is the thrust of your views?

15:22:05 20 A. Well, the thrust of my views would
15:22:11 21 come down to this. The British military was taken
15:22:15 22 by surprise but recovered quickly and was about to
15:22:19 23 come back and launch a military operation which
15:22:22 24 would have crushed those Indigenous nations that
15:22:25 25 were involved in that conflict. That is what I

15:22:29 1 believe.

15:22:29 2 I believe that the one Indigenous
15:22:33 3 attempt to capture a British warship was a distinct
15:22:37 4 and total failure, and I have given reasons as to
15:22:40 5 why that should be.

15:22:42 6 I also -- I wasn't sure, but Professor
15:22:47 7 Hinderaker made a great deal of this ambush of a
15:22:51 8 survey party on the St. Clair River. He seemed to
15:22:56 9 feel that this was the Anishinaabe people saying
15:23:00 10 don't go any farther, we control the Upper Lakes.
15:23:03 11 My feeling was I don't think they knew they were a
15:23:06 12 survey party, and basically they were attacked
15:23:08 13 because they were on the water, and in those days,
15:23:11 14 you moved on water because there was almost no road
15:23:13 15 system. So it was an enemy party. They attacked
15:23:17 16 it.

15:23:18 17 I think he probably made too much of
15:23:20 18 that incident.

15:23:23 19 One thing I should also say, I have had
15:23:27 20 a very strange career, but -- unlike the
15:23:30 21 traditional academic historian, but one thing I
15:23:34 22 have had a lot of experience in, I was in the
15:23:39 23 militia as an artillery gunner, so I knew a lot
15:23:44 24 about artillery, and one of the reasons I was hired
15:23:48 25 straight out of graduate school by the national

15:23:50 1 historic site service was they needed someone who
15:23:53 2 knew artillery, who could train, compile -- compile
15:23:57 3 a manual of artillery training for historic sites.
15:24:01 4 You know, they do this gun drill, and they fire off
15:24:03 5 a cannon, that would be historically accurate, but
15:24:08 6 above all would be safe. So I'm not afraid of
15:24:11 7 things that go boom.

15:24:12 8 Later on when I was the Director of the
15:24:14 9 Army Museum, I and my assistant were contracted by
15:24:20 10 Parks to prove ordnance in the old way, and it is a
15:24:24 11 test of destruction. You take a gun, and you load
15:24:27 12 it with two and a half times the normal service
15:24:30 13 charge, and you ram down a turbo wad, and you get
15:24:34 14 back a long way and ignite it.

15:24:37 15 If two and a half times a service
15:24:41 16 charge, you'll build up the breech pressures, and
15:24:43 17 if it blows, it didn't withstand its proof. It is
15:24:46 18 a test of destruction. If it withstands its proof,
15:24:49 19 then it can be used on a historic site because they
15:24:53 20 won't be using more than two, three ounces of black
15:24:55 21 powder. We were using 16 pounds. It was quite
15:24:59 22 impressive.

15:24:59 23 All this to say that when you talk
15:25:07 24 about warriors and canoes attacking warships, I
15:25:08 25 have a little bit more the knowledge of what would

15:25:13 1 have gone on and how that warship would have been
15:25:15 2 defended.

15:25:16 3 Q. So, you know, if you could
15:25:19 4 elaborate on that point in terms of what it means.

15:25:22 5 A. I'm sorry.

15:25:23 6 Q. You left us hanging, Mr. Graves.

15:25:26 7 A. Yeah, I know, I left it hanging.
15:25:28 8 Frankly, if you take a six-pound cannonball and
15:25:33 9 throw it over the bulwark onto the canoe, it will
15:25:36 10 sink it.

15:25:37 11 What I am saying is it is a very hard
15:25:38 12 thing to do, to use canoes to launch an attack on a
15:25:41 13 sailing ship, even a small one. They are very
15:25:44 14 tippy things canoes. Trying to get off a canoe
15:25:47 15 onto a deck, you have got to climb up 6 to 8 feet.

15:25:50 16 So I wanted to emphasize this because
15:25:53 17 Dr. Benn in his report made a statement to the
15:25:57 18 effect that the Indigenous people could use the
15:26:01 19 threat of water-borne violence against British
15:26:04 20 sailing ships, and I don't think there was any
15:26:06 21 threat whatsoever, not when you are using canoes.
15:26:12 22 Does that answer your question?

15:26:14 23 Q. I think in part, Mr. Graves. Can
15:26:16 24 you explain how this relates to what you were
15:26:17 25 saying earlier about artillery?

15:26:19 1 A. Well, they are better armed. The
15:26:25 2 British were better armed all the way around, and
15:26:27 3 also -- and very difficult to use a canoe as a
15:26:37 4 boarding vessel. And also they have -- artillery
15:26:39 5 has a longer range. Now, you could do it at night,
15:26:44 6 it would have been easy, which they did off
15:26:46 7 Detroit, but as Dr. Benn points out several
15:26:48 8 times -- and this is well-known -- the Indigenous
15:26:50 9 people do not like to operate at night. It is a
15:26:53 10 cultural thing. It is also a military thing. It
15:26:56 11 is very difficult. Even today with night vision,
15:27:00 12 it is difficult.

15:27:02 13 Q. So I am going to move a little bit
15:27:04 14 further forward in time, Mr. Graves, through your
15:27:07 15 Hinderaker section. We have discussed Pontiac's
15:27:11 16 War. You then discuss the British presence on the
15:27:16 17 Upper Great Lakes through the late 18th century
15:27:21 18 into the early 19th century in your report. Could
15:27:24 19 you give us a brief summary of the views that you
15:27:27 20 express in your report on this topic?

15:27:29 21 A. You have lost me there. I'm
15:27:37 22 sorry, could I ask you to repeat that?

15:27:38 23 Q. Most certainly, Mr. Graves. So I
15:27:40 24 just want you to tell us what views you express on
15:27:44 25 the British presence in the Upper Great Lakes in

1 the late 1700s into the early 1800s.

2 A. Well, they controlled the lake.

3 Q. What do you mean by that,

4 Mr. Graves?

5 A. They controlled the lake. No one

6 else could venture to compete with them for control

7 of the lake, not the Indigenous people. Dr. Benn

8 points out that Indigenous people wanted them

9 there, so they let them sail on the lake. I think

10 the British just went where they wanted to go.

11 Q. Going a bit further forward in

12 time, Mr. Graves, in your Hinderaker -- in the

13 Hinderaker section of your report, you discuss the

14 War of 1812. I am going to break that down into

15 some sub-topics to make it a bit more manageable,

16 Mr. Graves.

17 A. Yes.

18 Q. The first topic you address is the

19 general extent of Indigenous participation in the

20 War of 1812. Could you, please, give us a summary

21 of your views on that topic as expressed in your

22 report.

23 A. Well, I started with the list of

24 warriors, which I make to be 10,000, and that is

25 the whole Great Lakes Basin, of which 1,600 are in

1 Upper Canada. Dr. Benn felt there was more. He
2 felt there was 12 or 14,000. I wouldn't argue that
3 because we really don't know.

