

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

VOL 55 DAY 55
October 23, 2019



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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 55/DAY 55 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 23rd 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., Queen in Right of
19 & Peter Lemmond, Esq., Ontario.

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

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I N D E X

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WITNESS:

DR. PAUL DRIBEN; previously sworn.

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09:49:27 1 -- Upon commencing at 10:02 a.m.

10:03:56 2

10:04:02 3 THE COURT: Mr. Brookwell, just before
10:04:05 4 you begin, I wanted to let counsel know that I
10:04:07 5 anticipate that I am going to have to make some
10:04:10 6 adjustments to the schedule for January. But it
10:04:16 7 will be post the holiday period that counsel have
10:04:20 8 requested some accommodation on; it will have no
10:04:23 9 impact on that.

10:04:24 10 So it would seem to me next week would
10:04:26 11 be a good time to have a scheduling discussion
10:04:30 12 generally and I don't need to schedule that right
10:04:32 13 now.

10:04:33 14 We'll see how things go this week, and
10:04:36 15 then I'll invite counsel to make a suggestion as to
10:04:40 16 when next week would be a good time for that, all
10:04:43 17 right?

10:04:44 18 I take it that as long as it's post
10:04:49 19 accommodations we've discussed, there's no urgent
10:04:51 20 need to deal with it? Is that the case for this
10:04:55 21 week?

10:04:56 22 MR. FELICIAN: Not for us, Your
10:04:58 23 Honour.

10:04:58 24 THE COURT: If it turns out to matter
10:05:00 25 this week, just let me know. It will be after the

10:05:03 1 middle of January, those latter two weeks I need to
10:05:06 2 make an adjustment.

10:05:08 3 Please go ahead, sir.

10:05:10 4 MR. BROOKWELL: Good morning, Your
10:05:11 5 Honour. Further to your direction yesterday, I've
10:05:13 6 provided my friends from Canada and Ontario with a
10:05:17 7 supplementary findings, opinions and conclusions
10:05:21 8 page from Professor Driben. And I have a copy of
10:05:25 9 that page here, if you would like to review it.

10:05:27 10 THE COURT: I don't need to see it, no.
10:05:30 11 If it comes up in the testimony, then that's fine.

10:05:32 12 I should say just before you get too
10:05:35 13 much further along that my technology is having a
10:05:39 14 moment. Let me see if I can do something about
10:05:44 15 that.

10:05:44 16 Thank you, please go ahead.

10:06:18 17 MR. BROOKWELL: To the extent my
10:06:19 18 friends may have comment, I believe you left it
10:06:22 19 open to them to speak to whether they require any
10:06:26 20 accommodation in response to this one-pager.

10:06:31 21 THE COURT: Yes, so we'll leave it and
10:06:33 22 see if counsel remain in their chair or not. You
10:06:37 23 can proceed, sir.

10:06:38 24 MR. BROOKWELL: Okay.

10:06:39 25 THE COURT: Thank you for taking those

10:06:41 1 steps.

10:06:41 2 MR. BROOKWELL: If I can recall
10:06:49 3 Professor Driben to the stand, please.

10:06:51 4 PAUL DRIBEN: PREVIOUSLY SWORN.

10:07:15 5 THE COURT: Please go ahead.

10:07:16 6 MR. BROOKWELL: If we can put up on the
10:07:18 7 screen Exhibit 4320.

10:07:54 8 THE COURT: Is that the same as the
10:07:56 9 enlargement?

10:07:57 10 MR. BROOKWELL: It is the same as the
10:07:59 11 enlargement, but the enlargement was marked by
10:08:01 12 Mr. Lauzon, so that enlargement is Exhibit 4321.

10:08:11 13 THE COURT: Please go ahead.

10:08:12 14 EXAMINATION IN-CHIEF BY MR. BROOKWELL

10:08:12 15 (cont'd):

10:08:13 16 Q. Professor Driben, can you tell us,
10:08:19 17 having had a look at this map, what, if anything,
10:08:22 18 you conclude as an ethnologist?

10:08:26 19 A. Well, there are several things.
10:08:29 20 The first one is that when you look at -- when you
10:08:32 21 look at the use map, in this case it's a commercial
10:08:35 22 fishing map.

10:08:36 23 But when you look at use maps of this
10:08:38 24 sort, whether they're hunting or trapping or, in
10:08:40 25 this case, commercial fishing, you're getting some

10:08:43 1 indication of what the territory looks like, what
10:08:45 2 the homeland looks like -- or what the Band
10:08:49 3 territory, that's the proper term for it -- what
10:08:51 4 the Band territory looks like in terms of use.

10:08:54 5 It doesn't mean that every part of the
10:08:56 6 territory would be used, but this gives you some
10:08:58 7 indication of it.

10:08:59 8 And it shows me something that I'm
10:09:01 9 familiar with, and that's when you look at a
10:09:04 10 village site, where people are living today, you'll
10:09:07 11 see that the most intense activity is typically
10:09:10 12 around the village site. And the further you go
10:09:13 13 out from the village site the less intense the
10:09:16 14 activity would be.

10:09:17 15 Commercial fishing may be a little it
10:09:19 16 different. I'm certainly not an expert in
10:09:23 17 commercial fishing. But this sort of endeavor,
10:09:25 18 going after this sort of a resource looks familiar
10:09:29 19 to me. It looks pretty much like what I see in the
10:09:32 20 field.

10:09:32 21 What I use this for is to identify home
10:09:35 22 lands, identify the territories which people
10:09:38 23 consider their Band territories. And I do that by
10:09:41 24 use and also by interviewing people of course.

10:09:45 25 Q. And what, if anything, does it

1 tell you about the past?

2 A. Well, it's not an exact
3 representation of the past, but it gives you some
4 idea of what happened in the past. And we know
5 from the documentary record that this comports well
6 with use in the past as well, especially when you
7 look at the shoreline. You see the very, very
8 heavy use. So that this, as I said, gives you an
9 indication of past, through the present.

10 Q. Thank you, Professor Driben. I'd
11 like to now to move to a discussion about fisheries
12 broadly, as related to SON in the 1850s.

13 So in that point in time, how would SON
14 have understood its relationship to the fishery?

15 A. Well, in the 1850s, the Saugeen
16 Anishinaabe considered the fishery something over
17 which they held proprietary rights in their Band
18 territory. That's how they regarded the fishery at
19 the time.

20 And they tried over and over again to
21 establish a firmer control over the fishery.

22 Q. And what do you mean by "control"?

23 A. Well, it goes back to a concept
24 that I discussed earlier, which is conditions of
25 use. And when they made an agreement with the

10:11:19 1 Huron Fishing Company, say, for instance, what they
10:11:22 2 were trying to do, from an ethnological point of
10:11:27 3 view, was to establish the conditions of use so
10:11:30 4 that under certain circumstances, this resource
10:11:33 5 could be used.

10:11:33 6 And so that then, the conditions of use
10:11:35 7 would be under -- would be established by the Band.
10:11:39 8 And under those circumstances, they would be
10:11:41 9 controlling their own resource base, which would
10:11:44 10 harken back to what happened in the past, when I
10:11:47 11 was talking about Sault Ste. Marie or Mackinaw,
10:11:50 12 where they had tremendous fisheries as well.

10:11:52 13 Q. Why would they want to control the
10:11:55 14 resource base?

10:11:55 15 A. So they could survive, so they
10:11:58 16 could remain where they were. It is a question of
10:12:01 17 existence. That's their main food source, you
10:12:04 18 know, certainly in the 1850s, along with, you know,
10:12:08 19 other natural products of the land, game, let's say
10:12:12 20 for instance.

10:12:13 21 This is tremendously important to them
10:12:15 22 so they need control over the fishery to sustain
10:12:18 23 themselves and to have a commercial endeavor as
10:12:21 24 well. It's both at the same time. It's not only
10:12:24 25 subsistence, it also has commercial value. So the

10:12:27 1 fishery is tremendously important to them.

10:12:29 2 Q. So you mentioned Huron Fishing
10:12:31 3 Company this morning, and you spoke a little bit
10:12:33 4 about it with Mr. Townshend.

10:12:37 5 I'd like to return to it briefly to ask
10:12:43 6 you in your opinion, why enter into an agreement
10:12:48 7 with the Huron Fishing Company from SON's
10:12:52 8 perspective?

10:12:52 9 A. Because they felt that they could
10:12:57 10 not control it themselves. That they did not have
10:12:59 11 the resources or the power, the political power to
10:13:02 12 do it themselves. So they thought that they would
10:13:04 13 use an agent to do it.

10:13:06 14 They could do it through a European
10:13:08 15 agent, and in that way they'd be able to get
10:13:10 16 control. Trying to control it themselves, history
10:13:13 17 had taught them that was an impossible task because
10:13:16 18 they were slowly but surely losing control as the
10:13:20 19 years passed by.

10:13:21 20 But this way, if you had an agent, you
10:13:24 21 might be able to control it, according to their way
10:13:27 22 of thinking. You might be able to control it by
10:13:30 23 establishing the conditions of the permission for
10:13:31 24 the agent. When you did that, you would be in
10:13:34 25 control.

1 Q. What happened with this agreement
2 between SON and the Huron Fishing Company?

3 A. Well, it was not successful. The
4 conditions of permission that they tried to
5 establish via this never worked because the fishing
6 -- the Huron Fishing Company went and became
7 insolvent; they never paid.

8 The Huron Fishing Company's -- I don't
9 know what you would call those -- but their rights
10 to use the Fishing Islands, they were transferred
11 to three other individuals who never acted on them.

12 And what happened is that the
13 conditions of permission were never fully
14 implemented, so they kept losing further control of
15 the fishery.

16 Q. So what did SON do?

17 A. Oh, they protested. They
18 protested against Mr. McGregor, who we spoke about
19 yesterday. They protested against the Huron
20 Fishing Company, especially when they did not abide
21 by the terms of the agreement.

22 And they wrote to the Queen and they
23 tried to get some resolution that way and to make
24 sure they would be control of the fishery.

25 They did everything they could

10:14:45 1 diplomatically, I would say, to ensure that they
10:14:47 2 would be able to maintain the fishery for
10:14:50 3 themselves as both a commercial and a subsistence
10:14:54 4 endeavor. Because that resource was so vitally
10:14:59 5 important to them.

10:15:00 6 Q. In your opinion, what role, if
10:15:03 7 any, did SON see for the Crown for the fishery at
10:15:09 8 that time, in the 1850s?

10:15:10 9 A. Well, the Crown would be the
10:15:12 10 protector -- as I mentioned yesterday, when you
10:15:16 11 look at the relationship between Anishinaabe and
10:15:18 12 the Crown, you look to the term "Great Father" and
10:15:23 13 "Great Mother".

10:15:24 14 If you look at the term "father", for
10:15:28 15 instance, that means from a Anishinaabe point of
10:15:30 16 view a person who will assist you in endeavors that
10:15:34 17 are beyond your own ability to do.

10:15:36 18 So in this case, they expected the
10:15:38 19 Crown, since they weren't able to do this
10:15:40 20 themselves -- they didn't have the military means
10:15:43 21 to do it. And their diplomatic efforts were
10:15:47 22 failing, their court of last resource there was the
10:15:51 23 Crown.

10:15:52 24 Because the Crown would act as their
10:15:54 25 father. So they expected great things from the

1 Crown in terms of protecting the fishery. As
2 befitting the role of father, as they saw it.

3 Q. You mentioned this morning writing
4 to the Queen and protests. I want to speak to -- a
5 little about that.

6 So in your report you discuss an 1852
7 BCR. Can you tell us a little more about that?

8 A. Could you direct me to a
9 particular page in my report, please.

10 Q. Yes, it's page 237.

11 A. Thank you very much.

12 Well, again, this is October 30, 1852?

13 Q. Yes.

14 A. Yes. This is an important
15 document because it tells me that the Anishinaabe
16 here, the Saugeen Anishinaabe, they want to control
17 their own resource base. And not only that, they
18 believe that they're fully equipped to control
19 their own resource base because they believe they
20 have the ability to do that themselves.

21 So that's what this is about. This is
22 about them saying, we can control our own destiny.
23 We just need to be able to be allowed to do that.
24 And if we are allowed to do that, then we can be
25 independent. We can take our -- we can operate

10:17:43 1 exactly the same as Europeans. Exactly the same as
10:17:46 2 Europeans, because we possess the same intellectual
10:17:49 3 and practical skills. That's what this is about.

10:17:54 4 Q. If I can have Exhibit 1956 on the
10:17:58 5 screen, please.

10:18:02 6 Is this a transcription of the BCR that
10:18:09 7 you're referring to?

10:18:09 8 A. Yes, it is.

10:18:10 9 Q. I'd like to speak to you now about
10:18:15 10 writing to the Queen. So could I have Exhibit 2568
10:18:21 11 on the screen, please.

10:18:24 12 And can you tell us what the
10:18:29 13 circumstances were for SON at the time of this
10:18:32 14 petition?

10:18:32 15 A. This is in 18 -- well, what the
10:18:39 16 circumstances were, again, is that they're losing
10:18:42 17 control of the fishery. So they have to keep on
10:18:45 18 taking action to try -- not to give up. But they
10:18:48 19 keep on trying over and over and over again. So
10:18:51 20 you think to yourself, how can I accomplish this
10:18:54 21 goal?

10:18:54 22 Well, if you write to the Great Mother,
10:18:57 23 this is the best you can do. So that this is an
10:19:01 24 action that is really the last action they can
10:19:03 25 take. But in a very impressive action.

1 Q. Now, you've mentioned this is an
2 action that they can take. Sorry, this is the last
3 action that they can take. In your view, why have
4 they chosen a petition instead of some other form
5 of action?

6 A. Well, I think a petition is --
7 represents the way they like to communicate. They
8 like to communicate as a Band and the petition is
9 certainly a way to do that, with representation
10 from the Band.

11 Q. What was the result of this
12 petition?

13 A. Well, the result was that it was
14 unsuccessful. Because in 1857, the Fisheries Act
15 was passed. And when the Fisheries Act was passed,
16 the province took over control of the fishery.

17 Eventually, when this question came up,
18 the answer was that: "I'm sorry we cannot assist
19 you, because the fisheries are under provincial
20 control".

21 Q. I'd like to take you to page 235
22 in your report. You refer to Victor Lytwyn's
23 article, "The Usurpation of Aboriginal Fishing
24 Rights"?

25 A. Yes.

1 Q. Which is an exhibit we marked
2 yesterday, 4332.

3 MR. BROOKWELL: Can we have that up on
4 the screen, please?

5 BY MR. BROOKWELL:

6 Q. And can you tell us briefly who
7 Victor Lytwyn was?

8 A. A researcher, like me. But he's
9 an historical geographer, but he works in the same
10 area with Anishinaabe people. He's been doing that
11 a long time and he's an expert in the fisheries,
12 these particular fisheries.

13 Q. What is this article about?

14 A. Well, this is about the fisheries
15 and about their attempts to control the fishery and
16 the reaction that happens through their attempts.
17 There's a history of the points that I've been
18 hitting the highlights on.

19 Q. And if we could go to page 96 of
20 the article, which is PDF 17.

21 And there's a highlighted paragraph
22 there where Lytwyn talks about attempts to
23 physically remove fishermen.

24 Can you comment further on the activity
25 he's describing there?

10:21:55 1 A. As I mentioned yesterday, there's
10:21:58 2 three ways through which Anishinaabe can control
10:22:03 3 their Band territories with regard to intruders and
10:22:06 4 enemies. And one of that -- or people they
10:22:10 5 consider intruders and enemies.

10:22:12 6 One way is through medicine. But in
10:22:14 7 the case of medicine and Europeans, that doesn't
10:22:17 8 generally work, because Europeans are not cognizant
10:22:20 9 that medicine is being used.

10:22:22 10 Or, if the medicine is effective from
10:22:24 11 the point of view of the Anishinaabe, it might be
10:22:25 12 that the European might not recognize that the
10:22:27 13 medicine has been effective. So, in my experience,
10:22:29 14 medicine is not used with regard to Europeans, at
10:22:31 15 least not very much.

10:22:33 16 And, there's also the military action
10:22:36 17 and the diplomacy. I've already commented on the
10:22:42 18 diplomacy, because we can see letters to the Queen,
10:22:45 19 trying to make an agreement with the Huron Fishing
10:22:47 20 Company, complaints about overfishing. That's all
10:22:50 21 part of a diplomatic effort, as I see it as an
10:22:53 22 ethnologist.

10:22:54 23 But there's also the possibility of
10:22:56 24 military action. At the time we're looking at
10:22:58 25 here, it's clear that Anishinaabe and other

10:23:01 1 Indigenous people in Canada certainly do not have
10:23:04 2 the same military power they did before.

10:23:07 3 However, in 1850 Chief Shingwaukonse
10:23:14 4 from Sault Ste. Marie pointed out that even the
10:23:17 5 weakest animal in the forest, when pushed into
10:23:22 6 desperation, will attack. And I think that's what
10:23:25 7 we're looking at here.

10:23:27 8 You may be weak and you may not have
10:23:30 9 the military power you have before. And your
10:23:33 10 military endeavors may not be successful. But
10:23:36 11 nonetheless, it is a way to try and exert control
10:23:39 12 over your homeland. In this case I see them trying
10:23:43 13 to do that through these endeavors.

10:23:45 14 I'd like to say one other thing about
10:23:48 15 that, too. Oftentimes when you read the historical
10:23:50 16 literature, you come across passages where
10:23:53 17 Anishinaabe and people like them are doing acts
10:23:56 18 that, from a European point of view, would look
10:24:00 19 like a wanton act of violence, or something that's
10:24:04 20 just extraordinary cruel, things like that.

10:24:07 21 But that's -- if you look at it from
10:24:10 22 the point of view of the Europeans, I get it. But
10:24:13 23 if you look at it from the point of view of the
10:24:16 24 Anishinaabe, what are they trying to accomplish
10:24:18 25 here?

10:24:18 1 They're not being violent for the sake
10:24:20 2 of violence. They're trying to accomplish a goal.
10:24:24 3 They're trying to gain -- they're trying to regain
10:24:27 4 control over something that is vital to their
10:24:30 5 lives.

10:24:30 6 So if you look at it from an
10:24:34 7 Anishinaabe point of view, you understand this
10:24:35 8 activity in a completely different way. The
10:24:38 9 fisheries officer, Mr. Gibbard, threatened as a
10:24:43 10 result of this to fine them \$60. Sixty dollars.
10:24:48 11 He was going to take away their annuities, or a
10:24:51 12 portion of their annuities.

10:24:52 13 So he saw it as just a, you know,
10:24:56 14 something that was not part of a pattern of
10:24:59 15 anything but just a -- a depredation, that's the
10:25:03 16 word I'm looking for. He would regard it as a
10:25:15 17 depredation.

10:25:15 18 But if you look at it from an
10:25:15 19 Anishinaabe point of view, it looks completely
10:25:15 20 different.

10:25:15 21 Q. Further down in the same
10:25:15 22 paragraph, Lytwyn describes something happening in
10:25:18 23 1864, the last sentence, applying for a lease.

10:25:33 24 In your view, what would be the
10:25:39 25 intention behind applying for leases from the

1 Department of Indian Affairs?

2 A. Well, now they've determined there
3 is a way in which they can gain some measure of
4 control back, and that would be to follow the
5 course that you've just described, by getting a
6 licence.

7 So they think to themselves, let's do
8 that. Because at least that's something. And
9 remember, the fishery is vitally important to them.
10 So this is an action they can take.

11 It's a diplomatic action, if you look
12 at it again from a Anishinaabe point of view. All
13 of these are part of a large pattern that exists at
14 this time where they're trying to solve the
15 problem, a little bit by what I'll call military
16 means, but primarily through diplomatic means,
17 writing to the Queen, trying to get a licence,
18 passing a BCR.

19 They're exploring all sorts of
20 possibilities to accomplish the goal.

21 Q. In what circumstances would
22 military means not be considered as an option?

23 A. That is a very difficult question
24 because one cannot predict the future. I don't
25 know what the circumstances are, but I can tell you

10:26:58 1 what's happened up to this point and that's that,
10:27:01 2 by and large, military means are not employed --
10:27:05 3 although sometimes protests take place where roads
10:27:08 4 are blocked -- so sometimes those sorts of actions
10:27:13 5 are still undertaken, undertaken at Grassy Narrows,
10:27:16 6 undertaken at Armstrong.

10:27:17 7 Those sorts of endeavors are still
10:27:19 8 undertaken and I guess they would be -- you know
10:27:22 9 the blockages of roads and things like that, that's
10:27:25 10 the remnant of what this was, attacking the Fishing
10:27:29 11 Islands. Of course you can't do that anymore. And
10:27:32 12 I don't think people would contemplate that --

10:27:35 13 THE COURT: I'm just going to -- sorry,
10:27:36 14 do you want to --

10:27:37 15 MR. BROOKWELL: Yes, I meant to focus
10:27:39 16 my question not about today. But in this period of
10:27:43 17 time, in the late 1860s towards the 1900s.

10:27:47 18 THE WITNESS: I'm sorry, could you re
10:27:50 19 ask the question then, please?

10:27:51 20 BY MR. BROOKWELL:

10:27:51 21 Q. Yes. So in this period of time,
10:27:54 22 the latter part of the 1800s toward the 1900s, at
10:28:00 23 that time, what are the circumstances where
10:28:07 24 military action may not be an option?

10:28:11 25 A. Well, it is an option because --

10:28:13 1 MR. BROOKWELL: Your Honour.

10:28:14 2 THE COURT: Wait for a second.

10:28:15 3 THE WITNESS: I'm sorry.

10:28:17 4 MR. FELICIAN: I don't think it is a
10:28:19 5 relevant question because it's too speculative to
10:28:22 6 be of value.

10:28:23 7 It's very broad: Under what
10:28:24 8 circumstances wouldn't you consider something? I
10:28:26 9 can imagine you could come up with a whole raft of
10:28:30 10 circumstances where you wouldn't consider
10:28:32 11 something.

10:28:33 12 THE COURT: Mr. Brookwell?

10:28:35 13 MR. BROOKWELL: Well, the relevance of
10:28:39 14 the question is to address why there are different
10:28:43 15 approaches being taken at this time. I can focus
10:28:48 16 the question to ask specifically about those
10:28:52 17 different approaches and why that may have been
10:28:55 18 favoured at that time.

10:28:56 19 THE COURT: I think the difficulty with
10:28:57 20 the question is only that you're putting it in the
10:28:59 21 negative.

10:29:00 22 MR. BROOKWELL: Yeah.

10:29:00 23 THE COURT: When is the military option
10:29:03 24 not an option? Well, I would think that list could
10:29:06 25 take a couple of days.

1 But I don't think that's what you're
2 trying to accomplish. Is there a way to put your
3 question not in the negative? It would seem to me
4 there is.

5 MR. BROOKWELL: Yes.

6 BY MR. BROOKWELL:

7 Q. I think the question is then, in
8 your opinion, when would military action be an
9 option?

10 THE COURT: In the latter part of the

11 --

12 BY MR. BROOKWELL:

13 Q. In the latter part of the 19th
14 century then?

15 THE COURT: The 1800s.

16 THE WITNESS: I think it's always an
17 option, but it is not an option that's not acted on
18 too often, because of the differential in power
19 that exists between the Anishinaabe and the
20 newcomers.

21 It's always there for them, at least in
22 this period of time. We know it happens in other
23 venues at this period of time as well. So it does
24 exist for them there. But the question is, do you
25 really want to do that? Because you have to

1 balance that against the consequences of taking
2 action that is likely not going to be successful.
3 It's not likely going to drive the settlers from
4 the land anymore.

5 So, like I say, it's an option, but not
6 an option that will be acted upon too often because
7 of the low return.

8 But sometimes you just get so angry,
9 you know, that you just do it. Because you know
10 it's not going to be successful, but it's so
11 important to you, that you just forget about the
12 consequences and you just act.

13 BY MR. BROOKWELL:

14 Q. I'd like to turn to a different
15 part of your report now, page 245. You discuss the
16 policy of removing Indians.

17 And you cite Francis Prucha. I'm sorry
18 if I pronounced that incorrectly. Can you tell us
19 who that was?

20 A. Francis Prucha, Prucha is the way
21 you pronouns the name. Father Prucha was one of
22 the -- he's one of the most renowned historians of
23 U.S. Indian policy who ever lived. He's a great
24 scholar, he's written many books.

25 I don't know if I mentioned it, but one

1 of his books, The Great Father, was nominated for a
2 Pulitzer Prize. He was an outstanding scholar.

3 MR. BROOKWELL: One of his articles
4 we've marked as Exhibit 4333, if you can put that
5 up on the screen.

6 BY MR. BROOKWELL:

7 Q. Can you tell us, Professor Driben,
8 what this -- I believe it's an excerpt from a
9 volume -- what this excerpt is about. If we can
10 scroll to the next page, that's just the cover
11 page.

12 A. Yes, it says it in the title.
13 What he's looking at here is U.S. Indian Policy
14 from 1850 to 1860. This is during a period where
15 removal takes centre stage in about 1825 and it
16 plays itself out with the Anishinaabe into the
17 1850s.

18 Q. And what do you mean by "removal"?

19 A. Well, the idea was in order to
20 avoid contact, to separate the populations, to
21 separate the newcomers from people such as the
22 Anishinaabe, the idea was to take the Anishinaabe
23 from the lands that they used and occupied from
24 their Band territories and move them west of the
25 Mississippi River.

1 And then the land east of the
2 Mississippi would be there for the settlers and
3 they could farm, they could develop as they saw
4 fit.

5 And the land west of the Mississippi
6 would be left as a general refuge for Indigenous
7 people, including the Anishinaabe, who were one of
8 the main targets of the removal policy in the
9 north, in particular.

10 Q. What impacts, if any, would there
11 be on SON regarding policy you describe? And I'm
12 focusing on the time period around the 1850s.

13 A. Well, the 1850s is when the -- is
14 when an executive order came -- it was President
15 Fillmore issued a executive order that called for
16 removal of the Chippewa, the Anishinaabe,
17 Ojibway-speaking Anishinaabe from Wisconsin and
18 Minnesota. And they started to remove them.

19 Of course, when they removed them they
20 came back again. So it was an interesting kind of
21 movement, like almost going through a revolving
22 door. But people were being removed from their
23 homeland and that was a pretty -- I would imagine
24 from Anishinaabe point of view, that was
25 terrifying.

1 Because I describe the relationship

2 between the Anishinaabe --

3 MR. FELICIAN: Your Honour, I'm sorry.

4 Two problems.

5 This relates to a couple of things.

6 This witness has now talked about people being

7 angry and doing things. Now he's talking about

8 people being terrified.

9 I don't think this witness has the

10 expertise to comment on psychological states and

11 psychological motivations; that's one objection.

12 The second objection is the question

13 was focused on what impact did it have on the SON.

14 Not, what impact it had on the people being

15 removed. So it's a different question being

16 answered; that's the second objection.

17 THE COURT: Well, it's correct to say

18 that the witness was not answering the question. I

19 assume that was a simple miscommunication and not

20 anything more than that.

21 The question was, along the lines of,

22 in the period where this removal policy in the

23 United States, which he's described in part from a

24 U.S. executive order was going on, did he have

25 something to say about the impact on SON which is

1 obviously not down there. And I'm going to permit
2 that question and give the witness another
3 opportunity to focus on the question and answer the
4 question rather than some other matters that he was
5 talking about.

6 Go ahead, please, sir.

7 BY MR. BROOKWELL:

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

10 THE WITNESS: I'm sorry, Your Honour.

11 THE COURT: Perhaps Mr. Brookwell
12 should restate the question. If you could listen
13 to it carefully and try to focus on answering that
14 question.

15 THE WITNESS: Thank you, Your Honour.

16 THE COURT: Please go ahead.

17 BY MR. BROOKWELL:

18 Q. The question is, in the context of
19 the 1850s, that period of time, what impact of
20 removal policies in the United States, how that may
21 impact SON?

22 A. Well, they had already experienced
23 some of the impact of the U.S. removal policy,
24 because the policy started in 1825, and it wasn't
25 -- some Anishinaabe were removed earlier than

10:36:38 1 others, including the Pottawatomi. And they moved,
10:36:42 2 some, about 2,000, moved to Canada. So they had
10:36:46 3 direct experience with people who had been removed.

10:36:49 4 And I think that their reaction to this
10:36:54 5 -- I'm not saying this as a psychologist, I don't
10:36:57 6 mean that -- I'm only talking in commonsense terms
10:36:59 7 now.

10:37:00 8 I think they would have been very
10:37:02 9 frightened by what they were seeing and
10:37:06 10 contemplating that they too, could be removed.
10:37:09 11 After all, they heard that in 1836.

10:37:12 12 THE COURT: Well, this presents a small
10:37:14 13 difficulty for me, because I did not rule on the
10:37:17 14 other objection. But assuming you're moving on, I
10:37:22 15 can leave this answer as it is.

10:37:24 16 MR. BROOKWELL: I am moving on, Your
10:37:25 17 Honour.

10:37:25 18 THE COURT: All right.

10:37:28 19 BY MR. BROOKWELL:

10:37:30 20 Q. So now we're into the 1850s,
10:37:32 21 talking about SON. How would they perceive
10:37:38 22 encroachment on the Peninsula by settlers?

