

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

DAY 84 VOL 84
February 13, 2020



77 King Street West, Suite 2020
Toronto, ON M5K 1A2
1.888.525.6666 | 416.413.7755

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

--- This is VOLUME 84/DAY 84 of the trial
proceedings in the above-noted matter, being held at the Superior
Court of Justice, Courtroom 5-1, 330 University
Avenue, Toronto, Ontario, on the 13th day of
February, 2020.

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

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

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

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

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

REPORTED BY: Deana Santedicola, RPR, CSR, CRR

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2
3
4
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8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

PAGES

WITNESS: DR. GWEN REIMER

Examination In-Chief by Mr. Feliciant

(Cont'd)..... 10694 - 10715

Examination In-Chief by Ms. Lapan.... 10715 - 10751

Cross-Examination by Mr. Beggs..... 19751 - 10764

Supplementary Ruling by the Court in relation
to changes to the Severance Order in the
Ruling of January 16, 2020..... 10767 - 10772

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

INDEX OF EXHIBITS

NO.	DESCRIPTION	PAGE/LINE NO.
	[None marked]	

09:52:38 1 -- Upon commencing at 10:04 a.m.

09:04:17 2

10:04:17 3 THE COURT: Please go ahead.

10:04:19 4 EXAMINATION IN-CHIEF BY MR. FELICIANANT

10:04:19 5 (CONT'D):

10:04:19 6 Q. Good morning, Dr. Reimer.

10:04:20 7 A. Good morning.

10:04:21 8 Q. Could we start, please, by pulling

10:04:23 9 up the transcript from yesterday, being February

10:04:26 10 the 12th, 2020, and go to page 157, line 14. If

10:04:36 11 you would be so kind as to just read to yourself

10:04:40 12 that passage from yesterday and indicate if that

10:04:46 13 was, in fact, what you intended to say or if you

10:04:49 14 have any clarification, bearing in mind too this is

10:04:53 15 a rough draft transcript. It may be subject to

10:04:55 16 change, but this is what we have to work with at

10:04:58 17 the moment.

10:04:59 18 A. Yes, in the --

10:05:02 19 THE COURT: Hold on for a moment. Yes,

10:05:05 20 Ms. Guirguis?

10:05:07 21 MS. GUIRGUIS: Your Honour, this

10:05:11 22 question and this response yesterday, the response

10:05:14 23 that was given yesterday, I didn't stand up

10:05:17 24 yesterday when the witness was responding, but it

10:05:19 25 is based on a fair bit of speculation rather than

1 being grounded in any historical records, as she
2 said herself a few lines above.

3 THE COURT: Well, Ms. Guirguis, this
4 expert witness is entitled to draw inferences and
5 the strength or weaknesses of those can be tested,
6 if need be, by you, but I don't think it is
7 sufficiently remote that it should not be
8 permitted. And I certainly would want to know if
9 there was any correction or clarification required.

10 MS. GUIRGUIS: Okay. Thank you, Your
11 Honour.

12 BY MR. FELICIAN:

13 Q. Thank you, Your Honour. Please
14 proceed to look at the passage and let me know
15 whether or not it actually conveys what you
16 intended to convey.

17 A. In the first sentence, I realize
18 it is not grammatically correct, now that I read
19 it, so:

20 "But for me, the plausible
21 explanation is that some kind of
22 notification had been given and
23 [...]"

24 And that it may not have survived in
25 the archival record.

1 More importantly, it appears that in my
2 final sentence I used a double negative, and I
3 would like to correct that.

4 So considering the importance of his
5 task and the trip itself, it would be surprising to
6 me that he would have arrived unannounced, and
7 yesterday I said that he would not have arrived
8 unannounced, and that is a double negative.

9 So my surprise or speculation would be
10 that he would have given some notice and that he
11 would not have -- that he would -- oh, I'm so
12 sorry.

13 Scratch that.

14 It would be surprising to me that,
15 considering the importance of his task and the trip
16 itself, that he would have arrived unannounced
17 hoping somebody would be there.

18 Q. All right. Thank you. Now, if we
19 can go to now in the same document, this is the
20 transcript of February 12, 2020, at page 160,
21 starting at line 11 through to line 17, there is a
22 question and answer, and I had asked you a probably
23 badly-worded question:

24 "Do you have any information as
25 to how long SON deliberated on

Anderson's proposal?"

And you answered that. I understand you may have a clarification to that answer. You answered:

"I believe Anderson's report states that they took nearly all day and all night to deliberate on his proposal. And that is in Anderson's -- he states this in his speech on August 2, 1854."

So what is your clarification?

A. My clarification is that Anderson's speech on August 2nd, 1854, states that as a result of deliberations and discussions almost all day and almost all night, that period of time I believe pertains to the entire Council or the entire period of discussion of Anderson's proposal.

In his report, which is I believe August 16, 1854; is that correct?

Q. I could bring that up. That is Exhibit 2175. So if we could bring up Exhibit 2175, attached to Oliphant's Treaty report is an enclosure, which is Anderson's report of August 11, 1854. And if we can go to page 12, which is PDF page 11, you will see the highlighted blue portion.

10:09:36 1 A. To correct you, the report is
10:09:37 2 dated August 16, 1854.

10:09:41 3 Q. Sorry, August 16.

10:09:43 4 A. And in his report, he states that
10:09:47 5 as the discussions were proceeding, and I quote:

10:09:53 6 "At length, however, they began
10:09:54 7 to waver, and requested leave to
10:09:57 8 consult amongst themselves for an
10:09:58 9 hour, and on their return to the
10:09:59 10 council they agreed to cede all
10:10:02 11 except those parts marked on the map
10:10:04 12 in pencil".

10:10:08 13 So I just want to clarify that a period
10:10:10 14 for one hour was used for private deliberation and
10:10:14 15 that that not be confused with the period of time
10:10:17 16 almost all day yesterday and most of the night. So
10:10:20 17 this one hour will have been part of that longer
10:10:23 18 period of time. That is my understanding.

10:10:30 19 Q. Thank you. Now, speaking of the
10:10:34 20 October 1854 negotiations, what practical choices
10:10:43 21 were available to Oliphant in terms of the location
10:10:47 22 of the Council?

10:10:49 23 A. He could have held the Council
10:10:52 24 either at Owen Sound, Nawash, Owen Sound, or at
10:10:58 25 Saugeen. Those were the two main Saugeen Ojibway

1 Nation settlements.

2 Q. And where did he ultimately --
3 which location did he ultimately select?

4 A. His report states that he
5 deliberately chose to hold the Council at Saugeen.
6 His reason for doing so was Anderson's meeting had
7 been held at Owen Sound. Oliphant had been
8 informed that sort of the cultural centre of
9 Saugeen Ojibway Nation was considered to be the
10 Saugeen Village, and so he decided that this might
11 be a better place to hold the Council, as well
12 because more of the Saugeen First Nation members
13 would be able to attend the Council, which had
14 supposedly not been the case when it was held at
15 Owen Sound in August.

16 Q. When Oliphant, you wrote in your
17 report, arrived at Saugeen, he met with one of the
18 Chiefs, Madwayosh; is that correct?

19 A. Yes.

20 Q. And why did Oliphant meet
21 privately with Madwayosh in advance of the Treaty
22 Council?

23 A. Oliphant's report states that he
24 had a private interview with Chief Madwayosh in
25 order to prepare him for the terms of proposal --

10:12:37 1 the terms of surrender that Oliphant intended to
10:12:41 2 propose at the Treaty Council. He was aware,
10:12:46 3 likely through Anderson, a communication with
10:12:50 4 Anderson, that Madwayosh was probably one of the
10:12:54 5 strongest opponents to the surrender, and so he
10:13:01 6 chose to meet with him and be further informed
10:13:06 7 about his dissent.

10:13:09 8 The meeting ended with Madwayosh
10:13:13 9 expressing strong dissent to the proposal at that
10:13:16 10 point in time.

10:13:16 11 Q. And you also write in your report
10:13:22 12 that the public council was called shortly after
10:13:30 13 the Saugeen -- the Nawash Chiefs arrived. Why was
10:13:34 14 the public council called shortly after those
10:13:39 15 Chiefs arrived?

10:13:41 16 A. Again, Oliphant is explicit in his
10:13:44 17 report that he did not want to allow what in modern
10:13:53 18 day terms might be a united front of opposition
10:13:56 19 among the Chiefs and consultation with other
10:14:02 20 European advisors, such as missionaries, before he
10:14:07 21 had -- I understand he wanted to be able to have an
10:14:09 22 opportunity to present his proposal first and then
10:14:12 23 allow deliberations on the actual proposed terms.

10:14:22 24 Q. And we understand from your report
10:14:24 25 and the documents that there was, following the

1 public Treaty Council, an hour of private
2 deliberations. Can you assist us with how it came
3 to be that there was an hour of private
4 deliberations?

5 A. There is two accounts that I can
6 rely on. The first is Oliphant's report. His
7 report says -- it would actually be nice to see his
8 report and use his actual words.

9 Q. If we could pull up Exhibit 2175,
10 which is already on the screen, and if we could go
11 up to Oliphant's report. So let's start at the
12 beginning of the report. And now we have on the
13 screen -- I don't know if you can look more
14 efficiently through your own report, but we also
15 have it on the screen, and you can direct --

16 A. Right. I am just trying to
17 find -- okay. You can go down a little bit. I
18 should be able to find it. Down further.

19 Down further.

20 Okay. Down further. Continue.
21 Continue. Continue down, please. There. The
22 bottom of the paragraph, the full paragraph that is
23 on the screen:

24 "As soon as the discussion was
25 fairly diverted from the question of

10:16:44 1 the propriety of the surrender to a
10:16:47 2 consideration of the limits of the
10:16:49 3 reserves, I retired for an hour, in
10:16:52 4 order to allow time for a private
10:16:54 5 debate."

10:16:56 6 His memoirs later on indicate that he
10:17:05 7 left the Council and was called back after an hour.
10:17:09 8 Neither of these two documents indicate that
10:17:14 9 Oliphant insisted on only an hour, whether the
10:17:20 10 Chiefs insisted on an hour, whether the hour was
10:17:24 11 simply as long as it took before the Chiefs came
10:17:27 12 back, but there was that -- the two accounts are
10:17:33 13 consistent in terms of the one hour of private
10:17:36 14 debate.

10:17:37 15 Q. Now, if we could pull up the
10:17:44 16 transcript, and this is a final transcript, of
10:17:47 17 October 23rd, 2019, and this is the evidence of
10:17:54 18 Professor Driben, and if we can go to page 7000. I
10:18:02 19 am not used to saying that. And go to line 24,
10:18:08 20 please. Professor Driben says:

10:18:14 21 "So he stopped the process of
10:18:16 22 the Chiefs and -- of the Chiefs and
10:18:19 23 principal men talking to themselves
10:18:22 24 during the process itself. There
10:18:24 25 was not enough time to do anything

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like that."

And if you could read the balance and just let me know.

A. "There was no celebration."

Q. Sorry, you can read it to yourself.

A. Oh, I'm sorry.

Q. No, it was my fault.

A. [Witness reviews document.]

All right.

Q. Do you have any comments on that passage given what you have just said about the deliberations?

A. Yes, two things struck me about this passage.

First, at the top, that Oliphant stopped the deliberation, and then later on, the second paragraph up in the blue box here, Dr. Driben states:

"It's never rushed like this. There must be time for deliberation."

And I think that is a misrepresentation of the historical record that indicates that there was time for deliberation and time for private

10:19:30 1 debate as well.

10:19:36 2 Q. All right. Thank you. Can we --

10:19:39 3 A. Could I just make one more
10:19:40 4 comment, please?

10:19:41 5 Q. Yes.

10:19:42 6 A. The other thing that strikes me
10:19:43 7 about this passage is that there seems to be a
10:19:48 8 collapsing of what happened before -- during the
10:19:53 9 afternoon, before the Treaty Council was called,
10:19:55 10 and what happened at the Treaty Council itself.
10:19:59 11 There is a blurring the line between the two.

10:20:02 12 So when -- the way I read this is that
10:20:06 13 Dr. Driben is taking Oliphant's statement that he
10:20:12 14 wanted to call the Treaty Council before all the
10:20:16 15 Chiefs had a time to consult among themselves,
10:20:19 16 before the actual formal Treaty Council was called.
10:20:25 17 Dr. Driben is using that as the basis for saying
10:20:27 18 that there was no deliberation or that deliberation
10:20:30 19 was stopped.

10:20:30 20 And what happened before the Council
10:20:34 21 was actually called does not reflect what happened
10:20:38 22 during the formal Treaty Council.

10:20:40 23 And so there is a blurring here of
10:20:43 24 those two events as a single event.

10:20:50 25 Q. Thank you. Now, could we go to

10:20:55 1 page 14 of Volume 3 of your report, which is
10:21:02 2 Exhibit 4703. Now, this is the chart you have
10:21:18 3 testified about yesterday "Principles of
10:21:21 4 Treaty-Making". Is there anything in this chart,
10:21:29 5 any of the documents referenced in it or the custom
10:21:35 6 that has developed within the Indian Department
10:21:37 7 that would have provided specific guidance to
10:21:42 8 Oliphant with regard to where the Council should be
10:21:46 9 held?

10:21:47 10 A. No.

10:21:47 11 Q. Is there anything in this chart or
10:21:53 12 within the documents it references or within the
10:21:56 13 custom of the Indian Department that would have
10:21:58 14 provided any specific guidance to Mr. Oliphant with
10:22:06 15 regard to meeting with or not meeting with Chief
10:22:11 16 Madwayosh?

10:22:12 17 A. No, and my reading of other treaty
10:22:18 18 records indicates that was not an uncommon -- that
10:22:23 19 it was a common practice to meet with Chiefs. It
10:22:27 20 was not an unusual thing to happen.

10:22:29 21 Q. Is there anything in your chart or
10:22:34 22 contained within the documents it references or the
10:22:38 23 custom of the Indian Department that would have
10:22:42 24 provided direction or guidance to Mr. Oliphant with
10:22:48 25 regard to the specific timing of calling the public

1 council?

2 A. No.

3 Q. Is there anything in this chart or
4 contained within the documents it references or
5 within the custom of the Indian Department at the
6 time that would have provided guidance to
7 Mr. Oliphant in terms of how long either a council
8 had to take or private deliberations had to take?

9 A. No.

10 Q. Could we please bring up Exhibit
11 4706. This is your -- go to just the front part of
12 it. This is your changes to Dr. Gwen Reimer
13 opinion Volume 3. So if we could scroll down to
14 what I would say is the first change, where the
15 heading is "Expert Report Volume 3, page 185,
16 bottom paragraph", you deleted certain words, and
17 you have deleted the words:

18 "[...] as conduct unbecoming
19 of a representative of the Crown
20 instructed to openly negotiate a
21 surrender of lands by First Nations.
22 At the same time, however, from the
23 [...]"

24 And you deleted those words and added
25 new language.

1 Can you please explain your rationale
2 for making that change?

3 A. Yes, as I -- in the introduction
4 to the revisions that I have made, I state that,
5 after reflecting on my own work but certainly as a
6 result of reviewing the trial transcripts of
7 Dr. Driben and Dr. Brownlie, and it occurred to me
8 that this -- as I said earlier, this collapsing of
9 the two events, the pre -- what happened prior to
10 the Council and then the Council itself, that there
11 was a blurring of the line between those two and
12 that in fact my own wording of my opinions and
13 conclusions could be misconstrued to be exactly the
14 same thing.

15 So when I looked at what I had written,
16 and I looked at conduct unbecoming of a
17 representative of the Crown instructed to openly
18 negotiate a surrender, I thought but there was open
19 negotiation of the surrender during the Treaty
20 Council. So then how is this conduct unbecoming?
21 And decided that I needed to clarify that.

22 My opinion now is that that was an
23 inappropriate choice of words for what happened in
24 the hours prior to the Treaty Council.

25 Q. Further down on the page, you

1 added some language, "participate in the treaty
2 council or to". What was your rationale for adding
3 that language?

4 A. Again, to try to explain some
5 separation or distinction between the hours before
6 the Council and the Council itself. If, as has
7 been suggested -- and I realize now that on its
8 surface, when you are reading through Oliphant's
9 report, it can literally look very rushed, and I
10 think in my report I call it -- you know, it can
11 appear like a marathon meeting.

12 But Oliphant calling the Council as
13 soon as possible once everyone arrived, a Council
14 and a Council of negotiations require all the
15 parties' consent to participate in that process,
16 and there is no evidence that the First Nations,
17 once they arrived, objected to starting the Council
18 at 7 o'clock in the evening.

19 And so I added that, again, to provide
20 some distinction between the hours before and the
21 lack of refusal or any kind of complaint that they
22 wanted to postpone the Treaty Council to the next
23 day, that they didn't want to participate in a
24 Council that night. And so, again, there was no
25 reluctance that I have seen on record to go to the

1 Treaty Council at 7 o'clock in the evening or then
2 afterwards during the Council to negotiate with
3 Oliphant.

4 Q. Can we please scroll down then.
5 This is the next portion of the report that you
6 have revised. This is page 203, the second bullet.
7 You added the language "in part". What led to that
8 change?

9 A. Again, when I re-read my original
10 language, I thought, well, you know, I say --
11 originally I said I agree with both, and then I
12 follow that with a series of three qualifications.

13 So to be consistent, I have added "in
14 part" with Dr. Driben and Dr. Brownlie, and then I
15 added "who suggest that the tone set by Oliphant
16 appears to have been rushed".

17 Q. And why did you add the words "who
18 suggest"?

19 A. Because those are not actual words
20 that Dr. Driben and Dr. Brownlie use. Those are --
21 it is my interpretation of what they are suggesting
22 in their report.

23 Q. Now, you have changed
24 "manipulative", you have taken that out and
25 replaced it with "managed"; why did you do that?

10:29:19 1 A. Because manipulative can be
10:29:23 2 interpreted to have negative connotations, and
10:29:29 3 after reconsidering the historical record, I don't
10:29:32 4 think it is an appropriate choice of words. I
10:29:36 5 think that Oliphant is very explicit about his
10:29:40 6 attempts to manage the process, to gain a measure
10:29:43 7 of control. He was a skilled negotiator. He was
10:29:48 8 calculated in his actions, and this is quite
10:29:53 9 explicit in his report.

10:29:55 10 So after reconsidering the evidence and
10:30:00 11 the way I have presented the evidence in my report,
10:30:04 12 I felt that more neutral adjective or more neutral
10:30:10 13 language was appropriate.

10:30:15 14 Q. Now, the next change you make is
10:30:17 15 with respect to page 204, and you will see that you
10:30:20 16 have taken out the word "questionable" and replaced
10:30:23 17 it with "calculated negotiation". Could you
10:30:27 18 explain that change, please.

10:30:28 19 A. Yes. When I wrote this
10:30:32 20 originally, I think I was using the word
10:30:34 21 "questionable" as in I questioned why he would rush
10:30:37 22 ahead to call the Council at 7 o'clock before
10:30:41 23 anyone could meet.

