

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

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DAY 87 VOL 87  
February 21, 2020

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1 Court File No. 94-CQ-50872CM

2 ONTARIO  
3 SUPERIOR COURT OF JUSTICE

4 B E T W E E N:

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

8 - and -

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

18 Court File No. 03-CV-261134CM1

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

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

23 - and -

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

27 -----  
28 --- This is the VOLUME 87/DAY 87 of the trial  
29 proceedings in the above-noted matter, being held at  
30 the Superior Court of Justice, 330 University Avenue,  
31 Courtroom 5-1, Toronto, Ontario, on the 21st day of  
32 February, 2020.

33 -----  
34 B E F O R E:

35 The Honourable Justice Wendy M. Matheson



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WITNESS:

DONALD E. GRAVES; Previously Sworn

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09:52:38 1 -- Upon commencing at 10:00 a.m.

10:00:29 2

10:00:34 3 THE COURT: Please go ahead.

10:00:36 4 MS. GUIRGUIS: Thank you, Your Honour.

10:00:36 5 DONALD E. GRAVES; previously sworn.

10:00:38 6 CROSS-EXAMINATION BY MS. GUIRGUIS (CONT'D):

10:00:38 7 Q. Good morning, Mr. Graves.

10:00:39 8 A. Good morning. How are you today?

10:00:41 9 Q. I'm good. How are you?

10:00:42 10 A. Very well, thank you.

10:00:42 11 Q. Good.

10:00:43 12 I want to start by dealing with two  
10:00:46 13 matters from yesterday before proceeding with the  
10:00:50 14 rest of my questions.

10:00:51 15 So the first one, yesterday, sir, when  
10:00:53 16 we were talking about the potential for constables  
10:00:56 17 and militia called up under the 1846 Act to execute  
10:01:01 18 warrants and evict squatters on the Peninsula, you  
10:01:05 19 said that these men may have been the brothers or  
10:01:08 20 relatives of the squatters, so enforcement may not  
10:01:12 21 be likely?

10:01:12 22 A. It would be difficult, if they  
10:01:15 23 were.

10:01:15 24 Q. So, sir, prior to 1854, this is  
10:01:19 25 hypothetical, we don't know whether the

1 relationship between men charged with executing  
2 warrants and removing squatters on the Peninsula  
3 was an obstacle to enforcement because we don't  
4 have any examples that prior to the surrender in  
5 1854, that anyone was directed to do so with  
6 respect to squatters on the Peninsula; is that  
7 right?

8 A. Yes.

9 Q. Okay. But we do have the example  
10 of Oliphant instructing Sheriff Schneider after the  
11 surrender in 1854?

12 A. Yes.

13 Q. So if we can pull up Exhibit 2175.  
14 It's the last page of this exhibit, which is  
15 page 15 of the document. If we can zoom in on the  
16 second entry.

17 So this is the notice from Oliphant to  
18 Sheriff Schneider, which I know that you have seen.  
19 It's dated October 14, 1854.

20 So here we do have an example of  
21 Oliphant directing Sheriff Schneider to eject the  
22 squatters from the recently surrendered lands?

23 A. Let me read it, please.

24 Q. Sure.

25 A. (Witness reviews document). Okay.

10:02:53 1 Q. And there's no mention in this  
10:02:55 2 notice or in his report, which you've reviewed and  
10:02:58 3 commented on in your report, that enforcement --  
10:03:03 4 that he's concerned that enforcement won't take  
10:03:05 5 place because Sheriff Schneider and the men that  
10:03:08 6 may have been at his disposal were related to the  
10:03:12 7 squatters, correct?

10:03:12 8 A. Repeat your question, please.

10:03:14 9 Q. Sure. There's no mention in this  
10:03:18 10 notice, or in Oliphant's report that --

10:03:21 11 A. This isn't a notice, Counsellor.  
10:03:24 12 It's a note or a letter.

10:03:25 13 Q. A note or a letter?

10:03:26 14 A. Right. It's also a request, not a  
10:03:29 15 direction. He's requesting, not directing, not  
10:03:33 16 ordering.

10:03:33 17 Q. I don't think I said that he was  
10:03:35 18 ordering?

10:03:36 19 A. You said he was directing.

10:03:38 20 Q. Okay.

10:03:40 21 A. He's requesting the help of the  
10:03:42 22 sheriff.

10:03:43 23 Q. So in this request, as you put it?

10:03:46 24 A. Yes, as it is.

10:03:49 25 Q. There's no indication that he's



10:03:52 1 concerned that Sheriff Schneider won't enforce, as  
10:03:56 2 he's requested, because he was related to the  
10:04:00 3 squatters?

10:04:01 4 A. I don't see --

10:04:02 5 Q. Is that right?

10:04:03 6 A. I don't see how these things are  
10:04:04 7 connected.

10:04:05 8 My suggestion was it would be difficult  
10:04:08 9 to serve notices on squatters if you're using  
10:04:12 10 constables or militia men who were related to and  
10:04:16 11 knew the neighbors and who probably didn't think  
10:04:19 12 squatting was a bad thing.

10:04:21 13 All we have here is a request from  
10:04:23 14 Oliphant, he's concerned about this, a request to  
10:04:27 15 the sheriff. There's nothing in here about  
10:04:32 16 relations or friendships.

10:04:33 17 Q. But we can assume --

10:04:35 18 A. I don't see your point here. What  
10:04:37 19 is your point?

10:04:38 20 Q. We can assume that given that he  
10:04:40 21 gave this direction, he gave this in this notice or  
10:04:43 22 this request --

10:04:43 23 A. It's not a direction. He's saying  
10:04:47 24 "please", implied.

10:04:49 25 Q. We can assume that Oliphant wasn't

1 concerned that this wouldn't happen because Sheriff  
2 Schneider or the men at his disposal were related  
3 to trespassers and squatters to be evicted?

4 A. Two different subjects.

5 Q. Okay. Let's go to, we were  
6 talking about the Colored Corps yesterday --

7 A. Yes.

8 Q. -- in the context of discussing  
9 the militia structure that existed in the 1840s and  
10 early 1850s. And you had mentioned yesterday that  
11 the Colored Corps was not militia?

12 A. Yes.

13 Q. But you said they were long  
14 service units, two companies?

15 A. Long service units, yes.

16 Q. Okay. So I just want to clarify  
17 something with you. And I'd like to turn up  
18 SC1398. This is a thesis by Wayne Edward Kelly,  
19 called "Black Troops to Keep an Intelligent People  
20 in Awe: The Coloured Companies of the Upper  
21 Canadian Militia in 1837 - 1850". Are you familiar  
22 with this?

23 A. No, I'm not. I'm interested in  
24 this.

25 Q. I'm going to take you to page

1 roman numeral IV, which is PDF image 6.

2 If we can just look at the first  
3 paragraph of the abstract, starting at: "During  
4 the rebellion of 1837 [...]"

5 And ending in, "[...] was maintained on  
6 permanent service until being disbanded in 1850".

7 A. Uhm-hmm. (Witness reviews  
8 document).

9 My point was when I said "militia",  
10 they were not sedentary militia. Do you understand  
11 what "sedentary militia" is?

12 Q. So they were called up from the  
13 sedentary militia?

14 A. I don't think so. I think they  
15 were recruited directly from the public at large.

16 Q. Okay. So these --

17 A. Okay? My point was they were not  
18 sedentary militia. They were a long service unit.  
19 Yes, in a generality, they were members of the  
20 militia but they weren't sedentary militia, which  
21 is what we're dealing with at Saugeen Peninsula,  
22 okay?

23 Q. So it's keeping with this --

24 A. Are you aware, Counsellor -- sorry  
25 I can't ask questions.

1 Q. So keeping with this question that

2 I'm asking about --

3 A. What was your question?

4 Q. The Colored Corps? I'll ask it.

5 A. You haven't gotten to your  
6 question. So sorry.

7 Q. This thesis seems to suggest that  
8 the Colored Corps were in fact corps of the  
9 Canadian militia on permanent service until about  
10 1850, correct?