10:37:43 23 A. In a negative way. In a negative
10:37:46 24 way, because as encroachment occurs, they're using
10:37:50 25 and occupying their Band territory. And that's the

10:37:53 1 territory that they need to survive. That's the
10:37:56 2 territory in which they form their identity.

10:37:58 3 That's the territory in which their sacred places
10:38:01 4 are. So they would regard that as a very serious
10:38:04 5 intrusion.

10:38:05 6 Q. And how would they perceive a
10:38:10 7 statement from the Crown that they could not
10:38:12 8 protect them from settlers?

10:38:14 9 A. Well, I think that must have been
10:38:21 10 -- I'm going to use the word "terrifying" again,
10:38:24 11 but, again, in just a commonsense way.

10:38:26 12 I think they would have been terrified
10:38:29 13 by something like that. Now seeing the possibility
10:38:31 14 that they could be overwhelmed, I think that would
10:38:36 15 have been terrifying.

10:38:37 16 Q. I would like to move to a
10:38:42 17 different part of your report now and talk about
10:38:46 18 the Anishinaabe perspective on treaty making, which
10:38:50 19 is at 260 to 272 of your report.

10:39:02 20 So with Mr. Townshend, you've already
10:39:04 21 told us about kinship relations and kinship terms.
10:39:09 22 But I'd like to ask you a more focused question.

10:39:14 23 You reference in your report at
10:39:16 24 page 263 kinship terms in treaty documents. What
10:39:30 25 were these terms?

10:39:31 1 A. The terms are -- the terms that
10:39:34 2 we're using in -- that are being used in the 1850s
10:39:38 3 by the Anishinaabe are Father and Mother, or Great
10:39:41 4 Father and Great Mother, depending upon who is
10:39:45 5 administrator.

10:39:45 6 The Great Mother would be the Crown
10:39:48 7 overseas. The Mother would be -- or the Father, I
10:39:52 8 should say in this case, would be the Governor
10:39:55 9 General or his representatives.

10:39:57 10 Q. And can you tell us whether --
10:40:01 11 sorry, what those terms -- can you tell us what
10:40:04 12 those terms mean here in the treaty context?

10:40:08 13 A. It's as I said before, what they
10:40:12 14 mean in the treaty context is, they anticipate that
10:40:16 15 when they use these terms, they're using them in a
10:40:19 16 way in which they are saying: "We expect you to
10:40:23 17 assist us in matters that are beyond our own
10:40:26 18 understanding or ability to control".

10:40:29 19 Q. I'd like to take you to an article
10:40:34 20 that we marked as an exhibit yesterday, which is
10:40:37 21 Exhibit 4334. It's up on the screen here. And
10:40:45 22 it's by Heidi Stark.

10:40:48 23 Can you tell us who Heidi Stark is?

10:40:51 24 A. Yes, Heidi Stark is a professor of
10:40:54 25 political studies at the University of Victoria.

1 Q. And can you briefly summarize what
2 this article is about?

3 A. The primary thing that I'm taking
4 from this particular article is in the title:
5 "Respect, Responsibility and Renewal". These are
6 the three elements that Stark identifies as running
7 through the treaty-making process. And I certainly
8 agree with that.

9 Treaties from an Anishinaabe point of
10 view are made with mutual respect. Each side has a
11 responsibility and there is a necessity to renew,
12 to keep the agreement going, so there is a renewal
13 of the agreement as well.

14 So these are three elements of
15 Anishinaabe treaty-making that Dr. Stark has
16 identified.

17 Q. What do you mean by "keep the
18 treaty going", I think is what you said?

19 A. Yes. Well, when you're making --
20 when Anishinaabe make a treaty, let's say with
21 other Indigenous people, they renew that treaty,
22 they meet from time to time and they renew the
23 treaty.

24 And which is to say they keep the --
25 they say, yes, we're going to continue to abide by

10:42:12 1 the terms of this agreement. Or it may be there is
10:42:15 2 no renewal and then the agreement would come to an
10:42:18 3 end. But these are the three elements that are
10:42:21 4 always involved. So the renewal is important.

10:42:23 5 If you think about the presents that
10:42:28 6 the Anishinaabe were asking for after the Battle of
10:42:30 7 the Plains of Abraham, after the Seven Years' War,
10:42:33 8 what they were asking for there in the presents is
10:42:37 9 renewal. We want to renew the relationship.

10:42:39 10 Or in the case of the British, they
10:42:41 11 want to establish it, and then they're going to
10:42:43 12 renew it every year as presents are distributed.
10:42:47 13 That's what presents were from an Anishinaabe point
10:42:51 14 of view.

10:42:51 15 Of course, they were important in a
10:42:52 16 practical way, but they also had a symbolic value.
10:42:56 17 And that's that they were a renewal of the
10:42:58 18 relationship between the Anishinaabe and the
10:43:00 19 newcomers.

10:43:02 20 Q. I'd like to turn to another
10:43:04 21 footnote in your document, in your report, it's
10:43:09 22 footnote 590. And that's Exhibit 4335, if we can
10:43:17 23 put that up on the screen.

10:43:24 24 And can you just briefly remind us who
10:43:27 25 Helen Tanner is?

10:43:29 1 A. Helen Tanner was an ethnologist
10:43:32 2 and ethnohistorian who was at the Newberry Library
10:43:35 3 in Chicago for many years. The Newberry Library is
10:43:39 4 a mecca for doing research on Indigenous people,
10:43:43 5 especially Anishinaabe people in my case.

10:43:46 6 Q. And if we go to page 161 in the
10:43:50 7 atlas, please. Which is I believe page 11 of the
10:43:58 8 -- if we can zoom in on the highlighted paragraph.
10:44:03 9 And can you comment on this paragraph?

10:44:07 10 A. Well she's talking about Treaty
10:44:10 11 Councils here, and she's talking about them in the
10:44:13 12 Anishinaabe world. And that's why she has here "in
10:44:18 13 Canada and in the U.S."

10:44:19 14 What she's talking about is the Treaty
10:44:23 15 Council that takes place with Anishinaabe because
10:44:26 16 Anishinaabe have their own protocol for making
10:44:29 17 treaties. They had their own protocol for making
10:44:32 18 treaties before Europeans ever arrived.

10:44:34 19 When the Europeans did arrive, both
10:44:36 20 sides made accommodations to one another, but they
10:44:38 21 were largely in favor of the Indigenous people
10:44:42 22 because they were largely in control of things.

10:44:44 23 And the Treaty Council reflected what
10:44:48 24 was important to them as protocol to make a proper
10:44:51 25 treaty.

10:44:51 1 Q. Can you tell us in a broad general
10:45:05 2 sense, what are the phases for Anishinaabe
10:45:09 3 treaty-making?

10:45:10 4 A. In a broad sense, there's three.
10:45:12 5 The first one is an invitation. Somebody has to
10:45:15 6 initiate the process. So that could either be the
10:45:19 7 Anishinaabe, or it could be the Crown, let's say in
10:45:22 8 Canada, or the corresponding entity in the United
10:45:26 9 States. But somebody is going to ask to make a
10:45:29 10 treaty, one side or the other.

10:45:30 11 And then the answer is going to be
10:45:32 12 "yes" or "no". Now if it's yes, then the second
10:45:36 13 stage takes place, and the second stage is a stage
10:45:40 14 that I've talked about already. It's a stage of
10:45:43 15 deliberation.

10:45:44 16 I explained yesterday how you have the
10:45:46 17 extended families, each with a principal man. And
10:45:49 18 how when something comes up, an issue comes up that
10:45:53 19 the Band must deal with, a treaty is one of those
10:45:57 20 things.

10:45:57 21 So the discussion about -- once you
10:46:01 22 decide to accept the invitation or you've issued it
10:46:03 23 and the other side has accepted it, the next stage
10:46:06 24 is to determine what is -- what's appropriate in
10:46:11 25 each family.

10:46:11 1 So each family may discuss the
10:46:14 2 possibilities: Do they want annuities; do they
10:46:16 3 want reserves; do they want hunting and fishing
10:46:19 4 rights; do they want access to any special
10:46:21 5 resources? Things like that.

10:46:23 6 Then those families will get together
10:46:26 7 and they will have a discussion. The Chief will
10:46:29 8 grasp the consensus, and then once that is done, if
10:46:35 9 they decide to proceed along those lines, it may
10:46:38 10 have be that the principal men, when they get
10:46:41 11 together, they decide they are not going to
10:46:44 12 proceed. That means the process would be
10:46:48 13 truncated.

10:46:48 14 But if the consensus is we should
10:46:51 15 proceed along these lines, then the next step would
10:46:54 16 be to have the Treaty Council. So that these are
10:46:56 17 the three main steps. The invitation, the
10:46:59 18 deliberation, and the Treaty Council.

10:47:09 19 Q. I'd like your help with some
10:47:09 20 terminology in your report. You've used the word
10:47:10 21 "ratification", and can you clarify for us what you
10:47:14 22 mean when you say "ratification"?

10:47:16 23 A. Excuse me. I don't mean this in a
10:47:20 24 legal sense. I mean this in the sense that an
10:47:25 25 anthropologist would use it and the way I'm using

10:47:27 1 it is this way.

10:47:28 2 What I mean by ratification is that
10:47:30 3 when a Band decides what they want to do when a
10:47:34 4 consensus has been reached, and they decide this is
10:47:38 5 the approach we want to take. Then, from my point
10:47:41 6 of view as a anthropologist, I say they've ratified
10:47:44 7 the treaty.

10:47:45 8 So they've determined the terms, that's
10:47:49 9 what I regard as "ratification". So they've set
10:47:53 10 the terms down. The Chief now knows what the
10:47:57 11 agreement should be. So I regard it as they've
10:48:00 12 ratified their own agreement; this is the proposal
10:48:03 13 that they're going forward with. That's how I see
10:48:05 14 ratification. That's the internal process in the
10:48:08 15 Band.

10:48:08 16 Q. And you've talked about coming to
10:48:14 17 a consensus as a community. What does that mean in
10:48:22 18 the Anishinaabe perspective?

10:48:24 19 A. Some people mistakenly believe
10:48:28 20 that everybody in the community agrees in a
10:48:30 21 consensus; that's not so.

10:48:32 22 Here the -- I wouldn't say it's
10:48:37 23 measurable, because there's a number of subtle
10:48:39 24 features involved. It's not like a vote yes or no
10:48:41 25 and you can count them up. This is more subtle

10:48:44 1 than that.

10:48:45 2 And it's up to the Chief, who has the
10:48:47 3 experience to read the will of the people. So it's
10:48:49 4 a subtle thing, but a real thing nonetheless.

10:48:52 5 That's what the Chief does in order to
10:48:55 6 proceed. So the Chief, the Chief recognizes the
10:49:04 7 consensus with the knowledge that not everybody is
10:49:11 8 going to agree.

10:49:11 9 But not everybody has to agree in such
10:49:11 10 a system. All those who disagree have to do is not
10:49:15 11 raise problems anymore. And when they have a
10:49:19 12 consensus they don't, generally speaking.

10:49:21 13 Q. And what then -- I just want to
10:49:41 14 pause for a moment. I've been directed to an
10:49:44 15 administrative issue.

10:49:47 16 I think we put up on the screen a copy
10:49:54 17 of Tanner's Atlas but there's one copy that is a
10:50:01 18 already a secondary source that was marked and a
10:50:04 19 similarly excerpted copy that is up on the screen.
10:50:08 20 The only difference is that the pages excerpted are
10:50:12 21 slightly different. But maybe we can just bring up
10:50:17 22 Exhibit 4335?

10:50:18 23 THE COURT: Just pausing before you do
10:50:20 24 that.

10:50:20 25 MR. BROOKWELL: Okay.

1 THE COURT: If the administrative issue
2 is that there are two different excerpts from this
3 source and you're looking at only one of them, from
4 my standpoint, all you need to do is put the other
5 exhibit number on the record so that in this
6 portion of the testimony it's apparent that there
7 is another exhibit excerpt from the same source.

8 MR. BROOKWELL: Okay.

9 THE COURT: If what you're trying to do
10 is get at something that isn't in this exhibit,
11 then that's a different matter.

12 MR. BROOKWELL: No, they're both in
13 each excerpt.

14 THE COURT: So just put it on the
15 record.

16 MR. BROOKWELL: We'd have to make the
17 one we had shown Dr. Driben, which is SCO 942, to
18 turn that into the next exhibit.

19 THE COURT: Now I've misunderstood you.
20 The same excerpt exists in a document
21 that's already been marked?

22 MR. BROOKWELL: Yes.

23 THE COURT: You identified it by the
24 page in the source. So I just think you need to
25 put on the record the exhibit number that already

10:51:19 1 exists.

10:51:20 2 MR. BROOKWELL: Okay.

10:51:22 3 THE COURT: You don't need to mark it
10:51:24 4 twice if that's what we're talking about.

10:51:26 5 MR. BROOKWELL: Yes, it would end up in
10:51:28 6 the same result of marking it twice.

10:51:30 7 THE COURT: What is the preexisting
10:51:33 8 exhibit number for this document? I had it down as
10:51:36 9 4335 from yesterday. What is the other number?

10:51:39 10 MR. BROOKWELL: The other number is not
10:51:41 11 an exhibit. It is just a document we had put up on
10:51:43 12 the screen.

10:51:44 13 THE COURT: I see. As long as it's in
10:51:46 14 4335, I think we're okay.

10:51:49 15 MR. BROOKWELL: It is.

10:51:50 16 THE COURT: Okay.

10:51:51 17 BY MR. BROOKWELL:

10:51:51 18 Q. Sorry, Professor Driben. I'd like
10:51:53 19 to return to what you were talking about. The
10:51:57 20 Chief has now spoken to the community. Can you
10:51:59 21 tell us what sort of instructions would the Chief
10:52:02 22 leave with from such a meeting?

10:52:04 23 A. The Chief would leave with
10:52:08 24 instructions of the important things that the
10:52:12 25 members of the Band want.

1 Now, you have to understand that Band
2 members here and Band members elsewhere are going
3 to understand the treaty-making process because
4 that's been going on since 1795.

5 They understand from other treaties,
6 let's say 1850, which is the North Shore of Lake
7 Huron, which was right by them. They knew there's
8 annuities, they know there's reserves, they know
9 there's rights to use the natural resources
10 harvest. So these would be some of the things they
11 would be discussing.

12 But there also might be local things
13 that they might be interested in as well. But they
14 would go with -- they would go with general ideas
15 about what was wanted. General ideas about what
16 was wanted.

17 Q. What would it mean from the
18 Anishinaabe perspective if this process was not
19 followed?

20 A. Excuse me, do you mean if the
21 three-step process were not followed?

22 Q. Yes.

23 A. It wouldn't be a legitimate
24 agreement. These are the procedures that make the
25 agreement legitimate from an Anishinaabe point of

1 view. So if you don't engage in these procedures,
2 if you don't follow this protocol, they don't
3 regard the agreement as a valid one.

4 Q. How do you know about this process
5 in decision making?

6 A. Because I've studied it for
7 30 years, more than 30 years. And I've not only
8 studied treaties with Indigenous people, but
9 international treaties as well to better inform
10 myself about the nature of the treaty-making
11 process.

12 I've looked at many different treaties
13 in a very serious way in both Canada and the United
14 States, and so I guess it's -- the basic answer is
15 experience. Experience.

16 Q. Can you now take us to the phase
17 that you said is the Treaty Council, and tell us in
18 just a high-level overview what those -- what that
19 would look like?

20 A. The Treaty Council would be a
21 celebratory period. It would be, there would be a
22 lot of fanfare. The way it would open up -- it
23 opens up with speeches.

24 Typically, in these speeches what
25 happens is that the Anishinaabe, if we're talking

10:54:44 1 about Anishinaabe, the Anishinaabe would recount
10:54:45 2 the friendship that they've had with the Crown.
10:54:49 3 How over many years they've had a relationship with
10:54:52 4 the Crown and how they admire the Crown, and how
10:54:55 5 they've done well by the Crown.

10:54:57 6 Then there could be -- the treaty
10:54:59 7 commissioner would then say, well, look. Thank
10:55:02 8 you, you know, we appreciate all of that and here
10:55:05 9 is the proposal we want to make.

10:55:07 10 And then once the proposal is made,
10:55:10 11 they would separate for a day, two days, three days
10:55:13 12 depending upon the circumstances, so that the
10:55:15 13 Chiefs and -- so that the Chiefs, because there's
10:55:19 14 going to be more than one Band there typically, the
10:55:21 15 Chiefs and principal men could assess what the
10:55:25 16 commissioner had to offer.

10:55:26 17 After that, they get together again,
10:55:29 18 and they may want to discuss it in a certain order
10:55:32 19 and the discussion takes place and there will be
10:55:35 20 breaks every once in a while.

10:55:37 21 The Anishinaabe may ask for breaks
10:55:38 22 because they want to discuss one point or another
10:55:41 23 point, get information from their advisors. They
10:55:43 24 come with translators typically, they come with fur
10:55:47 25 traders who assist them not only as translators but

10:55:50 1 they're kin to them, to advise them, there could be
10:55:53 2 others there.

10:55:54 3 So they consult with those people and
10:55:55 4 they get together again and then they work out the
10:55:57 5 fine details.

10:55:58 6 And then there's a ceremony at the end
10:56:01 7 and that's called "touching of the pen", where they
10:56:06 8 literally touch the pen. And then there's another
10:56:09 9 celebration where they distribute the annuities.

10:56:11 10 All of this is a ritual activity. It's
10:56:15 11 a ritual that lends authenticity, social
10:56:20 12 authenticity to the process itself. So that it's
10:56:24 13 all of these activities are being undertaken, they
10:56:28 14 know and the Europeans too know this, that they're
10:56:31 15 following a procedure that they have developed over
10:56:33 16 time, over decades and that this agreement will now
10:56:38 17 be a good agreement, a valid agreement from both
10:56:41 18 points of view.

10:56:42 19 Q. And before I probe a little more
10:56:49 20 into that process, I'd like your help with another
10:56:53 21 term. What is it that you mean by "implementation"?

10:56:57 22 A. What I mean by "implementation" is
10:57:00 23 that they touch the pen. From the point of view of
10:57:03 24 the Anishinaabe, that's when the treaty takes
10:57:05 25 force. When the Chiefs and principal men touch the

1 pen, they may make the mark of their clan, often
2 they do, on the treaty document, that's the
3 implementation from their point of view because now
4 the treaty takes effect. So they're bound by the
5 terms of the treaty from that point on.

6 Q. In your overview you mentioned
7 adjournments. What role does an adjournment serve?

8 A. This allows the Anishinaabe --
9 I'll speak about it only from an Anishinaabe point
10 of view.

11 This allows the Anishinaabe to discuss
12 the offer that's being made by the treaty
13 commissioner to see whether it comports with their
14 instructions from the Band that they've left with.

15 Is there a goodness of fit between what
16 the treaty commissioner says and what they have
17 decided that they want?

18 So the treaty commissioner makes his
19 first statement, but then they have to analyze
20 that, so there has to be a break for them. And
21 then they take the break and they discuss the ins
22 and outs, the particulars of the agreement if you
23 will. And then they're ready to meet again.

24 Q. So at a Treaty Council, what does
25 "consensus" mean to the Anishinaabe?

10:58:27 1 A. Well, each Band, each Band
10:58:33 2 operates on its own when there's a Treaty Council
10:58:36 3 if you have a multi-Band Treaty Council. So
10:58:40 4 consensus has already been achieved in the Band;
10:58:42 5 they know what they want.

10:58:44 6 In any particular treaty, if you have a
10:58:46 7 multi-Band treaty, you may find that one does not
10:58:51 8 sign. You don't find it very often, but I have
10:58:55 9 come across a case like that.

10:58:57 10 So the consensus is inside the Band.
10:59:00 11 There will be -- you don't need a consensus of all
10:59:06 12 the Chiefs to do that because each Band is
10:59:07 13 responsible for its own territory. Each Band is
10:59:10 14 responsible for its own endeavors. So when they
10:59:13 15 participate in the treaty they participate as a
10:59:16 16 Band, not as part of a nation.

10:59:18 17 So you need not have consensus. All
10:59:21 18 you need is the bands participating. If they do
10:59:26 19 all agree to it, then you know obviously they have
10:59:28 20 some sort of consensus on going ahead, for whatever
10:59:31 21 reason that might be.

10:59:32 22 Q. So what sources -- you mentioned
11:00:00 23 your own experience. But what sources, if any, do
11:00:04 24 you rely on to inform your opinion about
11:00:11 25 treaty-making protocol?

11:00:12 1 A. Well, Charles Cleland has a great
11:00:16 2 section in "Faith in Paper" where he discusses the
11:00:19 3 stages of the Treaty Council. He doesn't discuss
11:00:22 4 the three stages that I've talked about; he doesn't
11:00:24 5 discuss the first two. But he has an excellent
11:00:26 6 discussion of what's going on at the Treaty
11:00:29 7 Council, and I've included that in my report here.

11:00:32 8 Cleland, it's Cleland's scheme of the
11:00:37 9 Treaty Council and it's just an analytical way of
11:00:41 10 looking at what happens in a Treaty Council.

11:00:44 11 Q. I'd like to take you to Exhibit
11:00:53 12 G-1 which is Dr. Reimer's report, Volume 3. And to
11:01:02 13 go to page 99 and 200, it overlaps on the two
11:01:09 14 pages. If we can scroll there.

11:01:19 15 Here, Dr. Reimer makes the critique of
11:01:21 16 your expert opinion, but there's two points I have
11:01:27 17 a question for you about.

11:01:30 18 The first is, she suggests that
11:01:35 19 Cleland's work applies primarily to the United
11:01:38 20 States. And may I have your comment on that before
11:01:45 21 we move to the second point?

11:01:47 22 A. Yes, well, that's not what Charles
11:01:55 23 Cleland has in mind. People who study the
11:01:57 24 Anishinaabe like Charles Cleland, Charles Bishop,
11:02:00 25 myself, Ed Rogers, Mary Black, we're interested in

11:02:04 1 Anishinaabe wherever they live. The international
11:02:07 2 boundary is no barrier to them. There's
11:02:10 3 Anishinaabe, it happens on both sides of the
11:02:12 4 international boundary.

11:02:14 5 But that's not a cultural barrier and
11:02:17 6 it's certainly not a barrier in understanding the
11:02:20 7 treaty-making process because this is a
11:02:22 8 treaty-making era, I should say, in Anishinaabe
11:02:25 9 culture history.

11:02:27 10 We've already seen the earlier passage
11:02:29 11 from Tanner and she's talking about Canada and the
11:02:32 12 United States, and more people involved in the
11:02:34 13 treaty-making process there.

11:02:36 14 But the same, the same is going on.
11:02:39 15 This is the Anishinaabe world we are looking at.
11:02:41 16 We're not looking -- those who study are not
11:02:45 17 studying in Canada or the United States. Because
11:02:47 18 if we did that, then we would exclude thousands of
11:02:50 19 people and information we would never be aware of
11:02:56 20 in order to better inform our opinion.

11:02:58 21 So that it's important that we look at
11:03:00 22 Anishinaabe on both sides of the international
11:03:03 23 boundary, and that's not an impediment. That's an
11:03:06 24 advantage doing that.

11:03:09 25 Q. The second point that I'd like

11:03:11 1 your comment on is she says that "Cleland's
11:03:16 2 protocols are not equivalent to the Royal
11:03:20 3 Proclamation".

11:03:23 4 Would you care to comment on that
11:03:24 5 point?

11:03:24 6 A. That's true. They're not the
11:03:27 7 equivalent of the Royal Proclamation. But I
11:03:29 8 haven't been asked to comment on the Royal
11:03:32 9 Proclamation.

11:03:32 10 I have been asked as an ethnohistorian
11:03:36 11 to comment on the Anishinaabe understanding of the
11:03:38 12 treaty-making process, not on the British
11:03:40 13 understanding of the treaty-making process.

11:03:42 14 So as thorough as an analysis of the
11:03:46 15 Royal Proclamation of the Dorchester regulations
11:03:50 16 may be, I ask myself what is it that the
11:03:53 17 Anishinaabe think is important. Is it the Royal
11:03:56 18 Proclamation?

11:03:56 19 I say to myself, no, it is not the
11:03:58 20 Royal Proclamation. It's these very protocols that
11:04:08 21 ethnologists and ethnohistorians have identified
11:04:08 22 over the decades and we have seen played out in
11:04:08 23 treaty-making in both Canada and the United States.
11:04:09 24 That's what's important from an Anishinaabe point
11:04:11 25 of view.

1 Because if we want to understand
2 whether the treaty, or any treaty is valid from an
3 Anishinaabe point of view, we can't look to
4 protocols of another culture. We must look at
5 protocols in their culture.

6 Q. I'd like to take you now to part
7 of your report where you address Treaty 72, pages
8 274 to 283.

9 One of the sources that you cite is a
10 memoir by Oliphant.

11 Can you tell us about how you use this
12 source as an anthropologist?

13 A. There are several reports by
14 Mr. Oliphant on the procedure, his description of
15 what happened. There's his book on Minnesota, his
16 subsequent description of it in another volume, and
17 there is a biographer that wrote about this as
18 well. I think it was his niece that wrote that
19 book.

20 Then there's his official report to the
21 Governor General as well. So we have different
22 accounts by the same person. And what I'm looking
23 for when I'm looking at those documents is the
24 common thread. Is there any common thread in those
25 documents?

11:05:34 1 If I find something in his official
11:05:37 2 report and I find something in those other
11:05:39 3 documents that leads me to believe that what he
11:05:41 4 said in the official report is correct, or if I
11:05:45 5 have a goodness of fit with all of them, they all
11:05:48 6 are telling the same story -- in general terms --
11:05:51 7 I'm not looking for exact replications because a
11:05:56 8 memoir is going to be different than a report to
11:05:59 9 the Governor General.

11:06:04 10 What I'm looking for, are there things
11:06:06 11 in one document that appear in another document
11:06:08 12 perhaps in a different form?

11:06:09 13 In one document, let's say for
11:06:11 14 instance, we have an indication that there was
11:06:13 15 conflict. In another document that may be blown
11:06:15 16 up, in the case of Oliphant's, that's blown up in
11:06:18 17 terms of hyperbole so that it is fistfight.

11:06:22 18 I don't believe that there was a
11:06:25 19 fistfight, but what I do believe is that there was
11:06:29 20 conflict. Because we can see it in that example,
11:06:29 21 and if we look at other examples, we can see
11:06:31 22 elements of that as well. And Oliphant produces
11:06:34 23 that in his report to the Governor General.

11:06:38 24 So I'm looking for the common thread in
11:06:40 25 these documents. I want to be cautious of

11:06:43 1 outliers. Things that are unusual.

11:06:45 2 For instance, the fistfight that he
11:06:48 3 reports, I don't have faith in that. But what I do
11:06:50 4 have faith in is the conflict that exists because I
11:06:53 5 see that reported over and over again. The
11:06:55 6 fistfight once.

11:06:56 7 So I don't think you can regard that as
11:06:59 8 reliable. But the underlying message is -- that's
11:07:02 9 what I'm looking for. The consistency in those
11:07:04 10 reports.

11:07:05 11 Q. Now you've mentioned his official
11:07:07 12 report. I'd like to put that up on the screen if
11:07:11 13 we could. Exhibit 2175.

11:07:21 14 Can you tell us to what extent the
11:07:24 15 events described in this report conform with the
11:07:28 16 Anishinaabe treaty-making protocols you've set out
11:07:32 17 for us?

11:07:33 18 A. You don't. They don't conform at
11:07:36 19 all. There's way too many -- way too many
11:07:40 20 exceptions from the very beginning. There's not
11:07:42 21 even an invitation.

11:07:44 22 Q. And can you expand on that a
11:07:51 23 little further?

11:07:52 24 A. Well, in order to have -- in order
11:07:54 25 to follow the procedure, you must -- I said,

11:07:57 1 there's three stages. And when you look at what
11:08:00 2 actually happened in the case of Treaty 72, you see
11:08:03 3 that these three stages didn't take place at all.

11:08:06 4 First of all, Oliphant arrived there,
11:08:08 5 and it was clearly a surprise to the people who
11:08:11 6 were there because he had to assemble them.

11:08:13 7 So he sent out for the Saugeen, who
11:08:16 8 were fishing. He sent a message back to Owen Sound
11:08:19 9 to have the people come there, and then they came
11:08:22 10 there.

11:08:23 11 So there was no invitation, because if
11:08:27 12 you had issued an invitation, then the bands would
11:08:30 13 have had time to deliberate on the invitation and
11:08:33 14 decide whether they want to proceed or not.

11:08:36 15 But that didn't happen here. They just
11:08:38 16 started it. He just had it. And there was no time
11:08:41 17 for deliberation at all. Because he arrived, the
11:08:45 18 next day the treaty process started and he wouldn't
11:08:48 19 allow the people from the two communities to talk
11:08:51 20 to each other about the procedure.

11:08:54 21 Not only that, he wouldn't let them
11:08:56 22 speak to their advisors. Oliphant kept them
11:08:59 23 separate.

11:08:59 24 So he stopped the process of the Chiefs
11:09:04 25 and -- of the Chiefs and principal men talking to

11:09:07 1 themselves during the process itself. There was
11:09:10 2 not enough time to do anything like that.

11:09:13 3 There was no celebration. There was no
11:09:16 4 -- he describes smoke, that's important. Because
11:09:20 5 you have to have the spirits there; I understand
11:09:23 6 that.

