

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

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DAY 53 VOL 53  
October 21, 2019

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1 Court File No. 94-CQ-50872CM

2 ONTARIO  
3 SUPERIOR COURT OF JUSTICE

4 B E T W E E N:

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

8 - and -

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

18 Court File No. 03-CV-261134CM1

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

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

23 - and -

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

27 -----

28 -- This is the VOLUME 53/DAY 53 of the trial proceedings  
29 in the above-noted matter, being held at the Superior  
30 Court of Justice, 330 University Avenue, Courtroom 5-1,  
31 Toronto, Ontario, on the 21st day of October, 2019.

32 -----

33 B E F O R E:

34 The Honourable Justice Wendy M. Matheson

1           A P P E A R A N C E S :

2

3           Roger Townsend, Esq.,                                 for the Plaintiffs,  
4           & Krista Nerland, Esq.,                             The Chippewas of  
5           & Cathy Guirguis, Esq.,                            Saugeen First Nation,  
6           & Ben Brookwell, Esq.,                            and the Chippewas of  
7   Nawash First Nation.

8

9

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

13

14          David Feliciant, Esq.,  
15          & Jennifer Lepad, Esq.,                             for the Defendant,  
16          & Richard Ogden, Esq.,                             Her Majesty the  
17   Queen in Right of  
18   Ontario.

19

20

21

22

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

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04:06:55 1 -- Upon commencing at 10:02 a.m.

10:03:19 2

10:03:20 3 THE COURT: Good morning, Counsel.

10:03:22 4 MS. NERLAND: Good morning. The  
10:03:23 5 Plaintiffs would like to call Ryan Lauzon as the  
10:03:27 6 next witness.

10:03:28 7 Before we do, I just want to flag for  
10:03:30 8 the Court that Mr. Lauzon has had some unexpected  
10:03:33 9 health issues over the weekend, so if he needs  
10:03:35 10 additional breaks, we might need to ask for your  
10:03:37 11 indulgence.

10:03:38 12 THE COURT: Absolutely. In fact, he  
10:03:41 13 should say so himself, if that's the case. That's  
10:03:40 14 no problem.

10:04:05 15 THE REGISTRAR: Good morning.

10:04:06 16 THE WITNESS: Good morning.

10:04:07 17 THE REGISTRAR: Would you like to make  
10:04:08 18 an oath on the Holy Book or make a solemn  
10:04:12 19 affirmation to tell the truth?

10:04:13 20 THE WITNESS: An affirmation, yes.

10:04:15 21 THE REGISTRAR: Can you state and spell  
10:04:17 22 your first and last name for the record.

10:04:19 23 THE WITNESS: Ryan Lauzon.

10:04:19 24 THE REGISTRAR: Can you spell your last  
10:04:19 25 name, please?

10:04:21 1 THE WITNESS: L-A-U-Z-O-N.

10:04:25 2 THE REGISTRAR: Thank you.

10:04:19 3 RYAN LAUZON: AFFIRMED.

10:04:45 4 EXAMINATION IN-CHIEF MS. NERLAND:

10:04:52 5 THE COURT: Please go ahead, counsel.

10:04:53 6 Sir, before we begin, two things. One,

10:04:56 7 speak up loudly so that everyone including the

10:04:58 8 people in the back row can hear you.

10:05:00 9 And secondly, if you do need a break

10:05:03 10 for any reason just say so. All right?

10:05:04 11 THE WITNESS: Thank you.

10:05:05 12 THE COURT: Please go ahead.

10:05:06 13 BY MS. NERLAND:

10:05:07 14 Q. Good morning, Mr. Lauzon. I'm

10:05:10 15 going to begin by asking you a few questions to

10:05:12 16 introduce you to the court.

10:05:13 17 Are you a member of the Saugeen Ojibwe

10:05:15 18 Nation?

10:05:15 19 A. No.

10:05:16 20 Q. Where do you live?

10:05:17 21 A. I live at 102 Meadow Land Road,

10:05:20 22 South Bruce Peninsula.

10:05:21 23 Q. And where is that in relation to

10:05:24 24 the Chippewas of Nawash First Nation?

10:05:27 25 A. About half an hour south.



10:05:29 1 Q. What is your educational  
10:05:31 2 background?

10:05:31 3 A. Yes, I have a Diploma in  
10:05:33 4 Environmental Technology, and a Bachelor of Science  
10:05:37 5 with a major in zoology and minor in geography.

10:05:44 6 Q. What is your current job title?

10:05:48 7 A. My current job title is the  
10:05:50 8 Chippewas of Nawash Unceded First Nation Fisheries  
10:05:57 9 Assessment Biologist.

10:05:57 10 Q. And so the Chippewas of Nawash  
10:06:00 11 Unceded First Nation is your employer; is that  
10:06:01 12 right?

10:06:01 13 A. Yes.

10:06:02 14 Q. How long have you worked for the  
10:06:07 15 Chippewas of Nawash Unceded First Nation as the  
10:06:14 16 Fisheries Assessment Biologist?

10:06:14 17 A. Since July 2nd, 2008.

10:06:14 18 Q. What is the name of the program  
10:06:16 19 that you work with?

10:06:17 20 A. The Chippewas of Nawash Unceded  
10:06:25 21 First Nation Fisheries Assessment Program.

10:06:25 22 Q. Can you please describe for us  
10:06:29 23 just at a high level your role as the fisheries  
10:06:32 24 assessment biologist in this program?

10:06:34 25 A. So, essentially, I'm there to

1 manage the Fisheries Assessment Program, and the  
2 purpose of that is essentially to keep track of the  
3 amount of harvest in the Saugeen Ojibway Nation  
4 Commercial Fishery. And also -- so that would be  
5 gross effort, as well as keeping track of  
6 individual fish to get -- collect biological  
7 samples.

8 This data is used to inform the joint  
9 councils and ultimately the governance committee  
10 for management decisions related to the fishery.

11 Q. And just to clarify, when you say  
12 "joint council" what do you mean?

13 A. By "joint council" I mean a  
14 meeting between the Chippewas of Saugeen First  
15 Nation and the Chippewas of Nawash Unceded First  
16 Nation chiefs and councils.

17 Q. And I know you mentioned another  
18 governance committee and I'm going to come back to  
19 that.

20 But first I want to ask you to describe  
21 how, if at all, your team is involved in  
22 coordination of the fishery with other parties?

23 A. Yes. So we have relationships  
24 with universities, various government departments,  
25 for example, Department of Fisheries and Oceans,

1 The Ministry of Natural Resources and Forestry,  
2 we've just newly started a relationship with the  
3 Great Lakes Fisheries Commission, and I'm probably  
4 forgetting some now because we have quite a few  
5 relationships with various organizations.

6 Q. What is the Great Lakes Fisheries  
7 Commission, or Fishery Commission?

8 A. So the Great Lakes Fisheries  
9 Commission is a bi-national organization which  
10 includes Canada and the United States, including  
11 participation from the U.S. tribal organizations.

12 Essentially it was set up initially as  
13 a response to evasive sea/land prey that came in  
14 through the Welland Canal from the St. Lawrence and  
15 basically were causing quite a bit of destruction  
16 in the Great Lakes and in Lake Huron. For example,  
17 they wiped out lake trout essentially, or they were  
18 certainly one of the larger contributors along with  
19 overfishing.

20 Q. You mentioned tribal  
21 organizations; what do you mean?

22 A. For example, there's an  
23 organization called the Chippewa Odawa Resource  
24 Authority that's a group of five tribes that  
25 participate in -- with the Great Lakes Fisheries

1 Commission on various research fisheries-related  
2 matters.

3 Q. How does the Saugeen Ojibway  
4 Nation participate in the Great Lakes Fisheries  
5 Commission?

6 A. So, at one time, historically, the  
7 Saugeen Ojibway Nation was excluded from the Great  
8 Lakes Fisheries Commission. It's my understanding  
9 that Ontario took the position that they  
10 represented First Nation interests and also that  
11 there were too many First Nations so it was too  
12 difficult to have First Nations participation.

13 I've seen a change in that perspective  
14 from Ontario more recently, and we've seen,  
15 where -- for example, I can relate a number of  
16 things.

17 One, I guess it would be -- there's a  
18 dam on the Saugeen River, and we work closely with  
19 the Great Lakes Fisheries Commission to get it  
20 rebuilt as a barrier to spawning of sea/land prey  
21 and actually the two Bands won an award from the  
22 Great Lakes Fisheries Commission in recognition of  
23 their great partnership. And I was honored to be  
24 able to attend that award ceremony at the Saugeen  
25 River this past summer.

1 In addition to that, I was the  
2 principal investigator for a research proposal  
3 between the Saugeen Ojibway Nation, The Ministry of  
4 Natural Resources and a couple of universities,  
5 looking at the interactions between lake whitefish  
6 and lake trout.

7 It's something that has been identified  
8 as a priority by the Great Lakes Fisheries  
9 Commission and it's something that was a priority  
10 for the Saugeen Ojibway Nation and we were looking  
11 at those interactions, not only through western  
12 science but also through the Saugeen Ojibway Nation  
13 traditional ecological knowledge perspective. And  
14 that proposal went before the Great Lakes Fisheries  
15 Commission research board.

16 It was ultimately not successful,  
17 however, it was -- it seemed apparent from the  
18 comments that it was more due to a lack of  
19 understanding from western scientists about  
20 traditional ecological knowledge than the actual  
21 proposal itself.

22 And we actually heard back from the  
23 Great Lakes Fisheries Commission because they were  
24 extremely interested in our proposal, it was  
25 something new and very interesting to them. And we

1 ended up inviting them to the territory and we were  
2 in the process of working with them to hold a  
3 retreat in the territory next summer, so that they  
4 can come and learn from the Elders about  
5 traditional ecological knowledge and they also  
6 would very much like us to put our proposal back  
7 in, because they're very interested in this  
8 particular research.

9 Aside from that, the Saugeen Ojibway  
10 Nation was also invited to put a name forward as an  
11 advisor to the Fisheries Committee which we're just  
12 in the process of working out. So we will have a  
13 Saugeen Ojibway Nation community member sitting as  
14 an advisory to the -- as an advisor to the Great  
15 Lakes Fisheries Commission.

16 We have also expressed interest in  
17 sitting on their Lake Huron Technical Committee and  
18 are going to be working with them to see about how  
19 we can get to sit on that particular committee.

20 Q. Thank you. You mentioned earlier  
21 a governance table. What is that in relation to?

22 A. Yes, the governance committee is a  
23 committee that was formed under the substantial  
24 commercial fishing agreement between the Province  
25 and the Saugeen Ojibway Nation.

1 Q. And what are the key elements, at  
2 a high level, that the agreement covers?

3 A. So the agreement at a high level  
4 is a co-management agreement between the Province  
5 and the Saugeen Ojibway Nation on how the  
6 commercial fishery will be managed.

7 Q. Who sits on the governance  
8 committee?

9 A. So the governance committee  
10 consists of Ontario, with the Assistant Deputy  
11 Minister and some of her other representatives.  
12 And then on the Saugeen Ojibway Nation side it  
13 consists of at least one of the two chiefs as well  
14 as councillors from both -- a couple of councillors  
15 from both First Nations.

16 Q. Can you give us some examples  
17 of the kind of matters that are decided at that  
18 table?

19 A. Yes. So the governance committee  
20 essentially is trying to fulfill the terms of the  
21 substantial commercial fishing agreement. But in  
22 addition to that, anything that arises as a result  
23 of commercial fishing, any kind of issue or so on  
24 would be addressed through the governance  
25 committee.

1 Back when the agreement was initially  
2 negotiated, back in 2013, I was there, and I  
3 remember seeing former Chief Randall Kahgeey, he  
4 had a napkin in front of him and he was writing, on  
5 that napkin, what he saw as the four key pillars of  
6 the agreement.

7 One of them being total allowable  
8 catch; one of them being the bays; one of them  
9 being fish stocking; and one of them being the  
10 economics of the fishery.

11 So those, for example, would be some of  
12 the things that we would be looking at in our  
13 talks. For example, setting the total allowable  
14 catch for the Saugeen commercial fishery each year,  
15 that's one of the important purposes of the  
16 governance committee.

17 It could be addressing compliance  
18 issues not only, for example, if there was a  
19 Saugeen Ojibway Nation community member that was  
20 fishing and was doing something that was outside of  
21 the agreement, but what proves to be the most  
22 common case is issues where we have vandalism,  
23 theft or racist acts against commercial fishermen  
24 and just try to address that particular issue.

25 I'm actually working with a couple of



10:16:50 1 representatives of the Ministry of Natural  
10:16:54 2 Resources trying to address that right now. We're  
10:16:57 3 working on some signs that will inform the  
10:17:02 4 community, the surrounding communities about --  
10:17:07 5 about the commercial fishery and also the fines  
10:17:12 6 associated with tampering with nets because it's  
10:17:14 7 such a major issue.

10:17:17 8 Q. I have a couple of clarifying  
10:17:19 9 questions about that.

10:17:20 10 You mentioned vandalism, theft and  
10:17:23 11 racist acts against commercial fishermen. Which  
10:17:27 12 commercial fishermen are these?

10:17:29 13 A. The Saugeen Ojibway Nation  
10:17:30 14 commercial fishermen.

10:17:31 15 Q. And you also mentioned one of the  
10:17:32 16 pillars of the agreement was the bays; can you  
10:17:36 17 explain what you mean by that?

10:17:38 18 A. Yes. So previous to 2013 there  
10:17:41 19 have been agreements since the year 2000. And in  
10:17:44 20 those past agreements, Saugeen Ojibway Nation  
10:17:48 21 commercial fishermen were excluded from Owen Sound  
10:17:53 22 and Colpoy's Bay in order to satisfy recreational  
10:17:59 23 fishing interests.

10:18:04 24 Q. So when you say "the bays"?

10:18:07 25 A. Owen Sound and Colpoy's Bay.

1 Q. How long has the joint table been  
2 operating?

3 A. The joint table has been operating  
4 since the signing of what I will -- what would be  
5 the 2013 Substantial Commercial Fishing Agreement.

6 Q. And what was the situation before  
7 2013?

8 A. Yeah, so before 2013, there were  
9 other agreements in place. And it's my  
10 understanding, from the perspective of the Saugeen  
11 Ojibway Nation, that those previous agreements were  
12 seen as more or less peace agreements because there  
13 was so much controversy, racism, there were violent  
14 acts associated with the 1993 Justice Fairgrieve,  
15 or Jones and Nadjiwon decision, where the  
16 reaffirmation took the place of the right to a  
17 commercial fishery.

18 Q. I want to shift now to your other  
19 role in the Fisheries Assessment Program. What is  
20 the Fisheries Assessment Program?

21 A. So the Fisheries Assessment  
22 Program is a program that was initially started  
23 back in 1995 as a data collection program. So we  
24 are collecting information on the Saugeen Ojibway  
25 Nation commercial fishery. And that information is

10:19:40 1 used by the joint chiefs and councils, as I said,  
10:19:46 2 as well as the governance committee can make  
10:19:50 3 informed decisions.

10:19:52 4 Not only that, but the data we collect  
10:19:56 5 is part of our obligation under the Substantive  
10:20:01 6 Commercial Fishing Agreement to share the data we  
10:20:05 7 collect with the Province which we do on a yearly  
10:20:09 8 basis, every February.

10:20:10 9 Q. How big is the team that works  
10:20:12 10 with you on the Fisheries Assessment Program?

10:20:14 11 A. So there's myself, and then I have  
10:20:19 12 an assistant on the Chippewas of Nawash side. And  
10:20:23 13 we also hire summer students, and co-opt students,  
10:20:31 14 and those that are unemployed and so on through  
10:20:35 15 various employment programs to help us with our  
10:20:39 16 data collection. And on the Saugeen side, they  
10:20:43 17 have a senior fisheries technician as well.

10:20:47 18 Q. What is the relationship between  
10:20:50 19 the Fisheries Assessment Program and the Saugeen  
10:20:56 20 Ojibway Nation environment office?

10:20:57 21 A. So as I said earlier, I am an  
10:21:00 22 employee of the Chippewas of Nawash Unceded First  
10:21:03 23 Nation. I am not an employee of the Saugeen  
10:21:07 24 Ojibway Nation environment office. That being  
10:21:10 25 said, I do work very closely with them and have a

10:21:14 1 strong relationship with them. And that's a very  
10:21:18 2 necessary part of my job function.

10:21:20 3 Q. And aside from this data  
10:21:21 4 collection on a commercial fishery that you've  
10:21:24 5 started to describe, are you involved in any other  
10:21:26 6 research activities into Saugeen Ojibway Nation  
10:21:30 7 water use?

10:21:30 8 A. Yes. So, we have been involved  
10:21:34 9 with various universities over the years, do quite  
10:21:41 10 a bit of research in regards to the fisheries. I  
10:21:44 11 can give one example that we're working on right  
10:21:47 12 now and that's looking at a fish called Cisco.  
10:21:51 13 It's actually a group of fishes and they're very  
10:21:55 14 poorly understood. And we are actually in the  
10:21:57 15 process of conducting traditional ecological  
10:22:02 16 knowledge interviews with community members to  
10:22:06 17 learn more about Cisco. And we are also doing this  
10:22:11 18 in partnership with the National Park, the  
10:22:16 19 Department of Fisheries and Oceans and a couple of  
10:22:23 20 universities.

10:22:23 21 And we are going to use -- partly use  
10:22:26 22 the information from the traditional ecological  
10:22:31 23 knowledge interviews to help inform our sampling  
10:22:34 24 design and we're going to actually hire Saugeen  
10:22:37 25 Ojibway Nation commercial fishermen to go out and

10:22:40 1 set out some index nets in order to be able to  
10:22:44 2 understand more clearly the situation that's going  
10:22:46 3 on with Cisco because there's so many unknowns  
10:22:50 4 right now about them. And they are also some of  
10:22:54 5 the Cisco species that are species at risk.

10:22:59 6 Q. I want to ask you now about the  
10:23:01 7 data that you collect through the Fisheries  
10:23:04 8 Assessment Program. What is a "harvest effort"?

10:23:07 9 A. So a harvest effort refers to  
10:23:15 10 fishermen going out, setting a net, going back out  
10:23:20 11 and retrieving that net. And all the information  
10:23:25 12 that we collect about that particular net set.

10:23:30 13 Q. Does the fisheries assessment team  
10:23:32 14 track these harvest efforts?

10:23:34 15 A. Yes, we track these efforts on a  
10:23:38 16 routine basis. It's one of the main components of  
10:23:43 17 our jobs.

10:23:43 18 Q. What about subsistence and  
10:23:46 19 ceremonial fishing, is there any program in place  
10:23:50 20 for that?

10:23:51 21 A. There are no programs in place to  
10:23:53 22 track ceremonial or subsistence fishing, and we  
10:23:57 23 don't keep track of that.

10:23:59 24 Q. Why does the fisheries assessment  
10:24:02 25 team track commercial harvest efforts?

10:24:05 1 A. So we track commercial harvesting  
10:24:08 2 in order to help inform the joint council and the  
10:24:13 3 governance committee so that decisions can be made  
10:24:18 4 about sustainable levels of harvest.

10:24:22 5 Q. Can you explain to us how you go  
10:24:26 6 about backtracking or how you go back recording,  
10:24:29 7 rather, harvest efforts?

10:24:31 8 A. So, in order to record harvest  
10:24:35 9 efforts, we have a document that we fill out at the  
10:24:40 10 dock and it goes through all the information about  
10:24:44 11 that particular harvest. And we basically do an  
10:24:47 12 interview with the fishermen to find out, to be  
10:24:50 13 able to fill out that document.

10:24:52 14 In addition to that, we have a few  
10:24:55 15 other ways we are able to fill out those forms  
10:24:58 16 because we're not always able to catch the  
10:25:01 17 fishermen. One of those ways is through contacting  
10:25:05 18 the fish buyers, because the fish are being sold  
10:25:09 19 commercially so we can keep track of them through  
10:25:12 20 their records. We also issue the fishermen with  
10:25:15 21 what we call fish buyer books, which keep track of  
10:25:19 22 the amount, date, and weight of various species  
10:25:24 23 harvested.

10:25:25 24 So we -- there's three different forms  
10:25:28 25 for each sale. It's basically like a receipt book

10:25:38 1 and we keep one of the sheets. It creates a carbon  
10:25:41 2 copy, essentially.

10:25:43 3 And then finally, we do interviews with  
10:25:47 4 the fishermen where we go back and we'll identify  
10:25:51 5 anything that we missed. For example, if we show  
10:25:58 6 that a fishing event took place but we weren't  
10:26:00 7 there to track it we would do an interview with the  
10:26:03 8 fishermen to find out where they were and collect  
10:26:06 9 all that effort information to be able to fill out  
10:26:09 10 the form.

10:26:10 11 Q. How often does your team go out to  
10:26:13 12 gather data information on harvest efforts?

10:26:15 13 A. So it really varies by season.  
10:26:18 14 Because sometimes if the seasons, like the fall or  
10:26:24 15 the heaviest times of use, so we're out there more  
10:26:28 16 often than others.

10:26:29 17 But we try and do so on a regular basis  
10:26:33 18 and we try and get out there at least a couple of  
10:26:36 19 times a week.

10:26:37 20 Q. I'm going to bring up a document  
10:26:39 21 now which is SC1231. This is titled, "Saugeen  
10:26:47 22 Ojibway First Nations Commercial Fishery Assessment  
10:26:50 23 Program 2019 Harvest Effort Data Sheet."

10:26:53 24 Are you familiar with this document?

10:26:54 25 A. Very familiar. I've filled out

10:26:57 1 these forms many times.

10:26:58 2 Q. And what is it?

10:26:59 3 A. So this is the form that I was  
10:27:02 4 speaking about earlier, that goes through all the  
10:27:06 5 information that we collect about an effort that  
10:27:10 6 took place, as well as a harvest that took place.

10:27:14 7 MS. NERLAND: Your Honour, I'd like to  
10:27:16 8 add this form as the next exhibit.

10:27:19 9 THE COURT: Mr. Registrar.

10:27:20 10 THE REGISTRAR: Exhibit No. 4318.

10:27:23 11 EXHIBIT NO. 4318: Document entitled,  
10:26:45 12 "Saugeen Ojibway First Nations  
10:26:47 13 Commercial Fishery Assessment Program  
10:26:50 14 2019 Harvest Effort Data Sheet".

10:26:50 15 BY MS. NERLAND:

10:27:29 16 Q. You touched on this briefly, but  
10:27:32 17 who filled out this form?

10:27:35 18 A. So typically, if I wrote out  
10:27:37 19 assessment -- it's one of our crew members that  
10:27:40 20 fill it out.

10:27:41 21 Usually they like to see me getting my  
10:27:43 22 hands dirty so they're usually the ones filling it  
10:27:46 23 out and letting me get my hands into the fish nets.

10:27:51 24 But yeah, it's typically either a  
10:27:53 25 Nawash or Saugeen assessment -- program assessment



10:27:59 1 employee that would be filling this form out.

10:28:03 2 Q. And where do you and your staff  
10:28:05 3 usually fill out the form?

10:28:07 4 A. So this form would typically be  
10:28:10 5 filled out at the dock, if we were meeting with the  
10:28:13 6 fishermen.

10:28:14 7 If we were collecting the form at --  
10:28:18 8 say we were filling out this form at the office  
10:28:21 9 because we collected the fish buyer records, then  
10:28:24 10 we would be filling it out at the office.

10:28:26 11 Q. How do you know whether you have  
10:28:28 12 spoken to all of the fishermen who were out  
10:28:31 13 commercially fishing?

10:28:31 14 A. So part of that, like I said  
10:28:33 15 earlier, is that we are keeping track of all the  
10:28:37 16 buyer records and the receipts.

10:28:38 17 So if we notice that somebody was  
10:28:41 18 selling fish and we hadn't caught them, then that  
10:28:44 19 would be a notification to us to get out there and  
10:28:47 20 speak with them. Yeah, that's essentially it.

10:28:53 21 Actually, there's one more thing. We  
10:28:55 22 also fill out daily logs when we're out, what we  
10:28:59 23 call out on assessment which is basically driving  
10:29:02 24 around the territory to see which fishermen are at  
10:29:07 25 what docks. And we can figure out that way as

1 well. We like to do that on a fairly regular basis  
2 so we have a good idea of where everybody is within  
3 the territory, because it is such a large territory  
4 and they do move around a bit, so that's something  
5 that we always strive to make sure we know where  
6 all of our fishermen are at.

7 Q. And when you say "fairly  
8 regularly" about how many times a week would that  
9 be?

10 A. So, like I said earlier, we try to  
11 get out at least a couple of times a week.

12 Q. I'd like you to help us understand  
13 what the headings on this form mean. I want to  
14 start with right underneath the title on the left,  
15 it says, "effort".

16 What do you enter at this line?

17 A. So the "effort" is a unique  
18 identifying code that is assigned to each effort,  
19 which I explained earlier what an effort was.

20 Q. And what do you enter next to the  
21 line below that, "fisherman"?

22 A. So the next line is "fisherman"  
23 where we identify which fisherman was the skipper,  
24 or the captain of that particular vessel.

25 Q. And I see below that it says

1 "BT size"; what is that?

2 A. Yeah, that indicates the boat  
3 size.

4 So there are two different types of  
5 boats or vessels that are used within the Saugeen  
6 Ojibway Nation commercial fishery. We have punts  
7 which are smaller open vessels, you can't go out  
8 deep with them, but they are particularly used  
9 because you can get in shallow.

10 And then we have tugs which are covered  
11 large, what they call Lake Erie style vessels,  
12 fishing vessels, and they are more suitable, you  
13 can put more nets on them and you can get out  
14 deeper.

15 Q. And below that it says "date",  
16 what date do you enter there?

17 A. So, that date is the date when the  
18 net was lifted. And you can see on the side that  
19 we include a little indication of what format the  
20 employee should be putting that date in.

21 Q. Below that it says "grid"; what do  
22 you enter in the line next to "grid"?

23 A. So essentially, as a management  
24 tool, we have -- we use a map that's broken up into  
25 five-minute by five-minute grids. Which a grid is

10:31:43 1 essentially one-twelfth of a degree. And we can  
10:31:49 2 actually see them on the map there, I don't know if  
10:31:52 3 you can see, it's all broken up into squares. Each  
10:31:57 4 one of those squares represents a grid and each one  
10:32:08 5 -- each grid has a unique number associated with  
10:32:08 6 it.

10:32:08 7 And next to "grid" we have an example  
10:32:08 8 of a number, a grid number so that -- just to jog  
10:32:14 9 staff's memories who are maybe new to filling out  
10:32:17 10 this form.

10:32:18 11 Q. You mentioned it was one-twelfth  
10:32:20 12 of a degree; a degree of what?

10:32:22 13 A. A degree of latitude or longitude.

10:32:34 14 Q. What do you enter on the next  
10:32:36 15 line, "LATLONG"?

10:32:39 16 A. So that's the latitude and  
10:32:41 17 longitude directions so we would give the fisherman  
10:32:50 18 a map when we're out meeting with them and ask them  
10:32:50 19 to point out the midpoint of their net set and  
10:32:53 20 that's where we would enter that.

10:32:58 21 As you can see, we have the format -- a  
10:33:00 22 format example in brackets to the right, just as  
10:33:05 23 another example.

10:33:08 24 Q. How do you determine what latitude  
10:33:11 25 and longitude or what grid a particular harvest

1 effort occurred at?

2 A. So we determine that by meeting  
3 with the fishermen, and doing the interview and  
4 asking them to point on the map, where the -- the  
5 midpoint of their net set. And then we basically  
6 just follow along the latitude and longitude lines,  
7 in order to fill out the LATLONG.

8 Q. Can you explain to me what the  
9 midpoint of the net set is?

10 A. Yeah, for example, if they had,  
11 say 1,000 yards of net out, then you would put it  
12 somewhere in the middle at about 500 or so.

13 Q. Thank you. Below latitude and  
14 longitude, there is "SPCTRG"; what does that refer  
15 to?

16 A. That refers to the species target.  
17 So what is it that the fishermen are out fishing  
18 for specifically.

19 Typically it could be whitefish, but  
20 could be other species, for example, yellow perch.

21 Q. And how do you record this  
22 information?

23 A. We use a unique numerical code  
24 that's three digits long and each code refers to a  
25 specific species of fish.

1 Q. I'm going to ask you about the  
2 next several lines together. "GRTP", "GRLEN5",  
3 "GRHTM" and what looks like "MESH5".

4 What category of information are you  
5 capturing under these headings?

6 A. Basically type of nets used and  
7 information about the dimensions of the nets  
8 themselves.

9 Q. Underneath that you have "set  
10 type". And you've listed "can, kyte and bottom".  
11 Can you explain what those terms mean?

12 A. Yeah, they just refer to different  
13 ways that you can set your nets, depending on  
14 whether you want to fish right on the bottom with  
15 your net, or if you want to -- for example, canning  
16 would mean that you would attach cans which are  
17 basically floats so that the net can be raised up  
18 off the bottom so you can target fish where they're  
19 at, using temperature and so on. Because they're  
20 not always at the bottom, sometimes they are up  
21 above the bottom at a certain temperature.

22 Q. The last line is "EFFDUR"; what is  
23 that?

24 A. So that would be the time between  
25 when the net was set out and when it was lifted.

10:35:53 1 Q. And about how long would that  
10:35:56 2 normally be?

10:35:56 3 A. So that varies anywhere typically  
10:35:59 4 from 24 to 48 hours. It could be longer if  
10:36:03 5 something came up that stopped the fisherman from  
10:36:06 6 retrieving the net due to bad weather and so on.

10:36:10 7 It also varies by season. As you can  
10:36:14 8 imagine in the summer the fish spoils a lot quicker  
10:36:17 9 so you typically have to lift your nets within  
10:36:22 10 24 hours; in the winter, the fall, or early spring,  
10:36:26 11 you can leave it out for a little while longer, a  
10:36:29 12 couple of days and you don't have to worry about  
10:36:33 13 the fish spoiling.

10:36:34 14 Q. And at the bottom of the form  
10:36:36 15 underneath the area we've looked at there's a  
10:36:40 16 table. Can you describe the information that gets  
10:36:42 17 recorded in this table?

10:36:51 18 A. Yeah, this is the harvest  
10:36:51 19 component of the effort harvest data sheet. So  
10:36:58 20 under "harvest" we include species. As I mentioned  
10:37:01 21 earlier we use a unique identifying code for each  
10:37:06 22 species. So, for example, you can see there "081"  
10:37:09 23 is lake trout. "09" is whitefish, and "094" is  
10:37:16 24 bloater. So we would include whatever species was  
10:37:20 25 harvested, we would include the code and then we

1 would include the form, whether it be round,  
2 dressed or filleted?

