

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

VOL 23 DAY 23
July 08, 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

Plaintiffs

- and -

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

Defendants

16 Court File No. 03-CV-261134CM1

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

18 CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and
19 SAUGEEN FIRST NATION

Plaintiffs

- and -

20 THE, ATTORNEY GENERAL, OF CANADA and HER MAJESTY
21 THE QUEEN IN RIGHT OF ONTARIO

Defendants

22 -----
23 --- This is VOLUME 23/DAY 23 of the transcript
24 of the trial proceedings in the above-noted
25 matter, being held at the Superior Court of
Justice, 330 University Avenue, Courtroom 5-2,
Toronto, Ontario, on the 8th day of July 2019.

B E F O R E:

The Honourable Justice Wendy M. Matheson

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

2 Cathy Guirguis, Esq., for the Plaintiffs,

3 & Krista Nerland, Esq., The Chippewas of

4 & Glykeria Prokos Saugeen First

5 Nation, and the

6 Chippewas of Nawash

7 First Nation.

8

9 Michael Beggs, Esq., for the Defendant,

10 & Michael McCulloch, Esq., Attorney General

11 & Barry Ennis, Esq., of Canada.

12

13

14 David Feliciant, Esq., for the Defendant,

15 & Jennifer Le Pan, Esq., Her Majesty the

16 & Richard Ogden, Esq., Queen in Right of

17 & Julia McRandall, Esq., Ontario.

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I N D E X

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WITNESS: DARLENE JOHNSTON

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1 --- Upon commencing at is 10:03 a.m.

10:02:58 2 THE COURT: Yes, sir.

10:03:01 3 MR. FELICIAN: Before we begin just a
10:03:02 4 small housekeeping matter from my
10:03:05 5 cross-examination of Marshall Nadjiwon from June
10:03:08 6 28th. I neglected to make an excerpt from
10:03:11 7 Wilmer Nadjiwon's book "Not Wolf, Nor Dog" an
10:03:13 8 exhibit, and I would be asking to do that this
10:03:15 9 morning. I've canvassed it with my friends and
10:03:18 10 they consent.

10:03:19 11 The SC number is SC0683. So if we
10:03:25 12 could make that the next exhibit, and it would
10:03:30 13 be excerpt from Wilmer Nadjiwon's book "Not
10:03:35 14 Wolf, Nor Dog."

10:03:38 15 THE REGISTRAR: Exhibit number 4080,
10:03:38 16 Your Honour.

10:03:41 17 THE COURT: Just give me a moment
10:03:42 18 then.

10:03:42 19 EXHIBIT NO. 4080: Excerpt from Wilmer
10:03:43 20 Nadjiwon's book "Not Wolf Nor Dog".
10:03:43 21 SC number SC0683.

10:03:45 22 THE COURT: Can you just give me the
10:03:46 23 SC number again. It was 06883 I think.

10:03:51 24 MR. FELICIAN: Yes, that's correct.
10:03:51 25 0683.

10:04:39 1 THE COURT: I seem to have it as 3897.
10:04:42 2 Is it because that's a different excerpt,
10:04:44 3 counsel?

10:04:48 4 MR. FELICIANANT: I had it as SC0683.

10:04:54 5 THE COURT: No, no, no. From the
10:04:56 6 previous day during your cross-examination --

10:05:00 7 MR. FELICIANANT: Yes.

10:05:00 8 THE COURT: -- I've noted that the
10:05:02 9 book entitled "Not Wolf, Nor Dog" was marked as
10:05:06 10 3897. Mr. Registrar, what is --

10:05:11 11 THE REGISTRAR: It's not marked, Your
10:05:11 12 Honour.

10:05:11 13 THE COURT: What is 3897?

10:05:13 14 THE REGISTRAR: Let me see. That is
10:05:21 15 the Ojibwe Nation oral history project from
10:05:26 16 1998.

10:05:28 17 THE COURT: All right.

10:05:29 18 MR. FELICIANANT: It was an interview.

10:05:31 19 THE COURT: Probably the previous
10:05:32 20 document.

10:05:33 21 MR. FELICIANANT: Yes.

10:05:34 22 THE COURT: So it's 4080.

10:05:37 23 THE REGISTRAR: Yes, Your Honour.

10:05:40 24 THE COURT: All right. Thank you.
10:05:48 25 Plaintiff's council.

10:05:50 1 MS. GUIRGUIS: Good morning, your
10:05:51 2 Honour. Today the plaintiffs are going to call
10:05:56 3 Professor Darlene Johnston.
10:06:09 4 THE COURT: And I understand that
10:06:10 5 Professor Johnston who is coming forward is
10:06:12 6 being called as a fact witness and not an expert
10:06:14 7 witness.
10:06:15 8 MS. GUIRGUIS: That's correct, Your
10:06:15 9 Honour.
10:06:24 10 DARLENE JOHNSTON: AFFIRMED.
10:06:43 11 EXAMINATION IN-CHIEF BY MS. GUIRGUIS:
10:07:05 12 THE COURT: Please go ahead.
10:07:07 13 BY MS. GUIRGUIS:
10:07:07 14 Q. Thank you, Your Honour. Good
10:07:08 15 morning, Professor Johnston, thank you for being
10:07:11 16 here with us today.
10:07:12 17 I am going to start by asking you have
10:07:13 18 a few questions to introduce you to the Court.
10:07:16 19 Which First Nation are you a member
10:07:18 20 of?
10:07:18 21 A. Chippewas of Nawash.
10:07:22 22 Q. When were you born?
10:07:23 23 A. January 7, 1960.
10:07:25 24 Q. Where do you currently live?
10:07:27 25 A. Vancouver, British Columbia.

10:07:29 1 Q. What is your current profession?

10:07:31 2 A. I'm a law professor.

10:07:35 3 Q. When did you graduate from law
10:07:36 4 school?

10:07:37 5 A. 1986.

10:07:39 6 Q. And when were you called to the
10:07:40 7 bar?

10:07:41 8 A. I was called to the bar in
10:07:42 9 Saskatchewan in 1987 and to the bar of Ontario
10:07:45 10 in 1989.

10:07:48 11 Q. How long you have been a law
10:07:50 12 professor?

10:07:50 13 A. Twenty-one years.

10:07:53 14 Q. And when did you start working as
10:07:56 15 a law professor?

10:07:58 16 A. At the University of Ottawa,
10:07:59 17 Faculty of Law in 1989.

10:08:02 18 Q. How long did you work at
10:08:03 19 University of Ottawa?

10:08:04 20 A. I was there for three years
10:08:07 21 teaching and then on a leave for three years. I
10:08:09 22 resigned in 1995.

10:08:13 23 Q. And after that when did you work
10:08:16 24 as a law professor again?

10:08:18 25 A. I joined the University of

1 Toronto in 2001 and was there until 2009.

2 Q. And then after the University of
3 Toronto?

4 A. The University of British
5 Columbia, Faculty of Law from 2009 until the
6 present.

7 Q. So for the period between 1991,
8 1992 is to 2001 you were not working as a law
9 professor?

10 A. That's right.

11 Q. What were you doing during that
12 time period?

13 A. I was the land claims research
14 co-ordinator for Saugeen and Nawash First
15 Nations.

16 Q. What did the role of land claims
17 researcher include?

18 A. I was a liaison between counsel
19 that had been retained by the Band for claims
20 matters. I was also an archival researcher, and
21 also worked with independent contractors who
22 were doing research. I supervised land claims
23 research office staff, and I was involved in the
24 development of the database for documents.

25 Q. So in developing the database of

10:09:25 1 documents and the archival research -- in
10:09:30 2 developing that database was your research
10:09:32 3 primarily about reviewing historical documents?

10:09:36 4 A. Yes.

10:09:36 5 Q. What about oral history research?

10:09:39 6 A. I had access to oral history
10:09:41 7 research that had been done prior to my starting
10:09:45 8 as research co-ordinator and that would be the
10:09:49 9 Vandenburg research from the mid-70s,
10:09:55 10 '74-'75, and the Schmaltz [ph] research from
10:10:00 11 1981. I was also involved in the research that
10:10:03 12 was done in '95 and '98.

10:10:10 13 Q. So Professor Johnston, I'm going
10:10:12 14 to show you a list that's part of an agreed
10:10:14 15 statement of facts. It's regarding the
10:10:16 16 authenticity of oral history materials.

10:10:22 17 Your Honour, this is Exhibit 3931.
10:10:26 18 This is a 29-page document so I don't need you
10:10:29 19 to review or go into it in detail. I'm just
10:10:32 20 wondering if you can identify the groups of oral
10:10:35 21 history interviews that you relied on while you
10:10:38 22 were conducting research for SON?

10:10:44 23 THE COURT: Exhibit number?

10:10:46 24 MS. GUIRGUIS: 3931.

10:10:47 25 THE COURT: All right.

1 BY MS GUIRGUIS:

2 Q. So your mentioned the Vandenburg
3 interviews from 1974 on?

4 A. Yes.

5 Q. Are these the ones that are
6 listed from pages 2 to 5?

7 A. Yes.

8 Q. I think we're having some trouble
9 scrolling down.

10 THE COURT: Pages?

11 MS. GUIRGUIS: Pages 2 to 5.

12 THE COURT: Just looking at this
13 document, counsel, it -- what is its organizing
14 principle? Chronological?

15 MS. GUIRGUIS: Chronological by year.
16 So the Vandenburg interviews would be from 1974
17 to 1975 that they were conducted.

18 BY MS GUIRGUIS:

19 Q. Is that correct?

20 A. Yes.

21 THE COURT: Well, so I understand
22 this, we have several interviews conducting
23 dated in those years, none of which have that
24 word connected to them. Oh I see, so in the
25 fifth column --

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1 MS. GUIRGUIS: That's right.
2 THE COURT: -- it's describe as the
3 "Vandenburgh interviews"?
4 MS. GUIRGUIS: That's correct.
5 THE COURT: And are all of them in
6 those years in that category or do I have to go
7 through and see if they are not?
8 MS. GUIRGUIS: In those time periods I
9 believe, yes.
10 THE COURT: Because I'm looking
11 through to, I guess, the last three in 1975 --
12 MS. GUIRGUIS: That's right.
13 THE COURT: -- don't fall into that
14 category.
15 MS. GUIRGUIS: The last three in 1975
16 are still Vandenburgh interviews. There is one
17 in 1978 that is an outlier.
18 THE COURT: Oh, I see. I have it now.
19 BY MS GUIRGUIS:
20 Q. And then Professor Johnston, you
21 mentioned the Experience 81 project.
22 A. Yes.
23 Q. And those are the interviews that
24 are starting at page 6, I believe, up until page
25 11?

10:13:07 1 So is that correct, up to the first
10:14:19 2 interview listed on page 11, was the Experience
10:14:23 3 81 -- or sorry, the first three?

10:14:26 4 A. Yes.

10:14:33 5 Q. Starting on page 12, there are
10:14:35 6 some -- some are 84 Elder interviews for the
10:14:38 7 Cape Croker Cultural Historical Museum starting
10:14:41 8 at the third row down?

10:14:43 9 A. Yes.

10:14:43 10 Q. Did you rely on these interviews
10:14:46 11 in your research?

10:14:47 12 A. Not that I recall.

10:14:53 13 Q. If we move to page 14 -- we have
10:14:54 14 the same page numbers? Yes. In 1990 we have
10:15:03 15 entered these as completed by Patrick Nadjiwon?

10:15:07 16 A. Yes.

10:15:08 17 Q. For the fishing trial?

10:15:09 18 A. Yes.

10:15:10 19 Q. What was your involvement in
10:15:11 20 these?

10:15:12 21 A. I was working on the fishing
10:15:14 22 trial as well in terms of the research, and I
10:15:19 23 supervised Patrick Nadjiwon in the work that he
10:15:24 24 was doing with interviews.

10:15:26 25 Q. And his interviews, that group

1 runs until about page 16, the second-last one on
2 page 16.

3 And then finally I think we get to the
4 last ones that you mentioned which were
5 interviews in 1995 and '96 that you relied on?

6 A. Yes.

7 Q. Are these the interviews starting
8 at page 17 by Ed Koenig?

9 A. Yes.

10 Q. And that runs until about the end
11 of page 20.

12 On page 22, there are further
13 interviews, oral history interviews that are
14 done in 1998?

15 A. Yes.

16 Q. And here in the first couple in
17 the column, it says that you were the
18 interviewee for a couple of these?

19 A. The interviewer.

20 Q. The interviewer, my apologies.

21 A. Yes.

22 Q. So in 1998 you participated in
23 doing the oral history interviews?

24 A. Just in the first one with
25 Frederick Andrew Jones. The others were

1 conducted by Victor Lytwyn who had been retained
2 by the Bands for that purpose.

3 Q. And Victor Lytwyn's group of
4 interviews, you also relied on those in your
5 research?

6 A. Yes.

7 Q. And those ones take us to about
8 the end of page 26, the 1998 interviews listed
9 on page 26?

10 A. Yes.

11 Q. Thank you, Professor Johnston. I
12 would like to go back to asking a few questions
13 about when you worked for SON. Did you report
14 directly to the Band councils of Saugeen and
15 Nawash?

16 A. Yes, I reported to them when they
17 met as joint council.

18 Q. When we say Band councils, what
19 does that mean?

20 A. It means the Chief in council of
21 the individual First Nation, so there is Band
22 council for Anishinaabe and another separate
23 Band council for Saugeen.

24 Q. And the Chief and councilors for
25 each First Nation are elected officials?

10:19:11 1 A. Yes.

10:19:12 2 Q. And how long are they elected
10:19:13 3 for?

10:19:14 4 A. For two years.

10:19:17 5 Q. You've mentioned the Saugeen
10:19:18 6 Ojibwe Nation Joint Council. Can you tell us
10:19:21 7 what that refers to?

10:19:23 8 A. It refers to -- joint council is
10:19:28 9 when the two First Nations Chiefs and councils
10:19:31 10 work, sit and work together as one.

10:19:36 11 Q. And for what matters do the two
10:19:39 12 Band councils typically sit as joint council to
10:19:42 13 work together?

10:19:42 14 A. For matters of mutual interest
10:19:44 15 and concern, including matters related to the
10:19:47 16 Treaties and litigation, to fisheries, and to
10:19:55 17 environmental matters.

10:19:59 18 Q. Does the SON Joint Council often
10:20:03 19 have to make decisions about legal issues?

10:20:05 20 A. Yes.

10:20:07 21 Q. Do you know whether there are any
10:20:09 22 specific requirements for education or training
10:20:11 23 about the law before members of Nawash or
10:20:14 24 Saugeen can be elected to Band council?

10:20:16 25 A. No, there are no such

10:20:17 1 requirements.

10:20:20 2 Q. How would you go about briefing
10:20:21 3 joint council about legal issues that you were
10:20:24 4 doing research about and liaising with legal
10:20:27 5 counsel about?