11:09:23 7 But this wasn't -- this was not a
11:09:25 8 process that I have ever seen in any treaty, any
11:09:29 9 treaty with Anishinaabe. It's never rushed like
11:09:31 10 this. There must be time for deliberation.

11:09:34 11 So I don't believe that this particular
11:09:36 12 treaty followed that protocol at all.

11:09:38 13 Q. So in that context, and this is
11:09:49 14 strictly the Anishinaabe perspective, why or under
11:10:09 15 what authority could a leader sign a treaty?

11:10:17 16 MR. BEGGS: Your Honour, sorry to jump
11:10:20 17 out of line. I don't see the relevance of this
11:10:22 18 line of questioning, seeing as Plaintiffs are not
11:10:24 19 challenging the legal validity of the treaty.

11:10:27 20 THE COURT: Yes, I was wondering about
11:10:28 21 that.

11:10:29 22 MR. BEGGS: The expert has now said it
11:10:30 23 would not be valid if it was not complied with. I
11:10:34 24 don't see how this evidence goes to any matter in
11:10:37 25 issue.

11:10:38 1 THE COURT: Mr. Brookwell?

11:10:41 2 MR. BROOKWELL: The evidence that we're
11:10:44 3 trying to elicit has to do with further
11:10:48 4 understanding of what happens if the protocol is
11:10:51 5 not followed, to simply understand from the
11:10:54 6 Anishinaabe perspective, what authority a Chief may
11:11:02 7 have acted upon.

11:11:03 8 But I take my friend's comments about
11:11:06 9 challenging the validity. This isn't evidence to
11:11:12 10 address validity, but simply to understand the
11:11:14 11 context of the treaty-making process from the
11:11:20 12 Anishinaabe perspective and using this as --

11:11:22 13 THE COURT: How is it any different
11:11:24 14 from the general process that he's now described
11:11:27 15 this morning at some length in answer to your
11:11:30 16 general questions if it isn't intended to drill
11:11:33 17 down to this particular treaty?

11:11:35 18 You've just taken us through a helpful
11:11:38 19 discussion of what he regards as the protocol and
11:11:41 20 the impact of the protocol, including the effect of
11:11:47 21 what instructions are given and so forth as a
11:11:51 22 general matter.

11:11:53 23 MR. BROOKWELL: Yes, the question as a
11:11:54 24 general matter is when would --

11:12:00 25 THE COURT: So this question was not as

1 a general matter. This question was specifically
2 as regards to this treaty, Counsel?

3 MR. BROOKWELL: Yes, that's correct.
4 And I see the difficulty of that.

5 What I am trying to get at is a general
6 proposition trying to use --

7 THE COURT: Different from what I've
8 already heard?

9 MR. BROOKWELL: Yes, on one issue, and
10 simply is there a circumstance -- well, what
11 circumstance would a Chief not follow the protocol?

12 THE COURT: Well, that's different and
13 perhaps an unobjectionable question.

14 Mr. Beggs, would you object to that
15 question?

16 MR. BEGGS: No, Your Honour.

17 THE COURT: Perhaps we could restate
18 that question for the witness then and move
19 forward.

20 MR. BROOKWELL: Okay.

21 BY MR. BROOKWELL:

22 Q. So this is in a general sense,
23 Dr. Driben, and it is what circumstance, if any,
24 would there be for a Chief to act without following
25 the protocol that you've discussed?

11:13:02 1 A. That would be rare because the
11:13:04 2 Chief, remember, is the spokesperson for the
11:13:07 3 consensus. But occasionally, and I've seen this in
11:13:10 4 my own research, is that occasionally something
11:13:13 5 comes up at a Treaty Council that there are not --
11:13:19 6 that there had been instructions to move one way or
11:13:23 7 another, but that the circumstances are
11:13:27 8 extraordinary.

11:13:27 9 So I would say in response to your
11:13:29 10 question, that a Chief would act on his own under
11:13:34 11 extraordinary circumstances only.

11:13:36 12 Q. Can you tell us what an
11:13:45 13 extraordinary circumstance might be?

11:13:47 14 A. Well, in the case of Treaty 72, I
11:13:52 15 can answer that question.

11:13:53 16 Q. Just generally.

11:13:54 17 A. Well, I have specific instances in
11:14:02 18 mind. I don't think I can answer the question in a
11:14:06 19 general way, because it typically doesn't happen.
11:14:09 20 These extraordinary circumstances are unique to the
11:14:12 21 case. So I can --

11:14:13 22 THE COURT: Mr. Beggs has not risen so
11:14:15 23 I think the witness can give the example he wishes
11:14:18 24 to give.

11:14:20 25 Please go ahead, sir.

11:14:21 1 THE WITNESS: Thank you, Your Honour.

11:14:22 2 I'm thinking of the Robinson-Huron

11:14:27 3 Treaty, the instructions -- or the Robinson

11:14:30 4 Superior Treaty, pardon me.

11:14:31 5 The instructions were to receive an

11:14:32 6 annuity, but when the Treaty Council took place,

11:14:37 7 what the treaty commissioner offered was an

11:14:41 8 escalator to the annuity. Now, that was different

11:14:44 9 from what they came with in mind.

11:14:46 10 Because they came with in mind that

11:14:50 11 they were going to get an annuity of some sort.

11:14:52 12 Now this new proposal had been made and the

11:14:54 13 proposal was the annuity would be geared toward the

11:14:57 14 resource revenue in the territory. So that's

11:14:59 15 something a little bit different.

11:15:01 16 That's something they have to think

11:15:02 17 about. That's something they have to think about

11:15:04 18 when that's -- because now it's not exactly what

11:15:08 19 they've been instructed to do, so they can act on

11:15:11 20 their own and in this case they did act on their

11:15:14 21 own.

11:15:15 22 MR. FELICIAN: Your Honour, I would

11:15:16 23 just point out that this particular line of

11:15:18 24 evidence was the subject of a very complicated

11:15:21 25 trial that recently ended and is now the subject of

11:15:24 1 an appeal.

11:15:25 2 So I just note that in case you intend
11:15:28 3 to make any findings of fact with respect to --

11:15:30 4 THE COURT: Are you talking about the
11:15:31 5 Robinson treaty?

11:15:33 6 MR. FELICIANANT: Yes, yes.

11:15:34 7 THE COURT: Well, I don't propose to
11:15:37 8 look beyond the evidentiary record in this trial
11:15:42 9 before me to deal with what is at issue in this
11:15:45 10 trial.

11:15:45 11 MR. FELICIANANT: Thank you, Your Honour.

11:15:46 12 THE COURT: However that relates to
11:15:48 13 another matter, note it would have to be sorted out
11:15:55 14 at some other juncture.

11:15:57 15 This gentleman is testifying about in
11:16:00 16 his opinion what transpired back then. Please go
11:16:04 17 ahead.

11:16:05 18 BY MR. BROOKWELL:

11:16:05 19 Q. And I think I led you off track
11:16:13 20 when I interrupted your other example into -- you
11:16:17 21 were going to discuss Treaty 72 as an example. If
11:16:21 22 you care to use that, please go ahead.

11:16:26 23 A. Well, that's another case here,
11:16:29 24 because what Mr. Oliphant did is, he told the
11:16:38 25 Anishinaabe, at least they heard him say: "If you

11:16:44 1 don't agree to this, you will be overrun and wiped
11:16:47 2 out. And there's nothing we're going to do to help
11:16:51 3 you -- there's nothing we can do to help you".

11:16:54 4 Under those circumstances when the
11:16:55 5 Chiefs hear that -- we know, or at least I know as
11:16:59 6 an ethnologist, at least in my opinion as an
11:17:02 7 ethnologist, that they came there and there was no
11:17:05 8 consensus about what to proceed.

11:17:07 9 But then when they were there, in that
11:17:10 10 brief period of time, without deliberation, without
11:17:12 11 allowing people to speak, and then hearing if you
11:17:15 12 do not agree to this now, you will be obliterated.
11:17:21 13 You will be wiped out. You will be overrun.

11:17:24 14 So under those circumstances, yes, then
11:17:27 15 the Chief would act on his own. That's what I
11:17:30 16 meant before by extraordinary circumstances. The
11:17:33 17 circumstances really have to be different from what
11:17:36 18 you see in many treaties -- many treaties that are
11:17:39 19 being made at this time both in Canada and the
11:17:43 20 U.S., following this protocol.

11:17:44 21 Q. I'd like to take you to a comment
11:17:52 22 -- sorry, a report by Dr. McHugh, who is an expert
11:17:57 23 for Canada who will give evidence later in this
11:17:59 24 trial. And if we could bring up document SC1240.

11:18:14 25 MR. BROOKWELL: And, Your Honour, our

1 practice has been to mark this as a lettered
2 exhibit in order to ask the witness a question.
3 I'd like to do the same today.

4 THE COURT: Mr. Registrar, what is the
5 next lettered exhibit?

6 THE REGISTRAR: W-2, Your Honour.

7 THE COURT: Thank you. Please go
8 ahead.

9 EXHIBIT NO. W-2: Expert Report by
10 Dr. McHugh.

11 BY MR. BROOKWELL:

12 Q. If we could turn to page 46 of the
13 report. There's a highlighted paragraph here,
14 paragraph 3.71, where Dr. McHugh sets out that:

15 "Access to the fishery was a
16 prime motivation for the Saugeen in
17 entering into Treaty 45½, and a
18 promise to protect the Peninsula in
19 terms of possession guaranteed
20 forever was not what they would have
21 been thinking about."

22 And he does this in reference to a
23 statement made by Metigwob. Can you comment on
24 this point?

25 A. I think Dr. McHugh is mistaken in

1 his assessment of what the Anishinaabe wanted.

2 From an ethnohistorical point of view I would say
3 of course they wanted access to the fishery. But
4 did they want a permanent home? Absolutely they
5 wanted a permanent home.

6 They didn't want to have to revisit
7 this issue over and over and over again until
8 they're left with nothing.

9 So that it's important not to just get
10 the fishery but to get your homeland, to achieve
11 the goal of establishing a homeland that's going to
12 be there forever. You've been there forever and
13 you want to remain there forever.

14 Sure, fishing is important. I'm not
15 going to disagree with Dr. McHugh on that ground
16 but he's really ignoring here -- or let me say it a
17 different way.

18 I don't think Dr. McHugh has taken into
19 account the close relationship between Anishinaabe
20 and the land that is critical in understanding what
21 they were trying to achieve in 1836, in 1854, in
22 all of the treaties that they've negotiated.

23 They're trying over and over and over
24 again to maintain themselves on the land that is
25 their place.

11:20:48 1 Q. And to what extent to, this is
11:20:51 2 from the Anishinaabe perspective, to what extent
11:20:55 3 would they expect promises made in a treaty with
11:20:58 4 the Crown to be kept?

11:21:02 5 A. Well, that would be the -- I'm
11:21:04 6 sorry?

11:21:05 7 Q. To what extent would they expect
11:21:10 8 promises made in a treaty to be kept?

11:21:12 9 A. Well, they would expect those to
11:21:14 10 be kept absolutely. Because you're making an
11:21:18 11 agreement with the Crown now, and the Crown as your
11:21:21 12 father, or your mother, they've said that they made
11:21:24 13 this promise to you, and those terms are not
11:21:27 14 meaningless terms to them. They're not catch
11:21:30 15 phrases.

11:21:30 16 They are talking about a relationship.
11:21:32 17 And in this relationship they expect the Crown to
11:21:35 18 abide by those promises, just as your father would
11:21:38 19 abide by them.

11:21:39 20 THE COURT: Mr. Beggs.

11:21:40 21 MR. BEGGS: Your Honour, sorry I'm late
11:21:42 22 in standing but this quote from Professor McHugh
11:21:48 23 simply doesn't say that, that promises were not
11:21:51 24 expected to be kept. And in that case I don't know
11:21:55 25 on what grounds this is being examined, when it

1 wasn't in Professor Driben's report.

2 THE COURT: Are you saying there's
3 nothing in this gentleman's long report that says
4 his opinion about whether the Anishinaabe would
5 expect Crown promises to be kept?

6 MR. BEGGS: I'm not aware that there
7 is. But I could be corrected.

8 THE COURT: Okay. Mr. Brookwell, can
9 you help me with that?

10 MR. BROOKWELL: Yes. If we could just
11 have a moment.

12 THE COURT: Please, go ahead.

13 In fact bearing in mind the time, why
14 don't we just take the morning break and I'll hear
15 from you afterward.

16 MR. BROOKWELL: Okay, thank you.

17 -- RECESS TAKEN AT 11:23 --

18 -- UPON RESUMING AT 11:48 --

19 MR. BROOKWELL: Your Honour, before the
20 break there was a question about where in
21 Dr. Driben's report it discusses treaty promises.

22 At page 263 of his report, the sentence
23 beginning on the 7th line down, and it reads:

24 "From an Anishinaabe
25 perspective" -- sorry -- "from an

11:49:11 1 Anishinaabe point of view, treaties
11:49:14 2 consequently established
11:49:16 3 relationships that were both
11:49:17 4 personal and contractual, and in
11:49:19 5 which it was the responsibility of
11:49:21 6 the participants to maintain the
11:49:25 7 integrity of their relationship by,
11:49:27 8 'adhering to the principles of
11:49:30 9 respect, responsibility and renewal'
11:49:32 10 that governed their rights and
11:49:34 11 responsibilities."
11:49:34 12 He also discusses the treaty promises
11:49:38 13 at page 250, 145 and 146 of his report. And
11:49:44 14 explicitly at the end of supplementary findings,
11:49:48 15 opinions and conclusions that I shared with my
11:49:50 16 friends yesterday, he notes the Anishinaabe would
11:49:54 17 expect promises made by the Crown in a treaty to be
11:49:59 18 kept.

11:50:00 19 THE COURT: Any reply to that,
11:50:02 20 Mr. Beggs?

11:50:02 21 MR. BEGGS: No, Your Honour. But I
11:50:06 22 still, would still point out Professor McHugh
11:50:09 23 doesn't make any observation about not keeping
11:50:13 24 promises, either. I mean, the question is in the
11:50:20 25 context of paragraph 3.71.

1 THE COURT: I think we were at
2 paragraph 3.71, I'm not so sure that Mr. Brookwell
3 hadn't moved on.

4 Had you moved on, sir?

5 MR. BROOKWELL: Yes, that's correct,
6 Your Honour.

7 THE COURT: I understand why it might
8 not be entirely clear.

9 All right, please go ahead.

10 I thought the witness I thought had
11 answered the question anyway, at some length. But
12 if you have a follow-up question.

13 MR. BROOKWELL: No, your Honour. I
14 believe he has answered the question, and that was
15 my last question.

16 THE COURT: Very good.

17 MR. BROOKWELL: So that will be it for
18 today for us.

19 THE COURT: Now I think we determined
20 on Monday that it was going to be Mr. Ennis.
21 Before I call on Mr. Ennis, I invited at least
22 Mr. Feliciant, if not also Mr. Ennis, to indicate
23 to me now, at the end of the examination in-chief,
24 if there were any time requests connected to these
25 conditional opinions that I have permitted the

1 witness to give.

2 Mr. Feliciant?

3 MR. FELICIAN: Your Honour, I've
4 received some communication from somebody looking
5 into this. And it's going to require some degree
6 of work on my part to read it, understand it and
7 then assimilate it into the cross.

8 At this point, I foresee starting my
9 cross-examination today, and getting through most
10 of it, until I get to a point at which this new
11 material becomes relevant.

12 At that point, if it is not the end of
13 the day already, I'd ask to break. I may ask,
14 depending on what time we finish today, if I don't
15 finish earlier than I had hoped, to start a bit
16 later tomorrow so I can put things together in the
17 morning if I have to.

18 THE COURT: This all depends on what
19 Mr. Ennis's submission is going to be, about
20 whether he's prepared to proceed or also request
21 some accommodation.

22 MR. FELICIAN: Thank you, Your Honour.

23 THE COURT: Perhaps I should have asked
24 you first, Mr. Ennis, what your position was?

25 MR. ENNIS: Yes, Your Honour.

11:52:35 1 We don't require any additional
11:52:38 2 accommodation at this point.

11:52:39 3 THE COURT: All right. So please
11:52:40 4 proceed then, sir.

11:53:15 5 MR. ENNIS: Your Honour, if we can have
11:53:16 6 just a few moments to set up.

11:53:17 7 THE COURT: Please go ahead.

11:53:19 8 MR. ENNIS: Thank you.

11:54:10 9 CROSS-EXAMINATION BY MR. ENNIS:

11:54:31 10 Q. Good morning, Professor Driben.

11:54:32 11 A. Good morning.

11:54:33 12 Q. My name is Barry Ennis, and I am
11:54:36 13 one of Canada's legal counsel on this matter. I
11:54:40 14 had the pleasure of meeting with you two years ago
11:54:42 15 during the course of the Robinson Superior and
11:54:47 16 Huron Annuities trial in Thunder Bay.

11:54:47 17 A. I recall that.

11:54:49 18 Q. And hearing your evidence in that
11:54:51 19 matter, although it was my colleague Mr. McCulloch
11:54:54 20 who asked you questions on that occasion.

11:54:56 21 A. I recall that as well.

11:54:57 22 Q. I want to begin my questions today
11:54:59 23 by first taking you to page 47 of your report.

11:55:10 24 And you state the following there at
11:55:29 25 the beginning, right under the "Introduction":

1 "In traditional Anishinaabe
2 society, the prerogative to make
3 decisions about land use and
4 occupancy was vested in the band,
5 the comparatively small, mobile,
6 politically and economically
7 autonomous group that was the
8 mainstay of early historic Ojibway
9 and Odawa society. Each band
10 presided over its own territory
11 [...]"

12 And in Monday's testimony you stated
13 that the Band is the fundamental decision-making
14 unit, and if I could just go to the rough
15 transcript of Monday's trial testimony, and put
16 that on the screen for a moment.

17 THE COURT: Now, perhaps the witness
18 knows this, but, Professor Driben, rough
19 transcripts are just that; they are rough. They're
20 not the final transcript. So do bear that in mind
21 when you're shown the transcript.

22 THE WITNESS: Thank you, Your Honour.
23 I will.

24 BY MR. ENNIS:

25 Q. If we can go to page 156, please.

1 THE COURT: I think you might have your
2 document wrong. This document is 135 pages long.

3 MR. ENNIS: I'm sorry, this is
4 Volume 53, October 21, 2019.

5 Thank you.

6 BY MR. ENNIS:

7 Q. Now, you were asked about the
8 Three Fires Confederacy, whether it had a military
9 aspect. And at line 21 you replied:

10 "Yes, in a sense it did.

11 Because many, many, some would fight
12 on, let's say, for instance, on the
13 side of the French, we'd find that.

14 Or on the side of the British, but
15 not all. So that in general, we

16 could say the Three Fires, you know"

17 -- and going to the next page --

18 "the Three Fires supported the
19 French, but not all of them, because
20 it was a loose association of Bands,
21 so that -- and Bands are

22 independent, so Bands could operate
23 on their own."

24 Can you tell us, Professor Driben, the
25 names of Anishinaabe Bands that supported the

1 British during the Seven Years' War in their fight
2 against the French? Can you recall?

3 THE WITNESS: Individual Bands?

4 BY MR. ENNIS:

5 Q. Or -- the Anishinaabe Bands?

6 A. The name of the individual Bands?

7 Q. Or just generally, where they were
8 located? If you can think of any examples?

9 A. I'm sorry, not offhand.

10 Q. But there were Anishinaabe Bands
11 who did support the British?

12 A. Yes, and I think that was the
13 point I was making here. It was not unanimous;
14 some supported the British, the majority the
15 French.

16 Q. Thank you. And during the Pontiac
17 Rebellion, did all the Anishinaabe Bands of the
18 Great Lakes choose to support Pontiac?

19 A. No, they didn't.

20 Q. Even from the beginning?

21 A. Even from the beginning, yeah.

22 Q. So they were not unanimous on that
23 front, either?

24 A. No, each Band makes its own
25 decisions and that's how they operate.

11:59:43 1 Q. Thank you.

11:59:44 2 I'd like to now ask you some points
11:59:46 3 just about what you've testified earlier this
11:59:48 4 morning.

11:59:50 5 My friend Mr. Brookwell took you to a
11:59:52 6 portion of Professor McHugh's report this morning
11:59:55 7 in which Professor McHugh references a statement
11:59:58 8 made by Chief Metigwob relating to the making of
12:00:05 9 Treaty 45 ½; you recall obviously seeing that
12:00:09 10 statement reproduced?

12:00:09 11 A. Yes, I do.

12:00:10 12 Q. Have you read Chief Metigwob's
12:00:15 13 statement?

12:00:15 14 A. Yes, I have.

12:00:16 15 Q. Thank you. When you testified
12:00:19 16 this morning that Oliphant conveyed to the Saugeen
12:00:23 17 and Nawash at the Treaty 72 Council that if they
12:00:28 18 did not surrender their lands, they would be quote
12:00:31 19 "obliterated" and quote "wiped out". Did Oliphant
12:00:36 20 himself use those words, or are they your terms?

12:00:40 21 A. Those are my terms. I believe
12:00:42 22 they faced an existential threat and I think they
12:00:47 23 understood that perfectly well.

12:00:49 24 Q. Thank you. You also spoke today
12:00:51 25 about the three stages of treaty-making. Do you

12:00:54 1 refer to these three stages in your expert report
12:00:59 2 or rely only on Cleland's seven stages?

12:01:03 3 A. No I've referred -- I haven't
12:01:05 4 referred to the initial one, but we have examples
12:01:07 5 of people asking for a treaty.

12:01:09 6 I talked about the deliberative stage
12:01:12 7 earlier in the report because I talked about any
12:01:22 8 decision that has to be made by the Band that
12:01:22 9 affects the Band as a whole, has to be made with
12:01:22 10 the deliberative process as I explained it.

12:01:24 11 Q. But in terms of, I guess cutting
12:01:29 12 it down to three basic stages, that's not
12:01:32 13 explicitly set out in your report, or is it?

12:01:35 14 A. No, it's not explicitly set out in
12:01:39 15 my report, but the three stages are in my report.
12:01:42 16 Because I talked about the deliberative stage in
12:01:44 17 length in my testimony and in the report.

12:01:47 18 Q. Thank you. Now I'd like to ask
12:01:50 19 you some questions arising out of your testimony
12:01:53 20 yesterday on October 22nd. Is there a difference
12:01:57 21 in prestige for hunters of large or more dangerous
12:02:02 22 game versus hunters of smaller game?

12:02:04 23 A. Not to the best of my knowledge as
12:02:15 24 an ethnographer, as an ethnologist. It's the
12:02:20 25 sharing that gains your reputation. Of course,

12:02:24 1 when you're shooting birds, you're not going to
12:02:27 2 have as much. When you're shooting rabbits, you're
12:02:29 3 not going to have as much.

12:02:31 4 But still, it's the idea of sharing,
12:02:33 5 and this is what makes you have a great person. Of
12:02:35 6 course, if you knock down a moose, that's a
12:02:37 7 considerable amount of meat and you can share a lot
12:02:37 8 more.

12:02:38 9 But there's no more prestige, at least
12:02:41 10 as my teachers tell me, in shooting one or --
12:02:45 11 taking one game as opposed to another game. As
12:02:49 12 long as you share it, that's the key from their
12:02:51 13 point of view.

12:02:52 14 Q. Thank you. Now you referred
12:02:56 15 yesterday morning to the Anishinaabe resorting to
12:02:59 16 military action as one of their primary methods to
12:03:03 17 keep intruders off their territory.

12:03:06 18 You stated that the Anishinaabe would
12:03:09 19 resort to military action when it's available, when
12:03:13 20 it's possible, when Anishinaabe feel it's
12:03:17 21 necessary. And then that evolved subsequently
12:03:22 22 after it's no longer possible to take military
12:03:24 23 action, that evolves into diplomacy.

12:03:27 24 So in that context, what do you mean by
12:03:30 25 when military action is possible?

12:03:32 1 A. Well, what I mean is, if they can
12:03:39 2 undertake an action that has a chance of success on
12:03:47 3 the one hand, or can demonstrate their resolve on
12:03:51 4 the other hand, in those circumstances that's where
12:03:54 5 military action is possible and that's when I
12:03:56 6 believe they undertake military action.

12:03:59 7 But when the odds are overwhelming,
12:04:14 8 when they think about it dispassionately they have
12:04:14 9 to make a decision. But as I said earlier today,
12:04:14 10 sometimes passion takes over as well.

12:04:16 11 Q. What would happen if there was a
12:04:18 12 superior military force invading, that the
12:04:24 13 Anishinaabe recognized was a superior military
12:04:27 14 force?

12:04:28 15 A. In the case of military, I think
12:04:30 16 that they would fight. They would try as best they
12:04:33 17 could to defend their territory.

12:04:35 18 Q. And if they recognized that they
12:04:39 19 would be defeated, would that possibly cause them
12:04:42 20 to take a different action?

12:04:45 21 A. I don't think so. I think they'd
12:04:48 22 fight their territory to the end because it's so
12:04:51 23 important to them.

12:04:53 24 Now, eventually you may get just driven
12:04:56 25 off of an area, pushed out of an area, and we know

12:04:59 1 this happened in this case. So the answer to your
12:05:01 2 question has to be yes, under certain circumstances
12:05:04 3 they will be driven from an area.

12:05:06 4 But I think that would be the last move
12:05:08 5 that they would make, they would try and make their
12:05:11 6 last stand. It's their country so they're trying
12:05:13 7 to defend their country.

12:05:15 8 I think we can generally understand
12:05:17 9 that as people in all cultures, people living in a
12:05:20 10 country and wanting to defend it. So they would do
12:05:23 11 their utmost to defend it, I believe.

12:05:25 12 Q. Thank you. You spoke yesterday
12:05:27 13 also about travel routes and access points to Lake
12:05:31 14 Huron and Georgian Bay. And you established these
12:05:36 15 routes by looking at the historical literature, and
12:05:39 16 historical documentation of various travelers and
12:05:43 17 how they traveled to particular places.

12:05:47 18 And you gave us examples of classic
12:05:49 19 routes, Champlain's routes and La Salle's routes.
12:05:54 20 Did you just look at the routes taken by European
12:05:57 21 travelers, or did you also look at any records
12:06:01 22 indicating Indigenous routes?

12:06:04 23 A. Well, the route that Champlain
12:06:08 24 followed, that was the route of Indigenous people.
12:06:11 25 That was the great canoe route. So that was the

1 route -- that was the principal route that they
2 traveled. So the answer to your question is yes.

3 Q. Okay. Thank you.

4 Now I won't take you there unless you
5 need to, but at the bottom of page 171 to the top
6 of page 172 of your report, you refer to Elders
7 saying that the Anishinaabe migrated to the shores
8 of the Upper Great Lakes from the Great Salt Sea in
9 the east. Can you tell us what is the Great Salt
10 Sea?

11 A. That is the Atlantic Ocean.

12 Q. Thank you. I would now like to
13 ask you, Professor Driben, to tell us your opinion
14 about some historical figures. Can you tell us who
15 George Copway is?

16 A. George Copway was a Methodist
17 minister who ministered to the people at Rice Lake
18 and Saugeen.

19 Q. Now, in his writings, is he a
20 reliable source?

21 A. It depends on in which passage of
22 his writings that we're looking at. You have to
23 look at each one separately. I believe the passage
24 I was relying on is consistent with a great many
25 other passages written by scholars and others.

12:07:36 1 So, as I say, it depends on the
12:07:38 2 particular passage you're looking at.

12:07:40 3 Q. Generally speaking, can you give
12:07:43 4 an opinion as to whether he's reliable or not?

12:07:46 5 A. I don't think it's a -- I don't
12:07:48 6 think -- I think it's better to answer it in the
12:07:51 7 specific and say that it's like any memoir I read
12:07:54 8 or any document I read.

12:07:55 9 There's going to be certain things that
12:07:58 10 strike me and certain -- that are in harmony with
12:08:00 11 other things. I think that is the case with
12:08:03 12 Copway.

12:08:03 13 But if there are things in Copway, as I
12:08:07 14 describe them as outliers, then I'm not so much
12:08:08 15 interested in those things, unless I'm particularly
12:08:11 16 focused on those. But I am generally not.

12:08:19 17 Q. Can you comment about his
12:08:26 18 knowledge of traditional stories?

12:08:30 19 A. Oh, he understood -- he understood
12:08:34 20 the culture, that's for sure. Yeah, he understood
12:08:37 21 those, I believe that.

12:08:38 22 Q. Thank you. And who is William
12:08:43 23 Warren?

12:08:43 24 A. William Warren was a scholar who
12:08:52 25 lived in the early 1800s and he was a Métis and he

1 wrote a book on the Anishinaabe. I think it
2 originally came out in 1850, which was considered a
3 classic in the field.

4 He had, for his teachers, the
5 Anishinaabe themselves. He spoke the language. He
6 spoke to all the people he referred to as "Elders",
7 and that's what that -- that's much of what that
8 book is based on. It's a famous book; it's a
9 classic in anthropology.

10 Q. Would you say he's a reliable
11 source?

12 A. Again, for most things. He has
13 passages in the book that are clearly in error,
14 but, again, you look for specific things.

15 You look, for instance, at his
16 description of clans, and you see that's consistent
17 with what Schoolcraft says. Both contemporary
18 observers of the same people at the same time.

19 So, yeah, that's again what you're
20 looking for is the consistency. So where he's
21 consistent with other authors, yes, then I consider
22 that passage very reliable.