3 Q. What does it mean for a fish to be  
4 "dressed" versus "in the round"?

5 A. So a "dressed" fish is essentially  
6 the most common form that the fish is sold in, and  
7 it means that it's been gutted. So basically they  
8 took a knife, cut the belly open and removed all  
9 the organs. And this is done to prevent the fish  
10 spoiling as quickly. "In the round" means that the  
11 fish is entirely intact, nothing has been done to  
12 it, just as it was caught in the net.

13 Q. In the bottom right corner, I see  
14 a line for a signature. Whose signature goes  
15 there?

16 A. This is a line where we can ask  
17 the fishermen for a signature to indicate that  
18 their catch had been assessed.

19 Q. And when you have finished  
20 completing this form with a fisherman, what do you  
21 do with it?

22 A. So this form goes back to the  
23 office, and we use this form to fill out our  
24 database. And in addition to that, we just  
25 recently started scanning the hardcopy here in



1 order to be able to keep a digital hard copy and we  
2 also keep the actual hardcopy itself in a binder.

3 Q. And so I see in the bottom it says  
4 "scanned"; what's the purpose of that box?

5 A. Yeah, so we would check that off  
6 once it had been scanned, as I mentioned earlier.

7 Q. I'm going to open up another  
8 document now, it's SC1229. Are you familiar with  
9 this?

10 A. (Witness reviews document).

11 Yes, I'm very familiar with this. It's  
12 essentially one of the tables out of the database  
13 that we fill out based upon the effort harvest form  
14 that we just saw earlier.

15 MS. NERLAND: Your Honour, I'd like to  
16 add this as the next exhibit entitled, "Database  
17 Harvest Effort Information".

18 THE COURT: Mr. Registrar.

19 THE REGISTRAR: Exhibit number 4319.

20 EXHIBIT NO. 4319: Document entitled,  
21 "Database Harvest Effort Information".

22 BY MS. NERLAND:

23 Q. And what time period does the data  
24 set we see here cover?

25 A. So the data set here I believe is

1 from 1995 to 2018.

2 Q. Approximately how many harvest  
3 efforts are recorded in this database?

4 A. Somewhere around 24,000.

5 Q. I'm going to bring up another  
6 document now. It is SC1230. For convenience,  
7 there is a printed copy behind you, Mr. Lauzon, to  
8 your left.

9 What is this?

10 A. So this is a map indicating the  
11 number of efforts that took place within the grids,  
12 each five-minute by five-minute grid from our  
13 database essentially. So we basically counted how  
14 many efforts took place in each grid and we  
15 assigned, as you can see from the legend, each  
16 number of efforts; there's a range.

17 And those are associated with different  
18 colours, essentially ranging from white in which no  
19 harvest took place, and then it graduates from  
20 yellow to a dark red and that graduation reflects  
21 lower to greater numbers of harvest.

22 Q. You said "we"; who produced this?

23 A. So this map was produced by an  
24 employee of mine, Alexander Duncan and myself.

25 MS. NERLAND: Your Honour, I'd like to

1 add this map as the next exhibit.

2 MR. McCULLOCH: Objection, Your Honour.

3 THE COURT: Yes.

4 MR. McCULLOCH: This is simply a  
5 graphic presentation of the information contained  
6 in Exhibit 4319. As such it is properly  
7 demonstrative evidence, not freestanding evidence.  
8 And indeed in our view, it is such a highly  
9 interpretive graphic presentation that it is in  
10 fact opinion evidence and hence inadmissible.

11 THE COURT: Ontario.

12 MS. LEPAN: Ontario would support the  
13 objection. Similarly, we view this as opinion  
14 evidence to the extent that it requires  
15 interpretation of the data.

16 We are also content to have it entered  
17 as a demonstrative aid. You would note that  
18 Ontario has prepared a map which also interprets  
19 the data, which we would have entered through one  
20 of our witnesses, if this map is entered as a  
21 demonstrative aid. To the extent that it is not,  
22 we will not be putting forward our map as a  
23 demonstrative aid.

24 THE COURT: All right. Just give me  
25 one moment.

1 What is your submission, counsel?

2 MS. NERLAND: Your Honour, my  
3 submission is that the witness is here before us  
4 and has testified to how this underlying data was  
5 collected.

6 That data has been entered as an  
7 exhibit. If there is any interpretation here at  
8 all, it is extremely limited. He's simply taken  
9 the grid number and harvest effort and placed it on  
10 a map in order to make that underlying data  
11 understandable as an exhibit.

12 THE COURT: Is anyone going to say  
13 anything at all about the law that applies to this  
14 sort of situation? I'll give you all another  
15 chance, I'll start with you, sir, Canada.

16 Now there's two issues. Obviously --  
17 well, maybe it isn't obvious. There is certain  
18 evidentiary law about what you have called  
19 "demonstrative evidence" but which is sometimes  
20 also called summaries and so forth. And you, other  
21 than in passing, haven't said anything about it.  
22 Do you wish to add anything to your submissions?

23 MR. McCULLOCH: Simply, Your Honour,  
24 this is clearly a summary, presented in graphic  
25 form. And, therefore, would fall into that

10:44:28 1 category.

10:44:29 2 THE COURT: But that category allows  
10:44:30 3 for the introduction of the evidence, sir. Correct  
10:44:33 4 me if I'm wrong, because it's been a little while  
10:44:39 5 since I've bumped into this.

10:44:41 6 But it certainly used to be the case  
10:44:43 7 that as long as the underlying factual --  
10:44:46 8 underlying facts were proved, and the witness who  
10:44:50 9 prepared the demonstrative aid was made available  
10:44:54 10 for cross-examination and can explain how it was  
10:44:56 11 prepared, that it was at least possibly admissible  
10:45:00 12 as evidence.

10:45:00 13 Is that your understanding, too, sir?  
10:45:02 14 Or do you wish to make a submission that there's  
10:45:05 15 some other law that I should be concerned about?

10:45:10 16 MR. McCULLOCH: Your Honour, it's our  
10:45:11 17 position that the way in which the evidence has  
10:45:13 18 been summarized is so highly interpretive, that  
10:45:17 19 this is genuinely opinion evidence and, therefore,  
10:45:20 20 inadmissible from a lay witness.

10:45:22 21 THE COURT: That's the second point  
10:45:23 22 you've made. Do you have anything to add to the  
10:45:25 23 first point you made?

10:45:27 24 MR. McCULLOCH: No, Your Honour.

10:45:28 25 THE COURT: Do you disagree with my

10:45:29 1 vague recollection of what the applicable law is to  
10:45:32 2 the first point?

10:45:33 3 MR. McCULLOCH: Certainly not, Your  
10:45:34 4 Honour.

10:45:34 5 THE COURT: You're welcome to. I mean,  
10:45:36 6 I'm not saying I can recall it.

10:45:37 7 Okay, Ontario. What do you have to say  
10:45:39 8 about all of this?

10:45:40 9 MS. LEPAN: With respect to your first  
10:45:42 10 point, Your Honour, we also don't disagree with the  
10:45:45 11 law.

10:45:45 12 However, we would submit that it should  
10:45:47 13 be entered as a lettered exhibit, instead of a  
10:45:51 14 numbered exhibit. And so we support Canada's  
10:45:54 15 submissions that it is opinion evidence.

10:45:56 16 THE COURT: Well, a lettered exhibit is  
10:45:59 17 not evidence.

10:46:00 18 So I think that means you're objecting  
10:46:03 19 to it as illustration, summaries, depictions of  
10:46:10 20 admissible admitted evidence. And leaving aside  
10:46:13 21 the opinion evidence point, do you have anything  
10:46:16 22 else to say about the law on that regard?

10:46:19 23 MS. LEPAN: No, nothing further.

10:46:20 24 However, I would just add that to the extent that  
10:46:23 25 we're saying it requires interpretation, we mean

10:46:26 1 not just simply that the data is plotted on the  
10:46:29 2 map, but also the legend of the map, and the  
10:46:32 3 categories that are used in order to display the  
10:46:35 4 data requires interpretation.

10:46:38 5 THE COURT: How is it that that's the  
10:46:40 6 case, counsel? I'm just looking at the legend, all  
10:46:40 7 right?

10:46:43 8 So taking the example the witness  
10:46:45 9 referred to, a white box, which is a box that's  
10:46:50 10 determined by -- he described it as five-minute  
10:46:55 11 grids. The white means that there is no --  
10:47:01 12 according to the database, there's no harvest  
10:47:05 13 information for that box, zero harvest information.

10:47:09 14 And how is that interpretive? It's  
10:47:12 15 either in the database or it isn't in the database.

10:47:14 16 MS. LEPAN: It's not that part that's  
10:47:16 17 interpretive. It's that if you look at the  
10:47:18 18 categories that are used -- so in this instance  
10:47:20 19 you'll see that the categories of the buckets are  
10:47:23 20 not necessarily even. So depending on how you  
10:47:26 21 organize those buckets, that will result in the  
10:47:28 22 data being displayed differently.

10:47:30 23 So, for example, the map that Ontario  
10:47:31 24 has prepared looks very differently. And which  
10:47:35 25 buckets you choose and how you choose to group the

10:47:37 1 data, that's an interpretive function of looking at  
10:47:41 2 the data and grouping it. And so that's what we're  
10:47:45 3 saying is the interpretive part of the map.

10:47:48 4 THE COURT: All right. Counsel, do you  
10:47:50 5 have anything to say about any of this?

10:47:51 6 MS. NERLAND: On the first point, I  
10:47:53 7 think the relevant law on demonstrative aids,  
10:47:57 8 you're correct, Your Honour.

10:47:58 9 "The demonstrative evidence  
10:48:01 10 must be relevant to an issue, the  
10:48:03 11 authenticating witness must identify  
10:48:06 12 it and testify that it is a fair  
10:48:07 13 representation of what it purports  
10:48:08 14 to portray. The witness' evidence  
10:48:09 15 should not be time-consuming and not  
10:48:11 16 misleading and, as such, doesn't  
10:48:13 17 have prejudicial value potentially  
10:48:16 18 greater than the probative value,  
10:48:17 19 and the evidence must not be  
10:48:18 20 cumulative."

10:48:19 21 That cite --

10:48:19 22 THE COURT: Is that from Sopinka or  
10:48:21 23 from somewhere else?

10:48:22 24 MS. NERLAND: It's from Sopinka.

10:48:22 25 THE COURT: Where is it in Sopinka,



10:48:22 1 because I've been trying to find it.

10:48:24 2 MS. NERLAND: It's 18.104, Your Honour.

10:48:31 3 THE COURT: 18.104.

10:48:33 4 MS. NERLAND: Page 1357.

10:48:35 5 THE COURT: Yes, I did look at that.

10:48:58 6 What is your submission with respect to  
10:48:59 7 the second ground of objection, which is that this  
10:49:02 8 is really opinion evidence and this gentleman is  
10:49:04 9 not being put forward as an expert?

10:49:06 10 MS. NERLAND: Your Honour, it's our  
10:49:07 11 submission that there isn't any interpretation in  
10:49:10 12 the graphic representation of this data.

10:49:12 13 The categories that have been used to  
10:49:13 14 generate the colours are clear from the legend in  
10:49:16 15 the map. It's not a matter of opinion or coming to  
10:49:24 16 any conclusion on the basis of the data, it's  
10:49:26 17 simply a matter of representing it graphically.

10:49:33 18 THE COURT: Now no one has objected on  
10:49:35 19 this basis, but I haven't yet heard this witness  
10:49:38 20 say that this is a fair depiction of the database  
10:49:40 21 information.

10:49:41 22 Is that something you're going to be  
10:49:43 23 getting around to?

10:49:45 24 MS. NERLAND: Yes, Your Honour.

10:49:56 25 THE COURT: All right. Well, my ruling

1 is as follows:

2 It's always a challenge to draw the  
3 line between a demonstration, simulation, summary,  
4 illustration, any of those things, of admissible  
5 evidence, and opinion evidence; because a process  
6 has to be engaged to produce the illustration.

7 Having said that, I think it has been  
8 long accepted that illustrations of admissible  
9 evidence are permitted, provided that they meet the  
10 criteria which is better described by Sopinka than  
11 me, as four criteria under paragraph 18.104 of my  
12 edition of Sopinka, which I suspect is the current  
13 one.

14 And looking at those criteria, with the  
15 exception of the one element that hasn't been  
16 arrived at yet, I'm satisfied that this depiction  
17 of admissible evidence is not, as put here,  
18 misleading.

19 I accept the submission that there may  
20 be other depictions of the same data that may show  
21 the data with different emphasis, or nuance, or  
22 other things that can be explored. But I think  
23 that the defendants are open to do that, as I take  
24 it they're intending to do, if necessary.

25 As far as the possibility that the

10:51:38 1 selection of the grid categories may influence the  
10:51:42 2 depiction of the data, that can also be explored in  
10:51:47 3 cross-examination as this witness was one of the  
10:51:51 4 two people who prepared this document. There were  
10:51:55 5 two people, but no one is objecting on the basis  
10:51:58 6 that the second person is not being made available.

10:52:01 7 So in all of the circumstances, I think  
10:52:03 8 it can fairly be addressed through combination of  
10:52:07 9 cross-examining this gentleman, and also the  
10:52:10 10 opportunity to put the same data in a different  
10:52:13 11 illustrative form. Again, provided that the  
10:52:17 12 requirement that the person who created that other  
10:52:19 13 illustration is produced for cross-examination.

10:52:23 14 So I will permit it. I will not yet  
10:52:25 15 mark it, because you haven't completed the criteria.

10:52:30 16 Please go ahead.

10:52:30 17 MS. NERLAND: Thank you, Your Honour.

10:52:31 18 BY MS. NERLAND:

10:52:31 19 Q. Mr. Lauzon, is this a fair  
10:52:34 20 depiction of the data that is contained in the  
10:52:36 21 database we just looked at?

10:52:38 22 A. Yes.

10:52:40 23 THE COURT: On that basis I will permit  
10:52:42 24 it. Mr. Registrar.

10:52:44 25 THE REGISTRAR: Exhibit number 4320.

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THE COURT: 4320?

THE REGISTRAR: Yes, Your Honour.

EXHIBIT NO. 4320: 5-Minute Grid Map  
produced by Alexander Duncan and Ryan  
Lauzon.

BY MS. NERLAND:

Q. At the bottom left of the map I  
see a legend and they refers to "harvest events".  
Can you explain what data you're referring to here?

A. Yes, so, the word "harvest events"  
actually refers to the number of efforts per grid  
as I mentioned earlier. And as I explained  
earlier, what an effort indicated, which was a net  
being set out, and then lifted.

Q. And you started to do this  
already, but I'd like you to walk us through what  
we're looking at on this map?

A. So this map shows the outline of  
the Saugeen Ojibway Nation traditional territory in  
green. So you can see the line, I don't know, do  
you want me to get up and...

THE COURT: Well, you may just slide  
your chair, try not to bump in to something. Since  
I need to be able to see it, standing up in front  
of it isn't going to work.

1 THE WITNESS: So the green line here  
2 is, starting here coming up and all the way around,  
3 that's an outline of the Saugeen Ojibway Nation  
4 traditional territory.

5 BY MS. NERLAND:

6 Q. And just for the record, I'm just  
7 going to describe that. It's a green line that's  
8 running south of Goderich out into the lake, Lake  
9 Huron, up the middle of Lake Huron cutting across  
10 at the midpoint between Tobermory and Manitoulin,  
11 into the centre of Georgian Bay back down, and it  
12 intersects with land again, just west of the  
13 Nottawasaga River at the south point of Georgian  
14 Bay.

15 You can continue with your description.

16 A. Yeah, I just -- one point to  
17 clarify. On the Lake Huron side it goes to the  
18 international boundary.

19 So aside from that, as I mentioned  
20 earlier, the map is broken up into five-minute by  
21 five-minute grids. Each one is assigned a number.  
22 So you can see the grids on the map here. Right  
23 here is our legend. So as mentioned earlier, we  
24 broke -- we basically used different classes or  
25 groups of data.

10:55:16 1 So the first one is 0, which is in  
10:55:19 2 white. Then we move to yellow, which is 1 to 10  
10:55:22 3 efforts. And then 11 and 20, all the way down to  
10:55:28 4 1,001, to 2,642 efforts.

10:55:32 5 We made this map on GIS and you can see  
10:55:37 6 also the scale here, so it goes from 1 to  
10:55:43 7 40 kilometers and essentially, as I mentioned  
10:55:49 8 earlier. As you go from yellow to the dark red,  
10:55:52 9 that just reflects an increase in number of harvest  
10:55:56 10 events.

10:55:57 11 Q. So, for example, I see that south  
10:55:59 12 of Point Clarke and east of Craigleith there's no  
10:56:03 13 color on the map; what does that mean?

10:56:07 14 A. That's a good point and it  
10:56:09 15 illustrates that, essentially, when the substantial  
10:56:14 16 commercial fishing agreements were negotiated, this  
10:56:18 17 is the southern extent of the commercial fishing  
10:56:23 18 waters.

10:56:23 19 However, there's a mismatch between the  
10:56:26 20 commercial fishing waters and the Saugeen Ojibway  
10:56:29 21 Nation territory. And on the Georgian Bay side,  
10:56:33 22 you can see right at Craigleith is the extent of  
10:56:40 23 the commercial fishing waters whereas the territory  
10:56:44 24 extends to the east of that.

10:56:47 25 Q. And when you refer to the

1 commercial fishing waters; what do you mean?

2 A. I mean the areas that are open to  
3 the Saugeen Ojibway Nation commercial fishermen. I  
4 don't mean areas that are used by subsistence or  
5 ceremonial reasons.

6 Q. Does anyone besides Saugeen  
7 Ojibway Nation members commercially harvest in the  
8 area delineated on the map within the green lines?

9 A. Yes. So the Saugeen Ojibway  
10 Nation commercial fishing waters that we already  
11 went through, those are fished commercially solely  
12 by the Saugeen Ojibway Nation.

13 However, the areas that are in the  
14 traditional territory outside of that substantial  
15 commercial fishing area, those are fished by other  
16 First Nations, Métis, and non-native commercial  
17 fishermen as well.

18 Q. Thank you Mr. Lauzon.

19 MS. NERLAND: Your Honour, those are my  
20 questions.

21 THE COURT: Just before -- because I'd  
22 like to know before the cross starts. So that last  
23 answer... the witness said certain areas were  
24 commercially fished solely by SON. I didn't  
25 understand the last answer. Maybe you could just

1 point on the map, sir, to which areas you say were  
2 -- are commercially fished solely by SON.

3 THE WITNESS: Do you mind if I use a  
4 marker on the map?

5 THE COURT: That's counsel's map.

6 MS. NERLAND: I don't mind if you use a  
7 marker if Your Honour will permit it. We can add  
8 it as another --

9 THE COURT: Does anyone have an  
10 objection to that? It might be helpful. No one  
11 has an objection.

12 Please go ahead, sir. Do you have a  
13 marker that is not small?

14 THE WITNESS: I have a good one here.

15 THE COURT: All right.

16 THE WITNESS: Right here at Point  
17 Clarke, if I were to draw a line like that.

18 Right here at Craigleith somewhere, I  
19 don't know, it's going to be approximate, but say  
20 somewhere around here, if I draw a line there  
21 (indicating).

22 So I don't want to get in anybody's  
23 way. But essentially, all the waters in this area,  
24 are open to Saugeen Ojibway Nation commercial  
25 fishing under our agreements.



1 BY MS. NERLAND:

2 Q. And Mr. Lauzon, is that exclusive  
3 or shared commercial fishing in that area?

4 A. So these are not shared. Only  
5 Saugeen Ojibway Nation commercial fishermen are  
6 fishing in these waters.

7 Q. And what happens south of the line  
8 you've drawn at Point Clarke?

9 A. So this area here is where there  
10 is other commercial fishing going on from First  
11 Nations and non-native commercial fishermen.

12 Q. What about subsistence and  
13 ceremonial fishing?

14 A. So this area is open to Saugeen  
15 Ojibway Nation fishermen for ceremonial or  
16 subsistence use.

17 THE COURT: Thank you for clarifying  
18 that, sir.

19 I take it, counsel, that is the  
20 conclusion of your questions?

21 MS. NERLAND: Yes, Your Honour.

22 Before I conclude, should we mark this  
23 as a --

24 THE COURT: Well, I think -- well,  
25 there's some options here. Can you have an image

1 of this prepared to be marked as an exhibit?

2 MS. NERLAND: Yes, Your Honour.

3 THE COURT: Mr. Registrar, give me a  
4 numbered exhibit, I guess, unless someone objects.

5 THE REGISTRAR: Numbered Exhibit 4321.

6 THE COURT: Will be the marked-up  
7 version of the map.

8 EXHIBIT NO. 4321: Marked up version of  
9 document marked as Exhibit 4320.

10 MS. NERLAND: Yes, Your Honour.

11 THE COURT: Is it you, Mr. McCulloch,  
12 for this gentleman?

13 MR. McCULLOCH: Yes, Your Honour.

14 THE COURT: Please go ahead. Did you  
15 say 43 --

16 THE REGISTRAR: 21, Your Honour.

17 THE COURT: All right.

18 CROSS-EXAMINATION BY MR. McCULLOCH:

19 Q. Mr. Lauzon, I am Michael McCulloch  
20 and I am going to be asking you a few questions on  
21 behalf of the Attorney General of Canada, just to  
22 clarify a couple of matters that you discussed with  
23 my friend.

24 You started work, you said, at Nawash  
25 in 2008; is that correct?

11:01:36 1 A. Yes.

11:01:37 2 Q. Now, so any knowledge you have of  
11:01:43 3 the events in the 1990s and the early 2000s, is  
11:01:47 4 that from personal experience?

11:01:48 5 A. No.

11:01:49 6 Q. Thank you. And just to clarify  
11:01:53 7 matters, and label or terms, you were hired by the  
11:01:59 8 Chippewas of Nawash First Nation?

11:02:00 9 A. Yes.

11:02:01 10 Q. You are paid by them?

11:02:02 11 A. Yes.

11:02:02 12 Q. And they presumably could fire  
11:02:06 13 you?

11:02:06 14 A. Yes.

11:02:06 15 Q. I just wanted to get the  
11:02:09 16 relationship very clear-cut.

11:02:12 17 I'd like now to ask you a few questions  
11:02:18 18 about Exhibit 4320, the marked-up copy of the map.  
11:02:25 19 Because to be honest there are parts of it that I  
11:02:28 20 find a little puzzling.

11:02:31 21 You spoke of it as showing increasing  
11:02:33 22 numbers of harvesting events by the legend. But  
11:02:38 23 it's not an arithmetic increase, is it?

11:02:42 24 A. No.

11:02:43 25 Q. In fact, it's not quite but close

1 to being geometric?

2 A. It's actually using Jenks natural  
3 breaks.

4 Q. Could you explain what a natural  
5 break is?

6 A. Yeah, so essentially, it's using  
7 an algorithm to essentially group the data  
8 according to natural breaks within the data itself.  
9 And we use that particular technique because of the  
10 variability in the data and that particular  
11 technique is particularly helpful for that  
12 particular situation.

13 Q. And did you write the algorithm?

14 A. No.

15 Q. Is your -- I gather your  
16 undergraduate degree, is it in mathematics?

17 A. No.

18 Q. Can you claim to understand the  
19 algorithm?

20 A. I haven't looked at it.

21 Q. Okay. In fact, just to work out  
22 the implications, you would agree -- this is simple  
23 mathematics -- that if you took 0 and the map which  
24 is the minimum number of events, and the maximum,  
25 which is 2,842, and broke them into even

11:04:02 1 distributions it would be 1 to 240, 240 to 480, so  
11:04:08 2 on, so forth, right?

11:04:10 3 A. Yes.

11:04:10 4 Q. At which point most of the colored  
11:04:13 5 squares would disappear?

11:04:16 6 A. Yes.

11:04:16 7 Q. The majority of the territory  
11:04:17 8 would be white?

11:04:18 9 A. Yes.

11:04:19 10 Q. And, secondly, I just want  
11:04:23 11 to confirm that the coloring of the squares is  
11:04:27 12 based on the total number of events over nearly  
11:04:34 13 25 years?

11:04:35 14 A. Yes.

11:04:35 15 Q. So we have no idea of when or how,  
11:04:40 16 or indeed what real intensity of fishing took place  
11:04:49 17 from this map?

11:04:50 18 A. No.

11:04:51 19 Q. Well, let's go into the underlying  
11:04:55 20 data then, and see just how unuseful this map is in  
11:05:03 21 terms of assessing the intensity and duration of  
11:05:07 22 use for commercial fishing purposes.

11:05:12 23 You would agree, from the data, that  
11:05:15 24 you could have what I believe is called an effort  
11:05:20 25 duration, EFFDUR of a minimum; on this, the data is

1 one?

2 A. Sorry, can you clarify?

3 Q. The minimum duration of the effort  
4 in your table is one. Meaning one hour?

5 A. Oh, yes.

6 Q. And maximum on your table is  
7 723 hours.

8 A. Okay, I haven't looked at it, so I  
9 don't know.

10 Q. And in terms of the length of the  
11 net, which I believe is GRENDS, the minimum on your  
12 table is seven?

13 A. I don't know.

14 Q. Would you like to have the  
15 opportunity to review your table?

16 A. Sure, if that would be helpful.

17 MR. McCULLOCH: Well, perhaps if I can  
18 ask some other questions which will take us to the  
19 break and that will allow Mr. Lauzon to review his  
20 tables.

21 BY MR. McCULLOCH:

22 Q. Do you happen to remember if the  
23 maximum length was 10,000 feet?

24 A. No, I don't know.

25 Q. But you will agree that an event

11:06:50 1 that lasts a day with, say, 40 feet of net, shows  
11:06:55 2 up on the map exactly the same as an event that  
11:06:59 3 lasted 72 hours with 4,000 feet of net; they would  
11:07:09 4 show up on the map the same way?

11:07:09 5 A. Yes.

11:07:09 6 Q. Okay. We'll come back to the  
11:07:12 7 table when you've had a chance to review it.

11:07:15 8 I'd like to call up now, if my  
11:07:18 9 colleague can assist me, in -- call up the document  
11:07:25 10 SC1233. And you're familiar with this document?

11:07:48 11 A. Yes.

11:07:49 12 Q. You're one of the co-authors?

11:07:51 13 A. Yes.

11:07:52 14 MR. McCULLOCH: I would like to ask for  
11:07:54 15 it to be added as an exhibit entitled, "Food  
11:07:59 16 Security and Access to Fish", article in Great  
11:08:05 17 Lakes Research, Ryan Lauzon, co-author.

11:08:09 18 THE COURT: Mr. Registrar.

11:08:11 19 THE REGISTRAR: Exhibit No. 4322.

11:08:14 20 EXHIBIT NO. 4322: Document entitled,  
11:07:59 21 "Food Security and Access to Fish",  
11:08:02 22 article in Great Lakes Research, Ryan  
11:08:08 23 Lauzon, co-author.

11:08:19 24 BY MR. McCULLOCH:

11:08:19 25 Q. Do you need time to refer to this

11:08:22 1 article?

11:08:22 2 A. I'm fairly familiar with it. I  
11:08:24 3 guess it depends what you ask, but I should be  
11:08:27 4 familiar with it.

11:08:27 5 Q. Well, I would like to go to page 3  
11:08:30 6 of the PDF which is page 176 of the document. And  
11:08:42 7 in the first full paragraph on the right-hand  
11:08:45 8 column you say that the two reserves have  
11:08:49 9 population of approximately 1,500 people; is that  
11:08:52 10 correct?

11:08:52 11 A. Yes.

11:08:53 12 Q. And that was roughly correct in  
11:08:55 13 2017?

11:08:57 14 A. Yes.

11:08:57 15 Q. But there are many more members of  
11:09:01 16 the community who do not live on the reserves; is  
11:09:04 17 that correct?

11:09:04 18 A. I don't know.

11:09:07 19 Q. Okay. And at the bottom of the  
11:09:15 20 column just above where "fisheries" starts, you say  
11:09:19 21 that there are limited formal opportunities in  
11:09:22 22 either community to buy local fish; is that still  
11:09:28 23 true?

11:09:29 24 A. Yes.

11:09:29 25 Q. And are you familiar with the



11:09:35 1 table below?

11:09:45 2 A. Yeah.

11:09:47 3 Q. Could you tell me under what  
11:09:49 4 heading of occupation fishing is entered? Because  
11:09:56 5 I don't see a distinct entry for it.

11:10:05 6 A. It is -- it's not specifically  
11:10:06 7 identified.

11:10:06 8 Q. Would it be under "primary  
11:10:09 9 industry"?

11:10:09 10 A. No, it's -- I don't know.

11:10:11 11 Q. So it doesn't figure on this map.  
11:10:15 12 Well, let's talk about the size of the commercial  
11:10:20 13 fishery.

11:10:20 14 If we could go to page 4 of the PDF,  
11:10:23 15 which is page 177 of the original. And in the  
11:10:32 16 third full paragraph down, "currently", it says  
11:10:44 17 there are approximately 30 commercial fish  
11:10:47 18 harvesters in the two communities; is that still  
11:10:51 19 correct?

11:10:51 20 A. Give or take, yeah. Yes.

11:10:52 21 Q. And that there are seven tugs and  
11:10:56 22 four punts?

11:10:57 23 A. It's really difficult to give an  
11:11:02 24 exact number, because fishing boats come and go so  
11:11:07 25 often. But just give me a second and I'll think

11:11:10 1 about it.

11:11:10 2 Q. Okay.

11:12:11 3 A. (Witness reviews document).

11:12:11 4 That -- that appears to be still the  
11:12:13 5 case, yes.

11:12:13 6 Q. Okay. And you've already referred  
11:12:17 7 to a total allowable catch as something being  
11:12:23 8 determined by agreement.

11:12:25 9 You also comment in this article that  
11:12:28 10 between 2013 and 2015 SON caught approximately  
11:12:38 11 53 to 60 percent of total allowable catch?

11:12:42 12 A. Yes.

11:12:42 13 Q. Slightly more than half.

11:12:45 14 A. (Witness nods.)

11:12:46 15 Q. And you give some explanations for  
11:12:48 16 that. Price volatility, supply, things like that?

11:12:58 17 A. Yes.