10:30:41 24 But as I have already explained, I now
10:30:48 25 think that by looking very carefully at what he has

1 written and what happened during that day, that he
2 was calculated in what he was doing, that he wanted
3 to have an opportunity to present the terms of his
4 proposal before the deliberations and discussions
5 actually occurred.

6 So I don't -- and again, the word
7 "questionable" can have a negative connotation that
8 I don't think is appropriate to what the evidence
9 tells us.

10 Q. And similarly, I am going to ask
11 you the same question. You removed the language
12 "not beyond reproach for a representative of the
13 Crown", and then added additional language. So
14 could you please explain the need for that change.

15 A. Yes. Again, this is a phrase
16 where I felt I was blurring the line between what
17 happened prior to the Council and what we know is
18 documented by the Council itself.

19 Oliphant did negotiate in open council,
20 so when I said "beyond approach", "not beyond
21 reproach for a representative of the Crown expected
22 to deal openly with First Nations", I realized that
23 that wording in fact implied that there was no open
24 negotiation and that is not the case from the
25 documentation that we have.

10:32:11 1 Q. And finally, at the end, you
10:32:14 2 indicate -- if we can scroll down a bit more,
10:32:16 3 please, you have added the language "participate in
10:32:19 4 the treaty council or to". Why did you add that
10:32:24 5 language?

10:32:24 6 A. It is just a repeat of what I said
10:32:27 7 in my summary statement above, that although
10:32:31 8 Oliphant wanted to quickly commence the Treaty
10:32:35 9 Council, it was up to the First Nations to agree to
10:32:41 10 participate in the Treaty Council.

10:32:42 11 Q. Now, could you explain to the
10:32:55 12 Court -- and perhaps you have done this already,
10:32:57 13 but I want to give you another opportunity if you
10:33:00 14 want to add anything -- the timing of these
10:33:01 15 changes. Why are you making these changes now?

10:33:05 16 A. I was given the opportunity to
10:33:12 17 review the transcripts of Dr. Brownlie in late
10:33:14 18 November and of Dr. Driben in December. I did so.
10:33:22 19 It was in the review of those transcripts that I
10:33:28 20 noted the statements that had been made during
10:33:32 21 testimony, and it was at that point that it started
10:33:34 22 to occur to me that there was this blurring of the
10:33:38 23 line between what happened before the Council and
10:33:39 24 after the Council.

10:33:40 25 I set that aside. I had other tasks

10:33:47 1 that I was fully occupied with. Then at the end of
10:33:53 2 January, I finally was able to pay close attention
10:33:58 3 to what I had written in my own report, and it was
10:34:01 4 in the process of reviewing Volume 3 and re-reading
10:34:06 5 the language I had used on pages 185 and 204 that I
10:34:13 6 thought, well, wait a minute, I need to take a
10:34:16 7 closer look at this now.

10:34:17 8 And it was a result of that that I
10:34:21 9 think it is important that I clarify my further
10:34:26 10 thinking on the matter and revise my wording on the
10:34:30 11 matter.

10:34:31 12 Q. Did anyone suggest to you that you
10:34:35 13 should change your opinion?

10:34:37 14 A. No.

10:34:37 15 Q. Okay. I am going to move on now
10:34:44 16 to my last couple of questions. Switching gears
10:34:51 17 back to 1854 in October, you discuss in your
10:35:03 18 squatting report at pages 4 and 6 and in your
10:35:07 19 Volume 3 at pages 186 to 187 the notices that were
10:35:13 20 given to the sheriff following the conclusion of
10:35:17 21 the Treaty, the no trespassing notices.

10:35:23 22 My question is why were the no
10:35:27 23 trespassing notices given to the sheriff when they
10:35:30 24 were given to the sheriff? Can you explaining the
10:35:35 25 timing?

10:35:35 1 A. My understanding is that it had to
10:35:39 2 do with the events and the experiences of Oliphant
10:35:46 3 on his trip to Owen Sound and Nawash, his meeting
10:35:52 4 up with potential settlers who were expressing
10:36:00 5 extreme interest in finding new lands in the area,
10:36:04 6 who were threatening to move on to the lands, who
10:36:11 7 were pressing for the success of a surrender of the
10:36:13 8 Saugeen lands, as well as events such as the big
10:36:19 9 land sale in Southampton just a few weeks prior to
10:36:22 10 that. Oliphant will have been aware of what was
10:36:26 11 happening there because the Crown Land Agent McNabb
10:36:31 12 was a witness to the Treaty.

10:36:32 13 These experiences and these events will
10:36:37 14 have impressed upon Oliphant the intensified threat
10:36:42 15 of the potential of squatters coming on to the
10:36:46 16 lands once they discovered that in fact a surrender
10:36:49 17 had been successful.

10:36:51 18 And so my reading of the timing of
10:36:55 19 these notices is that Oliphant felt it necessary
10:37:02 20 and expedient to make public just because the
10:37:08 21 surrender has been successful does not mean that
10:37:12 22 the squatting and trespass laws or rules do not
10:37:18 23 apply.

10:37:20 24 And so I think that explains the
10:37:22 25 immediacy on October the 14th.

1 Q. Your Honour, those are my
2 questions on Volume 3 of Dr. Reimer's report, and I
3 understand Ms. Lapan will now be proceeding with
4 Volume 4. Thank you.

5 Thank you, Dr. Reimer.

6 A. Thank you.

7 EXAMINATION IN-CHIEF BY MS. LEPAN:

8 Q. Good morning. Just as a matter of
9 housekeeping, for the purposes of this examination,
10 I will need Volume 4 in front of you and possibly
11 also Volume 3.

12 Good morning, Dr. Reimer.

13 A. Good morning.

14 Q. I am going to start with asking
15 you some questions about the introductory chapter,
16 Chapter 1 of Volume 4 of your report, which is
17 Exhibit 4704. I would like to show you page III of
18 that report, which is page 5 in the PDF. And you
19 state in that section, the second paragraph down:

20 "The principal objective of
21 this Volume 4 of my report is to
22 assess how the conduct of the Crown
23 and the First Nations in the
24 post-treaty period, reflected their
25 understandings of the provisions of

1 Surrender No. 72."

2 Can you explain how you used the
3 post-Treaty documentation to achieve this
4 objective.

5 A. Yes, I looked for any evidence of
6 understandings that often -- often it is the
7 misunderstandings that tell us about what was
8 understood originally. So I looked for any kinds
9 of complaints or expressions of understanding and
10 misunderstanding about the provisions and terms of
11 Surrender 72, and this then allowed me to assess
12 how things may have been understood originally at
13 the Treaty Council.

14 Q. Turning to page 3 of your report,
15 which is page 10 in the PDF, you list six main
16 categories of complaints which you focussed on in
17 Volume 4. Why do you focus on these six types of
18 complaints?

19 A. These are the types of complaints
20 that are evident from the historical records, so it
21 was an inductive method whereby I looked through
22 all of the post-Treaty correspondence, petitions,
23 Band Council resolutions, et cetera,
24 correspondence, and was able to make a
25 determination what are the main kinds of issues

10:40:48 1 that are being discussed and how might this reflect
10:40:51 2 on how the terms of Treaty 72 had been understood.

10:40:56 3 Q. And can you explain at a high
10:40:59 4 level how the Saugeen Ojibway Nation would have
10:41:02 5 brought forward complaints between 1850 to the
10:41:06 6 early 1900s.

10:41:08 7 A. How they would have communicated
10:41:10 8 their complaints to the Indian Department?

10:41:12 9 Q. Yes.

10:41:12 10 A. Yes, there is probably three,
10:41:16 11 maybe four main ways in which they would have
10:41:20 12 communicated.

10:41:22 13 The first one would have been
10:41:25 14 petitions, so the Band Council or Chiefs or Joint
10:41:32 15 Council of Saugeen-Nawash would meet, may have had
10:41:36 16 agreed on some specific complaints that they had
10:41:40 17 written this up as a petition to the Indian
10:41:45 18 Department, and then requested that the Indian
10:41:50 19 Agent or Crown Land Agent at the time pass that
10:41:54 20 along to headquarters.

10:41:55 21 A second way was for the Council to
10:41:59 22 actually pass resolutions and then, again, to ask
10:42:02 23 the agent to pass on the Band Council or General
10:42:11 24 Council, Joint Council resolution to headquarters
10:42:14 25 or to The Queen or to the Governor General.

1 A third method will have been the
2 Council deciding to actually send personal
3 delegations or deputations to Toronto or to
4 wherever the seat of government was at the time and
5 to speak in person and to present their complaints
6 or concerns in person. Again, it was a mode of
7 communication that required the intercession of the
8 Indian Agent to notify the headquarters this
9 deputation and what is to come, do they have
10 permission to come at this time and will you meet
11 with them.

12 Q. And from your review of the
13 post-Treaty documentation, is there any evidence
14 that the involvement of the Indian Agent stopped
15 the Saugeen Ojibway Nation from bringing forward
16 complaints?

17 A. I did not find any documentation
18 that complaints about the fact that communications
19 from the First Nations were not getting through to
20 whoever it is they were sending the petition or a
21 resolution, so no.

22 Q. I am going to move on and ask you
23 some questions about Chapter 2 now. In the
24 immediate one to two years following Treaty 72,
25 were there any complaints expressed to the Crown by

10:43:48 1 the Saugeen Ojibway Nation about reserves created
10:43:52 2 under Treaty 72?

10:43:53 3 A. Yes. Once surveys began in the
10:43:58 4 spring of 1855, one of the earliest surveys that
10:44:03 5 was being conducted was at and around the Saugeen
10:44:12 6 Reserve, and one of the first boundaries being
10:44:13 7 surveyed at the time was what is called the western
10:44:16 8 boundary, so that was the boundary from Saugeen
10:44:20 9 River to the coast of Lake Huron.

10:44:23 10 And immediately the First Nations
10:44:26 11 observed that the surveyor was not chaining a line
10:44:34 12 according to their understanding. He was chaining
10:44:36 13 a line due north from the Saugeen River, and they
10:44:40 14 had understood that the western boundary should
10:44:42 15 have -- was Copway Road, which is really more of a
10:44:48 16 northwesterly direction.

10:44:49 17 They stopped the survey at that point
10:44:52 18 and sent a complaint and a description of their
10:45:00 19 understanding at the time of Treaty to
10:45:04 20 headquarters. Do you want me to keep going?

10:45:05 21 Q. Perhaps I'll ask you to just --

10:45:08 22 A. That was not a high level answer.

10:45:10 23 Q. That is okay. Perhaps I'll ask
10:45:11 24 you to give me just a high level explanation of
10:45:14 25 what the other -- or if there were any other

10:45:17 1 complaints about reserve boundaries.

10:45:18 2 A. There was a complaint also in 1855
10:45:23 3 about the south boundary where it bordered on the
10:45:30 4 extension of the Half Mile Strip, and the Saugeen
10:45:35 5 Band had corn fields that overlapped that boundary,
10:45:38 6 so that was one complaint.

10:45:39 7 Later on, there was a third complaint
10:45:44 8 about the east boundary -- well, the south boundary
10:45:49 9 extending the full six miles, so that would have
10:45:51 10 changed the west boundary where the west boundary
10:45:58 11 would have been begun.

10:45:59 12 At Nawash, there was a complaint that
10:46:01 13 Rankin had made an error in the boundary and having
10:46:05 14 that error meant that one of the graveyards was
10:46:08 15 being cut off from the reserve.

10:46:11 16 I think that is all.

10:46:14 17 Q. Were there any complaints about
10:46:15 18 the Colpoy's Bay, Cape Croker, or Chief's Point
10:46:20 19 Reserve?

10:46:20 20 A. No.

10:46:20 21 Q. And what about later in the 19th
10:46:24 22 century, were there any complaints expressed to the
10:46:27 23 Crown by the Saugeen Ojibway Nation about reserves?

10:46:30 24 A. In the -- coming out of Treaty 72?

10:46:36 25 Q. 72.

10:46:37 1 A. Around the 1890s and into the
10:46:41 2 1900s, there were complaints that the northeast
10:46:45 3 corner of the Saugeen Reserve at Sauble Beach was
10:46:49 4 incorrect.

10:46:50 5 Q. Can you describe, again at a high
10:46:56 6 level, how the Crown responded to the Saugeen
10:47:00 7 Ojibway Nation's 1855 complaints regarding the
10:47:03 8 western boundary of the Saugeen Reserve?

10:47:06 9 A. Yes, they -- as I said, they
10:47:11 10 stopped the surveyor from continuing the survey of
10:47:14 11 that boundary. Rankin met with the Chiefs and said
10:47:20 12 he would make a recommendation to the Indian
10:47:24 13 Department regarding that boundary.

10:47:26 14 That occurred, and Lord Bury arranged
10:47:33 15 to meet with both the Saugeen and Nawash First
10:47:36 16 Nations in July 1855 at Allenford and recommended
10:47:41 17 that -- or stated that he would recommend that the
10:47:45 18 western boundary be re-surveyed according to the
10:47:49 19 First Nations' understanding. And in September
10:47:53 20 1855, an Order in Council was passed to that
10:47:56 21 effect.

10:47:56 22 Q. And so I want to show you Exhibit
10:47:59 23 2290. Is this the Order in Council you were
10:48:05 24 referring to?

10:48:06 25 A. I believe so, yes.

1 Q. I'll give you a second, and we can
2 scroll through the document so you can confirm.

3 A. I know that the date of 25
4 September, 1855 is correct, so if we could scroll
5 down, please.

6 [Witness reviews document.]

7 Continue.

8 [Witness reviews document.]

9 Continue.

10 Continue.

11 Continue, please.

12 It could be on a following page. I
13 believe there will be marginalia there. Yes.
14 Okay. Well, that is clergy reserves. Keep going.

15 [Witness reviews document.]

16 Sorry, we should have a page number
17 here. Keep going, please. Are you sure you have
18 the right document?

19 Q. I believe so. Perhaps we can come
20 back to this.

21 A. Well, it is a long -- they were
22 considering a number of adjustments to land -- here
23 it is. Okay. If you could just go to the top of
24 that page, please.

25 There we go. So:

1 "Indian Reserves and [...]"

2 THE COURT: I just want to interrupt
3 you. You haven't been asked a question.

4 THE WITNESS: I'm sorry.

5 THE COURT: You were asked if this was
6 the correct document, and you said yes.

7 THE WITNESS: Yes.

8 BY MS. LEPAN:

9 Q. We are actually going to move on
10 from this now. I just wanted you to confirm this
11 is the correct document. So I want to ask you
12 about the Saugeen Ojibway Nation's 1855 complaints
13 regarding the corn fields along the Half Mile Strip
14 border. Can you explain, again at a high level,
15 how the Crown responded to those complaints.

16 A. The Crown responded by reference
17 to the Treaty text of Surrender 72 stating that the
18 surrender included an agreement to extend the Half
19 Mile Strip to the Saugeen River where a bridge was
20 to be constructed and that that was surrendered
21 land, and so no adjustment was made.

22 Q. What about the Saugeen Ojibway
23 Nation's 1856 complaints regarding the southern
24 boundary of the Saugeen Reserve, how did the Crown
25 respond to those complaints?

1 A. I have not found a response to
2 that particular complaint, but it was not surveyed.
3 It was not surveyed six miles.

4 Q. And how did the Crown respond to
5 the Saugeen Ojibway Nation's 1855 complaints
6 regarding the graveyard of the Nawash Reserve?

7 A. The Crown came to an agreement
8 with the Nawash Band and with Charles Keeshick, who
9 was secretary of the Band and on whose property the
10 graveyard was situated, that they would sell the
11 lands to Charles Keeshick as some of his ancestors
12 were buried there, and he agreed that he would be
13 the caretaker for the graveyard, and that was a
14 satisfactory solution for the Band.

15 Q. And what does the Crown's
16 responses to the Saugeen Ojibway Nation's
17 complaints that we have just reviewed regarding
18 reserve boundaries, what does it tell us or what
19 can it tell us?

20 A. Well, it tells us that the
21 complaints were received by the department. The
22 complaints on the whole were taken seriously by the
23 Crown. The responses were not always to the
24 satisfaction of the First Nations. And only in the
25 case of the six mile southern boundary have I not

1 found a specific response to that complaint.

2 Q. So I'll move on now to Chapter 3
3 of your report, and I will begin by asking you some
4 questions about the Saugeen Ojibway Nation's
5 complaints regarding settlement conditions. Can
6 you summarize, again at a very high level, what the
7 Saugeen Ojibway Nation's complaints regarding
8 settlement conditions were?

9 A. The Saugeen Ojibway Nation
10 understood that settlement conditions would be set
11 on the sales of the lands when they came to
12 auction. When it was discovered that these
13 conditions would not be imposed, they argued that
14 settlement conditions were important in terms of
15 land values. They argued that large blocks of land
16 being purchased by speculators would lay idle,
17 would be uncultivated, would then devalue the lands
18 in the vicinity and would also slow down general
19 development of settlement within the region and the
20 economy, et cetera.

21 So they firmly believed that settlement
22 conditions would help to improve the financial
23 benefits of land sales.

24 Q. And during what time period did
25 the Saugeen Ojibway Nation bring forward complaints

1 to the Crown regarding settlement conditions?

2 A. 1855, 1856, that is my memory off
3 the top of my head.

4 Q. How familiar was the Saugeen
5 Ojibway Nation with settlement conditions?

6 A. They were -- the petitions
7 indicate they were very familiar with settlement
8 conditions. This was something that had been
9 imposed during the sale of the Half Mile Strip, for
10 example. It is in the text of the Treaty 67. They
11 were -- so they were familiar.

12 Q. And based on your review of the
13 documentary record, what was the Saugeen Ojibway
14 Nation's understanding of what the practical
15 results of settlement conditions was or would be?

16 A. That those lands would be taken
17 up, that they would be cultivated, that they were,
18 once sold, no longer lands that could be used by
19 the First Nations. They were private lands.

20 Q. I want to turn now to discuss the
21 Crown's response to the complaints they received
22 about settlement conditions. Can you provide a
23 brief overview of how the Crown responded to
24 complaints regarding settlement conditions.

25 A. The Crown decided not to impose

10:55:17 1 settlement conditions, their reason being that
10:55:23 2 being able to sell the lands as quickly as possible
10:55:26 3 was the best mode in terms of benefits for the
10:55:32 4 Indians.

10:55:33 5 Q. And I am showing you Exhibit 2161
10:55:43 6 now. So this is Oliphant's report of November 3rd,
10:56:13 7 1854, reporting on the Saugeen Peninsula Surrender
10:56:20 8 No. 72. If we turn to page 5 of that document,
10:56:24 9 which is page 4 of the PDF.

10:56:25 10 THE COURT: I thought we had a
10:56:26 11 transcript of this, Counsel.

10:56:35 12 BY MS. LEPAN:

10:56:35 13 Q. We do, 2175, so if we could scroll
10:56:38 14 through that document. So I'll take you to the
10:56:55 15 portion of this document which begins:

10:57:00 16 "The advantages of [confirming]
10:57:01 17 the sales to actual settlers [...]"
10:57:07 18 and ends with "[...] pursued here."