23 Otherwise, if it's an odd thing -- I
24 believe at the beginning, Schoolcraft says that
25 it's most likely that the Anishinaabe and people

12:10:05 1 like them are -- they're part of a biblical exodus.
12:10:15 2 That's not true, it's just not true. So that part
12:10:18 3 would be totally unreliable.

12:10:23 4 Q. Can you tell us anything about
12:10:25 5 Kohl, I think that's K-O-H-L?

12:10:26 6 A. Johann Kohl was a German
12:10:31 7 geographer and explorer who came to -- came to the
12:10:35 8 south shore of Lake Superior. And, again, he wrote
12:10:40 9 another book that's considered a classic, and he
12:10:42 10 traveled through that area about the same time as
12:10:47 11 Schoolcraft was writing.

12:10:49 12 And he's, I guess an early
12:10:51 13 ethnographer, if you will, and he represented an
12:10:55 14 ethnographic account of the Anishinaabe in that
12:10:57 15 area.

12:10:58 16 Q. Again, can you comment on his
12:11:00 17 reliability as a source?

12:11:02 18 A. It's the same for all sources. It
12:11:04 19 always has to be consistency and no outliers;
12:11:08 20 that's what I'm always looking for.

12:11:10 21 Q. Thank you.

12:11:11 22 Lastly, can you tell us who Andrew
12:11:17 23 Blackbird is?

12:11:19 24 A. Oh, Andrew Blackbird is an Odawa
12:11:23 25 who, again, he's an author and he participated in

12:11:30 1 the 1855 Treaty of Washington. He was one of the
12:11:36 2 representatives of Odawa from L'Arbre Croche, I
12:11:41 3 believe. I think that's the community he was from,
12:11:43 4 I'm not exactly sure about that.

12:11:45 5 And he lived with the people for many
12:11:49 6 years. The book that he wrote was subsequent in
12:11:53 7 his life. He became a postmaster; he was just part
12:11:57 8 of the community.

12:11:58 9 Q. And as far as his book, the same
12:12:02 10 statement about the reliability of it or...

12:12:04 11 A. Yes, that's correct.

12:12:05 12 Q. Thank you. I'd like to take you
12:12:18 13 to pages 205 and 206 of your report.

12:12:20 14 MR. ENNIS: If we can put that up on
12:12:21 15 the screen. Thanks.

12:12:25 16 BY MR. ENNIS:

12:12:25 17 Q. So under the heading "The Inland
12:12:34 18 Shore Fishery" on page 205, which is up on the
12:12:38 19 screen. It says:

12:12:39 20 "In fact, Anishinaabe in the
12:12:42 21 Upper Great Lakes Region lived
12:12:42 22 within the confines of what is known
12:12:44 23 as the inland shore fishery of the
12:12:47 24 northern Great Lakes."

12:12:50 25 And you reference the map on the

1 following page, page 206 of your report. If we can
2 turn to the page 206. Thank you.

3 Now, if we look at that map, would you
4 agree that these confines, known as the inland
5 shore fishery, do not extend into the open parts of
6 Lake Huron, which comprise the largest portion of
7 the lake, but hug the shorelines?

8 A. That is correct. That's what this
9 map displays.

10 Q. If we can turn now to page 220 of
11 your report. And on that page under the heading
12 "Spring and Summer" you're talking about the
13 seasonal rounds.

14 If we go to the part that starts --
15 that's marked on the screen "Fish", it's about
16 eight lines down:

17 "Fish, however, were the chief
18 mainstay of the Indians throughout
19 the spring and summer. Large shoals
20 of pickerel [walleye] and suckers
21 began to ascend the rivers in May,
22 and the men speared them in
23 thousands, or caught them by hand in
24 stone weirs, for the women to skin
25 and dry."

12:14:18 1 If we can then turn to page 221 under

12:14:21 2 "Fall", you write:

3 "There were other bands,
4 Jenness says, whose members
5 'repaired in October to the outer
6 islands of Georgian Bay in order to
7 spear the trout and whitefish that
8 were spawning close to shore.'"

12:14:38 9 And then just down a few lines to

12:14:48 10 "Heavy storms".

12:14:48 11 "'Heavy storms often prevented
12 the launching of canoes, but on a
13 favourable night a man frequently
14 captured as many as 20 large fish [...]'"

12:14:58 15 Now, did the Anishinaabe venture into
16 the middle of Georgian Bay or Lake Huron to fish?

12:15:04 17 A. I can't answer that question. I
18 don't know what -- I don't know the answer for the
19 period under consideration.

12:15:12 20 Q. Yes, this would be, the period
21 would be in the 1850s and before?

12:15:18 22 A. Yeah. I can't really answer that
23 question. You're asking specifically to capture
24 fish?

12:15:25 25 Q. Yes.

12:15:27 1 A. I'm sorry, I don't know.

12:15:28 2 Q. Can you comment at all on whether
12:15:32 3 the storms would be a deterrent to fishing in the
12:15:35 4 open areas in the middle of the lake?

12:15:37 5 A. That's correct; they would be.

12:15:39 6 Q. Thank you.

12:15:40 7 I had some questions for you about the
12:15:52 8 fistfight that Oliphant reports in his memoir, but
12:15:57 9 you clarified that this morning, so I will not ask
12:16:02 10 you anything further about that.

12:16:15 11 But I will ask you about Van Dusen, the
12:16:15 12 Indian Chief. In your report on a couple of
12:16:18 13 footnotes, and I can take you to them if necessary,
12:16:22 14 but you reference that it's David Sawyer. But you
12:16:26 15 would agree it's actually Conrad Van Dusen who's
12:16:29 16 the author of that book?

12:16:31 17 A. Yes, I agree. David Sawyer was
12:16:34 18 not as skilled as a writer as was Van Dusen, and
12:16:39 19 you can tell that that is Van Dusen's writing, not
12:16:42 20 Sawyer's writing. Because when you look at
12:16:44 21 Sawyer's letters, you'd see they're not the same
12:16:48 22 quality of English.

12:16:49 23 Q. You'll see the references cited at
12:16:50 24 the end, it is set out correctly that it is Conrad
12:16:56 25 Van Dusen that wrote the book The Indian Chief?

12:16:56 1 A. Yes, I mentioned that yesterday
12:16:56 2 also.

12:16:56 3 Q. Yes.

12:17:00 4 A. Or maybe two days ago, I think.

12:17:00 5 Q. No, you did clarify it.

12:17:00 6 A. It was yesterday.

12:17:02 7 Q. I think it was yesterday, yes.

12:17:09 8 Now in yesterday's testimony, Professor
12:17:12 9 Driben, you asked how reliable you consider the Van
12:17:16 10 Dusen accounts. And I'm just going to look
12:17:22 11 briefly, we may not need to put this on the screen.

12:17:45 12 I'm just going to read from it and you
12:17:45 13 can tell me if I captured it accurately, or if the
12:17:45 14 transcript captured it accurately. So you were
12:17:46 15 asked how reliable to consider Van Dusen's account.
12:17:50 16 And you said:

12:17:50 17 "Well, if it's consistent with
12:17:51 18 other accounts then I consider it
12:17:53 19 reliable. When I come across items
12:17:55 20 in that book or any other text that
12:17:57 21 are outliers that have no other
12:17:59 22 references to them, then I'm highly
12:18:02 23 skeptical. So in this case, is Van
12:18:06 24 Dusen's book 100 percent accurate?
12:18:08 25 I don't think so. I think there's

12:18:11 1 hyperbole in it. And, of course,
12:18:13 2 it's written with a certain message
12:18:15 3 in mind. But there are things in
12:18:17 4 there that are corroborated and
12:18:19 5 those are the things that I rely on
12:18:21 6 in that volume."

12:18:26 7 A. Yes, that's my testimony.

12:18:28 8 Q. Now, on page 240 of your report
12:18:46 9 you quote from Van Dusen's account just under the
12:18:52 10 heading "A Large Income", and you say:

12:18:55 11 "According to the Reverend
12:18:58 12 David Sawyer, who witnessed the
12:19:00 13 proceedings, notwithstanding the
12:19:02 14 dissatisfaction some band members
12:19:03 15 felt about the proposed transaction,
12:19:05 16 'still many of the most ignorant and
12:19:07 17 indolent part of the tribe were
12:19:10 18 elated with the prospects held out
12:19:12 19 to them by the agents sent by the
12:19:16 20 Indian Department to negotiate with
12:19:18 21 them for the surrender of nearly the
12:19:20 22 whole of their peninsula.' "

12:19:20 23 And then you cite:

12:19:22 24 "'They were told that from the
12:19:23 25 sale of the land they would soon

12:19:25 1 have a large income, that they would
12:19:28 2 all be able to ride in carriages,
12:19:29 3 roll in wealth, and fare sumptuously
12:19:35 4 every day.'"

12:19:37 5 That statement about riding in
12:19:39 6 carriages and rolling in wealth and faring
12:19:40 7 sumptuously every day; is that corroborated
12:19:44 8 elsewhere in the record, or would you regard that
12:19:47 9 statement as hyperbole?

12:19:49 10 A. It is hyperbole, but what the
12:19:52 11 common element there is that, what I see that he is
12:19:55 12 reporting is, you will have wealth, you will be
12:19:57 13 able to participate in the economy. That's the
12:19:59 14 part I'm looking at here.

12:20:00 15 So the issue that I am trying to deal
12:20:02 16 with is, what did they anticipate they would do for
12:20:06 17 their economy in the future? I believe it would be
12:20:09 18 fishing, hunting and also engaged in commercial
12:20:12 19 endeavors to the extent that these were possible.

12:20:14 20 Q. But not necessarily riding in
12:20:17 21 carriages?

12:20:17 22 A. No, no. I don't think the
12:20:19 23 Anishinaabe want to do that. In the time that
12:20:21 24 we're talking about here, the Anishinaabe are not
12:20:23 25 wealth accumulators, they're wealth distributors.

12:20:27 1 So riding in carriages is not something that would
12:20:29 2 appeal to them.

12:20:31 3 What really would appeal to them would
12:20:33 4 be sharing.

12:20:33 5 Q. Thank you.

12:20:37 6 And now turning to Treaty 72. At
12:20:45 7 page 255 of your report, you address the question
12:20:50 8 why the SON might have wanted conditions of actual
12:20:53 9 settlement to be placed on purchases of the land
12:20:57 10 that was subject to Treaty 72.

12:20:59 11 Can you sum up your opinion on this
12:21:02 12 question why they would have wanted conditions of
12:21:05 13 actual settlement?

12:21:06 14 A. Those, from my point of view, were
12:21:08 15 the conditions of the permission. And what they
12:21:10 16 wanted to have was good neighbors. Neighbors that
12:21:13 17 they could interact with. Neighbors that they
12:21:16 18 could develop a mutually beneficial economy with,
12:21:20 19 mutually beneficial social relationships with.

12:21:23 20 So for that to happen, they wanted
12:21:25 21 people to actually live there, to be good neighbors
12:21:27 22 with them. So that's what they were looking at
12:21:30 23 when they wanted to have the actual conditions of
12:21:33 24 settlement.

12:21:33 25 As I said, that's one of the conditions

1 of the permission that they were looking for.

12:21:38 2 Q. Now, I'd like to turn to
12:21:41 3 Exhibit 2197. And while my colleague is pulling it
12:21:50 4 up -- oh, here it is.

12:21:52 5 It is a petition of the Saugeen Chiefs,
12:21:54 6 February 27th, 1855, which you'll find on the
12:21:58 7 second page. You'll find at the bottom left that
12:22:05 8 it was made in Owen Sound and dated February 27,
12:22:12 9 1855, which would have been about four -- just a
12:22:17 10 little over four months after entering into Treaty
12:22:21 11 72; is that correct?

12:22:22 12 A. That's correct. Because they made
12:22:24 13 the treaty in October.

12:22:25 14 Q. That's right.

12:22:26 15 And you'll see that the -- those who
12:22:35 16 signed the petition -- well, one of the Chiefs is
12:22:41 17 on the bottom of page 1. But the others are
12:22:44 18 signed, you'll see on page 2, on the right-hand
12:22:51 19 side, going all the way down.

12:22:54 20 In any event, I'd like to read, going
12:22:57 21 back to page 1 of this. It's written to, you'll
12:23:02 22 see at the top, "His Excellency Sir Edmund Head,
12:23:08 23 Bart., the Governor General of British North
12:23:11 24 America", and, the Chiefs say:

12:23:13 25 "We the Chiefs, councillors and

12:23:16 1 principal Indians composing the
12:23:18 2 Ojibway tribe in the Owen Sound and
12:23:20 3 Saugeen country wish to say a few
12:23:22 4 words to our Great Father, the
12:23:24 5 Governor General:

12:23:26 6 "We fully believe it will not
12:23:28 7 only promote the general interest of
12:23:30 8 this part of the country, but
12:23:31 9 greatly increase the value and sale
12:23:33 10 of the land we have recently
12:23:35 11 surrendered, by requiring actual
12:23:37 12 settlement upon all farm lots that
12:23:40 13 may be disposed of for our benefit.

12:23:43 14 "By this means, the settlement
12:23:46 15 in these counties will be rapidly
12:23:49 16 extended and private speculators
12:23:51 17 will be prevented from purchasing
12:23:52 18 large blocks of the land, which may
12:23:54 19 remain for years uncultivated, and
12:23:58 20 unoccupied, and thus prevent the
12:24:00 21 rising value of the remaining part
12:24:02 22 of the territory, and also be a
12:24:04 23 great hindrance to the speedy
12:24:07 24 extension of the settlement.

12:24:09 25 "We, therefore, hope our Great

12:24:12 1 Father will be pleased to hear these
12:24:13 2 words of his Red Children, and
12:24:15 3 require of all purchasers, actual
12:24:17 4 settlement on the lands when sold,
12:24:21 5 [...]."

12:24:27 6 Now, Professor Driben, does this
12:24:30 7 document indicate that the Saugeen and Nawash made
12:24:33 8 this request in the belief and anticipation that a
12:24:37 9 sale of land to actual settlers would result in
12:24:41 10 more rapid sales and yield a higher sale price
12:24:47 11 thereby benefiting them financially?

12:24:49 12 A. I don't think that's their primary
12:24:51 13 motivation for this at all. It's true they say
12:24:54 14 this in the letter, but if you think about it,
12:24:57 15 writing a letter to the Governor General and saying
12:25:00 16 that we want good neighbors because we want to have
12:25:03 17 a relationship with them in the future is one way
12:25:06 18 to approach it.

12:25:07 19 But another way to approach it is write
12:25:11 20 it in a way that the Governor General will hear
12:25:14 21 exactly what he wants to hear. And this is exactly
12:25:17 22 what he wants to hear, and this is written
12:25:20 23 primarily from a Methodist point of view, this
12:25:23 24 document.

12:25:24 25 Q. So, in your view, this letter does

12:25:27 1 not give an indication that the Saugeen and Nawash
12:25:30 2 were interested in benefiting from higher sales of
12:25:33 3 the land?

12:25:34 4 A. I don't think that was a primary
12:25:36 5 consideration of theirs at all. What they were
12:25:39 6 concerned with, with regard to the actual
12:25:41 7 conditions of settlement, in my opinion, was, as I
12:25:44 8 said, having reliable neighbors, having people you
12:25:47 9 could interact with.

12:25:48 10 Money is not useful to them because
12:25:52 11 they don't have a money economy. They have an
12:25:54 12 economy that's based on gift-giving. So I know
12:25:57 13 they're using money somewhat at this time.

12:26:00 14 But by and large their economy was what
12:26:03 15 it was in the 1700s, so they're still sharing.
12:26:05 16 They're not using money on a regular basis like we
12:26:07 17 are.

12:26:08 18 So under these circumstances, I don't
12:26:10 19 see that as a primary motivation. They're not
12:26:13 20 wealth accumulators; they're wealth distributors.

12:26:16 21 So more money, that's something that
12:26:18 22 Europeans can certainly understand. But that's not
12:26:22 23 their mindset.

12:26:23 24 Q. Are they building schools at this
12:26:26 25 time?

12:26:26 1 A. I'm sorry --

12:26:28 2 Q. Or excuse me. Or endeavoring to
12:26:32 3 build schools for trade and so on?

12:26:34 4 A. They were -- there was a plan to
12:26:36 5 build an industrial school -- this was a Methodist
12:26:39 6 plan that had been long in the making. This was
12:26:42 7 not unique to this area.

12:26:45 8 As I said, this is something of course
12:26:47 9 that would be attractive to the Methodist
12:26:51 10 Anishinaabe, because they wanted to be civilized.
12:26:53 11 Which meant they would have farms, they would have
12:26:55 12 money economy, and then they will engage in
12:26:58 13 speculation because what they're doing is
12:27:00 14 transforming themselves or they want to be --
12:27:02 15 transform themselves in his to Europeans.

12:27:08 16 Q. So there was an element of the
12:27:10 17 Saugeen and Nawash Anishinaabe who were interested
12:27:12 18 in that prospect?

12:27:14 19 A. Yes, that's correct. There was.
12:27:16 20 There was an element of it. And that was among the
12:27:22 21 Methodists.

12:27:23 22 Q. Do you have any sense of what the
12:27:24 23 proportion of the total community was that would
12:27:27 24 have been interested in this?

12:27:28 25 A. No, I cannot tell you what

12:27:31 1 proportion. I can add something to it, though, if
12:27:35 2 you wish.

12:27:35 3 Q. Sure.

12:27:36 4 A. Whatever the proportion was, if
12:27:38 5 you have one part of the community going one way
12:27:40 6 and another part of the community going another
12:27:43 7 way, you're going to have conflict. Even if the
12:27:46 8 numbers are in balance, let's say it's 70-30, if
12:27:50 9 you cannot achieve a consensus, you simply cannot
12:27:54 10 achieve a consensus.

12:27:56 11 Q. Now, I've read most of this
12:27:58 12 petition. It does go on to request that they have
12:28:02 13 a say in the appointment of an agent in whom they
12:28:07 14 can fully confide in disposing of the lands to
12:28:10 15 their advantage under the control and direction of
12:28:13 16 the government.

12:28:13 17 But my question to you is, in this
12:28:17 18 petition written approximately four months after
12:28:20 19 the treaty, is there any indication in the petition
12:28:25 20 that the Saugeen and Nawash Anishinaabe did not
12:28:29 21 regard Treaty 72 as a legitimate agreement?

12:28:35 22 A. In this document?

12:28:36 23 Q. Yes.

12:28:37 24 A. No. There's nothing that says
12:28:39 25 here, no, this agreement is not valid from our

12:28:42 1 point of view. It's not in here.

12:28:45 2 Q. And if they, at this time, felt
12:28:48 3 that the agreement was not valid, would they have
12:28:50 4 resorted to diplomatic means such as writing a
12:28:54 5 petition to express their views to that effect?

12:28:59 6 A. No, I think what happened in 1854
12:29:02 7 is they faced an existential threat. They made a
12:29:09 8 decision and that was the end of it. They were
12:29:11 9 reduced to "ishkonigan", I-S-H-K-O-N-I-G-A-N, which
12:29:17 10 is scraps; that's the literal meaning of it.
12:29:19 11 That's the word for "reserve". It is "scraps".

12:29:20 12 They knew they had ishkonigan after
12:29:23 13 this and it was over. And they could tell that not
12:29:26 14 by their own experience, but by the experience of
12:29:29 15 Anishinaabe in general during this period. They
12:29:31 16 were all being concentrated in reserves at this
12:29:34 17 time.

12:29:34 18 So to rail against the treaty at this
12:29:37 19 point, I don't think there was any point in it.
12:29:41 20 They were trying to accomplish -- these people are
12:29:44 21 trying to accomplish other goals at this time.
12:29:47 22 They're trying to make the best they can of what is
12:29:49 23 a horrible situation, because they're left with the
12:29:51 24 scraps of once -- of what was once their dominion.

12:29:57 25 Q. But they are resigned or accepting

1 of the fact of the treaty?

2 A. I think they were -- they're
3 resigned to the treaty, there's -- I believe
4 there's nothing they thought they could accomplish
5 that they could set the thing right.

6 And I say that because, when you look
7 back and you look at -- this is in close proximity.
8 When you look back at Oliphant's writings, he
9 thought very little of the people. He referred to
10 them as stupid.

11 And he dealt with them in such a
12 callous way, and they had been dealt with in a
13 callous way before. What would be, you know, fool
14 me once, shame on me, fool me twice... I don't
15 think it's quite as simple as that.

16 But when you butt your head against the
17 wall 100 times you stop because you know it's not
18 going to accomplish anything. It's not going to be
19 legitimate.

20 These questions, by the way, are put in
21 abeyance for centuries and then pop up now. It's
22 not that they're not going to complain. It's just
23 that we're looking for a complaint at that time
24 when it would be not effective to make the
25 complaint.

1 It might be more effective if you take
2 a long-term view, and we have history behind us
3 now, to bring it up at another time.

4 There's no point in pushing that right
5 now. Because they've already been told something
6 very serious. We cannot prevent the settlers from
7 taking over your territory unless you sign the
8 document. What could they do?

9 Q. Now, you've provided the view in
10 your report and I think in your testimony that --
11 or at least the suggestion that Oliphant
12 deliberately did not allow the Saugeen and Nawash
13 treaty delegates sufficient time to discuss the
14 Crown's surrender proposal at the treaty
15 negotiations in October.

16 And on page 278 of your report, and
17 that's just under the heading "Before the Meeting",
18 and about five lines down it says:

19 "Oliphant deliberately
20 truncated the proceedings, providing
21 the delegates with virtually no time
22 for ceremony or celebration, or to
23 discuss the matter at hand [...]."

24 And then at page 279, the next page,
25 under the heading "During the Meeting", you state:

1 "Nor did Oliphant provide time
2 for the delegates to discuss his
3 proposal during the course of the
4 meeting."

5 Now, this was not the first time,
6 however, that the Crown was putting forward a
7 proposal to surrender a large portion of the
8 Saugeen Peninsula; you'd agree that in August,
9 early August, with Thomas Anderson that he also
10 made the proposal at a two-day meeting with the
11 Saugeen and Nawash at Owen Sound.

12 A. Yes, he did. And he did it in a
13 threatening way as well.

14 Q. Now on page 280 of your report,
15 immediately under the heading, "The Reverend
16 Sawyer's Observations", you acknowledge that
17 "Saugeen leaders undoubtedly had been discussing
18 the matter with their constituents since Anderson's
19 visit" in August. And you'll agree with that?

20 A. Yes, I think -- I think that when
21 Anderson -- when Captain Anderson came there, and
22 he issued his proposal, let's call it that, and he
23 told the Saugeen Anishinaabe exactly what the
24 consequences would be if they didn't participate,
25 they would be left alone to their own devices, I

1 think that after that, certainly they would have
2 discussed it amongst themselves.

3 However, I do not believe that they
4 came to a consensus, and that was the problem when
5 Oliphant arrived. They had time, but they had yet
6 to achieve a consensus.

7 So that the deliberative process, or at
8 least the consensus they reached, at least on the
9 one hand, when we listen to Chief Metigwob, I
10 believe -- I may be getting the Chief's name mixed
11 up. When the Chief has an argument with Oliphant
12 according to his official report, he's saying we've
13 made up our mind, we don't want to do this.

14 Then you have other opinions on the
15 other side. So there's no real consensus here
16 about -- in the Band about moving forward, that's a
17 problem. How do you move forward without the
18 consensus?

19 Q. Now is it possible that there was
20 a, more of a consensus but that the Chief did not
21 recognize it because he was opposed to the
22 surrender; is that a possibility?

23 A. No, no. No matter what the
24 Chief's -- no matter what the Chief's personal
25 views are the Chief has a responsibility to

12:36:09 1 represent the consensus. So that -- and I think
12:36:12 2 that if you're thinking about the same document I
12:36:16 3 am, which is subsequent to the treaty, where the
12:36:19 4 Chief says, well you know I really wanted to have
12:36:21 5 this thing going; I really wanted to get it going.
12:36:24 6 To me, that's making the best of a bad situation.

12:36:27 7 What is he supposed to say to the
12:36:29 8 government official after that? The deal is done
12:36:31 9 and he says, you know, I'm really on your side.
12:36:34 10 What he's doing is operating in the best interest
12:36:37 11 of the Band right there.

12:36:38 12 Q. Now, I'd like to bring you again
12:36:42 13 to Oliphant's reporting letter to Lord Elgin, which
12:36:46 14 is Exhibit 2175 dated November 3, 1854, that you
12:36:53 15 spoke about earlier this morning.

12:36:55 16 And I'd like to turn to page 4, which I
12:37:03 17 believe is PDF 3. Near the bottom, about 15 lines
12:37:15 18 from the bottom of that page. Starting with "I was
12:37:23 19 met by most decided opposition on the part of
12:37:26 20 Alexander Madwayosh," -- he's the Chief?

12:37:29 21 A. Yes, pardon me, that was an error
12:37:32 22 on my part.

12:37:32 23 Q. That's fine.

12:37:33 24 "-- principal Chief of the
12:37:35 25 Saugeen Band, whom I have before

12:37:36 1 mentioned, and with whom I
12:37:39 2 maintained an animated discussion,
12:37:41 3 none of the other Chiefs taking any
12:37:43 4 part in the proceedings. It was
12:37:45 5 clear, however, that public opinion,
12:37:47 6 more especially with the Chiefs of
12:37:50 7 the Owen Sound Band, was turning
12:37:52 8 against him" -- that's Madwayosh --
12:37:57 9 "and I therefore passed on to
12:37:58 10 explain to them the limits to the
12:37:59 11 reserves proposed by Government. As
12:38:02 12 soon as the discussion was fairly
12:38:03 13 diverted from the question of the
12:38:05 14 propriety of the surrender to
12:38:08 15 consideration of the limits of the
12:38:10 16 reserves, I retired for an hour, in
12:38:13 17 order to allow time for a private
12:38:14 18 debate."

12:38:15 19 Now my question is, in light of the
12:38:20 20 fact that they were -- had been considering this
12:38:24 21 proposal since the beginning of August at least,
12:38:30 22 would -- could an hour have been a sufficient
12:38:34 23 amount of time for them to reach a consensus in
12:38:38 24 these circumstances?

12:38:39 25 A. Not in my opinion. Not close.

12:38:43 1 Because they have to really build a consensus here,
12:38:46 2 or arrive at a consensus. And some were already
12:38:51 3 determined the answer is no.

12:38:52 4 The deliberative process takes time to
12:38:54 5 unfold in Anishinaabe communities, because
12:38:56 6 everybody gets to say their piece. Because that's
12:38:59 7 the way their government works.

12:39:01 8 So you have to go back to the -- if a
12:39:04 9 new proposal is made, and it is a radical proposal,
12:39:07 10 you're going to have to go back to the beginning.

12:39:09 11 We already have the invitation, but now
12:39:12 12 we have to have the heads of the families gathering
12:39:14 13 together. We have to see how they come out in
12:39:17 14 their discussions, and then it has to be brought
12:39:19 15 forward to the Chief. And then that's how the
12:39:23 16 consensus is built.

12:39:24 17 And that can't happen in a day, and it
12:39:26 18 can't happen in an hour certainly.

12:39:28 19 Q. However, if it is not a radically
12:39:31 20 new proposal but essentially the same proposal as
12:39:34 21 what was made two and a half months before, and
12:39:38 22 they had been deliberating about it during that
12:39:41 23 time, would that -- would it be possible that an
12:39:46 24 hour could be sufficient?

12:39:48 25 A. Well, in fact, they did sign on to

12:39:50 1 the treaty. So that's a fact to be reckoned with.
12:39:54 2 But I believe that's because they were told by
12:39:57 3 Oliphant that you have face an existential threat
12:40:01 4 here.

12:40:02 5 So the deliberation they're making,
12:40:04 6 from my point of view, what they're deliberating is
12:40:07 7 between the existential threat and ishkoniagan.
12:40:11 8 They're either going to say, okay, let it happen to
12:40:14 9 us. Let the settlers come in.

12:40:17 10 Or, we'll resort to the scraps. We'll
12:40:21 11 live in the scraps that are left. And what -- to
12:40:26 12 me, the choice was inevitable. Still to survive,
12:40:31 13 still to live, but now in the reserves. Which from
12:40:36 14 their point of view are not attractive.

12:40:40 15 Q. Now, if I can continue on to the
12:40:42 16 bottom paragraph on that page in front of us.
12:40:46 17 Page 4 of the reporting letter -- or of the
12:40:50 18 document, I should say, and I'll read:

12:40:56 19 "It was evident, from what had
12:40:58 20 already occurred, that the fact of
12:40:59 21 this Council having been held at
12:41:01 22 Saugeen instead of at Owen Sound, as
12:41:03 23 upon the former occasion, would
12:41:05 24 exercise an important influence upon
12:41:08 25 its proceedings. The Saugeen Band

12:41:10 1 maintain that they were first
12:41:12 2 established in this part of the
12:41:13 3 peninsula, and therefore, consider
12:41:15 4 that they occupy the most prominent
12:41:18 5 position in the tribe, and are
12:41:19 6 entitled to a larger share of its
12:41:22 7 councils. Feelings of jealousy
12:41:24 8 arising from this cause have
12:41:25 9 invariably manifested themselves
12:41:27 10 when called to a Council at Owen
12:41:30 11 Sound, and they consequently opposed
12:41:32 12 a measure, at all times
12:41:33 13 unpalatable," -- then to the next
12:41:37 14 page, please -- "when rendered
12:41:43 15 doubly so by the manner in which it
12:41:45 16 was submitted to them. An
12:41:47 17 additional advantage was derived
12:41:48 18 from the presence of many of the
12:41:49 19 young men and warriors of the
12:41:51 20 Saugeen Band, who did not attend at
12:41:53 21 Owen Sound, but whose opinions could
12:41:56 22 now be easily ascertained and
12:41:59 23 allowed to have their due effect."
12:42:06 24 In that passage, is Oliphant suggesting
12:42:08 25 that the young men and warriors of Saugeen may have

12:42:12 1 been more in favour of the proposal than Chief
12:42:12 2 Madwayosh?