11:12:58 18 Q. Okay. And I would now like to go  
11:13:06 19 to page 5 of the PDF, page 178 of the article,  
11:13:14 20 right-hand column. This discusses the frequency  
11:13:19 21 with which fish is eaten in the community and it  
11:13:25 22 states:

11:13:25 23 "The reported frequencies are  
11:13:30 24 considerably lower than the two  
11:13:31 25 servings of fish per week suggested

11:13:34 1 by Canada's national dietary  
11:13:38 2 guidelines."  
11:13:39 3 Is that still correct?  
11:13:41 4 THE WITNESS: I can't tell you if it's  
11:13:43 5 still correct.  
11:13:43 6 BY MR. McCULLOCH:  
11:13:43 7 Q. Well, was it correct when the  
11:13:44 8 article was written?  
11:13:45 9 A. Yes.  
11:13:45 10 Q. Which was 2017?  
11:13:47 11 A. Yes.  
11:13:55 12 Q. Okay. I'd like to now go to  
11:13:57 13 page 6 of the article, the first full column about  
11:14:01 14 halfway down. "Many of our participants" --  
11:14:10 15 that's participants in the study upon which the  
11:14:12 16 article is based, right?  
11:14:14 17 A. Yeah.  
11:14:14 18 Q. Okay:  
11:14:15 19 "Many of our participants  
11:14:17 20 described a decline in sharing  
11:14:20 21 practice in the community compared  
11:14:22 22 to previous generations."  
11:14:26 23 Is that a correct attribution?  
11:14:28 24 THE WITNESS: Yes.  
11:14:29 25 BY MR. McCULLOCH:

11:14:29 1 Q. Okay:

11:14:29 2 "'They used to share at one  
11:14:31 3 time, people would come to your  
11:14:33 4 house and ask if you wanted fish,  
11:14:36 5 but they don't do that anymore'."

11:14:41 6 To your recollection is that an  
11:14:43 7 accurate quotation?

11:14:45 8 THE WITNESS: I wasn't the one who did  
11:14:47 9 that particular interview. But I would assume it  
11:14:47 10 is.

11:14:50 11 BY MR. McCULLOCH:

11:14:50 12 Q. And the sentiment is something  
11:14:52 13 you're aware of?

11:14:54 14 A. Yes.

11:14:54 15 Q. Okay. Now, further down in the  
11:14:58 16 same paragraph, there is a quotation that goes:

11:15:08 17 "For example" -- sorry, "for  
11:15:09 18 example", quotation:

11:15:10 19 "I think when they got the  
11:15:12 20 commercial fishery they went to  
11:15:14 21 bigger boats. They sell it out  
11:15:16 22 more, they don't bring it back ..."

11:15:21 23 Similarly, is that a sentiment that  
11:15:24 24 you're aware of?

11:15:25 25 THE WITNESS: Yes.

11:15:25 1 BY MR. McCULLOCH:

11:15:29 2 Q. Another participant:

11:15:32 3 "Everything goes to the  
11:15:37 4 market... and they're the ones --  
11:15:39 5 the buyers -- making most of the  
11:15:40 6 money off that."

11:15:42 7 Is that again correct?

11:15:43 8 THE WITNESS: Yes.

11:15:44 9 BY MR. McCULLOCH:

11:15:44 10 Q. And the buyers, just for the  
11:15:47 11 record, I won't take you, because I believe it's in  
11:15:49 12 the article but fairly common knowledge, are in  
11:15:53 13 southern Ontario and the United States?

11:15:57 14 A. I believe that the United States  
11:15:58 15 is where they ultimately are ending up, but the  
11:16:03 16 buyers are located in southern Ontario, for the  
11:16:07 17 main buyer.

11:16:07 18 Q. And indeed, moving over to the  
11:16:10 19 right-hand column. Either a cause and effect is  
11:16:16 20 that there has been, a quotation:

11:16:17 21 "A decline in the fishing  
11:16:19 22 knowledge that is vital to the  
11:16:20 23 continuation of fishing traditions  
11:16:22 24 both for food and livelihood."

11:16:31 25 Is that consistent with your knowledge?

11:16:35 1 THE WITNESS: That was that  
11:16:35 2 participant's perspective, yes.  
11:16:38 3 BY MR. McCULLOCH:  
11:16:38 4 Q. Okay. And indeed further down:  
11:16:45 5 "Some younger participants ..."  
11:16:48 6 And this is the last full paragraph:  
11:16:52 7 "... indicated inadequate  
11:16:54 8 skills such as knowing how to fillet  
11:16:58 9 a fish."  
11:17:02 10 Is that true that some of the members  
11:17:03 11 of the community don't know how to fillet a fish?  
11:17:03 12 THE WITNESS: Yes.  
11:17:09 13 BY MR. McCULLOCH:  
11:17:09 14 Q. And indeed, some actually prefer  
11:17:14 15 having their fish already filleted because it's  
11:17:17 16 more convenient?  
11:17:18 17 A. Yes.  
11:17:18 18 Q. And I'm about to reveal my  
11:17:23 19 profound ignorance, filleting simply means slicing  
11:17:28 20 it off the --  
11:17:29 21 A. Removing the flesh from the fish  
11:17:38 22 carcass.  
11:17:38 23 Q. And including the bones or not  
11:17:41 24 including the bones?  
11:17:41 25 A. No, the fish frame is left behind.

11:17:44 1 Q. Okay. Now you've mentioned  
11:17:51 2 intentions with non-Indigenous fishers, right?

11:17:56 3 A. Yes.

11:17:57 4 Q. And these are sports fishers,  
11:17:59 5 right?

11:17:59 6 A. Yes.

11:18:00 7 Q. Okay. So, there are -- sports  
11:18:03 8 fishing is taking place in the area that is subject  
11:18:07 9 to the claim, right?

11:18:08 10 A. Yes.

11:18:09 11 Q. And the sports fishing is how  
11:18:12 12 extensive; do you know?

11:18:14 13 A. No.

11:18:15 14 Q. But it's not trivial?

11:18:19 15 A. No.

11:18:25 16 MR. McCULLOCH: And since I think we've  
11:18:27 17 covered everything that I was going to plunge into  
11:18:31 18 in terms of the actual tables of data, those are my  
11:18:37 19 questions.

11:18:38 20 THE COURT: Are you not going to wish  
11:18:39 21 him to review the table after all, sir?

11:18:49 22 MR. McCULLOCH: No, I think we've  
11:18:49 23 covered the qualitative effect that I was hoping to  
11:18:49 24 extract from the table.

11:18:49 25 THE COURT: All right. Thank you, sir.

11:18:52 1 Ms. Lepan, are you examining this  
11:18:56 2 gentleman?

11:18:57 3 MS. LEPAN: Yes, I am, Your Honour.

11:18:59 4 THE COURT: Move forward.

11:19:06 5 CROSS-EXAMINATION BY MS. LEPAN:

11:19:11 6 Q. Good morning, Mr. Lauzon.

11:19:14 7 A. Good morning.

11:19:14 8 Q. My name is Jennifer Lepan, I am  
11:19:17 9 counsel for Ontario.

11:19:18 10 I want to start by asking you a few  
11:19:20 11 questions about the equipment used by SON  
11:19:23 12 commercial fishermen.

11:19:24 13 You mentioned that SON commercial  
11:19:31 14 fishermen used punt boats and tugboats; is that  
11:19:36 15 right?

11:19:36 16 A. Yes.

11:19:36 17 Q. And they don't use any other types  
11:19:44 18 of boats?

11:19:44 19 A. No.

11:19:44 20 Q. So let's start with punt boats.  
11:19:44 21 Punt boats are about 16 feet to 24 feet; is that  
11:19:46 22 about right?

11:19:47 23 A. Do you mean between 16 and  
11:19:49 24 24 feet.

11:19:50 25 Q. No, 16 in width by 24 length?



11:19:54 1 A. I don't know if they're quite that  
11:20:00 2 wide, but yeah, the lengthwise it sounds about  
11:20:04 3 right.  
11:20:04 4 Q. And punt boats use outbound  
11:20:08 5 motors?  
11:20:08 6 A. Outboard, yes.  
11:20:09 7 Q. Outboard, thank you.  
11:20:12 8 And the horsepower of those motors  
11:20:16 9 ranges?  
11:20:16 10 A. Yes.  
11:20:16 11 Q. And some punt boats have motors  
11:20:19 12 with 200 horsepower?  
11:20:22 13 A. Perhaps, I don't know.  
11:20:24 14 Q. And do punt boats have GPS or  
11:20:29 15 radar systems?  
11:20:31 16 A. Typically they would have a GPS on  
11:20:34 17 board, radar, no.  
11:20:35 18 Q. Does the GPS assist them with  
11:20:38 19 tracking the longitude and latitude of where they  
11:20:42 20 set the nets?  
11:20:45 21 A. I couldn't speak to that.  
11:20:46 22 Q. And punt boats use a mechanical  
11:20:50 23 puller mechanism to pull up their nets?  
11:20:53 24 A. Sometimes.  
11:20:53 25 Q. Sometimes they do it by hand?

11:20:56 1 A. Yes.

11:20:56 2 Q. And those are the only two ways  
11:20:58 3 that they pull up their nets?

11:21:00 4 A. Yes.

11:21:00 5 Q. So they don't have a motor to pull  
11:21:03 6 up their nets?

11:21:04 7 A. The puller is a motorized  
11:21:06 8 mechanism to pull up the nets.

11:21:08 9 Q. Okay. And so can punt boats pull  
11:21:14 10 up nets that are very deep in water, say 200 feet  
11:21:18 11 plus?

11:21:18 12 A. It's my understanding that they  
11:21:20 13 can. But that would be -- like I said before,  
11:21:24 14 they're typically shallow water, they don't  
11:21:27 15 typically go out as deep.

11:21:28 16 Q. What size nets do punt boats use?

11:21:31 17 A. Because they're smaller vessels,  
11:21:33 18 they use smaller lengths of nets than tug. But it  
11:21:37 19 ranges, depends.

11:21:39 20 Q. Can you give me a broadest mid of  
11:21:42 21 the range?

11:21:43 22 A. Oh, probably, we just have to say  
11:21:50 23 on average, probably about a thousand yards.

11:21:52 24 Q. The nets are made of monofilament,  
11:21:55 25 I may not be saying that right?

11:21:57 1 A. Yes.

11:21:57 2 Q. And what is that, plastic or metal  
11:22:05 3 wire or --

11:22:06 4 A. I believe it's nylon, but it could  
11:22:08 5 be -- I don't know for sure.

11:22:09 6 Q. And do the punt boats have ice, or  
11:22:13 7 a fridge, or freezer, some mechanism to keep the  
11:22:16 8 fish cold?

11:22:16 9 A. Ice.

11:22:17 10 Q. And that's necessary to keep the  
11:22:20 11 fish fresh when they're going further offshore?

11:22:24 12 A. Yes.

11:22:29 13 Q. And you said punt boats don't fish  
11:22:34 14 far offshore. Is it fair to say they fish 1 or  
11:22:38 15 2 miles offshore at most?

11:22:39 16 A. It depends how adventurous the  
11:22:46 17 punt fisherman is.

11:22:50 18 Q. Typically, would you say that  
11:22:50 19 they --

11:22:51 20 A. Typically they're in closer, yes.

11:22:53 21 Q. And they don't fish further  
11:22:55 22 offshore because of their small size?

11:22:57 23 A. Yes.

11:22:58 24 Q. And because they don't -- it would  
11:23:02 25 be dangerous for them to fish further offshore?

11:23:06 1 A. Potentially, yes.

11:23:07 2 Q. Okay. So let's turn now to tugs.

11:23:11 3 You mentioned that a tugboat is larger than a punt,  
11:23:15 4 right?

11:23:15 5 A. Yes.

11:23:16 6 Q. And is it fair to say that the  
11:23:24 7 smaller tugboats are around 42 feet by 13 feet?

11:23:24 8 A. I would say they're larger than  
11:23:28 9 that, typically.

11:23:29 10 Q. Okay. What kind of range would  
11:23:32 11 you estimate?

11:23:32 12 A. I'm thinking more in the range of  
11:23:35 13 75 metres or so, 60 feet, in that range.

11:23:38 14 Q. And what about the larger  
11:23:40 15 tugboats; how big are those?

11:23:42 16 A. Well, I mean just in general size,  
11:23:44 17 yeah.

11:23:44 18 Q. And a tugboat is an enclosed boat?

11:23:50 19 A. Yes.

11:23:50 20 Q. And the size of the tugboat can  
11:23:53 21 also range?

11:23:53 22 A. Yes, some of them are bigger than  
11:23:56 23 others.

11:23:56 24 Q. Is it fair to say that a tugboat  
11:23:58 25 can have anywhere from 86 horsepower up to

11:24:02 1 540 horsepower?

11:24:05 2 A. No idea.

11:24:06 3 Q. Okay. That makes two of us. And  
11:24:08 4 a tugboat also using GPS and radar navigation?

11:24:11 5 A. I know that they have GPS, I'm not  
11:24:15 6 clear about the radar aspect.

11:24:18 7 Q. What length of nets are typical on  
11:24:20 8 tugboats?

11:24:21 9 A. They would have more nets on  
11:24:25 10 board, they're larger vessels than a punt. They  
11:24:28 11 could set out as much of 1 or 2 miles of nets.

11:24:32 12 Q. And the nets are also made of  
11:24:42 13 monofilament?

11:24:36 14 A. Same nets.

11:24:36 15 Q. And tugboats use motorized  
11:24:39 16 equipment to pull up their nets?

11:24:43 17 A. Yes.

11:24:44 18 Q. And that's because you couldn't  
11:24:45 19 lift the nets out of the water at very deep levels  
11:24:49 20 by hand?

11:24:49 21 A. Well, it becomes impractical.

11:24:51 22 Q. And do tugboats have ice or fridge  
11:24:56 23 or freezer or some mechanism to keep the fish cold?

11:25:00 24 A. Ice.

11:25:01 25 Q. So fishing more than 2 to 3 miles

11:25:06 1 offshore, SON commercial fishermen would typically  
11:25:11 2 use a tugboat?

11:25:13 3 A. I would say so, yes.

11:25:15 4 Q. That would be for safety reasons?

11:25:17 5 A. Well, yeah. Yes, that's part of  
11:25:24 6 it.

11:25:24 7 Q. It's also because they need a  
11:25:26 8 bigger boat to have all of the larger equipment?

11:25:29 9 A. Yeah, it just doesn't make sense  
11:25:31 10 to -- there's advantages to having a punt and  
11:25:34 11 there's advantages operating a tug. Each one has  
11:25:38 12 their kind of advantage and disadvantage.

11:25:42 13 For example, during the fall fishery,  
11:25:45 14 the punts can get in shallower so they're able to  
11:25:49 15 access parts of the fishery that the tugs can't.

11:25:52 16 Q. And you mentioned fish spoiling.  
11:25:55 17 How long can fish be in a boat in the summer before  
11:25:59 18 they spoil if they're not on ice?

11:26:01 19 A. It all depends on how hot it is,  
11:26:06 20 so I can't really answer that question.

11:26:07 21 Q. Can you give me a range if it's  
11:26:09 22 between -- if it's around 15-degree celsius?

11:26:13 23 A. I would say that they would have  
11:26:17 24 to get the -- sorry -- can you repeat the question?

11:26:21 25 Q. Of course. If it's about

11:26:22 1 15-degree celsius outside, how long could you have  
11:26:27 2 fish in a boat without them spoiling if they  
11:26:29 3 weren't on ice?

11:26:31 4 A. I don't know the exact number of  
11:26:36 5 hours.

11:26:36 6 Q. Can you estimate a range? Is it  
11:26:38 7 over ten hours, under five hours?

11:26:41 8 A. 15 degrees I would think -- I  
11:26:48 9 don't know. I would just be guessing.

11:26:49 10 Q. Okay. So we've discussed some of  
11:26:52 11 the modern technology that SON uses in their  
11:26:55 12 commercial fishing operations. So I want to just  
11:26:58 13 turn and discuss the SON and MNRF commercial  
11:27:01 14 fishing agreements that you mentioned?

11:27:03 15 A. Yes.

11:27:03 16 Q. So since 1995, MNRF and SON have  
11:27:09 17 entered into commercial fishing agreements?

11:27:12 18 A. No.

11:27:12 19 Q. Okay. When?

11:27:13 20 A. 2000.

11:27:14 21 Q. 2000, thank you. And prior to  
11:27:17 22 2000 were there any agreements between SON,  
11:27:21 23 MNRF and Canada?

11:27:22 24 A. I am not aware of what was in  
11:27:25 25 place previous.

11:27:25 1 Q. And the commercial fishing  
11:27:28 2 agreements set a total allowable catch?

11:27:33 3 A. Yes.

11:27:33 4 Q. And SON commercial fishermen have  
11:27:38 5 never exceeded the total allowable catch in the  
11:27:47 6 agreements that you're aware of?

11:27:47 7 A. So the agreements from 2013, I can  
11:27:51 8 speak to more and I would say, no, not since 2013  
11:27:56 9 that I'm aware of.

11:27:59 10 Q. And pursuant to the commercial  
11:28:01 11 fishing agreements, let's keep it with 2013 moving  
11:28:04 12 forward, because those are the ones that you're  
11:28:06 13 familiar with. SON receives funding from the  
11:28:09 14 Province of Ontario; is that correct?

11:28:11 15 A. Yes.

11:28:11 16 Q. And the funding assists SON with  
11:28:16 17 administering the commercial agreements?

11:28:19 18 A. The funds are used for the  
11:28:25 19 Fisheries Assessment Program.

11:28:26 20 Q. And so the funds also help with  
11:28:30 21 managing the commercial fishery?

11:28:32 22 A. Collecting the data that's part of  
11:28:36 23 the obligation under the substantive commercial  
11:28:40 24 fishing agreement, yes.

11:28:41 25 Q. And between April 2018 and



11:28:44 1 March 2019, the SON will receive \$250,000 from the  
11:28:50 2 Government of Ontario?

11:28:50 3 A. Yes.

11:28:51 4 Q. So let's now turn to the map, I  
11:28:55 5 only have a few more questions.

11:28:58 6 In the course of your work, do you  
11:29:02 7 create maps often?

11:29:03 8 A. No.

11:29:07 9 Q. And have you received any training  
11:29:11 10 in map-making?

11:29:12 11 A. No, that's just -- well, no.

11:29:17 12 Q. Thank you. And you mentioned that  
11:29:25 13 you used an algorithm to group the data according  
11:29:28 14 to natural breaks, that's how you came up with the  
11:29:31 15 buckets is what I'll call them?

11:29:32 16 A. Sure.

11:29:33 17 Q. And does the algorithm tell you  
11:29:35 18 the exact categories to use, or the buckets to use?

11:29:40 19 A. What comes out is -- they come out  
11:29:46 20 as a decimal, we round it up so -- and yes, it  
11:29:52 21 tells you how many categories. You can increase  
11:29:55 22 the number of categories and still be -- still use  
11:30:00 23 this method, which is what we did. Originally, we  
11:30:04 24 came up with five, we increased it to 11.

11:30:08 25 Q. And why did you choose to increase

11:30:10 1 it to 11?

11:30:10 2 A. We chose to increase it to 11  
11:30:13 3 because, well, this will get into opinion, but we  
11:30:17 4 believe it was less misleading because there was  
11:30:22 5 more distinction between groups.

11:30:29 6 Q. What do you mean when you say it  
11:30:31 7 was -- there was more distinction between groups?

11:30:33 8 A. Well, the smaller the number of  
11:30:35 9 categories there are, the least -- the less amount  
11:30:39 10 of information you're conveying to the audience.  
11:30:41 11 So we were trying to portray more evidence to the  
11:30:45 12 court, versus less. So in that way we saw that as  
11:30:51 13 less misleading.

11:30:52 14 Q. And so the 11 categories or  
11:30:55 15 grouping it with the 11 categories instead of the  
11:30:58 16 five categories, were those the only two different  
11:31:05 17 ways that you attempted to display the data?

11:31:09 18 A. No.

11:31:27 19 Q. What were the other ways that you  
11:31:13 20 displayed the data?

11:31:14 21 A. So GIS gives you a range of tools  
11:31:19 22 that you can use in order to display your data.  
11:31:22 23 And we explored every tool that was there, just to  
11:31:26 24 see -- gain more information. And not only that,  
11:31:32 25 but we looked at the data that we had, and what --

1 we looked to see what tool is the most appropriate  
2 for the data. And from the readings that we did,  
3 it was apparent that Jenks natural breaks was the  
4 most suitable tool for this particular data set.

5 Q. And when the algorithm originally  
6 provided you with five categories, do you recall  
7 what those categories were or buckets were?

8 A. I couldn't tell you off the top of  
9 my head, no.

10 Q. Were there fewer categories in the  
11 lower level of harvesting events?

12 A. I don't remember, but I believe --  
13 there was just fewer categories overall, less  
14 categories. Less information.

15 MS. LEPAN: Thank you.

16 Thank you those are my questions.

17 THE COURT: All right. Any  
18 re-examination?

19 MS. NERLAND: Your Honour, I see it's  
20 just after 11:30. Would you like me to proceed now  
21 or shall I go after the break? I have a couple of  
22 questions.

23 THE COURT: Do you mean that literally?

24 MS. NERLAND: Yes, literally.

25 THE COURT: All right. Then I think

11:32:50 1 you should go ahead.

11:32:51 2 MS. NERLAND: Yes, Your Honour.

11:32:52 3 THE COURT: And then this gentleman can  
11:32:53 4 be on his way.

11:32:55 5 REDIRECT EXAMINATION BY MS. NERLAND:

11:32:56 6 Q. Mr. Lauzon, my friend from Canada  
11:32:59 7 took you to an article that you wrote about food  
11:33:03 8 security and the Saugeen Ojibway Nation Fishery?

11:33:05 9 A. Yes.

11:33:06 10 Q. Can you give some more context of  
11:33:08 11 the findings set out in the article?

11:33:09 12 A. Yes. So if you go back to that  
11:33:12 13 article, the findings were essentially that -- or  
11:33:16 14 some more context would be that the reason for this  
11:33:21 15 decreased amount of reliance on fish as a food  
11:33:27 16 source is due to Colonialism.

11:33:33 17 In a number of ways, for example,  
11:33:36 18 starting with when Europeans came and had contact  
11:33:42 19 -- in contact, there was a push from the Europeans  
11:33:47 20 to move the Saugeen Ojibway Nation from fishing to  
11:33:54 21 farming essentially. So there was a push that  
11:33:57 22 way --

11:33:59 23 MR. McCULLOCH: Your Honour, I must  
11:34:00 24 object. The witness is here straying beyond the  
11:34:03 25 scope of the article and indeed is getting into

1 very much opinion evidence.

2 THE COURT: What is your response to  
3 that, counsel?

4 MS. NERLAND: Your Honour, my friend  
5 asked this witness specifically about the findings  
6 in the article. I am simply giving him the  
7 opportunity to set those findings, which he was  
8 asked about, in context to ensure they're fairly  
9 representative.

10 THE COURT: What I was struggling with,  
11 counsel, how this was reply, this question. That  
12 is not the objection that's been made.

13 Did Ontario mark this article? Or  
14 Canada?

15 MS. LEPAN: I believe Canada did.

16 THE COURT: Did you mark this as an  
17 exhibit?

18 MR. McCULLOCH: Yes, it's exhibit --

19 THE COURT: You don't have to give me  
20 the number.

21 MR. McCULLOCH: -- 4322.

22 THE COURT: Well, counsel, I'll permit  
23 you to ask, if you wish, to try another question.  
24 But bearing in mind that the article is in its  
25 entirety an exhibit. So what it says is already in

11:35:49 1 the court record and can be referred to.

11:35:52 2 I think it would be more appropriate  
11:35:55 3 for questions that more directly fall within what I  
11:36:04 4 regard is the rubric for reply, and that one just  
11:36:08 5 didn't -- it just seemed incredibly general to me.

11:36:12 6 So it's not that you will be prevented  
11:36:14 7 from making observations about what the article's  
11:36:18 8 thesis and conclusions are, because it's in, to the  
11:36:21 9 extent that may matter.

11:36:24 10 But if you would like to ask another  
11:36:25 11 question, just pause, sir, before you answer there  
11:36:28 12 are some technical rules that you need not worry  
11:36:30 13 about that limit the kinds of questions you can be  
11:36:33 14 asked.

11:36:34 15 I'm going to just pause for a minute to  
11:36:36 16 make sure there's no objection before we proceed to  
11:36:39 17 the answer to the question.

11:36:40 18 MS. NERLAND: Actually, Your Honour,  
11:36:40 19 I'm content to leave it there.

11:36:42 20 THE COURT: All right.

11:36:46 21 MS. NERLAND: I actually think I'm  
11:36:47 22 content to leave it there, full stop.

11:36:50 23 THE COURT: All together?

11:36:51 24 MS. NERLAND: All together, yeah.

11:36:52 25 THE COURT: So that concludes your

11:36:54 1 testimony. Thank you very much.

11:36:55 2 I'm assuming you traveled here today,  
11:36:58 3 thank you for doing that as well. You can step  
11:37:00 4 down.

11:37:00 5 THE WITNESS: Thank you.

11:37:00 6 (The witness is excused from the  
11:37:01 7 proceedings).

11:37:01 8 THE COURT: All right. As counsel  
11:37:03 9 know, the other thing on our agenda today is my  
11:37:07 10 ruling, which I will give now, unless anyone,  
11:37:12 11 including counsel and my court staff, want a break.  
11:37:15 12 Mr. Townshend?

11:37:17 13 MR. TOWNSHEND: I just wanted to alert  
11:37:18 14 you that Professor Driben is here today and we're  
11:37:22 15 ready to go.

11:37:23 16 THE COURT: I see, very good. Well, in  
11:37:24 17 that case, we'll take the morning break and we'll  
11:37:28 18 do -- I have no idea how long my ruling is going to  
11:37:32 19 take, so we won't try and schedule that aspect of  
11:37:35 20 this.

11:37:37 21 20 minutes.

11:37:37 22 -- RECESS TAKEN AT 11:37 --

11:52:58 23 -- UPON RESUMING AT 11:57 --

11:59:03 24 THE COURT: Now, counsel, when I was  
11:59:11 25 counsel it used to drive me crazy if I had to sit

11:59:14 1 for what I think would be at least a half an hour  
11:59:14 2 wondering how this is all going to turn out.

11:59:18 3 So this is not part of my reasons or  
11:59:20 4 order, but I will relieve you of the anxiety  
11:59:24 5 associated with that, by telling you that I am  
11:59:27 6 going to permit Dr. von Gernet to testify.

11:59:30 7 However, I am imposing a substantial  
11:59:33 8 number of terms on that, and I am not permitting  
11:59:35 9 his report to be entered as evidence and by which I  
11:59:39 10 mean his lengthy report of more than 300 pages.

11:59:43 11 So that sort of point first information  
11:59:47 12 for you, will help you sit through what I expect  
11:59:51 13 will be at least a half an hour as I read my  
11:59:55 14 reasons for a decision.

11:59:57 15 As well, and save my voice, there are  
12:00:02 16 certain quotations from cases in my reasons for  
12:00:04 17 decision, which I will refer to and have madam  
12:00:08 18 reporter insert in the transcript as if I had read  
12:00:13 19 them unless someone objects.

12:00:16 20 Anyone objecting? No. Because you  
12:00:19 21 know you have the cases and it will not only take  
12:00:23 22 some time to read them but I will no doubt read  
12:00:26 23 them imperfectly and the cases say what they say,  
12:00:30 24 all right.

12:00:30 25 Madam reporter, this commences my oral



12:00:35 1 reasons for decision on two matters both involving  
12:00:38 2 the same witness. There is a motion brought by  
12:00:40 3 Canada for leave, if necessary, to use a report of  
12:00:44 4 Dr. von Gernet as at least sufficient that he could  
12:00:53 5 testify as an expert witness in this trial.

12:00:57 6 And secondly, a voir dire of the same  
12:01:01 7 witness was initiated early due to a challenge by  
12:01:04 8 the Plaintiffs to that witness testifying as an  
12:01:07 9 expert, which was based mainly on an allegation of  
12:01:11 10 bias.

12:01:12 11 Starting with the motion brought by  
12:01:17 12 Canada. Canada seeks leave to file the full  
12:01:21 13 revised report of Alexander von Gernet dated  
12:01:27 14 July 2019 and proposes to call him as an expert  
12:01:30 15 witness in its case.

12:01:31 16 Ontario supports Canada's position on  
12:01:35 17 the motion, but is making no submissions. And  
12:01:39 18 while I'm at it, I mention that that was Ontario's  
12:01:43 19 position on the voir dire as well.

12:01:44 20 The Plaintiffs submit that the original  
12:01:48 21 report of Dr. von Gernet was late, as was the  
12:01:53 22 amended report. Leave is therefore required in the  
12:01:59 23 submission of the Plaintiffs, before that report  
12:02:03 24 can be the foundation of expert testimony. And in  
12:02:08 25 that regard, the Plaintiffs submit that they will

1 be prejudiced if Canada is permitted to use it.

2 Moving to the voir dire, the Plaintiffs  
3 submit that this proposed expert witness is in any  
4 event not qualified, based primarily on an  
5 allegation of bias.

6 The motion was heard first, and  
7 although initially it was intended that the voir  
8 dire be following immediately, as things unfolded,  
9 the voir dire was heard separately at a later date.  
10 I was concerned about the potential overlap between  
11 the arguments made in the two, so I reserved my  
12 decision on the motion in the end to be decided  
13 along with the voir dire. The voir dire itself was  
14 conducted a week ago Friday.

15 By way of brief background, before  
16 commencement of this trial, these actions had been  
17 case managed for quite some time. They were case  
18 managed first by Master Sproat, then Master  
19 Hawkins, and then Justice Gans.

20 In September of 2011, Master Sproat  
21 made the first case management order regarding  
22 expert reports, which required the Plaintiffs'  
23 reports to be served by December 31, 2012, among  
24 other deadlines. Since then, there have been a  
25 number of extensions of time, and ultimately the

1 Plaintiffs' reports were served commencing with a  
2 group of reports in September of 2013, and then  
3 individual reports in 2014, 2017 and 2018.

4 In February of 2014, Canada provided  
5 instructions to Dr. von Gernet to prepare a report  
6 focused on the role of oral histories and  
7 traditions, among other potential reports he may  
8 prepare. Issues arose in getting a final report  
9 from him, due in part to his obligations to another  
10 lawsuit. Like the Plaintiffs, the Defendants  
11 sought extensions of the schedule for the delivery  
12 of expert reports.

13 After a number of extensions were  
14 received, Canada received a draft report from  
15 Dr. von Gernet, and I believe it was Master  
16 Hawkins who ordered that the final report be served  
17 by February 29, 2016. This was among other  
18 scheduling matters dealt with from time to time.

19 With respect to the von Gernet report,  
20 in November of 2016, Canada told the Plaintiffs  
21 that it couldn't get his report on time and at some  
22 point told the Plaintiffs that the witness had  
23 become uncooperative. Dr. von Gernet did not  
24 appear on a 2017 witness list for this trial, and  
25 as of January 2018, Canada did not intend to call

12:05:23 1 him as a witness in this trial.

