

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

DAY 51 VOL 54
October 22, 2019



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Toronto, ON M5K 1A2
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Court File No. 94-CQ-50872CM

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

- and -

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

Court File No. 03-CV-261134CM1

A N D B E T W E E N:

CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and
SAUGEEN FIRST NATION
Plaintiffs

- and -

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

-- This is the VOLUME 54/DAY 54 of the trial proceedings
in the above-noted matter, being held at the Superior
Court of Justice, 330 University Avenue, Courtroom 5-1,
Toronto, Ontario, on the 22nd day of October, 2019.

B E F O R E:

The Honourable Justice Wendy M. Matheson

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

2

3 Roger Townshend, Esq., for the Plaintiffs,
4 & Ben Brookwell, Esq., The Chippewas of
5 & Cathy Guirguis, Esq., Saugeen First Nation,
6 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 & Alexandra Colizza, Esq.,

14

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

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

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WITNESS:

DR. PAUL DRIBEN; previously sworn.

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09:46:21 1 -- Upon commencing at 10:05 a.m.

09:59:27 2

10:06:48 3 THE COURT: Good morning, Mr. Townshend.

10:06:51 4 MR. TOWNSHEND: Good morning, Your Honour.

10:06:53 5 I wanted to correct one thing from

10:06:55 6 yesterday. I believe I told you that Exhibit 4328

10:07:00 7 was the full book "Faith in Paper" by Charles

10:07:06 8 Cleland. It's an excerpt, it's not the full book.

10:07:09 9 It's a large excerpt but...

10:07:11 10 THE COURT: Mr. Registrar, can we

10:07:14 11 correct the description of that to say "excerpt

10:07:18 12 from"?

10:07:19 13 THE REGISTRAR: Yes, Your Honour, right

10:07:20 14 away. Can you repeat the Exhibit number, counsel?

10:07:22 15 MR. TOWNSHEND: It's 4328.

10:07:27 16 THE COURT: That's the one called

10:07:29 17 "Faith in Paper".

10:07:30 18 MR. TOWNSHEND: Yes, it is.

10:07:32 19 THE COURT: All right, thank you.

10:07:33 20 THE REGISTRAR: It is corrected.

10:07:35 21 MR. TOWNSHEND: Now I wanted to try

10:07:37 22 something that I thought might streamline the

10:07:39 23 exhibit making process by doing a bunch at the

10:07:43 24 beginning.

10:07:44 25 So if I could have SC1245 up, please.

1 This is a list of documents we wish to make
2 exhibits and there's consent to the first eight of
3 those. There's a qualification on the ninth, so I
4 was just going to leave that one until it came up
5 but we would like the first eight made exhibits.

6 THE COURT: Yes, we can do that.

7 Are these also documents about which
8 you're going to ask the witness questions?

9 MR. TOWNSHEND: Yes, they are.

10 THE COURT: All right. Mr. Registrar,
11 what is your suggestion as to --

12 THE REGISTRAR: So the first eight --

13 THE COURT: Can we assign them?

14 THE REGISTRAR: We can assign the
15 number. The first Exhibit 0985 is going to be
16 Exhibit No. 4330.

17 EXHIBIT NO. 4330: "The Ojibwa Woman"
18 by Ruth Landes.

19 THE REGISTRAR: The next one is going
20 to be Exhibit No. 4331.

21 EXHIBIT NO. 4331: Paper entitled,
22 "Inland Shore Fishery of the Northern
23 Great Lakes: Its Development and
24 Importance in Prehistory" by Charles
25 Cleland.

10:08:53 1 THE REGISTRAR: S1074 is going to be
10:08:57 2 Exhibit No. 4332.

10:08:58 3 EXHIBIT NO. 4332: Paper entitled, "The
10:08:58 4 Usurpation of Aboriginal Fishing
10:08:58 5 Rights: A study of the Saugeen Nation's
10:08:58 6 Fishing Islands in Lake Huron", by
10:08:58 7 Charles Cleland.

10:08:59 8 THE REGISTRAR: S1397 is going to be
10:09:02 9 Exhibit No. 4333.

10:09:03 10 EXHIBIT NO. 4333: Excerpt from "History of
10:09:03 11 Indian-White Relations United States
10:09:03 12 Indian Policies, 1815 - 1860", by
10:09:04 13 Francis Prucha.

10:09:04 14 THE REGISTRAR: S1646 is Exhibit
10:09:10 15 No. 4334.

10:09:11 16 EXHIBIT NO. 4334: Paper entitled,
10:09:11 17 "Respect, Responsibility, and Renewal:
10:09:11 18 The Foundations of Banishing Treaty
10:09:11 19 Making with the United States Canada",
10:09:11 20 by Heidi Stark.

10:09:13 21 THE REGISTRAR: S1686 is Exhibit
10:09:13 22 No. 4335.

10:09:13 23 EXHIBIT NO. 4335: Excerpt from the
10:09:13 24 "Atlas of Great Lakes Indian History"
10:09:13 25 by Helen Tanner.

10:09:18 1 THE REGISTRAR: S1806 is going to be
10:09:21 2 Exhibit No. 4336.
10:09:22 3 EXHIBIT NO. 4336: Thesis by Leo
10:28:06 4 Waisberg entitled, "The Ottawa: Traders
10:09:23 5 of the Upper Great Lakes 1615 - 1700".
10:09:23 6 THE REGISTRAR: S0882, Exhibit
10:09:28 7 No. 4337.
10:09:28 8 EXHIBIT NO. 4337: Excerpt from, "The
10:09:28 9 Ojibwa Indians of Parry Island, Their
10:09:28 10 Social and Religious Life- Chapter 9 -
10:09:28 11 the cycle of Life and Death", by
10:09:28 12 Diamond Jenness.
10:09:28 13 THE REGISTRAR: And that's the first
10:09:31 14 eight.
10:09:32 15 THE COURT: What is the situation with
10:09:33 16 the Darlene Johnston document?
10:09:37 17 MR. TOWNSHEND: There was a
10:09:38 18 qualification that Canada wanted to put on it, and
10:09:40 19 so I was going to leave that until it came up.
10:09:42 20 THE COURT: All right. Let's do that
10:09:44 21 then, then.
10:09:45 22 Please go ahead.
10:09:56 23 MR. TOWNSHEND: So if I could recall
10:09:59 24 Professor Driben to the stand, please.
10:10:04 25 PAUL DRIBEN: Previously sworn.

EXAMINATION IN-CHIEF BY MR. TOWNSHEND

(CONT'D):

Q. So Professor Driben, I'd like to try to clarify the time period relevant to the various -- some of the various customs that I asked you about yesterday, because I believe there was a bit of confusion on that.

So the first thing, considering what you said about the nature and structure of Bands, can you tell us whether what you said changed between the 17th century and the present?

A. Bands from an anthropological point of view, the way I've described them as being control of their own territory and the resources within, that still pertains today; that still exists today.

Q. Considering what you said about the nature of structure of clans, can you tell us whether that changed between the 17th century and the present?

A. Yes, it did. That did change today. That changed around -- well, that changed with the influence of missionaries. Because in the clan system you can marry a cousin; in fact, it's a preferred marriage. Whereas from a western

1 theological point of view that can be considered,
2 in some instances, incest, so that was frowned upon
3 so the clan fell into disfavour.

4 In my experience, it's had a resurgence
5 in the past 25 years. People are more interested
6 in their clan designations now, than they were
7 before.

8 Q. Yesterday you were talking about
9 the Three Fires Confederacy and you said it was a
10 loose association with some political and economic
11 objectives of Ojibway speaking, Odawa speaking and
12 Pottawatomini speaking Anishinaabe.

13 At that level of generality, has that
14 changed from the 17th century to the present?

15 A. Well, the Three Fires Confederacy
16 does not exist anymore but as far as the
17 relationship between the three components of the
18 Three Fires, the Ojibway speakers, the Odawa
19 speakers and the Pottawatomini speakers, they all
20 consider themselves today Anishinaabe and all
21 consider themselves close relatives, as far as I'm
22 aware, and as far as I have read other scholars'
23 writings.

24 Q. What is your opinion of the --
25 generally, of the length of time where there was a

1 Three Fires Confederacy?

2 A. Well, that was -- that was in the
3 1600, 1700s. That's a long time ago that that
4 existed.

5 Q. Until when?

6 A. I'd say in the 1700s sometime.

7 Q. Considering what you said about
8 Anishinaabe self identity, can you tell us whether
9 that changed between the 17th century and the
10 present?

11 A. Based on my own fieldwork and what
12 I've read of other ethnologists and what I've read
13 in the historical record, no, I would say that the
14 identity is fundamentally the same. Of course, the
15 attributes that contribute to that identity changed
16 over time, but there still is a fundamental
17 Anishinaabe identity that I think is shared back in
18 time.

19 Q. All right. And considering what
20 you said about tribes, at what points in time did
21 the Pottawatomini function as a tribe?

22 A. I would say from the -- from 1700s
23 up until the -- maybe the 1830s.

24 Q. Okay. Considering what you said
25 about Anishinaabe Customs concerning a sense of

10:15:03 1 territory relating to a Band, can you tell us
10:15:07 2 whether that has changed between the 17th century
10:15:10 3 and the present?

10:15:11 4 A. I don't think so. Again, based on
10:15:13 5 my own research, based on the research of other
10:15:16 6 ethnologists and based on the research of
10:15:19 7 ethnohistorians as well, that's consistent
10:15:22 8 throughout the period.

10:15:23 9 Q. And concerning customs about the
10:15:31 10 response that Anishinaabe neighbours would get when
10:15:34 11 asking to use a Band's territory, you said it
10:15:38 12 hasn't changed from the mid-18th century to the
10:15:41 13 present. And after that, we talked about a 17th
10:15:46 14 century example of Dablon's observation of that
10:15:52 15 custom. Can you tell us whether that custom
10:15:54 16 changed between the 17th and the 18th century?

10:15:57 17 A. Not between the 17th and 18th.

10:16:04 18 Q. And yesterday you said there was
10:16:07 19 some difference between the 18th century and the
10:16:11 20 present concerning customs, while the response that
10:16:15 21 would be given to Anishinaabe who were not
10:16:18 22 neighbours and who asked to use a Band's territory.

10:16:21 23 Can you tell us what changed?

10:16:23 24 A. Sorry, could you ask that question
10:16:25 25 again, please?

1 Q. Okay. This is concerning the
2 customs about the response that would be given to
3 Anishinaabe, other Anishinaabe who are not
4 neighbours, but from elsewhere, asking to use a
5 Band's territory.

6 Yesterday you said there was some
7 difference between the 18th century and the present
8 in those customs. So I'd like you to ask -- tell
9 us what changed?

10 A. Well, it's -- what has changed is
11 that there's certainly more opportunity for one
12 community -- members of one community to come into
13 contact with another community. So there's more
14 potential interaction today than there was before.

15 In fact, there's more interaction, let
16 me say it that way, than there was before. But the
17 rules that they abide by, which require seeking
18 permission, acquiring permission, and then carrying
19 out the activities, whatever they may be, under the
20 terms of the conditions, those are pretty much the
21 same as they were, based again on my research,
22 others' research and the historical record.

23 Q. So I want to carry on in your
24 report, and in your report starting on page 55 you
25 have a section on foreign Aboriginal visitors by

10:17:57 1 which you're talking about Aboriginal visitors who
10:18:02 2 are not Anishinaabe asking to use a Band's
10:18:05 3 territory.

10:18:05 4 And I'm asking in this case about the
10:18:07 5 17th and 18th century. So what was the custom at
10:18:13 6 that period in relation to foreign Aboriginal
10:18:16 7 visitors?

10:18:17 8 A. In the case of foreign Aboriginal
10:18:20 9 visitors during this period, the decision to allow
10:18:23 10 them to enter the territory, and use it under
10:18:26 11 certain circumstances, would be based primarily on
10:18:29 12 secular considerations and this would be primarily
10:18:32 13 trade.

10:18:34 14 People such as the Huron, let's say,
10:18:36 15 travelling to meet the Ojibway speakers to engage
10:18:38 16 in trade; then for certain purposes, they would be
10:18:42 17 allowed into the territory, allowed to use the
10:18:45 18 territory because while they're there, they have to
10:18:47 19 supply themselves with food and so on.

10:18:49 20 So they would be able to do this during
10:18:51 21 the period in which they're trading. And then this
10:18:53 22 creates a reciprocal relationship in which the
10:18:56 23 Anishinaabe themselves would sometimes spend the
10:18:59 24 winter with the Huron as well.

10:19:00 25 Q. And at page 56 of your report, you

1 have an example of the Huron in Kitchispirini.

2 Could you explain that and comment on it, please?

3 A. Well, the Kitchispirini are
4 Anishinaabe, and but they -- if you don't mind I'll
5 just look -- we're talking about people who occupy
6 the Upper Ottawa Valley, those are the
7 Kitchispirini. And what they did is, as the fur
8 trade accelerated, they controlled the waterway and
9 they charged transit fees to use the waterway for
10 Huron.

11 What that meant is that Huron had to
12 present them with gifts in order to use the water
13 because they considered it their property. This is
14 the same with Anishinaabe.

15 Oh, pardon me, these are Anishinaabe,
16 so yes.

17 Q. How, if at all, does that relate
18 to SON Customs?

19 A. Well, it is -- it is Anishinaabe
20 Custom, it's their custom. They regard --
21 Anishinaabe regard themselves as proprietors of the
22 water and the aqueous resources that the water
23 contains, within limits, within the boundary.

24 Q. And in your report at page 81 you
25 describe the war with the Dakota. Can you explain

10:20:37 1 the causes of that war and what you conclude from
10:20:40 2 it?

10:20:40 3 A. This was a war that had to do with
10:20:46 4 the fisheries at the -- in the Lake Superior
10:20:51 5 region. And the war was fought over access to the
10:20:54 6 fisheries because the Ojibway speakers had gained
10:20:58 7 access to Dakota territory and then there was a
10:21:01 8 treaty along those lines, and then the treaty was
10:21:03 9 broken. And after that warfare broke out which
10:21:06 10 lasted for a century and a half.

10:21:08 11 Q. And what do you conclude about
10:21:14 12 Anishinaabe Custom from that?

10:21:15 13 A. I conclude that they -- that they,
10:21:19 14 they regard their Band territory as their own
10:21:22 15 territory. And they have the right to use that
10:21:25 16 territory and enjoy that territory; but also to
10:21:28 17 allocate the use and enjoyment to other people. It
10:21:32 18 could be anybody they choose. They could allow
10:21:35 19 them to use and enjoy that territory under certain
10:21:38 20 conditions. That custom, like I said, existed in
10:21:41 21 the past and exists today.

10:21:42 22 Q. At page 80 of your report, you
10:21:49 23 have a short bit on the Haudenosaunee war. Now,
10:21:54 24 the events of that war have been dealt with by
10:21:57 25 Dr. Williamson in his report and testimony, so I'm

1 not going to go into detail of the events of the
2 war. But I want to ask you, as an ethnohistorian,
3 what does the war tell you about the Anishinaabe?

4 A. The war tells me about the
5 Anishinaabe that they -- again, that they have
6 territory, and that they're obliged to defend that
7 territory against what Schoolcraft called intruders
8 and enemies.

9 Q. In your opinion, after such a war,
10 what were the Anishinaabe likely to do?

11 A. They're likely to return home to
12 the places where they came from because those
13 places had been occupied by Haudenosaunee. And
14 after the war, they could reoccupy those places and
15 then they would go to where they came from before,
16 in my opinion.

17 Q. And why do you say they would go
18 to the same place?

19 A. I believe they would go to the
20 same place because it is a predictable place, it's
21 predictable in terms of -- especially in terms of
22 food resources. It's predictable in terms of
23 sacred sites, it's predictable in terms of just
24 general familiarity with the area, the routes to
25 travel, when to go, how to go.

1 The intimacy that one has with the
2 environment when one lives off the land that's --
3 it's like reading a book. Like I could read the
4 book but if you're living in the bush you have to
5 read the environment like a bush. And where you
6 want to go back to is where you can still read the
7 environment. If you go into a new area, all the
8 words may be the same but they appear jumbled, so
9 you have to learn, you have to re-learn that.

10 So the most effective way is to go back
11 to where you came from, besides which you have a
12 tie to it, you have an emotional tie to it, it's
13 your place.

14 Q. Should they have chosen to go
15 somewhere else what is your opinion of what would
16 likely have happened?

17 A. Well, those whose place it was in
18 the first place, would be there. You can presume
19 that they would be there because they wanted to go
20 back there. And if another group came, they'd have
21 to work out an entirely different land use regime
22 because there would be two groups there; the one
23 group that has a priority and a new group. So
24 they're going to have to work out some of the
25 details, if possible. It may not be possible. But

10:24:22 1 they would certainly have to work that out, or it
10:24:25 2 would create some difficulty, if not conflict; that
10:24:28 3 would depend on the case.

10:24:30 4 Q. In your report at page 57, there's
10:24:46 5 a section concerning European visitors, and I'm
10:24:51 6 asking now about the 17th and 18th century.
10:24:55 7 Generally, how did the Anishinaabe relate to
10:24:59 8 European visitors in their territory?

10:25:01 9 A. That depended on the European
10:25:04 10 visitor. It depended on whether the visitor was
10:25:07 11 attuned to Anishinaabe Customs.

10:25:09 12 If you abided by Anishinaabe Customs,
10:25:12 13 if you knew the right way to behave, the proper way
10:25:16 14 to gain access, then that would be possible. But
10:25:20 15 if you didn't know that, if you didn't behave in
10:25:22 16 the proper way, then access would be extremely
10:25:25 17 difficult for you.

10:25:37 18 Q. So in your report at page 57
10:25:39 19 you're talking about Champlain. So what happened
10:25:44 20 when Champlain reached Georgian Bay in 1615?

10:25:50 21 A. Champlain gave a present to the
10:25:56 22 warriors he met. There was 300 warriors. He met
10:26:00 23 them and he gave their Chief -- he gave the war
10:26:04 24 Chief a present. He gave them a hatchet and that
10:26:07 25 hatchet was regarded as -- it's a symbol and a

1 function -- a functionary tool at the same time.

2 But the symbol is, when I give you a gift, what I'm
3 trying to do is establish a relationship with you,
4 from an Anishinaabe point of view. That's their
5 custom.

6 So when Champlain did this he was
7 abiding by their custom. So as soon as he gives
8 them a gift they receive that as a message that,
9 oh, he wants to establish a relationship with us.
10 Then they invite him to winter with them in the
11 subsequent year.

12 Q. How do you interpret the statement
13 that Champlain says the 300 warriors he met were
14 picking blue berries?

15 A. Blue berries are picked by
16 children and women, and I don't mean that in any
17 pejorative way, and old men, I have to say that as
18 well. It's not an activity for warriors,
19 certainly.

20 So what I think is going on there is
21 that they're coming to meet Champlain.

22 Q. Is there a scholarly reference for
23 that conclusion?

24 A. Well, Leo Waisberg who worked
25 at -- he's an ethnohistorian, who worked at Treaty

1 and Aboriginal Rights Research in Kenora, in the
2 Treaty 3 area and did a lot of work with another
3 chap named Tim Holtzkam -- sorry, I've lost my
4 train of thought. Could you ask that again,
5 please?

6 Q. I was asking for a scholarly
7 reference and you mentioned Leo Waisberg so maybe
8 I'll bring that document up.

9 A. Yes.

10 Q. It's S1806 which we just assigned
11 the Exhibit No. 4336.

12 So you were beginning to talk about Leo
13 Waisberg?

14 A. Yes. This was Leo Waisberg's
15 Masters thesis which was written under the
16 direction of Ed Rogers, who was a famous -- he has
17 since passed away, but a well-known ethnologist and
18 ethnohistorian of the Anishinaabe.

19 Q. You consider this thesis a
20 reliable source?

21 A. Yes, it's a very good thesis.

22 Q. If we can go to page 33 of the
23 thesis, which is page 56 of the PDF. Is this the
24 passage that you were referring to?

25 A. That is correct, this is the

10:28:38 1 passage.

10:28:39 2 Q. Do you have any further comment on
10:28:41 3 it?

10:28:41 4 A. I think Leo says it pretty well
10:28:47 5 here.

10:28:47 6 Q. Okay. Now at page 58 of your
10:29:01 7 report, that section about Allouez's Experience.
10:29:10 8 Can you tell us what happened?

10:29:11 9 A. Well, Alluoez was a Jesuit
10:29:16 10 missionary and he wanted to travel to the west to
10:29:18 11 take his religious duties to convert. And he tried
10:29:23 12 to go on the voyage to the west along the great
10:29:28 13 canoe route. Once that failed and then the second
10:29:32 14 time when he went on the voyage, it was a voyage
10:29:35 15 from hell, from his perspective.

10:29:37 16 It was a horrible voyage because he was
10:29:39 17 mistreated, from his perspective, all along the
10:29:42 18 way. He was just treated in the most shabby way,
10:29:46 19 he believed that he could be treated. People made
10:29:50 20 it quite clear they didn't want him there at all.
10:29:54 21 And in fact at one time he was abandon.

10:29:56 22 Q. So what do you draw from that, as
10:29:59 23 an ethnohistorian?

10:30:02 24 A. Well, there's two ways to look at
10:30:04 25 it. One way you could say, well, wow, that's a

10:30:07 1 pretty cruel thing to do to a person who's coming
10:30:11 2 to do missionary work.