4 But anyway, this is -- the Indigenous
5 warriors were a distinct asset for Britain, not so
6 much a military asset, but a psychological asset
7 because the Americans had a real fear of attacks on
8 border communities by the Aborigines.

9 So the use of this force put them off
10 balance. As the war went on, though, more and more
11 regular troops arrived. The Canadian militia or
12 the Canadian -- not really militia, units were
13 formed of -- long service units were formed of
14 Canadians armed, equipped, trained and led as
15 British soldiers and more of these were raised
16 every year. By 1814, the last year of the war,
17 there was a very large number of British regular
18 troops that were coming from Europe because the war
19 in Europe was over.

20 You must never forget that the War of
21 1812 was a sideshow of a bigger conflict in Europe,
22 and that is what kept the British army and navy
23 pinned down. But when Napoleon was defeated in
24 April 1814, then they began to send troop
25 reinforcements, and the next six months, they sent

1 22 battalions of regulars. A battalion is a
2 permanent formed unit of soldiers in number between
3 6 and 800, sometimes a thousand.

4 So by December 1815, when the Treaty of
5 Ghent was signed, there was anywhere between 29,000
6 and 30,000 regular soldiers, British soldiers in
7 Canada, plus another 4 to 6,000 what I call
8 colonial regulars. It is just a name I invented
9 for all these strange Canadian units.

10 Q. Just to pick up a point, did you
11 December 1815 or 1814 for the Treaty of Ghent?

12 A. Sorry, sorry. Yeah, 25th
13 December, 1814.

14 So the Indigenous people played an
15 important role in 1812, a lesser role in 1813, and
16 an even lesser role in 1814. By 1814, the war had
17 more or less resolved itself into battles between
18 large groups of regular troops.

19 Q. So, Mr. Graves, in the Hinderaker
20 section of your report, you also discuss in some
21 detail naval activities on Lake Huron between 1812
22 to the end of the War of 1812 and 1814, and then a
23 bit later until around 1830. Could you, please,
24 give us a brief summary of your views on that
25 sub-topic?

1 A. Well, at the outbreak of war, the
2 United States had two -- one warship and one
3 government transport. The government transport was
4 in the Upper Lakes in Detroit, and the warship was
5 at Lake Ontario. Britain had about 13 warships
6 and/or transports all over the lakes. So they were
7 outnumbered, the Americans, right away.

8 The Provincial Marine -- it wasn't the
9 Royal Navy then, it later became the Royal Navy --
10 controlled Lake Huron until the summer of 1814 when
11 the Americans sent a naval expedition, and it was
12 to take Mackinac. It was rebuffed, but they left
13 two schooners on the Lake Huron to blockade
14 Mackinac. And these were captured in a cutting-out
15 expedition by Lieutenant Miller Worsley, so all of
16 a sudden, the British had control of the lake
17 again.

18 Q. Mr. Graves, what is a cutting-out
19 expedition?

20 A. Well, technically a cutting-out
21 expedition, to use a strict definition, is when you
22 send parties in small boats into a harbour to
23 capture a ship at anchor, and you cut it out. You
24 literally cut the anchor ropes and winch it out.
25 Now, it is used a little more loosely. I mean, the

15:33:34 1 Tigris and Scorpion weren't technically cutting-out
15:33:37 2 expeditions because they weren't anchored in a
15:33:40 3 harbour or port. They were anchored on the lake.
15:33:43 4 But I use it loosely. It has been used much more
15:33:46 5 loosely these days than it used to be.

15:33:52 6 Q. It is almost our break time,
15:33:54 7 Mr. Graves. In fact, I guess it will be our break
15:33:57 8 time, Your Honour, if we may take the afternoon
15:33:59 9 break at this juncture.

15:34:01 10 THE COURT: You are asking to take the
15:34:02 11 break, are you, sir?

15:34:03 12 MR. LEMMOND: Yes, Your Honour.

15:34:04 13 THE COURT: 20 minutes.

15:34:05 14 -- RECESSED AT 3:35 P.M.

15:56:17 15 -- RESUMED AT 3:55 P.M.

15:56:17 16 THE COURT: Please go ahead.

15:56:18 17 BY MR. LEMMOND:

15:56:18 18 Q. Thank you, Your Honour.

15:56:19 19 So, Mr. Graves, when we left off before
15:56:23 20 the break, we were discussing the Hinderaker
15:56:26 21 section of your report, and we were discussing the
15:56:28 22 last section of your section dealing with the
15:56:32 23 Hinderaker report, focussing on the War of 1812 and
15:56:38 24 the Upper Great Lakes, particularly Lake Huron.

15:56:41 25 So you had mentioned the capture of the

15:56:44 1 two American ships on Lake Huron in 1814. Could
15:56:51 2 you, please, give us a brief summary of the views
15:56:56 3 that you express in your report that relate to the
15:56:59 4 end of the War of 1812 and post-War of 1812 events
15:57:03 5 on Lake Huron.

15:57:04 6 A. Well, at the end of the war, the
15:57:14 7 British had control of Lake Huron, no doubt about
15:57:16 8 it. There were no American War ships up there.
15:57:22 9 There was plans, I think, on the part of the
15:57:25 10 Americans to go back up, but it was too late in the
15:57:28 11 season. You have to remember that in the Great
15:57:30 12 Lakes Basin, the campaign season, be it land or
15:57:34 13 naval, is limited, basically mid-April to probably
15:57:39 14 early October. And you have got to get moving
15:57:45 15 early if you are going to mount a major campaign,
15:57:47 16 be it land or naval.

15:57:48 17 By the time the Tigris and Scorpion
15:57:53 18 were captured, and the time Sinclair, the American
15:57:59 19 naval commander on Lake Erie, learned about it, it
15:58:02 20 was a month gone. It was early October, and he
15:58:05 21 couldn't get back up there, and he knew it. You
15:58:07 22 don't want to be up on Lake Superior and Lake Huron
15:58:11 23 in late autumn. There is that famous song by
15:58:15 24 Edmund Fitzgerald. That is what you are facing.

15:58:24 25 Q. So, Mr. Graves, what happens on

1 Lake Huron after the War of 1812?

2 A. Well, after the war, the British
3 established a naval base at Nottawasaga Bay, but
4 later they moved it to Penetanguishene, but both
5 nations realized that this naval and this endless
6 "War of Carpenters", as it was called, is just
7 hopeless. So they limit -- they limit the number
8 of warships on the Great Lakes. I think it is one
9 per lake, two on Lake Ontario, and they are limited
10 in size, and the number of guns they can carry.

11 And that is still in effect today. If
12 either Canada or Britain or the United States want
13 to bring a larger warship up the Great Lakes, they
14 have to apply for and receive permission from the
15 other nation.

