

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

VOL 31 DAY 31
July 30, 2019



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

4 B E T W E E N:

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

8 - and -

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

18 Court File No. 03-CV-261134CM1

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

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

23 - and -

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

27 -----
28 --- This is VOLUME 31/DAY 31 of the trial
29 proceedings in the above-noted matter, being held
30 at the Superior Court of Justice, Courtroom 5-1,
31 330 University Avenue, Toronto, Ontario, on the
32 23rd day of July, 2019.

33 -----
34 B E F O R E: The Honourable Justice Wendy M.
35 Matheson

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

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

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

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

REPORTED BY: Deana Santedicola, RPR, CSR, CRR

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09:52:38 1 -- Upon commencing at 10:03 a.m.

09:11:06 2
10:03:46 3 THE COURT: Good morning, Counsel.

10:03:48 4 MS. NERLAND: Good morning.

10:03:48 5 THE COURT: Just before you get going,
10:03:50 6 Counsel, I am going to give my ruling on the matter
10:03:52 7 from yesterday afternoon.

10:03:54 8 You can have a seat for a minute.

10:03:55 9 My reasons for decision and decision
10:04:10 10 follow.

10:04:10 11 Late yesterday, the following question
10:04:13 12 was the subject of an objection:

10:04:16 13 "Question: Based on your
10:04:17 14 knowledge as a historian and your
10:04:19 15 review of the documents, what was
10:04:23 16 the ordinary amount of time or range
10:04:24 17 of times a First Nation might take
10:04:27 18 to come to a decision about a land
10:04:30 19 surrender like this?"

10:04:32 20 Ontario objected to that question.

10:04:33 21 In order to address the objection, I
10:04:35 22 asked where the opinion was disclosed in the expert
10:04:37 23 report. It is not.

10:04:39 24 The Plaintiffs rely on the last
10:04:41 25 sentence of the report regarding First Nations

10:04:44 1 finding themselves unprepared and generally
10:04:47 2 references to the process that was followed of not
10:04:50 3 including advance notice and other steps taken to
10:04:54 4 put pressure on the First Nations.

10:04:55 5 Mr. Feliciant submits that even
10:04:59 6 assuming this witness was prepared to give an
10:05:01 7 average time, it would require counsel to retain
10:05:04 8 some assistance in order to determine whether there
10:05:07 9 was any foundation to the answer and look at all of
10:05:10 10 those treaties, which he does not think he can do
10:05:13 11 in three or four days before he will be
10:05:15 12 cross-examining the witness.

10:05:18 13 Therefore, he submits Ontario would be
10:05:19 14 prejudiced.

10:05:20 15 I agree that this is the sort of
10:05:23 16 question for which an opposite party would need
10:05:25 17 expert assistance to assess the opinion, prepare
10:05:29 18 cross-examination and potentially call responding
10:05:32 19 expert evidence in the Defendants' case.

10:05:34 20 However, I am not persuaded that those
10:05:36 21 steps cannot now be accommodated fairly.

10:05:40 22 Yesterday I asked Plaintiffs' counsel
10:05:41 23 to give the Defendants notice of the witness's
10:05:44 24 opinion after Court, and I expect that they have
10:05:46 25 done so.

1 If Ontario needs more time to prepare
2 to cross-examine, they may have it. This witness
3 is coming back in the week of August 12th and the
4 cross-examination can be delayed until that time.

5 If it turns out that more time is
6 required, Ontario may request a further adjournment
7 of the cross-examination and this witness will have
8 to come back another time.

9 Should that be the case, I require that
10 Ontario conduct the balance of its
11 cross-examination that week in August and leave
12 aside only that portion of the cross-examination
13 that cannot fairly be conducted at that time.

14 If Ontario wishes to call reply expert
15 evidence in its defence, it may make that request
16 within 45 days of today. If that time presents a
17 problem, an extension may be requested.

18 On that basis, I permit the question.

19 Now, Counsel, shall we have the
20 question answered now or do you want to do
21 something else first?

22 MS. NERLAND: Let's do it now.

23 THE COURT: So the question, sir, and I
24 am reading it from the transcript:

25 "Based on your knowledge as a

1 historian and your review of the
2 documents, what was the ordinary
3 amount of time or range of times a
4 First Nation might take to come to a
5 decision about a land surrender like
6 this one?"

7 Please go ahead.

8 PROFESSOR JARVIS BROWNLIE; Under prior
9 affirmation.

10 THE WITNESS: Thank you.

11 It is a broad question. I am not aware
12 of earlier Treaty Councils for which we have
13 detailed enough evidence to know exactly how long
14 deliberation occurred among First Nations.

15 We do know, we have much more detailed
16 records for the number of Treaties in the 1870s, in
17 which case very often proposals would be made on
18 one day and the First Nations would then take one
19 or more days to talk amongst themselves and come
20 back with counter-proposals which might lead to a
21 further stage, you know, of more than one
22 counter-proposal.

23 So, often these processes took several
24 days. I believe that was also the case for the
25 Robinson Huron Treaties in which we have some

10:07:54 1 records of speeches from Chiefs who expressed their
10:08:00 2 beliefs about their land ownership, and those
10:08:05 3 processes, I believe, also took several days.

10:08:07 4 In general, I would say that an hour
10:08:13 5 was not enough time for the ordinary cultural
10:08:20 6 practices of the Ojibwe to be followed.

10:08:23 7 In a matter as serious as surrendering
10:08:26 8 land, and in this case surrendering virtually all
10:08:29 9 of their remaining land, the Anishinaabe
10:08:36 10 understanding was that Chiefs did not alone have
10:08:38 11 the authority to make such an important decision on
10:08:41 12 their own.

10:08:43 13 This was a matter in which all of the
10:08:46 14 community was interested and Ojibwe protocol was to
10:08:52 15 allow everyone to express their opinion and the
10:08:56 16 goal was usually to obtain consensus that everyone
10:09:04 17 agreed.

10:09:04 18 I have personally been involved in
10:09:06 19 consensus-based decision-making processes in which
10:09:09 20 the goal is not to have a majority vote but to get
10:09:13 21 everyone on-side. It is a very lengthy process.

10:09:19 22 So I would say that an hour was a very
10:09:23 23 short amount of time. I am not aware of any other
10:09:28 24 treaty negotiation in which only an hour was
10:09:30 25 allowed for discussion and, of course, since they

1 remained in the chapel for that hour, it was only
2 the Chiefs discussing the matter. They did not, as
3 far as I'm aware, have any opportunity to discuss
4 the matter with the rest of their community, as
5 would normally be expected in Ojibwe culture.

6 EXAMINATION IN-CHIEF BY MS. NERLAND

7 (CONT'D):

8 Q. I would like to return to one more
9 matter from yesterday. Yesterday there was an
10 objection to my question about whether Oliphant's
11 projection of the financial benefits of Treaty 72
12 was realistic. Mr. Feliciant objected that my
13 witness had not done sufficient research to answer
14 this question.

15 And, Your Honour, you expressed a
16 concern that this was not in the report.

17 Last night I reviewed the report one
18 more time, and I pulled the correct pages for that
19 section of the report, which are pages 24 to 26.

20 THE COURT: Specifically where is the
21 opinion?

22 MS. NERLAND: Yes, page 25 of the
23 report, at the beginning of the second paragraph
24 Dr. Brownlie comments:

25 "No doubt, estimating the total

10:10:33 1 future value of land sales for the
10:10:35 2 area was a nearly impossible task,
10:10:37 3 but Oliphant's overall estimate of
10:10:39 4 land sale revenue was probably
10:10:41 5 unrealistically high, especially
10:10:43 6 given his apparent assumption that
10:10:45 7 all or most of the peninsula would
10:10:47 8 sell in the near future."

10:10:48 9 And Dr. Brownlie goes on to provide the
10:10:51 10 bases for that opinion.

10:10:53 11 THE COURT: And since that is already
10:10:54 12 part of his examination in-chief, is there a
10:10:55 13 purpose to your question?

10:10:57 14 MS. NERLAND: The purpose was to have
10:10:59 15 him expand on his opinion. That is it.

10:11:02 16 THE COURT: Well, that wasn't the
10:11:03 17 question. Did you have a question?

10:11:05 18 MS. NERLAND: Yes, my question was,
10:11:07 19 based on your review of the documents from this
10:11:09 20 period, how realistic was the projection of the
10:11:11 21 benefits?

10:11:14 22 THE COURT: I heard that, but you just
10:11:15 23 read to me the answer that your witness has given
10:11:17 24 to that question, which is already part of his
10:11:20 25 evidence.

1 So to re-open on a ruling I have
2 already made, to have him repeat something that is
3 already part of his examination, is not a good
4 enough reason to re-open a ruling I have already
5 made. Is there some other question that you
6 thought you would ask but were deterred from?

7 MS. NERLAND: No, Your Honour.

8 THE COURT: Because isn't this the
9 answer to your question right here?

10 MS. NERLAND: It is an overview of the
11 answer to the question, yes.

12 THE COURT: Okay. Well, it would seem
13 to me that it is a direct answer to the question.
14 If there's other questions that you wish to ask
15 beyond the direct answer to your question, then
16 feel free to ask them and, you know, if there is an
17 objection, I'm sure someone will stand up.

18 But you certainly don't need to spend
19 time on this answer. It is right here in the
20 gentleman's examination in-chief.

21 MS. NERLAND: Okay, Your Honour.

22 BY MS. NERLAND:

23 Q. When we left off -- I'm going to
24 move on then.

25 When we left off yesterday, we were

1 speaking, or shortly before we left off yesterday,
2 actually, we were speaking about the hour period in
3 which Oliphant left the Treaty Council in October
4 of 1854. What do the documents suggest about why
5 Oliphant returned to the Treaty Council after just
6 an hour?

7 A. The documents I have seen don't
8 provide a conclusive answer to that. In his
9 memoirs, he explains coming back after an hour by
10 saying that the quote/unquote "Indian catechist,"
11 Peter Jacobs, told him to come back because the
12 decision had been made. But he doesn't mention
13 that in the report, which I consider a more factual
14 source and a more credible source. So it is hard
15 to know if that was the reason.

16 I think the likeliest reason was that
17 he had told them he would give them a certain time.
18 He probably said I'll give you an hour to discuss
19 it, and then he came back wanting to ensure that
20 they didn't have too long to consult.

21 Q. I would like to open back
22 Oliphant's memoir now which we were looking at
23 yesterday. This is Exhibit 2966.

24 And could we turn to page 71 of this
25 document, please. Thank you. In this passage,

10:14:25 1 Oliphant references an interpreter. Who is that
10:14:27 2 interpreter?

10:14:28 3 A. Peter Jacobs was the interpreter
10:14:30 4 for this negotiation.

10:14:35 5 Q. And what was Peter Jacobs' role in
10:14:38 6 the negotiation of this surrender?

10:14:40 7 A. It appears that Peter Jacobs was
10:14:46 8 engaged to participate in part as an interpreter,
10:14:52 9 but that he was also being asked to help obtain a
10:14:57 10 surrender, so that suggests a more active role. An
10:15:03 11 interpreter would normally just interpret between
10:15:06 12 the two languages to ensure that the two sides
10:15:08 13 could communicate; whereas helping to obtain a
10:15:14 14 surrender suggests that he was asked to help ensure
10:15:22 15 that the Treaty went through, that he would in some
10:15:26 16 way, well, most likely help to persuade the Saugeen
10:15:31 17 Ojibway in his role as a Methodist missionary,
10:15:34 18 which was a figure of authority.

10:15:37 19 Q. You referenced Jacobs being asked
10:15:47 20 to help obtain a surrender. What do you mean by
10:15:51 21 that? Where is that coming from?

10:15:53 22 A. It comes from a pair of documents
10:15:57 23 from 1857, I believe, which relate to the payment
10:16:06 24 to Peter Jacobs of 50 pounds. And so one of the
10:16:10 25 two documents is an Indian Affairs, you know,

1 receipt or a document showing that this amount had
2 been paid to Peter Jacobs and it says for services
3 rendered in obtaining a surrender of the Saugeen
4 Peninsula.

5 And then there is a document with it,
6 Peter Jacobs, you know, signing to say that he had
7 received the money and he used the -- he has a
8 little explanatory phrase and he says for services
9 rendered in procuring the surrender.

10 So both of those terms suggest an
11 active role in trying to ensure that the Treaty did
12 go through.

13 Q. Can we open Exhibit 2469, please.
14 Is this the document that you were referring to?

15 A. Yes.

16 Q. What evidence do we have, if any,
17 about what Jacobs did to procure or obtain a
18 surrender?

19 A. I'm only aware of one document
20 that gives any more detail about how he might have
21 or what he might have done to help obtain the
22 surrender, and that is the memoir, which I find not
23 entirely credible in that regard.

24 Q. Can you scroll down to the second
25 page. This is 138129 on the top of the document.

1 The date on this document is 28 March 1857. Why
2 did payment occur three years after the Treaty?

3 A. It is really two and a half years
4 after, but it is certainly a surprising time lag.
5 I don't have any direct evidence to show why that
6 was, but I suspect that Peter Jacobs had to work to
7 try to get them to pay him.

8 Q. What was Peter Jacobs' financial
9 situation in 1854?

10 A. For that, I have relied on the
11 short biography of Peter Jacobs produced by
12 historian Donald Smith, and what he says is that
13 Peter Jacobs was facing financial difficulties at
14 the time, he had had two daughters die in 1853 to
15 '54 and he had financial troubles. As a Methodist
16 missionary, he did not receive a large salary, and
17 he and his wife wanted to make sure that their
18 remaining children got a good education which was
19 going to require money because the free schooling
20 that was available was not of high quality.

21 Q. I would like to bring up that
22 biography now so we can add it as an exhibit. That
23 is S-1597. And what is this book that we are
24 looking at?

25 A. This is a book published by

10:19:38 1 historian Donald B. Smith. It is the culmination
10:19:42 2 of many years of research into these Ojibwe leaders
10:19:46 3 from the 19th century. He has been studying them
10:19:48 4 for, I don't know, 30 years or something. And
10:19:54 5 there are different chapters for each leader and
10:19:56 6 there is one covering Peter Jacobs.

10:19:57 7 Q. Can we scroll down to the next
10:19:59 8 page, please, and to the beginning of the chapter.
10:20:08 9 So this is now Chapter 4 that we are looking at.
10:20:12 10 There is no page number on here. So that is page
10:20:16 11 98 of the document.

10:20:17 12 And Chapter 4 of the book is entitled
10:20:21 13 "The Outsider: Peter Jacobs, or Pahtahsega."

10:20:28 14 A. Pahtahsega, I suspect.

10:20:30 15 Q. Thank you. Is this chapter
10:20:32 16 authoritative?

10:20:33 17 A. Yes.

10:20:33 18 MS. NERLAND: Your Honour, I would like
10:20:34 19 to add this chapter as the next exhibit entitled
10:20:38 20 "Donald Smith, Mississauga Portraits, Chapter 4,
10:20:40 21 Peter Jacobs."

10:20:44 22 THE COURT: Seeing no objection, Mr.
10:20:46 23 Registrar?

10:20:46 24 THE REGISTRAR: Exhibit No. 4125.

10:20:53 25 EXHIBIT NO. 4125: Chapter 4 from the

1 book entitled "Donald Smith,
2 Mississauga Portraits, Chapter 4, Peter
3 Jacobs."

4 BY MS. NERLAND:

5 Q. In the memoir that we have looked
6 at, Oliphant refers to Jacobs as pecuniarily
7 interested in the surrender. Based on the
8 documents you have reviewed what is your opinion on
9 whether Jacobs was in fact pecuniarily interested
10 in the surrender?

11 A. The evidence we have seems to me
12 to suggest very clearly that he was pecuniarily
13 interested. I say that because, well, the memoir
14 supports it, and the documents showing that he was
15 paid 50 pounds for services rendered in obtaining
16 the surrender seems to me to be a clear statement
17 that he was actively involved in obtaining the
18 surrender.

19 Otherwise, they would have said the
20 payment was for interpreting, and one would expect
21 a much lower amount.

22 Q. Before we move away from Jacobs, I
23 would like to turn to a source you have cited in
24 your report. Could we bring up Exhibit 1909,
25 P-1909, please. Let's go to the first page. And

10:22:19 1 can you zoom in. I anticipate no one can see this.

10:22:34 2 Can you tell us what this document is?

10:22:35 3 A. This is a letter from Charles
10:22:39 4 Keeshig, the secretary of the Nawash Band, to
10:22:44 5 Superintendent TG Anderson.

10:22:46 6 Q. And --

10:22:49 7 A. I believe in 1852.

10:22:50 8 Q. And we can scroll up to the date.

10:22:58 9 A. Yes. April 6/17th -- April 6/17,
10:23:07 10 1852.

10:23:08 11 Q. Can we scroll back down to the
10:23:12 12 portion that I have marked. It says there:

10:23:14 13 "They have also reduced my
10:23:16 14 salary to 50 pounds per annum."

10:23:18 15 What was Charles Keeshig's salary being
10:23:23 16 paid for?

10:23:24 17 A. He was being paid to be their
10:23:26 18 translator and interpreter.

10:23:27 19 Q. I would like --

10:23:32 20 A. So this is the amount he was being
10:23:33 21 paid for a full year's work.

10:23:34 22 Q. I would like to turn up one more
10:23:37 23 document, S-1892. What is this publication that we
10:23:47 24 are looking at?

10:23:48 25 A. This is a historical monograph

10:23:54 1 that discusses basically the ways that agricultural
10:23:59 2 colonization altered the landscape in Upper Canada
10:24:03 3 in the 19th century.

10:24:05 4 Q. Who is David Wood?

10:24:10 5 A. He is a historian.

10:24:11 6 Q. I would like to turn up page 117
10:24:17 7 of this document which is PDF image 19. And I am
10:24:28 8 interested in the chart there on the right-hand
10:24:31 9 side of the page. Can you explain to us what this
10:24:36 10 chart is?

10:24:37 11 A. Yes, this is a chart in which he
10:24:46 12 records his findings about the amounts of money
10:24:50 13 people were paid in Ontario in 1840 for these
10:24:54 14 different largely working class occupations.

10:24:57 15 Q. And I find this chart a bit
10:25:01 16 difficult to understand myself, so I'm hoping you
10:25:03 17 can help me.

10:25:04 18 A. Yes.

10:25:04 19 Q. I see, for instance, the
10:25:08 20 occupation of millers has several lines in the
10:25:13 21 pounds per annum. What do those lines mean?

10:25:16 22 A. It is a bit confusing. Basically,
10:25:19 23 what he has done here is he has done primary
10:25:21 24 research on two I think they might have been
10:25:27 25 districts, the Home District and the Ottawa

1 District, so these are just regional areas, and he
2 is distinguishing between the typical wages in the
3 two townships, just for purposes of comparison.

4 So under the column showing amounts per
5 annum, an unbroken line records figures he found
6 for the Home District, and then the broken line
7 shows figures for the Ottawa District.

8 Q. And how much is a miller being
9 paid in this period, according to the chart?

10 A. You can see there is a range
11 there, but somewhere between 30 and 50 pounds per
12 annum.

13 Q. Is this book chapter, and this
14 chart in particular, which is what we are relying
15 on it for, reliable on the topic of salaries in
16 1840?

17 A. I believe it is. It is based on
18 primary research.

19 MS. NERLAND: Your Honour, I would like
20 to add this as the next exhibit entitled "Wood,
21 Making Ontario, Chapter 5."

22 THE COURT: So the entire book?

23 MS. NERLAND: No, it is just Chapter 5,
24 Your Honour.

25 THE COURT: Chapter 5 of this book?

10:26:48 1 MS. NERLAND: Uhm-hmm.

10:26:50 2 THE COURT: Mr. Registrar?

10:26:51 3 THE REGISTRAR: Exhibit No. 4126.

10:26:51 4 EXHIBIT NO. 4126: Chapter 5 of the

10:26:59 5 book entitled "Wood, Making Ontario."

10:26:59 6 BY MS. NERLAND:

10:27:02 7 Q. We have now been through a number

10:27:04 8 of the primary documents about the process by which

10:27:07 9 the Crown sought a surrender of the peninsula. In

10:27:12 10 your view, to what extent did the Saugeen Ojibway

10:27:16 11 have an opportunity to consider and come to a

10:27:19 12 consensus on the proposal put to them by the Crown?

10:27:21 13 A. In October 1854, right? The

10:27:31 14 documentary record shows that Laurence Oliphant

10:27:38 15 rushed the process all along the way, that he did

10:27:44 16 not advise them that he was coming or that they

10:27:50 17 were going to be asked officially by an important

10:27:55 18 government figure to surrender their whole

10:27:59 19 peninsula.

10:28:00 20 The record also shows that once the

10:28:04 21 Chiefs had arrived, having been summoned to

10:28:12 22 Saugeen, that he rushed them into Council and he

10:28:16 23 says specifically that he did so in order to

10:28:19 24 prevent them from consulting among themselves or

10:28:23 25 talking to or getting advice from anyone else.

1 He then, his own record shows, and both
2 of his sources say this, that they had about an
3 hour, that he withdrew for about an hour to allow
4 them to reach a decision. This is a very short
5 period of time for an Ojibwe community to decide on
6 a matter of such great importance, and it also
7 appears that only the Chiefs were able to consult
8 among themselves; they were not able to consult
9 more widely with their community at that time on
10 the proposal that Oliphant had made to them.

11 Q. Earlier you took us through a
12 number of Crown efforts to secure a surrender of
13 portions of the peninsula in the years prior to
14 1854. To what extent, in your opinion, based on
15 your review of these documents, did the Saugeen
16 Ojibway have the opportunity to consider and come
17 to a consensus about the proposal that would
18 ultimately be put to them in October, over the
19 months preceding October of 1854?

20 A. The events in 1854 were a
21 culmination of years of attempts by government
22 officials and others to obtain lands on the
23 peninsula from the Saugeen Ojibway, and we have the
24 declaration of 1847 in which the Crown effectively
25 acknowledged that their lands were at risk by

10:30:05 1 issuing this Royal Declaration to protect them and
10:30:08 2 then also in 1851 applying the Act for the
10:30:14 3 protection of Indian lands to the Saugeen
10:30:18 4 territory.

10:30:18 5 And we know from the other records that
10:30:23 6 government officials and private parties approached
10:30:26 7 them multiple times in the early 1850s seeking
10:30:32 8 different areas of land.

10:30:35 9 So while it was no secret that the
10:30:40 10 British government and white settlers intended to
10:30:42 11 obtain this land, as much of it as they could get,
10:30:50 12 they were presented with a series of varying
10:30:53 13 proposals.

10:30:56 14 So when Laurence Oliphant arrived
10:31:03 15 unannounced to present a proposal that they
10:31:07 16 surrender the entire peninsula, this was the first
10:31:15 17 time that they were presented with a formal
10:31:19 18 proposal, I believe, in which they were being asked
10:31:22 19 to surrender the entire peninsula.

10:31:26 20 The records about the previous Council
10:31:28 21 in August 1854 are somewhat confusing, I find,
10:31:32 22 especially because we don't have the map that he
10:31:35 23 provided on which he marked the areas he proposed
10:31:39 24 to have surrendered and those that he proposed to
10:31:43 25 reserve.

10:31:43 1 But the letter from Charles Rankin that
10:31:48 2 sheds more light on that Council talks about a
10:31:53 3 190,000 acre parcel or tract that they wanted to
10:32:01 4 get the Saugeen Ojibway to surrender and that of
10:32:03 5 those 190,000, the desirable portion of the
10:32:08 6 peninsula, that the Saugeen Ojibway were not
10:32:10 7 willing to part with 130,000 of those acres and
10:32:15 8 were only willing to part with 60,000 of them.

10:32:18 9 Q. Based on the documents you have
10:32:24 10 reviewed, what explains the timing of this
10:32:26 11 surrender?

10:32:27 12 A. The documents suggest to me that
10:32:35 13 the arrival of Laurence Oliphant was a factor. His
10:32:42 14 predecessor, Colonel Bruce, had also written about
10:32:45 15 the likelihood of parts of the peninsula being
10:32:48 16 surrendered, but he had also said that the time
10:32:51 17 might not yet have come.

10:32:53 18 It does appear that after Oliphant took
10:32:56 19 up the position, there was a greater sense of
10:33:04 20 urgency, and this is consistent with the fact that
10:33:05 21 Oliphant had a vision of getting the entire
10:33:13 22 peninsula surrendered so that he could use part of
10:33:17 23 the proceeds from land sales to fund the Indian
10:33:21 24 Department and this would advance his career.

10:33:24 25 Q. I am going to move on to the last

10:33:42 1 topic of my examination now, which is brief.

10:33:44 2 I'm going to turn now to the terms of
10:33:47 3 Treaty 72. I would like to bring up Exhibit 2147.
10:34:06 4 Could you scroll down a bit. And further down also
10:34:14 5 just so that the witness can see the whole
10:34:16 6 document.

10:34:17 7 So what is this collection that we are
10:34:19 8 looking at on the front page?

10:34:21 9 A. I'm sorry, can you scroll up so I
10:34:24 10 can see the front page?

10:34:27 11 Oh, it is the surrender -- yes, it is
10:34:35 12 the Treaty 72 text.

10:34:37 13 Q. Let's turn to the image where the
10:34:41 14 text begins.

10:34:42 15 THE COURT: Is this a situation where
10:34:45 16 the handwritten text is different from the typed
10:34:48 17 version that we are using in this trial?

10:34:49 18 MS. NERLAND: Yes, Your Honour, not in
10:34:51 19 terms of the substance, but it is helpful, I think,
10:34:53 20 to see the position of the names.

10:34:55 21 THE COURT: Okay, which is fine, but
10:34:57 22 remember that we all have a typed version, so
10:35:00 23 please zero in on what you say is significant as
10:35:03 24 opposed to going through it chapter and verse,
10:35:06 25 because it is much harder to read this way.

1 MS. NERLAND: Yes, I just have one
2 question on this document, so it will be very
3 brief.

4 THE COURT: All right.

5 BY MS. NERLAND:

6 Q. Can we go to the last page.

7 On the right-hand side below the name
8 David Sawyer is John H. Beaty. Who was John Beaty?

9 A. Sorry, I'm looking for -- I'm not
10 finding it. Oh, there, yes, right. John H. Beaty.
11 Oh, he was a member of the Colpoy's Bay Band.

