

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

DAY 78 VOL 78
January 21, 2020



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Court File No. 94-CQ-50872CM

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

- and -

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

Court File No. 03-CV-261134CM1

A N D B E T W E E N:

CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and
SAUGEEN FIRST NATION
Plaintiffs

- and -

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

--- This is the VOLUME 78/DAY 78 of the transcript of
the trial proceedings in the above-noted matter, being
held at the Superior Court of Justice, 330 University
Avenue, Courtroom 5-1, Toronto, Ontario, on the
21st day of January, 2020.

B E F O R E:

The Honourable Justice Wendy M. Matheson

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

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& Benjamin Brookwell, Esq., The Chippewas of
& Cathy Guirguis, Esq., Saugeen First Nation,
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& Jennifer Lepad, Esq., Her Majesty the
& Richard Ogden, Esq., Queen in Right of
& David Feliciant, Esq., Ontario.

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

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09:55:43 1 -- Upon commencing at 10:03 a.m.

10:04:22 2
10:04:22 3 THE COURT: Yes, Counsel.

10:04:26 4 MS. MC RANDALL: Your Honour, I just
10:04:27 5 had a brief administrative matter to address this
10:04:30 6 morning.

10:04:31 7 THE COURT: Please go ahead.

10:04:32 8 MS. MC RANDALL: Your Honour had asked
10:04:34 9 that counsel advise when we would be available for
10:04:38 10 a scheduling discussion. I apologize for getting
10:04:42 11 back to you about this late date.

10:04:43 12 THE COURT: That's fine, it was
10:04:45 13 supposed to be sometime this week.

10:04:48 14 MS. MC RANDALL: So the Plaintiffs,
10:04:48 15 Ontario and Canada are prepared to have a
10:04:49 16 discussion Thursday afternoon after court. We
10:04:52 17 haven't heard back from the Municipalities on this,
10:04:55 18 but we will, of course, inform them if and when a
10:04:58 19 time is set.

10:05:00 20 THE COURT: That's fine, we can have
10:05:02 21 that as our working time.

10:05:03 22 Do we know yet whether there will be
10:05:05 23 gaps that we need to fill in the week's schedule or
10:05:09 24 is it too soon to say?

10:05:12 25 MS. MC RANDALL: We're able to move a

10:05:14 1 number of witnesses forward, so it's difficult to
10:05:16 2 say if or when there will be a gap.

10:05:18 3 THE COURT: Okay. So perhaps if you
10:05:19 4 can let the Municipalities know...

10:05:24 5 Just thinking, it may be that because
10:05:25 6 it's at 4:30, we would be able to use the room we
10:05:29 7 regularly use. And because of that, if you could
10:05:33 8 please let them know how they can join by phone if
10:05:36 9 they wish to.

10:05:37 10 MS. MC RANDALL: I will do so,
10:05:38 11 Your Honour.

10:05:38 12 THE COURT: All right. That worked out
10:05:39 13 well the last time.

10:05:40 14 MS. MC RANDALL: Thank you.

10:05:43 15 THE COURT: Mr. Brookwell.

10:05:46 16 MR. BROOKWELL: Thank you. Good
10:05:52 17 morning, Your Honour.

10:50:54 18 JEAN-PHILIPPE CHARTRAND; previously sworn.

10:05:57 19 CROSS-EXAMINATION BY MR. BROOKWELL (CONT'D):

10:05:57 20 Q. Good morning, Mr. Chartrand.

10:05:58 21 A. Good morning.

10:05:59 22 Q. So this morning, Mr. Chartrand, I
10:06:00 23 would like to speak to you a little bit about Agent
10:06:03 24 Schoolcraft. So could we have Exhibit 4328 on the
10:06:07 25 screen, please.

1 And again, this is Charles Cleland,
2 Faith in Paper. And could you please go to
3 page 52, which is 53 of the PDF, and scroll down.

4 Over two pages, there is an excerpt of
5 a letter -- sorry, transcription of a letter from
6 Agent Schoolcraft to Lewis Cass. And since it's
7 spread out over a couple of pages, I'm going to
8 read the excerpt, but if you'd like to review it
9 yourself afterward --

10 THE COURT: Does this mean it's pages
11 long, sir?

12 MR. BROOKWELL: Just the way it's
13 formatted on the following page is a map that takes
14 up part of the page, and just because it's in
15 columns, it's difficult to see all on one page.

16 So I was going to propose to read it
17 and then allow Mr. Chartrand to review it further
18 if he requires.

19 THE COURT: Well, you may read it if
20 you wish. It doesn't also improve understanding of
21 the passage, but if you wish to do so, you may do
22 so.

23 BY MR. BROOKWELL:

24 Q. So the opening part of the passage
25 is from Dr. Cleland where he's saying:

10:07:35 1 "In 1830 Agent Schoolcraft had
10:07:37 2 written to Secretary Lewis Cass
10:07:39 3 about the problems of regulating
10:07:41 4 fishing by non-Indians in Lake
10:07:44 5 Superior, which was entirely within
10:07:45 6 the Indian Country. In this case,
10:07:48 7 fish were superabundant and an
10:07:51 8 essential winter food source for
10:07:53 9 both Indians and non-Indians in the
10:07:55 10 area. Even though he believed
10:07:57 11 Indians would give their consent,
10:07:59 12 Schoolcraft was concerned, since the
10:08:02 13 Indian Trade and Intercourse Act did
10:08:04 14 not permit non-Indians to fish in
10:08:09 15 the Indian Country."

10:08:11 16 And then begins the excerpted
10:08:13 17 letter:

10:08:13 18 "On the 16th instant I granted
10:08:15 19 a permit to Samuel Ashman to fish
10:08:18 20 and take provisions and goods to cut
10:08:21 21 the necessary wood and --" it
10:08:24 22 continues on to the next page
10:08:25 23 "-- timber in Indian Country of Lake
10:08:30 24 Superior. The consent of the
10:08:32 25 Chippewas being necessary to give

1 validity to the permit so far as
2 relates to wood and timber --"

3 Oh, I skipped a page, there we go.

4 So we'll just review that again:

5 "[...] so necessary wood and
6 timber in Indian Country of Lake
7 Superior. The consent of the
8 Chippewas being necessary to give
9 validity to the permit, so far as
10 relates to wood and timber. I took
11 a bond with one --" and then
12 "-- [illegible word] in the amount
13 of \$500 conditioned for the
14 observance of the laws regulating
15 trade and intercourse with the
16 Indian tribes so far as these laws
17 are applicable:

18 "I had the honour to write to
19 you some years ago on this subject
20 and to report my proceedings in
21 relation to it. Since which, no
22 attempts at fishing in the lake have
23 been made. This season the plan has
24 been revived, and with it the
25 embarrassment under which the

10:09:33 1 department labours. It is scarcely
10:09:34 2 necessary to observe that the laws
10:09:36 3 respecting trade, do not contemplate
10:09:38 4 the necessity of citizens entering
10:09:40 5 the Indian Country, for any purpose,
10:09:45 6 except trading for furs, peltries
10:09:48 7 and their --" and continues to the
10:09:49 8 next page -- I'm sorry, on to the
10:09:54 9 next column "-- their provisions are
10:09:58 10 directed to guard against an abuse
10:10:00 11 of this privilege. Licenses may be
10:10:02 12 granted to trade and to purchase
10:10:04 13 certain articles. And passports may
10:10:06 14 be granted, special permits may be
10:10:10 15 given under certain instructions,
10:10:11 16 but it seems equally clear that the
10:10:14 17 licenses for no other purpose can be
10:10:18 18 granted. And that no person is
10:10:25 19 authorized to visit the Indian
10:10:27 20 Country, except under a view of the
10:10:28 21 laws and regulations:

10:10:30 22 "The inconvenience that would,
10:10:32 23 however, accrue to citizens by
10:10:36 24 excluding them from the privilege of
10:10:37 25 fishing in the Indian Country, where

10:10:39 1 the Indians themselves offer no
10:10:41 2 objection, are of a nature that will
10:10:44 3 readily occur. And I am of the
10:10:46 4 opinion, that if Congress would pass
10:10:49 5 the law allowing Indian Agents to
10:10:52 6 grant permits to fish for the
10:10:52 7 season, and cut wood and timber
10:10:52 8 necessary in the Indian Country that
10:10:55 9 advantages would result both to
10:10:57 10 themselves and to Indians. No
10:10:59 11 ardent spirits should be permitted
10:11:01 12 for this trade, and bonds should be
10:11:03 13 exacted for an observance of the
10:11:05 14 prohibition of ardent spirits. And,
10:11:10 15 conditioned that merchandise and
10:11:11 16 provisions employed in it, are
10:11:13 17 employed in the business of fishing.
10:11:15 18 It would be advisable to leave the
10:11:17 19 amount of the bond discretionary
10:11:21 20 with the president. Perhaps the law
10:11:25 21 should limit the bond not to exceed
10:11:27 22 \$1,800. I have, therefore, drafted
10:11:29 23 and herewith enclosed a bill to meet
10:11:31 24 the case; and that it might meet it
10:11:35 25 and no more."

10:11:37 1 And then the last paragraph is now

10:11:40 2 Dr. Cleland where he says:

10:11:42 3 "Clearly, Schoolcraft
10:11:43 4 appreciated the Indians's absolute
10:11:45 5 and exclusive right to the fishery
10:11:47 6 on unceded Indian land and his
10:11:49 7 responsibility to protect it. He
10:11:51 8 also understood that his authority
10:11:52 9 to permit resource use by
10:11:55 10 non-Indians was limited by the Trade
10:11:57 11 and Intercourse Act and that
10:11:58 12 non-Indians were permitted to use
10:12:01 13 resources in Indian Country, where
10:12:02 14 no settlers -- since we're not
10:12:05 15 settlers -- since settlers were not
10:12:07 16 permitted on unceded land."

10:12:11 17 Before I ask my question, would you
10:12:12 18 like a moment to review it again or scroll up or
10:12:16 19 down?

10:12:16 20 A. It's lengthy. I believe I have
10:12:20 21 more than the gist of the passage, so please go
10:12:23 22 ahead with your question. If I'm a little bit
10:12:26 23 ambiguous, then I may ask to read portions of it.

10:12:30 24 Q. That's fine, that's fair. Thank
10:12:32 25 you.

10:12:32 1 So from this, you'll agree that
10:12:35 2 Schoolcraft was a Treaty Commissioner, would have
10:12:41 3 understood that settlers were not permitted to fish
10:12:44 4 on unceded land; is that right?

10:12:45 5 A. Well, at the time of writing this
10:12:50 6 letter to Cass, and first of all, at this time in
10:12:53 7 1830, Cass was still Governor of Michigan
10:12:58 8 territory; he was not yet Secretary of War.

10:13:04 9 So he was writing to the Governor and
10:13:07 10 the Schoolcraft was not yet a Treaty Commissioner,
10:13:10 11 he was an Indian Agent. But, yes, I agree with
10:13:17 12 you.

10:13:17 13 Q. And from this, you'll agree with
10:13:20 14 me that he thought that settlers being unable to
10:13:27 15 fish on unceded land was an inconvenience towards
10:13:32 16 them, because even if they had the tribe's consent,
10:13:36 17 they could not fish?

10:13:40 18 A. Yes, I'll qualify that, though.
10:13:43 19 In this case, I believe he was referring to a
10:13:49 20 trader, not a settler. There were very, very few
10:13:57 21 settlers in the area, because it was essentially
10:14:00 22 prohibited.

10:14:06 23 Certainly looking forward, though,
10:14:09 24 following the Treaty of Washington, yes, that would
10:14:14 25 have been an issue.

1 Q. You'll agree from this letter,
2 he's described it as an inconvenience towards the
3 settlers?

4 A. Yes. Well, he's using terminology
5 of the early mid-18th century. It would have
6 created a hardship, actually.

7 Q. So then you'll agree with me that
8 it's possible that Schoolcraft later, when he
9 became a Treaty Commissioner, would have seen value
10 in a treaty including water in the Great Lakes
11 because it would allow settlers to fish in those
12 cessions?

13 A. In part. However, there were
14 reservations that were established in the treaty
15 territory -- in all of the treaty territories. And
16 typically, they fronted bodies of water, which
17 served two basic purposes.

18 One was to permit travel by Native
19 Americans. Waterways were the highways of the
20 Indigenous world, still at that time. But it also
21 provided access to fisheries. It does not,
22 however, explain the extent of the territory in the
23 Great Lakes that was included within the treaty.

24 Q. That may be, but my question was a
25 little more narrow. That Schoolcraft -- that it's

10:15:54 1 possible that Schoolcraft would have seen value in
10:15:57 2 having a treaty that included the lakes, because it
10:16:02 3 would allow settlers to fish in those areas?

10:16:05 4 A. There were multiple benefits to
10:16:08 5 granting the boundaries of the treaty the way they
10:16:12 6 were, but it doesn't change my opinion as to why
10:16:16 7 the boundaries were extended to the International
10:16:20 8 Border.

10:16:21 9 Q. I'm not asking if it changes your
10:16:24 10 opinion, only if it's possible that this is -- this
10:16:28 11 is something he would have seen value in, allowing
10:16:32 12 settlers to fish in the ceded waters?

10:16:34 13 A. Yes. To an extent I agree with
10:16:37 14 you, it's possible.

10:16:38 15 Q. I'd like to take you to another
10:16:43 16 document now, that's the Treaty of Greenville,
10:16:46 17 which is Exhibit 747.

10:16:53 18 MR. BROOKWELL: If we could scroll down
10:16:55 19 to Article 3. A little further, I think it carries
10:17:03 20 on to the next page.

10:17:10 21 BY MR. BROOKWELL:

10:17:10 22 Q. Is that too small for you to read?

10:17:12 23 A. No, no.

10:17:13 24 Q. Okay. So Article 3 talks about
10:17:18 25 the general boundary between the United States and

1 Indian lands; is that correct?

2 A. I'll need to read it a bit.

3 (Witness reviews document).

4 THE COURT: It's so tiny, Counsel...

5 MR. BROOKWELL: Sorry, yes. Why don't
6 we make it bigger and we can scroll when you would
7 like.

8 THE COURT: It's an improvement, but
9 it's still tiny.

10 MR. BROOKWELL: Can we zoom in a little
11 more?

12 THE WITNESS: Yes. The article does
13 refer to the boundary line, but goes on to describe
14 the area south of it in which the Native American
15 signatories agreed to cede lands.

16 BY MR. BROOKWELL:

17 Q. Okay. And if we can scroll to the
18 next page, which is the continuation of Article 3.
19 And if you'd like to take a moment to look at the
20 remainder of the article, I have a question for you
21 about the section in the green box.

22 A. (Witness reviews document).

23 Yes.

24 Q. So the section that's highlighted
25 in the green box says:

1 "And the said Indians will
2 allow to the people of the United
3 States a free passage by land and by
4 water, as one and the other shall be
5 found convenient through their
6 country, along the chain of posts
7 here before mentioned [...]"

8 You'll agree with me that this suggests
9 that at the time the Americans understood that they
10 needed a deal to have passage over land and water
11 within the Indian lands described in the treaty.

12 A. I'm not sure that "needed" is the
13 correct word. This is, as I indicated in my
14 testimony in-chief, it's a complex treaty with many
15 articles defining many provisions, but it's first
16 and foremost a treaty of peace. And this passage
17 is intended to ensure the peaceful travel through
18 the territory by the people of the United States.

19 It's simply adding further confirmation
20 by the Native American signatories that they will
21 allow people of the United States to travel through
22 the territory without hindrance.

23 MR. BROOKWELL: Can we scroll down to
24 Article 4, please?
25

1 BY MR. BROOKWELL:

2 Q. This is another lengthy article,
3 so if you'd like to take a moment to review it,
4 please go ahead.

5 A. (Witness reviews document).

6 Yes.

7 Q. In the first paragraph under
8 Article 4, it says:

9 "In consideration of the peace
10 now established, and of the cessions
11 and relinquishments of land made in
12 the preceding article by the said
13 tribes of Indians, and to manifest
14 the liberality of the United States,
15 as the great means of rendering this
16 peace strong and perpetual, the
17 United States relinquishes their
18 claims to all other Indian lands
19 northward of the River Ohio,
20 eastward of the Mississippi, and
21 westward and southward of the Great
22 Lakes, and the waters uniting them,
23 according to the boundary line
24 agreed on by the United States and
25 the King of Great Britain and the

10:23:05 1 Treaty of Peace made between them in
10:23:07 2 the year 1793."

10:23:12 3 And you'll agree with me that this
10:23:17 4 article is talking about the United States
10:23:21 5 relinquishing their claim to Indian lands; is that
10:23:28 6 right?

10:23:28 7 A. Yes. But however, the meaning of
10:23:37 8 the article is clarified much more extensively in
10:23:43 9 the following article, in Article 5.

10:23:57 10 Q. Let's have a look at Article 5.

10:24:05 11 And I want to -- have you had a moment
10:24:18 12 to review it?

10:24:20 13 A. Yes, I have.

10:24:21 14 Q. Now, I believe yesterday you said
10:24:29 15 that the treaty -- that you thought that the treaty
10:24:33 16 said that the Indian tribes acknowledged themselves
10:24:37 17 to be under the sovereignty of the United States;
10:24:41 18 do you recall giving that evidence?

10:24:43 19 In fairness, I believe you said you
10:24:46 20 didn't know the exact words at the time?

10:24:48 21 A. Right. Well, I didn't recall
10:24:51 22 them. I may have said "sovereignty", but I see
10:24:55 23 that in this article, it refers to the "protection
10:24:59 24 of the said United States and no other power
10:25:02 25 whatever".

1 Q. So I have a few more questions
2 about the Treaty of Greenville, but I want to be
3 very clear that the questions I'm asking -- I
4 understand that you're not a U.S. lawyer, and
5 you're not a legal historian. So my questions are
6 not going to be asking for legal opinions.

7 THE COURT: Well, I appreciate that
8 notice to the witness, but you also have to make
9 sure your questions don't ask those questions, sir.

10 MR. BROOKWELL: Yes, Your Honour.

11 THE COURT: You're treading pretty
12 close to the line this morning.

13 MR. BROOKWELL: I understand, Your
14 Honour. Thank you.

15 BY MR. BROOKWELL:

16 Q. Can we turn to page Roman Numeral
17 viii of Mr. Chartrand's report? It's page 9 of the
18 PDF.

19 And if you would take a moment to
20 review the paragraph that's under the green square.

21 A. (Witness reviews document).

22 Yes.

23 Q. So here you talk about how
24 provisions, Articles 3, 4 and 5 as a whole inform
25 how we should interpret Article 4; is that right?

10:27:30 1 A. Yes. They provide the context
10:27:41 2 within the treaty document for understanding
10:27:45 3 Article 4.

10:27:45 4 Q. And you go on to talk about the
10:27:48 5 consequences of these provisions for future
10:27:53 6 treaties; is that right?

10:27:54 7 A. Yes.

10:27:54 8 Q. And from my reading of your
10:27:59 9 report, you make this interpretation based on the
10:28:02 10 words of the treaty alone; is that right?

10:28:04 11 A. Yes, that's correct.

10:28:06 12 Q. So you'll agree with me that this
10:28:12 13 is not about what the U.S. intended or understood
10:28:15 14 based on the historical record?

10:28:19 15 A. I'm not sure I understand your
10:28:21 16 question.

10:28:21 17 Q. You haven't come to the conclusion
10:28:26 18 that Article 3, 4 and 5 need to be taken as a whole
10:28:30 19 to understand Article 4, based on the historical
10:28:37 20 record, but simply on the words of the treaty; is
10:28:42 21 that right?

10:28:42 22 A. No, I don't agree. My analysis of
10:28:47 23 the significance of the Treaty of Greenville in my
10:28:51 24 report, was contextualized within the broader
10:28:59 25 policy development of the American Government over

10:29:06 1 its Native Americans beginning in 1783 onwards.

10:29:12 2 So it's not as if in this passage,
10:29:16 3 which is focused on Article 4 and understanding it,
10:29:22 4 it's not as if this is devoid of historical context
10:29:27 5 in my report.

10:29:28 6 Q. But in your report, you don't have
10:29:32 7 historical source that says, "this is how the
10:29:36 8 Americans understood these provisions"; is that
10:29:41 9 right?

10:29:41 10 A. Well, the Americans drafted the
10:29:44 11 provisions. And subsequently, the provisions of
10:29:52 12 the Treaty of Greenville were referred to in some
10:29:55 13 of the prior land surrenders.

10:30:01 14 To my knowledge, the treaty was never
10:30:03 15 modified to reflect a different understanding at a
10:30:08 16 later point in time. So clearly, as I indicated, I
10:30:17 17 believe in-chief, or at least it's in my report,
10:30:20 18 General Wayne, who was commissioned to negotiate
10:30:25 19 this treaty, was given a very important task at the
10:30:33 20 time. And he would not have gone ahead and drawn
10:30:37 21 up the numerous detailed provisions of the treaty
10:30:44 22 without having had some prior instructions, and
10:30:53 23 without knowing or believing that these provisions
10:30:57 24 would not reflect the broader intentions of the
10:31:03 25 American Government.

1 Q. So I think my question is a little
2 bit more narrow than that, and it's that there's no
3 historical evidence that you cite that says: This
4 is how the Americans understood the treaty. That
5 they need to look at Article 3, 4 and 5 as a whole.