16 Q. Mr. Graves, when did the British
17 close their naval facility on Lake Huron after the
18 War of 1812?

19 A. I'm not sure, but I'm going to
20 hazard a guess, 1823 to '24, but I am not really
21 sure about that.

22 Q. So, Mr. Graves, before we move on
23 to the section of your report dealing with
24 Dr. Harring's report, do you have any further
25 comments to add concerning Dr. Hinderaker's report

1 and your comments on that section in your report?

2 A. Well, I think, you know, he is
3 clearly a man who did an honest job. I think the
4 weaknesses of it are it concentrates too much on
5 ideology and not enough on physical reality. As I
6 said, because of the nature of my interests and
7 professional work, I tend to have to come back to
8 earth quite a bit, or water, for that matter. But
9 he did -- you know, he did a competent job. I
10 disagree with him, but there it is.

11 Q. And on what point -- if you had to
12 summarize it, on what point do you disagree with
13 Dr. Hinderaker's evidence?

14 A. Oh, I think he exaggerates the
15 power of the Indigenous people to control the lake
16 and mount military and/or naval actions against the
17 British. I think that is exaggerated, and it just
18 wasn't that -- they weren't that powerful.

19 Q. So, Mr. Graves, I want to take you
20 now to the section of your report dealing with
21 Dr. Harring's report, and you begin that section
22 around page 18 of your report by dealing with or
23 discussing general issues of squatting in North
24 America and, more particularly, Upper Canada
25 between the late 18th and early 19th century.

16:01:11 1 A. Yes.

16:01:12 2 Q. Could you, please, give us a
16:01:17 3 statement of the views that you express in your
16:01:19 4 report, in that section of your report?

16:01:22 5 A. Well, bringing it all home,
16:01:25 6 squatting is a result of population pressure, and
16:01:32 7 at the top of page 20, I quote some figures, that
16:01:36 8 there were 90,000 people in Upper Canada at the end
16:01:39 9 of the War of 1812, they think, and by 1851, there
16:01:48 10 were 952,000. That is a 10 -- a 100 percent
16:01:55 11 increase, whereas the native population had
16:01:57 12 declined. The pressure is always on settling new
16:02:01 13 land. It is not just in Canada. It is in the
16:02:05 14 United States, probably even more so down there.
16:02:09 15 And this is behind squatting. I didn't -- I'm not
16:02:13 16 an expert on land settlement. I'll be the first to
16:02:16 17 admit it. I only examined squatting insofar as it
16:02:19 18 had to do with the Bruce Peninsula, and the concern
16:02:23 19 on the part of the Indian Department that there
16:02:26 20 would be bloodshed.

16:02:28 21 Q. So after that section of your
16:02:38 22 report, turning now to around page 20, Mr. Graves,
16:02:42 23 you then discuss briefly the making of Treaty 72 in
16:02:47 24 1854.

16:02:49 25 A. Yes.

1 Q. Could you, please, give us a brief
2 summary of the views that you express in that
3 section of your report.

4 A. Yeah. Well, here I quoted
5 Oliphant, the Superintendent General of Indian
6 Affairs, and it was his views I'm quoting, and I
7 agree with them. His view is that:

8 "[...] Indian concessions are
9 beneficial alike to the Indian and
10 to the white, was here merged in a
11 more important consideration. So
12 keen was the struggle for land, that
13 a surrender of the territory for the
14 purpose of sale, appeared the only
15 method by which the property of
16 these tribes could be conserved to
17 them."

18 Given what he had, the power, the
19 organizations, this is the best way. What he was
20 concerned about was preventing bloodshed, and to
21 him this seemed to be the best way to do it.

22 Q. Okay. In the next section of your
23 report, Mr. Graves, beginning on page 22, you
24 discuss Dr. Harring's views on the resources
25 available to officials in Canada West to deal with

1 squatting on the Bruce Peninsula. Before we go
2 into your views on that subject, can you tell us
3 what your understanding of Dr. Harring's views on
4 the subject are.

5 A. Well, Dr. Harring felt that the
6 British Crown had sufficient capacity to protect
7 the boundaries of the Saugeen. He names a number
8 of things. It had a regular army, as well as a
9 militia, local sheriffs, deputies and constables,
10 and there was sufficient reserves to put a small
11 armed force on the boundary of the Saugeen Reserve
12 to protect it from white encroachment.

13 Well, I don't know what he is talking
14 about here because this is not Upper Canada. I
15 think what he is doing here is applying --
16 Dr. Harring is an American. He is applying
17 organizations and structures in the United States
18 and moving them to Upper Canada.

19 He then goes on to say:

20 "[...] the British Empire
21 extended around the world", that
22 "[...] the Crown that had a large
23 army and navy [...]" - and actually,
24 it didn't have a large army - "[...]
25 and was engaging in wars around the

1 world - the Eighth Frontier War
2 against the Xhosa in [South Africa]
3 [...], the Crimean War [...] and the
4 Indian Mutiny [...]"

5 Or rather, the Bengal Mutiny.

6 "They are not irrelevant".

7 And he says these colonial wars are not
8 irrelevant and:

9 "[...] had all the resources it
10 needed to fully police the
11 boundaries of the [...] Reserve
12 [...]"

13 Well, they didn't, and that is all
14 there is to it, and for the very reason he is
15 quoting, that the war against the Xhosa, the
16 Crimean War, the Bengal Mutiny, they were pulling
17 garrisons down to Canada. I have quoted some
18 figures here. As for the militia, well, we are not
19 even sure whether there was an organized militia in
20 Grey and Bruce Counties in 1854. We are still
21 working on that.

22 Q. You discuss that in some more
23 detail a little bit later in your report,
24 Mr. Graves. Before we get into that, I just want
25 to deal with one other thing you deal with in your

1 report before we get to that, which is you
2 summarize Dr. Harring's views and then you discuss
3 practical steps that would need to be taken to
4 clear squatters from the Saugeen Reserve in 1854.
5 So that is at page 24 of your report. Can you give
6 us a succinct summary of your views.

7 A. Yeah, my feeling was they would
8 have to patrol a boundary of 20 miles, 32
9 kilometres, between the Saugeen Reserve on Lake
10 Huron and the Nawash Reserve at Georgian Bay. It
11 would have taken more than a few dozen men, and
12 then I get into a lot of technical detail here
13 about how fast troops can march, and that is based
14 on Scharnhorst, his 1811 "Militär Feld
15 Taschenbuch", and it was modernized in the Field
16 Service Pocketbook, which I have a copy of.

17 And in my time, on a road, a dirt road,
18 the soldier with a full load was expected to march
19 3 miles with a ten-minute break every hour, and
20 that is still pretty standard. That is for
21 infantry. Mounted men, of course, can move
22 farther. But horses need a lot more care than
23 people think they do. They have got to be rested,
24 put out to grass once a year.

25 All I'm saying is that to really have a

1 waterproof boundary there that would prevent
2 squatting would have required a lot of resources,
3 and nobody either did not have or did not have the
4 wish to utilize those resources. I don't think
5 they had them. Constables were municipal
6 appointment, and as I say, I'm not sure what he
7 meant by wardens. To me, wardens are a civil
8 appointment or a religious appointment. A warden
9 of a church is someone -- not the rector or the
10 vicar, but who looks after the administration of
11 the church. Rangers, I don't know where he got
12 that from. I think he is confused here with the
13 Cherokee rangers, but we didn't have anything like
14 that in Canada. Commissioners, I think he is
15 referring to appointments made possible under the
16 1839 Act.

