

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

DAY 91 VOL 91
March 06, 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 91/DAY 91 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 6th day of
32 March, 2020.

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

35 The Honourable Justice Wendy M. Matheson

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

2

3 H. W. Roger Townshend, Esq., for the Plaintiffs,
4 & Cathy Guirguis, Esq., The Chippewas of
5 & Krista Nerland, Esq., Saugeen First Nation,
6 & Jaclyn McNamara, Esq., and the Chippewas of
7 & Renée Pelletier, Esq., Nawash First Nation.

8

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

12

13

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

19

20 Jill Dougherty, Esq., for the Defendant,
21 & Debra McKenna, Esq., The Corporation of
22 the Township of Georgian
23 Bluffs.

24

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

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09:25:12 1 -- Upon commencing at 9:45 a.m.

09:46:42 2
09:46:42 3 THE COURT: Mr. Townshend.

09:46:44 4 MR. TOWNSHEND: Good morning.

09:46:46 5 Ms. Pelletier will be arguing this
09:46:48 6 motion. I'm standing because I wanted to
09:46:50 7 acknowledge the passing last night of Ted Johnston.

09:46:54 8 THE COURT: Oh, my dear, I had not
09:46:56 9 heard about that. Thank you for drawing that to
09:46:59 10 everyone's attention.

09:47:00 11 Before Ms. Pelletier gets up, you and
09:47:03 12 others have been calling -- you can sit down if you
09:47:05 13 wish. You and others have been calling this a
09:47:08 14 motion, I'll just put on the record that last
09:47:11 15 Friday I was notified by Plaintiffs' counsel that
09:47:15 16 there was a dispute between the parties about
09:47:19 17 proposed evidence schedule as part of the
09:47:24 18 Municipalities' defence, that defence is scheduled
09:47:26 19 to commence next week.

09:47:28 20 The request was made for a case
09:47:31 21 conference. We held that case conference on
09:47:34 22 Wednesday of this week, and had a preliminary
09:47:38 23 discussion of the issues. I invited counsel to
09:47:44 24 continue their dialogue and if they could not
09:47:49 25 resolve the issues that remained between them, I

09:47:52 1 informed every one that I would hear the
09:47:55 2 Plaintiff's objection to that testimony this
09:48:00 3 morning and that's why we're here. I did not
09:48:06 4 require anyone to file any motion material.

09:48:11 5 Ms. Pelletier, please go ahead with
09:48:13 6 your objection.

09:48:13 7 MS. PELLETIER: Thank you, Your Honour.

09:48:15 8 Before I begin, so the Plaintiffs do
09:48:18 9 not have any written materials, but I do have a
09:48:21 10 case that I'd like to hand up that I'll be
09:48:23 11 referencing, if I could do that now.

09:48:26 12 THE COURT: Sure.

09:48:32 13 MS. PELLETIER: I have provided copies
09:48:33 14 to my friends.

09:48:37 15 THE COURT: All right.

09:48:43 16 MS. PELLETIER: Your Honour, the
09:48:44 17 Plaintiffs are objecting to the relevance of some
09:48:47 18 of the evidence that is intended to be called by
09:48:50 19 the Municipal Defendants.

09:48:51 20 Namely, evidence that the
09:48:55 21 Municipalities say will go to establishing that
09:48:57 22 they are analogous to bona fide purchasers for
09:49:00 23 value without notice.

09:49:01 24 The Plaintiffs say that the proposed
09:49:04 25 evidence of the Municipalities is properly left to

09:49:08 1 Phase 2 and I will be making three main submissions
09:49:11 2 on this point.

09:49:12 3 THE COURT: Just before you do that.

09:49:14 4 Is it some or all of the evidence that
09:49:21 5 your objecting to? As I understood it was some,
09:49:25 6 but not all; is that correct?

09:49:27 7 MS. PELLETIER: We take no issue with
09:49:29 8 the Municipalities calling evidence on roles and
09:49:33 9 responsibilities of various municipal employees.

09:49:35 10 THE COURT: So in your submissions, I
09:49:38 11 need you to be very specific, in addition to the
09:49:42 12 general headline that you just gave, about the
09:49:46 13 specific categories of evidence that you say are
09:49:51 14 objectionable, all right?

09:49:54 15 MS. PELLETIER: Understood, thank you,
09:49:56 16 Your Honour.

09:49:56 17 THE COURT: Please go ahead. You can
09:50:00 18 do that at any point of your submissions.

09:50:03 19 MS. PELLETIER: Okay. Let me begin
09:50:05 20 this section then. The Plaintiffs say that the
09:50:07 21 proposed evidence of the Municipalities that speak
09:50:10 22 to whether the Municipalities are bona fide
09:50:13 23 purchasers for value without notice is properly
09:50:16 24 left to Phase 2 and I will be making three main
09:50:21 25 submissions on this point.

09:50:22 1 The first is whether a party is a bona
09:50:27 2 fide purchaser for value without notice, is a
09:50:30 3 remedial issue.

09:50:31 4 THE COURT: Just give me a moment. All
09:50:55 5 right.

09:50:55 6 MS. PELLETIER: Sorry, before I
09:50:56 7 continue I should also note, Your Honour, for the
09:50:59 8 record, that the County of Grey is not calling
09:51:01 9 evidence in Phase 1.