10:20:29 6 A. If there was a particular matter
10:20:31 7 that needed to be brought to the attention of
10:20:33 8 joint council, the advice would be provided to
10:20:37 9 me and also addressed to the Chiefs and council,
10:20:42 10 and I would review those matters with council in
10:20:45 11 advance of the meeting.

10:20:47 12 The materials would be provided to
10:20:49 13 Chief and council in advance of the meeting.
10:20:55 14 And at the meeting I would endeavour to present
10:20:58 15 the information in plain language to make it
10:21:01 16 accessible to Chief and councils so that they
10:21:04 17 would have a good understanding of what the
10:21:07 18 issues were and what direction might be
10:21:10 19 required.

10:21:11 20 Q. When the elected officials of
10:21:15 21 joint council would make a decision about legal
10:21:17 22 issues related to the land claims, what was the
10:21:21 23 typical process they would follow?

10:21:24 24 A. So, again, they would have the
10:21:25 25 materials in advance. They would be discussed

1 at council. I would be asked questions by the
2 Chiefs and councilors.

3 At some point a motion would be tabled
4 which contained the direction that the Chief and
5 council wanted to provide; and then there would
6 be a vote on the motion, and it would require
7 the support of the majority of both the Saugeen
8 council and the Nawash council in order to pass.

9 Q. How important was it for the
10 elected members of joint council to have
11 researchers and technical staff like yourself on
12 hand to explain these matters?

13 A. I think it was very important. I
14 could be there on a monthly basis with the
15 council. The lawyers attended less regularly.
16 I was, again, endeavoured to make the materials
17 accessible and to ensure that the council had
18 all the information that they needed, that they
19 understood the implications of what they were
20 being asked to do, that they understood what
21 their alternative courses of action were.

22 I think they had a high level of
23 confidence in me, partly because I was a
24 community member. I lived in the community and
25 was accessible both to the Chiefs, the councils,

1 and the land claim committee.

2 Q. Thank you.

3 Was there any other time, other than
4 working as the land claims researcher, that you
5 worked for Nawash or Saugeen?

6 A. Yes, in the summer of 1980 I
7 worked for the Nawash First Nation as a summer
8 student.

9 Q. What were your duties when you
10 worked as a summer student in 1980 for the Band?

11 A. It was a position involving land
12 claims. Partly it was a learning experience to
13 understand the land claims process and to --
14 particularly with respect to a claim on the 1836
15 Treaty, Treaty 45 1/2. We had -- I worked with
16 three other summer students, and we had focused
17 on the unsold, surrendered lands research.

18 Q. For clarity, when we talk about
19 "unsold, surrendered lands" can you point out
20 the area that you're referring to where those
21 the unsold, surrendered lands are on -- using
22 the map behind you that is Exhibit P?

23 A. It is in the area that is
24 coloured yellow for Treaty 72 from 1854.

25 Q. Professor, Johnston, I would like

1 to turn now to your interview with Professor
2 Jarvis Brownlie. I understand you were
3 interviewed by Professor Brownlie on June 14th,
4 2016, over the telephone?

5 A. Yes.

6 Q. Professor Brownlie discussed with
7 you some barriers facing the communities -- that
8 the communities faced in bringing claims to the
9 territory and to exercising rights to the
10 territory over the interviews. Do you recall
11 that interview?

12 A. Yes, I do.

13 Q. I want to show you a transcript
14 from your talk with Professor Brownlie. This is
15 Exhibit 3924. Have you seen this transcript
16 before?

17 A. Yes.

18 Q. Have you reviewed this
19 transcript?

20 A. Yes.

21 Q. Is it a true reflection of what
22 you said in your interview?

23 A. Yes.

24 Q. Is what you said in your
25 interview true and accurate to the best of your

10:25:16 1 knowledge?

10:25:17 2 A. Yes.

10:25:20 3 Q. Do you know why you were selected
10:25:21 4 to be interviewed by Professor Brownlie?

10:25:24 5 A. I assume it was because I had
10:25:26 6 been involved in the land claims research
10:25:29 7 between 1992 and 2001.

10:25:35 8 Q. Do you know anything else about
10:25:36 9 how and why Professor Brownlie selected the
10:25:39 10 other people that he interviewed?

10:25:41 11 A. No.

10:25:44 12 THE COURT: What is the exhibit number
10:25:44 13 again?

10:25:46 14 MS GUIRGUIS: 3924.

10:26:02 15 BY MS. GUIRGUIS:

10:26:03 16 Q. Did Professor Brownlie send you
10:26:05 17 questions in advance?

10:26:07 18 A. Yes, she did.

10:26:09 19 Q. I'd like to pull up a document
10:26:11 20 that is in the ready database. This is document
10:26:15 21 SC0723. Professor Johnston, are these the
10:26:24 22 questions you received from Professor Brownlie?

10:26:26 23 A. Yes, they are.

10:26:28 24 Q. Your Honour, I would like to add
10:26:29 25 this document list of interview questions from

1 Professor Brownlie as the next exhibit.

2 THE COURT: Seeing no objection,
3 that's fine.

4 THE REGISTRAR: Exhibit number 4081.

5 EXHIBIT NO. 4081: Interview questions
6 from Professor J. Brownlie to Darlene
7 Johnston. Document number SC0723.

8 BY MS. GUIRGUIS:

9 Q. I would like to pull another
10 document that is in the ready database, document
11 number SC0724. Professor Johnston, can you tell
12 the Court what this is?

13 A. This is a consent form that
14 Professor Brownlie sent to me in advance of the
15 interview and asked me to sign and return to
16 him.

17 Q. What were you giving your consent
18 to by signing this form?

19 A. That my comments could be
20 recorded and that the interview could be used in
21 connection with the litigation, Treaty 72
22 litigation and that it would be retained by
23 Olthuis Kleer Townshend as well as by Professor
24 Brownlie.

25 MS GUIRGUIS: Your Honour, I'd like to

1 add this document, consent form to be
2 interviewed and recorded by Professor Jarvis
3 Brownlie, as the next exhibit.

4 THE COURT: Mr. Registrar.

5 THE REGISTRAR: Exhibit number 4082.

6 EXHIBIT NO. 4082: Darlene Johnston's
7 consent form to be interviewed and
8 recorded by Professor Jarvis Brownlie.
9 Document number SC0724.

10 BY MS. GUIRGUIS:

11 Q. Professor Johnston, if we flip
12 back to the transcript of the interview, 3924,
13 at the top Professor Brownlie starts by saying:

14 "Play and begin. Okay. So I'm
15 here with Darlene Johnston."

16 What did you talk about before this?

17 A. The consent form.

18 Q. Thank you, Professor Johnston.

19 So I would like to move on to talk
20 about some of the matters that you discussed
21 with Professor Brownlie.

22 I would like to start with your role
23 in this 1990s as a researcher for SON in
24 relation to their research of rights in the
25 fishing trial and land claims. When did SON

1 begin to expressly assert its rights to the
2 lands and waters of the territory?

3 THE COURT: Sorry, what was the
4 question?

5 BY MS. GUIRGUIS:

6 Q. When did SON begin to expressly
7 assert its rights to its lands and waters of its
8 territory?

9 THE COURT: Well, I'm struggling to
10 understand how this witness can answer that
11 question, if anyone could. That is a
12 big-picture question.

13 Are you asking this witness what
14 information she's aware of in that regard?

15 MS. GUIRGUIS: That's correct. I can
16 make it a bit more specific.

17 THE COURT: And I recognize that
18 there's no counsel objecting, but I don't think
19 anyone could actually answer that question
20 without -- yes, sir.

21 MR. FELICIAN: My concern is it's one
22 thing to ask what information she's aware of,
23 but I think it has to be narrower than that.

24 THE COURT: Yes, narrower than what
25 she's aware of.

1 MR. FELICIAN: That's right. Because
2 if the answer is based on the research she's
3 done it's actually having her give opinion
4 evidence as an expert as opposed to as a fact
5 witness.

6 If it's directly as a consequence of
7 an interview, an oral history interview she may
8 have conducted that may be different. But I
9 think we need to suss out the source of the
10 information she's providing, so she's not
11 actually giving expert evidence under the guise
12 of being a fact witness.

13 THE COURT: Mr. Feliciant has raised a
14 second concern. My concern is simply that I
15 don't think that general question can be
16 answered by anyone, or at least not a fact
17 witness; and the second concern I think you can
18 deal with both of them quite easily. Would you
19 like to reframe your question?

20 MS. GUIRGUIS: Yes, Your Honour.
21 Thank you.

22 BY MS. GUIRGUIS:

23 Q. So let me ask the question by
24 pulling up an exhibit, 3765. This is a bit
25 difficult to read but, Professor Johnston, it's

1 a BCR dated April 2nd, 1968. Are you familiar
2 with this document?

3 A. Yes, I am.

4 Q. And how are you familiar with
5 this document?

6 A. When I was research co-ordinator
7 I had access to documents that were stored both
8 at the Saugeen Band office and at the Nawash
9 Band office. And I reviewed those and selected
10 certain ones to be retrieved, to be copied and
11 entered into the database.

12 THE COURT: Okay. Well again,
13 counsel, I'm just -- bear in mind that it's
14 Monday morning.

15 So you said BCR and I don't know what
16 that is. I'm looking at this document. It's
17 page 2 of something, Motion 2 of something.
18 Perhaps you can get the witness to more fully
19 explain what this is.

20 MS. GUIRGUIS: Sure. Your Honour, can
21 I read it out so that -- because I know it's
22 hard to see.

23 THE COURT: Well you can, but that
24 isn't is the problem. The problem is these
25 other things I just mentioned.

10:32:01 1 BY MS. GUIRGUIS:

10:32:01 2 Q. Professor Johnston, could you
10:32:03 3 provide us a bit more context of what a Band
10:32:05 4 council resolution might be or what this Motion
10:32:09 5 2 would be a part of?

10:32:10 6 A. This is actually a resolution
10:32:14 7 that was passed at a joint council meeting in
10:32:16 8 a -- on April 2nd, 1968. So this would have
10:32:21 9 been one the occasion when both Chiefs and
10:32:25 10 council met together at one meeting and operated
10:32:27 11 as a joint council.

10:32:38 12 Q. And what's the subject of this
10:32:40 13 motion?

10:32:41 14 A. It has to do with the unsold,
10:32:41 15 surrendered lands, lakes and islands that the
10:32:45 16 Band -- the Bands jointly are requesting be
10:32:49 17 returned to reserve status.

10:32:54 18 Q. What happened or what do you know
10:32:55 19 that happened to prompt the joint council to
10:32:58 20 make this motion?

10:33:00 21 THE COURT: Well, Mr. Feliciant is
10:33:03 22 wrestling himself to his feet. Are you or are
10:33:04 23 you not?

10:33:06 24 MR. FELICIAN: I still don't know how
10:33:07 25 this witness can answer that question as a fact

1 witness without actually providing an opinion
2 based on prior research.

3 THE COURT: Well, given that it was
4 1968, there's no -- there's no way this witness
5 was a fact witness in the normal sense. But she
6 presumably -- are you saying she can't be asked
7 any questions or that she can be asked if she's
8 aware of any documents or what is it you're
9 saying, sir?

10 MR. FELICIAN: As a researcher as
11 part of her job, she can come across certain
12 documents. What I don't think she can do is to
13 be asked to interpret documents. She can say,
14 this is a document, this was added to the
15 database. I think she can say, this is my
16 understanding of what it is as a document, but
17 beyond that I don't think she can say anything
18 else as a fact witness.

19 THE COURT: Well, let me ask counsel
20 to state your question. If you can just wait
21 and let me listen to the question. The question
22 before does seem to have a frailty to it. What
23 do you know happened? But, again, you may be
24 able to restate your question. So why don't you
25 restate your question and I'll see if there is

10:34:26 1 still an objection or not.

10:34:32 2 BY MS. GUIRGUIS:

10:34:33 3 Q. Based on your research, Professor
10:34:34 4 Johnston, and the documents you've seen, do you
10:34:37 5 know why the joint council was seeking the
10:34:42 6 return of unsold, surrendered lands?

10:34:44 7 THE COURT: So I have a problem with
10:34:46 8 that. Mr. Feliciant is on his feet again. It's
10:34:55 9 the same problem.

10:34:55 10 I think what Mr. Feliciant said, which
10:34:57 11 I'm not saying I'm going to agree with it
10:35:01 12 broadly, but narrowly what he is saying is if
10:35:04 13 this witness identified the document in her
10:35:06 14 research, that she might be able to say that.
10:35:07 15 Is that correct, Mr. Feliciant?

10:35:10 16 MR. FELICIAN: That's correct.

10:35:12 17 THE COURT: But it seems to me you
10:35:14 18 would have to put the question that way. In
10:35:16 19 other words, you have to ask her if she located
10:35:19 20 the document or documents in her research that
10:35:22 21 related to something. And then you could ask
10:35:25 22 her about the documents.

10:35:27 23 But if you're asking her to draw a
10:35:30 24 conclusion based on her research, that is the
10:35:32 25 field of a Rule 53 expert.

1 MS. GUIRGUIS: That's fair enough,
2 Your Honour.

3 So, I mean, what -- what she's
4 identified is that she has identified that she
5 found this motion, this resolution as part of
6 her research.

7 THE COURT: Yes.

8 MS. GUIRGUIS: The motion requests
9 that all unsold, surrendered lands, lakes and
10 islands revert back to reserve status, so we can
11 leave it there and I can move on to --

12 THE COURT: That's up to you. I think
13 that Mr. Feliciant and I agree that there are
14 questions that you could ask but you have to
15 reframe them.

16 BY MS. GUIRGUIS:

17 Q. Let me move on from this one.
18 And I would like to pull up another document
19 that is in the ready database which is document
20 number SC0548.

21 Professor Johnston, can you tell us
22 what this document is?

23 A. This is another resolution of
24 joint council from a meeting dated June 3rd,
25 1974.

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Q. And how do you know this document?

A. I retrieved it during the course of my research.

Q. And what is the content of this Band council resolution by joint council?

A. It's a request that the fishing islands and Cape Hurd islands remain in joint ownership and be given reserve status in order to protect fishing and Aboriginal rights and that the rights involved -- and further any developments for the benefit of the Bands concerned.

MS. GUIRGUIS: Your Honour, I'd like to add this document, SON joint council, BCR dated June 3rd, 1974, as the next exhibit.

THE COURT: Mr. Registrar.

THE REGISTRAR: Exhibit number 4083.

EXHIBIT NO. 4083: SON joint band council re. fishing island (Jones v Nadjiwon - fishing Trial Exhibits). Dated June 3rd, 1974. Document number SC0548.

BY MS. GUIRGUIS:

Q. Professor Johnston, what are the

1 fishing islands that are referred to here?

2 A. They are located on the shore of
3 Lake Huron on the western side of the peninsula.

4 Q. I'd like to bring up another
5 document that's in the ready database which is
6 document SC0550. Professor Johnston, do you
7 know what this document is?