17 I guess the whole point is it is not
18 clear what he is talking about, okay.

19 Q. Well, you have started to go into
20 this, Mr. Graves, this question of what the actual
21 resources available were from your perspective, and
22 you begin in your report by discussing civilian
23 resources. Could you focus on civilian resources
24 in particular as you address them in your report,
25 and that is at page 24 to 26 of your report.

16:09:06 1 A. Well, Grey and Bruce County were
16:09:10 2 in their infancy, and again, I am not sure just how
16:09:15 3 far they had gone by 1854 in developing
16:09:19 4 administrative organization, including courts of
16:09:24 5 law. I don't know. Certainly I'm not sure that
16:09:27 6 they had a functioning militia. The earliest I
16:09:30 7 could find reference to a militia -- I think there
16:09:35 8 is the point here somewhere.

16:09:40 9 Q. Mr. Graves, if I may, that is a
16:09:42 10 little bit later in your report where you deal with
16:09:45 11 militia. Right now we are discussing civilian
16:09:48 12 resources first.

16:09:48 13 A. Okay. Well, there is no police
16:09:50 14 forces we know in the province except around the
16:09:53 15 Welland Canal, and the Lachine Canal in Toronto has
16:09:58 16 a police force. What you may have is a village
16:10:01 17 constable, basically a night watchman. You are
16:10:04 18 going to need a lot of those to enforce that
16:10:07 19 boundary.

16:10:07 20 So there is nothing there. There is no
16:10:11 21 such thing as a Northwest Mounted Police, there is
16:10:13 22 no Ontario Provincial Police. That is all coming
16:10:16 23 in the future.

16:10:17 24 So you really don't have a lot.

16:10:19 25 Q. So after discussing the civilian

1 resources in your report at pages 20 to 31,
2 Mr. Graves, you discuss the militia. Can you,
3 please, give us a statement on your views of the
4 availability of militia resources for this purpose
5 of dealing with squatters on the Bruce.

6 A. Well, the first thing when a
7 county is formed, an officer is appointed called
8 the lieutenant, county lieutenant, and that officer
9 is in charge of the militia. He appoints captains
10 of militia, one in each area, neighbourhood, what
11 have you.

12 The captains then assemble the men,
13 which would be the 1841 Act. So he has got two
14 kinds of men, men 16 to 40 and men over 40. Men
15 over 40 don't have to muster, but he has to muster
16 the first category of man once a year, usually on
17 the King's birthday, which is taken to be the 4th
18 of June, that is King George III's birthday. He is
19 gone but his birthday lives on.

20 And that date is important because the
21 planting has been done, and the crops have not yet
22 been harvested because between planting and
23 harvesting there is a break in the agricultural
24 season, and that is why it is chosen. And
25 basically, what happens is the captain has compiled

1 a roll of the eligible men. He calls them out. He
2 marks those present present, and those absent are
3 recorded and could be fined.

4 There is no -- the militia wasn't
5 armed. They had to bring their own weapon. They
6 weren't equipped. They weren't given any kind of
7 load-carrying equipment, boots, nothing, and they
8 weren't paid.

9 So how serious is this, I don't know.
10 Basically the militia system at that time was an
11 organization for mobilization should there be a
12 war. Basically what would happen was that boys
13 would turn out. The roll would be called. They
14 would do a few evolutions and drill maneuvers, and
15 the captain, if he was wise, would have brought
16 either several barrels of beer or one or two
17 barrels of whiskey, and they would have then what
18 was called a jollification, and I don't have to
19 define that at any great length. And that was your
20 militia training.

21 The 1855 Act changed all that. For the
22 first time -- and this was done because the British
23 army had more or less withdrawn from the country.
24 For the first time, the militia would be paid.
25 They would be a volunteer paid militia. They would

16:13:04 1 be uniformed and armed by the Crown and paid. They
16:13:07 2 had to do a certain number of days a year. They
16:13:09 3 were better trained.

16:13:10 4 And this is actually -- now it is more
16:13:13 5 or less taken -- the 1855 Militia Act is more or
16:13:17 6 less taken as the birth date of the modern Canadian
16:13:20 7 Army. Most Canadian militia regiments and regular
16:13:24 8 regiments -- well, actually, the militia is older
16:13:26 9 than the regulars, but most will date their
16:13:28 10 creation in 1855. Some are before that. I'm
16:13:32 11 working on a history of the unit, and I think it
16:13:34 12 goes back to 1786.

16:13:39 13 So to use the militia in 1854, I'm not
16:13:42 14 even sure they got to the point of holding an
16:13:44 15 annual muster. That is why we are looking for this
16:13:47 16 document, another document.

16:13:49 17 The best I could do, and I pointed it
16:13:52 18 out here -- yeah, it is a footnote on page 30,
16:14:00 19 footnote 48. I found this in a -- a finding aid in
16:14:07 20 RG 9. Record Group 9 is the militia records. What
16:14:12 21 it is, it is simply a list of pay lists. Okay?
16:14:15 22 And the earliest pay list for -- was it Bruce
16:14:21 23 County? Yeah, 1856.

16:14:24 24 I didn't look at the document because
16:14:25 25 all the document is going to be is a list of names.

1 I was after the date. Now we are having some
2 problems finding this, and either I wrote the date
3 down wrong or PHI can't find it, but we are looking
4 for it.

5 What it means, though, is I don't think
6 there was a viable militia organization in
7 existence in Grey and Bruce Counties in 1854.

8 Q. Thank you, Mr. Graves. So in your
9 report after you discuss the militia, you then
10 discuss regular military forces available in Canada
11 in 1854. This is at page 31 to 33 of your report.

12 A. Yes.

13 Q. Could you, please, give us a brief
14 summary of your views on that point?

15 A. Well, for reasons I mentioned
16 earlier, overseas operations, the British garrison
17 in Canada was being drawn down. Three regiments of
18 infantry -- and that is a bad term, but actually it
19 should be three battalions of infantry, three
20 companies of artillery. A battalion of infantry at
21 this time would be a formed unit of between 6 and
22 800 men, a company of artillery would be 100 men.

23 So we have got about 300 -- 2,100
24 troops. Okay? And they are drawing them down, and
25 they are going to send some overseas. Now, they

1 are going to be replaced by this strange unit
2 called the Royal Canadian Rifle Regiment, which
3 despite its title was not a Canadian regiment. It
4 was a British regiment. It consisted of veterans
5 in their 40s, married men, and it had been formed
6 because one of the problems with the British army
7 in Canada was desertion across the border, and
8 there were what -- they were called crimpers, but
9 Americans, there is always a need for labour south
10 of the border. And I don't know what the modern
11 term would be. They were called crimpers. They
12 would come across the border and inveigle British
13 soldiers to desert, and, you know, they go across
14 the boarder, and that is it.