09:51:03 10 THE COURT: Is it just the County of
09:51:05 11 Grey? Yes, that is correct. So we're dealing with
09:51:08 12 two proposed witnesses for one group of
09:51:10 13 municipalities, and two proposed witnesses for
09:51:15 14 Georgian Bluffs.

09:51:18 15 MS. PELLETIER: That's right.

09:51:18 16 THE COURT: Please go ahead.

09:51:19 17 MS. PELLETIER: So number 1, again to
09:51:20 18 repeat whether a party is a bona fide purchaser for
09:51:23 19 value that notice is a remedial issue.

09:51:26 20 My second main submission will be
09:51:27 21 whether a party is a bona fide purchaser for value
09:51:29 22 is determined on a case-by-case basis, and you need
09:51:33 23 to have discovery for this.

09:51:34 24 And finally number 3, the phasing
09:51:38 25 motion was the appropriate time and place for this

09:51:42 1 argument?

09:51:47 2 On the first point that this is a
09:51:48 3 remedial issue, the Plaintiffs say that whether the
09:51:51 4 Municipalities are a bona fide purchaser for value,
09:51:53 5 is a remedial issue and belongs in Phase 2. It is
09:51:57 6 not a defence to the cause of action. We have no
09:52:01 7 cause of action against the Municipalities.

09:52:04 8 The cause of action for Treaty 72 is a
09:52:07 9 breach of fiduciary duty. The remedy we are
09:52:11 10 seeking is the beneficial ownership of land. A
09:52:14 11 defence to that remedy could be that someone is a
09:52:17 12 bona fide purchaser for value. But it is a defence
09:52:20 13 to a remedy and, therefore, belongs in Phase 2.

09:52:24 14 And moving to my second main
09:52:30 15 submission, bona fide purchaser for value without
09:52:35 16 notice is not determined in a general sense but
09:52:38 17 rather on a case-by-case basis and we need to have
09:52:41 18 discovery for this.

09:52:44 19 The Plaintiffs first received notice of
09:52:48 20 the bona fide purchaser for value assertion in an
09:52:51 21 amended Statement of Defence of the Corporation of
09:52:53 22 the Township of Georgian Bluffs in April 2019.

09:52:57 23 THE COURT: Just on that point. April
09:52:59 24 or May?

09:53:01 25 MS. PELLETIER: It is dated April. I

1 believe we were served in April and issued in May.

2 THE COURT: Hold on for a second. I
3 was trying to figure that out this morning.

4 It perhaps makes no difference at all
5 but the Crown record says May 13th. I did mean to
6 ask someone, so that will be you.

7 It was a long time ago, but I don't
8 remember any dispute about any amendments. Does
9 that mean this amendment was on consent?

10 MS. PELLETIER: One moment, Your
11 Honour.

12 THE COURT: You know, something would
13 have been required since the pleadings were closed.
14 Either consent or leave and I don't remember a
15 motion for leave but -- Ms. Dougherty, can you help
16 me? It's your pleading.

17 MS. DOUGHERTY: Yes, it was on consent
18 and I happen to have the transcript where there's a
19 discussion of that at the tail end of the
20 transcript after the opening.

21 THE COURT: All right. Well, I don't
22 need the transcript.

23 So I have it dated May 13th, on
24 consent. And I assume, Ms. Pelletier, you would
25 have had it in advance of the commencement of the

09:54:09 1 trial which is about two weeks earlier, is that the
09:54:13 2 case?

09:54:13 3 MS. PELLETIER: Yes, Your Honour.

09:54:14 4 THE COURT: And I have looked at that
09:54:15 5 document this morning.

09:54:17 6 MS. PELLETIER: Thank you.

09:54:18 7 So I do note that the corporation of
09:54:20 8 the Township of Georgian Bluffs are the only
09:54:23 9 municipal defendant to have made this amendment to
09:54:26 10 their pleadings.

09:54:27 11 Following that amendment, there was no
09:54:30 12 discovery. Now, the Plaintiffs were of course not
09:54:34 13 fussed by this because the Municipalities
09:54:36 14 themselves acknowledged in their opening statement,
09:54:39 15 that this issue did not belong in Phase 1.

09:54:44 16 So, Your Honour, I'd like to pull up
09:54:46 17 the transcript of April 25th being day 1 of this
09:54:50 18 trial, and I'd like to take a look at the Municipal
09:54:53 19 Defendants' opening statement, beginning at page --
09:54:57 20 well, I'll take you to page 126.

09:55:02 21 THE COURT: Actually, just a moment.

09:55:21 22 Please go ahead. I read it as well,
09:55:26 23 but I think I would need you to take me to the
09:55:28 24 specific pages you're relying on.

09:55:31 25 MS. PELLETIER: Page 126, Your Honour,

09:55:32 1 in the middle of that page it says Ms. Dougherty on
09:55:35 2 behalf of the Municipalities.

09:55:37 3 THE COURT: About what line are you on?

09:55:39 4 MS. PELLETIER: Line 13 beginning with
09:55:40 5 -- it's really just that one paragraph I wanted to
09:55:43 6 highlight. So the position of the
09:55:47 7 Municipalities --

09:55:47 8 THE COURT: I read that this morning.
09:55:49 9 I'm not sure it's crisp on your point but I'm not
09:55:53 10 surprised that you'd be raising it.