10:57:17 19 A. It will be another page or two
10:57:18 20 down.

10:57:34 21 Stop, please.

10:57:44 22 Q. So if we look in the last
10:57:46 23 paragraph --

10:57:52 24 A. May I assist you?

10:57:53 25 Q. Go ahead.

10:57:55 1 A. It is the full paragraph we see on
10:57:59 2 the screen, about maybe nine lines down, the
10:58:03 3 sentence beginning with "The advantages of
10:58:08 4 confining the sale [...]"

10:58:10 5 Q. Thank you. And I want you to read
10:58:13 6 up until the end of the sentence which ends with
10:58:20 7 "[...] pursued here."

10:58:23 8 A. "The advantages of confining the
10:58:25 9 sale to actual [...]"

10:58:27 10 Q. You can just read it to yourself.
10:58:29 11 That is okay.

10:58:30 12 A. [Witness reviews document.]

10:58:53 13 All right.

10:58:53 14 Q. And before I ask you about that,
10:59:00 15 just for the record, the passage that we are
10:59:02 16 looking at is on page 247 of Exhibit 2175, or page
10:59:09 17 4 in the PDF. I'll correct myself, page 5 of the
10:59:20 18 PDF.

10:59:25 19 THE COURT: Well, the computer thinks
10:59:26 20 it is page 4.

10:59:28 21 BY MS. LEPAN:

10:59:29 22 Q. Oh, sorry, page 5 in the document,
10:59:31 23 page 4 in the PDF. So having reviewed that
10:59:36 24 passage, can you explain what Oliphant means here.

10:59:38 25 A. Oliphant was of -- first of all,

10:59:42 1 the setting of settlement conditions on actual
10:59:47 2 sales was an issue that was apparently discussed
10:59:54 3 while he was at Saugeen and Owen Sound, but in
10:59:58 4 Oliphant's opinion, settlers had more energy than
11:00:02 5 they did capital and that, in order to realize the
11:00:07 6 greatest profit from the lands, he advised against
11:00:11 7 settlement conditions and that just the lands
11:00:18 8 should be sold at open auction.

11:00:20 9 Q. And what does this document tell
11:00:22 10 us, if anything, about why the Crown did not
11:00:25 11 immediately impose settlement conditions?

11:00:26 12 A. Because they wanted to be able to
11:00:30 13 sell the land as quickly as possible for the
11:00:34 14 highest price as possible to entrepreneurs and
11:00:38 15 others who could actually pay for the land.

11:00:42 16 Q. So moving on from our discussion
11:00:49 17 of settlement conditions, can you explain at a high
11:00:51 18 level the other complaints the Saugeen Ojibway
11:00:55 19 Nation expressed to the Crown regarding the
11:00:57 20 progress and process of land sales.

11:01:00 21 A. Yes. One complaint was that they
11:01:08 22 were not being consulted on the management and
11:01:14 23 process of the land sales themselves. They had
11:01:17 24 understood that they would be involved in the
11:01:21 25 administration and management of land sales, so

11:01:24 1 that was one complaint.

11:01:25 2 Another complaint over time was the
11:01:28 3 very slow pace of sales, that the proceeds from
11:01:32 4 sales were not being realized as they had
11:01:35 5 understood they would be after the surrender.

11:01:41 6 Later in the 1870s, there were
11:01:45 7 revaluations of the lands, particularly in the
11:01:48 8 northern townships because the lands were not
11:01:51 9 selling quickly there, and again, there was
11:01:56 10 complaint that they had not been advised or
11:01:57 11 consulted about these revaluations.

11:02:02 12 So those three.

11:02:03 13 Q. And during what time period were
11:02:05 14 those complaints brought forward?

11:02:07 15 A. The complaint about not being
11:02:13 16 consulted and not being involved in the management
11:02:14 17 of land sales was fairly early on. The complaints
11:02:18 18 about revaluations several decades later when in
11:02:24 19 fact those reassessments were being made.

11:02:26 20 Q. So you mentioned that one of the
11:02:29 21 complaints which was advanced by the Saugeen
11:02:33 22 Ojibway Nation related to the slow pace of land
11:02:34 23 sales. What does your research lead you to
11:02:38 24 conclude was the Saugeen Ojibway's motivation for
11:02:42 25 selling lands at a faster pace?

11:02:43 1 A. To be able to realize the proceeds
11:02:47 2 of land sales as quickly as possible and as they
11:02:52 3 had understood were the terms of the Treaty in
11:02:56 4 terms of discussions that had transpired with
11:03:02 5 Oliphant in October of 1854.

11:03:05 6 Q. And what action did the Saugeen
11:03:10 7 Ojibway Nation suggest the Crown take to address
11:03:12 8 their concerns regarding the slow pace of land
11:03:14 9 sales?

11:03:15 10 A. Over the years, there were several
11:03:19 11 recommendations that were made by the Saugeen
11:03:24 12 Ojibway Nation. One recommendation was that the
11:03:27 13 Indian Department simply purchase all of the
11:03:31 14 remaining unsold lands, pay the money into the
11:03:35 15 Band's account, and then undertake to sell those
11:03:39 16 lands themselves.

11:03:43 17 Another recommendation was that public
11:03:49 18 auction be held and that the remaining lands,
11:03:54 19 unsold lands, be sold at any price.

11:03:57 20 A third recommendation -- and I think
11:04:00 21 these were options that were being considered by
11:04:03 22 the Saugeen Ojibway Nation in order to realize the
11:04:07 23 full benefits of this land surrender. So a third
11:04:10 24 option was to put any unsold lands in the southern
11:04:16 25 townships back on the market at the current market

11:04:19 1 values -- market values changed over time, at
11:04:23 2 current market values and unsold lands in the
11:04:28 3 northern townships where the values were not as
11:04:29 4 high to simply do a set upset price of 25 cents per
11:04:37 5 acre.

11:04:38 6 Q. I'm going to take you to some of
11:04:40 7 the documentation where those requests were made.
11:04:43 8 So if we pull up Exhibit 2692, this is the letter
11:04:46 9 from William Bartlett, who was the Superintendent
11:04:49 10 of Indian Affairs, to Joseph Howe, and it is dated
11:04:53 11 May 8, 1871. And on page 2 of that document, you
11:04:58 12 can see the original document. Before that is a
11:05:01 13 transcript.

11:05:02 14 A. Uhm-hmm.

11:05:02 15 Q. And if we turn back to the
11:05:09 16 transcript -- I'll give you a moment to review it
11:05:11 17 briefly. It is a short document.

11:05:12 18 A. [Witness reviews document.]

11:05:23 19 I am ready.

11:05:24 20 Q. Can you explain what request is
11:05:26 21 being made here?

11:05:27 22 A. That the Indian Department
11:05:28 23 purchase and pay for all remaining unsold lands on
11:05:31 24 the peninsula and give them as free grants to
11:05:34 25 settlers.

11:05:35 1 Q. And I want to look at Exhibit 2749
11:05:39 2 now, and this is a petition dated April 8th, 1874,
11:05:54 3 from the Saugeen and Cape Croker Indians. On page
11:05:59 4 9 of the PDF, you will see the first page of the
11:06:02 5 original document. Before that, there is a
11:06:04 6 transcript. I'll give you a second to review it.

11:06:06 7 A. Okay.

11:06:07 8 Q. So if we go back to the first
11:06:11 9 page, if you look at the bottom of the document, I
11:06:14 10 want you to review a portion at the last paragraph
11:06:20 11 which is highlighted in blue and begins with "That
11:06:23 12 we have carefully [...]" and it follows on to the
11:06:27 13 next page and ends with "[...] invested for our
11:06:31 14 benefit."

11:06:31 15 I'll give you a moment to review it.

11:06:33 16 A. [Witness reviews document.]

11:06:41 17 Next page, please.

11:06:43 18 [Witness reviews document.]

11:06:44 19 And just scroll down a bit.

11:07:00 20 I'm ready.

11:07:06 21 Q. What request is being made in this
11:07:14 22 document?

11:07:15 23 A. This is a document where they are
11:07:16 24 making specific recommendations about how unsold
11:07:19 25 lands might be put back on the market at current

11:07:23 1 market values, that lands that have been sold but
11:07:28 2 not fully paid for, that efforts be made to acquire
11:07:36 3 those payments from the settlers, and that in the
11:07:41 4 southern townships of Amabel and Albermarle that
11:07:48 5 mill sites, town plots, also be valued at current
11:07:53 6 market values, but in the townships, in the
11:07:57 7 northern townships, that a set value of 25 cents
11:08:02 8 per acre in the aggregate an amount be then
11:08:06 9 invested for the benefit.

11:08:06 10 Could I just go up to the previous
11:08:09 11 page, please? Yes, they are making the specific
11:08:16 12 recommendations within a more general
11:08:17 13 recommendation that the government assume
11:08:22 14 possession and full control of the wild and unsold
11:08:25 15 lands, and then they outline the terms that they
11:08:27 16 would like to have those lands purchased by the
11:08:33 17 government.

11:08:33 18 Q. And how would the 25 cents per
11:08:36 19 acre figure compare with the upset price that the
11:08:39 20 lands were sold at?

11:08:41 21 A. I am not sure I can answer that.
11:08:44 22 I would need to go back to the earlier records.

11:08:47 23 Q. How did the Crown respond to
11:08:49 24 requests from the Saugeen Ojibway Nation that they
11:08:51 25 purchase unsold surrendered lands under Treaty 72?

11:08:57 1 A. The Department replied that they
11:08:59 2 were not in the business of purchasing lands en
11:09:05 3 bloc, that roads were being built, the railroad
11:09:11 4 would be coming in and that every effort was being
11:09:13 5 made to sell the lands to private purchasers as
11:09:18 6 quickly as possible.

11:09:18 7 Q. I am now showing you Exhibit 2860.
11:09:30 8 This is a letter to William Plummer from William
11:09:34 9 Angus, John Kaduhgekwun, Henry Madwayosh, and
11:09:39 10 William McGregor, and it is dated June 24, 1879,
11:09:43 11 and on page 3 of the document, you will see the
11:09:46 12 original. If we could go back to the beginning,
11:09:52 13 and I want you to review the portion of the
11:09:54 14 document that is highlighted and begins with "[...]
11:09:59 15 Chiefs in behalf [...]" and ends with "[...] for
11:10:06 16 our benefit."

11:10:10 17 A. [Witness reviews document.]

11:10:11 18 I am ready.

11:10:12 19 Q. What is the significance of this
11:10:13 20 request?

11:10:13 21 A. I interpret this request as
11:10:18 22 indicating considerable impatience on the part of
11:10:21 23 the Saugeen Ojibway Nation on the slow pace of
11:10:25 24 sales and now requesting that all vacant and unsold
11:10:33 25 lands be put to public auction and just be sold for

1 whatever price can be acquired.

2 Q. I am now showing you Exhibit 2865.

3 This is a letter to William Plummer dated August
4 11, 1879, and we don't have a transcript of this
5 document, but you have transcribed it on page 75 of
6 your report, in case that will assist you.

7 Can you explain what this document is
8 and what is the context surrounding it.

9 A. This is a letter to Plummer in
10 response to the previous petition that we just
11 looked at. It is not signed, but I have
12 interpreted it to be from Deputy Superintendent
13 Vankoughnet, and he is informing Plummer to advise
14 the Saugeen Ojibway Nation that their
15 recommendation was inadvisable for two reasons, the
16 first reason being the tightness of the money
17 market. Lands would not sell at a very high price.
18 And the second reason was the proposed railroad to
19 Wiarton which Vankoughnet argued would assist
20 greatly in the lands in the northern townships
21 being accessible and more speedy sales.

22 Q. And I am now showing you Exhibit
23 3340. Can you describe what this document is?

24 A. This is a Band Council resolution,
25 Joint Council resolution.

11:12:32 1 Q. And what is the significance of
11:12:33 2 this document?

11:12:33 3 A. Again, the Bands -- the joint
11:12:48 4 Bands have resolved to request that Indian Affairs
11:12:54 5 dispose of all the lands at any price.

11:12:57 6 Q. What do these documents tell us
11:13:04 7 about the core complaint of the Saugeen Ojibway
11:13:07 8 Nation regarding the land sale process?

11:13:08 9 A. That in their view the land sales
11:13:13 10 are proceeding at much too slow a pace, that they
11:13:20 11 are not realizing the monetary proceeds of those
11:13:23 12 sales, and an eagerness to have the land sale
11:13:28 13 process completed and the proceeds invested for
11:13:32 14 their benefit as soon as possible.

11:13:34 15 Q. And what do these documents tell
11:13:37 16 us about the focus of the Saugeen Ojibway Nation
11:13:40 17 after Treaty 72 was signed?

11:13:43 18 A. Land sales and the proceeds of
11:13:45 19 those land sales.

11:13:46 20 Q. And does that focus ever change in
11:13:49 21 the documentary record?

11:13:50 22 A. It ends in around the early 1900s,
11:13:58 23 so no, but from the time of 1855 to the early
11:14:06 24 1900s, the focus doesn't change. The options being
11:14:09 25 recommended change, but the focus is always let's

1 get these lands sold.

2 Q. And can you provide a very high
3 level overview of what action the Crown took to
4 respond to the Saugeen Ojibway Nation's complaints
5 about the slow pace of land sales?

6 A. Two main kinds of response.

7 One was the construction of roads. So,
8 for example, the road to Tobermory, which was
9 anticipated that this would open up the northern
10 townships and that lands would sell more speedily,
11 promoting the development of railroads which would
12 also help to increase settlement and sales.

13 And then in the 1870s, the sending in
14 appraisers to revalue the market value of lands,
15 the feeling being that one reason the lands were
16 not selling is that the original upset prices were
17 no longer consistent with current market values.

18 Q. And you mentioned the building of
19 roads. Did that have any effect on the pace of
20 land sales?

21 A. Yes, I looked at this. I was able
22 to find records of land sale -- land sale records
23 on Saugeen, and I was able to correlate that with
24 events like the construction of the railroad and
25 the completion of Tobermory Road, and you do see an

11:15:48 1 increase in sales in those townships after these --
11:15:54 2 after the roads and railroads were completed.

11:15:56 3 Q. I am going to move on now to ask
11:15:59 4 you some questions about Chapter 5. At a very high
11:16:08 5 level, can you describe the complaints that you
11:16:11 6 address in Chapter 5 of your report?

11:16:14 7 A. One of the complaints -- certainly
11:16:19 8 not the volume of documentation that I came across
11:16:23 9 for complaints about lack of settlement conditions
11:16:28 10 or process of land sales, but one of the complaints
11:16:35 11 regarded protection from trespass and squatting
11:16:39 12 after the surrender.

11:16:40 13 Q. And when you say it was not the
11:16:45 14 volume of documents that you found with respect to
11:16:47 15 the process of land sales or the settlement
11:16:49 16 conditions, what do you mean by that?

11:16:52 17 A. I mean there were fewer documents
11:16:54 18 addressing that issue.

11:16:55 19 Q. And what lands did these
11:17:00 20 complaints relate to?

11:17:01 21 A. Mainly the reserve lands.

11:17:05 22 Q. And in your report titled
11:17:13 23 "Documentation Relevant to the Extent of Squatting
11:17:15 24 on the Saugeen Peninsula Reserve Pre and Post
11:17:21 25 Surrender No. 72", which is Exhibit 4708, I won't

1 take you there, but in that report, you distinguish
2 between trespass and squatting.

3 Keeping in mind those distinctions,
4 what proportion of the complaints that you detail
5 in Chapter 5 relate to trespass versus squatting?

6 A. More of the complaints relate to
7 trespass, particularly with respect to timber
8 cutting and fishing.

9 Q. And when did you stop seeing
10 complaints about squatting and trespass in the
11 post-Treaty documentary record?

12 A. I would have to separate those
13 two.

14 Q. Go ahead.

15 A. With respect to squatting, the
16 complaints stopped after the land started to be
17 sold after 1856.

18 There were some complaints later on in
19 the 1870s that the Indian Department dealt with,
20 but these were not necessarily in response to
21 complaints coming forward from the Saugeen Ojibway
22 Nation. These were reports coming from agents and
23 the department dealing with them internally.

24 With respect to encroachment and
25 trespass, for example, timber cutting, these were

1 ongoing for several decades after the surrender.

2 Q. I want to leave Chapter 5 now and
3 ask you a few questions about what the post-Treaty
4 documentation tells us more generally. Does the
5 post-Treaty evidence tell us anything about the
6 Saugeen Ojibway Nation's motivations for entering
7 into Treaty 72?

8 A. The volume of documentation
9 related to imposing settlement conditions and the
10 pace of sales and proceeds from sales is a
11 reflection of the financial motivations that will
12 have, in part, induced them to agree to the
13 surrender.

14 Q. And does the post-Treaty evidence
15 tell us anything about the Crown's motivations for
16 entering into Treaty 72?

17 A. Mainly the Crown's motivation to
18 acquire settlement lands.

19 Q. And what does the post-Treaty
20 evidence tell us about how SON viewed Treaty 72
21 following the surrender?

22 A. That is a very general question.
23 I wonder if you could make that more specific.

24 Q. I'll leave that question for now
25 actually.

11:20:07 1 A. All right.

11:20:07 2 Q. So I am showing you Exhibit 2428.

11:20:19 3 This is an Indian Declaration dated October 1,

11:20:23 4 1856. Can you explain what an Indian Declaration

11:20:27 5 is.

11:20:27 6 A. This is a rather unusual document.

11:20:33 7 I don't know what the reason would have been that

11:20:37 8 the Saugeen Ojibway Nation wanted to write and send

11:20:42 9 an Indian Declaration. The document is

11:20:48 10 enlightening with respect to a declaration of

11:20:53 11 intent of this is how we want to proceed in terms

11:20:59 12 of the education, development, settlement of our

11:21:05 13 communities and how we want to move forward into

11:21:08 14 the future.

11:21:09 15 And so it deals with some general

11:21:12 16 issues such as enfranchisement, settlement in a

11:21:18 17 single central community, again, the formation or

11:21:23 18 the establishment of a manual labour school for the

11:21:28 19 benefit of their children.

11:21:32 20 Essentially the declaration starts by

11:21:35 21 explaining that we can no longer live by hunting,

11:21:41 22 fishing, and gathering. We want to become full

11:21:49 23 citizens. We want to -- we know that our hunting

11:21:55 24 grounds are gone, and these are the kinds of things

11:22:00 25 we declare is our intent for our future.

11:22:04 1 Q. And I think you mentioned this,
11:22:07 2 but to be clear, who is this Indian Declaration
11:22:12 3 coming from or who is it made by?

11:22:15 4 A. The Indians residing in Owen Sound
11:22:18 5 and Saugeen country.

11:22:19 6 Q. And I would like you to look at
11:22:21 7 the portion of the document which is highlighted in
11:22:23 8 blue on page 1. It begins with "We the Indians
11:22:30 9 [...]" and ends with "[...] abandon our hunting."