12 Q. Was he a Chief?

13 A. No.

14 Q. And what can you tell us about
15 Peter Jones' signature on this document?

16 A. Do -- oh, you do mean Peter Jones.

17 Q. Oh, pardon me, I meant --

18 A. You mean Peter Jacobs?

19 Q. I did, Peter Jacobs, thank you. I
20 made that mistake before.

21 A. Yes, I find this a bit unusual.
22 So the document is signed by Laurence Oliphant, the
23 Superintendent General of Indian affairs and the
24 negotiator of the Treaty. That is exactly where
25 you would expect the Treaty Commissioner's name to

10:36:28 1 appear, and right under it Peter Jacobs has signed
10:36:32 2 and it says "missionary." It would be more typical
10:36:37 3 for someone who was just the translator or
10:36:40 4 interpreter to appear somewhere else and to be
10:36:45 5 noted as a translator.

10:36:49 6 So this unusual placement does suggest
10:36:53 7 that his role was more expansive than simply that
10:36:58 8 of translator.

10:36:59 9 Q. I would like to move on now. In
10:37:03 10 your report at pages 30 to 32 you provide an
10:37:06 11 opinion on the issue of actual settlement
10:37:07 12 conditions and I am not going to go into that here.
10:37:10 13 I just want to ask one clarifying question on that
10:37:12 14 point.

10:37:13 15 Was an actual settlement condition ever
10:37:15 16 imposed on the sale of the lands on the peninsula?

10:37:19 17 A. I believe it was eventually, but
10:37:24 18 not for several years.

10:37:26 19 Q. Let's turn to harvesting rights
10:37:30 20 now. What did Treaty 72 say about the harvesting
10:37:34 21 rights in the tract surrendered?

10:37:40 22 THE COURT: Again, unless you really
10:37:43 23 need the handwritten version for some reason, it is
10:37:47 24 very difficult to read.

10:37:48 25 BY MS. NERLAND:

1 Q. Yes, let's get rid of the
2 handwritten version. In fact, I don't think I need
3 any version of this.

4 What did Treaty 72 say about harvesting
5 rights in the tract surrendered?

6 A. It says nothing about harvesting
7 rights.

8 Q. When did treaties in what is now
9 Ontario begin to contain express provisions dealing
10 with harvesting rights?

11 A. In 1850, and the Robinson Treaties
12 were signed in 1850. They are generally seen by
13 historians as establishing a pattern that was
14 followed in subsequent treaties, and they made
15 express provision for the continuation of
16 harvesting rights throughout the territory
17 surrendered.

18 Q. Why did these treaties expressly
19 guarantee hunting and fishing rights or harvesting
20 rights when others hadn't before?

21 A. The Commissioner for the Robinson
22 Treaties, Robinson, said expressly in his report on
23 the Treaty that he did this in order to ensure that
24 the Indigenous signatories could continue to
25 support themselves. He represented them as

10:39:15 1 preferring to live on government handouts, and so
10:39:20 2 he said he guaranteed the harvesting rights so that
10:39:25 3 the Ojibwe who signed the Treaty would not be able
10:39:28 4 to say that the government had deprived them of a
10:39:30 5 living.

10:39:31 6 Q. I would like to turn to S-1208.
10:39:51 7 This is cited in the section of your report that
10:39:54 8 addresses the Robinson Treaties. And we don't have
10:40:02 9 a title page on this, unfortunately. What is this
10:40:06 10 excerpt from?

10:40:07 11 A. It is Chapter 4 of a book by J.R.
10:40:12 12 Miller called "Compact, Contract, Covenant," which
10:40:16 13 is an overview of treaty-making in Canada.

10:40:19 14 Q. Who is J.R. Miller?

10:40:23 15 A. He is a prominent and prolific
10:40:27 16 historian of native-newcomer relations in Canada.

10:40:31 17 Q. Is this considered an
10:40:33 18 authoritative source on Upper Canadian treaties
10:40:38 19 between 1818 and 1862?

10:40:39 20 A. Yes.

10:40:40 21 Q. Is it considered then an
10:40:41 22 authoritative source on the Robinson Huron
10:40:45 23 Treaties?

10:40:46 24 A. Yes.

10:40:46 25 MS. NERLAND: Your Honour, I would like

10:40:47 1 to add this excerpt, Chapter 4 of Miller's
10:40:50 2 "Compact, Contract, Covenant" as the next exhibit.

10:40:55 3 THE COURT: Mr. Registrar?

10:40:55 4 THE REGISTRAR: Exhibit No. 4127.

10:40:55 5 EXHIBIT NO. 4127: Chapter 4 of J.R.

10:40:55 6 Miller's book entitled "Compact,
10:40:55 7 Contract, Covenant."

10:40:55 8 BY MS. NERLAND:

10:41:02 9 Q. And I would like to turn to one
10:41:03 10 more secondary source that you have cited. This is
10:41:06 11 S-1415. Can you scroll down a little, please. Are
10:41:31 12 you familiar with this document?

10:41:32 13 A. Yes.

10:41:33 14 Q. What is it?

10:41:35 15 A. It is a chapter from another book
10:41:39 16 on treaty-making in Canada called "Bounty and
10:41:43 17 Benevolence."

10:41:43 18 Q. And who wrote this book?

10:41:45 19 A. It was a collaboration between
10:41:52 20 three highly regarded historians including J.R.
10:41:55 21 Miller and also Arthur Ray and Frank Tough.

10:41:59 22 Q. This excerpt we have in front of
10:42:00 23 us is Chapter 3, precedents from early eastern
10:42:04 24 Treaties. Is this excerpt an authoritative source
10:42:07 25 on early eastern treaties?

10:42:09 1 A. Yes.

10:42:09 2 MS. NERLAND: Your Honour, I would like
10:42:10 3 to add this as the next exhibit.

10:42:12 4 THE COURT: Mr. Registrar?

10:42:13 5 THE REGISTRAR: Exhibit No. 4128.

10:42:13 6 EXHIBIT NO. 4128: Chapter 3 of the
10:42:19 7 book entitled "Bounty and Benevolence."

10:42:19 8 BY MS. NERLAND:

10:42:20 9 Q. How did the Saugeen Ojibway Nation
10:42:22 10 support themselves in 1854?

10:42:25 11 A. In 1854 they were doing a lot of
10:42:36 12 hunting and fishing and were reliant on hunting and
10:42:41 13 fishing as a source of food and trade goods. They
10:42:46 14 were doing some farming, but we have multiple
10:42:49 15 sources at the time that comment on how small the
10:42:53 16 areas were that they had cleared and were
10:42:55 17 cultivating.

10:42:57 18 So hunting and especially fishing were
10:43:04 19 a very significant portion of their livelihood and
10:43:08 20 economies.

10:43:09 21 Q. I'm not going to go to the primary
10:43:12 22 sources you have referred to on this, but I do want
10:43:15 23 to turn up one of the secondary sources. This is
10:43:20 24 SC0694, please.

10:43:27 25 What is this book we are looking at?

10:43:55 1 A. This is a book from the early 20th
10:44:01 2 century, what I would normally call a local
10:44:05 3 history, that is, a history written by a
10:44:10 4 non-academic historian on a focussed geographical
10:44:14 5 area.

10:44:15 6 Q. Is this book reliable, in your
10:44:23 7 view?

10:44:23 8 A. I would consider it reliable for
10:44:29 9 some things. The author was probably not a trained
10:44:34 10 historian and so he may not have regarded his
10:44:39 11 sources very critically or analyzed them very
10:44:42 12 critically.

10:44:45 13 At the same time, he was secretary of
10:44:49 14 the Bruce County Historical Society, so he was
10:44:52 15 probably -- he had probably done a lot of research.

10:44:54 16 Q. And can you scroll down to the
10:44:59 17 next page, please. We have excerpted here Chapter
10:45:04 18 5 of this book which is "The Settlement of the
10:45:06 19 County 1850-1856," and I would like to go to PDF
10:45:14 20 image 34, which is page 78 in the book. And at the
10:45:30 21 bottom, seven lines down, there is a passage that
10:45:35 22 begins "Game was plentiful [...]" and I won't read
10:45:39 23 that aloud. We can all see it.

10:45:42 24 But I do want to ask you, since you
10:45:44 25 have said that this book isn't necessarily -- you

10:45:48 1 have questions about whether it can be relied on
10:45:50 2 for all things, is this section of the book, in
10:45:52 3 your view, reliable?

10:45:53 4 THE COURT: What section are you
10:45:54 5 referring to?

10:45:55 6 MS. NERLAND: "Game was plentiful, the
10:45:57 7 creeks, especially those [...]"

10:46:00 8 THE COURT: Counsel, again, when
10:46:02 9 there's things going on on the screen, it is hard
10:46:05 10 to follow. You said at the bottom of the page. I
10:46:08 11 see footnotes at the bottom of the page. Is that
10:46:11 12 what you are referring to?

10:46:11 13 MS. NERLAND: No, Your Honour. I'm
10:46:13 14 referring to --

10:46:13 15 THE COURT: If, in words, you can
10:46:19 16 describe the section of the page that you are
10:46:21 17 asking the witness about. I can see it now, but it
10:46:24 18 doesn't fit with your verbal description. Please
10:46:27 19 give a new verbal description.

10:46:29 20 MS. NERLAND: I'm talking about the
10:46:31 21 passage of the main text beginning seven lines from
10:46:36 22 the bottom.

10:46:38 23 THE COURT: All right, and you have
10:46:39 24 read the opening phrase.

10:46:40 25 MS. NERLAND: Yes.

1 THE COURT: Where does the passage end
2 that you are asking about?

3 MS. NERLAND: The passage ends two
4 lines from the bottom with the words "[...] feed on
5 his growing grain."

6 THE COURT: Thank you very much.

7 Sir, can you answer the question?

8 BY MS. NERLAND:

9 Q. Would you like me to repeat the
10 question?

11 A. Yes, please.

12 Q. In your view, is this section of
13 this book reliable?

14 A. Yes. He is actually speaking from
15 personal experience and knowledge from his father.

16 MS. NERLAND: Your Honour, could I
17 please add this as the next exhibit entitled
18 "Robinson, The History of the County of Bruce,
19 Chapter 5."

20 THE COURT: Mr. Registrar?

21 THE REGISTRAR: Exhibit No. 4129.

22 EXHIBIT NO. 4129: Chapter 5 of the
23 book entitled "Robinson, The History of
24 the County of Bruce."

25 MS. NERLAND: And, Your Honour, as

10:47:26 1 promised, this concludes my portion of the
10:47:28 2 examination, and my colleague Ms. Guirguis would
10:47:31 3 like to ask Dr. Brownlie some questions now.

10:47:35 4 MS. GUIRGUIS: Your Honour, if we could
10:47:46 5 just have a moment to rearrange a bit and provide
10:47:48 6 the -- hand up the next expert report to Dr.
10:47:57 7 Brownlie?

10:47:57 8 THE COURT: Please go ahead.

10:48:02 9 You don't have to stand, sir.

10:48:06 10 Now, before you begin, Counsel, I just
10:48:33 11 have a couple of things I want to raise with you.

10:48:35 12 There are substantial components of
10:48:39 13 this second report that have already been covered
10:48:42 14 by your colleague. You are nodding your head.

10:48:45 15 MS. GUIRGUIS: Yes.

10:48:46 16 THE COURT: And as is the ordinary rule
10:48:49 17 in examinations in-chief, it is not open to you to
10:48:52 18 cover them again.

10:48:53 19 MS. GUIRGUIS: That's right.

10:48:55 20 THE COURT: And there are also some
10:48:57 21 matters within this report that cause me to pause
10:49:06 22 as to whether they are squarely within this
10:49:08 23 gentleman's expertise.

10:49:10 24 However, as you know from our case
10:49:13 25 conference last week, Ontario decided that rather

10:49:17 1 than challenging in a voir dire setting this
10:49:21 2 gentleman's scope, that they would leave that for
10:49:23 3 their cross-examination. And on that basis, I have
10:49:26 4 allowed the entire report to form part of his
10:49:28 5 examination in-chief.

10:49:29 6 Having said that, that does not open
10:49:33 7 the door to oral examination outside the tender
10:49:37 8 that I have accepted, and I am sure you are not
10:49:40 9 planning on that.

10:49:42 10 There is one aspect of that that I want
10:49:44 11 to raise and I will also hear from Defendants'
10:49:46 12 counsel if they have a problem with my suggestion.

10:49:49 13 Obviously, this gentleman's discussion
10:49:52 14 from time to time and particularly in the second
10:49:54 15 report touches on the legal framework in place
10:49:59 16 historically.

10:50:01 17 MS. GUIRGUIS: Uhm-hmm.

10:50:01 18 THE COURT: And in that context, we
10:50:03 19 have to bear in mind the fact that he is not
10:50:07 20 qualified to give opinion evidence about law, and
10:50:13 21 even if he was, he is not allowed to in this Court.

10:50:15 22 However, it would seem to me that you
10:50:17 23 are probably going to need from time to time to ask
10:50:19 24 him questions in the context of a legal framework.

10:50:22 25 So here is what I have come up with,

1 subject to your submissions and Defendants'
2 counsel's submissions.

3 It would seem to me that one way to
4 efficiently go through that kind of evidence is I
5 would provisionally, and subject to hearing from
6 the other side, not have a problem with this
7 gentleman being asked about his understanding of
8 the law, which is different from an opinion about
9 the law, in order that he can put his evidence in
10 context.

11 Now, is that satisfactory from your
12 standpoint, Ms. Guirguis, as far as the efficient
13 oral examination today?

14 MS. GUIRGUIS: Yes, that is, Your
15 Honour.

16 THE COURT: Now, does any Defendant
17 have a problem with proceeding in that fashion?
18 Mr. Beggs?

19 MR. BEGGS: No, Your Honour.

20 THE COURT: Mr. Feliciant?

21 MR. FELICIAN: No, Your Honour.

22 THE COURT: All right. So obviously,
23 if, you know, any question is objectionable,
24 counsel will stand up. But I thought it would be
25 smoother if we started off with an approach to

10:51:25 1 those sort of legal framework questions so we
10:51:30 2 didn't get a lot of objections on the basis that
10:51:33 3 that evidence is not -- wouldn't be admissible from
10:51:38 4 anyone, sir, it is not just about you.

10:51:40 5 THE WITNESS: Thank you.

10:51:41 6 THE COURT: So if that is satisfactory
10:51:43 7 to everyone, and those are the two things I wanted
10:51:46 8 to raise, the fact that it is not open to go over
10:51:49 9 that ground again. You know, it is a long report,
10:51:52 10 but substantial portions of it have been covered.
10:51:55 11 And a strategy to deal with the legal framework if
10:51:57 12 you need to, in your questions highlighting other
10:52:01 13 evidence of this witness.

10:52:03 14 MS. GUIRGUIS: Thank you, Your Honour.
10:52:04 15 I have been trying -- I have tried to be mindful in
10:52:07 16 drafting my questions not to go over, and if I
10:52:09 17 stray, you know --

10:52:10 18 THE COURT: Well, someone will stand
10:52:12 19 up.

10:52:12 20 MS. GUIRGUIS: Someone will stand up.

10:52:14 21 THE COURT: On the repetition, you just
10:52:16 22 can't, it is simple. You know, your colleague
10:52:18 23 ordinarily would do the entire examination and she
10:52:20 24 would not have attempted to cover it again, and I
10:52:22 25 am sure you are going to do your best to avoid it.

10:52:25 1 MS. GUIRGUIS: Yes, any attempt will be
10:52:27 2 accidental and require me to pause and redraft.

10:52:29 3 THE COURT: That is no problem at all.
10:52:30 4 Counsel, please go ahead.

10:52:31 5 EXAMINATION IN-CHIEF BY MS. GUIRGUIS:

10:52:33 6 Q. Thank you.

10:52:33 7 So good morning, Professor Brownlie.

10:52:37 8 A. Good morning.

10:52:38 9 Q. We are going to shift now to talk
10:52:39 10 about the second report that you completed for the
10:52:41 11 purposes of this litigation which is called "The
10:52:45 12 long road to land claims, the historical
10:52:48 13 development of the Saugeen Ojibway's capacity to
10:52:51 14 challenge governments on Treaty and land issues."
10:52:54 15 It was added as Exhibit 4119.

10:52:58 16 Your Honour, we noticed just yesterday
10:53:00 17 that there are some formatting issues -- yesterday
10:53:03 18 or the day before, my apologies -- on the report
10:53:06 19 where some indented quotes blended in with the text
10:53:08 20 of the report.

10:53:10 21 So we prepared an errata. Everybody
10:53:13 22 had that --

10:53:14 23 THE COURT: Is there any chance one of
10:53:15 24 them is on page 6?

10:53:16 25 MS. GUIRGUIS: Yes. If we could bring

1 up SC0845. It is a short errata that we prepared
2 and that we would like to file as an exhibit so
3 that that clarifies.

4 And I think that the first one is on
5 page 6.

6 THE COURT: Well, because I noticed
7 starting directly under the heading on page 6 a
8 lengthy section in the first person, which seemed
9 unlikely to have come from this gentleman.

10 MS. GUIRGUIS: That's correct.

11 THE COURT: And if that is the answer,
12 then that is a good solution for it.

13 Just for my information, because I
14 marked up this version, how long is that particular
15 quote? So it starts on page 6. Does it go to the
16 footnote? Is that where I should take it as --

17 MS. GUIRGUIS: Yes, it goes to the top
18 of page 7.

19 THE COURT: Where there is a 6?

20 MS. GUIRGUIS: That's right. So that
21 is how we have described it in our errata, is that
22 we have said what note it will be, note 6, and the
23 next one is note 68.

24 THE COURT: So that is very helpful,
25 because I was puzzled by that. And I assume you

1 want to mark this as an exhibit?

2 MS. GUIRGUIS: Yes, I would, Your
3 Honour.

4 THE COURT: Defendants' counsel have
5 been given a copy of it, I take it?

6 MS. GUIRGUIS: Well, they are seeing
7 the copy for the first time because I neglected to
8 send this last night, but I did tell them about it
9 before Court started and I don't believe my friends
10 have any objection.

11 THE COURT: Well, they are all firmly
12 planted in their seats so I think we are okay.

13 Mr. Registrar?

14 THE REGISTRAR: Exhibit No. 4130.

15 THE COURT: Is there any chance you
16 have a paper copy of it, Counsel? It is okay if
17 you don't.

18 MS. GUIRGUIS: We can get one. We can
19 bring it at the break.

20 THE COURT: There is absolutely no
21 hurry. I can print it when it gets in as an
22 exhibit.

23 So give that to me again, Mr.
24 Registrar?

25 THE REGISTRAR: Exhibit No. 4130.

10:54:53 1 THE COURT: 4130, errata.

10:54:53 2 EXHIBIT NO. 4130: Errata to the second

10:54:53 3 report of Professor Brownlie, prepared

10:54:58 4 by Plaintiffs' counsel.

10:54:58 5 THE COURT: Please go ahead, Counsel.

10:54:59 6 BY MS. GUIRGUIS:

10:55:00 7 Q. Thank you, Your Honour.

10:55:02 8 Professor Brownlie, let's start off by

10:55:04 9 discussing the questions that you were asked to

10:55:05 10 answer in this section of your expert evidence. I

10:55:07 11 would like to pull up document SC0803.

10:55:14 12 Professor Brownlie, do you recognize

10:55:17 13 this document?

10:55:17 14 A. Yes.

10:55:18 15 Q. And what is it?

10:55:19 16 A. These are the questions that Roger

10:55:24 17 Townshend sent to me and which he was asking me to

10:55:26 18 address in this report.

10:55:28 19 Q. So it is two pages, if you could

10:55:31 20 just scroll down, and you recognize both pages?

10:55:35 21 A. Yes.

10:55:36 22 MS. GUIRGUIS: Okay, Your Honour, I

10:55:37 23 would like to add this as the next exhibit.

10:55:39 24 THE COURT: Mr. Registrar?

10:55:41 25 THE REGISTRAR: Exhibit No. 4131.

1 EXHIBIT NO. 4131: List of questions
2 provided by Mr. Townshend to Professor
3 Brownlie for him to address in his
4 report.

5 BY MS. GUIRGUIS:

6 Q. Let's discuss your methodology in
7 answering these questions. How did you approach
8 the task of answering the questions that were laid
9 out for you?

10 A. This is -- these are a series of
11 questions, a number of which I have examined in my
12 own independent research previously, so I began by
13 looking at the records relating to the Saugeen
14 Ojibway, the primary -- many primary documents,
15 including texts of previously conducted oral
16 history.

17 I chose to conduct a small amount of
18 oral history myself so that I could ask the
19 specific questions I was trying to investigate, and
20 then I -- and a good deal of secondary source
21 material.

22 Q. You mentioned reviewing oral
23 history, and I want to pull up Exhibit 3931, which
24 is an agreed statement of facts regarding the
25 authenticity of oral history interviews. This is a

1 29-page document and I don't propose that we go
2 through each and every one. But, Professor
3 Brownlie, have you seen this before?

4 A. Yes.

5 Q. In your review of this document
6 previously, can you point to which of the oral
7 histories that you reviewed? Let's say taking it
8 by the -- it is grouped in the table of contents by
9 years.

10 A. I looked at most of it.

11 Q. Thank you. You just mentioned now
12 and in your report you reference that you
13 interviewed seven individuals?

14 A. Yes.

15 Q. How did you determine who to
16 interview from the Saugeen Ojibway Nation?

17 A. Initially, I received advice from
18 Roger Townshend because he knows the communities
19 and he knows the individuals involved and he could
20 provide introductions. And when you are conducting
21 oral history, you want to have some kind of
22 introduction. If you are going to a community that
23 you are not familiar with yourself or where you
24 don't have personal contacts, you want someone to
25 introduce you to people.

10:58:06 1 So I did that. And yeah, and I met
10:58:17 2 with the people who I was able to meet with who
10:58:22 3 were able and willing to meet with me, and just
10:58:24 4 ensured that these were people I knew from the
10:58:27 5 records had been directly involved in land claims.

10:58:31 6 Q. I would like to bring up Exhibit
10:58:35 7 3981. Professor Brownlie, do you recognize this
10:58:45 8 document?

10:58:45 9 A. Yes.

10:58:46 10 Q. And what is it?

10:58:48 11 A. These are the questions that I
10:58:50 12 posed to the people I interviewed.

10:58:52 13 Q. Please tell us briefly how you
10:58:57 14 developed these interview questions?

10:58:59 15 A. I tried to develop questions that
10:59:16 16 were specific to the area I was investigating and
10:59:21 17 that at the same time were fairly broadly phrased
10:59:25 18 so that I wasn't guiding the people I was talking
10:59:29 19 to, so that they could choose what were the most
10:59:33 20 important issues to raise.

10:59:35 21 So for instance, that first question:

10:59:37 22 "When did the Saugeen Ojibway
10:59:39 23 begin to assert their rights over
10:59:41 24 their ancestral territories?"

10:59:43 25 That is a very broadly phrased

10:59:45 1 question, so that each interviewee could choose
10:59:50 2 what he or she thought was the beginning point and,
10:59:53 3 you know, explain why they thought that.

10:59:57 4 So all of these questions are focussed
11:00:00 5 on the central issue of my investigation here or
11:00:05 6 the central issue I was investigating in the oral
11:00:08 7 history, which was their perspective on when and
11:00:12 8 how they were able to begin asserting their rights
11:00:17 9 over their territories and what factors hampered
11:00:19 10 them.

11:00:19 11 Q. Did you provide these questions to
11:00:23 12 the people you were interviewing in advance of
11:00:25 13 interviewing them?

11:00:26 14 A. Yes.

11:00:27 15 Q. In all cases?

11:00:30 16 A. I believe so. It might have been
11:00:34 17 -- I think it was usually at the beginning of the
11:00:36 18 interview, when I first met with them. Honestly, I
11:00:41 19 can't exactly remember because I made some
11:00:43 20 arrangements by email and I may have sent their
11:00:46 21 questions then initially, but honestly, I can't
11:00:49 22 exactly remember.

11:00:50 23 But everyone saw the questions before
11:00:53 24 they began to speak to me.

11:00:54 25 Q. Can you please describe briefly

11:01:02 1 how you conducted these interviews when you met
11:01:05 2 with a person or when you got on the phone with
11:01:08 3 them?

11:01:08 4 A. I began by introducing myself or
11:01:17 5 further introducing myself. They already -- when I
11:01:22 6 approached them to interview them, I had already
11:01:24 7 told them generally what I was trying to accomplish
11:01:27 8 and why I wanted to speak to them. But I gave them
11:01:30 9 a little more information about what I was trying
11:01:32 10 to do and what I was going to be asking of them.

11:01:36 11 Then we went through the consent
11:01:38 12 process, which is a very important part of oral
11:01:41 13 history, to ensure that they were giving informed
11:01:47 14 consent to what we were doing and that they could,
11:01:50 15 for instance, specify whether or not they would
11:01:54 16 authorize me to audiotape the interview, which
11:01:58 17 fortunately they did all authorize.

11:01:59 18 So first you have the consent process
11:02:01 19 in which you explain what you are going to do and
11:02:03 20 how their knowledge will be used and give them an
11:02:07 21 opportunity to exercise some control over what is
11:02:12 22 done with their knowledge.

11:02:14 23 And then I began to ask the questions.

11:02:16 24 Q. You spoke yesterday to my
11:02:27 25 colleague about when you rely on oral history

11:02:32 1 research. Paraphrasing, I think you mentioned that
11:02:36 2 you don't use it for certain kinds of information,
11:02:38 3 specific dates and so on.

11:02:39 4 I want to ask you about as a historian
11:02:46 5 how do you assess the accuracy of oral history?

11:02:50 6 A. In many ways that parallels the
11:03:04 7 exercise of determining the accuracy or likely
11:03:08 8 accuracy of written records so you can
11:03:11 9 cross-reference what one person says with what
11:03:14 10 other people say. And in this case, of course, I
11:03:17 11 interviewed the seven people myself, but I also had
11:03:20 12 a great many previous interviews to draw on, which
11:03:24 13 I had already read.

11:03:26 14 Then you cross-reference it with
11:03:28 15 written records. You listen closely to what people
11:03:35 16 say, and, you know, exercise the judgment that we
11:03:40 17 all would in speaking to people.