11 A. Very generally, correct. But I  
12 want again to emphasize there are various kinds of  
13 militia. We're talking here about the Upper Canada  
14 Rebellion of 1837, right? This is when they were  
15 formed.

16 Q. Uhm-hmm.

17 A. During the rebellion, you had  
18 sedentary militia, you had volunteers, you had  
19 fencibles, you had long service units.

20 The fencibles and long service units  
21 were recruited to serve six months to a year; they  
22 were a uniformed army, equipped by the Crown. This  
23 is one of them. There was no Canadian army.

24 Q. I understand.

25 A. So when you say "militia" you're

1 basically talking the Canadian military.

2 Q. They weren't part of the British  
3 Army, correct?

4 A. No.

5 Q. Right.

6 A. No. No, well, actually, they come  
7 under the Crown Acts. They weren't liable to the  
8 punishment of flogging.

9 Q. They were kept on service until  
10 1850, which is long after the Upper Canada  
11 Rebellion?

12 A. I'd have to read it. My date is  
13 1848, but they vary -- so 1850.

14 Q. Sure. And they were recruited  
15 from the Canadian sedentary militia, or from  
16 citizens, you were saying --

17 A. No, from the public at large.

18 Q. -- into full-time service?

19 A. I'm sorry, you know, I'm writing a  
20 manuscript, I'm writing a book right now on the  
21 militia of the Niagara Peninsula, and I go into the  
22 raising of these two companies.

23 They were raised directly from the  
24 public. There was no sedentary militia unit into  
25 Niagara that was black.

1 Q. Okay.

2 A. What they did, because the black  
3 population wanted to serve, is they raised these  
4 units. It's not just these two; there's about six  
5 of them. It is a very confusing issue as the  
6 records are so vague in that period.

7 MS. GUIRGUIS: Your Honour, if I can,  
8 may I add this as the next exhibit?

9 THE COURT: Mr. Registrar?

10 THE REGISTRAR: Exhibit No. 4723.

11 EXHIBIT NO. 4723: Thesis by Wayne  
12 Edward Kelly called "Black Troops to  
13 Keep an Intelligent People in Awe: The  
14 Coloured Companies of the Upper  
15 Canadian Militia in 1837 - 1850".

16 BY MS. GUIRGUIS:

17 Q. So, sir, my question to you with  
18 respect to this is simple. I understand that the  
19 Colored Corps was disbanded around 1850, but  
20 doesn't their existence between 1838 and 1850  
21 suggest that it was possible to create a full-time  
22 unit prior to the 1855 Act where authorities  
23 decided to do so?

24 A. There's actually a number of these  
25 units, okay? But they're volunteer units.

1 Q. Okay.

2 A. You have the Denison troop in  
3 Toronto, which is now the Governor's General Horse  
4 Guards, but we're not talking about the Saugeen  
5 Bruce Peninsula.

6 And on the 8th of January, 1857, the  
7 Adjutant-General of the Canadian militia issued a  
8 report. And in it, he went down and listed all the  
9 volunteer units under the 1855 Act, and all the  
10 sedentary units.

11 As I mentioned yesterday, Grey and  
12 Bruce County had no organized militia in 1856, so  
13 that would stand to reason, they didn't have any  
14 organized militia in 1854.

15 Q. That's fine.

16 A. Farthermore -- and I haven't  
17 finished, please.

18 THE WITNESS: Your Honour, may I  
19 finish?

20 THE COURT: Yes.

21 THE WITNESS: Thank you.

22 THE COURT: Counsel is nodding her  
23 head. Please go ahead.

24 THE WITNESS: Okay. Farthermore, the  
25 three counties adjacent to Grey and Bruce -- ma'am,

10:11:11 1 can you look at me when I'm talking? It's only  
10:11:14 2 polite.

10:11:19 3 Good. Three counties adjacent to Grey  
10:11:23 4 and Bruce, Wellington, Huron and I'm not sure of  
10:11:28 5 the other one, only half said their militia were  
10:11:32 6 organized.

10:11:32 7 BY MS. GUIRGUIS:

10:11:33 8 Q. Okay. So, sir, there are going to  
10:11:35 9 be times when I look at my notes or I look at Her  
10:11:38 10 Honour or I look at the transcript.

10:11:40 11 A. Understood.

10:11:40 12 Q. There's no disrespect intended to  
10:11:43 13 you?

10:11:43 14 A. I'm sure there's not.

10:11:44 15 Q. So, I wasn't asking about the  
10:11:47 16 militia in Grey and Bruce at this moment. What I  
10:11:50 17 was asking about is that this example, would you  
10:11:55 18 agree with me that it demonstrates, and the other  
10:11:58 19 examples you've mentioned, that in Upper Canada  
10:12:02 20 prior to the 1855 Act it was possible to create a  
10:12:05 21 full-time militia unit?

10:12:06 22 A. If there was an emergency.

10:12:08 23 Q. Okay.

10:12:09 24 A. In an emergency, I told you this  
10:12:11 25 yesterday, armed insurrection or foreign invasion.



10:12:19 1 We had armed insurrection when these units were  
10:12:23 2 raised and we had foreign invasion.

10:12:25 3 These units were raised in a period of  
10:12:27 4 crisis. They were kept on, as I mentioned  
10:12:29 5 yesterday, because they were good soldiers. They  
10:12:31 6 were sober, behaved well and they did the job.

10:12:35 7 The major job was keeping the peace on  
10:12:37 8 the Welland Canal, the struggles between the  
10:12:40 9 Protestants and Catholics which culminated in the  
10:12:44 10 Battle of Slabtown; I'm sure you're aware of that.  
10:12:48 11 Sorry, do you know about the Battle of Slabtown?

10:12:54 12 I guess not.

10:12:55 13 Q. Okay. Sir. So let me go back to  
10:13:02 14 where we left off yesterday.

10:13:08 15 A. Excuse me. I do want to make it  
10:13:10 16 clear, I want to add to this sentence. Your  
10:13:13 17 Honour, can I add to -- can I add something?

10:13:18 18 THE COURT: Counsel is not objecting.  
10:13:20 19 Please go ahead.

10:13:22 20 THE WITNESS: Are you objecting,  
10:13:23 21 Counsel?

10:13:23 22 THE COURT: No she's not objecting.  
10:13:25 23 Please go ahead.

10:13:25 24 THE WITNESS: Oh, I didn't see it.

10:13:28 25 Again, it depends when these units were

10:13:31 1 raised, if there's an emergency, these units would  
10:13:35 2 be raised. Most have been disbanded. This is the  
10:13:37 3 only one. I probably totted up 30 units raised  
10:13:42 4 between 1837 and 1842. These two units were kept  
10:13:46 5 on, because they fulfilled a useful function.

10:13:52 6 BY MS. GUIRGUIS:

10:14:00 7 Q. Okay. So yesterday we left off  
10:14:02 8 speaking about what Oliphant did with respect to  
10:14:17 9 calling in the militia and military. I believe --  
10:14:20 10 you have not pointed to any source that suggests  
10:14:22 11 Oliphant inquired about calling up the military?

10:14:26 12 A. No.

10:14:27 13 Q. Or any record that his  
10:14:31 14 predecessor, Colonel Bruce, called for military  
10:14:33 15 assistance?

10:14:34 16 A. No, but I don't think that's a  
10:14:44 17 dereliction of their duty.

10:14:46 18 Q. That's not my question, sir.

10:14:47 19 A. I know. That's my answer. The  
10:14:49 20 fact that they did not call for military or militia  
10:14:52 21 or assistance I don't think is a dereliction of  
10:14:55 22 duty. I think it's (a) they didn't regard the  
10:14:59 23 threat to be serious enough and (b) they had enough  
10:15:01 24 knowledge to know those forces are just not  
10:15:04 25 available.

