

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

DAY 77 VOL 77
January 20, 2020



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1 Court File No. 94-CQ-50872CM

2 ONTARIO
3 SUPERIOR COURT OF JUSTICE

4 B E T W E E N:

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

8 - and -

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

18 Court File No. 03-CV-261134CM1

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

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

22 Plaintiffs

23 - and -

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

Defendants

26 --- This is the VOLUME 77/DAY 77 of the transcript
27 of the trial proceedings in the above-noted
28 matter, being held at the Superior Court of Justice,
29 330 University Avenue, Courtroom 5-1, Toronto,
30 Ontario, on the 20th day of January, 2020.

31 B E F O R E:

32 The Honourable Justice Wendy M. Matheson

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

2

3 H. W. Roger Townshend, Esq., for the Plaintiffs,
4 & Benjamin Brookwell, Esq., The Chippewas of
5 Saugeen First Nation,
6 and the Chippewas of
7 Nawash First Nation.

8

9

10 Barry Ennis, Esq., for the Defendant,
11 & Michael McCulloch, Esq., The Attorney General
12 Of Canada.

13

14 Julia McRandall, Esq., for the Defendant,
15 & Peter Lemmond, Esq., Her Majesty the
16 & Richard Ogden, Esq., Queen in Right of
17 Ontario.

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22 REPORTED BY: Judith M. Caputo, RPR, CSR, CRR

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I N D E X

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WITNESS:

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1 -- Upon commencing at 10:04 a.m.

2
3 THE COURT: Good morning, Ms. McRandall.

4 MS. MC RANDALL: Good morning, Your Honour.

5 We would like to call Mr. Jean-Philippe
6 Chartrand to the stand.

7 THE COURT: Please go ahead.

8 THE REGISTRAR: Good morning, sir.

9 THE WITNESS: Good morning.

10 THE REGISTRAR: Would you like to make
11 an oath on the Holy Book or make a solemn
12 affirmation to tell the truth?

13 THE WITNESS: I would like to be
14 affirmed.

15 THE REGISTRAR: Can you state and spell
16 your first and last name for the record.

17 THE WITNESS: Jean-Philippe,
18 J-E-A-N-P-H-I-L-I-P-P-E. Chartrand,
19 C-H-A-R-T-R-A-N-D.

20 THE REGISTRAR: Thank you.

21 JEAN-PHILIPPE CHARTRAND; AFFIRMED.

22 THE COURT: Sir, we have a very large
23 room and it is important that everyone can hear
24 you, so please slide up to the microphone and keep
25 your voice up.

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THE WITNESS: I will do my best, Your Honour.

THE COURT: Thank you, sir.
Please go ahead, Counsel.

MS. MC RANDALL: Your Honour, I plan to go through Mr. Chartrand's qualification before seeking to make his expert report and a list of secondary sources exhibits. But if it is more efficient to do so now, I would be prepared to do that.

THE COURT: Either way is fine, Counsel.

MS. MC RANDALL: Thank you, Your Honour.

I would like to ask Ms. Benson to pull up document SC1661. This is an updated version of Mr. Chartrand's CV.

Your Honour, I believe that while this updated version was circulated to the other parties some time ago, I do not believe a version was sent to the Court, but I do have a hardcopy which I can pass up.

THE COURT: Thank you.

EXAMINATION IN-CHIEF BY MS. MC RANDALL:

Q. Mr. Chartrand, is this a copy of your curriculum vitae?

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A. I believe it is, yes.

MS. MC RANDALL: Can this be made the next exhibit.

THE REGISTRAR: Exhibit No. 4512.

EXHIBIT NO. 4512: Curriculum Vitae of Jean-Philippe Chartrand.

BY MS. MC RANDALL:

Q. Mr. Chartrand, did you prepare this CV?

A. Yes, I did.

Q. I see the first thing that you have outlined in your CV is education. So you have a bachelors of arts in anthropology?

A. That's correct.

Q. And you have a master's of arts in anthropology?

A. That's correct.

Q. Did you do any in-community research while completing your master's?

A. While completing the master's, yes. I did a brief research stint in an Inuit community at the time situated in the northwest Territories, well, since 1999 located in Nunavut. The community was called Igloodik. I'll spell

10:08:38 1 that. I-G-L-O-O-L-I-K.

10:08:47 2 Q. What did you do after you
10:08:49 3 completed your master's?

10:08:50 4 A. I joined a PhD program in
10:08:57 5 anthropology at McMaster University. And as part
10:09:03 6 of that, essentially completed all of the
10:09:04 7 requirements apart from completing my dissertation.

10:09:08 8 To make a long story short, I
10:09:11 9 essentially ran out of money, out of funding. And
10:09:15 10 there were other factors as well.

10:09:20 11 I had met my partner, who is a partner
10:09:25 12 in Praxis Research Associates, the firm that we are
10:09:31 13 both co-principals of. And we had become for many
10:09:36 14 reasons somewhat disillusioned with the prospects
10:09:38 15 of an academic career, and started to look into
10:09:46 16 consulting work.

10:09:47 17 And so for all of those reasons, I
10:09:50 18 never completed my PhD, but I did obtain a status
10:09:56 19 that is really only recognized in academia.

10:10:03 20 Basically I was referred to as PhD ABD,
10:10:07 21 "ABD" meaning "all but dissertation". But it's a
10:10:11 22 status that allows individuals at that level to
10:10:16 23 teach university courses and to become adjunct
10:10:22 24 professors in departments.

10:10:25 25 Q. Can you briefly describe what is

10:10:30 1 ethnohistory?

10:10:31 2 A. Well, ethnohistory today and for
10:10:33 3 several decades is a multidisciplinary field of
10:10:37 4 research. By that, I mean it's practiced -- it
10:10:42 5 originated by a fusion of methods developed in
10:10:47 6 history and anthropology back in the late 1940s,
10:10:54 7 early 1950s.

10:10:56 8 And so those two disciplines are really
10:10:59 9 the source of the field of research, but since the
10:11:03 10 late 60s, it's come to be practiced across a number
10:11:07 11 of other social science disciplines: Political
10:11:11 12 science, sociology, geography, for example.

10:11:17 13 And it's concerned at the broadest
10:11:21 14 level with detailing the history, reconstructing
10:11:30 15 societies that did not produce literate records, so
10:11:37 16 to speak, that were in a context of contact,
10:11:43 17 typically with European societies. And the goal is
10:11:49 18 to reconstruct those societies in this dynamic of
10:11:53 19 interaction with Europeans at particular points in
10:11:59 20 time.

10:12:00 21 So that's the broadest level definition
10:12:03 22 of ethnohistory.

10:12:05 23 Q. Can you briefly describe your
10:12:07 24 training in ethnohistory?

10:12:09 25 A. Well, it began, I took a few

10:12:14 1 courses at Carleton while in my bachelor of arts
10:12:21 2 program. Courses were offered at the third and
10:12:25 3 fourth year levels.

10:12:28 4 There were more advanced courses at the
10:12:31 5 master's level. And those courses dealt with
10:12:36 6 basically, well, learning about research that had
10:12:42 7 been done on particular groups of people.

10:12:45 8 The focus was very much at Carleton
10:12:50 9 University on Indigenous peoples in Canada. But
10:12:55 10 there were exposures to other areas, some Native
10:13:05 11 American tribes in the United States, First Nations
10:13:07 12 in Mexico, and those courses basically taught me
10:13:15 13 the basic methods of the field of research, as well
10:13:22 14 as allowed me to become familiar with what are now
10:13:25 15 considered classic pieces of academic research.

10:13:30 16 Q. Thank you. If we can turn to
10:13:33 17 page 8 of your CV, please, under the subheading
10:13:39 18 "Teaching Experience".

10:13:43 19 A. Yes.

10:13:44 20 Q. The course you taught from 1996 to
10:13:48 21 1999, did that involve teaching anthropological
10:13:55 22 methodology?

10:13:55 23 A. Yes, it did. It was an
10:13:57 24 introduction, as the course title says, it was an
10:14:00 25 introduction to methods of anthropological

10:14:03 1 research.

10:14:06 2 Q. And did any of the courses that
10:14:09 3 you taught address Indigenous peoples of the United
10:14:13 4 States?

10:14:13 5 A. In part. In 1998, I taught a
10:14:19 6 course that was titled by the university, "Indians
10:14:24 7 of America".

10:14:26 8 I had some freedom to design the
10:14:29 9 content of the course. The course was intended to
10:14:33 10 be a survey course, meaning that it wouldn't be
10:14:37 11 focused from beginning and end of term on a single
10:14:43 12 Indigenous group or Native American group, but
10:14:48 13 rather would provide a comparative overview of the
10:14:51 14 different types of Indigenous and Native American
10:14:55 15 societies.

10:14:57 16 And so having some freedom to design
10:14:59 17 the content, I largely focused the content on
10:15:05 18 Indigenous societies in Canada. But did also
10:15:09 19 include a number of Native American tribes actually
10:15:15 20 in the Upper Great Lakes area.

10:15:19 21 Q. Did the 1999 course that you were
10:15:21 22 a sessional lecturer in, did that address
10:15:27 23 Indigenous peoples of the United States at all?

10:15:29 24 A. That was a workshop. So students --
10:15:32 25 it was a fourth-year course -- and being a

10:15:38 1 workshop, students were encouraged to develop their
10:15:42 2 own research projects for the course.

10:15:46 3 We were responsible for holding, not
10:15:49 4 lectures but more informal class meetings in which
10:15:59 5 we would discuss readings that had been assigned,
10:16:02 6 and those readings included methods in
10:16:05 7 ethnohistorical research.

10:16:08 8 So, I'm trying to recall, there was
10:16:12 9 certainly a general interest among the students to
10:16:18 10 learn about Indigenous societies in Canada. My
10:16:25 11 memory is a little bit fuzzy as to exactly which
10:16:31 12 societies students chose to undertake research on.

10:16:35 13 Q. Thank you.

10:16:37 14 Can you describe generally what sort of
10:16:39 15 research you conduct when you're asked to research
10:16:42 16 a treaty between Indigenous peoples and the British
10:16:47 17 or Canada or the United States?

10:16:49 18 A. Well, all depends on the specific
10:16:54 19 issue pertaining to the -- pertaining to the treaty
10:16:58 20 that I'm asked to investigate. If it's the treaty
10:17:03 21 broadly speaking, then I will take a very
10:17:05 22 comprehensive approach to my research.

10:17:12 23 On the other hand, if it's a very
10:17:14 24 narrow issue, then I will tend to focus on
10:17:20 25 researching and collecting particular types of

10:17:24 1 documents, pre-treaty, during the Treaty Council
10:17:29 2 and post-treaty that may shed some light on
10:17:33 3 understanding the issue.

10:17:35 4 At any level, however, since we're
10:17:42 5 dealing with understanding a treaty, or a provision
10:17:46 6 of a treaty, at bare minimum, I would want to have
10:17:54 7 some understanding of the broader societal context
10:18:01 8 in which the treaty was made, that pertaining to
10:18:04 9 both the Europeans or Euro Canadians and the
10:18:11 10 Indigenous societies. I would like to know what
10:18:16 11 created the impetus for the treaty.

10:18:20 12 And then more specifically, why a
10:18:24 13 certain individual was appointed as treaty
10:18:28 14 commissioner to negotiate the treaty. What
10:18:34 15 instructions were issued to that treaty
10:18:38 16 commissioner?

10:18:42 17 I would also like to understand what
10:18:45 18 occurred at the Treaty Council and that would
10:18:49 19 involve attempting to collect records of what
10:18:53 20 transpired at the Treaty Council.

10:18:59 21 And following the treaty, inevitably --
10:19:03 22 I say inevitably because it's been my experience in
10:19:07 23 every research project I've undertaken, there were
10:19:12 24 responses post-treaty by the Indigenous or Native
10:19:19 25 American party to the treaty in respect of a number

1 of issues. And those responses often will document
2 or refer to what they had understood had been
3 agreed upon at the Treaty Council.

4 And so those can be important documents
5 that also help to shed light, not so much on the
6 Crown perspective on what the treaty pertained to,
7 but on what the Indigenous or Native American party
8 to the treaty intended and believed it had obtained
9 from the treaty agreement.

10 Q. Thank you. And I'd like to turn
11 now to your consulting experience. I will not be
12 taking you to every project that's listed on your
13 CV. But if we can turn to page 7 of your CV, about
14 three-quarters of the way down the page.

15 Could you tell the Court briefly about
16 the consulting work you did for the Royal
17 Commission on Aboriginal Peoples in the 1990s?

18 A. Yes, my partner and I, my partner
19 in Praxis Research Associates and I, had the good
20 fortune of attempting to begin our careers as
21 researchers and consultants at a time when the
22 Royal Commission on Aboriginal Peoples had been
23 established and had launched a fairly comprehensive
24 research agenda.

25 And in 1993, I along with -- actually

1 by myself in 1993, obtained a contract with the
2 Royal Commission, to conduct an evaluation of
3 social and economic statistical concepts on Inuit
4 as developed by governments at federal, provincial
5 and territorial levels.

6 This was very much a contemporary
7 study. It really had nothing to do with
8 ethnohistory, but it was my first contract with the
9 commission that led myself, and my partner to then
10 obtain further contract employment, in the case of
11 my partner, I believe up to 1996.

12 Q. If we can turn over to page 6,
13 please. Could you briefly describe the 1998
14 project that's referred to as "Mississaugas of the
15 New Credit First Nations Traditional Territory"?

16 A. Yes. This was a bit unique for us
17 at the time in that the research was prompted by a
18 charge against a member of the Mississaugas of New
19 Credit First Nation for fishing without a licence.

20 And during the pre-trial case
21 management, the case management judge convinced the
22 parties to work together and hire a single
23 researcher, or research firm, to undertake joint
24 research for the two parties.

25 And so that's how my partner and I came

1 to be involved in doing this research.

2 The project had to do with documenting
3 the history of the Mississauga people from
4 essentially contact with the Europeans in the
5 early, mid-17th century, down to the early 20th
6 century.

7 And that involved documenting their
8 movement from a traditional homeland on the North
9 Shore of Lake Huron, down to essentially the
10 Toronto area.

11 And from that point on, we researched
12 and documented the extent of land use by the First
13 Nation in the conduct of subsistence harvesting
14 activities.

15 Q. Did that involve any in-community
16 research?

17 A. It did. I actually personally
18 conducted a number of interviews with harvesters,
19 active harvesters in the community, detailing the
20 extent of which they participated in various
21 harvesting activities, identifying the general
22 locations where they conducted those activities.

23 Q. Could we scroll up a bit on the
24 same page. Thank you.

25 Could you briefly describe the 1999

1 project as described as "The Toronto Purchase:
2 Contemporary Boundaries and Landmarks"?

3 A. Yes, following -- I should say
4 this is a bit controversial, I've heard different
5 stories. But once the report was completed and
6 disseminated -- actually that entailed the
7 presentation at the Mississaugas of New Credit
8 council house -- the charge against the individual
9 was dropped by the Ontario Ministry of Natural
10 Resources.

11 However, the First Nation had been
12 pressing a land claim with the Indian Claims
13 Commission, and we were hired by them to undertake
14 a relatively brief, very focused project dealing
15 with documenting the original boundaries of the
16 Toronto purchase that occurred in the early 19th
17 century, and identify the key landmarks surrounding
18 the area that was surrendered.

19 Q. If we can turn to page 7, please.

20 And the 1996 item, "Historical Research
21 on Lake of the Woods Ojibwe Fisheries".

22 Was there treaty research involved in
23 that project?

24 A. Yes, the Lake of the Woods is
25 situated in Treaty 3 territory. Treaty 3 was

1 concluded in 1873.

2 Q. Thank you.

3 If we can turn, please, to page 5 of
4 your CV. The 2002 "Historical Research Report
5 Pertaining to HBC Archives for Michipicoten Post
6 Relevant to R. V. Shipman". Did that involve
7 treaty research?

8 A. Indirectly. The area where the
9 Michipicoten post was established came to be
10 situated within the Robinson Superior Treaty that
11 was concluded in 1850.

12 For the most part, the research focused
13 on documenting from post records activities
14 pertaining to resource harvesting from the
15 Michipicoten First Nation members affiliated with
16 the post.

17 Q. If we can turn to page 4 of your
18 CV. The item, "Spokane Tribe History, Economy and
19 Land Use", under 2006. First of all, who is the
20 Spokane tribe?

21 A. The Spokane tribe is a Native
22 American tribe essentially located now in
23 Washington State.

24 Q. Can you briefly explain that
25 consultation project?

10:28:30 1 A. Yes, this was our first
10:28:32 2 international contract. We were under contract by
10:28:37 3 a law firm representing a mining company that was
10:28:42 4 seeking to essentially undertake mining operations
10:28:46 5 within the traditional territory of the Spokane
10:28:52 6 tribe. And at a not too great distance from the
10:28:59 7 present settlement of the Spokane.

10:29:09 8 As a reaction to the mining companies
10:29:11 9 intention, the Spokane tribe had hired a consultant
10:29:18 10 to establish what is called in my CV it's
10:29:24 11 initialized as "RME subsistence scenario".
10:29:31 12 "RME" stands for "reasonable maximum exposure",
10:29:34 13 subsistence scenario.

10:29:37 14 Steering clear of technicalities, this
10:29:41 15 was a model that estimated the degree of exposure
10:29:47 16 that members of the tribe would have to possibly,
10:29:59 17 maybe not dangerous, but harmful mining tailings
10:30:06 18 while conducting subsistence resource harvesting
10:30:11 19 activities.

10:30:13 20 And so we were provided a copy of their
10:30:16 21 report, which in some respects was extremely
10:30:19 22 technical. But their findings were clear enough,
10:30:25 23 and we were able to conduct an evaluation of the
10:30:29 24 validity of their model by drawing on the
10:30:34 25 ethnohistorical literature that documented

10:30:37 1 traditional Spokane, as well as more contemporary
10:30:44 2 resourcing harvesting activities by members of the
10:30:50 3 Spokane tribe.

10:30:51 4 Q. If we can turn to the bottom of
10:30:57 5 page 3, please, another item in 2006. "Peer Review
10:31:01 6 of Historical Expert Affidavit, Garden River First
10:31:04 7 Nation" -- I won't read the whole title out. Did
10:31:07 8 that project involve treaty research?

10:31:10 9 A. Yes, it did. This pertained to
10:31:18 10 evaluating an affidavit relating to the intentions
10:31:28 11 and understandings of the Garden River First Nation
10:31:31 12 respecting the boundaries of the reservation that
10:31:38 13 was granted to them under the Robinson Huron
10:31:43 14 Treaty.

10:31:44 15 As part of that evaluation, I already
10:31:48 16 had considerable background knowledge about the two
10:31:56 17 Robinson Treaties, the Robinson Superior and
10:31:58 18 Robinson Huron treaties from prior research.

10:32:03 19 But there were very detailed specific
10:32:05 20 records pertaining to the process by which the
10:32:08 21 Garden River reservation was surveyed that was a
10:32:15 22 key focus of that work.

10:32:21 23 Q. I know that it says "peer review".
10:32:24 24 Did you produce a report for that project?

10:32:26 25 A. Yes, I believe I did.

1 Q. If we can turn to page 2, please,
2 at the bottom. The 2011 item beginning "Historical
3 and Ethnohistorical Research Report". Did that
4 involve treaty research?

5 A. Yes, absolutely. This pertained
6 to the negotiation of Treaty 9 at what was at the
7 time known as Osnaburgh, a Hudson Bay Company post
8 along the Albany River in Northern Ontario.

9 Treaty 9 was made originally in 1905
10 and 1906. The Mishkeegogamang which is the
11 contemporary name for the Osnaburgh Band, were
12 actually at the very first location at which the
13 treaty was negotiated.

14 Treaty 9 used a bit of a different
15 methodology from prior treaties that had been made
16 in Ontario, in that it involved a travelling
17 commission by design. And so Osnaburgh was the
18 very first location at which a Treaty Council was
19 held, and the treaty was concluded.

20 But there were many more. Essentially
21 the treaty commission traveled down the Albany
22 River to James Bay, stopping at a number of Hudson
23 Bay Company posts, went down James Bay to Moose
24 Factory.

25 The intent was to hold -- I'm trying to

1 recall the exact number, I think it is a total of
2 17 treaty councils with the Indigenous populations,
3 for the most part by assembling them at the trading
4 posts where they habitually traded.

5 But in the southern part there was a
6 very different situation. A railway had been built
7 and there were Indigenous peoples who had come to
8 essentially relocate and spend time in small
9 railway communities that had been established.

10 So this was, being the first location
11 at which the treaty was made, it was a particularly
12 important Treaty Council that the commissioners
13 noted in their report.

14 Q. Thank you. If we could just
15 scroll up to the top of this page, there's a
16 reference to a draft report in 2016. Did that
17 involve treaty research?

18 A. Yes. Again, dealing with the
19 Robinson Huron Treaty, and it pertained to the
20 process by which the -- an Indian reserve for the
21 Batchewana First Nation was made at the Treaty
22 Council.

23 And basically its aftermath, the
24 process by which it came to be surrendered and what
25 occurred in respect to the treaty -- the land sale

1 proceeds to the First Nation. But the principal
2 focus of the research was to document what the
3 parties had understood in respect to the extent and
4 location of the boundaries of that reserve.

5 Q. Thank you.

6 Could we please pull up Mr. Chartrand's
7 expert report, which is document SC1659. And if we
8 can turn to page 1, please.

9 THE COURT: Can you go to the cover,
10 please, first, so that I can have the date of the
11 document?

12 MS. MC RANDALL: It is September 30,
13 2015, Your Honour.

14 THE COURT: Thank you.

15 BY MS. MC RANDALL:

16 Q. So, Mr. Chartrand, in your report
17 you mentioned having conducted historical and
18 ethnohistorical research on Aboriginal peoples in
19 Manitoba, and then further -- and United States.

20 Then in the next sentence you state:

21 "In a recent research project I
22 undertook a comprehensive review of
23 United States treaties and
24 agreements concluded in the 19
25 century with Native American

1 tribes."