09:55:55 11 MS. PELLETIER: The point that I want
09:55:56 12 to highlight, Your Honour, is there is an
09:55:58 13 acknowledgement that the issue of being analogous
09:56:02 14 to a bona fide purchaser for value comes up when
09:56:04 15 there is a discussion of a constructed trust, which
09:56:07 16 is in Phase 2.

09:56:10 17 THE COURT: All right. And is that the
09:56:12 18 only reference you're relying on?

09:56:14 19 MS. PELLETIER: To the transcript?

09:56:16 20 THE COURT: Yes.

09:56:17 21 MS. PELLETIER: I will be bringing up
09:56:19 22 the transcript for the phasing motion as well, Your
09:56:27 23 Honour.

09:56:27 24 And whether someone is a bona fide
09:56:29 25 purchaser for value is determined on a case-by-case

09:56:31 1 basis. The Plaintiffs are entitled to rigorously
09:56:35 2 test the evidence that the Municipalities intend to
09:56:38 3 put forward on this point. And we cannot
09:56:41 4 sufficiently do that here as there has been no
09:56:44 5 discovery.

09:56:45 6 On this point, Your Honour, I'd like to
09:56:47 7 ask you to turn to the Ontario Court of Appeal
09:56:49 8 decision in the Chippewas of Sarnia that I've
09:56:53 9 handed up. Page 59, at paragraph 303.

09:57:05 10 THE COURT: Just while I'm turning that
09:57:06 11 up, does your colleague know the volume of the
09:57:09 12 transcript that you're about to refer to, by any
09:57:14 13 chance?

09:57:17 14 MS. PELLETIER: Day 71, Your Honour.

09:57:27 15 THE COURT: Page 59, paragraph 303?

09:57:30 16 MS. PELLETIER: That's right.

09:57:33 17 Here the Court cites the law on the
09:57:35 18 defence of bona fide purchaser for value without
09:57:38 19 notice.

09:57:40 20 And I'd like to take you to the
09:57:44 21 indented quotation, the case that the Court of
09:57:48 22 Appeal cites beginning with, "According to my view
09:57:48 23 [...]". so here:

09:57:52 24 "According to my view of the
09:57:54 25 established law of this court, such

09:57:56 1 a purchaser's plea of purchase for
09:57:59 2 valuable consideration without
09:58:00 3 notice is an absolute, unqualified,
09:58:03 4 unanswerable defence. In an
09:58:06 5 unanswerable plea to the
09:58:08 6 jurisdiction of this court [...]"

09:58:09 7 And this is the key for us:

09:58:11 8 "[...] such a purchaser, when
09:58:12 9 he has once put in his plea, may be
09:58:14 10 interrogated and tested to any
09:58:17 11 extent as to the valuable
09:58:18 12 consideration which has given in
09:58:20 13 order to show the bona fides or the
09:58:23 14 mala fides of this purchase."

09:58:26 15 THE COURT: I have a question about
09:58:27 16 that; I might as well ask it now.

09:58:31 17 As I read the pleadings and the
09:58:33 18 openings, and Ms. Dougherty will correct me if I
09:58:38 19 have this wrong, it seemed to me the Municipalities
09:58:41 20 were advancing two theories based upon which they
09:58:48 21 say they are analogous to, the bona fide purchaser
09:58:53 22 for value without notice.

09:58:54 23 One theory was that it was due to the
09:58:57 24 taking on of obligations, all right? And those
09:59:01 25 were statutory and regulatory obligations as

09:59:06 1 opposed to, say, for example spending money.

09:59:08 2 And the other theory seems to fit more
09:59:11 3 squarely within your point, of maybe you need to
09:59:15 4 know about the individual parcels of land. Leaving
09:59:18 5 that aside, what is your position on the first
09:59:21 6 theory, which is that the taking on of the
09:59:24 7 obligations is the key to becoming analogous to the
09:59:32 8 bona fide purchaser for value without notice.

09:59:33 9 And you say -- I mean I guess my
09:59:34 10 question is, why do you say you would need
09:59:38 11 discovery or need to descend to the individual
09:59:43 12 tracts of land to deal with that issue?

09:59:45 13 MS. PELLETIER: Well, the first point
09:59:46 14 that I would make, Your Honour, is that even if you
09:59:48 15 were to find that the taking on of obligations was
09:59:53 16 sufficient, there are roads for which -- road
09:59:55 17 allowances for which the Municipalities have taken
09:59:57 18 on no obligation. They remain unopened.

10:00:00 19 THE COURT: Okay, I hear you. So your
10:00:02 20 first point is, it's not comprehensive. But with
10:00:06 21 respect to the roads to which it does apply, or
10:00:08 22 road allowances, what is your submission about
10:00:11 23 that?

10:00:11 24 MS. PELLETIER: I think there needs to
10:00:13 25 be a case-by-case analysis. It may be that, first

1 of all, just by definition of the test, of the name
2 "bona fide purchaser for value", they are not
3 purchaser. Can the Municipalities make out a case
4 that the responsibility, the responsibility for
5 incurring costs of a road makes them -- puts them
6 in the shoes of a bona fide purchaser? It is
7 possible but I think there's a number of things we
8 need to look at. I have a list here that I think
9 perhaps I can go through now.