11:03:44 18 My experience in general in conducting
11:03:47 19 oral history is that people who decide -- who agree
11:03:51 20 to meet with you to be interviewed want to help
11:03:56 21 you, want to be helpful, and they are often
11:04:04 22 careful; you can often tell they are being careful
11:04:09 23 to state things as correctly as they can.

11:04:11 24 Q. So I would like to ask you to
11:04:20 25 describe how you verify the accuracy or determine

1 credibility of oral history information using an
2 example that we have heard about and that you
3 mention in your expert report. You mention in your
4 report at page 60 of the report that you heard a
5 story about the Indian Agent burning documents.

6 A. Yes.

7 Q. And you say you heard accounts
8 from Jim Ritchie, Darlene Johnson and Vernon Roote?

9 A. Yes.

10 Q. Please explain how you would
11 assess the accuracy or how you would use or rely on
12 these kinds of oral histories or on this oral
13 history?

14 A. This story is an excellent example
15 of the kinds of information you obtain from oral
16 history that you can't obtain in the same way from
17 other sources, and interpreting this kind of story
18 is complex and requires a careful and sophisticated
19 understanding of what is going on when people tell
20 a story of this kind.

21 I was told this story by these three
22 people when I interviewed them, and I did not ask
23 them about it. They volunteered the information.
24 The story was also told in many of the previous
25 oral histories that we have.

1 It is the sort of story that would not
2 appear in official records, probably would not. I
3 mean, it is possible that an Indian Agent was told
4 to burn documents, but I had never ever seen an
5 Indian Agent instructed to destroy documents. The
6 general pattern in Indian Affairs was that they
7 wanted to collect and retain information.

8 So, for instance, in my study of Indian
9 Agents, I found that there were numerous documents
10 they were required to fill out, often on a monthly
11 basis, that documented their activities, and all of
12 this would be kept by the Department of Indian
13 Affairs. Its general pattern was that it liked to
14 keep written records to refer to going forward.

15 And as anyone knows who knows anything
16 about Indian Affairs records, they are extremely
17 voluminous.

18 So the general pattern for the
19 department was to keep records. I have never ever
20 heard a story of an Indian Agent destroying
21 records.

22 So this is a story that you would
23 usually only have access to through oral history,
24 and this is one of the great advantages of oral
25 history.

11:07:12 1 And of course, oral history is
11:07:14 2 particularly important whenever you are dealing
11:07:16 3 with a group that is non-hegemonic, that does not
11:07:26 4 produce as many written records as other members of
11:07:31 5 society, has less access and fewer ways to keep
11:07:37 6 those records and is not likely to place their
11:07:39 7 records in archives and so on.

11:07:40 8 So there are many, many ways in which
11:07:43 9 Indigenous communities and other communities,
11:07:49 10 non-hegemonic communities, are at a disadvantage in
11:07:52 11 maintaining records, written records, but they
11:08:01 12 maintain oral history.

11:08:02 13 And when you ask them about their oral
11:08:04 14 history or simply about their own experiences, you
11:08:08 15 get access to their thinking and their
11:08:11 16 understandings in a way that is difficult to do in
11:08:16 17 any other way.

11:08:18 18 This particular story is told in
11:08:28 19 somewhat different ways by different people. The
11:08:31 20 details vary somewhat. For instance, people place
11:08:37 21 it at different points in time and speak of
11:08:44 22 different actors being involved in the process, so
11:08:47 23 different people are named as the ones who
11:08:49 24 witnessed the burning of these books.

11:08:51 25 At the same time, there are certain

11:08:56 1 aspects of the story that remain constant in every
11:08:59 2 telling. It is always the Indian Agent. It is
11:09:04 3 always burning of books and I think in every case
11:09:09 4 they specify that they are books that record land
11:09:12 5 transactions.

11:09:14 6 And what that tells you is that a
11:09:24 7 community story has circulated that gives you
11:09:29 8 insight into the community understandings of their
11:09:34 9 relations with Indian Agents in which the Indian
11:09:38 10 Agent was seen as not necessarily trustworthy, as
11:09:43 11 someone who withheld information about land from
11:09:47 12 them, and the fact that they always mention land
11:09:54 13 books, ledgers related to land sales, shows how
11:10:02 14 important those records were to the community.

11:10:05 15 One of the problems with this kind of
11:10:16 16 story is that sometimes people discount stories
11:10:21 17 like this because of the inconsistencies on some
11:10:26 18 details, such as when it happened and who witnessed
11:10:30 19 it, and that would be a great mistake.

11:10:36 20 And in this I rely on the insights of a
11:10:41 21 very famous and influential oral historian named
11:10:45 22 Alessandro Portelli from whom I have learned a
11:10:51 23 great deal about how to interpret oral history,
11:10:53 24 which is a very complicated process given that you
11:10:56 25 are dealing with human memory and sometimes with

1 stories like this that have been told and told and
2 re-told and circulated and that end up with these
3 somewhat different versions.

4 So he has written a couple of very
5 illuminating articles about how to make sense of
6 these narratives. One of the experiences he had
7 was he interviewed ironworkers in a small town in
8 Italy called Terni and there was a famous incident
9 where an ironworker was -- or a steelworker, I
10 guess, was shot during a demonstration. His name
11 was Luigi Trastulli.

12 And what he found in conducting
13 interviews was that everyone told the story of the
14 death of Luigi Trastulli, but the versions varied a
15 bit, similar to these book-burning stories.

16 And in particular, many of the people
17 he spoke to displaced the death to a different
18 time. So it is clear from written records when the
19 death actually occurred, and it was in 1849 --
20 sorry, 1949, in connection with a demonstration
21 that related to the signing of -- Italy signing the
22 NATO Treaty, but many narrators told the death as
23 occurring in a different context four years later
24 when there were thousands of layoffs in their town
25 and there were street fights.

11:12:34 1 So he has these very interesting
11:12:36 2 writings about why it was that the death was
11:12:39 3 recounted as happening in those circumstances at
11:12:42 4 that time. And his point is that the temporal
11:12:46 5 displacement does not make the story inaccurate and
11:12:50 6 invalid as a source of information, but rather that
11:12:53 7 in fact those things make it more valuable as a
11:12:56 8 source of information not about the date but about
11:13:00 9 the meaning of that death to the community and the
11:13:05 10 meaning of the other events to that community.

11:13:07 11 Q. So let's pause there --

11:13:09 12 THE COURT: Excuse me. Mr. Feliciant?

11:13:11 13 MR. FELICIAN: Now is a convenient
11:13:13 14 time, I think. It seems the witness has stopped
11:13:15 15 speaking. I am not sure where any of this is in
11:13:18 16 the report, quite frankly.

11:13:20 17 There is no elucidation in the report
11:13:23 18 around how historians make use of oral history. I
11:13:29 19 don't believe Professor Brownlie cited the
11:13:31 20 particular article we have just heard about in his
11:13:34 21 report. So that is my objection to this evidence.
11:13:43 22 This is going well beyond what is in his report,
11:13:45 23 and I am concerned.

11:13:49 24 THE COURT: Ms. Guirguis, what is your
11:13:50 25 response to that?

1 MS. GUIRGUIS: My response, Your
2 Honour, is that he has been qualified as a
3 historian. When we went through the qualifications
4 we did talk about his methodology as a historian
5 and how he approaches things.

6 He has qualifications, expertise in
7 collecting oral history. That was mentioned, in
8 historical method, and assessing the accuracy and
9 verifying the accuracy of oral histories, written
10 records, et cetera.

11 It is true that these articles are not
12 cited in the report. However, he has referred to
13 them, so I did provide them to my friends a few
14 days ago. They are on the REDI database and I was
15 going to bring them up and add them as exhibits.

16 So we would submit that he should be
17 able to testify to this to give context to how he
18 has treated the records and the oral histories that
19 he has reviewed in providing his expert opinion.

20 THE COURT: Your submissions are
21 focussed on whether or not this gentleman has the
22 appropriate expertise, but the objection was not.
23 The objection was that these findings, opinions and
24 conclusions aren't disclosed in the report, which
25 is Plaintiffs' counsel's obligation.

11:15:01 1 So, I mean, in some ways it is similar
11:15:04 2 to the objection late yesterday of an opinion that
11:15:10 3 was not disclosed in the report.

11:15:13 4 What is your submission on that, which
11:15:16 5 I take to be the objection?

11:15:19 6 MS. GUIRGUIS: Yes. So I would say
11:15:20 7 that what he is doing is commenting on the
11:15:22 8 reliability of his sources. And I think that that
11:15:26 9 is implicit that an expert will do that when they
11:15:29 10 are providing their expert evidence.

11:15:30 11 He is providing context and comments
11:15:34 12 about that.

11:15:36 13 THE COURT: Any reply, Mr. Feliciant?

11:15:37 14 MR. FELICIAN: Only that I think the
11:15:42 15 evidence goes beyond providing context. I mean, we
11:15:45 16 have heard an extremely detailed and lengthy answer
11:15:48 17 that is actually additional opinion evidence about
11:15:51 18 the way in which he conducted the interviews, how
11:15:54 19 he assessed them, and it goes beyond that.

11:16:01 20 THE COURT: Mr. Beggs?

11:16:02 21 MR. BEGGS: Your Honour, an additional
11:16:04 22 concern just arose. My friend said that the
11:16:07 23 witness has commented on the reliability of the
11:16:11 24 evidence of those who he interviewed. Those are
11:16:14 25 witnesses before the Court who have given the same

11:16:16 1 stories to the Court, so if the witness is
11:16:21 2 essentially commenting on the reliability of those
11:16:23 3 witnesses or supporting the reliability of those
11:16:26 4 witnesses, that would fall into an oath-helping
11:16:31 5 situation.

11:16:32 6 THE COURT: Any further response,
11:16:34 7 Counsel?

11:16:35 8 MS. GUIRGUIS: Well, in response to Mr.
11:16:39 9 Beggs' comment, I would differentiate the fact that
11:16:42 10 he is not oath-helping. What he is doing is he has
11:16:45 11 relied on these interviews in coming to conclusions
11:16:47 12 in his report, and he has talked about why he
11:16:50 13 relies on those and other oral histories. That is
11:16:53 14 not to be taken as him saying that they are
11:16:55 15 credible witnesses, which is the role of this
11:16:57 16 Court.

11:16:57 17 Those are my submissions.

11:17:02 18 THE COURT: All right. So taking the
11:17:03 19 objections out of order, this witness is not in the
11:17:10 20 position to opine on the credibility of any of the
11:17:17 21 people he interviewed who have I think all now
11:17:20 22 testified, is that correct, Counsel?

11:17:24 23 MS. GUIRGUIS: Yes, that's correct.

11:17:25 24 THE COURT: In person and given other
11:17:27 25 evidence that he has not heard nor was he present

11:17:29 1 for, including evidence that overlaps the subject
11:17:32 2 matter of the interviews he conducted.

11:17:35 3 So I am going to assume going forward
11:17:41 4 that he is not being asked to make that assessment,
11:17:43 5 because Counsel has told me that that is not what
11:17:46 6 she is trying to do here.

11:17:47 7 So that is Mr. Beggs' objection.

11:17:50 8 I tend to agree with Mr. Feliciant that
11:17:54 9 the lengthy answer we just heard goes well beyond
11:17:59 10 explaining how he approached these particular
11:18:01 11 people on these days and assessed for purposes of
11:18:07 12 preparing his opinion what to do with what they
11:18:09 13 said. That may just be the enthusiasm of this
11:18:13 14 gentleman to say as much as he could about the
11:18:15 15 subject matter, and not trying to introduce
11:18:22 16 undisclosed opinion.

11:18:24 17 Having said that, I have made this
11:18:27 18 morning an order that gives Mr. Feliciant
11:18:29 19 additional time for other reasons to prepare, and I
11:18:36 20 would expect that this subject matter could be
11:18:40 21 fairly dealt with within the context of my prior
11:18:43 22 ruling about undisclosed opinions, if necessary.

11:18:49 23 It is less clear to me in this instance
11:18:52 24 that it would be necessary, but, Mr. Feliciant, I
11:18:54 25 invite you when the time comes to indicate if you

11:18:56 1 need more time. And I will permit counsel to go
11:19:00 2 forward and please do what you can to focus. I
11:19:06 3 think you were doing that. But the witness's
11:19:09 4 answer was perhaps unexpectedly long. I don't
11:19:12 5 know. Please go ahead.

11:19:14 6 MS. GUIRGUIS: Thank you, Your Honour.
11:19:17 7 I would like to add the articles that the witness
11:19:20 8 has referenced just for the sake that he has
11:19:22 9 referenced them, and I suspect that it might be
11:19:28 10 convenient to have them added as exhibits to his
11:19:30 11 testimony.

11:19:30 12 So if we could just bring those up.

11:19:32 13 THE COURT: Well, just beforehand, Mr.
11:19:34 14 Feliciant, do you have any objection to the
11:19:41 15 Portelli articles being marked as exhibits? It is
11:19:44 16 all part of the same answer. You have been given
11:19:46 17 them, I take it?

11:19:49 18 MR. FELICIAN: Apparently two days
11:19:51 19 ago. I didn't have my phone, so I haven't read
11:19:53 20 them all yet. My preference would be to finish
11:19:57 21 reading them before answering, but --

11:20:00 22 THE COURT: Fair enough. What we'll do
11:20:02 23 is we'll put them in as lettered exhibits at this
11:20:06 24 time subject to you either telling me that you have
11:20:11 25 no objection or me hearing an objection.

11:20:14 1 MR. FELICIAN: Thank you.

11:20:14 2 THE COURT: Later this week when you

11:20:16 3 have had a time to read them.

11:20:17 4 MR. FELICIAN: Thank you.

11:20:18 5 THE COURT: Please go ahead, Counsel.

11:20:19 6 BY MS. GUIRGUIS:

11:20:20 7 Q. Thank you, Your Honour. So those

11:20:22 8 documents are SC0804. Dr. Brownlie, is this one of

11:20:39 9 the articles --

11:20:40 10 A. Yes.

11:20:41 11 Q. -- that you referred to? Okay,

11:20:42 12 can you just scroll down. There is highlighting in

11:20:45 13 this, and I just want to make it clear that this is

11:20:47 14 your highlighting, it is not counsel's?

11:20:52 15 A. Yes.

11:20:53 16 Q. Okay.

11:20:55 17 THE COURT: Can you go back to the

11:20:56 18 cover page, please. I see, so there is some -- a

11:20:59 19 mark on it, but is it Portelli, the author?

11:21:04 20 THE WITNESS: Yes, with a "P".

11:21:06 21 THE COURT: With a "P", all right.

11:21:09 22 MS. GUIRGUIS: So if we can add this as

11:21:10 23 the next lettered exhibit.

11:21:12 24 THE COURT: Mr. Registrar?

11:21:13 25 THE REGISTRAR: Lettered Exhibit H-1.

11:21:13 1 EXHIBIT H-1: Chapter 3 of the book by
11:21:17 2 A. Portelli.
11:21:17 3 BY MS. GUIRGUIS:
11:21:17 4 Q. If we can bring up the second
11:21:19 5 article, which is at SC0837. Oh, is this the same
11:21:31 6 one?
11:21:33 7 A. No.
11:21:34 8 Q. It is a different chapter?
11:21:35 9 A. It is the same book, different
11:21:37 10 chapter.
11:21:37 11 Q. That's right.
11:21:38 12 THE COURT: All right. Well, can you
11:21:39 13 please indicate for the record the chapter that is
11:21:41 14 now marked as Exhibit H-1 before we proceed
11:21:46 15 forward.
11:21:47 16 MS. GUIRGUIS: Can you scroll down one
11:21:50 17 page. Chapter 3 is the one that is marked as the
11:21:55 18 lettered Exhibit H-1.
11:21:58 19 THE COURT: And then what is this next
11:22:00 20 chapter?
11:22:01 21 MS. GUIRGUIS: This is Chapter 1.
11:22:04 22 THE COURT: All right. Mr. Registrar?
11:22:06 23 THE REGISTRAR: That will be lettered
11:22:09 24 Exhibit H-2.
11:22:09 25 EXHIBIT H-2: Chapter 1 of the book by

11:22:14 1 A. Portelli.

11:22:14 2 THE COURT: And, Mr. Feliciant, can you
11:22:17 3 put your position forward before we break for the
11:22:19 4 week, whenever that might be, later on this week?

11:22:25 5 MR. FELICIAN: Yes, I think I'll be
11:22:26 6 able to do that. Thank you, Your Honour.

11:22:27 7 THE COURT: Thank you.

11:22:29 8 BY MS. GUIRGUIS:

11:22:37 9 Q. The last question that I had, Dr.
11:22:40 10 Brownlie, just about your methodology, is why
11:22:43 11 didn't you interview anybody other than the seven
11:22:47 12 individuals?

11:22:47 13 A. My intent in conducting this oral
11:22:55 14 history was not to undertake a large oral history
11:22:59 15 project, but rather to use interviews with a few
11:23:06 16 individuals who had been directly involved in the
11:23:10 17 attempt to defend the Treaty rights and so on, in
11:23:17 18 order to ask them specific questions about, really
11:23:27 19 about their experience in trying to bring the
11:23:29 20 claim.

11:23:29 21 So I had a lot of written documents
11:23:32 22 that showed me what they had actually done, you
11:23:35 23 know, what steps had been taken. I already could
11:23:39 24 map that out very clearly based on the written
11:23:41 25 records.

11:23:41 1 What I was after with the oral history
11:23:44 2 was a few people's comments on what the experience
11:23:54 3 was like for them, you know, on a practical level
11:23:59 4 but also on an emotional and psychological level
11:24:03 5 because my view was and is that the barriers to
11:24:12 6 bringing claims were economic and political but
11:24:20 7 also emotional and psychological.

11:24:24 8 MR. FELICIAN: Your Honour, I hate to
11:24:26 9 rise again, but I think this witness is not in a
11:24:29 10 position to give any evidence pertaining to matters
11:24:31 11 of psychology. He has not been qualified as a
11:24:34 12 psychologist.

11:24:38 13 MS. GUIRGUIS: I would agree with that.

11:24:39 14 THE COURT: All right. So, sir, you
11:24:43 15 should restrain yourself from offering opinion and
11:24:48 16 I'm sure, since counsel agrees, she won't be asking
11:24:51 17 for it, on the subject of sociology. Rest assured
11:24:55 18 we have a parade of experts at this trial and you
11:24:58 19 are not being looked to to cover all the bases.
11:25:01 20 I'm sure both sides of this dialogue will do their
11:25:04 21 best.

11:25:04 22 Please go ahead, Counsel.

11:25:06 23 BY MS. GUIRGUIS:

11:25:06 24 Q. Thank you, Your Honour.

11:25:08 25 So I want to start by talking about the

1 substance of your report. At page 13 of your
2 expert report you list what you call the tools of
3 government -- "the tools that government used to
4 obtain control over Indigenous communities," those
5 are your words at page 13, and you include in that
6 list treaties, Indian Act, Band Council system,
7 Indian Agent system and residential schools.

8 I would like to use this list to frame
9 some questions to you. So let's briefly talk about
10 treaties.

11 Why, in your view, do you say that
12 treaties are a tool of the government to obtain
13 control over Indigenous communities?

14 A. Historically, treaties tended to
15 be one of the first measures by which individual
16 First Nations began to lose control over their
17 lands and become politically weakened.

18 And in the report I detail some of the
19 ways that treaties had that impact, because they
20 brought about significant losses of land which
21 undermined Indigenous economies. They resulted in
22 reserves in which they were, you know, confined to
23 small areas and separated from each other. And
24 then, of course, treaties resulted in usually
25 large-scale settlement around them, so that they

11:26:51 1 became demographically outnumbered.

11:26:54 2 So there are a variety of ways in which
11:26:59 3 treaties or land treaties resulted in the weakening
11:27:05 4 of Indigenous communities and providing the ability
11:27:10 5 for governments to exercise more control over their
11:27:12 6 communities.

11:27:14 7 Q. You have already given evidence
11:27:16 8 about the historical record around Treaty 45 1/2, so
11:27:20 9 I want to ask you the limited question of what,
11:27:24 10 based on that review, is your opinion about whether
11:27:27 11 and how Treaty 45 was used in such a way?

11:27:36 12 A. In Treaty 45 1/2, the Saugeen
11:27:39 13 Ojibway lost the bulk of their lands, something
11:27:41 14 like 80 percent, and those lands were taken up by
11:27:46 15 white settlers in the ensuing years and, as I noted
11:27:51 16 in the general process, the Saugeen Ojibway found
11:27:54 17 themselves confined to small areas of land and
11:27:57 18 surrounded by a larger population of settlers.

11:28:01 19 And so this is in keeping with the
11:28:05 20 pattern of treaties weakening Indigenous economies
11:28:10 21 and weakening their ability to assert their rights
11:28:13 22 or control the lands around them.

11:28:17 23 Q. And what is your opinion about
11:28:20 24 whether and how Treaty 72 was used in the same way?

11:28:22 25 A. It is a very similar story, and by

11:28:26 1 Treaty 72 they surrendered almost all of their
11:28:32 2 remaining lands and found themselves restricted now
11:28:35 3 to quite small areas of land, so that -- and
11:28:39 4 settlement proceeded gradually and agricultural
11:28:44 5 settlement undermines harvesting or hunting and
11:28:48 6 fishing -- well, especially hunting economies.

11:28:51 7 So once again, they lost control of
11:28:56 8 virtually the remainder of their land, found
11:28:58 9 themselves surrounded by white settlement and found
11:29:04 10 themselves divided between these small reserves
11:29:07 11 where they were sort of confined and separated.

11:29:10 12 Q. You spoke to my colleague about
11:29:18 13 securing implementation of treaty or treaty
11:29:22 14 obligations, and what mechanisms were available
11:29:28 15 right after the signing of the two treaties based
11:29:31 16 on your review of the historical records for the
11:29:34 17 Saugeen Ojibway to seek implementation?

11:29:40 18 A. I would say that in terms of
11:29:49 19 government mechanisms and structures, the system
11:29:56 20 was set up in such a way that First Nations were
11:30:00 21 supposed to deal with their Indian Superintendent
11:30:02 22 and conduct any business with government through
11:30:06 23 their Indian Superintendent.

11:30:08 24 So the main avenue that they had to try
11:30:13 25 to exercise some control over the implementation of

11:30:17 1 the treaty was to make requests of the Indian
11:30:22 2 Department.

11:30:22 3 There was no formal process or body
11:30:28 4 that adjudicated questions of treaty implementation
11:30:33 5 at that time.

11:30:37 6 Q. I would like to bring up Exhibit
11:30:39 7 2191. Can you zoom in a bit. Sorry, can you -- I
11:31:06 8 can't see that well.

11:31:07 9 THE COURT: Can you put it at a hundred
11:31:09 10 percent. That is better.

11:31:12 11 BY MS. GUIRGUIS:

11:31:13 12 Q. Do you recognize this document?

11:31:14 13 A. Yes.

11:31:15 14 Q. And what is it?

11:31:17 15 A. It is the text of Treaty 72.

11:31:21 16 Q. No --

11:31:24 17 A. No?

11:31:25 18 Q. That is what I was wondering when
11:31:28 19 it first came up.

11:31:29 20 A. Oh, yes, it is not.

11:31:31 21 Q. It looks like the same kind of
11:31:33 22 format, but it is --

11:31:34 23 A. It says 72 at the top. It is an
11:31:43 24 Order in Council.

11:31:44 25 Q. This is not the document that I

11:31:46 1 was looking for.

11:31:46 2 THE COURT: Yeah, I was wondering.

11:31:47 3 Well, if it was, I would say that you should
11:31:49 4 describe it because it says right on it what it is.
11:31:53 5 It says the type of document. It is -- can I call
11:31:58 6 it a digest of the document?

11:32:00 7 MS. GUIRGUIS: Yes.

11:32:01 8 THE COURT: The first page is
11:32:02 9 information about the document. It is not the
11:32:04 10 document itself. But if it is not the correct
11:32:06 11 document, that is much more important.

11:32:09 12 MS. GUIRGUIS: That's right. I don't
11:32:11 13 think it is the correct document. And I see it is
11:32:13 14 11:30, so perhaps we could take the morning break
11:32:15 15 and I will get my documents in order.

11:32:17 16 THE COURT: Excellent suggestion.
11:32:18 17 20 minutes.

11:32:20 18 -- RECESSED AT 11:32 A.M.

11:55:47 19 -- RESUMED AT 11:55 A.M.

11:55:47 20 THE COURT: Did you identify the
11:55:48 21 exhibit, Counsel?

11:55:49 22 MS. GUIRGUIS: I did, Your Honour.
11:55:50 23 So the exhibit that we'll pull up is
11:55:53 24 2197. That is on the screen.

11:55:56 25 Oh, also my colleague has printed

11:55:58 1 copies of the errata.

11:55:59 2 THE COURT: Oh, thank you very much.

11:56:00 3 If you could just hand one to Mr. Registrar, who
11:56:04 4 could hand it to me, and I'll keep it with my copy
11:56:07 5 of this gentleman's reports. Thank you very much.

11:56:11 6 BY MS. GUIRGUIS:

11:56:11 7 Q. So here we have the correct
11:56:12 8 exhibit. Professor Brownlie, do you know what this
11:56:16 9 is?

11:56:16 10 A. Yes.

11:56:17 11 Q. And what is it? Can you describe
11:56:18 12 it briefly?

11:56:19 13 A. Yes, it is a letter from the
11:56:22 14 Saugeen Ojibway to Sir Edmund Head, who was the
11:56:27 15 Governor General of British North America.

11:56:29 16 Q. And what is the content of the
11:56:32 17 letter?

11:56:33 18 A. This is an attempt by the Saugeen
11:56:38 19 Ojibway to induce the government to sell the lands
11:56:43 20 they surrendered with the so-called actual
11:56:48 21 settlement conditions included.

11:56:50 22 Q. Actual settlement conditions
11:56:55 23 meaning what?

11:56:56 24 A. The usual practice when selling
11:57:01 25 Crown lands was to require the purchasers to fulfil

11:57:06 1 certain conditions such as clearing a certain
11:57:10 2 amount of land, building a house on the land, and
11:57:13 3 sometimes building roads as a condition of
11:57:17 4 purchasing the land or the land could be -- or they
11:57:21 5 could -- or they would forfeit the land. The point
11:57:23 6 being to ensure that people actually advanced the
11:57:27 7 settlement.