2 Could you briefly explain what that
3 project was?

4 A. Yes. It pertained to a claim
5 that, at the time of my research and actually
6 beginning in 2006, a claim had been put forth by
7 the Red Rock and Whitesand First Nations, which are
8 in the Robinson Superior Treaty.

9 And the claim pertained to the
10 annuities that had been intended to be provided
11 under the Robinson Superior Treaty. That case,
12 roughly nine years later, turned into a joint
13 action because the Robinson Huron Treaty First
14 Nations joined that action.

15 So it was an action that involved two
16 sets of plaintiffs. But at the time of the
17 research I allude to, the research was solely in
18 relation to the claim of the Red Rock and Whitesand
19 First Nations.

20 Essentially in their pleadings, the
21 plaintiffs had indicated that there had been --
22 they asserted that there had been an intention for
23 the annuities under the Robinson Superior Treaty to
24 be indexed to inflation.

25 To put this in context, the annuity

10:39:43 1 provision of the Robinson -- of both Robinson
10:39:50 2 Treaties included an augmentation clause.

10:39:54 3 The original annuities set out under
10:39:57 4 the treaty, compared to prior treaties, were very
10:40:01 5 low, about \$1.50 per capita, as opposed to -- well,
10:40:07 6 \$10 per capita had pretty much been the standard
10:40:12 7 before then.

10:40:14 8 But for many reasons, including
10:40:18 9 obtaining the approval of the Anishinaabe parties
10:40:24 10 at the Treaty Council, the treaty commissioner,
10:40:27 11 William Robinson, included a clause by which those
10:40:31 12 annuities could be increased. And it is a two-part
10:40:35 13 clause.

10:40:37 14 The first part provides an increase up
10:40:39 15 to a defined amount of \$4 per capita; but that is
10:40:45 16 followed by another clause stipulating that
10:40:50 17 annuities could be augmented to "or such further
10:40:56 18 sum as Her Majesty may be graciously pleased to
10:41:01 19 order".

10:41:02 20 So it's within that context that the
10:41:05 21 plaintiffs made an assertion that there was an
10:41:10 22 understanding that the annuities were intended to
10:41:21 23 be augmented to match inflation rates.

10:41:26 24 What actually happened, under the
10:41:29 25 Robinson Treaties sadly, were augmented to \$4 per

10:41:32 1 capita in 1875 and have not since. I understand
10:41:37 2 there was a recent decision, which is under appeal,
10:41:45 3 but essentially up to the present time, annuities
10:41:48 4 have continued to be paid at the rate of \$4 per
10:41:52 5 capita.

10:41:52 6 Now factoring in the cumulative effect
10:41:55 7 of inflation between 1875 and today, it is very
10:42:01 8 easy to understand that whatever value -- economic
10:42:05 9 value \$4 per capita might have had --

10:42:09 10 MS. MC RANDALL: I'm sorry,
10:42:11 11 Mr. Chartrand, I don't mean to interrupt and please
10:42:14 12 continue with this if you feel you should, to
10:42:17 13 answer the question.

10:42:18 14 BY MS. MC RANDALL:

10:42:18 15 Q. I just wanted to ask about the
10:42:20 16 research project you described in your report, the
10:42:24 17 research into the United States treaty?

10:42:27 18 A. Okay. I'll just quickly conclude.
10:42:30 19 I'm sorry if I'm giving too much background.

10:42:33 20 Essentially, it's clear that those
10:42:37 21 annuities at \$4 per capita have become devalued to
10:42:42 22 the point where they've had merely a symbolic value
10:42:46 23 for several decades.

10:42:47 24 So, in relation to that claim, and I
10:42:53 25 was actually involved almost from the onset of the

1 claim in 2006, but very much on an on and off basis
2 -- I had other projects to deal with.

3 But in around 2009-2010, in relation to
4 the inflation claim, the Ontario Ministry of the
5 Attorney General asked me to undertake a review of
6 treaties made with Indigenous peoples in Canada,
7 but also with Native American tribes over the
8 course of the 19th century, reviewing specifically
9 annuity provisions under those treaties in order to
10 determine whether any of the treaties made in the
11 United States and Canada during the 1800s had
12 included a reference to inflation or provision of
13 protection for inflation.

14 And, essentially, I had to work, there
15 were some over 400 treaties made between the United
16 States and Native American tribes between the
17 period of 1,800 to 1871, when the United States
18 changed the terminology of their dealings to
19 agreements.

20 There were more agreements made between
21 1871 and 1899, but there was a very vast amount of
22 treaty documents to work through. I was aware that
23 there was a massive four-volume collection that had
24 been published by Charles Kappler in the early 20th
25 century that contained the texts of all treaties

10:45:04 1 made between the American government and Native
10:45:13 2 American tribes that had been ratified by the
10:45:15 3 American Senate.

10:45:16 4 It's an important provision, because to
10:45:18 5 my knowledge there are more treaties out there that
10:45:22 6 were not ratified. And even knowing the exact
10:45:29 7 number is practically impossible because they were
10:45:35 8 not catalogued and archived in the systematic way
10:45:40 9 that ratified treaties were.

10:45:42 10 I had to work with a data management
10:45:45 11 firm in order to collect and store copies of those
10:45:55 12 treaty documents in electronic format. And this
10:45:59 13 was Public History Incorporated, which had a, I
10:46:05 14 believe, a standing agreement --

10:46:07 15 THE COURT: I'm just going to interrupt
10:46:08 16 the witness a little bit. Sir, I appreciate you're
10:46:11 17 trying to be helpful. But I think you might be
10:46:14 18 getting into the detail more than counsel was
10:46:17 19 expecting.

10:46:18 20 So I'm just going to invite counsel to
10:46:20 21 ask another question and see -- if you want to go
10:46:23 22 down this road, that's fine, counsel.

10:46:25 23 But I suspect maybe we're down a little
10:46:31 24 deep in the detail this morning.

10:46:33 25 MS. MC RANDALL: I can ask another

10:46:35 1 question, Your Honour.

10:46:35 2 THE COURT: It's up to you.

10:46:38 3 BY MS. MC RANDALL:

10:46:42 4 Q. In conducting this research,
10:46:45 5 Mr. Chartrand, did you review all these American
10:46:48 6 treaties in full, not just the annuities
10:46:52 7 provisions?

10:46:52 8 A. Well, I had to review them in full
10:46:58 9 because American treaties don't necessarily have a
10:47:01 10 standard format. The format changes. So locating
10:47:05 11 where the annuity provision is in any treaty pretty
10:47:10 12 much requires reviewing the treaty document as a
10:47:12 13 whole.

10:47:13 14 But more fundamentally, I had to
10:47:18 15 familiarize myself, it became very clear at the
10:47:21 16 onset that these -- there were many different kinds
10:47:25 17 of treaties made by the American government.

10:47:29 18 Treaties for surrender of land,
10:47:31 19 treaties of peace owing to the numerous wars that
10:47:37 20 engaged Native American tribes. Treaties
10:47:41 21 pertaining to trade, which is another complicated
10:47:45 22 and somewhat separate issue.

10:47:51 23 And so I had to familiarize myself with
10:47:54 24 general American policy towards Native Americans,
10:48:02 25 and more specifically policy regarding

10:48:05 1 treaty-making.

10:48:07 2 So to understand the documents that I
10:48:09 3 was reviewing, the academic literature provided the
10:48:18 4 background overview, the context, so to speak,
10:48:22 5 which allowed me to make sense of the contents and
10:48:27 6 purpose of the treaties.

10:48:29 7 Q. Thank you. And in conducting that
10:48:33 8 research, did you become familiar generally with
10:48:35 9 the American treaties that you were asked to
10:48:39 10 research for your report in this litigation?

10:48:41 11 A. Well, they were very much included
10:48:44 12 in the set of -- again, over 400 treaties. But
10:48:50 13 what became clear -- of course, at the time I
10:48:53 14 didn't have a particular focus on the five treaties
10:48:57 15 concerned by this present report. They were very
10:49:01 16 much a part of the set that I reviewed.

10:49:04 17 But more importantly, the historical
10:49:09 18 and ethnohistorical literature that I had read
10:49:12 19 indicated, when I was contracted to undertake this
10:49:16 20 research, indicated that the area in which the five
10:49:20 21 treaties concerned by my present report were
10:49:22 22 located were in a key geographic region.

10:49:29 23 And this was a region where there were
10:49:32 24 key geopolitical relations and issues between the
10:49:36 25 American government, Native American tribes,

1 between the American government and the British,
2 and as well between the British and Native American
3 tribes, of course, within the United States.

4 This was called the northwest region.
5 And essentially it corresponds to the present-day
6 states of Ohio, Illinois, Michigan, Wisconsin.

7 Q. Thank you.

8 I'd like to now display the proposed
9 tender for Mr. Chartrand, which is SC1662.

10 MS. MC RANDALL: Your Honour, may this
11 be made a lettered exhibit?

12 THE COURT: Yes. Mr. Registrar?

13 THE REGISTRAR: Lettered Exhibit L-3.

14 EXHIBIT NO. L-3: Proposed Tender for
15 Jean-Philippe Chartrand.

16 THE COURT: Can you show the whole
17 thing on one page or does it not fit?

18 Better, thank you.

19 MS. MC RANDALL: Your Honour, I propose
20 to qualify Mr. Chartrand as follows: Mr. Jean-Philippe
21 Chartrand is an anthropologist and ethnohistorian
22 qualified to provide opinion evidence on British
23 and American relations with Indigenous peoples in
24 the Great Lakes region from the mid-18th century to
25 the mid-19th century, including administrative

1 development and general treaty policies and
2 practices; treaty-making with Native American
3 tribes in the Great Lakes region generally from
4 1795-1842, and in particular with reference to
5 treaties made in 1807, 1819, 1820, 1831 and 1836,
6 and the intentions and understandings of the United
7 States in making these treaties; and related
8 historical events and context.

9 THE COURT: I take it there's no
10 objection?

11 MR. BROOKWELL: No, Your Honour.

12 THE COURT: That's satisfactory,
13 Counsel. Please go ahead.

14 MS. MC RANDALL: Your Honour, at this
15 point may Mr. Chartrand's report be entered as an
16 exhibit; the number for that again is SC1659.

17 THE COURT: Mr. Registrar.

18 THE REGISTRAR: Exhibit No. 4513.

19 EXHIBIT NO. 4513: Expert Report of
20 Jean-Philippe Chartrand.

21 THE COURT: Now, Mr. Chartrand, as has
22 been the case with virtually almost all the expert
23 witnesses, your report has just become evidence in
24 this trial. And for that reason, I have not
25 permitted counsel to invite their expert witnesses

1 to repeat the entirety of their report from the
2 witness box.

3 You might imagine that that would take
4 a long time; your report is 100 pages long or so,
5 all right? So you should be listening carefully to
6 the questions and answering them, rather than
7 thinking that you must repeat everything in your
8 long report.

9 THE WITNESS: I understand, Your
10 Honour.

11 THE COURT: Please go ahead, Counsel.

12 MS. MC RANDALL: Your Honour, also, we
13 provided a list to Mr. Registrar of secondary
14 sources that we're asking to be made exhibits.

15 THE COURT: Do you have a copy of that
16 for me, Counsel?

17 You should really get one of your
18 co-counsel to walk that around next time.

19 MS. MC RANDALL: Apologies, Your
20 Honour.

21 THE COURT: All right. Now what we've
22 done in the past is had Mr. Registrar assign the
23 numbers, and he'll deal with the database entries
24 later.

25 But I would like to mark this list as a

10:53:30 1 lettered exhibit, Mr. Registrar.

10:53:32 2 THE REGISTRAR: Lettered exhibit M-3.

10:53:37 3 THE COURT: M-3.

10:53:39 4 THE REGISTRAR: As in "Mary".

10:53:41 5 THE COURT: I take it there's no

10:53:42 6 objection. I'm not seeing anyone.

10:53:44 7 EXHIBIT NO. M-3: List of Exhibits to

10:53:44 8 be entered for Identification on Consent.

10:53:45 9 THE COURT: Mr. Registrar, can you take

10:53:46 10 us through the assignment of the exhibit numbers to

10:53:49 11 these documents?

10:53:50 12 THE REGISTRAR: Of course, Your Honour.

10:53:51 13 Document number 0383 is Exhibit 4514.

10:53:51 14 EXHIBIT NO. 4514: A Place of Refuge

10:53:51 15 for All Time: Migration of the American

10:53:51 16 Potawatomi into Upper Canada 1830 to 1850,

10:53:51 17 by J. Clifton.

10:53:58 18 THE REGISTRAR: Document number S0104

10:54:01 19 is 4515.

10:54:01 20 EXHIBIT NO. 4515: Sir William Johnston

10:54:01 21 and the Indian Department, pp. 34-35

10:54:01 22 (excerpt), by R. Allen.

10:54:04 23 THE REGISTRAR: S0105, 4516.

10:54:08 24 EXHIBIT NO. 4516: Part Three: In

25 Defence of Canada, 1796-1815 -

1 Chapter 5 - Renewing the Chain of
2 Friendship - Part Four: Government-Indian
3 Relations in the Post-1815 Years:
4 Canada and the United States -
5 Chapter 8 - From Warriors to Wards -
6 Appendix B - His Majesty's Indian
7 Allies Notes (excerpts), by R. Allen.
10:54:08 8 THE REGISTRAR: S1207, 4517.
10:54:12 9 EXHIBIT NO. 4517: 2. Trade and Peace
10 We take to be one thing: Treaties of
11 Peace, Friendship and Alliance -
12 3. 'And whereas it is just and
13 Reasonable': The Royal Proclamation and
14 The Upper Canadian Treaties - 4. 'From
15 Our lands we receive scarcely
16 Anything': The Upper Canadian Treaties,
17 1818-1862 (excerpts), by J.R. Miller.
10:54:12 18 THE REGISTRAR: S0832, 4518.
10:54:18 19 EXHIBIT NO. 4518: United States Indian
10:54:18 20 Policies, 1776-1815 (excerpt),
10:54:18 21 by R. Horsman.
10:54:19 22 THE REGISTRAR: S1675, 4519.
10:54:22 23 EXHIBIT NO. 4519: Canadian Indian
10:54:22 24 Policies (excerpt), by R. Surtees.
10:54:22 25 THE REGISTRAR:: S0103, 4520.

10:54:26 1 EXHIBIT NO. 4520: Her Majesty's Indian
10:54:26 2 Allies - British Indian Policy in the
10:54:26 3 Defence of Canada, 1774-1815 (excerpts),
10:54:26 4 by R. Allen.

10:54:27 5 THE REGISTRAR: S1398, 4521.

10:54:33 6 EXHIBIT NO. 4521: American Indian
10:54:33 7 Treaties - The History of a Political
10:54:33 8 Anomaly (excerpts), by R. Prucha.

10:54:34 9 THE COURT: Thank you.

10:54:34 10 MS. MC RANDALL: Just in case it's not
10:54:36 11 on the record, Your Honour, the list that's been
10:54:38 12 now made Exhibit M-3 is SC1660.

10:54:44 13 THE COURT: All right.

10:54:52 14 BY MS. MC RANDALL:

10:54:52 15 Q. If we could please turn to page 2
10:54:54 16 of Mr. Chartrand's report, which is now
10:54:58 17 Exhibit 4513.

10:55:03 18 Mr. Chartrand, could you please briefly
10:55:07 19 explain the approach that you took to answer the
10:55:09 20 questions you were asked?

10:55:10 21 A. Well, the approach I took was
10:55:16 22 derived from terms of reference that I received
10:55:18 23 from Ontario.

10:55:21 24 And in relation to the five treaties
10:55:24 25 that were the subject of my research, Ontario

10:55:33 1 essentially asked me to attempt to provide an
10:55:36 2 explanation as to why those five treaties -- and
10:55:43 3 briefly they are the Treaty of Detroit of 1807; the
10:55:48 4 Treaty of Saginaw, 1819; Treaty of Sault Ste. Marie
10:55:53 5 of 1820; treaty with the Menominee of 1831; and the
10:56:04 6 treaty that's called Treaty of Washington dated
10:56:07 7 1836.

10:56:08 8 The plaintiffs, in an amended Statement
10:56:13 9 of Claim, I believe back in 2008, had asserted that
10:56:17 10 in contrast to treaties made by the British in the
10:56:22 11 early 19th century, the American government made
10:56:31 12 treaties with Native American tribes that included
10:56:36 13 surrenders of lake beds, especially in the Great
10:56:44 14 Lakes region, and identified those five treaties as
10:56:47 15 key examples.

10:56:49 16 So in relation to that claim, Ontario
10:56:52 17 asked me to undertake research to see if I could
10:56:58 18 identify a general explanation as to why those five
10:57:02 19 treaties, in particular, included surrenders of
10:57:09 20 lake beds in the Upper Great Lakes up to the
10:57:13 21 international border.

10:57:16 22 And more specifically, Ontario asked me
10:57:19 23 to ascertain the extent, if any, to which local
10:57:28 24 factors may have been a consideration in including
10:57:33 25 the provision of surrenders of lake beds. By local

10:57:37 1 factors was understood to mean either state level
10:57:41 2 or territory level factors.

10:57:45 3 I was also asked to ascertain the
10:57:49 4 extent to which the treaty -- the American treaty
10:57:55 5 commissioners were specifically instructed to
10:57:58 6 include surrenders of lake beds in the treaties.

10:58:04 7 And finally, I was asked to research
10:58:07 8 the extent to which the treaty commissioners of the
10:58:11 9 five treaties had any legal background or prior
10:58:21 10 administrative background in -- at the time it was
10:58:27 11 called Indian Affairs in the United States.

10:58:36 12 And so from those terms of reference, I
10:58:39 13 already had this massive collection of treaty
10:58:42 14 documents, again including absolutely the five
10:58:46 15 treaties that were the subject of my research, but
10:58:51 16 I also had familiarity with the historical and
10:58:54 17 ethnohistorical literature pertaining to
10:59:02 18 American-Indian policy and American treaty-making
10:59:04 19 in that time period.

10:59:07 20 But I undertook expanded research to
10:59:11 21 essentially update my literature review. Some time
10:59:19 22 had passed. I was commissioned to undertake this
10:59:22 23 in early 2015, so five years had past since I last
10:59:27 24 undertaken research.

10:59:33 25 And being 2015, research could, to a

10:59:39 1 much greater extent than even in 2009 be conducted
10:59:43 2 electronically.

10:59:44 3 I identified a number of electronic
10:59:46 4 American repositories that might hold documents
10:59:52 5 that were relevant to the background and impetus of
10:59:58 6 those treaties, that might provide information on
11:00:01 7 the treaty commissioners, their instructions, any
11:00:07 8 reports or minutes of treaty councils that they
11:00:14 9 held.

11:00:17 10 And it very quickly became apparent
11:00:20 11 that, in respect to archival research, because of
11:00:25 12 the international nature of the research, it would
11:00:31 13 be practically impossible to obtain copies from
11:00:37 14 American repositories.

11:00:39 15 At the time I was also under time
11:00:43 16 pressure to complete another report on another
11:00:48 17 matter; my report had a deadline for disclosure.

11:00:52 18 And so with the Ontario Ministry of the
11:00:56 19 Attorney General, it was agreed that a senior
11:00:59 20 researcher from Public History Incorporated would
11:01:04 21 travel to Washington, which is the site of the
11:01:08 22 National Archives, where it was determined that a
11:01:12 23 number of key documents were likely to be located,
11:01:18 24 to undertake the physical data, document search and
11:01:23 25 collection process.

11:01:26 1 He did so under instructions from me.

11:01:28 2 I prepared a document collection guide that
11:01:33 3 essentially laid out the issues and the documents
11:01:36 4 that I was interested in obtaining.

11:01:40 5 And while he was in Washington we
11:01:42 6 remained in contact electronically, and so I
11:01:47 7 continued to provide guidance to his research
11:01:50 8 efforts.

11:01:51 9 The research did in fact yield not
11:01:57 10 many, but a few documents that I considered to be
11:02:00 11 key documents that helped to shed some light on the
11:02:04 12 process by which actually four of the five treaties
11:02:10 13 identified by the plaintiffs came to include
11:02:14 14 surrenders of lake beds.

11:02:17 15 Q. Thank you. So turning now to
11:02:21 16 other parts of your report, in respect in
11:02:27 17 particular of treaty-making, when was the
11:02:31 18 British-Indian Department established?

11:02:32 19 A. It was established in 1755 in the
11:02:35 20 context of the outbreak of the Seven Years' War,
11:02:39 21 which in North America involved military conflict
11:02:44 22 between England and France for the control of North
11:02:49 23 America.

11:02:49 24 Q. Who ran the British Indian
11:02:52 25 Department after it was established?

11:02:53 1 A. Yes, I was going to say, it was
11:02:55 2 established as a branch of the military at the
11:02:58 3 time. The key goal for this department was to
11:03:10 4 cultivate diplomatic relations with Indigenous
11:03:14 5 peoples with a view to developing a military
11:03:21 6 alliance.

11:03:26 7 The reason for that is France, which
11:03:29 8 claimed a vast territory, including the territory
11:03:31 9 around the Upper Great Lakes, had long been in
11:03:40 10 contact with the Indigenous peoples, largely the
11:03:43 11 Anishinaabe, in that region. And had developed
11:03:47 12 longstanding protocols, diplomatic protocols, trade
11:03:53 13 relations.

11:03:55 14 And had also, as part of their
11:04:01 15 alliance-building efforts with the First Nations,
11:04:07 16 implemented a practice of issuing annual presents
11:04:16 17 to the First Nations at various locations where
11:04:19 18 they had military forts and trade posts in the
11:04:30 19 Upper Great Lakes.

11:04:30 20 So there was this alliance between
11:04:32 21 France and a very large number of First Nations at
11:04:34 22 the outbreak of the war that the British were
11:04:40 23 attempting to contest by developing their own
11:04:44 24 alliances.

11:04:46 25 Q. Thank you.

1 So who ran the British Indian
2 Department after it was initially established?

3 A. Well, William Johnson, who was a
4 very respected trader in what's now Upper New York
5 State, had already, through his business dealings,
6 developed an excellent rapport and had gained
7 considerable cultural understandings, largely with
8 the Haudenosaunee Confederacy.