6 A. Oh, in that very specific point,
7 no. This reflects my analysis of the treaty
8 document.

9 However, to me, in writing this --
10 writing up this bullet, it was practically
11 self-evident that understanding the full meaning of
12 Article 4, requires contextualizing it within
13 articles 3 and 5 as well.

14 Q. So I think I understand that you
15 said this is your interpretation then?

16 A. Yes, this is my analysis.

17 Q. Let's turn to page 38 of your
18 report, which is, I believe 51 of the PDF. And I'd
19 like to ask you a question about --

20 MR. BROOKWELL: Can we zoom out a
21 little bit?

22 BY MR. BROOKWELL:

23 Q. I'd like to ask you a question
24 about what you've written on this page as a whole.
25 So I'd ask you to take a moment to review the page

10:32:57 1 either on the screen or in your document.

10:33:00 2 A. (Witness reviews document).

10:33:29 3 Yes.

10:33:30 4 Q. So here you look at Article 4 of
10:33:37 5 the treaty, and you say that it's incorrect to
10:33:39 6 interpret this article at face value; is that
10:33:45 7 right?

10:33:46 8 A. Well, I believe that I'm fairly
10:33:47 9 clear in my report. To take out of context a
10:33:52 10 reference to the United States relinquishing their
10:33:56 11 claims to all other Indian lands is a statement
10:34:01 12 that could be subject to multiple interpretations.

10:34:08 13 At the most extreme, relinquishing the
10:34:12 14 territory, meaning, the territory is now excluded
10:34:16 15 from United States jurisdiction. And so I go on in
10:34:22 16 my report to refer to Article 5 of the Treaty of
10:34:29 17 Greenville, which was written very explicitly to
10:34:32 18 provide a detailed clarification as to what that
10:34:37 19 meant.

10:34:41 20 Q. And again, here, you'll agree with
10:34:45 21 me that you're not looking at historical sources to
10:34:48 22 tell us, this is how the U.S. understood Article 4
10:34:53 23 and 5, but instead it's an interpretation based on
10:34:58 24 the words of the treaty?

10:35:00 25 A. Well, correct. But again, the

1 drafter of the treaty was the General Anthony Wayne
2 who was commissioned to negotiate that treaty.
3 He's an American Treaty Commissioner at this point.
4 Certainly, he understood what he wrote in the
5 treaty, and he would have drafted it very
6 explicitly so that it would be understood by other
7 officials in Washington.

8 I found no evidence that the provisions
9 of this treaty were subsequently modified. So that
10 tells me that once this treaty was signed, and
11 returned to the Secretary of War, it was
12 understood, and it's written, it was accepted.

13 Q. I'd like to take you to page 39 of
14 your report, it's page 52 of the PDF. And I'd like
15 to ask a question about the paragraph that has a
16 highlighted box in it. If you'd like to take a
17 moment to read that paragraph and any words around
18 it, please do so.

19 A. (Witness reviews document).

20 Yes.

21 Q. So this paragraph is in your
22 section about Treaty of Greenville; is that right?

23 A. Yes, that's correct.

24 Q. So when you're talking about the
25 Native American signatories, it's the Native

1 American signatories to that treaty?

2 A. Yes, correct.

3 Q. And here you say that:

4 "The signatories also certainly
5 understood that the British were
6 going to leave the American mainland
7 and relocate to other shores of the
8 Great Lakes, placing them now at a
9 practical level, under American
10 jurisdiction."

11 My question for you is, you have not
12 cited a primary or secondary source that would
13 support that this was the Native American view,
14 have you?

15 A. No, that's correct.

16 Q. So you'll agree with me that this
17 cannot be a certainty?

18 A. Well, at the time of the Treaty of
19 Greenville, the Jay Treaty had already been signed;
20 it was ratified in 1875. And certainly given the
21 close context in relationships between Native
22 Americans and the British in their forts on the
23 American mainland, there's no doubt in my mind that
24 they will have been told that the British were
25 relocating.

1 This is something that they will have
2 witnessed from the fact that they were in the habit
3 of going to the forts, engaging in trade at the
4 forts.

5 Q. I believe it was your evidence
6 yesterday that the British didn't leave the forts
7 in the United States right away after the
8 Revolutionary War; is that right?

9 A. Yes, that's correct.

10 Q. So it took some time for them to
11 leave the American mainland?

12 A. Well, the they remained there
13 until the Jay Treaty, which essentially gave the
14 British two years to be moved from American
15 territory. So from that point on, this is a very
16 narrow window of time, 1794 to 1796, in which the
17 removal will have taken place.

18 Q. In your view, this was enough to
19 say that the Native Americans would have understood
20 that they were now, on a practical level, under
21 American jurisdiction?

22 A. Well, I'm referring here as well
23 to the provisions of the Treaty of Greenville.

24 Q. Let's move to another area. I'd
25 like to talk to you about the Royal Proclamation.

10:40:01 1 So yesterday you told us that you
10:40:05 2 changed your opinion on whether the Royal
10:40:09 3 Proclamation was explained after reading Professor
10:40:13 4 Beaulieu's report; is that right?

10:40:17 5 A. Well, specifically, it was
10:40:19 6 explained at the 1764 Niagara Conference, yes.

10:40:22 7 Q. That's right, thank you.

10:40:26 8 I take it this report came to your
10:40:28 9 attention because it was provided to you by
10:40:31 10 Ontario?

10:40:31 11 A. Yes, that's correct.

10:40:34 12 Q. And at that time, what
10:40:36 13 instructions were you given by Ontario?

10:40:40 14 A. I was given no instructions. The
10:40:43 15 report of Professor Beaulieu was produced in
10:40:52 16 relation to another trial in which I gave evidence;
10:40:55 17 and I received his report as part of a general
10:41:00 18 process of disclosure of multiple expert reports
10:41:06 19 produced by all of the parties.

10:41:08 20 Q. So it wasn't evidence from this
10:41:11 21 trial?

10:41:12 22 A. This trial specifically?

10:41:14 23 Q. Yes.

10:41:14 24 A. No.

10:41:15 25 Q. Which trial was it from?

1 A. It was the now joint hearing of
2 the Red Rock First Nation and Whitesand First
3 Nation, as well as Restoule et al. vs. Canada and
4 Ontario.

5 To make a long story short, to simplify
6 it, it is the Robinson Treaties Annuities trial.

7 Q. I see. So when did you then
8 receive the report.

9 A. 2016, perhaps.

10 Q. Shortly after you wrote your
11 report in this case?

12 A. Sometime afterwards, I don't have
13 an exact date of receipt of that report.

14 Q. So in 2016 you read Professor
15 Beaulieu's report and your opinion changed at that
16 time?

17 A. To an extent that I'm no longer
18 prepared to present as a fact that Sir William
19 Johnson explained the proclamation at the 1764
20 Niagara Conference.

21 Q. My question is, did your opinion
22 change in 2016, or did it change more recently?

23 A. Oh, no. It changed upon reading
24 the report, reviewing the evidence that was cited.
25 I can add a bit.

1 At the trial, during my evidence, an
2 issue had arisen in relation to another report
3 prepared by an expert retained by the Robinson
4 Huron Treaty Plaintiffs in relation to Professor
5 Beaulieu's report.

6 The Plaintiff expert had come to the
7 opinion that a treaty had been made at Niagara at
8 the 1764 Conference. Professor Beaulieu disputed
9 that claim in his report. And I reviewed the
10 Plaintiff expert report as well, but did not come
11 to -- when asked, I indicated that I did not come
12 to any position as to whether a treaty had been
13 made in 1764.

14 So there was considerably more evidence
15 involved in that trial and to which I became aware.

16 Q. I'd like to move then to what you
17 have said in this report, about the Royal
18 Proclamation.

19 First, can you confirm for me that
20 pages 9 through 13 is the section where you
21 discussed the Royal Proclamation; is that correct?

22 A. (Witness reviews document).

23 Yes, that's correct.

24 Q. And I take it that in this
25 section, you're not intending to give a legal

1 opinion, but instead a summary of what the Royal
2 Proclamation says; is that correct?

3 A. Yes, that's correct.

4 Q. So let's please go to page 10 of
5 your report, it's page 23 of the PDF.

6 And the second paragraph of your report
7 on this page, you note that the Royal Proclamation
8 describes Indian territory as beyond the bounds of
9 the then existing colonies; is that right?

10 A. Yes, that's correct.

11 Q. If we can go to --

12 THE COURT: I'm not seeing that.

13 Did you say the second paragraph?

14 MR. BROOKWELL: Yes, sorry. I was
15 summarizing it, not reading it.

16 THE COURT: Oh, I see --

17 MR. BROOKWELL: The second paragraph.

18 THE COURT: -- I thought you were
19 reading.

20 Which paragraph do you regard as the
21 second paragraph?

22 MR. BROOKWELL: The second full
23 paragraph starting with: "The Royal Proclamation
24 then addressed the following broad questions of the
25 British relations [...]"

1 THE COURT: All right.

2 BY MR. BROOKWELL:

3 Q. If we can go to page 12, which is
4 PDF 25 and scroll down, please.

5 So beginning on page 12, and continuing
6 on to page 13, you have excerpted three paragraphs
7 of the Royal Proclamation; is that correct?

8 A. Yes, that's correct.

9 Q. And if we can scroll on to
10 page 13. Below that excerpt you write in your
11 report -- it's the first paragraph that begins
12 after the italics:

13 "The Royal Proclamation clearly
14 stipulated basic procedures for
15 treaty-making aimed at obtaining
16 cessions of Aboriginal lands within
17 the Indian Territory."

18 Do you see that?

19 A. Yes.

20 Q. I take it this is a summary about
21 the preceding paragraphs that you excerpted?

22 A. Yes, that's correct.

23 Q. Now, if we can scroll up, please.

24 And the second full paragraph of the
25 excerpted section that begins with, "And whereas,

1 great frauds and abuses [...]"

2 In that paragraph, if we look down to
3 line 5, and continuing on to line 9, it reads:

4 "[...] we do, with the advice
5 of our Privy Council strictly enjoin
6 and require, that no private person
7 do presume to make any purchase from
8 the said Indians of any lands
9 reserved to the said Indians, within
10 those parts of our colonies where,
11 we have thought proper to allow
12 settlement [...]"

13 So this section is talking about
14 procedures to follow for lands within the
15 boundaries of colonies; is that right?

16 A. Yes, that's correct.

17 Q. And as you've just told us, the
18 Royal Proclamation describes Indian territory as
19 outside the bounds of colonies; is that right?

20 A. Yes, that's correct.

21 Q. So to say here that the three
22 paragraphs above that you had cited, clearly
23 stipulate basic procedures for treaty-making aimed
24 at obtaining cessions of Aboriginal lands within
25 the Indian territory is not accurate, correct?

10:48:57 1 A. No. Because the middle paragraph
10:49:00 2 refers to the lands that have not been ceded were
10:49:03 3 purchased. "[...] which are still reserved to the
10:49:07 4 said Indians as aforesaid, forthwith".

10:49:18 5 So the last part of the paragraph that says:

10:49:22 6 "[...] if at any time any of
10:49:23 7 the said Indians should be inclined
10:49:25 8 to dispose of the said lands, the
10:49:27 9 same shall be purchased only for us,
10:49:30 10 in our name, at some public meeting
10:49:33 11 or assembly of the said Indians, to
10:49:34 12 be held for that purpose by the
10:49:36 13 Governor or Commander in-Chief of
10:49:38 14 our Colony [...]"

10:49:40 15 So this is referring to -- this is
10:49:43 16 including lands in the Indian territory.

10:49:53 17 Q. So when it's talking about "within
10:49:55 18 these parts of our colony", it's your view that
10:50:00 19 that includes the Indian lands; is that what you're
10:50:06 20 telling me?

10:50:07 21 A. Well, the British considered that
10:50:10 22 the Indian territory still -- I'm sorry, but I'm
10:50:18 23 dancing on the line of legal opinion -- they
10:50:23 24 considered that the Indian territory was still
10:50:27 25 within British jurisdiction, which is the basis on

1 which they asserted that unceded lands

2 "would be purchased only by us in her name",

3 meaning, the Crown.

4 Q. I don't want to venture into that,
5 but maybe --

6 Can I suggest to you that it's more
7 accurate to say that this section stipulates basic
8 procedures for treating-making for cession of lands
9 for Indians within the boundaries of colonies; it
10 doesn't explicitly talk about the Indian territory.

11 A. (Witness reviews document).

12 I would disagree. There's a reason as
13 to why I put the three paragraphs together in my
14 quotation. The basic purpose of the last part of
15 the third paragraph was to define conditions for --
16 under which portions of the Indian territory could
17 be ceded.

18 Q. Okay. That's fine.

19 A. I can clarify a bit with just
20 further reference to the last -- the very last part
21 of the last paragraph.

22 The Royal Proclamation as a whole is a
23 long and fairly complex government. The portion
24 that I referred to in my report, and that comes up
25 time and again in Indigenous rights cases, pertains

1 to the principles lead out for acquiring Indian
2 lands within the Indian territory.

3 At the time of the proclamation and
4 within the text of the proclamation itself, which
5 is not quoted in my report, are acknowledgements of
6 multiple British Colonies in Colonial governments
7 within North America. And these colonies are
8 geographically defined to varying extents of
9 precision, but here in the last -- the very last
10 line, there's a reference to "of Her Colony" and I
11 believe that this is a reference to the totality of
12 British colonies in North America.

13 Q. Okay. I'm content to leave that
14 there. I'd like to talk to you now about a
15 different part of your report. And it's your
16 summary that's on page Roman Numeral ix, which is
17 page 13 of the PDF. If you'd like to take a moment
18 to review that section of summary of conclusions.

19 A. (Witness reviews document).

20 Yes.

21 Q. So before I jump into what you put
22 there, I have a couple of preliminary questions.
23 You'll agree with me that what is inside of a
24 treaty, what is listed inside of an Aboriginal
25 treaty is dependent on the location of the treaty.

1 For example, if the treaty isn't a
2 mountainous or a desert area, there may not be
3 water bodies within the boundaries of the treaty?

4 A. That's possible.

5 Q. And you'll agree with me that to
6 some extent, the Territories that Native American
7 tribe may identify as their territory in the treaty
8 is context-specific. By that I mean, it depends on
9 where, geographically speaking, they live.

10 A. I'm not sure if I'm missing
11 something. It seems self-evident that Native
12 American tribes will have an understanding of the
13 location and extent of their traditional lands.
14 But by virtue of living within them.

15 Q. And within that understanding of
16 territory, it would be influenced by the type of
17 subsistence they had. For example, if they were
18 fishers, they would see water bodies as part of
19 their territory; is that fair?

20 A. Oh, to my knowledge, I can't sum
21 up a single example of an Indigenous society that
22 subsisted exclusively from fishing.

23 So we have to understand concepts of
24 Indigenous territoriality by reference to the full
25 weight of life of the people concerned. And that

10:57:19 1 includes use of multiple renewable resources.

10:57:25 2 Yesterday I alluded to the fact that --
10:57:29 3 to simplify the matter, with the Anishinaabe of the
10:57:36 4 Upper Great Lakes, they followed a yearly cycle of
10:57:39 5 resource harvesting. And so it's within that
10:57:45 6 context that the Native American understanding of
10:57:53 7 territoriality, should be framed.

10:58:01 8 Q. Okay. So I want to talk to you
10:58:06 9 then now, more specifically about these
10:58:09 10 conclusions. So you'll agree with me that by
10:58:12 11 design in your study, you ignored instances of
10:58:16 12 water enclosed within the perimeter of a treaty
10:58:21 13 boundary; is that right?

10:58:22 14 A. I didn't -- well, I ignored -- I
10:58:26 15 simply set those aside. And as I explained,
10:58:30 16 because that presented the danger of my getting
10:58:35 17 into legal opinion, as to whether -- and I want to
10:58:40 18 be specific, explicit about it.

10:58:45 19 I'm aware that a legal question has
10:58:48 20 arisen in instances in which a treaty that
10:58:54 21 explicitly and exclusively refers to a surrender of
10:58:58 22 land, also implicitly includes a surrender of land
10:59:04 23 under water where bodies of water are contained
10:59:08 24 within the treaty territory.

10:59:10 25 So that's the issue that I wanted to

10:59:14 1 steer clear of in my analysis. And I completely
10:59:18 2 agree with you, I know where you're going with
10:59:21 3 this, because it's so clear from the way in which I
10:59:27 4 operationalize my analysis, there will have been
10:59:34 5 many treaties of land surrenders within the over
10:59:38 6 200 treaties that I refer to, that included bodies
10:59:43 7 of water.

10:59:44 8 Q. In your research, were you able to
10:59:57 9 locate any U.S. Treaties that didn't have bodies of
11:00:01 10 water within its boundaries?

11:00:15 11 A. To be perfectly honest, I don't
11:00:25 12 recall. However, I'm prepared to stick my neck out
11:00:28 13 and present a tentative answer. Given the time
11:00:35 14 period of my analysis and the region within which
11:00:38 15 these treaties were made, they weren't extending,
11:00:44 16 for example, to the deserts of Nevada and
11:00:53 17 California. And given the region in which the
11:00:56 18 treaties were made, I suspect that nearly all, if
11:00:59 19 not all, will have included bodies of water.

11:01:16 20 Q. I'd like to shift and talk to you
11:01:18 21 a little bit about your CV. And I believe that's
11:01:28 22 Exhibit 4512.

11:01:29 23 MR. BROOKWELL: Can we have that up on
11:01:31 24 the screen, please?

11:01:31 25 BY MR. BROOKWELL:

11:01:47 1 Q. So my friend took you through this
11:01:49 2 yesterday, but I'd like to just confirm some facts.
11:01:55 3 You'll agree you don't hold any degrees in U.S.
11:01:58 4 history; is that right?

11:01:59 5 A. A degree, no.

11:02:01 6 Q. And from 1992 to 1999, you were a
11:02:08 7 sessional instructor and part-time professor; is
11:02:11 8 that right?

11:02:11 9 A. Yes, but at different universities.

11:02:19 10 Q. And in that time, you didn't teach
11:02:21 11 a course in U.S. history; is that right?

11:02:23 12 A. Not in U.S. history, but as I
11:02:27 13 indicated, the course that I taught at the
11:02:31 14 University of Ottawa, University of Ottawa dealt in
11:02:35 15 part with Native American tribes. And that
11:02:40 16 required a brief -- as I said, it was a survey
11:02:44 17 course. So this entailed a fairly superficial
11:02:51 18 overview of different Indigenous societies and
11:02:57 19 Native American tribes, and it did -- the portion
11:03:02 20 of the course that dealt with Native American
11:03:05 21 tribes did deal with the context at the time of
11:03:09 22 their relations with the American Government.

11:03:12 23 But in specific answer to your
11:03:16 24 question, no, it didn't include American history,
11:03:21 25 per se.

11:03:22 1 Q. If we can go to page 9 of the CV,
11:03:26 2 please. This is a list of your publications; is
11:03:34 3 that right?

11:03:34 4 A. Yes, that's correct.

11:03:35 5 Q. And from my review of these
11:03:38 6 publications, I see one that deals directly with
11:03:42 7 the United States, a struggle to enumerate First
11:03:46 8 Nations in Canada and the United States, 1870 to
11:03:50 9 1911. Do you see that? Published in -- sorry,
11:03:56 10 it's not in 2000.

11:03:59 11 A. Sorry, sir. This is not a
11:04:01 12 publication, per se, it's a peer review.

11:04:05 13 Q. Yes, I see it is --

11:04:07 14 A. An individual had submitted a
11:04:10 15 manuscript to the journal titled "Ethnohistory",
11:04:15 16 which is actually the founding journal of
11:04:18 17 ethnohistory in the field of research. But I don't
11:04:21 18 want to get into too much detail.

11:04:23 19 I had coauthored on article in that
11:04:27 20 journal with Dr. Gwen Reimer in 2004. And in 2014,
11:04:37 21 I was contacted by the editors of the journal
11:04:41 22 Ethnohistory to undertake a peer review of the
11:04:44 23 manuscript that was submitted to them. So that's
11:04:47 24 what that is.

11:04:48 25 Q. I see. And that peer review was

11:04:51 1 about census-taking; is that right?

11:04:56 2 A. It was about conclusions that
11:04:58 3 could be drawn from statistical enumerations of
11:05:05 4 First Nations in Canada and Native American tribes
11:05:08 5 in the United States and the latter 19th century
11:05:13 6 and first decade of the 20th.

11:05:17 7 So, yeah, I recall that the author
11:05:22 8 included analyses of American census information,
11:05:28 9 yes.

11:05:29 10 Q. And then is the -- it's not a
11:05:33 11 publication then, but that is from your CV, the one
11:05:38 12 title that deals directly with the United States?

11:05:41 13 A. Yes, I believe you're correct.

11:05:49 14 Q. So I understand -- sorry. I
11:05:58 15 understand from your report and your evidence
11:06:00 16 yesterday, that prior to preparing your report in
11:06:03 17 this trial, you reviewed U.S. treaties and
11:06:06 18 agreements for another trial; is that right?

11:06:08 19 A. Yes, this was the same -- actually
11:06:12 20 it was the original litigation in the Robinson
11:06:20 21 Treaties Annuities, which was focused on the
11:06:26 22 Robinson Superior Treaty.

11:06:29 23 Q. And this is where you gained the
11:06:33 24 familiarity with British and United States history
11:06:37 25 with respect to the northwest treaty area that

11:06:42 1 we've been discussing?