10 THE COURT: All right.

11 MS. PELLETIER: So, yes, our first
12 submission would be that they don't meet the test.
13 They are not purchasers, and I would argue that if
14 the Municipalities spend money on roads, if they
15 incur an obligation for the roads, that might give
16 them an equitable interest. But then that interest
17 needs to be considered against that of the
18 Plaintiffs, and that of course belongs in Phase 2.

19 Now to your -- to answer your question
20 more directly, Your Honour, about whether it's
21 possible that incurring money on roads or taking
22 responsibility for roads could make the
23 Municipalities a bona fide purchaser for value --

24 THE COURT: I mean I think we have to
25 be clear that the position is not that they are

1 one, but that they are analogous. And that
2 introduces a legal issue. But I assume you're able
3 to confront legal issues and that's not why you're
4 standing up today.

5 MS. PELLETIER: That's right. So I
6 think in order for them to make that argument, we
7 would need to look at a number of different facts,
8 and have discovery on a number of different issues.
9 So some of the things the Plaintiffs would want to
10 look at are, where does the money for road
11 maintenance come from?

12 Assuming it's at least in part coming
13 from property revenue, what proportion of their
14 property revenue is derived from shoreline
15 properties that are subject to the claim? That is
16 one thing we would want to look at.

17 Another point would be, what benefits
18 the Municipalities have derived from opening and
19 maintaining roads. So, for example, additional
20 property taxes from increased residencies, revenue
21 from tourism, etcetera. Do the benefits outweigh
22 the expense such that they could no longer be said
23 to be in the shoes of bona fide purchaser for value
24 if they ever could have at all. What money is
25 spent on each road and what roads? We don't have a

10:02:39 1 comprehensive understanding of that.

10:02:41 2 And finally, what contribution towards
10:02:44 3 the construction and maintenance of roads comes
10:02:46 4 from outside sources? And specifically, what
10:02:50 5 contribution has come from the Plaintiffs
10:02:52 6 themselves.

10:02:54 7 So I think those are all things, Your
10:02:56 8 Honour, that we would need to consider before
10:03:00 9 accepting an argument that the Municipalities can
10:03:04 10 stand in the shoes of a bona fide purchaser for
10:03:07 11 value without notice.

10:03:11 12 Now as I mentioned, what's more is that
10:03:14 13 there are some roads that the Municipalities have
10:03:17 14 not spent any money on at all and that's because
10:03:20 15 they are open -- they are not opened and are
10:03:22 16 unlikely ever to be. And we do not have a clear
10:03:25 17 list of which roads are open and in use and which
10:03:28 18 are not. And all of these things would be subject
10:03:30 19 to discovery.

10:03:31 20 THE COURT: Are you saying -- are those
10:03:32 21 the roads you're saying they have no obligations in
10:03:34 22 respect of? When you said earlier in answer to one
10:03:38 23 of my questions --

10:03:39 24 MS. PELLETIER: Yes.

10:03:39 25 THE COURT: -- it doesn't apply to all

1 of the roads?

10:03:41 2 MS. PELLETIER: That is correct. There
10:03:41 3 is a number --

10:03:42 4 THE COURT: Are you saying there are no
10:03:43 5 statutory or regulatory obligations unless the road
10:03:47 6 is open? Again, that's a legal argument, not a
10:03:52 7 factual one.

10:03:52 8 MS. PELLETIER: We would want to have a
10:03:54 9 better understanding of how the Municipalities
10:03:55 10 describe their obligations, but they're certainly
10:03:57 11 not doing anything with respect to the unopened
10:03:59 12 roads.

10:04:04 13 THE COURT: All right. Okay.

10:04:04 14 MS. PELLETIER: Now my final point,
10:04:05 15 Your Honour, that the phasing motion was the
10:04:08 16 appropriate place for this argument.

10:04:09 17 In our submission the phasing order is
10:04:12 18 clear. The proposed evidence is a matter for
10:04:14 19 Phase 2 in that it very clearly falls under
10:04:19 20 paragraph 2(b)(4) of Your Honour's phasing order,
10:04:23 21 in that it goes to --

10:04:25 22 THE COURT: Just let me just get that
10:04:27 23 out, I have it up here somewhere.

10:04:30 24 MS. PELLETIER: Sure.

10:04:32 25 THE COURT: Mr. Registrar, I actually

1 gave you have a copy the other day; is that handy?

2 MS. PELLETIER: I'll also put it up on
3 the screen if that's helpful.

4 THE COURT: You can, it's helpful to
5 the attending persons, but I'd like to get it out.
6 I have it here.

7 All right, go ahead. Where are you?

8 MS. PELLETIER: So, in our submission,
9 the proposed evidence very clearly falls under
10 paragraph 2(b)(4) of Your Honour's phasing order.

11 In that it goes to the entitlement of
12 the Plaintiffs to beneficial ownership of the
13 categories of lands described in paragraphs 4(a)
14 and 4(b) of the Statement of Claim.

15 Now, if the Municipal Defendants
16 believe that there was any ambiguity on this matter
17 they could and should have raised it during the
18 motion respecting the phasing order. Instead, they
19 made arguments acknowledging that the constructive
20 trust remedy required a case-by-case analysis and
21 that their evidence belonged in Phase 2.

22 So I'd like to bring up the transcript
23 for the argument on the phasing order, which is
24 January 8th being day 71 of this trial, beginning
25 at page 9276. This is Ms. McKenna on behalf of the

1 Municipalities, that very first paragraph at the
2 top of that page.

3 And I reiterate that my friends have
4 said that:

5 "This is a remedy that is
6 obviously discretionary; and that it
7 is a discretionary remedy that
8 requires a case-by-case analysis and
9 evidence that requires a balancing
10 of the equities and interests at
11 play."