9 He was appointed initially at the onset
10 in 1855 as Superintendent of the Northern
11 Superintendency, but within a year, the British
12 realized that he was actually an ideal person to
13 head the department as a whole. And so he received
14 a commission in -- sorry, 18 -- 1756, which
15 appointed him as superintendent of the department.
16 He maintained that position for close to two
17 decades.

18 Q. You mentioned earlier -- I'm
19 paraphrasing here -- that the British were
20 attempting to establish diplomatic relations with
21 First Nations to develop military alliances?

22 A. Yes.

23 Q. So what efforts did they make
24 around that time?

25 A. Their efforts were largely

1 fruitless beyond the Haudenosaunee Confederacy; the
2 Anishinaabe around the Upper Great Lakes remained
3 staunch allies of France.

4 However, following the capitulation of
5 France in 1760, in 1761 Sir William Johnson held a
6 general conference that included the Anishinaabe
7 allies of France at Detroit.

8 This was essentially a peace-making
9 conference that appeared at the time to be
10 successful, but quickly degenerated, owing to the
11 fact that the British government had not adopted a
12 number of recommendations that Johnson had made
13 pertaining to the expansion of cultivating
14 diplomatic alliances, specifically the resumption
15 of the issue of annual presents.

16 There were also problems with respect
17 to trade, which under the French regime had been
18 very important to the First Nations.

19 So there was an outbreak of war led by
20 Pontiac that eventually led the British to attempt
21 to reassure Indigenous peoples in respect of their
22 intentions respecting traditional Indigenous lands
23 and relations with the British Crown. And that
24 occurred through the issue of the Royal
25 Proclamation of 1763.

11:08:33 1 Q. So is there a change in British
11:08:35 2 relations with First Nations after the Royal
11:08:38 3 Proclamation?

11:08:38 4 A. Yes, but it was gradual.

11:08:49 5 Q. And did it change how the British
11:08:51 6 approached making treaties with First Nations?

11:08:54 7 A. Well, the Royal Proclamation,
11:08:59 8 recognizing that there was essentially what was
11:09:04 9 called an Indian territory, the proclamation
11:09:09 10 actually used the term "hunting grounds", the
11:09:12 11 Indian hunting grounds.

11:09:14 12 But this was a vast region that was
11:09:16 13 geographically defined in relation to boundaries of
11:09:20 14 other British colonies that were established in
11:09:29 15 North America.

11:09:29 16 The proclamation stipulated some basic
11:09:33 17 principles by which Indigenous lands within that
11:09:38 18 territory could be obtained. And they were very
11:09:42 19 clear principles, and they could only be obtained
11:09:45 20 by the Crown if the Indigenous peoples showed an
11:09:53 21 inclination to sell some of their lands.

11:09:58 22 The negotiations for the lands were to
11:10:06 23 be held in a public council. This was attempted to
11:10:11 24 avoid a number of problems that had occurred in the
11:10:15 25 past and largely out of the 13 British colonies,

11:10:21 1 and what's now northeastern United States, in land
11:10:27 2 dealings with Native American tribes.

11:10:34 3 Q. Sorry?

11:10:34 4 A. Sorry. Go ahead.

11:10:37 5 Q. All right. Was there any change
11:10:40 6 in the practice of giving presents?

11:10:43 7 A. Yes. Not immediately. But within
11:10:51 8 a few years of the -- well, following the
11:10:58 9 proclamation, William Johnson held another, even
11:11:01 10 more massive conference with Indigenous peoples.
11:11:05 11 It was attended by over 2,000 Indigenous persons
11:11:11 12 representing over 20 nations.

11:11:15 13 And this was, again, another,
11:11:19 14 essentially, attempt by Johnson to confirm peace in
11:11:27 15 the context of Pontiac's War, and to begin to
11:11:35 16 explain the process by which trade would be
11:11:41 17 resumed, which was a major concern of Indigenous
11:11:44 18 peoples.

11:11:46 19 And following that conference, within a
11:11:49 20 few years, Johnson convinced the British that it
11:11:55 21 was of vital importance for them to resume the
11:11:59 22 issue of annual presents that the French had done
11:12:06 23 during the period of the French regime.

11:12:08 24 Q. What kind of goods were included
11:12:12 25 in those presents?

11:12:13 1 A. Massive. This was a very large
11:12:16 2 financial outlay for the Imperial government. They
11:12:24 3 included many practical goods, such as fish hooks,
11:12:32 4 fishing equipment. There were axes, knives. More
11:12:46 5 importantly, there were also guns, shot provided
11:12:55 6 which was intended to be used for hunting purposes,
11:12:59 7 but clearly also provided weapons of war. Just a
11:13:07 8 very large outlay.

11:13:09 9 There were some ceremonial goods,
11:13:15 10 medals issued to the chiefs. Blankets, clothing,
11:13:23 11 an extremely long list.

11:13:26 12 Q. Thank you. If we could bring up
11:13:28 13 the bottom of page 13 of your report.

11:13:31 14 The last paragraph, you commented very
11:13:36 15 briefly on what's sometimes called the Congress at
11:13:40 16 Niagara in 1764 and you just mentioned it earlier,
11:13:43 17 I believe.

11:13:44 18 Could you please explain your statement
11:13:46 19 about the terms of the Royal Proclamation being
11:13:48 20 communicated there?

11:13:49 21 A. That is in part a consequence of
11:13:55 22 five years elapsing between the time I wrote my
11:13:58 23 report. I have a changed my opinion on this matter
11:14:02 24 to an extent.

11:14:03 25 At the time I wrote my report, I, along

1 with many historians, believed that one of the
2 things that Johnson did at the Niagara Council of
3 1764 was to explain the terms of the Royal
4 Proclamation in order to provide an assurance to
5 this massive grouping of Indigenous peoples to
6 provide an assurance of the justice within which
7 the British Crown would deal with their lands as a
8 major attempt to secure a permanent peace.

9 Since writing my report I've become
10 aware of new research pertaining to this Council,
11 specifically by Professor Alain Beaulieu. He
12 teaches history at the University of Québec at
13 Montreal. And he's produced a very comprehensive
14 detailed report on the Niagara Council, the factors
15 leading to it and what transpired at the Council.

16 He has come to the opinion that in fact
17 Johnson did not explain the proclamation at that
18 Council. I read his report, I fully agree with
19 him, and this was actually known by historians
20 before his report, that the actual documents
21 detailing the proceedings at the Council do not
22 present evidence that the proclamation was
23 explained.

24 Nonetheless, many historians, including
25 myself, believed that it was simply said to be the

1 logical thing for Johnson to have done. That I
2 wrote the opinion that I did in my report.

3 After reading Professor Beaulieu's
4 report, I'm no longer convinced that this was
5 necessarily done, so I no longer want to present
6 this as a fact.

7 There's still a part of me that,
8 following a basic principle of historical and
9 ethnohistorical research, which says that absence
10 of evidence is not evidence of absence.

11 The fact that there's no positive
12 evidence to me still doesn't fully convince me that
13 Johnson would not have somehow alluded to the
14 proclamation, or at least to some of the principles
15 in it respecting Indian lands. So this is the
16 extent to which I've changed my position on this
17 matter.

18 Q. Thank you.

19 Do the Dorchester Instructions have an
20 impact on treaty-making between the Crown and
21 Indigenous people?

22 A. Yes. The British started to
23 undertake negotiations of treaties for land
24 cessions from Indigenous peoples in the 1780s.
25 Those treaties were found to be problematic in a

11:17:51 1 number of respects. There was poor record keeping
11:17:58 2 by the Indian Department, so key records of the
11:18:01 3 transactions were missing or misfiled.

11:18:05 4 And there was also a problem, a problem
11:18:09 5 had emerged with interpretation at some of those
11:18:14 6 treaty-making councils. So that Indigenous peoples
11:18:17 7 within a very short time of the conclusion of a
11:18:22 8 treaty were pressing claims based on an
11:18:26 9 understanding of what they had surrendered and what
11:18:29 10 they were to receive in compensation that differed
11:18:32 11 from the understanding of officials in the British
11:18:35 12 Indian Department.

11:18:36 13 So in response, as a means to
11:18:40 14 addressing and rectifying those problems, in 1794,
11:18:46 15 Lord Dorchester, who was Governor General, issued
11:18:52 16 an extensive set of very specific instructions to
11:18:56 17 the Indian Department pertaining to treaty-making.

11:19:00 18 The instructions specified that only
11:19:03 19 the highest ranking officials of the department or
11:19:11 20 someone commissioned by the Governor General could
11:19:14 21 negotiate treaties.

11:19:16 22 There were clear instructions with
11:19:19 23 respect to seeking the best local interpreters to
11:19:25 24 provide interpreter services at the Treaty Council,
11:19:28 25 clear instructions in respect to the need for the

1 presence of a surveyor at the Treaty Council who
2 would be in a position to actually demarcate the
3 tracts that were to be surrendered.

4 This was feasible because at the time,
5 the areas covered by these land session treaties
6 were relatively small. By relatively, I mean
7 compared to the vast territories subsumed under the
8 Robinson Treaties of 1850, which were simply
9 impossible to survey by a single individual.

10 There were instructions with respect to
11 the production of records, the deeds of surrender,
12 respecting the need to have maps of the tracts to
13 be surrendered appended to the deeds. To providing
14 the chief or chiefs with a copy of said deeds. I'm
15 missing a few details, but that's the gist of it.

16 Q. Thank you.

17 Did British -- or did the Crown's
18 treaty-making practices in Upper Canada change into
19 the 19th century?

20 A. There were by -- well, certainly
21 by the time of the Robinson Treaties, some
22 modifications to -- some of the instructions, for
23 example, of the 1794 Dorchester instructions were
24 not strictly followed to the letter.

25 But the Dorchester instructions and the

1 Royal Proclamation very much continued as a whole
2 to provide guiding principles for treaty-making.

3 Q. Thank you.

4 MS. MC RANDALL: Your Honour, I'm about
5 to move to another topic. I'm happy to keep going
6 because I realize it's earlier than our normal
7 morning break.

8 BY MS. MC RANDALL:

9 Q. I'd like to step back for a moment
10 to the late 18th century. Did the Revolutionary
11 War have an impact on alliances between the British
12 and First Nations?

13 A. Well, yes, it certainly did. To
14 put it into very broad context, the Revolutionary
15 War came out of a now crisis level sense of
16 frustration in the 13 colonies in respect to the
17 fact that the Imperial government was thwarting
18 their ambitions for territorial expansion, which
19 would have required taking up lands of Native
20 American tribes.

21 As well as there were scores of
22 problems dealing with trade and taxation, as well
23 as what, by then, were growing aspirations for self
24 government.

25 So the British reacted to the demands

1 and grievances of the 13 colonies by it essentially
2 clamping down on them. For example, in respect to
3 their territorial expansion ambitions, in 1774, the
4 British dramatically expanded the boundaries of the
5 province of Québec to include lands down to the
6 Ohio River up to its confluence with the
7 Mississippi River.

8 And that had the effect of,
9 essentially, preventing the expansion of the
10 colonies by virtue of the fact that there was
11 another province established there with a clear
12 border.

13 That was considered by the Americans
14 one of a number of intolerable acts, intolerable
15 acts by the British. There were others, there was
16 a long list.

17 But at the outbreak of war, actually in
18 1775 the first battle started to erupt, there were
19 a number of Native American tribes that sided with
20 the British as opposed to this new group of
21 revolutionaries, of which, you know, they had had
22 prior problematic dealings with respect to land
23 cessions.

24 And other Native Americans simply
25 remained neutral. Not many, actually, opted to

11:25:03 1 side with what were called the American patriots.

11:25:12 2 Q. What was the Treaty of Paris of
11:25:14 3 1783?

11:25:15 4 A. Well, that was the treaty that
11:25:17 5 formally concluded the American Revolutionary War.
11:25:25 6 It's a complex treaty but for purposes of my
11:25:27 7 research, among many other things, the treaty
11:25:31 8 defined the international border between the new
11:25:40 9 United States, and the British province of Québec.

11:25:49 10 And that border, in the St. Lawrence
11:25:51 11 and through the Great Lakes, was to run through the
11:25:55 12 middle of the bodies of water. So down the St.
11:26:00 13 Lawrence to the middle of Lake Ontario, middle of
11:26:02 14 Lake Erie, roughly the middle of Lake Huron and
11:26:06 15 middle of Lake Superior.

11:26:08 16 Q. What happened to the British
11:26:13 17 military forts and posts that were south the of
11:26:16 18 border after the Revolutionary War?

11:26:18 19 A. Well, the British didn't abandon a
11:26:20 20 number of posts that they had held in the Upper
11:26:26 21 Great Lakes that were after 1783 clearly located
11:26:29 22 within American territory.

11:26:31 23 I'm thinking of two examples: Detroit
11:26:35 24 was held by the British. Another important post,
11:26:39 25 much further up at the mouth of Lake Michigan,

1 Michilimackinac was held by the British. But there
2 were several others.

3 This of course infuriated the American
4 government. The American government could do
5 relatively little about it. It was exhausted,
6 financially and militarily, from the Revolutionary
7 War, and the British were justifying their ongoing
8 occupation of forts on a number of grounds.

9 One of which was to provide security in
10 the region, specifically to prevent the outbreak of
11 a new Indigenous war such as Pontiac's War. They
12 also accused the United States of failing to honour
13 the claims of loyalists that had sided with the
14 British during the Revolutionary War.

15 And by the early 1790s, a concept
16 developed within the British Indian Department that
17 considered establishing a Indian buffer state
18 between British possessions and the United States.

19 They continued to hold these forts in
20 order to maintain an alliance with Native American
21 tribes.

22 Q. So you mentioned they maintained
23 or attempted to maintain alliances with Native
24 American tribes; did that include continuing to
25 give presents?

11:28:45 1 A. Absolutely, yes.

11:28:48 2 Q. Shortly after the Treaty of Paris
11:28:56 3 can you describe how the government of the new
11:28:59 4 United States dealt with Native American tribes in
11:29:02 5 that old Northwest region?

11:29:04 6 A. Well, they essentially repeated at
11:29:06 7 a much higher level the original mistakes of the
11:29:11 8 British department. Neither the Treaty of Paris
11:29:14 9 nor the American government recognized Native
11:29:22 10 American lands in what was now the United States.
11:29:30 11 And this led very quickly to the outbreak of
11:29:34 12 military conflict with Native American tribes.

11:29:38 13 A somewhat loose confederacy was
11:29:46 14 formed, and the first of what would be seven major
11:29:51 15 battles erupted in 1785, between Native American
11:29:57 16 tribes and the American military.

11:30:02 17 During that time, there were some
11:30:08 18 acknowledgements of Native Americans and
11:30:12 19 treaty-making. For example, under the American
11:30:16 20 constitution, authority for making treaties with
11:30:21 21 Native American tribes was vested with the
11:30:24 22 president of the United States. This was more
11:30:30 23 honorific than anything.

11:30:34 24 In practice, the responsibility for
11:30:40 25 dealing with Native Americans was subsumed within

11:30:44 1 the American department of war.

11:30:49 2 However, in contrast to what the
11:30:52 3 British had done, the American government did not
11:30:57 4 establish a dedicated department to look after the
11:31:05 5 affairs of the American government with Native
11:31:08 6 Americans in that time period, and didn't do so
11:31:12 7 until 1824.

11:31:16 8 Q. Thank you.

11:31:17 9 MS. MC RANDALL: Your Honour, I believe
11:31:19 10 it is just after 11:30. Would this be a good time
11:31:22 11 to take the morning break?

11:31:24 12 THE COURT: Yes. 20 minutes.

11:31:25 13 -- RECESS TAKEN AT 11:31 --

11:50:16 14 -- UPON RESUMING AT 11:58 --

11:58:54 15 THE COURT: Please go ahead.

11:58:55 16 MS. MC RANDALL: Thank you, Your
11:58:56 17 Honour.

11:58:56 18 BY MS. MC RANDALL:

11:58:57 19 Q. Mr. Chartrand, before the break
11:59:00 20 you were describing American policy towards Native
11:59:06 21 Americans immediately after the end of the
11:59:08 22 Revolutionary War. Did American policies or
11:59:11 23 practices with respect to treaty-making change
11:59:15 24 later on in the 18th century and early 19th
11:59:21 25 century?

11:59:21 1 A. Well, in 1789 the American
11:59:23 2 government, and this is after several battles with
11:59:28 3 Native Americans had already taken place, did
11:59:31 4 generally recognize Native American rights to their
11:59:40 5 traditional lands and understood that there should
11:59:44 6 be treaty-making processes through which lands
11:59:51 7 should be acquired.

11:59:56 8 But the warfare that had erupted was
12:00:02 9 not stopped by that pronouncement. Battles
12:00:08 10 continued until 1794, when the last major battle
12:00:17 11 provided an end to what by then -- historians have
12:00:20 12 referred to them as the Northwest Wars.

12:00:26 13 Q. And you also mentioned before the
12:00:28 14 break that the United States didn't have a
12:00:31 15 dedicated organization for Indian Affairs prior to
12:00:36 16 I believe you said 1824. Could you please
12:00:39 17 summarize how that department was organized once it
12:00:44 18 was created?

12:00:44 19 A. Oh, well when it was created,
12:00:48 20 there was a head official titled superintendent of
12:00:57 21 the Breau of Indian Affairs who oversaw the overall
12:01:01 22 administration of the bureau. And the bureau
12:01:07 23 operated in an analogous manner to how the British
12:01:15 24 Indian Department had been operating.

12:01:17 25 It had a comprehensive mandate for

1 overseeing relations between Native Americans and
2 the American government, including processes for
3 treaty-making.

4 Q. Was there more than one
5 superintendency?

6 A. No. Oh, before the bureau was
7 established as a centralized administration, this
8 is going back to the 1780s and '90s, the late 1780s
9 and '90s.

10 Without -- in the absence of a
11 centralized administration, the Secretary of War,
12 who was the head official of the department of war,
13 had the broad-based responsibility for dealings
14 between the American government and Native
15 Americans. But clearly, he was occupied with other
16 matters.

17 But there were superintendencies that
18 were established in that time period. They
19 operated -- there wasn't the same kind of
20 integration that was the case in Upper Canada by
21 the 1790s.

22 And moreover, the administrations of
23 the superintendencies were limited by the fact that
24 any policies that they put forth could not violate,
25 could not be in violation of preexisting state

12:03:11 1 laws.

12:03:12 2 So in the United States in that time
12:03:14 3 period, individual states had a certain kind of --
12:03:23 4 how can I put it -- certain kind of veto over
12:03:28 5 Indian Affairs within the confines of their
12:03:31 6 boundaries.

12:03:33 7 But in that time period, as well, it
12:03:37 8 was the -- although ultimate authority for
12:03:42 9 treaty-making was vested in the President, in
12:03:46 10 practice, it was the Secretary of War who appointed
12:03:52 11 individuals as commissioners to negotiate treaties.

12:03:55 12 And typically, those individuals were
12:04:01 13 governors of states or territories.

12:04:07 14 Q. What was the -- I'm sorry?

12:04:10 15 A. In essence, the governors were
12:04:15 16 ex-officio superintendents of Indian Affairs within
12:04:20 17 the boundaries of their administration.

12:04:24 18 Q. What was the Treaty of Greenville
12:04:33 19 of 1795?

12:04:35 20 A. The Treaty of Greenville in 1795
12:04:40 21 was brought about in consequence of the last of --
12:04:47 22 the last major battle of the seven battles that I
12:04:51 23 alluded to earlier that occurred at Fallen Timbers.

12:05:02 24 I'm not a military historian, but the
12:05:07 25 seven battles were fought between 1785 and 1794 at

1 Fallen Timbers involved in some instances victories
2 for Native Americans and others for the American
3 military.

4 The battle of Fallen Timbers involved a
5 highly trained contingent of American troops under
6 the direction of general Anthony Wayne, who at the
7 time had earned the nickname "Mad Anthony Wayne".

8 He was a veteran of the American
9 Revolutionary War, had risen to the rank of
10 general, and had acquired his nickname as a
11 consequence of the fact he had quite a temper.

12 He was also highly a professional
13 soldier and with his troops, clearly took control
14 of the battle.

15 The Native Americans were forced to
16 retreat very quickly at the onset of the battle,
17 and attempted to seek refuge at the British fort.
18 This was Fort Miami, which was located close to the
19 present day city of Ohio, a little bit upstream of
20 what is now called the Maunee River, M-A-U-N-E-E.

21 THE COURT: I'm going to interrupt the
22 witness.

23 Counsel, I am a little concerned that
24 the witness is treading outside his expertise. It
25 is certainly not clear to me that this is something

12:07:02 1 you were asking about. If it is, say so. But I
12:07:05 2 don't want -- you should be obviously focusing your
12:07:11 3 witness.

12:07:14 4 Your question was a very
12:07:15 5 straightforward one. I believe your question was:
12:07:25 6 What was the Treaty of Greenville of 1795; it was a
12:07:29 7 very straightforward question. I'm not sure the
12:07:31 8 details of that battle are relevant to that answer,
12:07:34 9 but if the witness believes they are, then...

12:07:40 10 THE WITNESS: Well, to summarize, the
12:07:42 11 Treaty of Greenville was set up in consequence of a
12:07:49 12 very sound defeat on the part of the Native
12:07:53 13 Americans at the battle of Fallen Timbers.

12:07:56 14 The American government saw an
12:07:58 15 opportunity to establish peace in the region and to
12:08:03 16 that effect commissioned General Wayne to negotiate
12:08:07 17 this treaty. It was a very complex treaty that
12:08:12 18 dealt with essentially the broad scope of relations
12:08:18 19 between the government and Native American tribes
12:08:22 20 in the northwest region.

12:08:25 21 First and foremost, it was a treaty of
12:08:28 22 peace. There were provisions for the exchange of
12:08:32 23 prisoners, but it also concerned lands.

12:08:37 24 And under the treaty the Native
12:08:40 25 American signatories agreed to prior land cessions

12:08:48 1 that had been made that had formerly been in
12:08:55 2 dispute.