8 A. Yes.

9 Q. What is it?

10 A. It's an Order in Council from the
11 Privy Council of Canada dated the 20th of
12 February, 1980.

13 Q. And how do you know this
14 document?

15 A. I retrieved it during the course
16 of my research.

17 Q. And what does this Order in
18 Council do?

19 A. It establishes various islands in
20 the Cape Hurd -- sorry, the fishing islands and
21 Cape Hurd islands and sets them apart as an
22 Indian Reserve for the benefit of the Saugeen
23 and Nawash First Nations jointly.

24 Q. The second page of this document
25 provides a description of lands. Is this a

10:39:49 1 listing of the fishing islands that were added
10:39:51 2 to the reserve holdings of Nawash and Saugeen in
10:39:54 3 1980?

10:39:55 4 A. Yes.

10:39:57 5 Q. Your Honour, I would like to add
10:39:59 6 this document, February 20th, 1980, Order in
10:40:02 7 Council, adding fishing islands to reserve as
10:40:04 8 the next exhibit?

10:40:07 9 THE COURT: Mr. Registrar.

10:40:09 10 THE REGISTRAR: Exhibit number 4084.

10:40:11 11 EXHIBIT NO. 4084: Order in Council
10:40:13 12 adding fishing island to the reserve,
10:40:13 13 dated February 20th, 1980. Document
10:40:13 14 number SC0550.

10:40:32 15 BY MS. GUIRGUIS:

10:40:32 16 Q. I'd like to pull up Exhibit 3769.
10:40:45 17 It's a Cape Croker Council, Band Council
10:40:48 18 Resolution dated February 13th, 1969. Do you
10:40:51 19 know this document?

10:40:52 20 A. Yes.

10:40:53 21 Q. How do you know it?

10:40:54 22 A. Again, I retrieved it during my
10:40:57 23 research.

10:40:58 24 Q. It is a bit hard to read, so it
10:41:00 25 I'm just going to read aloud starting after,

1 "The movers of the resolution":

2 "That the Cape Croker Band
3 Council reiterates its stand on the
4 matter of unsold, surrendered lands;
5 therefore, be it resolved that the
6 Band Council requests the department
7 to give every consideration that
8 negotiation be proceeded with calling
9 for the restoration of the unsold,
10 surrendered portion of all lands and
11 lakes on the Bruce Peninsula to the
12 original owners.

13 And be it further resolved that
14 the Department declare that such land
15 and lakes shall revert to reserve
16 status.

17 And the Band Council further
18 resolves that immediate action,
19 negotiations and proceedings on the
20 matter of the restoration of these
21 lands and lakes be taken as
22 requested."

23 When the document says that Cape
24 Croker reiterates its stand, what stand is it
25 referring to?

1 MR. FELICIAN: Your Honour, I'm not
2 sure -- I think we have to establish how this
3 witness would know that information. And that
4 is calling for an opinion, as far as I'm
5 concerned.

6 THE COURT: Counsel?

7 MS. GUIRGUIS: I think, Your Honour,
8 it is based on the other documents that we've
9 looked at and the documents that she has
10 retrieved through her research, as if she can
11 point to another document where a similar stand
12 has been made.

13 THE COURT: Well, that is a different
14 question. So if your question was, is there
15 another document that you came across in your
16 research that deals with X subject matter, I
17 suspect Mr. Feliciant would stay in his chair.
18 But drawing conclusions from facts is outside
19 the ambit of the way this witness is being
20 called.

21 MS. GUIRGUIS: Okay. Thank you, Your
22 Honour.

23 BY MS. GUIRGUIS:

24 Q. So is there another document that
25 you came across in your research that set out a

1 stand with respect to the matter of unsold,
2 unsurrendered lands?

3 A. Yes, that was the motion number 2
4 from 1968.

5 Q. And then this document and in
6 this exhibit, 3769, that sets out that Cape
7 Croker expected the matter of unsold,
8 surrendered lands to be dealt with how?

9 A. Through negotiations.

10 MR. FELICIAN: I think to be fair, I
11 think it says through negotiations and other
12 proceedings. I mean the document does speak for
13 itself, Your Honour.

14 MS. GUIRGUIS: Thank you, Your Honour.

15 BY MS. GUIRGUIS:

16 Q. Another exhibit that I would like
17 to go to is 3790. This exhibit is two pages
18 long. It's labelled on the first page as being
19 "Minutes of Special Meeting, August 23rd, 1973".
20 Do you know this document?

21 A. Yes.

22 Q. And how do you know this
23 document?

24 A. I retrieved it during the course
25 of my research.

1 Q. I'd like to look at motions 1 and
2 2 on the first page. It is, again, a little
3 difficult to read so I can read motion number
4 one starting off with:

5 "The movers are named from, that
6 the Chippewas of Saugeen and Cape
7 Croker Band reaffirm their stand that
8 they took from motion number 2, dated
9 the 2nd day of April 1968, and request
10 the Indian Affairs and Northern
11 Development to take immediate action
12 on this motion. Also both Bands
13 request an immediate reply as to the
14 intention of the Indian Affairs and
15 Northern Development to the motion."

16 And if we continue on motion number 2
17 on the same page, beginning of the sentence --
18 oh, I'm sorry. Before I move on to motion
19 number 2, Professor Johnston, in the course of
20 your research between, in and around this --
21 that you did, it refers to 1968 reiterating that
22 stand, this document does, and this document is
23 dated 1973, can you recall any document that you
24 came across that showed there was a response in
25 between those years?

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A. No.

Q. From the department?

A. No, I cannot.

Q. If we continue looking at motion number 2 on the same page, again, it's a little difficult to read so I'll begin -- I'll read it aloud beginning after the movers are named:

"The two Bands resolve that in the future of the not surrendered islands, lakes and lands under Treaty Number 72 and Treaty Number 222, be sold without consultation with both Bands at a meeting attended by the Chiefs and councilors of both Bands and that this motion be responded to by the Department of Indian Affairs and Northern Development as the expressed wishes of both Bands."

The third exhibit that I would like to look at is 3791. This is a letter dated October 9, 1973, from M.J. Jones to the Regional Director of Ontario. Do you know this document?

A. Yes.

Q. How do you know it?

A. I retrieved it in the course of

1 my research.

2 Q. Who is M.J. Jones?

3 A. She is the officer in charge of
4 the Bruce District office.

5 Q. The first line of the letter
6 says:

7 "Attached hereto is Band council
8 resolution number 2 from a joint
9 council meeting of the Cape Croker and
10 Saugeen Bands where they reaffirm
11 their stand as per motion number 2
12 dated April 2nd, 1968."

13 At the last line, Mrs. Jones
14 recommends the approval of the attached Band
15 council resolution. So this letter was
16 forwarding a resolution to the Department of
17 Indian Affairs?

18 A. Yes.

19 Q. In the course of your research,
20 did you come across any other document that was
21 relevant to this letter?

22 A. Just the motion that -- the two
23 motions that are referenced.

24 Q. I would like to bring up Exhibit
25 3796. This is a Band council resolution dated

10:48:44 1 April 3rd, 1974, which is a bit easier to read
10:48:44 2 than some of the others. Do you know this
10:48:46 3 document?

10:48:47 4 A. Yes.

10:48:47 5 Q. How do you know it?

10:48:48 6 A. I retrieved it during the course
10:48:50 7 of my research.

10:48:53 8 Q. About half way down the
10:48:54 9 resolution, I'm going to start reading at:

10:48:57 10 "It is therefore resolved that
10:48:59 11 the two Band councils, assembled this
10:49:01 12 3rd day of April 1974, ascertain from
10:49:04 13 the departmental authorities why no
10:49:07 14 action has been taken, and strongly
10:49:10 15 advise the Department that all
10:49:11 16 submissions are to be not ignored,
10:49:14 17 that are relative to our intent and
10:49:17 18 desire as expressed in all our
10:49:20 19 submissions by which the unsold,
10:49:21 20 surrendered landed and landing sites
10:49:26 21 revert to reserve status and that all
10:49:27 22 submissions made prior to this date
10:49:28 23 accompany this resolution."

10:49:40 24 Do you know what are landing sites?

10:49:42 25 A. Shore road allowances.

1 Q. Did you come across anything in
2 your research or any documents in your research
3 to indicate whether the Department responded to
4 this resolution or to others to date?

5 A. No.

6 Q. At Exhibit 3807 we have a letter
7 dated January 28th, 1976, from Mr. Paul Williams
8 to Assistant Deputy Minister of Indian and
9 Northern Affairs, C. Mackey. Are you familiar
10 with this letter?

11 A. Yes, I am.

12 Q. How do you know it?

13 A. I retrieved it in the course of
14 my research.

15 Q. Before turning to this letter I
16 want to pause here for a moment. Who is
17 Mr. Paul Williams?

18 A. At the time that I met him when I
19 was a summer student in 1980, he was a research
20 director for claims at the Union of Ontario
21 Indians, and he provided services directly to
22 Nawash and Saugeen.

23 Q. When did he start providing
24 services directly to Nawash and Saugeen?

25 A. In 1975.

1 Q. And when did he stop providing
2 services to the Saugeen and Nawash?

3 A. In 1992.

4 Q. This is a two-page letter. Can
5 you quickly summarize what this letter is about?

6 A. It's a letter which details the
7 efforts of the joint council to obtain
8 information about unsold lands, in particular an
9 inventory of unsold, surrendered lands and also
10 demand that there be a moratorium or a freeze on
11 the sale of any lands that are remaining unsold
12 on the peninsula.

13 Q. Based on your research, are you
14 aware of any -- of SON receiving the inventory
15 in the 1970s when it was requested?

16 A. No.

17 Q. Were you involved in the efforts
18 to get this information about the unsold,
19 surrendered lands?

20 A. Yes, I was.

21 Q. What difficulties did you face in
22 accessing this information?

23 A. When I was --

24 MR. FELICIAN: Your Honour, that is a
25 bit of a leading question.

10:52:55 1 THE COURT: Well, it is leading
10:52:56 2 question. It's done now.

10:52:59 3 MR. FELICIAN: Too late.

10:53:03 4 MS. GUIRGUIS: My apologies, Your
10:53:04 5 Honour.

10:53:05 6 THE COURT: I'll permit the witness to
10:53:07 7 answer it. It's not helpful to anyone,
10:53:09 8 including the plaintiffs, to have questions
10:53:11 9 posed that way.

10:53:12 10 Please, go ahead.

10:53:15 11 THE WITNESS: When I was a summer
10:53:21 12 student in 1980 my co-workers and I made a trip
10:53:24 13 to Ottawa with the purpose of retrieving an
10:53:26 14 inventory from officials at the Department of
10:53:34 15 Indian Affairs. And when we met with officials,
10:53:37 16 we were told that the inventory was not ready
10:53:40 17 but that it would be sent to the First Nations
10:53:42 18 when it was ready.

10:53:43 19 BY MS. GUIRGUIS:

10:53:46 20 Q. Thank you. I'd like to pull up
10:53:48 21 another document that's in the ready database,
10:53:51 22 SC0717. This is a joint Band council resolution
10:54:07 23 that's dated September 22nd, 1982. Are you
10:54:10 24 familiar with this document?

10:54:11 25 A. Yes.

1 Q. And how do you know it?

2 A. I retrieved it during the course
3 of my research.

4 Q. Can you briefly describe the
5 request that is being made by joint council?

6 A. They are requesting that the
7 Department of Indian Affairs prepare maps that
8 would -- of the municipalities covered by Treaty
9 72 and asking that the maps provide the location
10 of various categories of lands and including, if
11 you scroll down a little bit, unsold,
12 surrendered lands.

13 Q. Thank you.

14 MS. GUIRGUIS: Your Honour, I would
15 like to add this document, 1982 joint council
16 resolution seeking maps and information
17 identifying unsold lands on the peninsula as the
18 next exhibit.

19 THE WITNESS: Mr. Registrar.

20 THE REGISTRAR: Exhibit number 4084.

21 EXHIBIT NO. 4084: 1982 Band Council
22 Resolution Motion No. 3, September 22,
23 1982. Document number SC0717.

24 BY MS. GUIRGUIS:

25 Q. Based on you research, Professor

10:55:16 1 Johnston, do you know whether SON ever received
10:55:19 2 this information on inventory?

10:55:20 3 A. They had received it at least by
10:55:22 4 the time I started working as research
10:55:24 5 co-ordinator in 1992.

10:55:28 6 Q. I'd like to show you another
10:55:30 7 document from the ready database. It's document
10:55:33 8 number SC0722. Have you seen this document
10:55:46 9 before?

10:55:46 10 A. Yes, I have.

10:55:47 11 Q. How do you know it?

10:55:48 12 A. I retrieved it as part of my
10:55:50 13 research.

10:55:50 14 Q. And what is the document?

10:55:51 15 A. It's a letter from the Department
10:55:56 16 of Indian Affairs. I think if you scroll down a
10:55:59 17 bit further, I can see that it's from Hubert
10:56:07 18 Ryan who was the lead negotiator once the Bands
10:56:11 19 had entered into negotiations on unsold,
10:56:13 20 surrendered lands. And he indicates that he's
10:56:17 21 enclosing a listing of unsold, surrendered lands
10:56:20 22 on the peninsula that should be a subject of
10:56:22 23 negotiations.

10:56:27 24 Q. Who is David McLaren?

10:56:29 25 A. He was the land claims

1 co-ordinator for the unsold lands negotiations
2 up until the time that I started in 1992.

3 Q. Professor Johnston, the enclosed
4 listing referred to when you began in 1992,
5 based on what you know, was that what you said
6 that you saw?

7 A. Yes, I think so.

8 Q. And then based on your research
9 prior to this, and also your experience at that
10 time starting in 1992, was that the first time
11 they had received that inventory?

12 A. That was my understanding.

13 Q. So the letter refers to
14 negotiations that were taking place. And I'd
15 like to come back to that, and your direct
16 knowledge of that. But I want to ask you first
17 a few questions about Paul Williams' work with
18 SON, being mindful that we don't want to get
19 into matters that are covered by
20 solicitor-client privilege.

21 Based on your work with SON, do you
22 know what general matters Paul Williams was
23 working on for Saugeen and Nawash?

24 A. Yes, he was working on
25 claims-related matters including early on the

1 claim involving Treaty Number 45 1/2 from 1836
2 and then claims involving Treaty Number 72.

3 Q. The claim about Treaty 45 1/2,
4 what can you tell us about that?

5 MR. FELICIAN: Your Honour, that is a
6 very broad question. Perhaps it could be a more
7 focused.

8 THE COURT: What is it you're trying
9 to get at, counsel?

10 MS. GUIRGUIS: So Professor Johnston
11 has mentioned she was a student in the 1980s and
12 worked on the specific claims issues, so I was
13 just asking her about what she knows about that
14 Treaty 45 1/2 claim.