11:06:43 2 A. I had some prior background. But,
11:06:46 3 yes, I mean this is where in the period 2009-2010,
11:06:54 4 this is where I undertook a systematic and in-depth
11:07:02 5 review of the historical and ethnohistorical
11:07:04 6 literature. I had been familiar long before then
11:07:09 7 with some of the publications cited in my report.

11:07:15 8 For example, the earlier book by
11:07:18 9 Charles Cleland titled "Rights of Conquest", was a
11:07:24 10 source that I had cited in many early reports. The
11:07:32 11 articles in the Handbook of North American Indians
11:07:38 12 by Horsman and Prucha, I was also familiar with.

11:07:45 13 But, yes, as I indicated, and you are
11:07:48 14 correct, it was that, that exercise that led me to
11:07:54 15 conduct a systematic review of the literature.

11:07:58 16 Q. And the focus of that research was
11:08:04 17 about annuity provisions; is that right?

11:08:06 18 A. Of the treaty text, correct. I
11:08:08 19 didn't read the literature, historical and
11:08:13 20 ethnohistorical literature, solely with a view to
11:08:18 21 determine whether any of the authors had anything
11:08:21 22 to say about annuities, per se.

11:08:25 23 Now, there are very few references to
11:08:31 24 that focused issue. It was more to gain a broader
11:08:35 25 understanding of the development of Indian --

11:08:44 1 sorry, of American policy towards Native American
11:08:50 2 peoples and of treaty-making policy and practices.

11:08:55 3 Q. You'll agree the focus of your
11:08:58 4 research was not geopolitical relations between the
11:09:02 5 United States and Britain?

11:09:04 6 A. No, that is correct. I read that
11:09:07 7 in order to have satisfactory background by which I
11:09:11 8 could understand the treaty documents that I was
11:09:14 9 reading. And the treaty documents were reviewed
11:09:33 10 and analyzed by myself, with a specific focus on
11:09:40 11 annuity provisions. And with, actually, a very
11:09:44 12 particular issue in mind determining whether any of
11:09:51 13 the annuity provisions were indexed for inflation.

11:09:56 14 Q. I'd like to go to page 1 of your
11:09:59 15 CV. If you can scroll down.

11:10:07 16 The first entry under "Consulting
11:10:10 17 Experience" is listed as a joint expert's statement
11:10:16 18 for the Gull Bay First Nation case.

11:10:22 19 In your other points you indicate who
11:10:25 20 you're under contract to, but you don't here. So
11:10:29 21 are you able to tell me who you were retained by in
11:10:32 22 this case?

11:10:34 23 A. By the parties as a whole. This
11:10:43 24 is actually parallel to an earlier joint report
11:10:46 25 which I coauthored in 2015, in relation to a claim

1 by the Missanabie Cree First Nation towards reserve
2 entitlement under Treaty 9.

3 Q. This is on page 2?

4 A. This is on page 2, yes.

5 Q. If we can turn to page 2.

6 A. And you'll see that I have the
7 same, the same notation that doesn't identify a
8 particular client, but merely identifies the
9 coauthors.

10 And in both instances, the coauthors
11 were the respective experts retained by the
12 parties.

13 Q. I see. So both instances these
14 coauthors were retained by the separate parties,
15 but then prepared a joint report; is that right?

16 A. Well, we did it together.

17 Q. You prepared it together?

18 A. Yes.

19 Q. But you were paid separately?

20 A. Yes, correct.

21 Q. Okay. So in these two instances,
22 who were you paid by?

23 A. By Ontario.

24 Q. Okay. Now yesterday my friend
25 brought you through, in some detail, your

1 consulting experience, and brought you to some
2 other parties that have employed you, other than
3 Ontario.

4 I just want to focus on one section.
5 From 2011 then to date, is it correct that you have
6 only been retained by Ontario for consulting
7 purposes?

8 A. Yes, that's correct.

9 MR. BROOKWELL: Thank you,
10 Mr. Chartrand. Those are my questions.

11 THE COURT: Re-examination?

12 MS. MC RANDALL: No, Your Honour.

13 THE COURT: Thank you, sir. That
14 concludes your testimony, you can step down now out
15 of the witness box.

16 THE WITNESS: Thank you, Your Honour.

17 (Mr. Chartrand was excused from the
18 proceedings).

19 THE COURT: Ms. McRandall, what is the
20 reorganized plan that you mentioned this morning?

21 MS. MC RANDALL: Your Honour, we are
22 prepared to call the next witness, Mr. Mark
23 Muschett today. Ms. Lepad will be examining him on
24 direct.

25 THE COURT: I'm noticing she's not in

11:13:41 1 the courtroom.

11:13:42 2 MS. MC RANDALL: Yes. Mr. Muschett was
11:13:43 3 in Toronto yesterday, but he had to return home to
11:13:46 4 Peterborough last night.

11:13:47 5 He's on his way back, he may actually
11:13:50 6 be in Toronto at this point. But we were going to
11:13:53 7 ask that he be allowed to begin his examination
11:13:55 8 after the lunch break.

11:13:57 9 For one thing, the Plaintiffs are, I
11:13:59 10 believe it was 12 documents yesterday that are
11:14:01 11 several hundreds pages in length, and Ms. Lepan
11:14:04 12 would like a chance to review those documents at
11:14:07 13 least briefly with Mr. Muschett before he begins
11:14:10 14 his testimony.

11:14:11 15 THE COURT: Are those new productions?

11:14:13 16 MS. MC RANDALL: Yes. They were
11:14:13 17 produced, I believe yesterday around 10 to
11:14:17 18 4:00 p.m.

11:14:19 19 THE COURT: Mr. Brookwell, what is the
11:14:21 20 explanation for that?

11:14:22 21 MR. BROOKWELL: I am going to let
11:14:24 22 Ms. Nerland speak to that, it's her witness.

11:14:27 23 THE COURT: That's perfectly fine.

11:14:29 24 MS. NERLAND: Thank you, Your Honour.

11:14:30 25 We also received some new productions

1 from Ontario in relation to this witness on, I
2 believe Thursday of last week. And so we had to
3 consult with our technical people about their
4 documents; this resulted in us getting some new
5 documents, and so here we are with a late
6 production, unfortunately.

7 THE COURT: Well, the good news is that
8 Ontario is not objecting, except for asking for
9 more time which is not much different from what the
10 stance was that the Plaintiffs' took in their case
11 and the circumstances I will take the same
12 approach, which is, I will give them some more
13 time.

14 Are we going to have this problem with
15 each of the witnesses, or is it just this one?

16 MS. NERLAND: I mean, I don't expect it
17 will be this short of notice for all the witnesses.
18 But there may be a few new documents that arise as
19 we prepare the witnesses.

20 THE COURT: If you would do your best
21 to do that preparation such that there aren't
22 short-notice documents. I'm sure you're trying.

23 MS. NERLAND: Yes, Your Honour.

24 THE COURT: Thank you.

25 Ms. McRandall. So I take it that's

1 Mr. Gould?

2 MS. MC RANDALL: That is Mr. Muschett.

3 THE COURT: Sorry, I have the wrong
4 page open, Mr. Muschett. He will begin at
5 2:15 p.m.

6 Is there any more you can tell me about
7 the plan after he's finished?

8 MS. MC RANDALL: We have spoken to our
9 other witnesses. Ms. Keyes will be prepared to
10 start tomorrow morning, or some other time tomorrow
11 in the event that Mr. Muschett --

12 THE COURT: She was meant to start
13 tomorrow morning -- no, she wasn't. All right.
14 That's good news if she's able to start tomorrow
15 morning.

16 MS. MC RANDALL: And then the following
17 witness will also be prepared to attend early.

18 THE COURT: Ms. O'Neill. So you'll
19 move her forward hopefully as well.

20 MS. MC RANDALL: Yes.

21 THE COURT: That's very helpful. So
22 we'll adjourn now until 2:15 p.m.

23 -- REPORTER'S NOTE: Proceedings were
24 adjourned at 11:18 to 2:15 p.m.

25 THE COURT: Please go ahead.

02:17:04 1 MS. LEPAN: Good afternoon, Your
02:17:05 2 Honour. Ontario would like to call Mark Muschett
02:17:07 3 as the next witness.
02:17:13 4 THE REGISTRAR: Good afternoon, sir.
02:17:21 5 THE WITNESS: Good afternoon.
02:17:22 6 THE REGISTRAR: Would you like to make
02:17:23 7 an oath on the Holy Book or make a solemn
02:17:27 8 affirmation?
02:17:27 9 THE WITNESS: A solemn affirmation,
02:17:29 10 please.
02:17:29 11 THE REGISTRAR: Would you please state
02:17:30 12 and spell your first and last name for the record.
02:17:33 13 THE WITNESS: Mark Muschett,
02:17:33 14 M-U-S-C-H-E-T-T.
02:17:43 15 MARK MUSCHETT: AFFIRMED.
02:17:50 16 THE COURT: Mr. Muschett, you need to
02:17:53 17 keep your voice up. If you're closer to the
02:17:55 18 microphone that will help, so that even the lady in
02:17:58 19 the back row can hear you; all right?
02:17:59 20 THE WITNESS: I will, thank you.
02:18:01 21 THE COURT: Thank you.
02:18:02 22 EXAMINATION IN-CHIEF BY MS. LEPAN:
02:18:03 23 Q. Good afternoon, Mr. Muschett.
02:18:04 24 A. Good afternoon.
02:18:05 25 Q. I'm going to begin by asking you a

02:18:09 1 few questions to introduce you to the Court. I
02:18:12 2 understand you work at the Ministry of Natural
02:18:15 3 Resources and Forestry?

02:18:15 4 A. I do.

02:18:15 5 Q. And for clarity sake today, I may
02:18:17 6 refer to the Ministry of Natural Resources and
02:18:20 7 Forestry as "MNRF".

02:18:22 8 When did you begin working at MNRF?

02:18:24 9 A. 1988.

02:18:26 10 Q. And in what capacity?

02:18:27 11 A. I was a Fish and Wildlife
02:18:29 12 Information Clerk at the MNR Information Centre.

02:18:33 13 Q. What were you doing in that role?

02:18:35 14 A. I answered general inquiries from
02:18:37 15 the public about fishing and hunting.

02:18:39 16 Q. What position did you hold
02:18:41 17 following that?

02:18:42 18 A. As a Fisheries Regulation Officer,
02:18:46 19 with Fish and Wildlife Branch.

02:18:48 20 THE COURT: Can I just interrupt you.
02:18:50 21 Does anyone else have a problem with their iPad.

02:20:25 22 -- OFF THE RECORD DISCUSSION --

02:20:26 23 THE COURT: Go ahead.

02:20:29 24 BY MS. LEPAN:

02:20:29 25 Q. So you mentioned you were a

02:20:31 1 Fisheries Regulation Officer?

02:20:32 2 A. Yes.

02:20:33 3 Q. Can you describe what you did in
02:20:35 4 that role?

02:20:35 5 A. I was responsible for coordinating
02:20:37 6 changes to Fisheries Regulations in both Provincial
02:20:41 7 and Ontario Fishery Regulations, the Federal regs
02:20:45 8 for the Province.

02:20:46 9 Q. And what position did you hold
02:20:48 10 following that?

02:20:49 11 A. I was an Aquaculture Policy
02:20:53 12 Biologist with MNR's Fish Culture Section.

02:20:59 13 Q. What did you do in that role?

02:21:00 14 A. I was responsible for development
02:21:01 15 of policy to support the commercial aquaculture
02:21:04 16 industry in Ontario, including Great Lakes cage
02:21:08 17 culture.

02:21:08 18 Q. And what is aquaculture?

02:21:11 19 A. It's the growing of fish in
02:21:14 20 containment for either food or other purposes.

02:21:17 21 Q. What is your current job title?

02:21:21 22 A. I'm the Indigenous Liaison for
02:21:22 23 Fish and Wildlife Services Branch.

02:21:24 24 Q. When did you begin working in that
02:21:27 25 role?

02:21:27 1 A. In 2004.

02:21:31 2 Q. Can you describe what an
02:21:32 3 Indigenous Liaison does?

02:21:33 4 A. Yes. It was kind of two parts to
02:21:35 5 it. One is, I support branch staff in their work
02:21:39 6 with Indigenous communities. I'm also a point of
02:21:42 7 contact with Indigenous communities in the
02:21:45 8 Ministry.

02:21:45 9 I also work internally from a policy
02:21:49 10 coordination perspective to ensure that we are
02:21:52 11 following corporate policies with respect to how we
02:21:56 12 work with Indigenous communities.

02:21:58 13 Q. And how, if at all, did your
02:22:00 14 previous work at MNRF inform your current work as
02:22:05 15 an Indigenous Liaison?

02:22:05 16 A. Those positions gave me a really
02:22:08 17 good background in terms of their regulatory
02:22:11 18 environment, as well as the policy environment for
02:22:13 19 fisheries.

02:22:14 20 Q. And you mentioned that the branch
02:22:17 21 you work in is the Fish and Wildlife Conservation
02:22:20 22 Branch?

02:22:20 23 A. Yes. Fish and Wildlife Services
02:22:23 24 Branch.

02:22:24 25 Q. And what is that branch

02:22:25 1 responsible for?

02:22:26 2 A. That branch has the Great Lakes
02:22:28 3 management units. There's one for Lake Eerie, one
02:22:32 4 for Lake Ontario, one for the Upper Lakes, which
02:22:32 5 covers Lake Huron and Lake Superior.

02:22:38 6 It has the Provincial Fish Culture
02:22:40 7 Program, as well as our Marketing Client Services
02:22:43 8 and Licensing Program that manages the
02:22:46 9 administration and issuance of Fish and Wildlife
02:22:48 10 Licenses in the province.

02:22:50 11 Q. What does the Upper Great Lakes
02:22:56 12 Management Unit do?

02:22:56 13 A. Upper Great Lakes Management Unit,
02:22:58 14 as I said, it covers Lake Huron and Lake Superior
02:23:00 15 and it has the lead fisheries management for the
02:23:04 16 Province.

02:23:04 17 Q. What do you mean when you say
02:23:07 18 "lead fisheries management"?

02:23:09 19 A. The unit is responsible -- and
02:23:12 20 I'll focus on Lake Huron -- it is responsible for
02:23:14 21 commercial licensing, aquaculture licensing,
02:23:18 22 stocking licenses. It does management planning,
02:23:22 23 things like, as an example, lake trout management
02:23:26 24 plans.

02:23:26 25 It does assessment and monitoring of

02:23:29 1 the fisheries. And there's an outreach program in
02:23:32 2 terms of both Indigenous communities, stakeholders
02:23:35 3 and general public.

02:23:37 4 Q. And you mentioned that the Upper
02:23:42 5 Great Lakes Management Unit covers Lake Huron; what
02:23:43 6 did you mean by that?

02:23:45 7 A. It's responsible for the waters of
02:23:49 8 Lake Huron from a fisheries perspective.

02:23:52 9 Q. What is your educational background?

02:23:55 10 A. I've Bachelor of Science in biology.

02:23:58 11 Q. What role does your education play
02:24:01 12 in your current position?

02:24:02 13 A. It helps me to understand the
02:24:07 14 technical discussions that are led by our
02:24:12 15 biologists, and also be in a better position to
02:24:16 16 communicate them in our discussions with Indigenous
02:24:20 17 communities.

02:24:20 18 Q. Are you a fisheries biologist?

02:24:22 19 A. I have a biology degree, but I'm
02:24:24 20 not what I'd call a practicing biologist.

02:24:27 21 Q. Are you a fisheries scientist?

02:24:29 22 A. No.

02:24:29 23 Q. So let's turn now to talk about

02:24:33 24 MNRF's management of the Lake Huron Fishery.

02:24:36 25 What is the Lake Huron Fishery?

02:24:38 1 A. So, it's two things that I can
02:24:42 2 focus on.

02:24:43 3 One is people sometimes think of the
02:24:46 4 fishery as just generally that entire system of
02:24:50 5 fish in the lake, it's an ecosystem concept.
02:24:53 6 People also think about fishery in terms of the
02:24:56 7 users. And so we have Indigenous foods,
02:24:58 8 subsistence ceremonial fishing, we have commercial
02:25:01 9 fishery, and we have a recreational fishery.

02:25:04 10 Q. Who utilizes the Lake Huron Fishery?

02:25:07 11 A. There is a large number of First
02:25:09 12 Nations, Métis communities, general public, it's
02:25:14 13 also used from a commercial perspective, both for
02:25:17 14 fishing and aquaculture.

02:25:20 15 Q. And what activities does MNRF
02:25:25 16 engage in to manage the Lake Huron Fishery?

02:25:28 17 A. So the Upper Great Lakes
02:25:31 18 Management Unit, as I said, has a lead role in
02:25:33 19 terms of planning, licensing, issuance of
02:25:36 20 commercial licenses. Sport fishing regulations,
02:25:40 21 commercial fishing regulations, commercial fishing
02:25:42 22 licenses, aquaculture licenses.

02:25:45 23 We also work on -- it's a management
02:25:49 24 plan. So things like Lake Trout Restoration Plan,
02:25:52 25 and the Upper Great Lakes Management Unit

02:25:57 1 participates, as the Ministry of Natural Resources
02:26:01 2 and Forestry representative at the Great Lakes
02:26:03 3 Fisheries Commission.

02:26:03 4 In addition to the Upper Great Lakes
02:26:10 5 Management Unit, we have other branches that are
02:26:11 6 involved in fisheries on the Great Lakes. So for
02:26:14 7 Lake Huron, we have a science and research branch
02:26:17 8 which contributes scientific expertise that helps
02:26:19 9 out in management decisions.

02:26:20 10 And we have an enforcement branch,
02:26:24 11 which has the lead role for on-water enforcement on
02:26:29 12 commercial and recreational fishing.

02:26:32 13 Q. You mentioned the Great Lakes Fish
02:26:35 14 and Wildlife Commission. Since you mentioned it,
02:26:37 15 can you describe at a very high level what that is?

02:26:39 16 A. Yes. It's the Great Lakes
02:26:42 17 Fisheries Commission, and it was established in, I
02:26:44 18 think around 1954 through the Great Lakes
02:26:47 19 Convention, with a goal of coordinating management
02:26:53 20 across the lakes and across jurisdictions.

02:26:57 21 The thing to keep in mind is that the
02:27:00 22 Great Lakes have both Canadian and U.S. waters.
02:27:04 23 And so the Great Lakes Fisheries Commission played
02:27:08 24 a role in ensuring that there was coordination
02:27:11 25 between agencies, that decisions were made on a

02:27:13 1 consensus basis, established objective of an
02:27:18 2 ecosystem management approach to the lake, and has
02:27:23 3 a couple of other roles.

02:27:24 4 One is, coordination of Great Lakes
02:27:29 5 research, and the second one is management and
02:27:33 6 control of invasive sea lamprey.

02:27:40 7 Q. So we'll come back to that later.

02:27:44 8 Turning back to MNRF's management of
02:27:47 9 the Lake Huron Fishery, is anyone else involved in
02:27:49 10 management?

02:27:49 11 A. Yes. As I mentioned the
02:27:52 12 binational commitments through the Great Lakes
02:27:55 13 Fisheries Commission. And we said the lake manager
02:27:58 14 and technical staff participate in Lake Management
02:28:02 15 Committees. And so there's a Lake Huron Management
02:28:04 16 Committee and a Lake Huron Technical Committee
02:28:06 17 established under the Great Lakes Fisheries
02:28:09 18 Commission.

02:28:09 19 We also do a lot of outreach with
02:28:14 20 Indigenous communities. And so there's a role for
02:28:17 21 First Nations and Métis to contribute to the
02:28:20 22 management of the fishery on Lake Huron.

02:28:22 23 Q. And what are the primary goals of
02:28:26 24 MNRF with respect to management of the Lake Huron
02:28:29 25 Fishery?

02:28:29 1 A. So we manage it from an ecosystem
02:28:32 2 approach, focused on making decisions based on
02:28:37 3 sound science, and that's both policy and -- policy
02:28:42 4 and management decisions.

02:28:44 5 I'm trying to ensure that we have good
02:28:47 6 outreach to Indigenous communities, stakeholders
02:28:50 7 and the general public. And that the fisheries are
02:28:52 8 managed in a way that maximizes benefits for
02:28:57 9 Ontarians.

02:28:58 10 Q. How does MNRF allocate or
02:29:03 11 prioritize fishing resources within the Lake Huron
02:29:07 12 Fishery?

02:29:07 13 A. We're guided by caselaw direction.
02:29:13 14 So our approach to allocation is that after
02:29:15 15 conservation, our first priority is Aboriginal and
02:29:19 16 Treaty Rights. And after Aboriginal and Treaty
02:29:22 17 Rights have been satisfied, then there's general,
02:29:25 18 commercial and recreational fishing.

02:29:27 19 Q. You mentioned that one of the
02:29:32 20 goals is maximizing benefits for Ontarians; what
02:29:35 21 did you mean by that?

02:29:36 22 A. So that the lake, lake is managed,
02:29:39 23 keeping in mind there's benefits that are provided
02:29:42 24 by things like commercial fishing, which provides
02:29:45 25 wholesome food source. Recreational fishing, which

1 provides opportunities for enjoyment on the waters.

2 And the importance of subsistence ceremonial
3 fishing as well.

4 Q. Are there any other benefits?

5 A. Cage aquaculture is another one
6 that I said it is important.

7 Q. What is the economic value of the
8 Lake Huron Fishery?

9 A. So the commercial fishery has a
10 landed value of around 4.5 million annually. It
11 has broader economic benefits as well in terms of
12 spinoff from that. But the number that I have is
13 just the landed value of that catch. And that
14 means the value -- the price that the fisherman
15 gets when those fish are sold at the point of
16 landing the fish.