12:08:55 3 They had also agreed to some new land
12:08:59 4 cessions under the treaty up to a boundary that
12:09:02 5 came to be known as the Greenville Line.

12:09:05 6 What's most interesting in terms of my
12:09:12 7 research, is that the Greenville treaty also
12:09:16 8 included a provision that brought about a measure
12:09:20 9 of security of land occupation and land use to
12:09:27 10 Native Americans in the northwest, north of this
12:09:31 11 Greenville Line.

12:09:34 12 And that area came to encompass what
12:09:40 13 later became the territory of Michigan, in which a
12:09:42 14 number of treaties were made.

12:09:47 15 BY MS. MC RANDALL:

12:09:48 16 Q. Thank you.

12:09:48 17 I'd like to turn now to some other
12:09:50 18 specific United States treaties. If we can please
12:09:54 19 bring up page 50 of Mr. Chartrand's report. Again,
12:09:57 20 that's Exhibit 4513.

12:10:14 21 Mr. Chartrand, what does this -- what
12:10:18 22 does the area highlighted in yellow show?

12:10:21 23 A. The area highlighted in yellow
12:10:24 24 shows approximately the territory that was
12:10:29 25 surrendered under the Treaty of Detroit made in

12:10:34 1 1807. I obtained this map from a publication
12:10:40 2 authored by Victor Lytwyn and Dean Jacobs in the
12:10:46 3 year 2000.

12:10:48 4 Q. Can you briefly describe how the
12:10:50 5 Treaty of Detroit of 1807 came about?

12:10:54 6 A. Yes. First of all, Michigan was
12:10:56 7 established as a territory in 1805, which provided
12:11:01 8 -- which meant practically that there was a
12:11:04 9 regional government established within the
12:11:10 10 territory.

12:11:14 11 The first Governor of the territory was
12:11:15 12 William Hull, a general who had taken part in the
12:11:19 13 American Revolutionary War. And in 1806, Hull
12:11:28 14 received a commission from the Secretary of War and
12:11:34 15 instructions in relation to obtaining two adjoining
12:11:42 16 land cessions in the general region of Detroit for
12:11:47 17 the purpose of settlement.

12:11:52 18 Q. In your opinion, why was the
12:11:54 19 international border a boundary in the Treaty of
12:11:59 20 Detroit?

12:12:00 21 A. This was an interesting finding
12:12:02 22 from my research. I obtained a copy of the
12:12:04 23 original instructions sent by the Secretary of War,
12:12:08 24 who was Henry Dearborn, to William Hull.

12:12:15 25 And those instructions specified a

1 number of conditions, maximum conditions for the
2 treaty.

3 Interestingly, it instructed Hull to
4 forbid the presence at the Treaty Council of any
5 non-Native Americans who were not part of the
6 treaty party, presumably to avoid any influence on
7 their part on the Native American leaders at the
8 Council.

9 But it also included descriptions of
10 the two adjoining territories that Hull was to
11 obtain a cession for. They're in my report.
12 What's interesting about the original descriptions
13 given to Hull was that they included boundaries
14 that did not extend to the international border in
15 Lakes Erie and Huron but were instead confined to
16 the shorelines of the lake.

17 In early 1807, I believe February 1807,
18 Hull wrote the Secretary of War and outlined a
19 number of queries. I was not able to obtain a copy
20 of Hull's letter to the Secretary of War, but I was
21 able to obtain a reply to that query from February.
22 I believe it dates it to February 20. The reply
23 came, I think, March 20, 1807.

24 And among some further instructions
25 dealing with compensation, the Secretary of War

1 informed Hull that -- or confirmed that he could in
2 fact modify the boundaries of the treaty to extend
3 from the shorelines of Lakes Huron and Erie up to
4 the international border. And I found the language
5 in the letter interesting.

6 I believe Dearborn said: "You may
7 extend the boundaries", which I thought was an
8 interesting choice of words. He was not actually
9 directed to positively do so.

10 So basically what my research indicates
11 is that, as originally conceived by the department
12 of war, this treaty was not to include territorial
13 surrender up to the international border. This is
14 something that, by the reply to Hull, originated
15 with Governor William Hull.

16 And I know, from the rest of the
17 research I conducted, that General Hull was at the
18 time particularly concerned about the influence
19 that British continued to assert on Native
20 Americans in the region of Detroit from the
21 establishment of a fort that was called Malden --
22 it was actually contemporary Amherstburg -- and the
23 issue of presents.

24 There were many ongoing political and
25 economic tensions continuing between the United

1 States and British at this time period.

2 And at the Treaty Council, Hull
3 cautioned the Native American leaders that he,
4 Hull, believed that war would be likely to resume
5 with the British and exhorted them not to side with
6 the British government in that warfare, essentially
7 either to remain neutral or hopefully, in the best
8 of all worlds, assist the American troops.

9 MS. MC RANDALL: Would you please bring
10 up page 55 of Mr. Chartrand's report.

11 BY MS. MC RANDALL:

12 Q. And, Mr. Chartrand, what is the
13 area in pink on this?

14 A. It depicts the approximate
15 boundaries of a subsequent treaty known as the
16 Treaty of Saginaw that was concluded in 1919 -- in
17 1819.

18 This was another treaty prompted by a
19 desire to open up lands for settlement. By this
20 time, there was a new Governor of Michigan
21 territory, Lewis Cass. He also had the rank of
22 general; he had taken part in the War of 1812.

23 Cass had quickly succeeded William Hull
24 in 1813 as governor, when William Hull, in the
25 context of the war, ended up being tried for

12:18:12 1 cowardice and convicted. Which basically put an
12:18:16 2 end to his military career and political position
12:18:20 3 as governor.

12:18:23 4 So, in 1819, Cass received a commission
12:18:27 5 and instructions from the Secretary of War. And
12:18:30 6 this is a pattern that we see happening again and
12:18:34 7 again, to negotiate a treaty to obtain as much land
12:18:41 8 as he could north of the boundaries of the Treaty
12:18:47 9 of Detroit.

12:18:49 10 Originally, the Secretary of War
12:18:53 11 proposed that Cass proceed to obtain this treaty
12:18:57 12 through a land exchange. This is one of the
12:19:02 13 cornerstones of American policy towards Native
12:19:08 14 Americans, pressing for their removal from
12:19:11 15 traditional lands.

12:19:15 16 Basically, from the 1790s onwards, the
12:19:19 17 American government, up to certainly the end of my
12:19:26 18 research period in the 1840s, pressed ambivalently
12:19:34 19 two alternating policies towards Native Americans.
12:19:38 20 One pressing for their civilization, and the other
12:19:41 21 for their removal.

12:19:44 22 And so this was proposed. Removal,
12:19:49 23 often enough, entailed removal far from regions
12:19:54 24 that might in the relatively near future become
12:20:01 25 susceptible to American settlement, and

12:20:04 1 specifically west of the Mississippi River.

12:20:08 2 So what Lewis Cass was instructed to
12:20:13 3 consider as an option in this treaty was to propose
12:20:19 4 a land exchange for a land mass in Michigan
12:20:22 5 territory in exchange for lands west of the
12:20:26 6 Mississippi.

12:20:28 7 We have very little information about
12:20:30 8 how the Treaty Council proceeded, but it's clear
12:20:36 9 that Cass found that option completely
12:20:43 10 impracticable. So he proceeded to negotiate what I
12:20:48 11 would call a standard treaty of land cession from
12:20:54 12 the Native Americans.

12:20:56 13 We know that Cass must have had a copy
12:21:02 14 of the Treaty of Detroit because, in defining the
12:21:08 15 boundaries of the land surrender in this treaty,
12:21:13 16 the Treaty of Saginaw made explicit reference to
12:21:19 17 the northern boundary of the Treaty of Detroit.

12:21:24 18 And so this is the beginning of what I
12:21:28 19 informally refer to as creating a bit of a
12:21:30 20 patchwork quilt of land surrenders, where the next
12:21:36 21 land surrender treaty extends the area of surrender
12:21:43 22 from the preceding treaty.

12:21:49 23 And the boundary of the surrender, like
12:21:51 24 the Treaty of Detroit, explicitly extended to the
12:21:57 25 international border.

12:21:58 1 Q. And in your opinion, why was that?

12:22:08 2 A. Well, Cass was a general; he had
12:22:10 3 fought in the War of 1812. There were still
12:22:14 4 ongoing tensions between the Americans and the
12:22:20 5 British, and how the British were perceived by the
12:22:23 6 Americans to hold a great degree of influence on
12:22:29 7 Native Americans.

12:22:31 8 And I believe that Cass extended the
12:22:40 9 boundaries to the international border first in
12:22:42 10 order to make this treaty territorially compatible
12:22:45 11 with the Treaty of Detroit. But what was happening
12:22:49 12 by this time was that American government, through
12:22:53 13 these treaties, was beginning to establish a series
12:22:59 14 -- a small series, there was only two -- but was
12:23:04 15 beginning to establish a series of treaties that
12:23:06 16 continued to confirm American jurisdiction up to
12:23:10 17 the international border.

12:23:13 18 This was a matter that had been of
12:23:17 19 great concern to the American government in respect
12:23:22 20 of treaties going back to the Treaty of Greenville,
12:23:27 21 in which, in the Indian territory that was
12:23:33 22 recognized, the article describing the territory
12:23:43 23 and alluding to the rights of occupation and use by
12:23:47 24 the Native Americans of that territory, also
12:23:53 25 stipulated that the Native Americans acknowledge

12:23:56 1 that they were under American jurisdiction.

12:23:59 2 And it was the final article that -- in
12:24:05 3 which the Native Americans explicitly acknowledged
12:24:09 4 that they came under the sovereignty of the United
12:24:14 5 States and no other power.

12:24:17 6 This had been -- that final clause had
12:24:20 7 actually been repeated almost word for word in the
12:24:24 8 1807 Treaty of Detroit.

12:24:31 9 Q. Can you briefly describe how the
12:24:33 10 treaty that's sometimes known as the Sault Ste.
12:24:38 11 Marie Treaty of 1820 came about?

12:24:41 12 A. Yes. In contrast to the 1807 and
12:24:46 13 1819 treaties, this came about in order to secure a
12:24:53 14 relatively small area ten miles square for -- to
12:25:00 15 permit the establishment of an American military
12:25:08 16 fort. There was no American military presence in
12:25:12 17 that part of the Great Lakes.

12:25:15 18 The British, on the other hand, had
12:25:19 19 abandoned their post at Michilimackinac at 1796,
12:25:26 20 but had proceeded to establish another post on
12:25:29 21 Drummond Island, which was relatively close to
12:25:34 22 Sault Ste. Marie.

12:25:39 23 Cass, however, had actually written to
12:25:42 24 the Secretary of War, indicating that he perceived
12:25:50 25 the necessity to obtain additional land cessions

1 from Native Americans within Michigan territory.

2 He had two locations specifically
3 identified, and they ended up being later in
4 Wisconsin. Green Bay was one and Prairie du Chien
5 was another. I'll spell that. P-R-A-I-R-I-E D-U
6 C-H-I-E-N.

7 The Secretary of War replied to Cass's
8 suggestions by indicating that, no, that there was
9 in fact no pressing need for further land cessions,
10 but there clearly was a pressing need to obtain a
11 small land cession near Sault Ste. Marie to permit
12 the establishment of an American military fort.

13 However, prior to Cass undertaking the
14 negotiations of that treaty, he received
15 last-minute instructions from the Secretary of War,
16 showing that the department of war had done a
17 complete about face respecting additional land
18 surrenders.

19 On June 1st, the Secretary of War, who
20 was now John Calhoun, a politician actually, not a
21 military official, instructed Cass to attempt to
22 seek a surrender of Indian title to the remaining
23 lands in Michigan territory. This was a very vast
24 area.

25 Cass was a busy governor in 1820,

12:28:10 1 because he had also been commissioned to undertake
12:28:13 2 an exploration expedition along the south shore of
12:28:19 3 Lake Superior in the summer of 1820, up to the
12:28:24 4 Mississippi River, in order to positively identify
12:28:27 5 its source.

12:28:29 6 So faced with these last-minute
12:28:34 7 instructions, he assigned the responsibility of
12:28:38 8 conducting a bit of an investigative journey to a
12:28:45 9 local Indian agent, and specifically to inquire
12:28:53 10 among Native American leaders in the region as to
12:28:58 11 their disposition to consider a vast cession of
12:29:04 12 land.

12:29:05 13 The Indian Agent responded that there
12:29:09 14 was a very strong opposition to that. So Cass
12:29:14 15 proceeded in the mid-part of June 1820 to undertake
12:29:20 16 the negotiation of the small land mass to build the
12:29:24 17 American fort.

12:29:27 18 He wrote a report back to Calhoun. The
12:29:34 19 Treaty Council quickly deteriorated, in part
12:29:43 20 because of Cass's attitude towards, or reluctance
12:29:48 21 -- the Native Americans objected to the land that
12:29:51 22 Cass had identified for, reserved for the fort on
12:29:57 23 the grounds that it contained a traditional burial
12:30:02 24 ground.

12:30:03 25 Cass basically dismissed that

12:30:05 1 complaint, which led to the breakdown of
12:30:12 2 negotiations, which almost culminated in bloodshed
12:30:21 3 save for the fact that the Native Americans
12:30:24 4 presented an offer of peace to Cass that allowed
12:30:29 5 the treaty to be concluded.

12:30:33 6 That treaty also included a surrender
12:30:40 7 that reached up to the international border in the
12:30:44 8 St. Mary's River. Cass had been instructed, in
12:30:50 9 addition to land for the fort, to secure a
12:30:54 10 surrender of a number of islands in the St. Mary's
12:30:59 11 River that were described by Calhoun as containing
12:31:05 12 "plaister". It's an archaic spelling of "plaster",
12:31:08 13 but I actually believe that what Calhoun was
12:31:12 14 alluding to was the fact that those islands
12:31:14 15 contained gypsum, which is a mineral used to make
12:31:20 16 plaster.

12:31:21 17 So he included those islands as well in
12:31:26 18 the surrender, but provided an important assurance
12:31:33 19 to the Native American signatories that they would
12:31:38 20 retain the right to the fisheries they had on the
12:31:42 21 St. Mary's River. I believe he used the term, that
12:31:47 22 the treaty specifies, "the right would be redeemed
12:31:53 23 in perpetuity".

12:31:55 24 The fisheries in the St. Mary's River
12:31:57 25 were extremely important, an extremely important

1 food source that was amply documented from the
2 earliest time of European contact, in the mid-late
3 17th century by the French.

4 Q. Thank you.

5 In your opinion, why was the
6 international border a boundary in the Sault Ste.
7 Marie Treaty of 1820?

8 A. Cass's report to the Secretary
9 General on the Treaty Council, first of all,
10 conspicuously omitted any account of the
11 near-hostilities that had erupted. We know about
12 them because one of the members of Cass's
13 exploratory expedition was Henry Rowe Schoolcraft,
14 who at the time was appointed as a geologist to
15 Cass's expedition.

16 I'll have a lot more to say about
17 Schoolcraft later. But he wrote an independent
18 account of what transpired. So Cass omitted any
19 mention of the near-disaster that occurred, but
20 then proceeded to explain why he had not attempted
21 to fulfill the instructions given to him on
22 June 1st to seek a broader, much broader surrender
23 of Indian lands in what was remaining of Michigan
24 territory.

25 And he squarely blamed the British for

12:33:48 1 having influenced Native American leaders in
12:33:53 2 distrusting the American government. He pointed
12:33:58 3 out the existence of the British fort at Drummond
12:34:04 4 Island, and the issue of Imperial presents at that
12:34:08 5 fort, as all contributing factors to fomenting
12:34:18 6 distrust of American government officials.

12:34:23 7 He went so far as, in respect to the
12:34:25 8 issue of presents, Cass went so far in his report
12:34:31 9 as to indicate that as long as that practice was
12:34:34 10 maintained by the British, prospects of permanent
12:34:40 11 peace would be in jeopardy.

12:34:50 12 MS. MC RANDALL: Can you please bring
12:34:51 13 up page 67 of Mr. Chartrand's report.

12:35:04 14 BY MS. MC RANDALL:

12:35:08 15 Q. Mr. Chartrand, what does this
12:35:11 16 figure show?

12:35:12 17 A. This is a copy of a map that is
12:35:18 18 published in a book authored by Charles Cleland,
12:35:23 19 who is one of the key historians and
12:35:30 20 ethnohistorians of Native American history in the
12:35:37 21 Upper Great Lakes. The book was published in 2011,
12:35:41 22 and it's called Faith in Paper.

12:35:46 23 This map depicts 1 of 2 tracts that
12:35:50 24 were surrendered by the Menominee to the American
12:35:55 25 government in 1831 at the treaty with the

12:36:06 1 Menominee.

12:36:13 2 Q. Can you briefly describe how the
12:36:17 3 Menominee Treaty of 1831, also sometimes called the
12:36:20 4 "Treaty of Green Bay", came about?

12:36:22 5 A. Only the high points. It has a
12:36:23 6 complicated history that is briefly detailed in my
12:36:28 7 report.

12:36:28 8 It came about as a result of a land
12:36:32 9 conflict between the Menominee, whose traditional
12:36:36 10 territory included the entire Green Bay region, and
12:36:43 11 another group of Native Americans that were
12:36:45 12 referred to as the New York Indians.

12:36:50 13 The New York Indians had been relocated
12:36:55 14 to the Green Bay area as a result of a land
12:37:02 15 surrender that was in fact a treaty of removal. It
12:37:07 16 was concluded in 1822.

12:37:12 17 And there had been many negotiations
12:37:16 18 between Indian Agents and a private landholding
12:37:23 19 company that had spurred the entire surrender in
12:37:27 20 New York with the Menominee.

12:37:35 21 But the agreement that was allegedly
12:37:37 22 achieved was fraught with problems. And the
12:37:41 23 Menominee claimed that the agreement that had been
12:37:44 24 reached was invalid on a number of grounds, the
12:37:48 25 most important of which was that the company and

12:37:53 1 the Indian Agent had concluded the agreement with
12:37:56 2 the wrong leaders.

12:37:58 3 So this problem persisted. And by
12:38:06 4 1830, the President appointed a commission to
12:38:14 5 resolve this land dispute. A new Indian Agent was
12:38:20 6 appointed, Samuel Stambaugh, who was a colonel in
12:38:25 7 the American military, and two other commissioners.

12:38:31 8 Their dealings failed to resolve the
12:38:34 9 conflict. And Stambaugh wrote the Secretary of
12:38:44 10 War, who was John Eaton, indicating that the
12:38:52 11 Menominee wished to send a deputation to Washington
12:38:56 12 to personally lay out their grievances to the
12:38:59 13 President of the United States. This was
12:39:06 14 communicated to President Andrew Jackson, who,
12:39:08 15 interestingly, agreed to receive the deputation.

12:39:13 16 Once there, Jackson met with the
12:39:17 17 Menominee leaders, promised that he would provide a
12:39:25 18 resolution to the land conflict -- and this is the
12:39:30 19 first in my research for this report, where the
12:39:33 20 President himself takes action.

12:39:36 21 But Jackson actually personally
12:39:38 22 appointed Stambaugh and the Secretary of War, John
12:39:44 23 Eaton, to negotiate to negotiate a treaty resolving
12:39:51 24 the question of provision of land for the New York
12:39:54 25 Indians.

1 In his instructions, he also informed
2 Stambaugh and Eaton that they were to obtain an
3 additional land cession that would be basically
4 directly for the benefit of the American
5 government.

6 Q. Was any land under water
7 surrendered in this treaty?

8 A. Well, this was a surprise finding.
9 First, I have another map that shows the -- I have
10 two maps that show the land mass that was secured
11 to the New York Indians. So this was actually a
12 surrender by the Menominee to the American
13 government for the New York Indians.

14 But the map depicted at page 67 of my
15 report depicts the other surrender, that was to the
16 American government.

17 And in examining the boundaries of that
18 surrender, I found that the depiction by Cleland is
19 correct. It was confined to what is essentially
20 the Door peninsula that essentially creates Green
21 Bay.

22 Q. Do you have a view of why the U.S.
23 treaty commissioners did not include boundaries of
24 the cessions in Green Bay or in Lake Michigan?

25 A. Well, what was interesting about

12:41:44 1 my research relating to this particular treaty is
12:41:49 2 that, in contrast to the prior treaties, I found no
12:41:57 3 evidence that American government officials were
12:42:01 4 concerned that the British exerted any kind of
12:42:08 5 influence on the Menominee at that time period.

12:42:13 6 It was also clear to me geographically
12:42:16 7 that the areas concerned by the Treaty of 1831, in
12:42:23 8 contrast with the prior treaties of 1807, 1819,
12:42:29 9 1820, were situated at some distance from the
12:42:32 10 international border.

12:42:37 11 The prior treaties that I've been
12:42:40 12 referring to involve land that was essentially
12:42:44 13 directly opposite British territory. And this
12:42:50 14 treaty differed markedly in that respect.

12:42:58 15 MS. MC RANDALL: If we can please bring
12:43:00 16 up page 76 of Mr. Chartrand's report.

12:43:09 17 BY MS. MC RANDALL:

12:43:09 18 Q. Mr. Chartrand, what is depicted by
12:43:16 19 the section that appears to have a diagonal line?

12:43:25 20 A. This is a map, also from the
12:43:27 21 Cleland book Faith in Paper, that depicts the
12:43:32 22 approximate boundaries of the area surrendered
12:43:35 23 under the 1836 Treaty of Washington, which clearly
12:43:41 24 includes an extension of boundaries into Lake
12:43:49 25 Huron, to the international border, through to St.

12:43:53 1 Mary's River, into Lake Superior, again, following
12:43:56 2 the international border, up to a very defined
12:44:01 3 point that was to basically demarcate the boundary
12:44:08 4 between Michigan and the soon to be territory of
12:44:11 5 Wisconsin.

12:44:13 6 And then continues to include
12:44:19 7 boundaries into the northern part of Lake Michigan
12:44:24 8 and then covering the northeastern part of Lake
12:44:28 9 Michigan up to the middle of the lake.