1 Q. So you reviewed Oliphant's report  
2 to Lord Elgin detailing his trip to Saugeen and  
3 also his treaty negotiations with the Saugeen  
4 Anishinaabe?

5 A. Yes.

6 Q. There's nothing in that report  
7 that refers to consideration of military sources?

8 A. Well, I think I just --

9 Q. Of whether he considered there was  
10 sufficient military resources?

11 A. I just answered that question.

12 Q. No, sir, you said that he knew  
13 that there wasn't enough. But you don't have  
14 anything cited or there's nothing in his report  
15 that says that he considered whether there was  
16 military resources?

17 A. If they did not request military  
18 and/or army and/or militia assistance, I said it's  
19 not a dereliction of their duty.

20 Q. I'm not asking about dereliction  
21 of duty.

22 A. Oh, okay. Or they did not regard  
23 the threat as being that bad.

24 Q. So I take it as a "yes", that you  
25 understand that his report didn't include any

1 consideration or assessment of whether there were  
2 military resources available?

3 A. Yes.

4 Q. Okay. So in your report, sir, in  
5 your expert report, which is Exhibit 4716, you make  
6 note that Oliphant was trying to avoid bloodshed  
7 and that's why he sought the surrender?

8 A. Uhm-hmm. Yes.

9 Q. So this opinion is based on two  
10 things, an assertion about the intense demand for  
11 land on the Peninsula?

12 A. Are you referring to my report?  
13 Can I get a page number, please?

14 Q. Sure. Page 20 and page 21.

15 A. Page 20.

16 Q. Yes?

17 A. What are you referring to?

18 Q. I'm referring to "By 1854..."

19 A. Yes.

20 Q. So from there, to page 21 at the  
21 end of that section that you excerpt. So, "By 1854  
22 the land held by the Aboriginal peoples" up until  
23 the end of that quote, which ends in "murder".

24 A. (Witness reviews document). Yes.

25 Q. At the top of page 21 you say:

1 "It was the wish to prevent

2 further bloodshed that led to the

3 negotiations for Treaty 72."

4 A. Yes.

5 Q. So the opinion as I read it is

6 based on two things. That it's Oliphant's

7 assertion about the intense demand for land on the

8 Peninsula?

9 A. Yeah, in the counties bordering

10 the Peninsula.

11 Q. Right. And comments and

12 Oliphant's report about some violence he

13 encountered en route to Treaty Council.

14 A. Where did he encounter violence?

15 He notes there's violence, but did he encounter it

16 personally? I don't see that.

17 He talks about the men:

18 "Collected at the door of every

19 backwood tavern, or in gangs

20 returning to most populous parts of

21 the country where they have no

22 settled occupation" -- yadda',

23 yadda', yadda'.

24 "Organizing bands and forcing

25 the ejection of more fortunate

1 squatters, a proceeding which  
2 generally resulted in bloodshed; and  
3 in one case which came to my notice  
4 in murder."

5 But he didn't personally witness this,  
6 did he?

7 Q. So --

8 A. It's all circumstantial, he's  
9 hearing it third hand.

10 Q. So you're reading of it is he's  
11 commenting on things that he's heard?

12 A. Yup.

13 Q. So I would like to start with your  
14 assertion about the intense demand for land on the  
15 Peninsula. So now you've confirmed already that  
16 you don't have any expertise on squatting on land  
17 policy in Upper Canada in the years leading up to  
18 Treaty 72. So this assertion is essentially  
19 outside of your expertise, no?

20 A. I'm not sure about that. I think  
21 I qualified that by saying as it related to Saugeen  
22 Peninsula, in particular, the civil police and  
23 military.

24 Q. Right. Yes, your expertise is on  
25 the --

10:19:45 1 A. Yeah.

10:19:45 2 Q. -- civil police and military?

10:19:47 3 A. But I said, I had delved into  
10:19:50 4 squatting as it related to Saugeen Peninsula in the  
10:19:53 5 period under examination. So I'm not an expert on  
10:19:57 6 squatting.

10:19:59 7 An expert, if it were, on police and  
10:20:02 8 military and being called to use to prevent  
10:20:08 9 squatting; this I know about squatting on the  
10:20:14 10 Saugeen and Bruce Peninsula.

10:20:18 11 Q. Okay. But not about policy, land  
10:20:20 12 policy and land settlement?

10:20:21 13 A. No.

10:20:23 14 Q. Thank you.

10:20:24 15 So you haven't looked of Crown lands  
10:20:25 16 available for sale in Upper Canada in the years  
10:20:27 17 leading up to the treaty?

10:20:28 18 A. No.

10:20:28 19 Q. You haven't looked at land sale or  
10:20:31 20 settlement patterns in the counties near the  
10:20:34 21 Peninsula in the years leading up to treaty?

10:20:37 22 A. No.

10:20:37 23 Q. When I say "treaty", I mean the  
10:20:39 24 Treaty of 1854.

10:20:44 25 And you haven't reviewed the historical

1 record regarding land settlement on the Peninsula  
2 after the surrender in 1854, correct?

3 A. It wasn't part of my remit.

4 Q. Thank you. And you haven't done  
5 any research on private lands market in Upper  
6 Canada in the years leading up to the Treaty of  
7 1854?

8 A. No.

9 Q. Let's turn now to Oliphant's  
10 report, and the conclusions we can draw from it  
11 about his motivations?

12 A. Page number, please?

13 Q. So we're going to bring up  
14 Exhibit 2175, page 3 of the document. And if we go  
15 to the first paragraph, there's an excerpt --  
16 page 3, PDF 2 --

17 So the second paragraph from the  
18 bottom, this is an excerpt that you refer to in  
19 Oliphant's report. It's highlighted in the green  
20 box starting with, "On my way to Saugeen [...]" and  
21 then ending in "[...] murder".

22 A. "I received numerous evidences  
23 testifying". He didn't say he saw it. He says he  
24 "received evidence".

25 Q. Okay. So if you can take a look



1 at the passage and then when you're done I can ask  
2 you the question I have for you now.

3 A. Well, the rest of the passage is  
4 just the block quote, is it not?

5 Q. There's some right at the  
6 beginning that you hadn't included?

7 A. Okay.

8 "In my way to Saugeen, in  
9 passing through the counties of Grey  
10 and Bruce adjoining this reserve, I  
11 received numerous evidences  
12 testifying to the expediency of the  
13 mission upon which your Lordship had  
14 been pleased to send me, and leading  
15 me to the hope that the most  
16 beneficial results might be  
17 anticipated to all classes of the  
18 community by the successful issue of  
19 the undertaking."

20 Then he goes on: "The tide of  
21 emigration". It's a block quote so --

22 Q. So what it says he's referring to  
23 a situation where there's dishonesty of Crown land  
24 agents?

25 A. I don't see that. Do you?

10:23:15 1 Q. Yes.

10:23:15 2 A. Where?

10:23:16 3 Q. The third line from the bottom of  
10:23:18 4 that paragraph.

10:23:19 5 A. Oh, okay. I thought you wanted me  
10:23:22 6 to read the beginning, yes.

10:23:24 7 Q. That's fine. If you want to take  
10:23:25 8 a moment and look at the whole passage yourself,  
10:23:28 9 and then you can let me know.

10:23:33 10 A. It's "alleged" dishonesty. It's  
10:23:37 11 not proven dishonesty, the "alleged dishonesty".

10:23:41 12 Q. So --

10:23:45 13 A. So what he's talking about here --

10:23:47 14 Q. Sir, I'm going to ask you  
10:23:49 15 questions and you can confirm them?

10:23:51 16 A. And I can add to my answer, can't  
10:23:54 17 I?

10:23:54 18 Q. You absolutely can but I haven't  
10:23:57 19 asked my question yet.

10:23:58 20 A. I'm still adding to my answer.  
10:24:01 21 You pointed out this business about dishonesty of  
10:24:04 22 Crown land agents, and I pointed out it's the  
10:24:07 23 "alleged" dishonesty. Not proven dishonesty.