12:42:23 3 A. That's what he's saying here, but
12:42:26 4 the question is, do we want to take Oliphant's
12:42:28 5 words for the internal operations of the Band at
12:42:30 6 this time?

12:42:31 7 Since he's only met them, he's hardly
12:42:32 8 been in Canada for very long, what he knows about
12:42:35 9 the Band must primarily come from Captain Anderson
12:42:38 10 and from Lord Elgin, and I don't think he's quite
12:42:42 11 equipped to make this sort of an assessment about
12:42:45 12 the internal operations of this particular Band.

12:42:48 13 He refers to them as two bands, by the
12:42:50 14 way, which is mistaken; it's one Band.

12:42:56 15 Q. If I can just go to the next
12:42:58 16 paragraph:

12:43:00 17 "Upon returning to council I
12:43:02 18 found that the Chief, Alexander
12:43:05 19 Madwayosh, had been completely
12:43:07 20 outvoted. Some of the other Chiefs
12:43:09 21 now came forward to stipulate for
12:43:11 22 increased limits to their reserves
12:43:13 23 and fresh privileges, in
12:43:17 24 consideration of their readiness to
12:43:19 25 adopt the views of Government.

12:43:22 1 These were discussed seriatim, each
12:43:25 2 party finding occasional concessions
12:43:27 3 necessary, until we decided upon the
12:43:31 4 terms of the surrender, as embodied
12:43:33 5 in the document herewith annexed,
12:43:35 6 which I drew out in the presence of
12:43:37 7 the Chiefs and which was afterwards
12:43:39 8 read and explained to them. By
12:43:41 9 1 o'clock a.m., the signing,
12:43:43 10 sealing, and affixing of totems was
12:43:46 11 concluded and the council broke up."

12:43:50 12 So Professor Driben, again, Oliphant,
12:43:57 13 from his point of view believes that the other
12:43:59 14 Chiefs who were in support of the proposal, perhaps
12:44:04 15 because they accepted the inevitable, but in any
12:44:07 16 event, there seems to have been -- would you agree,
12:44:14 17 a consensus apart from Chief Madwayosh at this time
12:44:19 18 to accept the terms of Treaty 72 as further
12:44:22 19 discussed?

12:44:23 20 A. I don't believe there was a
12:44:25 21 consensus at all. I just don't believe that
12:44:28 22 because they didn't have time to reach a consensus.

12:44:31 23 Remember, they would have to start the
12:44:34 24 process again. And when you look at treaty
12:44:37 25 councils, of course young men and warriors are

12:44:39 1 there, but they don't ever play a prominent role in
12:44:44 2 the deliberations. It's the Chiefs and principal
12:44:47 3 men that play the prominent role.

12:44:47 4 And the young men, as young men do
12:44:48 5 under these circumstances, they observe. Because
12:44:49 6 they're going to be the older men some day; they're
12:44:51 7 going to be in sort of this participation.

12:44:54 8 So this is hard for me to reconcile
12:44:57 9 from what I understand about actual treaty
12:44:59 10 deliberations. Again, when they're quarreling --
12:45:03 11 if there is any quarrel in a Treaty Council, that's
12:45:07 12 extraordinary.

12:45:08 13 Because they're supposed to come there,
12:45:09 14 in a normal procedure, they would come there with a
12:45:11 15 plan in mind. And they would be able to
12:45:14 16 deliberate, they would be able to take their time,
12:45:17 17 there would be ceremony, all of that would be super
12:45:20 18 important in having the agreement come to fruition.
12:45:22 19 And none of that happened here.

12:45:25 20 So when he's saying that something like
12:45:27 21 Madwayosh is outvoted? They don't vote. They have
12:45:33 22 consensus. He's representing something here as if
12:45:37 23 it were kind of a democratic process that we go
12:45:42 24 through. You know, they deliberate, they vote,
12:45:44 25 they come to consensus like in parliament.

12:45:47 1 No, that's not what was happening here.

12:45:48 2 There was a quarrel, there's a dispute between the
12:45:51 3 Anishinaabe themselves. And they had no time to
12:45:53 4 come to a consensus.

12:45:56 5 Q. Well, at least in this reporting
12:45:58 6 letter, would you agree that the only indication of
12:46:02 7 a disagreement was between Chief Madwayosh and then
12:46:11 8 subsequently some of the other Chiefs and the young
12:46:14 9 men and warriors?

12:46:15 10 A. Well, Oliphant also said that he
12:46:19 11 kept them apart from advisors, and he kept them
12:46:21 12 apart -- like he kept the advisors away and he kept
12:46:26 13 the various factions, if we can use that term, the
12:46:31 14 various factions separated.

12:46:33 15 But the fact that there were factions
12:46:35 16 at all was remarkable because that's not the way
12:46:38 17 you make a treaty.

12:46:39 18 Q. But they were all together of
12:46:41 19 course for that one hour?

12:46:42 20 A. Yes, they were together for an
12:46:44 21 hour, but -- and during that hour, I believe that
12:46:46 22 they -- they looked at the prospects before them:
12:46:53 23 Ishkonigan on one hand or the existential reality
12:46:59 24 on the other. I think that's what they faced in
12:47:03 25 1854.

12:47:58 1 MR. ENNIS: Now if we can turn to
12:47:59 2 Exhibit 2120.

12:48:01 3 BY MR. ENNIS:

12:48:13 4 Q. There is a letter from Captain
12:48:14 5 Anderson dated August 16, 1854, from the Indian
12:48:19 6 Office Cobourg. It's a report to Laurence
12:48:30 7 Oliphant, the Superintendent General of Indian
12:48:33 8 Affairs. Which if you can go briefly to the second
12:48:35 9 page, you'll see just there, just above page 3 that
12:48:41 10 it's to Laurence Oliphant.

12:48:43 11 A. Yes.

12:48:44 12 Q. And this document reports on the
12:48:49 13 negotiations between Thomas Anderson and the
12:48:51 14 Saugeen that took place at the Treaty Council at
12:48:55 15 Owen Sound on August 1st and 2nd of 1854?

12:48:58 16 A. Yes.

12:48:59 17 Q. And at that point -- in those
12:49:05 18 negotiations Captain Anderson endeavored to secure
12:49:08 19 a surrender of the southern portion of the Saugeen
12:49:13 20 Peninsula to the Crown?

12:49:16 21 A. I can't recall exactly the area
12:49:23 22 that he wanted surrendered. But he wanted it all,
12:49:26 23 and he wanted to leave the Anishinaabe with
12:49:30 24 reserves.

12:49:31 25 Q. Now, if we look at the third

1 paragraph on page 1, Thomas Anderson records:

2 "The Saugeen Band having
3 arrived, I opened the Council and
4 brought the subject before them on
5 the first instant. They at first
6 declared they would --"

7 And if we can go to the next page,
8 please:

9 "-- not sell an inch, but
10 having pointed out to them the folly
11 of their retaining so large a tract
12 of land from which they were
13 deriving no advantage, the
14 possibility of the Whites taking
15 possession of it without their
16 deriving half the profit they would
17 from the government, etcetera,
18 etcetera, in which arguments I was
19 supported by the Reverend Mr. Cribs
20 (a congressional Minister from
21 Colpoy's Bay), Mr. Surveyor Rankin,
22 Chief Peter Jones Kegedonce, and
23 Mr. Charles Keeshick and opposed by
24 the Chiefs and their Band from
25 Saugeen and Chief John Thomas

1 Wahbahdick, Nawash and their
2 adherents at Owen Sound, at length
3 however, they began to waver and
4 requested leave to consult amongst
5 themselves for an hour and on their
6 return to the Council they agreed to
7 cede all except those parts marked
8 on the map in pencil, 'Limits
9 Proposed By the Indians' [...]"

10 So in this case, they were given a
11 proposal to surrender and they retired -- according
12 to this reporting letter, they requested leave to
13 consult amongst themselves for an hour.

14 And on their return, they agreed to
15 cede all of the Peninsula except for parts that
16 they marked on the map in pencil "limits proposed
17 by Indians". There's been evidence before that we
18 don't have that map unfortunately today.

19 But would you agree that in the hour
20 that they requested, at this meeting, they came
21 back with a consensus even though it wasn't
22 acceptable to the Crown?

23 A. I don't believe they made that up
24 in an hour. I think they had this in their minds
25 beforehand what they were going to do, before they

12:52:09 1 met with Captain Anderson. Because Captain
12:52:11 2 Anderson was pretty insistent about what was going
12:52:14 3 to happen to them after. And he says this here, he
12:52:18 4 says:

12:52:20 5 "I told them that I did not
12:52:22 6 believe their Great Father would
12:52:24 7 permit them to make an arrangement
12:52:26 8 of this kind --"

12:52:28 9 He's talking about this, but what he's
12:52:29 10 saying here -- I'm sorry, I can't find the exact
12:52:30 11 passage -- but what he's saying here that they have
12:52:33 12 to do this. They have to abide by -- they wouldn't
12:52:36 13 sell an inch.

12:52:38 14 And then pointing out the folly of it.
12:52:40 15 But what is the folly? The folly is not that they
12:52:45 16 would lose money. The folly is that the government
12:52:47 17 would withdraw and leave them to their own devices.

12:52:51 18 Now this is a very threatening thing.
12:52:51 19 It is a very threatening thing that they have to
12:52:54 20 consider.

12:52:55 21 And so they -- I believe they had
12:52:57 22 something in mind beforehand and came back,
12:53:00 23 apparently it was modest -- again, we don't have
12:53:03 24 the map. That's a real problem. It would be nice
12:53:06 25 to have that.

1 I would imagine it was a very modest
2 proposal, because Thomas Anderson turned it down.

3 Q. Or it was at least insufficient to
4 the Crown?

5 A. I think that's a good way to
6 express it. It was insufficient to the Crown.

7 Q. But your opinion is that they --
8 in your opinion, they would have already
9 deliberated in advance of the Treaty Council, or at
10 least on the first day of the Treaty Council so
11 that one hour, therefore, was all that they needed
12 to come back with their counterproposal?

13 A. Well, I think that they were
14 looking at this in 1854 as well. They were talking
15 about this. So I think they had a plan in mind for
16 quite a long time and they were looking at
17 different contingencies about what might happen to
18 them.

19 And then this happened to them and they
20 came back with a counterproposal, but, as you say,
21 it was insufficient. And from the Anishinaabe
22 point of view it was sufficient. So that they just
23 didn't come to an agreement.

24 Now would one hour be time for them to
25 actually conduct a deliberation and plot over on a

12:54:10 1 map which parts would be kept and which parts would
12:54:13 2 be allocated to the Crown?

12:54:15 3 I don't think that that's sufficient
12:54:17 4 time to make those sorts of deliberations on the
12:54:20 5 basis of land use and occupancy; that's quite a
12:54:23 6 task to do.

12:54:25 7 To actually determine, this is where we
12:54:27 8 want the reserve, this is where -- this is what we
12:54:30 9 want to retain, this is what we -- the questions
12:54:32 10 are very complicated. I don't see that being
12:54:35 11 resolved in an hour.

12:54:36 12 That's why I think they came there and
12:54:38 13 had something in mind to begin with.

12:54:40 14 Q. Could they have carried on their
12:54:43 15 deliberations in the next two months knowing that
12:54:47 16 -- believing that the Crown might very well come
12:54:49 17 back and seek a surrender again?

12:54:51 18 A. Yes, I said that in my report. I
12:54:54 19 believe that after the August meeting they
12:54:55 20 continued to discuss this. But I also said that
12:54:58 21 they didn't come to a consensus in that period of
12:55:00 22 time. That was the problem with the treaty.

12:55:12 23 Q. Thank you. I now would like to
12:55:18 24 discuss with you the proposals that Bond Head made
12:55:23 25 to the Anishinaabe at the Treaty Council on

12:55:24 1 Manitoulin Island in August 1836 that resulted in
12:55:27 2 Treaty 45 and Treaty 45½.

12:55:30 3 And you discussed these treaties at
12:55:34 4 pages 246 to 248 of your report. But that's just
12:55:41 5 for your reference, and if you'd like a moment to
12:55:44 6 look or not, just let me know.

12:55:45 7 But I wanted to call up Exhibit 1128,
12:55:55 8 which is Treaty 45, and then read out some portions
12:56:06 9 of that treaty and then ask for your opinion.

12:56:09 10 In the second paragraph, in the middle
12:56:19 11 of the second line, Bond Head says:

12:56:22 12 "As an unavoidable increase of
12:56:25 13 white population, as well as the
12:56:27 14 progress of cultivation, have had
12:56:31 15 the natural effect of impoverishing
12:56:34 16 your hunting grounds, it has become
12:56:36 17 necessary that new arrangements
12:56:38 18 should be entered into for the
12:56:39 19 purpose of protecting you from the
12:56:41 20 encroachments of the whites."

12:56:45 21 Then he goes on:

12:56:47 22 "In all parts of the world,
12:56:48 23 farmers seek for uncultivated land
12:57:00 24 as eagerly as you, my Red Children,
12:57:03 25 hunt in your forest for game. If

12:57:05 1 you would cultivate your land, it
12:57:07 2 would then be considered your own
12:57:09 3 property, in the same way as your
12:57:11 4 dogs are considered among yourselves
12:57:13 5 to belong to those who have reared
12:57:15 6 them; but uncultivated land is like
12:57:19 7 wild animals, and your Great Father,
12:57:23 8 who has hitherto protected you, has
12:57:26 9 now great difficulty in securing it
12:57:28 10 for you from the whites, who are
12:57:30 11 hunting to cultivate it."

12:57:37 12 Now, in your opinion, Professor Driben,
12:57:40 13 at this time, would the Anishinaabe have understood
12:57:45 14 that cultivated lands are those lands that are
12:57:48 15 farmed?

12:57:54 16 A. I'm sorry, I can't answer that
12:57:56 17 question. I mean they understood what farms were.
12:57:58 18 They understood what cultivation is, but I don't --
12:58:01 19 I can't talk about the technical connection between
12:58:05 20 the terms.

12:58:05 21 Q. Would they have understood the
12:58:07 22 meaning of cultivated lands as translated into
12:58:11 23 Anishinaabemowin?

12:58:13 24 A. I think so. I think they would
12:58:16 25 understand what Bond Head is saying here assuming

12:58:19 1 it's properly translated. I think the whole
12:58:21 2 paragraph would be understandable to them. Farmers
12:58:24 3 want land.

12:58:25 4 Q. So that they would also therefore
12:58:27 5 understand the difference between cultivated and
12:58:30 6 not cultivated land?

12:58:33 7 A. Sure, that makes sense to me.

12:58:35 8 Q. Of course, they understood the
12:58:37 9 term "hunting"?

12:58:38 10 A. Yes, they did.

12:58:39 11 Q. Is there a theme here, Professor
12:58:41 12 Driben, that if the Anishinaabe would cultivate
12:58:44 13 their land, the Crown would be able to protect that
12:58:47 14 land from encroachment by white settlers who
12:58:51 15 eagerly seek for uncultivated land?

12:58:55 16 A. That the Crown would protect them
12:58:57 17 if they cultivated it?

12:58:59 18 Q. Yes.

12:59:00 19 A. Well, I don't know if they're --
12:59:06 20 if they're saying the Crown would protect them.
12:59:09 21 They would say you would own it like white people.
12:59:12 22 Pretty much you'd be in charge of it like a white
12:59:15 23 person. That's what they're saying.

12:59:16 24 Q. Would that therefore be a
12:59:18 25 safeguard against encroachment by white settlers

12:59:22 1 who are hunting for uncultivated land?

12:59:25 2 A. Not necessarily. Not necessarily
12:59:28 3 at all. Because in other jurisdictions where you
12:59:31 4 look at this, where you look at areas that have
12:59:33 5 been ceded and you take a look at the entry of
12:59:37 6 Europeans into areas, they can just take over
12:59:41 7 reserve land. They just settle and they take it
12:59:44 8 over.

12:59:44 9 So and what they've seen, what they've
12:59:48 10 seen is during this period, they've seen slowly but
12:59:52 11 -- slowly but surely, more and more land is being
12:59:55 12 lost to whites.

12:59:56 13 So I don't think they think that --
01:00:00 14 they think that if they cultivate the land and they
01:00:03 15 make themselves over in the image of the white
01:00:05 16 person in that sense, that that's going to be the
01:00:08 17 Crown protecting them.

01:00:09 18 I think they just believed that what
01:00:12 19 Bond Head is saying, he's saying, well, you'll have
01:00:15 20 the same protection as whites.

01:00:17 21 What that meant to them? I don't think
01:00:19 22 that meant that they would regard that as the same
01:00:22 23 as a promise that the Great Father would protect
01:00:25 24 you in a treaty; I think that's a completely
01:00:27 25 different thing.

01:00:28 1 Q. Well, if we can turn then to
01:00:32 2 Treaty 45½.

01:00:34 3 THE COURT: Just pausing there. Unless
01:00:39 4 we're turning there for a couple of minutes, I'm
01:00:42 5 going to suggest that we proceed after the lunch
01:00:45 6 break, being that it's 1 o'clock.

01:00:47 7 MR. ENNIS: Thank you, Your Honour.

01:00:51 8 THE COURT: And for today, we're going
01:00:53 9 to resume at 2:30.

01:00:55 10 Now, sir, you've testified as an expert
01:00:57 11 witness before, so I assume you are familiar with
01:01:01 12 the significant constraints on what you are
01:01:05 13 permitted to do while you're being cross-examined.

01:01:07 14 THE WITNESS: I am, Your Honour.

01:01:08 15 THE COURT: And that you should not be
01:01:09 16 outside the courtroom engaged in the subject
01:01:12 17 matters at all.

01:01:13 18 THE WITNESS: I will not, Your Honour.

01:01:14 19 THE COURT: All right. 2:30.

01:01:43 20 -- LUNCH RECESS TAKEN AT 1:01 --

02:20:12 21 -- UPON RESUMING AT 2:32 --

02:32:28 22 BY MR. ENNIS:

02:32:28 23 Q. Good afternoon, Professor Driben.

02:32:30 24 A. Good afternoon.

02:32:31 25 Q. We were just about to look at

1 Treaty 45½, which is Exhibit 1131. And there Bond
2 Head says to the Saugeen and Nawash Anishinaabe:

3 "You have heard the proposal I
4 just made to the Chippewas and
5 Ottawas, by which it has been agreed
6 between them and your Great Father
7 that in these islands (Manitoulin)
8 on which we are now assembled, that
9 these islands should be made, in
10 Council, the property (under your
11 Great Father's control) of all
12 Indians whom he shall allow to
13 reside on them."

14 This makes it clear that the Saugeen
15 Anishinaabe to whom this speech is being addressed
16 were present during the speech that was made to the
17 assembled Anishinaabe who entered into Treaty 45?

18 A. Yes, he says "You have just heard
19 the proposal", so, yes, he says that.

20 Q. Okay, good. And if I can
21 continue:

22 "I now propose to you that you
23 should surrender to your Great
24 Father the Saugeen territory you at
25 present occupy, and that you should

02:33:47 1 return either to this island" --

02:33:48 2 which is Manitoulin Island?

02:33:51 3 A. Yes, that's correct.

02:33:52 4 Q. "-- or to that part of your
02:33:54 5 territory which lies on the north of
02:33:56 6 Owen Sound, upon which proper houses
02:33:58 7 shall be built for you, and proper
02:34:00 8 assistance given to enable you to
02:34:03 9 become civilized and to cultivate
02:34:05 10 land which your Great Father engages
02:34:09 11 forever to protect for you from the
02:34:11 12 encroachments of the whites."

02:34:13 13 So my question to you, Professor
02:34:16 14 Driben, is this: Is the theme in Treaty 45½ that
02:34:22 15 the Great Father cannot protect the Saugeen's
02:34:26 16 uncultivated land from encroachment by white
02:34:29 17 settlers, but if the Saugeen become civilized and
02:34:33 18 cultivate their land on the Saugeen Peninsula,
02:34:37 19 their Great Father, the Crown, engages forever to
02:34:41 20 protect their cultivated land from encroachment
02:34:44 21 from white settlers; is this Bond Head's promise to
02:34:50 22 the Saugeen?

02:34:51 23 A. Give me one moment, please.

02:34:54 24 (Witness reviews document).

02:35:03 25 And the question is?

02:35:04 1 BY MR. ENNIS:

02:35:04 2 Q. It's a long question. So is it
02:35:05 3 the theme in Treaty 45½ that the Great Father can't
02:35:11 4 protect the uncultivated land from encroachment by
02:35:15 5 white settlers, but if the Saugeen become civilized
02:35:19 6 and cultivate their land on the Saugeen Peninsula,
02:35:24 7 then the Crown engages forever to protect the
02:35:28 8 Saugeen's cultivated land from encroachment by
02:35:31 9 white settlers; is that Bond Head's promise?

02:35:34 10 A. That's Bond Head's promise. I'm
02:35:36 11 not so sure that that's what the Anishinaabe
02:35:39 12 understood by this, by his promise.

02:35:41 13 I think that they understood by his
02:35:44 14 promise that they would be able to continue to live
02:35:46 15 their lives as they had before, because that's what
02:35:49 16 they were looking for.

02:35:51 17 They weren't looking to become farmers.
02:35:54 18 So I don't think that was a real option for them.
02:35:56 19 So it's reasonable for me to believe that what's
02:35:58 20 happening here is, when he says this, they're
02:36:01 21 hearing, "You move there, you do the cession, and
02:36:05 22 we'll protect your land". I think that's the way
02:36:15 23 they heard it.

02:36:15 24 Q. Okay. Thank you.

02:36:15 25 A. You're welcome.

02:36:15 1 Q. Now I'd like to turn to page 76 of
02:36:15 2 your report. And that's where you discuss an
02:36:32 3 assembly of various Anishinaabe peoples from
02:36:36 4 various parts of Canada West at Saugeen for a
02:36:43 5 General Council on July 1, 1845.

02:36:46 6 A. That's correct, yes.

02:36:48 7 Q. And midway down page 76 of your
02:36:51 8 report, starting with:

02:36:57 9 "'Chief John Jones of Owen
02:37:02 10 Sound --'"

02:37:02 11 A. Yes.

12 Q. "'-- having been chosen speaker
13 by the Saugeeng and Owen Sound
14 Indians to speak their sentiments,
15 rose and said, "Brother Chiefs - The
16 people for who I speak feel a great
17 deal of sympathy for their relatives
18 who are scattered abroad throughout
19 Canada West, living upon small
20 patches of Reserves; they see them
21 poor, and almost pushed off their
22 lands. Brother Chiefs, we have
23 called you to come here and meet
24 with us in general Council, to tell
25 you that a portion of our territory

1 shall be yours if you will come and
2 settle upon it; we would be glad to
3 have you for neighbors, and we
4 believe we would be a benefit to
5 each other if we were settled
6 together." The heads of thirteen
7 tribes rose successively, and in
8 very appropriate speeches gave
9 thanks, in the name and on the
10 behalf of their people, to their
11 brethren who have given them so
12 generous an offer.'"

02:38:04 13 If we can turn to the next page.

02:38:06 14 "'Resolutions were passed, and
15 a Petition to their Great Father the
16 Governor-General was drafted,
17 adopted, and signed, praying that
18 the Indian territory, situated
19 northerly of Saugeeng and Owen
20 Sound, may be a perpetual Reserve as
21 a future refuge for a general
22 colonization of the Ojibway nation,
23 comprising the scattered tribes of
24 Canada West.'"

02:38:34 25 Now, was it the intention that in 1845

02:38:39 1 of the Saugeen and Nawash Anishinaabe to have their
02:38:43 2 reserve lands settled more intensively at this
02:38:47 3 time, by the related -- their related Bands of
02:38:50 4 southern Upper Canada?

02:38:52 5 A. Well, it was the intention of the
02:38:55 6 Methodists to accomplish that goal. The idea of
02:38:59 7 having other Anishinaabe live there would not
02:39:02 8 necessarily restrict them to cultivating the soil;
02:39:05 9 they would be able to live there as Anishinaabe.

02:39:09 10 Q. But they would settle more
02:39:12 11 intensively on the Peninsula if a large group of
02:39:15 12 them, or large groups of them came to settle there?

02:39:18 13 A. Well, I believe they would remove
02:39:22 14 there and then they would live the life of
02:39:25 15 Anishinaabe.

02:39:25 16 It wouldn't just be cultivating the
02:39:27 17 land because they couldn't survive like that; that
02:39:30 18 would not be practical. So they would still have
02:39:33 19 to engage in their endeavors.

02:39:35 20 Because they're coming with that
02:39:36 21 experience. They're not coming with experience of
02:39:38 22 cultivating the soil. So my understanding of it
02:39:41 23 is, they would come there and pursue natural
02:39:44 24 resource harvests and engage in the modern market
02:39:47 25 economy to the extent they could, exactly as the

02:39:50 1 Saugeen would.

02:39:50 2 But I also would say the Saugeen would
02:39:53 3 be in control of that territory.

02:39:55 4 Q. But you're not saying it would --
02:39:59 5 might it result in contributing to a broader
02:40:03 6 cultivation of the lands that were there?

02:40:06 7 A. It might -- the information that
02:40:09 8 I'm familiar with indicates that there was not a
02:40:13 9 lot of cultivation going on. But I could see this
02:40:17 10 as part of the plan, because the idea is to, among
02:40:20 11 the Methodists, to civilize the Anishinaabe and one
02:40:24 12 of the indicators of that is you're farming.

02:40:26 13 That is a good indicator of
02:40:27 14 civilization. Because you're not roaming over the
02:40:30 15 landscape, let us say, and living an indolent life.

02:40:39 16 Q. If a number of these Anishinaabe
02:40:40 17 Bands did settle on Saugeen, would that be seen by
02:40:45 18 the Saugeen Anishinaabe as offering a greater
02:40:50 19 protection against white settler encroachment?

02:40:53 20 A. It might have, but I don't think
02:40:57 21 they had that in mind. I don't think they were
02:41:00 22 thinking here, like, making a plan to protect their
02:41:03 23 territory by attracting other Anishinaabe to the
02:41:07 24 area.

02:41:08 25 What they want is, they want an area

02:41:10 1 that will be set aside, a reserve for -- area
02:41:14 2 reserved for them, not a reserve, but an area
02:41:17 3 reserved for them in which other Anishinaabe would
02:41:20 4 be welcomed and they would live there as
02:41:23 5 Anishinaabe.

02:41:23 6 Hopefully, from the point of view from
02:41:25 7 the Methodists, they would learn to cultivate the
02:41:28 8 soil, they would engage in these activities and
02:41:30 9 they would become civilized. I think even in the
02:41:34 10 medium term there was no expectation they would
02:41:36 11 arrive, turn to cultivation and engage in that.

02:41:40 12 Q. But it might have offered a
02:41:43 13 greater buffer and protection against encroachment
02:41:47 14 if they had settled there?

02:41:48 15 A. That's a really hard question to
02:41:52 16 say because we don't know how aggressive the
02:41:54 17 settlers would have been in occupying territory, or
02:41:57 18 what the government policy would be. So the
02:42:00 19 hypothetical is a difficult question.

02:42:03 20 Q. Professor Driben, those are all my
02:42:06 21 questions. Thank you very much for your testimony?

02:42:08 22 A. It's my pleasure.

02:42:09 23 THE COURT: Mr. Feliciant?

02:42:37 24 CROSS-EXAMINATION BY MR. FELICIANANT:

02:42:57 25 Q. Good afternoon, Professor Driben.

02:42:59 1 My name is David Feliciant. We've met. And I'm
02:43:03 2 counsel for Ontario and I'm going to ask you some
02:43:06 3 questions about this matter.

02:43:07 4 A. Good afternoon.

02:43:08 5 Q. I understand that you describe
02:43:09 6 yourself as an anthropologist?

02:43:11 7 A. I am an anthropologist, yes.

02:43:13 8 Q. You're not a historian?

02:43:14 9 A. That is correct.

02:43:15 10 Q. You're not a military historian?

02:43:17 11 A. That is correct.

02:43:18 12 Q. You're not a psychologist that can
02:43:20 13 provide opinions on people's psychological states?

02:43:23 14 A. That is correct.

02:43:24 15 Q. You're not an accountant or
02:43:27 16 economist?

02:43:27 17 A. That is correct.

02:43:28 18 Q. You're not a lawyer?

02:43:29 19 A. That is correct.

02:43:30 20 Q. And those places in your evidence
02:43:32 21 and in your report where you reference, I believe
02:43:34 22 your lawyer covered this, but just to be sure,
02:43:37 23 people having -- the Saugeen Ojibway Nation as
02:43:41 24 having proprietary rights, that's not intended as a
02:43:43 25 legal opinion?