12:44:31 10 Q. I'd like to take you to page 82 of
12:44:34 11 your report, to the first paragraph -- sorry, the
12:44:50 12 first paragraph underneath the subheading. So
12:44:53 13 about halfway through the paragraph, the sentence
12:44:56 14 beginning "The 1836 treaty".

12:44:58 15 It says:

12:44:59 16 "The 1836 treaty additionally
12:45:03 17 obtains surrenders of the land under
12:45:03 18 water in a northwestern portion of
12:45:05 19 Lake Michigan and in a southeastern
12:45:08 20 portion of Lake Superior [...]."

12:45:13 21 Then it continues. Can you explain how
12:45:15 22 you reached the conclusion that it was a
12:45:19 23 northwestern portion of Lake Michigan?

12:45:21 24 A. Well, I was attempting to
12:45:23 25 describe -- and I apologize it ended up being a bit

12:45:28 1 clumsy -- I was attempting to describe the
12:45:31 2 surrender under water in the northern part of Lake
12:45:39 3 Michigan in relation to the northeastern surrender
12:45:43 4 in the middle of the lake.

12:45:45 5 And I subsequently realized that the
12:45:51 6 map didn't actually demarcate cardinal points. It
12:45:57 7 was more actually accurate to simply refer to the
12:46:01 8 additional area as the northern part of Lake
12:46:01 9 Michigan.

12:46:16 10 Q. Thank you.

12:46:17 11 What was the impetus for the Treaty of
12:46:21 12 Washington of 1836?

12:46:23 13 A. Well, you'll recall that Lewis
12:46:28 14 Cass in 1820 had received last-minute instructions
12:46:31 15 to try to obtain a surrender of title to all
12:46:36 16 remaining lands in Michigan territory, and did not
12:46:40 17 attempt that.

12:46:44 18 So that question remained outstanding
12:46:48 19 as late as 1836. But by 1835, the Native Americans
12:46:58 20 in the northern part of Michigan had been
12:47:02 21 experiencing a number of hardships.

12:47:05 22 They were contracting disease from
12:47:09 23 contact from Euro-Americans, harsh winters had made
12:47:15 24 hunting very difficult. And the Indian Agent who,
12:47:25 25 for many years had been Henry Rowe Schoolcraft, the

1 Indian Agent at Sault Ste. Marie -- actually by
2 1835 his agency had been much more broadly
3 expanded, so he was a key regional superintendent
4 of the Bureau of Indian Affairs -- received
5 information from a number of Anishinaabe leaders to
6 the effect that they were willing to cede some of
7 their lands in order to receive compensation which
8 would help to alleviate the hardships that they had
9 been experiencing.

10 And through discussions with the
11 Secretary of War, who was now Lewis Cass -- Eaton
12 had to resign in 1831 and was replaced by Lewis
13 Cass -- Cass and Schoolcraft saw an opportunity in
14 that offer to obtain a much larger land cession.

15 Cass decided that the Treaty Council
16 should be held in Washington, for many strategic
17 reasons. And through the negotiations that ensued
18 between Schoolcraft and North American leaders, he
19 was able to obtain the land surrender that
20 essentially had been contemplated in 1820, with an
21 important proviso.

22 The western boundaries of the map at
23 page 76 of my report were designed to reflect the
24 fact that Wisconsin was eminently about to be
25 established as its own distinct territory.

1 The Treaty of Washington was concluded
2 in March, at the end of March 1836. And prior to
3 the end of April 1836, the territory of Wisconsin
4 was established.

5 Q. In your opinion, why was the
6 international border a boundary in the 1836 Treaty
7 of Washington?

8 A. Well, again, it's clear that in
9 this time period, the tensions between Americans
10 and the British were very much continuing. The
11 British had abandoned their fort at Drummond Island
12 in 1828, when an International Boundary Commission
13 determined that Drummond Island was in fact
14 situated in American territory.

15 But in the summer of 1836, an important
16 administrative centre of the British Indian
17 Department was made operational at Manitowaning on
18 Manitoulin Island.

19 This represented an expansion of the
20 administrative area of the British Indian
21 Department. A superintendent was headed, hitting
22 the settlement at Manitowaning.

23 And Manitowaning was also designated as
24 a centre in the northern Great Lakes for the
25 distribution of Imperial presents. And the first

12:51:40 1 distribution of Imperial presents in fact occurred
12:51:43 2 in the summer of 1836.

12:51:46 3 All of those facts had not yet
12:51:48 4 materialized by the time the Treaty of Washington
12:51:52 5 was concluded. But Schoolcraft, who was himself a
12:51:59 6 longstanding superintendent of the British -- of
12:52:08 7 the American Bureau of Indian Affairs -- was
12:52:11 8 certainly aware of the impact that British Imperial
12:52:20 9 presents had had for decades on Native Americans in
12:52:27 10 the region.

12:52:33 11 So I believe that the extension of
12:52:39 12 boundaries of the Treaty of Washington specifically
12:52:43 13 in Lakes Huron and Lake Superior, again provide a
12:52:49 14 continuation of the extent of surrenders initiated
12:52:53 15 in 1807 and continued in 1819.

12:53:06 16 Why specifically the treaty came to
12:53:09 17 include a surrender up to the middle of Lake
12:53:15 18 Michigan in its northeastern section is actually
12:53:19 19 not explained in the records and accounts of the
12:53:25 20 treaty that I've read.

12:53:27 21 Q. You mentioned the British
12:53:34 22 distribution of Imperial presents around this time
12:53:37 23 period. Were Native Americans given Imperial
12:53:40 24 presents, or some Native Americans given Imperial
12:53:44 25 presents?

12:53:44 1 A. Continuously up until 1844. In
12:53:57 2 records of the Indian Department, they were
12:53:59 3 identified as "visiting Indians" because they were
12:54:04 4 briefly, in principle, in theory anyway, briefly
12:54:09 5 visiting British forts in British territory for the
12:54:14 6 purpose of being issued Imperial presents.

12:54:31 7 Q. Mr. Chartrand, how did you
12:54:33 8 approach researching the number of American
12:54:36 9 treaties that contained provisions for surrenders
12:54:40 10 of land under water?

12:54:41 11 A. This was identified in my terms of
12:54:43 12 reference from prior research and prior involvement
12:54:49 13 in giving evidence in court in a number of cases.

12:54:53 14 I was aware that I was at risk of
12:55:00 15 entering into a legal issue in conducting that
12:55:03 16 research. Specifically, relating to the question
12:55:10 17 as to whether a treaty presenting a defined area of
12:55:17 18 land surrender also implicitly entails a surrender
12:55:24 19 of land under water in bodies of water that are
12:55:28 20 contained within the boundaries of the treaty.

12:55:32 21 This was made an explicit legal
12:55:37 22 question in, for example, the Mishkeegogamang
12:55:44 23 trial, at which I gave evidence.

12:55:46 24 So I wanted to avoid becoming entangled
12:55:51 25 in that question. So I had to, for the purpose of

12:55:56 1 my research, develop an operational definition for
12:56:05 2 where I would agree that there is a surrender of
12:56:10 3 land under water.

12:56:13 4 And that definition was very strict,
12:56:17 5 and it required for a treaty provision of surrender
12:56:23 6 to explicitly include a boundary in the middle of a
12:56:29 7 body of water.

12:56:30 8 Q. And how many American treaties did
12:56:43 9 you end up reviewing for this project?

12:56:45 10 A. I was not given a specific year at
12:56:47 11 which to stop this comparative analysis. I settled
12:56:54 12 on 1842 for a couple of reasons. I was aware that
12:57:00 13 another major treaty in the Lake Superior region
12:57:06 14 had been made in 1842, what's known as the La
12:57:11 15 Pointe Treaty.

12:57:11 16 And I was curious to see if that
12:57:14 17 treaty, like the Treaty of 1836, Treaty of 1819,
12:57:20 18 Treaty of 1807 also included a boundary that
12:57:25 19 coincided with the international border; and lo and
12:57:29 20 behold it absolutely did.

12:57:31 21 And the reason is that 1842 is the
12:57:34 22 early, mid-19th-century, which was the time scope
12:57:39 23 in my terms of reference. That's basically where I
12:57:42 24 ended my research.

12:57:44 25 Between 1800-1842, there were over 200

1 American treaties made, not all of which pertain to
2 cessions of land. There were treaties of peace
3 that were made in the aftermath of the conclusion
4 of the War of 1812.

5 In the mid - late 1820s there were a
6 number of treaties concerning trade, which is an
7 issue addressed in part in my report, but I haven't
8 commented on, it's very tangential but there was
9 still a very considerable number of treaties that
10 involve land cessions.

11 And following my operational
12 definition, I found that, in addition to the four
13 treaties in which my research conclusively showed
14 cession of territory up to the international border
15 in the Great Lakes, I found an additional 12
16 treaties that explicitly included a boundary
17 situated in the middle of water.

18 One of which was the Treaty of La
19 Pointe of 1842, and there were two treaties in Lake
20 Michigan that also met that criteria. One was made
21 in 1816 and the other in 1826.

22 But the area over water in those
23 treaties differed in scale from the areas included
24 in the treaties of 1807, 1819, 1836 and 1842 in
25 that they included an area reaching ten miles into

1 Lake Michigan.

2 THE COURT: Counsel, it's 1 o'clock.

3 Unless you are you've just got one more question
4 for this gentleman I'm going to break for lunch.

5 MS. MC RANDALL: I've a couple of more
6 questions.

7 THE COURT: Let's break for lunch then
8 until 2:15.

9 -- LUNCH RECESS TAKEN AT 12:59 p.m. --

10 -- UPON RESUMING AT 2:19 --

11 THE COURT: Please go ahead.

12 MS. MC RANDALL: Thank you, Your
13 Honour.

14 BY MS. MC RANDALL:

15 Q. Mr. Chartrand, before the break,
16 you were speaking about some additional U.S.
17 treaties. And you said -- I'm reading here off of
18 a rough transcript, it is not the final version --
19 but you said roughly:

20 "And following my operational
21 definition, I found that in addition
22 to the four treaties in which my
23 research conclusively shows cession
24 of territory up to the international
25 border in the Great Lakes, I found

02:20:03 1 an additional 12 treaties that
02:20:05 2 explicitly included a boundary
02:20:07 3 situated in the middle of water."
02:20:10 4 Now on the screen before you is page 85
02:20:14 5 of your report.

02:20:14 6 A. Yes.

02:20:15 7 Q. So in the last sentence of the
02:20:20 8 first full paragraph it reads:

02:20:23 9 "[...] including four of the
02:20:25 10 treaties identified in the
02:20:26 11 Plaintiff's Amended Statement of
02:20:28 12 Claim, the 1807, 1819, 1820 and 1836
02:20:35 13 treaties, I was able to positively
02:20:37 14 identify a total of only 12 such
02:20:39 15 treaties in the period from 1800 to
02:20:42 16 1842."

02:20:42 17 A. Yes, that is correct. I erred in
02:20:46 18 my evidence in-chief.

02:20:48 19 Q. So just to be clear. This
02:20:51 20 statement in the expert report is the correct one?

02:20:53 21 A. Yes.

02:20:55 22 Q. Thank you.

02:21:02 23 To the extent that you're able to
02:21:03 24 comment, was there any pattern to the 12 treaties
02:21:10 25 you found which included surrenders of land under

02:21:12 1 water?

02:21:12 2 A. No. And perhaps I can allude to
02:21:15 3 the situation in Lake Michigan. I identified two
02:21:18 4 treaties, one in 1816 and the other in 1826,
02:21:23 5 involving surrenders reaching up to ten miles into
02:21:25 6 the lake.

02:21:27 7 And yet there were other treaties
02:21:31 8 within the period in which I reviewed treaty
02:21:35 9 documents 1800-1842, where boundaries of the
02:21:40 10 surrenders coincided with the shorelines of the
02:21:43 11 lake.

02:21:49 12 So why specifically the two treaties of
02:21:52 13 1816, 1826 included surrenders reaching ten miles
02:21:58 14 into the lake is a matter that I have not been able
02:22:03 15 to explain. I would need to conduct additional
02:22:07 16 specific research into the making of those treaties
02:22:11 17 in order to attempt to provide an explanation for
02:22:14 18 those surrenders.

02:22:17 19 So overall, no, I didn't find a pattern
02:22:24 20 to the 12 treaties as a whole, excluding, however,
02:22:34 21 the four treaties of 1807, 1819, 1820, and 1836,
02:22:42 22 for which I have derived an opinion explanation.

02:22:52 23 Q. Thank you.

02:22:55 24 MS. MC RANDALL: Those are my
02:22:56 25 questions, Your Honour.

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THE COURT: Thank you.

Mr. Brookwell, are you doing the cross-examination?

MR. BROOKWELL: Yes, I am, Your Honour. I just need a moment to switch things over.

THE COURT: Take the time you need to get organized.

Just while you're doing that process, Mr. Chartrand, I know you mentioned you testified before, so I suspect you are aware of the strict restrictions that now apply to you as a witness under cross-examination.

THE WITNESS: I believe I do.

THE COURT: I wish to remind you that during this process until you're finished your evidence, you can do nothing outside of the witness box in relation to the subject matter of this case, including not only talking to people about it, but your own inquiries and so forth. Are you familiar with the obligation, sir?

THE WITNESS: Yes, I am, Your Honour.

THE COURT: All right. Mr. Brookwell will begin when he's ready.

CROSS-EXAMINATION BY MR. BROOKWELL:
Q. Good afternoon, Mr. Chartrand.

02:24:37 1 My name is Benjamin Brookwell. I'm a
02:24:40 2 lawyer for the Plaintiffs and I'll be asking you
02:24:43 3 some questions today.

02:24:43 4 A. Good afternoon, Mr. Brookwell.

02:24:46 5 Q. So, Mr. Chartrand, I'd like to
02:24:48 6 start with some of the treaties that you've
02:24:50 7 mentioned today. And in your report, you cite,
02:24:56 8 among other treaties, the Treaty of Detroit; is
02:25:00 9 that right?

02:25:00 10 A. Correct.

02:25:01 11 Q. The Treaty of Saginaw?

02:25:04 12 A. Yes.

02:25:05 13 Q. The Sault Ste. Marie Treaty?

02:25:09 14 A. Correct.

02:25:09 15 Q. Treaty of Washington?

02:25:11 16 A. Yes.

02:25:12 17 Q. And the La Pointe Treaty?

02:25:15 18 A. Yes.

02:25:16 19 Q. And these five treaties are
02:25:20 20 between United States and Native American tribes;
02:25:26 21 is that right?

02:25:26 22 A. Yes, that's correct.

02:25:27 23 Q. And leaving aside possible reasons
02:25:31 24 for why, these treaties include surrenders of land
02:25:37 25 under water; is that right?

02:25:38 1 A. Well, I don't want to present a
02:25:41 2 legal opinion, but the boundary of the treaty
02:25:45 3 reaches up to the international border.

02:26:08 4 MR. BROOKWELL: Could we open up
02:26:11 5 Mr. Chartrand's report, please, which is
02:26:14 6 Exhibit 4513. And could you please go to Roman
02:26:20 7 Numeral page 10, PDF page 11.

02:26:31 8 BY MR. BROOKWELL:

02:26:32 9 Q. Mr. Chartrand, you'll see there on
02:26:34 10 the screen in front of you there's two highlighted
02:26:37 11 boxes. And in the second box, you indicate, four
02:26:42 12 lines down -- sorry, beginning on the third line,
02:26:47 13 that -- excuse me one moment. I've misplaced my
02:26:55 14 reference.

02:26:55 15 Sorry, I meant to take us to page 82,
02:27:25 16 which is page 95 of the PDF. So in that first box,
02:27:36 17 it indicates in the first line:

02:27:40 18 "The treaties of 1807, 1819,
02:27:45 19 1820 and 1836, like adjoining pieces
02:27:48 20 of a puzzle, systematically included
02:27:52 21 surrenders of land under water
02:27:54 22 throughout the American side of Lake
02:27:56 23 Huron."

02:27:57 24 My question, sir, is: Is that still
02:28:00 25 your evidence?

02:28:00 1 A. Yes, it is.

02:28:03 2 THE COURT: I'm just going to say,
02:28:05 3 Mr. Brookwell, that's fine. But the witness is
02:28:10 4 right to be cautious about distinguishing his
02:28:14 5 opinion within his specialty as distinct from a
02:28:17 6 legal conclusion about whether that is in fact and
02:28:22 7 in law what those treaties do.

02:28:24 8 We've had other witnesses on that
02:28:27 9 subject who have different qualifications.

02:28:31 10 MR. BROOKWELL: I understand, Your
02:28:32 11 Honour, that's fair. I'll move to my next
02:28:34 12 question.

02:28:34 13 THE WITNESS: Your Honour, can I add a
02:28:36 14 point of clarification as to why I phrased it the
02:28:39 15 way I did in this paragraph?

02:28:41 16 THE COURT: That's a question I'll let
02:28:43 17 Mr. Brookwell answer, as to whether he wants the
02:28:46 18 witness to make a point of clarification or not.

02:28:49 19 MR. BROOKWELL: No, that's fine. We
02:28:51 20 can move on to our next question.

02:28:51 21 BY MR. BROOKWELL:

02:28:53 22 Q. So included in these treaties, and
02:28:57 23 you describe the boundaries where they go up to,
02:29:01 24 leaving aside whether it's surrendered land under
02:29:05 25 water, those include parts of Lake Huron; is that

02:29:11 1 right?

02:29:11 2 A. Yes, that's correct. Well,
02:29:16 3 actually counting from the Treaty of Detroit to the
02:29:20 4 Treaty of Washington, the entire joint boundaries
02:29:28 5 of the treaties coincide to the international
02:29:32 6 border.

02:29:35 7 Counting the Treaty of Detroit, the
02:29:38 8 Treaty of Saginaw, which extends the boundary into
02:29:45 9 Lake Huron at the international border, and then
02:29:48 10 the Treaty of Washington, which further extends the
02:29:53 11 boundary in Lake Huron along the international
02:29:57 12 border. So it's continuous throughout the lake.

02:30:01 13 Q. And I understand from your
02:30:06 14 evidence today, that it's, in your opinion, those
02:30:11 15 surrenders for those treaties we just talked about,
02:30:16 16 were principally motivated by geopolitical factors
02:30:21 17 pertaining to the British-American relations in the
02:30:24 18 region; is that right?

02:30:25 19 A. No, not the treaties as a whole,
02:30:28 20 absolutely not. I'm simply commenting on the
02:30:32 21 observation that these treaties include a boundary
02:30:37 22 that coincides with the international border.

02:30:40 23 And that is what I consider being
02:30:46 24 motivated. This is my opinion, it's an inference
02:30:50 25 from the evidence that I reviewed, and so that is

02:30:58 1 what is motivated by geopolitical factors.

02:31:06 2 The treaties were, I've alluded
02:31:10 3 in-chief, they had very specific impetus to these
02:31:15 4 treaties. Settlement in the case of Treaty of
02:31:18 5 Detroit and Treaty of Saginaw, as well as the
02:31:23 6 Treaty of Washington. And military consideration
02:31:26 7 in the case of the Sault Ste. Marie Treaty.

02:31:29 8 Q. So then it's just the boundary
02:31:31 9 line that has to do with geopolitical factors, not
02:31:36 10 the treaty?

02:31:37 11 A. In my opinion, yes.

02:31:39 12 Q. All right. I'd like to talk to
02:31:45 13 you a bit about the evidence that you've told us
02:31:47 14 about today with respect to that opinion. But
02:31:51 15 before I go forward along that line, I just wanted
02:31:55 16 to tell you that I plan to refer to geopolitical
02:31:59 17 factors pertaining to the British-American
02:32:02 18 relations in the region, which is a bit of a
02:32:04 19 mouthful, as "geopolitical factors"; is that okay
02:32:10 20 for you as I proceed? Is that clear?

02:32:13 21 A. Yes, I believe it is.

02:32:15 22 Q. So in your report you cite Francis
02:32:21 23 Prucha.

02:32:23 24 A. Francis Paul Prucha, I believe.

02:32:26 25 Q. Prucha. And you cite him

1 throughout your report; is that right?

2 A. Well, at several places, yes.

3 Q. I take it you view him as an
4 authoritative source?

5 A. Like any scholar, I wouldn't agree
6 with every single thing he's written, but certainly
7 he has considerable experience on the subject
8 matter of American treaty-making.

9 Q. Okay. I'd like to show you a
10 passage from the document that was made an exhibit
11 today. So Exhibit 4521, which is "The American
12 Indian Treaties, the History of a Political
13 Anomaly" by Mr. Prucha.

14 If we can go to page 208, which is
15 page 54 of the PDF. And if we could expand the
16 left side of the screen so it's a little easier to
17 read.

18 Mr. Chartrand, can you see what is
19 highlighted in the green box; is that on the
20 screen?

21 A. Yes.

22 Q. And if you can just take a moment
23 to review it and I'll ask you a question about it?

24 THE COURT: Does it continue on the
25 next page?

02:34:01 1 MR. BROOKWELL: Yes, it does, it
02:34:03 2 continues for one line on the next page. Once
02:34:06 3 you're at that point, let us know and we'll scroll
02:34:09 4 over.

02:34:10 5 THE WITNESS: (Witness reviews
02:34:11 6 document).

02:34:11 7 Yes, I'd like to see the continuation.

02:34:37 8 BY MR. BROOKWELL:

02:34:37 9 Q. It's PDF page 54 and then the top
02:34:45 10 right.

02:34:47 11 A. (Witness reviews document).

02:34:53 12 Yes.

02:34:53 13 Q. And do you agree with this brief
02:35:00 14 summary about treaty-making in the United States?

02:35:02 15 A. Well, yes, but I believe that the
02:35:07 16 author is actually alluding to a later period to
02:35:12 17 the period subsumed by my research.

02:35:16 18 Q. In the period of your research, is
02:35:19 19 the process any different than what's been
02:35:21 20 summarized there?

02:35:22 21 A. Well, in the case of the five
02:35:25 22 treaties that were the focus of my research, the
02:35:30 23 process was relatively simpler in respect to
02:35:39 24 appointment, who was expected to be appointed as
02:35:44 25 treaty commissioners, for example.