10:30:12 3 But that would be not the point of view
10:30:15 4 that I would take. I would take the Anishinaabe
10:30:17 5 point of view and say what's happening from
10:30:19 6 Anishinaabe point of view? It seems to me that
10:30:21 7 they're saying, this is our territory. If you want
10:30:24 8 to enter our territory, you have to be somebody
10:30:26 9 that we want in our territory; otherwise, you can't
10:30:29 10 come in the territory.

10:30:30 11 So it's a question -- what I take from
10:30:34 12 it is I'm looking at it from the Anishinaabe point
10:30:39 13 of view.

10:30:58 14 Q. I want now to turn to events
10:30:59 15 preceding the Pontiac War. And in your report at
10:31:04 16 page 60 you quote a 1760 message by Pontiac to
10:31:11 17 Robert Rogers. Just for reference, that's
10:31:15 18 Exhibit 656; we don't need to go there.

10:31:18 19 So what happened, and what do you
10:31:21 20 conclude from that?

10:31:22 21 A. Well, Robert Rogers was a ranger
10:31:27 22 in the British Forces. And after the war, he was
10:31:33 23 travelling to occupy the French Fort at the
10:31:38 24 Mackina, and on his way there he encountered the
10:31:42 25 Anishinaabe, just like Champlain did. He

10:31:46 1 encountered them. And they said, "You have to wait
10:31:48 2 here". He knew the custom and he waited there
10:31:51 3 until he could have a conversation with Pontiac or
10:31:54 4 his emissaries in order to make arrangements for
10:31:58 5 him to be able to allow -- to transit the
10:32:07 6 territory.

10:32:07 7 So what Rogers was doing, because he
10:32:07 8 knew the custom, was he was seeking permission to
10:32:07 9 travel through and that was subsequently awarded to
10:32:08 10 him.

10:32:09 11 Q. Can you tell us whether he offered
10:32:16 12 gifts?

10:32:16 13 A. I believe he did, I believe he did
10:32:19 14 offer a gift. I'd have to look at my text right
10:32:23 15 now if you'd like me to.

10:32:25 16 Q. Sure.

10:32:26 17 A. Thank you.

10:32:28 18 (Witness reviews document).

10:32:42 19 Well, here he says, "I, at the same
10:32:46 20 time delivered him..." and he's speaking -- this is
10:32:49 21 Rogers speaking to -- about Pontiac. Rogers says,
10:32:53 22 "I, at the same time delivered him several friendly
10:32:57 23 messages or belts of wampum which he received but
10:33:00 24 gave me no answer".

10:33:02 25 But once he got these gifts of wampum

10:33:04 1 which are symbolic messages, and they have a very
10:33:08 2 high value. Once Pontiac saw the wampum it's not a
10:33:14 3 gift, per se, but it's a message that this person
10:33:17 4 is a reliable person and should be allowed to
10:33:20 5 enter.

10:33:25 6 Q. Now, in your report at page 70 and
10:33:28 7 page 65, you quote Minweweh's speech to Alexander
10:33:38 8 Henry at Michilimackinac. That speech has been
10:33:41 9 read in evidence during Professor Hinderaker's
10:33:44 10 evidence, so I'm not going to go through that word
10:33:47 11 by word anymore.

10:33:48 12 If you can just remind us who Alexander
10:33:54 13 Henry is?

10:33:54 14 A. Alexander Henry was an
10:33:56 15 entrepreneur, a fur trader, an explorer, an author,
10:33:59 16 who lived with the Anishinaabe in the 1700s, mid,
10:34:03 17 around 1763, in particular in the 1760s.

10:34:12 18 Q. Alexander Henry's journal refers
10:34:15 19 to Minewehwehna and you say Minweweh; can you
10:34:19 20 explain that?

10:34:19 21 A. Those are alternate spellings of
10:34:21 22 the same person's name. The person who's name is
10:34:24 23 translated as "the man with the silver tongue".

10:34:28 24 Q. So what is it you draw from this
10:34:31 25 speech which is a well-known speech?

1 A. What he's saying to Alexander
2 Henry is that he's saying this, "English men, this
3 is our territory. If you want to enter our
4 territory, you have to be like our father, the
5 French King, which means that you must give us
6 presents if you want to have a relationship with
7 us".

8 So he's setting out the terms of
9 establishing a relationship with the Anishinaabe
10 after the Seven Year's War.

11 Q. To back up slightly, what was
12 Alexander Henry's experience in getting to
13 Michilimackinac?

14 A. Much like Alluoez, except for --
15 except because -- what happened is he had to
16 disguise himself as a voyager, as a French voyager,
17 because there was so much animosity by the
18 Anishinaabe towards the British because they had
19 taken over the territory or they claimed they had
20 ownership of the territory but the Anishinaabe
21 said, no, you don't. This is still our territory.

22 So there was animosity between the two.
23 So for him to travel as an Englishman meant a death
24 sentence, so he was disguised and it was a very
25 difficult voyage. It's described in his travels

1 and adventures.

2 Q. So that was my next thing to ask,
3 the source for that.

4 So that's at Exhibit 476, and if I
5 could go to page, starting page 33 which is PDF 40.
6 And there's a passage marked on that page and on
7 some of the following pages. I just want to
8 confirm that's what you're referring to.

9 A. That's correct. This is what I'm
10 referring to.

11 Q. Now, concerning the Pontiac War
12 itself, your report in this chapter has a section
13 on the Pontiac War. But I want to ask you about
14 that later when you have another section that deals
15 with it in a little more detail. So I'll skip over
16 that now.

17 And I want to go to some events after
18 the Pontiac War. In your report, from pages 67 to
19 73, you recount various assertions made by
20 Aboriginal people, and I wanted you to say what it
21 is you draw from those?

22 A. These assertions are not only by
23 Anishinaabe. They are -- as you mentioned, they're
24 by various Indigenous people, and what they're
25 saying is that no matter what happens, it doesn't

10:37:45 1 matter whether it's a -- you know, the seven-year's
10:37:50 2 war or it's the American Revolution, when these
10:37:53 3 things happen, and territory changes hands between
10:37:56 4 Europeans, the Indigenous people say that has
10:38:01 5 nothing to do with us. This is still our
10:38:03 6 territory.

10:38:05 7 And that's what all of these passages
10:38:08 8 acknowledge. They acknowledge that but virtue of
10:38:11 9 the fact that people such as Croghan, for example,
10:38:13 10 who's an old hand in -- the deputy superintendent
10:38:16 11 of Indian Affairs. He's an old hand. He's lived
10:38:19 12 with the Indians for many, many years since 1715.
10:38:23 13 He recognizes this, and other people who have
10:38:25 14 familiarity with Indigenous people, including the
10:38:27 15 Anishinaabe of course, recognize this as well. And
10:38:30 16 they advise their superiors of it, which is, this
10:38:34 17 is still, from their point of view, their territory
10:38:37 18 and we must take account of that.

10:38:39 19 Q. At page 68 of your report at the
10:38:46 20 bottom there's an expression attributed to
10:38:50 21 Anishinaabe, or the group involved there, of the
10:38:55 22 King as a father who has sovereignty over their
10:38:59 23 country; what do you make of that comment?

10:39:02 24 A. I think it's important to
10:39:06 25 understand how Anishinaabe use the concepts of

1 father and mother.

2 Anishinaabe Society itself is a kinship
3 group, people are related. In order to have a
4 relationship with somebody, it's -- of course
5 presents are involved as well that I've just
6 explained. But kinship is involved as well.

7 So when they first came -- when
8 Indigenous people -- and let me just speak about
9 Anishinaabe here. When Anishinaabe came into
10 contact with Europeans, they initially called them
11 "brother" because the relationship was of equals.
12 But this was in the 17th century. But as time
13 passed, that relationship changed and they began to
14 use the term "mother" and "father" and "great
15 mother" and "great father" to refer to the
16 Europeans.

17 What they meant by that, was not a
18 father from the European point of view, they meant
19 the father or mother from an Anishinaabe point of
20 view which meant acting in a way to support the
21 people in endeavors that they were not capable of
22 doing themselves. But anything they were capable
23 of doing themselves there would be no need to have
24 any direction or interference or supervision by the
25 great father or great mother. So they used it in a

1 very specific sense. And the sense is, you know
2 some things that we don't, and this is what we rely
3 on you, father, for. Everything else, it's up to
4 us. That's how they used the term.

5 I should add here, too, that when you
6 go through the documentary history of relations
7 with Anishinaabe and great fathers and great
8 mothers, you could see that they also used the term
9 with sarcasm and derision.

10 Q. On page 73 of your report in
11 paragraph 2 there's an expression of being poor and
12 asking for compassion. What do you make of this?

13 A. This is a manner of speaking and
14 which is famous among the Anishinaabe.

15 Their language, Anishinaabemowin, is a
16 language of metaphors, allegories, figures of
17 speech. And this is a perfect example of that.

18 They're saying we want a present, but
19 they're making it very easy for the present to be
20 given. So they humble themselves. And this does
21 not mean that they feel inferior in any way. It's
22 a manner of speaking, we find this often in the
23 literature where they say, please, we're poor,
24 we're without, can you give us this, or can you
25 give us that? That's what this is about.

1 This is not about them being poor and
2 destitute.

3 Q. So still concerning relationships
4 with Europeans, this time in the 19th century, in
5 Mr. Wentzel's report for Canada he mentioned -- he
6 talked about an incident at Mica Bay. And I'd like
7 you to talk about the Anishinaabe perspective of
8 that incident.

9 A. It might --

10 THE COURT: Hold on, I'm sorry.

11 MR. FELICIAN: Your Honour, how is
12 this relevant to what's going on in the Bruce
13 Peninsula? So I'm objecting to relevance.

14 Mica Bay has a very specific history
15 related to the making of the Robinson Superior,
16 Robinson Huron Treaties. And I just don't see the
17 relevance to the decision you're going to have to
18 make in this case with respect to the SON.

19 THE COURT: Mr. Townshend.

20 MR. TOWNSHEND: It's a matter of
21 another example of Anishinaabe Custom and it's one
22 very quite closely -- not very far from SON
23 territory.

24 MR. FELICIAN: If I can just respond,
25 Your Honour.

1 My concern is that the Anishinaabe
2 comprise, as you've seen, millions of acres of
3 land, all around Georgian Bay. Surely every
4 incident in every part of territory that
5 Anishinaabe people occupy can't be relevant to the
6 decision you're going to have to make with respect
7 to Treaty 72 that dealt with the Bruce Peninsula.
8 That is my concern.

9 MR. TOWNSHEND: I was premising on this
10 that Mr. Wentzel had referred to it, Canada's
11 expert had referred to it in his report and giving
12 him --

13 THE COURT: The difficulty I'm having,
14 and I realize that, is that since I don't have a
15 reply report, I don't know what direction this is
16 going in.

17 And I certainly -- that it appears in
18 an expert report for Canada is a good start, sir.
19 I don't think it means that a wholesale analysis of
20 this other situation is necessarily relevant. But
21 I'm assuming that you're not asking for a wholesale
22 analysis. Because if you had been, you would have
23 given that opinion beforehand; is that correct?

24 MR. TOWNSHEND: That's correct. I'm
25 expecting a few sentences relating it to

1 Anishinaabe Customs that Professor Driben has been
2 talking about.

3 THE COURT: All right. Well, without
4 making a ruling about the relevance, because
5 frankly I don't think I have enough information in
6 front of me, I will permit that brief response.

7 If you could ask the question again,
8 please.

9 BY MR. TOWNSHEND:

10 Q. Could you tell us the Anishinaabe
11 perspective of the incident at Mica Bay?

12 A. Without going into the details of
13 the incident, to me, it's an example of the
14 Anishinaabe enforcing their customary rules to use
15 the resources within an area. The miners were
16 using that territory without their permission and
17 they launched their military operation to prevent
18 that.

19 Q. Can you tell us where Mica Bay is?

20 A. It's in the Sault Ste. Marie area.

21 Q. And can you tell us the time that
22 this happened?

23 A. This happened in 1849, just as
24 Vidal and Anderson were returning from their
25 recognizance mission to southern Ontario.

1 Q. In your report, starting at
2 page 79, you have a section called "Keeping Out
3 Intruders".

4 So I'm asking concerning the 17th and
5 18th century, what methods would Anishinaabe use to
6 keep intruders off their territory?

7 A. They used three primary methods.
8 One of these is what Anishinaabe call "medicine"
9 which means invoking the assistance of super
10 natural agents to accomplish the goal; that was one
11 way, medicine.

12 The second way was through military
13 action. An example of that would be Mica Bay.

14 And the third way would be through
15 diplomacy.

16 Q. What determines which approach you
17 take to that?

18 A. Time and circumstance, and persons
19 involved. For instance, if it's another
20 Anishinaabe then medicine may be your most powerful
21 weapon. However, when -- medicine is not always
22 effective against Europeans because Europeans don't
23 abide by the same custom so they don't grasp what's
24 happening at the time.

25 So military action, when it's

10:47:34 1 available, when it's possible, when Anishinaabe
10:47:40 2 feel it's necessary, and then that evolves
10:47:45 3 subsequently after. It's no longer possible to
10:47:47 4 take military action, that evolves into diplomacy.

10:48:01 5 Maybe I could just say that over time
10:48:03 6 what happens is a military action evolves into
10:48:16 7 diplomacy. I'm not going to say anything about
10:48:16 8 medicine.

10:48:17 9 Q. And what information are you
10:48:19 10 basing this opinion on?

10:48:22 11 A. Well, I'm basing -- I'm basing it
10:48:24 12 on my own research, the research of the others and
10:48:27 13 the reading of the historical record.

10:48:29 14 Q. Can you say a little more about
10:48:48 15 the sources for the medicine technique?

10:48:51 16 A. Well, Ruth Landes writes about it.
10:48:56 17 I've had my own experience with it because it's one
10:48:59 18 of the topics that I like to investigate as well;
10:49:01 19 so I have my own knowledge about it. Hallowell
10:49:05 20 writes about it. I would say especially Ruth
10:49:11 21 Landes wrote about it a lot. As I said, I have my
10:49:18 22 own field interest in this subject as well.

10:49:22 23 Q. I'm moving now to your first third
10:49:35 24 chapter which is "Anishinaabe View of Waters". It
10:49:39 25 starts on page 90.

1 So can you give us a capsule view of
2 how Anishinaabe viewed waters in relation to their
3 territory in the 17th and 18 century?

4 A. It's part of their territory.
5 They viewed it that way then, and they view it that
6 way now.

7 Q. How do Anishinaabe think of
8 boundaries?

9 A. Well, they conceive of their Band
10 territories as bounded. But we know from -- but
11 they're not fixed. And I don't think Anishinaabe
12 would say they're fixed, too. There's variation in
13 them depending on local circumstances, population,
14 growth or decline, availability of resources and so
15 on. But there always are boundaries and there's
16 some variation in them over time.

17 Q. At page 90 in your report, you use
18 a term "proprietary right". I'm asking you about
19 that in the ethnological sense, not the legal
20 sense.

21 Can you tell us how the Anishinaabe
22 understood this and what kind of resources are
23 subject to proprietary rights?

24 A. Proprietary rights are the rights
25 to use and enjoy particular resources. Now, among

10:51:25 1 the Anishinaabe, those resources are resources that
10:51:29 2 have a value, in particular, value as trade goods,
10:51:33 3 but not exclusively as trade goods. So if
10:51:36 4 something becomes -- so if something has a value as
10:51:39 5 a trade good, let's say a fur, then that's regarded
10:51:44 6 as a property. If it's something that's sugar,
10:51:47 7 that's regarded as -- made from maple trees, that's
10:51:49 8 regarded as property.

10:51:50 9 If it is a fish, it's regarded as
10:51:53 10 property, when these are traded. These are all --
10:51:55 11 so whatever, whatever can be used as trade, a trade
10:51:59 12 good, that's how you categorize a resource over
10:52:03 13 which they would exercise proprietary rights.

10:52:06 14 Q. How, if at all, does water and
10:52:15 15 water transportation routes fit into that?

10:52:19 16 A. As I said before, they consider
10:52:21 17 the water in their -- they consider water as part
10:52:24 18 of their territory. The mapping that I've done,
10:52:29 19 when I'm doing land use mapping, I'm mapping to the
10:52:32 20 water, because they direct me to say, "This is the
10:52:35 21 area which I use". So they regard the water as
10:52:39 22 their territory and they regard the resources
10:52:41 23 within that, as resources over which they have
10:52:44 24 proprietary rights.

10:52:45 25 I should say, with the exception of

10:52:48 1 individuals who come for food, who come for just
10:52:54 2 subsistence because they need the food. If you
10:52:57 3 need the food, you have to allow people to take the
10:52:59 4 food if they need that for their sustenance, their
10:53:03 5 basic sustenance. Otherwise, no, it has value, no,
10:53:08 6 then it is a resource over which you'll have a
10:53:11 7 proprietary right.

10:53:13 8 I would also say some things do not
10:53:15 9 have the value the at the beginning. Furs are a
10:53:19 10 good example of that; minerals are another example
10:53:21 11 of that. You have something that has a value, but
10:53:23 12 that value comes in later. As soon as the value
10:53:24 13 comes in, they regard the resource something over
10:53:27 14 which they have proprietary rights.

10:53:35 15 Q. How does fishing fit into that?

10:53:38 16 A. Fishing, to take a few fish for
10:53:42 17 personal consumption that's not a problem. But if
10:53:44 18 it's anything more than that, if you're in that
10:53:46 19 territory, you have to seek permission to take fish
10:53:49 20 from the territory. You have to ask for
10:53:53 21 permission, and you would do this by giving a gift,
10:53:56 22 and then when you would leave you would also return
10:53:59 23 that gift in a manner of speaking.

10:54:07 24 Q. What happens if proprietary
10:54:08 25 rights, as we've been speaking of, are not

10:54:12 1 respected?

10:54:13 2 A. Then there's three choices.

10:54:15 3 There's medicine, there's military action, which is
10:54:18 4 the case at Mica Bay, or the third option is
10:54:23 5 diplomacy and all three are used.

10:54:29 6 Q. And how have you determined the
10:54:33 7 way you would distinguish between resources of
10:54:36 8 which are proprietary rights and of those which
10:54:40 9 aren't?

10:54:41 10 A. I distinguish that on the basis of
10:54:45 11 work that Charles Cleland has done, who's an
10:54:51 12 ethnohistorian and an ethnologist like myself, and
10:54:54 13 I've done it on the basis of my own research,
10:54:57 14 asking people over which resources they would have
10:55:00 15 -- they would exercise proprietary rights. Under
10:55:03 16 what conditions could I come here -- I would ask
10:55:05 17 the question, under what conditions could I come
10:55:08 18 here and just use resources if I needed to be? And
10:55:11 19 then they would ask me questions and we'd go back
10:55:14 20 and forth until I could narrow down the question so
10:55:17 21 that they can give me the proper answer to the -- I
10:55:21 22 have to get my question properly designed before I
10:55:24 23 can get an answer. Then when it's properly
10:55:27 24 designed they explain it to me. Like I said it's
10:55:30 25 based on my own research but also on others as

10:55:40 1 well.

10:55:40 2 Q. Now going back to some of the
10:55:42 3 speeches we talked about a few minutes ago, I want
10:55:48 4 to try to see what, if any, relation they have to
10:55:51 5 waters.

10:55:51 6 So the Minweweh speech from 1761, one
10:55:58 7 of the things he talks about is these lakes, these
10:56:00 8 woods, and mountains were left to us by our
10:56:04 9 ancestors.

10:56:05 10 To what was he referring when he said
10:56:08 11 "lakes".

10:56:09 12 A. Well, he's referring to water.
10:56:10 13 But what he's referring to in the sentence, I
10:56:12 14 think, is everything within your purview here, he's
10:56:15 15 saying, everything you can see, this is ours. And
10:56:18 16 he's including the water in it. In fact, here he
10:56:20 17 specifically mentions lakes. But to me, that's not
10:56:26 18 just about lakes, it's about waterways in general.
10:56:29 19 It's kind of a generic sentence.

10:56:40 20 Q. On page 90, the quote from Croghan
10:56:40 21 refers to land. And when he says "land", to what
10:56:42 22 is he referring, in your opinion?

10:56:44 23 A. I believe he's referring to land
10:56:46 24 and water as well because -- and the reason I say
10:56:50 25 this is because Croghan is familiar with Indigenous

10:56:54 1 people. He's lived with them for most of his life.
10:56:57 2 He has vast experience and he understands their
10:57:00 3 customs.

10:57:21 4 Q. On page 90 as well, there's a
10:57:21 5 quote from Egouchouay and when he says "land", to
10:57:22 6 what is he referring, in your opinion?

10:57:24 7 MR. FELICIAN: Your Honour, I'm sorry
10:57:25 8 to rise again and I don't mean to unduly interrupt.
10:57:29 9 But I don't see how this witness -- and this is a
10:57:31 10 similar question to the other two, how this witness
10:57:34 11 can possibly know what somebody meant 150 years
10:57:38 12 ago, based on the very texts that we're all
10:57:41 13 reading. I mean we can read it, it speaks for
10:57:44 14 itself.

10:57:50 15 MR. TOWNSHEND: My submission is the
10:57:53 16 texts do not speak for themselves. They have been
10:57:55 17 -- they were given by someone from a very difficult
10:57:58 18 culture, they've been translated and this witness
10:58:02 19 specializes in understanding what Anishinaabe
10:58:05 20 people mean and meant.