15 THE COURT: This is a very obviously
16 learned lady who did a lot in these areas and
17 that could be hours from now, and I don't think
18 that's what you're asking about, counsel. We're
19 not going to be having any extended review of a
20 claim that isn't before this Court. But I would
21 imagine that you're looking for something rather
22 succinct; is that correct?

23 MS. GUIRGUIS: That's correct.

24 THE COURT: So if you could just
25 indicate that in your question, that would be

10:59:18 1 helpful.

10:59:19 2 BY MS. GUIRGUIS:

10:59:20 3 Q. Thank you, Your Honour.

10:59:21 4 Professor Johnston, do you know
10:59:22 5 when -- if there was a Treaty 45 1/2 claim
10:59:26 6 filed?

10:59:27 7 A. Yes. It wasn't accepted for
10:59:29 8 negotiation under the specific claims procedures
10:59:32 9 but it was sent by the First Nations directly to
10:59:39 10 the Governor General in 1980.

10:59:55 11 Q. Do you know what happened after
10:59:56 12 it was sent to the Governor General in 1980?

11:00:00 13 A. I'm not aware that anything
11:00:02 14 happened.

11:00:28 15 Q. I want to take you to two
11:00:29 16 exhibits, Professor Johnston. The first is
11:00:33 17 Exhibit 3962. This is a Statement of Claim
11:00:47 18 dated February 24, 1988. Do you know what this
11:00:54 19 action is about?

11:00:55 20 A. It involves the bed of McNab
11:01:02 21 Lake.

11:01:08 22 Q. And this is a claim that was
11:01:10 23 filed by Paul Williams on behalf of Saugeen and
11:01:14 24 Nawash?

11:01:15 25 A. Yes.

1 Q. You said it involves the bed of
2 McNab Lake. Do you know what it involves with
3 respect to that?

4 A. It involves the transfer by the
5 Government of Ontario to the Grey Sauble
6 Conservation Authority, which happened in 1963.

7 Q. Do you know what the current
8 status of this claim is?

9 A. It was stayed pending the outcome
10 of this litigation.

11 Q. I'd like to bring up Exhibit
12 3871. This is a Statement of Claim dated
13 November 29th, 1988, filed against Ontario in
14 the Supreme Court of Ontario. Do you know what
15 this action is about?

16 A. Yes. Again, it's the First
17 Nations bringing a claim against Ontario with
18 respect to certain lands that had been declared
19 in 1985 or proclaimed to be provincial parks.
20 And those lands were on the peninsula and
21 included some lands that had remained unsold.

22 Q. Do you know what the action is
23 seeking?

24 A. It's seeking to have the
25 Proclamation set aside and a declaration of the

11:02:58 1 interest that the Bands had in the unsold lands.

11:03:03 2 Q. And I think if we scroll down to
11:03:05 3 the end of this claim, we see that this was also
11:03:12 4 filed by Mr. Paul Williams on behalf of Saugeen
11:03:15 5 and Nawash?

11:03:17 6 A. Yes.

11:03:17 7 Q. Do you know the current status of
11:03:19 8 this claim?

11:03:20 9 A. It was also stayed pending the
11:03:21 10 outcome of this litigation.

11:03:45 11 Q. Going back to the subject of
11:03:46 12 negotiations that we referred to in the letter
11:03:48 13 that was dated 1991. You said earlier that you
11:03:54 14 came back to work for the Band around '91, '92?

11:03:59 15 A. In 1991 I had been asked to work
11:04:01 16 on the fishing rights litigation, and I did so
11:04:03 17 on a part-time basis. And then I became a
11:04:06 18 full-time lands research co-ordinator in 1992.

11:04:12 19 Q. Did you have any involvement in
11:04:13 20 the negotiations that were going on?

11:04:14 21 A. Yes, I did.

11:04:16 22 Q. Which governments were involved
11:04:17 23 in the negotiations with SON?

11:04:18 24 A. The Government of Canada and the
11:04:19 25 Government of Ontario.

1 Q. What got the governments -- or do
2 you know why the negotiations started at that
3 time?

4 A. The framework was in place for
5 the negotiations, tripartite negotiations as a
6 result of the 1986 Indian Lands Agreement, and I
7 think that the timing of the actions involving
8 McNab Lake and the provincial parks also played
9 a role in bringing the parties to the table.

10 MR. FELICIAN: It's too late now,
11 Your Honour, but this is calling for opinion
12 evidence, and the preface of the answer by "I
13 think" is an indication of exactly that.

14 THE COURT: It's always difficult,
15 counsel, and I'm sure you'll manage, but we have
16 a person who clearly is an expert in certain
17 areas, including domestic law about which I
18 cannot hear from anyone except maybe in passing,
19 which is fine. And so it is -- you know, when
20 you have someone who is clearly an expert in
21 some areas but isn't permitted to give expert
22 evidence, I'm not going to constrain you by the
23 choice of verb every now and then.

24 However, your questions are going to
25 be very important because the witness is here to

11:05:47 1 answer your questions, and it would be her, I
11:05:49 2 would assume, natural inclination to draw
11:05:52 3 conclusions given her background.

11:05:54 4 So if you could please, as you've been
11:05:57 5 doing, continue to work on very specific
11:06:02 6 questions to elicit the factual information that
11:06:07 7 we're looking for.

11:06:10 8 And we'll just press on ahead, and I'm
11:06:12 9 sure Mr. Feliciant will continue to stand up
11:06:16 10 when he has some objection.

11:06:17 11 MS. GUIRGUIS: Certainly, Your Honour.

11:06:18 12 BY MS. GUIRGUIS:

11:06:25 13 Q. Professor Johnston, based on your
11:06:29 14 direct knowledge as being part of these
11:06:30 15 negotiations, can you tell us what SON's -- or
11:06:37 16 what the priorities were in the negotiations?

11:06:42 17 A. The priorities were the return of
11:06:43 18 all unsold, surrendered lands and lakes, and
11:06:48 19 islands in those lakes to the ownership of the
11:06:55 20 First Nations.

11:07:03 21 Q. And based on your involvement, do
11:07:05 22 you know what Canada's and Ontario's positions
11:07:08 23 were in response to that?

11:07:10 24 A. As we saw in the previous
11:07:11 25 document, Canada took the position that no lands

1 within the boundaries of the national park would
2 be available for return to the First Nations.

3 Q. And when you're referring to the
4 previous document, that is the 1991 letter from
5 Hubert Ryan to David McLaren?

6 A. Yes.

7 Q. When did the negotiations -- or
8 did the negotiations end?

9 A. Yes.

10 Q. And when did that happen?

11 A. The last meetings took place in
12 1992.

13 Q. I would like to pull up a few
14 documents for you to have a look at. The first
15 one is document number SC0706 in the ready
16 database. Can you tell us what this document
17 is?

18 A. This is a memo that I faxed to
19 Hubert Ryan -- again, he was the lead negotiator
20 for Canada in the unsold lands negotiations --
21 concerning an application which was being
22 brought by a cottager who had lands adjoining
23 the shore road allowance in the Township of
24 Keppel.

25 MS. GUIRGUIS: Your Honour, I'd like

1 to add this as the next exhibit, the memo from
2 Darlene Johnston to Hubert Ryan dated May 18th,
3 1993.

4 THE COURT: Mr. Registrar.

5 THE REGISTRAR: Exhibit 4085.

6 EXHIBIT NO. 4085: Memorandum from
7 Darlene Johnston to Hubert Ryan, dated
8 May 18, 1993, re. shore allowance in
9 the Township of Keppel. Document
10 number SC0706.

11 BY MS. GUIRGUIS:

12 Q. So with respect to this memo,
13 Professor Johnston, can you explain briefly what
14 you were saying to Mr. Hubert Ryan?

15 MR. FELICIAN: Your Honour, my
16 concern here is that the memo does speak for
17 itself, but that kind of question calls for the
18 witness to then give evidence in-chief which
19 does -- it places an expressed opinion within
20 that memo. And the fact that she wrote the memo
21 is fine, and there was no objection to making it
22 an exhibit because it speaks for itself and she
23 wrote it.

24 But to now give evidence in-chief
25 repeating the contents is -- calls for her to

1 give opinions about the Band's position and the
2 litigation and the application. And that's my
3 concern.

4 THE COURT: Well, the question was,
5 can you explain briefly what you were saying?
6 Which is a specific question about what this
7 witness was saying and I'll permit the question.
8 Please, go ahead.

9 THE WITNESS: I was saying that if the
10 application had been successful, the shore
11 allowance in question would have been
12 transferred into private hands without any
13 compensation going to the Bands.

14 And it was also -- there was also a
15 concern that it would encourage other
16 municipalities to deal with similar claims and
17 that other shores then, shore allowances in the
18 peninsula would also potentially be conveyed
19 without any compensation being made to the
20 Bands. And I expressed concern that this would
21 have a negative effect on the negotiations for
22 unsold, surrendered lands.

23 BY MS. GUIRGUIS:

24 Q. I just want to scroll up a bit on
25 this document. Professor Johnston, it looks

1 like -- or you made a note here, I guess it is
2 you that made a note that says:

3 "First sent to Yan on May 14th"?

4 A. Yes.

5 Q. Can you explain what that note
6 is?

7 A. So I had, as you see, handwritten
8 this memo and initially I sent to Yan Lazor, who
9 was the Ontario representative in the unsold
10 lands negotiations. And I sent it to him on May
11 14th. And then rather than redraft the memo, I
12 simply whited out, it says "then used white out
13 and sent to Hubert" so actually I used the
14 document twice.

15 Q. So I would like to bring up
16 another document SC0707 from the ready database.

17 Professor Johnston, do you know what
18 this document is?

19 A. Yes. It's a reply, which I
20 received from Yan Lazor on the 20th of May '93
21 to the fax that I sent to him on May 14th.

22 Q. And the second paragraph after
23 "Thank you for the fax of May 14, 1993, and May
24 18th, 1993", the second paragraph starting with,
25 "I have discussed[...]", can you read that out?

11:13:22 1 A. Yes.

11:13:23 2 "I have discussed the matter with
11:13:24 3 the counsel in the Ministry of the
11:13:26 4 Attorney General. Ontario will not
11:13:29 5 intervene in the Aiken v. Keppel
11:13:31 6 Application."

11:13:35 7 Q. Your Honour, I would like to add
11:13:37 8 this letter from Yan Lazor to Darlene Johnston
11:13:40 9 May 20th, 1993, as the next exhibit.

11:13:44 10 THE REGISTRAR: Exhibit number 4086.

11:13:46 11 EXHIBIT NO. 4086: Letter from Yan
11:13:47 12 Lazor to Darlene Johnston, dated May
11:13:47 13 20th, 1993. Document number SC0707.

11:13:55 14 BY MS. GUIRGUIS:

11:13:55 15 Q. I would like to bring up another
11:13:56 16 document from the ready database, SC0708.
11:14:06 17 Professor Johnston, do you know this document?

11:14:07 18 A. Yes, I do.

11:14:08 19 Q. And what is it?

11:14:09 20 A. It's the reply that I received
11:14:10 21 from Hubert Ryan on May 20th to the fax that I
11:14:13 22 had sent to him on May 18th, 1993.

11:14:24 23 Q. And starting about midway in the
11:14:29 24 first paragraph, can you read from "I understand
11:14:29 25 [...]?"

11:14:34 1 A. "I understand that title to this
11:14:36 2 particular shoreline allowance is
11:14:36 3 vested in the Corporation of the
11:14:36 4 Township of Keppel by virtue of the
11:14:37 5 Ontario Municipal Act. As such, I
11:14:41 6 regret that we are not in a position
11:14:43 7 to intervene in the matter."

11:14:46 8 Q. Thank you.

11:15:09 9 THE COURT: Can you just go down to
11:15:09 10 the bottom of the document?

11:15:15 11 BY MS. GUIRGUIS:

11:15:17 12 Q. Professor Johnston, can you also
11:15:17 13 read the second paragraph of this letter?

11:15:20 14 A. "However, I would point out that
11:15:22 15 Ontario, Canada and the Chippewas of
11:15:24 16 Saugeen and Nawash have entered into
11:15:26 17 negotiations under the 1986 Indian
11:15:28 18 Lands Agreement in order to address
11:15:31 19 concerns surrounding unsold,
11:15:31 20 surrendered lands in the Bruce
11:15:34 21 Peninsula. The First Nations are
11:15:36 22 currently undertaking research to
11:15:37 23 verify which lands should be
11:15:39 24 considered in this process. If it is
11:15:42 25 confirmed, through this research, that

11:15:45 1 this land is considered unsold,
11:15:46 2 surrendered land in the form of an
11:15:51 3 unopen road allowance, I believe the
11:15:53 4 question of compensation for the
11:15:55 5 allowance can be addressed by the
11:15:57 6 parties in the context of these
11:15:59 7 negotiations."

11:16:01 8 Q. Thank you.

11:16:02 9 MS. GUIRGUIS: Your Honour, I would
11:16:02 10 like to add this letter as the next exhibit,
11:16:06 11 letter from Hubert Ryan to Darlene Johnston, May
11:16:10 12 20th, 1993.

11:16:12 13 THE REGISTRAR: Exhibit number 4087.

11:16:16 14 EXHIBIT NO. 4087: Letter from Hubert
11:16:17 15 Ryan (Chief Land Entitlement and
11:16:17 16 Registrar to Indian Lands Division) to
11:16:17 17 Darlene Johnston, dated May 20th,
11:16:17 18 1993. Document number SC0708.

11:16:24 19 BY MS. GUIRGUIS:

11:16:24 20 Q. I would like to bring up document
11:16:26 21 SC0709 from the ready database. Professor
11:16:37 22 Johnston, do you know what this document is?

11:16:39 23 A. Yes.

11:16:40 24 Q. And what is it?

11:16:40 25 A. It's the judgment that was issued

1 by the Superior Court in the matter of Saugeen
2 and Nawash First Nations and The Corporation of
3 the Township of Keppel.

4 Q. And the judgment is saying that
5 there are bylaws that are being quashed?

6 A. Yes.

7 MS. GUIRGUIS: Your Honour, I would
8 like to add this document as the next exhibit?

9 THE REGISTRAR: Exhibit number 4088.

10 EXHIBIT NO. 4088: Copy of the
11 judgement issued by the Superior court
12 in the matter of Chippewas of Saugeen
13 First Nation v The Corporation of the
14 Township of Keppel (Court File No.
15 2705/94 and 2904/94) Ontario
16 Court (General Division).

17 BY MS. GUIRGUIS:

18 Q. Professor Johnston, according to
19 the work that you were doing or -- when you were
20 working with SON in the 1990s, were you
21 involved in what led to this judgment?

22 A. Yes.

23 Q. Can you explain what the
24 application was?

25 A. It was an application to quash

11:17:46 1 the bylaws that had been passed by Keppel
11:17:50 2 Township which conveyed portions of the shore
11:17:53 3 road allowances in Keppel to the adjoining
11:17:56 4 landowners without compensation being paid to
11:17:58 5 the First Nations.