11:22:34 10 I'll give you a second to review that.

11:22:36 11 A. [Witness reviews document.]

11:22:39 12 Okay.

11:22:39 13 Q. What is meant when they say
11:22:44 14 "having disposed of all our hunting grounds"?

11:22:47 15 A. This is a reference -- I take this
11:22:49 16 as a reference to having surrendered their
11:22:51 17 traditional territories.

11:22:52 18 Q. And which surrender would that be?

11:22:54 19 A. Both -- in this sentence just
11:22:59 20 generally both Treaty 45 1/2 and 72.

11:23:05 21 Q. I am now showing you Exhibit 2956.
11:23:11 22 This is a letter dated March 10th, 1886, sent from
11:23:15 23 the Nawash and Saugeen Chiefs to Sir John A.
11:23:20 24 McDonald, who is the Superintendent General of
11:23:21 25 Indian Affairs. If we turn to the first page of

11:23:31 1 that document, there is a portion in blue that is
11:23:36 2 highlighted, and I will ask that you read that into
11:23:40 3 the record, as we don't have a transcript of this
11:23:42 4 document, and it begins at "Many winters ago [...]"
11:23:47 5 and ends with "[...] portion of the said tract of
11:23:51 6 land."

11:23:53 7 A. "Many winters ago our
11:23:57 8 forefathers surrendered to their
11:24:00 9 Great Father King George the III a
11:24:02 10 large portion of their territory
11:24:03 11 which had been their hunting grounds
11:24:05 12 from the beginning of time, to make
11:24:06 13 homes for white men and only
11:24:08 14 reserved for themselves a tract of
11:24:10 15 land called the Saugeen Peninsula.

11:24:14 16 Many years afterwards when the
11:24:16 17 hunting was destroyed and the
11:24:18 18 Indians had to turn their attention
11:24:20 19 to farming the land in order to
11:24:22 20 provide food for themselves and
11:24:24 21 children, they found that the tract
11:24:26 22 of land which they had reserved for
11:24:31 23 their own use was more land than
11:24:33 24 with their slender means they were
11:24:36 25 able to cultivate [...]"

1 [As read.]

2 Did you want me to read further?

3 Q. You can keep going up until "[...]
4 said tract of land". I think you were at the next
5 "and".

6 A. So just for continuity:

7 "[...] they were able to
8 cultivate and they were induced to
9 make a second surrender of a large
10 portion of the said tract of land."

11 [As read.]

12 Q. Thank you. What is this section
13 of the document referring to?

14 A. The first paragraph is referring
15 to Surrender 45 1/2, and the second paragraph is
16 referring to Surrender 72.

17 Q. You mentioned in your report that
18 the text of Treaty 72 does not contain any
19 provisions relating to hunting, fishing or any
20 other harvesting rights or privileges on the
21 surrendered tract. What do the above two documents
22 we just reviewed tell us about the Saugeen Ojibway
23 Nations, how they would have understood the impact
24 of Treaty 72 on their traditional life-style,
25 despite there not being those provisions in Treaty

11:25:42 1 72?

11:25:42 2 A. It demonstrates an awareness and
11:25:45 3 an acknowledgment that those lands that were
11:25:50 4 surrendered would no longer be available to them as
11:25:54 5 hunting grounds.

11:25:59 6 MS. LEPAN: Your Honour, I'm about to
11:26:01 7 move on to a new topic. We are five minutes before
11:26:05 8 we take the usual break. I would request that we
11:26:08 9 break five minutes early for the morning break.

11:26:11 10 THE COURT: For Mr. Beggs' benefit, how
11:26:14 11 much longer do you think you'll be, Counsel?

11:26:17 12 MS. LEPAN: No longer than half an
11:26:19 13 hour.

11:26:19 14 THE COURT: All right. 20 minutes.

11:26:21 15 -- RECESSED AT 11:26 A.M.

11:50:13 16 -- RESUMED AT 11:50 A.M.

11:50:13 17 THE COURT: Please go ahead.

11:50:20 18 BY MS. LEPAN:

11:50:22 19 Q. I am showing you Exhibit 2590.
11:50:27 20 This is a report by Pennefather dated November 1st,
11:50:31 21 1860. Can you briefly explain the context in which
11:50:36 22 this report was made.

11:50:37 23 A. Yes. In 1860, a number of First
11:50:42 24 Nations in Canada West were asked to submit
11:50:49 25 petitions or memorials in preparation for the

1 Prince of Wales, Duke of Newcastle's visit to
2 Canada, and quite a number of First Nations did so.

3 After the visit ended, Pennefather
4 wrote a report summarizing and documenting the
5 various complaints that had been made, and this
6 document is his explanation and response to the
7 complaints by the Cape Croker First Nation.

8 Q. If we turn to page 383 in that
9 document, which is page 9 in the PDF, at the top of
10 the page there is a portion that is highlighted in
11 blue, and we don't have a transcript of this
12 document, so I'm going to read this into the
13 record:

14 "It is quite clear that the
15 statement that the treaty is
16 'unlawful for the want of His
17 Excellency's signature' is
18 incorrect. The stipulation of the
19 treaty that it should remain null
20 and void unless it received the
21 assent of the Governor General in
22 Council."

23 [As read.]

24 What is this statement describing?

25 A. This statement is responding to a

11:52:23 1 complaint that had been made by the Cape Croker
11:52:26 2 band that the Treaty 82 of the Nawash Reserve
11:52:32 3 was -- had not been -- was invalid because it had
11:52:38 4 not received assent of the Governor General, and
11:52:46 5 Pennefather is disputing that fact.

11:52:48 6 Q. Turning now to Exhibit 1142, on
11:53:00 7 page 4 and 5 of that document you can see the
11:53:04 8 original. Now, if we can go back up to page -- if
11:53:12 9 we can go back to page 8 in the PDF, there is a
11:53:15 10 transcript. Do you recognize this document?

11:53:23 11 A. Yes, I do.

11:53:24 12 Q. And can you explain the context
11:53:27 13 for it?

11:53:27 14 A. This is a speech by Metigwob at a
11:53:34 15 General Council held at the River St. Clair in
11:53:37 16 September 1836, and it is a record of a speech he
11:53:43 17 gave with respect to the surrender of the Saugeen
11:53:47 18 territory, also known as the Bond Head Treaty
11:53:50 19 45 1/2.

11:53:51 20 Q. And if we look at the last
11:53:54 21 sentence of that speech, it states:

11:54:01 22 "That he M. did not understand
11:54:04 23 many things that the Governor said
11:54:05 24 to them and that he and his fellow
11:54:07 25 Chiefs were over persuaded to sign

11:54:09 1 the surrender."

11:54:12 2 What is your understanding of what
11:54:13 3 Metigwob is saying in that passage?

11:54:15 4 A. Metigwob is challenging the
11:54:21 5 propriety, the -- I'm not sure if he is questioning
11:54:25 6 the validity of the Treaty, but he certainly is
11:54:29 7 questioning the propriety of the process by which
11:54:31 8 that Treaty was taken and that they had felt
11:54:35 9 coerced to sign.

11:54:36 10 Q. In the course of your research,
11:54:39 11 did you discover any complaints of this nature in
11:54:42 12 the documentary record with respect to Treaty 72?

11:54:44 13 A. No, I did not.

11:54:45 14 Q. And what does the lack of such
11:54:49 15 complaints in the post-Treaty documentation
11:54:51 16 regarding Treaty 72 tell us?

11:54:53 17 A. I take that to mean that the fact
11:54:58 18 of the Surrender 72 was not questioned. What was
11:55:04 19 questioned, and as I demonstrate in Volume 4, was
11:55:08 20 the understandings of the terms of that surrender.

11:55:10 21 Q. And before we move on from this
11:55:13 22 document, who was Metigwob making this speech to?

11:55:18 23 A. To a General Council being held at
11:55:22 24 St. Clair, so to fellow Anishinaabe Chiefs.

11:55:26 25 Q. How many documents did you review

1 in preparing Volume 4 of your report?

2 A. Thousands.

3 Q. And in what time period did those
4 documents cover?

5 A. I started from October 14, 1854,
6 immediately after the surrender, and viewed any
7 available documentation I had through to the 1970s
8 when the claim was -- a legal claim was made.

9 Q. In any of that documentation did
10 you find any complaints by the Saugeen Ojibway
11 Nation where they claimed the process for making
12 Treaty 72 was flawed?

13 A. No.

14 Q. Did you find any complaints where
15 the Saugeen Ojibway Nation suggested they were
16 pressured or coerced into entering into Treaty 72?

17 A. No.

18 Q. Did you find any complaints where
19 the Saugeen Ojibway Nation suggested that they were
20 not given enough time to consider Treaty 72?

21 A. No.

22 Q. And what about complaints from the
23 Saugeen Ojibway Nation that the Crown failed to
24 follow treaty-making protocols?

25 A. No.

1 Q. Did you find any complaints where
2 the Saugeen Ojibway Nation suggested that Treaty 72
3 was invalid?

4 A. No.

5 Q. What can we understand from the
6 lack of such complaints in the documentary record?

7 A. Again, that the fact of the
8 surrender and the treaty-making process of the
9 surrender was not at question. What was at
10 question was the understanding, implementation of
11 the terms of that surrender.

12 Q. A moment's indulgence.

13 Thank you, Dr. Reimer. Those are all
14 my questions.

15 A. Thank you.

16 THE COURT: Mr. Beggs.

17 MR. BEGGS: Thank you, Your Honour. If
18 I could just take a few moments to hook up the
19 proper wires.

20 THE COURT: Mr. Beggs.

21 CROSS-EXAMINATION BY MR. BEGGS:

22 Q. Thank you, Your Honour. Good
23 morning/afternoon, Dr. Reimer.

24 A. Good morning.

25 Q. My name is Michael Beggs. I'll be

1 asking questions on behalf of the Attorney General
2 of Canada.

3 I would like to take you to your Volume
4 3 of your reports, which is Exhibit 4703, and I
5 will be asking you about your table which was
6 labelled "Principles of Treaty-Making in Upper
7 Canada".

8 This appears at page 14 of your report.
9 Could we scroll down a few pages. So there we are.
10 It is 14 of the report. It is page 24 of the PDF.

11 Now, you discussed this table with my
12 friend yesterday, I believe.

13 A. Yes.

14 Q. First of all, it is entitled
15 "Principles of Treaty-Making". These principles
16 apply only to land surrenders; is that correct?

17 A. That was my intent, yes.

18 Q. Yes. Okay. And these numbers
19 are -- well, you took the -- I'll take a step back.

20 You mentioned several documents
21 yesterday and in your report that you based this
22 chart on, and you first identified several
23 instructions from various documents; is that
24 correct?

25 A. That's correct.

12:01:41 1 Q. And there were 22 or 23
12:01:44 2 instructions that you compiled?

12:01:47 3 A. I believe 22.

12:01:51 4 Q. 22. And these 13 principles in
12:01:58 5 this chart then are distilled from the 22
12:02:01 6 instructions; is that right?

12:02:02 7 A. That's correct.

12:02:02 8 Q. And so the numbering of these
12:02:07 9 principles is your own, I take it?

12:02:09 10 A. Yes, that is my own. That is just
12:02:11 11 my own ordering and grouping.

12:02:13 12 Q. Okay. And it is not in order of
12:02:15 13 importance, perhaps?

12:02:15 14 A. No.

12:02:16 15 Q. And would it be fair to say that
12:02:19 16 some of these principles are more important than
12:02:21 17 others?

12:02:21 18 A. I had not thought of it in those
12:02:27 19 terms, but I would certainly consider the row
12:02:33 20 labelled number 1 as more important than, you know,
12:02:39 21 the number of copies of the deed of conveyance and
12:02:43 22 whether it was in duplicate or triplicate, so --

12:02:49 23 Q. So yes?

12:02:49 24 A. -- yes.

12:02:50 25 Q. And the 22 instructions, those

1 were also your numbering; is that correct?

2 A. Yes.

3 Q. So when you, for example, compiled
4 the instructions from the Dorchester Instructions,
5 the Dorchester Instructions have numbered articles,
6 nine numbered articles; is that right?

7 A. Yes.

8 Q. And then you broke that down into
9 essentially 12 more -- or you broke those nine
10 articles into 12 additional instructions?

11 A. Yes.

12 Q. Okay.

13 A. And I identify which article the
14 specific instructions as I broke them down can be
15 found in the original instructions.

16 Q. But to some extent, these
17 instructions and the principles are your own
18 language; is that correct?

19 A. Yes, they are paraphrased.

20 Q. Now, given that they are
21 paraphrased, would the historical actors of the
22 time be able to recognize these principles or
23 instructions?

24 A. I think some of them, yes. I
25 think that the evidence of how treaties were made

12:04:31 1 at this point in time demonstrate an awareness of
12:04:38 2 basic principles of treaty-making because you
12:04:40 3 actually see people doing these things.

12:04:44 4 I don't know that they will have gone
12:04:48 5 out to a Treaty Council with a list of things that
12:04:52 6 they needed to do. So if that is what you are
12:04:54 7 asking, then -- I think there was a general
12:04:58 8 awareness of there are protocols that we follow,
12:05:02 9 this is how we make treaties, and there are certain
12:05:05 10 expectations, that headquarters needs certain kinds
12:05:10 11 of records in order to document the fact of the
12:05:14 12 surrenders, et cetera, but not -- I doubt that
12:05:19 13 there was a sense of 13 items on a list in their
12:05:23 14 heads when they went to make the treaties.

12:05:26 15 Q. Okay. Now, are you aware that
12:05:35 16 Professor McHugh testified earlier in this
12:05:40 17 proceeding with respect to your table?

12:05:41 18 A. Yes, I am.

12:05:42 19 Q. And did you have an opportunity to
12:05:43 20 read that transcript?

12:05:45 21 A. I read that portion of the
12:05:46 22 transcript. I haven't read his entire transcript.

12:05:49 23 Q. And perhaps if I could call up the
12:06:00 24 transcript from December 9th, 2019, which is the
12:06:10 25 transcript of Professor McHugh. If we could scroll

12:06:16 1 down a bit, this is the final transcript, and this
12:06:23 2 is page 8733, and it is where at that point my
12:06:29 3 friend directs him to the table that we are talking
12:06:36 4 about.

12:06:36 5 Now, if we could scroll down to page
12:06:47 6 8736, and the first full paragraph. Yesterday you
12:06:55 7 told my friend what -- or why you used the term
12:06:59 8 "instructions" and what you meant by it?

12:07:00 9 A. Correct.

12:07:01 10 Q. And here Professor McHugh says
12:07:07 11 that:

12:07:10 12 "[...] 'instructions' are a
12:07:11 13 term of art that refer to documents
12:07:15 14 emanating from Whitehall, from
12:07:17 15 Secretaries of State, informing and
12:07:18 16 telling Governors what to do."

12:07:20 17 Would you agree with that statement?

12:07:22 18 A. I have not researched the
12:07:25 19 provenance or the precise character of documents
12:07:35 20 that are entitled "instructions". This seems
12:07:39 21 plausible and logical to me, but because I have not
12:07:44 22 specifically researched the meaning of a term of
12:07:51 23 art used in Whitehall, I am a little hesitant to
12:07:55 24 agree or disagree.

12:07:57 25 But I do agree that it is consistent

12:07:59 1 with the way that I have interpreted instructions.

12:08:05 2 Q. If we could scroll down to the
12:08:07 3 next paragraph, he says at the last sentence of the
12:08:13 4 second paragraph, referring to the instructions he
12:08:18 5 was identifying:

12:08:20 6 "We might call them guidelines,
12:08:21 7 protocols, but if they are
12:08:23 8 protocols, then there is no
12:08:24 9 overriding sense that these are what
12:08:26 10 we have to do."

12:08:27 11 Would you agree that they might be
12:08:28 12 called "guidelines" or "protocols".

12:08:31 13 A. Yes. In fact, I think I refer
12:08:33 14 to -- use both those terms in my report.

12:08:36 15 Q. Now, I want to consider a few of
12:08:52 16 the items you used -- the documents you used to
12:08:55 17 create the principles table, and one of those
12:09:05 18 documents was the Dorchester Instructions, I
12:09:07 19 believe?

12:09:08 20 A. Yes.

12:09:21 21 Q. Now, would you agree with
12:09:22 22 Professor McHugh that the Dorchester Instructions
12:09:25 23 were created in a military context?

12:09:27 24 A. Yes. Pardon me, yes.

12:09:29 25 Q. Now, if I could actually call up

12:09:41 1 your report again. It is Exhibit 4703, and go to
12:09:48 2 page 11 of the document, which I believe would be
12:09:55 3 21 of the PDF. Yes, that is the one.

12:10:01 4 So in the last full paragraph, you
12:10:05 5 describe the correspondence between Joseph Chew and
12:10:11 6 T.A. Coffin. Now, you say Joseph Chew was the
12:10:17 7 secretary of Indian Affairs. What would that
12:10:19 8 position be? He is not the Superintendent General,
12:10:21 9 is he?

12:10:22 10 A. No.

12:10:22 11 Q. So he is subordinate to the
12:10:24 12 Superintendent General?

12:10:24 13 A. Yes.

12:10:25 14 Q. And --

12:10:27 15 A. That is my understanding.

12:10:28 16 Q. Okay. And Coffin would be the
12:10:30 17 Civil Secretary for the Governor; is that right?

12:10:33 18 A. Yes, uhm-hmm.

12:10:33 19 Q. And the Governor was Dorchester at
12:10:37 20 that time?

12:10:37 21 A. Correct.

12:10:38 22 Q. So you have the two of them
12:10:44 23 discussing a set of instructions, and I believe the
12:10:48 24 footnote refers to two letters from Chew to Coffin,
12:10:52 25 and then you go into the Dorchester Instructions

12:10:56 1 being in issue in December 1794. Are you saying or
12:11:02 2 implying that the Chew/Coffin instructions led
12:11:05 3 directly to the Dorchester Instructions?

12:11:07 4 A. That was my understanding.

12:11:07 5 Q. Now, one of the letters that Chew
12:11:12 6 wrote Coffin was actually following the Dorchester
12:11:16 7 Instructions. In your footnote, it is January 5th,
12:11:23 8 1795. That is footnote 27.

12:11:26 9 A. Right. I see that.

12:11:27 10 Q. And in that document -- and I can
12:11:28 11 take you to that document if you would like, but
12:11:31 12 would you agree in that document Chew was still
12:11:34 13 talking about modifications in the instructions to
12:11:35 14 Coffin?

12:11:36 15 A. I would need to see the document.

12:11:38 16 Q. If I could call up Exhibit 743, so
12:12:02 17 if you just read the first paragraph after "Dear
12:12:09 18 Sir" to yourself, that would be helpful.

12:12:11 19 A. [Witness reviews document.]

12:12:14 20 Just the first paragraph?

12:12:19 21 Q. Yes.

12:12:19 22 A. I'm ready.