11:57:27 8 Q. From your review of the historical
11:57:29 9 record, do you know whether the government
11:57:35 10 responded by imposing this actual settlement
11:57:37 11 condition?

11:57:37 12 A. No, it didn't.

11:57:39 13 Q. And from a review of the
11:57:42 14 historical record, can you tell us your view of
11:57:45 15 whether SON was typically successfully in the time
11:57:50 16 following the signing of the Treaties and securing
11:57:54 17 implementation through these requests, letters and
11:57:57 18 other mechanisms?

11:57:58 19 A. The main issue that they raised
11:58:07 20 after the making of the Treaty was this one, their
11:58:12 21 request that their lands be sold with actual
11:58:14 22 settlement requirements attached because they
11:58:18 23 believed it would increase the value of the land
11:58:20 24 and so the money that they received from the land.

11:58:23 25 There were also some issues about

1 reserve boundaries. But they were never able to
2 get the government to impose the actual settlement
3 conditions.

4 Q. And what about the reserve
5 boundaries?

6 A. They had some success in that
7 regard. So I believe the Saugeen reserve, there
8 was one major issue where they were unhappy with
9 the survey and that issue was changed, but there
10 was another issue that does not seem to have been
11 changed in the way that they had asked for.

12 Q. Thank you. I would like to turn
13 to the next tool on your list from your expert
14 report that we referred to earlier, which is the
15 Indian Act, to talk about and elaborate more on
16 your understanding of the Indian Act in the
17 historical context.

18 When was the Indian Act first put in
19 place?

20 A. When we use the phrase "Indian
21 Act," most often people are referring to the
22 legislation passed in 1876 by the Canadian
23 government, but more broadly the term refers to
24 legislation that was passed specifically with
25 reference to Indians, as they were termed.

11:59:52 1 So, for instance, the Act of 1857, the
11:59:55 2 Gradual Civilization Act, is really part of that
11:59:59 3 suite of legislation.

12:00:02 4 Q. And in your report at page 16, you
12:00:05 5 describe the Indian Act with your words as
12:00:07 6 quote/unquote "the single-most powerful tool in the
12:00:11 7 government's arsenal." Why in your view -- why do
12:00:16 8 you have that understanding?

12:00:20 9 A. I'm trying to formulate an answer.
12:00:29 10 It is sort of a big question, and I am feeling
12:00:32 11 aware that I am not to comment on law and not
12:00:38 12 exactly sure how to avoid that, but I'm sure you'll
12:00:40 13 tell me if I --

12:00:41 14 THE COURT: Well, sir, you simply give
12:00:43 15 your understanding of the law without expressing
12:00:47 16 your opinion about what the law was.

12:00:48 17 THE WITNESS: Okay, that sounds good.

12:00:50 18 Okay, so the reason that the Indian Act
12:00:52 19 was such a powerful tool was that it was
12:00:57 20 legislation and that meant that the government had
12:01:00 21 means of enforcing it through the Courts, through
12:01:05 22 the Indian Agents, as justices of the peace, and
12:01:09 23 with the backing of the police and jail
12:01:13 24 potentially.

12:01:13 25 Secondly, the government controlled the

1 Indian Act. They were the ones who determined what
2 was in the Indian Act, and so they could write it
3 and re-write it to serve their own purposes.

4 And thirdly, I would say that law in
5 general was seen in the broader society as very
6 legitimate, and so when the government was
7 enforcing the terms of the Indian Act, it was very
8 unlikely to be questioned by the broader society.

9 BY MS. GUIRGUIS:

10 Q. I want to turn to two secondary
11 documents that you cite in support of your
12 understanding. The first one is S-0303. So,
13 Professor Brownlie, what is this document?

14 A. This is the monograph on Indian
15 Agents that I published in 2003.

16 MS. GUIRGUIS: If we could scroll down,
17 this is the second chapter, and I would like to add
18 this chapter of J. Brownlie's "Fatherly Eye" as the
19 next exhibit, Your Honour.

20 THE COURT: Mr. Registrar?

21 THE REGISTRAR: Exhibit No. 4132.

22 EXHIBIT NO. 4132: Chapter 2 of
23 "Fatherly Eye."

24 BY MS. GUIRGUIS:

25 Q. Professor Brownlie, the

12:02:55 1 description of your understanding of the Indian
12:02:57 2 Act, you rely on this chapter. Can you tell me,
12:03:00 3 what are you -- what time period are you dealing
12:03:02 4 with in this chapter?

12:03:04 5 A. The purpose of this chapter was to
12:03:08 6 provide historical context so that the reader had a
12:03:14 7 better understanding of the Indian Agents that I
12:03:18 8 was studying, so the Indian Agent case studies
12:03:22 9 dealt with the 1920s and 1930s, but for this
12:03:25 10 chapter I went back, a little bit back further in
12:03:29 11 time so that people could understand the evolution
12:03:31 12 of this administrative context.

12:03:34 13 Q. Thank you. The next secondary
12:03:36 14 source I want to pull up is document number S-1479.
12:03:55 15 This is an excerpt of RCAP, Royal Commission on
12:04:00 16 Aboriginal Peoples. Are you familiar with this
12:04:03 17 document?

12:04:03 18 A. Yes.

12:04:03 19 Q. Professor Brownlie, can you tell
12:04:05 20 us what the Royal Commission on Aboriginal Peoples
12:04:10 21 is?

12:04:11 22 A. Yes. It was a Royal Commission
12:04:17 23 appointed by the government of Prime Minister Brian
12:04:22 24 Mulroney shortly after the end of the so-called Oka
12:04:27 25 crisis, and it was given a very broad mandate to

1 inquire into really, I guess, the history of and
2 conditions of Indigenous peoples within Canada and
3 to make recommendations to try to address some of
4 the issues.

5 Q. When was the report released?

6 A. 1996.

7 Q. Can we scroll down to pages 184 to
8 186 of this document. So 184. It is page 50 of
9 the PDF image. Can you scroll down to the bottom
10 paragraph, I believe. Professor Brownlie, can you
11 briefly summarize what the conclusion of RCAP is
12 with respect to the Indian Act?

13 A. It argues here that the Indian Act
14 facilitated the imposition of the government's
15 will, especially with respect to assimilation which
16 was one of its main objectives in dealing with
17 Indigenous peoples, and that it was also used to
18 try to compel conformity with Canadian social
19 mores.

20 Q. Do you know what time period RCAP
21 was discussing the Indian Act or looking at the
22 Indian Act?

23 A. I think in this instance they are
24 talking about the Indian Act I think generally over
25 a longer period of time.

1 MS. GUIRGUIS: So, Your Honour, I would
2 like to add this excerpt. It is actually Chapter 6
3 of the report on the Royal Commission on Aboriginal
4 Peoples 1996 -- sorry, Volume 1, Chapter 6, the
5 Report of the Royal Commission on Aboriginal
6 Peoples, as the next exhibit.

7 THE COURT: Mr. Registrar?

8 THE REGISTRAR: Exhibit No. 4133.

9 EXHIBIT NO. 4133: Volume 1, Chapter 6
10 of the Report of the Royal Commission
11 on Aboriginal Peoples.

12 BY MS. GUIRGUIS:

13 Q. Based on your research and review
14 of the historical records with respect to the
15 Saugeen Ojibway Nation, what is your opinion about
16 whether and how the Indian Act and your
17 understanding of the Indian Act would have affected
18 the Saugeen Ojibway Nation's ability to bring
19 forward claims that are now in this Court?

20 A. I would say the Indian Act was a
21 very important factor in the lives of the Saugeen
22 Ojibway generally and that it had particular
23 provisions that made it more difficult and at times
24 virtually impossible for them to bring claims
25 against the government.

12:07:36 1 Q. So I would like to move on to the
12:07:41 2 next tool that you list or one of the next tools in
12:07:45 3 your list, which is the Band Council system. What
12:07:50 4 is a Band Council?

12:07:51 5 A. The elected Band Council system is
12:07:58 6 a system of government invented by the Federal
12:08:06 7 Government and outlined in the Indian Act and the
12:08:11 8 government gave itself the power to impose this
12:08:14 9 system of governments on Indigenous communities.

12:08:16 10 It was very different from traditional
12:08:19 11 Indigenous methods of governing their communities.

12:08:23 12 Q. When do we first see the Band
12:08:28 13 Council?

12:08:30 14 A. I believe it is the Gradual
12:08:33 15 Civilization Act that introduces provisions to
12:08:41 16 essentially abolish traditional Indigenous
12:08:44 17 governance and impose the Band Council system.

12:08:47 18 Q. And what kind of powers did the
12:08:51 19 Band Council have in the late 19th century to
12:08:54 20 mid-20th century?

12:08:55 21 A. They had very limited powers.
12:08:59 22 Some Indian Affairs documents describe them as the
12:09:01 23 equivalent of municipal governments, but, if
12:09:05 24 anything, they had even more limited powers than
12:09:09 25 municipalities. They had very few economic powers,

12:09:12 1 so they were limited to a short list of specific
12:09:16 2 jurisdictional matters that were of fairly low
12:09:19 3 importance, like controlling weeds and stray dogs.

12:09:22 4 Q. What role did the department --
12:09:26 5 and when I say "department," I'll be referring to
12:09:28 6 the Indian Department as it was referred to at that
12:09:30 7 time. What role did the department play in how
12:09:33 8 Band Councils operated in the late 19th century to
12:09:37 9 mid-20th century?

12:09:39 10 A. In the first place, the government
12:09:46 11 essentially invented this Band Council system. It
12:09:49 12 is a modified version of elected municipal
12:09:53 13 government, but not exactly the same. They
12:09:56 14 invented it. They decided when it was imposed on
12:10:00 15 particular groups. And the way that the Indian Act
12:10:03 16 was written, the Indian Agent was given a lot of
12:10:07 17 control over the operation of Band Councils.

12:10:11 18 Q. What sources do you rely on to
12:10:14 19 support your conclusions about the Band Council
12:10:16 20 system?

12:10:17 21 A. I rely in part on my own primary
12:10:22 22 research, a close reading of the Indian Act itself
12:10:26 23 at different times, and also secondary work by
12:10:29 24 other academics, other scholars, oh, and also oral
12:10:36 25 history.

1 Q. And when you say your own primary
2 research, again, this is the research you would
3 have done as part of "Fatherly Eye"?

4 A. Yes.

5 Q. So I want to just bring up the
6 chapter of the book that is relevant, which is
7 Chapter 3, and add that as an exhibit. It is
8 S-0304. And if we scroll down, this is the third
9 chapter, and Professor Brownlie, this is the
10 chapter that deals with the Band Council system?

11 A. Yes.

12 MS. GUIRGUIS: Your Honour, I would
13 like to add Chapter 3 of "Fatherly Eye" as the next
14 exhibit.

15 THE COURT: Mr. Registrar?

16 THE REGISTRAR: Exhibit No. 4134.

17 EXHIBIT NO. 4134: Chapter 3 of
18 "Fatherly Eye."

19 BY MS. GUIRGUIS:

20 Q. I want to ask you about the time
21 periods that you are dealing with, with the Indian
22 Agent system and the Band Council system, that we
23 talked about in the 19th and 20th centuries. When
24 was the Band being controlled in the way that you
25 have described?

12:11:44 1 A. Certainly for most of the first
12:11:49 2 half of the 20th century the Indian Department --
12:11:54 3 well, actually the whole first half of the 20th
12:11:56 4 century, the Indian Department continued to
12:11:58 5 exercise a great deal of control over Band
12:12:03 6 Councils. There was a gradual shift beginning,
12:12:11 7 yeah, I mean, I guess in the 1950s, but more in the
12:12:15 8 1960s to loosening that control a bit.

12:12:20 9 Q. Based on what you have reviewed in
12:12:25 10 the historical record and the research, did this
12:12:29 11 kind of control extend to Saugeen and/or Nawash?

12:12:33 12 A. Definitely.

12:12:34 13 Q. And based on your research and
12:12:46 14 review of the historical records, can you summarize
12:12:48 15 your view about whether and how the Band Council
12:12:52 16 system is relevant to the question of SON's, the
12:12:56 17 Saugeen Ojibway Nation's historic ability to bring
12:12:59 18 forward claims that are now before this Court?

12:13:01 19 A. Yes, it is very important.

12:13:04 20 Q. How so?

12:13:05 21 A. The Band Council system was
12:13:10 22 designed to ensure the Indian Department's control
12:13:16 23 over governance and political and economic
12:13:18 24 decisions on the reserves, and the Indian
12:13:28 25 Department throughout the period up to the

12:13:32 1 beginning of the 1970s remained very resistant to
12:13:39 2 any efforts to raise issues of treaty
12:13:44 3 implementation or unlawful takings of land, any
12:13:48 4 grievances relating to treaties and Indigenous
12:13:50 5 rights.

12:13:51 6 And so the Band Council was used as a
12:13:54 7 tool to help suppress discussion of these issues
12:14:01 8 and to help prevent Indigenous people from raising
12:14:05 9 these issues publicly or pressing claims.

12:14:09 10 Q. Thank you. Let's turn to the tool
12:14:13 11 of the Indian Agent system. We are going to talk
12:14:17 12 about this pretty briefly because you cover it in
12:14:20 13 your report well.

12:14:20 14 But I just want to start with questions
12:14:23 15 about the structure of the department. So I would
12:14:30 16 like to bring up a secondary source document that
12:14:33 17 you reference in your report. It is S-0769. Are
12:14:41 18 you familiar with this document?

12:14:42 19 A. Yes.

12:14:43 20 Q. What is it?

12:14:45 21 A. It is the report of a research
12:14:51 22 group that was commissioned by the Department of
12:14:55 23 Indian Affairs to conduct a survey of the
12:14:56 24 conditions of, as they were called then, Indians in
12:15:04 25 Canada, so it was a group of academics who

12:15:08 1 conducted extensive research and then made
12:15:10 2 recommendations.

12:15:10 3 Q. Can we just scroll down a bit. So
12:15:12 4 this is Part 1 of the report?

12:15:13 5 A. Yes.

12:15:13 6 Q. And if we go to the second page,
12:15:17 7 I'm just trying to see a date. Do you know what
12:15:19 8 date it was commissioned and/or released?

12:15:21 9 A. It was commissioned in 1964 and
12:15:24 10 released in -- this report was completed in 1966.

12:15:29 11 Q. Do you know who were the academics
12:15:31 12 that were commissioned?

12:15:32 13 A. Yes, Dr. Harry Hawthorn was hired
12:15:39 14 as the Director of the entire project. It was a
12:15:41 15 fairly extensive project, so they needed someone to
12:15:44 16 oversee and direct it and to hire the other
12:15:47 17 researchers. So that was Dr. Harry Hawthorn, he
12:15:55 18 was the Head of the Sociology Department, or I
12:15:56 19 think Sociology and Anthropology Department at the
12:15:58 20 time at the University of British Columbia. And
12:16:00 21 then there were several other fairly high profile
12:16:03 22 academics who were involved in the research.

12:16:05 23 MS. GUIRGUIS: So this is Chapter 17 of
12:16:10 24 "A Survey of Contemporary Indians of Canada." I
12:16:16 25 would like to add that as the next exhibit.

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THE COURT: Mr. Registrar?

THE REGISTRAR: Exhibit No. 4135.

EXHIBIT NO. 4135: Chapter 17 of "A Survey of Contemporary Indians of Canada."

BY MS. GUIRGUIS:

Q. What time period did this report deal with?

A. Like many reports on the circumstances of Indigenous people, it attempted to provide an explanation of the historical background in order to explain how things had ended up being in the circumstances that they were in at the time. So they go back to some extent in time to explain the conditions that they found.

Q. So this chapter, being "The Politics of Indian Affairs," can you give me a brief summary or can you tell us a brief summary of what the Hawthorn -- it is commonly called the Hawthorn Report; correct?

A. Yes, it is.

Q. What the Hawthorn Report had to say about the structure of the department?

A. Yes, they described the Indian Department as being to some extent distinct from

12:17:46 1 other departments of government in terms of its
12:17:50 2 political outlook and its -- in essence, its
12:17:57 3 corporate culture, and they say that the department
12:17:58 4 was widely seen as being an authoritarian
12:18:02 5 organization in the sense that decision-making was
12:18:06 6 concentrated at the top and subordinate officials
12:18:09 7 were required to follow -- really follow the orders
12:18:15 8 of their superiors.

12:18:16 9 And also they said that it was also
12:18:21 10 authoritarian in terms of the way that it related
12:18:24 11 to Indigenous people, and they specify that Indian
12:18:27 12 Agents were often authoritarian in their dealings
12:18:31 13 with Indigenous people.

12:18:33 14 Q. Let's turn to the Indian Agent.
12:18:35 15 What was the Indian Agent's position in the
12:18:37 16 department?

12:18:39 17 A. Within the department there was a
12:18:45 18 hierarchy, and, as I just noted, a concentration of
12:18:48 19 decision-making at the top. The Indian Agents were
12:18:51 20 not that high within the department hierarchy. For
12:18:56 21 much of its history, it was not that large a
12:18:58 22 department. There weren't large numbers of people.
12:19:00 23 It is now a very large department, but for a long
12:19:03 24 time, there weren't huge numbers of employees and
12:19:06 25 there were just a few people at the top who made

12:19:07 1 all the decisions.

12:19:08 2 Duncan Campbell Scott, for instance, so
12:19:13 3 the Deputy Superintendent General, and then there
12:19:15 4 was a so-called secretary and that was actually a
12:19:17 5 high position, so there would be a small group of
12:19:20 6 employees who made most of the decisions.

12:19:23 7 And they were involved not only in sort
12:19:26 8 of high-level decision-making, but even in
12:19:29 9 relatively small matters. Often the decisions were
12:19:32 10 issued by these few figures at the top of the
12:19:35 11 hierarchy.

12:19:35 12 The Indian Agents, as I said, were
12:19:38 13 lower in the hierarchy, but their advice was
12:19:41 14 usually taken.

12:19:42 15 Q. When was the Indian Agent system
12:19:49 16 put into place on reserves in Ontario?

12:19:52 17 A. Well, the Indian Agent system is
12:20:10 18 -- originally came into being as something that was
12:20:12 19 called the Indian Department that was located
12:20:15 20 within the British military, and those were the
12:20:17 21 people who implemented the alliance -- the military
12:20:20 22 alliance policy we talked about earlier.

12:20:22 23 When the Indian Department shifted to
12:20:26 24 its civilization policy, many of those same people
12:20:29 25 who were designated Indian Superintendents

12:20:32 1 continued to be Superintendents maintaining
12:20:36 2 relations with Indigenous peoples, but their role
12:20:38 3 changed. Now their job was to try to advance the
12:20:42 4 civilization policy and then the assimilation
12:20:45 5 policy.

12:20:45 6 So on reserves in Ontario, really as
12:20:51 7 the reserves were being settled, agents were being
12:20:56 8 assigned to them. Sometimes there was a bit of a
12:20:59 9 lag, but it basically happens in the first half of
12:21:01 10 the 19th century.

12:21:03 11 Q. And when did the Indian Agent
12:21:08 12 system operate until?

12:21:11 13 A. Roughly, until the end of the
12:21:15 14 1960s, maybe early 1970s in some places. It was
12:21:22 15 sort of a gradual end.

12:21:24 16 Q. You mentioned the Indian
12:21:28 17 Superintendent, Indian Superintendent, and then the
12:21:31 18 Indian Agent. Can you explain to us what is the
12:21:33 19 difference between an Indian Agent, an Indian
12:21:36 20 Superintendent and an officer in charge of an
12:21:40 21 Indian Agency?

12:21:42 22 A. I'll deal with that last one
12:21:44 23 first. I have actually never heard of that
12:21:45 24 position. I gather there was one for Cape Croker
12:21:58 25 and Saugeen. But I have otherwise not heard of

12:22:02 1 that job title.

12:22:04 2 Indian Agent and Superintendent, I
12:22:09 3 believe under the military alliance policy they
12:22:12 4 were called Superintendents. And I think in
12:22:18 5 general the term "Superintendent" was usually used
12:22:21 6 for someone like Anderson who was responsible for
12:22:24 7 multiple reserves.

12:22:26 8 But it is not quite that simple because
12:22:29 9 the Indian Agents I studied were also responsible
12:22:32 10 for multiple reserves. So there is overlap between
12:22:35 11 the two categories. I think to some extent it is
12:22:37 12 just that the terms were used in different periods.
12:22:41 13 They used Superintendents for awhile, and then they
12:22:44 14 went to Indian Agents, and then I think after that
12:22:46 15 they sometimes went back to the term
12:22:50 16 "Superintendent."

12:22:51 17 Q. You have gone -- you have talked
12:23:03 18 about in your report the responsibilities and the
12:23:06 19 roles of the Indian Agent, so I don't want to
12:23:08 20 repeat that here. But you have relied on a couple
12:23:10 21 of secondary sources to support that and I would
12:23:13 22 like to add those as exhibits.

12:23:15 23 So the first I would like to pull up is
12:23:18 24 document SC0307. Again, we have an excerpt from
12:23:27 25 your book "Fatherly Eye."

12:23:31 1 THE REGISTRAR: The Court's indulgence.
12:23:33 2 Counsel, that was SC0307?
12:23:38 3 MS. GUIRGUIS: Yes.
12:23:40 4 THE REGISTRAR: I only have S-0307
12:23:43 5 here.
12:23:43 6 MS. GUIRGUIS: That is because I wrote
12:23:45 7 it down wrong. My apologies.
12:23:47 8 THE COURT: So is 0307 the correct --
12:23:50 9 MS. GUIRGUIS: Yes, it is S-0307.
12:23:50 10 THE COURT: All right. Just give Mr.
12:23:55 11 Registrar a minute.
12:23:55 12 THE REGISTRAR: All right.
12:23:56 13 THE COURT: And which chapter is this
12:23:58 14 excerpt, Counsel?
12:23:59 15 MS. GUIRGUIS: This is -- if we can
12:24:01 16 scroll down, chapter -- oh, it is the "Conclusion."
12:24:09 17 THE COURT: Okay.
12:24:10 18 MS. GUIRGUIS: So I would like to add
12:24:13 19 this "Conclusion" from Professor Brownlie's
12:24:19 20 "Fatherly Eye" as the next exhibit.
12:24:21 21 THE COURT: Mr. Registrar?
12:24:22 22 THE REGISTRAR: Exhibit No. 4136.
12:24:22 23 EXHIBIT NO. 4136: "Conclusion" from
12:24:27 24 "Fatherly Eye."
12:24:27 25 BY MS. GUIRGUIS:

1 Q. I would also like to pull up what
2 I hope is S-1480. This is another excerpt of RCAP.
3 And you have relied on this in your footnotes, Dr.
4 Brownlie; is that correct?

5 A. Yes.

6 MS. GUIRGUIS: I would like to add --

7 THE COURT: Is this an excerpt? I'm
8 sure it is a long document, but I am noticing this
9 is 100 pages long.

10 MS. GUIRGUIS: Yes, it is one of the
11 volumes -- it is one of the sections of the
12 volumes.

13 THE COURT: All right. And is it the
14 Part 2, Chapter 9?

15 MS. GUIRGUIS: That's right.

16 THE COURT: Mr. Registrar?

17 THE REGISTRAR: This is Exhibit No.
18 4137.

19 EXHIBIT NO. 4137: Part 2, Chapter 9,
20 of the Report of the Royal Commission
21 on Aboriginal Peoples.

22 BY MS. GUIRGUIS:

23 Q. Thank you.

24 So a couple more questions just about
25 the logistics of the Indian Agent system. Based on

1 your research, can you tell us how many First
2 Nations that typically one Indian Agent would work
3 with or be assigned to?

4 A. How many First Nations they would
5 be assigned to?

6 Q. Yes.

7 A. This varied quite a bit. In some
8 places an agent would be responsible for only one;
9 others were responsible for multiple reserves. So
10 for instance, Robert Lewis, one of the agents I
11 studied on Manitoulin Island, he was responsible
12 for I think it was 11 reserves. It is not really
13 clear exactly why it varied so much, but it did.
14 It really went from 1 to I think 11 is the largest
15 number I know of. Some might be responsible for 3
16 or 4. Daly was responsible for 7.

17 Q. And do you know what the setup was
18 for Saugeen and Nawash?

19 A. I believe they each had their own
20 -- yeah, they each had their own agent who I
21 believe was responsible in each case only for them
22 until the two agencies were amalgamated in, I think
23 it is, 1958. And then they were put together,
24 there was one agent for the two.

25 Q. So I would like to bring up

1 Exhibit 4091. This is an excerpt from Indian
2 Affairs Branch for the fiscal year ending March 31,
3 1959. This was put by my friends from Canada to
4 Professor Darlene Johnson during her cross-exam.
5 And I just want to go to page 4 of the document --
6 or, I'm sorry, it's page 28 of the document and
7 it's page 4 of the PDF image. Page 82 of the
8 document and page 4 of the PDF.

9 And in the third-last paragraph, I
10 believe, it states:

11 "Cape Croker and Saugeen
12 Reserves, formerly separate Indian
13 Agencies, were combined as the Bruce
14 Agency with one superintendent
15 located at Chippewa Hill."

16 Chippewa Hill being at Saugeen. So
17 this is what you are referring to about the
18 combination?

19 A. Yes.

20 Q. What does it mean to combine the
21 Indian Agencies?

22 A. Well, essentially it meant that
23 instead of two separate Indian Agency offices,
24 there would be just one, and there would only be
25 one Superintendent. So that is, yeah, responsible

12:28:38 1 for both of them.

12:28:40 2 Q. Would that mean that the Indian
12:28:42 3 Agent would conduct his or her work from the one
12:28:49 4 office?

12:28:50 5 A. Yes.

12:28:51 6 Q. Would the --

12:28:53 7 A. Most likely, yeah.

12:28:54 8 Q. Does it mean that the Indian Agent
12:28:55 9 would have no -- no longer have occasion to visit
12:28:58 10 the other reserve?

12:28:59 11 A. Oh, no, I'm sure he would still
12:29:01 12 visit. This is still a time period of doing a lot
12:29:05 13 of things face-to-face.