11:18:01 6 Q. Thank you. And by this time
11:18:21 7 you've said that the negotiations had ended with
11:18:23 8 the Federal Government and Provincial
11:18:24 9 Government?

11:18:25 10 A. Yes.

11:18:26 11 Q. I'd like to come back to a point
11:18:29 12 that you mentioned earlier that Paul Williams
11:18:31 13 was no longer acting for SON as of June -- or as
11:18:35 14 of 1992 I believe you said?

11:18:37 15 A. Yes.

11:18:40 16 Q. Again, being mindful of any
11:18:43 17 solicitor-client privilege regarding advice to
11:18:44 18 you or received by SON, can you tell me about
11:18:48 19 the process that you were involved with in terms
11:18:52 20 of seeking new legal counsel?

11:18:55 21 A. Yes. I approached a number of
11:18:58 22 law firms and indicated that we were seeking a
11:19:04 23 new legal team to deal with unsold, surrendered
11:19:08 24 lands on the peninsula. I met with and
11:19:14 25 discussed the claims with a number of firms, and

1 ultimately the joint council retained Morris
2 Rose Ledgett. The lawyers, in particular, were
3 John Olthuis and Roger Townshend. And they
4 eventually started their own firm, Olthuis Kleer
5 Townshend.

6 Q. And was the -- do you know
7 whether the litigation that we're here for
8 today, when that was launched?

9 A. The Notice of Claim was issued in
10 April of 1994 and the Statement of Claim, I,
11 think was filed in May of 1994.

12 Q. Okay. Thank you.

13 THE COURT: You're talking about one
14 of the two actions. It is a matter of record in
15 this trial when these actions were commenced.

16 MS. GUIRGUIS: That's right.

17 THE COURT: That's only one of these
18 two actions.

19 MS. GUIRGUIS: That's only one of
20 these two actions, so the action that Professor
21 Johnston is referring to is the Treaty 72 breach
22 of fiduciary duty claim.

23 BY MS. GUIRGUIS:

24 Q. Professor Johnston, I want to
25 turn briefly to another matter raised in your

11:20:40 1 interview with Professor Brownlie and that is
11:20:43 2 with respect to the Indian Agent. You mentioned
11:20:52 3 in your interview with Professor Brownlie
11:20:56 4 something about the Indian Agent burning
11:20:58 5 documents. Can you tell us more about that?

11:21:02 6 A. I was told in the process of my
11:21:05 7 research that the last Indian Agent that was
11:21:11 8 stationed at Cape Croker was asked to leave by
11:21:18 9 the Chief at the time, Wilmer Nadjiwon, and that
11:21:22 10 prior to his departure he was seen burning some
11:21:28 11 books in a large barrel.

11:21:31 12 He was approached by one of the
11:21:35 13 custodians for the Band and that person stopped
11:21:41 14 the Indian Agent from burning any further
11:21:44 15 materials.

11:21:47 16 Q. And where did this happen?

11:21:48 17 A. At Cape Croker.

11:21:54 18 Q. And you said you were told. Who
11:21:56 19 told you about this?

11:21:58 20 A. I heard the story from a number
11:21:59 21 of elders. I can't remember which ones.

11:22:09 22 Q. And also in your interview with
11:22:11 23 Professor Brownlie you said that you had heard
11:22:16 24 that the documents that were saved from burning
11:22:18 25 were ones that you had seen at a safe --

11:22:20 1 A. Yes.

11:22:21 2 Q. -- in the Nawash Band office.

11:22:23 3 Can you tell us more about that part that you
11:22:25 4 spoke to Professor Brownlie about?

11:22:27 5 A. These documents were old ledger
11:22:31 6 books and letter books that I first saw in the
11:22:36 7 safe at the Band office for the Chippewas of
11:22:39 8 Nawash.

11:22:40 9 And when the land claims office was
11:22:42 10 established at Nawash, the building that it was
11:22:47 11 housed in had a basement. And we had a very
11:22:51 12 large walk-in safe installed in the basement and
11:22:55 13 those books were moved from the Band office to
11:23:00 14 the land claims research office and stored in
11:23:03 15 the safe.

11:23:07 16 Q. Did you recall when you saw these
11:23:09 17 documents at the Nawash Band office?

11:23:13 18 A. I may have seen them, in terms of
11:23:16 19 my recollection, when I was a summer student in
11:23:20 20 1980. And I definitely saw them when I was land
11:23:25 21 claims research co-ordinator for the Bands.

11:23:42 22 Q. So you said that they were
11:23:44 23 eventually moved over to the land claims office?

11:23:46 24 A. Yes.

11:23:50 25 Q. And there was a walk-in safe

11:23:53 1 there?

11:23:53 2 A. Yes.

11:23:53 3 Q. What happened to these documents
11:23:55 4 afterwards?

11:23:55 5 A. I was told by Roger Townshend
11:23:58 6 that sometime after I had resigned in 2001 that
11:24:01 7 he went to the land --

11:24:03 8 THE COURT: I'm going to interrupt the
11:24:05 9 witness. The witness is going to testify about
11:24:09 10 what counsel in this trial told her. I don't
11:24:13 11 know how --

11:24:15 12 MS. GUIRGUIS: So, Your Honour, we
11:24:16 13 have -- we have a draft agreed statement of
11:24:18 14 facts with respect to this, which I wanted to
11:24:20 15 pull up, but we heard from the municipalities
11:24:22 16 today that they are still reviewing it.

11:24:25 17 So I'm trying to, this morning,
11:24:27 18 determine how to deal with that, whether I can
11:24:30 19 bring that up as a draft that says what happened
11:24:32 20 to them or I can just leave this subject
11:24:35 21 entirely.

11:24:35 22 THE COURT: Well, that's terrific, the
11:24:37 23 fact that that's under discussion between
11:24:39 24 counsel makes a lot of sense.

11:24:49 25 Does any counsel for any defendant

11:24:51 1 have any objection to this question? Because if
11:24:54 2 not, I might consider permitting it. Let me
11:24:58 3 wait, counsel, and see if anyone has a problem.

11:25:12 4 You're asking this witness to say what
11:25:13 5 she was told by another person, so that is
11:25:15 6 hearsay. And that person happens to be senior
11:25:18 7 council for the plaintiff and that is very
11:25:21 8 problematic ordinarily, because we know that
11:25:24 9 Mr. Townshend is not going to be testifying in
11:25:26 10 this trial, because that would create other
11:25:26 11 problems. So, defendants does anyone have any
11:25:30 12 problems with the question? Mr. Beggs?

11:25:34 13 MR. BEGGS: Your Honour, I mean
11:25:34 14 assuming that the answer that was started, "I
11:25:37 15 was told by Roger Townshend [...] is an answer
11:25:40 16 to the question, what happened to these
11:25:41 17 documents, I think that is -- well, assuming the
11:25:50 18 answer is what I expect it.

11:25:52 19 THE COURT: Well, I am not permitting
11:25:53 20 that question to be answered just yet. The
11:25:57 21 question is, do you have an objection to the
11:25:59 22 question itself?

11:26:00 23 MR. BEGGS: I think the question is
11:26:01 24 fine.

11:26:01 25 THE COURT: All right. Mr. Feliciant?

1 If you wish to waive any objection, that's --

2 MR. FELICIAN: It is hearsay and he
3 is counsel and it calls for what otherwise would
4 be privileged information in circumstances where
5 it's probably not necessary. That's my --

6 THE COURT: Well, my problem is that
7 it seems there is an objection by the defendant
8 Ms. Pellier, who aren't here. So Mr. Beggs
9 isn't making an objection? Are you making an
10 objection? There is no question that it's
11 hearsay.

12 MR. FELICIAN: It is hearsay --

13 THE COURT: Let me ask counsel --

14 MR. FELICIAN: Go ahead.

15 MS. GUIRGUIS: Your Honour --

16 THE COURT: Are you trying to do this
17 because this is the only way to get this done?

18 MS. GUIRGUIS: No. I think that -- I
19 have reasonable confidence that the agreed
20 statement of facts will become an agreed
21 statement of facts and not a draft any more, so
22 we can deal with that. And I can simply
23 withdraw this question at this time.

24 THE COURT: Let's put it this way.

25 Let's hope that that does occur. If it does not

1 occur, obviously plaintiff's counsel will have
2 to give some thought to who could be brought
3 forward to deal with it. But if the only reason
4 for asking this witness is that she happened to
5 have a conversation about it with senior counsel
6 to the plaintiffs, that doesn't make it
7 necessary to have her be that person anyway, it
8 seems to me, at least not based on anything I've
9 heard so far.

10 So perhaps we should move forward.

11 MS. GUIRGUIS: We will move forward.

12 THE COURT: And if you have some
13 difficulty getting this evidence in at a later
14 date, you can just raise it and we'll deal with
15 it then.

16 MS. GUIRGUIS: All right. Thank you,
17 Your Honour.

18 BY MS. GUIRGUIS:

19 Q. I would like to bring up another
20 document that's been added to the ready
21 database, which is document number SC0729.

22 Professor Johnston, this is four
23 pictures. Can you describe what these pictures
24 are of?

25 A. They are pages out of the, what I

11:28:14 1 have referred to as the "ledger book" for
11:28:17 2 surrendered lands on the peninsula.

11:28:22 3 Q. And that's the ledger book that
11:28:24 4 you said you had seen in the Nawash Band office?

11:28:26 5 A. Yes.

11:28:27 6 Q. And in the land claims office?

11:28:28 7 A. Yes.

11:28:36 8 MS. GUIRGUIS: So, Your Honour, I
11:28:36 9 would like to add this document, pictures of the
11:28:40 10 damaged documents as the next exhibit?

11:28:44 11 THE COURT: I'm just going to let your
11:28:45 12 colleague finish what she's doing, which I think
11:28:48 13 is running down through the four pages. And
11:28:58 14 then I'll hear from Mr. Beggs.

11:29:01 15 All right. I've seen it now.

11:29:01 16 Mr. Beggs?

11:29:16 17 MR. BEGGS: Your Honour, my concern
11:29:17 18 with this document is -- and it's kind of a
11:29:21 19 convoluted story -- but these ledger books were
11:29:28 20 first drawn to our attention last Wednesday.

11:29:31 21 THE COURT: You mean these four pages?
11:29:33 22 Because we've had evidence in this trial about
11:29:35 23 the ledger books already.

11:29:37 24 MR. BEGGS: Yes, but not that they
11:29:39 25 existed anywhere.

11:29:41 1 THE COURT: All right. I mean, I've
11:29:44 2 had a number of witnesses referring to the
11:29:45 3 ledger books so that is not news. Are you
11:29:48 4 talking about the four pages, sir?

11:29:51 5 MR. BEGGS: No, I'm talking about all
11:29:52 6 the ledger books. They were not put in any list
11:29:54 7 of documents or Affidavit of Documents.

11:29:59 8 THE COURT: I'm a bit confused. We've
11:30:00 9 had a number of witnesses who testified about
11:30:04 10 certain books that existed that were either
11:30:08 11 partially or completely or not at all burned and
11:30:11 12 saved, at least some of them, in the Band
11:30:13 13 office. So that is not something you learned
11:30:17 14 last week. Because I sat here and listened to
11:30:20 15 witnesses talk about it a month ago.

11:30:23 16 MR. BEGGS: Well, if it was true, they
11:30:25 17 should have been disclosed years ago.

11:30:27 18 THE COURT: The books themselves?

11:30:28 19 MR. BEGGS: Yes.

11:30:29 20 THE COURT: So I'm trying to get
11:30:30 21 underneath what you say the first time you heard
11:30:34 22 about this was last week, not the subject
11:30:37 23 matter.

11:30:38 24 MR. BEGGS: No, not the subject
11:30:38 25 matter.

11:30:39 1 THE COURT: So what is it you say you
11:30:40 2 heard about last week for the first time?

11:30:43 3 MR. BEGGS: That these books were
11:30:44 4 being kept -- well, this was the first evidence
11:30:48 5 that these books actually existed, other than
11:30:51 6 the statements that people made. But many --
11:30:54 7 most of these witnesses hadn't even seen the
11:30:56 8 books themselves if you recall, Your Honour.

11:30:58 9 THE COURT: Well, there was at least
11:30:59 10 one or two that said that they did see them.

11:31:02 11 MR. BEGGS: Last Friday or --

11:31:04 12 THE COURT: In --

11:31:05 13 MR. BEGGS: In Mr. Wilmer Nadjiwon's
11:31:07 14 evidence he did say it or, sorry, Marshall
11:31:10 15 Nadjiwon.

11:31:10 16 THE COURT: So it wasn't last week,
11:31:12 17 but it was a week ago last Friday. He was one
11:31:14 18 of them.

11:31:14 19 So we've had some evidence in this
11:31:16 20 trial about circumstances about books, about --
11:31:22 21 that gentleman is a good example and he
11:31:24 22 testified that, indeed, the books were saved, if
11:31:27 23 you will -- my word, not his -- before they were
11:31:34 24 burned and put into a safe place. So we know
11:31:35 25 that that is not news, the fact that people had

11:31:37 1 those accounts of something that happened.

11:31:39 2 What is the news that you received
11:31:41 3 last week?

11:31:42 4 MR. BEGGS: That these books -- that
11:31:43 5 the physical copy of these books were -- you'll
11:31:46 6 recall that we were asking every witness where
11:31:49 7 these books were, and we got varying answers to
11:31:52 8 that answer. Apparently these books have been
11:31:55 9 in the possession of the lawyers for the
11:31:56 10 plaintiffs since 2008 or, I guess, maybe
11:32:05 11 earlier.

11:32:05 12 And we were not aware that the lawyers
11:32:07 13 had possession of these documents that we could
11:32:09 14 have inspected at that time.

11:32:11 15 We had heard that there were these
11:32:13 16 books in a safe, perhaps the Saugeen safe,
11:32:17 17 perhaps the Nawash safe. So we had heard that
11:32:22 18 there was books that had been saved, but we were
11:32:27 19 not disclosed these books until last Wednesday.

11:32:33 20 THE COURT: Okay. And what is it you
11:32:35 21 were told last Wednesday before I ask
11:32:36 22 Ms. Guirguis to respond?

11:32:42 23 MR. BEGGS: That these books were held
11:32:43 24 by the plaintiff's lawyers, and we were asked if
11:32:47 25 they -- if we would agree to a statement of

1 facts that that was true, that they had these
2 books and give a brief description of them.

3 And you'll recall that we also asked
4 witnesses what the books were as we had no idea
5 until that time.

6 THE COURT: All right. And what's
7 your objection, counsel?

8 MR. BEGGS: My objection is to the
9 admissibility of this -- is that this document
10 shouldn't be admitted given the late disclosure.
11 It should have been included in the Affidavit of
12 Documents ten years ago.