10:58:18 21 THE COURT: Well, we've had some
10:58:22 22 variety of expert testimony from a variety of
10:58:24 23 different disciplines, including testimony from
10:58:33 24 historians, for example, about what certain words
10:58:36 25 may or may not mean, and including testimony about

10:58:41 1 translations. This gentleman is not here as an
10:58:44 2 expert in translation.

10:58:46 3 And it's overlapping, which is to say
10:58:53 4 that I'm not expecting at the end of this trial for
10:58:56 5 you to stand up and say the anthropological
10:58:59 6 evidence is all that I should look at when
10:59:02 7 considering what these words mean. You call
10:59:06 8 evidence from other professionals about those sort
10:59:10 9 of subject matters; am I right so far, sir?

10:59:14 10 MR. TOWNSHEND: I'm not sure we had
10:59:15 11 evidence on this particular speech but, yes.

10:59:17 12 THE COURT: I'm not talking about this
10:59:19 13 particular thing, sir.

10:59:20 14 MR. TOWNSHEND: But in general, yes.
10:59:22 15 And I submit that it's important to have another
10:59:24 16 lens of ethnohistory to look at some of these. An
10:59:29 17 ethnohistorian has a different lens than a
10:59:31 18 historian and a translator.

10:59:34 19 THE COURT: Well, I just pick those as
10:59:36 20 examples. I think I could probably find a few more
10:59:39 21 in the evidence of your prior experts in other
10:59:42 22 areas.

10:59:51 23 I'm going to permit the question. I
11:00:41 24 observe that the significance of this type of
11:00:45 25 evidence, which we have had from a number of

11:00:48 1 different disciplines, will have to be assessed at
11:00:51 2 the end of this case.

11:00:54 3 And to some extent I think it would be
11:00:57 4 helpful to focus your questions, as I think you've
11:01:02 5 been trying to do, on the reasons for
11:01:05 6 interpretations that are being put forward by this
11:01:08 7 witness, which show a different, as you put it,
11:01:13 8 lens and may or may not, at the end of the day,
11:01:18 9 contribute to a conclusion about what a certain
11:01:24 10 person meant on a certain day; you certainly have a
11:01:27 11 lot of that kind of evidence so far. So that will
11:01:29 12 be for later. For now I'll permit the question.

11:01:33 13 MR. TOWNSHEND: Okay.

11:01:34 14 THE COURT: You're going to have to
11:01:36 15 repeat the question.

11:01:38 16 BY MR. TOWNSHEND:

11:01:38 17 Q. In the quote from Egouchouay on
11:01:43 18 page 90 when he says "land" to what is he referring
11:01:47 19 in your opinion?

11:01:47 20 A. In my opinion, he's referring to
11:01:50 21 everything in the territory, which would include
11:01:53 22 land and water.

11:01:54 23 Q. On page 91 you speak of a Huron
11:02:05 24 custom about trade route. What is the significance
11:02:09 25 of that, if any, in relation to Anishinaabe?

11:02:12 1 A. Well, what I was trying to do in
11:02:15 2 this paragraph here is just to demonstrate that
11:02:18 3 people other than Anishinaabe at this time, other
11:02:22 4 Indigenous people had the same or similar custom
11:02:24 5 and that's that waterways are environmental
11:02:30 6 features over which you have exercised proprietary
11:02:34 7 rights because they have value. And so I'm
11:02:37 8 describing that with the Huron here, but then the
11:02:39 9 same custom prevails among the Anishinaabe. I'm
11:02:42 10 just saying here that it is a general custom.

11:02:45 11 Q. On page 92 of your report, you
11:02:51 12 have a section on La Salle's ship, the Le Griffon.
11:02:57 13 Can you outline what happened here?

11:03:00 14 A. Well, the ship was built by
11:03:08 15 La Salle's men, and the idea, La Salle's idea was
11:03:14 16 to find a route to the east. Anyway, the ship
11:03:17 17 after about a year of construction, sailed south
11:03:20 18 from Niagara. It sailed south and it came up into
11:03:25 19 Lake Michigan by Detroit.

11:03:27 20 And when it came there, it was -- it
11:03:32 21 traded, they acquired furs, and then La Salle left
11:03:37 22 with some other people to continue further to
11:03:39 23 search for the route west, and the ship was
11:03:41 24 attacked and destroyed. Those are the facts of the
11:03:45 25 case.

11:03:45 1 Q. And what is the significance of
11:03:47 2 that to the Anishinaabe?

11:03:48 3 A. Well, again, looking at it from an
11:03:54 4 Anishinaabe perspective -- well, again, there's
11:03:56 5 different perspectives one could take.

11:03:58 6 Was it a wanton act of violence? Was
11:04:02 7 it a theft? Was it is something like that? I look
11:04:05 8 at it from an Anishinaabe point of view and I say
11:04:06 9 this is an example of them exercising their right
11:04:10 10 to control waterways. I see it as that.

11:04:27 11 Q. Dr. Reimer has criticized what you
11:04:27 12 write on this point on the basis that this is an
11:04:27 13 act of warfare rather than a territorial control;
11:04:31 14 can you comment on that?

11:04:31 15 A. Well, I think warfare is one of
11:04:34 16 the ways in which they control territory. So I
11:04:36 17 don't think that we're too far off in that. We
11:04:39 18 both agree that it was an act of war, but the
11:04:42 19 question is why was it an act of war? And I'd say
11:04:42 20 it's an act of war to defend territory. So I
11:04:45 21 really don't think we're that far apart on this.

11:04:58 22 Q. On page 96 of your report, you
11:05:01 23 talk about an account by Collins of a 1785 meeting
11:05:06 24 at Lake Simcoe. Can you explain what happened
11:05:09 25 here?

11:05:09 1 A. Yes, this was a -- this was a
11:05:11 2 treaty that was being made. And at this treaty,
11:05:16 3 what happened is that the Anishinaabe were
11:05:19 4 agreeing, under certain conditions, to allow the
11:05:25 5 navigation of rivers and lakes for the King's
11:05:29 6 vessels. So it's just part of an agreement that
11:05:33 7 talks specifically about the water and that's why I
11:05:37 8 included it.

11:05:19 9 Q. What did the Anishinaabe get from
11:05:19 10 this agreement?

11:05:48 11 A. Forts, store houses. What they
11:05:50 12 received was places to trade and the assurance that
11:05:53 13 they would be able to engage in trade with the
11:05:56 14 Europeans which is one of the things they were
11:05:57 15 seeking. They wanted European trade goods and this
11:06:00 16 is one of the ways they could get it.

11:06:03 17 Q. And just for the record, that is
11:06:06 18 in Exhibit 506, but I don't think we need to go
11:06:10 19 there.

11:06:18 20 Now in your report, starting at
11:06:21 21 page 99, you have a section on SON with a focus on
11:06:26 22 fisheries. Mr. Brookwell is going to be asking you
11:06:30 23 about fishing as an activity later on. At this
11:06:34 24 point, I just want to ask you about how SON viewed
11:06:39 25 their fisheries in the 19th century.

11:06:42 1 So at page 99 and over the next page,
11:06:48 2 you have a quote from a speech by Metigwob.
11:06:53 3 Mr. Brookwell will be going to that speech later in
11:06:56 4 relation to Treaty 45½. But I want to focus on
11:07:00 5 what it said about the fishery. So I want to ask
11:07:04 6 you what is Bond Head saying about the fishery and
11:07:07 7 how would the Anishinaabe have understood that?

11:07:09 8 A. Well, Bond Head acknowledges the
11:07:12 9 critical role that the fishery plays in the lives
11:07:16 10 of the Saugeen Anishinaabe. And he points out --
11:07:19 11 he says, you can own the Fishing Islands which are
11:07:23 12 critical to their fishing endeavors in terms of
11:07:26 13 technique.

11:07:26 14 He says, and he is going to protect
11:07:29 15 these from intrusion by Europeans. He's going to
11:07:33 16 protect the fishery, make sure that the Anishinaabe
11:07:36 17 have it, but not allowing whites to take it over.

11:07:39 18 Q. In page 105 of your report, you
11:07:51 19 refer to a letter from Alexander McGregor, and I'd
11:07:55 20 like to go to that, that's Exhibit 1027. And what
11:08:14 21 do you take from what is written in this letter?

11:08:14 22 A. Two things. First of all, that
11:08:20 23 the Anishinaabe believe that they're in control of
11:08:25 24 the fishery, that it's their fishery, that they
11:08:28 25 have the proprietary rights to the fishery. And

11:08:30 1 this letter is an acknowledgement from the point of
11:08:33 2 view of the Europeans, such as McGregor and of
11:08:35 3 course, Sir John Colborne, that those rights exist.
11:08:40 4 They acknowledge the existence of the rights, that
11:08:42 5 the Anishinaabe believed that the territory is
11:08:45 6 their own, that the fishery is their own.

11:08:47 7 Q. Now on page 105 of your report,
11:08:50 8 you also refer to the Huron Fishing Company. So
11:08:53 9 I'd like to go to Exhibit 1056. Have you seen this
11:09:05 10 before, Professor Driben?

11:09:05 11 A. Yes, I have. This is the lease
11:09:07 12 that was written by the Huron Fishing Company for
11:09:09 13 the use of the Fishing Islands. Because the
11:09:12 14 experience -- because McGregor, there's no record
11:09:16 15 that McGregor had actual approval from the Saugeen
11:09:19 16 Anishinaabe. So the Saugeen Anishinaabe made an
11:09:22 17 agreement with the Huron Fishing Company, so that
11:09:24 18 they could have control over the fishery.

11:09:28 19 Q. And who signed the lease? You may
11:09:32 20 need to scroll down a bit there.

11:09:34 21 A. Chief Metigwob, Chief Aisance, and
11:09:44 22 Chief Madwayosh.

11:09:51 23 Q. And what does that tell you about
11:09:53 24 the Anishinaabe perspective?

11:09:55 25 A. This tells me again that they

11:09:58 1 regard the fishery as something over which they
11:10:02 2 have proprietary rights and they're trying to make
11:10:04 3 sure that they can exercise those proprietary
11:10:07 4 rights through an agent. And in this case, their
11:10:09 5 agent would be the Huron Fishing Company. It also
11:10:14 6 tells me that the Huron Fishing Company understands
11:10:16 7 the relationship as well.

11:10:18 8 Q. I want to move to Chapter 4 of
11:10:33 9 your report, and talking about access points. So
11:10:42 10 in 1763, I want to ask you what were the primary
11:10:48 11 access points to Lake Huron and Georgian Bay? And
11:10:51 12 if we go to page 129 of your report, you have a map
11:10:55 13 there.

11:10:56 14 A. Yes.

11:10:56 15 Q. Can you explain your conclusion
11:11:07 16 about what you have marked there and how did you
11:11:09 17 come to the conclusions about those?

11:11:11 18 A. Well, these -- let's take a look
11:11:14 19 at the four circles on the right-hand side of the
11:11:18 20 screen first. These are entrances to Georgian Bay
11:11:23 21 and Lake Huron, from the east. So if you're coming
11:11:26 22 from the east, each of these circles represents an
11:11:30 23 access point that is following a particular route
11:11:33 24 there, because there are four main routes. So the
11:11:36 25 routes end at those spots.

11:11:39 1 And also, you could reach the same area
11:11:42 2 by travelling through Lake Michigan, or through
11:11:44 3 Lake Superior. And you can see that you'd enter
11:11:48 4 Lake Michigan through the straits and you would
11:11:50 5 enter the Georgian Bay area through the St. Mary's
11:12:00 6 River.

11:12:00 7 That's from the west. Most of the
11:12:01 8 traffic is coming from the -- from the east.

11:12:06 9 Q. And how did you come to the
11:12:09 10 conclusion that these were the key access points?

11:12:12 11 A. Oh, by looking at the historical
11:12:15 12 literature, the historical documentation of various
11:12:19 13 travelers, how they got to be in the particular
11:12:21 14 places they were. Champlain's route, for instance,
11:12:24 15 is a classic route, his route there and his route
11:12:27 16 back.

11:12:28 17 La Salle's route again is another
11:12:32 18 classic route. And then it's just by reading and
11:12:34 19 just by looking at the historical documents, that's
11:12:37 20 how you know where the access points are and the
11:12:39 21 routes that they travel.

11:12:41 22 Q. And what Aboriginal routes were
11:12:43 23 located at these access points?

11:12:44 24 A. All of these were under the
11:12:47 25 control of Anishinaabe people.

11:12:51 1 Q. And what was their relationship to
11:12:53 2 SON?

11:12:54 3 A. They're related to them by virtue
11:12:56 4 of the clan system. They're part of the same
11:12:59 5 culture.

11:13:00 6 Q. Now I want to talk about the
11:13:08 7 Pontiac War and you have parts of that in your
11:13:11 8 report at pages 81 to 83 and also at pages 141 to
11:13:18 9 157.

11:13:19 10 I'm not going to ask you about details
11:13:22 11 of the events of the war as Professor Hinderaker
11:13:27 12 dealt with that at some length. But I do want to
11:13:31 13 ask about the Anishinaabe perspective on the war.
11:13:33 14 So what was it in the lead up to the war that the
11:13:40 15 Anishinaabe wanted the British to do?

11:13:43 16 A. They wanted the British to make an
11:13:46 17 arrangement with them to use their territory.
11:13:48 18 Because they had an arrangement when the French
11:13:53 19 King before. But after the end of the Seven Years'
11:13:56 20 War they had no such arrangement with the English
11:13:59 21 King. And what they wanted to do was to have a
11:14:02 22 relationship with the English King, if the English
11:14:06 23 were prepared for it, that would be the same as
11:14:10 24 they had with the French King. They regarded this
11:14:12 25 area as their property and said to the British, you

11:14:15 1 cannot come in here without making arrangement with
11:14:17 2 us, and that means, you must give us presents.

11:14:21 3 Q. Did the British meet these
11:14:23 4 expectations?

11:14:23 5 A. No, they didn't and the result was
11:14:25 6 Pontiac's War.

11:14:27 7 Q. So how did the Anishinaabe
11:14:31 8 understand the British not complying with these
11:14:35 9 expectations?

11:14:35 10 A. As an affront. In fact, more than
11:14:39 11 an affront. It was an act that called for a
11:14:43 12 response that was war. So they took it in the most
11:14:45 13 serious way possible of people -- of the British
11:14:49 14 using their territory, using the forts that the
11:14:53 15 French had built, because they had received
11:14:55 16 tributes for those before, they had received the
11:14:57 17 presents. They had an arrangement, but they didn't
11:14:59 18 want to let the British in.

11:15:01 19 When Sir Jeffrey Amherst decided that
11:15:04 20 he was not going to distribute wealth anymore to
11:15:08 21 Anishinaabe and other Indigenous peoples, they
11:15:12 22 reacted in a very negative way to that. Because
11:15:15 23 they said, well, you don't want to have a
11:15:17 24 relationship with us, and you want to use our
11:15:19 25 territory at the same time? That's not allowed.

1 Q. At page 146 and 156 in your
2 report, you referred to Neolin. Can you tell us
3 who Neolin was?

4 A. Neolin was a prophet and he was a
5 prophet who -- technically we would refer to him in
6 anthropology as a revitalization leader who
7 proposed a blueprint for a new and better society
8 because of the crisis that Aboriginal people were
9 in the at the time.

10 So he was a religious prophet that
11 preached a way of life that would renew and
12 revitalize the culture.

13 Q. What were his stated goals in
14 relation to the war?

15 A. Neolin's goals?

16 Q. Yes, Neolin's goals.

17 A. Well, what Neolin wanted to do was
18 to go back to the time period in which Europeans
19 were no longer present on the scene. So what
20 Neolin wanted to do was at the end of the war he
21 wanted to create a situation in which there would
22 only be Indigenous people, and they would abide by
23 Indigenous Customs and use Indigenous technology
24 and have Indigenous religious beliefs. He wanted
25 to recreate, or resurrect the past; that was his

11:16:54 1 goal.

11:16:54 2 Q. To what extent, if at all, was
11:16:58 3 that goal shared by the rest of Anishinaabe?

11:17:00 4 A. I don't think it was -- it was
11:17:02 5 shared by Neolin's followers, because he was a
11:17:06 6 revitalization leader. But on the other hand, I
11:17:10 7 don't think it was widely shared, because what the
11:17:12 8 Anishinaabe wanted to do at this time as well, was
11:17:16 9 still trade, was still engage in trade with
11:17:17 10 Europeans.

11:17:18 11 However, they were not getting the
11:17:20 12 message to engage in trade. They didn't receive
11:17:22 13 the proper response and warfare was the result.
11:17:26 14 But I don't think that they were on the same -- I
11:17:27 15 don't think Pontiac, for instance, had the same
11:17:30 16 vision of the future as Neolin did. He had a
11:17:34 17 different vision of the future where there would be
11:17:36 18 trade and people would operate together and life
11:17:38 19 would go on that way; whereas Neolin's would be to
11:17:43 20 get rid of all the white people and make North
11:17:47 21 America brown.

11:17:48 22 Q. What kind of behaviour did Neolin
11:17:52 23 promote in sort of a daily life sort of way?

11:17:57 24 A. Abstinence from European, from
11:17:59 25 anything European.

11:18:00 1 Q. How many Anishinaabe followed that
11:18:09 2 teaching?

11:18:09 3 A. I don't know.

11:18:09 4 Q. Was it widely shared or not?

11:18:09 5 A. Not to my -- not to the best of my
11:18:12 6 knowledge it wasn't.

11:18:13 7 Q. Now, in your report at page 154,
11:18:23 8 you have a section called "Pontiac's actions in
11:18:25 9 retrospect".

11:18:27 10 I'd like you to elaborate on that.

11:18:32 11 A. Well, when I look back at Pontiac,
11:18:37 12 who -- by the way, his territory is right there on
11:18:39 13 the Detroit River.

11:18:40 14 When I look back at Pontiac, I see him
11:18:43 15 as an Anishinaabe leader, who is following the
11:18:48 16 dictates of his culture. Anishinaabe are obliged
11:18:51 17 to defend their territories against intruders and
11:18:54 18 enemies. And that is precisely, I think, what
11:18:57 19 Pontiac is doing in Pontiac's War. He is defending
11:19:01 20 his territory against intruders and enemies. That
11:19:04 21 is the way I see that.

11:19:05 22 Q. What was the outcome of the war on
11:19:18 23 the Anishinaabe point of view?

11:19:21 24 A. Well, in the long-term, the war
11:19:24 25 was successful because a relationship was

11:19:27 1 established -- was established, there was a
11:19:30 2 relationship established. In the short term -- you
11:19:36 3 know, in the short term what happened was
11:19:40 4 this: The resistance, if you will, collapsed. And
11:19:43 5 the reason for that was independence of Bands.
11:19:46 6 Because the Bands that were there with Pontiac were
11:19:48 7 all independent of one another. And after Pontiac
11:19:53 8 laid siege to Fort Detroit and after the siege was
11:19:57 9 unsuccessful, after about seven or eight months, I
11:19:59 10 believe it was, the other Bands, their leaders
11:20:01 11 decided to quit the area so they left. And the
11:20:04 12 movement kind of petered out after that.

11:20:08 13 So in the short term you might say that
11:20:10 14 Pontiac's resistance or the Pontiac's War was
11:20:13 15 unsuccessful but if you looked at it in the
11:20:16 16 long-term, if your goals were to re-establish a
11:20:19 17 relationship and re-establish the present system
11:20:22 18 again, that's what happened. So I would say that
11:20:24 19 they could say in the short term it was
11:20:27 20 unsuccessful, they may have lost the battle but
11:20:30 21 they won the war.

11:20:48 22 Q. What is the significance of the
11:20:50 23 water warfare that Pontiac waged during the siege
11:20:54 24 of Detroit?

11:20:55 25 A. The significance of it is, again,

11:20:59 1 it is another example to me of the Anishinaabe
11:21:01 2 regarding water as their territory and using it as
11:21:06 3 a vehicle, in this case to attack, and successfully
11:21:08 4 to attack the British.

11:21:10 5 So water here is regarded as property.
11:21:12 6 They're using the water as property. They're
11:21:14 7 defending that property as well, because ships that
11:21:16 8 come in to resupply are turned back. Through
11:21:25 9 bloody fighting, also.

11:21:36 10 Q. Now, Mr. Graves, who is one of
11:21:40 11 Ontario's experts, commented on the suggestion that
11:21:48 12 the warriors were compelled by the strategic
11:21:51 13 necessity of acting because the St. Claire River
11:21:55 14 forms a passageway between Lake Huron and the
11:21:59 15 earth, and Mr. Graves responded that while this may
11:22:01 16 be a possibility, there's a greater possibility
11:22:04 17 that the British party was attacked simply because
11:22:07 18 it was necessarily on the water since there were no
11:22:10 19 roads in the region at this time.

11:22:12 20 THE COURT: Just pause, sir, for a
11:22:14 21 moment.

11:22:14 22 MR. FELICIAN: I raise the same
11:22:15 23 objection to this evidence as I did with
11:22:18 24 Dr. Reimer's that there's no reply report to
11:22:22 25 Mr. Graves and so this is evidence we've had no

11:22:28 1 notice of.

11:22:31 2 THE COURT: Again, is this going to be
11:22:32 3 a frequent form of question or is there just a few
11:22:36 4 of these as well?