12:05:25 2 The Plaintiffs served a number of reply  
12:05:30 3 expert reports in 2016 and 2017. Some of those  
12:05:35 4 reports were from experts for which prior reports  
12:05:38 5 had been served. But in 2018, there was a  
12:05:43 6 additional report from a new expert, Professor  
12:05:47 7 McCarthy; and I'll get back to that expert report  
12:05:49 8 in a minute.

12:05:55 9 As well, in the spring of 2018, Canada  
12:05:57 10 raised objections regarding some of the Plaintiffs  
12:06:00 11 proposed expert witnesses. Among other issues,  
12:06:03 12 Canada disputed that the following three people,  
12:06:06 13 who were being put forward as experts, could  
12:06:08 14 testify in that capacity. One, Chief Vernon Roote;  
12:06:14 15 two, Karl Keeshig; three, Lenora Keeshig. These  
12:06:22 16 three individuals are members of the Plaintiff  
12:06:25 17 First Nations.

12:06:30 18 There was also the related question of  
12:06:31 19 whether expert evidence was needed to respond to  
12:06:34 20 those expert reports.

12:06:56 21 There was a dialogue in the case  
12:06:37 22 management process regarding a number of issues  
12:06:39 23 overlapping with these issues, including a question  
12:06:46 24 of whether those three people should be put forward  
12:06:48 25 as experts. There were other issues in connection

1 with geological evidence. It was determined that  
2 the Plaintiffs could deliver an additional expert  
3 report, and in that regard, the Plaintiffs  
4 delivered the report of Professor McCarthy that I  
5 mentioned earlier in September of 2018.

6 Professor McCarthy has now testified as  
7 an expert in this trial. She was qualified as an  
8 expert in earth sciences and geology, to be brief.  
9 In large part, her testimony focused on geological  
10 events in the Georgian Bay area at various periods  
11 of time, including a great time ago. However, she  
12 testified based on a different report than the one  
13 that was served in 2018. Her 2018 report went  
14 beyond those geological subjects. It was entitled,  
15 "The Post Glacial History of Lake Huron Basin -  
16 Assessing Parallels and Anishinaabe Myths". In  
17 that regard, during the pretrial process, Canada  
18 raised an issue about the McCarthy report as well  
19 and whether it should be limited to geology.

20 About six weeks after the Plaintiffs'  
21 reply reports were served, Canada served a very  
22 lengthy report from Dr. von Gernet. The report  
23 exceeds 300 pages long. Canada submits that that  
24 report was in reply to the McCarthy report, which  
25 it had received in September of 2018.



1 no dispute about some elements of the compromise.

2 There is a substantial dispute about other elements  
3 of the compromise.

4 Focusing first on those things that are  
5 not disputed, the parties agree that the compromise  
6 included at least the following:

7 1) Dr. von Gernet would provide a new  
8 report, limited to traditional stories that he had  
9 gathered, and removing all opinion evidence.

10 2) Canada could seek a leave of the  
11 trial judge to introduce the opinion evidence of  
12 Dr. von Gernet based on the evidence that was then  
13 elicited at trial.

14 3) The Plaintiffs would deliver an  
15 amended McCarthy report limited to geology and  
16 removing the material about geomythology. And it  
17 was open to the Plaintiffs to make submissions in  
18 their argument at trial about the connection  
19 between the myths and the geology of the area.

20 Moving to disputed areas, and I'll try  
21 and focus on those that have been raised and not  
22 get into other issues.

23 There is some dispute about aspects of  
24 the compromise. First and foremost, the Plaintiffs  
25 submit that as far as they understood the

12:12:10 1 compromise, it was not open to Canada to take the  
12:12:14 2 position at trial that the Dr. von Gernet report  
12:12:18 3 was not late. As far as the Plaintiffs understood,  
12:12:24 4 that door was closed.

12:12:26 5 The Plaintiffs further submit that  
12:12:30 6 their withdrawal of expert reports, as they did,  
12:12:34 7 for Chief Vernon Roote, Mr. Keeshig and  
12:12:41 8 Ms. Keeshig, was done on this understanding that  
12:12:44 9 the issue of lateness was not to be raised.  
12:12:50 10 However, they withdrew those reports before Justice  
12:12:53 11 Gans made his proposed compromise. Those three  
12:13:01 12 witnesses have all testified in this trial, but not  
12:13:05 13 as expert witnesses. Chief Vernon Roote testified  
12:13:13 14 at some length in many aspects of the evidence in  
12:13:20 15 this trial; I'm not going to try and summarize  
12:13:24 16 them. Karl Keeshig also testified at length,  
12:13:28 17 including recounting a number of stories that are  
12:13:32 18 important to these First Nations, and other oral  
12:13:40 19 history. Lenora Keeshig also testified, indicating  
12:13:46 20 that she, herself, was a storyteller and recounting  
12:13:50 21 how she became a storyteller and the significance  
12:13:53 22 of stories. And she, herself, recounted certain  
12:13:57 23 stories that were important to these First Nations.

12:14:07 24 Moving back to the events regarding the  
12:14:12 25 Dr. von Gernet report. Canada did proceed to



1 deliver an abridged report removing all opinion  
2 evidence as agreed. That report, which is about 30  
3 pages long, is not in dispute.

4 In addition, he was on the witness list  
5 for this trial prior to the commencement of the  
6 trial. He would need to be, in my view, because  
7 for his 30-page report of factual information to go  
8 in on consent, he would need to be made available  
9 at least for cross-examination if nothing else.

10 In addition, the Plaintiffs complied  
11 with the part of the compromise that required that  
12 they deliver a revised McCarthy report that was  
13 focused on geology only. That was done and the  
14 witness has testified based on that revised report.

15 In looking at the issues on the motion,  
16 there is no dispute that Canada is entitled to seek  
17 leave of the trial judge to call opinion evidence  
18 from Dr. von Gernet. That is one of the undisputed  
19 terms of the compromise that was reached. Thus,  
20 the Plaintiffs have known of that prospect since  
21 the end of last year when reaching the compromise  
22 itself. Canada indicated an intention to do so in  
23 the trial management process, and I scheduled the  
24 motion that I have now heard.

25 Prior to the return of the motion,

12:15:52 1 Canada served a revised von Gernet report. As set  
12:15:57 2 out in the introduction to that version, the report  
12:16:00 3 was done because of some changes in the meantime.  
12:16:05 4 Most significantly, the revised report was done  
12:16:08 5 because in its original form, it had responded to  
12:16:16 6 Lenora Keeshig's expert report, which was since  
12:16:17 7 withdrawn, and to the original McCarthy report  
12:16:21 8 before it was revised and replaced to focus on  
12:16:26 9 geology only.

12:16:27 10 After some time to consider the revised  
12:16:34 11 report, causing an adjournment of the hearing,  
12:16:39 12 Plaintiffs' counsel later indicated that  
12:16:41 13 Plaintiffs' objections to the motion were not  
12:16:43 14 based on the recent updating of the report,  
12:16:47 15 although aspects of that revised report would be  
12:16:50 16 raised in the voir dire.

12:16:53 17 Moving to the legal grounds for the  
12:16:56 18 motion. There's no dispute that the motion is  
12:16:59 19 brought under Rule 53 of the Rules of Civil  
12:17:02 20 Procedure. Specifically, Rule 53.08(1) provides as  
12:17:02 21 follows:

12:17:10 22 "If evidence is admissible only  
12:17:14 23 with leave of the trial judge under  
12:17:15 24 a provision listed in sub rule (2),  
12:17:19 25 leave shall be granted on such terms

12:17:21 1 as are just and with an adjournment,  
12:17:24 2 if necessary unless to do so will  
12:17:28 3 cause prejudice to the opposite  
12:17:29 4 party or will cause undue delay in  
12:17:32 5 the conduct of the trial."

12:17:34 6 And then sub rule (2) includes the  
12:17:38 7 failure to serve an expert report. So that's the  
12:17:42 8 gist of the rule.

12:17:54 9 Leave to proceed is only required if in  
12:17:56 10 fact the original von Gernet report or any later  
12:18:00 11 version of it was late. The parties agree before  
12:18:07 12 me that the issue of whether the report was late  
12:18:09 13 is, at least technically, not res judicata. They  
12:18:13 14 agree that Justice Gans made no order. And both  
12:18:17 15 sides, to their credit, expressed unhappiness about  
12:18:20 16 what has become an apparent misunderstanding about  
12:18:24 17 the terms of the compromise.

12:18:26 18 Having said that, regardless of whether  
12:18:32 19 one side or the other is right, I conclude, having  
12:18:37 20 looked carefully at the evidence, the highlights of  
12:18:40 21 which I've now recounted, that the von Gernet  
12:18:43 22 report was in fact late. Therefore, leave is  
12:18:46 23 required under the rule I've just quoted.

12:18:49 24 You will have just heard that under the  
12:19:02 25 rule, "leave shall be granted unless to do so will

1 cause prejudice to the opposite party or will cause  
2 undue delay in the conduct of the trial."

3 In the submissions before me, the First  
4 Nations made it clear that their objection to leave  
5 was on the basis of prejudice, not on the ground of  
6 delaying the trial. The Plaintiffs put forward a  
7 number of arguments on prejudice, which I have  
8 grouped and dealt with as follows:

9 First, they submit that the case  
10 management deadline should be respected, and that  
11 granting leave would fundamentally undermine the  
12 case management process.

13 I agree that case management deadlines  
14 should be respected, but it is not in every case  
15 that being relieved of the deadline will undermine  
16 the process, so I must proceed to consider the  
17 other reasons.

18 The Plaintiffs also submit that late  
19 delivery of expert reports is a problem in the  
20 management of civil litigation in the Province of  
21 Ontario. And again, I agree. It is a problem as a  
22 general matter. However, this case does not  
23 reflect that general problem.

24 Canada's position is that,  
25 unfortunately, expert reports are sometimes late,

12:20:42 1 that the Plaintiffs also sometimes delivered  
12:20:45 2 reports late. And that in any event, the  
12:20:48 3 Plaintiffs have had this report for six months  
12:20:51 4 prior to the commencement of the trial and at least  
12:20:53 5 a year before the witness will testify. Those are  
12:20:57 6 also accurate general observations.

12:21:07 7 It seems to me that the case management  
12:21:09 8 process generated the result that Canada could seek  
12:21:14 9 leave to use this report during the trial. That  
12:21:18 10 was one of the specific terms of the compromise and  
12:21:23 11 it is not the subject of a dispute.

12:21:27 12 The history of this particular case is  
12:21:29 13 that both sides requested a number of extensions of  
12:21:32 14 time, and there were a number of delays in  
12:21:35 15 delivering expert reports. And even the Plaintiffs  
12:21:37 16 agreed before me that sometimes case management  
12:21:41 17 timetables need not always be strictly enforced.

12:21:45 18 I have now been managing this trial for  
12:21:48 19 quite sometime, and, from that process, it is  
12:21:51 20 apparent to me that this case has been  
12:21:53 21 characterized by positive and effective case  
12:21:56 22 management and cooperation between counsel. This  
12:22:00 23 contested issue is very unusual and does not  
12:22:04 24 demonstrate a disregard for the case management  
12:22:07 25 process.

1 Further, the Plaintiffs have had this  
2 report since last fall and have been on notice  
3 since then of the contents of it. Perhaps most  
4 importantly, the compromise that they agreed to  
5 allowed for seeking leave at trial to use these  
6 opinions, so there has been notice of that  
7 possibility now since last fall.

8 The Plaintiffs raise some other  
9 objections. The Plaintiffs submit they are  
10 prejudiced by withdrawing the three reports that  
11 were the subject of objections by Canada that I  
12 have listed already.

13 In response, Canada submits that they  
14 did not ask that they be withdrawn. They did give  
15 notice that they would be objecting to those three  
16 individuals being called as expert witnesses; and  
17 in the ordinary course, that objection would be  
18 dealt with at trial. That certainly would be the  
19 ordinary course. On this, and one of the other  
20 submissions, Canada also consents to a term  
21 permitting the Plaintiffs to deliver a reply expert  
22 report to Dr. Von Gernet's report.

23 The next submission by the Plaintiffs  
24 in support of that conclusion of prejudice is that  
25 because this issue is coming up in the middle of

12:23:42 1 the trial, they are prejudiced because they would  
12:23:46 2 have, or may have to recall, witnesses who have  
12:23:49 3 already testified to address aspects of the report.  
12:23:55 4 Along the same lines, the Plaintiffs submitted that  
12:23:58 5 dealing with Dr. Von Gernet's report in this way,  
12:24:03 6 would have the unfair affect of highlighting his  
12:24:06 7 evidence, because there would be some evidence  
12:24:08 8 focused only on his evidence. In that regard, I  
12:24:14 9 observe that this is not a jury trial and I am able  
12:24:16 10 to avoid that outcome and look at all the evidence  
12:24:19 11 in full context.

12:24:20 12 Again, in this general area, the  
12:24:25 13 Plaintiffs submit that it also may distort the way  
12:24:28 14 the Plaintiffs have presented their case. And in  
12:24:31 15 this regard, the Plaintiffs ask me to infer that it  
12:24:35 16 has done so.

12:24:43 17 As I said at the hearing, I have some  
12:24:45 18 difficulty with a number of these submissions.  
12:24:50 19 Since the compromise was reached, the Plaintiffs  
12:24:52 20 knew that leave could be sought by Canada to use  
12:24:57 21 this report at this trial. That is an uncontested  
12:25:04 22 part of the compromise that was reached. As well,  
12:25:07 23 the compromise expressly contemplated that this  
12:25:10 24 could occur after the evidence had started going  
12:25:14 25 in. The one document we do have says that the

12:25:18 1 leave could be sought "based on the evidence then  
12:25:24 2 elicited at the trial". That is not at the  
12:25:28 3 beginning of the trial.

12:25:29 4 Thus the compromise expressly  
12:25:31 5 contemplated that the Plaintiffs case would already  
12:25:34 6 be going in. Plaintiffs' counsel fairly said at  
12:25:40 7 the hearing of this motion, said that this was not  
12:25:43 8 completely unexpected. Plaintiffs reasonably  
12:25:46 9 should have factored this possibility in. If the  
12:25:50 10 timing of a decision was significant to the way  
12:25:53 11 they were going to put in their case, they could  
12:25:56 12 have asked for an early determination and they did  
12:25:59 13 not do so.

12:26:00 14 The Plaintiffs cannot now say that  
12:26:03 15 prejudice is inevitable, which is as it was  
12:26:06 16 submitted to me, since they have agreed that Canada  
12:26:12 17 can seek leave during the course of the trial.

12:26:15 18 The Plaintiffs also submit that they  
12:26:19 19 may have difficulty finding an expert, especially  
12:26:22 20 finding an expert in time to assist in their  
12:26:25 21 preparation for the cross-examination of Dr. von  
12:26:28 22 Gernet, which is presently scheduled for January.  
12:26:33 23 That will be dealt with in the terms that I am  
12:26:36 24 going to attach to my order.

12:26:41 25 As for reply expert evidence, as I



12:26:43 1 said, Canada consents to that and Ontario, by  
12:26:47 2 generally supporting Canada's position, also must  
12:26:49 3 consent to that.

12:26:52 4 I conclude that there is not prejudice  
12:26:56 5 for the above reasons, subject to the need for  
12:26:59 6 terms, which I will deal with at the end of my  
12:27:02 7 reasons for decision.

12:27:12 8 We move to the voir dire, in which  
12:27:16 9 Dr. von Gernet testified in-chief and was  
12:27:19 10 cross-examined at some length, after which I heard  
12:27:23 11 submissions about whether or not he should be  
12:27:27 12 accepted as qualified to testify in this trial.

12:27:30 13 Dr. von Gernet is an anthropologist, a  
12:27:36 14 profession that addresses reconstructing the past.  
12:27:40 15 He has a focus on the role of oral histories and  
12:27:43 16 oral traditions in that regard.

12:27:45 17 We have heard from a number of fact  
12:27:47 18 witnesses who have testified about oral history and  
12:27:53 19 oral traditions at some length, as well as some  
12:27:55 20 experts who have touched on how that type of  
12:27:58 21 evidence should be looked upon.

12:28:00 22 Dr. von Gernet, in his proposed opinion  
12:28:07 23 evidence, talks about what he, in his opinion,  
12:28:10 24 describes as the appropriate methodology to apply  
12:28:13 25 to that sort of information, and gives an

1 anthropological view of approaches to take to using  
2 oral traditions and oral histories to establish  
3 historical facts.

4 Canada tendered Dr. von Gernet as an  
5 expert as follows: "Anthropologist and  
6 ethnohistorian with special expertise in the use of  
7 archaeological evidence, written documentation, and  
8 oral histories and traditions to reconstruct past  
9 cultures of Indigenous peoples and their history of  
10 contact with European newcomers throughout Canada  
11 and parts of the United States."

12 That tender was challenged by the  
13 Plaintiffs on the following grounds, which are  
14 loosely grouped by me as follows:

15 1) that the witness assumes the role  
16 of advocate in his report, including the selective  
17 use of caselaw;

18 2) that the witness presents an  
19 incomplete picture;

20 3) that the witness is not  
21 open-minded;

22 and in the alternative,

23 4) that the expert evidence is not  
24 necessary.

25 The test for admissibility of expert

12:29:41 1 evidence is well summarized in the case of Regina  
12:29:45 2 V. Abbey, 2017 ONCA 640:

3 "[48] The test may be summarized as follows:  
4 Expert evidence is admissible when:

5 (1) It meets the threshold requirements of  
6 admissibility, which are:

7 a. The evidence must be logically  
8 relevant;

9 b. The evidence must be necessary to  
10 assist the trier of fact;

11 c. The evidence must not be subject to  
12 any other exclusionary rule;

13 d. The expert must be properly  
14 qualified, which includes the requirement that the  
15 expert be willing and able to fulfil the expert's  
16 duty to the court to provide evidence that is:

17 i. Impartial,

18 ii. Independent, and

19 iii. Unbiased.

20 e. For opinions based on novel or  
21 contested science or science used for a novel  
22 purpose, the underlying science must be reliable  
23 for that purpose,  
24 and

25 (2) The trial judge, in a gatekeeper role,

1 determines that the benefits of admitting the  
2 evidence outweigh its potential risks, considering  
3 such factors as:

- 4 a. Legal relevance,
- 5 b. Necessity,
- 6 c. Reliability, and
- 7 d. Absence of bias.

8 "[49] In short, if the proposed expert  
9 evidence does not meet the threshold requirements  
10 for admissibility it is excluded. If it does meet  
11 the threshold requirements, the trial judge then  
12 has a gatekeeper function. The trial judge must be  
13 satisfied that the benefits of admitting the  
14 evidence outweigh the costs of its admission. If  
15 the trial judge is so satisfied then the expert  
16 evidence may be admitted; if the trial judge is not  
17 so satisfied the evidence will be excluded even  
18 though it has met the threshold requirements."

12:30:04 19 The two aspects of that test that are  
12:30:06 20 the subject of the objections here are shown in  
12:30:14 21 paragraph 48 (1) b, which is the alternative  
12:30:23 22 argument that the evidence is not necessary to  
12:30:26 23 assist me, and secondly in paragraph 48 (1) d,  
12:30:34 24 which requires that the expert must be properly  
12:30:37 25 qualified, including the requirement the expert be

1 willing and able fulfill his or her duty to the  
2 court to provide evidence that is impartial,  
3 independent and unbiased. That is the primary  
4 issue on this motion.

5 Additional general principles are set  
6 out by the Supreme Court of Canada in the leading  
7 case of White Burgess Langille Inman v. Abbott and  
8 Hailiburton Co, 2015 SCC 23:

9 "[32] Underlying the various formulations of  
10 the duty are three related concepts: Impartiality,  
11 independence and absence of bias. The expert's  
12 opinion must be impartial in the sense that it  
13 reflects an objective assessment of the questions  
14 at hand. It must be independent in the sense  
15 that it is the product of the expert's independent  
16 judgment, uninfluenced by who has retained  
17 him or her or the outcome of the litigation. It  
18 must be unbiased in the sense that it does not  
19 unfairly favour one party's position over another.  
20 The acid test is whether the expert's opinion would  
21 not change regardless of which party retained him  
22 or her: P. Michell and R. Mandhane, 'The Uncertain Duty  
23 of the Expert Witness' (2005), 42 Alta. L. Rev.  
24 635, at pp. 638-39. These concepts, of course,  
25 must be applied to the realities of adversary litigation.

1 Experts are generally retained, instructed and paid  
2 by one of the adversaries. These facts alone do  
3 not  
4 undermine the expert's independence, impartiality  
5 and freedom from bias.

6 E. The Expert's Duties and Admissibility

7 [33] As we have seen, there is a broad  
8 consensus about the nature of an expert's duty to  
9 the court. There is no such consensus, however,  
10 about how that duty relates to the admissibility of  
11 an expert's evidence. There are two main  
12 questions: Should the elements of this duty go to  
13 admissibility of the evidence rather than simply to  
14 its weight?; And, if so, is there a threshold  
15 admissibility requirement in relation to  
16 independence and impartiality?

17 [34] In this section, I will explain my view  
18 that the answer to both questions is yes: A  
19 proposed expert's independence and impartiality go  
20 to admissibility and not simply to weight and there  
21 is a threshold admissibility requirement in  
22 relation to this duty. Once that threshold is met,  
23 remaining concerns about the expert's compliance  
24 with his or her duty should be considered as part  
25 of the overall cost-benefit analysis which the

1 judge conducts to carry out his or her gatekeeping  
2 role."

12:32:29 3 The Supreme Court of Canada expanded on  
12:32:31 4 that to some degree in its paragraph 36, which  
12:32:35 5 quotes at length from its prior decision in  
12:32:43 6 Mouvement Laïque Québécois v. Saguenay (City), 2015  
12:32:44 7 SCC 16 at paragraph 106.

12:32:47 8 Further discussion in White Burgess  
12:33:04 9 that informs the approach to be taken to this  
12:33:06 10 analysis is found in paragraphs 48, 49 and 50 of  
12:33:13 11 White Burgess:

12 "[48] Once the expert attests or testifies on  
13 oath to this effect, the burden is on the party opposing  
14 the admission of the evidence to show that there is  
15 a realistic concern that the expert's evidence  
16 should not be received because the expert is unable  
17 and/or unwilling to comply with that duty. If  
18 the opponent does so, the burden to establish on a  
19 balance of probabilities this aspect of the  
20 admissibility threshold remains on the party  
21 proposing to call the evidence. If this is not  
22 done, the evidence, or those parts of it that are  
23 tainted by a lack of independence or impartiality,  
24 should be excluded. This approach conforms to the  
25 general rule under the Mohan framework,

1 and elsewhere in the law of evidence, that the  
2 proponent of the evidence has the burden of  
3 establishing its admissibility.

4 [49] This threshold requirement is not  
5 particularly onerous and it will likely be quite  
6 rare that a proposed expert's evidence would be  
7 ruled inadmissible for failing to meet it. The  
8 trial judge must determine, having regard to both  
9 the particular circumstances of the proposed expert and  
10 the substance of the proposed evidence, whether the  
11 expert is able and willing to carry out his  
12 or her primary duty to the court. For example, it  
13 is the nature and extent of the interest or  
14 connection with the litigation or a party thereto  
15 which matters, not the mere fact of the interest or  
16 connection; the existence of some interest or a  
17 relationship does not automatically render the  
18 evidence of the proposed expert inadmissible. In  
19 most cases, a mere employment relationship  
20 with the party calling the evidence will be  
21 insufficient to do so. On the other hand, a direct  
22 financial interest in the outcome of the litigation  
23 will be of more concern. The same can be said  
24 in the case of a very close familial relationship  
25 with one of the parties or situations in which the



1 proposed expert will probably incur professional  
2 liability if his or her opinion is not accepted by  
3 the court. Similarly, an expert who, in his or her  
4 proposed evidence or otherwise, [page 208]  
5 assumes the role of an advocate for a party is  
6 clearly unwilling and/or unable to carry out the  
7 primary duty to the court. I emphasize that  
8 exclusion at the threshold stage of the analysis  
9 should occur only in very clear cases in which the  
10 proposed expert is unable or unwilling to  
11 provide the court with fair, objective and  
12 non-partisan evidence. Anything less than clear  
13 unwillingness or inability to do so should not lead  
14 to exclusion, but be taken into account in the  
15 overall weighing of costs and benefits of receiving  
16 the evidence.

17 [50] As discussed in the English case law,  
18 the decision as to whether an expert should be  
19 permitted to give evidence despite having an  
20 interest or connection with the litigation is a  
21 matter of fact and degree. The concept of apparent  
22 bias is not relevant to the question of whether or  
23 not an expert witness will be unable or unwilling  
24 to fulfill its primary duty to the court. When  
25 looking at an expert's interest or relationship

1 with a party, the question is not whether a  
2 reasonable observer would think that the expert is  
3 not independent. The question is whether the  
4 relationship or interest results in the expert  
5 being unable or unwilling to carry out his or her  
6 primary duty to the court to provide fair,  
7 non-partisan and objective assistance."

12:33:22 7  
12:33:22 8 In accordance with the White Burgess  
12:33:30 9 decision, Dr. von Gernet has testified. And in his  
12:33:34 10 testimony he has attested under oath that he is  
12:33:37 11 aware of and will carry out his duties to be fair,  
12:33:41 12 objective and non-partisan.

12:33:43 13 Again in accordance with White Burgess,  
12:33:45 14 this means that the burden is on the Plaintiffs as  
12:33:50 15 the party opposing admission of the evidence to  
12:33:53 16 show a realistic concern that Dr. von Gernet is  
12:33:55 17 unable and/or unwilling to comply with that duty.

12:34:01 18 There is, again, some overlap in the  
12:34:04 19 arguments put forward by the Plaintiffs, so I have  
12:34:07 20 grouped them perhaps somewhat differently than they  
12:34:10 21 did, but I will now go through them.

12:34:12 22 First, the Plaintiffs submit that this  
12:34:15 23 witness has assumed the role of advocate. It was  
12:34:20 24 clarified in argument that it is not the role of  
12:34:25 25 advocate in the usual sense of advocating for a

12:34:28 1 party, but in the sense of advocating in his report  
12:34:33 2 for acceptance of his archaeological approach and  
12:34:38 3 opinions.

12:34:39 4 As it came out in the voir dire,  
12:34:48 5 additional context is that according to this  
12:34:53 6 witness, there is an academic debate, or tension,  
12:34:58 7 within the archaeological community between what he  
12:35:03 8 described as the purely scientific side, on the one  
12:35:08 9 hand, and the more culture and social anthropologic  
12:35:14 10 sides on the other hand. And within his  
12:35:24 11 professional work, he has taken a stand in that  
12:35:24 12 debate.

12:35:24 13 The Plaintiffs submit, therefore, that  
12:35:25 14 he is not open-minded. However, the witness has  
12:35:32 15 made it clear in his testimony that in his  
12:35:37 16 professional opinion, each case must be approached  
12:35:40 17 on an individual basis and not determined, as he  
12:35:42 18 put it, by a priori view or by generalizations.

12:35:52 19 The Plaintiff also submits that the  
12:35:54 20 report itself is argumentative, repetitive, and  
12:35:58 21 selective. One of the primary reasons for this  
12:36:02 22 submission is a section in the witness' report  
12:36:04 23 where he talks about some caselaw.

12:36:11 24 Dealing first with the suggestion that  
12:36:13 25 the report is somewhat repetitive and

12:36:16 1 argumentative, I agree that it is. However, it's  
12:36:20 2 not unlike some of the other reports that I have  
12:36:23 3 received in this trial; and in my view, that  
12:36:25 4 argument can more properly be dealt with under the  
12:36:28 5 rubric of whether the report itself should become  
12:36:32 6 evidence.

12:36:33 7 The issue about the use of caselaw  
12:36:37 8 overlaps with some other submissions, and arises in  
12:36:42 9 this way. There is a short section in this report  
12:36:46 10 called "Application of Approaches to Legal  
12:36:49 11 Settings". In that section, Dr. von Gernet says  
12:36:54 12 that he's discussing what he describes as an early  
12:36:56 13 approach that he has taken, comparing it with his  
12:37:00 14 current approach. In that context, he discusses  
12:37:04 15 and quotes from three of the cases that he has  
12:37:08 16 testified in, and what the courts have said about  
12:37:13 17 his testimony. That is three of the about 30 cases  
12:37:17 18 that are listed comprehensively in his curriculum  
12:37:21 19 vitae.

12:37:22 20 In those three cases the courts made  
12:37:25 21 favourable comments about his evidence, but it was  
12:37:28 22 demonstrated in cross-examination that there are  
12:37:31 23 other cases in which the courts have disagreed with  
12:37:34 24 or rejected his approach.

12:37:38 25 In considering whether that choice and

12:37:41 1 that small section of the report represents, I'll  
12:37:46 2 use the general term, bias, I have to note that the  
12:37:50 3 section itself was not put forward as a  
12:37:52 4 comprehensive summary of how this individual's  
12:37:56 5 evidence has been received by the courts.

12:37:59 6 As well, there is a comprehensive list  
12:38:02 7 in the curriculum vitae, with all the information  
12:38:05 8 necessary for anyone to look at every single case  
12:38:08 9 and see what transpired. So it is not a case where  
12:38:13 10 the witness is hiding the treatment by courts of  
12:38:21 11 his evidence.

12:38:23 12 I would have preferred that the witness  
12:38:25 13 worked harder against the potential inference from  
12:38:28 14 quoting only those three cases. But taking the  
12:38:31 15 evidence as a whole, including his answers on  
12:38:34 16 cross-examination, I'm not satisfied that this  
12:38:39 17 creates a realistic concern that this gentleman is  
12:38:42 18 unwilling or unable to comply with his duties.

12:38:50 19 The Plaintiffs also repeatedly sought  
12:38:52 20 to demonstrate in cross-examination, using aspects  
12:38:55 21 of the report, that this witness held the view that  
12:38:57 22 oral traditions should be given no independent  
12:39:01 23 weight, regardless of the circumstances. And it  
12:39:05 24 was demonstrated in cross-examination that that is  
12:39:09 25 not this gentleman's view. He repeatedly indicated

12:39:17 1 that each case has to be dealt with on a case by  
12:39:20 2 case basis, and did give some examples where he was  
12:39:24 3 involved in situations where oral traditions were  
12:39:27 4 given weight.

12:39:28 5 The Plaintiffs also noted that this  
12:39:32 6 witness has been retained almost exclusively by  
12:39:35 7 governments and other parties that are opposite the  
12:39:38 8 position of Indigenous peoples. This submission is  
12:39:42 9 correct with some exceptions, as detailed by the  
12:39:45 10 witness in his evidence. And I've taken it into  
12:39:49 11 account, but I do not find it determinative.