13 Now, in fairness, we have been
14 informed that in 2002 Mr. Townshend showed the
15 books to Mr. Penner and Mr. Lemmond or showed
16 some books, perhaps the same books, to
17 Mr. Penner and Mr. Lemmond during the
18 videotaping events of Rule 36 that you have
19 witnessed already. Because you will recall that
20 John Nadjiwon referred to those books and that
21 was the first time that book had been -- that
22 book had been raised.

23 Neither Mr. Lemmond nor Mr. Penner
24 have any recollection of that, but Mr. Townshend
25 does have a recollection of it.

11:34:06 1 But the books were not relevant until
11:34:09 2 2008 when the plaintiffs added that to a
11:34:12 3 response to demand for particulars. Until that
11:34:14 4 time, these were land sale books that had
11:34:18 5 nothing to do with the case.

11:34:22 6 THE COURT: So I'm looking at four
11:34:23 7 pages of something. You're saying that
11:34:26 8 plaintiff's counsel has not only these four
11:34:29 9 pages but, in fact, either four or other number
11:34:32 10 of books that have variously been referred to in
11:34:34 11 this trial and let you know that last week?

11:34:37 12 MR. BEGGS: Yes, Your Honour.

11:34:38 13 THE COURT: And have you had a chance
11:34:40 14 to look at them?

11:34:42 15 MR. BEGGS: Yes, we've looked through
11:34:43 16 them.

11:34:44 17 THE COURT: Okay. And is there four
11:34:45 18 or is there more?

11:34:46 19 MR. BEGGS: Books, there's -- well,
11:34:48 20 they have been dismantled because of the age,
11:34:51 21 but there appears to be 16 separate books or so.
11:34:54 22 Is that correct?

11:34:55 23 MS. GUIRGUIS: I believe so.

11:34:56 24 THE COURT: Well, let me hear from
11:34:57 25 plaintiff's counsel about this. Sorry,

1 Mr. Feliciant, did you wish to add something
2 before I move on to plaintiff's counsel?

3 MR. FELICIAN: I think my objection
4 would be mainly on the purpose for which it's
5 being tendered anyway.

6 To the extent that these particular
7 pages are a sample of what could be -- we never
8 counted them because, for various reasons,
9 safety included -- we didn't examine every page
10 of these documents due to some mold damage which
11 you may hear about later.

12 But these are just four pages of what
13 could be a couple of hundred pages or even more.

14 So if the issue is simply the
15 plaintiffs hold records, I think -- and I don't
16 want to speak for Canada -- I would be prepared
17 to concede that the plaintiffs have in their
18 possession certain records.

19 However, there has not been any
20 evidence linking these particular four pages to
21 a barrel that was set on fire in a certain year,
22 whether it's 1958 or 1962.

23 So how are these four pages standing
24 alone relevant to anything without some evidence
25 linking them to that? So that would be my

11:36:20 1 additional objection, that it's not really even
11:36:21 2 a representative sample of the documents that
11:36:23 3 are in the possession of plaintiff's counsel.
11:36:24 4 And they are not really relevant standing on
11:36:27 5 their own, because they can't be directly linked
11:36:29 6 to any particular event a hundred or so years
11:36:31 7 ago.

11:36:40 8 THE COURT: Ms. Guirguis?

11:36:41 9 MS. GUIRGUIS: Your Honour, to address
11:36:42 10 the initial objection by Mr. Beggs, I believe
11:36:45 11 that he's already addressed that in 2008, my
11:36:49 12 understanding is that Mr. Gary Penner and
11:36:51 13 Mr. Peter Lemmond did inspect these documents in
11:36:54 14 2002. So there was previous notice of this.

11:37:02 15 In terms of the evidence establishing
11:37:04 16 that these are the documents referred to by
11:37:07 17 other witnesses, all we're seeking to establish
11:37:11 18 from Professor Johnston is that these are the
11:37:15 19 pages that she saw at the Nawash Band office.

11:37:18 20 THE COURT: To do that she is going to
11:37:19 21 have to remember these specific pages, but we're
11:37:22 22 not there yet. There are either two or three or
11:37:25 23 four, I forget, rules that apply to this
11:37:26 24 situation where there is late disclosure of
11:37:30 25 potentially relevant documents because, as you

11:37:32 1 all know, late disclosure is not exactly rare.

11:37:37 2 And we've got some options.

11:37:49 3 I think what I'm inclined to do, given
11:37:52 4 the time, is take the morning break. Counsel
11:37:55 5 should refresh their memory on those rules which
11:37:57 6 you, no doubt, will locate, and if you find one
11:38:08 7 keep going, because there's more, to do with
11:38:12 8 request to introduce at trial documents that
11:38:14 9 were not previously disclosed or disclosed in a
11:38:18 10 timely way.

11:38:20 11 And I will obviously want to have
11:38:23 12 regard for those specific rules before I make a
11:38:26 13 ruling on whether or not this witness can answer
11:38:29 14 ask what would be a narrow question, which is
11:38:31 15 whether or not these particular four pages she
11:38:33 16 can specifically identify as having seen before.

11:38:39 17 So we'll take the break for 20 minutes
11:38:41 18 now, and you can -- I'm sure I see computers
11:38:45 19 everywhere. You can look at the applicable
11:38:47 20 rules and then -- because you will see from the
11:38:52 21 rules, Ms. Guirguis, it's your -- I'll stand to
11:38:56 22 be corrected if my recollection is wrong, but my
11:38:58 23 recollection is that it's your burden, under
11:39:00 24 these rules. So I'll be hearing from you first.
11:39:03 25 All right?

11:39:04 1 MS. GUIRGUIS: Okay. Thank you, Your
11:39:04 2 Honour.
11:39:04 3 -- RECESSED AT 11:38 A.M. --
11:39:04 4 -- RESUMED AT 12:03 P.M. --
11:39:04 5 THE COURT: I understand counsel have
12:04:14 6 come to a resolution on this issue.
12:04:16 7 MS. GUIRGUIS: That's correct, Your
12:04:16 8 Honour. My friends have agreed to withdraw
12:04:18 9 their objections to entering it as an exhibit.
12:04:22 10 So if it is okay with you, I'd like to enter it
12:04:25 11 as an exhibit stating that these pictures are a
12:04:28 12 random selection of documents that Professor
12:04:36 13 Darlene Johnston would have seen at the Nawash
12:04:39 14 Band office.
12:04:40 15 THE COURT: And that's on consent?
12:04:43 16 Yes?
12:04:44 17 MR. FELICIAN: That's fine, Your
12:04:44 18 Honour.
12:04:46 19 THE WITNESS: Exhibit number 4089.
12:04:48 20 EXHIBIT NO. 4089: Four pictures of
12:04:48 21 damaged documents, random selection.
12:04:54 22 BY MS. GUIRGUIS:
12:04:55 23 Q. Professor Johnston, you
12:04:55 24 mentioned, prior to us taking a break, that the
12:05:03 25 documents had been moved from the Band office to

12:05:06 1 the Land Claims office. Do you have knowledge
12:05:07 2 of why it was moved?

12:05:09 3 A. The safe was larger and we
12:05:11 4 thought it was more secure.

12:05:19 5 Q. Thank you.

12:05:19 6 MS. GUIRGUIS: The only remaining
12:05:20 7 matter, Your Honour, is that Mr. Registrar has
12:05:24 8 noted I neglected to add document number SC0550
12:05:29 9 which is an Order in Council setting aside the
12:05:31 10 fishing islands as reserve as an exhibit.

12:06:05 11 THE COURT: Just give me a moment.
12:06:05 12 I'll find that in my notes. Mr. Registrar, I
12:06:05 13 have that as 4084 unless there is more than one
12:06:09 14 Order in Council.

12:06:12 15 THE REGISTRAR: It is not marked, Your
12:06:13 16 Honour.

12:06:14 17 THE COURT: What is 4084?

12:06:16 18 THE REGISTRAR: 4084 is Band Council
12:06:19 19 Resolution from September 22nd, 1982.

12:06:37 20 THE COURT: I'll have to go back and
12:06:38 21 check that which I can do independently. So
12:06:41 22 what is the number you're giving to the Order in
12:06:43 23 Council of February 20, 1980?

12:06:49 24 THE REGISTRAR: 4090.

12:06:50 25 EXHIBIT NO. 4090: Order in Council

12:06:51 1 setting aside the fishing islands as
12:06:51 2 reserve, dated February 20, 1980. OIC
12:06:51 3 re. lands surrendered in 1885, Privy
12:06:51 4 Council, File P.C. 1980-531 (Jones v.
12:06:51 5 Nadjiwon - Fishing Trial Exhibits).
12:06:51 6 Document number SC0550.

12:06:56 7 THE COURT: And just again,
12:06:56 8 Mr. Registrar, the exhibit number that you gave
12:07:02 9 to the four pages of -- four photographs of
12:07:07 10 pages that were just described by counsel.

12:07:11 11 THE REGISTRAR: It's 4089.

12:07:32 12 THE COURT: Thank you, counsel.

12:07:34 13 MS. GUIRGUIS: Thank you, Your Honour.
12:07:33 14 Thank you, Professor Johnston.

12:07:35 15 THE COURT: Does Canada wish to ask
12:07:36 16 questions?

12:07:37 17 MR. BEGGS: Yes, Your Honour.

12:07:38 18 THE COURT: Please go ahead,
12:07:39 19 Mr. Beggs.

12:07:39 20 CROSS-EXAMINATION BY MR. BEGGS:

12:08:39 21 Q. My apologies, Your Honour.

12:08:42 22 Good morning, Professor Johnston.

12:08:43 23 A. Good morning.

12:08:47 24 Q. Now, I understand that you're the
12:08:50 25 daughter of a -- of a previous witness that we

12:08:53 1 had Ted Johnston, or Edward Johnston?

12:08:56 2 A. Yes.

12:08:57 3 Q. And he testified earlier on in
12:09:01 4 this trial. And I understand that he was in the
12:09:07 5 military for 20 years?

12:09:10 6 A. Yes.

12:09:11 7 Q. And your family travelled and
12:09:14 8 lived in different locations for some period of
12:09:17 9 time?

12:09:17 10 A. Yes.

12:09:18 11 Q. When was the first time you lived
12:09:21 12 on the Nawash reserve?

12:09:22 13 A. I didn't live there as a child.
12:09:25 14 The first time I lived there would have been the
12:09:27 15 summer of 1980.

12:09:29 16 Q. When you were a summer student?

12:09:30 17 A. Yes.

12:09:31 18 Q. Okay. And when you started as a
12:09:39 19 summer student in 1980 the Chief was Frank
12:09:43 20 Solomon, is that right?

12:09:45 21 A. I don't recall.

12:09:53 22 Q. Now, one of the Chiefs that you
12:10:06 23 referred to in your interview, and that appeared
12:10:08 24 on the exhibits my friend took you to this
12:10:11 25 morning, was Wilmer Nadjiwon?

12:10:13 1 A. Yes.

12:10:13 2 Q. You're familiar with Chief
12:10:15 3 Nadjiwon?

12:10:15 4 A. Yes.

12:10:16 5 Q. Is it correct that he was Chief
12:10:18 6 approximately from 1964 to 1977?

12:10:26 7 A. I can't say for sure. I know he
12:10:28 8 was a Chief in the '60s.

12:10:42 9 Q. I'd like to call up your
12:10:43 10 interview with the Professor Brownlie. I
12:10:47 11 believe that was Exhibit 3924.

12:11:13 12 Now, had you ever spoken to Professor
12:11:20 13 Brownlie before this occasion?

12:11:21 14 A. I met her once at the University
12:11:23 15 of Manitoba when I was there to give a guest
12:11:26 16 lecture.

12:11:29 17 Q. And you indicated that you signed
12:11:31 18 a consent form which allowed the use of your
12:11:35 19 material for this litigation?

12:11:36 20 A. Yes.

12:11:38 21 Q. Did Professor Brownlie ask you to
12:11:39 22 sign a second consent form for his use?

12:11:43 23 A. Not that I recall.

12:11:53 24 Q. If I could go to page 2 of the
12:12:03 25 interview.

1 I believe you stated in your
2 interview, and you can correct me if this isn't
3 what you recall, that the Indian Agent didn't
4 leave Cape Croker until about 1968?

5 A. That was my recollection.

6 Q. And you tied the event of the
7 Indian Agent leaving with your recollection of
8 the story of the Indian Agent burning records?

9 A. Yes.

10 Q. So they happened more or less at
11 the same time, as far as you know?

12 A. As far as I know.

13 Q. And you indicated in your
14 interview that the caretaker who intervened was
15 George Keeshig?

16 A. Yes.

17 Q. And you mentioned that you had
18 heard the story from several elders. Was the
19 story always that it was George Keeshig?

20 A. I don't recall actually.

21 Q. So while I have this document up,
22 can you just go to page 5? And there is a
23 paragraph beginning "And so [...]". Sorry, it's
24 the middle. It starts, "Carl Keeshig".

25 So you were talking about the event of

12:14:44 1 the summer of 1980 I believe?

12:14:47 2 A. Yes.

12:14:47 3 Q. And you described the individuals
12:14:48 4 who worked with you, Carl Keeshig being one of
12:14:52 5 the people whom we've heard from already. And
12:14:55 6 then you say:

12:14:56 7 "And so we were basically tasked
12:14:58 8 with going through all the records
12:15:00 9 that were in the old safe in the Band
12:15:02 10 office and just trying to learn
12:15:04 11 about -- learning how the lands had
12:15:06 12 been managed and how people could --
12:15:08 13 we could get to the table."

12:15:12 14 So this old safe in the Band office,
12:15:19 15 can you describe how big it is or was, I should
12:15:23 16 say?

12:15:24 17 A. It was a walk -- it was not a
12:15:26 18 walk-in safe, but it was quite tall.

12:15:31 19 Q. Stood on the floor, did it?

12:15:32 20 A. Yes.

12:15:40 21 Q. And you've reviewed some
12:15:41 22 materials with, recently about -- that came from
12:15:48 23 that safe, as I understand?

12:15:50 24 A. Yes.

12:15:51 25 Q. Were there materials other than

12:15:53 1 what you've looked at recently that were there
12:15:55 2 that are no longer there?

12:16:02 3 A. Not that I can recall.

12:16:03 4 Q. And so when you later moved the
12:16:08 5 documents from -- this is the safe you moved
12:16:15 6 the documents from that you then moved to the
12:16:17 7 research office?

12:16:18 8 A. Yes.

12:16:18 9 Q. And you took all the documents
12:16:20 10 that were there?

12:16:20 11 A. Yes.

12:16:30 12 Q. And most of these documents were
12:16:31 13 in the form of books, large ledger books?

12:16:35 14 A. Ledger books and also some letter
12:16:37 15 books.

12:16:39 16 Q. None of the books were minute
12:16:40 17 books, were they?

12:16:44 18 A. Not that I recall.

12:16:46 19 Q. And your understanding is that
12:16:48 20 these documents always pertained to Cape Croker
12:16:57 21 to Nawash, is that correct?

12:16:59 22 A. Well, they were -- the ledger
12:17:01 23 books were for unsold, surrendered lands, so I
12:17:04 24 assumed they would pertain both to Nawash and
12:17:08 25 Saugeen.