15 So to do this, they did -- to lessen
16 this problem, they did two things. First of all,
17 they drew the garrisons back from the border, and
18 second of all, they created this regiment called
19 the Royal Canadian Rifle Regiment. I don't think
20 it was a -- it wasn't a Brigade of Guards, and a
21 lot of these fellows were old, broken down, and
22 liked to drink or they had family or they had
23 children. The main thing was they weren't so
24 susceptible to desertion.

25 So that is what they had, and what

16:17:16 1 could they do? I think it comes in -- I think it
16:17:24 2 was Dr. Benn's cross-examination. They mentioned
16:17:26 3 it in Toronto at this time. There is eight members
16:17:28 4 of the Royal Artillery, and they are there
16:17:31 5 basically to look after the ordnance stores, and
16:17:33 6 the powder and ammunition. So there is very few
16:17:36 7 regular soldiers available.

16:17:37 8 Now, even if they were available, there
16:17:39 9 is a whole procedure that has to be gone through,
16:17:43 10 and I spent quite a bit of time on this, because in
16:17:47 11 contrast to what Dr. Harring says, the whole
16:17:51 12 process of using regular troops against civilians
16:17:55 13 is one that has a long and tortured history in the
16:18:00 14 British army, and they don't like it. Believe me,
16:18:03 15 they do not like it. And of course, it was only in
16:18:06 16 1816 that you had the Peterloo Massacre where
16:18:11 17 poorly trained troops were -- as it turns out
16:18:14 18 illegally turned against a crowd and killed
16:18:17 19 several.

16:18:18 20 So they are very, very careful about
16:18:22 21 using troops in aid of the civil power, and that is
16:18:27 22 still true today. In the Oka Crisis, they thought
16:18:30 23 a long time. It wasn't so much in Oka, but on the
16:18:34 24 Mercier Bridge in Montreal, because I talked to the
16:18:38 25 young lieutenant who was in charge of the guard

16:18:40 1 that night when a mob tried to rush his position,
16:18:42 2 you know. So he gave the classic order, on my
16:18:46 3 command, one round ball cartridge, aim at the man
16:18:50 4 in the front with the microphone. The crowd
16:18:54 5 dissipated, you know, but it gets that serious.
16:18:56 6 You don't want that to happen.

16:18:58 7 The police should handle this. Our
16:19:00 8 police are better trained for this now, but this is
16:19:04 9 what we have got. Does that explain -- does that
16:19:06 10 answer your question?

16:19:07 11 Q. Just one small question embedded
16:19:12 12 in what you said there. You had a reference there,
16:19:15 13 they are not the Brigade of Guards. What do you
16:19:17 14 mean by that?

16:19:18 15 A. Well, the Brigade of Guards were
16:19:19 16 the best, you know. They were the biggest, the
16:19:21 17 tallest, the best drilled, best uniformed, and
16:19:25 18 certainly had the best life-style in London, and so
16:19:29 19 it is an expression in the British army that the
16:19:31 20 Brigade of Guards are the A-plus ultra. So these
16:19:37 21 guys weren't the Brigade of Guards, quite the
16:19:39 22 opposite.

16:19:40 23 I get a kick, I have to say -- and this
16:19:42 24 is a digression. I go to Fort Wellington, the
16:19:45 25 national historic site, and they have got these

16:19:48 1 young kids dressed as Royal Canadian Rifles, young
16:19:51 2 high school students, 18 years old, and they didn't
16:19:54 3 look like that at all. I'm sorry, sorry for the
16:19:57 4 digression.

16:19:57 5 Q. That is okay, Mr. Graves. Before
16:20:01 6 we go on to the last section of your report, do you
16:20:03 7 have any further comments to add regarding
16:20:08 8 Dr. Hinderaker -- sorry, Dr. Harring's report?

16:20:10 9 A. My feeling was that, again,
16:20:15 10 Dr. Harring's heart was in the right place, but he
16:20:18 11 just does not understand enough about Canadian and
16:20:21 12 British history or Canadian and the British
16:20:25 13 military, and he was relating what he knew about
16:20:29 14 the American military and the American police and
16:20:35 15 the law enforcement agencies to Canada, and it
16:20:38 16 doesn't work.

16:20:39 17 Q. So we are moving on to the last
16:20:43 18 section of your report, Mr. Graves, and this is the
16:20:46 19 section that deals with a number of documents cited
16:20:50 20 by the Plaintiffs in paragraph 19 of their
16:20:54 21 Statement of Claim of 2003. I am not going to --

16:20:59 22 THE COURT: Can you just pause for a
16:21:01 23 moment.

16:21:02 24 MR. LEMMOND: Yes, Your Honour.

16:21:04 25 THE COURT: All right.

1 BY MR. LEMMOND:

2 Q. So I am not going to take you,
3 Mr. Graves, through each and every one of those
4 paragraphs. I am just going to ask you to tell us
5 in general terms what this section is about.

6 A. Well, this section arises out of
7 section 19 of the Statement of Claim in which the
8 Plaintiffs made reference to some 20 documents, as
9 I say, that purport to show that members of the
10 Anishinaabe peoples asserted their land rights.

11 I went through it one by one, and I
12 found -- I did a basic analysis of what are we
13 looking at here? Does it say what the Plaintiffs'
14 counsel or the Plaintiff says it says? And is
15 there more to this?

16 And that is basically what I did. I am
17 not sure how many I found had some weaknesses, but
18 if you go through it, there were problems with
19 dating. There were problems of incomplete
20 quotation, if more context should have been given
21 for the document. Let's see. I'm just looking
22 at -- yeah, incorrect quoting, and quotes weren't
23 properly transcribed.

24 It is just basic scholarship review is
25 what it is, and that is all I have done. I felt

16:22:49 1 that there seems to be no accompanying thesis to
16:22:53 2 it, and it was just a long list of documents, and
16:22:57 3 so I examined them one by one.

16:22:59 4 Q. Okay. My last question for you,
16:23:05 5 Mr. Graves.

16:23:05 6 A. Okay.

16:23:06 7 Q. Before we finish your direct
16:23:09 8 examination, do you have any comments that you
16:23:10 9 generally want to share regarding the subject
16:23:12 10 matter of your report?

16:23:14 11 A. Oh, I have got lots, but I am not
16:23:19 12 sure it is really necessary. I think I have said
16:23:23 13 what I had to say, and what I haven't said will be
16:23:26 14 in that report.

16:23:27 15 Q. Okay. Thank you, Mr. Graves.

16:23:31 16 A. Thank you.

16:23:31 17 THE COURT: Now, before we adjourn for
16:23:33 18 the day, I have something I want to speak to
16:23:35 19 counsel about, sir, so would you mind just waiting
16:23:39 20 outside?

16:23:40 21 THE WITNESS: Not at all.

16:23:48 22 THE COURT: Before you go outside, sir,
16:23:50 23 I should tell you now, sir, you have said you
16:23:53 24 testified twice before.