12 THE COURT: The thing is that, I mean,
13 I don't think anyone has any disagreement about
14 what the test is for a constructive trust. We know
15 that's discretionary and case-by-case.

16 The issue I'm dealing with right now is
17 the question of whether it is separately an issue
18 outside of the question of a constructive trust.
19 So it's interesting but it isn't really responsive
20 to the position of the Municipalities.

21 MS. PELLETIER: Well, Your Honour --

22 THE COURT: I understand your position
23 which is you believe it ought to be, but I don't
24 see this as a concession of the point we have this
25 morning.

1 MS. PELLETIER: Well, perhaps we can go
2 to page 9279, I believe this is a concession of
3 this point which is again Ms. McKenna on behalf of
4 the Municipalities.

5 THE COURT: All right.

6 MS. PELLETIER: Very end of that page:

7 "Well, the Plaintiffs are
8 urging on you that you make findings
9 or the judge that deals with the
10 Phase 1B makes findings that guide
11 the future court with respect to
12 Phase 2; and also the parties coming
13 to some conclusions or resolution
14 that would necessitate or not
15 necessitate Phase 2 being -- taking
16 place. But the reality is, Phase 2
17 is where the Municipalities will
18 have an opportunity to lead evidence
19 on the properties for which they
20 own."

21 So, Your Honour, again, if --

22 THE COURT: I mean I understand why you
23 point it out, but it isn't -- I mean I don't think
24 anyone can fairly say that this issue that's been
25 raised in front of me was on the table squarely if

10:08:16 1 -- and I understand you disagree with this -- if it
10:08:18 2 can be described as an issue that's outside of the
10:08:21 3 analysis of constructive trust. I think your
10:08:25 4 submission is it's inside and that's the end of it.

10:08:27 5 MS. PELLETIER: It is inside.

10:08:29 6 THE COURT: I understand that
10:08:30 7 submission but I am just anticipating that I'm
10:08:32 8 going to hear something different. All right. Go
10:08:34 9 ahead.

10:08:34 10 MS. PELLETIER: So each of these
10:08:35 11 submissions, Your Honour, I would argue are
10:08:38 12 consistent with what the Plaintiffs argue now that
10:08:40 13 these matters belong in Phase 2 and they are
10:08:42 14 inconsistent with the position the Municipalities
10:08:44 15 are taking.

10:08:48 16 In closing, Your Honour, our submission
10:08:50 17 is that the issues raised by the proposed evidence
10:08:52 18 of the Municipalities with respect to whether they
10:08:57 19 are bona fide purchasers for value without notice,
10:08:59 20 very clearly by the wording of your order, falls
10:09:02 21 into Phase 2.

10:09:04 22 But quite apart from that, without
10:09:06 23 having had discovery on this matter there's simply
10:09:10 24 no fair way in which to allow this evidence to be
10:09:13 25 admitted at this time it would certainly be too

1 prejudicial to the Plaintiffs. Subject to any
2 questions those are my submissions.

3 THE COURT: Yes, I'd like an answer to
4 that question I asked a few minutes ago which I
5 have four Will-Says in front of me. Can you please
6 point out specifically on those four documents
7 which parts of you submit should be excluded? I
8 note as you look at that, that there's nothing in
9 here about specific parcels, it's all general. So
10 I need you to be very specific as to what you
11 object to.

12 MS. PELLETIER: Well, my issue, Your
13 Honour, is they can't speak about general
14 obligations or general expenses, and without
15 evidence, say that they therefore stand in the
16 shoes of the bona fide purchaser. I mean I suppose
17 they can say that in Phase 2.

18 THE COURT: Take me through it.

19 MS. PELLETIER: Perhaps we can turn to
20 the Will-Say of --

21 THE COURT: I've got them all right
22 here. As you know from our discussion earlier in
23 the week, most of what is said in here -- not all
24 of it -- but most of it is under the general rubric
25 of, you know, roles and responsibilities,

10:10:19 1 legislation, what people do.

10:10:22 2 And we've heard considerable evidence
10:10:24 3 like that already in this trial. I understand
10:10:26 4 you're not objecting to that, but I need to know
10:10:29 5 where you draw the line.

10:10:36 6 MS. PELLETIER: Perhaps we can turn to
10:10:38 7 the Will-Say Statements, South Bruce Peninsula,
10:10:44 8 Northern Bruce Peninsula and Saugeen Shores.

10:10:48 9 THE COURT: I have them by the name of
10:10:50 10 the person.

10:10:51 11 MS. PELLETIER: I don't believe that
10:10:52 12 there is a name on this one.

10:10:54 13 THE COURT: Yes, that one, with the
10:10:57 14 point four list, is that the one you're talking
10:11:00 15 about?

10:11:01 16 MS. PELLETIER: Yes, that is correct.

10:11:02 17 THE COURT: All right. Now you have --
10:11:04 18 anticipating, that one of the points on the list is
10:11:07 19 squarely within this objection, but I need you to
10:11:09 20 take me through it and tell me what you say is
10:11:12 21 objectionable here. Because a lot of it is more
10:11:15 22 within that other category.