10:24:12 24 Q. So it is not really key to my  
10:24:17 25 question right now?

1 THE COURT: Counsel, you asked a  
2 question. You just said you did not ask a  
3 question. I do wonder sometimes why counsel don't  
4 object.

5 But I don't think it's fair. You did  
6 ask him a question. Your proposition was he's  
7 referring to dishonesty of Crown agents. You asked  
8 that question; he's answering that question.

9 It might not be what you're hoping to  
10 focus on, but it's not very complicated what's  
11 going on here. You chose to ask him about that  
12 passage. He's answering.

13 You can object if you want, ask for a  
14 ruling that he not be permitted to supplement his  
15 answer; that's fine. But you did ask him about it.

16 MS. GUIRGUIS: Okay, thank you, Your  
17 Honour.

18 BY MS. GUIRGUIS:

19 Q. Keep going.

20 A. Yeah, what he's talking about here  
21 that these gangs, would-be squatters who are  
22 gathered in the back doors of all the taverns and  
23 coming up with all these reasons why they can't get  
24 on the land. One of them is the alleged dishonesty  
25 of the Crown land agents. Okay? It's alleged.

10:25:27 1 It's gossip, okay? We can't get what we want  
10:25:31 2 because the Crown land agents are corrupt and  
10:25:34 3 they're taking bribes, not proven. Not proven,  
10:25:38 4 it's alleged.

10:25:39 5 Q. Okay. He also talks about that  
10:25:46 6 he's referring -- he's gotten notice that there's  
10:25:49 7 squatters who are ejecting more fortunate squatters  
10:25:52 8 and this generally resulted in bloodshed.

10:25:54 9 He mentions one instance of murder that  
10:25:58 10 he has notice of. But he doesn't provide any  
10:26:01 11 additional specifics about what's transpired,  
10:26:04 12 correct?

10:26:04 13 A. No, because he hasn't seen this  
10:26:06 14 himself.

10:26:07 15 Q. He hasn't prescribed specifics  
10:26:08 16 about where it has transpired?

10:26:10 17 A. I would suspect it's on the  
10:26:13 18 Saugeen Peninsula.

10:26:14 19 Q. Okay. We don't have any other  
10:26:16 20 sources that indicate that there was violence by  
10:26:20 21 squatters on the Peninsula?

10:26:21 22 A. In fact, if you go up a paragraph,  
10:26:23 23 he says the Peninsula of Saugeen. It makes it  
10:26:26 24 clear. In the next paragraph he's referring to  
10:26:29 25 Saugeen Peninsula.

1 Now what was your question? Sorry.

2 Q. You don't have any other sources,  
3 other than this report, that indicate that there  
4 was violence by squatters on the Peninsula, right?

5 A. I didn't put it, but I think  
6 there's a newspaper report. But I didn't put it in  
7 my report.

8 Q. Nothing cited in the report?

9 A. Nothing cited in the report.

10 Q. So if there was bloodshed and  
11 murder, you'd agree with me that there were laws in  
12 place to deal with such violence, for example,  
13 arrests of individuals engaging in that behaviour?

14 A. Laws were in place.

15 Q. So that would have been the next  
16 logical step as a means to stop this kind of  
17 behaviour? To arrest those folks?

18 A. Didn't we argue this yesterday?  
19 You threw all these acts at me saying -- and I said  
20 that's the intent of the law. What is the event?

21 In other words, they had legal power  
22 that was not used. We argued this. At one point I  
23 had to be sent from the room.

24 THE COURT: Well, sir, that was me, not  
25 counsel.

1 THE WITNESS: Okay.

2 THE COURT: But I think this morning  
3 you should just plug away at answering the  
4 questions and not worry about that.

5 THE WITNESS: Okay.

6 THE COURT: Please go ahead.

7 BY MS. GUIRGUIS:

8 Q. My question for you is, that  
9 wouldn't have been the next logical step as a means  
10 to stop this kind of behaviour, violence or murder,  
11 to arrest and jail individuals that are engaged in  
12 that violence?

13 A. It would have been the next  
14 logical step, but it wasn't taken.

15 Q. But that may have been a practical  
16 solution?

17 A. That's not the solution he sought,  
18 Oliphant.

19 Q. But it may have been a practical  
20 solution, over taking a surrender of 450,000 acres  
21 of Indian reserve lands?

22 A. That's hypothetical.

23 Q. Yes. I'm asking whether you would  
24 agree that that may have been a more -- a practical  
25 solution?

10:28:37 1 A. You mean comparing the two?

10:28:38 2 Q. Yes.

10:28:40 3 A. I was not on the spot. He was on  
10:28:41 4 the spot; he made a decision.

10:28:45 5 I can't venture an opinion on that.

10:29:05 6 Q. So, sir, I want to ask you a few  
10:29:08 7 more questions about Oliphant's intentions.

10:29:11 8 So I'd like to bring up Exhibit 4375.  
10:29:28 9 This is from the Canada Gazette dated June 24,  
10:29:32 10 1854. If we zoom in on that highlighted box which  
10:29:36 11 is at the right-hand side of the page.

10:29:39 12 A. Yes, it's a notice of appointment.

10:29:42 13 Q. That's right. So this tells us  
10:29:44 14 Oliphant is appointed on the 19th of June 1854 as  
10:29:47 15 civil secretary and Superintendent General of  
10:29:51 16 Indian Affairs for the Province of Canada?

10:29:54 17 A. Yes.

10:29:55 18 Q. And I'd like to bring up  
10:29:58 19 Exhibit 2094. If we go to -- if we zoom in here,  
10:30:12 20 we can see the date of this letter, June 28, 1854,  
10:30:19 21 from Oliphant to Anderson. And I'll give you a  
10:30:25 22 moment to look that over?

10:30:26 23 THE COURT: Very hard to read, Counsel.

10:30:28 24 MS. GUIRGUIS: It is. I'm going to  
10:30:30 25 inquire, if I can have a moment, whether we have a

1 transcript.

2 THE COURT: Yes, please look into that.

3 BY MS. GUIRGUIS:

4 Q. So we're having some trouble  
5 locating the transcript, but I can read it in terms  
6 of the --

7 THE COURT: Perhaps you can ask the  
8 witness if he can read it.

9 MS. GUIRGUIS: That would be fine.

10 BY MS. GUIRGUIS:

11 Q. Sir, are you able to read?

12 A. Yeah, blow it up a little, please.

13 Q. Sure.

14 A. Okay, what is the date of the  
15 letter?

16 Q. It's June 28th --

17 A. Dated Québec, 28th June, 1854.

18 "In reply to your letter of the  
19 22nd instant" -- that is the 22nd of  
20 the same month -- "I am directed to  
21 state that the Governor General is  
22 satisfied with the course you  
23 propose to adopt for the --"

24 THE COURT: Oh, we found one.

25 THE WITNESS: Oh, magic...



10:32:51 1 BY MS. GUIRGUIS:

10:32:51 2 Q. Okay, here we go.

10:32:55 3 THE COURT: What are we looking at,  
10:32:57 4 Counsel?

10:32:57 5 MS. GUIRGUIS: This is a transcript of  
10:33:00 6 Exhibit 2094, the letter dated June 28, 1854, from  
10:33:04 7 Oliphant to Anderson.

10:33:06 8 THE COURT: That is interesting but not  
10:33:08 9 going to assist Mr. Registrar in understanding what  
10:33:12 10 this document is. You must have a number  
10:33:15 11 associated with it.

10:33:21 12 MS. GUIRGUIS: It's not ready yet.

10:33:22 13 THE COURT: It's not in the database?

10:33:24 14 MS. GUIRGUIS: No, it's not.

10:33:25 15 THE COURT: Have the other parties seen  
10:33:27 16 this and accepted it as an accurate transcript?