12:39:52 12 The Plaintiffs further submit that the  
12:39:59 13 witness has acknowledged that he has a confirmation  
12:40:02 14 bias and testified that he holds strong views  
12:40:07 15 within the archaeological field, and that this  
12:40:11 16 should be taken as sufficient to find that  
12:40:15 17 realistic concern.

12:40:20 18 It is apparent that the witness is  
12:40:24 19 aware of the dangers of bias in general and  
12:40:27 20 confirmation bias in particular. He talked about  
12:40:30 21 this as part of human behaviour, which of course  
12:40:33 22 would include his own. However, he also testified  
12:40:36 23 that in his professional work, he has been trained  
12:40:40 24 to resist this phenomenon in his work. It has not  
12:40:45 25 been demonstrated, at least at this early stage,

12:40:48 1 that that was insufficient to address the issue.

12:40:55 2 The Plaintiffs also rely on a few  
12:40:57 3 statements in this lengthy report where the witness  
12:40:59 4 arguably uses or adopts negative terminology, such  
12:41:04 5 as the phrase "fashionable nonsense" taken from a  
12:41:08 6 book title written by another author, or calling a  
12:41:12 7 native American proponent of geomythology, a  
12:41:17 8 "influential gadfly".

12:41:21 9 These matters were explored at length  
12:41:24 10 in cross-examination, and addressed satisfactorily  
12:41:28 11 in cross-examination from the standpoint of the  
12:41:32 12 threshold for this voir dire.

12:41:35 13 Bearing in mind all of the evidence, I  
12:41:39 14 am not satisfied that the Plaintiffs have met their  
12:41:41 15 burden to show a realistic concern that this  
12:41:44 16 witness is "unwilling and/or unable" such that his  
12:41:49 17 evidence be ruled inadmissible.

12:41:52 18 I then adopt the following quote from  
12:42:15 19 White Burgess as illustrative of what's going to  
12:42:17 20 happen next in this trial. At paragraph 49, toward  
12:42:22 21 the end:

22 "I emphasize that exclusion at the threshold  
23 stage of the analysis should occur only in very  
24 clear cases in which the proposed expert is unable  
25 or unwilling to provide the court with fair,

1 objective and non-partisan evidence. Anything less  
2 than clear unwillingness or inability to do so  
3 should not lead to exclusion, but be taken into  
4 account in the overall weighing of costs and  
5 benefits of receiving the evidence."

12:42:56 6 I have done so and will continue to do  
12:42:58 7 so when this gentleman testifies. But you will see  
12:43:01 8 in my terms that I've imposed that I have attempted  
12:43:03 9 to address some of the cost benefit issues that I  
12:43:08 10 have identified both in the voir dire and on the  
12:43:10 11 motion.

12:43:11 12 I note that I will continue to assess  
12:43:15 13 this witness for bias throughout his testimony in  
12:43:19 14 the broader overall context of weighing his  
12:43:24 15 evidence as I would do with any expert witness who  
12:43:27 16 testifies in this trial.

12:43:28 17 I then move to the Plaintiffs'  
12:43:33 18 alternative submission. In the alternative, the  
12:43:37 19 Plaintiffs submit that this opinion evidence is not  
12:43:39 20 necessary. They submit that the witness' evidence  
12:43:42 21 relates to the weighing of three types of evidence:  
12:43:46 22 archaeological evidence, historical documents, and  
12:43:49 23 oral histories and oral traditions.

12:43:52 24 The Plaintiffs submit that the court  
12:43:53 25 weighs evidence on a regular basis, and this



12:43:57 1 opinion evidence is unnecessary. And in relation  
12:44:05 2 to some of the references in the report, the  
12:44:05 3 Plaintiffs submit that this is simply common sense.

12:44:09 4 In considering this submission, I note  
12:44:13 5 that I have already had expert evidence from  
12:44:16 6 Plaintiffs' expert witnesses about aspects of the  
12:44:19 7 approach I should take when considering oral  
12:44:22 8 histories and oral tradition types of evidence. I  
12:44:28 9 am not persuaded that the topic will be driven  
12:44:32 10 entirely by common sense. And, therefore, I am not  
12:44:37 11 prepared to exclude the witness on the basis that  
12:44:40 12 his opinion evidence is unnecessary.

12:44:42 13 One other discrete objection was  
12:44:47 14 raised, because this gentleman's report refers to  
12:44:50 15 Dr. McCarthy's evidence. As set out in the tender  
12:44:54 16 that I have read, Dr. von Gernet is not being  
12:44:59 17 tendered as an expert in any aspect of geology, and  
12:45:04 18 he will not be permitted to testify about geology  
12:45:06 19 as an expert.

12:45:07 20 Lastly, I confirm as has been confirmed  
12:45:10 21 to me that the short report, which is about 30  
12:45:13 22 pages of non-expert evidence, can go in on consent.  
12:45:20 23 And this, from the Plaintiffs, is on the basis it  
12:45:23 24 is not opinion evidence to begin with.

12:45:25 25 Now, before I move on to summarize my

12:45:33 1 order, I note that I must still address the issue  
12:45:36 2 of whether the report itself should become trial  
12:45:38 3 evidence. There was an agreement between these  
12:45:41 4 parties that most reports would become trial  
12:45:45 5 evidence. And that has been of assistance to me.  
12:45:49 6 As a matter of course under that agreement, each of  
12:45:54 7 the experts who have testified thus far have had a  
12:45:56 8 large portion of their examination in-chief made  
12:46:01 9 more efficient through the marking as evidence of  
12:46:04 10 their reports. From time to time there have been  
12:46:08 11 some focused issues about reports that I've dealt  
12:46:11 12 with in rulings.

12:46:14 13 Having said that, ordinarily an expert  
12:46:17 14 report does not become trial evidence. Its main  
12:46:21 15 function is to give the other side notice of the  
12:46:23 16 findings, opinions and conclusions that they should  
12:46:26 17 expect the expert to testify to at trial.

12:46:30 18 Even though the process that the  
12:46:33 19 parties have agreed to I have found helpful and  
12:46:37 20 efficient, in this case there is no consent. And I  
12:46:40 21 understand why there is no consent, because in the  
12:46:43 22 course of the argument, I've been taken to various  
12:46:46 23 sections of the report that are potentially  
12:46:51 24 problematic. I've given illustrations of those  
12:46:54 25 this morning.

1 Bearing all this in mind, and bearing  
2 in mind my role as gatekeeper, I am not prepared to  
3 grant Canada the right to have this lengthy report  
4 become trial evidence. Only the abridged report  
5 will become trial evidence.

6 By doing so, I do not mean to give  
7 Canada an indefinite length of time to call this  
8 gentleman in-chief because they will not have the  
9 report as a shortcut. I am going to require Canada  
10 to tightly focus on the opinion evidence that they  
11 are looking for in the related material.

12 Especially given the lateness of this report, and  
13 its length, and some of its weaknesses that have  
14 been identified by Plaintiffs' counsel, I find that  
15 it is appropriate to limit Canada in the length of  
16 time it will have for its examination in-chief to  
17 ensure that Canada does tightly focus on the  
18 opinion evidence that it needs for its case.

19 In a moment I'll go through the orders  
20 I'm making arising from the motion and voir dire  
21 and bearing in mind my role as gatekeeper in both  
22 contexts.

23 My orders are as follows:

24 1) The tender of Dr. von Gernet as  
25 expert witness is accepted.

12:48:44 1 2) Dr. Von Gernet's longer report is  
12:48:49 2 not to be marked as a trial exhibit. In that  
12:48:55 3 regard, it will not become trial evidence.  
12:48:57 4 3) Dr. Von Gernet's abridged report  
12:49:00 5 will be marked as trial evidence on consent.  
12:49:03 6 4) Leave is granted to Canada to call  
12:49:08 7 expert evidence from this witness despite the late  
12:49:12 8 delivery of his report.  
12:49:13 9 5) That expert opinion evidence must be:  
12:49:23 10 i. Within the scope of the  
12:49:24 11 accepted tender;  
12:49:27 12 ii. Within the scope of my ruling;  
12:49:29 13 and  
12:49:30 14 iii. Within the report itself such  
12:49:31 15 that notice has been given of the opinion evidence.  
12:49:35 16 6) Given the lateness of the report,  
12:49:42 17 I'm imposing additional terms regarding the  
12:49:45 18 examination of this witness.  
12:49:49 19 Before I go through the first two of  
12:49:56 20 those terms, I note that if Canada concludes that  
12:50:02 21 there will be a substantial unfairness, it will be  
12:50:07 22 open to them to ask for an extension, but they  
12:50:09 23 should not proceed on the assumption that they're  
12:50:11 24 going to get one.  
12:50:15 25 The first term is that I am going to

12:50:17 1 impose a time limit of two and one-half days for  
12:50:21 2 the examination in-chief of this witness. In doing  
12:50:24 3 so, I note the following:

12:50:26 4 First of all, we have already concluded  
12:50:29 5 the voir dire and tender, so no time will be  
12:50:32 6 required for that.

12:50:33 7 And second of all, 30 pages of fact  
12:50:35 8 evidence are going to be marked on consent, so no  
12:50:39 9 time is required for that.

12:50:40 10 The second condition is that I require  
12:50:43 11 Canada to provide to the Plaintiffs a list of all  
12:50:46 12 the documents that will be put to this witness  
12:50:49 13 in-chief, at least 30 days before he testifies.

12:50:55 14 In this regard, I note my prior  
12:50:58 15 observation that counsel should not be putting  
12:51:02 16 documents to witnesses simply to mark them, if  
12:51:06 17 there's no dispute. That can be done by providing  
12:51:09 18 a list to Mr. Registrar, as we have done with at  
12:51:13 19 least one other witness.

12:51:14 20 This term is a reference to documents  
12:51:16 21 that would be put to the witness and that he would  
12:51:19 22 actually be asked questions about them.

12:51:22 23 This is especially important given the  
12:51:26 24 very large number of footnoted sources in this  
12:51:29 25 lengthy report. If those two terms present what

12:51:37 1 Canada would submit as a profound unfairness or  
12:51:40 2 unfairness to the conduct of the trial, as things  
12:51:42 3 unfold, it's open to them as it would always be  
12:51:46 4 open to anyone, to seek an amendment to my order at  
12:51:50 5 that time. But I am not encouraging it, obviously.

12:51:54 6 Next, at present Dr. von Gernet is  
12:52:01 7 schedule to testify on January 10th, which just  
12:52:03 8 happens to be a Friday, that's just a coincidence,  
12:52:06 9 but it is about three months from now. In order  
12:52:17 10 that the Plaintiffs will have an ability to get an  
12:52:22 11 expert to assist them in preparing for that  
12:52:25 12 cross-examination, with less uncertainty about the  
12:52:29 13 schedule than would ordinarily apply, I am going to  
12:52:33 14 order now, subject to exigencies that may be  
12:52:38 15 raised, that Dr. von Gernet will not testify at an  
12:52:41 16 earlier date. And, if the precise timing of his  
12:52:48 17 testimony becomes a problem for the availability of  
12:52:51 18 a consulting expert, that the Plaintiffs should  
12:52:54 19 raise that with me so that an adjustment could be  
12:52:57 20 made.

12:53:01 21 Now I am not encouraging the Plaintiffs  
12:53:03 22 to seek a lengthy adjournment. But as with the  
12:53:07 23 proviso that I applied to the first two terms, I  
12:53:10 24 say here that if you think there's going to be an  
12:53:13 25 important unfairness or an unfairness, you should

1 raise that and see if we can make an adjustment.

2 Moving on then.

3 7) The Plaintiffs shall be permitted  
4 to call reply expert evidence as follows:

5 i. The schedule for delivery of that  
6 report shall first be discussed between counsel.  
7 If counsel cannot agree, I will set the schedule.

8 ii. Plaintiffs' counsel shall notify  
9 me by December 2nd regarding the outcome or status  
10 of their discussions about that schedule.

11 8) Plaintiffs' counsel raised the  
12 prospect that there may need to be other reply  
13 evidence beyond expert evidence. The question of  
14 whether that is the case or not may be raised by  
15 the Plaintiffs within a reasonably short time after  
16 Dr. Von Gernet's testimony is complete. At that  
17 time, I will be able to deal with it in full  
18 context.

19 That concludes the terms of my order,  
20 and my oral reasons for decision. Is there any  
21 request for clarification of any of those terms, or  
22 do you want to think it over?

23 No. All right. Okay.

24 Coincidentally, it's lunchtime. So  
25 we'll resume with Dr. von Gernet at 2:15.

12:55:05 1 MR. TOWNSHEND: Professor Driben.

12:55:07 2 THE COURT: We will commence with

12:55:09 3 Professor Driben at 2:15. Thank you, Mr. Townshend.

12:55:14 4 -- LUNCH RECESS TAKEN AT 12:58 --

02:17:42 5 -- UPON RESUMING AT 2:17 --

02:19:26 6 THE COURT: Mr. Townshend.

02:19:28 7 MR. TOWNSHEND: Yes, I'd like to call

02:19:30 8 Professor Paul Driben to the stand.

02:19:33 9 THE COURT: Please go ahead.

02:19:39 10 THE REGISTRAR: Good afternoon, sir.

02:19:45 11 PAUL DRIBEN: Good afternoon.

02:19:47 12 THE REGISTRAR: Would you like to make

02:19:48 13 an oath on a Holy Book or solemn affirmation to

02:19:53 14 tell the truth?

02:19:54 15 PAUL DRIBEN: Holy Book, please.

02:19:54 16 THE REGISTRAR: Please state and spell

02:19:54 17 your name for the record.

02:19:57 18 PAUL DRIBEN: My name is Paul Driben,

02:20:00 19 P-A-U-L, D-R-I-B-E-N.

02:20:03 20 THE REGISTRAR: Thank you.

02:20:00 21 PAUL DRIBEN: SWORN.

02:20:34 22 MR. TOWNSHEND: Your Honour, in

02:20:35 23 accordance with the agreements of -- between

02:20:37 24 counsel of splitting examination, I am going to

02:20:41 25 examine Professor Driben in relation to



02:20:43 1 qualifications and Chapters 1 through 6 of his  
02:20:47 2 report. And Mr. Brookwell will examine him in  
02:20:52 3 relation to chapters 7 through 10.

02:20:56 4 MR. FELICIAN: Your Honour, if I may,  
02:20:57 5 my iPad doesn't seem to be working and I take notes  
02:21:03 6 on the iPad as we go along. Is there something  
02:21:04 7 perhaps madam reporter could do to fix the iPads  
02:21:06 8 back here?

02:21:06 9 THE COURT: I'm okay with that,  
02:21:06 10 Mr. Townshend, but counsel can't agree on something  
02:21:22 11 like that.

02:21:22 12 MR. TOWNSHEND: We had agreed that we  
02:21:24 13 would not object to each other making that request.

02:21:28 14 THE COURT: I thought that was what you  
02:21:31 15 meant to say.

02:22:54 16 -- OFF THE RECORD --

02:22:54 17 THE COURT: Mr. Townshend, I'm going to  
02:22:56 18 give you permission to split the examination  
02:22:58 19 in-chief provided that it doesn't cause it to  
02:23:01 20 become unnecessarily lengthy.

02:23:05 21 In other words, it's not an invitation  
02:23:08 22 to take more time.

02:23:11 23 MR. TOWNSHEND: That is correct, Your  
02:23:13 24 Honour.

02:23:13 25 I expect we will be within our allotted

1 time, or estimated time, and we will certainly not  
2 ask about the same issue of this witness.

3 May I have document SC1113.

4 EXAMINATION IN-CHIEF BY MR. TOWNSHEND:

5 Q. Do you recognize this, Professor  
6 Driben?

7 A. Yes, I do.

8 Q. And it is?

9 A. This is my CV, my curriculum  
10 vitae.

11 MR. TOWNSHEND: And could we have that  
12 made an exhibit, please.

13 THE COURT: Mr. Registrar.

14 THE REGISTRAR: Exhibit No. 4323.

15 EXHIBIT NO. 4323: Professor Paul  
16 Driben's curriculum vitae.

17 THE COURT: Is that the same document,  
18 Mr. Townshend, as is appended to this gentleman's  
19 report or is it an updated version?

20 MR. TOWNSHEND: This is an updated  
21 version.

22 THE COURT: All right, thank you.

23 Exhibit No. 4323. Thank you, Mr. Registrar.

24 BY MR. TOWNSHEND:

25 Q. So Professor Driben, you have an

02:24:11 1 MA and PhD in anthropology?

02:24:15 2 A. Yes, I do.

02:24:15 3 Q. You've taught anthropology for  
02:24:18 4 39 years?

02:24:18 5 A. Yes, I did.

02:24:19 6 Q. And what are your principal  
02:24:21 7 interests in your career?

02:24:21 8 A. My principal interests are  
02:24:22 9 Anishinaabe society and culture and I am also  
02:24:25 10 interested in applied anthropology.

02:24:27 11 Q. You were director of the Lakehead  
02:24:31 12 University studies native -- Lakehead University  
02:24:34 13 Native Studies Program from 1976 to 1983?

02:24:38 14 A. That is correct.

02:24:39 15 Q. And you were chair of the  
02:24:40 16 department of anthropology from 1979 to 1985?

02:24:44 17 A. That's correct.

02:24:45 18 Q. And you were chair of the  
02:24:47 19 international committee of the study of Jesuit  
02:24:50 20 relations concerning the Lake Superior Ojibwe 1848  
02:24:56 21 to 1924, from 1999 to 2002?

02:25:00 22 A. That is also correct.

02:25:06 23 MR. TOWNSHEND: Your Honour, in the  
02:25:08 24 tender of this witness there are a number of  
02:25:11 25 technical and anthropological terms that I wanted

02:25:14 1 to have the witness explain.

02:25:14 2 BY MR. TOWNSHEND:

02:25:17 3 Q. So, in a few words, can you state  
02:25:19 4 what are the divisions of anthropology?

02:25:21 5 A. There's two main divisions of  
02:25:23 6 anthropology. On the one hand, there's the social  
02:25:26 7 or cultural side and on the other hand there is the  
02:25:31 8 biological side. My career is on the social side.

02:25:35 9 On that side, there's subdivisions so  
02:25:37 10 there's anthropological linguistics, there's  
02:25:40 11 ethnology which is the descriptions of cultures,  
02:25:43 12 and there's also the study of race and racism.

02:25:49 13 Q. Can you explain what ethnography  
02:25:52 14 is, please?

02:25:52 15 A. Ethnography is how I began my  
02:25:56 16 career. And ethnography is a discipline of  
02:25:58 17 description. So what your primarily interested in  
02:26:02 18 as an ethnographer is to live with another group of  
02:26:06 19 people and to participate with them, to record, to  
02:26:10 20 be a participant of observer and then to write an  
02:26:14 21 account of their culture and that's called an  
02:26:17 22 ethnography.

02:26:18 23 Q. Thank you. And what is ethnology?

02:26:21 24 A. Ethnology is a higher level of  
02:26:24 25 analysis. An ethnologist is a person who takes

02:26:27 1 ethnographic information and analyzes it to find  
02:26:30 2 trends, patterns.

02:26:36 3 Q. And what is ethnohistory?

02:26:38 4 A. Ethnohistory is a subdivision of  
02:26:41 5 ethnology, in which you take what you've learned in  
02:26:48 6 the field, by observing, by studying, by learning  
02:26:51 7 the rules by which people behave in another  
02:26:54 8 society, in my case Anishinaabe, you learn those  
02:26:57 9 rules. And then what you do is you look the at  
02:27:00 10 documentary record and you interpret the  
02:27:02 11 documentary record based on what you know about the  
02:27:06 12 behaviour of people while you're interacting with  
02:27:08 13 them. So this gives you more insight into the  
02:27:12 14 historic record because you're reading things in  
02:27:15 15 the historic record but you're also participating  
02:27:18 16 in the lifestyle that is reminiscent of that  
02:27:22 17 historical record or a mirror of that historical  
02:27:25 18 record of some kind.

02:27:27 19 Q. What is the role of fieldwork in  
02:27:29 20 ethnohistory?

02:27:30 21 A. Well, fieldwork is essential in  
02:27:33 22 ethnohistory. Because in order to understand a  
02:27:40 23 document, if you're interested in the Indigenous  
02:27:40 24 point of view, which I am, and other  
02:27:42 25 ethnohistorians are, if you're interested in the

02:27:45 1 Indigenous point of view, the insights that you get  
02:27:47 2 from fieldwork are tremendous. Because you can see  
02:27:52 3 things in your fieldwork that you can read about in  
02:27:56 4 the past but you've actually experienced them. And  
02:27:58 5 when you experience them, it's -- you get deeper  
02:28:01 6 insight into the behaviors of people, in the past  
02:28:03 7 as well as the present.

02:28:05 8 Q. And how did you become interested  
02:28:12 9 in ethnohistory?

02:28:14 10 A. Well, I began my work as an  
02:28:16 11 ethnographer, that was in the 1960s, I began my  
02:28:20 12 work as ethnographer, a describer of cultures. But  
02:28:24 13 then the people who I was describing became  
02:28:27 14 interested in the documentary history of  
02:28:30 15 themselves. They became interested in Treaties and  
02:28:32 16 other agreements that had been made in the past.

02:28:35 17 And when the people who I was studying,  
02:28:37 18 which is to say my teachers, when my teachers  
02:28:40 19 became interested in that subject I also became  
02:28:42 20 interested in the subject because it was an  
02:28:44 21 interest of theirs.

02:28:45 22 So then I moved from -- I was already  
02:28:49 23 doing ethnology by that time but I moved into  
02:28:54 24 ethnohistory as I consider to be a natural part of  
02:28:56 25 my career because that is where I was being led.

02:28:59 1 Q. You've been getting at this a bit,  
02:29:06 2 but can you give us a general overview in a few  
02:29:09 3 sentences of the arc of your career?

02:29:11 4 A. Well, as I said, I began my career  
02:29:13 5 as an ethnologist, or as an ethnographer and then I  
02:29:18 6 became, after learning about it, I became an  
02:29:21 7 ethnologist. I became more interested in the  
02:29:24 8 general patterns of culture, like general trends in  
02:29:25 9 culture, let's say, the evolution of culture, or  
02:29:28 10 the evolution of war, any institution of those  
02:29:31 11 sorts of things. And then I -- when I was doing  
02:29:36 12 that I was also doing a lot of fieldwork  
02:29:38 13 particularly with Anishinaabe people.

02:29:40 14 And as I was doing that, I was also  
02:29:43 15 becoming interested in ethnohistory and the two of  
02:29:46 16 them just sort of combined in my life, and I kept  
02:29:49 17 doing that and I've been doing it for a long, long  
02:29:54 18 time now, for about 50 years.

02:29:55 19 Q. Thank you. In your CV you have a  
02:30:00 20 section called "fieldwork" which goes from pages 3  
02:30:04 21 to 6. And I counted in that 22 Anishinaabe  
02:30:10 22 communities, in which you had done fieldwork, one  
02:30:15 23 Cree community, one Inuit and one Métis community;  
02:30:19 24 is that right?

02:30:20 25 A. That is correct, yes.

02:30:21 1 Q. Can you talk about different  
02:30:23 2 subdivisions of Anishinaabe people?

02:30:25 3 A. That's a very interesting question  
02:30:30 4 because if you ask Anishinaabe people, if you ask  
02:30:33 5 them who they are, they will say, "I'm an  
02:30:37 6 Anishinaabe".

02:30:38 7 But from an anthropological point of  
02:30:41 8 view we make a different distinction. The term  
02:30:45 9 "Anishinaabe" is an ethno name, it's a term that  
02:30:48 10 people use to describe themselves.

02:30:50 11 But when anthropologists first came  
02:30:52 12 into contact with the Anishinaabe, they noticed  
02:30:56 13 that some people spoke in this way; some people's  
02:31:02 14 economy was this way; but other people were  
02:31:05 15 slightly different.

02:31:06 16 For instance, if you take people who  
02:31:09 17 ethnologists call Ojibway you'll see that they live  
02:31:12 18 in the northern regions, they speak a language  
02:31:16 19 that's called Ojibwe or a dialect of a language  
02:31:19 20 that's called Ojibwe and they're mostly hunters and  
02:31:22 21 fishers.

02:31:23 22 Now if you look at people who are  
02:31:26 23 Odawa, they do -- they hunt, they fish, but they  
02:31:31 24 also do more farming. And then if you look at the  
02:31:35 25 Pottawatomi, who have a separate language but



02:31:40 1 closely related to Odawa, and Ojibwe, which are  
02:31:44 2 linguistic variances of a language called  
02:31:50 3 Anishinaabemowin, the Pottawatomi do a little bit  
02:31:53 4 more farming.

02:31:53 5 However, these distinctions between  
02:31:56 6 Ojibwe and Odawa and Pottawatomi, these  
02:31:59 7 distinctions are distinctions that anthropologists  
02:32:02 8 make among the people. But they're not  
02:32:04 9 distinctions that the people necessarily make with  
02:32:07 10 each other. To each other, they're Anishinaabe.

02:32:09 11 So if you ask them or they're talking  
02:32:12 12 to each other they won't say, I'm Ojibwe. They  
02:32:15 13 won't say, I'm Odawa, or I'm Pottawatomi. They  
02:32:18 14 will say "I'm Anishinaabe".

02:32:21 15 So there's -- so Anishinaabe is the  
02:32:23 16 cover term that they use to talk about themselves.  
02:32:27 17 Ojibway, Odawa, and Pottawatomi are terms that  
02:32:29 18 anthropologists use to divide that larger  
02:32:32 19 population into analytical categories that are  
02:32:36 20 slightly different from our point of view, but not  
02:32:39 21 necessarily from theirs.

02:32:41 22 Q. Are there other subdivisions that  
02:32:43 23 anthropologists use, such as in relation to  
02:32:47 24 subsistence patterns?

02:32:49 25 A. Yes, as I was saying before, if

02:32:53 1 you have a subsistence pattern that is based mostly  
02:32:58 2 on foraging, which is to say hunting and fishing  
02:32:58 3 and trapping, or living directly off the land,  
02:33:02 4 that's the subsistence pattern that's mostly  
02:33:04 5 associated with Ojibwe speakers, and Odawa speakers  
02:33:07 6 there's some agriculture. And again, with  
02:33:09 7 Pottawatomi, there's more agriculture.

02:33:14 8 Q. In which of these subdivisions  
02:33:17 9 have you done fieldwork?

02:33:18 10 A. I've done fieldwork with all --  
02:33:20 11 except for the Pottawatomi, I've done fieldwork  
02:33:22 12 with all of the divisions of the Ojibwe.

02:33:28 13 Let me explain it this way -- with  
02:33:30 14 Ojibwe speakers. Ojibwe speakers are divided into  
02:33:34 15 Plains Ojibwe, or Bungee. Northern Ojibwe, those  
02:33:38 16 who live in the far north of Ontario, let's say.  
02:33:40 17 There's also the Southwestern Ojibwe, and those are  
02:33:43 18 in Minnesota, Wisconsin, Michigan, and then there's  
02:33:47 19 the Southeastern Ojibwe, the people here, the  
02:33:50 20 Southeastern Ojibwe.

02:33:52 21 So those are the main divisions of the  
02:33:59 22 Ojibwe and I have done fieldwork with all of them.

02:34:01 23 Q. Have you done fieldwork in the  
02:34:03 24 Georgian Bay area?

02:34:03 25 A. Pardon me, I didn't hear that.

02:34:04 1 Q. Have you done fieldwork in the  
02:34:06 2 Georgian Bay area?

02:34:07 3 A. Yes, I have, I've done fieldwork  
02:34:09 4 at Shawanaga, and I have also done fieldwork at  
02:34:13 5 Whitefish.

02:34:14 6 Q. Can you point those out on a map,  
02:34:19 7 there's -- maybe I need to bring up exhibit W.

02:34:38 8 A. Okay. I've done fieldwork -- if  
02:34:42 9 you're asking me in this, this particular area  
02:34:45 10 here, this is -- this is where Shawanaga is, right  
02:34:57 11 here.

02:34:57 12 Q. For the record, that's in the  
02:34:57 13 eastern shore of Georgian Bay, across the bay from  
02:35:06 14 the Bruce Peninsula?

02:35:07 15 A. Yeah. And then whitefish is at  
02:35:09 16 the entrance to the great Manitoulin Island, in  
02:35:14 17 this area here, a place where the island ends,  
02:35:18 18 which is -- it's right here. Right in this area  
02:35:23 19 here I've done fieldwork.

02:35:25 20 Q. For the record that's the eastern  
02:35:27 21 end of Manitoulin Island?

02:35:29 22 A. Yeah.

02:35:29 23 Q. The northern shore of the eastern  
02:35:31 24 end of Manitoulin?

02:35:32 25 A. That's correct.

02:35:33 1 Q. And what kind of work did you do  
02:35:36 2 at those locations?

02:35:37 3 A. I did land use and occupancy  
02:35:39 4 studies, which is to say, that I was interested in  
02:35:46 5 finding out what people were doing on the land,  
02:35:49 6 when they were doing it and how much they were  
02:35:52 7 capturing, what they were doing with what they were  
02:35:54 8 capturing. And I wanted to get a good picture of  
02:35:57 9 their land use and occupancy, on the one hand for  
02:36:00 10 those sorts of subsistence endeavors, but I was  
02:36:03 11 also interested in sacred sites.

02:36:05 12 I made, for both of these places, a  
02:36:07 13 cultural atlas, if you will, which included things  
02:36:10 14 that you would normally find in an atlas but  
02:36:13 15 they're -- it's more than that because it is a  
02:36:15 16 cultural atlas that's associated with Anishinaabe  
02:36:18 17 activities, so I would pull out where people  
02:36:21 18 hunted, I pull up where people trapped, I'd pull up  
02:36:23 19 where people fished, where people -- where there  
02:36:27 20 were sacred sites. Where people went to gather  
02:36:29 21 eagle feathers. Anything that was relevant to  
02:36:33 22 their concerns to map, I mapped.

02:36:34 23 So I let them guide the mapping. I  
02:36:37 24 mean, I had my own input due to experience as well.  
02:36:40 25 And so there's some things I could bring forward to

02:36:44 1 suggest, but I wanted to make sure that it had  
02:36:47 2 everything on those maps that the people were  
02:36:49 3 concerned with.

02:36:50 4 Q. For how long have you studied the  
02:36:53 5 Anishinaabe people?

02:36:54 6 A. Since 1967.

02:37:00 7 Q. Can you tell us in a few sentences  
02:37:05 8 what substantive topics you looked at in your  
02:37:09 9 fieldwork?