17 Q. And what's the economic value of
18 the recreational Lake Huron Fishery?

19 A. I have some general awareness of
20 some numbers that were collected in 2010. These
21 are numbers for Lake Huron as a whole, and it's
22 around 60 million in direct -- there's things like
23 lodging, travel, food associated with fishing. And
24 another 92 or 3 million in major purchases directly
25 attributable to recreational fishing.

02:31:19 1 Q. So you mentioned that one of the
02:31:21 2 activities that MNRF engages in with respect to
02:31:25 3 management of the Great Lakes Fishery is research
02:31:28 4 and assessment. So I want to turn now and talk
02:31:31 5 more about that.

02:31:31 6 A. Okay.

02:31:32 7 Q. What type of research and
02:31:34 8 assessment is conducted to help manage the Lake
02:31:38 9 Huron Fishery?

02:31:38 10 A. So the Upper Great Lakes Unit and
02:31:43 11 Lake Huron Management Unit does regular commercial
02:31:45 12 fish assessment. Where it's collecting data from,
02:31:50 13 I guess the amount of nets that were set; how long
02:31:53 14 they were set; type of catch that's coming from
02:31:56 15 those nets. That's used for managing the
02:31:58 16 commercial fishery.

02:32:00 17 We have something called "long-term
02:32:02 18 index netting", which are nets that are repeated
02:32:05 19 over a very long time series to collect information
02:32:09 20 about fish populations as trends over time.

02:32:13 21 We have other types of assessment
02:32:14 22 that's going on in the near shore areas, to look at
02:32:18 23 biodiversity. Species like walleye, and a number
02:32:26 24 of other ongoing assessment programs.

02:32:28 25 We also have a science and research

02:32:31 1 branch that does targeted focus research on various
02:32:35 2 issues of concern on the Great Lakes.

02:32:38 3 Q. So that research and assessment
02:32:42 4 that you've mentioned; where does that occur?

02:32:44 5 A. It's occurring throughout the
02:32:45 6 waters of Lake Huron.

02:32:46 7 Q. And has research and assessment
02:32:50 8 ever been conducted in the waters of the Saugeen
02:32:55 9 Ojibway Nations Traditional Territory?

02:32:56 10 A. It has.

02:32:56 11 Q. And is research and assessment
02:33:00 12 currently being conducted?

02:33:01 13 A. It has. Or is, sorry.

02:33:03 14 Q. What access, if any, is required
02:33:06 15 to Lake Huron in order to conduct the research and
02:33:09 16 assessment that you've mentioned?

02:33:11 17 A. Most of that work is taking place
02:33:15 18 from small and large vessels. And so those vessels
02:33:19 19 do need to access the waters in order to conduct
02:33:22 20 the research. Some of it is also taking place by
02:33:25 21 walking through near shore areas to set smaller
02:33:29 22 nets. So, again, we physically need to be able to
02:33:32 23 access the lake to conduct the research and
02:33:36 24 assessment.

02:33:36 25 Q. And how is the research and

02:33:43 1 assessment information that MNRF collects regarding
02:33:44 2 Lake Huron used?

02:33:44 3 A. It's used to make management
02:33:46 4 decisions with respect to recreational fishing
02:33:50 5 regulations, with respect to development of
02:33:52 6 management plans. It's used on an annual basis to
02:33:56 7 adjust commercial quotas. And it's shared broadly
02:34:01 8 back to the Great Lakes Fisheries Commission to
02:34:07 9 First Nations Métis, the general public, to work
02:34:10 10 towards our goal of better informed partners.

02:34:14 11 Q. So let's shift now to talk more
02:34:18 12 about the Great Lakes Fishery Commission.

02:34:24 13 What role does MNRF play with respect
02:34:30 14 to the Great Lakes Fishery Commission?

02:34:31 15 A. So for each of the Lake Management
02:34:34 16 Committees, MNRF has representatives that sit on
02:34:40 17 the Lake Management Committees. We also have
02:34:44 18 representatives sitting on the technical committees
02:34:46 19 and science committees.

02:34:47 20 We work with the Great Lakes Fisheries
02:34:56 21 Commission towards the shared binational goals to
02:34:59 22 manage in a ecologically sustainable way and
02:35:02 23 ecosystem approach, as I mentioned.

02:35:04 24 There are commitments around
02:35:06 25 information sharing. There's commitments to

02:35:08 1 consensus building and, yeah, that's...

02:35:15 2 Q. So you mentioned "ecosystem
02:35:17 3 approach"; what do you mean by that?

02:35:19 4 A. So it means rather than focusing
02:35:21 5 on just a particular species, it's looking at the
02:35:24 6 lake as a whole, and looking at not just the fish,
02:35:28 7 but the habitat, the corresponding water quality,
02:35:31 8 much more broadly the entire overall functioning of
02:35:35 9 the lake.

02:35:35 10 Q. I'd like to now pull up a document
02:35:38 11 at SC1667 which is titled, "A Joint Strategic Plan
02:35:44 12 for Management of the Great Lakes Fisheries".

02:35:49 13 Do you recognize this document?

02:35:50 14 A. I do.

02:35:50 15 Q. Can you describe at a high level
02:35:52 16 what this document is?

02:35:53 17 A. This is the current document that
02:35:56 18 sets out the binational commitments of the Great
02:36:02 19 Lakes Fisheries Commission. The management
02:36:04 20 agencies around the Great Lakes are signatory to
02:36:07 21 it, and it sets out those high-level commitments I
02:36:10 22 spoke of earlier, in terms of the consensus-building,
02:36:16 23 science-based ecosystem management, information
02:36:19 24 sharing approach.

02:36:22 25 Q. And what commitments, if any, has

02:36:26 1 Ontario entered into under this agreement or this
02:36:28 2 strategy?

02:36:29 3 A. This is what drives our commitment
02:36:36 4 to participate at the Great Lakes, at the Lake
02:36:41 5 Management Committees.

02:36:41 6 We've developed things like lake trout
02:36:44 7 restoration plans under this agreement. And
02:36:49 8 there's consistent information sharing, and
02:36:52 9 ensuring that through the Great Lakes Fisheries
02:36:56 10 Commission Committees, that there's
02:36:58 11 consensus-building in our management decisions.

02:37:00 12 Q. The strategic plan mentions
02:37:07 13 sea lamprey -- I'll rephrase. Are there invasive
02:37:20 14 species in the Great Lakes?

02:37:22 15 A. There are.

02:37:23 16 Q. And what are those?

02:37:24 17 A. So I'm going to take a queue off
02:37:28 18 of sea lamprey. And one of the original points of
02:37:33 19 the commission when it was formed in 1954, was to
02:37:37 20 combat the invasion sea lamprey, that continues to
02:37:41 21 be a primary function of the commission. But there
02:37:44 22 are a number of other invasive species in the Great
02:37:48 23 Lakes.

02:37:48 24 Right now, a couple of the ones we're
02:37:51 25 significantly concerned about are invasive mussels.

02:37:54 1 And it's both through the Great Lakes Fisheries
02:38:00 2 Commission and much more broadly, it's a
02:38:05 3 multi-agency effort in terms of surveillance,
02:38:08 4 monitoring and education; as well as working to
02:38:15 5 close some of the pathways for a new invasive
02:38:19 6 species coming into the Great Lakes.

02:38:22 7 Q. So now I want to shift and talk
02:38:25 8 about the Saugeen Commercial Fishing Agreement with
02:38:30 9 MNRF. I'd like to bring up a document --

02:38:36 10 MS. LEPAN: Your Honour, I would ask
02:38:38 11 that this be marked as the next exhibit.

02:38:41 12 THE COURT: Mr. Registrar.

02:38:42 13 THE REGISTRAR: Exhibit No. 4522.

02:38:45 14 EXHIBIT NO. 4522: A Joint Strategic
02:38:45 15 Plan for Management of the Great Lakes
02:38:45 16 Fisheries.

02:38:45 17 THE COURT: Just a reminder, Counsel.

02:38:48 18 The objective of asking at the
02:38:51 19 beginning and not the end.

02:38:53 20 MS. LEPAN: Yes, I will keep that in
02:38:54 21 mind.

02:38:57 22 BY MS. LEPAN:

02:38:57 23 Q. So I'd like to bring up a
02:38:59 24 document, SC1028. This is titled, "The Substantive
02:39:06 25 Commercial Fishing Agreement Between the Chippewas

02:39:08 1 of Nawash Unceded First Nation and Saugeen First
02:39:15 2 Nation and Her Majesty the Queen in Right of
02:39:17 3 Ontario".

02:39:17 4 THE COURT: Dated?

02:39:17 5 MS. LEPAN: That date at the bottom of
02:39:20 6 the page is October 28, 2012.

02:39:21 7 THE COURT: A number of these have
02:39:23 8 already been marked. Are you saying this one has
02:39:26 9 not been?

02:39:27 10 MS. LEPAN: I believe this document has
02:39:29 11 not been marked as an exhibit previously.

02:39:37 12 A moment's indulgence.

02:39:49 13 BY MS. LEPAN:

02:39:49 14 Q. Do you recognize this document?

02:39:50 15 A. I do.

02:39:51 16 Q. And can you describe what this
02:39:53 17 document is?

02:39:53 18 A. This is the current Commercial
02:39:56 19 Fishing Agreement entered into in 2013 between MNR
02:40:01 20 and SON.

02:40:03 21 MS. LEPAN: Your Honour, I would ask
02:40:04 22 that this document be marked as the next exhibit.
02:40:07 23 From our understanding, it has not previously been
02:40:10 24 marked as an exhibit.

02:40:11 25 THE COURT: Mr. Registrar.

02:40:13 1 THE REGISTRAR: Exhibit No. 4523.

02:40:17 2 EXHIBIT NO. 4523: The Substantive

02:40:17 3 Commercial Fishing Agreement Between

02:40:17 4 the Chippewas of Nawash Unceded First

02:40:17 5 Nation and Saugeen First Nation and Her

02:40:17 6 Majesty the Queen in Right of Ontario,

02:40:19 7 dated October 28, 2012.

02:40:19 8 BY MS. LEPAN:

02:40:23 9 Q. I'd like to bring up another

02:40:25 10 document, SC1029 which is titled, "Amending

02:40:32 11 Agreement to the Substantive Commercial Fishing

02:40:35 12 Agreement."

02:40:35 13 THE COURT: Dated?

02:40:36 14 MS. LEPAN: February 15th and

02:40:39 15 February 20th of 2018.

02:40:40 16 THE COURT: I'm not seeing any dates.

02:40:42 17 MS. LEPAN: So if you scroll down to

02:40:44 18 the very bottom of the agreement.

02:40:49 19 THE COURT: There is a single date at

02:40:54 20 the bottom.

02:40:55 21 MS. LEPAN: There's also a further date

02:40:57 22 that's given in the first paragraph, so if we

02:41:00 23 scroll up to the top.

02:41:01 24 THE COURT: What is the date of the

02:41:02 25 document, Counsel?

02:41:03 1 MS. LEPAN: It says that the --
02:41:07 2 February 25th, 2013.

02:41:08 3 THE COURT: All right.

02:41:17 4 BY MS. LEPAN:

02:41:17 5 Q. Do you recognize this document?

02:41:18 6 A. I do.

02:41:19 7 Q. And can you describe what this
02:41:20 8 document is?

02:41:21 9 A. This is the extending agreement
02:41:23 10 that was entered into in February of 2018 that
02:41:27 11 extended the 2013 agreement that you had previously
02:41:30 12 pulled up.

02:41:32 13 MS. LEPAN: Your Honour, I misspoke on
02:41:34 14 the record. The date of the document is not
02:41:36 15 February 25, 2013. I made an error there.

02:41:43 16 It's either February 15th or
02:41:45 17 February 20th, 2018. My understanding is that the
02:41:47 18 document was executed at different dates. So the
02:41:52 19 reference to February 25th --

02:41:54 20 THE COURT: Well, Counsel.

02:41:55 21 MS. LEPAN: Yes?

02:41:56 22 THE COURT: I'm looking at the screen.
02:42:01 23 The first preamble, the first 2-1 date, that is the
02:42:06 24 incorrect date.

02:42:08 25 MS. LEPAN: That is the date of the

02:42:09 1 original Substantive Commercial Fishing Agreement.

02:42:12 2 THE COURT: I haven't read this
02:42:13 3 agreement. The fact that it is signed on two
02:42:15 4 different days, does not necessarily affect the
02:42:18 5 date of the agreement.

02:42:20 6 If you are unsure of the date of the
02:42:23 7 agreement, because you haven't had a chance to read
02:42:26 8 it to determine if it is a designated date, you can
02:42:28 9 tell me that. But I don't want the thought process
02:42:31 10 on the record if you're unsure.

02:42:33 11 MS. LEPAN: Thank you. There is no
02:42:35 12 designated date outside of the two dates when it
02:42:40 13 was signed.

02:42:40 14 THE COURT: How are you proposing that
02:42:42 15 it be accurately described?

02:42:44 16 MS. LEPAN: I would describe it as the
02:42:46 17 Amending Agreement to the Substantive Commercial
02:42:49 18 Fishing Agreement signed February 15th and 20th,
02:42:51 19 2018.

02:43:00 20 THE COURT: Mr. Registrar.

02:43:01 21 THE REGISTRAR: Exhibit No. 4524.

02:43:04 22 EXHIBIT NO. 4524: The Amending
02:43:04 23 Agreement to the Substantive Commercial
02:43:04 24 Fishing Agreement signed February 15th
02:43:10 25 and 20th, 2018.

02:43:10 1 BY MS. LEPAN:

02:43:10 2 Q. Can you describe what this
02:43:11 3 document is?

02:43:12 4 A. Yes. This is the extending
02:43:15 5 agreement that continues the 2013 agreement. And
02:43:19 6 it's in combination with the two documents, what
02:43:22 7 we're working on, under today for MNRF and SON.

02:43:27 8 Q. Prior to this agreement, were
02:43:29 9 there any other agreements between MNRF and the
02:43:33 10 Saugeen Ojibway Nation relating to commercial
02:43:36 11 fishing?

02:43:36 12 A. There were.

02:43:37 13 Q. And when were those agreements in
02:43:39 14 place from?

02:43:39 15 A. The first agreement was entered
02:43:42 16 into sometime in 2000.

02:43:44 17 Q. How, if at all, did those
02:43:46 18 agreements differ from this agreement?

02:43:48 19 A. All of the agreements have similar
02:43:53 20 characteristics in focusing on management of SON's
02:43:59 21 commercial fishery in the waters set out in the
02:44:01 22 agreements.

02:44:02 23 They all make mention of the importance
02:44:04 24 of joint governance. And they all talked about the
02:44:09 25 importance of addressing SON's concerns about the

02:44:13 1 waters -- stocking in the waters set out in the
02:44:16 2 agreements.

02:44:18 3 What has changed over the course of the
02:44:20 4 agreements is the level of implementation funding;
02:44:25 5 restrictions on fishing. Commercial fishing by SON
02:44:28 6 members in Owen Sound and Colpoy's Bay have been
02:44:34 7 lifted over the term of the different agreements,
02:44:36 8 to the point where we are today. And the structure
02:44:41 9 of the recent -- the most current agreements has
02:44:44 10 changed to include establishment of what we call a
02:44:49 11 Governance Committee that provides direction on
02:44:54 12 implementation of the agreement.

02:44:57 13 MS. LEPAN: Your Honour, I would ask
02:44:59 14 that the amending agreement -- have we marked
02:45:03 15 the amending --

02:45:06 16 THE COURT: Yes.

02:45:06 17 MS. LEPAN: Thank you.

02:45:08 18 BY MS. LEPAN:

02:45:11 19 Q. Can you describe at a high level
02:45:13 20 how this agreement and the amending agreement work?

02:45:16 21 A. Yes. So the agreement, as I said,
02:45:24 22 in the body of the agreement, it establishes the
02:45:28 23 waters in which commercial fishing can take place.

02:45:30 24 That description of waters is also
02:45:33 25 relevant in terms of the commitments in the

02:45:35 1 agreement to discuss SON's concerns with respect to
02:45:39 2 stocking in the waters of the agreement.

02:45:43 3 It has, in addition to the Governance
02:45:45 4 Council that I mentioned, has established a number
02:45:49 5 of both standing and as-needed working groups. And
02:45:53 6 so there's what's called a "Total Allowable
02:45:57 7 Commercial Catch Working Group" where the parties
02:45:59 8 jointly work to share information and make
02:46:05 9 recommendations on changes to total allowable
02:46:09 10 commercial catch on an annual basis.

02:46:10 11 And there's some other working groups.
02:46:12 12 From time to time there's been a communications
02:46:14 13 working group, a stocking working group and
02:46:17 14 economic development working group.

02:46:20 15 Q. You mentioned the Joint Governance
02:46:23 16 Council; can you describe what that is?

02:46:25 17 A. Joint Governance Committee
02:46:27 18 includes, from MNR, an assistant Deputy Minister
02:46:31 19 and a director. For each of the two First Nations
02:46:36 20 there are -- there's the Chief, and one or two
02:46:43 21 councillors, that's the core of the Governance
02:46:46 22 Committee.

02:46:47 23 In addition, there are a number of
02:46:48 24 people that participate in Governance Committee
02:46:52 25 meetings and working groups that support at

02:46:54 1 Governance Committee.

02:46:55 2 I'm one of those people, so that's like
02:46:58 3 my primary role in terms of the agreement is
02:47:01 4 supporting the Governance Committee, and at times
02:47:04 5 some of the working groups.

02:47:06 6 Q. What if any restrictions are
02:47:11 7 placed on the Saugeen Ojibway Nation with respect
02:47:14 8 to commercial fishing under this agreement?

02:47:16 9 A. The agreement sets out the waters
02:47:18 10 in which commercial fishing can take place. As
02:47:21 11 well as agreement on how much lake whitefish can be
02:47:27 12 harvested. There's elements of the agreement that
02:47:30 13 allow limits to be set on other species, but there
02:47:34 14 are currently none in place.

02:47:36 15 There are also restrictions, specific
02:47:39 16 to Owen Sound and Colpoy's Bay, those are areas of
02:47:43 17 high recreational use. And so the agreement sets
02:47:46 18 out a number of specific restrictions designed to
02:47:49 19 minimize conflict between the two fisheries and
02:47:54 20 enhance safety. And these are specific net marking
02:47:59 21 restrictions.

02:48:03 22 The last one that I would mention in
02:48:05 23 terms of restrictions on the fishery, again,
02:48:08 24 specific to Owen Sound and Colpoy's Bay, is that
02:48:11 25 there are a number of seasonal stream restrictions

02:48:16 1 where commercial fishing can't take place, I
02:48:20 2 believe within a kilometre of the stream mouth in
02:48:23 3 those seasonal dates.

02:48:25 4 Q. What is the purpose of that?

02:48:27 5 A. That's to reduce the bycatch of
02:48:30 6 species like rainbow trout and Chinook salmon in
02:48:36 7 the commercial gill nets at those times of year
02:48:37 8 when they're returning -- either going into or
02:48:40 9 coming out of the streams.

02:48:41 10 Q. What if any restrictions are
02:48:44 11 placed on the Saugeen Ojibway Nation with respect
02:48:47 12 to fishing for recreational subsistence or
02:48:50 13 ceremonial purposes?

02:48:52 14 A. There are none.

02:48:57 15 Q. The restrictions that you've
02:48:58 16 mentioned, are these typical of commercial
02:49:01 17 agreements that MNRF enters into with other
02:49:04 18 parties?

02:49:04 19 A. The types of restrictions that are
02:49:06 20 in the SON agreement would also be found in other
02:49:10 21 agreements and licenses we have.

02:49:12 22 Typically, those agreements and
02:49:16 23 licenses would have a few more restrictions.
02:49:19 24 Commercial quotas would be established for other
02:49:22 25 species, and there's generally more restrictions in

02:49:25 1 terms of the mesh size and general proximity to
02:49:30 2 near-shore fishing to restrict commercial fishing
02:49:33 3 in more near shore areas. Again, to minimize
02:49:37 4 conflict with recreational fishing and to manage
02:49:41 5 bycatch of recreational fish species.

02:49:45 6 Q. You mentioned there were
02:49:46 7 restrictions on where Saugeen Ojibway Nation can
02:49:49 8 fish commercially.

02:49:50 9 Using the map behind you that is
02:49:52 10 lettered Exhibit P, can you describe for the Court
02:49:54 11 where the Saugeen Ojibway Nation can commercially
02:49:58 12 fish under the agreement?

02:49:59 13 THE COURT: Just before you do that,
02:50:01 14 that map has gravitated down the hall. Perhaps
02:50:07 15 someone -- thank you, Mr. Ogden -- perhaps move it
02:50:12 16 in the next location. You're probably planning on
02:50:17 17 using that other exhibit, too, right?

02:50:19 18 MS. LEPAN: Actually, just this.

02:50:24 19 THE WITNESS: Okay. Thank you,
02:50:24 20 Mr. Ogden. So the witness can see it, and also
02:50:25 21 others, as well as me. That's fine from my
02:50:29 22 standpoint.

02:50:40 23 THE COURT: You're going to have to
02:50:42 24 keep your voice up, sir.

02:50:45 25 Madam Reporter, do let me know if you

02:50:46 1 can't hear.