12:29:06 14 Q. What kind of things would the
12:29:09 15 Indian Agent have to go to the reserves to do
12:29:11 16 face-to-face?

12:29:12 17 A. Oh, all kinds --

12:29:15 18 Q. Very briefly.

12:29:17 19 A. Yeah, they had a long list of
12:29:19 20 responsibilities, but basically they were
12:29:21 21 responsible for the welfare of the people there, so
12:29:23 22 they would have distributed treaty and annuity
12:29:28 23 monies. They would have looked after, you know,
12:29:32 24 social issues such as child welfare cases, looking
12:29:36 25 after the elderly, deciding whether or not children

12:29:39 1 went to residential school. It is a long list.

12:29:43 2 Q. So how often, despite the fact
12:29:45 3 that the Indian Agencies were combined at Saugeen,
12:29:49 4 would you suspect that the Indian Agent would be
12:29:52 5 attending at Cape Croker Reserve?

12:29:58 6 MR. FELICIAN: Your Honour --

12:29:59 7 THE COURT: Yes, Mr. Feliciant.

12:30:00 8 MR. FELICIAN: -- this witness is
12:30:01 9 being asked to give expert opinions, and the
12:30:03 10 question is how often would you suspect, and I
12:30:06 11 don't think that is particularly helpful, Your
12:30:08 12 Honour.

12:30:09 13 THE COURT: And these --

12:30:13 14 MS. GUIRGUIS: Your Honour -- sorry.

12:30:14 15 THE COURT: What response do you have,
12:30:15 16 Counsel, to that?

12:30:16 17 MS. GUIRGUIS: Your Honour, what I am
12:30:19 18 asking is based on this witness's wealth of
12:30:22 19 research and knowledge about how Indian Agents
12:30:24 20 operated and whether he can provide an opinion as
12:30:28 21 to how often an Indian Agent, particularly this
12:30:33 22 Indian Agent, let's say based on his review of the
12:30:35 23 historical records, would visit Cape Croker
12:30:39 24 Reserve, despite the fact that the agency was
12:30:41 25 centralized.

12:30:42 1 THE COURT: I'm only pausing, and you
12:30:44 2 can correct me if I'm wrong, but we have had
12:30:46 3 testimony from members of the community who were
12:30:51 4 there, and I don't recall any of those people being
12:31:00 5 asked this factual question.

12:31:05 6 Is that -- that is my recollection,
12:31:07 7 which makes me pause over whether this gentleman's
12:31:13 8 opinion has -- well, it makes me pause. I mean,
12:31:21 9 you know, the better evidence of this could have
12:31:27 10 been obtained from people who were there.

12:31:30 11 MS. GUIRGUIS: Now, the evidence that
12:31:31 12 we have got from the fact witnesses is about what
12:31:37 13 they may have been told, but the fact witnesses
12:31:39 14 that we called such as Professor Johnson or Dale
12:31:44 15 Jones were all quite young in 1958, so --

12:31:47 16 THE COURT: We had six or five Rule 36
12:31:51 17 witnesses as well.

12:31:52 18 MS. GUIRGUIS: Oh, that's correct, yes.
12:31:57 19 Yes. So that is fine, I can leave it there.

12:32:00 20 THE COURT: I mean, the witness has
12:32:02 21 already said that there would be a number of
12:32:03 22 reasons why face-to-faces were required. I am just
12:32:09 23 -- the question itself reveals a degree of
12:32:12 24 uncertainty that perhaps makes me wonder if it is
12:32:14 25 helpful.

1 MS. GUIRGUIS: If it is necessary.

2 Your Honour, I'm fine to withdraw the question and
3 leave it there. Okay, thank you.

4 BY MS. GUIRGUIS:

5 Q. I'm skipping ahead. So you have
6 told us about your opinion and your understanding
7 of the role of the Indian Agent in the lives of
8 Indigenous peoples based on your own research and
9 your review of the historical records. Can you
10 share with us your view about whether and how the
11 Indian Agent system is relevant to the question of
12 SON's historic ability to bring forth the claims
13 that are now before this Court?

14 A. Yes, the Indian Agent system is
15 central to this question because Indian Agents were
16 assigned responsibility for monitoring and
17 controlling affairs on Indigenous reserves, in
18 Indigenous communities, and part of that control
19 was to ensure that Indigenous people complained as
20 little as possible in public and to suppress
21 attempts to bring forward issues concerning treaty
22 rights and Indigenous rights.

23 And I found substantial evidence of
24 agents acting in ways that -- acting in that way,
25 to suppress dissent, to silence individuals who

12:34:17 1 were trying to raise these issues and to discredit
12:34:20 2 them.

12:34:21 3 Q. Thank you. Let's turn to the
12:34:31 4 final tool that you have identified in that list.
12:34:34 5 You talk about residential schools.

12:34:36 6 A. Yes.

12:34:36 7 Q. Professor Brownlie, when we are
12:34:43 8 talking about residential schools, what are we
12:34:44 9 referring to?

12:34:45 10 A. We are referring to a
12:34:51 11 long-standing system of boarding schools that were
12:34:56 12 established specifically for Indigenous children,
12:35:00 13 mostly First Nations children, but not only, that
12:35:06 14 were really the keystone of the Indian Department's
12:35:11 15 assimilation policy and education policy.

12:35:14 16 The department saw itself as under an
12:35:17 17 obligation to educate Indigenous people, and it
12:35:24 18 used residential schools as a way of advancing
12:35:32 19 assimilation more forcefully than day schools
12:35:35 20 allowed them to do because they could remove
12:35:39 21 children from their families without their family's
12:35:42 22 consent and, in the process, prevent parents from
12:35:48 23 passing on the language and the culture, the oral
12:35:53 24 history, the knowledge of their people and so on.

12:35:57 25 And -- I'm sorry, what was the question

12:36:01 1 again?

12:36:01 2 Q. Just briefly, what are residential
12:36:03 3 schools?

12:36:03 4 A. Oh, what are they, yes, right.

12:36:05 5 Q. That is good. When did these
12:36:09 6 schools, when did residential schools operate in
12:36:11 7 Ontario?

12:36:12 8 A. Ontario had some of the earliest
12:36:19 9 church-run residential schools. The Roman
12:36:25 10 Catholics started residential schools initially in
12:36:29 11 the 17th century, but those were abortive attempts.
12:36:36 12 It is really in the 19th century that you start
12:36:39 13 getting church-run residential schools, and there
12:36:43 14 were a couple started in Ontario in around the
12:36:49 15 mid-19th century, the Mohawk Institute being one, I
12:36:51 16 think it might have been the first.

12:36:58 17 Q. What was the Truth and
12:37:03 18 Reconciliation Commission?

12:37:04 19 A. The Truth and Reconciliation
12:37:09 20 Commission was appointed as part of the terms of
12:37:13 21 the Indian Residential Schools Settlement Act of
12:37:17 22 2007 I believe is the date. That Settlement Act
12:37:21 23 was the culmination of a long campaign by
12:37:26 24 residential school survivors to bring their issues
12:37:28 25 to the public and to obtain compensation for the

12:37:33 1 negative experiences they had in residential
12:37:36 2 schools.

12:37:37 3 So one component of the Settlement Act
12:37:40 4 was that the government would appoint a Truth and
12:37:45 5 Reconciliation Commission whose job was to
12:37:48 6 investigate the history of residential schools
12:37:51 7 basically through oral history and written records
12:37:53 8 and help educate the public and create a complete
12:37:59 9 or as complete as possible record of the history of
12:38:03 10 the schools.

12:38:03 11 Q. I would like to pull up document
12:38:05 12 number S-1748 which is the final report of the
12:38:12 13 Truth and Reconciliation Commission. Are you
12:38:15 14 familiar with this report?

12:38:16 15 A. Yes. It is a summary of the final
12:38:18 16 report.

12:38:18 17 Q. Right.

12:38:23 18 A. A 536-page summary.

12:38:26 19 Q. What date was the report released
12:38:29 20 on?

12:38:29 21 A. 2015, I think.

12:38:34 22 MS. GUIRGUIS: Your Honour, I would
12:38:34 23 like to add this summary of the Truth and
12:38:38 24 Reconciliation Commission Final Report released in
12:38:40 25 2015 as the next exhibit.

12:38:41 1 THE COURT: Mr. Registrar?

12:38:43 2 THE REGISTRAR: Exhibit No. 4138.

12:38:35 3 EXHIBIT NO. 4138: Summary of the Truth
12:38:36 4 and Reconciliation Commission Final
12:38:39 5 Report released in 2015.

12:38:50 6 BY MS. GUIRGUIS:

12:38:50 7 Q. Professor Brownlie, I would like
12:38:51 8 to take you to two excerpts. The first is at page
12:38:55 9 132 of the document which is PDF image 140. It is
12:39:03 10 at the bottom of the page. And I don't think we
12:39:15 11 need to read it out loud. I just wanted you to
12:39:17 12 have a quick look to refresh your memory on this,
12:39:19 13 and then I'll take you to the second excerpt, and
12:39:21 14 then ask you a few questions.

12:39:23 15 A. Yes, thank you.

12:39:23 16 Q. The second excerpt is at page 135
12:39:36 17 of the document and it is PDF image 143. And it is
12:39:47 18 the marked paragraph there.

12:39:50 19 A. Yes.

12:39:51 20 Q. What is the Commission saying in
12:40:03 21 these two excerpts about the impacts of residential
12:40:06 22 schools?

12:40:06 23 A. It is trying to summarize broadly
12:40:16 24 the long-term impacts of the schools and to show
12:40:19 25 that those impacts continue to this day and

1 affected people well beyond the group of people who
2 actually attended the schools, what we call
3 inter-generational effects.

4 Q. How is this relevant to what we
5 are discussing today, that is the Saugeen Ojibway
6 Nation's historic ability to bring claims in Court?

7 A. I think this report does a good
8 job of trying to summarize a complex and expansive
9 subject and trying to explain some of these large,
10 long-term effects.

11 And what they are addressing here, and
12 I will try to summarize it briefly, but basically
13 is that the legacy of the schools continues to this
14 day in the educational attainment of Indigenous
15 people, in their health, in their income, and in
16 their treatment in society.

17 And many of these factors pose
18 continued barriers to bringing claims against
19 government and to getting favourable attention to
20 these matters.

21 Q. What are the continued barriers
22 that it would pose to them? Can you give me, like,
23 a practical example of what that might be?

24 A. Sorry, it is such a large subject.
25 I am trying to winnow it down.

12:42:24 1 Q. Yes, it is, yeah. And I
12:42:27 2 appreciate that I am trying to ask you a very
12:42:29 3 specific question about the relevance to specific
12:42:32 4 barriers for the Saugeen Ojibway Nation to bring
12:42:34 5 claims to Court?

12:42:35 6 A. Well, okay, let's look at
12:42:36 7 education. The educational attainment rates for
12:42:43 8 Indigenous people remain well below those of
12:42:46 9 average Canadians, so there are fewer people who go
12:42:48 10 to high school, fewer people who go to university,
12:42:50 11 and therefore fewer people who have the knowledge
12:42:52 12 and skills to try to organize land claims.

12:42:58 13 Q. That is very helpful. Thank you.

12:43:04 14 A. Income rates are important here
12:43:06 15 too, because the less money you have, the less you
12:43:08 16 can afford to hire help to help you advance a land
12:43:15 17 claim.

12:43:19 18 MS. GUIRGUIS: So I would like to pull
12:43:20 19 up document S-1481. So this is another excerpt of
12:43:42 20 the Report of the Royal Commission on Aboriginal
12:43:46 21 Peoples. This portion deals with residential
12:43:47 22 schools, so it is Chapter 10 of Part 2.

12:43:51 23 And, Your Honour, I would like to add
12:43:53 24 this as the next exhibit.

12:43:54 25 THE COURT: Mr. Registrar?

12:43:56 1 THE REGISTRAR: Exhibit No. 4139.

12:43:56 2 EXHIBIT NO. 4139: Chapter 10, Part 2,
12:43:43 3 of the Report of the Royal Commission
12:44:01 4 on Aboriginal Peoples.

12:44:01 5 BY MS. GUIRGUIS:

12:44:05 6 Q. And Professor Brownlie, you cited
12:44:08 7 the section I am going to go to in your report. We
12:44:11 8 have different page numbers. So our page number is
12:44:14 9 108961 on this document, which is page 57 of the
12:44:19 10 PDF image.

12:44:20 11 THE COURT: So the report page number,
12:44:22 12 can you repeat it, please?

12:44:23 13 MS. GUIRGUIS: 108961.

12:44:36 14 THE COURT: All right.

12:44:37 15 BY MS. GUIRGUIS:

12:44:37 16 Q. If you can just scroll up. It
12:44:39 17 starts on the previous page there.

12:44:42 18 So, Professor Brownlie, in the
12:44:45 19 highlighted passage, what can we take away from
12:44:48 20 this passage about residential schools?

12:44:50 21 A. This passage addresses the
12:44:57 22 harshness of the regime of residential schools,
12:45:06 23 that punishment was pervasive, that the children
12:45:12 24 were punished a great deal, and that they were
12:45:19 25 forced to learn to obey, that a big part of the

12:45:21 1 regime was to force them to obey, and that harsh
12:45:29 2 methods were used to enforce obedience. And they
12:45:33 3 are addressing the fact that that insistence on
12:45:37 4 instant obedience had a significant impact on
12:45:40 5 people's ability, on the survivors' ability to take
12:45:44 6 initiative and stand up for themselves.

12:45:48 7 Q. So we are on the second page in
12:45:53 8 the highlights, so it is like in the bottom of what
12:45:55 9 we have highlighted in this green box, so it's page
12:45:58 10 108962 of this document, the third line up it says:

12:46:05 11 "[...] implications of this
12:46:07 12 tyranny of routinization, charged
12:46:11 13 that at Mount Elgin, 'They [...]'"
12:46:15 14 et cetera, et cetera.

12:46:15 15 What is Mount Elgin?

12:46:16 16 A. It is a residential school in
12:46:18 17 Southern Ontario at Muncey, I think.

12:46:22 18 Q. So I would like to turn to Exhibit
12:46:24 19 P-3880. Professor Brownlie, are you familiar with
12:46:49 20 this document?

12:46:50 21 A. Yes.

12:46:50 22 Q. And what is it?

12:46:52 23 A. It is a compilation of oral
12:46:55 24 histories that were conducted with Elders of
12:46:58 25 Nawash.

12:46:58 1 Q. I would like to go to page 35
12:47:08 2 which is 34 of the PDF image. This is the
12:47:20 3 interview with Fred Jones. Who was Fred Jones?

12:47:26 4 A. He was an Elder of Cape Croker,
12:47:29 5 Nawash.

12:47:30 6 Q. I would like to -- starting at the
12:47:35 7 bottom of the first column marked in green it says:

12:47:39 8 "I never went to Spanish -- it
12:47:42 9 was only some that went to Spanish,
12:47:44 10 and the other children that were
12:47:46 11 here went to Muncey or a school
12:47:48 12 north of Sault Ste. Marie."

12:47:51 13 THE COURT: Just for my benefit,
12:47:53 14 Counsel, this is the same gentleman who we had
12:47:55 15 testimony from?

12:47:56 16 MS. GUIRGUIS: In the Rule 36, yes, I
12:47:58 17 believe so.

12:47:58 18 THE COURT: It is the same gentleman,
12:48:00 19 all right.

12:48:01 20 BY MS. GUIRGUIS:

12:48:01 21 Q. Yes. So when he says here that
12:48:13 22 the other children here went to Muncey, what is he
12:48:16 23 referring to?

12:48:17 24 A. That is the Mount Elgin school.

12:48:20 25 Q. What was Spanish?

12:48:21 1 A. Spanish was a pair of schools on
12:48:28 2 the North Shore of Lake Huron. There was a boys
12:48:32 3 school and a girls school, and together they were
12:48:34 4 called the Spanish Indian Residential School I
12:48:37 5 think was the formal name.

12:48:39 6 Q. So I would like to look at another
12:48:42 7 interview in this compilation at page 43 of the
12:48:47 8 document. It is 42 PDF image. Here we have an
12:48:57 9 interview with -- sorry, can you scroll up --
12:49:03 10 Ainsley Solomon?

12:49:04 11 A. Yes.

12:49:05 12 Q. Who was Ainsley Solomon?

12:49:11 13 A. Also an Elder at Cape Croker,
12:49:11 14 Nawash.

12:49:11 15 Q. So we have highlighted a lengthy
12:49:17 16 excerpt. If you can just take a look at it and it
12:49:23 17 goes until the end of the page.

12:49:25 18 A. Yes.

12:49:25 19 Q. Can you give us a brief summary of
12:49:41 20 what he is saying here?

12:49:43 21 A. He is explaining -- he is
12:49:51 22 basically explaining why he ran away from Spanish
12:49:54 23 residential school because he felt very badly
12:49:58 24 treated there, so he talks -- basically he is
12:50:01 25 talking about how bad the experience was for him,

12:50:03 1 that he was always getting beaten up and strapped
12:50:05 2 for nothing or strapped for things that he didn't
12:50:07 3 even do, and that he couldn't -- he wouldn't accept
12:50:15 4 the treatment at some point and that he -- and then
12:50:18 5 he tells the story of how he escaped.

12:50:20 6 Q. Thank you. Based on what we have
12:50:26 7 reviewed and what you have reviewed in terms of the
12:50:28 8 oral histories and the other historical records and
12:50:32 9 what we have talked about today, can you tell us
12:50:36 10 your view on whether and how the experiences with
12:50:38 11 residential schools that members of SON may have
12:50:42 12 had have any bearing on what we are talking about
12:50:44 13 today regarding SON's historic ability to bring
12:50:47 14 claims against the government?

12:50:49 15 A. Residential schools had a huge
12:50:54 16 ability -- sorry, a huge impact on the ability of
12:50:58 17 the Saugeen Ojibway people to bring land claims and
12:51:02 18 on several fronts.

12:51:07 19 They experienced this very harsh regime
12:51:12 20 that left them often troubled, that left them
12:51:20 21 feeling unjustly treated, that left them afraid of
12:51:24 22 white authorities.

12:51:27 23 They received very poor educations in
12:51:29 24 these institutions. For a long time, in fact,
12:51:36 25 residential schools were run on what was called the

12:51:38 1 half-day system, which was a system by which the
12:51:40 2 students were only in school for half the day.
12:51:43 3 They were only in school for the morning and the
12:51:47 4 afternoons and often much of the evenings were
12:51:51 5 spent doing labour around the school. So they
12:51:53 6 received a poor academic education as well.

12:51:56 7 So in many ways they were disempowered,
12:51:59 8 they were left poorly educated, they were trained
12:52:02 9 to obey and not take initiative, and they were
12:52:06 10 deprived of an understanding of their own history
12:52:09 11 and culture which meant it was also not easy for
12:52:15 12 the community to retain its own historical
12:52:20 13 traditions, its own oral history. It wasn't easy
12:52:23 14 for them to pass down the knowledge that their
12:52:25 15 Elders had, which included knowledge about the
12:52:29 16 Treaties and their history of trying to defend
12:52:31 17 their lands and resources.

12:52:33 18 Q. Thank you. So I would like to
12:52:38 19 shift to another section. We have gone through
12:52:40 20 those tools that you listed at page 13 of your
12:52:43 21 report and I want to focus in on one of the items
12:52:47 22 that you give some attention to in your expert
12:52:50 23 report and talk briefly about that, and that is
12:52:53 24 section 141 of the Indian Act and what you refer to
12:52:59 25 as the ban on hiring lawyers.

12:53:01 1 A. Yes.

12:53:01 2 Q. So I would like to pull up the

12:53:03 3 provision that you are referring to, which is

12:53:05 4 Exhibit 3964. Can you explain your understanding

12:53:20 5 of what this provision is about?

12:53:22 6 A. I was re-reading this report in

12:53:27 7 preparation for testimony, and it occurred to me

12:53:31 8 that "lawyer ban" is a convenient shorthand, but it

12:53:35 9 actually understates the scope of this provision

12:53:38 10 because they were not banned only from hiring

12:53:41 11 lawyers, they were -- what this provision does is

12:53:44 12 prohibit anyone, lawyers or otherwise, including

12:53:50 13 Band members, from collecting any money or even any

12:53:54 14 promise of money in order to prosecute any claim.

12:53:59 15 This was forbidden unless they received

12:54:04 16 written consent from the Superintendent General.

12:54:11 17 And the section outlines penalties for those who

12:54:14 18 violate the provision; in other words, for those

12:54:18 19 who collect money without written permission from

12:54:21 20 the department.

12:54:21 21 Q. And you have said the

12:54:22 22 Superintendent General, and I don't want to confuse

12:54:24 23 the terms, the Superintendent General is the

12:54:26 24 predecessor of the Indian Agent?

12:54:28 25 A. The Superintendent General, within

12:54:32 1 the Indian Act the term essentially means the head
12:54:35 2 of the Department of Indian Affairs.

12:54:37 3 Q. Okay, thank you. What is your
12:54:41 4 understanding of the penalty that could be imposed
12:54:43 5 if an individual was convicted under this
12:54:46 6 provision?

12:54:46 7 A. They could be fined up to \$200,
12:54:53 8 and not less than \$50, and they could be imprisoned
12:54:57 9 up to two months.

12:54:58 10 Q. Let's talk about the history of
12:55:01 11 this provision. Is 1927 the first time that this
12:55:06 12 provision appeared in the Indian Act?

12:55:07 13 A. Yes, that's right.

12:55:08 14 Q. And how long was it in the Indian
12:55:12 15 Act?

12:55:12 16 A. Until 1951.

12:55:14 17 Q. From your review of the historical
12:55:17 18 records, can you briefly tell us what you
12:55:20 19 understand to have led to the addition of this
12:55:24 20 provision?

12:55:24 21 A. Yes. This provision was added to
12:55:31 22 the Indian Act in the context of growing agitation
12:55:38 23 and organization by Indigenous groups and leaders
12:55:42 24 to try to advance claims relating to land and
12:55:46 25 resources.

1 In this period, there were more
2 Indigenous people than ever before who spoke good
3 English, who could read and write English, who had
4 some experience with the general Canadian
5 community, non-Indigenous community, and so -- and
6 who had more education, so they had -- they were
7 beginning to have people with the skills to build
8 political organizations and to lobby for attention
9 to their land claims.

10 And there were several centres of
11 agitation at this time. One was the Six Nations
12 Reserve in Southern Ontario. Another was a group
13 of Indigenous communities in British Columbia and
14 the other was -- there was a Mohawk activist, Fred
15 Loft, who was building regional and trying to build
16 a national organization. And all of them were
17 talking about land claims.

18 Q. Who was Duncan Campbell Scott?

19 A. Duncan Campbell Scott was a
20 long-standing employee of the Indian Department.
21 If we were doing this right, Indian Department, the
22 official terms vary over the years, but I am trying
23 to refer to the whole time period under its
24 different names.

25 Duncan Campbell Scott first joined the

1 Indian Department as a copy clerk in 1879. He was
2 very young, I think he was in his late teens. And
3 he continued as a member, an employee of the Indian
4 Department for the rest of his career until he
5 retired in 1932. So 53 years he was a member of
6 the department.

7 And he worked his way up through the
8 ranks and in 1913 he became the Superintendent --
9 sorry, the Deputy Superintendent General, and that
10 was the top civil service position just below the
11 Minister in the department.

12 So for 20 years he was the head of the
13 Indian Department.

14 Q. What, if anything, was his role --

15 THE COURT: I am going to interrupt
16 you, Counsel, because it is one o'clock, and I am
17 sure this is probably not your last question on
18 this area, so we might as well take the lunch
19 break.

20 -- RECESSED AT 1:00 P.M.

21 -- RESUMED AT 2:18 P.M.

22 THE COURT: Please go ahead, Counsel.

23 BY MS. GUIRGUIS:

24 Q. Thank you, Your Honour.

25 So, Professor Brownlie, we left off by

14:18:26 1 talking about section 141 and we had left off with
14:18:33 2 you telling us who Duncan Campbell Scott was, and I
14:18:36 3 wanted to ask you what, if any, role Duncan
14:18:40 4 Campbell Scott had in the introduction of section
14:18:45 5 141?

14:18:46 6 A. Yes, he seems to be the source of
14:18:53 7 the idea for adding this provision to the Indian
14:18:56 8 Act. At least as early as 1924 he had proposed the
14:19:01 9 addition of a clause along these lines to the
14:19:03 10 Indian Act.

14:19:04 11 Q. So I want to pull up a secondary
14:19:11 12 source document that you rely on in your report.
14:19:14 13 It is S-1695. Professor Brownlie, what is this
14:19:20 14 document?

14:19:21 15 A. This is a monograph by a political
14:19:27 16 scientist Paul Tennent on the history of the Indian
14:19:36 17 land question in British Columbia.

14:19:39 18 Q. Could you just scroll down to the
14:19:41 19 next page. So this is Chapter 8 of Paul Tennent's
14:19:50 20 book, and who is Paul Tennent?

14:19:53 21 A. He is a political scientist.

14:19:54 22 Q. And this is the chapter of his
14:19:59 23 book that you rely on for your information about
14:20:03 24 the understanding of section 141?

14:20:04 25 A. Yes, largely.

1 MS. GUIRGUIS: Your Honour, I would
2 like to add Paul Tennent "Aboriginal People and
3 Politics," Chapter 8, as the next exhibit.

4 THE COURT: Mr. Registrar?

5 THE REGISTRAR: Exhibit No. 4140.

6 EXHIBIT NO. 4140: Chapter 8,
7 "Aboriginal People and Politics" by
8 Paul Tennent.

9 BY MS. GUIRGUIS:

10 Q. I would like to go quickly to the
11 bottom of page 111 of this document, which is PDF
12 image 18. If you could just take a look and
13 refresh your memory on what it says on these pages,
14 Professor Brownlie, and I will ask you a couple of
15 questions about it.

16 A. Yes.

17 Q. So the reference to section 141 in
18 this, what is this excerpt saying, very briefly?

19 A. He is talking about the reasons
20 why the section was introduced.

21 Q. What is the committee that is
22 referred to here?

23 A. It is a joint committee of the
24 Senate and House of Commons that had been
25 established to consider the question about

14:21:39 1 unsundered Indigenous lands in British Columbia.