02:43:44 1 A. Not at all. It's intended as a
02:43:46 2 concept -- the terms that I'm using should not be
02:43:49 3 mistaken for your terms of art. They're my terms
02:43:52 4 of art.

02:43:53 5 Q. All right. Now, in terms of the
02:43:56 6 work in your CV, your fieldwork was pretty much all
02:44:02 7 conducted, if I can tell, in Northern Ontario or at
02:44:04 8 least the majority of it, in communities north of
02:44:08 9 Lake Superior?

02:44:09 10 A. The majority of it. But I've done
02:44:12 11 fieldwork with all of the divisions that
02:44:14 12 anthropologists draw between Anishinaabe and I'm
02:44:17 13 the only one that's ever done that.

02:44:20 14 Q. And your fieldwork appears to be
02:44:23 15 related to, and I don't say this exclusively, but
02:44:26 16 appears to be related to the contracts and grants
02:44:29 17 which you list on your CV?

02:44:31 18 A. This is correct, yes.

02:44:32 19 Q. Okay. And your fieldwork also
02:44:36 20 involves work on specific projects. And for the
02:44:42 21 most part, does not involve extended time in these
02:44:46 22 communities.

02:44:46 23 You're going there for a specified
02:44:48 24 period of time, not an entire year, not for two
02:44:51 25 years, not for three years. But to complete the

02:44:55 1 work required to do the project?

02:44:56 2 A. Some projects take over two years.
02:44:59 3 I've been going to some communities for over
02:45:02 4 20 years. What I mean is I go back and forth and
02:45:06 5 back and forth.

02:45:07 6 Since my dissertation research, which
02:45:10 7 took about a year in northern Alberta, my stays are
02:45:14 8 less extensive. So I would say a month or two
02:45:17 9 months in some cases, or for shorter periods of
02:45:21 10 time.

02:45:21 11 Q. And your fieldwork, because it
02:45:23 12 involves work on specific projects, for the most
02:45:26 13 part, fieldwork did not involve asking these
02:45:31 14 communities to recount their past histories.

02:45:34 15 It's more about their current land use
02:45:37 16 and occupation and aspirations?

02:45:40 17 A. Well, it -- that's what it looks
02:45:44 18 like on the resumé. But when you're in a
02:45:47 19 community, you want to be -- as an anthropologist,
02:45:51 20 as an ethnologist, I want to be part of that
02:45:56 21 community. I want to do what's called participant
02:45:56 22 observation.

02:45:57 23 So I can't limit myself to doing a
02:45:59 24 specific task. If there's going to be a ceremony,
02:46:01 25 I'm going to be involved in the ceremony.

02:46:03 1 You see, you just get involved in
02:46:04 2 everything. And then you can certainly get at the
02:46:06 3 subject you want, but it doesn't mean you're not
02:46:08 4 going to go to a sweat lodge; it doesn't mean that
02:46:11 5 you're not going to ask questions about that. You
02:46:13 6 just do everything you can to gather information as
02:46:16 7 you're in the field.

02:46:17 8 It's not, it's not a relationship like
02:46:20 9 we have now. We have to develop -- not that we
02:46:23 10 have a negative one, but we have to develop rapport
02:46:26 11 over time, and they have to get to know me because
02:46:29 12 they have to be able to trust me; that's a big
02:46:32 13 obstacle. And that takes some time, that takes
02:46:36 14 some doing.

02:46:37 15 As time goes on, you can ask, and I was
02:46:40 16 trying to explain this on the first day of my
02:46:43 17 testimony. You can ask the broadest range of
02:46:45 18 questions, even though your assignment is a very
02:46:48 19 specific one, because I still have my own interests
02:46:50 20 in the culture itself, in other elements of the
02:46:53 21 culture. So you're correct that my focus is
02:46:56 22 specific, but my questioning, if you will, is
02:46:58 23 broad.

02:46:58 24 Q. But in most cases you're not
02:47:00 25 making detailed inquiries about their past? That's

02:47:04 1 not your objective and it's not part of your
02:47:07 2 methodology to sit someone down and start asking
02:47:11 3 them about their past? If it comes up, it comes
02:47:14 4 up? If it doesn't, it doesn't?

02:47:16 5 A. If they wish to talk about it,
02:47:18 6 correct. If I wish to talk about it, yes, I'll
02:47:21 7 pursue it.

02:47:21 8 Q. Now, with the exception of the
02:47:23 9 report you've done for this litigation, I take it
02:47:26 10 none of your prior reports or articles concern SON,
02:47:29 11 the Saugeen Ojibway Nation?

02:47:31 12 A. That is correct.

02:47:31 13 Q. Or the Bruce Peninsula?

02:47:33 14 A. That is correct.

02:47:34 15 Q. And none of your prior reports
02:47:36 16 involved a study of Treaty 45½ or Treaty 72?

02:47:42 17 A. That is also correct.

02:47:43 18 Q. From what I can tell, and correct
02:47:44 19 me if I'm wrong, none of your prior work was
02:47:48 20 focussed on pre-Confederation treaties in Southern
02:47:51 21 Ontario? I am thinking of things like the Johnson
02:47:53 22 purchase, the Collins purchase, the Williams
02:47:56 23 Treaties.

02:47:56 24 A. I understand what you're saying.
02:47:58 25 You're correct on that.

02:47:59 1 Q. And anthropology, I take it, is no
02:48:01 2 different from other disciplines, in that you need
02:48:03 3 and require evidence in order to formulate
02:48:05 4 opinions?

02:48:06 5 A. That's correct.

02:48:06 6 Q. And the more -- the better
02:48:10 7 evidence you have, the more reliable the opinion
02:48:14 8 is; you would agree with that?

02:48:15 9 A. I would agree with that, yes.

02:48:17 10 Q. I want to ask you some questions
02:48:19 11 now about oral history. Now I understand in this
02:48:23 12 case you did not review or analyze any oral history
02:48:28 13 from community members for the purpose of preparing
02:48:30 14 your report?

02:48:31 15 A. That is correct.

02:48:32 16 Q. Okay. You did however, cite
02:48:34 17 Copway and you cited Conrad Van Dusen's book on
02:48:38 18 David Sawyer?

02:48:40 19 A. That is correct.

02:48:40 20 Q. You have over the course of your
02:48:42 21 work as an anthropologist collected and analyzed
02:48:45 22 oral histories?

02:48:46 23 A. Oh, I've published an oral history
02:48:48 24 on Anishinaabe, yes.

02:48:49 25 Q. And it's part of the work of an

02:48:52 1 ethnohistorian to look at oral histories from time
02:48:56 2 to time?

02:48:56 3 A. Yes, for sure it is.

02:48:58 4 Q. You would agree that oral
02:49:00 5 histories can be valuable?

02:49:01 6 A. Certainly. I did one myself, so I
02:49:04 7 know they can be valuable. Yes, they are valuable.

02:49:07 8 Q. You can agree there's also many
02:49:09 9 problems associated with oral histories?

02:49:11 10 A. That is absolutely correct.

02:49:13 11 Q. It has frailties?

02:49:14 12 A. It has frailties. You're
02:49:16 13 absolutely right.

02:49:17 14 Q. One of those frailties or dangers
02:49:20 15 is that people forget information?

02:49:23 16 A. I think Enoch Powell put it: "Old
02:49:25 17 men forget".

02:49:26 18 Q. And you would agree that people
02:49:28 19 remember things differently?

02:49:29 20 A. As time passes, that's certainly
02:49:31 21 correct.

02:49:31 22 Q. And you would agree the longer the
02:49:33 23 period of time between observing an event and
02:49:36 24 reporting on an event, the less one can have in the
02:49:40 25 oral version?

02:49:40 1 A. Yes, the telling changes over
02:49:45 2 time. That's certainly true, the telling changes
02:49:48 3 over time, and varies from the original. You're
02:49:51 4 correct.

02:49:51 5 Q. So in general you can have more
02:49:53 6 confidence if it is a matter of weeks, less
02:49:56 7 confidence if it's ten years?

02:49:57 8 A. In the oral history itself?

02:49:59 9 Q. Yes?

02:50:01 10 A. I would say so, yes. Excuse me.
02:50:03 11 The closer you are, the point you're making and I
02:50:06 12 agree with, the closer you are in time, it strikes
02:50:09 13 me, the better the information is.

02:50:10 14 Q. And this would be equally true of
02:50:13 15 really anyone reporting an event, I would think?

02:50:15 16 A. I would think that other
02:50:18 17 ethnologists and other ethnohistorians would
02:50:20 18 approach it the same way I do.

02:50:22 19 Q. Once you're 170 years away from an
02:50:26 20 event, oral history loses much of its strength?

02:50:29 21 A. That depends what the oral history
02:50:32 22 says. If we want to consider oral history as
02:50:35 23 scholarly discourse, then that's not going to work.

02:50:39 24 But I don't consider oral history
02:50:41 25 scholarly discourse. I consider oral history raw

02:50:44 1 data, the same as documents that I read.

02:50:46 2 So I'm not looking for an accurate or
02:50:48 3 truthful rendition of the past when I'm reading
02:50:52 4 oral history. I'm looking at the oral history for
02:50:54 5 the cultural content of that oral history.

02:50:56 6 And, again, what's consistent with the
02:50:59 7 oral history, in the examples like this, the case
02:51:02 8 we're dealing with here, I'm looking for the
02:51:04 9 consistency between the oral history that I can
02:51:06 10 read, and what happened in the past as revealed
02:51:09 11 through the documentary record.

02:51:10 12 Q. Okay. But on its own, as the
02:51:16 13 story is passed on over time through generations,
02:51:19 14 once you're 170 years away, my understanding is,
02:51:23 15 your view would be oral history would lose a lot of
02:51:25 16 its strength because you would be concerned about
02:51:27 17 stories changing, people forgetting and all of the
02:51:30 18 other frailties it has?

02:51:32 19 A. Certainly details change. But
02:51:34 20 when I look at oral history, I have to look at the
02:51:37 21 core message, too. I have to see what the core of
02:51:40 22 it is.

02:51:41 23 Because of course parts of the story
02:51:42 24 are going to change. But if there's a core there,
02:51:45 25 and that core remains solid all the way through,

02:51:48 1 then the variation is less significant. It's the
02:51:51 2 core that I'm interested in there.

02:51:52 3 Q. Now you would agree that the best
02:51:54 4 practice in ethnohistory dictates that a
02:51:58 5 community's earliest communication on a subject
02:52:00 6 would reflect their proximate understanding?

02:52:02 7 A. That depends entirely on the data.
02:52:06 8 That depends entirely on the case at hand.

02:52:09 9 Q. Now if I could just bring up --
02:52:14 10 you recall testifying in Robinson, the Robinson
02:52:18 11 annuities case, a couple of years ago?

02:52:20 12 A. I certainly do.

02:52:21 13 Q. Can I bring up the Robinson
02:52:27 14 SC1237.

02:52:28 15 THE COURT: What is this document?

02:52:30 16 MR. FELICIAN: This is the Robinson
02:52:31 17 reply report, filed in the Robinson annuities case.
02:52:34 18 And if we can go to PDF page 3. Now, that's your
02:52:38 19 report; do you recognize that as your report?

02:52:41 20 THE WITNESS: Yes, I do.

02:52:42 21 BY MR. FELICIAN:

02:52:42 22 Q. This is page 3. I've taken an
02:52:44 23 excerpt from the Robinson annuities reply report.
02:52:47 24 PDF page 3, line 19.

02:52:50 25 So if we can go -- here it is.

02:53:10 1 It says, where the arrow is on the
02:53:13 2 page, the cursor:

02:53:15 3 "If we want to know what the
02:53:16 4 chiefs and principal men who
02:53:17 5 implemented the treaties thought
02:53:19 6 they would receive by way of an
02:53:20 7 annuity, best practice in
02:53:22 8 ethnohistory dictates that their
02:53:25 9 bands' earliest communication on the
02:53:26 10 subject would reflect their
02:53:28 11 proximate understanding."

02:53:30 12 So that's where I took that from.

02:53:33 13 A. And that's true in this case.

02:53:35 14 Q. But you're saying it's not
02:53:36 15 general? That you weren't intending that as a
02:53:39 16 general statement on the best practice in
02:53:42 17 ethnohistory?

02:53:43 18 A. Well, no, because it is a case by
02:53:44 19 case basis. In this case, my concern is
02:53:47 20 criticizing Mr. Chartrand.

02:53:56 21 Q. But it certainly is something that
02:53:57 22 in the appropriate case, you would say, the
02:53:58 23 earliest communication is more reflective of the
02:54:03 24 proximate understanding?

02:54:04 25 A. In the annuity case, absolutely.

02:54:10 1 Q. Under what circumstances might it
02:54:12 2 be different?

02:54:13 3 A. It might be different, for
02:54:14 4 instance, if you want to take -- a political tack
02:54:16 5 were taken instead of -- we dealt with an example
02:54:19 6 of that earlier on today.

02:54:23 7 Madwayosh saying, you know, I would
02:54:24 8 have been on your side for the treaty, it's just
02:54:26 9 that everybody else was against it. Well, he's
02:54:28 10 taking a political tack there. So that document
02:54:31 11 would not be as revealing as the kind of things
02:54:34 12 that I'm talking about in the case of the Robinson
02:54:38 13 Superior Annuity. That's different.

02:54:42 14 Q. I'll keep going. You would agree
02:54:46 15 that one reason why it is important to compare --
02:54:49 16 sorry. I should make this the next exhibit,
02:54:53 17 please, Your Honour.

02:54:58 18 THE COURT: I'm pausing because I'm
02:55:02 19 wondering why. I know no one is objecting but...

02:55:08 20 MR. FELICIAN: I'm content to make it
02:55:10 21 a lettered exhibit. We did refer to it in the
02:55:12 22 course of the evidence.

02:55:13 23 THE COURT: But you've read into the
02:55:14 24 record and put to him a proposition from it, which
02:55:17 25 is in the record now; his answer is in the record

02:55:20 1 now.

02:55:23 2 MR. FELICIAN: That's fine. I don't
02:55:25 3 think it's necessary. I've accomplished what I
02:55:27 4 wanted to accomplish.

02:55:28 5 THE COURT: Before you move on, I have
02:55:39 6 no difficulty with this document being marked as a
02:55:41 7 lettered exhibit in order to keep track of it, if
02:55:44 8 that's what this is about.

02:55:46 9 It doesn't have any other status as
02:55:49 10 evidence.

02:55:50 11 MR. FELICIAN: No, you're right.
02:55:51 12 That's correct.

02:55:52 13 THE COURT: If you do want it marked as
02:55:55 14 an exhibit, I think I would limit that to being a
02:55:59 15 lettered exhibit.

02:56:01 16 What is the next lettered exhibit?

02:56:03 17 THE REGISTRAR: X-1, Your Honour.

02:56:05 18 THE COURT: What are we going to do
02:56:08 19 when we get to Z is my question. X-1, reply report
02:56:14 20 dated what?

02:56:16 21 MR. FELICIAN: If we can bring it up
02:56:24 22 again. This is reply report of Dr. Driben in
02:56:28 23 Robinson dated August 15, 2017.

02:56:32 24 THE COURT: All right. Please go
02:56:33 25 ahead.

02:56:33 1 EXHIBIT NO. X-1: Reply report of
02:56:26 2 Dr. Driben in Robinson dated August 15,
02:56:36 3 2017.

02:56:36 4 BY MR. FELICIANANT:

02:56:37 5 Q. You would also agree that when
02:56:38 6 analyzing oral history one of the factors you would
02:56:41 7 consider is whether the community has taken
02:56:43 8 positive steps to preserve it, such as recording it
02:56:46 9 early on?

02:56:47 10 A. That would be useful. That would
02:56:50 11 be a useful thing to -- if for instance I went to a
02:56:53 12 community and there were previous oral histories
02:56:56 13 that I hadn't examined, I would certainly examine
02:56:58 14 those. I did that in the case of Grand Portage
02:57:00 15 certainly.

02:57:01 16 Q. Ensuring -- another method could
02:57:03 17 be on the part of the community ensuring that
02:57:05 18 stories are told regularly and consistently?

02:57:07 19 A. I think told regularly, that's
02:57:11 20 true. Consistency depends on the teller. Because
02:57:15 21 the stories change over time, I've said that
02:57:19 22 before, and you put that proposition to me and I
02:57:21 23 certainly agree with it.

02:57:23 24 Q. And in analyzing oral history,
02:57:30 25 you'd want to understand the community's method of

02:57:32 1 preserving it and whether that method was applied
02:57:36 2 to the stories you're analyzing?

02:57:39 3 A. Well, I understand the method that
02:57:42 4 the Anishinaabe use to preserve their oral history,
02:57:45 5 which is to tell the story. That's what they do,
02:57:47 6 that's their method of doing it; they don't write
02:57:50 7 it down. It's people like me who subsequently
02:57:53 8 write it down.

02:57:53 9 But they have a technique for doing
02:57:55 10 that. They're an oral people, they have an oral
02:57:57 11 culture, their language is a beautiful language and
02:58:01 12 that's the way they transmit information is by
02:58:03 13 stories.

02:58:04 14 Q. You'd want to know, though, with
02:58:06 15 the particular story you're analyzing, it was one
02:58:08 16 of those stories that got retold regularly?

02:58:12 17 A. Well, you know, to understand --
02:58:20 18 I'm not sure I quite understand the question.

02:58:22 19 Q. So if you have an oral history?

02:58:24 20 A. Yes.

02:58:25 21 Q. And you're being asked to analyze
02:58:27 22 it and weigh it as evidence?

02:58:28 23 A. Yes.

02:58:29 24 Q. You would want to know that that
02:58:32 25 oral history is one of those stories and perhaps

02:58:37 1 I'm confusing you because I'm using the word oral
02:58:40 2 history. Perhaps if I took that out -- if you're
02:58:43 3 asked to analyze a story and weigh it?

02:58:45 4 A. Yes.

02:58:46 5 Q. You'd want to know if that's the
02:58:49 6 story that actually was retold regularly and not a
02:58:52 7 story that someone said, oh, yeah, I haven't talked
02:58:56 8 about this for years, I think my grandmother might
02:58:59 9 have told me something.

02:59:01 10 You'd want to know that, as opposed to,
02:59:04 11 this was regularly told at community events, we
02:59:06 12 hear it all the time. There is a difference.
02:59:08 13 You'd want to know?

02:59:09 14 A. I agree I would want to know that.
02:59:12 15 But, again, I want to point out that I do not
02:59:14 16 regard oral history as scholarly discourse, so I'm
02:59:19 17 not looking for oral history in the history book.

02:59:31 18 I'm looking for oral history to tell me
02:59:31 19 things like what did people think of something at a
02:59:31 20 particular time. That's what I'm looking for in an
02:59:31 21 oral history. Or how did people feel about
02:59:34 22 something at a particular time.

02:59:35 23 Because I know that the story is going
02:59:37 24 to vary over time. So that's why I'm trying to say
02:59:41 25 that what I want to look at is the core of the

02:59:44 1 story in relationship to the problem at hand.

02:59:47 2 That's what I did in the annuity case.
02:59:49 3 I looked at the correspondence, in this case the
02:59:52 4 correspondence immediately after, because I
02:59:54 5 thought, well, that was important. And
02:59:56 6 correspondence later on, I said was less, less
03:00:00 7 reliable.

03:00:01 8 But it only meant less reliable in
03:00:04 9 terms of figures. It didn't mean that there was --
03:00:08 10 that the later oral history had no relevance.

03:00:12 11 To me, it still had lots of relevance
03:00:14 12 because it told me that there was something from
03:00:17 13 the Anishinaabe point of view that was not exactly
03:00:19 14 right with that treaty in the annuity.

03:00:21 15 So that was the core message that was
03:00:23 16 always there, no matter there was variation in it;
03:00:26 17 that was the core.

03:00:27 18 And you could see that running right
03:00:29 19 from 1851, when the first letter is published by
03:00:33 20 the Jesuits -- 1852, pardon me -- right up until
03:00:37 21 the last letter that we examined from the Lake
03:00:43 22 Huron side. Subsequently, which was 40 years,
03:00:46 23 50 years later.

03:00:48 24 But what was common in those was that
03:00:51 25 there was a problem in the annuity. That was

03:00:53 1 common.

03:00:53 2 Q. That's not something you have done
03:00:55 3 in this case. You have not looked at oral
03:00:57 4 histories and compared them to other documents,
03:00:59 5 assessed them for repetition, seen whether there is
03:01:03 6 a core within it. For this case, for these
03:01:06 7 communities, you haven't done that?

03:01:08 8 A. I have done that.

03:01:09 9 Q. Where in your report have you done
03:01:11 10 that?

03:01:11 11 A. Well, I did that when I read the
03:01:13 12 oral histories. I was trying to determine whether
03:01:16 13 there was something in the oral histories here that
03:01:20 14 could inform me about what happened in 1854.

03:01:23 15 Q. But where in your report have you
03:01:25 16 done that?

03:01:26 17 A. I haven't put it in my report
03:01:27 18 because my report was finished before the oral
03:01:30 19 histories, before I read the oral history.

03:01:33 20 But subsequently I certainly was
03:01:35 21 interested in whether they were consistent. And in
03:01:38 22 my view they are consistent because the oral
03:01:40 23 histories say something was wrong with the treaty.

03:01:42 24 Q. And why was it that you read them
03:01:44 25 after you did your report and not before?

03:01:46 1 A. That's the way I proceeded. I
03:01:49 2 always proceed in that order. That's my method of
03:01:52 3 operating. I always do the documents first and
03:01:55 4 then come to oral history later, if I come to it.

03:01:58 5 Q. So you're saying, you write your
03:02:00 6 expert report always prior to -- and come to
03:02:05 7 conclusions and opinions in your expert report
03:02:08 8 prior to looking at the oral history that may
03:02:11 9 impact your expert report and then not share the
03:02:13 10 results of what you looked at? Is that what you're
03:02:16 11 saying?

03:02:16 12 A. Not at all.

03:02:17 13 Q. But you didn't share the results
03:02:18 14 of what you looked at after writing your report?

03:02:22 15 A. Share the results of my analysis
03:02:24 16 of the oral history?

03:02:25 17 Q. Yes, sir?

03:02:26 18 A. I was only looking at the oral
03:02:28 19 history for one reason afterwards: To find out if
03:02:31 20 it was consistent with what I had written, and it
03:02:33 21 is.

03:02:33 22 And it's consistent in the sense that I
03:02:37 23 can look at those oral histories today, we can all
03:02:40 24 read them, and when we read them, we find out one
03:02:43 25 thing, one basic thing to me, and that's that

03:02:46 1 something was wrong with the treaty-making process
03:02:48 2 in 1854.

03:02:50 3 Now I can identify that. I'm not
03:02:53 4 expecting the Anishinaabe storytellers to tell me
03:02:56 5 that there were three phases in a treaty-making
03:02:59 6 process; that's my analytical skills.

03:03:01 7 I'm not expecting them to tell me that
03:03:04 8 they didn't do this ceremony or that ceremony. All
03:03:07 9 I wanted to find out with from those oral histories
03:03:10 10 is, is that consistent with the documentary record?
03:03:13 11 And I believe it is.

03:03:13 12 Q. Why couldn't you have done that
03:03:15 13 prior to writing your report? And why wouldn't you
03:03:20 14 have? Why couldn't you have and why wouldn't you
03:03:23 15 have?

03:03:23 16 A. This is the way I operated this
03:03:25 17 time.

03:03:25 18 Q. But why?

03:03:26 19 A. That's the way I generally do it.
03:03:28 20 I'm just following the normal procedures that I
03:03:31 21 operate by. I start with documents and then I move
03:03:33 22 to oral history.

03:03:34 23 When I was finished with the documents
03:03:36 24 here, I thought I had a pretty good argument, a
03:03:39 25 pretty good analysis, an analysis that would be

03:03:42 1 informative, then I looked at the oral histories to
03:03:45 2 see if there was something inconsistent. What if
03:03:49 3 there was something inconsistent? Then I would
03:03:51 4 have to report it for sure.

03:03:52 5 If it's consistent, all I can tell you
03:03:54 6 right now is, my reading of it is makes the two
03:03:57 7 things fit together.

03:03:58 8 Q. Do you understand, though that it
03:04:02 9 poses a challenge for those of us who don't
03:04:05 10 understand your methodology to understand how you
03:04:10 11 came to the conclusion it's consistent if you don't
03:04:14 12 disclose that you've actually done this activity in
03:04:17 13 your report or shortly after your report, or when
03:04:20 14 you've done it?

03:04:21 15 A. I don't know how to answer that
03:04:26 16 question. If you see that as a problem, then you
03:04:29 17 see that as a problem. I have to tell you from my
03:04:32 18 point of view, I like to write my reports this way.
03:04:35 19 I like to look at oral histories at the end of it.

03:04:39 20 I don't like to base my report
03:04:43 21 exclusively on oral history, because it's not
03:04:47 22 scholarly discourse. I cannot simply repeat the
03:04:49 23 oral history and say, this is their history.
03:04:51 24 Because that wouldn't be the history. It's a set
03:04:54 25 of data that I wanted to look at.

03:04:55 1 In this case, I did my analysis, I
03:04:57 2 finished my analysis and the oral histories, when I
03:05:00 3 had time to look at the oral histories, which was
03:05:03 4 subsequently, I looked at the oral histories. If
03:05:05 5 there would have been something inconsistent with
03:05:07 6 them, I would have reported it.

03:05:11 7 Q. Thank you. Now one of the
03:05:13 8 concerns about oral history is reporter bias?

03:05:17 9 A. That is correct.

03:05:17 10 Q. And you'd agree that some Elders
03:05:19 11 or community members may have a particular view
03:05:22 12 that they seek to promote, such as in land claims
03:05:27 13 cases?

03:05:27 14 A. Elders can report, can report
03:05:31 15 events that further claims. You're right. That's
03:05:34 16 absolutely correct; that's in the literature.

03:05:36 17 Q. There's also concern about
03:05:38 18 interviewer bias?

03:05:40 19 A. That is correct.

03:05:41 20 Q. The interviewer could promote a
03:05:44 21 particular view through, for example, by the asking
03:05:46 22 of leading questions?

03:05:47 23 A. Yes, absolutely.

03:05:48 24 Q. So what do you want to do as a
03:05:49 25 anthropologist is diversify your research bias by

03:05:54 1 looking at the oral history in conjunction with
03:05:56 2 other available evidence?

03:06:01 3 A. That's correct.

03:06:02 4 Q. I'm going to move on to another
03:06:04 5 area, more about generally about the Saugeen
03:06:12 6 Ojibway Nation. I hope this isn't repetitive, but
03:06:15 7 I need to understand this in my own mind.

03:06:18 8 You would agree that the term
03:06:19 9 Algonquian refers to an Indigenous language family?

03:06:23 10 A. That is correct.

03:06:31 11 Q. And you would agree that
03:06:31 12 Algonquian is distinct from Iroquoian or
03:06:31 13 Haudenosaunee language families?

03:06:32 14 A. Yes. They are different language
03:06:35 15 families; that is correct.

03:06:35 16 Q. Algonquians include Cree and
03:06:37 17 Anishinaabeg?

03:06:38 18 A. That's correct.

03:06:38 19 Q. But Anishinaabeg are comprised of
03:06:40 20 a number of groups. So for example, the Algonquin
03:06:45 21 are Anishinaabe?

03:06:47 22 A. You mean --

03:06:48 23 Q. The Algonquin, not the
03:06:52 24 Algonquians. The Algonquin are Anishinaabe?

03:06:53 25 A. Yes, they call themselves

03:06:56 1 Anishinaabe, that's correct.

03:06:56 2 Q. The Nipissing are Anishinaabe?

03:06:57 3 A. Yes, they call themselves
03:06:59 4 Anishinaabe as far as I am aware.

03:07:00 5 Q. The Ottawa or Odawa are
03:07:03 6 Anishinaabe?

03:07:03 7 A. That is correct.

03:07:04 8 Q. The Pottawatomi are Anishinaabe?

03:07:05 9 A. That is correct.

03:07:06 10 Q. The Ojibwe are Anishinaabe?

03:07:07 11 A. Yes. The Anishinaabe are composed
03:07:09 12 of three primary linguistic groups. So from an
03:07:15 13 ethnological point of view, I've mentioned those
03:07:15 14 earlier. There's Ojibwe-speaking Anishinaabe,
03:07:17 15 there's Pottawatomi-speaking Anishinaabe, and
03:07:19 16 there's Odawa-speaking Anishinaabe.

03:07:21 17 Some of the groups that you mentioned,
03:07:22 18 like the Nipigon, are Ojibwe-speaking Anishinaabe,
03:07:26 19 if I remember correctly.

03:07:28 20 So the distinction that I would make
03:07:29 21 would be the threefold one, rather than the
03:07:31 22 distinctions that you're making.

03:07:33 23 Q. And there are variants of the term
03:07:36 24 Ojibwe in the literature, such as Ojibwa, with an
03:07:39 25 "A" at the end, Ojibwe with an "E" at the end.

03:07:45 1 Ojibbeway, with two Bs, E-W-A-Y. And Otchpwe,
03:07:51 2 O-T-C-H-P-W-E?

03:07:51 3 A. Yes, there are many. They
03:07:52 4 spelling that's preferred today is O-J-I-B-W-E.

03:07:56 5 Q. And the Chippewa or Chippewas are
03:07:59 6 also terms referring to Ojibwe?