02:50:46 2 THE WITNESS: So in an attempt to
02:50:47 3 roughly show the area, so we're focusing in on this
02:50:51 4 blue area here. And most of this blue area is
02:50:57 5 included in the Commercial Fishing Agreement.

02:50:59 6 What is not included -- and that's the
02:51:01 7 easier way to do it -- is an area here. It's about
02:51:07 8 Craigleith, which you can't -- it's not marked on
02:51:09 9 the map, but the line would come straight up to the
02:51:12 10 red line (indicating).

02:51:13 11 This area here (indicating), is not in
02:51:15 12 the Commercial Fishing Agreement.

02:51:18 13 And then over here, I believe it's
02:51:20 14 Point Clarke, there's a line that goes over here
02:51:23 15 (indicating). So everything down is not included
02:51:26 16 in the waters of the Commercial Fishing Agreement.

02:51:35 17 BY MS. LEPAN:

02:51:35 18 Q. Thank you. And, apologies, I'm
02:51:39 19 going to have you look one more time.

02:51:41 20 When you're looking at lettered exhibit
02:51:43 21 P, does MNRF have any other Commercial Fishing
02:51:47 22 Agreements or licenses in the light blue area
02:51:51 23 that's marked on the exhibit?

02:51:52 24 A. In the area described that's over
02:51:56 25 to the east of Craigleith, we describe it as

02:52:00 1 Nottawasaga Bay. There is a First Nation Fishery
02:52:04 2 in this area, Beausoleil First Nation, Christian
02:52:08 3 Island, has access to this area. And there is a
02:52:11 4 Métis citizen who holds an Ontario Commercial
02:52:15 5 Fishing Licence that also has access to this area.

02:52:18 6 In the area south of Point Clarke,
02:52:22 7 there are also a number of non-Indigenous Ontario
02:52:26 8 commercial fish licence holders that have access to
02:52:29 9 that area.

02:52:30 10 THE COURT: Can you just point out one
02:52:31 11 more time, when you said "south of Point Clarke"
02:52:35 12 where you were referring to.

02:52:39 13 THE WITNESS: (Witness complies).

02:52:39 14 MS. LEPAN: So for the record, he's
02:52:41 15 pointing to the west side of the map, a little ways
02:52:48 16 up from Goderich; and he's pointing at a straight
02:52:54 17 line between the lighter green area and the
02:53:03 18 International Boundary.

02:53:05 19 THE COURT: Thank you.

02:53:17 20 BY MS. LEPAN:

02:53:17 21 Q. Were there any other resource
02:53:22 22 users in that light blue area? You don't have to
02:53:24 23 describe where they are, but just...

02:53:24 24 A. Throughout. There's recreational
02:53:26 25 fishing taking place throughout the lake, and

02:53:29 1 there's going to be likely some other subsistence
02:53:34 2 harvesting from other Indigenous communities taking
02:53:36 3 place in some of those waters.

02:53:38 4 Q. And you mentioned earlier, just to
02:53:45 5 clarify, that there was a First Nations fishery at
02:53:54 6 the Beausoleil Fishery, I believe you said. Is
02:53:54 7 that a recreational fishery, a commercial fishery?

02:53:57 8 A. That is a commercial fishery.

02:54:00 9 Q. How big is the recreational
02:54:02 10 fishery in the light blue area that you pointed
02:54:05 11 out?

02:54:05 12 A. I can't quantify it other than to
02:54:08 13 say it is a significantly large recreational
02:54:11 14 fishery.

02:54:12 15 Q. Thank you. You mentioned a total
02:54:20 16 allowable catch earlier; what is that?

02:54:22 17 A. That's something -- we'd also
02:54:24 18 sometimes call it "quota", or "commercial quota"
02:54:29 19 and it represents the amount of a species that can
02:54:31 20 be harvested by a particular fishery in a given
02:54:34 21 year.

02:54:35 22 Q. How is the total allowable catch
02:54:39 23 determined?

02:54:39 24 A. In the context of the SON
02:54:41 25 Commercial Fishing Agreement, it's set jointly

02:54:44 1 using the assessment data that I mentioned earlier.
02:54:48 2 So there's information that SON collects from their
02:54:51 3 commercial fishermen, there's information that MNRF
02:54:54 4 collects from their index nets, that information is
02:54:57 5 shared back and forth between the parties and
02:55:00 6 there's a process where technical staff for both
02:55:04 7 parties make recommendations on how much fish can
02:55:09 8 be harvested for that year.

02:55:11 9 Q. Has the total allowable catch ever
02:55:14 10 been exceeded in the past five years?

02:55:15 11 A. No.

02:55:15 12 Q. What about in the past ten years?

02:55:17 13 A. It has not.

02:55:18 14 Q. Who determines which members of
02:55:22 15 the Saugeen Ojibway Nation can fish commercially?

02:55:25 16 A. The Saugeen Ojibway Nation.

02:55:26 17 Q. And who is responsible for
02:55:27 18 enforcement of the agreement?

02:55:29 19 A. The agreement includes enforcement
02:55:32 20 protocol that sets out that both parties have a
02:55:35 21 role on enforcement of the agreement.

02:55:38 22 As I mentioned earlier, MNRF has an
02:55:40 23 enforcement branch, and we do have a presence of
02:55:43 24 conservation officers on the waters; so they play a
02:55:47 25 role.

02:55:48 1 If any potential violations are
02:55:51 2 reported, or -- that information is shared back to
02:55:57 3 SON, and then SON has a lead role in addressing any
02:56:00 4 concerns with respect to compliance.

02:56:02 5 Q. So I'd like to turn now to the
02:56:08 6 Commercial Fishing Agreement, which is
02:56:13 7 Exhibit 4523. And if we turn to page 4 of that
02:56:17 8 document, I'd like to look at clause 7.3.

02:56:28 9 What does this clause do?

02:56:29 10 A. This is the section from the 2013
02:56:34 11 agreement that sets out the implementation funding
02:56:38 12 that MNRF contributed to SON over that five-year
02:56:43 13 period. And it's, as I said, as implementation
02:56:46 14 funding, it's used by SON to contribute towards the
02:56:53 15 commitments in the agreement.

02:56:54 16 Q. I'd like to now pull up the
02:56:57 17 amending agreement, which is Exhibit 4524.

02:57:05 18 And if we turn to page 2 of that
02:57:07 19 document, I'd like to look at No. 4. Thank you.

02:57:11 20 What does this clause do?

02:57:13 21 A. This is a similar clause for the
02:57:16 22 extending agreement. And so this is the funding
02:57:20 23 that is being provided currently under the extended
02:57:23 24 agreement. And we're in year two of that agreement
02:57:27 25 in terms of MNRF providing implementation funding

1 to SON for commitments set out in the agreement.

2 Q. And has MNRF fulfilled its funding
3 commitments under this agreement to date?

4 A. It has.

5 Q. So let's return back to the
6 Commercial Fishing Agreement, Exhibit 4523.

7 Do any of the portions of this
8 Commercial Fishing Agreement relate to public
9 health and safety?

10 A. Yes. There are a number of
11 sections in, I believe it's Schedule C. And that's
12 the area that relates to fishing in Owen Sound and
13 Colpoy's Bay that were specifically put in to
14 address public safety.

15 Q. I'd like you to identify those
16 sections for the Court. So if we can turn to
17 Schedule C, which is page 19 in the PDF.

18 So I'll have my clerk scroll down for
19 you, whenever you indicate you'd like to move down
20 in the document, and if you can identify those
21 sections that you were referencing.

22 A. Okay. So the first one is
23 technically Section 4, which is some areas that are
24 well into Owen Sound, Colpoy's Bay. And it's very
25 dense activity, so no commercial fishing can take

1 place inside those red lines.

2 The next one is -- if we go down to
3 Section 8, and that's "joint communications and
4 public education material". So when the agreement
5 was first implemented in 2013, we developed jointly
6 some brochures to educate the public about
7 commercial fishing starting back in Owen Sound,
8 Colpoy's Bay, and developed signage for those bays.

9 The next one, if we scroll down to the
10 next page. And it's Section 13, "All nets will be
11 marked with a buoy." That's also related to
12 ensuring visibility of the nets in those high
13 traffic bays.

14 And Section 15 is the other one in
15 terms of the maximum length of nets. That was the
16 original condition. The amending agreement did
17 change Section 15 to remove the maximum length of
18 nets from 300 metres, but required that the nets be
19 marked every 300 metres. Again, as a public safety
20 measure for high visibility of the nets.

21 Q. Thank you.

22 I'd like to turn to page 4 of the
23 Commercial Fishing Agreement now, and look at
24 Section 5, which is titled, "Data Exchange".

25 What is the purpose of this section?

03:00:27 1 A. This is the core of the agreement
03:00:28 2 in terms of collecting information about the
03:00:30 3 fisheries so that the parties can jointly make
03:00:34 4 decisions about how the commercial fishery in the
03:00:37 5 agreement waters should be managed.

03:00:39 6 So it sets out that SON commercial
03:00:43 7 fishers will report to SON in terms of their daily
03:00:46 8 harvest; their fishing effort; where they set nets;
03:00:50 9 the type of gear they used; the length of time;
03:00:53 10 it's all really important information for assessing
03:00:56 11 the fishery.

03:00:57 12 It also sets out that MNRF will agree
03:01:00 13 to exchange the information it collects from its
03:01:02 14 assessment program as well as information from
03:01:04 15 other commercial fisheries.

03:01:08 16 Q. I'd like to bring up Exhibit 4319.
03:01:14 17 This is titled, "Database Harvest Effort
03:01:18 18 Information".

03:01:18 19 Do you recognize this document?

03:01:19 20 A. Generally, yes.

03:01:20 21 Q. And what do you understand this
03:01:23 22 document to be?

03:01:26 23 A. This is a copy of the database
03:01:29 24 that contains the commercial fish harvest records
03:01:33 25 that SON collects from their commercial fishermen.

03:01:36 1 Q. Pursuant to Section 5?

03:01:40 2 A. Yes.

03:01:40 3 Q. I'd like to bring up a document
03:01:42 4 which is SC1686. This is titled, "Saugeen Ojibway
03:01:50 5 Nation Commercial Fishing Events from 1995-2018";
03:01:53 6 are you familiar with this document?

03:01:59 7 A. I am.

03:02:00 8 Q. Can you tell us what it is?

03:02:01 9 A. This is a graphical representation
03:02:03 10 of SON harvest events over that period of 1995 to
03:02:09 11 2018.

03:02:11 12 Q. And what is a harvest event?

03:02:15 13 A. In this case, what a harvest event
03:02:18 14 is referring to is a net was set.

03:02:22 15 Q. What data was used to create this
03:02:24 16 map?

03:02:25 17 A. The data in that database that you
03:02:28 18 previously showed me.

03:02:29 19 Q. And who created this document?

03:02:31 20 A. The Lake Huron commercial fish
03:02:34 21 biologists created this.

03:02:35 22 Q. And did you provide the Lake Huron
03:02:38 23 fish biologist with instructions on how to create
03:02:41 24 this map?

03:02:41 25 A. I did.

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Q. And what instructions did you provide?

A. I asked -- I provided direction to create a map using the commercial harvest event in the way that he felt best represented -- best portrayed a visual picture of those events.

Q. And did you discuss with the creator of the map how they created the map?

A. I did.

Q. And do you understand the process that they used in creating the map?

A. I do.

Q. And is this an accurate representation of what you instructed them to create?

A. It is.

Q. And to the best of your knowledge, is this an accurate representation of Saugeen Ojibway Nation harvesting events from 1995 to 2018?

A. It is.

MS. LEPAN: Your Honour, I would like to add this as the next exhibit.

THE COURT: Just remind me, Counsel, how this relates to that similar appearing map that we had earlier in the trial.

03:03:41 1 MS. LEPAN: Both maps are based on the
03:03:44 2 same data.

03:03:45 3 So the Exhibit 4319 that I brought up,
03:03:51 4 is the data that was used to create both maps. And
03:03:56 5 they used the same grid in terms of -- you'll see
03:04:04 6 that there's a grid pattern on the actual map and
03:04:07 7 there's the same number of boxes within that grid.

03:04:09 8 But the difference between the two maps
03:04:12 9 is that the buckets, in terms of harvesting events,
03:04:19 10 you'll see at the bottom right-hand corner of that
03:04:22 11 map, differ. So the way the data has been
03:04:25 12 organized and then plotted onto the map has
03:04:28 13 differed.

03:04:33 14 THE COURT: Help me with -- my
03:04:34 15 recollection is the prior map was also put forward
03:04:38 16 by Ontario.

03:04:39 17 MS. LEPAN: The prior map was put
03:04:41 18 forward by the Plaintiffs. Ontario did object to
03:04:44 19 that map being entered into evidence.

03:04:47 20 However, the map was ultimately entered
03:04:49 21 in as a numbered exhibit, and Ontario at that time
03:04:53 22 indicated in the course of our objection, that we
03:04:56 23 would be putting forward a map that similarly
03:04:59 24 displayed that data, if the Plaintiffs' map was
03:05:02 25 entered as a numbered exhibit.

03:05:04 1 THE COURT: Just remind me, which
03:05:06 2 witness was that?

03:05:07 3 MS. LEPAN: It was Ryan Lauzon.

03:05:13 4 THE COURT: All right. I might be
03:05:18 5 confusing it with a different map.

03:05:22 6 Just let me add, it won't change
03:05:25 7 anything, sir, from your standpoint. I'm just
03:05:28 8 trying to locate your evidence.

03:05:29 9 Something was put forward where Ontario
03:05:31 10 said they would call the person who created it.

03:05:34 11 MS. LEPAN: That was a separate map.

03:05:35 12 THE COURT: It was.

03:05:36 13 MS. LEPAN: Those were a series of maps
03:05:38 14 that were used in the cross-examination of
03:05:40 15 Professor Brownlie.

03:05:41 16 THE COURT: I see. So I'm just
03:05:44 17 thinking of that when I'm asking these questions.
03:05:46 18 So separate issue altogether.

03:05:47 19 MS. LEPAN: Yes. Those maps will be
03:05:49 20 raised with that --

03:05:50 21 THE COURT: You didn't use this in
03:05:53 22 cross-examination of Mr. Lauzon?

03:05:56 23 MS. LEPAN: I perhaps referred to it
03:05:59 24 during the cross-examination, but it was not put
03:06:01 25 forward by Ontario.

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THE COURT: I think I'm definitely
confusing the two things.
All right. Any objection to marking
this map?
No.
Mr. Registrar.
THE REGISTRAR: Exhibit No. 4525.
EXHIBIT NO. 4525: Map with Graphical
Representations of Saugeen Ojibway
Nation Harvesting Events from 1995
to 2018.
BY MS. LEPAN:
Q. I'm going to bring up another
document which is SC1668 --
THE COURT: Sorry, just before you do
that. Remind me, you mentioned the exhibit number
of the Plaintiffs' depiction of the same data; can
I just get that from you again?
MS. LEPAN: The data set is 431 --
THE COURT: Not the data set, the
depiction of the data. If you don't have it
handy --
MS. LEPAN: Exhibit 4320, my friend is
very helpfully and assisted me.
THE COURT: So the Plaintiffs' map

03:06:52 1 depicting the same data, Exhibit 4320?

03:06:59 2 MS. LEPAN: Yes.

03:07:01 3 THE COURT: Thank you, please go ahead.

03:07:02 4 BY MS. LEPAN:

03:07:05 5 Q. So the next document I'll bring
03:07:07 6 up is SC1668 which is also entitled, "Saugeen
03:07:14 7 Ojibway Nation Commercial Fishing Events from 1995
03:07:16 8 to 2018"?

03:07:17 9 Are you familiar with this document?

03:07:18 10 A. I am.

03:07:18 11 Q. And can you tell us what it is?

03:07:22 12 A. It, again, is a graphical
03:07:24 13 representation of SON harvest events.

03:07:27 14 Q. And what data was used to create
03:07:29 15 this map?

03:07:29 16 A. The same data as the other map.

03:07:33 17 Q. And who created this map?

03:07:35 18 A. The Lake Huron commercial fish
03:07:37 19 biologists.

03:07:38 20 Q. And did you provide them with
03:07:40 21 instructions on how to create the map?

03:07:41 22 A. I did.

03:07:42 23 Q. And did you discuss with them how
03:07:44 24 they created the map?

03:07:46 25 A. I did.

03:07:46 1 Q. And do you understand the process
03:07:48 2 they used in creating the map?

03:07:50 3 A. I do.

03:07:51 4 Q. And is this an accurate
03:07:52 5 representation of what you instructed them to do?

03:07:54 6 A. It is.

03:07:55 7 Q. To the best of your knowledge, is
03:07:57 8 this an accurate representation of Saugeen Ojibway
03:08:00 9 Nation harvesting events from 1995 to 2018?

03:08:04 10 A. It is.

03:08:05 11 MS. LEPAN: Your Honour, I'd like to
03:08:06 12 have this marked as the next exhibit.

03:08:10 13 THE COURT: Mr. Registrar.

03:08:11 14 THE REGISTRAR: Exhibit No. 4526.

03:08:13 15 EXHIBIT NO. 4526: Map of a Graphical
03:08:13 16 Representation of the Saugeen Ojibway
03:08:13 17 Nation Commercial Fishing Events from
03:08:14 18 1995 to 2018.

03:08:14 19 THE COURT: Thank you.

03:08:15 20 BY MS. LEPAN:

03:08:15 21 Q. How does this map differ from the
03:08:17 22 map that I just showed you?

03:08:19 23 A. The number of bins used to
03:08:22 24 describe, or to breakdown the harvest data. In
03:08:28 25 this case it was selected, as I believe ten equal

03:08:31 1 bins. Otherwise, it's the identical data, it is
03:08:36 2 just the distribution of the data into those colour
03:08:40 3 bins.

03:08:40 4 Q. And what does this map and the
03:08:43 5 underlying data use to create this map tell you
03:08:45 6 about where the Saugeen Ojibway Nation fish most
03:08:49 7 frequently?

03:08:49 8 A. It shows -- most of the fishing is
03:08:52 9 taking place in the waters that are closer to the
03:08:54 10 two reserve areas.

03:08:56 11 THE COURT: Could you enlarge this
03:08:57 12 please, Counsel. I just want to see the key on the
03:09:01 13 bottom right-hand corner.

03:09:05 14 I don't have time to do the math. Are
03:09:29 15 the gradations of equal size?

03:09:31 16 THE WITNESS: They are, Your Honour.

03:09:32 17 THE COURT: They are, thank you.

03:09:33 18 Thank you, Counsel.

03:09:36 19 MS. LEPAN: I have no further
03:09:39 20 questions.

03:09:39 21 THE COURT: All right.

03:09:47 22 MS. LEPAN: Your Honour, I note that
03:09:49 23 it's 3:10. Would now be a good time for the
03:09:52 24 afternoon break?

03:09:54 25 THE COURT: You're finished, are you?

03:09:55 1 MS. LEPAN: I am, yes.

03:09:56 2 THE COURT: Let me ask Ms. Nerland what

03:09:58 3 she thinks.

03:10:00 4 Certainly if you wish, Counsel, we can

03:10:00 5 do it early afternoon break.

03:10:04 6 MS. NERLAND: Your Honour, I think that

03:10:04 7 would be helpful. I may be able to shorten my

03:10:07 8 cross.

03:10:08 9 THE COURT: Counsel always say that.

03:10:11 10 Now, sir, you're now in a

03:10:12 11 cross-examination which means you can't discuss

03:10:14 12 these matters with anybody at all.

03:10:16 13 THE WITNESS: I understand.

03:10:17 14 THE COURT: Or do any independent

03:10:18 15 reading or research. I'm sure you'll find

03:10:21 16 something else to talk about over the afternoon

03:10:23 17 break, all right?

03:10:24 18 THE WITNESS: Thank you.

03:10:26 19 THE COURT: 20 minutes.

03:10:26 20 -- RECESS TAKEN AT 3:11 --

03:11:19 21 -- UPON RESUMING AT 3:33 --

03:33:42 22 THE COURT: Go ahead.

03:34:00 23 MS. NERLAND: Thank you, Your Honour.

03:34:02 24 CROSS-EXAMINATION BY MS. NERLAND:

03:34:02 25 Q. Good afternoon, Mr. Muschett.

03:34:05 1 My name is Krista Nerland, I'm one of
03:34:09 2 the lawyers for the Plaintiffs.

03:34:10 3 A. Good afternoon.

03:34:11 4 Q. I'd like to start today by asking
03:34:14 5 you a few questions about how the Ministry of
03:34:17 6 Natural Resources manages the fishery around Lake
03:34:19 7 Huron. I want to start by focusing outside of
03:34:21 8 SON's traditional waters.

03:34:23 9 So my understanding is that the
03:34:27 10 Ministry divides Lake Huron into what it calls
03:34:29 11 "quota management areas"; is that right?

03:34:31 12 A. That is correct for commercial
03:34:34 13 fishing.

03:34:34 14 Q. And when we talk about a quota
03:34:37 15 management area, this is essentially an area that
03:34:41 16 is managed as a single unit for the purposes of
03:34:44 17 commercial fisheries related activities?

03:34:45 18 A. That's correct.

03:34:46 19 Q. And so within a particular quota
03:34:50 20 management area, quotas are issued to commercial
03:34:53 21 fisherman that set a limit on how many kilograms of
03:34:56 22 a particular species they can catch in a year?

03:34:59 23 A. That's correct.

03:35:00 24 Q. And so if we take all of the
03:35:02 25 quotas issued to all of the licensed commercial

03:35:05 1 fisherman in a particular quota management area,
03:35:08 2 and we add them together, that's the sort of
03:35:11 3 maximum amount of fish that can be taken in that
03:35:14 4 quota management area of that species?