12:17:08 1 Q. Are you aware of any books from
12:17:10 2 Saugeen being kept in the Nawash safe?

12:17:13 3 A. No.

12:17:13 4 Q. And so I think you said this
12:17:25 5 morning that you believed that the documents
12:17:26 6 were there in -- they may have been there in
12:17:27 7 1980, but they were certainly there in 1991?

12:17:31 8 A. I believe that I saw them in
12:17:32 9 1980. I don't have a really firm recollection,
12:17:35 10 but I definitely remember seeing them in 1992 I
12:17:38 11 think.

12:17:38 12 Q. So this document that we've just
12:17:40 13 recently looked at, this four-page document, you
12:17:43 14 recall that from 1992, is that right?

12:17:46 15 A. Yes.

12:17:47 16 Q. Or from a period 1992 to 2001?

12:17:50 17 A. Yes.

12:17:51 18 Q. I'd like to call up a document.
12:18:13 19 It is SC0730. It is an Indian Annual Report
12:18:22 20 from 1959. Are you familiar with the Indian
12:18:45 21 annual reports?

12:18:46 22 A. Yes.

12:18:46 23 Q. You have looked through many of
12:18:47 24 them I believe --

12:18:48 25 A. Yes.

12:18:49 1 Q. -- in your work.

12:19:11 2 If you can go to the first page.

12:19:18 3 MR. MCCULLOCH: I may have to download
12:19:20 4 another copy.

12:19:22 5 MR. BEGGS: Oh dear. I'll come back
12:19:30 6 to that, my apologies.

12:19:32 7 BY MR. BEGGS:

12:19:43 8 Q. In your interview with Professor
12:19:50 9 Brownlie, you mentioned that there was a ban on
12:19:53 10 hiring lawyers for Indian -- Indians hiring
12:19:56 11 lawyers?

12:19:59 12 A. Yes.

12:20:00 13 Q. And is that the statute from 1927
12:20:01 14 that you're referring to?

12:20:03 15 A. Yes.

12:20:04 16 Q. And --

12:20:16 17 THE COURT: Counsel, all right. Is
12:20:16 18 that the statute you referred to?

12:20:17 19 MR. BEGGS: No, that's the document
12:20:17 20 I'm asking Professor --

12:20:17 21 THE COURT: Well, I'm presuming you
12:20:17 22 know the name of the statute? You could --

12:20:19 23 MR. BEGGS: Yes.

12:20:20 24 BY MR. BEGGS:

12:20:20 25 Q. The Indian Act, and for the

1 record, Statutes of Canada 1927, chapter 98,
2 section 141?

3 A. Yes.

4 Q. I see. It's up on the screen
5 now.

6 THE COURT: All right.

7 BY MR. BEGGS:

8 Q. Now, this document is already an
9 exhibit, Exhibit 3964. Is this the statute
10 provision you're referring to?

11 A. Yes.

12 Q. And this was repealed in 1951 was
13 your understanding?

14 A. Yes.

15 Q. And this -- well, I won't ask you
16 to interpret it, thank you. Although I know it
17 would be interesting.

18 THE COURT: Well, it would give
19 plaintiff's counsel a chance to stand up. She
20 looks like she's ready to.

21 BY MR. BEGGS:

22 Q. Do we have the 1959 report?

23 So if you could scroll down. So this
24 is the report, the Indian Affairs Branch for the
25 fiscal year March 31st -- ending March 31st,

12:21:31 1 1959. And I see my friend is standing up.

12:21:34 2 MS. GUIRGUIS: Your Honour, we've just
12:21:35 3 received this, and it's several pages long. I'm
12:21:38 4 wondering if we could have a few minutes to
12:21:41 5 review it before --

12:21:43 6 THE COURT: Yes, you can, if that's
12:21:44 7 the situation. Mr. Beggs?

12:21:47 8 MR. BEGGS: Yes, Your Honour.

12:21:48 9 THE COURT: You already deferred this
12:21:49 10 topic once. Perhaps you can defer it a second
12:21:52 11 time.

12:21:52 12 MR. BEGGS: Certainly, Your Honour.

12:21:57 13 MS. GUIRGUIS: Thank you, Your Honour.

12:21:59 14 THE COURT: And depending on where we
12:21:59 15 are, perhaps what we could do is stop at 10
12:22:00 16 minutes to 1:00 o'clock, and if you have
12:22:03 17 completed your other questions before then just
12:22:05 18 say so. So let's take it one step at a time.

12:22:09 19 MR. BEGGS: Thank you, Your Honour.

12:22:23 20 MS. GUIRGUIS: Thank you, Your Honour.

12:22:30 21 BY MR. BEGGS:

12:22:30 22 Q. So I won't go over the interview
12:22:32 23 generally with Professor Brownlie that you did,
12:22:35 24 but the gist of it, as I understand it -- and
12:22:38 25 let me know if you agree -- is that the members

1 of SON were persistent and vigilant in pursuing
2 their rights, is that correct?

3 A. Yes.

4 Q. And that's from as early as 1836
5 to the present?

6 A. Yes.

7 Q. And they made demands in a
8 variety of ways through complaints, petitions,
9 BCRs, legal actions? Is that correct?

10 A. Yes.

11 Q. Sorry to jump back for a moment,
12 but I mentioned George Keeshig. Could you tell
13 me who George Keeshig was?

14 A. He was -- by the time I got to
15 know him, he was an Elder in the community. And
16 at that -- again, at the time that I got to know
17 him, which would be in probably the '80s, he
18 was a caretaker at the school on the reserve.

19 Q. And so when you mentioned in your
20 interview that a caretaker -- that he was a
21 caretaker and you -- he was a caretaker for the
22 school, was he?

23 A. At that point in time, yes.

24 Q. So he wasn't a caretaker for the
25 Indian Agent's office or the Band office or

12:24:14 1 anything like that?

12:24:15 2 A. I'm not sure what position he
12:24:16 3 would have had in the '60s.

12:24:19 4 Q. Do you know when he stopped being
12:24:20 5 a caretaker?

12:24:25 6 A. No, I don't.

12:24:54 7 Q. So if I could return to the 1959
12:24:57 8 report for a moment.

12:24:58 9 THE COURT: Is that satisfactory,
12:25:00 10 Ms. Guirguis?

12:25:01 11 MS. GUIRGUIS: Yes, Your Honour.

12:25:03 12 THE COURT: Please, go ahead.

12:25:05 13 BY MR. BEGGS:

12:25:06 14 Q. And as I said, it's SC0730. And
12:25:09 15 it's the report of the Indian Affairs Branch for
12:25:12 16 the fiscal year ended March 31st, 1959. And I
12:25:17 17 would like to make this the next exhibit, if
12:25:21 18 possible.

12:25:21 19 THE COURT: Any objection?

12:25:22 20 MS. GUIRGUIS: No, Your Honour.

12:25:23 21 THE WITNESS: Exhibit 4091.

12:25:25 22 EXHIBIT NO. 4091: Report of the
12:25:26 23 Indian Affairs Branch For the Fiscal
12:25:26 24 Year Ended March 31, 1959 (Excerpt).
12:25:26 25 Document number SC0730.

12:25:28 1 BY MR. BEGGS:

12:25:29 2 Q. If I could go to page 4 of the
12:25:30 3 PDF -- sorry, I should have qualified that as
12:25:33 4 it's an excerpt from the --

12:25:35 5 THE COURT: We'll make that change to
12:25:37 6 the description of the exhibit, Mr. Registrar.

12:25:42 7 THE REGISTRAR: Yes, Your Honour.

12:25:43 8 BY MR. BEGGS:

12:25:44 9 Q. Page 4 of the PDF, page 28 of the
12:25:48 10 document. In the last third of the page, it
12:25:55 11 states, third last paragraph:

12:26:00 12 "Cape Croker and Saugeen
12:26:01 13 reserves, formerly separate Indian
12:26:03 14 Agencies, were combined as the Bruce
12:26:06 15 agency with one Superintendent located
12:26:08 16 at Chippewa Hill."

12:26:10 17 Could you tell me what Chippewa Hill
12:26:12 18 is?

12:26:13 19 A. It's the location of the, one of
12:26:16 20 the names that's used for Saugeen reserve.

12:26:24 21 Q. And there was an Indian Affairs
12:26:25 22 office there, was there?

12:26:26 23 A. Yes.

12:26:27 24 Q. And that's the office that I
12:26:28 25 think you referred to and -- Mary Jones --

12:26:33 1 A. Marie Jones.

12:26:34 2 Q. Marie Jones?

12:26:35 3 A. Yes.

12:26:36 4 Q. But is your -- seeing this
12:26:39 5 document that says the two agencies were
12:26:44 6 combined you -- at some point in your research,
12:26:46 7 you came across the agencies being combined?

12:26:50 8 A. Yes, I knew there was a district
12:26:53 9 office at the time that I was working as
12:26:55 10 research co-ordinator.

12:26:59 11 Q. And you dealt exclusively with
12:26:59 12 the -- there was no office on Cape Croker when
12:27:03 13 you were there?

12:27:03 14 A. No.

12:27:05 15 Q. And would you accept that the
12:27:07 16 office closed down -- the office on Cape Croker
12:27:11 17 closed down in 1958 or 1959?

12:27:15 18 A. That's what this report suggests,
12:27:17 19 yes.

12:27:25 20 Q. Now, in your interview with
12:27:33 21 Professor Brownlie you mentioned the Band office
12:27:41 22 burning down at some point, is that right?

12:27:45 23 A. It was the council hall.

12:27:46 24 Q. The council hall burned down?

12:27:48 25 A. Yes.

12:27:48 1 Q. And do you know when that was?

12:27:50 2 A. Around 1971 I think or after 1971
12:27:54 3 at least.

12:27:55 4 Q. And so did you ever come across
12:28:10 5 records which had been damaged in that fire in
12:28:13 6 your research?

12:28:15 7 A. Not that I can recall.

12:28:18 8 Q. If I understand your correction,
12:28:20 9 the Band office never burned down?

12:28:22 10 A. No.

12:28:26 11 Q. Now, the Saugeen Indian Affairs
12:28:30 12 office at Chippawa Hill closed down in 1997, is
12:28:35 13 that correct?

12:28:36 14 A. I'm not sure.

12:28:38 15 Q. It closed down while you were
12:28:39 16 working with them? Do you recall that event?

12:28:42 17 A. No, I don't.

12:28:57 18 Q. Okay. In that case that's the
12:28:59 19 last of my questions, thank you very much.
12:29:01 20 Thank you, Your Honour.

12:29:04 21 THE COURT: Ontario? Mr. Feliciant.

12:29:08 22 MR. FELICIAN: Thank you, Your
12:29:08 23 Honour.

12:29:09 24 CROSS-EXAMINATION BY MR. FELICIAN:

12:29:15 25 Q. Good afternoon, Professor

12:29:16 1 Johnston.

12:29:18 2 A. Good afternoon.

12:29:22 3 Q. We just have to transfer the
12:29:24 4 cables.

12:30:01 5 If you can think back to when you were
12:30:03 6 first approached by Professor Brownlie, and I'm
12:30:08 7 wondering, was it Professor Brownlie that first
12:30:10 8 approached you for conducting an interview?

12:30:13 9 A. Yes.

12:30:15 10 Q. Did anyone else from the Band
12:30:18 11 office contact you to facilitate the interview?

12:30:21 12 A. No.

12:30:29 13 Q. So how was it you obtained notice
12:30:30 14 that you would be interviewed? Was it -- you
12:30:33 15 said you had the interview questions provided in
12:30:35 16 advance. Can you tell me a bit about that
12:30:37 17 process?

12:30:38 18 A. So I received an e-mail from
12:30:39 19 Professor Brownlie introducing himself and
12:30:41 20 indicating that he'd been retained to do the
12:30:45 21 work that he was approaching me about. And we
12:30:49 22 agreed to a date that would be convenient for a
12:30:52 23 telephone interview. And the date of the -- the
12:30:55 24 day of the interview he actually sent me the
12:30:57 25 questions and the consent form.

1 Q. Were you consulted by anyone in
2 the Band office with respect to who would be
3 best for Professor Brownlie's interview?

4 A. No.

5 Q. Do you have any -- do you have
6 any knowledge of how Professor Brownlie selected
7 the various individuals to interview?

8 A. No.

9 Q. Did Professor Brownlie ask you to
10 provide any names of people that would be
11 beneficial for him to interview?

12 A. No.

13 Q. Now, if I can pull up your
14 interview transcript for a moment. It's Exhibit
15 3924. And if you look at the top of the page
16 just under your name, it says:

17 "Age unknown- much of her
18 knowledge from many years of being a
19 Band researcher."

20 Now, is that something you told him or
21 is that something he concluded?

22 A. I think that's something that he
23 concluded.

24 Q. Is it accurate?

25 A. Yes.

1 Q. Now I know this is a telephone
2 interview. Does this represent your entire
3 conversation?

4 A. Yes. Well, sorry, I should say
5 there was some discussion about the consent form
6 at the beginning of the interview, and then I'm
7 not sure if it shows up at the end of the
8 transcript, but that was also discussed.

9 Q. Is this the only interview you
10 had with Professor Brownlie?

11 A. Yes.

12 Q. Did you have any follow-up
13 discussions with him?

14 A. No.

15 Q. Did he reach out to you after the
16 interview for any further information or for any
17 clarifications?

18 A. No.

19 Q. Now, I know the transcript speaks
20 for itself, but I just want to tie this down
21 from your perspective. Professor Brownlie never
22 asked you specifically about the source of your
23 information that I could see. So he never asked
24 you, for example, where did you hear that from?
25 Who told you that? Is that fair?

1 A. I think so. I'm trying to -- I
2 don't recall every paragraph in the transcript
3 that I reviewed, but I think that's fair.

4 Q. And Professor Brownlie never
5 asked you specifically about how your
6 communities preserve oral tradition to ensure
7 accuracy and reliability over time? He never
8 asked you any of those questions?

9 A. No.

10 Q. Professor Brownlie never asked
11 you if you had any discussions with former
12 councilors around the issue of why the
13 communities had not commenced claims against
14 Canada or Ontario before 1994?

15 A. No.

16 Q. And Professor Brownlie never
17 asked you who he should speak to regarding this
18 kind of information?

19 A. No.

20 Q. Can we bring up -- again, I think
21 we're on the same page, Exhibit 3924, page 6.
22 If we could go to page 6, the middle of the
23 page.

24 In the middle of the page, I'm trying
25 to take you to "Sometime after 1971 [...]". Do

12:34:48 1 you see the reference right there?

12:34:49 2 A. Yes.

12:34:50 3 Q. The next sentence starts:

12:34:52 4 "Anyway, Wilmer Nadjiwon would be
12:34:54 5 the person to talk about. I mean,
12:34:56 6 probably there's lots of Elders who
12:34:58 7 could speak to the power of the Indian
12:35:00 8 Agent and how much they were -- he was
12:35:02 9 resented."