03:08:01 7 A. Ojibwe speakers, that's correct.
03:08:03 8 It is a corruption of the term that's used in the
03:08:05 9 United States.

03:08:05 10 Q. And Mississauga or Mississaugas
03:08:09 11 are also terms referring to Ojibwe?

03:08:11 12 A. Yes, because that means "big river
03:08:13 13 mouth opening".

03:08:13 14 Q. Similarly, Sautaux or Saulteaux.
03:08:14 15 Sautaux being S-A-U-T-E-U-X or Saulteaux
03:08:14 16 S-A-U-L-T-E-A-U-X are also terms referring to
03:08:24 17 Ojibwe.

03:08:24 18 A. Yes, those are the terms used by
03:08:26 19 the French.

03:08:26 20 Q. And now some of the literature,
03:08:28 21 and I think you talked about this in-chief, such as
03:08:30 22 the Handbook of North American Indians categorize
03:08:34 23 Ojibwe into geographical or regional groups?

03:08:37 24 A. This is correct.

03:08:38 25 Q. So the Ojibwe groups living in the

03:08:41 1 further northwest of Ontario and into northeast
03:08:44 2 Manitoba are the Northern Ojibwe?

03:08:46 3 A. That is correct.

03:08:47 4 Q. The Ojibwe groups living west of
03:08:49 5 Lake Superior and into the Lake of Woods area of
03:08:52 6 Ontario, are referred to as Southwestern Ojibway?

03:08:55 7 A. Southwestern, that's correct.

03:08:57 8 Q. And the Ojibwe groups in the Lake
03:09:01 9 Huron, Georgian Bay and Southern Ontario regions
03:09:02 10 are referred to as Southeastern Ojibwe?

03:09:04 11 A. That is correct.

03:09:05 12 Q. And they include, the Southeastern
03:09:08 13 Ojibwe include the Saugeen Ojibway Nation?

03:09:11 14 A. That is correct.

03:09:11 15 Q. Which includes the two Plaintiffs
03:09:13 16 communities here?

03:09:13 17 A. Yes.

03:09:14 18 Q. All right. And the Saugeen
03:09:19 19 Ojibway Nation also includes members, though, of
03:09:21 20 Pottawatomi ancestry?

03:09:24 21 A. Well they're Anish -- no, I don't
03:09:28 22 like to characterize it that way, when we say
03:09:31 23 Pottawatomi ancestry. They are Anishinaabe who
03:09:34 24 speak Pottawatomi. They're still Anishinaabe. So
03:09:37 25 their ancestry is Anishinaabe; it's not

03:09:40 1 Pottawatomi.

03:09:40 2 We should not think of the Pottawatomi,
03:09:42 3 the Odawa and the Ojibwe as three different
03:09:44 4 cultures. We should think of them as one culture
03:09:47 5 with linguistic variation, and some variation in
03:09:51 6 their subsistence techniques because of their
03:09:53 7 location. That's how we should think about them.
03:09:56 8 So their background is Anishinaabe, not
03:09:58 9 Pottawatomi.

03:09:58 10 Q. I see. From an anthropological
03:10:02 11 perspective, am I correct Southeastern Ojibway are
03:10:06 12 considered to reside in Southern Ontario?

03:10:09 13 A. Yes.

03:10:09 14 Q. Now I'm going to show you some
03:10:11 15 sources and then ask you a couple of questions
03:10:15 16 after I show them to you.

03:10:17 17 You cited Peter Schmalz. Can you
03:10:21 18 remind us who Peter Schmalz is?

03:10:23 19 A. He's a ethnohistorian who wrote a
03:10:26 20 book on the Ojibwa of Southern Ontario.

03:10:28 21 Q. Could we bring up S1524, please.

03:10:42 22 This is Chapter 1 of The Ojibwa of
03:10:46 23 Southern Ontario. If we can make this the next
03:10:51 24 exhibit, please.

03:10:52 25 THE COURT: Mr. Registrar.

03:10:54 1 THE REGISTRAR: Exhibit No. 4339.

03:10:57 2 EXHIBIT NO. 4339: Chapter 1 of The

03:10:57 3 Ojibwa of Southern Ontario written by

03:10:59 4 Peter Schmalz.

03:10:59 5 BY MR. FELICIANANT:

03:10:59 6 Q. If we can go to page 5 of the

03:11:01 7 document, PDF 7, I believe. And you'll see Peter

03:11:08 8 Schmalz writes:

03:11:09 9 "The Ojibwa of Southern Ontario

03:11:11 10 date from about 1701, since it was

03:11:16 11 not until that year that the

03:11:17 12 territory between Lakes Huron, Erie

03:11:20 13 and Ontario was occupied by them.

03:11:21 14 Prior to the period of expansion,

03:11:23 15 their settlements were in the

03:11:24 16 Georgian Bay area and on Lake

03:11:26 17 Superior, especially the north

03:11:26 18 shore."

03:11:30 19 Before I ask you the question, I want

03:11:31 20 to show you another document; so if we can keep

03:11:35 21 that in mind for a moment. Can we turn up

03:11:40 22 Exhibit 3998, please.

03:11:45 23 This is the Rogers text on the

03:11:50 24 Southeastern Ojibwa and on page 760, the first

03:11:56 25 paragraph. So it's the first page, first

03:11:58 1 paragraph:

03:11:59 2 "Within a century after
03:12:00 3 European contact, Ojibwa began to
03:12:03 4 expand into Southern Ontario and
03:12:05 5 Michigan from a homeland that is
03:12:07 6 difficult to define with any
03:12:09 7 precision on the basis of culture or
03:12:12 8 linguistic data. It is reasonably
03:12:14 9 certain that their homeland was
03:12:16 10 somewhere within an area extending
03:12:18 11 from the east shore of Georgian Bay,
03:12:21 12 west along the North Shore of Lake
03:12:23 13 Huron, and a short distance along
03:12:24 14 the northeast shore of Lake Superior
03:12:26 15 and on to the Upper Peninsula of
03:12:29 16 Michigan."

03:12:31 17 Then if we can go to the next page, 761. First
03:12:37 18 full paragraph on the left side, it says:

03:12:41 19 "Until the last decade of the
03:12:42 20 17th century, Southeastern Ojibwa
03:12:46 21 had occupied only the Precambrian
03:12:48 22 Shield about the northern shores of
03:12:50 23 Lake Huron. During the 1690s, some
03:12:53 24 began moving south into extreme
03:12:55 25 Southern Ontario and soon replaced,

03:12:57 1 often it appears by force, the

03:12:59 2 Iroquois who had settled after 1650

03:13:02 3 along the north shores of Lakes Erie

03:13:05 4 and Ontario."

03:13:12 5 Right beside that is a map. You

03:13:13 6 actually include it in your report -- we don't have

03:13:19 7 to go there, but it's included at page 33, and it's

03:13:22 8 your Map 4. And if we can blow that map up a bit.

03:13:31 9 On the legend it shows in the

03:13:34 10 triangles, the named groups, presumably Ojibwa,

03:13:38 11 about 1650. And you'll see those triangles on the

03:13:41 12 eastern shore, consistent with what we've read, I'd

03:13:44 13 suggest, on the eastern shore of Georgian Bay and

03:13:47 14 up along the north shore of Lake Huron and up the

03:13:50 15 eastern side of Lake Superior.

03:13:55 16 A. Yes, these are communities that

03:13:57 17 are on the shore. There's no -- Ed Rogers didn't

03:14:03 18 know what was happening north, so of course that

03:14:06 19 was never included on this map. But we know there

03:14:08 20 were people there.

03:14:10 21 Q. Right. And you'll see, though,

03:14:12 22 the other part of the legend shows "Settlements

03:14:15 23 about 1850" so when we get to 1850 we see the two

03:14:20 24 settlements at Saugeen and Nawash. And that's from

03:14:23 25 the map you included in your report; is that

03:14:25 1 correct?

03:14:25 2 A. That's correct.

03:14:26 3 Q. Okay. Do you take issue with
03:14:30 4 anything in Rogers or Schmalz?

03:14:34 5 A. In terms of the Saugeen Peninsula
03:14:36 6 and who's occupying it?

03:14:38 7 Q. Yes?

03:14:38 8 A. Anishinaabe are occupying it.
03:14:41 9 They're specifically about Ojibway people. I'm
03:14:44 10 talking Anishinaabe people, that would include
03:14:47 11 Odawa people as well.

03:14:48 12 Q. Okay. So which specific Bands
03:14:57 13 would have been occupying it at that time? My
03:15:00 14 understanding is in the 1600s, and prior to the
03:15:03 15 invasion of the Iroquois, the Huron, Petun and
03:15:08 16 Neutral were located along the south shore of
03:15:13 17 Georgian Bay there?

03:15:15 18 Isn't that correct that the Huron,
03:15:17 19 Neutral, and Petun were in that area?

03:15:20 20 A. I'm sorry. I just can't recall,
03:15:22 21 I'd have to look at a map. But then it would be a
03:15:27 22 map of Huron settlements.

03:15:29 23 Q. So are you able to provide an
03:15:30 24 opinion today, based on your knowledge, of which
03:15:34 25 Bands occupied the area south of Georgian Bay, and

03:15:41 1 on the Bruce Peninsula?

03:15:47 2 We're talking about Bands, not the
03:15:49 3 broader cultural group you're talking about?

03:15:51 4 THE COURT: At what point in time.
03:15:53 5 You've lost me.

03:15:55 6 MR. FELICIAN: In the 1600s.

03:15:57 7 THE WITNESS: I cannot give -- I cannot
03:16:00 8 name a Band. I wouldn't know the names of the
03:16:02 9 Bands. I don't think anybody does. I don't think
03:16:05 10 anybody can answer the question you're asking.

03:16:07 11 BY MR. FELICIAN:

03:16:07 12 Q. All right. I'd like to now ask
03:16:13 13 you some questions about the Three Fires
03:16:18 14 Confederacy.

03:16:18 15 Do you agree that the -- you agree that
03:16:21 16 the Anishinaabe, and I think you've said this,
03:16:24 17 resided in different communities across Ontario?

03:16:27 18 A. This is correct.

03:16:28 19 Q. And similarly, the Ojibwe
03:16:30 20 resided in different communities from the eastern
03:16:33 21 end of Lake Ontario and the north shore of Lake
03:16:36 22 Ontario around Lake Superior and into Manitoba, so
03:16:39 23 they occupied a large territory?

03:16:41 24 A. The Anishinaabe occupy a large
03:16:43 25 territory. Ojibwe speakers among the Anishinaabe

03:16:46 1 also occupy a large territory because they're the
03:16:48 2 largest group of Anishinaabe.

03:16:52 3 Q. I believe you've already testified
03:16:53 4 these communities were, by the time of contact with
03:16:56 5 Europeans, independent of the others and governed
03:16:58 6 their own day-to-day affairs independently of the
03:17:01 7 others?

03:17:01 8 A. That's correct.

03:17:02 9 Q. Okay. Bands, therefore, would
03:17:07 10 have had their own unique concerns and objectives?

03:17:10 11 A. Yes, that's correct.

03:17:11 12 Q. And those concerns and objectives
03:17:13 13 may have been similar to other Bands, might have
03:17:16 14 been very different?

03:17:17 15 A. Yes, that's correct.

03:17:18 16 Q. And you've observed in your report
03:17:20 17 that the Ojibwe, Odawa and Pottawatomi were part of
03:17:23 18 a loose confederacy called the Three Fires; is that
03:17:27 19 right?

03:17:27 20 A. That's correct.

03:17:29 21 Q. You've said that the Bands made
03:17:30 22 decisions about lands and waters within their
03:17:33 23 traditional territories?

03:17:35 24 A. Each Band made its own decisions
03:17:38 25 that's correct.

03:17:39 1 Q. And you'd agree that those
03:17:40 2 decisions very likely would be decisions that would
03:17:44 3 have addressed the Band's concerns or pursued the
03:17:48 4 Band's objectives?

03:17:49 5 A. Yes, I would say certainly they
03:17:51 6 would be concerned with the Band's objectives. I
03:17:53 7 can't rule out other objectives, but I would say
03:17:56 8 that would be their primary orientation.

03:17:59 9 Q. And different Bands participate --
03:18:02 10 I believe you said this morning with my friend from
03:18:06 11 Canada -- different Bands participated in the Three
03:18:09 12 Fires at different times and perhaps when it suited
03:18:12 13 their interests?

03:18:13 14 A. That's right. When it suited
03:18:14 15 their interests, they participated in it. It was a
03:18:17 16 matter of expediency.

03:18:18 17 Q. All right. Can we bring up S0606,
03:18:28 18 please. And this is a footnote in your report
03:18:32 19 entitled -- this is a document entitled "Alliance
03:18:36 20 of the Three Fires in Trade and War, 1630 to 1812".
03:18:43 21 If we can make that the next exhibit, please?

03:18:46 22 THE COURT: Mr. Registrar.

03:18:48 23 THE REGISTRAR: Exhibit No. 4340.

03:18:51 24 EXHIBIT NO. 4340: Document entitled

03:18:36 25 "Alliance of the Three Fires in Trade

03:18:38 1 and War, 1630 to 1812".

03:18:52 2 BY MR. FELICIANANT:

03:18:52 3 Q. If we can go to page 3 of the
03:18:55 4 document, footnote 7. You have to blow up footnote
03:19:04 5 7; it's quite small. Here the author writes:

03:19:19 6 "The emphasis is stressed on
03:19:20 7 alliances rather than confederacies
03:19:23 8 or leagues, since the latter two
03:19:25 9 suggest more permanent
03:19:27 10 organizations. Alliances among the
03:19:28 11 tribes of the Great Lakes often were
03:19:30 12 understood to be temporary, and the
03:19:33 13 Three Fires preferred holding
03:19:35 14 intertribal councils only when
03:19:38 15 necessary."

03:19:39 16 A. I see that note, yes.

03:19:56 17 Q. That suggests to me, and perhaps
03:19:57 18 you'd agree, that these intertribal councils were
03:20:01 19 not occurring at regular intervals?

03:20:04 20 A. As far as I'm aware, they did not
03:20:07 21 occur at regular intervals. They would happen on
03:20:11 22 an as-need-be basis.

03:20:13 23 MR. FELICIANANT: Can we pull up
03:20:15 24 Exhibit 1013, please, which is an excerpt from
03:20:19 25 Schoolcraft.

03:20:35 1 This is on page -- on the first page
03:20:35 2 which is page 146, the second full paragraph. So
03:20:36 3 if we can go down the page, please.

03:20:45 4 You will see it says:

03:20:52 5 "Their government has been
03:20:53 6 deemed a paradox, at the same time
03:20:55 7 exercising, and too feeble to
03:20:57 8 exercise power. But it is not more
03:21:00 9 paradoxical than all patriarchal
03:21:03 10 governments which have their tie in
03:21:06 11 filial affection, and owe their
03:21:08 12 weakness to versatility of opinion.
03:21:11 13 War and other public calamities
03:21:13 14 bring them together, while
03:21:14 15 prosperity drives them apart. They
03:21:16 16 rally on public danger, with
03:21:18 17 wonderful facility, and they
03:21:20 18 disperse with equal quickness. All
03:21:23 19 their efforts are of the partisan,
03:21:26 20 popular kind."

03:21:27 21 Do you agree with that?

03:21:29 22 A. I don't know what the context is.
03:21:31 23 And to agree that this is a general characteristic
03:21:35 24 of the Anishinaabe or of Ojibwe-speaking people,
03:21:39 25 this is way too general to --

03:21:42 1 Q. At the Three Fires Confederacy,
03:21:42 2 not all Ojibwe-speaking peoples.

03:21:45 3 A. Oh, is that -- is that what
03:21:47 4 Schoolcraft is talking about here?

03:21:50 5 Q. I believe it is.

03:21:52 6 A. I just don't recognize the Three
03:21:55 7 Fires in here, that's all.

03:21:57 8 Q. Let me ask it this way. Would you
03:22:00 9 agree that with regard to the Three Fires and the
03:22:04 10 history of the Three Fires, that they would come
03:22:07 11 together quickly and disperse quickly?

03:22:09 12 A. Not necessarily. They come
03:22:14 13 together as need be, and they would remain as long
03:22:16 14 as required. And then they would disperse. How
03:22:19 15 long that would be would depend upon the activities
03:22:21 16 that they're undertaking at the time.

03:22:23 17 When they undertake activities,
03:22:26 18 remember, they have to have the imprimatur of the
03:22:29 19 supernatural world, so there's going to be lots of
03:22:32 20 ceremonies and rituals as they're doing these
03:22:36 21 things.

03:22:36 22 So I don't think they come together
03:22:38 23 like fusion and fission in a very rapid way. I
03:22:40 24 think they take their time, they deliberate, they
03:22:43 25 talk and work things out. I think that takes some

03:22:46 1 time.

03:22:46 2 So this coming apart, this fusion and
03:22:50 3 fission, I can understand this in terms of the
03:22:53 4 annual round, sure. And Schoolcraft is certainly
03:22:56 5 familiar with that. You know, fission, fusion,
03:23:06 6 people coming together, people moving apart. But
03:23:06 7 with the Three Fires, it's different than the
03:23:06 8 fusion and fission in a community.

03:23:06 9 Q. But there's no evidence that
03:23:07 10 you've located, I take it, in the secondary
03:23:09 11 sources; we've been through the secondary sources.
03:23:12 12 There's no evidence that assists us with precisely
03:23:16 13 how frequently the Three Fires Confederacy met or
03:23:19 14 indeed what they even talked about when they met?

03:23:21 15 A. That is correct. Except we know
03:23:23 16 in general terms they would deal with political and
03:23:26 17 economic matters.

03:23:27 18 Q. Okay. And there's no evidence
03:23:29 19 that they ever had a role in the day-to-day
03:23:32 20 decision making by the Bands of the use of the
03:23:36 21 lands and waters in their traditional territory?

03:23:38 22 A. That is correct. It was the
03:23:39 23 Bands' prerogative to do that, and not the Three
03:23:42 24 Fires.

03:23:42 25 Q. Okay. Similarly, you'd agree

03:23:47 1 again, there is no direct evidence that the
03:23:49 2 Chippewas of Saugeen or Chippewas of Nawash
03:23:52 3 participated in any of the councils held by the
03:23:55 4 Three Fires Confederacy?

03:23:55 5 A. That would be beyond my knowledge.

03:23:58 6 Q. Okay. You talked a little bit in
03:24:11 7 your evidence of the Three Fires as brothers,
03:24:14 8 referring to themselves as brothers?

03:24:18 9 A. That is correct, yes.

03:24:19 10 Q. So if we can go to page 27 of your
03:24:21 11 report, if we can pull that up, please, the second
03:24:39 12 sentence you write:

03:24:39 13 "The connection between the
03:24:39 14 Three Fires was further buttressed
03:24:39 15 by the fact that they spoke of one
03:24:41 16 another as brothers: Ojibway, "the
03:24:43 17 elder brother", Odawa, "the middle
03:24:45 18 brother" and Pottawatomi, "the
03:24:46 19 younger brother", and while the
03:24:48 20 metaphor implies that Ojibway held a
03:24:50 21 position of authority and
03:24:51 22 responsibility in the alliance...."

03:24:56 23 I'll stop there because you have a
03:24:58 24 footnote 26. If we can go down to footnote 26
03:25:01 25 that's Edward Rogers, "The Round Lake Ojibwa".

03:25:09 1 A. Uhm-hmm.

03:25:10 2 Q. If we can pull up footnote 26

03:25:12 3 Edward Rogers "The Round Lake Ojibwa". Looking up

03:25:36 4 S1460.

03:25:51 5 If we can make this the next exhibit,

03:25:54 6 please.

03:25:55 7 THE COURT: Mr. Registrar?

03:25:59 8 THE REGISTRAR: Exhibit No. 4341.

03:26:01 9 EXHIBIT NO. 4341: Document entitled

03:25:13 10 "The Round Lake Ojibwa" by Edward

03:26:04 11 Rogers.

03:26:04 12 BY MR. FELICIANANT:

03:26:04 13 Q. So if we can go to page -- you

03:26:06 14 cite in your footnote pages B21 to B22. If we can

03:26:12 15 just look at B21, please.

03:26:16 16 So while we're getting there, you would

03:26:22 17 agree with me, this piece is literally about

03:26:27 18 kinship relationships? It talks about brother to

03:26:31 19 brother, sister to sister, parents to children,

03:26:35 20 mother to father, husband to wife. It's literally

03:26:38 21 about kinship relationships?

03:26:41 22 A. Yes, in Weagamow, yes, in Round

03:26:48 23 Lake.

03:26:48 24 Q. Page B21 it starts with the

03:26:50 25 discussion of brother and brother. If we can go to

03:26:54 1 the top of page B22. I understand that this
03:27:07 2 suggests, and correct me if I'm wrong, the younger
03:27:13 3 brother must ask for permission to engage in any
03:27:16 4 task from the elder brother?

03:27:17 5 A. In this community in 1960s -- in
03:27:21 6 the 1960s that's exactly what Ed Rogers found.

03:27:24 7 Q. Okay. So what I'm suggesting to
03:27:26 8 you is that this authority, this citation, this
03:27:30 9 article, is not support for the proposition that
03:27:34 10 the Three Fires Confederacy literally behaved as
03:27:37 11 brothers?

03:27:38 12 A. Well, I never intended that in my
03:27:41 13 essay --

03:27:41 14 Q. Okay.

03:27:41 15 A. -- at all.

03:27:42 16 Q. Your "essay", you mean your
03:27:44 17 report?

03:27:45 18 A. Pardon me, my report. It is a
03:27:47 19 metaphor. It's the way they speak. They speak of
03:27:50 20 each other as brothers, just as they speak of
03:27:52 21 others as kin like father, or brother, which they
03:27:56 22 first called Europeans.

03:27:57 23 Q. Certainly it's not the case among
03:27:59 24 the Ojibwe, Odawa or Pottawatomi that they have to
03:28:03 25 consult with each other and seek permission about

03:28:05 1 decisions in their territory; we've already
03:28:07 2 established that?

03:28:07 3 A. You're absolutely correct on that,
03:28:11 4 sir.

03:28:11 5 MR. FELICIAN: Your Honour, I'm moving
03:28:14 6 into a different area, if you'd like to take the
03:28:16 7 afternoon break.

03:28:17 8 THE COURT: Yes.

03:28:18 9 -- RECESS TAKEN AT 3:28 --

03:53:38 10 -- UPON RESUMING AT 3:51 --

03:53:38 11 THE COURT: Please go ahead.

03:53:41 12 BY MR. FELICIAN:

03:53:42 13 Q. I'd like to turn now and ask you
03:53:44 14 some questions about the Allouez experience. This
03:53:46 15 is at page 58 of your report, if we can pull that
03:53:49 16 up, please.

03:53:51 17 And you start your discussion on
03:53:59 18 page 58, and I understand you're using Allouez as
03:54:02 19 an example of how the Anishinaabe would treat
03:54:06 20 Europeans if they were not welcome; is that right?

03:54:09 21 A. Well, partly what I want to do is,
03:54:12 22 what I'm trying to do here is bring to attention
03:54:17 23 the fact that Anishinaabe controlled their
03:54:19 24 territories. And they did this by various means
03:54:23 25 and Allouez was regarded as an intruder and they

03:54:27 1 treated him correspondingly. That's the overall
03:54:30 2 message that I was trying to get here.

03:54:32 3 Q. So if we could go to page 59 of
03:54:36 4 your report. We can stop there. You write in the
03:54:45 5 first paragraph, last sentence of the first
03:54:50 6 paragraph you say:

03:54:52 7 "But when Allouez arrived in
03:54:54 8 Montreal the flotilla had left,
03:54:56 9 almost certainly because the
03:54:57 10 Anishinaabe in charge of the fleet
03:54:58 11 did not want Allouez on the voyage."

03:55:04 12 Now, you don't cite a source for this
03:55:07 13 specifically, but it's addressed in the source you
03:55:10 14 footnote at the bottom of the page.

03:55:15 15 MR. FELICIAN: So can we pull up
03:55:18 16 S1274, please.

03:55:18 17 BY MR. FELICIAN:

03:55:23 18 This is the visit of Father Allouez to
03:55:26 19 Lake Nipigon in 1667. If we can make that the next
03:55:26 20 exhibit, please.

03:55:40 21 THE COURT: Mr. Registrar?

03:55:40 22 THE REGISTRAR: Exhibit No. 4342.

03:55:40 23 EXHIBIT NO. 4342: Description of the
03:55:40 24 Visit of Father Allouez to Lake Nipigon
03:55:40 25 in 1667.

03:55:40 1 BY MR. FELICIANIANT:

03:55:40 2 Q. If we can go to page 42, second
03:55:40 3 page of the document, second paragraph. It says
03:55:53 4 here, if you go down three lines:

03:55:56 5 "He studied the Huron and
03:55:58 6 Algonquian languages and was
03:55:58 7 initiated into the work of the
03:56:00 8 Indian Missions in the Three Rivers
03:56:01 9 neighbourhood. In 1664 he was ready
03:56:05 10 to go to the Ottawa country on Lake
03:56:08 11 Superior. Bishop Laval appointed
03:56:11 12 him Vicar General of the whole
03:56:12 13 northwest country, and he went to
03:56:15 14 Montreal late in the summer to join
03:56:18 15 the usual Indian flotilla on its way
03:56:22 16 back to Lake Superior. But he
03:56:22 17 arrived there too late; the Indians
03:56:24 18 had left already. So he returned to
03:56:25 19 Three Rivers to wait another year."

03:56:28 20 So I take it from the plain reading of
03:56:31 21 that is that he was too late, and they left. It
03:56:34 22 says nothing about them not wanting him to go.
03:56:37 23 Certainly not, "almost certainly not wanting him to
03:56:40 24 go". It doesn't say anything like that at all.

03:56:42 25 A. It doesn't say that, but we have

03:56:44 1 to look subsequently what happened on the voyage.

03:56:47 2 And when we see how he was mistreated -- let me use
03:56:51 3 that term -- how he was treated very poorly on the
03:56:54 4 voyage, it's clear in my mind they didn't want him
03:56:57 5 on the voyage.

03:56:58 6 So when I say almost certainly they
03:57:00 7 didn't want him on the voyage I think that's
03:57:03 8 consistent with what happened afterwards. And
03:57:06 9 Father Nelligan is not talking about that.

03:57:10 10 Q. I want to understand the logic.
03:57:12 11 You're saying -- let's assume that it's correct.
03:57:15 12 In the next voyage a year later he's treated badly.
03:57:20 13 You're able to take from that that the year before
03:57:23 14 they didn't want him to go, without any evidence of
03:57:28 15 how they felt or what they were thinking the year
03:57:31 16 before. You're still prepared to render the
03:57:34 17 opinion that they almost certainly didn't want him
03:57:37 18 to go?

03:57:37 19 A. I'm going to stick by that opinion
03:57:41 20 because of what happened subsequently. It's not
03:57:44 21 critical to the argument one way or the other
03:57:47 22 anyway.

03:57:47 23 What's critical is when he went on the
03:57:50 24 voyage and they treated him so badly and that is a
03:57:53 25 demonstration of their view of their proprietorship

03:57:56 1 of the water. That's the key point.

03:57:58 2 This is a minor point whether he left
03:58:01 3 -- whether he got the flotilla on the first go
03:58:04 4 around or second go around. The second go around
03:58:07 5 is far more telling in terms of evidence and trying
03:58:10 6 to make the point I'm trying to make. I'm not
03:58:14 7 trying to make a point about them leaving him
03:58:17 8 behind, and that's the central point of my
03:58:20 9 argument; it's a minor point.

03:58:22 10 Q. I'm just suggesting it is a point
03:58:26 11 based on no evidence. That's my point. And yet
03:58:29 12 you've made it anyway. I'm allowing to you respond
03:58:33 13 to it, but that's the point I'm making.

03:58:35 14 A. And my point is that given how he
03:58:37 15 was treated when he did get on board with them the
03:58:40 16 next year, I take it that what my argument says,
03:58:45 17 makes sense to me because if they had wanted him,
03:58:48 18 they would have waited for him.

03:58:49 19 They would have known that he was going
03:58:51 20 to go. After all he was appointed by the Bishop.
03:58:56 21 That wouldn't be a secret he was going out there;
03:58:58 22 they would have known that in advance.

03:59:01 23 And given the way he was treated
03:59:03 24 afterwards, that they would know in advance and he
03:59:06 25 was treated afterwards poorly, I think my

03:59:09 1 conclusion is a reasonable conclusion.

03:59:12 2 Q. If we can pull up for a moment,
03:59:15 3 S0003, please, which you cite at footnote 99. This
03:59:20 4 is the Dictionary of Canadian Biography entry for
03:59:26 5 Claude Allouez.

03:59:27 6 MR. FELICIAN: If we can make this the
03:59:29 7 next exhibit, please.

03:59:41 8 THE REGISTRAR: Exhibit No. 4343.

03:59:41 9 EXHIBIT NO. 4343: Dictionary of
03:59:24 10 Canadian Biography entry for Claude
03:59:27 11 Allouez.

03:59:41 12 BY MR. FELICIAN:

03:59:41 13 Q. If we can go down to the third
03:59:41 14 paragraph, starting with "the first trip".

03:59:52 15 The first trip, if you can put the
03:59:55 16 cursor over it, it's after "the following year",
03:59:57 17 Your Honour, about 6 or 7 lines down.