10:33:46 17 We'll do it this way. Mr. Registrar,  
10:33:49 18 if you can reserve an exhibit number subject to any  
10:33:52 19 objection that may be raised at the conclusion of  
10:33:55 20 the cross-examination to the accuracy of this, I  
10:33:57 21 will permit counsel to use this document on the  
10:34:00 22 assumption that it's accurate.

10:34:01 23 Please go ahead.

10:34:02 24 MS. GUIRGUIS: Thank you, Your Honour.

25

1 BY MS. GUIRGUIS:

2 Q. Sir, if you can take a look at  
3 this and when you've looked at the letter then I  
4 can ask you my questions.

5 A. (Witness reviews document).

6 I've read it.

7 Q. Thank you. So we see from this  
8 letter that within a week of being appointed to his  
9 position, Oliphant communicates with Anderson that  
10 the Governor General is agreeable to getting a  
11 surrender of the Peninsula?

12 A. Yes.

13 Q. So this is well before his journey  
14 to Saugeen that he describes in his November 3rd,  
15 1854, report?

16 A. Yes.

17 Q. And there's no reference in this  
18 June 1854 exchange between Oliphant and Anderson to  
19 the threat of bloodshed if the surrender is not  
20 taken?

21 A. No, not that I can see.

22 Q. So I'd also like to bring up  
23 Exhibit 4376. Perhaps we can zoom out first to  
24 take a look at the whole document. This is an  
25 article dated September 25th, 1854, from the Sarnia

1 Observer.

2 THE COURT: I can't see that, Counsel.

3 Is there more to this document that's not on the  
4 screen?

5 MS. GUIRGUIS: So the information I  
6 suppose is in the ready database for the exhibit.

7 THE COURT: Okay. Can you repeat it  
8 for the witness please.

9 BY MS. GUIRGUIS:

10 Q. Yes, this is an article dated  
11 September 25th, 1854, from the Sarnia Observer. If  
12 we go to the centre of the page, starting with  
13 "Land purchased from Indians [...]"

14 A. Yes, do you want me to read...

15 Q. If you can read that to yourself  
16 to the end where it ends at "[...] September 25th".

17 A. (Witness reviews document).

18 Okay.

19 Q. So this describes Oliphant leaving  
20 for Saugeen territory to purchase the reserve. And  
21 it's dated September 25th, 1854. So this is prior  
22 to his journey that he describes in his  
23 November 3rd report, when he's given notice of the  
24 potential for bloodshed, violence and notice of  
25 potentially a murder?

10:38:04 1 A. Uhm-hmm.

10:38:04 2 Q. Yes?

10:38:05 3 A. Yes.

10:38:06 4 Q. So based on what we've looked at,

10:38:12 5 would you agree with me that it sounds like the

10:38:15 6 decision had already been made to get a surrender

10:38:17 7 of the Peninsula?

10:38:18 8 A. Yes.

10:38:20 9 Q. So that this decision was made

10:38:23 10 prior to Oliphant's journey to Saugeen, and prior

10:38:27 11 to his note of concern over bloodshed?

10:38:31 12 A. I think that was the purpose of

10:38:33 13 his journey, wasn't it?

10:38:34 14 Q. Thank you.

10:38:35 15 A. To ensure peaceful transfer of the

10:38:38 16 land.

10:38:38 17 Q. Okay.

10:38:43 18 MS. GUIRGUIS: If I can have one

10:38:45 19 moment, Your Honour.

10:39:05 20 Those are my questions. Thank you.

10:39:07 21 THE COURT: Mr. Registrar, what exhibit

10:39:09 22 number did we reserve for that transcript?

10:39:11 23 THE REGISTRAR: For the transcript

10:39:14 24 Exhibit No. 4724.

10:39:14 25 EXHIBIT NO. 4724: Partial transcript

1 of Exhibit 2094, letter dated June 28, 1854,  
2 from Oliphant to Anderson (reserved).

3 THE COURT: Counsel, you'll provide an  
4 image of that into the database.

5 MS. GUIRGUIS: Yes, Your Honour.

6 THE COURT: And is there any objection  
7 to that exhibit?

8 MR. MC CULLOCH: Your Honour, in that  
9 it does not contain all of the information in the  
10 original document, it should be noted as "partial  
11 transcript".

12 THE COURT: Yes, I noticed there were  
13 some dots in it. We can call it a partial  
14 transcript.

15 I should say, Counsel I've been looking  
16 over at Ontario and mentioning Ontario, where it  
17 was Canada who I was wondering about, so to  
18 Ontario, and Mr. Lemmond, that is because that  
19 other witness was yours.

20 Anyway, this is -- now I'm confused.  
21 Mr. Graves is part of Ontario's case.

22 MR. LEMMOND: Yes.

23 THE COURT: You, sir, are stating your  
24 position for Canada so I'm not confused; that's  
25 better. Mr. Lemmond, what is your position on this

1 exhibit?

2 MR. LEMMOND: We're fine with that  
3 proposal, Your Honour.

4 THE COURT: On the basis it is a  
5 partial transcript?

6 MR. LEMMOND: Yes, Your Honour.

7 THE COURT: All right, sir, I just have  
8 to find out if there are any re-examination and I  
9 think it's Mr. Lemmond, but let me ask you if it is  
10 you, sir?

11 MR. LEMMOND: It is, Your Honour, and I  
12 do have.

13 THE COURT: It feels like it's been a  
14 long week for some reason.

15 MR. LEMMOND: I do have some questions,  
16 Your Honour.

17 Just a moment, Your Honour, while we  
18 transfer the cable, thank you.

19 RE-EXAMINATION BY MR. LEMMOND:

20 Q. Good morning, Mr. Graves.

21 A. Good morning.

22 Q. Mr. Graves, yesterday following  
23 the afternoon break you were asked a number of  
24 questions by Plaintiff's counsel about the state of  
25 the militia in Grey and Bruce Counties in the

10:42:18 1 1850s.

10:42:20 2 And in responding to those questions, a  
10:42:22 3 number of times you made references to we should  
10:42:25 4 look at this document, a couple of times you have  
10:42:28 5 actually pulled up a document physically.

10:42:31 6 What document were you referring to?

10:42:33 7 A. It's the report of the  
10:42:34 8 Adjutant-General of the Militia of Canada, that's  
10:42:39 9 both provinces, written by Colonel de Rottenburg,  
10:42:44 10 Baron de Rottenburg, actually the son of Major  
10:42:47 11 General Baron de Rottenburg, who was the  
10:42:52 12 administrative President of Upper Canada in 1813.

10:42:54 13 THE COURT: I'm just going to interrupt  
10:42:56 14 you there, sir.

10:42:57 15 Yes, Ms. Guirguis.

10:42:58 16 MS. GUIRGUIS: Yes, Your Honour, these  
10:43:00 17 documents, these documents, as the witness  
10:43:02 18 referenced yesterday, were brought up after the  
10:43:06 19 close of his examination in-chief, two reports,  
10:43:09 20 that my friends did provide me.

10:43:12 21 I have no objection to these documents  
10:43:13 22 being added as exhibits on consent. However, since  
10:43:16 23 they did not form part of Mr. Graves's original  
10:43:20 24 opinion, we do object to him providing additional  
10:43:24 25 opinion on these documents.

10:43:25 1 THE COURT: That wasn't an objection to  
10:43:27 2 the question so much as a heads up, I think; is  
10:43:30 3 that correct?

10:43:30 4 MS. GUIRGUIS: Yes, that's correct.

10:43:32 5 THE COURT: That's helpful to know,  
10:43:34 6 Counsel. The witness has identified the document,  
10:43:36 7 Mr. Lemmond. Do you have another question?

10:43:40 8 MR. LEMMOND: I do, Your Honour.

10:43:41 9 THE COURT: That doesn't tread over the  
10:43:43 10 early heads up about a potential objection.

10:43:46 11 MR. LEMMOND: There may be an  
10:43:48 12 objection, Your Honour.