11:22:37 5 MR. TOWNSHEND: That's the only one.

11:22:39 6 THE COURT: That's the only one.

11:22:40 7 MR. TOWNSHEND: About Mr. Graves.

11:22:42 8 THE COURT: Obviously, it's preferable,
11:22:46 9 indeed with experts require that there be notice of
11:22:51 10 opinions.

11:22:51 11 So, having said that, I think it's
11:22:54 12 useful for me to know now what this gentleman has
11:22:58 13 to say. So what I'm going to do, counsel, is
11:23:01 14 overrule your objection, but indicate now that if
11:23:06 15 either you or someone else, I assume also
11:23:12 16 cross-examining this witness -- who is it going to
11:23:16 17 be, you, sir?

11:23:17 18 MR. ENNIS: Yes, Your Honour.

11:23:19 19 THE COURT: Having concluded the
11:23:21 20 examination in-chief and subject to any further
11:23:23 21 objections and rulings, I will hear from you about
11:23:29 22 whether a short gap for additional preparation may
11:23:38 23 be needed for the cross-examination.

11:23:41 24 That does not mean that you should sit
11:23:44 25 down if you think there are further objectionable

11:23:46 1 questions. Because without the objections I don't
11:23:49 2 know that there are problems. But for the most
11:23:53 3 part, I am going to permit Mr. Townshend to
11:23:56 4 continue along this line with respect to a modest
11:24:00 5 number of questions about responses to other
11:24:05 6 defence expert witnesses.

11:24:07 7 Please go ahead.

11:24:08 8 MR. TOWNSHEND: Thank you, Your Honour.

11:24:09 9 THE COURT: You'll have to repeat the
11:24:11 10 question.

11:24:11 11 MR. TOWNSHEND: Yes.

11:24:11 12 BY MR. TOWNSHEND:

11:24:13 13 Q. Mr. Graves was commenting on the
11:24:15 14 suggestion that there was a strategic goal in
11:24:19 15 attacking -- in controlling the St. Claire River.
11:24:23 16 And he said that may be a possibility but there was
11:24:27 17 a greater possibility that the British party was
11:24:29 18 attacked simply because it was necessarily on the
11:24:32 19 water since there were no roads in the region at
11:24:35 20 this time.

11:24:36 21 And my question is, can you comment on
11:24:39 22 that from your perspective as an ethnologist?

11:24:42 23 A. Well, from my perspective as an
11:24:46 24 ethnologist I will say again that I regard this as
11:24:53 25 an act, a purposeful act on the part of Anishinaabe

11:24:53 1 to defend their territory and to defend their
11:24:54 2 waterways. That's how I regard it. Mr. Graves has
11:24:59 3 another opinion.

11:25:01 4 Q. Chapters 5 and 6 --

11:25:20 5 MR. TOWNSHEND: Your Honour, I'm
11:25:20 6 getting into another section. It's 25 after 11.
11:25:26 7 Would this be a good time for a break?

11:25:29 8 THE COURT: All right, 20 minutes.

11:25:30 9 -- RECESS TAKEN AT 11:25 --

11:48:57 10 -- UPON RESUMING AT 11:48 --

11:48:57 11 THE COURT: Let's go ahead.

11:48:57 12 BY MR. TOWNSHEND:

11:48:58 13 Q. Professor Driben, I want to turn
11:49:02 14 now to chapters 5 and 6 of your report which deal
11:49:06 15 with Anishinaabe spiritual beliefs.

11:49:13 16 And can you tell us, by way of
11:49:14 17 introduction, whether the beliefs you describe in
11:49:18 18 these chapters have changed substantially from the
11:49:23 19 17th century to the present?

11:49:25 20 A. That's certainly a difficult
11:49:33 21 question. To some extent, yes, certainly they've
11:49:38 22 changed because of the advent of Christianity. So
11:49:43 23 that many people no longer practice their
11:49:46 24 traditional beliefs, but there's been a
11:49:49 25 resurrection of that as well.

1 I think we also have to take into
2 account that when you look at things from an
3 Anishinaabe point of view, the acceptance of
4 Christianity is not necessarily a rejection of
5 their own theology, because they regard Jesus as
6 another spirit. So that -- I've been told that
7 that's not a difficult thing to do to incorporate
8 another spirit into the pantheon of spirits that
9 exists now.

10 On the other hand, it's clear that
11 there has been a tremendous influence on the people
12 through Christianity. So it's not the same as it
13 was before. But these beliefs that I'm talking
14 about in the past still exist today, and of course
15 in the past they were the belief.

16 Q. So what is the basis for
17 traditional -- the traditional attitude of
18 Anishinaabe toward the land and its products?

19 A. Well, one word really captures it
20 and that word is "respect". You have to respect
21 the land and its products.

22 Q. And how did Anishinaabe men
23 traditionally get their identity?

24 A. There was a difference between
25 Anishinaabe men and Anishinaabe women during the

11:51:09 1 middle of the 1800s. Men were hunters, women
11:51:15 2 produced the products of the hunt.

11:51:18 3 So, in the case of a man, a man had
11:51:22 4 less leeway in forming his cultural identity, but
11:51:26 5 that identity flowed directly from the land as a
11:51:29 6 forager, as a hunter, as a trapper, as a fisher.
11:51:32 7 So that everything the man did as he was growing up
11:51:35 8 encouraged him to pursue these endeavors, and he
11:51:38 9 would form his identity in that way. So at the end
11:51:41 10 of the process, he would say to himself, I am a
11:51:44 11 forager, I am an Anishinaabe.

11:51:45 12 Women on the other hand, as I said,
11:51:49 13 they had more leeway. So they could engage in some
11:51:52 14 male activities, hunting, for example. There have
11:51:56 15 been women who are exceptional hunters, they're
11:51:58 16 noted in the past as well. But overall, their
11:52:00 17 concern was the lodge. So that everything that was
11:52:02 18 internal to the lodge was under the care of women.
11:52:06 19 Everything external to the lodge, by and large was
11:52:08 20 under the care of men. So that each of them
11:52:11 21 derived their identity from the land, directly from
11:52:15 22 the land.

11:52:15 23 Q. In the sense you are using "lodge"
11:52:18 24 there, what does it mean?

11:52:20 25 A. A habitation, a hut.

1 Q. So how does the relationship to
2 the land that you described develop?

3 A. It develops over time and it
4 develops through -- first of all, it develops
5 through storytelling. It develops through stories
6 about the relationship between people and the land,
7 between the spirits and the people spirits and the
8 land. All that is taught to children through
9 stories, so that as children are growing up they
10 listen to the Elders, primarily in winter because
11 in summer you don't tell stories because the
12 spirits that are involved, forbid that. So you
13 tell these stories in winter.

14 And as you're growing up, you learn the
15 philosophical or let us say the theoretical aspects
16 of living off the land, both sexes. But at the
17 same time you're doing that, you're learning by
18 participation and imitation. Because your parents
19 are taking you out, your grandparents are taking
20 you out. And when they take you out on the land,
21 they teach you how to do things, they show you how
22 to do things and you imitate them.

23 And you do those things and so you
24 become proficient in two areas. One of them is a
25 practical area of the practical ability to live off

11:53:35 1 the land. But the other is looking at the moral
11:53:37 2 and ethical dimensions of living off the land so
11:53:42 3 that you can do that in a proper way without
11:53:43 4 offending the spirits. Because if you do offend
11:53:46 5 the spirits, no matter what else you do, you will
11:53:49 6 be doomed.

11:53:50 7 Q. Where do the moral and ethical
11:53:55 8 considerations you mention come from?

11:53:57 9 A. They come from an environmental
11:53:59 10 ethic which Anishinaabe possess, which has been the
11:54:05 11 subject of a number of books, I would say, in the
11:54:09 12 past 25 years that talk about environmental ethics
11:54:12 13 and specifically about Anishinaabe environmental
11:54:14 14 ethics.

11:54:15 15 Q. Can you say anymore about that?

11:54:22 16 A. Well, I'm not a philosopher, but
11:54:27 17 what I have read of what they're writing about,
11:54:30 18 they're saying that there is an environment --
11:54:32 19 there is an environmental ethic. And if you look
11:54:34 20 at what the Anishinaabe are doing, we can say that
11:54:38 21 they say that they conform to that ethic, to an
11:54:44 22 ethic. So there's a way of interacting with the
11:54:47 23 environment that they must master and those will be
11:54:50 24 based on ethical considerations.

11:54:52 25 For example, each animal species has a

1 spirit or an Ogima, a boss, and if you do something
2 to an underling of the boss, a particular animal,
3 you will be subject to punishment by the
4 supernatural world. You learn this by listening to
5 the stories, learning about the relationship
6 between this species and its Ogima. And then you
7 can -- then you understand how you have to operate
8 given this frame of reference.

9 Q. And how did you learn about this?

10 A. Well, I've learned about it by
11 reading about it, certainly. But also by
12 participating in religious ceremonies and inquiring
13 about Anishinaabe theology because it's an
14 important thing to understand, if you're interested
15 in other subjects.

16 For instance, I'm interested in living
17 off the land, where people go, what they do, how
18 they do it. But in order to understand that
19 properly, you also have to understand the spirit
20 world. Because if you don't, you just won't -- you
21 won't understand the capture. You won't understand
22 the productivity. Because if you over produce, if
23 you over kill, you'll be subject to punishment by
24 the Ogima. And the Ogima can punish you in any
25 number of ways. It may make you sick when you eat

11:56:12 1 that species. It may make a relative of yours
11:56:16 2 sick.

11:56:16 3 There's various indicators that you
11:56:18 4 look for and when you see them, you know you've
11:56:20 5 done an offense. Now you can do ceremonies to
11:56:25 6 correct that, but that's a difficult procedure.

11:56:29 7 Q. When Anishinaabe persons go out on
11:56:32 8 the land, what have you learned about what they
11:56:34 9 see?

11:56:41 10 A. What I see when I go out on the
11:56:44 11 land is I see the physical aspects of the land.
11:56:48 12 But my Anishinaabe teachers don't see that. What
11:56:50 13 they see is all the spirits that are out there as
11:56:53 14 well. Because everything that's living, from their
11:56:55 15 point of view, has a Ogima, has a boss.

11:56:58 16 So water is alive. A village is alive.
11:57:04 17 Rocks are alive -- no, not everything is alive of
11:57:07 18 course and not everything has a spirit, otherwise
11:57:09 19 the concept would be vacuous. But that you have
11:57:14 20 many living things out there, and each of them has
11:57:22 21 a spirit. So when you step into their world -- I
11:57:22 22 think Seldma Dutney (ph) pointed this out -- when
11:57:24 23 you step into their world, you're stepping into a
11:57:27 24 real world that's filled with spirits. So it's not
11:57:30 25 just the physical aspects of the land that you see,

11:57:32 1 you see the pantheon of all the spirits around you.
11:57:36 2 And when I have say pantheon, I don't mean higher
11:57:39 3 or lower, although some spirits of course are more
11:57:43 4 powerful than others.

11:57:44 5 Q. And why are the Anishinaabe
11:57:46 6 concerned with spirits?

11:57:48 7 A. Well, they're concerned because
11:57:50 8 spirits, by their very nature, are disobedient.
11:57:59 9 They work according to whim; they're not easily
11:58:05 10 controlled. You try and gain their favour by
11:58:13 11 giving presents to them, which in particular,
11:58:13 12 tobacco and smoke which they really like.

11:58:14 13 But it's because -- because the spirits
11:58:18 14 don't respond directly and they may not want to
11:58:23 15 respond at all or not take any interest in it, when
11:58:25 16 you're out on the land you always have to be on
11:58:28 17 tiptoe stance because you never know when action
11:58:31 18 can be taken against you. And if something befalls
11:58:34 19 you, you will look for the action in a past
11:58:37 20 activity.

11:58:39 21 Q. Where is the ceremonial life of
11:58:47 22 Anishinaabe located?

11:58:48 23 A. In their territory, in various
11:58:50 24 locations. It could be located in a stream, it
11:58:52 25 could be located in a grove of trees, it could be

11:58:55 1 located in a rock formation of a special sort, it's
11:59:01 2 various places. And these have to be pointed out
11:59:04 3 to you because they're not obvious, at least
11:59:06 4 they're not obvious to me. When I'm shown them, I
11:59:09 5 have to be directed and then I have to be told what
11:59:11 6 they are, and then I ask for explanations of what
11:59:14 7 the sacred site is.

11:59:16 8 Q. In your report, starting at
11:59:22 9 page 169, you have a section about Nanahbozhoo.
11:59:29 10 Can you tell us who Nanahbozhoo?

11:59:32 11 A. Yes. Well, I think I should start
11:59:33 12 out with, in order to understand Nanahbozhoo, I
11:59:36 13 think you have to start with Kitchimanitou.
11:59:40 14 Kitchimanitou is the great spirit, and the great
11:59:42 15 spirit is what is known as "Otius Deus" which is
11:59:47 16 the "resting God".

11:59:49 17 Now, what Kitchimanitou did was to
11:59:52 18 create everything. And one of the creations that
11:59:56 19 Kitchimanitou created was the other spirits and
11:59:59 20 then became the resting God and one of the most
12:00:03 21 important spirits that Kitchimanitou created was
12:00:06 22 Nanahbozhoo. Nanahbozhoo was a trickster, he's
12:00:10 23 like Hermes in Greek mythology? And as time
12:00:14 24 passes, Nanahbozhoo grows and as he grows he
12:00:15 25 matures so he does silly things as a child would

1 do. But as Nanahbozhoo passes through his life,
2 you can see how he becomes more mature and more
3 caring and learns to respect and protect the land.

4 And children learn this through a cycle
5 called the Nanahbozhoo cycle. And this cycle is a
6 series of stories that are told in winter. And as
7 you listen to the -- as you listen to the stories
8 then you understand the role of Nanahbozhoo. But
9 you're also getting a lesson itself in life and how
10 you are supposed to mature as a person in your
11 life. You're supposed start off as a child but of
12 course you end up as an adult, as a mature adult.

13 In the end, that's exactly how
14 Nanahbozhoo ends up. At the end of Nanahbozhoo's
15 adventures, if I can use that term, at the end of
16 his adventures he receives parents, because he
17 didn't start off with parents. He receives
18 parents. And then Nanahbozhoo rests, he lays down
19 to rest, and where he's resting right now is right
20 where I live in Thunder Bay in the harbour. It's
21 called the sleeping giant, but that's not the
22 Anishinaabe name for that. It's Nanahbozhoo.
23 That's where he is resting right now, that stone
24 figure there, that's -- that's a spirit. It's a
25 spirit.

12:01:28 1 Q. What does the content of the
12:01:39 2 Nanahbozhoo stories tell you about the world view
12:01:42 3 of Anishinaabe?

12:01:44 4 A. Well, they tell me that the world
12:01:47 5 view of Anishinaabe is quite different from my own
12:01:49 6 world view, the world view that I was raised up
12:01:52 7 with. It's -- I guess that's what you learn in --
12:01:56 8 learn as being an ethnologist and it is a world
12:02:00 9 view that is directly related to the environment,
12:02:03 10 to the place in which they live. Their world view
12:02:06 11 is directly related to the land, it's -- because
12:02:10 12 that's where the spirits are, too.

12:02:12 13 So everything goes back to the land.
12:02:15 14 Everything does, and that's what they learn as they
12:02:20 15 pass through life.

12:02:21 16 Q. What do Anishinaabe see when they
12:02:28 17 are on the water?

12:02:29 18 A. The same thing. There are spirits
12:02:31 19 on the water as well. Every -- and what -- how
12:02:36 20 many spirits there are in the water, depends.
12:02:40 21 Because there's not just one water spirit, there's
12:02:43 22 many water spirits. So when you're on the water
12:02:45 23 it's the same thing.

12:02:47 24 And on the water you have to remember
12:02:49 25 that you're talking about people that are on the

12:02:51 1 water a lot and that's a dangerous place, it can be
12:02:54 2 a dangerous place to be. So on the water you have
12:02:58 3 to be especially cognizant of the spirits. Or
12:03:01 4 translate that today into an airplane, you'll be
12:03:04 5 especially cognizant of flying today in like a bush
12:03:08 6 plane or something like that. But you're always
12:03:10 7 cognizant of the water spirits of which there's
12:03:14 8 many.

12:03:14 9 Q. Are there ceremonies that are done
12:03:22 10 on or at the water?

12:03:23 11 A. Yes. Oh, yes. There's often
12:03:25 12 ceremonies done at or on the water in which I've
12:03:29 13 participated in too and which I've read about. And
12:03:31 14 these ceremonies always involve tobacco in my
12:03:35 15 experience because tobacco is what attracts the
12:03:38 16 spirits, and that's what you want to do. Because
12:03:41 17 if you can share -- if you can get some power from
12:03:44 18 those spirits, if you can just get a little bit of
12:03:49 19 power from those spirits, then you possess that
12:03:51 20 power and you can do miraculous things yourself.

12:03:54 21 So you want to attract -- you have a
12:03:54 22 ceremony on the water or you put tobacco in the
12:03:59 23 water or you might tie a dog up and throw the dog
12:04:03 24 in the water and particularly, like a white dog
12:04:06 25 ceremony, say, for instance, and this would be for

12:04:09 1 safe travels, things of that sort, safety. Safety,
12:04:14 2 and to please the spirits of the water.

12:04:17 3 Q. If I can take you to page 186 of
12:04:27 4 your report. Can you expand on what you were
12:04:38 5 saying on pages 186 and 17?

12:04:40 6 A. Yes, well, here I'm talking about
12:04:42 7 a particular -- I'm talking about two spirits that
12:04:46 8 are especially powerful. One of those spirits are
12:04:50 9 the thunder birds, and the thunder birds occupy the
12:04:54 10 highest realm, the highest realm. You never see
12:04:56 11 them, but you can hear them when there's thunder
12:04:59 12 and you can see the lightning that they're sending
12:05:02 13 down.

12:05:02 14 And when you go -- and when you're out
12:05:06 15 in the world and you find a flat top mountain,
12:05:09 16 that's where they're going to lay their eggs on the
12:05:12 17 flat top mountain and sometimes they're on an
12:05:15 18 island. And today, the eggs that I've been shown
12:05:18 19 they're like giant boulders, okay. I'm sorry,
12:05:24 20 could you ask the question again.

12:05:26 21 Q. I was asking you to expand on that
12:05:28 22 section that's at 186 and 187, and you were part
12:05:32 23 way through that?

12:05:33 24 A. I'm sorry, I lost my train of
12:05:35 25 thought.

12:05:35 1 So, on the one hand, you have the
12:05:37 2 thunder birds but on the other hand there's a very
12:05:40 3 dangerous spirit that's in the water. And this
12:05:43 4 spirit is so dangerous that it's -- that some
12:05:46 5 people will not pronouns the name of that spirit,
12:05:49 6 it's that powerful.

12:05:51 7 I'm going to call it an underwater
12:05:54 8 panther because when you look at representations of
12:05:55 9 it by Anishinaabe artists you'll see that it
12:05:59 10 represents a panther with scales. It's like a cat
12:06:02 11 but like a water -- a water monster, it's a water
12:06:06 12 monster, we call it an underwater panther. And
12:06:09 13 this is tremendously dangerous. You're in a boat
12:06:12 14 or paddling a canoe and everything is calm and all
12:06:15 15 of a sudden there's a rogue wave or just something
12:06:19 16 amazing happens in the water. That is the panther.
12:06:22 17 And the panther is the most dangerous creature
12:06:25 18 because it can make -- it can just twist the water
12:06:28 19 around, it can throw you out of your boat, it can
12:06:31 20 kill you in an instant.

12:06:32 21 And you have to remember that that
12:06:35 22 spirit is, again, like all spirits, extremely
12:06:41 23 difficult to control. Extremely difficult to
12:06:44 24 control. That requires lots of tobacco, lots of
12:06:49 25 praying. I've seen that in the field.

1 Q. How does that relate to
2 Anishinaabe ethical behaviour, if at all?

3 A. Well, their ethics are determined
4 by -- it seems to me, their ethics are determined
5 by their relationship with the spirits. Because
6 the spirits determine how they interact with their
7 underlings. So that they're careful always not to
8 offend the spirits. They're careful not to over
9 hunt, not to over kill, because if they do that
10 then they're going to be punished. They're careful
11 to respect the water because if they don't then the
12 underwater panther can ruin your life, destroy your
13 life, or destroy the life of one of your relatives
14 lives.

15 So when you think of them interacting
16 with the spirits that I've been describing, it's a
17 constant endeavor on the part of the forager not to
18 be offensive to the environment, to respect the
19 environment. Because if you don't then the spirits
20 will turn against you and you're doomed when that
21 happens, you're doomed. Or, you're condemning one
22 of your relatives to doom who might not know
23 anything about it.

24 For instance, I came to a case one
25 time, a woman and her husband killed a moose, they

12:08:02 1 let the moose go. You're supposed to follow it,
12:08:05 2 they let the moose go. Subsequent to that, she
12:08:07 3 told me that her father could not eat moose any
12:08:13 4 longer. And she attributed that to her and her
12:08:17 5 husband offending the moose Ogima, the moose
12:08:21 6 spirit.

12:08:22 7 So the spirits mediate their
12:08:25 8 relationship with the land. They have a huge
12:08:27 9 impact on the relationship in which Anishinaabe
12:08:30 10 relate to the land and the water.