12:12:20 23 Q. Okay. Now, would you agree with
12:12:23 24 me that the first paragraph indicates that Chew was
12:12:28 25 still making suggestions as to what should be

1 included, in particular, not allowing rum to be
2 used and making sure interpreters are included?

3 A. It does say that, yes.

4 Q. And that would be -- this is dated
5 after the Dorchester Instructions?

6 A. It is, yes.

7 Q. But you are not aware of any
8 different set of instructions coming out of Chew
9 and Coffin, are you?

10 A. No.

11 Q. Okay. I was just wondering if we
12 were missing a document from that --

13 A. No.

14 Q. Okay. Now, another document you
15 refer to is something entitled Plan For the Future
16 Management of Indian Affairs from 1764; is that
17 correct?

18 A. That's correct.

19 Q. And that is Exhibit 615, but I
20 don't know that we'll need to go to any specific
21 page. Now, Professor McHugh stated that this plan
22 was a draft that remained a draft; would you agree
23 with that?

24 A. I do agree with that, yes.

25 Q. Now, I understand yesterday in

1 your testimony you indicated that -- I think it was
2 this document, but that this draft plan was
3 attached or appended to instructions to Governor
4 Haldimand -- or instructions for Governor Haldimand
5 and Governor Dorchester; is that right?

6 A. Yes, when Dorchester was Governor
7 of Carleton. Yes.

8 Q. Okay. So just to avoid any
9 confusion, this -- you are saying this was attached
10 to instructions that were given to Guy Carleton,
11 Lord Dorchester later, and that is not the same as
12 the instructions that Dorchester himself later
13 issued?

14 A. That's correct.

15 Q. And presumably there was also
16 attached the instructions given Governor Haldimand?

17 A. It is not directly attached. The
18 instructions to Haldimand indicate that he would be
19 sent a copy of the draft plan.

20 Q. Okay. And did those instructions
21 say what to do with the plan?

22 A. They are in relation to trade with
23 the Indians and Indian Affairs.

24 Q. Okay.

25 A. So then there is an instruction,

1 and it said, you know, we are sending you this
2 draft, the plan.

3 Q. Okay. And Haldimand was the
4 Governor prior to Sir Guy Carleton; is that right?

5 A. No, Guy Carleton first.

6 Q. Oh, okay.

7 A. And then Haldimand and then
8 Dorchester after.

9 Q. Okay. Now, another document you
10 derived your principles from was the Royal
11 Proclamation; is that correct?

12 A. Yes.

13 Q. And I would like to take you back
14 to the transcript from Professor McHugh again, and
15 if I could go to page 8739. Now, this section was
16 the subject of an objection, so I want to be
17 careful here. Essentially what Professor McHugh
18 was asked and what I would ask you is to keep in
19 mind the historical context, not the legal context.

20 Now, I could scroll up if you would
21 like, but he is referring to the Quebec Act and its
22 impact on the Royal Proclamation. I guess maybe if
23 we scroll up a bit to the next page, and he is
24 reading from -- sorry. Well, my friend actually
25 reads from the Quebec Act, Article IV, and he

12:17:42 1 refers to the annotation which says:

12:17:44 2 "Former provisions made for the
12:17:45 3 province to be null and void after
12:17:47 4 May 1, 1775."

12:17:50 5 And then he asks Professor McHugh:

12:17:55 6 "What is the term 'former
12:17:58 7 provisions' a reference to?"

12:18:00 8 And Professor McHugh answers:

12:18:02 9 "The Proclamation."

12:18:04 10 So going back to where we were on 8739,

12:18:07 11 he says:

12:18:07 12 "The historical meaning that
12:18:10 13 was ascribed to the Quebec Act was
12:18:14 14 that it was a repeal of the
12:18:15 15 operative provisions of the Royal
12:18:16 16 Proclamation."

12:18:17 17 And then he discusses later

12:18:20 18 interpretations.

12:18:21 19 Would you agree with that statement?

12:18:23 20 A. That is not an issue I have
12:18:26 21 researched, so I am hesitant to agree or disagree.

12:18:30 22 Q. Okay. If I could have just a
12:18:55 23 moment, Your Honour.

12:18:56 24 Your Honour, we had received leave to
12:19:04 25 cross-examine on two topics, and I have completed

12:19:07 1 my cross-examination on the one topic of the
12:19:13 2 guidelines or checklist, and we won't be asking any
12:19:16 3 questions about the other topic pertaining to
12:19:18 4 Niagara.

12:19:18 5 THE COURT: Thank you, sir.

12:19:21 6 MR. BEGGS: Thank you very much,
12:19:22 7 Dr. Reimer.

12:19:22 8 THE WITNESS: Thank you.

12:19:23 9 THE COURT: A couple of things.

12:19:24 10 Dr. Reimer, you have testified before,
12:19:26 11 and you will perhaps recall some fairly strict
12:19:31 12 restrictions on what you are permitted to do while
12:19:33 13 under cross-examination.

12:19:34 14 Now, I don't know -- and I will ask
12:19:37 15 Mr. Feliciant -- is there any request made for
12:19:41 16 exceptions from those restrictions, as has occurred
12:19:44 17 at least once with the Plaintiffs' expert and once
12:19:47 18 with a recent expert?

12:19:50 19 MR. FELICIAN: I would ask that she be
12:19:51 20 permitted, particularly in light of the gap -- the
12:19:53 21 length of the gap, she be permitted to review her
12:19:56 22 several reports and any supporting documents that
12:19:58 23 they reference.

12:20:00 24 And in the event that the Plaintiffs
12:20:05 25 provide us with new documents, that we be permitted

12:20:09 1 to provide them to her to read in advance of her
12:20:12 2 cross-examination. That would just promote
12:20:16 3 efficiency, if nothing else.

12:20:18 4 But those would be my only requests. I
12:20:20 5 have no reason to speak with her --

12:20:22 6 THE COURT: Well, I am going to break
12:20:24 7 that down into two steps.

12:20:25 8 Step number one, this expert's own
12:20:30 9 reports and anything cited in them, is there any
12:20:33 10 objection to that, Ms. Guirguis or Mr. Townshend?

12:20:40 11 MR. TOWNSHEND: No, Your Honour.

12:20:41 12 THE COURT: No. All right. With
12:20:42 13 respect to step number two, I think it is difficult
12:20:44 14 for me to call upon the Plaintiffs to react to it
12:20:46 15 in the abstract, which is what it is today.

12:20:48 16 Should it occur that there are such
12:20:51 17 documents, and should it occur that both -- that
12:20:57 18 especially the Plaintiff in particular consents,
12:21:00 19 then you need not come back to me for an exception.

12:21:04 20 But in the situation where the
12:21:08 21 Plaintiffs may not consent, you will have to
12:21:11 22 communicate with my office in some fashion, and
12:21:13 23 we'll sort something out. All right?

12:21:16 24 MR. FELICIAN: Thank you.

12:21:16 25 THE COURT: So, Dr. Reimer, the end

12:21:18 1 product of all this is the following.

12:21:19 2 Before you return -- I believe it is
12:21:22 3 March 3rd, Ms. Guirguis, is that correct, or
12:21:26 4 Mr. Townshend?

12:21:27 5 MS. GUIRGUIS: Yes, that's correct,
12:21:28 6 Your Honour.

12:21:28 7 THE COURT: That's correct. Before you
12:21:29 8 return on March 3rd, you are free to review all of
12:21:32 9 your reports and any documents in them, but nothing
12:21:34 10 else, including anything else you may have
12:21:37 11 collected, and I am sure there is a lot of stuff
12:21:39 12 around, including any independent or new research.
12:21:42 13 You should do none of those things.

12:21:44 14 THE WITNESS: I understand.

12:21:45 15 THE COURT: All right. Find other ways
12:21:47 16 to occupy yourself.

12:21:48 17 If you have any questions about what
12:21:50 18 you may or may not do, you can ask Mr. Feliciant,
12:21:54 19 and he will loop around to the necessary people.
12:21:57 20 All right?

12:21:58 21 THE WITNESS: Thank you.

12:21:59 22 THE COURT: So you will, I am sure,
12:22:01 23 have many other things to engage yourself in for
12:22:03 24 the next couple of weeks.

12:22:04 25 And on that basis, you can step down

1 now from the witness stand.

2 THE WITNESS: Thank you.

3 THE COURT: All right. Counsel, I have
4 said at a TMC recently that I would put an
5 additional comment on the record about our
6 discussion about the order arising from the motion
7 for directions that I heard in January, and I am
8 going to take this time available to do that now.

9 Madam Reporter, this will be
10 supplementary reasons in relation to the changes to
11 the severance order that are the subject of
12 lengthier reasons and a ruling given by me on
13 January 16, 2020. All right?

14 So those supplementary reasons are as
15 follows.

16 I heard a motion for directions on
17 January 8, 2020, in relation to a then existing
18 Severance Order, and rendered my decision and
19 reasons in relation to that motion on January 16,
20 2020.

21 As stated in those reasons, there was
22 discussion initiated by me with the parties about
23 the form of the order arising from my decision.
24 That discussion was first at a case conference and
25 then followed thereafter.

1 In the course of that discussion, I
2 provided the parties with a draft order on February
3 4 by email. Having reviewed my draft order, there
4 was then only one issue that the parties wished to
5 discuss, and that issue related to paragraph
6 2(a)(ii) of the order. More specifically, it
7 related to additional language in relation to
8 limitation periods and laches and how that fit in
9 the severance order.

10 I had said in my reasons for decision
11 given January 16, 2020, as follows:

12 "Given the Plaintiffs'
13 submission that certain limitation
14 periods will be relevant in each of
15 the stages, it is not clear to me
16 what, whether or how those issues
17 will be addressed. That will have
18 to be the subject of final
19 argument."

20 That part of my reasons led to my
21 addition of a phrase at the end of paragraph
22 2(a)(ii). The entire paragraph as amended by me
23 now reads as follows:

24 "limitations or laches defences
25 applicable to any of the Plaintiffs'

12:25:19 1 causes of action in general, or
12:25:21 2 applicable to the entitlement of the
12:25:23 3 Plaintiffs to compensation for
12:25:25 4 breaches of fiduciary duty of the
12:25:27 5 pre-Confederation Crown, save and
12:25:31 6 except any such limitations or
12:25:33 7 laches defences that may apply to
12:25:35 8 the claims of beneficial ownership
12:25:37 9 of lands or that the Phase 1 trial
12:25:39 10 judge concludes in the Phase 1
12:25:41 11 judgment should be deferred to Phase
12:25:44 12 2."

12:25:45 13 It is that final phrase that was the
12:25:49 14 subject of objection by Plaintiffs' counsel after
12:25:55 15 receipt of this draft by my email of February 4.

12:26:04 16 As I have previously said to counsel,
12:26:14 17 it seems to me that I would have that discretion
12:26:16 18 anyway, but I wanted it to be expressly noted in
12:26:23 19 order that the parties would have it in mind.

12:26:25 20 For the Plaintiffs, Mr. Townshend
12:26:29 21 raised two concerns about this additional language.

12:26:35 22 By way of background, I note that
12:26:37 23 Ontario and Canada are, to different degrees,
12:26:40 24 advancing defences of limitations and laches, at
12:26:46 25 least in Stage 1 and I expect in Stage 2 of this

12:26:52 1 trial as well.

12:26:53 2 Mr. Townshend's first concern was that
12:26:54 3 Canada and/or Ontario could unilaterally defer
12:26:58 4 those defence issues to Phase 2 and this would
12:27:05 5 defeat the effort that has already gone into that
12:27:07 6 part of the trial before me in Phase 1.

12:27:13 7 As I have told counsel, it will not be
12:27:15 8 an issue because I will not permit. If either
12:27:20 9 Canada or Ontario do not wish to argue their
12:27:22 10 limitations or laches defences at the end of Phase
12:27:27 11 1 as described in the pre-existing part of the
12:27:29 12 order, I will not permit them to unilaterally defer
12:27:35 13 them to Phase 2. If they don't wish to pursue
12:27:39 14 them, they will have to abandon those defences
12:27:41 15 altogether.

12:27:44 16 The second concern raised by Mr.
12:27:46 17 Townshend is based on the fact that there has been
12:27:50 18 substantial evidence in the trial before me that is
12:27:55 19 relevant to the question of limitation periods and
12:27:58 20 laches.

12:27:59 21 Mr. Townshend submits that he would be
12:28:01 22 seeking findings of fact about the Plaintiffs'
12:28:06 23 capacity to commence litigation and that the
12:28:09 24 Plaintiffs would be prejudiced if that evidence and
12:28:12 25 those findings were not made in Phase 1 of this

1 case.

2 While I recognize that concern, it does
3 not directly address the reason for the additional
4 wording in the order. As I said in my original
5 reasons for decision, we have a situation where
6 there could be some limitations and laches defences
7 advanced in both Phase 1 and Phase 2 of this trial.
8 Having heard submissions on the motions for
9 direction, it became apparent to me that to know
10 with certainty that there was no possible overlap,
11 I would have to have full argument on the merits of
12 those defences. That is a step that does not
13 ordinarily happen until closing argument.

14 As I considered the matter, I do not
15 see the point of full argument on the merits of
16 those two defences at any stage prior to final
17 argument. Those defences will be advanced at that
18 time and the potential issue that I am concerned
19 about may not arise at all. But without that full
20 argument, I felt it prudent to include that phrase
21 in the order.

22 I have therefore concluded that the
23 order as I distributed it should be signed, and it
24 is available to be picked up from Mr. Registrar for
25 whichever party is going to take out that order.

12:30:05 1 Whoever does so should distribute the entered order
12:30:08 2 to all concerned.

12:30:09 3 Madam Reporter, that concludes my
12:30:13 4 additional reasons for decision in relation to the
12:30:15 5 severance matter.

12:30:16 6 All right. Does any counsel have
12:30:19 7 anything else they wish to raise as we have a bit
12:30:22 8 of time?

12:30:23 9 I'll start with Mr. Townshend.

12:30:24 10 MR. TOWNSHEND: No. Thank you, Your
12:30:26 11 Honour.

12:30:26 12 THE COURT: No? All right.

12:30:27 13 Mr. Beggs?

12:30:29 14 MR. BEGGS: No, Your Honour.

12:30:29 15 THE COURT: Mr. Feliciant?

12:30:31 16 MR. FELICIAN: No, Your Honour.

12:30:33 17 THE COURT: All right. I am just
12:30:39 18 trying to think myself if there are any other
12:30:42 19 things we can usefully do with our time.

12:31:05 20 I am not seeing anything in my list.

12:31:07 21 I see counsel consulting with each
12:31:12 22 other. Does that give rise to anything?

12:31:14 23 MR. BEGGS: No, Your Honour.

12:31:16 24 THE COURT: All right. We'll adjourn
12:31:17 25 to March the 3rd.

12:31:18

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-- Adjourned at 12:31 p.m.

1 REPORTER'S CERTIFICATE

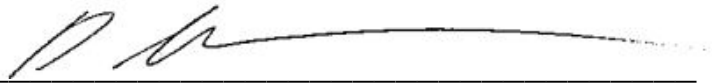
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3
4 I, DEANA SANTEDICOLA, RPR, CRR,
5 CSR, Certified Shorthand Reporter, certify:

6 That the foregoing proceedings were
7 taken before me at the time and place therein set
8 forth, at which time the witness was put under oath
9 by me;

10 That the testimony of the witness
11 and all objections made at the time of the
12 examination were recorded stenographically by me
13 and were thereafter transcribed;

14 That the foregoing is a true and
15 correct transcript of my shorthand notes so taken.

16
17
18 Dated this 21st day of February, 2020.

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20
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23 NEESONS, A VERITEXT COMPANY

24 PER: DEANA SANTEDICOLA, RPR, CRR, CSR

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1	1775 10763:4	1st 10746:20	2749 10733:1	10727:8
	1794 10759:1	2	2860 10735:7	10728:17,22
1 10715:16	1795 10759:8		2865 10736:2	10739:4,6
10742:3	1836 10748:16	2 10697:10	2956 10743:21	10740:5
10743:8	185 10706:15	10718:23	2nd 10697:13	10741:2
10753:20	10713:5	10732:11		10748:7
10763:4	1850 10717:5	10769:12,25	3	5th 10759:7
10769:9,10,25	1854 10697:10,	10770:4,13		
10770:6,11,25	13,19,24	10771:7		6
10771:7	10698:2,20	2(a)(ii)	3 10705:1	6 10713:18
1/2 10743:20	10713:17	10768:6,22	10706:13,15	615 10760:19
10745:15	10727:7	20 10746:14	10713:4,19	67 10726:10
10748:19	10731:5	2019 10702:17	10715:2,11	
10 10716:15	10750:5	10755:24	10716:14	
10:04 10694:1	1855 10719:4	2020 10694:10	10725:2	7
10th 10743:22	10720:2	10696:20	10735:11	
11 10696:21	10721:7,16,20	10767:13,17,20	10752:4	7 10708:18
10697:23,25	10722:4	10768:11	3340 10736:23	10709:1
10736:4	10723:12	203 10709:6	383 10747:8	10710:22
10758:2	10724:5	204 10710:15	3rd 10727:6	7000 10702:18
1142 10748:6	10726:2	10713:5	10766:3,8	72 10716:1,11
11:26 10746:15	10737:23	21 10758:3	10772:25	10717:2
11:50 10746:16	1856 10723:23	2161 10727:5	4	10718:24
12 10696:20	10726:2	2175 10697:21,	4 10713:18	10719:2
10697:24	10740:17	22 10701:9	10715:4,10,16,	10720:24,25
10754:9,10	10742:4	10727:13	21 10716:17	10723:17
12:31 10773:2	186 10713:19	10728:16	10727:9	10727:8
12th 10694:10	1860 10746:21,	22 10753:1,3,4,	10728:17,20,23	10734:25
13 10753:4	23	5,25	10748:7	10737:17
10755:13	187 10713:19	2290 10721:23	10749:19	10739:25
14 10694:10	1870s 10730:6	23 10753:1	10750:1	10741:7,16,20
10705:1	10738:13	23rd 10702:17	10768:3	10743:20
10750:5	10740:19	24 10702:19	10769:15	10745:16,18,24
10752:8,10	1871 10732:11	10735:10	45 10743:20	10746:1
14th 10714:25	1874 10733:2	10752:10	10745:15	10749:12,16,18
157 10694:10	1879 10735:10	2428 10742:2	10748:19	10750:12,16,20
16 10697:19	10736:4	247 10728:16	4703 10705:2	10751:2
10698:2,3	1886 10743:22	25 10722:3	10752:4	743 10759:16
10767:13,19	1890s 10721:1	10732:4	10758:1	75 10736:5
10768:11	1900s 10717:6	10734:7,18	4704 10715:17	8
160 10696:20	10721:2	2590 10746:19	4706 10706:11	8 10732:11
17 10696:21	10737:22,24	2692 10732:8	4708 10739:25	10748:9
1764 10760:16	1970s 10750:7	27 10759:8	5	10767:17
	19th 10720:21			82 10748:2
			5 10715:18	8733 10756:2