16:23:53 25 THE WITNESS: Yes.

16:23:54 1 THE COURT: You may, therefore, be
16:23:56 2 aware that during your next testimony and
16:23:58 3 cross-examination, you should not be discussing
16:24:01 4 this subject matter with anybody at all.

16:24:04 5 THE WITNESS: Yes, I am aware of that.

16:24:05 6 THE COURT: And you should not be doing
16:24:06 7 research or any other steps.

16:24:08 8 THE WITNESS: Okay.

16:24:09 9 THE COURT: All right.

16:24:11 10 MR. LEMMOND: Your Honour, may I ask
16:24:12 11 that -- he doesn't resume in the stand for two
16:24:14 12 weeks. Would he still be able to do some
16:24:17 13 preparation for his return to the stand as he
16:24:22 14 hasn't begun his cross-examination.

16:24:22 15 THE COURT: Well, why don't we have the
16:24:24 16 gentleman wait outside, and we can talk about that.

16:24:27 17 MR. LEMMOND: Okay. Thank you, Your
16:24:27 18 Honour.

16:24:28 19 THE COURT: And, Mr. Graves, counsel
16:24:30 20 may give you some additional guidance after.

16:24:34 21 THE WITNESS: Thank you.

16:24:36 22 THE COURT: But don't leave yet.

16:24:38 23 THE WITNESS: Outside.

16:24:40 24 THE COURT: Just wait outside.

16:24:42 25 [Reporter's Note: Witness exits the

16:24:44 1 courtroom.]

16:25:21 2 THE COURT: Now, Counsel, I was
16:25:22 3 previously notified that this gentleman had a
16:25:25 4 correction to his report.

16:25:27 5 MR. LEMMOND: Yes, Your Honour.

16:25:27 6 THE COURT: And he said, I guess it
16:25:30 7 would have been this afternoon or this morning,
16:25:33 8 that he had -- afternoon, that he somewhat began to
16:25:36 9 change his mind about something in his report.

16:25:38 10 MR. LEMMOND: Yes, Your Honour.

16:25:39 11 THE COURT: But you have not asked him
16:25:40 12 what that is, and I will ask him if it comes to
16:25:42 13 that at the end of his cross-examination, but in
16:25:44 14 fairness to the cross-examining counsel, I thought
16:25:47 15 I would raise it now. Is it the redacted thing was
16:25:49 16 the correction? So what you have done is removed
16:25:52 17 it?

16:25:52 18 MR. LEMMOND: Yes, Your Honour.

16:25:55 19 THE COURT: Well, Ms. Pelletier, you
16:26:00 20 now know that at the end of your cross-examination
16:26:02 21 I will ask him because I need to know the answer to
16:26:07 22 why he says he began to change his mind.
16:26:10 23 Otherwise, I am not going to be able to know what
16:26:12 24 to do with this evidence.

16:26:13 25 And I can do it then, you know, if it

1 doesn't come out in your cross-examination. But if
2 you want it out of the way now, I would have him
3 back and deal with it now.

4 I really can't just let that go.

5 MR. LEMMOND: Yes, Your Honour.

6 MS. PELLETIER: Your Honour, what I was
7 struggling with is, if you recall, the change of
8 opinion. It was the basis for the supplemental
9 report.

10 THE COURT: Well, it was part of it.

11 It wasn't --

12 MS. PELLETIER: It was part of it.

13 THE COURT: And as I said at the time,
14 one can't say that an expert can't make a
15 correction if there is something -- we have had
16 corrections all over the place in this trial.

17 MS. PELLETIER: I mean, perhaps my
18 friend can speak to this. I believe the redaction
19 was to take out the thing that he no longer
20 believes. He has not supplemented the new opinion,
21 and it is the new opinion I'll remind you, Your
22 Honour, that our expert said would take him several
23 weeks to consider.

24 THE COURT: That is not at all what I
25 am talking about. I mean, I went back and

1 consulted my notes. I understand that the --

2 Mr. Lemmond, I mean, call me old fashioned, but one
3 lawyer only should be standing.

4 MR. LEMMOND: Sorry, Your Honour, I
5 didn't realize there was a chair there.

6 THE COURT: The supplementary report
7 was a combination of two things, new material.

8 MS. PELLETIER: Correct.

9 THE COURT: About which there was an
10 objection, and a correction. And I hear now, and
11 it is fine, that the correction has been addressed
12 by redacting the bit from his report, so it is not
13 in evidence to begin with. That is fine.

14 I am happy to wait until whenever we
15 get to the end and I get reached, and if it is not
16 clear, I am going to have to ask him what he was
17 referring to when he said he was -- after he did
18 all these steps, that he began to change his mind
19 about something.

20 MS. PELLETIER: So, Your Honour, I
21 think there is maybe one piece that is missing from
22 how you just described the supplemental opinion.
23 It is a redaction, and then he has introduced
24 something new, and then the second piece was
25 something brand new.

16:28:14 1 THE COURT: So you might be missing my
16:28:16 2 point, Counsel. I'm not talking about any of that
16:28:19 3 stuff.

16:28:21 4 Mr. Lemmond tells me that what he was
16:28:22 5 referring to in his testimony in-chief is the thing
16:28:25 6 that has been removed. That is what counsel
16:28:27 7 expects. But that isn't on the record in any way
16:28:30 8 in this trial, and I am going to need to get some
16:28:33 9 clarification of that that is on the record.

16:28:36 10 Now, there is a couple of ways we can
16:28:38 11 go about doing that. I can sit patiently and wait
16:28:41 12 until I get reached and ask him about it. We can
16:28:44 13 just put it on the record, but you will have to
16:28:47 14 agree to that.

16:28:51 15 MS. PELLETIER: Your Honour, that is
16:28:52 16 the piece that we figured we would need a reply
16:28:55 17 for, and the compromise that was reached --

16:28:57 18 THE COURT: How is that possible? How
16:28:58 19 do you need a reply? I mean, to have this
16:29:02 20 gentleman say the thing he changed his mind about
16:29:05 21 is now redacted from his report, how do you need a
16:29:07 22 reply for that?

16:29:08 23 MS. PELLETIER: I'm sorry, perhaps I'm
16:29:10 24 misunderstanding --

16:29:10 25 THE COURT: I think you are

16:29:12 1 misunderstanding.

16:29:12 2 MS. PELLETIER: Do you simply want to
16:29:14 3 ask him what he took out of the report, not what he
16:29:15 4 replaces that with?

16:29:17 5 THE COURT: Okay. I am going to try
16:29:19 6 again.

16:29:19 7 He said in his examination in-chief
16:29:22 8 that after reading the evidence of a bunch of
16:29:25 9 people, he began to change his mind about things he
16:29:28 10 had written in his report. This did not surprise
16:29:31 11 me because I had previously been told that he had a
16:29:33 12 correction. However, on the record, I have no idea
16:29:37 13 what that refers to. All right?

16:29:41 14 I asked Mr. Lemmond. He says it refers
16:29:43 15 to the correction that has now been removed, but it
16:29:46 16 is not on the record either.