12:08:31 11 Q. In your report starting at
12:08:44 12 page 189, you have a section on burial customs.
12:08:46 13 And on 195, you have a quote from Schoolcraft.

12:08:51 14 And for reference that's Exhibit 1691
12:08:55 15 but we don't need to go there, the quote is here.

12:08:59 16 Can you remind us who Schoolcraft is?

12:09:01 17 A. Schoolcraft was a -- he was the
12:09:04 18 wife of Jane Schoolcraft, who was the granddaughter
12:09:07 19 of a very famous Anishinaabe Chief called
12:09:11 20 "Whitefisher". Schoolcraft was an Indian Agent, he
12:09:16 21 was also a Treaty Commissioner. He lived with the
12:09:18 22 Anishinaabe for most of his adult life. He was an
12:09:21 23 explorer, he wrote many books on Native Americans.
12:09:27 24 He has a six-volume work on -- he was a prolific
12:09:32 25 author, obviously, on the Indians of the United

1 States. Plus, he wrote other works on Anishinaabe,
2 with whom he was familiar, because he was related
3 to them through marriage and spoke the language.

4 Q. And what is he talking about in
5 this quote you have from him?

6 A. He's talking about the duality of
7 the soul. And he's saying that what he learned is
8 that there's two souls. And Anishinaabe believe
9 that each person, each human being has two souls,
10 and that when a person passes away, one of those
11 souls travels, generally speaking, travels to the
12 west. And there's a particular route that it takes
13 to the west. It travels to a -- it travels to the
14 west, it's enough said about that.

15 Then the other spirit or the other soul
16 which is sometimes referred to as a ghost but not
17 in a negative way, not something that's
18 frightening. That spirit stays in the grave
19 itself. But you must have the physical remains of
20 the person in the grave. I learned that through my
21 fieldwork because I was investigating an accident
22 and a woman told me that what she was concerned
23 with is that the departed who died in this crash,
24 she could not communicate with the person anymore
25 because their soul wasn't there, because the body

1 wasn't there. The other soul had already gone
2 west.

3 So they believe in a dual soul, one
4 that stays in the grave and one that travels to the
5 west. And if you want to communicate with the
6 departed, you go to the grave.

7 Q. On page 196 you have a quote from
8 Diamond Jenness and you previously told us
9 yesterday who Diamond Jenness was. And this is an
10 additional excerpt here and we marked that as an
11 exhibit this morning. It's -- it was document
12 S0882 and it's now Exhibit 4337.

13 So what is Diamond Jenness saying in
14 this excerpt that you have discussed here?

15 A. He's talking about the Parry
16 Islanders on Georgian Bay in Wausauksing, and he's
17 saying exactly the same thing that I'm saying.
18 He's using the same terms, he's using soul and
19 ghost, and he says this is what the Parry Islanders
20 believed and he was doing his fieldwork there in
21 the 1930s, I'm thinking.

22 Q. What are the consequences of this
23 belief of two souls for the Anishinaabe?

24 A. Well, the consequence is that the
25 grave site is very important. And you can tell

12:12:35 1 that when you're -- when you go to Anishinaabe
12:12:38 2 graves. Because some of them you'll see -- I have
12:12:41 3 an illustration here of grave houses and these
12:12:45 4 grave houses are structures that are built over
12:12:47 5 graves and they have openings in them. What you do
12:12:49 6 when you're there is, you can put tobacco into the
12:12:54 7 grave house; you can put food in.

12:12:56 8 Sometimes they are not grave houses but
12:13:00 9 you'll see Anishinaabe, let's say, cemetery or a
12:13:05 10 grave because it could be just a lone grave. And
12:13:08 11 you'll see there will be all kinds of items there.
12:13:11 12 There could be dishes which would have had food,
12:13:14 13 there's sometimes coins, there's going to be
12:13:15 14 tobacco for sure. Jenness points out there's a
12:13:20 15 mirror. I've never seen that myself, but I've seen
12:13:22 16 all of these other objects. And these graves are
12:13:24 17 visited regularly. Whether they're in the village
12:13:27 18 or not, the graves that I'm talking about here are
12:13:29 19 not in villages.

12:13:44 20 Q. In the paragraph that starts on
12:13:44 21 the bottom of 196 there, you have a number of
12:13:44 22 references, I just wanted to get a little more
12:13:47 23 detail on some of them.

12:13:49 24 The first one is about -- it's from
12:13:52 25 Benjamin Armstrong, and can you tell us where he

12:13:57 1 was working?

12:13:58 2 A. Oh, he was in Minnesota and
12:14:02 3 Wisconsin and Benjamin Armstrong was a friend of
12:14:08 4 Chief Buffalo who was a great Chief among the
12:14:14 5 Anishinaabe. And this is in the -- pardon me.
12:14:16 6 This is in the 1830s. And in 1837, Chief Buffalo
12:14:21 7 accompanied -- was accompanied by Armstrong to
12:14:26 8 Washington to meet with President Fillmore.

12:14:31 9 And he talks about the importance, in
12:14:34 10 this particular passage. He wrote a book about it,
12:14:37 11 actually someone else wrote the book for him,
12:14:43 12 amanuensis, but it's his volume and his description
12:14:46 13 of his life and his encounters and he has a section
12:14:49 14 here that he's talking about the graves. And he's
12:14:51 15 saying, and I use the quote here: "The dearest
12:14:54 16 thing to an Indian known" and what he's talking
12:14:56 17 about is the attachment to the graves; how
12:14:59 18 important the graves are from their perspective.

12:15:02 19 Q. And for the record, that's
12:15:05 20 Exhibit 3051; we don't need to go there.

12:15:09 21 And the next quote is from Waywaynosh?

12:15:14 22 A. Yes.

12:15:14 23 Q. And where is he from?

12:15:16 24 A. From Sarnia.

12:15:17 25 Q. And what is he saying?

12:15:20 1 A. Well, he's saying pretty much the
12:15:22 2 same thing. He said that what he wants to do is he
12:15:27 3 wants to remain by his relations who have passed.
12:15:31 4 And those would be in the burial grounds so he
12:15:35 5 wants to maintain a connection with those burial
12:15:39 6 grounds.

12:15:39 7 Q. For the record, that's
12:15:43 8 Exhibit 986.

12:15:44 9 And finally there's a quote from
12:15:49 10 TG Anderson; of whom is he speaking here?

12:15:53 11 A. Well, this is what Anderson was
12:15:55 12 told by Rama Chiefs and they're saying the same
12:15:58 13 thing here. They're saying here, and I'm just
12:16:03 14 going to quote the last part of it:

12:16:06 15 "When we die we wish to be
12:16:08 16 buried by the side of them."
12:16:11 17 Meaning, their deceased relatives.

12:16:13 18 BY MR. TOWNSHEND:

12:16:14 19 Q. Can you tell us where Rama is?

12:16:17 20 A. Yes, near Orillia.

12:16:24 21 Q. For the record, that's
12:16:26 22 Exhibit 2106.

12:16:31 23 If you go to page 198, you're relying
12:16:38 24 on Professor Darlene Johnston who has testified but
12:16:42 25 not as an expert in this litigation. So can you

12:16:45 1 tell us who she is as a scholar?

12:16:48 2 A. She's a professor of law. I can't
12:16:52 3 recall what institution she's at right now.

12:16:54 4 Q. And what comments do you have on
12:16:56 5 her work?

12:16:57 6 A. Well, I don't -- I didn't read her
12:17:01 7 work for legal purposes. I was interested in this
12:17:03 8 comment here that she has about graves because I
12:17:06 9 was looking at this from the point of view of an
12:17:09 10 Anishinaabekwe, how a woman would express this.
12:17:12 11 And she's expressing it in much the same way as the
12:17:15 12 other authors that we've spoken about.

12:17:17 13 Q. You consider this reliable?

12:17:19 14 A. Yes. As a firsthand account of an
12:17:22 15 Anishinaabekwe. I don't regard this as a scholarly --
12:17:29 16 this is not a scholarly account. This is a
12:17:31 17 personal view of things as far as I see it. She's
12:17:33 18 reporting how people in her community feel. And
12:17:35 19 it's consistent with what I've learned in the field
12:17:37 20 and with what other people say as well.

12:17:42 21 Q. Can I have document S0905. And
12:17:59 22 this is "Connecting People to Place: Great Lakes
12:18:05 23 Aboriginal History in Cultural Context" prepared
12:18:05 24 for the Ipperwash Commission of inquiry, by Darlene
12:18:12 25 Johnston, is the passage you're relying on in here?

12:18:18 1 A. Yes, this is the source of that
12:18:19 2 passage.

12:18:19 3 THE COURT: Mr. Townshend, this person
12:18:21 4 has testified in this trial. Is this evidence that
12:18:23 5 was solicited from her directly?

12:18:26 6 MR. TOWNSHEND: No, it wasn't. She was
12:18:29 7 called as a lay witness, not as an expert.

12:18:33 8 THE COURT: This is not, as the witness
12:18:35 9 himself has said, that he relies on her only as
12:18:40 10 someone giving a firsthand account, not a scholarly
12:18:44 11 account and certainly couldn't in any event fall
12:18:48 12 under the rubric of being a law professor.

12:18:51 13 So I'm just pausing over why, when this
12:19:00 14 person was available, you're seeking to put what is
12:19:05 15 a fact in indirectly through a paper prepared for a
12:19:08 16 commission of inquiry that has presumably 30-odd
12:19:13 17 pages of things that have nothing to do with this
12:19:15 18 case? Other than simply having asked her the
12:19:21 19 questions when she was here?

12:19:24 20 MR. TOWNSHEND: I was not anticipating
12:19:26 21 that this passage would not be thought of as
12:19:29 22 scholarly so that's...

12:19:32 23 THE COURT: Maybe you can help me by
12:19:33 24 showing me the specific passage. Even if it was
12:19:37 25 scholarly, I'm not sure if that solves the problem

12:19:42 1 but, you know, let's see what...

12:19:43 2 MR. TOWNSHEND: It's at page 24.

12:20:07 3 THE COURT: All right. Whereabouts on
12:20:07 4 that page are you referring to?

12:20:07 5 MR. TOWNSHEND: I'm just looking for
12:20:07 6 that.

7 Professor Driben, can you find the
8 quote you're referring to?

9 THE WITNESS: Hold on for one second,
10 please.

11 BY MR. TOWNSHEND:

12:20:20 12 Q. It's the first paragraph after the
12:20:21 13 heading, "Anishinaabeg Burials and Totemic
12:20:27 14 Identity"?

12:20:28 15 THE COURT: I see the middle full
12:20:29 16 paragraph starts "Anishinaabeg attachments to
12:20:33 17 lands..." Is that it?

12:20:35 18 THE WITNESS: Yes.

12:20:37 19 MR. TOWNSHEND: Oh, yes. Yes, that's
12:20:39 20 correct. I believe my friends are content this be
12:20:45 21 made an exhibit with a certain qualification that
12:20:47 22 Canada wants to put on it that really all we're
12:20:50 23 relying on it is for is what Professor Driben
12:20:58 24 quoted.

12:20:59 25 THE COURT: Let me canvas counsel and

1 then we get back to my question.

2 Starting with Canada.

3 MR. ENNIS: Yes, Your Honour. We're
4 content that these two paragraphs be entered in as
5 an exhibit but that this document itself, this
6 report made for the Ipperwash Commission, not be
7 given any evidentiary value outside of these two
8 paragraphs.

9 THE COURT: Which two paragraphs are
10 you referring to?

11 MR. ENNIS: On page 24, the two that
12 were identified.

13 THE COURT: One was identified.

14 MR. ENNIS: Oh, and the one immediately
15 below I believe is also quoted on page 198 in
16 Professor Driben's report.

17 THE COURT: All right. What is
18 Ontario's position?

19 MR. FELICIAN: I would agree with my
20 friend. I think one of the solutions to the
21 problem, although it's cumbersome to read things
22 into the record, is to simply read it in to the
23 record. It's a very short, brief passage. He can
24 say this is what I considered, and what I relied
25 on. That may solve the problem of importing into

12:22:04 1 the record a lot of extraneous material.

12:22:06 2 THE COURT: Do either of you have a
12:22:09 3 submission about the question I've raised with
12:22:11 4 plaintiff's counsel?

12:22:13 5 Yes.

12:22:13 6 MR. FELICIANANT: I do agree that
12:22:14 7 Professor Johnston could have been asked this
12:22:17 8 question and she wasn't.

12:22:18 9 I think given the nature of the
12:22:20 10 evidence which, to my mind, is simply the
12:22:23 11 importance of grave sites, I don't think that very
12:22:27 12 narrow issue is being contested, in any event. I
12:22:30 13 don't think anyone is saying they're not important.

12:22:33 14 So I'm not troubled by those paragraphs
12:22:37 15 going in. I think it would have been preferable to
12:22:40 16 put it to the witness, but in the circumstances and
12:22:42 17 given the nature of the evidence, I'm less
12:22:44 18 concerned.

12:22:44 19 THE COURT: All right. Well, having
12:22:46 20 heard from the defendants, sir, who have a very
12:22:52 21 limited focused objection, I am prepared to permit
12:23:00 22 you to mark this one page with the record
12:23:06 23 reflecting that it is the third and fourth
12:23:08 24 paragraphs on the page that are the paragraphs upon
12:23:11 25 which the witness relied for his opinion.

1 Which seems to be the gist of what
2 you've all agreed to. Is that correct
3 Mr. Townshend?

4 MR. TOWNSHEND: That is correct.

5 THE COURT: So we're not going to mark
6 the whole document. We'll mark page 24 as an
7 excerpt from the document entitled "Connecting
8 people to place" by Darlene Johnston and note on
9 the record that it's paragraphs 3 and 4 upon which
10 this witness relied.

11 I understand there will have to be
12 another image provided for that, but in the
13 meantime, Mr. Registrar what will the exhibit
14 number be?

15 THE REGISTRAR: Exhibit number 4338.

16 EXHIBIT NO. 4338: Excerpt from the
17 document entitled, "Connecting People
18 to Place" by Darlene Johnston,
19 paragraphs 3 and 4.

20 THE COURT: Thank you. Please go
21 ahead.

22 MR. TOWNSHEND: Your Honour, at this
23 point I want to turn the examination over to
24 Mr. Brookwell.

25 THE COURT: Fine. Please go ahead,

1 Mr. Brookwell.

2 Just to make it clear, if it isn't
3 already, that having permitting you to split the
4 chief, I do not permit you to split the reply, if
5 there is any, all right? One or the other of you
6 can do that, if there is any.

7 I should say re-examination. I fall
8 into bad habits.

9 Please go ahead.

10 EXAMINATION IN-CHIEF BY MR. BROOKWELL:

11 Q. Good afternoon, Professor Driben.

12 A. Good afternoon.

13 Q. So, I'm going to be asking you
14 questions about chapters 7, 8, 9 and 10 of your
15 report. And I'd like to start by talking about
16 Anishinaabe subsistence patterns.

17 And you have touched on hunting to a
18 degree with Mr. Townshend. But I hope you could
19 perhaps explain what the significance today is of
20 being a hunter to the Anishinaabe?

21 A. Well, in the communities in which
22 I am today, being a hunter is something that you
23 still aspire to. It doesn't mean you're going to
24 do it on a full-time basis but it means it is a
25 very high value occupation or endeavor in

12:25:58 1 Anishinaabe communities today.

12:25:59 2 This is the way to -- this is the way
12:26:02 3 to achieve a high status in the community because
12:26:06 4 -- and one of the reasons for that is because the
12:26:10 5 products of the hunt are never hoarded, they're
12:26:13 6 also distributed because Anishinaabe are wealth
12:26:16 7 distributors rather than wealth a accumulators. So
12:26:19 8 the more you give, the better your reputation of
12:26:22 9 somebody who is living the good life, the proper
12:26:24 10 life. Because the proper life is one in which you
12:26:27 11 share what you have.

12:26:28 12 So the hunter today, as in the past, is
12:26:34 13 -- to be a good hunter is a great achievement. And
12:26:37 14 when you're with people they'll tell you about
12:26:40 15 great hunters who are alive or who are not. And
12:26:43 16 I've spoken to some great hunters as well. It's
12:26:46 17 extremely important in their Society to be a great
12:26:48 18 hunter today as it was in the past, in my opinion.

12:26:52 19 Q. And what do you draw on to form
12:26:55 20 that opinion about hunters today; let's start
12:26:58 21 there.

12:26:58 22 A. Well, I've been doing fieldwork
12:27:02 23 for 50 years with hunters, and that's one of the
12:27:06 24 main things that I study. And I've talked to many
12:27:09 25 hunters, I've been in many villages. I've talked

12:27:12 1 to others who share the wealth. I've actually
12:27:15 2 measured what hunters do over periods of time
12:27:19 3 stretching up to two years.

12:27:20 4 And you can tell by when you're doing
12:27:22 5 interviews, let's say, and you're talking to
12:27:23 6 somebody and you find out how much they produced
12:27:25 7 and then people will give you an aside and say,
12:27:27 8 "You know, that fellow there, he's an awesome
12:27:31 9 hunter." And what he means by that is he's not
12:27:34 10 only a good hunter but he distributes what he
12:27:37 11 gathers, so that the more he distributes the higher
12:27:40 12 his reputation. It's extremely important.

12:27:42 13 Q. And what do you rely on to form
12:27:44 14 your opinion about the past?

12:27:46 15 A. Well, I rely on writings of people
12:27:50 16 such as Schoolcraft, other ethnologists as well who
12:27:53 17 have written about this. But there are many
12:27:55 18 firsthand accounts about how important it is to be
12:27:59 19 a hunter. Schoolcraft has an excellent section on
12:28:01 20 it, but so does Ruth Landes. She talks about it in
12:28:05 21 the 1930s. So we have one from the 1830s, one from
12:28:09 22 the 1930s and I can tell you about this from the
12:28:13 23 2000s.

12:28:14 24 Q. So in terms of Schoolcraft, I
12:28:19 25 believe you have a footnote at page 161 to the

12:28:25 1 "Indian in His Wigwam". Is this the source you're
12:28:31 2 referring to?

12:28:31 3 A. Yes, it's one of the sources yes.
12:28:34 4 That's a very good source.

12:28:35 5 Q. For the record, that is already
12:28:37 6 Exhibit 1690. So we won't need to go to pull it
12:28:41 7 up.

12:28:43 8 But you did mention Ruth Landes which
12:28:47 9 is a document we made an exhibit today. It is
12:28:51 10 document S0985, which is now Exhibit 4330. If we
12:29:00 11 can put that up on the screen.

12:29:05 12 And could you tell us who Ruth Landes
12:29:07 13 was?

12:29:07 14 A. Ruth Landes was a person like
12:29:11 15 myself. She was an ethnologist -- she didn't do
12:29:18 16 much ethnohistory. She was an ethnologist who was
12:29:21 17 -- I don't think she did ethnohistory.

12:29:24 18 She was an ethnologist who spent her
12:29:26 19 time among the Emo Anishinaabe, they're in the Fort
12:29:31 20 Frances area of Ontario. And she produced this
12:29:34 21 wonderful book on Ojibwe woman. And what she's
12:29:38 22 talking about here is the role of women and also
12:29:41 23 the role of men in the Society and the various
12:29:42 24 endeavors that they pursue as they live their
12:29:46 25 lives. She did this in 1930s by living with them.

12:29:51 1 She's quite well-known in Canada.

12:29:54 2 Q. In your report, you also refer to
12:30:01 3 Charles Cleland who you've discussed today. And
12:30:06 4 we've already discussed an exhibit, Exhibit 4328
12:30:11 5 which is "Faith in Paper".

12:30:16 6 I'd like to take you to one excerpt on
12:30:21 7 page 23 of that exhibit.

12:30:24 8 If we could have that up on the screen.
12:30:44 9 I'll have you scroll down.

12:30:54 10 It's on page 24 of the PDF and you'll
12:30:56 11 see a highlighted section there regarding social
12:31:01 12 coping mechanisms? I wonder if you can expand on
12:31:04 13 that.

12:31:04 14 A. Well, what Dr. Cleland is talking
12:31:07 15 about here is the exchange of gifts between people.
12:31:11 16 He's talking about the importance of reciprocal
12:31:15 17 gift-giving.

12:31:15 18 It's much like loaning out your
12:31:18 19 territory to somebody else. You know, the more you
12:31:20 20 engage in gift-giving, the more likely you will be
12:31:22 21 able to receive those gifts in return. But they
12:31:25 22 don't have a money economy and the way their
12:31:28 23 economy works is, it works exactly through this
12:31:31 24 type of exchange. And the more gifts that are
12:31:33 25 giving, again as I said, your status goes up as you

1 do this.

2 So giving to them, as Dr. Cleland is
3 pointing out, is very important in a practical
4 sense. But it's also more -- it's also equally
5 important in a social sense as well and I think
6 he's describing both of these endeavors, you know.
7 One you're getting the gift, you're using it,
8 you're establishing the relationship, that's the
9 social part. But there's also the practical part
10 of sharing food and knowing that you're going to
11 share in it -- that you can expect to share in it
12 if you're giving in the first place, under most
13 circumstances.