02:35:47 1 It was clearly the -- whoever happened
02:35:50 2 to be governor of the territory at the time. This
02:35:54 3 is again prior to the establishment of the Bureau
02:35:58 4 of Indian Affairs in 1824.

02:36:05 5 Q. But the treaties were still
02:36:08 6 monitored by the Senate; is that right?

02:36:10 7 A. Well, in the case of American
02:36:11 8 treaties, and I actually have examples in my
02:36:15 9 report, once a treaty agreement was concluded, it
02:36:24 10 was transmitted to the Secretary of War and from
02:36:28 11 the Secretary of War to the American Senate, who
02:36:32 12 reviewed it.

02:36:33 13 And the American Senate had the
02:36:46 14 privilege or right to demand changes to the
02:36:51 15 substance of any treaty provisions. And that
02:36:56 16 actually occurred in the case of the treaty with
02:37:04 17 the Menominee in 1831, and with the Treaty of
02:37:10 18 Washington of 1836.

02:37:12 19 When that occurred, the commissioners
02:37:18 20 who had concluded the treaty on the part of the
02:37:21 21 government were required to go back, reassemble
02:37:26 22 Native American leaders, and basically attempt to
02:37:31 23 obtain their agreement to the changes.

02:37:34 24 Q. So then I take it the process
02:37:39 25 would be a treaty commissioner would be appointed;

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is that right?

A. Correct.

Q. That treaty commissioner would go and try and get a treaty agreed to with the tribes; is that fair?

A. Yes.

Q. After, they would bring that agreement to the Senate to be reviewed?

A. Correct.

Q. And if the Senate had changes or concerns they would send it back to the treaty commissioner?

A. Well, they would identify the changes and, yes, the commissioner would be required to attempt to obtain the consent of the Native American signatories.

Q. And I take it this process was done through exchange of documents; is that right? In terms of the American side, maybe I should be clear about that. A document would be sent to the Senate of some kind; is that right?

A. Well, the treaty document, a written treaty document would be sent certainly. The written treaty document would be provided back to the commissioner along with an identification of

02:38:50 1 the changes that the Senate demanded.

02:38:53 2 Q. I'd like to talk to you now about
02:38:59 3 one of the treaties we spoke about this morning,
02:39:01 4 the Treaty of Detroit. And you'll agree with me
02:39:12 5 that the primary motivation for this treaty, the
02:39:15 6 treaty, not the boundaries, was to clear Native
02:39:19 7 American title to permit settlement; is that right?

02:39:21 8 A. Yes, that's correct.

02:39:31 9 Q. And I believe in your report you
02:39:33 10 say that the treaty commissioner, who was Hull,
02:39:39 11 likely sought instructions to obtain the
02:39:39 12 territorial surrender out to the international
02:39:41 13 boundary line; is that correct?

02:39:43 14 A. I'm not sure if he's on
02:39:45 15 instructions. He, at the very least, queried about
02:39:49 16 it to the Secretary of War. He had a number of
02:39:54 17 questions, actually, about the terms and
02:39:59 18 instructions he had been given. But that was one
02:40:03 19 of the key ones.

02:40:08 20 Q. So maybe you can help me with
02:40:09 21 this. Do you see asking questions as different
02:40:12 22 from seeking instructions?

02:40:14 23 A. Well, if he's asking a question,
02:40:17 24 he will want the question clarified. So in that
02:40:20 25 sense, I don't think that we're on different pages.

02:40:24 1 He's seeking more specific, in the case
02:40:28 2 of the boundary change, he's inquiring about an
02:40:34 3 issue on which he wants clarification.

02:40:40 4 Q. And I believe you also say that he
02:40:48 5 would have asked for this clarification either
02:40:52 6 because he wanted to propose making the treaty to
02:40:55 7 conform with the boundaries of the Greenville
02:41:00 8 Treaty, or to obtain a legal instrument that would
02:41:03 9 bolster American claims to sovereignty in the area;
02:41:07 10 is that a fair summary?

02:41:09 11 A. Yes, I believe that's reasonably
02:41:13 12 accurate.

02:41:14 13 Q. But you'll agree with me that we
02:41:18 14 don't have evidence of Hull's request? We don't
02:41:22 15 have a letter or a document saying: This is my
02:41:26 16 question.

02:41:26 17 A. Correct. We only have the reply
02:41:30 18 to Hull's letter from the Secretary of War.

02:41:35 19 Q. And we don't have any record or
02:41:39 20 evidence of him explaining these terms to the
02:41:45 21 Native Americans, so the terms of asking for a
02:41:47 22 surrender to the international boundary line; we
02:41:51 23 don't have any record of that either, do we?

02:41:54 24 A. No, we don't.

02:41:55 25 Q. And we don't have minutes from

02:41:58 1 this treaty; is that right?

02:42:00 2 A. I believe that's correct, yes.

02:42:09 3 Q. So the document that we do have is
02:42:13 4 the letter from Dearborn to Hull which you've just
02:42:16 5 mentioned; is that right?

02:42:18 6 A. Well, we also have the original
02:42:20 7 instructions from Dearborn to Hull, and then the
02:42:25 8 reply letter from Dearborn to Hull.

02:42:28 9 Q. I see. But the original
02:42:29 10 instructions don't talk about the international
02:42:32 11 boundary line; is that right?

02:42:34 12 A. Yes, that's correct.

02:42:35 13 Q. So it's the reply letter, which I
02:42:38 14 believe is Exhibit 785. If we can put that up on
02:42:43 15 the screen, please.

02:42:47 16 Is this the letter that you're
02:42:50 17 referring to?

02:42:52 18 A. That's the correct date.

02:42:54 19 THE COURT: Is there some way to
02:43:00 20 lighten that up?

02:43:02 21 MR. BROOKWELL: Is it possible? No.

02:43:05 22 THE COURT: Is that a "no"?

02:43:07 23 MR. BROOKWELL: I don't believe so,
02:43:09 24 Your Honour.

25

02:43:10 1 BY MR. BROOKWELL:

02:43:10 2 Q. But we can look at a transcription
02:43:12 3 of this document which I believe is in your report
02:43:15 4 at page 48, PDF page 61. Perhaps that's the
02:43:19 5 easiest way to proceed.

02:43:25 6 If we can scroll down a little bit. In
02:43:29 7 the first box, is that a transcription of the
02:43:31 8 letter that we've been discussing from Dearborn to
02:43:34 9 Hull?

02:43:35 10 A. Yes, it's my transcription.

02:43:37 11 Q. Okay. And you'll agree with me
02:43:42 12 that the line that refers to, or may refer to the
02:43:45 13 international boundary is on the fourth line, which
02:43:49 14 reads:

02:43:50 15 "The boundary line between
02:43:52 16 Canada and the United States may be
02:43:54 17 substituted for the shores --"
02:43:56 18 Etcetera.

02:44:00 19 A. Correct.

02:44:00 20 Q. This morning you said you found
02:44:02 21 that an interesting choice of words -- these are
02:44:08 22 your words: "He has not actually directed Hull to
02:44:12 23 positively do so"; do you recall that evidence?

02:44:15 24 A. Yes, I do.

02:44:16 25 Q. So if the international boundary

02:44:23 1 was important for geopolitical reasons, wouldn't
02:44:27 2 you expect Dearborn to say to Hull that he should
02:44:30 3 make that change, rather than give him an option?

02:44:34 4 A. All would depend on Dearborn's
02:44:37 5 familiarity with, for example, the Greenville
02:44:40 6 Treaty and with his understanding of the situation
02:44:44 7 in the proximate area that was contemplated to be
02:44:50 8 included within the treaty.

02:44:53 9 William Hull certainly had. And I have
02:44:58 10 evidence to that effect.

02:45:02 11 Q. So I take that to mean we don't
02:45:06 12 know what Dearborn thought about the international
02:45:08 13 boundary line from this document?

02:45:10 14 A. Well, we know something. He's
02:45:14 15 certainly not preventing Hull from making the
02:45:18 16 substitution. What I found interesting about the
02:45:23 17 language in that reply was that he wasn't also
02:45:30 18 explicitly directing Hull to make the substitution.

02:45:35 19 So to properly understand, to narrow
02:45:39 20 down our understanding of his phrasing would --
02:45:45 21 well, it would certainly possibly shed some light
02:45:49 22 to have Hull's original letter. And we don't have
02:45:53 23 that.

02:45:57 24 So I agree that there's a limitation to
02:46:02 25 how much we can read here, with certainty.

02:46:09 1 Q. So I take it that that means we
02:46:21 2 can't know if Hull asked the question about
02:46:29 3 bringing the surrender out to the international
02:46:31 4 boundary line because of geopolitical reasons; is
02:46:36 5 that right?

02:46:36 6 A. Well, whether he explained those
02:46:39 7 in his letter is a matter that I can't comment on
02:46:42 8 positively. He certainly had, in his dealings
02:46:50 9 with -- at the Treaty Council, he had grave
02:46:56 10 concerns about British influence on Native
02:47:02 11 Americans, grave concerns about resumption of
02:47:08 12 warfare with the British, and he exhorted Native
02:47:13 13 Americans to at least remain neutral, or not become
02:47:19 14 involved in assisting the British in any
02:47:22 15 forthcoming war.

02:47:25 16 So that tells me that he had those
02:47:29 17 concerns. The extent to which he explicated them
02:47:35 18 in his letter to the Secretary of War is a matter
02:47:39 19 that I can only speculate on.

02:47:40 20 But clearly in his letter to the
02:47:43 21 secretary, he will have raised the issue of
02:47:48 22 changing the boundary line from the shorelines of
02:47:51 23 Lakes Erie and Huron to the international boundary.

02:47:58 24 Q. I'd like to take you now to a
02:48:01 25 different treaty, the Treaty of Saginaw. And I

02:48:07 1 understand from your evidence today and from your
02:48:10 2 report, that it's your opinion that again the
02:48:13 3 boundary line in that treaty was sought because of
02:48:19 4 geopolitical factors; is that right?

02:48:22 5 A. The boundary line was made to
02:48:26 6 coincide with the international border? Yes, I do.

02:48:30 7 Q. Sorry, maybe I was a little
02:48:38 8 unclear. Yes, you agree that it was sought because
02:48:41 9 of geopolitical factors?

02:48:44 10 A. Well, it was established there,
02:48:45 11 yes.

02:48:46 12 Q. And it's your evidence in your
02:48:50 13 report that the treaty commissioner, Cass, must
02:48:56 14 have received instructions about the international
02:49:00 15 boundary line; is that right?

02:49:01 16 A. Can you take me to the section in
02:49:05 17 my report?

02:49:06 18 Q. Yes, certainly. If we go to
02:49:10 19 page 53, PDF page 66. And the first box.

02:49:37 20 A. Well, what I see at page 53 of my
02:49:41 21 report is the second full paragraph, and I state:

02:49:48 22 "Cass must have received
02:49:49 23 additional instructions from Calhoun
02:49:51 24 that, among other matters, provided
02:49:54 25 a description of the territory to be

02:49:55 1 surrendered, but such additional
02:49:57 2 instructions have not been found."

02:50:05 3 Q. And do I understand it is in those
02:50:07 4 instructions, which have not been found, that you
02:50:12 5 suggest included direction about having a boundary
02:50:17 6 at the international border?

02:50:18 7 A. That I can't be certain about.
02:50:23 8 What I can be certain about is that Cass was
02:50:26 9 certainly aware of the Treaty of Detroit. And
02:50:31 10 because the southern boundary of the Treaty of
02:50:35 11 Saginaw corresponds to the northern boundary of
02:50:38 12 that treaty, and he also extends the boundary into
02:50:44 13 Lake Huron to make it coincide with the
02:50:49 14 international boundary, as has been done with the
02:50:55 15 Treaty of Detroit.

02:50:56 16 So it's certainly possible that Cass
02:51:01 17 outlined the boundaries into the lake in order to
02:51:04 18 make it consistent with the boundaries of the
02:51:11 19 Treaty of Detroit. He may -- it's also possible
02:51:14 20 that he received instructions to that effect.

02:51:17 21 But since we don't have the
02:51:19 22 instructions, I can't positively state that this
02:51:23 23 was explicitly outlined in these missing
02:51:26 24 instructions.

02:51:27 25 Q. And in this treaty there are no

02:51:32 1 official minutes of the Treaty Council; is that
02:51:37 2 right?

02:51:37 3 A. Yes, that is correct.

02:51:39 4 After reviewing Charles Cleland's
02:51:42 5 account in his statement, that was, I recall, one
02:51:47 6 of the specific issues that I instructed the
02:51:52 7 researcher from Public History Inc., who was at
02:51:57 8 National Archives, to undertake a dedicated search.
02:52:03 9 And he failed to find them.

02:52:10 10 Q. I also understand there's no
02:52:11 11 evidence about how the nature and extent of the
02:52:13 12 boundary line for the surrender was described or
02:52:17 13 explained to the Native American leaders?

02:52:22 14 A. That's correct. In fact, that is
02:52:24 15 the case with the Treaty of Washington as well.

02:52:37 16 Q. So you'll agree with me that in
02:52:39 17 this case, we don't have evidence that can tell us
02:52:45 18 that the international boundary line was chosen as
02:52:51 19 part of the treaty because of geopolitical factors?

02:52:54 20 A. Well, I believe, again, this is an
02:52:58 21 opinion of mine. In my report I very clearly
02:53:03 22 indicate that I was unable to find an explicit
02:53:11 23 explanation in historical documents that I
02:53:14 24 collected, or in the historical and ethnohistorical
02:53:19 25 literature that I reviewed, as to why these

02:53:23 1 treaties in Lakes Huron and the Treaty of
02:53:29 2 Washington systematically include a boundary that
02:53:32 3 coincides to the international boundary.

02:53:35 4 So the explanation that I provided in
02:53:38 5 my report is an opinion. And this opinion is
02:53:44 6 really an inference from available historical
02:53:48 7 evidence from documents, and consideration of the
02:53:53 8 broader geopolitical context in which those
02:53:58 9 treaties were made in that time period.

02:54:02 10 Q. So if I understand what you're
02:54:07 11 saying about an opinion in this case, what you're
02:54:10 12 telling us is this is your explanation or your
02:54:14 13 theory about what may have happened; is that right?

02:54:19 14 A. Yes. But it's an opinion that I
02:54:23 15 found to fit the broader geopolitical context and
02:54:32 16 the available documentary evidence just about
02:54:36 17 perfectly in the cases of parts of Lake Erie, Lake
02:54:45 18 Huron, Lake Superior, in contrast in what I found
02:54:50 19 in respect to Lake Michigan.

02:54:54 20 Q. I'm going to take you to another
02:55:06 21 treaty that we talked about today, the Sault Ste.
02:55:08 22 Marie Treaty. For this treaty, it's also your
02:55:17 23 opinion that the boundary line in the lake was
02:55:19 24 chosen based on geopolitical factors; is that
02:55:23 25 right?

02:55:23 1 A. Yes, but as well, Cass had been
02:55:26 2 specifically instructed to obtain surrenders of a
02:55:31 3 number of islands in the river.

02:55:39 4 Q. But in those instructions, it
02:55:40 5 doesn't mention seeking a surrender up until the
02:55:43 6 international border; does it?

02:55:46 7 A. I'd have to refresh my memory.

02:55:49 8 Q. If you turn to page 60 of your
02:55:51 9 report, PDF page 73.

02:56:00 10 And if we scroll to the bottom. Sorry,
02:56:12 11 it's up on the screen as well, the box I'm
02:56:12 12 referring you to.

02:56:21 13 A. Yes, you are correct.

02:56:22 14 Q. Again, you'll agree with me that
02:56:26 15 we have an absence of direct evidence that says,
02:56:30 16 "this boundary was chosen because of geopolitical
02:56:34 17 factors"?

02:56:35 18 A. In the instructions, yes, I agree.

02:56:40 19 However, from Cass's report, it's very
02:56:43 20 clear that he had grave concerns about British
02:56:47 21 influence on Native Americans in that region. And
02:56:52 22 specifically about the ongoing issue of Imperial
02:56:59 23 presents to Native Americans from the British fort
02:57:03 24 at Drummond Island.

02:57:04 25 Q. You'll agree with me, though, that

02:57:06 1 to have concerns of that nature is not the same
02:57:10 2 thing as writing in his report: "I obtained
02:57:13 3 surrender up to this boundary line for that
02:57:18 4 reason"?

02:57:18 5 A. No, it's nowhere near that
02:57:21 6 explicit. But the purpose for obtaining that
02:57:25 7 surrender, in order to establish an American
02:57:30 8 military fort, was obviously to provide an
02:57:37 9 installation that would help in the defence of
02:57:42 10 American soil, but also in bolstering American
02:57:49 11 government jurisdiction over the area.

02:57:55 12 Q. You'll agree that that view isn't
02:57:57 13 supported by any direct evidence that we have?

02:58:04 14 A. No, if we go to the instructions
02:58:12 15 that Cass received...

02:58:28 16 (Witness reviews document).

02:59:16 17 Actually, you're correct. It only
02:59:18 18 speaks about the need to establish a military fort.

02:59:28 19 Q. All right. Well, I'd like to move
02:59:30 20 to another treaty now, to the Treaty of Washington.
02:59:35 21 And for this treaty, it's again your opinion that
02:59:41 22 the territorial boundary sought by the treaty was
02:59:48 23 done because of geopolitical factors; is that
02:59:52 24 right?

02:59:52 25 A. Well, not exclusively. Again, to

02:59:57 1 understand what Schoolcraft did, we need to
03:00:04 2 understand the instructions that had been given to
03:00:12 3 Governor Lewis Cass on June 1, 1820, which were to
03:00:17 4 obtain a surrender of Indian title to all that
03:00:24 5 remained in the territory of Michigan.

03:00:26 6 And that had been described implicitly
03:00:33 7 -- the territory of Michigan didn't exist at the
03:00:35 8 time of the Treaty of Greenville -- but what had
03:00:38 9 been recognized in terms of the extent of Indian
03:00:44 10 rights was an area that extended up to the
03:00:49 11 international boundary.

03:00:54 12 And so it would certainly be logical
03:00:58 13 since that had been recognized under the Treaty of
03:01:01 14 Greenville, that a treaty seeking the surrender of
03:01:06 15 all remaining title would include boundaries up to
03:01:11 16 the -- would include boundaries up to the
03:01:15 17 international border.

03:01:17 18 Q. Well, on the issue of instruction
03:01:28 19 letters, I think I'd like to look at the
03:01:30 20 instruction letter for this treaty, which I believe
03:01:33 21 you've transcribed in your report, page 72, and
03:01:37 22 carrying on to page 73 which is 85, 86 of the PDF.

03:01:45 23 Do you have that section in front of
03:01:56 24 you?

03:01:56 25 A. Yes, I do.

03:01:57 1 Q. You'll agree with me that this
03:02:02 2 letter of instruction -- and this is from Cass to
03:02:06 3 Schoolcraft; let's start there. Is that right,
03:02:09 4 from Cass to Schoolcraft?

03:02:10 5 A. Yes, that's correct.

03:02:11 6 Q. This letter of instruction does
03:02:13 7 not say "obtain a surrender" to the international
03:02:18 8 boundary line; is that right?

03:02:19 9 A. No, and I indicated that in my
03:02:22 10 report.

03:02:22 11 Q. And how Schoolcraft described the
03:02:27 12 extent of the territory to be surrendered to the
03:02:32 13 Native Americans is unknown; is that right?

03:02:34 14 A. Yes, that's correct. We do know
03:02:41 15 two things about this treaty. First, it was
03:02:44 16 negotiated at Washington, and Schoolcraft -- the
03:02:50 17 negotiations lasted several weeks as I recall.
03:02:57 18 Schoolcraft was certainly in contact with Cass and
03:03:02 19 with other American government officials during
03:03:06 20 that time period.

03:03:08 21 So whether he received further
03:03:10 22 instructions, possibly even verbally, is a
03:03:16 23 possibility. But I cannot present that as a fact.

03:03:22 24 Q. And Schoolcraft's report about
03:03:27 25 this treaty doesn't mention that the boundary was

03:03:33 1 decided based on geopolitical factors; is that
03:03:38 2 right?

03:03:38 3 A. No, that's correct. His report
03:03:42 4 highlights the main issues of negotiation, which
03:03:49 5 pertained to the question of granting reservations
03:03:55 6 in common, a very important issue to Native
03:04:00 7 Americans in many treaties in that region.

03:04:03 8 The question of settlement of their
03:04:05 9 debts to independent traders -- this was a
03:04:10 10 provision that the American government made as an
03:04:17 11 inducement to agreeing to treaty conditions, other
03:04:24 12 treaty conditions.

03:04:27 13 But he does not allude to the extent of
03:04:34 14 geographic boundaries of the treaty, other than in
03:04:44 15 the text of the treaty itself.

03:04:46 16 Q. So based on what we have in the
03:04:50 17 record from Schoolcraft, you'll agree with me that
03:04:54 18 we cannot definitively say why he chose a boundary
03:04:58 19 in the middle of the lake?

03:05:00 20 A. We can't definitively say that.
03:05:04 21 However, I go back to once Schoolcraft realized
03:05:11 22 that he could accomplish what the Department of War
03:05:15 23 had sought back in 1820, once he realized that he
03:05:20 24 could obtain a surrender of title to the remaining
03:05:24 25 lands in Michigan, he proceeded to do so on the

03:05:31 1 basis of obtaining a full surrender of title.

03:05:38 2 Q. And that wouldn't end at the
03:05:45 3 shoreline? That would go out into the lake; is
03:05:47 4 that your evidence?

03:05:48 5 A. Well, from what I understand, yes.
03:05:51 6 From the Treaty of Greenville of 1795, the extent
03:05:56 7 of territorial rights that were recognized to
03:06:04 8 Native Americans in the Indian territory were
03:06:06 9 described as reaching up to the international
03:06:09 10 boundary line.

03:06:13 11 Q. I'd like to take you, only
03:06:15 12 briefly, to the La Pointe Treaty, which is 1842.