10:11:16 23 MS. PELLETIER: An estimate of the
10:11:17 24 annual cost of maintaining the roads.

10:11:19 25 THE COURT: Now, I'm not surprised to

10:11:21 1 hear that, Counsel. Is there anything else in
10:11:24 2 these documents that you would object to?

10:11:26 3 MS. PELLETIER: Miguel Pelletier, Your
10:11:40 4 Honour. And the last paragraph:

10:11:45 5 "Current road system and
10:11:46 6 operations and costs associated with
10:11:49 7 same."

10:11:49 8 THE COURT: So it's the cost mainly; is
10:11:53 9 it, Counsel?

10:11:54 10 MS. PELLETIER: Yes, that's right.

10:11:55 11 THE COURT: All right. And the other
10:11:55 12 two, I don't think have anything quite that pointed
10:11:58 13 in them. Is there something you'd like to
10:12:00 14 identify?

10:12:01 15 MS. PELLETIER: No, Your Honour. One
10:12:03 16 moment, please.

10:12:09 17 I would actually -- I understand this
10:12:11 18 objection has been focused on the evidence that
10:12:14 19 goes to bona fide purchaser for value without
10:12:17 20 notice, but the affidavit of -- sorry, the Will-Say
10:12:20 21 of Ms. Hunter, the very last sentence -- I should
10:12:28 22 note out for the Court says that she will testify
10:12:30 23 as to when the Municipalities first received notice
10:12:34 24 of any claim which --

10:12:35 25 THE COURT: I'm just going to ask you

10:12:37 1 to pause. I have a document called, "Will-Say
10:12:42 2 Wendy Hunter". The last point I have, which I
10:12:47 3 frankly did expect that you would raise says, "the
10:12:47 4 amount the Municipality has spent." But it does
10:12:51 5 not say notice -- am I missing something? Oh, I
10:12:53 6 see. Over on the next page it says when the
10:12:57 7 municipality first received notice of a claim.

10:13:00 8 Well, that's a straightforward factual
10:13:02 9 matter. Are you objecting to that?

10:13:05 10 MS. PELLETIER: It's a limitations and
10:13:06 11 Laches argument, Your Honour, that would go to
10:13:09 12 Phase 2 with respect to Municipalities, as there is
10:13:11 13 no cause of action against them in Phase 1.

10:13:13 14 THE COURT: So you're objecting to
10:13:15 15 that?

10:13:16 16 MS. PELLETIER: That's correct.

10:13:17 17 THE COURT: Are you objecting to that
10:13:18 18 final point at the bottom of page 1 or not?

10:13:20 19 MS. PELLETIER: I am, and thank you for
10:13:21 20 pointing that out, Your Honour. My apologies, Your
10:13:23 21 Honour I missed that.

10:13:23 22 THE COURT: I know there isn't anything
10:13:25 23 mentioned in other Will -- the fourth Will-Say.

10:13:27 24 MS. PELLETIER: So with respect to the
10:13:28 25 other evidence that the Municipalities want to

1 lead, we take no objection but I will note the
2 concern that I have is with respect to what the
3 Municipalities intend to use this evidence for.

4 THE COURT: Okay. Now, I'm going to
5 ask you to pause there. You've made your
6 submission that you say that an argument about
7 whether the Municipalities are analogous to, and I
8 won't repeat the long phrase, is squarely in
9 Phase 2; and I understand that argument.

10 I'd like to try, if I can, to
11 understand that separately from what these folks
12 can talk about next week. So I think what you're
13 saying is, you've identified these specific facts
14 that you say they should not be permitted to talk
15 about at all. And then separately from that you
16 say that to the extent this evidence which you're
17 not objecting to might be used for this other
18 argument, you have other objection.

19 THE WITNESS: That is correct.

20 THE COURT: It's less about the
21 testimony and more about what's on the table.

22 MS. PELLETIER: That's correct.

23 THE COURT: I understand, all right.

24 My only other question, and I'll ask
25 you while you're on your feet, there is some

10:14:54 1 evidence in the ASF about -- it's very general,
10:14:59 2 obviously it's in.

10:15:03 3 Who's having trouble? -- I heard
10:15:08 4 someone say "I'm having some trouble".

10:15:11 5 MS. PELLETIER: I believe it was an
10:15:12 6 iPad, Your Honour.

10:15:14 7 THE COURT: If someone could mute that
10:15:16 8 iPad, please. It's a funny phrase to come popping
10:15:20 9 out of an iPad.

10:15:21 10 Let me find my note. I have it
10:15:27 11 somewhere. It is already in evidence in this
10:15:31 12 trial, through the ASF involving the
10:15:36 13 Municipalities, that the Municipalities have spent
10:15:39 14 -- and I'm going to say the words are "significant
10:15:43 15 resources", or something like that.

10:15:45 16 MS. PELLETIER: Yes.

10:15:46 17 THE COURT: And you know, obviously
10:15:48 18 that's in already. And, here it is "significant
10:15:53 19 resources". Somewhere I have the exhibit number
10:16:00 20 but you know what I am talking about.

10:16:02 21 MS. PELLETIER: Yes, I do know what
10:16:03 22 you're talking about, Your Honour.

10:16:04 23 THE COURT: And that led me to conclude
10:16:08 24 that your objection, with respect to those parts of
10:16:11 25 the evidence we just looked at, has to do with them

1 descending below that general proposition into
2 something more specific; is that the issue?