03:59:59 18 "This first trip which is
04:00:01 19 recalled for us by the Relation for
04:00:03 20 1667, was the most arduous of all,
04:00:07 21 and it enables us to gauge the
04:00:09 22 spiritual stature of Father Allouez.
04:00:12 23 Scorned by the Ottawas, who did not
04:00:14 24 want him among them, and abandoned
04:00:17 25 on the shore of a lake as if he were

04:00:19 1 a cumbersome deadweight, he took
04:00:22 2 refuge in prayer: 'In this
04:00:24 3 abandoned state I withdrew into the
04:00:27 4 woods and, after thanking God for
04:00:30 5 making me so acutely sensible of my
04:00:34 6 slight worth, confessed before his
04:00:36 7 divine Majesty that I was only a
04:00:39 8 useless burden on this earth. My
04:00:42 9 prayer ended, I returned to the
04:00:43 10 water's edge where I found that the
04:00:46 11 disposition of that Savage who had
04:00:47 12 repulsed me with such contempt
04:00:49 13 entirely changed; for, unsolicited,
04:00:52 14 he invited me to enter his Canoe
04:00:55 15 which I did with much alacrity,
04:00:58 16 fearing he would change his mind.'

04:00:59 17 "The remainder of the voyage
04:01:01 18 still held numerous hardships and
04:01:03 19 humiliations in his store for him;
04:01:06 20 he was an awkward paddler and he was
04:01:08 21 obliged to carry unaided over the 36
04:01:11 22 portages his personal effects: Some
04:01:13 23 books, a portable altar and a
04:01:17 24 two-year supply of wine for masses."
04:01:20 25 Now I'm suggesting that the conclusion

04:01:23 1 that he was rebuffed at every turn, when you look
04:01:32 2 at that description of what happened, is an
04:01:32 3 exaggeration.

04:01:32 4 A. It may be when you look at this.
04:01:34 5 But you should read Father Nelligan's report and
04:01:38 6 you'll come to a different conclusion, because he
04:01:41 7 describes the voyage a little differently than this
04:01:43 8 biography, this biography in the Canadian
04:01:49 9 dictionary -- I forget what the title is.

04:01:54 10 Q. Dictionary of Canadian Biography.

04:01:56 11 A. This is not as expressive as the
04:01:58 12 first document that you showed me. This is a short
04:02:00 13 biography of the person; it's not fleshed out.

04:02:10 14 Q. Regardless. It's one account of a
04:02:10 15 person attending on a boat for one trip.

04:02:15 16 And I'm suggesting that it doesn't
04:02:18 17 allow to you draw any broad conclusions about
04:02:22 18 people being welcomed or not welcomed within a
04:02:25 19 First Nation territory. This tells you about
04:02:28 20 someone who may not have been welcome on a boat?

04:02:30 21 A. Well, this is what it may tell
04:02:32 22 you, but given my knowledge of Anishinaabe people,
04:02:34 23 and given how I see them in the field operating,
04:02:38 24 given what I've read in the past about how they
04:02:40 25 repelled people from their territories, it's

04:02:43 1 perfectly consistent with what I say.

04:02:45 2 The fact that -- from my point of view,
04:02:48 3 the fact that they didn't want him on the voyage
04:02:50 4 was made clear by them; they mistreated him. Then
04:02:53 5 this fellow, and this is true, it's mentioned in
04:02:56 6 the other account, in Father Nelligan's account, he
04:03:05 7 took pity on him and rescued him.

04:03:05 8 But for the rest of the voyage if you
04:03:05 9 look back at what Nelligan says, and he mentioned
04:03:07 10 here, this author -- I can't remember who it is --
04:03:09 11 he says it was still a very difficult voyage.

04:03:11 12 What I'm trying to tell you is that
04:03:15 13 they weren't mistreating him just because they were
04:03:18 14 in a bad mood or just because they were mean.

04:03:20 15 I'm saying that this has to do with
04:03:23 16 their vision of their world. And their vision of
04:03:26 17 their world is that they control the water. And
04:03:29 18 this person is where he's not supposed to be; and
04:03:32 19 that's why, I think, they're mistreating him. And
04:03:35 20 that's why I think he wasn't accepted on the first
04:03:39 21 voyage. We must look at it in the context of their
04:03:42 22 culture.

04:03:42 23 Q. Okay. If we can go to page 60,
04:03:47 24 please of your report. So we're back to page 60.
04:03:58 25 You say at the top:

04:04:00 1 "As Allouez's experience
04:04:02 2 indicates, visitors needed
04:04:03 3 permission to enter a Band's
04:04:05 4 territory and to use the resources
04:04:06 5 over which the Band presided."

04:04:10 6 Perhaps you'll have the same answer.
04:04:12 7 But I'm going to suggest to you again, that that --
04:04:16 8 what we've read about his experience doesn't tell
04:04:20 9 us about permissions to enter territory or use of
04:04:24 10 resources over which the Band resided.

04:04:28 11 A. It may not tell you that, but this
04:04:30 12 is my discipline and it's what it tells me.

04:04:37 13 Q. Similarly, use this example again
04:04:39 14 at page 91, in the last paragraph. So if we go to
04:04:44 15 page 91, please. And the last paragraph.

04:05:00 16 A. Yes, I'm there, thank you.

04:05:02 17 Q. "Anishinaabe believed likewise;
04:05:04 18 routes within a Band's territory
04:05:06 19 that incorporated rivers and lakes
04:05:07 20 were under the control of the Band
04:05:09 21 in whose territory the waterways
04:05:11 22 were located, and outsiders who
04:05:13 23 traveled these waterways without
04:05:15 24 permission were subject to the same
04:05:17 25 enmity as intruders who poached

04:05:20 1 game. Father Claude Allouez's
04:05:23 2 experience is a case in point."

04:05:25 3 Again, I'm going to suggest that is not what Father
04:05:28 4 Allouez's experience tells us, but I take it you
04:05:31 5 disagree?

04:05:32 6 A. I do disagree. We have a
04:05:33 7 fundamental disagreement on this.

04:05:35 8 Q. And how does one account then for
04:05:37 9 the fact that on the same trip there were other
04:05:47 10 Frenchmen on board and they did not report the same
04:05:47 11 problems?

04:05:47 12 A. Well, what was Father Allouez
04:05:48 13 doing? I think what he was doing -- the other
04:05:50 14 Frenchmen weren't trying to invite them to life.
04:05:54 15 They weren't criticizing their view of the Manitou.
04:05:59 16 Remember what he's going to do. He is going out
04:06:00 17 there to invite them to life.

04:06:02 18 Q. Invite them to?

04:06:03 19 A. Invite them to life. It's a
04:06:05 20 description of being converted.

04:06:07 21 Q. Oh.

04:06:07 22 A. That's how Catholics say that,
04:06:09 23 you're invited to life.

04:06:11 24 What he's going to do is invite them to
04:06:13 25 life. But they already have a life; they already

04:06:16 1 have a theology. Now this person is going to come
04:06:20 2 out there and say, you know? This is the way
04:06:22 3 things really are. It's not the way you think they
04:06:27 4 are.

04:06:27 5 The Great Spirit is still active, the
04:06:30 6 Christian God is an active God. It's a different
04:06:34 7 God from your God. And the spirits that you're
04:06:36 8 worshipping? They don't play any role in true
04:06:39 9 worship. That's savagery.

04:06:43 10 So when this fellow is coming out there
04:06:46 11 they have reason to treat him differently from the
04:06:49 12 people on the boat who most likely are Métis.

04:06:52 13 Q. So you have to assume, to hold
04:06:56 14 your theory, that the people on the boat knew
04:06:59 15 that's what he was going on this trip to do.

04:07:01 16 You have to assume that it troubled
04:07:03 17 them. And you then have to assume that that's the
04:07:08 18 reason they treated him as they did. And then you
04:07:13 19 also have to assume that it's because of a -- your
04:07:19 20 broad generalization, that this is how they treat
04:07:21 21 people that aren't welcome.

04:07:23 22 So I am struggling with how you can
04:07:26 23 draw a conclusion with so many assumptions and
04:07:28 24 other than say it's an educated guess, but to
04:07:31 25 actually say it's an expert opinion?

04:07:35 1 A. Well, I'm not going to say it's an
04:07:37 2 educated guess, because it is an expert opinion.

04:07:56 3 MR. FELICIAN: Can we pull up S1464,
04:07:59 4 please.

04:08:06 5 This is an article by Edward Rogers
04:08:08 6 entitled, "Cultural Adaptations - the Northern
04:08:12 7 Ojibway of the Boreal Forest, 1670 to 1980". Which
04:08:18 8 you cite at footnote 517.

04:08:20 9 If we can make that the next exhibit
04:08:23 10 please.

04:08:23 11 THE COURT: Mr. Registrar.

04:08:23 12 THE REGISTRAR: Exhibit No. 4344.

04:08:06 13 EXHIBIT NO. 4344: Article by Edward
04:08:08 14 Rogers entitled, "Cultural Adaptations
04:08:11 15 - the Northern Ojibway of the Boreal
04:08:15 16 Forest, 1670 to 1980".

04:08:26 17 BY MR. FELICIAN:

04:08:27 18 Q. Can we go to page 112, please,
04:08:30 19 which I understand is PDF page 28.

04:08:56 20 "During the 19th-century, as
04:08:58 21 the trapping of fur-bearing animals
04:09:00 22 became more and more important in
04:09:02 23 the lives of the Northern Ojibwa, a
04:09:03 24 new system of land tenure began to
04:09:05 25 take shape. Trapping territories

04:09:07 1 emerged. Initially, trappers only
04:09:10 2 marked beaver lodges to indicate
04:09:12 3 individual ownership of the beaver
04:09:13 4 within. LaPotherie had noted the
04:09:17 5 custom as early as 1697 when he
04:09:20 6 visited York Factory. This did not
04:09:23 7 always work, since not all Indians
04:09:25 8 respected the marks of ownership.
04:09:26 9 Furthermore, it was not possible to
04:09:28 10 mark the location of other species
04:09:30 11 since they did not remain for long
04:09:32 12 in a restricted territory. These
04:09:35 13 difficulties were overcome as each
04:09:36 14 hunting group began to spend most of
04:09:38 15 the winter together within a
04:09:40 16 circumscribed area that they had
04:09:42 17 come to habitually exploit year
04:09:44 18 after year, now that hare and fish
04:09:47 19 were the principal foods upon which
04:09:49 20 they depended. As this development
04:09:51 21 took place, the hunting group began
04:09:53 22 to consider the land they used and
04:09:56 23 resources found upon it as theirs.
04:09:59 24 When this occurred, an imaginary
04:10:01 25 boundary was conceived to enclose

04:10:03 1 the area. Anyone who crossed that
04:10:03 2 line was considered to be a
04:10:05 3 trespasser and subject to punishment
04:10:07 4 directly or through supernatural
04:10:10 5 means. As the details of such a
04:10:13 6 system evolved, only those resources
04:10:14 7 that were taken for barter or sale
04:10:15 8 to the Euro-Canadian finally came to
04:10:19 9 be considered the property of those
04:10:20 10 who annually exploited the area.
04:10:23 11 All other resources that were used
04:10:24 12 domestically continue to be
04:10:26 13 considered free goods. No one had
04:10:27 14 the right to stop another from
04:10:29 15 entering any area in search of food
04:10:32 16 or other resources when in want
04:10:35 17 because of their scarcity or absence
04:10:37 18 in the individual's home territory.
04:10:39 19 These trapping territories emerged
04:10:41 20 first among the southernmost of
04:10:43 21 Northern Ojibway. Not until toward
04:10:46 22 the end of the 19th or the beginning
04:10:47 23 of the 20th century did this form of
04:10:50 24 land tenure come into existence
04:10:52 25 among those living farthest north."

04:10:55 1 So that suggests to me that the concept
04:10:58 2 of defined hunting territories used by the Ojibwe
04:11:01 3 arose in the 1800s, and developed in response to
04:11:05 4 trade with Europeans and particularly the value
04:11:09 5 placed on beaver.

04:11:10 6 A. Hunting territories?

04:11:12 7 Q. Yes, the concept of defined
04:11:14 8 hunting territories used by the Ojibway arose in
04:11:16 9 the 1800s and developed in response to trade with
04:11:19 10 Europeans, and particularly in response to the
04:11:22 11 value placed on beaver.

04:11:23 12 A. Yes. And what Rogers is saying
04:11:25 13 here, he's not talking about Band territories.
04:11:28 14 He's talking about hunting territories within Band
04:11:30 15 territories that are similar to trap lines.

04:11:34 16 And once you have a trap line, what
04:11:36 17 he's saying after you have a trap line, in some
04:11:39 18 jurisdictions, remember if you go to different
04:11:41 19 communities you're going to read different things.
04:11:44 20 One community may do it one way; one community may
04:11:46 21 do it another way.

04:11:47 22 Some people own specific -- families --
04:11:52 23 own specific parts of Lake Superior -- not own.
04:11:56 24 They have the proprietary rights over specific
04:11:59 25 parts of Lake Superior. In the case of SON, I

04:12:02 1 never saw any evidence that indicated any families
04:12:04 2 had that. But what Rogers is saying here is you
04:12:07 3 have a family hunting territory and this develops
04:12:09 4 through time. This develops with respect to trade
04:12:13 5 goods.

04:12:13 6 I mentioned that yesterday, that
04:12:15 7 resources that have value are those resource also
04:12:18 8 over which you exercise proprietary rights. But in
04:12:22 9 all cases, as Rogers points out, when it comes to
04:12:25 10 survival, when it comes to existence, all bets are
04:12:28 11 off. You have to let those people in. You have to
04:12:31 12 let them use what's there.

04:12:32 13 Q. I just want to direct you to one
04:12:36 14 more passage, this was from another authority. You
04:12:40 15 cite Janet Armstrong. This is S0142, please.

04:12:46 16 And you cite this at footnote 516. If
04:12:53 17 we can pull up S0142, this is "A Political Economy
04:12:58 18 of Native Marginalization". Can we make this the
04:13:03 19 next exhibit, please?

04:13:07 20 THE COURT: Mr. Registrar.

04:13:08 21 THE REGISTRAR: Exhibit number 4345.

04:13:10 22 EXHIBIT NO. 4345: Document by Janet
04:12:56 23 Armstrong entitled "A Political Economy
04:12:58 24 of Native Marginalization".
25

04:13:12 1 BY MR. FELICIANANT:

04:13:12 2 Q. On page 149, if we can go to the
04:13:16 3 page 149 at the bottom, please. And the last
04:13:22 4 sentence on the page:

04:13:25 5 "Fisheries were located in
04:13:26 6 places where aboriginal people knew
04:13:28 7 the temperature of the water was
04:13:30 8 suitable for a successful fishery.
04:13:33 9 While certain fishing spots might
04:13:34 10 have been used repeatedly, they were
04:13:36 11 not considered to be the property of
04:13:38 12 any one family."

04:13:43 13 Now, from what I understand from the
04:13:44 14 Saugeen and Nawash communities, that's also the
04:13:47 15 case; is that right?

04:13:47 16 A. Yes, I just said that before.
04:13:49 17 Yes, I don't believe they have -- there's no
04:13:51 18 evidence that they had family fishing territories
04:13:53 19 as I've seen in other communities.

04:14:00 20 MR. FELICIANANT: Can we pull up
04:14:02 21 Exhibit 4332, please.

04:14:03 22 Q. This is the article by Victor
04:14:06 23 Lytwyn, and you cited it at footnote 537.

04:14:10 24 If we can look at page 1, under the
04:14:12 25 heading "Introduction", second paragraph, please,

04:14:14 1 page 1.

04:14:24 2 "In a manner that was foreign
04:14:26 3 to European newcomers, Aboriginal
04:14:28 4 people shared their occupancy on
04:14:30 5 earth with their non-human
04:14:32 6 neighbors. While it is also
04:14:34 7 apparent that the European notion of
04:14:37 8 ownership was foreign to Aboriginal
04:14:39 9 people, there can be little doubt
04:14:41 10 that Aboriginal stewardship of
04:14:43 11 resources such as fish engendered
04:14:46 12 proprietary responses when
04:14:48 13 non-Aboriginal fisherman began to
04:14:50 14 encroach on the Lake Huron fisheries
04:14:53 15 in the 1830s. Beginning in the
04:14:56 16 1830s Aboriginal Nations who lived
04:14:57 17 in the Lake Huron Basin negotiated
04:15:00 18 fishing agreements with
04:15:01 19 non-Aboriginal fishermen."

04:15:05 20 So am I correct then that resources
04:15:07 21 such as land and animals were considered to be
04:15:11 22 gifts from the Creator and so the whole idea of
04:15:14 23 owning a resource as in the European sense, was a
04:15:17 24 foreign concept; would you agree with that?

04:15:20 25 A. Not entirely. Because we -- there

04:15:25 1 are forms of proprietorship. Let's say the
04:15:30 2 property on which I live, or this sort of
04:15:34 3 proprietorship.

04:15:35 4 To me, it's not -- they're not polar
04:15:38 5 opposites. They're not different categories.
04:15:40 6 There's a range of variation, so it's like a curve.
04:15:43 7 You start off and you have this is the most extreme
04:15:46 8 sort on this end. This is the least extreme sort
04:15:49 9 on the other end.

04:15:50 10 And as you look through the curve you
04:15:52 11 see, ah, there's different forms of proprietorship.
04:15:54 12 And now we're looking at what the Anishinaabe are
04:15:56 13 doing and say, wow, they have a different form of
04:16:01 14 proprietorship than we do, but nonetheless they
04:16:04 15 have a form of proprietorship.

04:16:05 16 So to say that they don't have that, I
04:16:07 17 think is a mistake.

04:16:09 18 Q. And part of the determination as
04:16:11 19 an anthropologist you make, I would take, it you
04:16:14 20 would have to interview the community members to
04:16:17 21 actually understand what their perspective is on
04:16:20 22 animals and stewardship and resources; isn't that
04:16:24 23 right?

04:16:24 24 A. Certainly you have to do that.
04:16:25 25 You have to talk to the foragers and you have to go

04:16:28 1 out there and do it with them. Because when you're
04:16:30 2 doing it with them, then you see that when you're
04:16:33 3 -- like when he's talking about "non-human
04:16:36 4 neighbors", that's not exactly the way the
04:16:41 5 Anishinaabe conceive of it.

04:16:43 6 They conceive of non-human animals as
04:16:46 7 other than human persons. They're persons to them.
04:16:49 8 And they must be treated as persons. Because
04:16:52 9 that's the way -- because if you don't treat them
04:16:55 10 as persons, you will suffer the consequences of
04:16:57 11 that.

04:16:58 12 So Dr. Lytwyn is correct when he's
04:17:01 13 saying that there are forms of proprietorship. But
04:17:04 14 if we think that the forms of proprietorship only
04:17:07 15 developed after contact, I think that's a mistake.

04:17:10 16 Because, remember, they're trading with
04:17:12 17 the Huron. They're trading fish with the Huron,
04:17:15 18 they're trading some furs with the Huron.

04:17:19 19 Rogers is saying the same thing I am,
04:17:22 20 although I would say it in more general terms. But
04:17:25 21 what Rogers is saying, once the thing is used for a
04:17:27 22 trade good, then you have proprietorship. You can
04:17:30 23 exercise proprietary rights over it.

04:17:32 24 So when we look at it that way, if we
04:17:36 25 look at the trade among Indigenous people, let's

04:17:38 1 say tobacco would be another example of that;
04:17:39 2 copper would be another example of that. Things
04:17:42 3 they are trading before Europeans ever get here,
04:17:46 4 they're going to have proprietary rights over by
04:17:48 5 definition. So in that sense, proprietorship is
04:17:51 6 not associated with the appearance of Europeans.

04:17:54 7 What we must do is think -- not think
04:17:58 8 that they have -- that they have -- because they
04:18:02 9 say they cannot own land in the same way as
04:18:05 10 Europeans, we should not close our minds to the
04:18:07 11 fact that there are different forms of
04:18:09 12 proprietorship.

04:18:10 13 And now we can explore them -- sorry,
04:18:12 14 we can explore them among humankind by looking at
04:18:15 15 this very example here. And we'll see that there's
04:18:18 16 different kinds of proprietorship among the
04:18:20 17 Anishinaabe, and that's informative.

04:18:22 18 Q. And that you would have to
04:18:23 19 determine by talking to each particular Band and
04:18:26 20 talk about their territory and their resources?

04:18:29 21 A. I would say that's correct. When
04:18:31 22 I do this sort of work, I definitely talk to the
04:18:35 23 people in the community. Because if I want to know
04:18:38 24 -- I know, for instance, from my own research that
04:18:40 25 people have proprietary rights over certain parts

04:18:42 1 of Lake Superior, as I explained before.

04:18:44 2 So often I'm in a community like, say
04:18:48 3 for instance, Red Rock, which is right at the
04:18:55 4 Nipigon River. When I'm there, I want to know, do
04:19:00 5 you have proprietary rights in Lake Nipigon?

04:19:03 6 So I can talk to the fishers there and
04:19:05 7 I say, did you have these in the past? Where does
04:19:08 8 this come from? Is this new? I can ask all kinds
04:19:09 9 of questions like that, and I would pursue those
04:19:11 10 questions.

04:19:11 11 Q. I'm going to move on now to
04:19:14 12 another section. It may take longer than ten
04:19:27 13 minutes.

04:19:27 14 THE COURT: That's all right. Press
04:19:29 15 ahead.

04:19:30 16 MR. FELICIAN: Can we pull up
04:19:32 17 Exhibit 1327, please. You may have to enlarge the
04:19:41 18 portions we're looking at.

04:19:41 19 BY MR. FELICIAN:

04:19:44 20 Q. And I'm going to draw your
04:19:45 21 attention to certain portions of the document and
04:19:48 22 then ask you a question at the end so that you get
04:19:51 23 a gist of the portions of the documents I'm going
04:19:55 24 to ask you to draw a conclusion from.

04:19:58 25 So we're going to look first at the

04:20:00 1 right side of the first page. We have a General
04:20:05 2 Council of various Bands taking place on
04:20:09 3 January 24, 1840, and these are the River Credit,
04:20:13 4 Alderville, Rice Lake, Mud Lake, Balsam Lake,
04:20:15 5 Narrows, Snake Island, Cold Water, Saugeen, St.
04:20:19 6 Clair and Munceytown.

04:20:22 7 A. Yeah.

04:20:22 8 Q. So you'll note that this is an
04:20:30 9 address, this first document is an address to the
04:20:34 10 Governor General Charles John Poulett Thomson, also
04:20:41 11 known as I understand, as Lord Sydenham.

04:20:44 12 So if we can go to the last "Father" on
04:20:46 13 the first page, they write:

04:20:53 14 "When the White man came into
04:20:54 15 our country our forefathers took him
04:20:57 16 by the hand and gave him land on
04:21:04 17 which to pitch his wigwam. Ever
04:21:08 18 since that time he has continued to
04:21:10 19 flow to our shores, and now the
04:21:12 20 White man is greater and stronger
04:21:14 21 than your Red Children.

04:21:20 22 "For many years we have been
04:21:22 23 made very poor on account of the
04:21:24 24 introduction of the fire water --"
04:21:26 25 I'll pause there, that's liquor I take

04:21:28 1 it, that's alcohol.

04:21:29 2 A. That's alcohol, correct.

04:21:32 3 Q. "And other evils --"

04:21:38 4 A. "Amongst us".

04:21:39 5 Q. " -- amongst us, which have
04:21:41 6 killed and --"

04:21:43 7 I don't know what that word is; can you
04:21:45 8 help me with that?

04:21:45 9 A. I think it is: "Maimed many of
04:21:48 10 our fathers".

04:21:49 11 Q. Thank you. Then the last "Father"
04:21:57 12 on the page:

04:21:59 13 "We rejoice to assure Your
04:22:02 14 Excellency that we are perfectly
04:22:03 15 satisfied and contented to live
04:22:05 16 under the good and powerful
04:22:07 17 protection of the British government
04:22:09 18 who have already proved by repeated
04:22:19 19 acts of kindness that they are our
04:22:22 20 -- they are the true friends of the
04:22:24 21 Red Man, and we shall ever hold
04:22:28 22 ourselves in readiness to obey the
04:22:32 23 calls for our Great Mother the Queen
04:22:34 24 to defend this country."

04:22:41 25 Now just keep that in mind, if we can go to the

04:22:45 1 next page, we have a petition to the Governor
04:22:48 2 General. You'll see all the people that signed, so
04:22:53 3 this is a large Council. There's a lot of people
04:22:55 4 you'll see signed on behalf of the communities.

04:22:58 5 A. Yes, there are.

04:23:03 6 Q. In the third paragraph where it
04:23:05 7 reads "We have heard..."

04:23:10 8 "We have heard that a Union of
04:23:15 9 Upper and Lower Canada is about to
04:23:17 10 take place and that in all
04:23:19 11 probability" --

04:23:22 12 A. "The Great Council".

04:23:23 13 Q. "-- the Great Council fire,
04:23:24 14 which was lighted at Menesing, now
04:23:30 15 called Toronto, will be removed
04:23:33 16 farther towards the sun rising."

04:23:42 17 Now if we can go to the last "Father"
04:23:45 18 on the page. Next page. If we can go to the next
04:23:56 19 page, this is an address to Sir George Arthur.

04:24:00 20 So just bear in mind now the
04:24:01 21 communities have indicated their knowledge of the
04:24:03 22 upcoming union of Upper and Lower Canada. If we
04:24:11 23 can go to the address to Sir George Arthur. The
04:24:17 24 second "Father":

04:24:17 25 "Father, we your Red Children

04:24:20 1 humbly pray that our beloved Great
04:24:22 2 Mother the Queen may be graciously
04:24:24 3 blessed to allow the Great Council
04:24:26 4 Fire of our Great Father to remain
04:24:32 5 at Toronto."

04:24:37 6 And this is also January 24, 1840.

04:24:43 7 MR. FELICIAN: Can we go up? Go to
04:24:46 8 the prior page. And then over to the other side.
04:24:57 9 Go up a bit, please.

04:24:57 10 BY MR. FELICIAN:

04:25:36 11 Q. Are you familiar with this
04:25:37 12 document?

04:25:37 13 A. No.

04:25:38 14 Q. Oh, okay. I'm looking for my
04:25:48 15 reference.

04:25:48 16 MR. FELICIAN: If we can go to the
04:25:49 17 next page. If we can look at this other one --

04:26:03 18 I need to sort this out, Your Honour.
04:26:05 19 It doesn't match up with my numbers, Your Honour.
04:26:09 20 If we can break for the day, I'd be able to get it
04:26:12 21 sorted for the morning.

04:26:14 22 THE COURT: Well, this isn't
04:26:15 23 productive, so I think that is what we'll do.

04:26:18 24 Just before we adjourn. Without
04:26:21 25 holding you to it, sir, do you have a rough

04:26:24 1 estimate of how much longer you will be?

04:26:28 2 MR. FELICIAN: I would definitely -- I
04:26:30 3 can't imagine going past lunchtime. I will finish
04:26:36 4 tomorrow, for sure, but I can't imagine going past
04:26:41 5 lunchtime.

04:26:42 6 THE COURT: I know rough estimates can
04:26:43 7 be just that.

04:26:44 8 In that situation, how would counsel
04:26:47 9 react to having a case conference on Friday? We
04:26:52 10 can do it by telephone, so you all don't have to
04:26:56 11 come here and spend time that way. Friday morning,
04:26:59 12 for example, since you were otherwise planning to
04:27:03 13 be here, I assume you haven't booked something
04:27:05 14 else.

04:27:06 15 I'm most concerned that the people need
04:27:08 16 to be there, be there. But I see I have in the
04:27:10 17 courtroom various of the senior counsel, among
04:27:13 18 others.

04:27:15 19 You can check if you need with people
04:27:17 20 who aren't here and perhaps tell me tomorrow
04:27:20 21 morning if that's -- if you want to check.

04:27:25 22 MR. TOWNSHEND: Thank you.

04:27:26 23 THE COURT: Would you prefer to do
04:27:27 24 that, Mr. Townshend? It's fine with me.

04:27:30 25 MR. TOWNSHEND: Yes, I would.

04:27:31 1 THE COURT: Why doesn't everybody
04:27:34 2 check. I see a lot of people, but I do see some
04:27:37 3 people not here.

04:27:38 4 I would like to circle back around to
04:27:41 5 the schedule and if we're not having a witness on
04:27:44 6 Friday we can do it then. All right? So I'll hear
04:27:47 7 back from you about that tomorrow morning.

04:27:50 8 Now, sir, you remember the very, very
04:27:55 9 restrictive rules for witnesses under
04:27:57 10 cross-examination and you'll find something
04:27:59 11 entirely different to do with your time in the
04:28:01 12 meantime, right?

04:28:02 13 THE WITNESS: I'm on my own this
04:28:03 14 evening, Your Honour.

04:28:04 15 THE COURT: Yes, not just on your own,
04:28:06 16 but on other matters.

04:28:08 17 THE WITNESS: On other matters.

04:28:10 18 THE COURT: All right.

19
20 -- Court adjourned at 4:28 p.m.
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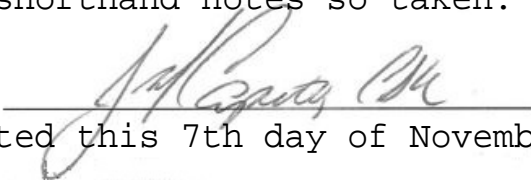
REPORTER'S CERTIFICATE

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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