10:43:49 13 THE COURT: Well, Mr. Graves, could you  
10:43:51 14 just pause, before answering whatever the next  
10:43:55 15 question might be so I can see if there's an  
10:43:57 16 objection.

10:43:57 17 THE WITNESS: Okay.

10:43:58 18 THE COURT: Yes, Mr. Lemmond.

10:44:00 19 BY MR. LEMMOND:

10:44:01 20 Q. There's two questions actually. I  
10:44:03 21 was going to pull up the documents, Your Honour,  
10:44:06 22 sequentially.

10:44:08 23 THE COURT: What Ms. Guirguis says, I  
10:44:11 24 don't think you're going to draw an objection about  
10:44:13 25 that.



10:44:14 1 MR. LEMMOND: That's just to confirm  
10:44:15 2 these are the documents that Mr. Graves has just  
10:44:17 3 referred to.

10:44:20 4 THE COURT: All right, go ahead.

10:44:21 5 BY MR. LEMMOND:

10:44:21 6 Q. The first is marked. Mr. Graves,  
10:44:23 7 if you can take a look at the screen. Is this the  
10:44:25 8 document you're referring to, or one of the  
10:44:27 9 documents you were referring to?

10:44:28 10 A. Yes, yeah.

10:44:29 11 MR. LEMMOND: And Ms. Lepan, if you can  
10:44:33 12 show us the other report?

10:44:33 13 BY MR. LEMMOND:

10:44:35 14 Q. Did you mean to refer to this  
10:44:37 15 document, also, Mr. Graves?

10:44:38 16 A. No, it was the first one.

10:44:40 17 Q. So just the 1857 one, marked 1857  
10:44:44 18 in this case?

10:44:45 19 THE COURT: Can you speak up, please?

10:44:47 20 MR. LEMMOND: Sorry, Your Honour.

10:44:48 21 BY MR. LEMMOND:

10:44:49 22 Q. So the question I have for you,  
10:44:51 23 Mr. Graves, which may be the subject of an  
10:44:55 24 objection, is: What, in your view, Mr. Graves,  
10:45:00 25 does this document say or signify in relation to

1 the state of the militia in Bruce and Grey counties  
2 in the 1850s?

3 A. That's the most authoritative --

4 THE COURT: Sir, sir, just wait please.

5 MS. GUIRGUIS: Yes, our objection is  
6 this was not provided or formed the basis of his  
7 original opinion. This is a document after the  
8 fact. As I've said, we've consented to adding it  
9 in as an exhibit, but for Mr. Graves, we do object  
10 to Mr. Graves providing new opinion based on this  
11 document.

12 THE COURT: Thank you. Whoever has  
13 control of the exhibit, could they please move  
14 forward to the next page.

15 And the document is in its entirety  
16 that report; is that correct?

17 MR. LEMMOND: It is, Your Honour.

18 THE COURT: And Mr. Lemmond, are you  
19 asking for it to be entered as an exhibit?

20 MR. LEMMOND: I am, Your Honour.

21 THE COURT: Let's see about that first.  
22 Mr. Registrar?

23 THE REGISTRAR: Exhibit No. 4725.

24 EXHIBIT NO. 4725: Report of the  
25 Adjutant-General of Militia dated 1857.

10:46:10 1 THE COURT: Mr. Lemmond, what is your  
10:46:12 2 response to the objection?

10:46:13 3 MR. LEMMOND: Your Honour, this  
10:46:16 4 document was found after the close of Mr. Graves'  
10:46:22 5 direct examination. It was provided to the  
10:46:24 6 Plaintiffs at that time and we came to the  
10:46:29 7 agreement it could be provided to Mr. Graves.

10:46:31 8 It clearly is an authentic document, an  
10:46:35 9 official document from the period that is relevant  
10:46:37 10 to issues that he has been cross-examined upon.

10:46:40 11 So I think it's an appropriate subject  
10:46:43 12 for re-examination.

10:46:44 13 THE COURT: That's not the question,  
10:46:45 14 sir. The question is, why should you be permitted  
10:46:48 15 to introduce opinion evidence that hasn't  
10:46:50 16 previously been disclosed. At least that's how I  
10:46:55 17 understood the objection.

10:46:55 18 MR. LEMMOND: Right, Your Honour.

10:46:56 19 Simply, in this case, there's no other  
10:46:59 20 way of dealing with it. And this is an opportunity  
10:47:01 21 for Mr. Graves to provide his best evidence on the  
10:47:04 22 point.

10:47:05 23 THE COURT: Well, he has referred to  
10:47:07 24 it, sir, but if we have a report -- just pausing  
10:47:14 25 over whether in the circumstances it shouldn't

1 speak for itself. Presumably it contains certain  
2 information in it.

3 MR. LEMMOND: It does, Your Honour, but  
4 I do believe it would be of assistance to have an  
5 explanation from Mr. Graves as to what that  
6 information is and how it can be understood given  
7 the context of the military at the time.

8 So reduced to its basics, simply, Your  
9 Honour, I think this is the -- mechanically it's  
10 the only way we can do it given how the document  
11 came up. It's simply a question of providing the  
12 best evidence on the issue.

13 THE COURT: What is your reply, Ms.  
14 Guirguis? My concern, Ms. Guirguis, is obviously  
15 it's not a good situation, I agree with you.

16 But since Mr. Graves was in  
17 cross-examination, it was not open to Ontario to  
18 speak to him and get, you know, some piece of  
19 disclosure to give to you. We've done that before  
20 when the issue came up in examination in-chief,  
21 where there's less constraints on counsel.

22 And you have cross-examined him on many  
23 aspects of this report, which is fine. Is the  
24 problem that you don't know what he's going to say?

25 MS. GUIRGUIS: Yes, Your Honour, there

10:48:45 1 is a problem that we don't know what he's going to  
10:48:47 2 say. This, in our view, is not necessarily  
10:48:51 3 directly relevant to what we cross-examined on. We  
10:48:54 4 were cross-examining on the militia prior to 1855  
10:48:57 5 and this deals with -- this is a report from 1857.

10:49:00 6 Our position is that this document can  
10:49:03 7 stand on its own. And doesn't require Mr. Graves  
10:49:08 8 to opine on it any further.

10:49:57 9 THE COURT: I'm pausing, Counsel,  
10:50:00 10 because in any trial but especially in long trial,  
10:50:04 11 it's an unfortunate reality that sometimes relevant  
10:50:08 12 documentation pops up at late stages.

10:50:14 13 Even though I'm very concerned that you  
10:50:18 14 have a proper opportunity to deal with such a  
10:50:20 15 document, I'm also concerned that this important  
10:50:24 16 trial is not left without a piece of important  
10:50:27 17 information because it did, through no one's  
10:50:33 18 design, become available late.

10:50:35 19 So I have those two conflicting  
10:50:39 20 difficulties. This leads me to ask you this  
10:50:43 21 question: Is there anything that you would submit  
10:50:46 22 would assist you, if I do permit him to  
10:50:49 23 characterize this report in re-examination?

10:50:54 24 You've had it, I mean, I suppose one  
10:51:00 25 thing that crosses my mind, and I'm not suggesting

10:51:02 1 that you would find it satisfactory, is that we  
10:51:05 2 could have the re-examination and come back at 2:30  
10:51:10 3 and you can have a chance to cross-examine on the  
10:51:13 4 report, if you feel you need it after you've heard  
10:51:16 5 what this gentleman says. That crosses my mind.  
10:51:19 6 What would your submission be about all of that?

10:51:22 7 MS. GUIRGUIS: I think, Your Honour, so  
10:51:28 8 I do appreciate that it's a long trial and  
10:51:31 9 discovering documents a bit late. That's why I  
10:51:34 10 tried to reach the compromise of saying we'll add  
10:51:36 11 it as an exhibit on consent and let the document  
10:51:39 12 speak for itself.