16:29:48 17 There is a number of options here. I
16:29:51 18 thought I would invite you to say which one you
16:29:53 19 preferred. One option is I can just get
16:29:56 20 Mr. Lemmond to ask him one more question, hope he
16:29:59 21 doesn't make a speech. I think that is what you
16:30:01 22 are concerned about, that he might make a speech.

16:30:03 23 MS. PELLETIER: It is simply --

16:30:05 24 THE COURT: Another option is that it
16:30:07 25 can be covered in some agreed way. If he was back

16:30:10 1 tomorrow morning, we could do it that way, but I
16:30:13 2 take it he is not planning on being back tomorrow
16:30:14 3 morning, is that right, Mr. Lemmond?

16:30:16 4 MR. LEMMOND: Yes, Your Honour.

16:30:17 5 THE COURT: Yes. I mean, for that
16:30:20 6 matter, we can just adjourn, and if it doesn't get
16:30:25 7 addressed to my satisfaction, I'll ask him myself.

16:30:30 8 Another option that comes to my mind is
16:30:32 9 that in the meantime -- he is coming back in a
16:30:34 10 couple of weeks -- you all can do a one-line ASF
16:30:38 11 that resolves my concern without a speech, which I
16:30:43 12 accept you would wish to avoid, because as soon as
16:30:46 13 he makes a speech, you may get into these other
16:30:49 14 areas that you have explained would require
16:30:51 15 significant preparation to address. I am really
16:30:56 16 looking for a way to avoid it, not to encourage it.

16:30:58 17 Do you have a suggestion, Counsel?

16:31:00 18 MS. PELLETIER: I believe of the
16:31:01 19 options you just listed, Your Honour, I think the
16:31:05 20 agreed ASF, if my friend is agreeable, sounds like
16:31:09 21 the way I would like to approach it.

16:31:10 22 THE COURT: Any other ideas?

16:31:13 23 MS. PELLETIER: Can you give us a
16:31:14 24 moment perhaps, Your Honour?

16:31:15 25 THE COURT: Yes, certainly.

1 MS. PELLETIER: Okay. Your Honour, I'm
2 sorry, just to clarify, is all that you are
3 interested in what was redacted, not the new
4 opinion?

5 THE COURT: Okay. I am going to say it
6 one more time.

7 MS. PELLETIER: Okay.

8 THE COURT: He said in his testimony
9 before me today that after reading a bunch of
10 evidence from this trial, he began to change his
11 mind about things he had written in his report.
12 That is what his testimony is.

13 Right now, that is the record. All
14 right? There is nothing on the record about why
15 there is a redaction.

16 If you want, we can just plow on ahead,
17 and when I get reached, I'm going to ask him what
18 he was referring to.

19 MS. PELLETIER: So you can ask him --

20 THE COURT: Now, when he said he began
21 to change his mind about things he had written in
22 his report, unless somebody gets into that with
23 him, I'm not going to have any sense of what to do
24 with this evidence. All right? I have given you a
25 whole bunch of ideas of how we might fairly deal

1 with this, given Mr. Lemmond's submission that what
2 that refers to is in fact the redaction, which is
3 not on the record.

4 MS. PELLETIER: Understood.

5 THE COURT: Okay. And Mr. Feliciant is
6 trying to help here, so let him in on the
7 discussion.

8 MS. PELLETIER: Thank you, Your Honour.

9 We perhaps will -- well, why don't --
10 I'll pass it off to Mr. Lemmond.

11 MR. LEMMOND: Your Honour, I am going
12 to do my best to try to address your concern as I
13 understand it by putting one question to
14 Mr. Graves.

15 THE COURT: We can do that. Let's have
16 him back. I mean, I -- well, I gave Ms. Pelletier
17 some other options, but if that is where you are,
18 that is fine.

19 Okay. One more suggestion, and then
20 I'm running out of ideas. Being that he is leaving
21 but coming back, I could also give you all a little
22 time to think about this and work something out,
23 and on his return, if the way you resolved it was
24 that Mr. Lemmond was going to ask one more
25 question, you can still do that.

1 But I mean, I see a lot of shaking
2 heads and puzzled faces that maybe they would like
3 to have a good long discussion about this.

4 I am going to let you do that. Okay.
5 A good long discussion, is that what you are going
6 with? Okay. Now, Mr. Lemmond --

7 MR. LEMMOND: Yes.

8 THE COURT: -- what -- thank you,
9 Ms. Pelletier.

10 Mr. Lemmond, what would you like to add
11 to or remove from my rejoinder of your witness with
12 respect to what he ought to do? I mean, are you
13 talking about can he re-read his report in advance
14 of coming back, is that the sort of thing?

15 MR. LEMMOND: Yes, Your Honour, also
16 look at documents that he has referred to.

17 THE COURT: In his report?

18 MR. LEMMOND: Yes, and there is also
19 another list of documents, and this has been the
20 subject matter of discussion with Ms. Pelletier,
21 documents that he is familiar with but have not
22 been cited in his report but could relate to
23 possible questions on cross-examination.

24 THE COURT: All right. Ms. Pelletier?

25 MS. PELLETIER: That is not typically

16:35:08 1 what your direction has been, Your Honour, and --

16:35:11 2 THE COURT: We don't usually have
16:35:13 3 people with a long gap before they start their
16:35:15 4 cross, either.

16:35:16 5 MS. PELLETIER: This is 98 documents
16:35:18 6 that we are talking about. I do feel that it gives
16:35:21 7 Mr. Graves an advantage that was not available to
16:35:23 8 other witnesses. So I would not be in support of
16:35:25 9 that.

16:35:26 10 THE COURT: Any of it? Are you saying
16:35:29 11 he can't read his own report when he comes back?

16:35:32 12 MS. PELLETIER: Sorry, what is in his
16:35:36 13 report and the documents in his report I think are
16:35:39 14 fair game, but the additional documents not cited
16:35:42 15 or referred to in his report, I would not be in
16:35:43 16 support of allowing him to review those in the next
16:35:46 17 two weeks.

16:35:48 18 THE COURT: All right. Response,
16:35:49 19 Mr. Lemmond?

16:35:50 20 MR. LEMMOND: I think it is the obvious
16:35:51 21 one, Your Honour. It is some time before he
16:35:53 22 returns to the stand, and it is a fair bit of work
16:35:55 23 as a matter of just the long challenge. We are
16:36:00 24 anticipating when he is in the stand for his
16:36:04 25 cross-examination he'll have a list of those

16:36:05 1 documents that has been shared among counsel. Just
16:36:08 2 for him to be able to maintain some familiarity
16:36:10 3 with those materials before he returns to
16:36:11 4 cross-examination, I think it is, you know, the
16:36:13 5 practical and obvious thing to do.

16:36:18 6 THE COURT: Well, we have got a
16:36:20 7 non-obvious situation, and there has been -- you
16:36:22 8 know, at the request of Plaintiffs' counsel, there
16:36:25 9 is a gap, and the reason for that is that there
16:36:28 10 were late-produced documents, as I understand it.
16:36:30 11 Are these the late-produced documents?