03:35:16 5 A. That's correct.

03:35:17 6 THE COURT: Counsel can you just stop
03:35:19 7 for a moment. I'm having a technology problem.

03:35:24 8 All right, please go ahead.

03:35:46 9 MS. NERLAND: Thank you.

03:35:47 10 BY MS. NERLAND:

03:35:47 11 Q. So, for example, if we take the
03:35:49 12 example of lake whitefish. In each quota
03:35:53 13 management area there would be a total number of
03:35:56 14 kilograms of lake whitefish that could properly be
03:36:00 15 caught under the licenses?

03:36:01 16 A. That is correct.

03:36:01 17 Q. And lake whitefish, those are one
03:36:04 18 of the primary species that are the target of
03:36:07 19 commercial fishers in Lake Huron?

03:36:09 20 A. Correct.

03:36:09 21 Q. So I'm going to pull up SC1678
03:36:14 22 now. And this is an excerpt from Ontario's
03:36:19 23 Ministry of Natural Resources and Forestry, Lake
03:36:23 24 Huron Commercial Fishing Summary for 2017.

03:36:27 25 Are you familiar with this document?

03:36:28 1 A. I am.

03:36:28 2 Q. And can we scroll to page 3 of
03:36:32 3 this, which is PDF Image 4.

03:36:34 4 This is a map of the quota management
03:36:42 5 areas in the Canadian side of Lake Huron. Is this
03:36:47 6 an accurate picture of the quota management areas?

03:36:50 7 A. It is.

03:36:52 8 MS. NERLAND: Your Honour, I'd like to
03:36:54 9 add this as the next exhibit.

03:36:56 10 THE COURT: Mr. Registrar.

03:36:57 11 THE REGISTRAR: Exhibit No. 4527.

03:36:59 12 EXHIBIT NO. 4527: 2017 Map of the
03:36:59 13 Quota Management Areas - Canadian Side
03:37:00 14 of Lake Huron.

03:37:00 15 THE COURT: Is there a date that you
03:37:01 16 can associate with this, Counsel, for the record?

03:37:05 17 MS. NERLAND: The date is 2017,
03:37:06 18 generally. The report was issued for the year
03:37:10 19 2017.

03:37:10 20 THE COURT: Right.

03:37:23 21 BY MS. NERLAND:

03:37:23 22 Q. So if we look at this map,
03:37:25 23 zones 1, 2 and 3, those are the areas that are
03:37:29 24 covered by the SON Substantive Commercial Fishing
03:37:33 25 Agreement; is that right?

03:37:33 1 A. Correct.

03:37:34 2 Q. And so Zone 1 is in the main basin

03:37:38 3 of Lake Huron?

03:37:38 4 A. It is.

03:37:39 5 Q. And Zone 2 is in the northwest

03:37:41 6 part, I guess, of Georgian Bay?

03:37:45 7 A. Correct.

03:37:45 8 Q. And Zone 3 is in the southwest

03:37:47 9 part of Georgian Bay?

03:37:48 10 A. Correct.

03:37:49 11 Q. And in these zones, only SON

03:37:52 12 members fish commercially; is that right?

03:37:54 13 A. Correct.

03:37:55 14 Q. So in the rest of my questions,

03:37:58 15 I'm going to try to refer to this area of Zone 1,

03:38:02 16 Zone 2 and Zone 3 together as the "SON Fishing

03:38:06 17 Agreement waters", just to streamline things a

03:38:09 18 little.

03:38:09 19 So I think you mentioned the first SON

03:38:13 20 Commercial Fishing Agreement was concluded in about

03:38:16 21 2000; is that right?

03:38:17 22 A. That's when it entered -- it was

03:38:20 23 ratified in 2000, yes.

03:38:22 24 Q. And prior to that, non-Indigenous

03:38:24 25 fishermen were fishing in the SON Fishing Agreement

03:38:27 1 waters?

03:38:27 2 A. Yes. As I understand, there would
03:38:32 3 have been a time period where there would have been
03:38:35 4 a mixed fishery.

03:38:38 5 Q. And those non-Indigenous fishers,
03:38:41 6 they would have been licensed by Ontario in that
03:38:43 7 period prior to 2000?

03:38:46 8 A. Yes.

03:38:47 9 Q. Now in order to implement the new
03:38:49 10 agreement, Ontario had to buy the commercial
03:38:51 11 licenses that were held by non-Indigenous fishers
03:38:53 12 in the SON Fishing Agreement waters; is that right?

03:38:56 13 A. Correct. Ontario has processed
03:39:02 14 what we call "a willing seller and willing buyer
03:39:06 15 process" to reallocate fisheries. And in doing so,
03:39:09 16 there were licenses purchased for this purpose.

03:39:12 17 Q. And so essentially what you did
03:39:14 18 is, give some share of the quota of those licence
03:39:18 19 holders that you purchased, to SON to allocate to
03:39:21 20 their members?

03:39:22 21 A. Correct.

03:39:22 22 Q. The context that prompted Ontario
03:39:26 23 to enter this first fishing agreement and buy up
03:39:30 24 these licenses for SON, that was the Court decision
03:39:33 25 that recognized SON's right to commercially fish in

03:39:37 1 the SON Fishing Agreement waters?

03:39:38 2 A. That would have been one part of
03:39:40 3 the context, without a doubt. As well as I think
03:39:47 4 over time an increase in recognition of desire to
03:39:53 5 work -- I think move out of a conflict
03:39:58 6 relationship. But, yes, without a doubt the
03:40:02 7 '93 decision would have been a big part of that.

03:40:06 8 Q. That was the Jones and Nadjiwon
03:40:08 9 decision?

03:40:09 10 A. Yes.

03:40:09 11 Q. So I heard you mention the term
03:40:13 12 "total allowable catch" earlier. I think that sets
03:40:17 13 specific to the SON Substantive Fishing Agreement;
03:40:20 14 is that right?

03:40:21 15 A. It is. In other quota management
03:40:23 16 zones, we typically simply use the term "quota".

03:40:27 17 Q. And I think you mentioned that the
03:40:29 18 total allowable catch is essentially the total
03:40:32 19 quantity of lake whitefish that might be harvested
03:40:36 20 each year?

03:40:37 21 A. In the context of the SON
03:40:39 22 agreement, yes.

03:40:39 23 Q. There's no total allowable catch
03:40:43 24 for other species at this point?

03:40:45 25 A. Correct.

03:40:45 1 Q. And you set a total allowable
03:40:48 2 catch for each of Zone 1, Zone 2 and Zone 3; is
03:40:51 3 that right?

03:40:51 4 A. Correct.

03:40:52 5 Q. Now, SON is involved alongside of
03:40:57 6 the Ministry in setting the total allowable catch
03:41:01 7 in each of Zone 1, Zone 2 and Zone 3?

03:41:02 8 A. Correct.

03:41:02 9 Q. And no other First Nations are
03:41:04 10 involved in setting the total allowable catch in
03:41:07 11 the SON Fishing Agreement waters?

03:41:13 12 A. Correct.

03:41:13 13 Q. So I want to ask you now a little
03:41:21 14 bit about the 2013 Substantive Fishing Agreement.

03:41:25 15 And I think you confirmed in your
03:41:30 16 examination in-chief that this was extended in the
03:41:32 17 amending agreement in 2018?

03:41:34 18 A. Correct.

03:41:34 19 Q. For the record, this agreement is
03:41:38 20 4523. We'll bring it up if we need to, but I think
03:41:42 21 we probably don't.

03:41:43 22 You discussed earlier the Governance
03:41:46 23 Committee under the 2013 agreement. You attend
03:41:50 24 Governance Committee meetings?

03:41:52 25 A. I do.

03:41:53 1 Q. This is the main body for the
03:41:54 2 implementation of the agreement and for making key
03:41:56 3 decisions under it?

03:41:57 4 A. It is.

03:41:58 5 Q. And you also mentioned, I think,
03:41:59 6 four working groups that have operated under the
03:42:02 7 working agreement. A communications one; a group
03:42:05 8 that deals with total allowable catch; a working
03:42:09 9 group related to fish stocking; and one that deals
03:42:12 10 with capacity and economic development?

03:42:14 11 A. Correct.

03:42:14 12 Q. And these working groups, they're
03:42:17 13 intended to deal with issues at a technical level?

03:42:20 14 A. Yes.

03:42:20 15 Q. And then they report to the
03:42:22 16 Governance Committee?

03:42:23 17 A. Correct.

03:42:23 18 Q. So I want to ask you a little bit
03:42:26 19 in detail about how the total allowable catch is
03:42:29 20 determined in the areas that are subject to the
03:42:31 21 fishing agreement.

03:42:32 22 And I want to start by talking about
03:42:34 23 what the agreement sets out, and then we'll turn to
03:42:37 24 what happens in practice, because there may be some
03:42:40 25 discrepancies there.

03:42:42 1 So under the agreement, the total
03:42:45 2 allowable catch working group includes up to three
03:42:48 3 technical representatives from SON, and up to three
03:42:51 4 technical representatives from the Ministry; is
03:42:53 5 that right?

03:42:53 6 A. Correct.

03:42:54 7 Q. And, essentially, these
03:42:58 8 representatives work with an expert facilitator to
03:43:01 9 come to a consensus under the agreement on a total
03:43:05 10 allowable catch for a recommendation for lake
03:43:07 11 whitefish for each year?

03:43:08 12 A. I think the one point I would add
03:43:13 13 to it is that an expert facilitator has not always
03:43:17 14 been used. But in time periods where facilitation
03:43:21 15 has been used in the process, and other time
03:43:23 16 periods where it's done without facilitation.

03:43:26 17 Q. But that's provided for under the
03:43:28 18 agreement, for there to be a facilitation process
03:43:31 19 every year?

03:43:32 20 A. Yes.

03:43:32 21 Q. So if through this process, or
03:43:34 22 another process, the working group comes to a
03:43:37 23 consensus, then they bring one recommendation to
03:43:39 24 the Governance Committee?

03:43:40 25 A. Correct.

03:43:41 1 Q. Or if they can't come to a
03:43:43 2 consensus, then the Saugeen Ojibway Nation
03:43:47 3 representatives and the Ministry representatives,
03:43:49 4 they'll each bring a separate recommendation to the
03:43:53 5 Governance Committee?

03:43:53 6 A. Correct.

03:43:54 7 Q. So there could be two
03:43:55 8 recommendations before the Governance Committee?

03:43:56 9 A. Yes.

03:43:57 10 Q. And the Governance Committee will
03:43:58 11 then set the total allowable catch based on these
03:44:02 12 recommendations?

03:44:03 13 A. Correct.

03:44:03 14 Q. So let me confirm now what's
03:44:05 15 happened in practice, which I know is not always
03:44:07 16 exactly the same.

03:44:09 17 So I understand that it used to be, up
03:44:11 18 until maybe a couple of years ago, that the
03:44:14 19 Ministry and the Saugeen Ojibway followed
03:44:17 20 essentially the process that I described. That the
03:44:20 21 Ministry on the one hand and the Saugeen Ojibway on
03:44:23 22 the other, would do research to determine what they
03:44:26 23 considered to be a reasonable total allowable catch
03:44:29 24 based on their scientific knowledge, and in SON's
03:44:33 25 case, based also on their cultural knowledge; is

03:44:36 1 that fair?

03:44:36 2 A. Yes.

03:44:37 3 Q. Generally speaking, they wouldn't
03:44:38 4 come to a consensus, and the TAC working group
03:44:41 5 would present two recommendations to the Governance
03:44:44 6 Committee?

03:44:44 7 A. Correct.

03:44:45 8 Q. And the Governance Committee would
03:44:49 9 be able to make a decision based on those
03:44:51 10 recommendations to set a total allowable catch?

03:44:53 11 A. Correct.

03:44:54 12 Q. And the Governance Committee is
03:44:56 13 now in the process of developing a new system to
03:45:00 14 make decisions collaboratively about the total
03:45:03 15 allowable catch?

03:45:03 16 A. Correct. There was a working
03:45:07 17 group struck -- probably a couple of years ago now,
03:45:14 18 to start working on developing a new process for
03:45:17 19 joint assessment and TAC setting to alleviate those
03:45:21 20 challenges that you describe.

03:45:23 21 Q. In the meantime, over the last
03:45:25 22 couple of years while you're working on this
03:45:27 23 process, SON and the Ministry have -- essentially,
03:45:31 24 adopted a status quo approach, where you're holding
03:45:34 25 the total allowable catch steady?

03:45:36 1 A. That is correct.

03:45:37 2 Q. So in your experience sitting on
03:45:40 3 the Governance Committee, is it fair to say there's
03:45:42 4 sometimes been differences of opinion between the
03:45:46 5 Saugeen Ojibway Nation and the Ministry, about
03:45:47 6 where to set the total allowable catch of lake
03:45:50 7 whitefish?

03:45:51 8 A. Yes.

03:45:51 9 Q. But the Governance Committee
03:45:55 10 members, who include representatives of the
03:45:58 11 Ministry and of SON, have been able to work
03:46:01 12 together in any event to set a total allowable
03:46:04 13 catch under the agreement?

03:46:05 14 A. Correct.

03:46:05 15 Q. So I'd like to turn now back to
03:46:09 16 this map of the fishing zones that we have in front
03:46:11 17 of us. The other quota management areas --

03:46:16 18 THE COURT: Sorry, we've got maps
03:46:18 19 everywhere we look. Please be more specific.

03:46:22 20 MS. NERLAND: Of course.

03:46:24 21 THE COURT: You mean the one on the
03:46:26 22 screen.

03:46:26 23 MS. NERLAND: The one on the screen,
03:46:30 24 SC1678.

03:46:30 25 THE COURT: Is that an exhibit?

03:46:32 1 MS. NERLAND: It is an exhibit.

03:46:36 2 THE COURT: What is the exhibit number?

03:46:37 3 MS. NERLAND: 4527, Your Honour.

03:46:40 4 THE COURT: Thank you.

03:46:40 5 BY MS. NERLAND:

03:46:47 6 Q. So I want to look at the quota
03:46:49 7 management zones or areas that are outside of the
03:46:53 8 fishing agreement. So outside of Zone 1, Zone 2
03:46:56 9 and Zone 3.

03:46:59 10 In those zones, quotas are set by the
03:47:03 11 Ministry alone; is that right? Not with the
03:47:05 12 participation of SON, I mean.

03:47:07 13 A. Correct.

03:47:07 14 Q. So we have -- and I think you
03:47:11 15 looked at it when you were giving your testimony
03:47:14 16 in-chief to my friend. We have here Exhibit P,
03:47:18 17 which is the Plaintiffs' traditional territory.

03:47:23 18 So just for the purposes of our
03:47:24 19 conversation, I'd like you to assume that this is
03:47:26 20 an accurate representation of that.

03:47:27 21 A. (Witness nods.)

03:47:28 22 Q. So is it fair to say that if we
03:47:32 23 look at Zone 5-9 on Exhibit 4527, which is right at
03:47:38 24 the southern end of Georgian Bay, is it fair to say
03:47:44 25 that the western parts of that quota management

03:47:47 1 area are within SON's traditional territory?

03:47:50 2 A. Yes.

03:47:50 3 Q. But it's the Ministry that sets
03:47:53 4 the limit on how much lake whitefish can be caught
03:47:56 5 in that area?

03:47:57 6 A. Yes.

03:47:57 7 Q. There's no collaborative process,
03:48:00 8 or agreement with SON, for the total allowable
03:48:01 9 catch in that zone?

03:48:02 10 A. There is currently no
03:48:05 11 collaborative process. It was raised as an action
03:48:08 12 for follow up at a recent governance meeting.

03:48:13 13 Q. Follow-up by who?

03:48:19 14 A. Between the Ministry of Natural
03:48:22 15 Resources and SON. It's specifically to have
03:48:26 16 discussions related to a process to discuss TAC and
03:48:33 17 quota in 5-9.

03:48:35 18 Q. To develop a process for SON to
03:48:37 19 collaborate on setting the total allowable catch in
03:48:40 20 that area?

03:48:40 21 A. I don't have the specific action
03:48:44 22 in front of me, but I think it was a little bit
03:48:46 23 more general than that. But it was to have a
03:48:49 24 follow-up discussion on what to do with that
03:48:52 25 concern in 5-9.

03:48:54 1 Q. Right. So not a commitment to
03:48:55 2 adopt a process, but a commitment to have a
03:48:57 3 discussion?

03:48:58 4 A. Correct.

03:48:59 5 Q. So if we look at zone quota
03:49:03 6 management area 4-5, which is in the main basin of
03:49:07 7 Lake Huron, running right along the southern part
03:49:09 8 of the lake below Zone 1.

03:49:13 9 Is it fair to say that the northern
03:49:15 10 part of quota management area 4-5 is part of SON's
03:49:19 11 traditional territory?

03:49:20 12 A. It is.

03:49:20 13 Q. And there's no agreement or
03:49:23 14 collaborative process with SON to set the total
03:49:26 15 allowable catch here, either?

03:49:28 16 A. Correct.

03:49:29 17 Q. I'd like to open now document
03:49:37 18 SC1679, please.

03:49:51 19 This is a document called, "Developing
03:49:53 20 Research Priorities for Lake Whitefish in the Upper
03:49:58 21 Great Lakes: Results of a Workshop Sponsored by
03:50:03 22 the Great Lakes Fishery Trust and the Great Lakes
03:50:05 23 Fishery Commission. Michigan State University
03:50:07 24 February 27th-28th, 2018".

03:50:10 25 Are you familiar with this document?

03:50:11 1 A. I'm familiar with its existence
03:50:14 2 but not the contents specifically.
03:50:17 3 MS. NERLAND: Your Honour, I'd like to
03:50:18 4 add this as the next exhibit.
03:50:26 5 MS. LEPAN: No objection, Your Honour.
03:50:28 6 THE COURT: Mr. Registrar.
03:50:29 7 THE REGISTRAR: Exhibit No. 4528.
03:50:32 8 EXHIBIT NO. 4528: Developing Research
9 Priorities for Lake Whitefish in the
10 Upper Great Lakes: Results of a
11 Workshop Sponsored by the Great Lakes
12 Fishery Trust and the Great Lakes
13 Fishery Commission. Michigan State
14 University February 27th-28th, 2018.
15 BY MS. NERLAND:
03:50:48 16 Q. The Great Lakes Fishery Trust is a
03:50:50 17 funding body; is that right?
03:50:52 18 A. I am not certain.
03:50:55 19 Q. You talked already about the Great
03:50:55 20 Lakes Fishery Commission --
03:50:55 21 A. Yes.
03:50:59 22 Q. -- and that's the binational body
03:51:01 23 you spoke of earlier?
03:51:02 24 A. Yes.
03:51:02 25 Q. And Ontario sits on that?

03:51:03 1 A. Yes.

03:51:04 2 Q. And Canada as well?

03:51:05 3 A. Yes.

03:51:05 4 Q. So can we turn to page 4 of this

03:51:09 5 document. And this part that I've marked in green

03:51:16 6 explains, essentially, what this workshop is and

03:51:18 7 what this report is.

03:51:20 8 So can you take a moment to look at

03:51:23 9 that. Is it big enough for you to see?

03:51:27 10 A. It is.

03:51:29 11 (Witness reviews document). Okay.

03:51:40 12 Q. So this is essentially a report of

03:51:42 13 a workshop hosted by the Great Lakes Fishery Trust

03:51:46 14 and the Great Lakes Fishery Commission to

03:51:47 15 understand recent trends in the lake whitefish

03:51:50 16 population in Lake Huron, Lake Michigan and Lake

03:51:55 17 Superior; is that right?

03:51:55 18 A. Yes.

03:51:56 19 Q. And Ontario was represented at

03:51:58 20 this workshop?

03:51:59 21 A. It was.

03:52:05 22 MS. NERLAND: Can we turn to the bottom

03:52:07 23 of page 5 of this document, please, under the

03:52:09 24 heading "Lake Huron Whitefish Status and Trends".

25

03:52:13 1 BY MS. NERLAND:

03:52:13 2 Q. So this is a report made at the
03:52:15 3 workshop on the status of lake whitefish in Lake
03:52:18 4 Huron. And I see here that one of the authors is
03:52:23 5 Adam Cottrill, and it says in brackets beside his
03:52:28 6 name "OMNRF". So that's to indicate he's an
03:52:34 7 employee of the Ministry of Natural Resources and
03:52:36 8 Forestry?

03:52:36 9 A. He is.

03:52:37 10 Q. So I'd like you to look at the
03:52:38 11 first two paragraphs under this heading. It's
03:52:38 12 short, so I'm going to read them because there are
03:52:40 13 a couple of technical terms that we might need --

03:52:42 14 THE COURT: Is this short, Counsel?

03:52:46 15 MS. NERLAND: It's relatively short,
03:52:48 16 Your Honour.

03:52:48 17 THE COURT: And why is it you're
03:52:50 18 reading it?

03:52:51 19 MS. NERLAND: Because I'd like to, when
03:52:52 20 we get to the term "CPUE", ask for the witness to
03:52:58 21 confirm what that stands for, for clarity.

03:53:00 22 THE COURT: Well, you don't need to
03:53:02 23 read it to do that. I won't stop you, though, if
03:53:04 24 you really feel it's important to read it.

03:53:04 25 MS. NERLAND: No, it's not necessary.

03:53:06 1 THE COURT: I'm curious, though.