3 MS. PELLETIER: Yes, exactly. And
4 again what they intend to do with that evidence.
5 Our intention is that the issues raised in the
6 ASF go to Phase 2. We may have entered into this
7 ASF in this time period but I mean it's not
8 relevant now.

9 THE COURT: All right. Well, I have
10 some difficulty with that because the lion's share
11 of the ASF was subject to the Municipalities
12 opening statement so it's hard to say it has
13 nothing to do with this case. If it had nothing to
14 do with this case I assume one of your team would
15 have been on their feet saying this has nothing to
16 do with this case.

17 Anyway, most of it is legislative, in
18 any event. And a lot of it is what I've been
19 describing as roles and responsibilities. And I
20 think I counted correctly that there was one
21 witness for Canada and four for Ontario who have
22 all testified about what I would describe as roles
23 and responsibilities, and without any objection.

24 Okay. That was my other question,
25 thank you very much.

10:17:20 1 MS. PELLETIER: Thank you, Your Honour.

10:17:21 2 THE COURT: Ms. Dougherty, are you
10:17:23 3 taking the lead on this issue? Come on forward.

10:17:26 4 MS. DOUGHERTY: Yes, I'm bringing up
10:17:28 5 the rear as well. I'm here on behalf of all of
10:17:31 6 the --

10:17:32 7 THE COURT: You have to come all the
10:17:33 8 way forward before you start, Ms. Dougherty, for
10:17:37 9 the court reporter's sake.

10:17:40 10 MS. DOUGHERTY: Good morning, Your
10:17:41 11 Honour. I am here on behalf of all of the
10:17:44 12 Municipal Defendants as agent for counsel for them,
10:17:57 13 except for the County of Grey which, as you've
10:17:52 14 heard, is not looking to lead evidence on this
10:17:56 15 issue.

10:18:00 16 If I could ask, Mr. Registrar, if you
10:18:03 17 would pass up the outline of arguments and book of
10:18:07 18 authorities which I've provided to my friends.

10:18:16 19 THE COURT: All right.

10:18:17 20 MS. DOUGHERTY: So it won't surprise
10:18:19 21 you, Your Honour, that the position of the
10:18:23 22 Municipal Defendants, and I'm using that for
10:18:27 23 brevity but it does include Grey -- the position of
10:18:33 24 the Municipal Defendants is this is not just a
10:18:36 25 remedy issue, it is a defence that is properly

1 raised at Phase 1 of the proceeding.

2 And more particularly, it is raised
3 because the Plaintiffs themselves have repeatedly
4 defined the scope of their claim as not including
5 lands that are in the hands of a bona fide
6 purchaser for value without notice.

7 And we say that the Municipalities in
8 relation to the road allowances are in subsets,
9 bona fide purchasers. And those road allowances
10 fall outside the scope of the Phase 2 exercise.

11 Now, my friend has brought you to a
12 number of comments made in relation to the phasing
13 motion in respect of what I'll call the
14 constructive trust arguments that are anticipated
15 at Phase 2.

16 And my simple submission on that is my
17 friend is conflating the two issues. The
18 constructive trust issue, which is a remedial
19 issue, my friends are in effect seeking a remedial
20 constructive trust and we agree that if -- if you
21 are seeking a remedial and constructive trust with
22 respect to a piece of land that is within the scope
23 of the Phase 2 exercise, then it does require a
24 parcel-by-parcel examination of all of the equities
25 that would apply to that particular parcel.

1 And just to flag, perhaps the obvious,
2 but it's worth saying to indicate why the
3 Municipalities are so concerned about this.

4 For the Municipalities, for the -- for
5 example, the Township of Georgian Bluffs alone, and
6 only looking at the improved roads, so not all the
7 road allowances, just improved roads, we have 380
8 kilometers of roads. And it's not like that
9 parcel-by-parcel analysis that would go on in
10 Phase 2 if those -- for example, traveled and
11 untraveled roads are in Phase 2.

12 It's not like that analysis would be a
13 per road analysis. It's more likely that it would
14 look like a -- similar to what a Boundaries Act
15 application looks like for hundreds of parcels
16 because of course each piece of roadway is in front
17 of someone's property, or is being used by someone
18 in some fashion, or at least many of them are.

19 And so that would be, let's just say, a
20 crippling exercise for the Municipalities. And
21 there is no way that if this bona fide purchaser
22 argument is left to Phase 2, there's no way that we
23 could show up at Phase 2 without having prepared
24 for those, in effect, hundreds and hundreds of
25 Boundaries Act applications. We have had to do the

1 title searches, get the survey evidence, it would
2 be an enormous and very expensive undertaking.

3 So, it is, in my submission, important
4 to look at what falls within the scope of Phase 2,
5 if we get to a Phase 2, and what doesn't. And by
6 my friends' own definition if the lands are in the
7 hands of bona fide purchasers for value without
8 notice, then they are not within the scope of
9 Phase 2.

10 And in the interests of time, I don't
11 propose to go through all of this chapter and
12 verse, but I've highlighted a number of those
13 statements in my friends' pleadings and materials
14 and those are set out starting at paragraph 8 on
15 page 4 of the outline of argument for the
16 Municipalities.

17 So in her opening statement the
18 Plaintiff specifically said they "were only seeking
19 a constructive trust over lands that were, first of
20 all, within the Treaty 72 area, and that are not in
21 the hands of bona fide purchasers".