12:35:08 10 And if we go a little further down to
12:35:10 11 the bottom of the same page, you'll see "JB".
12:35:15 12 You'll see the reference to "JB", "JB, yeah" --
12:35:22 13 referring to Jarvis Brownlie:

12:35:27 14 "Yeah, I have heard that story
12:35:29 15 from a few people, and it is quite
12:35:31 16 striking. I don't recall having heard
12:35:33 17 anywhere else about the Indian Agent
12:35:35 18 burning the records. And that was --
12:35:37 19 was that when he was being run out of
12:35:39 20 town or [...]"

12:35:41 21 And if we can go to the next page, you
12:35:41 22 respond, DJ:

12:35:43 23 "Yes, I think he was basically
12:35:44 24 given notice that they wanted him to
12:35:46 25 leave and that happened. But it would

12:35:48 1 be -- like I said, if you get a chance
12:35:50 2 to talk to Wilmer, or any of the other
12:35:52 3 Elders that were politically active at
12:35:55 4 the time, they could probably explain.
12:35:57 5 I'm sure it was something that
12:35:59 6 happened, that it was the Chief and
12:36:02 7 council that made that decision."

12:36:05 8 Now, I'm assuming the decision you're
12:36:06 9 talking about is to ask or tell the Indian Agent
12:36:09 10 to leave?

12:36:10 11 A. Yes.

12:36:11 12 Q. Now, did Professor Brownlie not
12:36:14 13 ask you who the other Elders were that he should
12:36:17 14 speak to?

12:36:18 15 A. No.

12:36:19 16 Q. And are you aware whether
12:36:21 17 Professor Brownlie ever spoke to Wilmer?

12:36:31 18 A. I'm trying to remember. I've
12:36:36 19 seen the list of the interviews, but I can't
12:36:39 20 recall.

12:36:50 21 Q. I'd like to ask you some
12:36:52 22 questions, again, just about your research in
12:36:55 23 1980. In 1980, as a summer student, you
12:37:00 24 reported to Paul Williams, is that right?

12:37:02 25 A. Yes.

12:37:06 1 Q. And at that time as a summer
12:37:09 2 student, how long were you there?

12:37:14 3 A. Maybe three months.

12:37:17 4 Q. And what was the focus of the
12:37:18 5 research you were asked to do?

12:37:21 6 A. Partly it was, first of all, to
12:37:23 7 learn something about the land claims process
12:37:25 8 and then to do work on unsold, surrendered
12:37:31 9 lands.

12:37:35 10 Q. And at the time in 1980, was it
12:37:38 11 your understanding that it was being
12:37:40 12 contemplated to make a request of Canada and/or
12:37:43 13 Ontario in respect of the unsold, surrendered
12:37:46 14 lands?

12:37:46 15 A. Yes.

12:37:51 16 Q. And when you came back in 1991
12:37:54 17 and you were doing research as the research
12:37:59 18 co-ordinator, did you share your research
12:38:01 19 findings with Chief and council?

12:38:03 20 A. Yes.

12:38:03 21 Q. And did you share your research
12:38:06 22 findings with community members who happened to
12:38:08 23 be interested and would ask you about it?

12:38:15 24 A. Yes.

12:38:16 25 Q. And how often would you speak

12:38:17 1 about your research at community events or
12:38:20 2 functions?

12:38:23 3 A. Not very often.

12:38:24 4 Q. But you would do it from time to
12:38:25 5 time?

12:38:26 6 A. From time to time.

12:38:38 7 Q. Now, if we could just go -- stay
12:38:40 8 on the same -- back to page 6. If we can go
12:38:43 9 back to page 6, please. I'd like to ask you
12:38:47 10 some questions about the burning of the records.

12:38:57 11 And I believe the story starts a
12:38:59 12 little further down the page. It's the last
12:39:03 13 half of the page starting at:

12:39:09 14 "I think it was the late
12:39:11 15 '60s[...]."

12:39:15 16 And then after that you say:

12:39:16 17 "One of the stories that people
12:39:17 18 have told me was [...]"

12:39:19 19 Do you see that?

12:39:19 20 A. Yes.

12:39:20 21 Q. Did Professor Brownlie ask you
12:39:21 22 who those people were?

12:39:23 23 A. No.

12:39:24 24 Q. Did Professor Brownlie ask you
12:39:26 25 about any of the other versions of the story

12:39:29 1 that had been reported by various community
12:39:32 2 members?

12:39:33 3 A. No.

12:39:42 4 Q. Now, you spoke about -- just
12:39:48 5 before that part, you mentioned that the Band
12:39:52 6 office burned down the year, sometime after '71
12:39:57 7 and you answered some questions from Mr. Beggs
12:39:59 8 about that.

12:40:05 9 So can I just ask you, did the Band
12:40:07 10 have an inventory of records that existed before
12:40:09 11 1971 and then after 1971?

12:40:14 12 A. I'm not aware.

12:40:15 13 THE COURT: Sorry, can you just stop
12:40:16 14 for a moment. Ms. Guirguis?

12:40:19 15 MS. GUIRGUIS: Your Honour, when my
12:40:20 16 friend Mr. Beggs asked the question about the
12:40:22 17 Band office, the witness had clarified the
12:40:25 18 council hall. He had asked this question about
12:40:27 19 the Band office burning down, and she had
12:40:29 20 clarified council hall.

12:40:32 21 THE COURT: Right. Mr. Feliciant --

12:40:42 22 MR. FELICIAN: I can rephrase the
12:40:43 23 question.

12:40:43 24 THE COURT: He can rephrase his
12:40:43 25 question. Thank you, counsel.

12:40:45 1 MR. FELICIANANT: Perhaps I won't get
12:40:46 2 hung up --

12:40:47 3 THE COURT: Just before you don't get
12:40:47 4 hung up on that, you asked whether the Band
12:40:49 5 office had the inventory of records.

12:40:56 6 MR. FELICIANANT: Yes.

12:40:56 7 THE COURT: Is that the question
12:40:56 8 you're about to rephrase or are you going on to
12:40:59 9 something else?

12:41:01 10 MR. FELICIANANT: No. I'm going to stay
12:41:02 11 with that question but rephrase it.

12:41:04 12 THE COURT: All right. Please, go
12:41:05 13 ahead.

12:41:06 14 BY MR. FELICIANANT:

12:41:07 15 Q. So in terms of the records kept
12:41:09 16 by Saugeen and Nawash, the two communities, did
12:41:13 17 the communities have a record or inventory of
12:41:19 18 the records that existed prior to 1971 and then
12:41:24 19 a separate list after 1971?

12:41:27 20 A. Not that I'm aware.

12:41:35 21 Q. And is there any inventory of
12:41:37 22 records that existed prior to 1958 and after
12:41:40 23 1962?

12:41:48 24 A. Not that I'm aware.

12:41:57 25 Q. Were you aware in 1991 when you

1 viewed the records in the safe, of which the
2 four pages that were made an exhibit was a
3 sample, were you aware that they had suffered
4 from mold and water damage?

5 A. Yes.

6 Q. And did you take any precautions
7 at the time in handling the records?

8 A. Tried to be as gentle with them
9 as I could, and moved them into the safe at the
10 research office. They weren't generally handled
11 after that.

12 Q. And have you seen the records
13 recently?

14 A. Yes.

15 Q. And would you agree with me that
16 the records that you did see recently show no
17 evidence of obvious fire damage?

18 THE COURT: Mr. Guirguis?

19 MS. GUIRGUIS: Your Honour, the
20 witness is not an expert in identifying
21 particular types of damage, so we would object
22 to that question.

23 THE COURT: I mean, she is not and
24 I'll take that into account. But in the
25 ordinary person, I think, would have a lay

1 person's opinion about what fire damage looks
2 like. And this witness can certainly explain
3 what she means by it.

4 So I will permit the question, which
5 was, do you agree that when she saw them
6 recently there was no evidence of obvious fire
7 damage?

8 THE WITNESS: Yes, I agree with that.

9 MR. FELICIAN: Thank you, Your
10 Honour. Those are my questions.

11 THE COURT: Thank you. Any
12 re-examination, counsel?

13 MS. GUIRGUIS: No, Your Honour.

14 THE COURT: Thank you. Professor, I
15 do have what you are going to think is a simple
16 question and no one else asked it and that's
17 probably because counsel know the answer.

18 On two occasions when you were asked
19 to describe these books that you viewed, you
20 were asked if they were ledger books and I think
21 both times you corrected that to say ledger
22 books and letter books. Am I hearing that
23 correctly?

24 THE WITNESS: Yes.

25 THE COURT: Can you just explain to me

12:44:17 1 what you mean by "letter book"?

12:44:20 2 THE WITNESS: There were books that
12:44:21 3 were kept which had copies of letters that had
12:44:24 4 been sent by the Indian Agent to various
12:44:26 5 persons, usually at the headquarters in Ottawa
12:44:29 6 of Indian Affairs.

12:44:33 7 THE COURT: So in my mind what I'm
12:44:35 8 imagining is books that contain letters without
12:44:38 9 any other documentation. It's just a way of
12:44:42 10 collecting them together?

12:44:43 11 THE WITNESS: Yes.

12:44:47 12 THE COURT: That's what you meant?

12:44:47 13 THE WITNESS: Yes.

12:44:47 14 THE COURT: All right. Now, having
12:44:48 15 asked that question, I want to ask first of all
12:44:49 16 Ms. Guirguis do you have any questions about
12:44:51 17 that question that I just asked of the witness
12:44:53 18 by way of follow-up?

12:45:01 19 MS. GUIRGUIS: No, Your Honour.

12:45:02 20 THE COURT: Mr. Beggs?

12:45:03 21 MR. BEGGS: No, Your Honour.

12:45:04 22 THE COURT: Mr. Feliciant?

12:45:05 23 CROSS-EXAMINATION BY MR. FELICIANANT:

12:45:08 24 Q. Just one, Your Honour. The
12:45:09 25 letter books that contained copies -- contained

12:45:10 1 the letters that you saw, would you agree that
12:45:13 2 they were copies -- original copies of letters
12:45:18 3 that were actually sent?

12:45:20 4 A. Yes.

12:45:23 5 MR. FELICIAN: Thank you, Your
12:45:23 6 Honour. That's the only question I had.

12:45:40 7 THE COURT: Professor Johnston, thank
12:45:41 8 you for coming to assist us all the way from
12:45:44 9 British Columbia. You can step down.

12:45:46 10 THE WITNESS: Thank you, Your Honour.

12:45:48 11 THE COURT: Counsel, I have a --
12:45:51 12 unrelated to this witness question and now is as
12:45:53 13 good a time as any since we have a few minutes.

12:45:56 14 One of the expert witnesses that has
12:45:58 15 been called had amongst the other documents in
12:46:01 16 their report a copy of their Rule 53
12:46:04 17 acknowledgment documentation, which is fine.

12:46:07 18 Because with, I think, only one
12:46:10 19 exception, all of the expert witnesses in this
12:46:11 20 trial have been testifying on consent at least
12:46:14 21 to some extent, I have assumed that to the
12:46:18 22 extent that any counsel wish to be satisfied
12:46:21 23 that those documents were signed, they have had
12:46:25 24 an opportunity to do that and that I should
12:46:27 25 proceed on the assumption that all of those

12:46:29 1 experts have executed the ordinary documentation
12:46:33 2 under Rule 53.

12:46:35 3 But, since it was in one of the
12:46:37 4 materials, I thought I would just get counsel to
12:46:41 5 confirm that my assumption was correct. So
12:46:44 6 starting with plaintiffs' counsel, is that
12:46:46 7 accurate, counsel?

12:46:47 8 MS. GUIRGUIS: Yes, that's accurate.

12:46:49 9 THE COURT: Canada?

12:46:49 10 MR. BEGGS: Yes, Your Honour.

12:46:51 11 THE COURT: Ontario?

12:46:53 12 MR. FELICIAN: Yes, Your Honour.

12:46:55 13 THE COURT: Thank you. Okay. So let
12:46:55 14 me -- we're going to resume tomorrow with which
12:47:01 15 expert is it again, counsel?

12:47:03 16 MS. GUIRGUIS: It's Mary Ann Corbiere
12:47:03 17 with Mr. Townshend and Mr. Brookwell.

12:47:13 18 THE COURT: So that's starting at
12:47:13 19 10:00 o'clock tomorrow morning. Is everything
12:47:16 20 proceeding in a timely way with respect to our
12:47:19 21 Friday motion and voir dire? Materials are
12:47:22 22 being exchanged? Everybody's on track? People
12:47:25 23 seem to be nodding their heads.

12:47:28 24 MS. GUIRGUIS: Yes, Your Honour.

12:47:29 25 THE COURT: What I'm going to ask you

12:47:32 1 to do with respect to the material is -- if
12:47:40 2 you've been across the street recently, you will
12:47:43 3 know that the office at which ordinarily you
12:47:46 4 would leave such material has moved down the
12:47:49 5 hall; it is not very complicated. But if at all
12:47:52 6 possible, it would be of assistance to me to
12:47:56 7 receive your materials for Friday both in
12:48:03 8 electronic form and with one paper copy
12:48:06 9 delivered to judges' administration, which room
12:48:12 10 number I could not tell you at this point but
12:48:13 11 you can't miss it. Because there is a big sign
12:48:16 12 on the old door telling you where the new door
12:48:18 13 is.

12:48:19 14 And can anyone give me a sense of -- I
12:48:21 15 know I made an order on dates. Did I make an
12:48:24 16 order on timing for Thursday? I'm trying to see
12:48:28 17 how much of this material I can get as soon as
12:48:30 18 possible so I can start looking it over.

12:48:34 19 This is motion material mainly in case
12:48:37 20 law. I think it's Canada's motion.

12:48:40 21 MR. BEGGS: Yes, Your Honour. I think
12:48:41 22 it was Tuesday for the motion materials.

12:48:45 23 THE COURT: That's still very
12:48:46 24 satisfactory.

12:48:48 25 MR. BEGGS: And Wednesday for the case

12:48:48 1 law on bias.

12:48:49 2 THE COURT: Okay. So all of it should
12:48:57 3 be delivered by the end of the day on Wednesday?

12:49:00 4 MS. GUIRGUIS: Yes, Your Honour.

12:49:01 5 THE COURT: That is very satisfactory.
12:49:04 6 Anything else before we adjourn for
12:49:06 7 our expert witness coming tomorrow?

12:49:38 8 MS. GUIRGUIS: No, Your Honour.

12:49:41 9 THE COURT: Thank you.

10 --- Whereupon the proceedings were
11 adjourned at 12:50 p.m.

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REPORTER'S CERTIFICATE

I, HELEN MARTINEAU, 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
accurate transcript of my shorthand notes so
taken. Dated this 21st day of July 2019.



PER: HELEN MARTINEAU
CERTIFIED SHORTHAND REPORTER

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