14:21:43 2 Q. On page 111, right near the bottom
14:21:53 3 of that block quote, right before the last
14:21:56 4 paragraph, there is mention of:

14:22:00 5 "The section 141 next to
14:22:02 6 section 140, the antipotlatch
14:22:05 7 provision."

14:22:11 8 And I would like to turn to page 112,
14:22:14 9 which is the next page over that you looked at, the
14:22:21 10 end of the second-last paragraph, so later on that
14:22:25 11 page, right there, it says:

14:22:33 12 "In Indian memories, section
14:22:34 13 141 is usually linked with the
14:22:37 14 potlatch prohibition and the
14:22:38 15 combination of the two produces the
14:22:40 16 still common belief, which
14:22:42 17 presumably existed from 1927 to 1951
14:22:45 18 as well, that any gathering of
14:22:47 19 Indians or any discussion of land
14:22:49 20 claims was illegal without the
14:22:50 21 permission of a missionary, Indian
14:22:53 22 agent or police official."

14:22:54 23 And my question is what is this
14:22:57 24 potlatch prohibition that Tennent is referring to?

14:22:59 25 A. It was a provision in the Indian

1 Act that banned a very important cultural
2 institution called the potlatch, and it was a
3 ceremony that was practiced among BC coastal
4 tribes.

5 Q. So I would like to pull up the
6 section 140 of the Indian Act, which is Exhibit
7 3544. It is PDF image 58. So that is page 300 of
8 this document. This is the section 140 that is
9 being referred to by Tennent?

10 A. Yes.

11 Q. So when I read this, I didn't see
12 any mention of potlatch.

13 A. Yes.

14 Q. And why does Tennent refer to it
15 as the "potlatch prohibition"?

16 A. The history of this section was
17 that it was the evolution of an earlier provision
18 introduced first in 1884 that banned the potlatch,
19 and that first provision was much shorter. I can't
20 tell you the exact words, but it basically said
21 that the institution known as the potlatch is
22 banned. And then when Indian Affairs officials
23 tried to take that to Court, the judge looked at
24 the provision and said, I can't apply this, I don't
25 know what a potlatch is, and it wasn't defined.

14:24:43 1 So then the provision was amended so
14:24:48 2 that it defined the potlatch, and then it didn't
14:24:51 3 name it.

14:24:52 4 Potlatch, the term "potlatch" was a
14:24:58 5 Chinook word, but each of the coastal tribes would
14:25:03 6 have had their own name for it, so they probably
14:25:04 7 thought, well, we are not going to put all the
14:25:07 8 names; we'll just try to describe it.

14:25:08 9 Q. Based on what you have reviewed in
14:25:10 10 the historical record and on these sources, what
14:25:12 11 are your views of Tennent's conclusion about the
14:25:19 12 effect of the relationship between the lawyer ban
14:25:21 13 and the potlatch ban?

14:25:23 14 A. His argument is that the potlatch
14:25:31 15 ban, as we'll call it for short, it would really be
14:25:34 16 more appropriate, as you see from the language, to
14:25:36 17 call it the provision banning Indigenous cultural
14:25:40 18 practices because it is much more widely written
14:25:43 19 and was used much more widely than simply to ban
14:25:47 20 the potlatch and the sun dance.

14:25:49 21 His argument is that, especially under
14:25:52 22 Duncan Campbell Scott in the 1910s and 1920s, this
14:25:57 23 cultural ban was used as -- was used instrumentally
14:26:02 24 as a way of trying to stop BC coastal bands from
14:26:09 25 meeting to discuss land claims.

14:26:12 1 Q. Thank you. So turning back to
14:26:19 2 section 141, you discussed in your report two
14:26:21 3 examples of the ban being enforced. And I just
14:26:32 4 want to touch on it briefly to ask you, the first
14:26:35 5 one that you mention is about Arthur O'Meara. Can
14:26:40 6 you briefly tell us who that is?

14:26:42 7 A. Arthur O'Meara was an Anglican
14:26:49 8 missionary who was trained as a lawyer and had
14:26:49 9 worked as a lawyer in Ontario for 20 years before
14:26:51 10 he became an Anglican missionary.

14:26:54 11 He then went to British Columbia and
14:26:55 12 served as an Anglican missionary to First Nations
14:27:00 13 groups in British Columbia, and between, I think it
14:27:01 14 is, about 1909 and 1928 or so, he was the main
14:27:07 15 person who assisted them in trying to bring their
14:27:10 16 land claims issues and trying to advance their land
14:27:14 17 claims issues.

14:27:15 18 Q. You say in your report that the
14:27:16 19 department attempted to use the ban against him?

14:27:19 20 A. Yes.

14:27:19 21 Q. What was the outcome of that?

14:27:21 22 A. They began to -- Duncan Campbell
14:27:24 23 Scott ordered his officials to begin collecting
14:27:27 24 evidence in order to charge him under the
14:27:32 25 provision, under section 141, but he died before

14:27:38 1 they had a chance to bring it to Court. He died in
14:27:40 2 1928, so just the year after the lawyer ban was
14:27:43 3 added to the Indian Act.

14:27:45 4 Q. The other example you mention in
14:27:50 5 your report is about Frederick Loft. Who was
14:27:54 6 Frederick Loft?

14:27:55 7 A. He was a Mohawk activist and
14:27:58 8 organizer who had had considerable success in
14:28:04 9 establishing political organizations among First
14:28:08 10 Nations in Ontario and on the Prairies. I think he
14:28:12 11 might even be into BC at one point. Duncan
14:28:17 12 Campbell Scott considered Fred Loft a serious
14:28:20 13 threat because he was bringing up these land claims
14:28:24 14 issues that Duncan Campbell Scott did not want
14:28:26 15 discussed, that he wanted to suppress.

14:28:28 16 And so Scott used a variety of measures
14:28:32 17 to try to undermine Loft's work, including
14:28:37 18 beginning to collect evidence of Loft trying to
14:28:41 19 collect money, so that he could be prosecuted under
14:28:44 20 section 141.

14:28:45 21 Q. What was the outcome of those
14:28:48 22 efforts?

14:28:49 23 A. Fred Loft was getting older and
14:28:55 24 his wife was ill, and he had been doing all this
14:28:59 25 organizing mostly on his own dime, and he just had

14:29:04 1 to -- he wasn't able to continue with his work.

14:29:09 2 So again, he ceased the activity before
14:29:12 3 the department had a chance to take him to Court
14:29:16 4 under section 141.

14:29:17 5 Q. What sources do you rely on in
14:29:21 6 your report for the account of Frederick Loft?

14:29:24 7 A. I think it is -- it is either Paul
14:29:32 8 Tennent or Brian Titley in "A Narrow Vision."

14:29:39 9 Q. Okay, so if it is Titley, then I
14:29:43 10 would like to bring up S-1708, to add that
14:29:46 11 secondary source as an exhibit. So, Professor
14:30:04 12 Brownlie, is this the book that you rely on?

14:30:06 13 A. Yes.

14:30:06 14 Q. And if we could scroll to the next
14:30:08 15 page, or the page after, I'm sorry, this is Chapter
14:30:17 16 6. Is this the chapter of Titley's book that you
14:30:21 17 rely on for your account?

14:30:22 18 A. Yes.

14:30:23 19 MS. GUIRGUIS: So, Your Honour, I would
14:30:24 20 like to add Titley, "A Narrow Vision," Chapter 6 as
14:30:32 21 the next exhibit.

14:30:33 22 THE COURT: Mr. Registrar?

14:30:33 23 THE REGISTRAR: Exhibit No. 4141.

14:30:33 24 EXHIBIT NO. 4141: Chapter 6, "A Narrow
14:30:36 25 Vision," by Brian Titley.

14:30:36 1 BY MS. GUIRGUIS:

14:30:47 2 Q. And, Professor Brownlie, I want to
14:30:48 3 turn to, related to this topic, something that you
14:30:53 4 discuss in your expert report from pages 61 to 70.
14:30:57 5 That is the Pottawatomi claim against the U.S.
14:30:59 6 government.

14:31:01 7 A. Yes.

14:31:01 8 Q. Very briefly, what was the
14:31:03 9 Pottawatomi claim?

14:31:04 10 A. The Pottawatomi were an Indigenous
14:31:13 11 group whose territories had ended up mostly south
14:31:20 12 of the international border in the United States.
14:31:22 13 They had made some treaties with the United States
14:31:25 14 under which they were to receive annuities and then
14:31:28 15 some of them or most of them had been removed from
14:31:31 16 their original territories and some of them had
14:31:36 17 moved to Upper Canada.

14:31:38 18 The ones who moved to Upper Canada
14:31:40 19 ceased receiving these annuities and they were
14:31:43 20 trying to get the United States to pay them the
14:31:46 21 annuities.

14:31:46 22 Q. So the ones that ended up in Upper
14:31:51 23 Canada, where did they generally reside?

14:31:53 24 A. Some of them ended up at Nawash,
14:31:57 25 quite a few ended up at Nawash, and there were some

14:32:00 1 in other settlements as well.

14:32:01 2 Q. When was the Pottawatomi claim
14:32:07 3 launched? And sorry, let me clarify, the
14:32:14 4 Pottawatomi claim from the Pottawatomi that were
14:32:16 5 residing in Upper Canada.

14:32:17 6 A. Right. I believe they first began
14:32:21 7 to speak to lawyers at the very end of the 19th
14:32:25 8 century. Im looking for the date here. Right,
14:32:33 9 1894 is our first record of the Pottawatomi
14:32:35 10 consulting a lawyer and trying to pursue the claim.
14:32:40 11 It at that point doesn't seem to have gone
14:32:43 12 anywhere.

14:32:43 13 And then they, as of 1911 they had
14:32:47 14 hired a lawyer to try to pursue the claim.

14:32:49 15 Q. And who was the lawyer that they
14:32:54 16 hired?

14:32:55 17 A. Andrew Gordon Chisholm, he was an
14:33:00 18 attorney from London.

14:33:01 19 Q. How did the department become
14:33:03 20 aware that the Pottawatomi had hired Chisholm?

14:33:12 21 A. It appears to have become aware of
14:33:12 22 this first when it received a lawyer -- sorry, a
14:33:15 23 letter from an American lawyer named C.J. Smith,
14:33:22 24 and I think the date of that letter was February
14:33:25 25 15th, 1911.

1 Q. How did the department respond to
2 that letter?

3 A. It was interested in knowing more,
4 so it replied to Smith. The particular issues that
5 Smith had raised were ones that were important to
6 the department, and so it felt it needed to act.

7 Q. What were the issues that Smith
8 raised?

9 A. One of the major issues he was
10 writing about was the fact that Chisholm -- somehow
11 this C.J. Smith knew that Chisholm had made a
12 contract with the Pottawatomi under which Chisholm
13 would receive one-third of any money that was
14 recovered through the claim.

15 And Smith felt that this was an
16 unreasonably high amount to be charging, and this
17 was one of the issues that the Indian Department
18 always took very seriously, any time that it
19 believed Indigenous people were being taken
20 advantage of, that this was an issue where the
21 department should intervene.

22 Q. So this letter, I don't think we
23 need to bring it up because it is already an
24 exhibit. It is Exhibit 3434, for the record.

25 Did the department ever consider

14:35:09 1 whether it had to apply section 141 in this case?

14:35:28 2 A. Yes, that question did come up
14:35:32 3 later. The claim began before the provision was
14:35:39 4 added to the Indian Act.

14:35:40 5 Q. I'll bring up two exhibits
14:35:52 6 quickly. Exhibit 3644, this is a memo from -- a
14:36:15 7 memo dated May 15th. I can't see that date.

14:36:20 8 A. I think it is 1939.

14:36:21 9 Q. All right. You recognize this
14:36:25 10 document?

14:36:25 11 A. Yes.

14:36:26 12 Q. Can you tell us, very briefly,
14:36:31 13 what it is about, what it is?

14:36:32 14 A. Yes, it is a memorandum to the
14:36:34 15 Deputy Minister of the Indian Affairs Branch, as it
14:36:37 16 then was, giving historical background to the
14:36:41 17 Pottawatomi claim.

14:36:41 18 Q. And why were they giving
14:37:07 19 background to the Pottawatomi claim? We can scroll
14:37:09 20 down, if you want to take a look at it.

14:37:11 21 A. Yes, please.

14:37:20 22 Further down, please.

14:37:21 23 Yes, please keep scrolling.

14:37:35 24 Please keep scrolling.

14:38:02 25 I believe we do eventually get to a

14:38:15 1 question about the right of the Saugeen -- or,
14:38:21 2 sorry, the Pottawatomi to hire a lawyer.

14:38:23 3 Q. Right.

14:38:27 4 A. I think we still need to scroll
14:38:29 5 further.

14:38:29 6 Ah, there we go. In the first full
14:38:37 7 paragraph, Mr. Young, a lawyer they had mentioned
14:38:41 8 above, was already representing some of the
14:38:44 9 Pottawatomi and he had asked the department for a
14:38:47 10 conditional waiver of section 141 of the Indian Act
14:38:49 11 so that he could represent them; rather, so that
14:38:55 12 they could pay him.

14:39:00 13 Q. If we could pull up the next
14:39:04 14 exhibit, it is 3645. This is one page. And what
14:39:12 15 is this document?

14:39:13 16 A. This is a memorandum from the
14:39:21 17 Deputy Minister of Mines and Resources, which is --
14:39:27 18 that was where the Indian Affairs Branch was
14:39:30 19 located at that time, a memorandum to Dr. McGill,
14:39:33 20 who was the head of the Indian Affairs branch.

14:39:35 21 Q. So this was responding to whoever
14:39:37 22 it was?

14:39:37 23 A. Yes, this was a response of the
14:39:41 24 Minister or the Deputy Minister to the request from
14:39:47 25 Mr. A.T. Young, the barrister, a response to his

14:39:51 1 request for a conditional waiver of section 141 of
14:39:53 2 the Indian Act.

14:39:54 3 Q. And what is the response?

14:39:57 4 A. The request was granted.

14:39:59 5 Q. So in your view, on review of
14:40:02 6 these two documents, what does it suggest about how
14:40:05 7 applications for hiring lawyers would be treated?

14:40:07 8 A. Well, we have this one instance in
14:40:17 9 which an additional lawyer applied for a waiver of
14:40:21 10 that section so that he could be paid to represent
14:40:25 11 some of the Pottawatomi.

14:40:27 12 In the case of the other lawyer, Andrew
14:40:30 13 Chisholm, he had been hired by the Pottawatomi much
14:40:33 14 earlier, in 1911, and actually what happened in
14:40:39 15 that case is that because the department was
14:40:43 16 concerned about the fee that he was supposed to
14:40:47 17 receive, it had become involved. And then being
14:40:50 18 the department, it stayed involved and really to a
14:40:54 19 large extent took over the handling of the claim
14:40:58 20 and, you know, the way that the lawyer, Chisholm,
14:41:04 21 pursued the claim.

14:41:07 22 So really what happened here is that to
14:41:10 23 some extent the Indian Department took over a
14:41:15 24 portion of pursuing this claim and did some of the
14:41:19 25 work of approaching American officials about it,

14:41:23 1 and then, you know, did the -- maintained the
14:41:28 2 relationship with Chisholm in his prosecution of
14:41:31 3 the claim.

14:41:34 4 And then when Mr. Young came along, by
14:41:37 5 this time the Pottawatomis had been waiting over
14:41:42 6 two decades, probably closer to three decades, for
14:41:45 7 a result and they had not seen any result, so they
14:41:48 8 began hiring other lawyers because they lost
14:41:51 9 confidence that Chisholm would be able to get
14:41:53 10 results.

14:41:53 11 And when they did hire this lawyer, he
14:41:57 12 successfully applied for a waiver of section 141.

14:42:02 13 Q. So does this suggest to us that
14:42:06 14 waivers would be provided by the department?

14:42:09 15 MR. FELICIAN: Sorry, that is a very
14:42:10 16 leading question.

14:42:14 17 BY MS. GUIRGUIS:

14:42:14 18 Q. Sorry, you are right.

14:42:18 19 Let me put it this way. Based on your
14:42:23 20 review of these documents and other historical
14:42:26 21 records, what is your view on how -- on whether and
14:42:38 22 how this section that we are talking about, section
14:42:42 23 141, impacted SON's historic ability to bring a
14:42:47 24 claim against the Canadian government?

14:42:48 25 A. The evidence that I have seen I

14:42:58 1 would say is of two types.

14:43:00 2 In the first place, we have a little
14:43:02 3 bit of evidence, which I have canvassed in this
14:43:04 4 report, about the department's, the Indian
14:43:09 5 Department's approach toward this question, so we
14:43:13 6 have some memos from a little bit later on in which
14:43:16 7 department officials note that they had found it
14:43:20 8 very difficult to get convictions under section
14:43:23 9 141, which seems to be a clear indication that they
14:43:25 10 had attempted to get convictions under that
14:43:27 11 section.

14:43:27 12 And they later state that, I think it
14:43:37 13 is much closer to the time that they dropped the
14:43:39 14 provision, that it was difficult for them to
14:43:42 15 justify politically.

14:43:43 16 The other evidence I have is the oral
14:43:48 17 history in which a number of people refer to the
14:43:54 18 ban on hiring lawyers, and so what that tells me is
14:43:59 19 that there was a belief in the community that they
14:44:02 20 were banned from hiring lawyers.

14:44:06 21 I am not aware of any instance in which
14:44:10 22 the Indian Department granted the SON permission to
14:44:14 23 hire lawyers or to pay anyone to prosecute land
14:44:17 24 claims.

14:44:17 25 Q. Thank you. So in your report,

14:44:30 1 starting at page 70, or at page 70 of your report,
14:44:34 2 you say, you use the words:

14:44:36 3 "It is highly unlikely that
14:44:40 4 most First Nations people were aware
14:44:41 5 of this conclusion on the part of
14:44:42 6 the Indian Department [...]"

14:44:43 7 And you are referring to the conclusion
14:44:45 8 to repeal the ban:

14:44:47 9 "[...] which remain largely
14:44:48 10 dismissive of claims against
14:44:49 11 Canadian governments and continue to
14:44:52 12 employ Indian Agents as a force of
14:44:55 13 surveillance."

14:44:57 14 Why is it your view that the Indian
14:45:06 15 Agent's role made it highly unlikely, as you put
14:45:09 16 it, that First Nations people did not know they no
14:45:11 17 longer had to seek permission from the department
14:45:14 18 to hire lawyers?

14:45:14 19 A. It is clear that the role of
14:45:30 20 maintaining control and keeping Indigenous people
14:45:37 21 quiet for Indian Agents continued into the post-war
14:45:42 22 period, so into the 1950s and the 1960s.

14:45:46 23 We have some references from Indian
14:45:51 24 Agents to withholding documents from Indigenous
14:45:57 25 people because when they had them, they used them

14:46:00 1 to make trouble. So this general attitude of the
14:46:03 2 department and of the Indian Agents that it was
14:46:08 3 important to keep Indigenous people quiet and to at
14:46:18 4 least discourage claims against government
14:46:20 5 continued long after section 141 was dropped from
14:46:25 6 the Indian Act.

14:46:26 7 And of course, I have never met an
14:46:32 8 Indigenous person from that time period who had
14:46:34 9 actually read the Indian Act, and of course, these
14:46:38 10 days you can just look it up on the internet, but
14:46:40 11 that was not the case back then.

14:46:42 12 And in general, their information on
14:46:47 13 what was in the Indian Act tended to come from
14:46:50 14 Indian Agents. It is theoretically possible that
14:46:54 15 an Indian Agent could call a meeting and say, guess
14:46:56 16 what, we have dropped this provision that banned
14:46:59 17 you from paying people to prosecute claims, but
14:47:03 18 based on my research, extensive research on how
14:47:09 19 Indian Agents prosecuted their jobs, I find that
14:47:14 20 highly unlikely, especially for Nawash where the
14:47:19 21 oral history speaks over and over of the Indian
14:47:26 22 Agents suppressing them and maintaining control,
14:47:28 23 and they used terms like "dictatorial" and
14:47:32 24 "communist." They talk about them controlling Band
14:47:35 25 Council meetings.

14:47:35 1 So there is very extensive oral history
14:47:38 2 that pretty well uniformly depicts Indian Agents as
14:47:43 3 acting in authoritarian ways or exercising a lot of
14:47:48 4 power and not allowing the Saugeen Ojibway to
14:47:54 5 pursue issues that they wanted to pursue.

14:48:03 6 Q. Thank you. One final section, or
14:48:09 7 the way I have divided up the sections, to review
14:48:12 8 with you.

14:48:13 9 So we have talked already and you have
14:48:20 10 identified a number of what you have called
14:48:21 11 obstacles that the SON faced. I would like to
14:48:24 12 discuss now, if they did, how SON was able to
14:48:29 13 assert or exercise their rights.

14:48:39 14 A. Of course I cover this in the
14:48:40 15 report and I show examples of the ways they tried
14:48:44 16 to proceed, but --

14:48:46 17 THE COURT: Sir, I am going to
14:48:47 18 interrupt you. I know you have got your report in
14:48:49 19 front of you and you are trying to be helpful, but
14:48:52 20 counsel hasn't asked you a question yet.

14:48:54 21 THE WITNESS: Oh, sorry.

14:48:57 22 MS. GUIRGUIS: Sorry, it is probably my
14:49:00 23 intonation.

14:49:00 24 THE COURT: No, it is no problem at
14:49:02 25 all. That was a headline; that's correct, isn't

14:49:04 1 it, Counsel?

14:49:05 2 BY MS. GUIRGUIS:

14:49:06 3 Q. That's right, yes.

14:49:07 4 What do the historical documents and
14:49:09 5 research you have reviewed indicate about SON's
14:49:15 6 efforts to keep the lands and waters after Treaty
14:49:20 7 72 was signed?

14:49:21 8 A. Can you repeat the question,
14:49:25 9 please?

14:49:25 10 Q. Sure. What do the historical
14:49:28 11 documents and research you have reviewed indicate
14:49:30 12 about SON's actions and efforts to keep their lands
14:49:39 13 and waters after Treaty 72 was signed?

14:49:48 14 MR. FELICIAN: Well, to a certain
14:49:50 15 extent, Your Honour, it is a leading question in
14:49:51 16 two respects.

14:49:52 17 It implies that there are efforts and
14:49:53 18 it also specifies the kinds of things that there
14:49:56 19 were efforts to protect. It strikes me there was a
14:49:59 20 less leading way of proceeding.

14:50:09 21 THE COURT: Well, perhaps there was,
14:50:10 22 Mr. Feliciant, but there is evidence already in the
14:50:12 23 record in this report that I think mitigates any
14:50:21 24 unexpected outcome from the answer to this
14:50:23 25 question.

14:50:25 1 So I say both you are probably right,
14:50:29 2 and I would ask counsel to proceed.

14:50:32 3 BY MS. GUIRGUIS:

14:50:32 4 Q. Thank you, Your Honour.

14:50:37 5 So if you could answer that question?

14:50:40 6 A. Can you repeat it, please? Sorry.
14:50:45 7 Do you have it?

14:50:46 8 Q. Yes. In your review of historical
14:50:52 9 documents and research, what can you say about
14:50:57 10 whether and how SON made efforts to keep the lands
14:51:00 11 and waters -- to keep its lands and waters after
14:51:05 12 Treaty 72 was signed?

14:51:06 13 A. There is abundant evidence of
14:51:13 14 efforts in a number of areas and in a number of
14:51:18 15 ways to try to protect their land and their waters.
14:51:22 16 Some of the most abundant evidence relates to the
14:51:25 17 fisheries, so efforts to prevent people from
14:51:28 18 fishing on grounds that they considered to be their
14:51:31 19 fishing grounds. They appointed their own
14:51:35 20 guardians or overseers. They sometimes complained
14:51:37 21 to government about people, others fishing on
14:51:40 22 grounds they considered to be their own.

14:51:41 23 And they also continued to exercise
14:51:46 24 their fishing right actively by continuing to fish.
14:51:50 25 They also continued to hunt and

14:51:53 1 exercise the hunting right.

14:51:59 2 And those efforts evolved over time
14:52:07 3 according to the means that they had at their
14:52:12 4 disposal and also the challenges they faced. So,
14:52:17 5 for instance, they were subjected to much more
14:52:24 6 government restriction with their fishing after the
14:52:26 7 Second World War and this is when you begin to see
14:52:29 8 them taking other actions to try to assert fishing
14:52:33 9 rights.

14:52:33 10 And later still, other mechanisms begin
14:52:41 11 to be put in place that they can use, such as the
14:52:43 12 specific claims process and the Constitution Act
14:52:47 13 and other litigation proceedings.

14:52:52 14 Q. We talked earlier about requests
14:53:00 15 and petitions by SON for the implementation of
14:53:04 16 terms, and you referred right now to other ways
14:53:11 17 that they tried to protect their lands. Based on
14:53:18 18 that and the research and review of the historical
14:53:21 19 record, what is your view of why the Saugeen
14:53:28 20 Ojibway Nation didn't protest the validity of
14:53:29 21 Treaty 72?

14:53:34 22 THE COURT: Just for my benefit, can
14:53:36 23 you give that a time period? I mean, are you going
14:53:40 24 from 1854 to today? Are you going in a historical
14:53:44 25 period?

14:53:46 1 BY MS. GUIRGUIS:

14:53:46 2 Q. Let's say 1854 for the remaining
14:53:48 3 part of the 19th century, after the signing of the
14:53:53 4 Treaty, when they were making efforts for things?

14:53:58 5 THE COURT: So I have your question as
14:53:59 6 based on the historical record, what is your view
14:54:02 7 of why SON didn't protest the validity of Treaty
14:54:07 8 72, and you would say for the remainder of that
14:54:09 9 century?

14:54:11 10 MS. GUIRGUIS: For the remainder of
14:54:12 11 that century or -- yes, so shortly after signing
14:54:16 12 the Treaty and when we see them mand what Professor
14:54:20 13 Brownlie has already talked about, when they make
14:54:23 14 petitions for implementation --

14:54:25 15 THE COURT: Yes, I heard about that.
14:54:26 16 I'm just trying to get --

14:54:26 17 MS. GUIRGUIS: A sense of the time
14:54:27 18 period, no, and I appreciate that, Your Honour.