03:06:25 13 Is it fair for me to say that you
03:06:28 14 didn't explore this treaty in the same detail as
03:06:30 15 the others?

03:06:31 16 A. No, that's correct.

03:06:32 17 Q. You just note that the boundaries
03:06:38 18 go into the -- up to the international boundary
03:06:42 19 line; is that right?

03:06:43 20 A. Yes. And more importantly, or
03:06:48 21 interestingly, this treaty completes the
03:06:52 22 territorial surrender in Lake Superior, situated
03:06:58 23 within American territory up to the boundary line.
03:07:01 24 It completes the process that had been initiated
03:07:04 25 with the 1836 Treaty of Washington.

03:07:08 1 Q. But in this case, you haven't
03:07:10 2 looked at whether the geopolitical factors were the
03:07:14 3 reason for that boundary line; is that right?

03:07:16 4 A. Not explicitly. Well, I certainly
03:07:22 5 indicate that of all the treaties under
03:07:27 6 consideration, 1807, 1819, 1836, certainly the 1842
03:07:35 7 La Pointe Treaty concerned a region that was the
03:07:41 8 most remote from British government influence.

03:07:48 9 As of 1842, the closest British
03:07:56 10 government centre was still at Manitowaning on
03:08:01 11 Manitoulin Island. So that's a considerable
03:08:04 12 distance.

03:08:05 13 However, I am aware that as far as the
03:08:12 14 western end of Lake Superior, on both sides of the
03:08:16 15 border was concerned, during the annual
03:08:18 16 distribution of presents, there were fairly regular
03:08:24 17 travel and attendance by Indigenous, by
03:08:30 18 Anishinaabe, for example, at Fort William, which is
03:08:33 19 now Thunder Bay, as well as Native Americans.

03:08:40 20 There were very close ties between the
03:08:43 21 Native Americans who came under the Treaty of La
03:08:48 22 Pointe and the Anishinaabe at Fort William and the
03:08:58 23 area closing into the American border on the west
03:09:02 24 shore of Lake Superior.

03:09:04 25 Q. So, I want to see if I understand

03:09:10 1 what you're saying for these five treaties we just
03:09:15 2 talked about.

03:09:18 3 You'll agree with me that so far we
03:09:22 4 don't have written instructions to the treaty
03:09:27 5 commissioners that say: "Obtain a boundary line
03:09:32 6 out into the international border"; is that right?

03:09:37 7 A. Yes, that's correct.

03:09:44 8 Q. And we don't have Treaty Council
03:09:49 9 minutes that say that?

03:09:52 10 A. I'm sorry, the Treaty Council
03:10:00 11 minutes would have recorded the negotiations
03:10:08 12 between the treaty commissioners and Native
03:10:14 13 American leaders at the Treaty Council. So I agree
03:10:16 14 that we don't have records from the Treaty Councils
03:10:23 15 describing a discussion or explanation of the
03:10:28 16 boundaries of the treaty reaching up to the
03:10:31 17 international border.

03:10:32 18 Q. And we don't have correspondence
03:10:37 19 to or from treaty commissioners that explicitly say
03:10:44 20 to seek the surrender line out to the international
03:10:49 21 boundary?

03:10:52 22 A. I'm sorry. Can you repeat your
03:10:55 23 question?

03:10:56 24 Q. Yes, I'm sorry, that wasn't clear.
03:10:58 25 We don't have correspondence to or from

03:11:04 1 treaty commissioners that show us that the decision
03:11:09 2 to choose the international border line in the
03:11:13 3 treaties was sought because of geopolitical
03:11:16 4 factors?

03:11:17 5 A. No, that's correct. But we do
03:11:19 6 have the reply to William Hull that clearly
03:11:24 7 indicates that he at least queried about extending
03:11:29 8 the boundary line to the international border.

03:11:32 9 Q. And I understand we don't have
03:11:37 10 records of a discussion in the U.S. Senate that say
03:11:45 11 the territorial boundary line for these treaties
03:11:49 12 should go to the international boundary line
03:11:51 13 because of geopolitical factors?

03:11:54 14 A. No, I was not able to obtain this.

03:12:03 15 Q. So, am I to understand then there
03:12:08 16 is no direct evidence on this point of seeking the
03:12:12 17 international boundary line as the border for these
03:12:15 18 treaties because of geopolitical factors?

03:12:17 19 A. Well, I indicated that in my
03:12:20 20 report, specifying that I was unable to find direct
03:12:24 21 evidence from either historical documents that I
03:12:30 22 obtained or the historical or ethnohistorical
03:12:35 23 literature explaining as to why the boundaries of
03:12:41 24 those treaties extended up to the international
03:12:45 25 border.

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I believe it's clearly stated in my report.

Q. So then I understand it, I think you've already mentioned, alluded to this a little bit. But you then -- you have reached your opinion, your conclusion based on -- what I'll call the context, the big picture geopolitical situation; is that right?

A. Yes, but that context also includes, interestingly enough, the Treaty of Greenville. So we have to include the Treaty of Greenville, and ongoing geopolitical issues in that region.

Q. And since we have an absence of direct evidence, we have to make up for that with inferences; is that right?

A. Well, it's certainly common practice in historical and ethnohistorical research and analysis. And it was, my opinion was the best explanation that I could derive.

And again, you know, I clarified that my opinion is an inference from the available historical evidence, including consideration of geopolitical factors in the region.

Q. So you'll agree with me that one

03:14:25 1 of the inferences that you make for this to make
03:14:30 2 sense, is that there are no records because they've
03:14:34 3 been either lost, or you haven't been able to find
03:14:38 4 them; is that right?

03:14:40 5 A. Yes, that's correct.

03:14:44 6 Q. So, they would have had to have
03:14:48 7 been lost by the commissioners and the Senate, and
03:14:57 8 the U.S. war department?

03:15:00 9 A. Well, I don't believe that there
03:15:02 10 would have been an abundance of records concerning
03:15:06 11 the question. So I don't believe that there was a
03:15:13 12 massive misclassification of records.

03:15:18 13 Q. Leaving aside misclassification of
03:15:22 14 why it might be lost, you will agree that we have
03:15:25 15 to infer that they were lost?

03:15:26 16 A. No, we don't have to. It is
03:15:29 17 equally possible that given the scale of records at
03:15:34 18 the American National Archives that the researcher
03:15:40 19 at Public History Incorporated was simply unable to
03:15:43 20 locate them.

03:15:44 21 Q. So the researcher was either
03:15:48 22 unable to locate them or they were lost for the
03:15:54 23 four different treaties that you looked at in-depth
03:15:58 24 in 1807, for example, 1819, 1820 and 1836; for all
03:16:08 25 those times?

03:16:09 1 A. No, I disagree that he was -- he
03:16:11 2 was able to identify certain documents, certainly
03:16:18 3 relating to the 1807 treaty. The 1819 treaty, I
03:16:24 4 agree with you. The Treaty of Washington he was
03:16:30 5 able to identify documents; as well as the treaty
03:16:34 6 with the Menominee. The Sault Ste. Marie Treaty
03:16:37 7 was also covered in the ethnohistorical literature.

03:16:49 8 So those documents, and I already
03:16:52 9 indicated in-chief that there isn't a large
03:16:56 10 collection cited in my report, but they do provide,
03:17:04 11 in my opinion, some evidence that helps to shed
03:17:11 12 light on what transpired in respect to the setting
03:17:18 13 of the boundaries at the international border.

03:17:23 14 Q. I see. Just no direct evidence?

03:17:26 15 A. Yes, that's correct.

03:17:27 16 Q. So is it also your view that there
03:17:34 17 are some inferences that we shouldn't take? For
03:17:37 18 example, we shouldn't infer that instructions about
03:17:41 19 taking the international boundary line as the
03:17:46 20 border for geopolitical reasons was never given?

03:17:50 21 THE COURT: I didn't understand that
03:17:51 22 question.

03:17:52 23 MR. BROOKWELL: I know that --

03:17:54 24 THE COURT: If you don't either, then
03:17:56 25 we're in real trouble.

03:17:58 1 MR. BROOKWELL: Let me break it down a
03:18:00 2 little more than that.

03:18:00 3 BY MR. BROOKWELL:

03:18:01 4 Q. So one inference we shouldn't make
03:18:03 5 is that there were no instructions given about
03:18:05 6 obtaining the boundary line out to the
03:18:08 7 international border?

03:18:08 8 A. We shouldn't necessarily make it.
03:18:14 9 That's correct.

03:18:14 10 But again, one exception concerns the
03:18:18 11 original instructions to William Hull. He wasn't
03:18:24 12 forbidden, the instructions defined the boundaries
03:18:30 13 positively as coinciding with the shorelines of the
03:18:36 14 lake.

03:18:36 15 Q. And we shouldn't infer that it was
03:18:41 16 other factors that led the treaty commissioners to
03:18:45 17 choose the international boundary lines rather than
03:18:48 18 geopolitical factors?

03:18:52 19 A. Again, the opinion I derived is
03:19:05 20 the best opinion that fits the available evidence
03:19:09 21 including the historical geopolitical context of
03:19:13 22 the region.

03:19:18 23 So it's always good practice to
03:19:20 24 consider alternatives, but, in my opinion, the
03:19:25 25 explanation I provided in my report is the best

03:19:29 1 that fits the entire picture of treaty-making in
03:19:35 2 the Upper Great Lakes.

03:19:37 3 Q. In your report, you cite a number
03:19:43 4 of academics that include U.S. historians; is that
03:19:46 5 right?

03:19:46 6 A. Yes, that's correct.

03:19:47 7 Q. And I believe you referred to
03:19:53 8 ethnologists as well?

03:19:54 9 A. Yes.

03:19:54 10 Q. And both of those study Native
03:19:58 11 Americans in the old Northwest; is that right?

03:20:03 12 A. To an extent, yes. They'll have,
03:20:06 13 for example, different focus of research from
03:20:12 14 simply stemming from the different academic
03:20:17 15 perspectives from which they're approaching the
03:20:19 16 subject matter.

03:20:20 17 But yes, I mean, clearly there's
03:20:27 18 consistency between them in the sense that the
03:20:33 19 historian, for example, will examine policy, policy
03:20:37 20 development, treaty-making practices. The
03:20:43 21 ethnohistorian will delve into the broader dynamics
03:20:48 22 between the American government and Native
03:20:53 23 Americans in the process of treaty-making.

03:20:54 24 Q. And they've, some of these
03:20:59 25 scholars have studied the same treaties that we're

1 talking about today; is that right?

2 A. Yes, that's correct.

3 Q. And is it fair for me to say that
4 you've cited them in your report because you
5 consider them to be reputable scholars?

6 A. Yes, I do.

7 Q. You cited them, at least the
8 reasons you cited them in your report, is because
9 you see their work as authoritative?

10 A. Again I tend to back off from the
11 word "authoritative". Academic research is
12 constantly ongoing, and I would simply caution
13 counsel and Your Honour about the approach with
14 which historians and ethnohistorians in the
15 consulting field treat publications and respected
16 scholars, always with a certain grain of salt.

17 The fact that I simply cite a
18 particular author doesn't mean that I agree with
19 the entire contents of the publication.

20 Q. That's fair. But you'll agree
21 with me, that from the authors that you have cited,
22 none of them say that the surrenders of land into
23 the Upper Great Lakes that we've talked about in
24 these treaties were principally motivated by
25 geopolitical factors?

03:22:39 1 A. Well, more fundamentally, the
03:22:42 2 question of location of boundaries to coincide with
03:22:48 3 the international boundary line was not an issue
03:22:51 4 that I found addressed in the literature that I
03:22:56 5 reviewed.

03:22:57 6 Q. So it wasn't in the literature at
03:23:00 7 all?

03:23:00 8 A. The question, the specific
03:23:02 9 question as to why a number of treaties included
03:23:07 10 boundaries coinciding with the international border
03:23:12 11 was not addressed in the literature that I
03:23:15 12 reviewed.

03:23:16 13 Q. I'd like to take you to another
03:23:26 14 treaty that we discussed today, the Green Bay
03:23:31 15 Treaty, I think also named the treaty with
03:23:35 16 Menominee Nation, 1831.

03:23:38 17 And in your evidence today you
03:23:46 18 mentioned Dr. Cleland and his work, Faith in Paper;
03:23:49 19 is that right?

03:23:49 20 A. Yes, that's correct.

03:23:58 21 Q. I trust, with respect to the
03:23:59 22 treaties that he looks at, you would consider him a
03:24:02 23 reliable source?

03:24:03 24 A. Well, he had expertise both in
03:24:08 25 research and giving evidence in a number of those

03:24:11 1 treaties. So, yes, I would consider him a reliable
03:24:15 2 source.

03:24:22 3 Q. Can we have Exhibit No. 994 on the
03:24:25 4 screen, please?

03:24:29 5 This is a copy of the treaty with the
03:24:33 6 Menominee. If we scroll down a little further
03:24:38 7 you'll see a section with green boxes, there's
03:24:42 8 three of them. And that section is about the
03:24:46 9 boundaries of the Menominee country. If you'd like
03:24:51 10 to review more of it, we can scroll up or down,
03:24:56 11 whatever you like.

03:24:56 12 A. (Witness reviews document).

03:25:13 13 Yes.

03:25:15 14 Q. And now I'd like to look at one of
03:25:19 15 Dr. Cleland's maps from Faith in Paper which relate
03:25:26 16 to these boundaries. So if we could have
03:25:30 17 Exhibit 4328 on the screen, please. And to look at
03:25:35 18 page 152 -- sorry, 101 of the PDF.

03:25:58 19 Now, you'll agree with me that the
03:26:15 20 territory that's in the shaded color is
03:26:21 21 representative of the description in the treaty
03:26:22 22 that you just reviewed?

03:26:27 23 THE COURT: There's two shaded colours.
03:26:29 24 Which one are you referring to?

03:26:31 25 MR. BROOKWELL: So there's -- you'll

03:26:33 1 have to forgive me. The colours are not quite --

03:26:36 2 THE COURT: One is lighter than the
03:26:37 3 other.

03:26:38 4 MR. BROOKWELL: Yes, so the lighter
03:26:40 5 shaded color is the water and the darker shaded
03:26:43 6 color is land.

03:26:45 7 BY MR. BROOKWELL:

03:26:45 8 Q. So my question is about the area
03:26:47 9 in the darker shaded color. First, you'll agree
03:26:52 10 that that is representative of what is described in
03:26:56 11 the treaty?

03:26:57 12 A. Yes, I believe it is.

03:27:01 13 Q. And the outside lines of that
03:27:05 14 darker shaded color is the boundary lines of the
03:27:09 15 treaty; is that right? Not the boundary lines of
03:27:12 16 the treaty, sorry, of the territory of the
03:27:14 17 Menominee?

03:27:15 18 A. Well, as described in the treaty.

03:27:17 19 Q. And you'll see at the top right
03:27:23 20 corner of that section, there's a line that goes
03:27:25 21 across Green Bay; do you see that?

03:27:28 22 A. Yes, that's correct.

03:27:29 23 Q. So leaving aside whether land
03:27:32 24 under water is included when not explicitly stated;
03:27:38 25 you'll agree with me that there is water inside of

03:27:42 1 the boundary line as depicted on this map?

03:27:44 2 A. Yes, that's correct.

03:27:46 3 Q. And while it is depicted on the
03:27:58 4 map as representative in the treaty, that water was
03:28:03 5 not surrendered by the treaty; is that right?

03:28:05 6 THE COURT: I'm going to interrupt you
03:28:06 7 there.

03:28:12 8 I see no objection. I get concerned
03:28:14 9 about that question because of its legal -- it
03:28:17 10 sounds like a legal question, sir.

03:28:20 11 Counsel is not on her feet. This
03:28:23 12 witness has used that phrase in his report. I
03:28:27 13 guess I'll just ask you to clarify on what basis
03:28:29 14 you're asking the question, so that I understand
03:28:32 15 whether I can make use of it or not.

03:28:35 16 MR. BROOKWELL: I'll clarify.

03:28:47 17 BY MR. BROOKWELL:

03:28:36 18 Q. The question I have is: When you
03:28:48 19 say in your report that the surrender did not
03:28:51 20 relate to water, you aren't talking about the
03:28:59 21 territory described as the Menominee? You're
03:29:02 22 talking about what was surrendered; is that right?

03:29:06 23 A. What I'm talking about are two --
03:29:10 24 there are two articles in this treaty subsequent to
03:29:13 25 the description of the Menominee territory that is

03:29:19 1 the first article of the treaty.

03:29:22 2 There are two articles that describe
03:29:25 3 the extent of cessions made by the Menominee. I
03:29:31 4 believe the first concerns an area totalling some
03:29:38 5 500,000 acres to accommodate the needs and claims
03:29:42 6 of the New York Indians.

03:29:45 7 And the second concerns the Door
03:29:50 8 Peninsula. And I very methodically reviewed that
03:29:56 9 second surrender and satisfied myself that it
03:30:00 10 corresponded to the Door Peninsula as depicted by
03:30:10 11 Charles Cleland in a map subsequent to this one.

03:30:21 12 MR. BROOKWELL: Your Honour, I'm about
03:30:22 13 to move to a different area. I see the time now is
03:30:25 14 just coming on 3:30, if now would be an appropriate
03:30:28 15 time for a break.

03:30:29 16 THE COURT: Yes, it is. 20 minutes.

03:30:31 17 -- RECESS TAKEN AT 3:30 --

03:53:03 18 -- UPON RESUMING AT 3:52 --

03:53:11 19 THE COURT: Please go ahead.

03:53:21 20 MR. BROOKWELL: Thank you, Your Honour.

03:53:24 21 BY MR. BROOKWELL:

03:53:24 22 Q. Mr. Chartrand, I'd like to talk to
03:53:27 23 you now about some of what I've been describing as
03:53:30 24 the context. So what is going on in the big
03:53:34 25 picture for the United States in the 19th century.

03:53:38 1 And I'd like to begin at page 42 of your report,
03:53:42 2 page 55 of the PDF.

03:54:02 3 And at this part of your report, I
03:54:09 4 think you see a highlighted box. And you note that
03:54:15 5 the British and the United States each feared that
03:54:19 6 eventual military action was likely if not
03:54:22 7 inevitable after 1796; is that a fair summary of
03:54:28 8 that paragraph?

03:54:29 9 A. (Witness reviews document).

03:54:45 10 Yes, that's correct.

03:54:46 11 Q. You'll agree with me that this
03:54:49 12 concern of renewed war wasn't a constant state of
03:54:54 13 affairs in the 19th century?

03:54:56 14 A. It was constantly in the
03:54:57 15 background. There were, I'm not sure if this is in
03:55:05 16 my report, but there were ongoing trade issues
03:55:10 17 between the American government and the British,
03:55:15 18 occasional local military confrontations in the
03:55:27 19 waters of the Atlantic.

03:55:29 20 And so it was always present. I would
03:55:40 21 agree with you that it wasn't constantly front page
03:55:44 22 headline material.

03:55:47 23 Q. I want to have a look at a couple
03:55:51 24 of publications that you cite in your report. And
03:55:56 25 we've made them exhibits earlier this morning, so

03:55:59 1 I'll just go over an initial question with you.

03:56:03 2 One is by Richard Allen, another is by
03:56:07 3 J.R. Miller and the third by James Clifton. And
03:56:12 4 you would agree with me that those sources --

03:56:14 5 THE COURT: Sorry, I'm pausing.

03:56:17 6 What are you talking about? Are you
03:56:19 7 talking about the lettered exhibit that was marked
03:56:22 8 this morning?

03:56:23 9 MR. BROOKWELL: Yes, I apologize, Your
03:56:25 10 Honour. The lettered exhibit was marked this
03:56:29 11 morning.

03:56:29 12 THE COURT: I have no information to
03:56:31 13 suggest the witness has even seen that document.
03:56:34 14 Perhaps he has, but you just need to take a step
03:56:37 15 back.

03:56:37 16 It is an exhibit and you're welcome to
03:56:40 17 use it. But I haven't heard from this gentleman
03:56:43 18 that he would be able to follow your generalization.

03:56:47 19 MR. BROOKWELL: We won't go by
03:56:49 20 generalization then. I think it's easiest to go by
03:56:53 21 the specific.

03:56:53 22 So can we have Exhibit 4520 on the
03:56:58 23 screen, please.

03:57:06 24 Q. And this is a publication by
03:57:08 25 Robert Allen, "His Majesty's Indian Allies, British

03:57:17 1 Indian Policy the Defence of Canada, 1774-1815"; I
03:57:21 2 believe it's an excerpt from that book.

03:57:24 3 This is cited in your report. I take
03:57:27 4 it you're familiar with the document?

03:57:28 5 A. Yes, I am.

03:57:31 6 Q. You'll agree with me that Robert
03:57:34 7 Allen is a reliable scholar?

03:57:36 8 A. Yes, generally. He's a historian,
03:57:41 9 and I wouldn't cite a particular author if I knew
03:57:46 10 or suspected that he was systematically incorrect
03:57:50 11 in his historical accounts.

03:57:52 12 But again, you know, just cautioning
03:57:55 13 that the simple fact that I cite Dr. Allen doesn't
03:58:03 14 mean that I necessarily agree with everything that
03:58:06 15 he's ever written.

03:58:07 16 Q. Okay. Let's go to page 25 of the
03:58:10 17 PDF, which is page 171 of the document. I've
03:58:17 18 highlighted a section there, that reads:

03:58:22 19 "Indeed relations between Great
03:58:24 20 Britain, the United States and
03:58:26 21 Canada were in such a state of
03:58:27 22 general harmony in the
03:58:30 23 post-1815 years as to be considered
03:58:31 24 an era of good feelings. By 1819,
03:58:37 25 for instance, British military

03:58:39 1 forces for the defence of Canada
03:58:41 2 were significantly reduced, and at
03:58:44 3 the frontier posts, including Fort
03:58:47 4 Malden, there was such a sense of
03:58:48 5 calm and security that of the 173
03:58:51 6 officers, 80 were absent for the
03:58:54 7 winter."

03:58:55 8 My question for you, sir is, would you
03:58:58 9 agree with me that this suggests that in 1819, at
03:59:03 10 least, the United States and Britain were on good
03:59:08 11 terms?