10:51:40 13 However, what you're proposing that we  
10:51:46 14 wait and see what Mr. Graves says, and then perhaps  
10:51:49 15 we do come back and if I need to ask some questions  
10:51:53 16 then I will; I think that would be satisfactory.

10:51:56 17 THE COURT: All right.

10:51:59 18 So we're going to tread slowly, Mr.  
10:52:01 19 Lemmond, because this is not a wide open door.  
10:52:05 20 This is a tiny crack of a door being open.

10:52:10 21 But on that basis, I will -- I'm just  
10:52:16 22 trying to find your -- the witness indicated what  
10:52:19 23 the document was, that was your question.

10:52:21 24 And then the next question, I'm just  
10:52:24 25 trying to find it here on the screen. Was "what

1 does this document say --" I'm going to try again  
2 to read it from the real-time transcript.

3 Your question was, what in your view,  
4 Mr. Graves -- are you listening, Mr. Graves?

5 THE WITNESS: Yes.

6 THE COURT: What in your view does this  
7 document say or signify in relation to the state of  
8 the militia in Bruce and Grey Counties in the  
9 1850s?

10 I'm going to permit you to answer that  
11 question, sir, on the basis you may be subject  
12 later on today to further cross-examination about  
13 this report.

14 Please go ahead.

15 THE WITNESS: Okay. What it is, it's  
16 the most authoritative document I see to date on  
17 the state of the Upper Canada militia around the  
18 period of the Saugeen transfer.

19 And if you look at the appendix,  
20 unfortunately the appendix, they're not -- should  
21 be A, B, C but they aren't.

22 But anyway, the appendix dealing with  
23 sedentary militia of Upper Canada in 1856 is broken  
24 down by district and county. We'll find it under  
25 Grey and Bruce Counties' comment: "Militia, not

1 organized." That's not the exact comment.

2 Can I --

3 THE COURT: You can ask for the  
4 document to be moved, sir.

5 THE WITNESS: Okay. Can we go to the  
6 end, the last --

7 THE COURT: It is a lengthy document,  
8 so give Ontario's technology person a minute.

9 THE WITNESS: See "Bruce County" at the  
10 bottom of the page? First, second, third  
11 battalion, sedentary militia, Bruce County: Not  
12 organized.

13 Grey County, if you go down a little  
14 farther, first to fifth battalions, Grey County:  
15 Not organized. There was no organized militia in  
16 those counties.

17 Furthermore, I think Simcoe and  
18 Wellington Counties and Huron County should be  
19 around the same general -- Huron County, look at  
20 this. Six battalions, no return parts organized,  
21 no return, not organized, not organized, not  
22 organized.

23 If you go down to Simcoe County, these  
24 are the counties adjacent to Grey and Bruce. Hang  
25 on, Wellington County you have nine battalions,



10:55:21 1 three not organized, not organized, not organized,  
10:55:24 2 not organized.

10:55:25 3 Basically the sedentary militia in the  
10:55:28 4 counties surrounding the Saugeen Peninsula weren't  
10:55:30 5 organized in 1856. It's hard to believe they were  
10:55:34 6 organized in 1855, and then disorganized.

10:55:36 7 There's another factor that comes into  
10:55:39 8 play here, and that's the Militia Act of 1855 which  
10:55:43 9 changed the whole basis of militia.

10:55:45 10 I believe, Colonel de Rottenburg makes  
10:55:50 11 reference to this act several times in his report.

10:55:53 12 And I believe as a result of this Act,  
10:55:56 13 they began to issue these annual reports, and this  
10:55:59 14 is either the first or second of them. So it's a  
10:56:02 15 very important document.

10:56:04 16 THE COURT: Again, I'm going to ask you  
10:56:06 17 to pause, if there's another question, before  
10:56:08 18 answering it.

10:56:09 19 Is there another question?

10:56:10 20 MR. LEMMOND: There is one further  
10:56:12 21 question, your Honour.

10:56:12 22 THE COURT: So pause, sir, before  
10:56:14 23 answering it. What is the question?

10:56:15 24 BY MR. LEMMOND:

10:56:15 25 Q. The next question is a relatively

1 narrow one. Yesterday during questioning by  
2 Plaintiffs' counsel, Mr. Graves, in relation to a  
3 letter involving a Captain Tulloch or Colonel  
4 Tulloch?

5 A. Captain, I think, yeah.

6 Q. There is mention of "pensioners",  
7 and you mentioned or caught the word.

8 Who or what are the "pensioners"  
9 referenced in that letter, if you know?

10 A. It's hard to be definite, but I  
11 think what he's talking about is the Royal Canadian  
12 Rifle Regiment. Which is a regiment of the British  
13 Army consisting of older soldiers which is  
14 organized for service in Canada because of  
15 desertion problem with British Army.

16 They thought that if they have a unit  
17 of older married men, they'd be more stable and  
18 less likely to desert. A lot of them were pretty  
19 long in the tooth, well into their 40s, which is  
20 long in the tooth for a soldier. That's what I  
21 think he meant by pensioners.

22 MR. LEMMOND: I have no further  
23 questions, Your Honour.

24 Oh, I do have, I should ask -- thank  
25 you Ms. Lapan -- for the other of the two reports

1 be marked as an exhibit. It's SC1851.

2 THE COURT: Ms. Guirguis, do you have  
3 an objection to that.

4 MS. GUIRGUIS: No, I don't.

5 THE COURT: Is it a later report?

6 MR. LEMMOND: It's the following year,  
7 Your Honour.

8 THE COURT: Please describe it for the  
9 record. Before you do that, Mr. Lemmond, you  
10 didn't put on the record the page numbers of the  
11 tables your witness was just referring to.

12 MR. LEMMOND: Yes, I have it, Your  
13 Honour, as PDF page 51.

14 THE COURT: All right.

15 MR. LEMMOND: And the second document,  
16 can be described as the report of the  
17 Adjutant-General of Militia 1858.

18 THE COURT: Mr. Registrar?

19 THE REGISTRAR: Can I get the document  
20 number, Your Honour?

21 MR. LEMMOND: Yes, it's SC1851.

22 And for the record, Your Honour, the  
23 exhibit that had the reference of pensioners was  
24 Exhibit 2250.

25 THE COURT: Mr. Registrar if you're

1 able to access the 1858 report.

2 THE REGISTRAR: Yes, Your Honour. So  
3 the 1858 report is going to be Exhibit 4726.

4 THE COURT: Thank you, Mr. Lemmond.

5 EXHIBIT NO. 4726: Report of the  
6 Adjutant-General of Militia dated 1858.

7 THE COURT: Ms. Guirguis, we can take a  
8 20-minute break when you consider whether or not  
9 you want to exercise that right to cross-examine.

10 MS. GUIRGUIS: That's all right, your  
11 Honour, I don't need to.

12 THE COURT: You're satisfied at this point?

13 MS. GUIRGUIS: Yes.

14 THE COURT: Mr. Graves, thank you for  
15 travelling to trial to assist us twice. You can  
16 step down out of the witness box.

17 THE WITNESS: Can I add one thing?  
18 Just these reports are being described as  
19 1857-1858; that's when they were printed.

20 THE COURT: Yes, I understand that,  
21 sir. Thank you, you can step down out of the  
22 witness box.

23 (Donald Graves was excused from the  
24 proceedings).

25 THE COURT: Now, Mr. Lemmond, as the

1 person calling the evidence today, I get you  
2 upfront on the schedule.

3 Don't worry, I know there isn't another  
4 witness coming today. I just want to confirm for  
5 all concerned that the next order is Dr. Reimer is  
6 returning on March 3rd.

7 MR. LEMMOND: Yes, Your Honour, that's  
8 our understanding also, and arrangements are in  
9 place.

10 THE COURT: Now I don't think we have  
11 anyone here today from the municipalities; is that  
12 correct?

13 MR. LEMMOND: No, Your Honour.

14 THE COURT: Ms. Guirguis or Ms.  
15 Pelletier, if you don't know the answer just say  
16 so. But do you have any updated idea of whether  
17 the seven days we set aside for Dr. Reimer is going  
18 to be more than adequate? Yes, Counsel?