14:54:29 19 Yes, I think for the remaining part of
14:54:32 20 the 19th century.

14:54:33 21 THE COURT: All right.

14:54:41 22 THE WITNESS: There was no way that
14:54:42 23 they would ever have been able to have Treaty 72
14:54:47 24 declared invalid any time in the 19th century.
14:54:49 25 That was politically unthinkable.

14:54:56 1 BY MS. GUIRGUIS:

14:54:58 2 Q. And why is that?

14:54:59 3 A. You canvassed the historical
14:55:04 4 record about the years leading up to Treaty 72 in
14:55:09 5 which the Saugeen Ojibway were under intense
14:55:12 6 pressure to surrender their lands and being faced
14:55:16 7 by requests from government officials and private
14:55:20 8 persons for different parts of their land, and
14:55:24 9 being well aware that the intent of the society,
14:55:28 10 the settler society, was to take over their lands.

14:55:32 11 It is a situation where they kept
14:55:37 12 saying no, and they just got asked again. It
14:55:44 13 didn't matter how many times they said no, somebody
14:55:47 14 came again and asked them again. They finally were
14:55:54 15 pressured into saying yes, and everyone knew that
14:56:00 16 that was what the settler society was determined to
14:56:04 17 see happen and that it would never have permitted
14:56:08 18 or even entertained the question of invalidating
14:56:13 19 Treaty 72. They had finally got a yes and there
14:56:18 20 was no way to undo that in the context of that
14:56:21 21 time, or for the next century.

14:56:24 22 Q. You mentioned in your answer a
14:56:33 23 moment ago that SON asserted its rights by
14:56:37 24 continuing to fish. How did the encroachment on
14:56:45 25 their territory that we have talked about already,

14:56:49 1 you talked about yesterday with my colleague, in
14:56:51 2 the 1830s impact on their fishery?

14:56:53 3 A. Their fisheries were greatly
14:56:56 4 impacted by the desire of non-Indigenous people to
14:57:04 5 access the fisheries for food and especially for
14:57:07 6 commercial purposes, and the commercial fishery
14:57:14 7 kept expanding and gaining more control over the
14:57:18 8 fisheries while the Saugeen Ojibway's control of
14:57:23 9 the fisheries declined and then disappeared.

14:57:26 10 Q. How did the SON respond to these
14:57:30 11 encroachments in the 1830s with respect to their
14:57:32 12 fisheries? 1830s.

14:57:39 13 A. 1830s, yes. Initially they tried
14:57:45 14 to make their own agreements with commercial
14:57:47 15 fishermen so that they would at least get some
14:57:51 16 compensation for sharing their fisheries, and I
14:57:57 17 believe also so that they would at least have some
14:57:59 18 control.

14:58:00 19 And it appears that what they were
14:58:03 20 trying to do was get some financial compensation
14:58:06 21 for their fisheries being used by others, and also
14:58:13 22 ensure that it was just one person, they were just
14:58:16 23 dealing with one person who would be exploiting the
14:58:19 24 fishery and that presumably might allow them at
14:58:23 25 least some control over how it was used and how

14:58:25 1 many fish were taken.

14:58:26 2 Q. I would like to bring up Exhibit
14:58:29 3 1053. Professor Brownlie, do you know what this
14:58:39 4 document is?

14:58:40 5 A. Yes.

14:58:43 6 Q. We can scroll down, if you would
14:58:45 7 like.

14:58:56 8 A. Yes.

14:58:56 9 Q. Can you tell us briefly what it
14:58:59 10 is?

14:58:59 11 A. Yes, this is a lease or licence of
14:59:02 12 occupation that -- no, there are two different
14:59:14 13 documents here, are there not?

14:59:15 14 Q. Yes.

14:59:15 15 A. One is a licence of occupation
14:59:17 16 granted by the government to fishermen to use the
14:59:22 17 fishing islands for a commercial fishery.

14:59:25 18 And can you please scroll down?

14:59:28 19 And then the second document describes
14:59:39 20 what this licence of occupation is and adds the
14:59:45 21 proviso, says that they are granting a licence of
14:59:48 22 occupation to the fishermen provided that the
14:59:50 23 Indian tribes are not excluded from the right of
14:59:52 24 fishing which they have always enjoyed.

14:59:54 25 Q. Okay. Can you tell us who the

1 Huron Fishing Company is that is mentioned here?

2 A. Yes, it is one of the early
3 commercial fishing companies in the area.

4 Q. I want to turn to the third page
5 and this highlighted area, it is a document
6 labelled "Lease"?

7 A. Yes.

8 Q. Firstly, who is Alexander
9 McGregor?

10 A. He was another commercial
11 fisherman to whom they probably had formerly leased
12 the islands or certainly who had been using them.

13 Q. So who is "they" in this lease?

14 A. The Saugeen Ojibway.

15 Q. If we scroll down to the fourth
16 page --

17 THE COURT: Just before you do that,
18 I'm looking for the word "they" anywhere in this
19 document.

20 THE WITNESS: Oh, did you mean me?

21 MS. GUIRGUIS: Yes, I meant Professor
22 Brownlie said "they," who they leased it to, so I
23 said who is "they."

24 THE COURT: Oh, in the prior question.
25 So this particular document emanates from the

15:01:28 1 Saugeen, yes?

15:01:31 2 BY MS. GUIRGUIS:

15:01:32 3 Q. Yes?

15:01:32 4 A. It says the Chiefs of the Chippewa
15:01:34 5 Indians.

15:01:35 6 Q. So the lessor is Saugeen?

15:01:37 7 A. Yes.

15:01:41 8 THE COURT: Thank you.

15:01:41 9 BY MS. GUIRGUIS:

15:01:41 10 Q. Okay. If we scroll down to the
15:01:44 11 next page, page 4, it should be highlighted in
15:01:53 12 green as well. Sorry, no, stay on that document,
15:01:58 13 please.

15:01:58 14 Under number 1 it says:

15:02:07 15 "The Licence of occupation
15:02:08 16 being given by Government prior to
15:02:10 17 the Lease from the Indians, no lease
15:02:12 18 was necessary and no rent was
15:02:13 19 payable."

15:02:14 20 What does this tell us?

15:02:16 21 A. It is an opinion from the Attorney
15:02:21 22 General about the legal rights in this instance and
15:02:27 23 what he is asserting is that essentially that the
15:02:30 24 government is the one who owns and controls the
15:02:35 25 lands and has the ability to grant or decline

1 leases, and that the Indians didn't have the right
2 to lease the lands or to receive rent for them --
3 the islands, I'm sorry.

4 Q. I would like to pull up Exhibit
5 P-1073. One of these documents.

6 So, Professor Brownlie, do you
7 recognize this document?

8 A. Yes.

9 Q. Okay. And can you tell us what it
10 is?

11 A. It is a letter from Koong-Wah-Wis
12 who is a member of the Saugeen Ojibway, addressing
13 his concerns about the way the fishery was being
14 exploited by Mr. McGregor, whom we mentioned
15 earlier was occupying the fishing islands.

16 Q. And I think it is addressed to
17 John Colborne? That is what I have in my
18 transcript, but I would like to --

19 THE COURT: Is there a transcript?

20 BY MS. GUIRGUIS:

21 Q. There is no transcript filed with
22 it, unfortunately. I think we had just sat down
23 very closely and read it.

24 A. It says "desirous to leave before
25 His Excellency the following particulars," so His

15:04:21 1 Excellency, I'm guessing, would be the Lieutenant
15:04:23 2 Governor.

15:04:24 3 Q. Okay. Well, in any case, it is
15:04:28 4 dated January 17, 1835, and so the highlighted area
15:04:39 5 I'm going to read it out, given the fact that I
15:04:42 6 don't think it is easy to read out.

15:04:44 7 A. I'm sorry, can I interrupt for a
15:04:45 8 moment? I just read who it was addressed to.
15:04:48 9 Could you scroll up a little, please. It is
15:04:50 10 addressed to "his Great Father, Lord Colborne."

15:04:58 11 Q. Okay, thank you. So the
15:05:04 12 highlighted area says:

15:05:05 13 "McGregor is encroaching on the
15:05:07 14 Indian fisheries, contrary to their
15:05:09 15 wish, and hopes his Great Father,
15:05:10 16 the Governor, will order to have
15:05:12 17 them driven off from their
15:05:14 18 territory."

15:05:16 19 Did your research and review of the
15:05:19 20 historical record reveal what, if anything, the
15:05:22 21 government did in response to this request?

15:05:26 22 A. I don't think I have seen the
15:05:29 23 evidence that McGregor was driven off. In general,
15:05:36 24 the government was in favour of the establishment
15:05:38 25 of commercial fisheries, which were a source of

15:05:41 1 revenue for government.

15:05:43 2 Q. Based on your research and review
15:05:51 3 of the historical record, is there anything to
15:05:54 4 indicate whether the issue of fisheries was an
15:05:57 5 issue raised when Treaty 45 1/2 was concluded?

15:06:03 6 A. Yes, I believe there is evidence
15:06:07 7 that it was raised. Well, there is evidence, in
15:06:12 8 particular we have the statement of Metigwob, who
15:06:15 9 is mentioned in these documents as well, stating
15:06:17 10 when he met with the Chiefs in the General Council
15:06:23 11 that Bond Head had asked them if they would be
15:06:26 12 willing to move to the Saugeen Peninsula, and he
15:06:28 13 had spoken to his head men and they liked the plan,
15:06:32 14 as there were many fish at that place, and then
15:06:35 15 Metigwob went on to say that Bond Head had promised
15:06:38 16 to remove white people who were fishing on their
15:06:41 17 fishing grounds.

15:06:42 18 Q. So that statement that you are
15:06:48 19 referring to from Metigwob, that is something that
15:06:52 20 you have discussed already from yesterday. For the
15:06:53 21 record, it is at Exhibit 1142.

15:06:57 22 Right now I would like to take you to
15:06:59 23 another document, which is Exhibit 1323. Again,
15:07:16 24 unfortunately, we don't have a transcript of this
15:07:19 25 document, but I believe you are familiar with it,

1 Professor Brownlie, as you cite it in your report.

2 A. Yes.

3 Q. Can you tell us what it is?

4 A. It is a General Council meeting on
5 January 17, I believe. Sorry, can you scroll down,
6 please. Thank you.

7 Can you scroll down further, please.

8 I think we need to keep going.

9 Yes, keep going. Yes, I think it is
10 actually a number -- at least one more page, if not
11 -- I think there is a whole long list. Oh yes,
12 this is a meeting with Jarvis where they listed a
13 bunch of issues. Can you keep going, please. I
14 think it might be number 11 or something that we
15 are looking for. Number 9. No, you have to go
16 back up, please.

17 Q. Yes, we can stop there. Who
18 convened this General Council?

19 A. Samuel Peters Jarvis, who was the
20 head of the Indian Department.

21 Q. And he was meeting with who?

22 A. I think it is the -- yes, it is
23 the Saugeen.

24 Q. Okay. So this section that we
25 have highlighted is the section that you have

1 cited. Can you summarize briefly what is being
2 raised by the Chiefs to Colonel Jarvis at this
3 page?

4 A. Yes, they are raising issues of
5 harvesting rights and interference with their
6 harvesting rights by non-Indigenous people.

7 Q. The text at the bottom of the
8 fourth page where we have highlighted, it says:

9 "The Saugeen Chiefs have had
10 some conversation with Colonel about
11 the fishery which has been leased to
12 a company of white men who the Chief
13 stated were destroying more fish
14 than they could preserve."

15 A. Yes.

16 Q. When it says "has been leased,"
17 what is your reading of who is the lessor?

18 A. Did we find out what year this
19 was?

20 Q. In the exhibit it is described as
21 being at 1840, I believe, but I can't find the year
22 on here.

23 A. 1840, okay. I think by this time,
24 when they say "has been leased," this is the
25 passive voice so common in official correspondence,

15:10:30 1 which doesn't identify the actors, but we know from
15:10:34 2 the lease of 1834 or '35 that the government had
15:10:40 3 effectively disallowed the lease the Saugeen had
15:10:42 4 granted and had asserted its own right to determine
15:10:45 5 who fished there.

15:10:46 6 So by this time, it would have been the
15:10:47 7 government who had leased the fishery.

15:10:49 8 Q. What, if anything, did Colonel
15:10:56 9 Jarvis do in response to these complaints?

15:10:58 10 A. Can you scroll down, please. It
15:11:09 11 is not clear, and a noteworthy feature of this
15:11:13 12 document is that it lists the questions that were
15:11:17 13 posed to Jarvis and, in most cases, it then
15:11:21 14 provides the answer that Jarvis gave. But this
15:11:24 15 document does not show any reply by Jarvis, and it
15:11:31 16 seems to me unlikely that he would have taken
15:11:34 17 action on this grievance.

15:11:36 18 Q. Okay, thank you.

15:11:41 19 You discussed with my colleague the
15:11:45 20 Royal Declaration of 1847 yesterday.

15:11:47 21 A. Yes.

15:11:47 22 Q. What is your view on whether the
15:11:54 23 declaration of 1847 set out any protection of SON's
15:11:58 24 fishery?

15:11:59 25 A. I believe it did set out to

1 protect the fishery. It -- the area that it
2 specifies includes the islands, the islands in the
3 lake, the islands off the shore, and those islands
4 were used for fishing.

5 Q. Sorry, one moment.

6 What do you rely on to form that
7 opinion?

8 A. The historical practice of the
9 department and the government, and the history of
10 the fisheries which was a history of a growing
11 commercial fishery that was encouraged by
12 government because it was a source of revenue and
13 it was part of a shared government and settler
14 vision of how the colony would develop, that they
15 would take the resources of the land and waters in
16 order to grow the country's economy and earn money.

17 Q. Sorry --

18 A. And -- go ahead.

19 Q. I think my question was about your
20 opinion on the Royal Declaration providing some
21 protection to the fishery.

22 A. I'm sorry.

23 Q. That is okay.

24 A. I'm losing my focus.

25 Q. It has been a long couple of days.

15:13:41 1 What do you rely on for that?

15:13:43 2 A. My interpretation of the Royal --

15:13:46 3 Q. Yes, your understanding.

15:13:47 4 A. Well, the fact that the islands
15:13:48 5 were used for fisheries.

15:13:50 6 Q. Okay. You have a secondary source
15:13:58 7 cited in your report that speaks to this as well
15:14:01 8 that I would like to bring up and add as an
15:14:04 9 exhibit. It is at document S-1076. Professor
15:14:12 10 Brownlie, what is this document?

15:14:14 11 A. It is a compilation of history
15:14:18 12 essays relating to Indigenous history in Ontario.

15:14:21 13 Q. And if we scroll down, this
15:14:31 14 article "Waterworld: The Aquatic Territory of the
15:14:37 15 Great Lakes First Nations," this is the article
15:14:39 16 that you have cited in your report?

15:14:40 17 A. Yes.

15:14:41 18 Q. Very briefly, what is Dr. Lytwyn
15:14:51 19 speaking about in this article?

15:14:53 20 A. He is looking at the relationship
15:14:56 21 between First Nations around the Great Lakes and
15:14:58 22 their aquatic territory and tracing the history of
15:15:01 23 their relationship with that territory in the
15:15:03 24 context of colonization.

15:15:04 25 Q. And he deals with the declaration?

15:15:10 1 A. Yes.

15:15:11 2 Q. At page 85? It is page 85 of the
15:15:19 3 PDF. Let me see what page it is, I'm sorry. No,
15:15:22 4 it is page 85 of -- I don't have the right page
15:15:28 5 number.

15:15:28 6 A. 15?

15:15:29 7 Q. This is the article that you rely
15:15:31 8 on for this point?

15:15:31 9 A. Yes, yes.

15:15:32 10 Q. So, Your Honour, I would like to
15:15:34 11 add this article as the next exhibit.

15:15:36 12 A. Maybe page 15.

15:15:40 13 THE COURT: Well, I see that it says a
15:15:41 14 16-page extract from this book, and it is short
15:15:43 15 enough that I think we are okay with that. No one
15:15:46 16 is objecting. Mr. Registrar?

15:15:48 17 THE REGISTRAR: Exhibit No. 4142.

15:15:48 18 EXHIBIT NO. 4142: 16-page article by
15:15:53 19 Dr. Lytwyn.

15:15:53 20 BY MS. GUIRGUIS:

15:16:03 21 Q. From your review of the relevant
15:16:05 22 historical records, what is your opinion on whether
15:16:08 23 and how the Royal Declaration was effective in
15:16:12 24 protecting SON's fishery?

15:16:14 25 A. My opinion is that it was not very

1 effective in protecting SON's fishery. That would
2 have required a political will to protect the
3 fishery for them, which was not present.

4 Q. Eight years after the declaration,
5 you have talked about this already yesterday, about
6 the conclusion of Treaty 72 in 1854, based on your
7 review of the historical record, what is your
8 opinion on whether and how SON raised concerns
9 about the fishery?

10 A. On whether and how they raised
11 concerns?

12 Q. Uhm-hmm.

13 THE COURT: At what point in time
14 again?

15 BY MS. GUIRGUIS:

16 Q. In concluding Treaty 72.

17 A. Oh, thank you, in concluding
18 Treaty 72. The evidence does not allow us to
19 determine whether that was raised or not. It is
20 hard to imagine it wasn't, given the importance of
21 the fisheries to the SON, but the evidence doesn't
22 allow us to determine that.

23 Q. So going back, you have said that
24 SON, in one of the initial responses you gave, that
25 SON continued to exercise its rights to fish, or is

1 fishing, continued to fish. What do you rely on to
2 come to that conclusion?

3 A. There is abundant evidence. There
4 is evidence in the Band records in different ways
5 and the oral history talks. In almost every oral
6 history that we have from the community mentions
7 the importance of fishing and attempts to protect
8 their fishery.

9 MS. GUIRGUIS: Sorry, Your Honour, I'm
10 just taking a moment to see if I can skip over a
11 few things.

12 THE COURT: Counsel, would it be of
13 assistance to take our afternoon break a little
14 earlier?

15 MS. GUIRGUIS: Yes, I think so. Thank
16 you, Your Honour.

17 THE COURT: We'll take it now. 20
18 minutes.

19 -- RECESSED AT 3:20 P.M.

20 -- RESUMED AT 3:43 P.M.

21 THE COURT: Please go ahead.

22 BY MS. GUIRGUIS:

23 Q. Thank you, Your Honour.

24 So, Your Honour, looking through my
25 plan, I was trying to skip ahead and not needing to

1 go through everything that was in the expert
2 report. There was one thing, it is arising as a
3 bit of a housekeeping matter halfway through this,
4 but there is one document that Professor Brownlie
5 relies on at page 86 of his report, footnote 225.

6 Professor Brownlie, you see it, it is a
7 letter from William Plummer, Superintendent of
8 Indian Affairs?

9 A. Yes.

10 Q. The roll number was incorrect, so
11 it didn't get added as a primary document, so I
12 would propose just to do that now, and the document
13 number already is SC0846.

14 THE COURT: And the date is?

15 MS. GUIRGUIS: January 1st, 1876.

16 THE COURT: I am just looking at the
17 longhand, and have we moved to something else?

18 MS. GUIRGUIS: Sorry, June.

19 THE COURT: June? June 15th?

20 THE WITNESS: I am going to guess 1st,
21 because the --

22 THE COURT: Oh, yes, I see that.

23 THE WITNESS: The stamp date.

24 THE COURT: So June 1st, did you say
25 1876, Counsel?

15:45:21 1 MS. GUIRGUIS: 1876.

15:45:22 2 THE COURT: Mr. Registrar?

15:45:23 3 THE REGISTRAR: Exhibit No. 4143.

15:44:29 4 EXHIBIT NO. 4143: Letter from William
15:44:30 5 Plummer, Superintendent of Indian
15:45:29 6 Affairs, dated June 1, 1876.

15:45:29 7 BY MS. GUIRGUIS:

15:45:29 8 Q. I will just turn to the second
15:45:31 9 page briefly first, Professor Brownlie, and ask you
15:45:32 10 a quick question about this.

15:45:36 11 So first off, William Plummer, who was
15:45:39 12 that?

15:45:40 13 A. He was their Superintendent of
15:45:43 14 Indian Affairs.

15:45:43 15 Q. And he was writing to who?

15:45:45 16 A. The Minister of the Interior.

15:45:48 17 Q. Okay --

15:45:49 18 A. Who at that time was the Minister
15:45:51 19 of Indian Affairs.

15:45:52 20 Q. Oh, thank you. So the second page
15:45:56 21 reads:

15:45:57 22 "The Indians have held these
15:45:58 23 waters for nobody knows how long.
15:46:00 24 They have spent their time and
15:46:01 25 labour in clearing and protecting

15:46:02 1 the fishing grounds."

15:46:05 2 On whose behalf was he writing?

15:46:08 3 A. The Saugeen Ojibway.

15:46:08 4 Q. So what, in your view --

15:46:15 5 THE COURT: Could you just give me a

15:46:16 6 moment, Counsel. I'm having a technology challenge

15:46:19 7 here.

15:46:19 8 MS. GUIRGUIS: Yes.

15:46:39 9 THE COURT: Okay, please go ahead.

15:46:41 10 BY MS. GUIRGUIS:

15:46:41 11 Q. Thank you. What, in your view,

15:46:43 12 Professor Brownlie, does this letter suggest about

15:46:45 13 what the government knew about SON's interests in

15:46:47 14 the waters and fishing grounds?

15:46:49 15 A. It suggests that the government

15:46:58 16 was aware that the Saugeen Ojibway had been fishing

15:47:02 17 in these fishing grounds for a very long time, and

15:47:08 18 Plummer here is making a classic argument for

15:47:11 19 ownership based on use and labour, ala John Lock.

15:47:22 20 Q. In an earlier answer that you gave

15:47:24 21 to one of my questions, you said that they, SON,

15:47:27 22 appointed their own guardians and overseers when

15:47:29 23 you were answering a question about fisheries?

15:47:31 24 A. Yes.

15:47:31 25 Q. What is a guardian or overseer?

15:47:34 1 A. It is someone who protects the
15:47:40 2 fishing grounds, tries to ensure that unauthorized
15:47:43 3 persons are not trespassing on the grounds and
15:47:48 4 generally it is a stewardship and protection role.

15:47:52 5 Q. Is that unique to Saugeen Ojibway?

15:47:56 6 A. No, I suspect they took the term
15:47:59 7 from the English who had also appointed fisheries
15:48:02 8 overseers for a similar purpose, although in
15:48:06 9 practice the government fishery overseers were
15:48:09 10 there to oversee the transfer of the resource from
15:48:12 11 Indigenous people to non-Indigenous commercial
15:48:16 12 fishermen and sportsmen.

15:48:19 13 Q. Thank you. So when we left off at
15:48:22 14 the break, we had just, I think, also referred to
15:48:25 15 the oral histories, and you had talked about the
15:48:29 16 oral histories you had reviewed, so I would like to
15:48:31 17 turn to a few of those oral histories.

15:48:32 18 The first one is in the REDI database
15:48:36 19 as doc number SC0174. So it is an interview dated
15:49:02 20 July 15th, 1974 and conducted by R. Vanderburgh.
15:49:08 21 Are you familiar with this document?

15:49:09 22 A. Yes.

15:49:10 23 Q. How do you know it?

15:49:11 24 A. I have reviewed it previously.

15:49:15 25 MS. GUIRGUIS: So, Your Honour, I would

1 like to add this document, interview with Verna
2 Johnston, dated July 15, 1974, as the next exhibit.

3 THE COURT: Mr. Registrar?

4 THE REGISTRAR: Exhibit No. 4144.

5 EXHIBIT NO. 4144: Interview with Verna
6 Johnston, dated July 15, 1974.

7 BY MS. GUIRGUIS:

8 Q. Professor Brownlie, who was Verna
9 Johnston?

10 A. She was a member of the Nawash
11 Band, the Chippewas of Nawash.

12 Q. And when was she born?

13 A. It is not stated here, but I
14 believe it was 1909 or '11, somewhere around there.

15 Q. And so if we flip to the third
16 page, starting at the bottom, there is a discussion
17 about fishing, if you want to take a look at this
18 and the next page to refresh your memory.

19 A. Yes.

20 Q. Can you tell us very briefly what
21 she says about fishing?

22 THE COURT: I mean, do you want the
23 witness to -- I'm not sure what you are asking him
24 to do. It is set out in detail in the document.

25 BY MS. GUIRGUIS:

1 Q. Just the main points so that we
2 don't -- like, some highlights on that.

3 A. She is describing the extent to
4 which fishing was a part of her family's life and,
5 more generally, the life of Saugeen Ojibway, both
6 for food and on the larger scale for commercial
7 use.

8 Q. What time period -- sorry, what
9 does she say about fishing with her father when she
10 was a child?

11 A. She addresses two things, really.
12 First, how many fish there were at the
13 time, that there were much larger quantities of
14 fish at the time in the lake.

15 And also, that her father fished on a
16 commercial basis, that he sold some of his fish.

17 Q. And what time period is Verna
18 likely speaking to when she talks about that?

19 A. I would guess the 1910s and '20s,
20 possibly later.

21 Q. Thank you. Let's go to SC0176.
22 So this is an interview dated July 16th, 1974
23 conducted by R. Vanderburgh of Walter Johnston.
24 Are you familiar with this document?

25 A. Yes.

15:53:12 1 MS. GUIRGUIS: Your Honour, I would
15:53:13 2 like to add this document, interview of Walter
15:53:16 3 Johnston dated July 16th, 1974, as the next
15:53:19 4 exhibit.

15:53:20 5 THE COURT: There is no objections, so
15:53:23 6 that is fine. I think you should put on the
15:53:25 7 record, Counsel, that this witness did not conduct
15:53:28 8 these interviews, so when you say is he familiar
15:53:31 9 with them, I think you are not suggesting that he
15:53:35 10 was present.

15:53:36 11 MS. GUIRGUIS: No.

15:53:37 12 THE COURT: Or otherwise directly
15:53:38 13 involved.

15:53:38 14 MS. GUIRGUIS: That's correct, Your
15:53:39 15 Honour. He was not directly or otherwise involved,
15:53:42 16 but he is familiar with it, and these documents --

15:53:45 17 THE COURT: What it means is he read
15:53:46 18 the document.