02:37:09 10 A. Well, I've done land use and  
02:37:14 11 occupancy studies. I've done a lot of different  
02:37:18 12 work for the Court. Some of that work has been  
02:37:21 13 with personal injury and death, others land claims  
02:37:26 14 research, others for mediation. I've done work for  
02:37:30 15 industry, Bell Canada, mining companies, Aboriginal  
02:37:38 16 organizations I've worked for like Assembly of  
02:37:40 17 First Nations. I've worked for different  
02:37:42 18 governments, Government of Michigan, Government of  
02:37:45 19 Minnesota, Government of Wisconsin. I've worked  
02:37:50 20 for Government of Canada, Government of Ontario,  
02:37:53 21 many different -- many different places.

02:37:55 22 Q. The topics you've looked at in  
02:38:02 23 your fieldwork, could you just give a quick  
02:38:05 24 overview of that?

02:38:07 25 A. Okay. Well --

02:38:14 1 Q. I'm going to take you to specific  
02:38:16 2 items in a moment. But we can leave that then and  
02:38:19 3 we can go on.

02:38:20 4 You worked as an expert witness for  
02:38:26 5 very -- for the Department of Justice Canada?

02:38:31 6 A. Yes, I have.

02:38:32 7 Q. And for the Government of  
02:38:33 8 Wisconsin, and Minnesota and Michigan?

02:38:36 9 A. That is correct.

02:38:37 10 Q. And you worked for mining  
02:38:39 11 companies, such as Platinex?

02:38:42 12 A. That is correct.

02:38:43 13 Q. And many First Nations and  
02:38:44 14 organizations?

02:38:45 15 A. That is correct, yes.

02:38:47 16 Q. And you've also worked for the  
02:38:50 17 Government of Ontario, on a number of departments  
02:38:53 18 the Royal Commission on Northern Environment,  
02:38:56 19 Ministry of Citizenship and Culture, ministry of  
02:38:56 20 Community and Social Services and Ministry of  
02:39:02 21 Natural Resources back in the 1970s and '80s?

02:39:06 22 A. That is correct. Yes, I have.

02:39:07 23 Q. And you worked for Ontario Hydro?

02:39:09 24 A. I have, I've done studies for  
02:39:12 25 Ontario Hydro, in conjunction with First Nations.

02:39:14 1 Q. And you've also worked for the  
02:39:17 2 Government of Northwest Territories?

02:39:19 3 A. Yes, I have. I've worked for the  
02:39:24 4 Government of Manitoba, also.

02:39:25 5 Q. Okay. What do the Anishinaabe  
02:39:28 6 communities in which you do fieldwork, think about  
02:39:32 7 your working for this variety of different parties?

02:39:35 8 A. Well, I'll tell you, I was pretty  
02:39:37 9 afraid at first. Because what happened was, I was  
02:39:40 10 working in a community, I was working for  
02:39:43 11 Whitesand, and they lived in Whitesand Reserve  
02:39:46 12 which is adjacent to Armstrong, Ontario, on the  
02:39:49 13 North Shore of Lake Nipigon. And I had been  
02:39:54 14 working there years by that time and I had an  
02:39:56 15 opportunity to do some work in the United States.

02:39:58 16 But that work was not for Anishinaabe  
02:40:00 17 people. That work was for a case that involved  
02:40:02 18 Anishinaabe people, but I wouldn't be working for  
02:40:05 19 them; I would be working for people who were not  
02:40:08 20 working for them, if I can put it that way.

02:40:10 21 So, I was in a quandary, because I  
02:40:14 22 thought, that was a very difficult thing. I'm  
02:40:17 23 working for people, I'm learning from them, and yet  
02:40:20 24 now I'm going to appear in a legal case and that  
02:40:23 25 could have an adverse impact on some Anishinaabe,

02:40:27 1 on their goals.

02:40:29 2 So I was telling this -- I finally  
02:40:29 3 blurted it out, we used to all go for breakfast to  
02:40:36 4 this particular place, it was an old airforce  
02:40:37 5 barracks and just chat in the morning. And I was  
02:40:38 6 there with several of my friends, teachers, and we  
02:40:40 7 were chatting and I said, "You know, I have to tell  
02:40:42 8 you guys this". I told them, I said, this is what  
02:40:45 9 I'm doing. And Doug Sinoway, the late Doug  
02:40:48 10 Sinoway, who was Chief of the Whitesand Band at the  
02:40:51 11 time and a very good friend of mine said to me --

02:40:53 12 THE COURT: I'm just going to interrupt  
02:40:55 13 you, sir, for a moment.

02:40:59 14 Yes?

02:40:59 15 MR. FELICIAN: I'm concerned, your  
02:41:00 16 Honour, we're straying into hearsay at this point.

02:41:03 17 THE COURT: Yes, we are.

02:41:04 18 Mr. Townshend, what do you have to say  
02:41:06 19 about that?

02:41:07 20 MR. TOWNSHEND: Well, this has to do  
02:41:11 21 with any issue of, if there was a bias in favour of  
02:41:16 22 First Nations. I think the attitude that First  
02:41:21 23 Nations have to this witness working for other  
02:41:25 24 government issues, government, governments, would  
02:41:33 25 bear on that.



02:41:33 1 THE COURT: The objection was hearsay,  
02:41:39 2 not relevance.

02:41:48 3 Perhaps I had some trouble with myself.  
02:41:52 4 What did the Anishinaabe communities --  
02:41:55 5 just to make it shorter -- think about you? That  
02:41:59 6 was the gist of the question. I mean, I think  
02:42:02 7 there would be a question you could ask. But  
02:42:05 8 having this gentleman recount what he said someone  
02:42:08 9 said to him on some occasion is hearsay so you'd  
02:42:12 10 have to inform me of -- make a submission about an  
02:42:16 11 exception if that's where you want to go.

02:42:21 12 MR. TOWNSHEND: Okay. Well, maybe I  
02:42:22 13 could ask it this way.

02:42:23 14 BY MR. TOWNSHEND:

02:42:24 15 Q. Have any Anishinaabe people you  
02:42:26 16 have worked for, objected to you working for other  
02:42:30 17 governments?

02:42:30 18 A. No, they haven't.

02:42:32 19 Q. So in your CV, from pages 6 to 19,  
02:42:44 20 you have a list of grants and contracts, and I've  
02:42:48 21 counted 83 items in that.

02:42:52 22 A. Yes.

02:42:52 23 Q. And of those, I counted 42 that  
02:42:58 24 involve expert witness work supporting litigation  
02:43:01 25 or mediation?

02:43:03 1 A. Yes, that's correct.

02:43:05 2 Q. Now I'd like to talk -- take you  
02:43:07 3 to a few selected examples of those, and ask you to  
02:43:11 4 tell us just in a couple of sentences, what your  
02:43:13 5 work on that item was about.

02:43:16 6 The first one, it's on page 11, but  
02:43:21 7 it's "1992 to 1994, Mille Lacs Band". Can you just  
02:43:26 8 give us a very short description of your work on  
02:43:30 9 that one?

02:43:31 10 THE COURT: Which one was it?

02:43:33 11 MR. TOWNSHEND: It's 1992. It's on  
02:43:34 12 page 11 and it says, "1992 to 1994, Mille Lacs  
02:43:44 13 Band".

02:43:44 14 THE COURT: The one that says  
02:43:45 15 "Government of Minnesota"?

02:43:46 16 MR. TOWNSHEND: No.

02:43:46 17 THE WITNESS: Yes.

02:43:47 18 MR. TOWNSHEND: Yes, yes, that's  
02:43:48 19 correct.

02:43:52 20 THE COURT: Okay, I've got it now.

02:43:52 21 THE WITNESS: Well, in that particular  
02:43:53 22 case, what I was asked to do was to explain why it  
02:43:58 23 was that the Ojibwe speakers signed two Treaties.  
02:44:03 24 One was the 1837 treaty with the Chippewa, the  
02:44:08 25 other was the 1842 with the Chippewa.

02:44:11 1 And the question was whether they had  
02:44:13 2 reserved the right to use the natural resources  
02:44:16 3 harvests that they -- in 1837 and whether that  
02:44:20 4 changed in 1842. That was the question that I  
02:44:23 5 addressed in that project.

02:44:26 6 BY MR. TOWNSHEND:

02:44:26 7 Q. Thank you. And have you done  
02:44:27 8 other expert work in relation to the treaty right  
02:44:34 9 to harvest?

02:44:34 10 A. Oh, yes. Quite a bit of that.

02:44:38 11 Q. That's fine, you don't need to  
02:44:40 12 enumerate.

02:44:41 13 A. Oh, yeah.

02:44:42 14 Q. On page 13, there's an item called  
02:44:48 15 "2003c" "Assin". Can you explain what you were  
02:44:54 16 doing in that case?

02:44:56 17 A. Yes. Well, this was a case in  
02:44:58 18 which there was a train -- a train hit a car coming  
02:45:02 19 from Grassy Narrows, and what this -- what happened  
02:45:06 20 when the train hit the car is that some people were  
02:45:10 21 killed, but others were injured. And one of them  
02:45:12 22 was Mr. Assin. And Mr. Assin's legs were damaged.

02:45:22 23 So I was asked to investigate his  
02:45:22 24 ability to still pursue natural resources harvest.  
02:45:27 25 So I went into the community -- I've been in Grassy

02:45:28 1 before, but I went to Grassy Narrows, interviewed  
02:45:30 2 him and what I found -- and his hunting partner,  
02:45:33 3 too. And what I discovered in that particular case  
02:45:36 4 is that his legs were no longer able to withstand  
02:45:39 5 any walking. So he couldn't hunt anymore.

02:45:42 6 And so that he appeared to be a healthy  
02:45:47 7 young man, but he wasn't at all and this affected  
02:45:50 8 his ability to -- well, he didn't have a hunting  
02:45:53 9 partner anymore. His hunting partner abandoned him  
02:45:56 10 so he suffered as a result. So he did suffer as a  
02:46:00 11 result of the accident. So I was assessing the  
02:46:01 12 damages that occurred as a result of that accident,  
02:46:05 13 in an Anishinaabe context.

02:46:06 14 Q. And have you done other work  
02:46:09 15 concerning how living off the land is damaged  
02:46:12 16 through personal injury?

02:46:13 17 A. Oh, yes, I've done quite a bit of  
02:46:15 18 that as well.

02:46:16 19 Q. Thank you. There's -- on page 13,  
02:46:21 20 there's also an item that says, "2001 to 2007  
02:46:25 21 Whitesand". Can you explain what you were doing  
02:46:29 22 there?

02:46:30 23 A. Well, I've done a lot of work at  
02:46:33 24 Whitesand but that one, 2001 to 2007, in that  
02:46:41 25 particular case Ontario Hydro, or the predecessors

02:46:48 1 of Ontario Hydro, had changed Lake Nipigon, so that  
02:46:53 2 it became a reservoir. When it became a reservoir,  
02:46:56 3 the water wasn't the same as it was before, it was  
02:46:59 4 higher sometimes, lower sometimes and it caused  
02:47:01 5 damage to the First Nations in that area.

02:47:04 6 And one of the things I looked at there  
02:47:06 7 was damages that had been caused, but more than  
02:47:10 8 that, I was looking prospectively at damages that  
02:47:13 9 might be caused by a new development which was a  
02:47:16 10 development on the Little Jackfish River  
02:47:19 11 hydroelectric project. The project never went  
02:47:22 12 ahead but what I did was I established a baseline  
02:47:25 13 of living off the land for people; a baseline of  
02:47:29 14 what they were doing, where they were doing and  
02:47:31 15 what they were doing with what they were producing  
02:47:34 16 so that when the project went ahead, if there were  
02:47:37 17 any adverse effects, these effects could be  
02:47:40 18 examined quickly because you'd be able to measure  
02:47:43 19 them and you'd be able to take remedial action so  
02:47:46 20 that there would be less damage than there would be  
02:47:49 21 otherwise.

02:47:50 22 Q. Have you done other cases where --  
02:47:54 23 of how living off the land and culture in community  
02:47:58 24 interacts with industrial development?

02:48:01 25 A. Yes, I have. I have done other

02:48:03 1 work like that as well because that's one of the --  
02:48:06 2 it's one of the main concerns of First Nations and  
02:48:10 3 government so that I've been involved in those  
02:48:12 4 studies as well.

02:48:15 5 Q. Also on page 13 there's an item  
02:48:17 6 that says "2003 B. Shipman"?

02:48:23 7 A. Yes.

02:48:23 8 Q. Can you explain what your role in  
02:48:26 9 that was?

02:48:26 10 A. This had to do with the rules for  
02:48:28 11 using another person's -- another Band's territory.  
02:48:32 12 One -- here you have one Band using another Band's  
02:48:36 13 territory and I was asked to explain under what  
02:48:39 14 conditions -- what were the rules for that? How  
02:48:41 15 does that happen? Because if you're using -- if  
02:48:44 16 you're from one Band and using another Band's  
02:48:47 17 territory there's a protocol that you have to go  
02:48:49 18 through in order to do that. Whether you're from  
02:48:52 19 another Band or you're another person you still  
02:48:54 20 have to go through the protocol.

02:48:55 21 And what I was looking at there was  
02:48:56 22 whether this protocol was followed. In other  
02:48:59 23 words, whether Anishinaabe Law, if you will, was  
02:49:01 24 followed in this case where use of another Band's  
02:49:05 25 territory.

02:49:05 1 Q. Have you done another case  
02:49:07 2 involving Anishinaabe territory or customs about  
02:49:11 3 harvesting and permission to harvest?

02:49:13 4 A. Oh, yes, I have. Yes, I have.

02:49:15 5 Q. On page 17 at the top, there's an  
02:49:21 6 item, "2014 Begetikong also known as Pic River"?

02:49:26 7 A. Yes.

02:49:26 8 Q. Can you say what you were doing  
02:49:28 9 there?

02:49:29 10 A. Well, what I was doing in that  
02:49:41 11 case, was I was looking at the treaty-making  
02:49:44 12 process that was in place for the Robinson Superior  
02:49:49 13 Treaty. This -- the Begetikong, or Pic River  
02:49:58 14 Anishinaabe, they didn't send a representative to  
02:49:58 15 the Treaty Council in 1850. And what I was asked  
02:49:59 16 to do was to determine whether, from the point of  
02:50:01 17 view of the Anishinaabe, what were the rules for  
02:50:03 18 engaging in a treaty-making process and whether  
02:50:06 19 this process was followed in this case, and whether  
02:50:09 20 there was a legitimate treaty made from their --  
02:50:12 21 from an Anishinaabe perspective.

02:50:13 22 Q. On page 16 -- 16 in the middle, in  
02:50:13 23 the case about Helen Frank.

02:50:13 24 A. Yes.

02:50:26 25 Q. Can you explain your work on that,

02:50:28 1 please?

02:50:28 2 A. Helen Frank was the Chief of the  
02:50:33 3 Namaygoosisigagun Band and she had, under the  
02:50:37 4 instructions from the Elders in the community, she  
02:50:40 5 had constructed a house on one side of this  
02:50:46 6 CN tracks, the train tracks, this is near  
02:50:48 7 Armstrong, Ontario, this is in Northern Ontario,  
02:50:51 8 it's just to the west of Armstrong.

02:50:54 9 And she had constructed this building,  
02:50:56 10 and she was charged with erecting a structure on  
02:51:01 11 Crown land. And what I was asked to do was to find  
02:51:04 12 out whether she had followed the proper rules for  
02:51:07 13 constructing buildings according to Anishinaabe  
02:51:09 14 protocols.

02:51:11 15 Q. And have you done other work  
02:51:14 16 concerning Anishinaabe decision-making roles?

02:51:17 17 A. Yes, that's mostly what I'm  
02:51:20 18 concerned with. I'm concerned with the rules that  
02:51:22 19 generate all sorts of behaviour, the rules that  
02:51:25 20 generate -- the rules that govern hunting  
02:51:29 21 behaviour, the rules that govern theology, the  
02:51:31 22 rules that govern political interaction. The rules  
02:51:32 23 that govern everything. Because to the extent that  
02:51:35 24 I understand the rules that govern their behaviour,  
02:51:37 25 then I can say uh-huh, I understand what this



behaviour is. It's in line with this rule.

Let's take, for example, let's say that hunting. Well, you're out hunting and you notice that a person takes only as much as they need and you wonder why they don't take more. But you know what the rule is, the rule is, that if you take more than you need, you'll be punished by the supernatural agents that control those species. So once you know the rule, you can understand the behaviour. The behaviour then makes sense to you.

Q. I'm going to go to one more, and that's at the bottom of page 17, Restoule, and can you just tell us in a few sentences what your role in that was?

A. My role was to explain to the court how the Lake Superior Anishinaabe understood the escalator clause in the 1850 Robinson Superior Treaty.

Q. Have you done expert work concerning the Anishinaabe perspective on treaty interpretation?

A. Yes, that's primarily what I do.

Q. Now, in your -- in your work, can you tell us what types of sources you -- you tend to use?

02:52:50 1 A. Well, first of all, I use my own  
02:52:52 2 field experience because I've learned many things  
02:52:54 3 over the decades in the field. But I also rely on  
02:52:57 4 the work of other ethnologists who have done  
02:53:01 5 fieldwork with Anishinaabe people as well.

02:53:02 6 And of course what I use in my work is  
02:53:05 7 documents because everybody who is interested in  
02:53:07 8 the past will use documentary records. So I use  
02:53:10 9 those three primary sources: my own experience,  
02:53:12 10 the experience of other ethnologists, and the  
02:53:16 11 historical record.

02:53:16 12 Q. Historical records made by whom,  
02:53:19 13 for example?

02:53:19 14 A. Well, by and large they're made by  
02:53:21 15 Europeans, because they're literate and so they  
02:53:24 16 leave most of the documents. But there are  
02:53:26 17 literate Anishinaabe, too, in certain periods of  
02:53:30 18 time. And I'm interested in of course what they  
02:53:32 19 say, as well.

02:53:33 20 Q. So, going through this section of  
02:53:35 21 your CV, I counted 12 times you've testified or  
02:53:40 22 have been deposed?

02:53:42 23 A. That's correct, I have.

02:53:44 24 Q. And then in your CV at pages 19  
02:53:48 25 through 21 there's a section of conference papers,

02:53:52 1 I counted 20 of those.

02:53:56 2 A. Yes.

02:53:56 3 Q. And in the CV pages 30 to 32 with  
02:54:01 4 a section of journal articles and book chapters I  
02:54:05 5 counted 18 of those?

02:54:07 6 A. Sounds about right.

02:54:08 7 Q. And on page 32, you've written  
02:54:14 8 five books?

02:54:15 9 A. Yes, I have.

02:54:16 10 Q. And three are about Anishinaabe,  
02:54:19 11 one of which is an oral history?

02:54:21 12 A. That is correct.

02:54:21 13 Q. One is about the Métis?

02:54:23 14 A. That is correct.

02:54:24 15 Q. And one is an introductory on  
02:54:28 16 anthropology text?

02:54:29 17 A. Yes, it's an introductory  
02:54:30 18 anthropology text for Canadian universities.

02:54:34 19 Q. So in the course of your career,  
02:54:38 20 how many Anishinaabe traditional knowledge holders  
02:54:41 21 have you interviewed, roughly speaking?

02:54:48 22 A. Hundreds. Hundreds. But it's not  
02:54:49 23 necessarily -- when we say "interview" you may get  
02:54:53 24 the idea that all of this is a very formal  
02:54:56 25 procedure; but that's not exactly the way it works

1 after 40 years, or 50 years. Because after this  
2 length of time, you get to know people. And as you  
3 get to know them, as they become your friends, you  
4 may have a question. A question may arise.

5 For instance, you may want to know, as  
6 an ethnologist, you may want to know, how is it --  
7 because it's a delicate question, how is it that  
8 people can have sexual relations in a house which  
9 only has one room. You can ask that question if  
10 you have friends.

11 How is it that you do this or how is it  
12 that you do that? How is it that you've been  
13 converted to Christianity when you have your own  
14 religion? You see, if you just -- if you know  
15 people you can ask them all sorts of questions but  
16 they must trust you that you will not use that  
17 information to cause harm, and I haven't.

18 So the idea is not so much formal  
19 interviews, it's interviews, but plus all that  
20 other experience that you -- sorry, about that.  
21 It's all those other experiences that you can have  
22 by talking to people who are friends with you, that  
23 you have known for years.

24 Q. Have you done fieldwork at SON?

25 A. No, I haven't.

02:56:06 1 Q. Before preparing your report, did  
02:56:09 2 you review any oral histories at SON?

02:56:12 3 A. Yes, I did. I reviewed all of the  
02:56:14 4 ones that I had, yes.

02:56:15 5 Q. Before your report?

02:56:16 6 A. No, not before my report. I did  
02:56:18 7 that after my report.

02:56:20 8 Q. Have you reviewed the trial  
02:56:24 9 testimony of SON lay witnesses?

02:56:27 10 A. Yes, I have.

02:56:32 11 Q. Now you mentioned various  
02:56:34 12 divisions of the Ojibwe and Anishinaabe that are  
02:56:39 13 made by scholars; what is the significance of those  
02:56:43 14 subdivisions to the Anishinaabe themselves?

02:56:46 15 A. As far as I've been taught by  
02:56:51 16 Anishinaabe, not much. They don't use the same  
02:56:54 17 categories that we use to talk about themselves.  
02:56:56 18 They do not refer to themselves as Ojibwe, Odawa or  
02:57:01 19 Pottawatomi. They refer to themselves as  
02:57:03 20 Anishinaabe.

02:57:04 21 Because the others are technical terms  
02:57:05 22 in anthropology. I know it's confusing, because  
02:57:08 23 people -- they're called Ojibwe. And if you look  
02:57:11 24 at my own work, for example, you'll see that I use  
02:57:14 25 that term as well.

02:57:15 1 But from the point of view of the  
02:57:16 2 people, which is your question, from the point of  
02:57:19 3 view of the people themselves, they don't make much  
02:57:21 4 of that distinction at all. It's a scholarly  
02:57:24 5 distinction.

02:57:25 6 Q. In the distinctions made by  
02:57:27 7 scholars, where does SON fit?

02:57:29 8 A. They would be the Southeastern  
02:57:32 9 Ojibwe.

02:57:43 10 Q. To what extent are general  
02:57:44 11 Anishinaabe customary rules applicable to  
02:57:47 12 individual Anishinaabe communities?

02:57:49 13 A. That depends on time and place, of  
02:57:52 14 course. But in general -- at one level of  
02:57:56 15 generalization, they're going to be the same.

02:57:58 16 For instance, if you're interested in  
02:58:00 17 theology, I find a common theology. If you're  
02:58:04 18 interested in economy, there's going to be some  
02:58:06 19 variation because of the ecological circumstances  
02:58:10 20 in which people find themselves. Political  
02:58:12 21 organizations, it's common.

02:58:13 22 So some things vary, but it's usually  
02:58:16 23 things that have to do with subsistence, things  
02:58:19 24 like -- those would be economic things. Things  
02:58:21 25 that are fundamentally the same would be things

02:58:24 1 like political organization -- I'm talking  
02:58:26 2 traditionally now -- political organization,  
02:58:29 3 religious organization, kinship, all those would be  
02:58:32 4 the same, right throughout the Anishinaabe world.

02:58:35 5 Whereas the others that you're talking  
02:58:37 6 about, these economic or some linguistic  
02:58:40 7 differences would be -- they would be present as  
02:58:46 8 well.

02:58:46 9 MR. TOWNSHEND: Can I have document  
02:58:48 10 SC1114, please. Your Honour, this is our tender  
02:58:57 11 for the expert qualification for Professor Driben.

02:59:26 12 THE COURT: Does anyone have any  
02:59:27 13 submissions about this before I ask my question?

02:59:30 14 Canada, no?

02:59:32 15 Ontario?

02:59:33 16 MR. FELICIAN: No, Your Honour.

02:59:34 17 THE COURT: Mr. Townshend, recognizing  
02:59:43 18 that anthropology is not limited to historical  
02:59:46 19 events, and your witness seemed to be bouncing back  
02:59:53 20 and forth, and I don't say that in a pejorative way  
02:59:56 21 but just in a descriptive way, between present day  
02:59:59 22 and historical events.

03:00:01 23 MR. TOWNSHEND: Yes.

03:00:01 24 THE COURT: I did start to wonder about  
03:00:06 25 whether the references to today ought to be coming

03:00:11 1 from an expert.

03:00:12 2 Now, I think that in the absence of an  
03:00:16 3 objection, that there is a -- I recognize there is  
03:00:19 4 room for this discipline to talk about the human  
03:00:25 5 behaviour cultural practices today. The witness  
03:00:34 6 mentioned Anishinaabe Law which is not in the  
03:00:37 7 tender and it would be something I would need to  
03:00:40 8 hear from you about as to whether he can talk about  
03:00:42 9 that.

03:00:43 10 Can you clarify for me to what extent  
03:00:49 11 -- I'm not asking about the historical aspect of  
03:00:53 12 the tender but more to what extent this gentleman  
03:00:56 13 is going to be testifying about beliefs today?  
03:01:02 14 I've heard from however many witnesses directly who  
03:01:05 15 are members who might have been -- well, might have  
03:01:09 16 been, have already been speaking about things like  
03:01:13 17 that.

03:01:13 18 MR. TOWNSHEND: Yes. As I understand  
03:01:17 19 Professor Driben's methodology, he is looking at  
03:01:22 20 Anishinaabe customs today as a means of  
03:01:27 21 illuminating past primarily.

03:01:29 22 And then when you actually drill down  
03:01:31 23 in his report and what it will be his testimony,  
03:01:34 24 he's talking about the past. But he's using the  
03:01:38 25 present at times to illuminate the past. He's not,



03:01:42 1 I don't believe, talking about the present in  
03:01:46 2 isolation from that.

03:01:51 3 THE COURT: All right. Well, in the  
03:01:52 4 absence of an objection, I'm going to accept the  
03:01:54 5 tender with the observation that as you proceed, it  
03:02:02 6 would be helpful if that connection was as obvious  
03:02:07 7 as possible. Because I don't need this gentleman  
03:02:11 8 to tell me, for example, how these two First  
03:02:15 9 Nations govern themselves today because I've heard  
03:02:17 10 from their leaders about that. And the rule for  
03:02:22 11 expert witnesses does require that the evidence be  
03:02:25 12 necessary.

03:02:25 13 Having said that, I don't think that is  
03:02:28 14 your primary goal.

03:02:30 15 MR. TOWNSHEND: That's correct.

03:02:31 16 THE COURT: And so I would ask you to  
03:02:33 17 try and focus on what you've just described, which  
03:02:37 18 is, you know, the extent to which the present may  
03:02:40 19 illuminate the past in a way that I can see that's  
03:02:43 20 where you're going.

03:02:45 21 MR. TOWNSHEND: Thank you, Your Honour.

03:02:47 22 THE COURT: Please go ahead.

03:02:50 23 MR. TOWNSHEND: I will do that.

03:02:52 24 BY MR. TOWNSHEND:

03:02:54 25 Q. You had made another comment about

03:02:56 1 Anishinaabe Law --

03:02:58 2 THE COURT: I mean, I'm not expecting  
03:02:59 3 to hear about that, it's not part of the tender so  
03:03:02 4 you don't need to address that.

03:03:04 5 MR. TOWNSHEND: Well, I would think  
03:03:05 6 customs concerning decision making would cover  
03:03:10 7 Anishinaabe Law in the sense that this witness is  
03:03:12 8 talking about it.

03:03:14 9 THE COURT: Well, it's not a term that  
03:03:16 10 I've heard from you or the Plaintiffs. And I  
03:03:22 11 wouldn't think it would be -- you used different  
03:03:25 12 terminology, that's fine.

03:03:29 13 MR. TOWNSHEND: Yes.

03:03:29 14 THE COURT: I'm not sure this gentleman  
03:03:31 15 would be the very first person in this trial to  
03:03:33 16 introduce that terminology if that was something  
03:03:37 17 that you were going to run with.

03:03:39 18 MR. TOWNSHEND: We can talk about  
03:03:40 19 decision-making customs. I think that would  
03:03:46 20 cover...

03:03:47 21 THE COURT: All right, please go ahead.

03:03:49 22 BY MR. TOWNSHEND:

03:03:55 23 Q. Could I have document SC1115,  
03:03:58 24 please?

03:03:59 25 THE COURT: Before you go on, sir, we

03:04:01 1 should assign a number, a lettered exhibit to your  
03:04:04 2 tender.

03:04:04 3 Mr. Registrar, what is the next  
03:04:08 4 lettered exhibit?

03:04:09 5 THE REGISTRAR: Lettered exhibit W-1.

03:04:12 6 THE COURT: W-1?

03:04:15 7 THE REGISTRAR: Yes, Your Honour.

03:04:16 8 EXHIBIT NO. W-1: Tender for the expert  
03:04:16 9 qualification for Professor Driben.

03:04:16 10 THE COURT: Please go ahead.

03:04:18 11 BY MR. TOWNSHEND:

03:04:19 12 Q. Can I have document SC1115.

03:04:23 13 Do you recognize this document?

03:04:24 14 A. I do. That is the report I  
03:04:27 15 prepared.

03:04:28 16 MR. TOWNSHEND: I'd like that entered  
03:04:30 17 as an exhibit, please. At the moment it is exhibit  
03:04:33 18 M-1 as well.

03:04:34 19 THE COURT: Well, we'll just leave it  
03:04:35 20 there because the record will need to understand  
03:04:38 21 that it was described that way. And we'll give it  
03:04:41 22 a second exhibit number as a numbered exhibit.  
03:04:45 23 Mr. Registrar.

03:04:47 24 THE REGISTRAR: Exhibit number 4324.

03:04:47 25 THE COURT: 4324?

03:04:52 1 THE REGISTRAR: 4324, Your Honour.

03:04:53 2 EXHIBIT NO. 4324: Report entitled,

03:04:53 3 "An Anthropological Report on Selected

03:04:53 4 Aspects of the Cultural Lives of the

03:04:53 5 Saugeen Anishinaabe" prepared by

03:04:54 6 Professor Driben.

03:04:54 7 THE COURT: And in keeping with the

03:04:57 8 agreement between counsel and the process that has

03:05:01 9 been employed, that document will become trial

03:05:05 10 evidence. It will not be the case that it won't

03:05:09 11 need to be or should be repeated in the witness

03:05:12 12 box, but you will be going through some aspects of

03:05:15 13 it; please go ahead.

03:05:17 14 MR. TOWNSHEND: That is correct.

03:05:18 15 BY MR. TOWNSHEND:

03:05:18 16 Q. Can I have document SC1116 for a

03:05:22 17 moment, please.

03:05:25 18 Do you recognize this, Professor

03:05:27 19 Driben?

03:05:27 20 A. Yes, this is an errata sheet from

03:05:30 21 my report.

03:05:33 22 MR. TOWNSHEND: I'd like this entered

03:05:35 23 as an exhibit, please.