14 Q. So given that you've told us, what
15 happens when a hunter gets old and can no longer
16 hunt?

17 A. Well, I'm in that position myself,
18 and it doesn't mean that you cannot be effective
19 any longer. What it means, in the case of
20 Anishinaabe, not me, but what it means for the
21 people that I've hunted with, it means that they do
22 other activities. They may, for instance -- well,
23 they'll switch. They won't hunt large game
24 anymore, they won't hunt moose anymore, but they'll
25 go after birds, just something a little bit easier

12:32:48 1 to do.

12:32:49 2 Or maybe they -- if they're incapable
12:32:50 3 of walking through the bush, they may just take you
12:32:54 4 to a spot. I was with an Elder one time who took
12:32:57 5 me to a spot. This was for goose hunting and he
12:32:59 6 said, "Just remain here, the geese will appear.
12:33:01 7 They'll start to fly at daybreak". And sure
12:33:05 8 enough, you hunker down and the geese start to fly
12:33:06 9 at daybreak, and off you go.

12:33:07 10 So they take you to places even though
12:33:09 11 they may be infirm. As long as they have a truck
12:33:12 12 to get you in the vicinity of where you need to be,
12:33:20 13 then you can do that. So you can participate and
12:33:20 14 you can still teach kids, too. Maybe not so much
12:33:20 15 with hunting. But let's take the case of -- well,
12:33:23 16 it would be hunting, but take the case of trapping
12:33:26 17 for instance. You're going teach the kids not to
12:33:28 18 trap beaver, you'll teach them to trap muskrat.
12:33:30 19 Because you can make mistakes with muskrats, but
12:33:31 20 beaver is a harder thing to make a mistake with
12:33:34 21 because of the value of the pelt.

12:33:36 22 So as an older person, even though you
12:33:39 23 may not be doing this activity anymore, you still
12:33:42 24 have it in your head that's what you would want to
12:33:47 25 be and you do as best you can, under the

12:33:49 1 circumstances. Age makes your body deteriorate,
12:33:54 2 you're just not able to do those things anymore but
12:33:57 3 it doesn't mean your heart is not in it or your
12:34:00 4 mind is not in it.

12:34:01 5 Q. So in this context of a shifted
12:34:03 6 role, what happens to their status if they no
12:34:06 7 longer hunt?

12:34:07 8 A. Well, if they've been generous in
12:34:10 9 the past, people will continue to be generous with
12:34:14 10 them. The only time that you will not be generous
12:34:19 11 with somebody is when your generosity causes them
12:34:22 12 pain.

12:34:24 13 An example: When a person's wife dies
12:34:27 14 and they're no longer as effective on the land
12:34:30 15 because a wife and a husband are the productive
12:34:33 16 unit, when that happens, the more you give gifts to
12:34:37 17 that person to make up for the loss, the worse he
12:34:39 18 may feel. So you have to balance gifts,
12:34:43 19 gift-giving with the outcome but by and large
12:34:47 20 that's an exceptional circumstance. Gifts are
12:34:50 21 constantly moving through the community.

12:34:51 22 And beyond the community, they're
12:34:54 23 moving from communities to other places. When I'm
12:34:58 24 in the far north, say, for instance, and I come to
12:35:01 25 Thunder Bay, people say to me, "Can you take this

12:35:04 1 gift" -- which is almost always food. "Can you
12:35:07 2 take this to my grandson" and they'll tell me where
12:35:09 3 to go in Thunder Bay and I say, sure.

12:35:11 4 So those gifts are still being
12:35:15 5 distributed today and they're extremely important
12:35:17 6 in terms of what Anishinaabe would refer to as
12:35:20 7 "Anishinaabe meechum", which means "native food".

12:35:24 8 Q. So if we switch from hunting to
12:35:28 9 fishing, can you tell us what the significance is
12:35:33 10 of fishing to the Anishinaabe?

12:35:34 11 A. Well, they aspire to be hunters
12:35:37 12 but fish are the primary item in their diet. When
12:35:40 13 you look at an Anishinaabe, even in the far north
12:35:44 14 of Ontario where I've worked, you'll see that
12:35:46 15 fishing is still an extremely important part of
12:35:49 16 their diet. In fact, there's a period in the
12:35:53 17 1800s, after the northwest company and the Hudson
12:35:57 18 Bay Company amalgamate, when large game has been
12:36:02 19 over hunted because of the fur trade and people
12:36:06 20 turn to what's referred to in the literature as the
12:36:08 21 fish and hare period.

12:36:12 22 But it's important to realise that when
12:36:12 23 you look at the Anishinaabe people you're really
12:36:14 24 looking at people who derive most of their
12:36:18 25 nourishment from fish, not from large game.

1 Fishing is essential to them.

2 Q. So how, if at all, from what you
3 have told us about fishing and hunting, apply to
4 SON?

5 A. It applies in particular to SON
6 because SON is located in an area that is referred
7 to as the "inland shore fishery of the Great
8 Lakes". And this is an area in which fish are
9 super abundant. And the cultures developed, the
10 Anishinaabe adaptation to that ecological area,
11 which I think I have a map in my report here.

12 That adaptation is an adaptation to
13 fishing and using the territory in a way that you
14 can produce the nourishment that you need to
15 survive, but also trade goods that you can use with
16 other people, including, over time -- well, first
17 with other native people. We know that fish were
18 traded. But in time that Europeans will start to
19 trade for fish as well for food.

20 Q. And what about what you've told us
21 about hunting, how does that apply, if at all?

22 A. In what respect, I'm sorry?

23 Q. You've spoken to us about the
24 significance of hunting to the Anishinaabe. My
25 question is, how does that apply to SON, if at all?

12:37:48 1 A. Well, it's hugely significant in
12:37:50 2 terms of diet. Hugely, because they could not
12:37:55 3 survive without that in the inland shore fishery.
12:37:57 4 That's why they live there, because of the
12:37:59 5 tremendous abundance of fish. But it's not as high
12:38:04 6 status. It's not as high status as hunting moose,
12:38:06 7 let's say, for instance. But, it is nonetheless
12:38:10 8 critical.

12:38:11 9 Q. So, I'd like to talk to you now
12:38:14 10 about the seasonal round in general, which you
12:38:18 11 discuss in your report. I have some questions to
12:38:22 12 help us, I think, understand what you're saying a
12:38:26 13 little bit more.

12:38:27 14 So can you tell us first, just in an
12:38:31 15 overview way, what the seasonal round is?

12:38:35 16 A. The seasonal round is the way of
12:38:46 17 life of Anishinaabe during the course of a year.
12:38:46 18 And we're talking of a period in early 1800s now,
12:38:47 19 early 1800s, 1850, that area. And the seasonal
12:38:51 20 round is where you have a group of people and they
12:38:53 21 camp together in the summer and sometimes in the
12:38:56 22 spring and the fall where there's lots of fish and
12:38:59 23 they enjoy the fishery resource. That's the time
12:39:02 24 that you can -- so you're in an encampment. That's
12:39:09 25 the time you look for mates, you conduct religious

1 ceremonies, you enjoy the company of visitors and
2 you may visit other communities. That's the
3 primary social time and it's centered around
4 fishing.

5 And then once the cold weather starts,
6 once the cold weather comes in, then you start to
7 move. And what happens is, Anishinaabe move
8 inland, and then as they're moving inland, they're
9 taking game and, you know, they put in stores of
10 blueberries, let's say, and fish as well and they
11 traveled into the interior to their hunting area,
12 and then they fission at that time, they separate
13 into smaller units, sometimes one extended family,
14 sometimes two extended families, and they live
15 there, and they live there on a trap line or a
16 hunting territory. Both terms are used although in
17 different senses.

18 And they live there during the course
19 of the winter and then as the winter comes to an
20 end about March you'll start headed towards the
21 sugar bush. Then in April, after you finish making
22 your sugar, you'll move off again to the village.
23 And this pattern happens year after year, after
24 year.

25 And the important point from an

1 ethnological point of view is that as they're
2 moving in this annual round, as they're moving in
3 this annual round, they're using each of the
4 resources that they encounter, whether they're fish
5 or moose or fur bearers, or going to a maple grove
6 or even wild rice, they'll use these at their
7 maximum production.

8 So they're only looking at food at the
9 maximum production, being careful not to take too
10 many to allow the resource to replenish itself.
11 And they do that year after year after year, moving
12 through the landscape, through their territory,
13 year after year. That's what the annual round
14 looks like.

15 Q. Now, in your description here, you
16 reference the 1800s. Can you tell us whether there
17 is a difference in how the Anishinaabe pursued this
18 annual round prior to that time?

19 A. As far as I know, that was the
20 pattern of life up until recently. In fact, in
21 some of the places I've worked, that was the
22 pattern of life until the 1940s and then it changed
23 after the 1940s because villages were established
24 and schools were established. And once that
25 happened, then the women and the children tended to

1 stay in the village and what happened then is that
2 they were not there to assist the hunter.

3 And among the Anishinaabe, the
4 productive unit is not the hunter, the productive
5 unit is the family. So if you remove some elements
6 of that, it's much more difficult for them to hunt.
7 So there has been a change since then.

8 But that is a modern change. And like
9 I say, I've been in communities where that happened
10 in the 1950s and I was there maybe within 15 or
11 20 years. And still people would be going out, but
12 less, fewer times. And now it's even less so today
13 people go out less to hunt where I am.

14 Q. So you told us that you have
15 experience in communities for what happens today.
16 What about what has happened in the past, what
17 source or sources do you rely on?

18 A. Well, Dr. Cleland, there's just so
19 many different sources, they're all talking about
20 elements of the annual round.

21 Schoolcraft talks about it, Cleland
22 talks about it, Rogers talks about it. Just many,
23 many authors talk about the annual round because
24 it's such a fundamental aspect of Anishinaabe life.

25 Anishinaabe talk about the cycle as if

12:43:13 1 you participate in the cycle and you live according
12:43:16 2 to the rules of that participation, then you will
12:43:19 3 achieve what's called the "bimaadziwin"; and
12:43:25 4 bimaadziwin is the good life, the proper life for a
12:43:28 5 human. You'll realize yourself as a human being if
12:43:31 6 you behave this way on the environment and take the
12:43:33 7 resource in this way, respect, renewal, moving
12:43:36 8 through the cycle year after year after year.
12:43:39 9 Growing, maturing as a person, understanding your
12:43:41 10 place in the universe.

12:43:48 11 Q. I'd like to take you to one of
12:43:50 12 your footnotes that's at page 219, footnote 505
12:43:55 13 where you reference Jenness.

12:43:58 14 And this is Exhibit 4327, if we could
12:44:03 15 have that exhibit up on the screen, please.

12:44:06 16 Now, I believe you've discussed the
12:44:23 17 work of Diamond Jenness today a little already.

12:44:26 18 I'd like to turn to page 13 if we
12:44:29 19 could, which is page 17 on the PDF. And if we
12:44:35 20 could zoom in a little bit.

12:44:38 21 And if I could have your comment on the
12:44:42 22 section that is highlighted in the green box?

12:44:44 23 A. This is the cycle. But here he's
12:44:46 24 describing the particular cycle on Georgian Bay,
12:44:49 25 among the Parry Islanders. And he's talking about

12:44:53 1 exactly the same thing that I'm talking about.

12:44:57 2 I should have mentioned there's another
12:44:59 3 classic account of this by an Anishinaabekwe whose
12:45:05 4 name is Nodinins and she was at Mille Lacs and she
12:45:11 5 described this annual round to an ethnologist named
12:45:16 6 Francis Densmore around 1860. She's describing her
12:45:18 7 life in 1860. And what you have here is a
12:45:21 8 description much like that. It's much, much like
12:45:25 9 that. Her firsthand account is the kind of thing
12:45:27 10 that Diamond Jenness is basing his analysis on, and
12:45:32 11 this is exactly what I'm talking about. He's
12:45:35 12 talking about December to March. And he's talking
12:45:37 13 about March and they go off to April. Women
12:45:41 14 collect the syrup, you know, and so on, as I was
12:45:47 15 describing it.

12:45:47 16 Q. If we can return to a general
12:45:50 17 sense, and this is now in the past I'm talking
12:45:55 18 about, in the 17th -- sorry, in the 18th and 19th
12:45:58 19 century.

12:45:58 20 How far would people travel during this
12:46:01 21 annual round?

12:46:03 22 A. Hundreds of kilometers throughout
12:46:05 23 their territory. Hundreds of kilometers.

12:46:08 24 Q. And can you give us a sense or a
12:46:18 25 description of what this movement would look like

12:46:22 1 at a community level? I think you've explained it
12:46:25 2 at individual, but in terms of what's happening to
12:46:28 3 the community?

12:46:28 4 A. Let's imagine that we're
12:46:33 5 travelling into Anishinaabe country at the time of
12:46:36 6 contact and we're going to travel there during the
12:46:38 7 warm weather months. What we're going to find is
12:46:41 8 aggregates of people, small aggregates of people
12:46:42 9 and they're going to be fishing and they're going
12:46:44 10 to be living primarily off of fish.

12:46:46 11 If we made that same voyage in the
12:46:48 12 winter we wouldn't encounter those people because
12:46:51 13 they would have left their fishing encampments and
12:46:54 14 they would have moved inland to go after fur
12:46:59 15 bearers and game. What you have is a case of
12:47:01 16 fission and fusion. Fission and fusion.

12:47:05 17 So you have the gathering in the
12:47:06 18 summer, into the larger communities but then in the
12:47:09 19 winter, as they go off to their separate trapping
12:47:13 20 grounds, there you will find one or two extended
12:47:15 21 families. Those living closest to one another will
12:47:19 22 likely be related on their trap lines, or they may
12:47:23 23 be friends.

12:47:23 24 Q. So you've described two moments in
12:47:27 25 the cycle, fusion and fission. When there is

12:47:35 1 fusion, when people are together, how are decisions
12:47:38 2 made?

12:47:38 3 A. Decisions are always made the same
12:47:40 4 way in a Band whether it's summer or winter.
12:47:42 5 Decisions are always made in the extended family
12:47:46 6 first; the principal man. Then once they come to a
12:47:51 7 consensus in the extended family, then the
12:47:53 8 principal man, or principal men will meet with the
12:47:57 9 Chief but everybody is going to be there. There
12:48:00 10 generally be the spokespeople but others will be
12:48:02 11 allowed to talk. You have free expression in their
12:48:06 12 Society.

12:48:06 13 And like I said yesterday, what happens
12:48:09 14 is, once the Chief realizes a consensus, he'll say,
12:48:17 15 "Meway" which means "that's enough" and then
12:48:20 16 they'll take action along those lines, one way or
12:48:24 17 the other.

12:48:24 18 And you can do this in the winter, too.
12:48:27 19 And in the winter what would happen is that the
12:48:30 20 Chief would erect a special structure for this to
12:48:33 21 take place if you needed to have a meeting in the
12:48:36 22 winter.

12:48:36 23 Q. So, you just talked about erecting
12:48:41 24 a special structure. Can you tell us a little bit
12:48:45 25 more about why the Anishinaabe would gather

12:48:49 1 together during the seasonal round? What reasons
12:48:55 2 there may be, if any?

12:48:58 3 A. Oh, there would be reasons because
12:49:00 4 they have to make a decision that is going to
12:49:03 5 affect the entire Band. When they have to make a
12:49:06 6 decision that affects the entire Band they all have
12:49:09 7 to participate in the decision-making process so
12:49:12 8 the Chief will understand what the consensus is and
12:49:14 9 then act as the spokesperson for that decision.

12:49:17 10 The Chief isn't the decisionmaker, it
12:49:21 11 may look like that. But the Chief has no power
12:49:24 12 other than the power that is allocated to him by
12:49:27 13 their constituents. That's how decisions are made
12:49:30 14 in their Society.

12:49:31 15 Q. So moving away from this
12:49:34 16 high-level look at subsistence. I want to talk
12:49:37 17 about some certain moments in time to help us
12:49:39 18 understand it. And starting with the start of the
12:49:45 19 fur trade, so now we're in the 1600s and early
12:49:51 20 1700s. How did the fur trade affect the
12:49:58 21 Anishinaabe subsistence pattern, if at all?

12:50:01 22 A. Well, it did, but not as much as
12:50:06 23 it would have affected other people such as the
12:50:09 24 Huron who were mostly agriculture.

12:50:11 25 For them, they became -- their role was

12:50:15 1 to act as middle men in the trade. But for the
12:50:17 2 Anishinaabe, they were ideally suited to the trade
12:50:20 3 because their subsistence endeavors involved them
12:50:23 4 being out on the land in the winter. That's when
12:50:26 5 you get the fur bearers.

12:50:29 6 So they began to participate in the fur
12:50:33 7 trade as a kind of endeavor that just went along
12:50:38 8 with hunting; it was a very good -- it was a
12:50:40 9 goodness of fit. In fact, from an Anishinaabe
12:50:42 10 point of view, there is no difference,
12:50:44 11 linguistically between hunting and trapping. They
12:50:48 12 refer to those as "andawaygegawin" which means
12:50:53 13 "going after game". So they're one activity. If
12:50:58 14 you understand that they're one activity you can
12:51:00 15 see how easily they fit together.

12:51:03 16 So Anishinaabe were in an ideal
12:51:05 17 position to take part in the fur trade when it
12:51:07 18 began because of their adaptation to the
12:51:11 19 environment.

12:51:18 20 Q. How did the fur trade -- sorry.
12:51:32 21 Was there any effect in terms of
12:51:36 22 proprietary rights?

12:51:38 23 A. Yes. Yes, there was. The fur
12:51:41 24 trade had a huge impact on the proprietary rights
12:51:46 25 of Anishinaabe because, as I explained before,

12:51:51 1 there are goods that have value and there are goods
12:51:54 2 that are free goods. Now at one time, fur bearers
12:51:59 3 would have been free goods because they're not
12:52:01 4 generally used as a trade good. Sometimes
12:52:03 5 generally with the Huron but generally not. So
12:52:06 6 they were available to all. But when furs became a
12:52:11 7 trade good then what happened is that the
12:52:12 8 Anishinaabe developed what are called family
12:52:15 9 trapping territories.

12:52:16 10 Now those were areas, and those are
12:52:19 11 areas in which the Anishinaabe family has the
12:52:24 12 proprietary rights to the furs in that area, to the
12:52:30 13 fur bearers in that area. They do not have the
12:52:33 14 proprietary rights to all resources in the area,
12:52:36 15 but the fur bearers they do. So, for instance,
12:52:38 16 somebody can come in and hunt a moose, that's not a
12:52:40 17 problem, but they would not be able to take fur
12:52:51 18 bearers because they've developed a set of --
12:52:51 19 because they've developed proprietary rights over
12:52:51 20 that resource and they exercise those rights.

12:52:51 21 So if somebody offends them, if
12:52:52 22 somebody comes into their trapping territory then
12:52:55 23 they can take -- let's say somebody comes in and
12:52:58 24 puts their own traps down. Then you have a perfect
12:53:00 25 right to spring the traps and throw them away. Or

12:53:03 1 you could take other action against somebody coming
12:53:06 2 in on the basis of medicine.

12:53:09 3 Q. So I'd like to move forward now in
12:53:12 4 time, in to the 1700s, getting towards the middle
12:53:18 5 of the 1700s. And can you tell us just in a broad
12:53:25 6 sense, how the Anishinaabe are sustaining
12:53:29 7 themselves at that time?

12:53:30 8 A. By living off the land. By living
12:53:32 9 directly off the land.

12:53:34 10 Q. And sorry, I don't have the page
12:53:40 11 number, but in footnote 53 in your report, you
12:53:47 12 refer to accounts by Alexander Henry, which is
12:53:54 13 Exhibit 476, and if you can bring that up for a
12:54:01 14 moment.

12:54:09 15 A. Sorry, can you tell me which
12:54:11 16 footnote that was, please.

12:54:12 17 Q. 513.

12:54:14 18 A. Thank you.

12:54:15 19 Q. For your reference it's document
12:54:20 20 number P0476.

12:54:23 21 THE COURT: Do we need that? We have
12:54:26 22 an exhibit number.

12:54:29 23 MR. BROOKWELL: We do. It's only for
12:54:32 24 my document manager to be able to find a PDF copy.
25

12:54:44 1 BY MR. TOWNSHEND:

12:54:44 2 Q. And turning to page 224 which is
12:54:47 3 page 229 of the document.

12:54:53 4 THE COURT: I think you mean page 224
12:54:55 5 of the document.

12:54:56 6 MR. BROOKWELL: Sorry, that's correct.

12:54:58 7 BY MR. TOWNSHEND:

12:54:58 8 Q. The 224 of the document, page 229
12:55:04 9 of the PDF.

12:55:05 10 I apologize, this is not the right
12:55:20 11 reference. So you know what? I am not going to
12:55:25 12 need to take you to the exhibit. Maybe I can just
12:55:28 13 ask you to expand for us who Alexander Henry was.
12:55:35 14 I know you've touched on this and --

12:55:38 15 THE COURT: I think we already --

12:55:41 16 MR. BROOKWELL: Yes, we have.

12:55:42 17 THE COURT: -- dealt with that, no?

12:55:45 18 MR. BROOKWELL: We have on who he was.
12:55:48 19 But to the extent that you may have comments
12:55:51 20 regarding the Anishinaabe economy, and his
12:55:54 21 accounts.