8736 10756:6	actors 10754:21	administratio n 10729:25	10724:12	apparently 10729:2
8739 10762:15 10763:10	actual 10700:23 10701:8 10704:16 10709:19 10727:17 10728:9 10729:1	advance 10699:21 10765:1	agreement 10723:18 10724:7	appears 10696:1 10709:16 10752:8
8th 10733:2		advanced 10730:21 10771:7,17	ahead 10694:3 10710:22 10727:25 10740:14 10746:17	appended 10761:3
<hr/> 9 <hr/>		advancing 10769:24	Albermarle 10734:4	applicable 10768:25 10769:2
9 10733:4 10747:9	add 10709:17 10712:4,14	advantages 10727:16 10728:3,8	Allenford 10721:16	apply 10714:23 10752:16 10769:7
9th 10755:24	added 10706:24 10708:1,19 10709:7,13,15 10711:13 10712:3	advise 10736:13	allowed 10716:11	appraisers 10738:14
<hr/> A <hr/>		advised 10729:6 10730:10	allowing 10760:1	approach 10711:20
a.m. 10694:1 10746:15,16	addition 10768:21	advisors 10700:20	altogether 10770:15	April 10733:2
abandon 10743:9 10770:14	additional 10711:13 10754:10 10767:5 10768:7 10769:21 10771:3 10772:4	Affairs 10732:10 10737:4 10743:25 10758:7 10760:16 10761:23	Amabel 10734:4	archival 10695:25
abstract 10765:15	address 10731:7 10739:6 10771:3	afternoon 10704:9	amended 10768:22	area 10714:5
accessible 10736:21	addressed 10768:17	agent 10714:11 10717:19,23 10718:8,14	amount 10734:8	argue 10770:9
account 10731:15	addressing 10739:18	agents 10740:22	ancestors 10724:11	argued 10725:13,15 10736:19
accounts 10701:5 10702:12	adjective 10710:12	aggregate 10734:8	and/or 10770:3	argument 10768:19 10771:11,13,15, 17,20
achieve 10716:3	adjoin 10772:24	agree 10709:11 10712:9 10741:12 10756:17,24,25 10757:11,21 10759:12,23 10760:22,24 10763:19,21	Anderson 10700:3,4	arise 10771:19
acknowledg ment 10746:3	Adjourned 10773:2	agreed 10698:10 10717:16	Anderson's 10697:1,5,8,13, 17,23 10699:6	arising 10767:6,23
acquire 10734:2 10741:18	adjustment 10723:21		Angus 10735:9	arranged 10721:14
acquired 10736:1	adjustments 10722:22		Anishinaabe 10749:24	arrived 10696:6,7,16 10699:17 10700:13,15 10708:13,17
acre 10732:5 10734:8,19			annotation 10763:1	art 10756:13,23
Act 10762:21, 25 10763:13			answers 10763:8	article 10754:13 10762:25
action 10731:6 10738:3 10769:1			anticipated 10738:9	articles 10754:5,6,10
actions 10710:8			apparent 10771:9	

ascribed 10763:13		Beggs 10751:16,17,20, 21,25 10764:6 10772:13,14,23	blue 10697:25 10703:18 10733:11 10743:8 10744:1 10747:11	brought 10717:5 10730:14
asks 10763:5	B	Beggs' 10746:10		Brownlie 10707:7 10709:14,20 10712:17
assent 10747:21 10748:4	back 10702:7, 12 10713:17 10722:20 10731:25 10732:15 10733:8,25 10734:22 10735:12 10748:8,9 10752:19 10762:13 10763:10 10765:19	begin 10725:3	blurring 10704:11,23 10707:11 10711:16 10712:22	building 10738:18
assess 10715:22 10716:11		beginning 10701:12 10728:3 10735:12 10744:12	Bond 10748:18	built 10735:3
assist 10701:2 10727:24 10736:6,19	background 10769:22	begins 10727:15 10733:11 10735:14 10743:8 10744:4	border 10723:14	bullet 10709:6
assume 10734:13	badly-worded 10696:23	begun 10720:11	bordered 10720:3	buried 10724:12
attached 10697:22 10761:3,9,16,17	balance 10703:2	behalf 10735:15 10752:1	bottom 10701:22 10706:16 10733:9	Bury 10721:14
attempts 10710:6	band 10716:23 10717:14,23 10720:5 10724:8,9,14 10736:24 10748:2	believed 10725:21	boundaries 10719:6 10720:1 10724:18	business 10735:2
attend 10699:13	Band's 10731:15	beneficial 10769:8	boundary 10719:8,14 10720:3,5,8,10, 13 10721:8,11, 13,18 10723:24 10724:25	C
attention 10713:2 10744:18	Bands 10737:3,4	benefit 10733:14 10734:9 10735:16 10737:14 10742:19 10746:10	box 10703:18	calculated 10710:8,17 10711:2
Attorney 10752:1	Bartlett 10732:9	benefits 10725:23 10727:3 10731:23	breaches 10769:4	call 10704:14 10708:10 10710:22 10755:23 10757:6,25 10759:16 10765:14
auction 10725:12 10729:8 10731:18 10735:25	based 10694:25 10726:12 10752:21 10770:17	big 10714:8	break 10746:8, 9 10765:6	called 10700:12,14 10702:7 10704:9,16,21 10719:7 10744:15 10757:12
avoid 10761:8	basic 10755:2	bit 10694:25 10701:17 10712:2 10733:19 10756:1 10762:23 10772:7	bridge 10723:19	calling 10705:25 10708:12
aware 10700:2 10714:10 10755:15 10760:7	basis 10704:17 10766:25	block 10735:3	briefly 10732:17 10746:21	Canada 10746:24 10747:2 10752:2,7 10769:23 10770:3,9
awareness 10746:2 10755:1,8	Bay 10720:18	blocks 10725:15	bring 10697:20,21 10706:10 10725:25	capacity 10770:23
	Beach 10721:3		bringing 10718:15	Cape 10720:18
	bearing 10694:14		broke 10754:8, 9,14	
	began 10698:6 10719:3			

10733:3 10747:7 10748:1 capital 10729:5 careful 10762:17 carefully 10710:25 10733:12 caretaker 10724:13 Carleton 10761:7,10 10762:4,5 case 10699:14 10711:24 10724:25 10736:6 10767:24 10771:1 categories 10716:16 cede 10698:10 celebration 10703:4 central 10742:17 centre 10699:8 cents 10732:4 10734:7,18 century 10720:22 certainty 10771:10 cetera 10716:23 10725:20 10755:12 chaining 10719:11,12 challenging 10749:4 change 10694:16 10706:14 10707:2	10709:8 10710:14,18 10711:14 10713:13 10737:20,24,25 changed 10709:23 10720:10 10732:1 chapter 10715:15,16 10718:23 10725:2 10739:4,6 10740:5 10741:2 character 10756:19 Charles 10724:8,11 chart 10705:2, 4,11,21 10706:3 10752:22 10753:5 checklist 10764:2 Chew 10758:5, 6,24 10759:5, 12,24 10760:8 Chew/coffin 10759:2 Chief 10699:24 10705:15 Chief's 10720:18 Chiefs 10699:18 10700:13,15,19 10702:10,11,22 10704:15 10705:19 10717:14 10721:11 10735:15 10743:23 10748:25 10749:24 children 10742:19 10744:21	choice 10707:23 10710:4 choices 10698:20 chose 10699:5 10700:6 cited 10765:9 citizens 10742:23 Civil 10758:17 claim 10750:8 claimed 10750:11 claims 10769:8 Clair 10748:15 10749:24 clarification 10694:14 10695:9 10697:3,11,12 clarify 10698:13 10707:21 10713:9 clear 10743:2 10747:14 10768:15 clergy 10722:14 close 10713:2 closer 10713:7 closing 10771:13 coast 10719:9 coerced 10749:9 10750:16 Coffin 10758:6,16,24 10759:6,14 10760:9 collapsing 10704:8 10707:8	collected 10766:11 Colpoy's 10720:18 commence 10712:8 10770:23 commencing 10694:1 comment 10704:4 10767:5 comments 10703:11 common 10705:19 communicate 10765:22 communicate d 10717:7,12 communicati on 10700:3 10718:7 communicati ons 10718:18 communities 10742:13 community 10742:17 compare 10734:19 compensatio n 10769:3 compiled 10753:2 10754:3 complaint 10708:21 10719:18 10720:2,6,7,12 10724:2 10725:1 10729:21 10730:1,2,10,15 10737:7 10748:1	complaints 10716:9,16,18, 19 10717:5,8,16 10718:5,16,18, 25 10720:1,17, 22 10721:2,7 10723:12,15,23, 25 10724:5,17, 21,22 10725:5, 7,25 10726:21, 24 10729:18 10730:14,17,21 10738:4 10739:5,7,9,10, 20 10740:4,6, 10,16,18,21 10747:5,7 10749:11,15 10750:10,14,18, 22 10751:1,6 completed 10737:13 10739:2 10763:25 completion 10738:25 computer 10728:19 concern 10770:2,16 10771:2 concerned 10771:18 10772:2 concerns 10718:6 10731:8 10769:21 conclude 10730:24 concluded 10771:22 concludes 10769:10 10772:3 conclusion 10713:20 conclusions 10707:13
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

conditions 10725:5,8,10, 13,14,22 10726:1,5,8,15, 22,24 10727:1 10729:1,7,11,17 10739:9,16 10741:9	10738:17 10756:25 constructed 10723:20 construction 10738:7,24 consult 10698:8 10704:15 consultation 10700:19 consulted 10729:22 10730:11,16 consulting 10772:21 CONT'D 10694:5 contained 10705:22 10706:4 context 10736:8 10746:21 10748:12 10757:23 10762:19 Continue 10701:20,21 10722:7,9,10,11 continuing 10721:10 continuity 10745:6 control 10710:7 10734:14 convey 10695:16 conveyance 10753:21 conveys 10695:15 copies 10753:21 Copway 10719:15	copy 10761:19 core 10737:7 corn 10720:5 10723:13 corner 10721:3 correct 10695:18 10696:3 10697:19 10698:1 10699:18 10722:4 10723:6,11 10728:17 10752:16,24,25 10753:7 10754:1,18 10756:9 10758:21 10760:17,18 10761:14 10762:11 10766:3,5,7 correction 10695:9 correlate 10738:23 corresponde nce 10716:22, 24 10758:5 council 10697:16 10698:10,22,23 10699:5,11,13, 22 10700:2,12, 14 10701:1 10702:7 10704:9,10,14, 16,20,22 10705:8 10706:1,7 10707:10,20,24 10708:2,6,12, 13,14,17,22,24 10709:1,2 10710:22 10711:17,18,19 10712:4,9,10, 23,24 10716:13, 23 10717:14,15, 21,23,24	10718:2 10721:20,23 10736:24,25 10747:22 10748:15 10749:23 10755:5 counsel 10727:11 10746:11 10767:3 10769:14,16 10770:7 10772:6,21 country 10743:5 couple 10713:16 10764:9 10766:24 Court 10694:3, 19 10695:3 10712:12 10723:2,5 10727:10 10728:19 10746:10,14,17 10751:16,20 10764:5,9 10765:6,12,25 10766:7,15,22 10767:3 10772:12,15,17, 24 cover 10750:4 create 10757:17 created 10719:1 10757:23 Croker 10720:18 10733:3 10747:7 10748:1 cross- examination 10751:21 10764:1,13 10765:2	cross- examine 10763:25 Crown 10706:19 10707:17 10711:13,21 10714:11 10715:22 10717:19 10718:25 10720:23 10721:6 10723:15,16,24 10724:4,7,23 10726:1,23,25 10729:10,19 10731:7 10734:23 10738:3 10750:23 10769:5 Crown's 10724:15 10726:21 10741:15,17 cultivate 10744:25 10745:8 cultivated 10726:17 cultural 10699:8 current 10731:25 10732:2 10733:25 10734:5 10738:17 custom 10705:5,13,23 10706:5 cut 10720:15 cutting 10740:8,25 <hr/> D <hr/> date 10722:3
--------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

dated 10698:2 10732:10 10733:2 10735:10 10736:3 10742:3 10743:22 10746:20 10760:4	defeat 10770:5 defence 10770:4 defences 10768:24 10769:7,24 10770:10,14 10771:6,12,16, 17 defer 10770:3, 12 deferred 10769:11 degrees 10769:23 delegations 10718:3 deleted 10706:16,17,24 deliberate 10697:7 deliberated 10696:25 deliberately 10699:5 deliberation 10698:14 10703:17,22,25 10704:18 deliberations 10697:14 10700:23 10701:2,4 10703:13 10706:8 10711:4 demonstrate 10749:19 10755:1 demonstrate s 10746:2 department 10705:6,13,23 10706:5 10717:8,18 10721:13 10724:21 10731:13	10732:22 10735:1 10740:19,23 deputation 10718:9 deputations 10718:3 Deputy 10736:12 derived 10762:10 describe 10721:5 10736:23 10739:5 10758:5 describing 10747:24 description 10719:18 destroyed 10744:17 detail 10740:4 determinatio n 10716:25 devalue 10725:17 developed 10705:6 development 10725:19 10738:11 10742:12 difficult 10765:13 direct 10701:15 direction 10705:24 10719:16 10771:9 directions 10767:7,16 directly 10759:3 10761:17	10771:3 directs 10756:3 disagree 10756:24 10763:21 discover 10749:11 discovered 10714:16 10725:12 discretion 10769:17 discuss 10713:17 10726:20 10768:5 discussed 10717:1 10729:2 10752:11 discusses 10763:17 discussing 10758:23 discussion 10697:17 10701:24 10729:16 10767:6,22,24 10768:1 discussions 10697:14 10698:5 10711:4 10731:4 dispose 10737:5 disposed 10743:14 disputing 10748:5 dissent 10700:7,9 distilled 10753:5	distinction 10708:5,20 distinctions 10740:3 distinguish 10740:1 distribute 10772:1 distributed 10771:23 diverted 10701:25 document 10696:19 10703:9 10722:2,6,8,15, 18 10723:6,11 10727:8,14,15 10728:12,22 10729:9 10732:11,12,17, 18 10733:5,9, 16,18,22,23 10735:11,14,17 10736:5,7,23 10737:2 10742:6,9 10743:7,11 10744:1,4 10745:13 10747:6,9,12 10748:7,10 10749:22 10755:11 10758:2 10759:10,11,12, 15,19 10760:12, 14 10761:2 10762:9 documentary 10726:13 10737:21 10740:11 10749:12 10751:6 documentati on 10711:25 10716:3 10718:13,17 10732:7 10739:8,23 10741:4,8
------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

10749:15 10750:7,9	duplicate 10753:22	10765:25 10768:21 10770:10	European 10700:20	10752:4 10758:1 10759:16 10760:19
documented 10711:18	duty 10769:4	ended 10700:8 10747:3	evening 10708:18 10709:1	existing 10767:17
documenting 10747:4	E	ends 10727:18 10728:6 10733:13 10735:15 10737:22 10743:9 10744:5	event 10704:24 10764:24	expect 10769:25
documents 10700:25 10702:8 10705:5,12,22 10706:4 10737:6,15 10739:14,17 10745:21 10749:25 10750:4 10752:20,23 10756:13,19 10757:16,18 10764:22,25 10765:17 10766:9	eagerness 10737:12	energy 10729:4	events 10704:24 10707:9 10714:2,8,13 10738:24	expectations 10755:10
earlier 10707:8 10734:22 10755:16	earliest 10719:4	enfranchisem ent 10742:16	evidence 10702:17 10708:16 10710:10,11 10711:8 10716:5 10718:13 10741:5,14,20 10754:25 10770:18,24	expected 10711:21
east 10720:8	early 10717:6 10730:17 10737:22,23 10746:9	engage 10766:23	enlightening 10742:10	expedient 10714:20
economy 10725:20	education 10742:12	entered 10772:1	evident 10716:20	experiences 10714:2,13
effect 10721:21 10738:19	efficiency 10765:3	entering 10741:6,16 10750:16	examination 10694:4 10715:7,9	expert 10695:4 10706:15 10764:17,18
efforts 10734:2	efficiently 10701:14	entire 10697:16,17 10755:22 10768:22	Excellency's 10747:17	expert's 10765:8
email 10768:3 10769:15	effort 10735:4 10770:5	entitled 10695:4 10752:14 10756:20 10760:15	exception 10765:19	explain 10707:1 10708:4 10710:18 10711:14 10712:11 10716:2 10717:3 10723:14 10728:24 10729:17 10732:20 10736:7 10742:4 10746:21 10748:12
emanating 10756:14	efficiency 10765:3	entitlement 10769:2	exceptions 10764:16	explained 10710:24
en 10735:2	effort 10735:4 10770:5	entrepreneur s 10729:14	Exhibit 10697:21 10701:9 10705:2 10706:10 10715:17 10721:22 10727:5 10728:16 10732:8 10733:1 10735:7 10736:2,22 10739:25 10742:2 10743:21 10746:19 10748:6	explaining 10713:24 10742:21
enclosure 10697:23	effort 10735:4 10770:5	error 10720:13, 14	essentially 10742:20 10754:9 10762:17	explains 10714:24
encroachment 10740:24	efforts 10734:2	establishmen t 10742:18	entire 10697:16,17 10755:22 10768:22	explanation 10695:21 10719:24 10747:6
end 10712:1 10713:1 10728:6	email 10768:3 10769:15			
due 10719:13	emanating 10756:14			
Duke 10747:1	en 10735:2			
	enclosure 10697:23			
	encroachment 10740:24			
	end 10712:1 10713:1 10728:6			

explicit 10700:16 10710:5,9	farming 10744:19	find 10701:17, 18 10718:17 10738:22 10750:10,14,18 10751:1 10766:15	found 10724:1 10725:1 10739:14 10744:21 10754:15	10752:1 10755:7 10758:8,12 10769:1
expressed 10718:25 10720:22 10729:19	fashion 10765:22	faster 10730:25	free 10732:24 10766:8	generally 10741:4 10743:20
expressing 10700:9 10714:4	Father 10744:9	finding 10714:5	friend 10752:12 10756:3,7 10762:24	George 10744:9
expressions 10716:9	fault 10703:8	findings 10770:22,25	front 10700:18 10706:11 10715:10	give 10712:13 10719:24 10722:1 10732:16,24 10733:6,15 10743:10 10772:22
expressly 10769:18	February 10694:9 10696:20 10768:2 10769:15	firmly 10725:21	full 10701:22 10720:9 10728:1 10731:23 10734:14 10742:22 10756:6 10758:4 10771:11,15,19	Good 10694:6, 7 10715:8,12,13 10751:22,24
extend 10723:18	feeling 10738:15	fishing 10740:8 10742:22 10745:19	fully 10713:1 10734:2	government 10718:4 10734:13,17
extending 10720:9	Feliciant 10694:4 10695:12 10764:15,19 10765:24 10766:18 10772:15,16	fit 10768:8	future 10742:14,25 10760:15	Governor 10717:25 10747:21 10748:4,23 10758:17,19 10761:3,4,5,6, 16 10762:4
extension 10720:4	fellow 10748:24 10749:24	flawed 10750:12	gain 10710:6	Governors 10756:16
extent 10739:23 10754:16	felt 10710:12 10711:16 10714:19 10749:8 10771:20	focus 10716:17 10737:16,20,24, 25	gap 10764:20, 21	grammaticall y 10695:18
extreme 10714:5	F	focussed 10716:16	gathering 10742:22	grants 10732:24
		follow 10709:12 10750:24 10755:8	gave 10748:17	graveyard 10724:6,10,13
		food 10744:20	gears 10713:16	graveyards 10720:14
fact 10694:13 10707:12 10711:23 10714:16 10718:18 10730:19 10748:5 10749:17 10751:7 10755:11 10757:13 10770:17,22		footnote 10758:24 10759:7,8	general 10717:23,25 10725:18 10734:12 10741:22 10742:15 10743:24 10747:21 10748:4,15 10749:23	Great 10744:9
failed 10750:23	fewer 10739:17	forefathers 10744:8		greatest 10729:6
fair 10694:25 10753:15	fiduciary 10769:4	form 10767:23		greatly 10736:20
fairly 10701:25 10730:17 10764:11	fields 10720:5 10723:13	formal 10704:16,22		grounded 10695:1
familiar 10726:4,7,11	figure 10734:19	formation 10742:17		grounds
	final 10696:2 10702:16 10756:1 10768:18 10769:13 10771:16	forward 10717:5 10718:15 10725:25 10730:14 10740:21 10742:13		
	finally 10712:1 10713:2			
	financial 10725:22 10741:11			