03:05:36 24 THE COURT: Mr. Registrar.

03:05:38 25 THE REGISTRAR: Exhibit No. 42 -- 4325.

EXHIBIT NO. 4325: Errata sheet from  
Professor Driben's report (Exhibit No.  
4324).

BY MR. TOWNSHEND:

Q. So going to the report at pages 15  
through 16 you set out the questions you were asked  
to answer. And I don't want to go through those, I  
just want to refer that that's where we're starting  
from. Then you have a methodology section that  
starts on page 17 of your report.

So can you tell us how you approached  
answering these questions you were given?

A. Well, as I say in my report, my  
approach to these was an ethnohistorical approach.  
And what I was -- so what I -- what I was  
interested in is first and foremost is the  
documentary record; what does the documentary  
record tell me about the questions that you posed.

And then, what I was interested in is  
not only what the documentary record said but how  
that documentary record is informed by the customs  
and traditions of Anishinaabe people.

Q. How do you assess the reliability  
of the source that you use in general?

A. Well, what I look for is

03:07:13 1 diversification of research bias. Each technique  
03:07:16 2 that one uses has limitations. So, if one relied,  
03:07:21 3 say, for instance, strictly on the historical  
03:07:24 4 record, that would be a limitation, because there's  
03:07:27 5 also information about customary practices that you  
03:07:32 6 can learn in the field.

03:07:33 7 And so if you don't have that  
03:07:41 8 information and you don't bring that information to  
03:07:41 9 bear then it's harder to interpret the material  
03:07:41 10 that you really want to interpret which is the  
03:07:42 11 documentary record.

03:07:43 12 So I take -- as I said before, I take  
03:07:45 13 what I know in this approach, what other  
03:07:48 14 ethnologists, what I know through my own field  
03:07:51 15 research, what other conclusions people have come  
03:07:53 16 to, let's say about the decision-making process,  
03:07:56 17 and see whether that has a -- whether that can  
03:07:58 18 inform the documentary record which would consist  
03:08:01 19 of letters and diaries and government reports, and  
03:08:06 20 sundry others.

03:08:13 21 Q. How would you deal with any  
03:08:15 22 divergences in the content of your sources?

03:08:19 23 A. Well, if I find something that's  
03:08:21 24 an outlier, that makes me suspicious of it. But if  
03:08:26 25 I find something that is consistent, something that

03:08:29 1 there's more than one source for, that's what I'm  
03:08:32 2 looking for. I'm looking for something with more  
03:08:37 3 than -- more than a single substantiation. I want  
03:08:41 4 multiple substantiations because then I know I can  
03:08:44 5 say something that is correct.

03:08:46 6 But if I have only one thing, only one  
03:08:49 7 -- let's say one item that talks about a particular  
03:08:52 8 event or something like that, then I feel far less  
03:08:57 9 confident than that. I'm looking for consensus in  
03:09:04 10 the data.

03:09:11 11 Q. I want to turn to the chapter in  
03:09:13 12 your report which is called "Anishinaabe Social  
03:09:16 13 Structures" which is the first chapter?

03:09:18 14 A. Yes.

03:09:18 15 Q. And I want to start with the Band,  
03:09:20 16 the section on the Band at pages 29 through 35 of  
03:09:24 17 the report. So can you start by telling us in what  
03:09:29 18 sense you are using the word "Band"?

03:09:33 19 A. The Band is a technical term in  
03:09:35 20 anthropology. It's used to describe a type of  
03:09:39 21 social structure. There are different types of  
03:09:42 22 social structures: Band is one, tribe is another,  
03:09:47 23 Chiefdom is another, state is another.

03:09:49 24 And this type of organization that I'm  
03:09:53 25 talking about a technical term is a Band. And a

03:09:56 1 Band has a meaning. And that is it's a group of  
03:09:59 2 people who are politically independent, who are  
03:10:01 3 economically self-sufficient, who occupy an area  
03:10:06 4 that they recognize as their own and other people  
03:10:09 5 recognize as their own, and on which they exercise  
03:10:11 6 proprietary rights to the resources within.

03:10:14 7 Q. What does a Band -- what are the  
03:10:17 8 functions of the Band?

03:10:22 9 A. Well, the Band is the society  
03:10:23 10 itself, the way it's organized. It's a small-scale  
03:10:29 11 society and its functions are everything that has  
03:10:32 12 to do with the society.

03:10:34 13 So there's all elements in it.  
03:10:37 14 Kinship, economics, political organization,  
03:10:40 15 religious organization, all of these are under the  
03:10:44 16 auspices of the Band. The Band controls its own  
03:10:47 17 affairs.

03:10:48 18 Q. What is the role of the Chief in a  
03:10:50 19 Band?

03:10:51 20 A. Well, a Band -- a Band is a  
03:10:53 21 libertarian organization. A Band is an  
03:10:58 22 organization where decisions are made from the  
03:11:00 23 bottom and the decisions made in that way and then  
03:11:03 24 come up to the Chief.

03:11:04 25 So what happens in a decision-making



03:11:07 1 process -- something that would affect the entire  
03:11:09 2 membership. In that case, what would happen is  
03:11:12 3 that the Band itself is divided into kinship  
03:11:16 4 groups, families. These are -- in the case of  
03:11:18 5 Anishinaabe these are extended families whose  
03:11:20 6 members trace their descent through the male line.

03:11:24 7 There will be several of these in each  
03:11:26 8 Band. The reason there will be several of them  
03:11:29 9 because marriage between members of these family  
03:11:33 10 groups is prohibited. I can get into that later  
03:11:36 11 but so you have these groups and these family  
03:11:39 12 groups.

03:11:40 13 If there's an important question, that  
03:11:42 14 question will be raised within the family first and  
03:11:45 15 then it will be discussed and the family itself  
03:11:48 16 will come to some conclusion about whatever the  
03:11:50 17 problem is. That will be the same with the other  
03:11:53 18 families in the Band.

03:11:54 19 When all these families have come to a  
03:11:57 20 conclusion more or less, or sometimes even before,  
03:11:59 21 the Chief will call a meeting. People will get  
03:12:04 22 together, and they will discuss this further, and  
03:12:08 23 then when the Chief feels that a consensus has been  
03:12:11 24 reached which does not mean there's universal  
03:12:14 25 agreement, but that this is the way the Chief

03:12:17 1 assesses -- this is the way in which the community  
03:12:20 2 wants to go, he listens, he reads the group, and  
03:12:23 3 then he announces the consensus.

03:12:26 4 So he's not the policy maker, he's the  
03:12:29 5 speaker for the consensus. So the decisions are  
03:12:33 6 made from the bottom up and then the Chief  
03:12:35 7 announces those decisions. The Chief is not the  
03:12:38 8 decision maker. That's how decisions are made in  
03:12:42 9 Bands. They are made by the population as a whole.

03:12:44 10 Q. And what is the role of what is  
03:12:47 11 called in some documents, the principal men?

03:12:50 12 A. Well, the principal men are the  
03:12:52 13 heads of these various families so that you may  
03:12:56 14 have four or five families, then you would have  
03:12:59 15 four or five principal men in the families and they  
03:13:03 16 would be the -- let's say that you would have the  
03:13:04 17 meeting with the Chief, which would be a Council.  
03:13:07 18 Not just the men would be involved, there would be  
03:13:10 19 women there as well, and everybody is allowed to  
03:13:13 20 speak.

03:13:13 21 They would be allowed to speak, as well  
03:13:16 22 as young people if they wished, usually they  
03:13:19 23 didn't, but they'd participate in this and then  
03:13:21 24 they'd come to the conclusion, then they'd proceed.

03:13:24 25 Q. In what circumstances would a Band

03:13:34 1 call upon allies?

03:13:37 2 A. Well, there's different reasons  
03:13:39 3 for -- you could call on an ally in times of  
03:13:47 4 stress, of course. But you could call on an ally  
03:13:52 5 not in a time of stress but in a time in which you  
03:13:55 6 can share with some of what you've got with what  
03:13:58 7 that other -- what the other Band has got, let's  
03:14:00 8 say. And then you would form an association with  
03:14:02 9 them. But all these decisions are made inside the  
03:14:10 10 Band itself.

03:14:20 11 Q. On page 30 of your report, I draw  
03:14:23 12 your attention to the map there. And can you tell  
03:14:29 13 us what you're concluding or not concluding from  
03:14:32 14 that?

03:14:33 15 A. This is a map that was prepared by  
03:14:36 16 Dr. Cleland, Charles Cleland. He's an  
03:14:41 17 archaeologist and ethnohistorian. And what he did  
03:14:44 18 in this particular map which I've reproduced here,  
03:14:48 19 he's showing you what the Band territories look  
03:14:51 20 like. This is an approximation of the Band  
03:14:53 21 territories in the Great Lakes area.

03:14:55 22 And what he's showing you, is something  
03:14:59 23 that I was talking about earlier, which is the  
03:15:01 24 territory of the Band, the Bands domain, if you  
03:15:03 25 will. The Bands country. That's what these are

03:15:07 1 meant to represent. And they're not meant to be  
03:15:09 2 exact representations, but this is more or less  
03:15:12 3 what things would look like on the ground, if you  
03:15:15 4 came there in 1820 -- between 1820 and 1850, you'd  
03:15:20 5 be able to find Bands in each of these areas. They  
03:15:24 6 would be separate Bands.

03:15:25 7 Q. Can you comment on the territory  
03:15:27 8 shown at the south end of Georgian Bay with the  
03:15:30 9 white portion adjacent to it?

03:15:32 10 A. Yes. Well, I've put an arrow  
03:15:35 11 there to show where the territory of the Saugeen  
03:15:39 12 Ojibway Nation is there and Dr. Cleland has  
03:15:42 13 included part of their territory but certainly not  
03:15:45 14 the whole thing.

03:15:48 15 Q. So in your report at pages 45 --  
03:15:53 16 40 to 45, and also later on at page 136 to 138 you  
03:16:00 17 talk about "clans". So can you tell us about  
03:16:04 18 clans?

03:16:04 19 A. Well, the Anishinaabe believe that  
03:16:09 20 in the remote past, that they were visited by  
03:16:14 21 supernatural agents. And these supernatural  
03:16:17 22 agents, who were extremely powerful, gave them the  
03:16:21 23 clans.

03:16:22 24 And the clans are descent units in  
03:16:26 25 which people trace their descent from a mythical

03:16:31 1 ancestor. Now, in the case of the Anishinaabe, the  
03:16:34 2 original clans were catfish, loon, crane, bear and  
03:16:42 3 marten. These were the five original clans, from  
03:16:44 4 which subsequent clans were created.

03:16:46 5 Each of these clans, is a corporate  
03:16:53 6 unit, and people, when they trace their descent  
03:16:56 7 through it, everybody in the same clan is  
03:16:58 8 considered a blood relative. So let's say for  
03:17:00 9 instance, that I'm a bear, a Mukwa, I'm a bear in  
03:17:05 10 the clan. That would mean that every other bear,  
03:17:07 11 every other member of the bear clan, is my blood  
03:17:10 12 kin, no matter if I've ever seen that person, no  
03:17:13 13 matter where they're located, if they are bear and  
03:17:16 14 I'm bear then we are blood relatives.

03:17:19 15 So what a clan system does is, if you  
03:17:24 16 look at the Anishinaabe as a whole, if you look  
03:17:26 17 back at that map that you showed me before, and you  
03:17:29 18 saw all of those Bands, or the Band territories,  
03:17:32 19 one wonders, well, how do people exchange  
03:17:36 20 information? How do they keep in touch with each  
03:17:39 21 other? The answer is the clan system. Because the  
03:17:42 22 clan system cross cuts the geographical separation  
03:17:45 23 between Anishinaabe and integrates them into a  
03:17:48 24 larger social whole. But that social whole is not  
03:17:51 25 a political whole, it is a social whole. And that

03:17:59 1 is one of the functions of clans.

03:18:01 2 I should add that another function of  
03:18:03 3 clans is to regulate marriage because --

03:18:05 4 THE COURT: Sir, I'm just going to  
03:18:07 5 interrupt you.

03:18:07 6 THE WITNESS: Certainly.

03:18:08 7 THE COURT: You're very knowledgeable,  
03:18:09 8 I've read this report already.

03:18:11 9 You haven't been asked about that,  
03:18:13 10 maybe Mr. Townshend will. But you should let him  
03:18:17 11 do that. All right?

03:18:20 12 THE WITNESS: Thank you, Your Honour.

03:18:21 13 THE COURT: Just remember, that  
03:18:22 14 everything in your report is already in evidence.  
03:18:25 15 So Mr. Townshend is here to highlight things.

03:18:29 16 THE WITNESS: Thank you.

03:18:29 17 THE COURT: Certainly I've carefully  
03:18:31 18 read the section, all these sections but I know  
03:18:34 19 exactly what you're about to say, sir, assuming  
03:18:37 20 you'll say what's in your report.

03:18:39 21 BY MR. TOWNSHEND:

03:18:40 22 Q. If you could just say a bit more  
03:18:42 23 about the obligations that someone would have to  
03:18:45 24 someone else of the same clan or the...

03:18:50 25 A. They would be close kin. They

03:18:52 1 would be like brothers and sisters when they'd  
03:18:55 2 meet. So in the past they'd start to smoke,  
03:18:58 3 because that's what you do, you start to smoke.  
03:19:00 4 And then you'd have conversations about whatever it  
03:19:03 5 was that interested you. It might be personal, it  
03:19:06 6 might be a larger issue that's affected  
03:19:08 7 Anishinaabe, but that's what clans would do, and  
03:19:11 8 remember they're blood relatives and they consider  
03:19:13 9 themselves close blood relatives.

03:19:26 10 Q. At page 24 you have a section on  
03:19:30 11 the Three Fires Confederacy and you also mention  
03:19:35 12 that a bit later. Can you tell us what the Three  
03:19:42 13 Fires Confederacy is?

03:19:42 14 A. Yes, the Three Fires Confederacy  
03:19:52 15 was a loose association with some political and  
03:19:52 16 economic objectives of the Ojibwe speaking, Odawa  
03:19:52 17 speaking and Pottawatomini speaking Anishinaabe. And  
03:19:56 18 they were -- it dates back to about the 1600s.

03:20:04 19 Q. And what functions did it have?

03:20:05 20 A. Its functions were largely  
03:20:08 21 political or economic. So they would undertake  
03:20:11 22 joint economic or political endeavours from time to  
03:20:15 23 time.

03:20:16 24 Q. Can you tell us whether it had a  
03:20:20 25 military aspect?

03:20:22 1 A. Yes, in a sense it did, because  
03:20:24 2 many, many -- some would fight on, let's say for  
03:20:32 3 instance, on the side of the French, we'd find  
03:20:35 4 that, or on the side of the British but not all.  
03:20:38 5 So that in general, we could say the three fires,  
03:20:41 6 you know, the three fires supported the French but  
03:20:44 7 not all of them because it was a loose association  
03:20:47 8 of Bands, so that -- and Bands are independent so  
03:20:50 9 Bands could operate on their own.

03:20:52 10 But like I say, it was a loose  
03:20:54 11 association they would undertake military  
03:20:58 12 activities.

03:20:59 13 Q. Can you talk a bit about the  
03:21:04 14 nature of the three linguistic components of the  
03:21:08 15 Three Fires Confederacy that you mentioned?

03:21:11 16 A. I'm sorry.

03:21:12 17 Q. Can you talk a bit more about the  
03:21:14 18 nature of the three linguistic components that you  
03:21:16 19 mentioned of the Three Fires Confederacy?

03:21:18 20 A. Well, the three linguistic  
03:21:20 21 components the Odawa, the Ojibwe and the  
03:21:24 22 Pottawatomi, the differences between -- they were  
03:21:28 23 considered -- the older brother was Ojibwe, the  
03:21:31 24 middle brother, the Odawa, the younger brother the  
03:21:34 25 Pottawatomi.



03:21:35 1 It didn't mean that they would relate  
03:21:37 2 to each other as unequal, it just meant that they  
03:21:41 3 -- it's just an organizational way of looking at  
03:21:43 4 it. But they would interact with each other, as I  
03:21:46 5 said, as brothers. Meaning that, yes, you could  
03:21:49 6 agree lots of the time, but sometimes you wouldn't.

03:21:53 7 Q. I asked you a bit about the  
03:21:58 8 concept of nation, which you've mentioned in a  
03:22:01 9 couple of spots.

03:22:02 10 Do you consider the Anishinaabe to be a  
03:22:05 11 nation?

03:22:05 12 A. In the cultural sense I do.

03:22:07 13 Q. And what do you mean by that?

03:22:08 14 A. Well, I mean that they share the  
03:22:10 15 same theology, they share the same -- and I'm  
03:22:13 16 talking in the past now, the same theology, they  
03:22:17 17 serve the same political organization, economic  
03:22:19 18 organization, kinship organization. They share the  
03:22:22 19 same social institutions and structures.

03:22:25 20 Q. To what extent, if at all, did the  
03:22:35 21 Anishinaabe nation in this sense have a political  
03:22:35 22 manifestation?

03:22:35 23 A. There was no political  
03:22:35 24 manifestation of the nation itself. As I said, the  
03:22:39 25 nation is a cultural unit from my perspective. The

03:22:42 1 -- any activity is going to be a Band activity. It  
03:22:47 2 always comes back to the Band. The Band is the  
03:22:49 3 fundamental decision-making unit, it's the  
03:22:52 4 landholding unit, it's the most critical  
03:22:55 5 organization that you can understand when you're  
03:22:57 6 looking at Anishinaabe people.

03:22:59 7 Q. Roughly speaking, how many  
03:23:04 8 Anishinaabe communities are there?

03:23:08 9 A. I estimated between 200 and 250  
03:23:13 10 communities in Canada and the United States.

03:23:15 11 Q. And where would they be located?

03:23:17 12 A. In the Great Lakes area, generally  
03:23:19 13 in the Great Lakes area. Great Lakes drainage  
03:23:22 14 basin but sometimes a bit beyond. Like in Canada,  
03:23:25 15 you can find Anishinaabe in the west.

03:23:31 16 Q. And roughly how many people are  
03:23:33 17 Anishinaabe?

03:23:33 18 A. I'd say between a quarter of a  
03:23:36 19 million, and 300,000, maybe more.

03:23:44 20 Q. Now at page 20 to 25 of your  
03:23:47 21 report, you have a section on identity. So if at  
03:23:52 22 the time of European contact, you ask someone in  
03:23:57 23 the Great Lakes who they were, what is your opinion  
03:24:00 24 of what they would say?

03:24:01 25 A. They would say Anishinaabe. If

03:24:05 1 you asked them who they were, they would say  
03:24:08 2 they're Anishinaabe. If you asked a person that  
03:24:10 3 question.

03:24:10 4 Q. Would they give any other  
03:24:12 5 identity?

03:24:12 6 A. They might give you their clan  
03:24:14 7 identity as well. They would say -- let's say it  
03:24:18 8 would be bear, they would say that. Or, it could  
03:24:21 9 be loon, or it could be frog, turtle, many, many  
03:24:24 10 different clans. But they would give you that.

03:24:33 11 But they would be reticent to give you  
03:24:33 12 their personal names. That was not important to  
03:24:33 13 them.

03:24:33 14 Q. And is there a scholarly reference  
03:24:35 15 for this?

03:24:36 16 A. Schoolcraft mentions that, Cleland  
03:24:39 17 mentions it as well.

03:24:40 18 Q. Okay. I just want to -- it's a  
03:24:43 19 bit from Cleland which I think is what you're  
03:24:45 20 referring to I'd like to make it as an exhibit.

03:24:48 21 Can I have document SC0377 and go to  
03:25:00 22 page 39, can you pull that up? It's rather hard to  
03:25:26 23 read.

03:25:26 24 Is this the section you're referring  
03:25:28 25 to?

03:25:28 1 A. That is correct, yes.

03:25:30 2 MR. TOWNSHEND: Can we make this

03:25:31 3 document an exhibit, please?

03:25:32 4 THE COURT: What is it?

03:25:34 5 MR. TOWNSHEND: Oh, it's an excerpt

03:25:36 6 from Charles Cleland, "Rites of Conquest".

03:25:45 7 THE COURT: A 176-page long excerpt.

03:25:48 8 MR. TOWNSHEND: That may be the whole

03:25:50 9 book.

03:25:50 10 THE COURT: Can we clarify that, first

03:25:52 11 and then we can make it an exhibit?

03:26:02 12 Just go to the table of contents.

03:26:02 13 MR. TOWNSHEND: If you go to the ready.

03:26:05 14 THE COURT: Sorry, keep going. I

03:26:08 15 thought I saw -- all right. So it's a large

03:26:10 16 portion, but not the entire book.

03:26:12 17 MR. TOWNSHEND: Yes, that is correct.

03:26:13 18 THE COURT: Mr. Registrar.

03:26:15 19 THE REGISTRAR: Exhibit No. 4326.

03:26:18 20 EXHIBIT NO. 4326: Excerpt of the book

03:26:18 21 by Charles Cleland, "Rites of

03:26:20 22 Conquest".

03:26:20 23 THE COURT: Thank you.

03:26:44 24 BY MR. TOWNSHEND:

03:26:44 25 Q. In your report, I think you

03:26:45 1 mentioned Cleland before, but can you just say a  
03:26:49 2 little bit more of who Cleland is and how he's  
03:26:51 3 treated as a scholar?

03:26:53 4 A. Charles Cleland is Professor  
03:26:54 5 Emeritus of Anthropology at Michigan State  
03:26:58 6 University. He's retired now. But he's written  
03:27:01 7 widely on Anishinaabe people in the Great Lakes  
03:27:05 8 area. He's published a very famous paper on the  
03:27:08 9 inland shore fishery of Anishinaabe, and he's also  
03:27:11 10 written a book called "The Rights of Conquest" this  
03:27:15 11 book, and another one called -- sorry, it will come  
03:27:20 12 up during conversation. But it is a book on  
03:27:23 13 treaty-making in the Great Lakes theatre.

03:27:25 14 Q. Okay. In your report at page 21,  
03:27:34 15 your footnote 12, it gives a large number of terms  
03:27:38 16 by which Anishinaabe groups are designated by other  
03:27:41 17 people.

03:27:42 18 So did these terms shift over time?

03:27:47 19 A. Yes, they did, because what  
03:27:49 20 happened is that when you -- when Europeans first  
03:27:52 21 came into contact with Anishinaabe, they would be  
03:27:56 22 given -- they might be given a name of a clan,  
03:27:59 23 let's say for instance, or they might be given a  
03:28:02 24 name of a village, or they might be given some  
03:28:05 25 other designation.

03:28:05 1 So what happened is over time, as  
03:28:08 2 Europeans got to know the Anishinaabe and people  
03:28:10 3 like them better, the names became fewer and fewer.  
03:28:16 4 But if you go back to the past you'll find that  
03:28:18 5 there's just a plethora of names because people  
03:28:23 6 didn't realize they were dealing with Anishinaabe,  
03:28:25 7 and Anishinaabe had this large culture area in the  
03:28:28 8 heart of the continent. They didn't understand  
03:28:30 9 that. So they went from community to community.  
03:28:32 10 And so there is a they thorough a of names.

03:28:36 11 Also here in this particular case you  
03:28:38 12 have names that other people call Anishinaabe, and  
03:28:41 13 these are not necessarily positive names. Some of  
03:28:46 14 them are insulting.

03:29:00 15 Q. What significance would it have to  
03:29:02 16 the Anishinaabe that there are these different  
03:29:04 17 names and that the names shift?

03:29:07 18 A. I don't quite understand.

03:29:10 19 Q. What significance would it have to  
03:29:13 20 the Anishinaabe themselves that they were referred  
03:29:16 21 to, or some different groups of them were called  
03:29:20 22 different things at different times and that these  
03:29:22 23 terms shifted?

03:29:25 24 A. I don't understand what you mean  
03:29:27 25 by significance; in what sense?

03:29:29 1 Q. What would it mean to the  
03:29:31 2 Anishinaabe?

03:29:31 3 A. To be called by these names?

03:29:33 4 Q. Yes.

03:29:34 5 A. Well, it wouldn't effect their  
03:29:36 6 identity, they know who they are. Certainly they  
03:29:37 7 would say they're Anishinaabe. It would affect  
03:29:40 8 them in a way that people would not come to  
03:29:42 9 understand -- would not come to understand the  
03:29:43 10 intricacies of their culture until we could sort  
03:29:47 11 this out which took a long time.

03:29:57 12 Q. Okay. In Dr. Reimer's report I  
03:30:00 13 had asked you specifically to look at Volume 1,  
03:30:04 14 pages 19 through 43, which discusses each of the  
03:30:08 15 Ojibwe, the Odawa, and Pottawatomi separately. Can  
03:30:11 16 you comment on this section, please?

03:30:13 17 A. I think that's a mistake to do  
03:30:16 18 that. I think that you have to understand that  
03:30:17 19 we're talking about Anishinaabe people, that's who  
03:30:20 20 they call them -- that's who they are, that's who  
03:30:23 21 they call themselves. The other terms are  
03:30:26 22 technical terms in anthropology so that's not --  
03:30:29 23 that's not what they call themselves.

03:30:30 24 So if you use those terms you make it  
03:30:33 25 seem like there's three different groups of people

03:30:35 1 here, three different cultures; that's not the  
03:30:38 2 case. There's one group here.

03:30:39 3 MR. FELICIAN: Your Honour.

03:30:40 4 THE COURT: I'm going to interrupt you,  
03:30:42 5 sir.

03:30:42 6 MR. FELICIAN: I'm a bit late  
03:30:44 7 standing. It took a moment to process.

03:30:46 8 My friend has had Dr. Reimer's report  
03:30:48 9 for some considerable period of time. And so this  
03:30:51 10 question is eliciting an opinion from the witness  
03:30:54 11 on the adequacy or content of Dr. Reimer's report  
03:31:00 12 so it is not an opinion contained within his  
03:31:03 13 existing report. And I've had no notice of it.  
03:31:07 14 Whereas, we could have had notice of it because the  
03:31:10 15 report has been out there from Dr. Reimer for a  
03:31:13 16 very long time. There's no reply report that we've  
03:31:17 17 been served with.

03:31:18 18 THE COURT: Mr. Townshend.

03:31:19 19 MR. TOWNSHEND: Your Honour, this isn't  
03:31:20 20 going really anything beyond what Professor Driben  
03:31:25 21 has already talked about. It was just only  
03:31:27 22 applying it to this particular comment where -- and  
03:31:29 23 Dr. Reimer explicitly addresses Professor Driben on  
03:31:33 24 a number of points and I thought it would be fair  
03:31:37 25 to give him a chance to comment on that.



03:31:40 1 THE COURT: We've had a number of other  
03:31:42 2 Plaintiffs' experts who have done just that through  
03:31:45 3 a reply report. Why was there no reply report in  
03:31:49 4 this instance?

03:31:50 5 MR. TOWNSHEND: I didn't consider that  
03:31:52 6 that was really much of an addition. It was just a  
03:31:56 7 comment of how it applied.

03:31:58 8 I mean, he has already expressed the  
03:32:01 9 opinion about the unity of Anishinaabe people.

03:32:06 10 THE COURT: Is this going to be a major  
03:32:08 11 feature of your examination in-chief?

03:32:10 12 MR. TOWNSHEND: I think he's probably  
03:32:12 13 already said about as much as I wanted.

03:32:14 14 THE COURT: I mean comments on  
03:32:15 15 Dr. Reimer's report?

03:32:17 16 MR. TOWNSHEND: There are a handful of  
03:32:19 17 places where I was going to ask him to comment on  
03:32:23 18 that.

03:32:23 19 THE COURT: Well, a handful sounds like  
03:32:27 20 two or three to me; is that what you mean?

03:32:30 21 MR. TOWNSHEND: Yes.

03:32:30 22 THE COURT: All right. Well, in that  
03:32:34 23 instance, I will permit it especially because  
03:32:38 24 Dr. Reimer is coming later on. I think your  
03:32:44 25 practice that you've used for the most part for

03:32:46 1 this trial, which is to deliver a reply report, is  
03:32:50 2 preferable.

03:32:50 3 But if it's only a few points, then I'm  
03:32:54 4 sure defendant's counsel can cope. If they can't,  
03:33:00 5 and they need more time for cross-examination for  
03:33:03 6 some reason, they can stand up and ask for it.  
03:33:06 7 Please go ahead.

03:33:07 8 MR. TOWNSHEND: I notice it's past  
03:33:09 9 3:30.

03:33:09 10 THE COURT: It is indeed. We'll take  
03:33:11 11 the afternoon break at this time.

03:33:13 12 -- RECESS TAKEN AT 3:33 --

03:45:28 13 -- UPON RESUMING AT 3:53 --

03:55:01 14 THE COURT: Please go ahead.

03:55:02 15 BY MR. TOWNSHEND:

03:55:05 16 Q. Professor Driben, starting at  
03:55:07 17 page 35 of your report, you have a section on  
03:55:11 18 "tribe". Can you tell us what a tribe is in  
03:55:15 19 anthropological terms?

03:55:16 20 A. The tribe is a form of social  
03:55:18 21 organization that's in the same category as Band  
03:55:21 22 and Chiefdom and State. And in a tribe, what  
03:55:24 23 happens is that you have a temporary leader who can  
03:55:31 24 bring various villages together, and they operate  
03:55:35 25 under the auspices of that leader for some purpose.

03:55:38 1 It may be for an economic purpose,  
03:55:41 2 let's say for a harvest, or it may be for a  
03:55:44 3 military purpose, let's say, to repel or to launch  
03:55:45 4 an attack. But the tribe is different from the  
03:55:48 5 Band in that they have a temporary leader that  
03:55:50 6 draws -- that draws larger numbers of people  
03:55:55 7 together.

03:55:56 8 But the leadership is a ephemeral, once  
03:55:58 9 the leader -- once the function of the leader is no  
03:56:00 10 longer required, then the group becomes acephalus  
03:56:04 11 again, becomes headless again.

03:56:07 12 Q. Just to clarify. In oftentimes in  
03:56:13 13 the United States, there are groups called tribes,  
03:56:16 14 are they the same as the anthropological meaning of  
03:56:18 15 tribe?

03:56:19 16 A. No, that's a political term. In  
03:56:21 17 the United States, the same -- wherever you find  
03:56:24 18 Anishinaabe you'll find Band societies. And in the  
03:56:27 19 case of the Pottawatomie you'll find also a tribe,  
03:56:31 20 from time to time.

03:56:32 21 But primarily it's a Band societies  
03:56:36 22 that we're looking at here, for the vast majority.

03:56:39 23 Q. So I'd like to now go to chapter 2  
03:56:45 24 of your report, regarding decisions about land. So  
03:56:51 25 which Anishinaabe social entity made decisions

03:56:55 1 about land use?