16:36:32 12 MR. LEMMOND: Yes, Your Honour.

16:36:33 13 THE COURT: And has he had any
16:36:36 14 opportunity to go over them?

16:36:38 15 MR. LEMMOND: Yes, Your Honour, he
16:36:39 16 selected them.

16:36:42 17 THE COURT: I mean, Ms. Pelletier, the
16:36:53 18 difficulty I'm having is this is an expert witness.
16:36:55 19 This isn't, you know, a gentleman who says the
16:37:00 20 light was green, and the other witness said it was
16:37:02 21 red, and -- I mean, I'm struggling a little bit
16:37:06 22 with why there should be a gotcha-style advantage
16:37:13 23 with an expert witness.

16:37:14 24 I completely understand the reason why
16:37:16 25 you asked for and indeed I permitted this gap, but

1 I don't think it normally works, frankly, Counsel,
2 to try and put something in front of an expert that
3 they are not familiar with, hoping that you might
4 get some sort of admission. I am not suggesting
5 you would do anything improper, but I'm struggling
6 a little bit with why, as an expert, he shouldn't
7 be able to look at the material that is the very
8 reason why the adjournment was granted in the first
9 place.

10 MS. PELLETIER: Your Honour, I have
11 just been reminded that with one of our witnesses,
12 Professor Brownlie, there was also a two-week gap,
13 and I believe in that case he was instructed to
14 only review his report -- or he was permitted to
15 only review his report and not the source material.

16 THE COURT: I don't remember there was
17 a request, though, that he be permitted to do so.

18 MS. PELLETIER: Well, I think in order
19 to be consistent, Your Honour, I have said okay to
20 the documents that are cited in his report, but the
21 voluminous material that has not been is not
22 something that I believe has been -- other
23 witnesses have not been permitted to go beyond
24 their report, and I don't see any reason to make an
25 exception here.

1 THE COURT: Well, I don't recall
2 specifically the circumstances, but I don't
3 remember these circumstances. In other words, I
4 don't remember that there was a two-week gap in
5 order that Plaintiffs' counsel could address -- or
6 the opposite counsel could address newly-produced
7 documents and that was the otherwise planned,
8 ordinary course examination followed by
9 cross-examination.

10 MS. PELLETIER: I understand that the
11 circumstances for Professor Brownlie was that there
12 was a new opinion that came out in-chief, and that
13 is why more time was given so --

14 THE COURT: Was it a new opinion or --
15 I don't think it was, now that I think about it.
16 It wasn't a big stack of material. It was an
17 actual opinion that was solicited that hadn't
18 previously been disclosed.

19 MS. PELLETIER: That sounds like that
20 is correct, Your Honour.

21 THE COURT: I just don't remember that
22 in relation to Dr. Brownlie that there was a
23 request that he be -- and if there was, please
24 correct me, that there was a request that he be
25 able to review additional documentation.

1 MS. PELLETIER: I believe there was a
2 request that he be able to review his report, and
3 your qualification was that yes to report, but no
4 to source documents.

5 THE COURT: Well, what I am going to
6 do, because I would like to look it up, is for now,
7 Mr. Lemmond, you can indicate to your witness
8 before he leaves that he can review his report and
9 those documents that are expressly cited in his
10 report, and I will consider this and refresh my
11 memory about what happened with Dr. Brownlie. And
12 at some point over the course of the week I'll tell
13 you one way or the other about the other material.

14 And, you know, I ask Plaintiffs'
15 counsel to consider my comments about the fact that
16 he is an expert witness, in case on consideration
17 you may take a different view.

18 If Plaintiffs' counsel could, please,
19 email my assistant with the pinpoint citations for
20 what you are relying on. All right?

21 MS. PELLETIER: Thank you, Your Honour.

22 THE COURT: Okay. Does this mean we
23 don't have another witness tomorrow, Mr. Lemmond?

24 MR. LEMMOND: It does, Your Honour.

25 THE COURT: I am very unhappy to hear

16:41:01 1 that.

16:41:02 2 MR. LEMMOND: My apologies, Your
16:41:03 3 Honour.

16:41:03 4 THE COURT: So when is -- the
16:41:09 5 gentleman's name is --

16:41:11 6 MR. LEMMOND: It is Mr. Gold, Your
16:41:12 7 Honour.

16:41:13 8 THE COURT: Is he coming on Wednesday?
16:41:15 9 Can he be coming on Wednesday instead of Thursday?

16:41:21 10 MR. LEMMOND: We believe he is coming
16:41:22 11 on Thursday, Your Honour.

16:41:23 12 THE COURT: He is presently scheduled
16:41:24 13 to come on Thursday?

16:41:25 14 MR. LEMMOND: Yes, Your Honour. Sorry,
16:41:26 15 Your Honour.

16:41:30 16 Ms. Le Pan was just informing that our
16:41:36 17 understanding is that it was at the request of the
16:41:38 18 Plaintiffs that he not come on Wednesday.

16:41:40 19 THE COURT: Oh, I see. Okay. Well, I
16:41:42 20 don't want to interfere with that. Whoever is
16:41:44 21 cross-examining him --

16:41:47 22 MS. GUIRGUIS: That is me, Your Honour.

16:41:48 23 THE COURT: That's you? You can't come
16:41:49 24 on Wednesday? You know, it is all right,
16:41:55 25 Ms. Gurguis. My frustration, which counsel are

1 very aware of, about these gaps in the schedule
2 does not change the fact that there isn't anyone
3 else, so you might as well continue with your plan,
4 counsel.

5 MS. GUIRGUIS: Thank you, Your Honour.

6 THE COURT: Because if we move him to
7 Wednesday, then we would just have no one for
8 Thursday.

9 Well, we do have a TMC this week at
10 which counsel will be expected to deal with various
11 scheduling issues, and this will not necessarily be
12 a plus in that context.

13 Is there anything else anyone wishes to
14 raise until we adjourn till Thursday?

15 Now, please do think about this issue
16 that I have raised, in case a having consulted with
17 everyone and thought about it and slept on it
18 solution. I'm talking now about the redaction
19 because it seems to me that there is lots of
20 straightforward ways to do that, but if you want to
21 leave it to a question and hope for lack of speech,
22 then that is the ordinary process. All right.

23
24 -- Adjourned at 4:45 p.m.
25

REPORTER'S CERTIFICATE


I, DEANA SANTEDICOLA, RPR, CRR,
CSR, Certified Shorthand Reporter, certify:

That the foregoing proceedings were
taken before me at the time and place therein set
forth, at which time the witness was put under oath
by me;

That the testimony of the witness
and all objections made at the time of the
examination were recorded stenographically by me
and were thereafter transcribed;

That the foregoing is a true and
correct transcript of my shorthand notes so taken.

Dated this 10th day of February, 2020.



NEESONS, A VERITEXT COMPANY

PER: DEANA SANTEDICOLA, RPR, CRR, CSR

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