15:53:47 19 MS. GUIRGUIS: Yes.

15:53:47 20 THE COURT: All right. What is the
15:53:49 21 next exhibit, Mr. Registrar?

15:53:50 22 THE REGISTRAR: Exhibit No. 4145.

15:53:14 23 EXHIBIT NO. 4145: Interview of Walter
15:53:16 24 Johnston dated July 16th, 1974.

15:53:54 25 MS. GUIRGUIS: And, Your Honour, I have

1 a few of these oral histories that I will be going
2 through, and these all are listed on the agreed
3 statement of facts with respect to the authenticity
4 of the oral history, so I'll just put that on the
5 record as well.

6 THE COURT: Is there any reason why we
7 couldn't just mark them all in that case?

8 MS. GUIRGUIS: Yes, we can.

9 THE COURT: Because if they are in the
10 ASF, I can't imagine any of the counsel I see
11 sitting quietly in their chairs would object to
12 them becoming exhibits.

13 MS. GUIRGUIS: That is fine with me.

14 So we can just bring up the document
15 numbers and mark them each in turn.

16 THE COURT: How many are there
17 altogether?

18 MS. GUIRGUIS: I'm on Walter Johnston,
19 so there are four more.

20 THE COURT: Please go ahead.

21 MS. GUIRGUIS: Okay, so the first
22 document number is SC0177. And it is described as
23 an interview by R. Vanderburgh of Henry Johnston
24 dated July 18th, 1974.

25 THE COURT: Mr. Registrar?

15:55:06 1 THE REGISTRAR: That will be Exhibit
15:55:09 2 No. 4146.
15:54:57 3 EXHIBIT NO. 4146: Interview by R.
15:54:59 4 Vanderburgh of Henry Johnston dated
15:55:03 5 July 18th, 1974.
15:55:12 6 THE COURT: Thank you.
15:55:13 7 MS. GUIRGUIS: The next one is doc
15:55:20 8 number SC0182. This is described as an interview
15:55:27 9 completed by R.M. Vanderburgh of Willis Waukey
15:55:44 10 dated August 15, 1974.
15:55:53 11 THE COURT: Mr. Registrar?
15:55:54 12 THE REGISTRAR: Exhibit No. 4147.
15:55:27 13 EXHIBIT NO. 4147: Interview completed
15:55:28 14 by R.M. Vanderburgh of Willis Waukey.
15:55:58 15 THE COURT: Thank you.
15:56:00 16 MS. GUIRGUIS: And the next is document
15:56:06 17 number SC0197 described as an interview conducted
15:56:13 18 by K.J. Shoefly of George Elliot dated July 7,
15:56:26 19 1975.
15:56:30 20 THE COURT: Mr. Registrar?
15:56:31 21 THE REGISTRAR: Exhibit No. 4148.
15:56:12 22 EXHIBIT NO. 4148: Interview conducted
15:56:13 23 by K.J. Shoefly of George Elliot dated
15:56:24 24 July 7, 1975.
15:56:40 25 MS. GUIRGUIS: The next document is

1 document number SC0204. This is described as an
2 interview by Vanderburgh of David Solomon dated
3 August 14th, 1975.

4 THE COURT: Mr. Registrar?

5 THE REGISTRAR: Exhibit No. 4149.

6 EXHIBIT NO. 4149: Interview by R.
7 Vanderburgh of David Solomon dated
8 August 14th, 1975.

9 BY MS. GUIRGUIS:

10 Q. Thank you, Your Honour.

11 So my next question is I think that you
12 may be able to, just from your review of the oral
13 histories in general, be able to answer the
14 question, rather than going in detail to all of
15 these.

16 What did you see about -- or when you
17 did this review of the oral histories, what did you
18 see about the state of the fisheries in the 1940s?

19 A. The oral histories document a good
20 deal of fishing in the early 1940s but numerous
21 interviews mention a change in 1947 with the
22 introduction of invasive species to the lake,
23 particularly lamprey eel, which caused the stocks
24 of trout to plummet.

25 Q. And based on your review of these

1 histories and other historical records, do you know
2 when the fishery began to rebound?

3 A. I think it was in the '50s.
4 Certainly by the '60s.

5 Q. Thank you. And I would like to
6 bring up Exhibit 3810. Can you zoom in a little
7 more for my sake. So this exhibit is a Band
8 Council resolution and joint resolution of the
9 Saugeen and Nawash and it is dated July 1976?

10 A. Yes, possibly the 1st. It is hard
11 to tell.

12 Q. Are you familiar with this
13 document?

14 A. Yes.

15 Q. And what is this resolution about?

16 A. It is an assertion of sovereign
17 ownership of the lake bed of Lake Huron. It
18 specifies some boundaries to the territory, but
19 basically an assertion of continuing ownership of
20 the lake bed under Lake Huron and in Georgian Bay,
21 as well as the lake beds under all the bodies of
22 water on the peninsula.

23 Q. Did you come across any kind of
24 similar discussion or statement elsewhere in your
25 review of the historical record and oral histories?

16:00:21 1 A. Yes, at least one of the people I
16:00:26 2 talked to myself, I interviewed myself, talked
16:00:29 3 about continuing ownership of the waters and I
16:00:31 4 think there were several, but for sure I remember
16:00:33 5 Paul Jones talking about this.

16:00:36 6 And yeah, I think there are other
16:00:39 7 documents as well that show this belief that they
16:00:43 8 continued to own the waters and the land under the
16:00:47 9 waters, and that they were never surrendered. They
16:00:49 10 are not mentioned in the Treaty text of Treaty 72.

16:00:53 11 Q. So I would like to bring up
16:00:56 12 Exhibit 3892. This is an oral history interview
16:01:13 13 with Delena Johnston dated August 12th, 1998. Are
16:01:18 14 you familiar with this interview?

16:01:19 15 A. Yes.

16:01:19 16 Q. Who was Delena Johnston?

16:01:22 17 A. She was an Elder of Cape Croker,
16:01:25 18 Chippewas of Nawash.

16:01:26 19 Q. And when was she born?

16:01:28 20 A. She was born in the mid 1920s.

16:01:34 21 Q. So if we could go to page 8 of
16:01:40 22 this document and this highlighted area, starting
16:01:50 23 with actually the second paragraph with "Janet" who
16:01:56 24 I believe is the interviewer?

16:01:59 25 A. Yes.

1 Q. Saying:

2 "We know for example that there
3 was a treaty that dealt with the
4 peninsula," and so on.

5 It goes on from this page to the next,
6 if you want to just take a look to refresh your
7 memory.

8 A. Yes, please give me a moment.

9 [Witness reviews document.]

10 Okay, thank you.

11 Q. Can you go back up for me, scroll
12 back up for me.

13 What is Ms. Johnston saying about what
14 she refers to as "our waters"?

15 A. This is a good example of an
16 interview that reflects the community's belief that
17 they had always owned the waters and continued to
18 own the waters and had never surrendered them. And
19 she talks about hearing this as a child growing up,
20 hearing people talk about this belief that they
21 owned the waters and that they were not included in
22 any surrender.

23 And then she talks about the fact that
24 there was a period of time beginning I believe in
25 the 1950s, maybe a bit earlier, when the province

16:03:50 1 became more active in regulating fisheries and that
16:03:55 2 this is when a more concerted effort began by
16:03:59 3 government to reduce the areas in which they were
16:04:03 4 allowed to fish and that in the community this was
16:04:06 5 viewed as entirely illegitimate.

16:04:10 6 And it obviously became quite
16:04:17 7 conflictual because she says that the fisheries
16:04:19 8 overseers even threatened to shoot men from Cape
16:04:22 9 Croker if they fished outside of the boundary that
16:04:25 10 Ontario was trying to impose, and she states that
16:04:27 11 the community thought this was incorrect and
16:04:32 12 unjust, that they continued to own these waters and
16:04:34 13 that Ontario didn't have the right to prohibit them
16:04:36 14 from fishing there.

16:04:39 15 Q. If you could scroll to the second
16:04:41 16 page at the end of the marked area. So the
16:04:57 17 paragraph after the interviewer Janet, so on my
16:05:03 18 screen I see it as the fourth paragraph down. The
16:05:06 19 interviewer Janet says:

16:05:08 20 "When your Grandfather was
16:05:10 21 saying that was something happening
16:05:11 22 that... was that right to the water
16:05:14 23 being challenged somehow... to make
16:05:17 24 him say that is."

16:05:18 25 Delena provides an answer about the

16:05:24 1 fishing we were just talking about, the limitations
16:05:24 2 on the fishing, and what does she say about how
16:05:26 3 other people or fishermen would deal with this?

16:05:30 4 A. She recounts that the Nawash
16:05:37 5 fishermen responded by fishing secretly at night,
16:05:41 6 so that they would not -- obviously so that they
16:05:44 7 would not be stopped or harassed by the fisheries
16:05:48 8 or the provincial fisheries overseers and so that
16:05:56 9 they would still have access to the fisheries that
16:05:56 10 they continued to believe were theirs.

16:05:57 11 So this is again an illustration of
16:05:58 12 them continuing to exercise the right to fish even
16:06:01 13 when government was attempting to stop them.

16:06:06 14 Q. Thank you. Okay, I would like to
16:06:11 15 move on to talking about a subject that you touch
16:06:13 16 on at page 111 of your report, the role of First
16:06:18 17 Nation political organizations.

16:06:21 18 When was the National Indian
16:06:25 19 Brotherhood established?

16:06:27 20 A. Well, it formally came into being
16:06:35 21 in 1968, '69, but it was the culmination of a
16:06:43 22 process that began a little bit earlier of people
16:06:46 23 trying to establish an -- starting to talk about
16:06:50 24 establishing an organization like that.

16:06:51 25 Q. And what kind of organization is

16:06:53 1 it?

16:06:53 2 A. It is a political organization or
16:06:57 3 a lobby -- I guess political organization of First
16:07:02 4 Nations.

16:07:02 5 Q. Based on your review of the
16:07:05 6 historical records at that time, which you said was
16:07:12 7 about 1968, '69, what is your view of whether and
16:07:17 8 how the National Indian Brotherhood had any role in
16:07:21 9 SON's assertions of its rights and claims?

16:07:29 10 A. The National Indian Brotherhood
16:07:32 11 came into being just before the Federal Government
16:07:37 12 announced the White Paper proposal, and this led to
16:07:45 13 the National Indian Brotherhood becoming -- well,
16:07:54 14 becoming galvanized, I'll say, and becoming deeply
16:07:58 15 involved in the effort of First Nations to prevent
16:08:02 16 the government from implementing the White Paper
16:08:06 17 policy that it was proposing.

16:08:07 18 Q. Can I stop you there for one
16:08:09 19 second.

16:08:09 20 A. You bet.

16:08:10 21 Q. Can you just describe very briefly
16:08:11 22 what is the White Paper, for the record?

16:08:14 23 A. Oh, yes. The White Paper was a
16:08:19 24 policy proposal brought forward by the government
16:08:23 25 of Prime Minister Pierre Trudeau with Jean Chretien

1 at the time as Minister of Indian Affairs, and it
2 was an attempt to radically transform federal
3 policy toward Indigenous people, to repeal -- they
4 proposed repealing the entire Indian Act,
5 abolishing the Department of Indian Affairs within
6 five years, terminating treaties and transferring
7 responsibility for First Nations people to the
8 provinces.

9 So basically, they were planning on
10 eliminating all of the institutional aspects of the
11 existing government policy.

12 Q. Thank you. Sorry, if you can
13 continue with the answer to based on your review of
14 the historical records at that time, what is your
15 view of whether and how the National Indian
16 Brotherhood had any role in SON's assertion of
17 rights and claims?

18 A. I am looking for the person I
19 quoted who talked specifically about the Indian
20 Brotherhood that I had on a previous page.

21 THE COURT: I didn't hear that. You
22 are looking in your report, sir?

23 THE WITNESS: Yes. One of the people I
24 interviewed specifically addressed this and
25 basically said that it was rattling cages in the

1 sense that it was asserting itself strongly
2 politically and talking about land claims and
3 related issues and that this, you know, made the
4 government nervous and started to create a context
5 in which there was more space to speak about land
6 claims and rights.

7 BY MS. GUIRGUIS:

8 Q. Thank you. What is the Union of
9 Ontario Indians?

10 A. It is another Indigenous political
11 organization that was formed to try to protect
12 Indigenous rights.

13 Q. And when was it established?

14 A. In the mid 1960s and I think I had
15 heard that more than one person from Nawash was
16 involved. Certainly we have testimony from Wilmer
17 Nadjiwan of Nawash that he was involved in founding
18 the Union of Ontario Indians.

19 Q. Based on your review of the
20 historical records at that time, what is your view
21 of whether and how the Union of Ontario Indians had
22 any role in SON's assertion of rights and claims?

23 A. The Union of Ontario Indians
24 played a fairly important role at a certain point
25 because it had some resources that it could use to

16:11:08 1 help SON try to identify issues and ways of
16:11:12 2 proceeding and it also had a lawyer, Paul Williams,
16:11:16 3 who was working for it.

16:11:18 4 Paul Williams was one of the first
16:11:21 5 lawyers in Canada who practiced what was coming to
16:11:25 6 be known as, I guess, Native law they would have
16:11:30 7 said then, but laws or the law respecting
16:11:34 8 Indigenous peoples.

16:11:34 9 And so they made Paul Williams
16:11:38 10 available to help them with their claims.

16:11:40 11 Q. Based on your review of the
16:11:52 12 historical records at that time, what is your view
16:11:54 13 of whether and how the government responded to
16:11:56 14 efforts by SON and other First Nations to organize
16:12:00 15 to assert their rights?

16:12:01 16 A. Can you restate that, please?
16:12:05 17 Just repeat it?

16:12:06 18 Q. Sure. So based on your review of
16:12:09 19 the historical records at that time, what is your
16:12:12 20 view of whether and how the government responded to
16:12:14 21 efforts by SON or other First Nations to organize
16:12:17 22 to assert their rights?

16:12:19 23 A. Are you talking about the 1960s?

16:12:23 24 Q. Yes.

16:12:23 25 A. The Indian Department was in the

1 process of change in the 1960s. They were backing
2 away from coercive measures and trying to introduce
3 new measures such as economic development.

4 So they didn't take the same kinds of
5 steps against political organizers at this time.
6 We do have testimony from several of the activists
7 at the time that they felt the government officials
8 weren't supportive and didn't particularly like
9 what they were doing, but they weren't trying to
10 shut them down or defame them or discredit them as
11 actively.

12 That said, in the 1960s the government
13 was -- neither the Federal Government nor the
14 Department of Indian Affairs was prepared to begin
15 to respond to land claims or to take action on land
16 claims or to accept them as a legitimate issue to
17 be negotiated. And this was particularly clear in
18 the White Paper from 1969 which specifically said
19 that Indigenous claims about land were, I think the
20 phrase was, something like so general and undefined
21 that, you know, they couldn't be addressed, which
22 was a serious misrepresentation, but it expresses
23 their view that land claims were -- that they
24 weren't going to address land claims if they could
25 help it.

1 Q. In your report you cite RCAP on
2 this point, and I would like to pull that up and
3 add it as an exhibit.

4 THE COURT: Where is it in the report?

5 MS. GUIRGUIS: It is at pages 112 and
6 113. I'll get you the exact cite.

7 THE COURT: You can give it to me
8 later.

9 MS. GUIRGUIS: Thank you.

10 THE COURT: The document number was?

11 MS. GUIRGUIS: Document S-1484.

12 THE COURT: And is this a section of
13 Volume 2 or the whole of Volume 2?

14 MS. GUIRGUIS: This is a section of
15 Volume 2, it is 46 pages long.

16 THE COURT: And is it the introduction
17 or what is it? Just for purposes of your request
18 that it be marked.

19 MS. GUIRGUIS: So this section, this
20 is --

21 THE COURT: I see.

22 MS. GUIRGUIS: It seems to be described
23 differently in different places in the report, but
24 this is -- so Volume 2, Part 1 is how we have
25 referred to it.

16:15:36 1

THE COURT: Right.

16:15:39 2

MS. GUIRGUIS: And it is section 4 that

16:15:41 3

I think is the relevant section about lands and

16:15:44 4

resources.

16:15:45 5

THE COURT: Okay. Mr. Registrar?

16:15:47 6

THE REGISTRAR: Exhibit No. 4150.

16:15:47 7

EXHIBIT NO. 4150: Excerpt of the RCAP

16:15:53 8

Report, Volume 2, Part 1.

16:15:53 9

BY MS. GUIRGUIS:

16:15:55 10

Q. Thank you. So I would like to

16:15:59 11

talk about the different processes available a bit

16:16:01 12

later in the 20th century, so post-1974, as you

16:16:05 13

bring it up in your report, to bring forward

16:16:08 14

claims.

16:16:08 15

THE COURT: I'm just going to interrupt

16:16:10 16

you for a second.

16:16:26 17

MS. GUIRGUIS: Yes.

16:16:37 18

THE COURT: Now, I don't have any

16:16:38 19

problem with you getting into this, Counsel, but

16:16:40 20

just before you begin, there is going to become a

16:16:42 21

point where it is no longer history and we have had

16:16:46 22

other witnesses who have more direct involvement.

16:16:52 23

And when you are talking about the time

16:16:56 24

periods, I think it would just be helpful if you

16:16:59 25

could be specific as to which time period you are

16:17:02 1 talking about.

16:17:03 2 MS. GUIRGUIS: Certainly, I will try to
16:17:05 3 do that, Your Honour.

16:17:06 4 Oh, the footnote, sorry, just going
16:17:12 5 back to the RCAP report, the footnote is footnote
16:17:15 6 338.

16:17:15 7 THE COURT: Thank you, that is great.

16:17:17 8 BY MS. GUIRGUIS:

16:17:22 9 Q. Okay, so I would like to ask you
16:17:25 10 what was the Office of Native Claims?

16:17:27 11 A. It was a branch within the
16:17:34 12 Department of Indian Affairs, I think Indian
16:17:39 13 Affairs and Northern Development at the time, that
16:17:41 14 was established first in 1974 for the first time as
16:17:49 15 a body to consider and negotiate claims concerning
16:17:54 16 land, Indigenous land claims.

16:17:56 17 Q. If I could just take one moment.

16:18:00 18 Thank you.

16:18:14 19 Can you tell me what the difference is,
16:18:17 20 if you know, between comprehensive claims and
16:18:20 21 specific claims?

16:18:21 22 A. Yes, that is a distinction that
16:18:26 23 was introduced at this time between two different
16:18:29 24 types of claims concerning land.

16:18:31 25 Comprehensive claims were those

1 relating to lands that had never been the subject
2 of a land treaty.

3 And specific claims were claims
4 relating to lands that were covered by a treaty
5 where the First Nation felt that land had been
6 taken unlawfully.

7 Q. Okay, thank you.

8 What is the Indian Commission of
9 Ontario?

10 A. That is a body that was set up as
11 an arm's length body in the hope that it would be
12 able to help the land claims process move forward
13 more effectively, so it was meant to try to bring
14 the parties together, the government and First
15 Nation parties together, to advance negotiations
16 and try to get claims settled.

17 Q. Do you know when it was
18 established?

19 A. I don't know exactly.

20 Q. Okay. It was post-1974?

21 A. Oh, yes, I'm going to guess in the
22 1980s maybe, maybe '90s.

23 Q. That is fine, thank you.

24 A. It was after they had a few years
25 of trying to implement -- trying to negotiate

16:20:01 1 claims and there were a lot of problems.

16:20:02 2 Q. So I would like to take you to a
16:20:06 3 document now. This is SC0799. This is called
16:20:20 4 "Discussion Paper Regarding First Nation Land
16:20:22 5 Claims" from the Indian Commission of Ontario, and
16:20:27 6 it is dated September 24, 1990. Are you familiar
16:20:31 7 with this document?

16:20:31 8 A. Yes.

16:20:42 9 MS. GUIRGUIS: And my apologies, it is
16:20:43 10 not the full report. We just have an excerpt of
16:20:46 11 the report, three pages. So, Your Honour, I would
16:20:49 12 like to make this the next exhibit.

16:20:50 13 THE COURT: All right. Mr. Registrar?

16:20:52 14 THE REGISTRAR: Exhibit No. 4151.

16:20:20 15 EXHIBIT NO. 4151: "Discussion Paper
16:20:21 16 Regarding First Nation Land Claims"
16:20:24 17 from the Indian Commission of Ontario,
16:20:27 18 dated September 24, 1990.

16:20:58 19 BY MS. GUIRGUIS:

16:21:03 20 Q. Professor Brownlie, what is this
16:21:04 21 excerpt dealing with? If you want us to scroll
16:21:09 22 down, we can.

16:21:10 23 A. Yes, this is a discussion paper
16:21:12 24 produced by the Indian Commission of Ontario to
16:21:17 25 address some of the problems that they were seeing

1 in the land claims process and to offer
2 recommendations for ways to improve the process.

3 Q. So if we look at the first
4 highlighted point in this excerpt, and the headings
5 "Analysis" and then "Recommendation Number 16" and
6 "Recommendation Number 17," what is this portion
7 dealing with?

8 A. This is dealing with the system
9 for allocating funding to First Nations in order to
10 be able to negotiate and it identifies the problem
11 that the existing way of funding Indian claimants
12 was to give them -- primarily to loan them money,
13 and they note that this is problematic because it
14 effectively places pressure on the Indigenous
15 claimants. It says they are subject to undue
16 influence in the course of negotiations.

17 Q. Okay. And if we go to the next
18 section, C, "Consenting to the Process," what does
19 "Consenting to the Process," what is this issue
20 that is being raised here?

21 A. This addresses one of the biggest
22 problems that has occurred in the land claims
23 process which is that the Government of Ontario and
24 the Government of Canada was in a position to
25 simply refuse to negotiate or to terminate

1 negotiations without settling, and that it was
2 difficult to prevent them from doing so.

3 Q. If we could go to the next page,
4 which is 102 of this document, in the middle there
5 is a highlighted portion. Professor Brownlie, can
6 you tell me what this portion is referring to?

7 A. Yes. It is referring to the fact
8 that the Federal Government's general policy in
9 dealing with land claims is that when a First
10 Nation commences Court proceedings or litigation,
11 that Canada will terminate negotiations.

12 Q. Thank you. So I would like to
13 bring up Exhibit 3864. Professor Brownlie, do you
14 know what this document is?

15 A. Yes.

16 Q. Can you tell us what it is?

17 A. Yes, it is a letter to Roberta
18 Jamieson, who was the Commissioner of the Indian
19 Commission of Ontario at the time, from the
20 Minister of Indian Affairs and Northern
21 Development, and --

22 Q. And the time being? Sorry, it was
23 dated September 18th, 1986?

24 A. Right. And it is informing her,
25 she has been trying to help advance the claim and

1 bring the parties together, and this letter is
2 informing her that the Department of Indian Affairs
3 and Northern Development isn't going to agree to
4 non-binding arbitration which the Indian Commission
5 of Ontario had proposed because the Federal
6 Government had reviewed the claim thoroughly and
7 decided it could not be accepted for negotiation.

8 Q. When you say "the parties," who
9 are you referring to?

10 A. The Indian Commission was trying
11 to bring together the Saugeen and Nawash people and
12 the government parties.

13 Q. Thank you. So based on what you
14 have reviewed about the Native Claims Office, the
15 Indian Claims Commission and other historical
16 records, what is your view on whether and how this
17 is relevant to the question of SON's historic
18 ability to bring its claims forward?

19 A. What I found when I looked at this
20 period was that SON had attempted to engage in the
21 claims process that the government had initiated in
22 the 1970s and had taken a series of steps to try to
23 negotiate in order to advance its goals concerning
24 land.

25 And so it tried to go through this

1 specific claims process with the Federal
2 Government, the Saugeen Ojibway. They did also try
3 to negotiate with the Provincial Government. They
4 went to the Indian Commission of Ontario to try to
5 get its assistance to move the claim forward.

6 So we see the Saugeen Ojibway engaging
7 in the legitimate processes that had been made
8 available to try to get their land claims
9 adjudicated and to try to negotiate a settlement,
10 but that they were not able to get the Federal
11 Government to agree to the validity of their claim.

12 And so these efforts were not fruitful
13 for the Saugeen Ojibway.

14 MS. GUIRGUIS: Thank you, Your Honour.
15 Those are my questions for this witness.

16 THE COURT: Thank you. As between the
17 two present Defendants, who has planned to go
18 first?

19 MR. BEGGS: I will, Your Honour.

20 THE COURT: All right, so you'll start
21 at 10 o'clock tomorrow morning.

22 MR. BEGGS: Thank you, Your Honour.

23 THE COURT: Professor, although you
24 haven't started your cross-examination yet, it is
25 my preference that you treat it as if you have, by

1 which I mean that henceforth you cannot discuss the
2 subject matter of this matter with anybody at all,
3 and for experts I usually mention that that
4 includes engaging in inquiries and research and
5 online searches to satisfy what might be your
6 curiosity about this or that or the other thing
7 that might have arisen in the last two days. All
8 right?

9 I'm sure you have other things to do.

10 So we'll resume at 10 o'clock tomorrow
11 morning with cross-examination by Canada.

12 MR. FELICIAN: Your Honour --

13 THE COURT: Oh, I'm sorry, Mr.
14 Feliciant.

15 MR. FELICIAN: No, that is okay. I'm
16 nervous to raise it because it sounds like I'm
17 shirking responsibilities, and I am not, I'm just
18 trying to plan elements of my life.

19 My friend from Canada advises that he
20 could be two to three days. If he is two days, it
21 takes him to the end of Thursday. If in fact he is
22 three days, it takes him to the end of Friday.

23 I'm asking if I could have the comfort
24 of suggesting that you permit me a fixed time to
25 start upon our return after the two-week break so

1 that I can have whatever is left of Friday to deal
2 with some of the issues that have come up.

3 THE COURT: That is the effect of the
4 ruling I made this morning, sir.

5 MR. FELICIANANT: I just needed to
6 clarify that, so thank you.

7 THE COURT: Yes.

8
9 -- Adjourned at 4:29 p.m.

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REPORTER'S CERTIFICATE

I, DEANA SANTEDICOLA, RPR, CRR,
CSR, Certified Shorthand Reporter, certify;

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

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

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

Dated this 3rd day of August, 2019



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