19 MS. GUIRGUIS: I think that it will be  
20 adequate.

21 THE COURT: Adequate but not more than  
22 adequate?

23 MS. GUIRGUIS: Probably not more than  
24 adequate.

25 THE COURT: The reason I raise it is,

1 I'd like someone to communicate to the  
2 municipalities who aren't here today and maybe  
3 Ms. Guirguis, if I can have you back.

4 MS. GUIRGUIS: Yes.

5 THE COURT: The reason I ask your team  
6 that question is that if you're very comfortable  
7 with the seven days, recognizing it could be  
8 shorter, but you don't think it's going to be  
9 longer, that it may be of assistance to the  
10 municipalities if I was to ask you to communicate  
11 that they can count on beginning on the 12th.

12 MS. GUIRGUIS: Yes, we can certainly do  
13 that, Your Honour.

14 THE COURT: That may mean there's a gap  
15 if you did yours shorter and that's okay, because  
16 we've moved everyone forward already. I just want  
17 to make sure that doesn't create a problem to put a  
18 pin in that date for the Plaintiffs.

19 MS. GUIRGUIS: I think that should be  
20 fine, Your Honour.

21 THE COURT: Should be okay?

22 MS. GUIRGUIS: Yes.

23 THE COURT: I think it will assist the  
24 group of counsel who are trying to manage their  
25 involvement in the trial if they have a little

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11:02:41 20  
11:02:44 21  
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11:02:59 25

certainty.

So could you copy everyone on an e-mail that communicates that, they should be able to rely on the 12th and if we are done a day early, for example --I'm not suggesting that will happen -- that they can still rely on that day.

MS. GUIRGUIS: Yes, we will do that, Your Honour.

THE COURT: We are still having people travelling in the winter even in March, at least I assume we will be.

MS. GUIRGUIS: Thank you, Your Honour.

THE COURT: Is there any other scheduling matter that anyone wishes to raise before we adjourn.

MS. GUIRGUIS: No, Your Honour.

THE COURT: Canada? No? Mr. McCulloch?

MR. MC CULLOCH: No, Your Honour.

THE COURT: Okay. I don't want to let you leave if I have anything we can get done, so I'm just going to check my own notes.

Is someone taking what I expect will take another week, the process of taking out the severance order? Is someone working on that?

MS. GUIRGUIS: Yes, we're working on that.

11:03:00 1 THE COURT: It takes a while.

11:03:02 2 MS. GUIRGUIS: Yes.

11:03:02 3 THE COURT: When you get it, could you  
11:03:04 4 send it to my assistant as well as everyone else.

11:03:07 5 MS. GUIRGUIS: Yes, we will do that.

11:03:08 6 THE COURT: All right.

11:03:17 7 I have one other note that I haven't  
11:03:19 8 raised with counsel, but I'll let you know now  
11:03:23 9 because it's something we can deal with.

11:03:24 10 For final argument, I would ask that  
11:03:27 11 each party, at least those present here -- it may  
11:03:31 12 not affect the municipalities so I'll just say the  
11:03:33 13 Plaintiffs, Canada, Ontario -- do submit a chronology.

11:03:38 14 Given how much work is involved in such  
11:03:42 15 matters, I'm not asking you to try and agree on  
11:03:46 16 everything in it. I mean, obviously, that would be  
11:03:49 17 better, but that might be something you don't have  
11:03:55 18 time for.

11:03:56 19 So I would ask that you submit a  
11:03:59 20 chronology that's founded on the evidence. And,  
11:04:02 21 you know, if you're able to agree on it, that's  
11:04:05 22 great. But I'm not expecting that you'll be able  
11:04:07 23 to be working that in.

11:04:12 24 The other similar request, which is  
11:04:17 25 perhaps a little harder to envisage, is a cast of



11:04:21 1 characters that is short. I have a cast of  
11:04:25 2 characters that was provided to me at the outset of  
11:04:27 3 the trial which has not been used very much,  
11:04:29 4 probably because it's -- we've got hundreds and  
11:04:34 5 hundreds of people, many of whom are not featured  
11:04:38 6 in this trial.

11:04:39 7 But if you could, in your written  
11:04:41 8 material, include a list of the people who you do  
11:04:44 9 refer to in your written argument, and their  
11:04:48 10 respective titles and so forth. That could be very  
11:04:52 11 short, but it would still be of some assistance to  
11:04:56 12 me, all right?

11:04:57 13 And again, I'm not asking that you try  
11:04:59 14 to come to an agreement on it. Presumably you'll  
11:05:03 15 cite some piece of evidence that you rely on and  
11:05:06 16 that will be fine.

11:05:13 17 Those are the two small things I had in  
11:05:16 18 my notes to mention to counsel. Does anyone have  
11:05:20 19 any difficulty with that?

11:05:21 20 MS. GUIRGUIS: No, Your Honour.

11:05:22 21 THE COURT: Thank you, Ms. Guirguis.

11:05:24 22 Could someone please -- well,  
11:05:26 23 recognizing the municipalities don't get these  
11:05:30 24 transcripts on a regular basis, I'd appreciate it  
11:05:32 25 if someone could summarize that for the

1 municipalities, recognizing that those two things  
2 are something that they may not need, but if they  
3 do, they should be aware of it, okay?

4 Is there anything else anybody wishes  
5 to raise? No? All right.

6 Yes, Mr. Ogden.

7 MR. OGDEN: Your Honour, you mentioned,  
8 you made a request for the timeline, and I just  
9 wanted to make clear, whether you're aware -- or  
10 recall, of course you're aware, two exhibits that  
11 were entered at the start of the trial, which are  
12 3925, described as Agreed Statement of Facts, Basic  
13 Timeline and 3927, Agreed Statement of Facts,  
14 Treaty 72 Negotiations.

15 THE COURT: Yes, I have those two  
16 exhibits, thank you for mentioning them. But the  
17 -- I have them right here.

18 The latter of the two appear to me to  
19 be those portions of Oliphant's report that you all  
20 agree on, which is great, it's helpful, but it is I  
21 think a subset of what might be regarded as  
22 relevant events.

23 MR. OGDEN: Okay.

24 THE COURT: If it features in your  
25 chronology you can reference that exhibit. That's

1 fine.

2 The other one -- yes. You know, I've  
3 got it's sort of a two-page timeline plus some  
4 definitions. If that is the sum total of what  
5 you're considering as the necessary timeline then  
6 you can just exhibit that to your oral argument.

7 But as the trial has progressed, it did  
8 strike me that some parties might be interested in  
9 some dates that aren't on that list. As I look at  
10 it again today, I think that may be the case.

11 MR. OGDEN: Thank you.

12 THE COURT: I guess what I'm trying to  
13 emphasize is, it's really what you are focused on  
14 and it should not be comprehensive or long; it's  
15 the things that you think are important. The dates  
16 that you think are important or the events.

17 And if that's still the core, then  
18 that's great, that's fine.

19 MR. OGDEN: Thank you, Your Honour.

20 THE COURT: Anything else anyone wishes  
21 to raise? No.

22 Okay. Adjourned until the date I just  
23 mentioned.

24  
25 -- Court adjourned 11:15 a.m.

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REPORTER'S CERTIFICATE

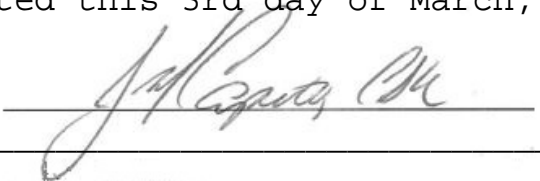
I, JUDITH M. CAPUTO, RPR, CSR, CRR,  
Certified Shorthand Reporter, certify;

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 3rd day of March, 2020.



NEESON COURT REPORTING INC.

PER: JUDITH M. CAPUTO, RPR, CSR, CRR

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