03:53:06 2 You've made me curious. Is there a different
03:53:09 3 meaning for that term than the ordinary one?

03:53:14 4 MS. NERLAND: For the term "CPUE"?

03:53:14 5 THE COURT: CUPE, yes.

03:53:18 6 MS. NERLAND: It's C-P-U-E, not
03:53:23 7 C-U-P-E.

03:53:23 8 THE COURT: Oh, very good. That's
03:53:24 9 exactly the mistake I made. Please go ahead.

03:53:27 10 BY MS. NERLAND:

03:53:28 11 Q. Perhaps I'll get you to confirm my
03:53:30 12 understanding of the term and I'll have you read it
03:53:30 13 yourself.

03:53:33 14 "CPUE" is "Catch Per Unit Effort"; is
03:53:35 15 that right?

03:53:35 16 A. Correct.

03:53:35 17 Q. And so, essentially, is that the
03:53:36 18 amount of fish that the fisher brings up every time
03:53:39 19 they drop their net?

03:53:40 20 A. With the clarification that a unit
03:53:42 21 effort would be a specific, either length of net or
03:53:46 22 time set of net or some combination of. But it's a
03:53:50 23 standardized effort number.

03:53:52 24 Q. Got it. Can you take a moment to
03:53:55 25 look at these two paragraphs, please.

03:54:10 1 A. (Witness reviews document).

03:54:11 2 Okay.

03:54:12 3 THE COURT: Are you going to scroll on
03:54:14 4 to the rest of the sentence?

03:54:14 5 THE WITNESS: (Witness reviews
03:54:14 6 document).

03:54:14 7 BY MS. NERLAND:

03:54:33 8 Q. Is it fair to say based on this
03:54:35 9 document, that the Ministry is concerned about the
03:54:37 10 decline of lake whitefish in Lake Huron?

03:54:39 11 A. It is.

03:54:40 12 Q. And is it fair to say based on
03:54:43 13 this document, that this is a concern for the
03:54:46 14 Ministry throughout Lake Huron, not just in the
03:54:48 15 area covered by the Commercial Fishing Agreement
03:54:51 16 with SON?

03:54:52 17 A. Correct.

03:54:52 18 Q. Is it also fair to say that SON
03:54:56 19 has expressed concern to the Ministry about the
03:54:59 20 decline in lake whitefish in Lake Huron?

03:55:00 21 A. It is.

03:55:01 22 Q. Has SON also expressed to the
03:55:06 23 Ministry, that lake whitefish are culturally
03:55:08 24 significant species for SON members?

03:55:10 25 A. It has.

03:55:11 1 Q. And also that it is an
03:55:12 2 economically significant species for the --

03:55:15 3 A. It has.

03:55:16 4 Q. Now in response to concerns about
03:55:24 5 the decline in lake whitefish, am I right in
03:55:27 6 thinking that in 2011 SON recommended to the
03:55:31 7 Governance Committee that the total allowable catch
03:55:34 8 in Zone 1 for lake whitefish should be reduced by
03:55:38 9 43 percent?

03:55:38 10 A. I don't recall the specific details.

03:55:42 11 Q. Perhaps I can give you some
03:55:44 12 comfort.

03:55:45 13 MS. NERLAND: Can we open up SC1684,
03:55:49 14 please.

03:55:49 15 BY MS. NERLAND:

03:55:54 16 Q. So this is entitled "A Feasibility
03:55:56 17 Assessment of Proposals from Nawash and Saugeen
03:56:00 18 First Nations Communities to Improve the Lake Huron
03:56:03 19 Lake Whitefish Fishery".

03:56:05 20 MS. NERLAND: So what I'd like to do is
03:56:08 21 scroll down, just so I can explain a bit about what
03:56:11 22 this document is before I add it.

03:56:14 23 Can you scroll down to the summary?

03:56:14 24 BY MS. NERLAND:

03:56:16 25 Q. So it says:

03:56:17 1 "During a series of interviews,

03:56:18 2 community members of the Saugeen

03:56:20 3 Ojibway Nation raised concerns

03:56:21 4 regarding the Lake Huron whitefish

03:56:23 5 fishery that encompassed 19

03:56:25 6 different themes."

03:56:26 7 Essentially this is a report that

03:56:28 8 outlines a community engagement process with SON

03:56:32 9 members about the problems with the whitefish

03:56:34 10 fishery and solutions; is that fair?

03:56:36 11 A. (Witness nods.)

03:56:37 12 Q. So there's no date on this

03:56:38 13 document, unfortunately, but if we look at PDF

03:56:43 14 Image 5 here, you can see the interviews were

03:56:49 15 conducted, if you look at the second paragraph with

03:56:52 16 the green box, in the spring of 2019.

03:56:55 17 So based on that, would you accept this

03:56:58 18 as a 2019 document?

03:56:59 19 A. I would.

03:57:00 20 Q. Now do you recall seeing this

03:57:01 21 before?

03:57:01 22 A. I have seen this. A summary of

03:57:07 23 the document was provided at a recent Governance

03:57:10 24 Committee meeting.

03:57:12 25 MS. NERLAND: I'd like to add this as

03:57:13 1 the next exhibit.

03:57:18 2 THE COURT: Mr. Registrar.

03:57:19 3 THE REGISTRAR: Exhibit No. 4529.

03:57:24 4 EXHIBIT NO. 4529: A Feasibility
03:57:24 5 Assessment of Proposals from Nawash and
03:57:24 6 Saugeen First Nations Communities to
03:57:24 7 Improve the Lake Huron Lake Whitefish
03:57:25 8 Fishery.

03:57:25 9 BY MS. NERLAND:

03:57:26 10 Q. Now I'd like to go to PDF Image 8
03:57:31 11 on this document.

03:57:32 12 THE COURT: What page is it, Counsel?

03:57:36 13 MS. NERLAND: Unfortunately, the
03:57:37 14 document is not paginated, Your Honour.

03:57:39 15 THE COURT: That is unfortunate.

03:57:47 16 BY MS. NERLAND:

03:57:47 17 Q. So I'd just like to direct your
03:57:49 18 attention to the first green box, which is about
03:57:51 19 four lines down in the first full paragraph. And
03:57:53 20 it says:

03:57:55 21 "In 2011, SON Joint Council
03:57:57 22 reduced the total allowable catch in
03:57:59 23 the main basin of Lake Huron --"
03:58:01 24 And that's Zone 1; is that right.

03:58:02 25 A. That is correct.

03:58:04 1 Q. "-- by 43 percent due to
03:58:05 2 concerns raised by Gillis about lake
03:58:13 3 whitefish."

03:58:14 4 Would you accept that the SON Joint
03:58:17 5 Council made this recommendation?

03:58:18 6 A. I would.

03:58:18 7 Q. And since you sit on the
03:58:21 8 Governance Committee, I'm wondering if you
03:58:23 9 remember. Was the total allowable catch ultimately
03:58:25 10 reduced by the Governance Committee in 2011?

03:58:28 11 A. This change actually took place --
03:58:32 12 and it's actually why I was struggling to
03:58:35 13 remember -- it was during the negotiations of the
03:58:38 14 2013 agreement. And there was a period of
03:58:41 15 extensions and not -- Governance Council as it is
03:58:49 16 structured today, didn't exist.

03:58:51 17 So I believe that these numbers were
03:58:53 18 put forward as part of the extension process
03:58:57 19 leading up to the 2013 agreement, rather than
03:59:00 20 through a Joint Governance Council type discussion.

03:59:05 21 Q. But the decision was ultimately
03:59:07 22 made to go forward with the reduction?

03:59:08 23 A. It was reflected in the Commercial
03:59:11 24 Fishing Agreement.

03:59:11 25 Q. And at that time, to your

03:59:13 1 knowledge, is it fair to say there were no
03:59:16 2 comparable changes to the quotas set by the
03:59:20 3 Ministry in the other quota management areas in the
03:59:23 4 main basin?

03:59:24 5 A. I don't know that.

03:59:26 6 Q. And since 2011, has the decline in
03:59:34 7 lake whitefish in Lake Huron persisted?

03:59:36 8 A. Generally speaking, yes.

03:59:40 9 Q. I'd like to open Exhibit 4106 now.

04:00:03 10 THE COURT: What is it, Counsel?

04:00:07 11 BY MS. NERLAND: This is a letter from
04:00:08 12 David Orazietti, who was then Minister of Natural
04:00:11 13 Resources in the Owen Sound Times dated April 9,
04:00:11 14 2013.

04:00:11 15 BY MS. NERLAND:

04:00:17 16 Q. So I want to scroll down to the
04:00:18 17 part of the article that I've marked in green. It
04:00:18 18 says:

04:00:21 19 "The Saugeen Ojibway Nation has
04:00:23 20 demonstrated responsible stewardship
04:00:26 21 for the long-term sustainability of
04:00:28 22 our fishing resources."

04:00:32 23 Would you agree that this reflects the
04:00:34 24 viewpoint of the Ministry of Natural Resource and
04:00:37 25 Forestry?

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04:01:30 24
04:01:32 25

A. I would.

Q. I would like to open Exhibit 4107.

And this, similarly, is an article about comments made by the Minister of Natural Resources and Forestry. And again, it's in the Owen Sound Times.

Can we scroll down to the portion marked in green, and it says -- and this is quoting the Minister:

"I commend the First Nations for, while they have a court-recognized Treaty Right that is without exception, that they were prepared to sit down with the Ontario Government, the Ministry of Natural Resources, to enter into an agreement because they, too, are concerned about the long-term sustainability of the fishing resource [...]"

And this also reflects the view of the Ministry on SON's stewardship of the fishery?

A. It does.

Q. You mentioned earlier that there were some restrictions on SON's commercial fishing

04:01:35 1 in Owen Sound and Colpoy's Bay?

04:01:37 2 A. Correct.

04:01:37 3 Q. And these restrictions are
04:01:40 4 negotiated under the agreement; is that right?

04:01:42 5 A. Correct.

04:01:42 6 Q. So SON has assisted in setting an
04:01:47 7 appropriate balance between the First Nations
04:01:48 8 Commercial Fishery and the needs and enjoyment of
04:01:54 9 other users of the lake?

04:01:55 10 A. It has.

04:01:55 11 Q. And they have consented to doing
04:01:57 12 this in their agreement?

04:01:58 13 A. Correct.

04:01:59 14 Q. Even though it sometimes has an
04:02:01 15 effect on how they can exercise their court-recognized
04:02:06 16 rights?

04:02:06 17 A. Correct.

04:02:10 18 Q. I'd like to ask you now about some
04:02:12 19 of the challenges under the fishing agreement.

04:02:14 20 One of the areas that the substantive
04:02:17 21 agreement deals with is fish stocking; is that
04:02:20 22 right?

04:02:20 23 A. Correct.

04:02:21 24 Q. I think we've discussed earlier
04:02:24 25 there's a working group on this issue?

04:02:25 1 A. There is.

04:02:26 2 Q. Made up of representatives of both

04:02:29 3 SON and the Ministry?

04:02:30 4 A. Correct.

04:02:31 5 Q. One of the issues that the working

04:02:33 6 group deals with in Lake Huron is the stocking of

04:02:38 7 non-native salmonid species; is that right?

04:02:41 8 A. Correct.

04:02:42 9 Q. Basically, those are salmon-like

04:02:46 10 fish?

04:02:46 11 A. Correct.

04:02:47 12 Q. So one example, I think you gave

04:02:49 13 one earlier, would be rainbow trout?

04:02:51 14 A. Yes.

04:02:52 15 Q. I'd like to open now SC1680.

04:03:04 16 This is a December 2012 report of the

04:03:07 17 SON-MNR Fish Stocking Working Group. Again, this

04:03:12 18 would be a product of the working group we just

04:03:16 19 discussed?

04:03:16 20 A. It would.

04:03:17 21 Q. Are you familiar with this

04:03:18 22 document?

04:03:18 23 A. I am familiar at a general level.

04:03:20 24 I didn't participate on the working group, but I'm

04:03:23 25 aware of the document, yes.

04:03:23 1 Q. Can we turn to page 1 of the
04:03:26 2 document, which is PDF Image 2. I just want to
04:03:32 3 give you a second to review this section marked in
04:03:34 4 green under the heading "Background".

04:04:05 5 A. (Witness reviews document).

04:04:07 6 Okay.

04:04:11 7 Q. So you would agree that this is a
04:04:13 8 report coming out of the facilitated discussion of
04:04:15 9 the working group?

04:04:16 10 A. I would.

04:04:16 11 Q. And if we look at the table of
04:04:18 12 contents just above --

04:04:19 13 MS. NERLAND: Can you scroll up,
04:04:21 14 please? Thank you.

04:04:21 15 BY MS. NERLAND:

04:04:23 16 Q. So you see there's the various
04:04:24 17 components of the report, and then there's an
04:04:26 18 appendix, which is the meeting agenda for the
04:04:30 19 report.

04:04:31 20 And I just want to scroll down, because
04:04:33 21 there's two documents that are appended that were
04:04:35 22 part of that agenda. The first is at PDF Image 9.
04:04:43 23 And this is --

04:04:46 24 MS. NERLAND: If you can scroll up to
04:04:47 25 the top, please. Thank you.

04:04:47 1 BY MS. NERLAND:

04:04:47 2 Q. So this is a new page 1, PDF Image
04:04:51 3 9, and this is the SON briefing package for that
04:04:54 4 meeting. And if we look at page 15, PDF Image 15
04:05:02 5 which is again, a new page 1.

04:05:05 6 This is the Ministry of Natural
04:05:07 7 Resources briefing material for the meeting that
04:05:09 8 they went into that discussion with.

04:05:11 9 So with that information in place, I
04:05:16 10 would like to add this as the next exhibit. And I
04:05:18 11 propose that it be titled, "2012 SON Ministry of
04:05:22 12 Natural Resources Fish Stocking Working Group
04:05:25 13 Meeting Report"?

04:05:25 14 THE COURT: Well, that's not the title
04:05:28 15 in front of me, Counsel. Is there some reason why
04:05:30 16 you're marking it now and not at the beginning?

04:05:33 17 MS. NERLAND: I just wanted to cover
04:05:34 18 everything the document had in it before I marked
04:05:36 19 it, that's all.

04:05:37 20 THE COURT: Why?

04:05:38 21 MS. NERLAND: Because there's these two
04:05:39 22 briefing materials at the end that I thought could
04:05:42 23 be confusing if we didn't.

04:05:44 24 THE COURT: Well, it will be confusing
04:05:46 25 if we don't have the name of the document as

04:05:48 1 described on the cover page.

04:05:50 2 If you can go to the cover page and do
04:05:52 3 it. If there was an objection, Counsel, that would
04:05:54 4 be one thing; but I take it there is none.

04:06:00 5 MS. NERLAND: Okay.

04:06:00 6 THE COURT: So if you can go back and
04:06:02 7 start again with the SC number and the proper title
04:06:06 8 and so forth.

04:06:07 9 MS. NERLAND: The SC number is 1680.
04:06:11 10 And this is a "2012 SON-MNR Fish Stocking Working
04:06:17 11 Group Outcome of December 2012 Meeting". I'd like
04:06:20 12 to add this as the next exhibit, please.

04:06:25 13 THE COURT: Mr. Registrar.

04:06:39 14 THE REGISTRAR: Exhibit No. 4530.

04:06:42 15 EXHIBIT NO. 4530: 2012 SON-MNR Fish
04:06:42 16 Stocking Working Group Outcome of
04:06:48 17 December 2012 Meeting.

04:06:48 18 BY MS. NERLAND:

04:06:48 19 Q. I'd like to turn now to page 3 of
04:06:50 20 this working group report, which is PDF Image 4?

04:06:54 21 THE COURT: Now you've said on the
04:06:56 22 record there are three page 1's. How many page 3's
04:06:59 23 are there?

04:07:00 24 MS. NERLAND: This is in the first
04:07:01 25 part, which is the full report.

04:07:02 1 THE COURT: All right, please go ahead.

04:07:04 2 BY MS. NERLAND:

04:07:04 3 Q. If you look under the heading

04:07:06 4 "Environmental Assessment of Stocking", can you

04:07:11 5 just review that section there?

04:07:13 6 A. (Witness reviews document).

04:07:18 7 Complete, yes.

04:07:19 8 Q. So according to this report, when

04:07:23 9 stocking of salmonids began in Lake Huron and

04:07:25 10 Georgian Bay, it was done without any environmental

04:07:27 11 assessment; is that right?

04:07:29 12 A. Well, the environmental assessment

04:07:31 13 process, I believe it's referring to the formal

04:07:35 14 EA process that's established through legislation

04:07:37 15 today.

04:07:39 16 I don't have sufficient knowledge to

04:07:41 17 say there was nothing done when stocking first

04:07:44 18 began. But it was done in, probably the late

04:07:48 19 1800s, so...

04:07:49 20 Q. So I'd like to go to PDF Image 15

04:07:58 21 now. And this is part of the briefing material

04:08:00 22 prepared by the Ministry.

04:08:03 23 MS. NERLAND: If we can scroll down now

04:08:05 24 to 17 from here.

04:08:07 25 THE COURT: Again, please be specific.

04:08:09 1 MS. NERLAND: PDF Image 17, which is
04:08:11 2 page 3 of the MNRF materials.

04:08:15 3 Thank you.

04:08:15 4 BY MS. NERLAND:

04:08:16 5 Q. I'd like you to look at the
04:08:17 6 section marked in green, please.

04:08:29 7 A. (Witness reviews document). Okay.

04:08:41 8 Q. This section is discussing the
04:08:43 9 fisheries management plan that was in place in Owen
04:08:48 10 Sound District in 1987; is that fair?

04:08:49 11 A. I'm not familiar with it, but it
04:08:52 12 would appear so.

04:08:52 13 Q. Is the Owen Sound District, do you
04:08:55 14 know, part of the fishing agreement waters?

04:08:57 15 A. It would be.

04:08:57 16 Q. And would you agree with me that
04:09:00 17 this suggests that in 1987 anyway, part of the
04:09:05 18 reason for introducing new species like rainbow
04:09:08 19 trout, was to expand angling opportunities?

04:09:14 20 A. It would appear so from this
04:09:16 21 bullet, but it is somewhat out of context.

04:09:19 22 Q. Is it fair to say that part of the
04:09:21 23 point of stocking today, is to expand fishing
04:09:23 24 opportunities for recreational fishers?

04:09:25 25 A. It is.

04:09:27 1 Q. And that's because salmonids are
04:09:32 2 fun to catch?

04:09:35 3 A. Correct.

04:09:35 4 Q. The Saugeen Ojibway have expressed
04:09:38 5 concern to the Ministry about the stocking of
04:09:41 6 non-native species like salmonids in the
04:09:42 7 traditional territory; is that right?

04:09:44 8 A. Correct.

04:09:44 9 Q. One of the reasons that the
04:09:58 10 Saugeen Ojibway has given to the Ministry for this
04:10:00 11 concern is the ecological impacts of stocking?

04:10:04 12 A. Correct.

04:10:04 13 Q. And SON has also expressed concern
04:10:08 14 to the Ministry from a cultural perspective, about
04:10:14 15 introducing new species into the lake?

04:10:17 16 A. Correct.

04:10:17 17 Q. Who are not represented by the
04:10:20 18 totemic or plant system?

04:10:23 19 A. Correct.

04:10:23 20 Q. I want to go to PDF Image 9 now,
04:10:26 21 and this is page 1 of the SON briefing package.
04:10:33 22 And I'd like to go to the bottom paragraph. It
04:10:33 23 says:

04:10:41 24 "SON also cannot support
04:10:43 25 stocking as a fisheries management

04:10:44 1 tool to supplement wild stocks that
04:10:46 2 are being overharvested through
04:10:48 3 mismanagement. Neither can SON
04:10:52 4 support the stocking of nonnative
04:10:55 5 species that cause harmful ecosystem
04:10:57 6 effects."

04:10:58 7 Is this a fair summary of the position
04:11:00 8 that SON has expressed to the Ministry in your
04:11:02 9 experience?

04:11:03 10 A. I think the position on nonnative
04:11:08 11 species is clear and consistent with the position
04:11:10 12 that's been shared by SON in the past. The
04:11:14 13 sentence with respect to stocking is a fisheries
04:11:18 14 management tool is less so.

04:11:21 15 Q. To date, the stocking of salmonids
04:11:24 16 continues in the area subject to the Commercial
04:11:28 17 Fishing Agreement; is that right?

04:11:28 18 A. That's correct.

04:11:29 19 Q. And that's in spite of SON's
04:11:31 20 concerns?

04:11:31 21 A. That's correct.

04:11:32 22 Q. And in spite of the working group
04:11:33 23 that addresses this issue under the fishing
04:11:37 24 agreement?

04:11:38 25 A. I would say that there have been

04:11:39 1 ongoing efforts and periodic efforts to make
04:11:42 2 progress on the working group. There was an
04:11:45 3 additional working group after the one that -- is
04:11:49 4 the document that we're looking at right here.

04:11:53 5 Looking at another process to
04:11:54 6 potentially make some progress on tackling this
04:11:58 7 concern as a joint process. Under the Commercial
04:12:03 8 Fishing Agreement that both parties have limited
04:12:05 9 resources and need to prioritize those resources.

04:12:09 10 So my understanding is that sometime in
04:12:11 11 2013, some of the joint working group efforts were
04:12:16 12 paused so that efforts could be focused on some
04:12:19 13 other whitefish-specific processes. And that more
04:12:25 14 recently, and I'm talking about the last 12 months,
04:12:29 15 the working group and efforts have started to ramp
04:12:32 16 up again in terms of having discussions on this.