10742:24	heading	hold 10694:19	immediacy	10771:20
10743:14	10706:15	10699:5,11	10714:25	included
10744:11	headquarters	homes	immediately	10723:18
10746:5	10717:20,24	10744:13	10719:10	10760:1,2
grouping	10718:8	Honour	10729:11	including
10753:11	10719:20	10694:21	10750:6	10766:10,12
guess	10755:10	10695:11,13	impact	incorrect
10762:22	heads	10715:1	10745:23	10721:4
guidance	10755:14	10746:6	10762:22	10747:18
10705:7,14,24	heard 10767:7,	10751:17,22	impatience	increase
10706:6	16 10771:8	10763:23,24	10735:22	10738:12
guidelines	held 10698:23	10765:11	implementati	10739:1
10757:6,12	10699:7,14	10766:6	on 10751:10	independent
10764:2	10705:9	10772:11,14,16,	implied	10766:12
Guirguis	10731:18	23	10711:23	Indian
10694:20,21	10748:15	hook 10751:18	implying	10705:6,13,23
10695:3,10	10749:23	hoping	10759:2	10706:5
10765:10	helpful	10696:17	importance	10717:8,17,18
10766:3,5	10759:18	hour 10698:9,	10696:4,15	10718:8,14
Guy 10761:10	Henry 10735:9	14,17 10701:1,3	10753:13	10721:12
10762:4,5	hesitant	10702:3,7,9,10,	important	10723:1
Gwen	10756:23	13 10746:13	10713:9	10731:13
10706:12	10763:21	hours	10725:14	10732:10,22
<hr/>	high 10717:3	10707:24	10753:16,20	10737:4
H	10719:22,24	10708:5,20	importantly	10740:19
<hr/>	10721:5	housekeepin	10696:1	10742:3,4,9
Haldimand	10723:14	g 10715:9	impose	10743:2,25
10761:4,16,18	10725:6	Howe	10726:25	10758:7
10762:3,7	10729:17	10732:10	10729:11	10760:16
half 10720:4	10732:4	hunting	imposed	10761:23
10723:13,18	10736:17	10742:21,23	10725:13	Indians
10726:9	10738:2	10743:9,14	10726:9	10727:4
10746:12	10739:4	10744:11,17	imposing	10733:3
happen	highest	10745:19	10741:9	10743:4,8
10705:20	10729:14	10746:5	impressed	10744:18
10771:13	highlighted	Huron 10719:9	10714:14	10761:23
happened	10697:25	<hr/>	improve	indicating
10704:8,10,20,	10733:11	I	10725:22	10735:22
21 10707:9,23	10735:14	<hr/>	IN-CHIEF	induced
10711:1,17	10743:7	identified	10694:4	10741:12
10712:23	10744:2	10752:22	10715:7	10745:8
happening	10747:10	identify	inadvisable	inductive
10714:11	historical	10754:13	10736:15	10716:21
harvesting	10695:1	identifying	inappropriate	indulgence
10745:20	10703:24	10757:5	10707:23	10751:12
head 10726:3	10710:3	idle 10725:16	include	inferences
10748:18	10716:20	Ill 10715:17		10695:4
	10754:21	10744:9		information
	10762:19			10696:24
	10763:12			

informed 10699:8 10700:6	interpretation s 10763:18	J	laches 10768:8,24 10769:7,24 10770:10,20 10771:6	10754:18 10768:7 10769:21
informing 10736:13 10756:15	interpreted 10710:2 10736:12 10757:1	January 10713:2 10759:7 10767:7,13,17, 19 10768:11	lack 10708:21 10739:9 10749:14 10751:6	large 10725:15 10744:10 10745:9
initiated 10767:22	interpreters 10760:2	John 10735:9 10743:23	Lake 10719:9	late 10712:17
insisted 10702:9,10	interrupt 10723:2	joint 10717:14, 24 10736:25 10737:3	land 10714:9, 11 10717:19 10722:22 10723:21 10725:15,23 10729:13,15,20, 23,25 10730:17, 22 10731:2,8,23 10737:8,9,12, 18,19 10738:5, 20,22 10739:10, 15 10740:16 10744:6,15,19, 22,23 10745:4, 10 10752:16	laws 10714:22
instructed 10706:20 10707:17	interview 10699:24	Joseph 10732:10 10758:5,6	lands 10706:21 10714:5,6,8,16 10724:11 10725:11,17 10726:16,18,19 10727:2 10729:6,7 10730:7,8,25 10731:14,16,18, 19,24 10732:2, 23 10733:25 10734:1,15,16, 20,25 10735:2, 5,25 10736:17, 20 10737:5 10738:1,10,14, 15 10739:19,21 10741:18 10746:3 10769:9	lay 10725:16
instruction 10761:25	introduction 10707:3	Judge 10769:10		lead 10730:23
instructions 10752:23 10753:2,6,25 10754:4,5,10, 14,15,17,23 10756:8,12,20 10757:1,4,18,22 10758:23,25 10759:2,3,7,13 10760:5,8 10761:3,4,10, 12,16,18,20	introductory 10715:15	judgment 10769:11		leave 10698:7 10741:2,24 10763:24
intended 10694:13 10695:16 10700:1	invalid 10748:3 10751:3	July 10721:16		led 10709:7 10759:2 10768:20
intensified 10714:14	involved 10729:24 10730:16	June 10735:10		left 10702:7
intent 10742:11,25 10752:17	involvement 10718:14	K		legal 10750:8 10762:19
intercession 10718:7	issue 10729:2 10739:18 10759:1 10763:20 10768:4,5 10770:8 10771:18	Kaduhgekwu n 10735:9		length 10698:6 10764:21
interest 10714:5	issued 10761:13	Keeping 10740:3		lengthier 10767:12
internally 10740:23	issues 10716:25 10742:16 10768:16 10770:4	Keeshick 10724:8,11		Lepan 10715:3,7 10723:8 10727:12 10728:21 10746:6,12,18
interpret 10735:21	items 10755:13 10757:16	kind 10694:11 10695:21 10708:21		letter 10732:8 10735:8 10736:3,9 10743:22
interpretation 10709:21	IV 10762:25	kinds 10716:8, 25 10738:6 10742:24 10755:10		letters 10758:24 10759:5
		King 10744:9		level 10717:4 10719:22,24 10721:6 10723:14 10725:6 10729:18 10738:3 10739:5
		L	language 10706:25 10708:1,3 10709:7,10 10710:13 10711:11,13 10712:3,5 10713:5	life-style 10745:24
		labelled 10752:6 10753:20		
		labour 10742:18		

light 10764:20		manage 10710:6	McNabb 10714:11	method 10716:21 10718:1
limitation 10768:8,13 10770:19	M	managed 10709:25	meaning 10756:22 10763:12	Metigwob 10748:14 10749:3,4,22
limitations 10768:24 10769:6,24 10770:10 10771:6	Madam 10767:9 10772:3	management 10729:22,25 10730:16 10760:16	means 10728:24 10744:24	Michael 10751:25
limits 10702:2	made 10707:4 10712:20 10720:13 10723:21 10730:19 10731:11 10732:7,21 10733:21 10734:2 10735:5 10743:3 10746:22 10747:5 10748:1 10750:8 10754:25 10763:2 10764:15 10770:25	manipulative 10709:24 10710:1	meant 10720:14 10743:13 10756:8	mile 10720:4 10723:13,19 10724:25 10726:9
lines 10695:2 10728:2	Madwayosh 10699:18,21,24 10700:4,8 10705:16 10735:9	manual 10742:18	measure 10710:6	miles 10720:9 10724:3
list 10716:15 10755:5,13 10772:20		map 10698:11	meet 10699:20 10700:6 10705:19 10710:23 10717:15 10718:10 10721:15	military 10757:23
literally 10708:9		marathon 10708:11	March 10743:22 10766:3,8 10772:25	mill 10734:5
litigation 10770:23		marginalia 10722:13	meeting 10699:6 10700:8 10705:15 10708:11 10714:3	mind 10694:14 10740:3 10762:19 10769:19
live 10742:21		marked 10698:11	members 10699:12	minute 10713:6
location 10698:21 10699:3		market 10731:25 10732:1,2 10733:25 10734:1,6 10736:17 10738:14,17	memoirs 10702:6	minutes 10746:7,9,14
logical 10756:21		matter 10713:10,11 10715:8 10771:14 10772:5	memorials 10746:25	misconstrued 10707:13
long 10696:25 10702:11 10706:7 10722:21	main 10698:25 10716:15,25 10717:11 10738:6	Mcdonald 10743:24	memory 10726:2	misrepresenta- tion 10703:23
longer 10698:17 10726:18 10738:17 10742:21 10746:4,11,12	make 10704:3 10710:14 10714:20 10716:24 10721:12 10741:23 10744:12 10745:9 10755:9,14	Mcgregor 10735:10	men 10702:23 10744:13	missing 10760:12
looked 10707:15,16 10716:5,8,21 10736:11 10738:21	making 10707:2 10712:15 10733:24 10734:11 10749:22 10750:11 10759:25 10760:2	Mchugh 10755:16,25 10756:10 10757:22 10760:21 10762:14,17 10763:5,8	mentioned 10730:20 10738:18 10743:1 10745:17 10752:20	missionaries 10700:20
loop 10766:19			merits 10771:11,15	misundersta- nding 10716:10
Lord 10721:14 10761:11			met 10699:17 10721:11	misundersta- ndings 10716:7
lot 10766:11				mode 10718:6 10727:3
				modern 10700:17
				modifications 10759:13

moment 10694:17,19 10732:16 10733:15 10763:23	10719:1 10720:23 10725:9,25 10726:5 10729:19 10730:22 10731:7,12,22 10734:24 10735:23 10736:14 10737:8,16 10740:22 10742:8 10747:7 10750:11,15,19, 23 10751:2	needed 10707:21 10755:6	notice 10696:10	10765:16,17
moment's 10751:12		negative 10696:2,8 10710:2 10711:7	notices 10713:19,21,23 10714:19	occurred 10707:7 10711:5 10721:14 10764:16
moments 10751:18		negotiate 10706:20 10707:18 10709:2 10711:19	notification 10695:22	October 10698:20 10702:17 10713:17 10714:25 10731:5 10742:3 10750:5
monetary 10737:11		negotiation 10707:19 10710:17 10711:24	notify 10718:8	
money 10731:14 10736:16		negotiations 10698:20 10708:14	November 10712:18 10727:6 10746:20	
morning 10694:6,7 10715:8,12,13 10746:9 10751:24	Nation's 10721:7 10723:12,23 10724:5,16 10725:4,7 10726:14 10738:4 10741:6	negotiator 10710:7	null 10747:19 10763:3	office 10765:22
morning/ afternoon 10751:23		neutral 10710:12	number 10722:16,22 10746:23 10747:2 10753:20,21 10765:8,13	Ojibway 10698:25 10699:9 10717:4 10718:15 10719:1 10720:23 10721:7 10723:12,22 10724:5,16 10725:4,7,9,25 10726:5,13 10729:18 10730:22 10731:7,12,22 10734:24 10735:23 10736:14 10737:7,16 10738:4 10740:21 10741:6 10742:8 10745:22 10750:10,15,19, 23 10751:2
motion 10767:6,16,19	Nations 10706:21 10708:16 10711:22 10712:9 10715:23 10718:19 10719:10 10721:16 10724:24 10726:19 10745:23 10746:24 10747:2	Newcastle's 10747:1	numbered 10754:5,6	
motions 10771:8		Niagara 10764:4	numbering 10753:8 10754:1	
motivation 10730:24 10741:17		nice 10701:7	numbers 10752:18	
motivations 10741:6,11,15		night 10697:7, 15 10698:16 10708:24	<hr/> O <hr/>	
move 10713:15 10714:6 10718:22 10723:9 10725:2 10739:3 10742:13 10746:7 10749:21	Nations' 10721:19	north 10719:13	objected 10708:17	
moving 10729:16	nature 10749:11	northeast 10721:2	objection 10762:16 10765:10 10769:14	
<hr/> N <hr/>	Nawash 10698:24 10700:13 10714:3 10720:12 10721:15 10724:6,8 10743:23 10748:2	northern 10730:8 10732:3 10734:7 10736:20 10738:9	objective 10715:20 10716:4	
Nation 10699:1,9,12 10717:4 10718:15	necessarily 10740:20	northwestern 10719:16	observed 10719:11	Ojibway's 10730:24
		note 10769:22	occupied 10713:1	Oliphant 10698:21 10699:7,16,20 10700:1,16 10702:9 10703:16 10705:8,14,24 10706:7 10708:12
		noted 10712:20 10769:18	occupy 10766:16	
			occur 10712:22	

10709:3,15 10710:5 10711:19 10712:8 10714:2,10,14, 19 10728:24,25 10731:5 Oliphant's 10697:22 10699:23 10701:6,11 10704:13 10708:8 10727:6 10729:4 ongoing 10741:1 Ontario 10769:23 10770:3,9 open 10707:18 10711:19,23 10729:8 10738:9 openly 10706:20 10707:17 10711:22 operative 10763:15 opinion 10706:13 10707:22 10713:13 10729:4 opinions 10707:12 opponents 10700:5 opportunity 10700:22 10711:3 10712:13,16 10755:19 opposition 10700:18 option 10731:24 options	10731:21 10737:24 order 10699:25 10702:4 10721:20,23 10729:5 10731:22 10744:19 10753:12 10755:11 10767:6,11,18, 23 10768:2,3,6, 9 10769:19 10770:12 10771:4,21,23, 25 10772:1 ordering 10753:11 ordinarily 10771:13 original 10709:9 10732:12 10733:5 10735:12 10738:16 10748:8 10754:15 10771:4 originally 10709:11 10710:20 10716:8,12 outline 10734:15 overlap 10771:10 overlapped 10720:5 overriding 10757:9 overview 10726:23 10738:3 Owen 10698:24 10699:7,15 10714:3 10729:3 10743:4	ownership 10769:8 <hr/> P <hr/> p.m. 10773:2 pace 10730:3, 22,25 10731:8 10735:23 10737:10 10738:5,19 10741:10 pages 10713:5,18,19 10752:9 paid 10734:2 paragraph 10701:22 10703:18 10706:16 10715:19 10727:23 10728:1 10733:10 10745:14,15 10756:6 10757:3,4 10758:4 10759:17,20,24 10768:5,21,22 paraphrased 10754:19,21 Pardon 10757:24 part 10698:17 10706:11 10709:7,14 10735:22 10741:12 10768:20 10770:6,11 participate 10708:1,15,23 10712:3,10 parties 10767:22 10768:2,4 10769:19 parties' 10708:15	parts 10698:11 party 10771:25 pass 10717:19, 22,23 passage 10694:12 10695:14 10703:12,15 10704:7 10728:15,24 10749:3 passed 10721:20 pay 10713:2 10729:15 10731:14 10732:23 payments 10734:3 PDF 10697:24 10715:18 10716:15 10727:9 10728:17,18,23 10733:4 10747:9 10748:9 10752:10 10758:3 pencil 10698:12 peninsula 10727:7 10732:24 10739:24 10744:15 Pennefather 10746:20 10747:3 10748:5 people 10755:3 10766:19 period 10697:15,17 10698:13,15,18 10715:24 10725:24 10730:13 10750:3	periods 10768:8,14 10770:19 permission 10718:10 permit 10770:8,12 permitted 10695:8 10764:12,20,21, 25 person 10718:5,6 personal 10718:2 persuaded 10748:25 pertaining 10764:3 pertains 10697:16 petition 10717:17 10718:20 10733:2 10736:10 petitions 10716:22 10717:14 10726:6 10746:25 Phase 10769:9,10,11 10770:4,6,10, 13,25 10771:7 phrase 10711:15 10768:21 10769:13 10771:20 picked 10771:24 place 10699:11 Plaintiff 10765:18 Plaintiffs 10764:24 10765:14,21
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