12:55:55 22 THE WITNESS: Well, his account takes
12:55:56 23 place in 1763. And he's taken by a man named
12:56:04 24 Wawatam and his family, and he goes on the annual
12:56:09 25 round with him. This is on his previous voyage

12:56:13 1 there where he had to disguise himself as a
12:56:15 2 voyager. When he was in Mackina he was in danger
12:56:18 3 and Wawatam said "you come with me." And he took
12:56:24 4 him for the winter. And in Henry's book, he
12:56:24 5 describes the annual round that he went on with
12:56:29 6 Wawatam and his family, to Saint Martin Bay and
12:56:33 7 then down south along the lakeshore of Lake
12:56:34 8 Michigan, and then inland along the Sable River
12:56:38 9 about 100 kilometers or so, I can't remember the
12:56:39 10 exact distance. And then he describes the other
12:56:41 11 families there and he says, you know, in spring we
12:56:44 12 waited until the weather warmed and then we got
12:56:46 13 together with the sugar bush.

12:56:48 14 So what he's -- what Henry does in this
12:56:51 15 volume is he describes in 1763 precisely what the
12:56:54 16 annual round looked like.

12:56:56 17 BY MR. TOWNSHEND:

12:56:56 18 Q. And can you tell us a little bit
12:56:58 19 about this family that he traveled with, who they
12:57:01 20 were?

12:57:01 21 A. Wawatam was an Ojibwe man. His
12:57:05 22 family was -- it was just a small family, small
12:57:08 23 extended family and he had sympathy on him. I
12:57:12 24 can't remember precisely what his role was there.

12:57:14 25 He rescued Alexander Henry.

12:57:17 1 Q. Now I have a question of
12:57:21 2 terminology in your report. You discuss a
12:57:25 3 peripheral market economy. Can you tell us what
12:57:29 4 that means in the sense that you're conveying it?

12:57:34 5 A. What I was trying to do in my
12:57:36 6 report was describe what -- or identify what the
12:57:41 7 economy of the Anishinaabe, in general, looked like
12:57:45 8 during the period under consideration.

12:57:48 9 And what happened after the fur trade
12:57:50 10 began, is that the economy of the Anishinaabe
12:57:54 11 changed. At first it was a 100 percent subsistence
12:58:00 12 economy but then they began to trade with
12:58:03 13 Europeans.

12:58:04 14 And when they happened, they developed
12:58:06 15 what anthropologists refer to as a peripheral
12:58:10 16 market economy which means that the market played a
12:58:15 17 peripheral role in their economy rather than a
12:58:18 18 central role. The central role was still
12:58:21 19 subsistence but the peripheral market was an
12:58:24 20 important area in which you could acquire an item
12:58:26 21 of European manufacture that you were incapable of
12:58:30 22 making yourself.

12:58:30 23 And you would participate in that
12:58:32 24 market as a target marketer. So you'd be in the
12:58:35 25 market and then withdraw from the market. In the

12:58:37 1 market, then withdraw from the market. So that
12:58:39 2 most of your endeavors are still going to be
12:58:42 3 subsistence endeavors but now you're participating
12:58:46 4 in the market but at the same time as you're
12:58:49 5 participating, your participation is not driven by
12:58:53 6 the accumulation of wealth because peripheral
12:58:55 7 marketers are not geared to that. And Anishinaabe
12:58:59 8 certainly aren't at this period. They're not
12:59:01 9 interested in the accumulation of wealth. So you
12:59:03 10 participate in the peripheral market not to gain
12:59:06 11 wealth but just to acquire -- not just, but to
12:59:10 12 acquire some special item that you cannot otherwise
12:59:12 13 acquire, typically, a technology that Europeans
12:59:17 14 possess that you don't.

12:59:18 15 But in no case are you going to be
12:59:20 16 acquisitive and try and acquire more and more and
12:59:23 17 more, that's not the object. It's peripheral and
12:59:25 18 that's why the concept is a good one.

12:59:28 19 MR. BROOKWELL: Your Honour, I'm going
12:59:31 20 to be continuing on with these sorts of questions,
12:59:34 21 for a little further but this is a logical point to
12:59:37 22 break for me, if this is a good time.

12:59:41 23 THE COURT: Are you trying to say it's
12:59:43 24 1 o'clock and it's time for lunch? That's all you
12:59:46 25 need to say. Adjourn until 215.

12:59:49 1 MR. BROOKWELL: Thank you.

12:59:50 2 -- LUNCH RECESS TAKEN AT 12:59 --

02:16:57 3 -- UPON RESUMING AT 2:16 --

02:17:02 4 MR. BROOKWELL: Your Honour, before we

02:17:03 5 continue, I have an administrative matter to note

02:17:06 6 regarding the list of documents that we made

02:17:09 7 exhibits this morning.

02:17:10 8 There is a typo in the author's title

02:17:14 9 for Exhibit 4332. It is noted as Charles Cleland

02:17:20 10 but it's in fact Victor Lytwyn.

02:17:29 11 THE COURT: How do you spell the last

02:17:31 12 name?

02:17:32 13 MR. BROOKWELL: L-Y-T-W-Y-N.

02:17:35 14 THE COURT: All right, thank you.

02:17:41 15 BY MR. BROOKWELL:

02:17:43 16 Q. Professor Driben, before our break

02:17:45 17 for lunch we were discussing the peripheral market

02:17:50 18 economy. I'd like you to turn to page 213 in your

02:17:53 19 report where there is a table.

02:17:56 20 A. Yes.

02:17:57 21 Q. And can you begin by telling us

02:18:01 22 what this table is?

02:18:03 23 A. This table is a table that

02:18:05 24 demonstrates, in numerical form, what a peripheral

02:18:09 25 market economy looked like in this particular area

02:18:13 1 so that -- so that I could bring information
02:18:16 2 forward, so that the court could see what a
02:18:21 3 peripheral market economy might look like in the
02:18:24 4 middle of the 1800s, around 1850. Because this is
02:18:31 5 1842 data from the 1842 Treaty with the Chippewa,
02:18:34 6 which is a treaty with the Anishinaabe in
02:18:37 7 Wisconsin.

02:18:37 8 And Alfred Brunson who was a missionary
02:18:41 9 and also an Indian Agent, he collected this
02:18:44 10 information in terms of annual values. And then I
02:18:48 11 converted that in a way in which allowed me to
02:18:52 12 create a portion, a proportion I should say, so
02:18:56 13 that so much would be in personal consumption and
02:18:58 14 so much would be used for trade.

02:19:00 15 And we see that it's roughly about
02:19:02 16 50-50 in this case. 58-42 with this data set. And
02:19:09 17 it just gives an idea of what a peripheral market
02:19:12 18 economy looks like in terms of production for
02:19:14 19 market and production for subsistence. It's an
02:19:18 20 illustration.

02:19:21 21 Q. And for this illustration, how did
02:19:23 22 you decide on the division between consumption and
02:19:27 23 trade?

02:19:27 24 A. Well, what I did, looking at goods
02:19:30 25 for personal consumption, I thought materials for

02:19:33 1 canoes, that would be for personal on consumption,
02:19:36 2 that made sense to me. And fish and game I thought
02:19:38 3 would be used primarily used for personal
02:19:49 4 consumption in this case. Because Brunson's way of
02:19:49 5 calculating the fish and game, separated fur out.
02:19:49 6 So I regarded that for use for personal
02:19:50 7 consumption.

02:19:50 8 And then with regard to goods used for
02:19:53 9 exchange, I had furs, sugar, which I know at this
02:19:58 10 particular time in this particular trade, was
02:20:00 11 traded at 100 percent, they didn't use it for
02:20:02 12 themselves. And then also rice, by which I mean by
02:20:06 13 that wild rice. Then I divided them up on the
02:20:08 14 basis of what, it seemed reasonable to me, would go
02:20:10 15 primarily for personal consumption and primarily
02:20:15 16 for the market.

02:20:16 17 Understanding, of course, that there
02:20:18 18 would be some personal consumption that would be
02:20:21 19 used for market and vice versa.

02:20:24 20 Q. In this peripheral market economy,
02:20:28 21 how did the Anishinaabe decide whether to
02:20:35 22 participate?

02:20:36 23 A. It was definitely regulated, as I
02:20:39 24 was explaining earlier. What regulated it is that
02:20:45 25 their primary endeavor was living off the land, was

02:20:49 1 foraging. That was their primary activity.

02:20:52 2 However, they were also geared to the market. But

02:20:57 3 the market was a market in which they would

02:21:00 4 participate only at certain times as target

02:21:02 5 marketers. That's the technical term we use in our

02:21:06 6 discipline, target marketers.

02:21:08 7 So they would be in the market, let's

02:21:11 8 say for instance, to get a firearm and then they

02:21:12 9 withdraw from the market. Or be in the market to

02:21:15 10 get a kettle and then they withdraw. Or to get

02:21:19 11 rum, and then withdraw. So it's in the market and

02:21:22 12 out of the market which differentiates it from a

02:21:25 13 market economy where you're constantly producing in

02:21:28 14 the market and where subsistence becomes peripheral

02:21:30 15 to that. What you see now in some communities in

02:21:32 16 the north, it's the reverse of what was happening

02:21:35 17 here.

02:21:39 18 Q. So how does what you've told us

02:21:41 19 about the peripheral market for the Anishinaabe in

02:21:45 20 the large sense relate to those living around Lake

02:21:51 21 Huron and Georgian Bay?

02:21:51 22 A. Well, it relates to them in this

02:21:53 23 way.

02:21:55 24 What I wanted to do here was illustrate

02:21:57 25 what it might have looked like, given this data

02:22:00 1 set. And I think it is a reasonable set of data to
02:22:03 2 look at to get some idea of what was going on in
02:22:07 3 Saugeen, Anishinaabe territory. Is it exact
02:22:10 4 representation? No. But is it an indication of
02:22:13 5 what likely was the case? I think it is.

02:22:16 6 Q. I'd like to take you forward in
02:22:21 7 time now again to the 1800s now. And at this point
02:22:27 8 in the 1800s, how are the Anishinaabe sustaining
02:22:31 9 themselves?

02:22:31 10 A. Excuse me for a minute. This is
02:22:36 11 1842 data that I was looking at here.

02:22:38 12 Q. Yes, sorry. That's right. And we
02:22:42 13 started at the 1700s, and we moved to this example.
02:22:45 14 So I want to talk largely about this period of time
02:22:50 15 now, the 1800s, including this time that you
02:22:53 16 discussed. So how are they sustaining themselves
02:22:58 17 as compared to the 1700s?

02:23:00 18 A. Pretty much in the same way by
02:23:02 19 living off the land. I mean, there's more
02:23:05 20 endeavors -- there's more efforts into the fur
02:23:07 21 trade. But remember, too, you can eat all the fur
02:23:13 22 bearers you're catching. You can eat lynx, you can
02:23:15 23 eat muskrat, you can eat squirrels, so all of the
02:23:17 24 animals that you're trapping is also a food supply
02:23:20 25 for you. So the two activities go hand-in-hand as

02:23:23 1 I mentioned earlier.

02:23:25 2 Q. As we get into the middle of the
02:23:27 3 1800s and late 1800s what is happening with respect
02:23:30 4 to the fur trade?

02:23:30 5 A. By that time the fur trade is past
02:23:35 6 its prime. Certainly it peaks about 1821 that's
02:23:40 7 when the companies amalgamate and after that the
02:23:42 8 fur trade declines so that it becomes less and less
02:23:45 9 and less important.

02:23:46 10 Having said that, people still
02:23:48 11 participate today.

02:23:50 12 Q. And that's in general terms about
02:23:55 13 the fur trade. What about in Lake Huron and
02:23:57 14 Georgian Bay?

02:23:58 15 A. They where are still -- well, what
02:24:00 16 happened in Lake Huron and Georgian Bay area, is
02:24:03 17 that the furs there were largely removed because of
02:24:07 18 a policy of the Hudson Bay Company to trap the area
02:24:11 19 to extinction to avoid competition. So this really
02:24:14 20 had a big impact on the fur trade there. But the
02:24:16 21 fur trade was declining everywhere. It was
02:24:18 22 declining primarily because of overkilling of
02:24:22 23 animals.

02:24:23 24 Q. And what did this mean for hunting
02:24:28 25 for the Anishinaabe at the time?

02:24:29 1 A. It caused them to not travel as
02:24:35 2 far as they used to. So they would stay closer to
02:24:38 3 a post and they would subsist, in this period, as I
02:24:42 4 mentioned, by fish and hare. Fish and hare become
02:24:46 5 extremely very important because the large game
02:24:48 6 that you would get when you are going after fur
02:24:58 7 bearers like moose and deer, they're are not
02:24:58 8 available anymore, so you're eating more and more
02:24:58 9 fish during this period.

02:24:58 10 They're important to begin with,
02:25:00 11 they're the main source of nourishment to begin
02:25:04 12 with, but in this period they become even more
02:25:08 13 important.

02:25:09 14 Q. And in this time can you tell us
02:25:12 15 about farming, what may be going on with the
02:25:15 16 Anishinaabe for farming?

02:25:16 17 A. There's some farming in southern
02:25:18 18 Ontario. Anishinaabe are trying their hand at
02:25:28 19 various endeavors. I've read of orchards in
02:25:28 20 southern Ontario -- not in SON territory, but
02:25:28 21 they're engaged to some extent. And of course the
02:25:31 22 Methodists -- as far as SON is concerned, the
02:25:37 23 Methodists are promoting farming because they
02:25:39 24 regard it as a key element to civilization.

02:25:44 25 Q. What sources do you rely on for

02:25:46 1 this opinion about the historical period in the
02:25:49 2 1800s?

02:25:50 3 A. About the fur trade?

02:25:52 4 Q. About the fur trade and the
02:25:55 5 economy you've been discussing, farming and
02:25:58 6 hunting, and so on.

02:25:59 7 A. Oh, there's Ed Rogers' work, I
02:26:05 8 can't recall exactly all my footnotes. But Ed
02:26:11 9 Rogers, Mary Black, who was his wife, had written
02:26:14 10 about this particular period.

02:26:17 11 Charles Bishop has written about it.
02:26:19 12 Ed Rogers has written about it. Those are primary
02:26:23 13 sources that have written about it. Ethnologists
02:26:26 14 who have written about it.

02:26:27 15 Q. What about fishing? Sources for
02:26:31 16 fishing?

02:26:31 17 A. Again, Ed Rogers, the same people
02:26:36 18 that I mentioned before. They've have all noticed
02:26:39 19 this change in the economy such that fish become
02:26:42 20 more important to the people.

02:26:44 21 And again, I should add here, is that
02:26:47 22 the market for furs is declining at the same time,
02:26:51 23 because the fashions are changing so that there's
02:26:54 24 -- that would inevitably lead to more reliance on
02:26:58 25 fish.

02:26:59 1 Q. I'd like to take you to a source
02:27:02 2 that we've marked as an exhibit this morning, which
02:27:08 3 is now Exhibit 4331, which is the ready document
02:27:15 4 number S0374. If we could have that up on the
02:27:20 5 screen, please.

02:27:28 6 Just for the record this is -- well,
02:27:30 7 can you tell us what this document is?

02:27:32 8 A. This is a 1982 paper by Charles
02:27:36 9 Cleland that's quite important and quite famous and
02:27:39 10 he's talking about the inland shore fisheries on
02:27:42 11 the northern Great Lakes and he's talking about how
02:27:44 12 it's developed in-situ in archeological times and
02:27:48 13 how it developed over the years and how important
02:27:50 14 it was to the people.

02:27:51 15 And he has a map in here that shows
02:27:53 16 exactly where that is and you can see that the SON
02:27:56 17 territory is located in this area, the inland shore
02:27:59 18 fishery area.

02:28:00 19 Q. If we can go to the page 6 of the
02:28:02 20 PDF, which is page 765 of the article, is this the
02:28:11 21 map that you're referring to?

02:28:12 22 A. Yes, it is.

02:28:13 23 Q. Can you explain to us a little bit
02:28:15 24 about what we are seeing on this map?

02:28:16 25 A. Well, what you are seeing on the

02:28:18 1 map is that he's -- if you look at the -- on the
02:28:21 2 left-hand side of the map, the last square there,
02:28:27 3 what Dr. Cleland is showing you is where the inland
02:28:30 4 shore fisheries are, and you'll notice -- if you
02:28:33 5 notice this area here you can see them in Lake
02:28:37 6 Huron and you can also see them clearly in Georgian
02:28:39 7 Bay. In fact, most of Georgian Bay is in this
02:28:42 8 area.

02:28:42 9 Then it stretches up, of course, into
02:28:44 10 Lake Superior and Michigan as well. This is where
02:28:46 11 the inland shore fishery really flourishes. And
02:28:50 12 then he has other categories of wild rice and then
02:28:53 13 forest categories. But this gives the idea of what
02:28:58 14 people were subsisting on in this area for many,
02:29:01 15 many years which would be fish.

02:29:04 16 Q. I'd like to take you to another
02:29:06 17 exhibit from this trial, Exhibit 1534.

02:29:10 18 If we could have that up on the screen,
02:29:12 19 please.

02:29:27 20 Can you tell us what this document is?

02:29:27 21 A. Yes, this is a volume that was
02:29:27 22 written by a very famous artist named Paul Kane.
02:29:36 23 And what Paul Kane did is he did portraits of --
02:29:37 24 portraits, I should say, of Indigenous people. And
02:29:38 25 he traveled into their communities and he did these

02:29:40 1 portraits. He also made ethnographic observations
02:29:43 2 or at least observations that certainly are of
02:29:45 3 interest to anthropologists such as myself. And he
02:29:49 4 commented on Saugeen in particular and how
02:29:53 5 dependent they were on the fish and he mentioned
02:29:55 6 that in this particular book.

02:29:58 7 Q. If we can go to page 4 of the PDF,
02:30:01 8 which is page 2 of the headnote. And there's two
02:30:08 9 highlighted portions?

02:30:08 10 A. Yes.

02:30:10 11 Q. Is that what your referring to?

02:30:11 12 A. That's correct. And he's talking
02:30:13 13 about the population and he's talking here about
02:30:16 14 how dependent that population of 200 people is on
02:30:20 15 the fish. And he says -- he's also talking about
02:30:22 16 killing other game, but fish is their sustenance.
02:30:27 17 He points that out.

02:30:28 18 Q. Can you tell us approximately what
02:30:30 19 time period?

02:30:31 20 A. 1845.

02:30:32 21 Q. I'd like to take you to one more
02:30:39 22 exhibit here, Exhibit 1297, which is something that
02:30:50 23 you cite on page 234 of your report, at footnote
02:30:55 24 534.

02:30:56 25 And can you tell us what this document

02:31:00 1 is?

02:31:00 2 A. Yes. This is a report prepared by
02:31:03 3 Judge Maculay and this is a report that is on the
02:31:07 4 conditions of Indian people. It was a report of
02:31:12 5 Indian Affairs and it was done for his superiors in
02:31:16 6 the government because they wanted to know how the
02:31:19 7 Indians were subsisting, their conditions.

02:31:21 8 Q. At what time was this report?

02:31:22 9 A. 1839. So it was roughly around
02:31:25 10 the same period of Paul Kane, six years earlier.

02:31:29 11 Q. If we can go to PDF page 48 which
02:31:33 12 is page 47 of the report. And there is a
02:31:38 13 highlighted section and would you care to comment
02:31:45 14 on the section that's highlighted?

02:31:46 15 A. Yes, again he's saying much of
02:31:48 16 what I've been saying again.

02:31:49 17 And he's saying that there is some
02:31:51 18 farming there, but primarily they live by -- he
02:31:57 19 says "trusting very much to hunting and fishing by
02:32:01 20 support".

02:32:03 21 Q. And on the topic of sources, I'd
02:32:07 22 like to speak to you about one in your report. You
02:32:10 23 cite Conrad van Dusen's book, "Indian Chief"?

02:32:14 24 A. Yes.

02:32:14 25 Q. Who was Conrad van Dusen?

02:32:16 1 A. Conrad van Dusen was a missionary,
02:32:19 2 a Methodist missionary who was in Nawash.

02:32:27 3 Q. And what do you take from his
02:32:30 4 report -- or sorry, his book?

02:32:30 5 A. Well, his book was a book about
02:32:32 6 the life of David Sawyer, who was another
02:32:37 7 Methodist, and what he wanted to do was reveal the
02:32:40 8 conditions of Indian people by describing the life
02:32:42 9 of David Sawyer, who was a missionary, had --
02:32:45 10 another Methodist missionary who was a native
02:32:50 11 person who was at Nawash but also at Saugeen.

02:32:54 12 Q. And how reliable do you consider
02:32:56 13 his account?

02:33:01 14 A. Well, if it's consistent with
02:33:02 15 other accounts, then I consider it reliable. When
02:33:05 16 I come across items in that book or any other text
02:33:07 17 that are outliers, that have no other references to
02:33:10 18 them, then I'm highly skeptical. So, in this case,
02:33:13 19 is Van Dusen's book 100 percent accurate? I don't
02:33:16 20 think so.

02:33:17 21 I think there's hyperbole in it and of
02:33:20 22 course it's written with a certain message in mind.
02:33:23 23 But there are corroborating -- there are things in
02:33:24 24 there that are corroborated and those are the
02:33:27 25 things that I rely on in that volume.

02:33:28 1 Q. You mention a "message in mind";
02:33:31 2 what is the message, in your view?

02:33:33 3 A. I'm sorry?

02:33:34 4 Q. What is the message that you
02:33:36 5 believe he has in mind, in your view?