04:12:35 17 Q. But the stocking has continued in
04:12:37 18 the interim?

04:12:37 19 A. Correct.

04:12:38 20 Q. So you mentioned just now limited
04:12:42 21 resources. And you mentioned earlier as well that
04:12:45 22 funding provided for under the agreement that the
04:12:49 23 Ministry gives to the Saugeen Ojibway.

04:12:52 24 Is it fair to say that there have been
04:12:53 25 consistent funding shortfalls under the agreement?

04:12:56 1 So it costs the Saugeen Ojibway more to do their
04:13:00 2 work under the agreement than they are funded to do
04:13:02 3 it?

04:13:02 4 A. I can't confirm that. It would be
04:13:05 5 fair to say that SON has raised concerns with
04:13:08 6 funding levels. But we don't have the sufficient
04:13:14 7 detail to get into, you know, how shortfalls may or
04:13:19 8 may not exist.

04:13:19 9 Q. I see. So you're aware of the
04:13:21 10 concern?

04:13:22 11 A. I am.

04:13:22 12 Q. And you agree that it's been
04:13:24 13 persistent?

04:13:25 14 A. I am.

04:13:25 15 Q. You do?

04:13:26 16 A. I am. One thing would I like to
04:13:29 17 point out, however, is that in the recent
04:13:34 18 extension, funding was increased from the previous
04:13:36 19 agreement to the current \$250,000 on an annual
04:13:41 20 basis, and it was agreed to.

04:13:43 21 Q. The Saugeen Ojibway has expressed
04:14:02 22 to the Ministry that its scientific and traditional
04:14:05 23 knowledge suggests that the lake whitefish swim
04:14:08 24 between the different quota management zones; is
04:14:10 25 that right?

04:14:11 1 A. Correct. And I think more
04:14:14 2 specifically the concerns or the perspective has
04:14:17 3 been raised in the area of the main basin
04:14:22 4 primarily.

04:14:22 5 Q. And so as a result, SON has
04:14:25 6 expressed the opinion to the Ministry that
04:14:27 7 overfishing, for example, south of the SON Fishing
04:14:31 8 Agreement, could impact the fish stocks in the area
04:14:33 9 within the agreement?

04:14:34 10 A. Correct.

04:14:35 11 Q. But the Substantive Fishing
04:14:38 12 Agreement doesn't provide a mechanism for SON to
04:14:40 13 provide input on the quota or catch in the adjacent
04:14:44 14 quota management areas; is that right?

04:14:46 15 A. It doesn't provide a direct
04:14:48 16 mechanism. One of the things that did happen, and
04:14:53 17 it wasn't taken to conclusion was, there was a
04:14:57 18 working group struck to focus on something called
04:15:00 19 "Stock Discrimination Working Group". And it was
04:15:04 20 looking at that issue in terms of movement of fish
04:15:06 21 between Zone 1 and quota management area 4-5.

04:15:12 22 Q. So there was a discussion, but it
04:15:13 23 hasn't yielded a process where SON provides input
04:15:17 24 into that quota?

04:15:19 25 A. Correct.

04:15:20 1 Q. SON has expressed to the Ministry
04:15:23 2 as well, concerning about habitat alterations in
04:15:29 3 the area governed by the Substantive Fishing
04:15:32 4 Agreement; is that right?

04:15:33 5 A. I am not aware of that.

04:15:44 6 Q. Can we go back to SC1684? And
04:15:49 7 I'll just look up the exhibit number.

04:16:07 8 That's Exhibit 4529. So I'd like to go
04:16:23 9 to PDF Image 13 of this document --

04:16:26 10 THE COURT: Which document?

04:16:27 11 MS. NERLAND: Excuse me, Your Honour.

04:16:28 12 THE COURT: What document are we
04:16:29 13 looking at, Counsel?

04:16:31 14 MS. NERLAND: This is a "Feasibility
04:16:32 15 Assessment of Proposals from Nawash and Saugeen
04:16:36 16 First Nations Communities to improve the Lake Huron
04:16:39 17 Lake Whitefish Fishery".

04:16:47 18 BY MS. NERLAND:

04:16:47 19 Q. And the first box here:

04:16:50 20 "SON also collaborated with
04:16:53 21 Trent University to investigate
04:16:54 22 contaminants in Colpoy's Bay and
04:17:00 23 Owen Sound Bay and identified a
04:17:01 24 major contaminants issue in the
04:17:03 25 latter. These findings are

04:17:05 1 factoring heavily in consultation
04:17:07 2 discussions on Transport Canada's
04:17:09 3 intentions to divest themselves of
04:17:11 4 the Owen Sound Harbour and future
04:17:13 5 dredging for commercial fishing
04:17:13 6 purposes."

04:17:15 7 So does this suggest to you that the
04:17:16 8 Saugeen Ojibway have expressed this concern?

04:17:20 9 A. It does.

04:17:20 10 Q. Is there any mechanism in the
04:17:22 11 agreement for SON to have a say about something
04:17:24 12 like the dredging example we see here in this
04:17:27 13 excerpt, under the Substantive Fishing Agreement?

04:17:29 14 A. Not directly.

04:17:30 15 Q. And you're aware of the Bruce
04:17:36 16 Power and Nuclear Generating Station?

04:17:36 17 A. I am.

04:17:36 18 Q. And that's near Huron on the shore
04:17:41 19 of Lake Huron; is that right?

04:17:42 20 A. Correct.

04:17:43 21 Q. Are you aware that the Saugeen
04:17:46 22 Ojibway Nation has expressed concern to the
04:17:48 23 Ministry about the cooling system for Bruce Power,
04:17:50 24 which relies on lake water and can suck fish, and
04:17:54 25 larvae and eggs into the cooling mechanism?

04:17:57 1 A. I think it would be in the same
04:17:59 2 context as this. It may have been raised, but not
04:18:01 3 in the context of the workings of the Commercial
04:18:05 4 Fishing Agreement.

04:18:05 5 Q. So it's fair to say there's no
04:18:07 6 mechanism under the Commercial Fishing Agreement to
04:18:09 7 deal with the impacts of the nuclear generating
04:18:12 8 station on the fishery?

04:18:13 9 A. It's outside of the jurisdiction
04:18:15 10 of MNRF.

04:18:17 11 Q. So is it fair to say that the
04:18:20 12 Saugeen Ojibway Nation have expressed concerns
04:18:22 13 about activities that they feel can impact their
04:18:25 14 fishery that the Ministry considers to be outside
04:18:28 15 the scope of the fishing agreement?

04:18:29 16 A. Correct.

04:18:30 17 Q. So I'd like to talk now about the
04:18:41 18 fishing maps that we've seen today. And I think
04:18:44 19 for clarity sake, I'm going to be referring to the
04:18:47 20 two we saw today, and also Exhibit 4321, which is
04:18:51 21 the marked up version of 4320 that you see beside
04:18:55 22 you?

04:18:57 23 THE COURT: There is no marked up
04:18:58 24 version beside the witness, Counsel.

04:19:01 25 MS. NERLAND: Excuse me, Your Honour.

04:19:03 1 When Mr. Lauzon was testifying, he drew
04:19:07 2 a felt pen line from Point Clark to the
04:19:11 3 international boundary, and from Craigleith to the
04:19:13 4 middle of Georgian Bay.

04:19:15 5 THE COURT: You're telling me this, but
04:19:16 6 it's the witness who wouldn't know that since he
04:19:19 7 wasn't here.

04:19:19 8 MS. NERLAND: I'll explain it to the
04:19:20 9 witness as well.

04:19:21 10 THE COURT: You've just done that.
04:19:23 11 All right. Please be specific about
04:19:25 12 which exhibit you're referring to.

04:19:28 13 MS. NERLAND: Yes, Your Honour.

04:19:29 14 BY MS. NERLAND:

04:19:32 15 Q. So on the screen now, I'd like to
04:19:34 16 bring up -- let's start with Exhibit 4525. This is
04:19:41 17 the first of the two maps that my friend provided
04:19:44 18 us with today.

04:19:45 19 You're familiar with the term "harvest
04:20:16 20 effort"?

04:20:17 21 A. I am.

04:20:17 22 Q. And it essentially means when a
04:20:20 23 commercial fisher drops a net and picks it back up
04:20:23 24 again?

04:20:23 25 A. That's the context here, yes.

04:20:24 1 Q. And so just on the key here when
04:20:27 2 it says "harvest events", that is actually a
04:20:30 3 reference to "harvest efforts"; is that correct?

04:20:32 4 A. Correct.

04:20:33 5 Q. And so when you track harvest
04:20:39 6 events on this map, that's essentially what you're
04:20:41 7 representing. Every time a net has been dropped
04:20:43 8 and raised?

04:20:44 9 A. Correct.

04:20:44 10 Q. And the squares we see on this
04:20:49 11 map, they're what are sometimes called five-minute
04:20:52 12 by five-minute squares?

04:20:53 13 A. Correct.

04:20:53 14 Q. And so this essentially means
04:20:54 15 they're one-twelfth of a degree of longitude by
04:20:58 16 one-twelfth of a degree of latitude?

04:21:01 17 A. Correct.

04:21:01 18 Q. Now beside you is Exhibit 4321.
04:21:05 19 This was a map generated for this trial, and
04:21:08 20 entered through Mr. Lauzon. And it shows the
04:21:14 21 harvest efforts in the Saugeen Ojibway Nation
04:21:18 22 territory.

04:21:18 23 Is it your understanding that these two
04:21:20 24 maps rely on the same underlying data?

04:21:23 25 A. It is.

04:21:23 1 Q. So the only two differences
04:21:26 2 between these maps are the colour scheme and how
04:21:30 3 you group the number of harvest events into each
04:21:33 4 colour category; is that right?

04:21:35 5 A. Correct.

04:21:35 6 Q. So the first three groupings --

04:21:41 7 MS. NERLAND: And can we zoom in on the
04:21:43 8 legend here, because it's quite small.

04:21:43 9 BY MS. NERLAND:

04:21:50 10 Q. So the first three groupings on
04:21:52 11 the Ontario map, the first Ontario map which is
04:21:56 12 4325 exhibit, they are 0, 1 to 36, and 37 to 111?

04:22:03 13 A. Correct.

04:22:04 14 Q. And on the map behind you, the
04:22:07 15 Saugeen Ojibway Nation map, Exhibit 4321, you have
04:22:10 16 the first three categories as 0, 1 to 10, and 11 to
04:22:16 17 20; is that correct?

04:22:16 18 A. Correct.

04:22:17 19 Q. So is it fair to say that there
04:22:20 20 are much bigger groupings of data on the Ontario
04:22:23 21 map than on the Saugeen Ojibway Nation map?

04:22:26 22 A. Yes.

04:22:26 23 Q. And so it is difficult to tell as
04:22:30 24 precisely the number of harvest events in each
04:22:35 25 square?

04:22:37 1 A. I think that's -- it's somewhat of
04:22:45 2 an interpretive statement and so --

04:22:52 3 Q. Let me put it this way. There
04:22:54 4 would be a distinction on Exhibit 4321 between a
04:23:00 5 square where there was one harvest event and there
04:23:02 6 were 35 harvest events. You could tell those were
04:23:05 7 not the same level of intensity of fishing; is that
04:23:08 8 fair?

04:23:08 9 A. That's fair. I think the
04:23:11 10 clarification I would offer is that these are
04:23:14 11 harvest events done over a multi-year period. And
04:23:18 12 so 0, and even 36, are relatively very few harvest
04:23:23 13 events.

04:23:23 14 Q. Leaving that aside. On the
04:23:25 15 Ontario map, Exhibit 4325, you couldn't tell the
04:23:31 16 difference between one harvest event and
04:23:33 17 36 harvest events?

04:23:36 18 A. It is difficult to see in this
04:23:39 19 colour gradation.

04:23:40 20 Q. Well, they're both within the same
04:23:42 21 box, so in fact it's impossible to see?

04:23:44 22 A. Sorry, you said 0 and?

04:23:46 23 Q. 1 and 36.

04:23:47 24 A. Oh, sorry. Correct.

04:23:48 25 Q. In terms of the colour gradations,

04:23:50 1 that actually brings me to my next point.

04:23:52 2 It's difficult to see between 0 and 36,
04:23:55 3 because they're essentially shades of white?

04:23:58 4 A. Correct.

04:23:58 5 Q. Okay.

04:24:00 6 MS. NERLAND: Can we open up
04:24:07 7 Exhibit 4526.

04:24:07 8 BY MS. NERLAND:

04:24:19 9 Q. So this is the second map that you
04:24:20 10 looked at today with my friend. And again, on this
04:24:25 11 map, the underlying data is the same as we see in
04:24:29 12 the map beside you, Exhibit 4321?

04:24:32 13 A. Correct.

04:24:32 14 Q. And so again, the only difference
04:24:34 15 is the way you've proved the data, and the colour
04:24:37 16 scheme that you've chosen?

04:24:39 17 A. Correct.

04:24:39 18 Q. And so here --

04:24:40 19 MS. NERLAND: Can we zoom in on
04:24:47 20 Exhibit 4526, please?

04:24:47 21 BY MS. NERLAND:

04:24:49 22 Q. So we look at the key to this map.
04:24:51 23 On this map, the groupings of data are
04:24:54 24 bigger again. So it provides even less information
04:24:57 25 to discriminate between different levels of

04:25:00 1 harvest?

04:25:00 2 A. It certainly provides less ability
04:25:05 3 to discriminate at the low numbers.

04:25:07 4 Q. Less than the Plaintiff's map and
04:25:10 5 less than the map we just looked at?

04:25:11 6 A. Correct.

04:25:12 7 Q. Okay. And on this map, because of
04:25:15 8 the colour scheme that's been chosen, it's very
04:25:18 9 difficult to see any distinction between where
04:25:20 10 there was no fishing at all, and where there were
04:25:22 11 over 500 harvest events; is that fair?

04:25:25 12 A. Correct.

04:25:26 13 Q. And it's impossible to tell the
04:25:29 14 difference between squares where there was one
04:25:31 15 fishing event and there were 294 fishing events?

04:25:34 16 A. Correct.

04:25:34 17 Q. You mentioned in your testimony to
04:25:46 18 my friend that the Lake Huron Commercial Fishery
04:25:50 19 had a value of about \$4.5 million a year?

04:25:53 20 A. Correct.

04:25:54 21 Q. That's around the lake as a whole?

04:25:56 22 A. Yes.

04:25:56 23 Q. And the recreational fishery I
04:25:59 24 think you said \$60 million annually in direct
04:26:02 25 benefits?

04:26:03 1 A. Direct expenditures, correct.

04:26:06 2 Q. Is this revenue shared with First
04:26:07 3 Nations?

04:26:07 4 A. This isn't tax revenue or
04:26:11 5 government revenue. These are just the numbers
04:26:14 6 represent direct purchases by consumers.

04:26:17 7 Q. There is licensing, though, of the
04:26:20 8 recreational fishery in SON's territory?

04:26:25 9 A. There is.

04:26:25 10 Q. And Ontario collects licensing
04:26:27 11 fees for those?

04:26:28 12 A. Correct.

04:26:28 13 Q. And is that licensing fee ever
04:26:30 14 shared with the Saugeen Ojibway Nation?

04:26:32 15 A. It is not.

04:26:32 16 Q. Has the Saugeen Ojibway Nation
04:26:34 17 raised this issue with the Ministry?

04:26:36 18 A. It has been raised as a point that
04:26:39 19 they would like to pursue for future discussion.

04:26:43 20 Q. You also spoke to my friend
04:26:51 21 earlier about research and assessment and the
04:26:54 22 importance of that in the Lake Huron Fishery
04:26:57 23 context?

04:26:57 24 A. Correct.

04:26:57 25 Q. And that includes in the Saugeen

04:27:02 1 Ojibway Nation territory?

04:27:03 2 A. It does.

04:27:04 3 Q. Now you've never had your
04:27:05 4 access -- the Ministry hasn't -- had its access to
04:27:08 5 the Saugeen Ojibway Nation's waters blocked when
04:27:10 6 you're trying to enter for research or monitoring
04:27:12 7 or assessment?

04:27:13 8 A. Correct.

04:27:14 9 Q. And in fact, SON plays an
04:27:16 10 important role in contributing to research and
04:27:18 11 assessment in the waters in their territory?

04:27:20 12 A. Correct.

04:27:26 13 MS. NERLAND: May I have a moment,
04:27:28 14 Your Honour.

04:28:04 15 Thank you.

04:28:05 16 MS. NERLAND: So I just have one more
04:28:07 17 topic to cover and I would hate to have this
04:28:09 18 gentleman have to come back from Peterborough
04:28:13 19 tomorrow.

04:28:13 20 May I have the Court's indulgence to go
04:28:16 21 a minute or two over?

04:28:18 22 THE COURT: Yes, you may.

04:28:19 23 BY MS. NERLAND:

04:28:20 24 Q. Thank you. You discussed earlier,
04:28:22 25 and we also discussed the Great Lakes Fishery

04:28:27 1 Commission. And you confirmed that Ontario sits on
04:28:29 2 the commission; and is that the Ministry of Natural
04:28:32 3 Resources?

04:28:32 4 A. It is.

04:28:33 5 Q. And you confirmed also that Canada
04:28:35 6 sits on the commission. Now, is that the
04:28:36 7 Department of Fisheries and Oceans?

04:28:38 8 A. It is.

04:28:38 9 Q. Okay. I'd like to open up
04:28:43 10 Exhibit 4522, which you went to with my friend.

04:28:56 11 MS. NERLAND: Just for my document
04:28:58 12 manager's benefit, that's SC1667.

04:29:03 13 BY MS. NERLAND:

04:29:03 14 Q. So this is titled, "A Joint
04:29:05 15 Strategic Plan for Management of Great Lakes
04:29:10 16 Fisheries As Revised 10th June, 1997."

04:29:14 17 I understand if we scroll down on the
04:29:16 18 page, it's actually a January 2007 publication.

04:29:20 19 So if we could please turn to PDF
04:29:23 20 Image 5, which is in the non-paginated section of
04:29:26 21 this report. And this is a list of the parties
04:29:32 22 that participated in the joint strategic planning
04:29:36 23 process as described in the report, right?

04:29:39 24 A. Correct.

04:29:39 25 Q. And I see here the first party

04:29:41 1 listed on this list, is the Chippewa-Ottawa Treaty
04:29:48 2 Fishery Management Authority?
04:29:48 3 A. Correct.
04:29:49 4 Q. And that is a body composed of
04:29:51 5 Ottawa and Chippewa tribes placed in what is now
04:29:54 6 the U.S.?
04:29:55 7 A. Correct.
04:29:55 8 Q. And I see it also includes the
04:30:00 9 Great Lakes Indian -- this is the third line --
04:30:03 10 Great Lakes Indian Fish and Wildlife Commission?
04:30:07 11 A. Correct.
04:30:07 12 Q. And this is a body that represents
04:30:12 13 11 Ojibway tribes in Minnesota, Wisconsin and
04:30:14 14 Michigan; is that right?
04:30:16 15 A. That is correct.
04:30:16 16 Q. And both of these bodies
04:30:18 17 representing American Indigenous Nations, they're
04:30:21 18 both bodies representing American Indigenous Nations
04:30:23 19 who have rights to the fishery on the Great Lakes?
04:30:26 20 A. Correct.
04:30:27 21 Q. And they participated in the
04:30:28 22 strategic planning process for the Great Lakes
04:30:32 23 Fishery detailed in this document?
04:30:34 24 A. Correct.
04:30:35 25 Q. And they did that alongside the

04:30:37 1 Government of the United States, and Ontario, and
04:30:40 2 Canada, and a number of state governments?

04:30:41 3 A. Correct.

04:30:42 4 Q. To your knowledge, this didn't
04:30:43 5 derail the strategic planning process, the
04:30:46 6 binational strategic planning process?

04:30:48 7 A. It did not.

04:30:50 8 MS. NERLAND: Just one moment, Your Honour.
04:30:51 9 Your Honour, those are my questions.

04:30:54 10 THE COURT: Thank you.

04:30:55 11 Ms. LEPAN, do you have any re-examination?

04:30:57 12 MS. LEPAN: No, Your Honour.

04:30:58 13 THE COURT: Sir, that concludes your
04:31:00 14 testimony. You can step down. Thank you for coming.

04:31:03 15 Ms. LEPAN.

04:31:05 16 MS. LEPAN: Yes.

04:31:10 17 THE COURT: Who is Ontario's next witness?

04:31:12 18 MS. LEPAN: Jennifer Keyes is Ontario's
04:31:15 19 next witness, and she will be ready tomorrow
04:31:17 20 morning at 10:00 a.m.

04:31:18 21 THE COURT: Thank you. We will adjourn
04:31:20 22 to that time.

04:31:21 23

04:31:44 24 -- Court adjourned at 4:31 p.m.

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REPORTER'S CERTIFICATE

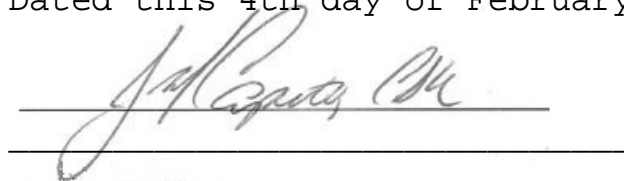
I, JUDITH M. CAPUTO, RPR, CSR, CRR,
Certified Shorthand Reporter, certify;

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.



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