10769:3,20 10770:24 Plaintiffs' 10764:17 10768:12,25 10769:14 10770:22 plan 10760:15, 21 10761:2,19, 21 10762:2 plausible 10695:20 10756:21 plots 10734:5 Plummer 10735:8 10736:3,9,13 point 10700:10 10712:21 10719:17 10720:18 10755:1 10756:2 10771:15 portion 10697:25 10709:5 10727:15 10733:10 10735:13 10743:7 10744:1,5,10 10745:10 10747:10 10755:21 position 10758:8 possession 10734:14 possibly 10715:10 Post 10739:24 post-treaty 10715:24 10716:3,22 10718:13 10740:11 10741:3,5,14,19 10749:15	postpone 10708:22 potential 10714:4,15 10771:18 practical 10698:20 10726:14 practice 10705:19 pre 10707:9 10739:24 pre- confederatio n 10769:5 pre-existing 10770:11 precise 10756:19 prejudiced 10770:24 preparation 10746:25 prepare 10699:25 preparing 10750:1 present 10700:22 10711:3 10718:5 presented 10710:11 pressing 10714:7 pressured 10750:16 previous 10734:10 10736:10 previously 10769:16 price 10729:14 10731:19 10732:4 10734:19	10736:1,17 10737:5 prices 10738:16 Prince 10747:1 principal 10702:23 10715:20 principles 10705:3 10752:6,15 10753:4,9,16 10754:17,22 10755:2 10757:17 10762:10 prior 10707:9, 24 10711:17 10714:9 10762:4 10771:16 private 10698:14 10699:24 10701:1,3 10702:4,13 10703:25 10706:8 10726:19 10735:5 privately 10699:21 privileges 10745:20 proceed 10695:14 10742:11 proceeding 10698:5 10715:3 10737:10 10755:17 proceeds 10730:3 10731:1 10737:11,13,18 10741:10 process 10702:21,24 10708:15	10710:6 10713:4 10729:20,23 10737:8,13 10739:10,15 10749:7 10750:11 10751:8 Proclamation 10762:11,22 10763:9,16 product 10766:1 Professor 10702:18,20 10755:16,25 10756:10 10757:22 10760:21 10762:14,17 10763:5,8 profit 10729:6 progress 10729:20 promote 10765:2 promoting 10738:11 proper 10751:19 property 10724:9 proportion 10740:4 proposal 10697:1,8,17 10699:25 10700:9,22 10711:4 propose 10700:2 proposed 10700:23 10736:18 propriety 10702:1 10749:5,7	protection 10739:11 protocols 10750:24 10755:8 10757:7,8,12 provenance 10756:19 provide 10708:19 10726:22 10738:2 10744:20 10764:25 10765:1 provided 10705:7,14,24 10706:6 10768:2 province 10763:3 provisions 10715:25 10716:10 10745:19,25 10763:2,15 provisions' 10763:7 prudent 10771:20 public 10700:12,14 10701:1 10705:25 10714:20 10731:17 10735:25 pull 10701:9 10702:15 10732:8 pulling 10694:8 purchase 10731:13 10732:23 10734:25 purchased 10725:16 10734:16
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

purchasers 10735:5	10741:3 10751:14 10752:1	10759:17 10765:1	recent 10764:18	10760:15
purchasing 10735:2	10764:3 10766:17	reading 10705:17 10708:8 10714:18 10762:24	recently 10767:4	reference 10723:16 10743:15,16 10763:7 10764:23
purposes 10715:9	quickly 10712:8 10727:2 10729:13 10730:9 10731:2 10735:6	reads 10762:25 10768:23	RECESSED 10746:15	referenced 10705:5
pursue 10770:13	quote 10698:5	ready 10732:19 10733:20 10735:18 10759:22	recognize 10748:10 10754:22 10771:2	references 10705:12,22 10706:4
pursued 10727:18 10728:7	<hr/> Q <hr/>	realize 10695:17 10708:7 10729:5 10731:1,22	recommend 10721:17	referring 10721:24 10745:13,14,16 10757:4 10762:21
put 10731:24 10733:25 10735:25 10767:4	<hr/> R <hr/>	realized 10711:22 10730:4	recommenda tion 10721:12 10731:12,17,20 10734:13 10736:15	reflect 10758:24 10763:1
<hr/> Q <hr/>	railroad 10735:3 10736:18 10738:24	realizing 10737:11	recommenda tions 10731:11 10733:24 10734:12	refers 10758:24 10763:1
qualifications 10709:12	railroads 10738:11 10739:2	reason 10699:6 10727:1 10736:16,18 10738:15 10742:7 10765:5 10771:3	recommende d 10721:16 10737:25	reflect 10704:21 10717:1
Quebec 10762:21,25 10763:13	raise 10772:7	reasons 10736:15 10767:10,12,14, 19,21 10768:10, 20 10771:5 10772:4	reconsiderin g 10710:3,10	reflected 10715:24
Queen 10717:25	raised 10769:21 10770:16	reassessmen ts 10730:19	record 10695:25 10703:24 10708:25 10710:3 10726:13 10728:15 10737:21 10740:11 10744:3 10747:13 10748:16 10749:12 10751:6 10767:5	reflecting 10707:5
question 10694:22 10696:22,23 10701:25 10711:11 10713:22 10723:3 10741:22,24 10751:9,10 10770:19	Rankin 10720:13 10721:11	recall 10764:11	records 10695:1 10705:18 10716:20 10734:22 10738:22 10755:11	reflection 10741:11
questionable 10710:16,21 10711:7	rationale 10707:1 10708:2	receipt 10769:15	received 10724:21 10726:21 10747:20 10748:4 10763:24	refusal 10708:21
questioned 10710:21 10749:18,19	re-read 10709:9	reassessmen ts 10730:19	refer 10756:13 10757:13	regard 10705:8,15,25
questioning 10749:5,7	re-reading 10713:4	reassessmen ts 10730:19		regarded 10739:11
questions 10713:16 10715:2,15 10718:23 10725:4 10739:4	re-surveyed 10721:18	recall 10764:11		region 10725:19
	read 10694:11 10695:18 10703:2,5 10704:12 10728:5,10 10744:2 10745:1,2,11 10747:12,23 10755:20,21,22			Registrar 10771:24
				Reimer 10694:6 10706:12 10715:5,12 10751:13,23 10764:7,10 10765:25
				Reimer's 10715:2

relate 10739:20 10740:5,6	10701:6,7,8,11, 12,14 10705:1 10706:15 10708:9,10 10709:5,22 10710:9,11 10713:3,18 10715:2,16,18, 21 10716:14 10725:3 10727:6 10736:6 10739:6,22 10740:1 10745:17 10746:20,22 10747:4 10750:1 10752:8,10,21 10757:14 10758:1	requests 10732:7 10734:24 10765:4 require 10708:14 required 10695:9 10718:7 research 10730:23 10749:10 10766:12 researched 10756:18,22 10763:21 reserve 10719:6 10720:1,15,19 10721:3,8 10723:24 10724:6,18 10739:21,24 10748:2 reserved 10744:14,22 reserves 10702:3 10719:1 10720:23 10722:14 10723:1 residing 10743:4 resolution 10717:24 10718:21 10736:24,25 resolutions 10716:23 10717:22 resolved 10737:4 respect 10710:15 10739:14 10740:7,15,24 10742:10 10748:17 10749:12	10755:17 10765:13 respond 10723:25 10724:4 10734:23 10738:4 responded 10721:6 10723:15,16 10726:23 responding 10694:24 10747:25 response 10694:22 10724:1 10725:1 10726:21 10736:10 10738:6 10740:20 10747:6 responses 10724:16,23 restrictions 10764:12,16 result 10697:14 10707:6 10713:8 results 10726:15 RESUMED 10746:16 retired 10702:3 return 10698:9 10766:2,8 revaluations 10730:7,11,18 revalue 10738:14 review 10712:17,19 10718:12 10726:12 10732:16 10733:6,10,15	10735:13 10743:10 10749:25 10764:21 10766:8 reviewed 10724:17 10728:23 10745:22 10768:3 reviewing 10707:6 10713:4 reviews 10703:9 10722:6,8,15 10728:12 10732:18 10733:16,18 10735:17 10743:11 10759:19 revise 10713:10 revised 10709:6 revisions 10707:4 rights 10745:20 rise 10772:22 River 10719:9, 13 10723:19 10748:15 road 10719:15 10738:8,25 roads 10735:3 10738:7,19 10739:2 rough 10694:15 row 10753:19 Royal 10762:10,22 10763:15 rules 10714:22 ruling 10767:12
----------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

rum 10760:1	10734:24	select 10699:3	10726:1,5,7,15, 22,24 10727:1	10732:4
rush 10710:21	10735:23	sell 10724:10	10729:1,7,11,17	single
rushed	10736:14	10727:2	10738:12	10704:24
10703:20	10737:7,16	10729:13	10739:9,15	10742:17
10708:9	10738:4,23	10731:15	10741:9,18	sir 10743:23
10709:16	10739:24	10735:5	10742:12,16	10759:18
	10740:21	10736:17		10762:4
	10741:6	10738:10	settlements	10764:5
	10742:8		10699:1	
	10743:5,23	selling	settlers	sites 10734:5
	10744:15	10730:9,25	10714:4	situated
	10745:22	10738:16	10727:17	10724:10
	10748:17	send 10718:2	10729:4	situation
sale 10714:9	10750:10,15,19, 23 10751:2	10742:8	10732:25	10765:20
10726:9		sending	10734:3	10771:5
10728:4,9		10718:20	severance	skilled
10737:8,12		10738:13	10767:11,18	10710:7
10738:22		10762:1	10768:9	slender
sales	Saugeen-	sense	10772:5	10744:24
10725:11,23	nawash	10755:13	sheriff	slow 10725:18
10727:17	10717:15	10757:9	10713:20,23,24	10730:3,22
10729:2,20,23, 25 10730:3,4, 17,23 10731:2,9	save 10769:5	sentence	short 10732:17	10731:8
10735:24	school	10695:17	shortly	10735:23
10736:21	10742:18	10696:2	10700:12,14	10737:10
10737:9,12,18, 19 10738:5,12, 20 10739:1,10, 15 10741:10	Scratch	10728:3,6	show 10715:17	10738:5
	10696:13	10743:19	10721:22	sold 10726:18
	screen	10748:21	showing	10729:8
	10701:10,13,15, 23 10728:2	10757:3	10727:5	10731:19
	scroll	separate	10735:7	10734:1,20
	10706:13	10740:12	10736:2,22	10735:25
	10709:4	separation	10742:2	10738:1
	10712:2	10708:5	10743:21	10740:17
	10722:2,4	September	10746:19	solution
	10727:13	10721:19	sign 10748:25	10724:14
	10733:19	10722:4	10749:9	SON 10696:25
	10752:9	10748:16	signature'	10741:20
	10755:25	series	10747:17	sort 10699:8
	10756:5	10709:12	signed	10765:23
	10757:2	set 10709:15	10736:11	Sound
	10762:20,23	10712:25	10737:17	10698:24
	seat 10718:4	10725:10	10771:23	10699:7,15
	Secretaries	10732:4	significance	10714:3
	10756:15	10734:7	10735:19	10729:3
	secretary	10758:23	10737:1	10743:4
	10724:9	10760:8	similarly	south 10720:3, 8
	10758:7,17	setting	10711:10	Southampton
	section	10729:1	simply	10714:9
	10715:19	settlement	10702:11	
	10745:12	10725:5,8,10, 14,19,21	10731:13	
	10762:15			
	seeking			
	10770:22			

southern 10723:23 10724:25 10731:24 10734:4	stand 10694:23 10767:1	stopped 10702:21 10703:17 10704:19 10718:14 10719:17 10721:10 10740:16	suggest 10709:15,18 10713:12 10731:7	10743:18 10745:9,15,16 10748:17 10749:1,18,20 10750:6 10751:8,9,11
speak 10718:5 10765:5	start 10694:8 10701:11 10715:14 10772:9	strength 10695:5	suggested 10708:7 10750:15,19 10751:2	surrendered 10723:20 10734:25 10743:16 10744:8 10745:21 10746:4
speaking 10698:19	started 10712:21 10740:16 10750:5	strict 10764:11	suggesting 10709:21	surrenders 10752:16 10755:12
specific 10705:7,14,25 10717:16 10725:1 10733:24 10734:11 10741:23 10754:14 10760:20	starting 10696:21 10708:17	strikes 10704:6	suggestions 10759:25	surrounding 10736:8
specifically 10756:22 10768:6	starts 10742:20	Strip 10720:4 10723:13,19 10726:9	summarize 10725:6	survey 10719:17 10721:10
speculation 10694:25 10696:9	state 10707:4 10715:19 10756:15	strong 10700:9	summarizing 10747:4	surveyed 10719:7 10724:2,3
speculators 10725:16	stated 10721:17 10760:21 10767:21	strongest 10700:5	summary 10712:7	surveyor 10719:11 10721:10
speech 10697:9,13 10748:14,16,21 10749:22	statement 10704:13 10712:7 10747:15,24,25 10756:17 10763:19	struck 10703:14	Superintende nt 10732:9 10736:12 10743:24 10758:8,12	surveys 10719:3,4
speedily 10738:10	statements 10712:20	stuff 10766:11	supplementa ry 10767:10,14	survived 10695:24
speedy 10736:21	states 10697:6,9,13 10698:4 10699:4,23 10703:19 10748:21	subject 10694:15 10762:16 10767:11 10768:18 10769:14	supporting 10764:22	Switching 10713:16
spring 10719:4	statements 10712:20	submission 10768:13	supposedly 10699:14	<hr/> T <hr/>
squatters 10714:15	states 10697:6,9,13 10698:4 10699:4,23 10703:19 10748:21	submissions 10771:8	surface 10708:8	T.A. 10758:6
squatting 10713:18 10714:22 10739:11,23 10740:2,5,10,15	stating 10723:17	submit 10746:24	surprise 10696:9	table 10752:5, 11 10755:17 10756:3 10757:17
St 10748:15 10749:24	step 10752:19 10765:8,13 10766:25 10771:12	submits 10770:21	surprising 10696:5,14	taking 10704:13
stage 10769:25 10771:16	stipulation 10747:18	subordinate 10758:11	surrender 10700:1,5 10702:1 10706:21 10707:18,19 10714:7,16,21 10716:1,11 10723:17,18 10727:7 10730:5 10731:23 10739:12,25 10741:1,13,21	talking 10702:23 10756:3 10759:13
stages 10768:15	steps 10765:7	substantial 10770:18	success 10714:7	task 10696:5,
	stop 10727:21 10740:9	successful 10714:17,21	successfully 10695:7	

15	10742:24	10713:25	transcript	treaty-
tasks 10712:25	10748:23	10714:18	10694:9,15	making
telling	10755:3,5	titled 10739:22	10696:20	10705:4
10756:16	10764:9	TMC 10767:4	10702:16	10750:24
tells 10711:9	10766:13,23	Tobermory	10727:11	10751:8
10724:20	10772:19	10738:8,25	10732:13,16	10752:6,15
10741:4	thinking	10733:6	10736:4	10755:2
term 10756:7,	10713:10	10736:4	10744:3	trespass
13,22 10763:6	thinks	10747:11	10748:10	10714:22
terms	10728:19	10748:10	10755:20,22,24,	10739:11
10698:21	thought	25 10756:1	10762:14	10740:2,5,7,10,
10699:25	10707:18	tone 10709:15	transcripts	25
10700:1,18,23	10709:10	top 10703:16	10707:6	trespassing
10702:13	10713:6	10722:23	10712:17,19	10713:21,23
10706:7	10727:10	10726:3	transpired	trial 10707:6
10711:3	10753:18	10747:9	10731:4	10769:9
10716:10	Thousands	topic 10746:7	treaties	10770:1,6,18
10717:2	10750:2	10764:1,3	10754:25	10771:7
10725:14	threat	topics	10755:9,14	trip 10696:5,15
10727:3	10714:14	10763:25	treaty	10714:3
10731:3,4	threatening	Toronto	10697:22	triplicate
10734:15	10714:6	10718:3	10699:21	10753:22
10742:11	tightness	town 10734:5	10700:2	turn 10726:20
10749:20	10736:16	Townshend	10701:1	10727:8
10751:11	timber	10765:10,11	10704:9,10,14,	10732:15
10753:19	10740:7,25	10766:4	16,22 10705:17	10743:25
10757:14	time 10697:15	10769:20	10707:19,24	10744:18
territories	10698:15,18	10770:17,21	10708:1,22	10747:8
10743:17	10700:10	10772:9,10	10709:1	Turning
territory	10702:4,25	Townshend's	10712:4,8,10	10716:14
10744:10	10703:21,25	10770:2	10713:21	10748:6
10748:18	10704:15	townships	10714:12	types
tested 10695:5	10706:6,22	10730:8	10716:13	10716:17,19
testified	10717:19	10731:25	10717:2	
10705:3	10718:4,10	10732:3	10718:24	U
10755:16	10719:7,19	10734:4,6,7	10719:2,19	
10764:10	10725:24	10736:20	10720:24	uhm-hmm
testimony	10730:2,13	10738:10	10723:17	10732:14
10712:21	10732:1	10739:1	10726:10	10758:18
10761:1	10737:23	tract 10744:5,	10731:3	ultimately
text 10723:17	10744:12	14,21 10745:4,	10734:25	10699:2,3
10726:10	10750:3,20	10,21	10737:17	unannounce
10745:18	10754:22	trade 10761:22	10741:7,16,20	d 10696:6,8,16
thing 10704:6	10755:1	traditional	10743:20	unbefitting
10705:20	10758:20	10743:17	10745:18,24,25	10706:18
10707:14	10767:8	10745:24	10747:15,19	10707:16,20
things	10771:18	transcribed	10748:2,18	uncommon
10703:14	10772:8,19	10736:5	10749:6,8,12,16	10705:18
10716:12	timing		10750:12,16,20	
	10705:25		10751:2	
	10712:14		10755:5	

uncultivated 10725:17	10742:6	10750:1 10752:3	wondering 10760:11
understand 10697:2 10700:21,24 10715:3 10748:22 10751:5 10760:25 10766:14	Upper 10752:6 upset 10732:4 10734:19 10738:16	<hr/> W <hr/>	word 10710:16, 20 10711:6
understandin g 10698:18 10714:1 10716:9 10719:12,19 10721:19 10726:14 10749:2 10751:10 10758:15 10759:4	usefully 10772:19 usual 10746:8	wait 10713:6 Wales 10747:1 wanted 10700:21 10704:14 10708:22 10711:2 10712:8 10723:10 10729:12 10742:8 10769:18	wording 10707:12 10711:23 10713:10 10771:4 words 10701:8 10706:16,17,24 10707:23 10709:17,19 10710:4 work 10694:16 10707:5 write 10700:11 10742:8
understandin gs 10715:25 10716:6 10749:20	<hr/> V <hr/>	waver 10698:7 ways 10717:11 10766:15 weaknesses 10695:5 weeks 10714:9 10766:24 west 10720:10 10746:24 western 10719:7,14 10721:8,18 whichever 10771:25 white 10744:13 Whitehall 10756:14,23 Wiaraton 10736:19 wild 10734:14 William 10732:9 10735:8,10 10736:3 winters 10744:4,7 wires 10751:19 wished 10768:4	written 10707:15 10711:1 10713:3 10717:17 wrote 10699:16 10710:19 10747:4 10759:6
understood 10716:8,12 10717:2 10719:14 10725:10 10729:24 10730:5 10731:3 10745:23	validity 10749:6 valued 10734:5 values 10725:15 10732:1,2,3 10734:1,6 10738:17 Vankoughnet 10736:13,19 versus 10740:5 vicinity 10725:18 view 10737:9 viewed 10741:20 10750:6 Village 10699:10 visit 10747:1,3 void 10747:20 10763:3 volume 10705:1 10706:13,15 10713:4,19 10715:2,4,10, 11,16,21 10716:17 10739:8,14 10741:8 10749:19	<hr/> Y <hr/>	years 10718:24 10731:10 10744:16 yesterday 10694:9,12,22, 23,24 10696:7 10698:16 10705:3 10752:12,21 10756:6 10760:25
undertake 10731:15			
unilaterally 10770:3,12			
united 10700:18			
unlawful 10747:16			
unsold 10731:14,19,24 10732:2,23 10733:24 10734:14,25 10735:24			
unusual 10705:20			