03:59:09 12 A. Well, he's referring specifically
03:59:11 13 to the British at Fort Malden. And yes, I would
03:59:21 14 agree that certainly in the immediate aftermath of
03:59:24 15 the conclusion of the War of 1812, relative to the
03:59:27 16 war context, certainly there was a far more relaxed
03:59:35 17 relationship between Britain and the United States.

03:59:41 18 I'm not so sure that I would agree to
03:59:47 19 the extent to which Dr. Allen has characterized,
03:59:52 20 for example, referring to such a "state of general
03:59:57 21 harmony".

03:59:57 22 I would not agree with the term
04:00:02 23 "harmony", nor would I say this was "an era of good
04:00:10 24 feelings", only by contextualizing this in the
04:00:22 25 outbreak of war.

04:00:26 1 So this is an instance in which I
04:00:30 2 wouldn't wholeheartedly endorse Dr. Allen's
04:00:38 3 assessment of the situation.

04:00:44 4 MR. BROOKWELL: Could I have -- this is
04:00:46 5 document -- forgive me. I think this is now an
04:00:53 6 exhibit, but I don't have the number down, S1207.

04:00:53 7 BY MR. BROOKWELL:

04:01:02 8 Q. So it's Exhibit 4517. This is an
04:01:16 9 excerpt from, "Compact, Contract, Covenant
04:01:19 10 Aboriginal Treaty-Making in Canada" by J.R.
04:01:22 11 Miller.

04:01:23 12 Mr. Chartrand, is J.R. Miller a
04:01:26 13 reliable source in your view?

04:01:28 14 A. Yes. Again, generally. He has
04:01:30 15 published some very high-level accounts of
04:01:42 16 Indigenous policy and its development, and in this
04:01:47 17 particular instance, Aboriginal treaty-making.

04:01:54 18 Q. Could you go to page 35 of the
04:01:56 19 PDF, please, which is page 94. If you can zoom in
04:02:01 20 on the highlighted box, I'm going to take you to a
04:02:04 21 page after this. But if you'd like to read more of
04:02:07 22 this paragraph before I do so, please let me know.

04:02:12 23 The highlighted section here -- sorry,
04:02:14 24 this is the only page. The highlighted section
04:02:17 25 here says:

04:02:20 1 "First in 1817, Britain and the

04:02:23 2 United States signed the Rush-Bagot

04:02:25 3 Convention, which demilitarized the

04:02:28 4 Great Lakes. This pact reflected an

04:02:31 5 acceptance of the boundary

04:02:32 6 settlement of 1783 reinforced by the

04:02:35 7 Treaty of Ghent in 1814."

04:02:40 8 My question here for you here,

04:02:43 9 Mr. Chartrand, is: Would you agree that this

04:02:44 10 suggests that the United States and Great Britain

04:02:49 11 were on good terms in 1817?

04:02:52 12 A. Well, they were clearly on much

04:02:54 13 better terms than they had been during the War of

04:02:59 14 1812. I disagree, I would need to really review

04:03:03 15 the full context of Professor Miller's analysis

04:03:13 16 here.

04:03:14 17 But clearly, the Great Lakes were not

04:03:17 18 fully demilitarized; the British maintained a post

04:03:23 19 in this time period at Drummond Island, another

04:03:26 20 post at what's now Amherstburg. And these had been

04:03:38 21 established for some time as of 1817, and they were

04:03:43 22 maintained.

04:03:45 23 So I think it would be important to

04:03:48 24 have a more specialized review of the evidence in

04:03:54 25 order to understand what he means by "demilitarized

04:03:59 1 the Great Lakes".

04:04:02 2 Q. Do you agree with his assessment
04:04:04 3 that the Rush-Bagot Convention reflects acceptance
04:04:11 4 of the international boundary line?

04:04:13 5 A. The international boundary line,
04:04:20 6 to my knowledge, was not generally disputed with
04:04:24 7 the exception of the boundary line -- sorry, in the
04:04:31 8 northern part of Lake Huron and the St. Mary's
04:04:34 9 River. I alluded to the situation with respect to
04:04:39 10 Drummond Island.

04:04:41 11 The British held a fort there, on the
04:04:46 12 belief that the island was situated in Canadian, or
04:04:52 13 Upper Canadian territory, but there were some
04:04:55 14 competing claims in that area. I do indicate that
04:04:59 15 in my report.

04:05:03 16 So in that area of Lake Huron, the very
04:05:07 17 northern part, in fact, a boundary commission was
04:05:11 18 established to come to an agreement as to where
04:05:18 19 exactly the international boundary was situated.
04:05:25 20 In the case of Drummond Island, it was found by the
04:05:27 21 commission to be established in American territory.

04:05:30 22 Setting aside that problematic area,
04:05:33 23 and I believe that the Boundary Commission kept on
04:05:37 24 working until the 1840s -- I could be wrong on
04:05:46 25 that, my memory is a bit fuzzy. But they were

04:05:50 1 certainly operative after this settlement of
04:05:55 2 Drummond Island.

04:05:56 3 Setting that aside, the general layout
04:05:59 4 of the international boundary as it had been
04:06:04 5 defined in the 1783 Treaty of Paris was not subject
04:06:08 6 to comprehensive dispute.

04:06:11 7 Q. I'd like to look at another
04:06:14 8 document.

04:06:14 9 MR. BROOKWELL: If we could put up
04:06:17 10 Exhibit 4514 on the screen, please.

04:06:19 11 And if you could zoom out so we can see --
04:06:26 12 scroll down.

04:06:26 13 BY MR. BROOKWELL:

04:06:30 14 Q. That's a bit difficult to read,
04:06:32 15 but the title is, "A Place of Refuge for All Time -
04:06:36 16 migration of the American Potawatomi into Upper
04:06:40 17 Canada 1830 to 1850".

04:06:42 18 And the author is James Clifton. And
04:06:46 19 you've cited Mr. Clifton in your report, and you've
04:06:51 20 given me a general statement about what you do when
04:06:54 21 you cite authors, but would you agree with me that
04:06:58 22 Mr. Clifton is a reliable source?

04:07:00 23 A. Again, within the same conditions
04:07:02 24 and parameters as I've explained. He's an
04:07:06 25 ethnohistorian or was a ethnohistorian, yes.

04:07:09 1 Q. I'd like to take you to two
04:07:11 2 sections. The first is on PDF page 18, which is
04:07:15 3 page 7 of the document. And there's a section
04:07:19 4 highlighted in a box. It reads:

04:07:24 5 "Thus the Border between the
04:07:25 6 United States and Canada in the
04:07:27 7 1830s was effectively uncontrolled.
04:07:29 8 There was considerable population
04:07:31 9 movement both ways; Euro-American
04:07:34 10 and Canadian as well as Indian."

04:07:42 11 If you'd like to read more of that
04:07:44 12 paragraph, please let me know before I ask you a
04:07:47 13 question.

04:07:47 14 A. Not necessary. I believe I
04:07:50 15 actually quoted at least the first sentence in the
04:07:54 16 paragraph. And yes, I agree with it.

04:07:56 17 Q. So you'll agree then that this
04:07:59 18 suggests that in and around the 1830s, the United
04:08:03 19 States and Great Britain were on good terms?

04:08:06 20 A. No, I wouldn't jump to that
04:08:08 21 conclusion. There were certainly on the British
04:08:12 22 side, some very severe limitations in respect to
04:08:19 23 border enforcement.

04:08:22 24 I believe the first Customs Agent in
04:08:25 25 the northern part of Lake Huron was appointed in

04:08:36 1 the 1840s, and he was a force of one. So you can
04:08:43 2 imagine that he had very limited ability outside
04:08:48 3 the immediate area of Sault Ste. Marie to enforce
04:08:54 4 any laws.

04:08:56 5 The same was true -- I can elaborate my
04:09:00 6 answer if you'll let me. The same was true in
04:09:03 7 respect to the general operation of the Indian
04:09:08 8 Department in the Upper Great Lakes, meaning the
04:09:13 9 northern part of Lake Huron and Lake Superior.

04:09:15 10 The superintendency that was
04:09:17 11 established at Manitowaning was the northernmost
04:09:23 12 superintendency in the department. And the
04:09:28 13 boundaries of its jurisdiction westward were never
04:09:35 14 really fully defined.

04:09:39 15 So you had essentially one
04:09:41 16 superintendent in 1836. That was Thomas Anderson;
04:09:47 17 he was succeeded later by another individual in the
04:09:51 18 1840s. So he had a very limited potential to
04:10:00 19 travel beyond Sault Ste. Marie westward.

04:10:03 20 To my knowledge, the superintendents in
04:10:07 21 that time period, 1830s, 1840s, never traveled far
04:10:16 22 into Lake Superior, beyond perhaps Batchewana Bay,
04:10:23 23 which is at the southeastern end of the British
04:10:27 24 Canadian side of Lake Superior.

04:10:30 25 On the other hand, there is clearly

04:10:33 1 some expectation that the jurisdiction extended
04:10:37 2 further west, because they were in contact with
04:10:41 3 Anishinaabe from the western shores of Lake
04:10:45 4 Superior, but in a limited context during,
04:10:49 5 essentially during the time of distributions of
04:10:53 6 annual Imperial presents.

04:10:57 7 So the lack of manpower resulting in an
04:11:04 8 effectively uncontrolled border is not necessarily
04:11:09 9 evidence that relations between the United States
04:11:13 10 and Canada were on a fantastic footing in this time
04:11:20 11 period.

04:11:21 12 It reflected the limited abilities of
04:11:29 13 in fact both governments, to provide a -- to
04:11:39 14 provide a significant amount of personnel to
04:11:44 15 oversee on the British side, in the administration
04:11:52 16 on Lake Superior, and in respect to the border
04:11:59 17 specifically, manning (ph) were patrolling the
04:12:03 18 Border in the centre of the Great Lakes.

04:12:08 19 Q. I'd like to take you to a
04:12:10 20 different part of this document, page 28 which is
04:12:13 21 page 39 of the PDF. This section says:

04:12:24 22 "In 1828 some Potawatomi,
04:12:26 23 probably from the Milwaukee area,
04:12:29 24 had been active in efforts to renew
04:12:31 25 an anti-American coalition of

04:12:33 1 western Indians. They sent a war
04:12:35 2 belt to Chief Kiskenick of the
04:12:41 3 L'arbre Croche Odawa in July of
04:12:47 4 1828. Similarly, other Indians from
04:12:49 5 Wisconsin reported to Agent T.G.
04:12:51 6 Anderson at Drummonds Island that
04:12:54 7 the Wisconsin Potawatomi had come to
04:12:56 8 them with a war belt and a proposal
04:12:58 9 to unite with '...all the Indians
04:13:01 10 west of the Mississippi to crush the
04:13:03 11 Big Knives ...' The chiefs reporting
04:13:06 12 these facts wanted Anderson's
04:13:08 13 advice: Might they count on their
04:13:10 14 [British] support? Anderson and the
04:13:12 15 military commander told them that
04:13:14 16 they had no advice. They could not
04:13:16 17 expect support, for Britain and the
04:13:18 18 United States were on friendly
04:13:19 19 terms."

04:13:20 20 My question for you, sir, is: Do you
04:13:22 21 agree with me this suggests, at least from the
04:13:25 22 perspective of the British, that the United States
04:13:27 23 and Britain were on friendly terms in and around
04:13:30 24 the 1830s?

04:13:38 25 A. Again, in context, they were on

04:13:40 1 friendly terms, in the sense that in fact neither
04:13:43 2 side actively wanted to resume warfare in this time
04:13:48 3 period.

04:13:50 4 And so what is interesting here is that
04:13:55 5 Native American chiefs are coming to a British
04:13:59 6 officer with the Indian Department, asking if they
04:14:06 7 could count on British support in the event that
04:14:09 8 they would launch war against the American
04:14:15 9 military.

04:14:16 10 And so we have Anderson, as well as the
04:14:21 11 military commander, essentially telling them that
04:14:28 12 they could not provide any guarantee of that. In
04:14:32 13 fact, they may have said, this is a paraphrase, may
04:14:36 14 have said that they had no answer to that query.

04:14:40 15 So, again, saying that, you know,
04:14:45 16 Canada and the United States were on friendly terms
04:14:48 17 in this period has to be taken into context. They
04:14:53 18 were certainly not prepared to initiate a new round
04:14:56 19 of warfare.

04:15:00 20 But beyond that, that doesn't mean that
04:15:03 21 either side had concerns, and especially from the
04:15:09 22 American side, concerns about the extent to which
04:15:13 23 the British exerted influence on Native Americans.

04:15:16 24 And we have a perfect example here with
04:15:22 25 Native American leaders going to an official of the

1 Indian Department and military commander.

2 Q. I'd like to return to your report
3 and look at page 42, which is PDF page 56.

4 And the highlighted section reads --

5 THE COURT: Just a second.

6 MR. BROOKWELL: Sorry.

7 THE COURT: What's on the screen is not
8 on my page 42.

9 MR. BROOKWELL: It may be page 43.

10 Yes. That's an error on my part.

11 BY MR. BROOKWELL:

12 Q. So please return to page 43. The
13 section reads:

14 "Thus after 1814, American
15 concerns to bolster their
16 sovereignty in the Upper Great Lakes
17 were not so much prompted by fears
18 of new British military aggression,
19 as by British economic competition
20 and policies that maintain British
21 influence on Native Americans."

22 So I take it from your statement here,
23 that after 1814, the concerns from the American
24 side were economic rather than military?

25 A. Yes, I would generally agree with

04:17:04 1 that, and I believe the statement actually is
04:17:08 2 consistent with the answer I just gave in relation
04:17:10 3 to the last document you took me to.

04:17:14 4 It's not just economic competition.
04:17:17 5 It's also policies that maintain British influence
04:17:20 6 on Native American tribes.

04:17:23 7 But, again, I mean, right here in my
04:17:28 8 report I come out and say that neither side was
04:17:38 9 actively pursuing plans for a new military
04:17:45 10 confrontation. Both sides from time to time had
04:17:49 11 concerns that it might recur, but this was not part
04:17:55 12 of the active agenda of either the British or the
04:17:59 13 Americans.

04:18:00 14 Q. So if I understand, the statement
04:18:05 15 you've made here is about the American perspective.
04:18:14 16 Would you agree that the British would have shared
04:18:16 17 a similar perspective? Their concerns would not be
04:18:20 18 military, but economic, and influence over Native
04:18:29 19 American tribes?

04:18:29 20 A. I haven't researched the British
04:18:37 21 perspective in this time period to the same extent.
04:18:41 22 I would tend to generally agree with you, but this
04:18:44 23 is in a sense the mirror image.

04:18:47 24 The British continued to want to have
04:18:57 25 influence and to continue -- there is a time limit

04:19:00 1 to this.

04:19:01 2 But certainly in the latter 1810s,
04:19:08 3 1820s and 1830s, the diplomatic alliance that had
04:19:14 4 been forged for decades between the British and
04:19:23 5 Native American tribes was something that local
04:19:25 6 authorities in Upper Canada very much wanted to
04:19:32 7 maintain.

04:19:33 8 They saw Native Americans as potential
04:19:39 9 allies in the event of future conflict, without
04:19:45 10 themselves, of course, attempting to initiate
04:19:49 11 direct military confrontation with the Americans.

04:19:53 12 Q. Okay. I'd like to move away from
04:20:01 13 the discussion about war and direct economic
04:20:05 14 competition and talk to you about land and
04:20:10 15 settlement in the United States.

04:20:12 16 MR. BROOKWELL: So could I have
04:20:14 17 Exhibit 4518 on the screen?

04:20:28 18 BY MR. BROOKWELL:

04:20:28 19 Q. I believe this is an excerpt out
04:20:30 20 of "History of Indian-White Relations", which is
04:20:35 21 edited by Wilcomb Washburn. And if we scroll to
04:20:42 22 the next page, you'll see that this chapter is
04:20:46 23 "United States Indian Policies, 1776-1815" by
04:20:51 24 Reginald Horsman. I believe you cite
04:21:01 25 Mr. Horsman in your report; is that right?

04:21:02 1 A. Yes, on several occasions.

04:21:04 2 Q. I assume you'll agree with me that
04:21:08 3 he's a reliable source with the same caveat you put
04:21:12 4 on the other sources we've discussed?

04:21:14 5 A. Yes, that's correct.

04:21:15 6 Q. I'd like to go to page 32, which
04:21:24 7 is PDF page 4. And unfortunately it's not
04:21:31 8 highlighted but if we zoom into the second column,
04:21:39 9 you'll see the paragraph is -- unfortunately, this
04:21:55 10 is not quite highlighted so I can accommodate that
04:21:58 11 after.

04:21:59 12 I'll move to a separate document.

04:22:06 13 MR. BROOKWELL: If you can please put
04:22:08 14 up Exhibit 4328.

04:22:33 15 BY MR. BROOKWELL:

04:22:33 16 Q. And before I ask you some
04:22:34 17 questions on this document, I'd like to turn to
04:22:38 18 page 51 of your report.

04:22:45 19 MR. BROOKWELL: And perhaps we can have
04:22:47 20 that on the screen as well. Can we scroll to the
04:23:18 21 bottom just so we can -- oh it's at the top, sorry.

04:23:35 22 BY MR. BROOKWELL:

04:23:37 23 Q. So the second highlighted box, if
04:23:43 24 you'll take a moment to review that, I'll have a
04:23:46 25 question for you. If you wish to read more, please

04:23:51 1

let me know.

04:23:52 2

A. (Witness reviews document).

04:24:00 3

Yes.

04:24:03 4

Q. So you'll agree with me that in

04:24:07 5

the 19th century, fisheries were an important

04:24:10 6

resource to Native Americans?

04:24:14 7

A. Well, generally more important in

04:24:19 8

some areas than others. Fishing was a resource

04:24:29 9

harvesting activity that was integrated into

04:24:34 10

Indigenous, Anishinaabe, Native American -- all

04:24:39 11

these people had a yearly cycle of resource

04:24:45 12

harvesting, focusing on harvesting certain

04:24:48 13

resources at particular times of the year, and then

04:24:51 14

shifting their resource harvesting strategy on

04:24:55 15

other resources at other times.

04:24:58 16

Now that said, yes, absolutely

04:25:02 17

fisheries will have been important to the Native

04:25:07 18

Americans who were dealing with Hull in 1807. And, for

04:25:14 19

that matter, with all of the Upper Great Lakes treaties.

04:25:22 20

Q. You agree with me it would have

04:25:24 21

also been an important resource to settlers at that time?

04:25:30 22

A. To an extent, yes, it could have been.

04:25:37 23

Q. If we can return to Exhibit 4328,

04:25:41 24

please. Which is Charles Cleland Faith in Paper if

04:25:47 25

you go to page 52, which should be page 53 of the

04:25:51 1 PDF. And if we can zoom in on the highlighted
04:26:01 2 paragraph. I'll just give you have a moment to
04:26:09 3 read that paragraph.

04:26:10 4 A. (Witness reviews document).

04:26:30 5 Yes.

04:26:37 6 Q. Here Cleland is talking about
04:26:52 7 non-Indian resources -- procurement being -- sorry
04:26:55 8 resources being prohibited for non-Indians; is that
04:27:00 9 a fair summary of that paragraph?

04:27:02 10 A. Well, that was a reference to the
04:27:05 11 Treaty of Greenville. And what the Treaty of
04:27:09 12 Greenville stipulated, I believe I'm accurate, was
04:27:16 13 that the Native American signatories in the Indian
04:27:22 14 territory recognized under the Treaty of Greenville
04:27:26 15 would be able to continue practicing their
04:27:33 16 renewable resource harvesting activities free of
04:27:39 17 hindrance from the American government, so long as
04:27:43 18 they didn't resume hostilities.

04:27:51 19 And the American government also
04:27:53 20 pledged itself to protect the Native American
04:27:58 21 occupants of the Indian territory against -- I'm
04:28:03 22 tempted to use the word "molestation", it may or
04:28:08 23 may not actually be in the treaty, but something to
04:28:11 24 that effect -- from non-Native Americans.

04:28:17 25 And I believe the language is "whites"

04:28:21 1 and "other whites". And so there was an element in
04:28:25 2 the treaty, article in the Treaty of Greenville
04:28:30 3 that secured essentially a continued reliance for
04:28:43 4 Native American signatories, continued reliance on
04:28:45 5 the renewable resources that they had harvested for
04:28:53 6 time immemorial.

04:28:58 7 MR. BROOKWELL: Your Honour, my
04:28:59 8 questions in this area go on for a little bit
04:29:03 9 longer. So I am conscious of the time. It would
04:29:06 10 be a logical place for me to break, if we could
04:29:09 11 continue tomorrow morning.

04:29:10 12 THE COURT: Yes. Before you leave,
04:29:13 13 please make sure you speak with Ontario about your
04:29:16 14 timing, so that they can have the next witness
04:29:19 15 ready when needed, all right?

04:29:23 16 MR. BROOKWELL: Okay. Will do, Your Honour.

04:29:23 17
04:29:54 18 -- Court adjourned at 4:29 p.m.
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REPORTER'S CERTIFICATE

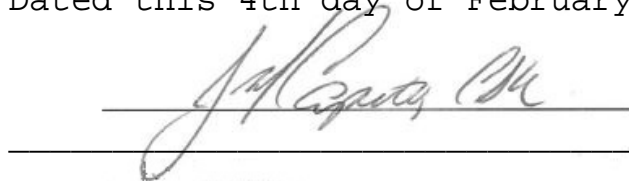
I, JUDITH M. CAPUTO, RPR, CSR, CRR,
Certified Shorthand Reporter, certify;

That the foregoing proceedings were
taken before me at the time and place therein set
forth at which time the witness was put under oath
by the court registrar;

That the testimony of the witness and
all objections made at the time of the examination
were recorded stenographically by me (Note: Not
all quotes have been verified against source
document, but transcribed as read into the record);

That the foregoing is a Certified
Transcript of my shorthand notes so taken.

Dated this 4th day of February, 2020.



NEESONS, A Veritext Company

PER: JUDITH M. CAPUTO, RPR, CSR, CRR

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