03:56:56 2 A. The Band made the decisions about  
03:56:58 3 land use.

03:56:59 4 THE COURT: Can I just understand what  
03:57:01 5 time period we're talking about as you embark on  
03:57:04 6 this? Is this now or forever or... I'm not asking  
03:57:12 7 you, but I'm asking you to --

03:57:14 8 MR. TOWNSHEND: Yes. Well, maybe you  
03:57:15 9 can clarify that, Dr. Driben, what time period or  
03:57:18 10 periods you're --

03:57:19 11 THE WITNESS: I'm speaking from the  
03:57:21 12 1800s, 1700s, that period of time.

03:57:24 13 BY MR. TOWNSHEND:

03:57:25 14 Q. I'd like to get your comments on  
03:57:29 15 some of the sources you've cited on page 47 and  
03:57:36 16 footnote 74. One of them is Jenness.

03:57:36 17 A. Yes.

03:57:46 18 Q. Could I have read S0880, please?

03:57:56 19 MR. TOWNSHEND: Could I have this made  
03:57:57 20 an exhibit, please?

03:57:58 21 THE COURT: Can you describe it,  
03:58:00 22 please.

03:58:01 23 MR. TOWNSHEND: It is an excerpt from  
03:58:02 24 Diamond Jenness, "The Ojibwe Indians of Parry  
03:58:09 25 Island, Their Social and Religious Life".

03:58:12 1 THE COURT: Is it the whole article?

03:58:15 2 MR. TOWNSHEND: No, that's an excerpt.

03:58:25 3 THE REGISTRAR: Exhibit No. 4327.

03:58:29 4 THE COURT: All right.

03:58:29 5 EXHIBIT NO. 4327: Excerpt from Diamond

03:58:03 6 Jenness, "The Ojibwe Indians of Parry

03:58:09 7 Island, Their Social and Religious

03:58:11 8 Life".

03:58:31 9 BY MR. TOWNSHEND:

03:58:31 10 Q. Can you tell us who Diamond

03:58:42 11 Jenness was?

03:58:42 12 A. Diamond Jenness was one of the

03:58:42 13 most famous anthropologists in Canada. He of

03:58:42 14 course is no longer alive, but he worked for the

03:58:43 15 National Museum of Canada for decades and he

03:58:46 16 published in his life over 100 books and articles,

03:58:49 17 many of them on Inuit but also on other Indigenous

03:58:53 18 people as well, including the Parry Islanders here.

03:58:58 19 Q. And where did you do the fieldwork

03:59:02 20 that is behind this article?

03:59:04 21 A. We did this on Parry Island,

03:59:04 22 Wasauksing.

03:59:10 23 Q. Can you point to that on the map,

03:59:13 24 maybe the map behind that would be easier, Exhibit

03:59:18 25 No. 4321?

03:59:18 1 A. Can I stand up?

03:59:19 2 THE COURT: Well, I'm not sure what

03:59:21 3 Mr. Townshend is referring to.

03:59:24 4 MR. TOWNSHEND: I was asking to point

03:59:25 5 out Parry Island on the map.

03:59:31 6 THE COURT: All right. Well, is it...

03:59:31 7 THE WITNESS: It is right here.

03:59:32 8 THE COURT: Okay, I can see that. But

03:59:34 9 I think what Mr. Townshend is trying to accomplish

03:59:37 10 is that a closer-up map, is that what you're trying

03:59:41 11 to do, sir?

03:59:43 12 MR. TOWNSHEND: Pardon me?

03:59:44 13 THE COURT: Are you trying to get a

03:59:45 14 closer-up image, is it?

03:59:46 15 MR. TOWNSHEND: I really just -- now

03:59:48 16 that the witness has pointed on the map I just

03:59:50 17 wanted to note that it was on the eastern shore of

03:59:53 18 Georgian Bay, across the bay from Nawash.

03:59:57 19 THE COURT: All right.

04:00:01 20 BY MR. TOWNSHEND:

04:00:02 21 Q. And what did Diamond Jenness

04:00:06 22 conclude about decisions about land use?

04:00:11 23 A. He concluded the same thing that

04:00:14 24 all ethnologists who are students of the

04:00:16 25 Anishinaabe conclude and that's that the Band is

04:00:19 1 responsible for land use and occupancy.

04:00:28 2 Q. Okay.

04:00:29 3 Could I go to pages 4 to 6 of this  
04:00:31 4 excerpt, which is pages 8 to 10 on the PDF?

04:00:37 5 There are a few passages marked here.  
04:00:39 6 I'd just like you to confirm these are the passages  
04:00:42 7 that you're speaking of and maybe you can say --  
04:00:48 8 have a few comments about them?

04:00:50 9 THE COURT: I can't read them, I don't  
04:00:53 10 know about anybody else.

04:00:54 11 BY MR. TOWNSHEND:

04:00:55 12 Q. All right. Can you read the  
04:00:56 13 passage, you can read it aloud --

04:00:59 14 THE COURT: The witness doesn't need to  
04:01:01 15 read it aloud. Your colleague has made it larger.  
04:01:05 16 Perhaps you can ask your question again.

04:01:06 17 BY MR. TOWNSHEND:

04:01:06 18 Q. All right.

04:01:07 19 Well, is this the passage you were --  
04:01:10 20 one of the passages you were referring to, and do  
04:01:12 21 you have any additional comment on it?

04:01:13 22 A. Yes. This is one of the passages  
04:01:15 23 that I was referring to, and it's -- it makes the  
04:01:18 24 same point that I made as -- that I made before,  
04:01:20 25 except he's mentioning specific things such as

04:01:23 1 fishing places, maple groves and so on.

04:01:29 2 Q. And on the next page or two  
04:01:31 3 there's some other highlighted part. Just keep  
04:01:50 4 going. I just wanted to note these for the record  
04:01:50 5 that there are a few more.

04:01:53 6 Also at this footnote you cite Cleland  
04:01:57 7 "Faith in Paper"?

04:01:58 8 A. Yes.

04:01:58 9 THE COURT: I'm sorry I'm just trying  
04:02:00 10 to read this. Sorry. All right.

04:02:25 11 BY MR. TOWNSHEND:

04:02:25 12 Q. And also in this footnote you cite  
04:02:25 13 Cleland "Faith in Paper"?

04:02:28 14 A. Yes.

04:02:28 15 Q. You already spoke about Cleland,  
04:02:32 16 could I have document S0381. I'd like that made an  
04:02:42 17 exhibit, please.

04:02:44 18 THE COURT: Sir, you need to say what  
04:02:46 19 it is.

04:02:46 20 MR. TOWNSHEND: Oh, I'm sorry. It's  
04:02:50 21 Charles Cleland "Faith in Paper" and I think this  
04:02:58 22 is the whole book.

04:03:02 23 THE COURT: Mr. Registrar.

04:03:03 24 THE REGISTRAR: Exhibit 4328.

04:03:07 25 EXHIBIT NO. 4328: Excerpt from the



04:03:07 1 book by Charles Cleland, "Faith in  
04:03:14 2 Paper".

04:03:14 3 BY MR. TOWNSHEND:

04:03:14 4 Q. Of what group is he speaking in  
04:03:17 5 this book?

04:03:17 6 A. Well, he's speaking about  
04:03:21 7 Anishinaabe in the Great Lakes area, so he's not  
04:03:25 8 speaking about -- he's speaking about particular  
04:03:28 9 Bands in the text itself, but what he's concerned  
04:03:32 10 with here is Anishinaabe as a whole. And  
04:03:35 11 Anishinaabe customs as a whole.

04:03:36 12 Q. And what did he conclude about  
04:03:38 13 decisions on land use?

04:03:39 14 A. He concluded that decisions on  
04:03:42 15 land use are made by the Band.

04:03:45 16 Q. And if we could go to page 22  
04:03:48 17 which is page 24 of the PDF. And there's a marked  
04:03:55 18 part of that page. If you can zoom in on that,  
04:04:02 19 please.

04:04:02 20 Is this the message you're mentioning  
04:04:05 21 or do you have any further comment on it?

04:04:07 22 A. This is much the same as I say,  
04:04:15 23 much the same as other ethnologists who study the  
04:04:18 24 subject say.

04:04:19 25 Q. Okay. There's an exhibit I would

04:04:27 1 like to get your comments on, on this point as  
04:04:31 2 well. So can you remind us who Peter Jones is?

04:04:35 3 A. Peter Jones was a missionary, a  
04:04:39 4 Mississaugan missionary.

04:04:42 5 Q. And what did he write? Did he  
04:04:48 6 write books?

04:04:49 7 A. Yes, it's just escaped my mind for  
04:04:56 8 a moment.

04:04:57 9 Q. We don't need the title but I just  
04:04:59 10 mean, what did he write about?

04:05:02 11 A. About his own people, about the  
04:05:03 12 Anishinaabe.

04:05:04 13 Q. And in what generally area did he  
04:05:08 14 work?

04:05:08 15 A. In the area that we're concerned  
04:05:10 16 with right now.

04:05:11 17 Q. Okay. Is he considered a reliable  
04:05:13 18 source?

04:05:13 19 A. Yes, I would say; yes, he is.

04:05:16 20 Q. What does he say about this topic?

04:05:18 21 A. The same thing, he says the  
04:05:20 22 decisions are made by the Band.

04:05:22 23 Q. So if I can go to Exhibit 2598.  
04:05:30 24 And page 39 which is PDF page 46.

04:05:39 25 And there's a passage marked there, is

04:05:43 1 this a passage you were referring to?

04:05:45 2 A. Yes, that's correct.

04:05:46 3 Q. And any further comment on that?

04:05:49 4 A. No, it's the same. It's the same  
04:05:54 5 piece.

04:05:55 6 Q. Okay. And also page 71 which is  
04:05:58 7 PDF 79 of that book.

04:06:04 8 There's another marked passage there;  
04:06:08 9 any further comment on that?

04:06:09 10 A. I'm familiar with this. This is  
04:06:11 11 the same, the same conclusion, the same subject  
04:06:15 12 again. It's about the Band and its territory and  
04:06:18 13 who controls it.

04:06:19 14 Q. Okay. I'd like to get your  
04:06:25 15 comments on one of Ontario's productions.

04:06:28 16 Can I have document SC1117, please.

04:06:39 17 Can you tell us what this is?

04:06:41 18 A. This is the Vidal and Anderson  
04:06:44 19 report, it's the typescript copy of it.

04:06:47 20 MR. TOWNSHEND: May I have that made as  
04:06:49 21 an exhibit, please.

04:06:49 22 THE COURT: You need to properly  
04:06:49 23 describe it, sir.

04:06:51 24 MR. TOWNSHEND: I'm sorry, the Vidal  
04:06:53 25 and Anderson report dated December 5, 1849. This

1 is a typescript copy.

2 THE COURT: Mr. Registrar.

3 THE REGISTRAR: Exhibit No. 4329.

4 EXHIBIT NO. 4329: Typescript copy of  
5 Report by Alexander Vidal and Thomas G.  
6 Anderson dated December 5, 1849.

7 BY MR. TOWNSHEND:

8 Q. Can you tell us who Vidal was?

9 A. Vidal was the provincial surveyor  
10 in the 1840s and '50s.

11 Q. And is this, this Anderson, the  
12 T.G. Anderson?

13 A. Yes, it's Captain Anderson who was  
14 -- began his career in 1815.

15 Q. And what were they doing in 1849?

16 A. They had been sent by the Governor  
17 General to find out more information about the --  
18 about the people who ended up participating in the  
19 Robinson -- at least some of them -- Robinson  
20 Superior and Robinson Huron Treaties. What the  
21 Governor General wanted was more information. He  
22 called them particulars, he wanted census  
23 information.

24 Q. And where were they?

25 A. Well, they started off, they met

04:08:11 1 -- they gathered -- the two of these men met at  
04:08:14 2 Sault Ste. Marie and then they went directly to  
04:08:17 3 Fort William and then they traveled back along Lake  
04:08:21 4 Superior and back along Lake Huron, and that was  
04:08:23 5 the -- that was their voyage. That was their  
04:08:27 6 voyage of gathering information so it could be  
04:08:30 7 presented in a report, which is this document, to  
04:08:36 8 the Governor General, to Lord Elgin.

04:08:39 9 Q. And what did they say about  
04:08:41 10 territory?

04:08:41 11 A. They have a very good statement  
04:08:43 12 about territory. And they say each Band has its  
04:08:46 13 own territory and that if you -- if you need to ask  
04:08:50 14 anything about that territory you consult with the  
04:08:52 15 Band, in particular with its representatives, who  
04:08:54 16 would be the chiefs.

04:08:55 17 Q. Can I go to page 5 of this  
04:08:59 18 document, please, and scroll down to that mark.

04:09:05 19 Is this the passage you're referring  
04:09:07 20 to, and if you have any further comment, if so --

04:09:09 21 A. Yes, this is -- this is the  
04:09:10 22 passage, and it's a very informative passage  
04:09:14 23 because it's written in 1849, in December 1849, so  
04:09:16 24 it gives us a very good picture of what was on the  
04:09:20 25 ground in 1849.

04:09:27 1 Q. Can you tell us what is the  
04:09:28 2 Anishinaabe perspective on land ownership?

04:09:33 3 THE COURT: Can I get a time period on  
04:09:36 4 any of this? I mean, are we back in 1849? Is this  
04:09:40 5 in 2019?

04:09:42 6 BY MR. TOWNSHEND:

04:09:43 7 Q. Shall we say mid-18th century?

04:09:45 8 A. That they are the proprietors of  
04:09:47 9 the land, that this land is their territory which  
04:09:50 10 they are obliged to defend against intruders and  
04:09:54 11 enemies.

04:09:57 12 MR. FELICIAN: Your Honour, I just  
04:09:58 13 rise to make sure what's being asked is not a legal  
04:10:04 14 opinion in terms of proprietorship. It's more of a  
04:10:07 15 cultural understanding but I trust my friend is not  
04:10:10 16 asking for a legal opinion.

04:10:13 17 MR. TOWNSHEND: That's correct, I  
04:10:15 18 wasn't.

04:10:15 19 THE COURT: Please go ahead.

04:10:30 20 BY MR. TOWNSHEND:

04:10:30 21 Q. Have you personally observed any  
04:10:32 22 demonstrations of Anishinaabe Customs about  
04:10:34 23 territories?

04:10:34 24 A. Yes, I have.

04:10:35 25 Q. Can you tell us where and when?

04:10:37 1 A. I can tell you where it was. It  
04:10:43 2 was on the north side of the Kiashke River, I was  
04:10:49 3 the Chief of the Whitesand Band. And the Kiashke  
04:11:00 4 River is the dividing line between the territory of  
04:11:00 5 the Gull Bay Anishinaabe and the Whitesand  
04:11:00 6 Anishinaabe. We were hunting moose and there was a  
04:11:02 7 sound behind us. And we turned. And we saw there  
04:11:05 8 was another Anishinaabe hunter there. But the  
04:11:11 9 Chief, who I was with, knew right away that this  
04:11:14 10 person was from another Band and he was in another  
04:11:17 11 -- he was in his territory.

04:11:19 12 So he said to the person, "What are you  
04:11:21 13 doing here?" And the person said, "I'm just having  
04:11:24 14 a leak". In other words, he knew he was in the  
04:11:27 15 wrong place. And the person I knew, the Chief who  
04:11:30 16 was with me, told him he was in the wrong place and  
04:11:33 17 then he left and he went back to his own side of  
04:11:36 18 the river. That's one case. I've observed other  
04:11:40 19 cases as well.

04:11:41 20 Q. Can you tell us another one?

04:11:43 21 A. Another one was, this happened in  
04:11:51 22 Namaygoosisigagun, which is otherwise known as  
04:11:53 23 Collins, perhaps I'll use that name. In Collins  
04:11:55 24 there was a person who came from southern Ontario,  
04:11:58 25 a non-Anishinaabe person, and built a structure

04:12:02 1 with the Band, regarded as its own territory. And  
04:12:05 2 so they sent an emissary, a young person. They  
04:12:09 3 sent an emissary to the man and said, "Look, the  
04:12:11 4 Chief wants to have a discussion with you".

04:12:19 5 Well, the fellow said that he didn't  
04:12:19 6 want to come in. So they came back to the -- so  
04:12:20 7 the fellow came back to the community and the Chief  
04:12:23 8 said, "Well, you know what? We're going to try  
04:12:26 9 this once again". Sent the emissary once again,  
04:12:29 10 but again he refused to go.

04:12:31 11 So they then begin then debating on  
04:12:34 12 what exactly they were going to do to this person  
04:12:37 13 to help remove him from the territory. And he  
04:12:39 14 quickly understood that they were going to remove  
04:12:42 15 him from the territory, I imagine because he left.  
04:12:47 16 And they informed him.

04:12:48 17 In this case, they informed him that he  
04:12:50 18 was in the wrong place and he had no right to be  
04:12:52 19 there and he had to leave.

04:12:54 20 Q. Okay. Can you have a time on when  
04:12:57 21 this happened?

04:12:58 22 A. Well, this is in the last  
04:13:00 23 15 years.

04:13:00 24 Q. Okay. At page 49 of this chapter  
04:13:07 25 you have a section on relations with neighbours.



04:13:11 1 So can I ask you to give us a summary of what  
04:13:13 2 happens when Anishinaabe neighbours ask for  
04:13:16 3 permission to enter a Band's territory?

04:13:19 4 THE COURT: Again, I'm going to  
04:13:21 5 interrupt again. I mean, there's a couple of  
04:13:24 6 options here. One is that you mean over the last  
04:13:27 7 250 years; another is you mean now, another is you  
04:13:32 8 mean back in the 19th century.

04:13:35 9 I'm not -- I haven't heard any evidence  
04:13:38 10 which suggests I should assume that there was  
04:13:41 11 absolutely no change of any kind between the  
04:13:47 12 mid-19-century and today. So you really need to be  
04:13:50 13 more helpful with respect to when it is you're  
04:13:52 14 asking about these situations. Be more specific at  
04:13:57 15 least.

04:14:04 16 I've read the report I know what it  
04:14:05 17 says.

04:14:06 18 MR. TOWNSHEND: Yes.

04:14:07 19 THE COURT: It would surprise me if  
04:14:08 20 someone suggested that in any culture of any kind  
04:14:15 21 that there was zero change in 250 years. I suppose  
04:14:18 22 that's a possibility, but I haven't heard that. So  
04:14:21 23 I need to know when it is you're asking about.

04:14:27 24 250 is perhaps wrong, but it's still a  
04:14:31 25 very long time.

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MR. TOWNSHEND: I'm sorry, I missed  
that.  
THE COURT: I think I made my point.  
MR. TOWNSHEND: Okay.  
THE COURT: These general questions are  
only helpful to me if I know at what time period  
you're asking about.  
MR. TOWNSHEND: All right.  
BY MR. TOWNSHEND:  
Q. Well, I'm most interested in the  
mid-18th century. But if there has been some  
change in these customs about territoriality and  
permission I'd like to know that, too.  
THE COURT: Let's take it one step at a  
time, because we're not going to do a  
month-by-month review.  
MR. TOWNSHEND: No.  
THE COURT: So, there's only certain  
periods of time that are relevant. I'd like you to  
stick to those.  
I have no problem with you asking about  
mid-18th century or --  
MR. TOWNSHEND: I'll start with --  
THE COURT: Mid-17th century, did you  
say?

04:15:27 1 MR. TOWNSHEND: I said mid-18th.

04:15:29 2 THE COURT: Mid-18th, please go ahead.

04:15:32 3 BY MR. TOWNSHEND:

04:15:32 4 Q. Well, all right.

04:15:34 5 In the mid-18th century, what happened  
04:15:36 6 when Anishinaabe neighbours asked for permission to  
04:15:40 7 enter a Band's territory?

04:15:42 8 A. It would be granted almost always.  
04:15:45 9 And the reason for that is, as explained in my  
04:15:48 10 report, is because it's like an insurance policy.  
04:15:50 11 Because you may need to use their territory  
04:15:52 12 sometimes if something happens to your yours in an  
04:15:55 13 adverse way. So they almost say -- almost always  
04:15:58 14 say, yes, to their neighbours.

04:16:00 15 Q. Has that custom changed since  
04:16:03 16 then?

04:16:04 17 A. Not as far as I'm aware.

04:16:06 18 Q. What do scholars believe are the  
04:16:09 19 motivations for this, or for this custom?

04:16:11 20 A. Well, scholars have argued that  
04:16:13 21 the motivation is self interest. But it strikes me  
04:16:17 22 that it's more than self interest. Having people  
04:16:20 23 beside you that are being like minded is also  
04:16:23 24 present. There's also the opportunity to conduct  
04:16:25 25 larger ceremonies, to find mates and so on. So it

04:16:29 1 has other advantages as well. But there is the  
04:16:31 2 practical effect. Like I said it's an insurance  
04:16:37 3 policy.

04:16:37 4 Q. On page 51, you have a section  
04:16:46 5 called "Dablon's Observation" and this is from the  
04:16:56 6 17th century?

04:16:57 7 Can you start with who Dablon was.

04:17:06 8 A. He was a Jesuit missionary who  
04:17:06 9 established the mission at what subsequently became  
04:17:06 10 Sault Ste. Marie.

04:17:11 11 Q. Can you explain the passage you  
04:17:16 12 quoted in this paragraph?

04:17:17 13 A. Yes. But what -- this is a --  
04:17:18 14 from an anthropological point of view this is very  
04:17:21 15 interesting because what you have is one Band here,  
04:17:25 16 who's territory it is, but there's many visitors,  
04:17:29 17 many visitors. In fact, there's about 1,450 people  
04:17:33 18 that are fishing there during the course of the  
04:17:35 19 warm weather months.

04:17:36 20 Now how are they there? They're there  
04:17:40 21 by virtue of the fact that they've been invited in  
04:17:43 22 and they've been invited by the Anishinaabe who  
04:17:45 23 live at Sault Ste. Marie.

04:17:47 24 And what Dablon is saying here is he's  
04:17:51 25 describing all these different groups of people who

04:17:53 1 are there and where they come from. And he said,  
04:17:55 2 well, there are these people from this location who  
04:18:00 3 are fishing from here, there are these people from  
04:18:01 4 the southern location, some are even from the very  
04:18:03 5 far north, some of them -- it appears that one of  
04:18:04 6 them is not even Anishinaabe, they may be Cree.

04:18:06 7 Q. And how would this situation be  
04:18:17 8 managed?

04:18:17 9 A. They manage it by what  
04:18:19 10 anthropologists refer to as conditions of the  
04:18:22 11 permission. Which means that let's say that I'm a  
04:18:25 12 hunter using somebody else's hunting -- another  
04:18:30 13 Band's territory. Now for this example I'm  
04:18:34 14 Anishinaabe. When I go to hunt, I have to go with  
04:18:37 15 conditions on me. I can't just go and do whatever  
04:18:40 16 I want. So the Band specifies what the conditions  
04:18:43 17 of the permission are. And that's exactly what's  
04:18:46 18 happening in Sault Ste. Marie, or what becomes  
04:18:51 19 Sault Ste. Marie in the 1670s when Dablon is there.  
04:18:55 20 Because you have a number of different groups of  
04:18:57 21 people that are fishing and yet it's very orderly.  
04:19:00 22 Because each is abiding by the conditions of the  
04:19:03 23 permission. And the conditions of the permission  
04:19:05 24 are set up by what anthropologists would call the  
04:19:08 25 proprietors, which would be the Sault Ste. Marie

04:19:11 1 Anishinaabe.

04:19:11 2 Q. In this chapter and at page 54 you  
04:19:25 3 have a section on other Anishinaabe. And -- well,  
04:19:34 4 I wanted to ask what happens when other Anishinaabe  
04:19:37 5 visitors who aren't neighbours ask for permission  
04:19:40 6 to forage on a Band territory and you can start  
04:19:44 7 with the mid-18th century and if there's any  
04:19:47 8 differences before and after, you can let us know.

04:19:50 9 A. Well, let me answer the first one,  
04:19:54 10 first. I think there are differences now with  
04:19:56 11 Anishinaabe from other territories.

04:19:57 12 But in the past, in 1850 when we're  
04:20:01 13 talking about it, what happens the Anishinaabe,  
04:20:04 14 whether they're neighbours, whether they're close  
04:20:07 15 neighbours or more distant they still have to ask  
04:20:10 16 for permission. Then if they're granted permission  
04:20:12 17 which generally they are, they're granted  
04:20:14 18 permission and then they come and use the land or  
04:20:17 19 they use what they've been allowed to use,  
04:20:19 20 according to the conditions of the permission.

04:20:23 21 And in this case, I'm describing a  
04:20:25 22 situation here where they would approach the Chief,  
04:20:28 23 they would ask the Chief what to do, the Chief  
04:20:30 24 would consult with others to determine it but again  
04:20:33 25 the decision is always being made from the bottom

04:20:36 1 up.

04:20:40 2 Q. What would be the method of  
04:20:43 3 seeking permission in this case?

04:20:46 4 A. Well, the method would first be,  
04:20:48 5 when you first meet somebody, you give -- well,  
04:20:52 6 first of all for Anishinaabe they're going to find  
04:20:54 7 out whether they're members of the same clan. But  
04:20:56 8 in addition to that they're going to give each  
04:20:58 9 other -- they're going to give a gift. The person  
04:21:00 10 who's coming will give the gift right away because  
04:21:03 11 the giving of the gift establishes a relationship  
04:21:07 12 and once you have a -- if you don't give the gift,  
04:21:09 13 you can't have the relationship. You need that to  
04:21:12 14 start things off. And once you have the  
04:21:14 15 relationship then you can move forward with  
04:21:16 16 different elements of the relationship.

04:21:20 17 Gift-giving is critical in this society  
04:21:23 18 and still is today.

04:21:25 19 Q. In your report starting at page 73  
04:21:32 20 you talk about the Pottawatomi arriving in SON  
04:21:36 21 territory. This would be in the 19th century. Can  
04:21:38 22 you explain what happened?

04:21:42 23 A. In the larger sense where the  
04:21:44 24 Pottawatomi came from?

04:21:45 25 Q. What happened when they arrived in

04:21:49 1 SON territory?

04:21:49 2 A. They were welcomed.

04:21:51 3 Q. Can you tell us whether they  
04:21:59 4 became part of the community?

04:22:00 5 A. Yes, they did become part of the  
04:22:03 6 community. They were welcomed and did become part  
04:22:06 7 of the community.

04:22:06 8 Q. At page 76 of the report, you talk  
04:22:09 9 about Ojibwe general councils in the mid-19th  
04:22:13 10 century in southern Ontario. Can you talk about  
04:22:16 11 what happened and what you would conclude from  
04:22:20 12 that?

04:22:22 13 A. Yes, this is a special case  
04:22:23 14 because this is Methodists, these are Methodists  
04:22:27 15 and what they wanted to accomplished, Methodist  
04:22:31 16 Anishinaabe. What they wanted to accomplish here  
04:22:33 17 was to have all Anishinaabe gathered -- well, not  
04:22:34 18 all the Anishinaabe, but to have a homeland for the  
04:22:37 19 Anishinaabe. So they wanted Anishinaabe to come to  
04:22:40 20 the Peninsula and they offered an invitation.

04:22:47 21 Q. And what does that demonstrate to  
04:22:51 22 you about their customs?

04:22:56 23 A. Well, it demonstrates to me that  
04:22:58 24 they're pretty friendly with other Anishinaabe.  
04:23:01 25 They're happy to be with other Anishinaabe and



04:23:03 1 they're willing to work together.

04:23:05 2 Q. Now on this point of hospitality  
04:23:12 3 to other Anishinaabe, Dr. Reimer has critiqued your  
04:23:17 4 conclusion on the basis that it is a matter of self  
04:23:20 5 interest in increasing the Aboriginal population in  
04:23:24 6 the area; so do you have a comment on that?

04:23:27 7 A. It's a way to characterize it. I  
04:23:30 8 just think it's a mischaracterization. I think  
04:23:32 9 that we have to understand it in the context of the  
04:23:34 10 culture of the people we're talking about. It's  
04:23:37 11 not a pecuniary interest that they have in mind  
04:23:40 12 when they welcome people like the Pottawatomi or  
04:23:43 13 others, or any Anishinaabe.

04:23:44 14 In my experience, in my experience and  
04:23:48 15 from what I've read and from what other  
04:23:50 16 ethnologists have written, I've never heard that  
04:23:53 17 decisions are made on the basis of financial  
04:23:55 18 considerations when it comes to welcoming other  
04:23:59 19 people into your community.

04:24:06 20 MR. TOWNSHEND: My next section will be  
04:24:08 21 a bit longer and I notice it's almost 25 after  
04:24:12 22 4:00. Would this be a good time to stop for the  
04:24:14 23 day?

04:24:15 24 THE COURT: Normally I would say let's  
04:24:17 25 press on, but I'm very happy to give everyone an

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extra five minutes to go out and vote.

We'll adjourn until 10:00 o'clock  
tomorrow morning.

-- Court adjourned at 4:24 p.m.

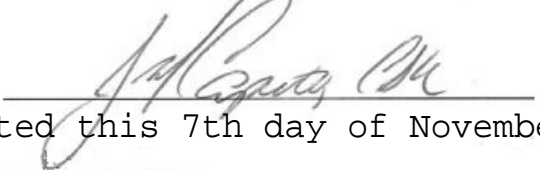
REPORTER'S CERTIFICATE

I, JUDITH M. CAPUTO, RPR, CSR, CRR,  
Certified Shorthand Reporter, certify;

That the foregoing proceedings were  
taken before me at the time and place therein set  
forth at which time the witness was put under oath  
by the court registrar;

That the testimony of the witness and  
all objections made at the time of the examination  
were recorded stenographically by me (Note: Not  
all quotes have been verified against source  
document, but transcribed as read into the record);

That the foregoing is a Certified  
Transcript of my shorthand notes so taken.

  
Dated this 7th day of November, 2019.

NEESON COURT REPORTING INC.

PER: JUDITH M. CAPUTO, RPR, CSR, CRR

<hr/> <b>\$</b> <hr/>	<b>11</b> 6646:3 6673:24 6674:1, 2,14,15 6738:6, 12	<b>1837</b> 6738:24 6739:3	<b>2,842</b> 6652:25	<b>21</b> 6650:16 6746:25 6773:14
<b>\$250,000</b> 6673:1	<b>11:30</b> 6675:20	<b>1840s</b> 6788:10	<b>20</b> 6646:3 6679:21 6747:1 6770:20	<b>22</b> 6727:21 6785:16
<hr/> <b>(</b> <hr/>	<b>11:37</b> 6679:22	<b>1842</b> 6738:25 6739:4	<b>200</b> 6665:12 6666:10 6770:9	<b>23</b> 6701:8
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