02:33:38 6 A. Well, the message is the message
02:33:40 7 of the Methodist. What they want to do is -- they
02:33:48 8 are there to proselytize, they're there to invite
02:33:49 9 people to life, and so that is their primary
02:33:52 10 concern. And indicators of being invited to life
02:33:55 11 would include turning away from living off the land
02:33:57 12 and towards agriculture.

02:33:59 13 So this is what van Dusen and Sawyer
02:34:03 14 are trying to promote. They're trying to promote
02:34:05 15 what they consider to be a civilized life, as
02:34:09 16 opposed to the life of living off the land.

02:34:11 17 And his book, therefore, is written
02:34:14 18 with that undertone in mind that this is a goal,
02:34:16 19 this is a good goal to be achieved because he
02:34:19 20 believes that.

02:34:21 21 Q. So I'd like to tie together what
02:34:24 22 you've told us about subsistence in this part of
02:34:27 23 the 19th century and talk about 1854; and so we're
02:34:36 24 in this period of time. In your opinion, what role
02:34:41 25 would farming have for SON at that time?

02:34:46 1 A. In terms of subsistence it would
02:34:49 2 be minimal. It would be there, but it wouldn't
02:34:52 3 be -- it wouldn't be the way they're subsisting.
02:34:55 4 They're going to be living off the land, they're
02:34:58 5 going to be fishing and hunting. That's what they
02:35:00 6 were doing in 1854. Not they are going to be, that
02:35:04 7 is what they are doing.

02:35:05 8 Q. What about participation in the
02:35:07 9 market economy?

02:35:08 10 A. To the extent that that was
02:35:10 11 possible to engage in the market, sure, they were
02:35:12 12 trying to diversify their economy at the time.
02:35:15 13 It's still going to be an economy that you would
02:35:17 14 recognize as a foraging economy but they're also
02:35:21 15 trying to incorporate other things, just like they
02:35:23 16 did with the fur trade now they're trying to
02:35:25 17 incorporate other items -- they're trying to do
02:35:28 18 other endeavors that will yield them income in that
02:35:31 19 way. So they're trying to diversify their economy
02:35:35 20 but still in all, the primary orientation of the
02:35:38 21 economy is to living off the land.

02:35:40 22 Q. So in that vein, where does
02:35:42 23 hunting fit in?

02:35:43 24 A. It's critical. Hunting is
02:35:45 25 critical and so is fishing. Both are critical.

02:35:48 1 Q. So with what you've told us, at
02:35:56 2 that time, what would SON make of the idea of no
02:36:00 3 longer hunting?

02:36:01 4 A. It would be a catastrophe. If
02:36:06 5 you're not allowed to hunt it means you cannot
02:36:09 6 achieve yourself as a person. It means the
02:36:12 7 bimaadziwin is gone. It means your identity is
02:36:14 8 gone. It means your subsistence is gone. It means
02:36:17 9 your contact with the spirits are gone. It has so
02:36:21 10 many negative aspects to it that it would be a
02:36:23 11 scenario too ghastly to contemplate from the point
02:36:26 12 of view of Anishinaabe.

02:36:28 13 Q. I'd like to turn to another
02:36:34 14 section in your report which is page 223 and there
02:36:49 15 is a map here on your report, which I believe we
02:36:55 16 have an easier copy to look at.

02:36:58 17 So could I have document SC1241. There
02:37:03 18 it is on the screen.

02:37:05 19 Is this the same map from your report?

02:37:07 20 A. Yes, it is.

02:37:08 21 Q. And perhaps we can zoom in a
02:37:10 22 little bit so that we can see what's in the legend.
02:37:22 23 So can you tell us what this map is?

02:37:24 24 A. Well, first of all, you should
02:37:27 25 know the map was produced by Terry Tobias who is

02:37:31 1 one of the foremost experts in the world in making
02:37:34 2 these sorts of maps.

02:37:35 3 You can see that he has broken this
02:37:38 4 down into numerous categories so that -- excuse me
02:37:41 5 for a moment -- that he differentiates, let's say,
02:37:46 6 for instance a shot muskrat, from a trapped
02:37:49 7 muskrat, from a shot beaver, to a trapped beaver.
02:37:51 8 The difference would be the quality -- one you
02:37:54 9 could use the fur and the other that you couldn't.
02:37:57 10 But he's differentiating all these out. And when
02:37:59 11 he puts a map like this together, you can really
02:38:01 12 see what's going on in a community, in an
02:38:05 13 Anishinaabe community as far as land use and
02:38:08 14 occupancy goes.

02:38:09 15 This map also appears in a volume
02:38:15 16 called "Living Proof" and the nickname for that
02:38:18 17 book is "the Bible" because it's such a tremendous
02:38:21 18 volume in terms of land use and occupancy.

02:38:23 19 I've worked in Pic as well. In fact, I
02:38:27 20 worked with Terry in Pic. And I've done -- I've
02:38:31 21 done similar things in terms of harvesting work
02:38:35 22 there, and produce different sorts of maps but
02:38:39 23 along the same line. And what you have see in this
02:38:42 24 map here is just a tremendous use of the area. And
02:38:46 25 the interesting thing is that this is contemporary.

02:38:48 1 This is not historic; this is now.

02:38:51 2 Q. So if it's contemporary, as an
02:38:56 3 ethnologist what do you use it for?

02:38:58 4 A. Well, I use it to -- there are
02:39:00 5 different reasons you would use these particular
02:39:03 6 maps, there's practical reasons for doing it.
02:39:05 7 Let's say there's an industrial development then
02:39:07 8 you would want to know where people are foraging
02:39:10 9 for sure to mitigate against any possible harm that
02:39:13 10 the development could produce.

02:39:18 11 But you also want to do this for
02:39:20 12 management, for knowing where people are, for
02:39:22 13 dealing with the Ministry of Natural Resources, for
02:39:24 14 dealing with Canada. You want to know this
02:39:27 15 information. It's very important from the point of
02:39:29 16 view of Anishinaabe to know today where they are in
02:39:31 17 the land and what they are doing on the land and
02:39:34 18 what they do with what they get from the land.

02:39:47 19 Q. If we can just shift over so that
02:39:47 20 we can see the actual map. And scroll down a
02:39:50 21 little bit.

02:39:52 22 So what is that we're looking at on
02:39:57 23 this map?

02:39:58 24 A. A heavy, heavy use. Now I will
02:40:00 25 give that you each of these icons could be made

02:40:03 1 smaller or larger; I understand that. Dr. Terry
02:40:09 2 Tobias understands that as well. But even glancing
02:40:12 3 at this map, you can see that their use of their
02:40:15 4 homeland, still today, their use of their homeland
02:40:18 5 is enormous?

02:40:19 6 Now they're not out there constantly,
02:40:22 7 they're out mostly what they call weakened hunters
02:40:25 8 but you can see the intensity of uses is just
02:40:28 9 enormous and it's similar to what I find in other
02:40:32 10 venues having done very similar work to this.

02:40:35 11 Q. And what does this tell you, if
02:40:39 12 anything, about the past?

02:40:40 13 A. It tells me about the past that
02:40:43 14 there was even more going on in the past. If we
02:40:45 15 were able to collect this data in the past I don't
02:40:47 16 think we'd be able to see the map below the icons.

02:40:52 17 There's also another phenomenon here,
02:40:56 18 too. Like what Terry is doing here he's showing
02:40:58 19 you what they produce. But it's also important to
02:41:01 20 understand that sometimes when you have enough, you
02:41:04 21 don't have to go out to produce, but people still
02:41:07 22 go out to feel it. I've asked -- like, if you're
02:41:12 23 not going to capture anything, why do you still go
02:41:15 24 out? To be there. To be on the land. Because
02:41:18 25 that's who you are, that's where you belong.

02:41:20 1 Q. I'd like to bring up an exhibit
02:41:26 2 from this trial, 4014. And perhaps we can zoom in
02:41:35 3 just a little bit further.

02:41:39 4 This exhibit was prepared by
02:41:43 5 Mr. Nadjiwon in court. And the green dots are
02:41:52 6 hunting locations and the red dots are Anishinaabe
02:41:57 7 placings. Can you tell us what, if anything, you
02:42:00 8 would take from this kind of map as an ethnologist?

02:42:03 9 A. What I would do with this map and
02:42:06 10 it is a map that I would collect myself, and I
02:42:09 11 would talk to the person and I would find out
02:42:11 12 exactly these sorts of things. There would be
02:42:13 13 other categories I would be interested in.

02:42:16 14 MR. FELICIAN: Your Honour, I'm sorry
02:42:17 15 to interrupt. This is not in the report. This is
02:42:19 16 an expert opinion on live testimony from a witness
02:42:22 17 that was here in this trial and put the dots on the
02:42:25 18 map.

02:42:26 19 I don't think this is appropriate for
02:42:29 20 Professor Driben to be commenting on.

02:42:36 21 THE COURT: Mr. Brookwell?

02:42:38 22 MR. BROOKWELL: Yes, as Professor
02:42:39 23 Driben has told us with the previous map, he uses
02:42:42 24 these kinds of maps to look at present use and
02:42:47 25 understand past use, which he discusses at page 222

02:42:51 1 of his report, which is beside on the map.

02:42:59 2 To the extent that he's commenting here
02:43:01 3 it's simply a specific example of that principle
02:43:03 4 which he sets out in his report. This isn't an
02:43:07 5 opinion that is beyond the substance of what he's
02:43:11 6 already set out. And to the extent that he can
02:43:16 7 provide some insight on this, I think it is helpful
02:43:19 8 for the Court to hear it.

02:43:24 9 THE COURT: I'm pausing over this
02:43:26 10 particular question, sir. Because unlike some of
02:43:28 11 the other more general questions that were objected
02:43:31 12 to, what we're doing here is moving from a map
02:43:36 13 which is in a completely different area
02:43:40 14 geographically from the claim area. And opinions
02:43:44 15 generally about what that map shows to a map that
02:43:47 16 is the claim area itself.

02:43:49 17 So it is quite the opposite of moving
02:43:54 18 in generalities. It is the very area that's at
02:44:00 19 issue in this trial. So my concerns about fairness
02:44:05 20 are much higher with respect to your current
02:44:08 21 undisclosed opinion evidence than they were with
02:44:11 22 respect to Mr. Townshend's more general questions.

02:44:16 23 Obviously, the Defendants have no
02:44:22 24 notice at all about what this gentleman is going to
02:44:26 25 say, which is the first problem.

02:44:27 1 And the second problem is, it's very
02:44:29 2 central to the issues in this case. So I become
02:44:33 3 more concerned about fairness in that situation
02:44:38 4 than I perhaps was with respect to some of the
02:44:40 5 other general questions.

02:44:42 6 I take it you made no disclosure of
02:44:44 7 this opinion?

02:44:45 8 MR. BROOKWELL: That's correct, Your
02:44:47 9 Honour.

02:44:47 10 THE COURT: Not even with an e-mail or
02:44:49 11 something like that?

02:44:50 12 MR. BROOKWELL: No.

02:44:53 13 THE COURT: Okay. Do you have any
02:45:03 14 reply to what you've heard, sir?

02:45:05 15 MR. FELICIAN: It's hard, it's hard
02:45:10 16 because I'm in the dark. I don't know where this
02:45:13 17 is going. I don't think it's on the same footing
02:45:19 18 as the map about Pic and the area around Pic and
02:45:22 19 Lake Superior. This is very different, as you've
02:45:25 20 pointed out. I don't know where it's going so I
02:45:27 21 can't comment.

02:45:29 22 THE COURT: Mr. Feliciant, before you
02:45:31 23 sit down, recognizing you haven't heard the opinion
02:45:34 24 yet, my question might be a difficult one for you
02:45:56 25 which is: Is this a situation where a little extra

02:46:00 1 preparing time might address the difficulty of
02:46:02 2 hearing this for the first time today?

02:46:07 3 MR. FELICIAN: I think ordinarily what
02:46:09 4 I would be doing is hearing -- if this had been in
02:46:12 5 a form of a report, I would have provided it to our
02:46:15 6 expert to comment on. So presumably --

02:46:20 7 THE COURT: I realize that but there's
02:46:21 8 some practical challenges here now.

02:46:24 9 The Plaintiff, although I'm not
02:46:25 10 suggesting that they weren't aware of, to some
02:46:28 11 extent, what their witnesses were going to say, did
02:46:31 12 not have this map, you know, last year.

02:46:33 13 MR. FELICIAN: That is correct.

02:46:34 14 THE COURT: They had this map earlier
02:46:36 15 in the trial and it was no doubt planned, but
02:46:39 16 still, you know, rather current, if I can call it
02:46:43 17 that, depiction.

02:46:44 18 So it's not a situation where the
02:46:47 19 plaintiffs have been sitting on this map. So then
02:46:49 20 the question is, well what ought -- what should
02:46:53 21 they have done, you can't obviously do a formal
02:46:57 22 report a year ago. I would have preferred if they
02:46:59 23 had done something, so they could stand up today
02:47:02 24 and say, well, Your Honour, we wrote an e-mail a
02:47:05 25 month ago and that's enough.

02:47:07 1 But, you know, things happen in long
02:47:11 2 trials and I guess I'm trying to think of a way
02:47:14 3 where this could fairly be proceeded with,
02:47:17 4 procedurally, you know. I don't want to -- I also
02:47:24 5 don't know exactly what the evidence is going to
02:47:27 6 be.

02:47:27 7 I think what I am going to do is permit
02:47:30 8 the opinion to be given, and if any of the
02:47:35 9 defendants feel that they need something, you know,
02:47:39 10 ranging from more time to this gentleman back is
02:47:43 11 another possibility, then I'll hear that submission
02:47:47 12 from you.

02:47:51 13 It's not an ideal situation, but I
02:47:53 14 think the realities of a long trial throw out this
02:48:00 15 sort of situation every now and then.

02:48:02 16 So that's my ruling.

02:48:04 17 MR. FELICIAN: Thank you, Your Honour.

02:48:05 18 THE COURT: Mr. Brookwell, tread with
02:48:07 19 care if you're going to go into these areas that
02:48:11 20 are undisclosed.

02:48:12 21 MR. BROOKWELL: Thank you, Your Honour.
02:48:13 22 If I might just have a moment.

02:48:30 23 BY MR. BROOKWELL:

02:48:30 24 Q. So the question, Professor Driben,
02:48:32 25 is what if anything would you take from this kind

02:48:35 1 of map as an ethnologist?

02:48:36 2 A. I would take this as a data point,
02:48:39 3 for me. And it would show what one forager,
02:48:45 4 himself is reporting. What I would -- the way I
02:48:47 5 approach it and the same way that Terry Tobias
02:48:49 6 approaches it, is you collect more and more and
02:48:52 7 more of this by interviewing each forager, so that
02:48:55 8 you get the picture that Terry ended up with.

02:48:55 9 This is the beginning of the process,
02:48:59 10 this is the first step. This is one forager. We
02:49:03 11 must move forward through other foragers to get a
02:49:11 12 more complete use of the land and land use area.

02:49:32 13 Q. What, if anything, does it tell
02:49:34 14 you about the past?

02:49:35 15 A. Well, it shows me that people are
02:49:37 16 still doing things that they did in the past,
02:49:39 17 according to Mr. Nadjiwon. He's saying I'm doing
02:49:42 18 these things now. We know that they did them in
02:49:45 19 the past, because we know where they lived. We
02:49:47 20 know how they subsisted because people reported
02:49:50 21 that. So I would say this is an example of
02:49:53 22 continuity. It's a connection between the past and
02:49:55 23 the present.

02:49:55 24 The activities are now less than they
02:49:58 25 were before, but they still persist in the culture.

02:50:01 1 And those who engage in these activities, in my
02:50:04 2 experience, have a higher status because of what
02:50:07 3 they do with the product.

02:50:13 4 Q. I would like to turn to another
02:50:15 5 exhibit, Exhibit 4320, which is the map behind the
02:50:25 6 map with a "W" on it which I anticipate my friends
02:50:31 7 will have the same comments.

02:50:32 8 THE COURT: Let's just pause then if
02:50:34 9 that's what's going on here. I asked Mr. Townshend
02:50:36 10 the same question. How many undisclosed opinions
02:50:39 11 are you hoping to elicit in your portion of this
02:50:43 12 examination in-chief?

02:50:44 13 MR. TOWNSHEND: This is the -- the
02:50:46 14 second map is the only map or exhibit that I'm
02:50:50 15 going to be putting to Professor Driben that has
02:50:55 16 yet to be disclosed. And there is two references
02:50:59 17 to expert reports one from Canada, one from Ontario
02:51:05 18 that I intend to address at the end of his
02:51:08 19 examination.

02:51:08 20 THE COURT: All right. Just before you
02:51:09 21 proceed, I think we -- I heard this morning it's
02:51:15 22 Mr. Ennis as well as Mr. Feliciant, are open to a
02:51:20 23 request that we adjourn earlier today and that
02:51:22 24 Mr. Brookwell write an e-mail to the two of you
02:51:25 25 with the opinion that he intends to elicit that are

02:51:32 1 not yet disclosed.

02:51:34 2 It would remain open to you to ask for
02:51:36 3 other relief, but do either of you request that at
02:51:40 4 this time?

02:51:43 5 MR. ENNIS: Yes, Your Honour.

02:51:45 6 THE COURT: Mr. Feliciant.

02:51:47 7 MR. FELICIAN: I would, Your Honour.

02:51:48 8 And one of the challenges for me is, as
02:51:51 9 a lay person and not an expert, even identifying if
02:51:54 10 more is required. So it is a good start; I suspect
02:51:58 11 I may, depending on what's in the e-mail, need to
02:52:01 12 run it by someone else to actually get advice that
02:52:04 13 this is really important or it isn't.

02:52:06 14 THE COURT: We're going to take this
02:52:07 15 one step at a time.

02:52:09 16 MR. FELICIAN: Thank you.

02:52:10 17 THE COURT: I want the Plaintiffs to be
02:52:11 18 able to get through what they're hoping for in a
02:52:14 19 way that's fair to the Defendants.

02:52:16 20 So what we'll do is we'll break early
02:52:19 21 today and, Mr. Brookwell, I ask that -- you can
02:52:23 22 tell me right now how much time you want, but I
02:52:26 23 hope it's not too terribly long, that you put into
02:52:29 24 an e-mail to the Defendants what's called the
02:52:31 25 findings, opinions and conclusions in the rules,

02:52:34 1 with respect to the four matters that you have in
02:52:39 2 your plan that have not yet been the subject of
02:52:41 3 notice to the Defendants.

02:52:42 4 Now how much time are you requesting in
02:52:45 5 order to do that?

02:52:46 6 MR. BROOKWELL: I should be able to do
02:52:47 7 that by the end of today.

02:52:49 8 THE COURT: What does that mean?

02:52:51 9 MR. BROOKWELL: So by 5 o'clock today.

02:52:53 10 THE COURT: All right. That's very
02:52:54 11 helpful.

02:52:54 12 So if you can send that e-mail out that
02:52:57 13 will give some advance notice to the defendants.
02:52:59 14 We'll be able to proceed, I think, in a more
02:53:03 15 orderly way.

02:53:04 16 If, after the examination in-chief has
02:53:07 17 concluded, either or both Defendants wish to make
02:53:10 18 requests for other process, you know, associated
02:53:15 19 with this new material, we can deal with it at that
02:53:18 20 time. It may be unnecessary, I don't know, all right?

02:53:21 21 Does anyone have anything they wish to
02:53:24 22 raise in a general context of that process this
02:53:27 23 afternoon? Starting with you, Mr. Brookwell.

02:53:31 24 MR. BROOKWELL: No, Your Honour, that
02:53:33 25 sounds fair to me.

02:53:34 1 THE COURT: Anyone else? No?

02:53:36 2 I think that might help, I guess we'll
02:53:39 3 find out. So we'll adjourn now to 10 o'clock
02:53:42 4 tomorrow morning.

02:53:43 5 Mr. Brookwell will do his best to get
02:53:46 6 you an e-mail by 5:00, if it's not quite 5:00, I
02:53:49 7 think that's fine. I mean as long as it's, say,
02:53:53 8 before 5:30 or 6:00 at the latest.

02:53:56 9 I do think, Mr. Brookwell, keep in mind
02:53:59 10 that these parties may wish to try and get some
02:54:02 11 expert advice and so the sooner the better if you
02:54:06 12 can manage it, all right.

02:54:07 13 MR. BROOKWELL: I will do, thank you,
02:54:08 14 Your Honour.

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16 -- Court adjourned at 2:55 p.m.
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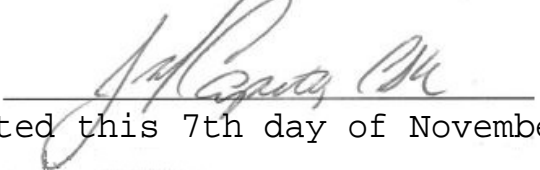
REPORTER'S CERTIFICATE

I, JUDITH M. CAPUTO, RPR, CSR, CRR,
Certified Shorthand Reporter, certify;

That the foregoing proceedings were
taken before me at the time and place therein set
forth at which time the witness was put under oath
by the court registrar;

That the testimony of the witness and
all objections made at the time of the examination
were recorded stenographically by me (Note: Not
all quotes have been verified against source
document, but transcribed as read into the record);

That the foregoing is a Certified
Transcript of my shorthand notes so taken.


Dated this 7th day of November, 2019.

NEESON COURT REPORTING INC.

PER: JUDITH M. CAPUTO, RPR, CSR, CRR

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