22 Again, at paragraph 80 of the written
23 opening statement, they again reiterate that
24 they're not looking to deal with lands -- or that
25 SON says that an appropriate remedy for the Crown

1 's breach would be a constructive trust on any land
2 subject to Treaty 72 for which there is no bona
3 fide purchaser for value of the legal estate
4 without notice.

5 THE COURT: You don't have to take me
6 through all of that.

7 MS. DOUGHERTY: My simple submission,
8 my friend took you to the phasing order on that,
9 and I would simply say that the phasing order talks
10 about the Phase 2 being focused on the constructive
11 trust remedies with respect to the categories of
12 lands that are referred to in 4(a) and 4(b) of the
13 claim.

14 And my simple submission is that the
15 category of land has carved out of it anything
16 that's in the hands of bona fide purchasers so that
17 begs the question, in my submission.

18 Now, my friend has also made a number
19 of suggestions that the Municipalities don't do
20 anything with all of their unopened road
21 allowances, they don't make any expenditures on
22 them. That actually is not accurate.

23 Certainly it's fair to say that travel
24 that improved roads are more expensive for
25 municipalities than road allowances that are not

1 improved. But they still have to be insured, they
2 have to be patrolled. In some cases municipal
3 title has to be defended in repeated Boundaries Act
4 applications, for example, by cottagers relating to
5 shoreline road allowances.

6 It's not just a no-cost,
7 no-responsibility aspect of the municipal road
8 allowances and in law those road allowances are
9 roads just as much as traveled roads are.

10 My friend is objecting, to some extent,
11 as I understand it, to the evidence, but the
12 Plaintiffs have raised a number of times in my
13 friends' argument that what they're concerned about
14 is not so much the evidence as what we intend to do
15 with it, or what we intend to argue. And in my
16 submission, it has been crystal clear from the time
17 of the amendment to the pleadings, from the time of
18 the opening statements of the Municipal Defendants,
19 that they were advancing this argument.

20 And this is a motion about whether the
21 municipal witnesses are entitled to testify to the
22 dollar figure, so to speak, related to maintaining
23 and improving and so forth the municipal road
24 allowances. It's not a motion to preclude the
25 Municipalities from, in my submission, raising an

1 argument that they've always said that they wanted
2 to raise in Phase 1. I certainly have not --

3 THE COURT: You're calling it a motion;
4 I don't think there's any magic to it.

5 What it is, is an objection.

6 MS. DOUGHERTY: Yes.

7 THE COURT: And when it comes down to
8 the financials when you get below the ASF which
9 does contain an agreement and a statement about
10 financial expenditures.

11 MS. DOUGHERTY: Yes.

12 THE COURT: As I understand it you
13 haven't even produced your documents.

14 MS. DOUGHERTY: No, that's not --
15 that's not entirely correct.

16 A number of the audited financial
17 statements, in my recollection the ones back to
18 2007, were produced at the same time as the
19 Will-Says provided by Georgian Bluffs. So that was
20 toward the end of January, I believe January 24th.

21 THE COURT: But that's not exactly
22 helpful time to get around to producing documents
23 especially on financial issues. I mean you all
24 amended -- I'll get back to the fact it's just you
25 -- you all amended last year, last May and the

1 obligation to produce the documents arose very
2 shortly after that time and nothing happened. And
3 now it seems like there's some noncomprehensive
4 production got done in January, which is, you know,
5 a month and a half ago at best, not just -- which
6 would just be -- if it's audited financial
7 statements normally would just be the beginning of
8 a dialogue on financial disclosure, not the end of
9 one.

10 But let me understand what you did in
11 January. So did anyone other than Georgian Bluff
12 produce anything in January?

13 MS. DOUGHERTY: I'm looking at my
14 friend, Ms. McKenna. I don't believe that the
15 other Municipal Defendants produced materials in
16 January.

17 THE COURT: And you produced, what?

18 MS. DOUGHERTY: We produced audited
19 financial statements that had been on the
20 Municipalities' website dating back to 2007.

21 Then subsequently, we produced a Zip
22 file of materials including the financial
23 statements dating back to 1913 --

24 THE COURT: When was that done?

25 MS. DOUGHERTY: That was done

10:29:55 1 yesterday. We had the full file from the archives.

10:29:58 2 THE COURT: And that's also only
10:30:00 3 Georgian Bluffs?

10:30:02 4 MS. DOUGHERTY: Yes.

10:30:03 5 THE COURT: I just don't understand,
10:30:05 6 Counsel, how in a matter that's been ongoing for
10:30:08 7 decades, about which there have been -- I mean the
10:30:15 8 ordinary production of document obligations do not
10:30:20 9 accord with financial information being handed over
10:30:27 10 in the last month and a half, let alone yesterday.

10:30:33 11 MS. DOUGHERTY: What I would say is
10:30:35 12 there were a couple of things that affected the way
10:30:43 13 that the financial statements were disclosed in
10:30:46 14 this case.

10:30:47 15 The first thing that impacted the
10:30:53 16 Municipalities' productions, which were done
10:30:55 17 initially back in 2002, if I recall, is that
10:31:02 18 although we've been in this litigation since the
10:31:05 19 beginning, we've been very peripheral players, the
10:31:10 20 focus of the litigation by the main Defendants has
10:31:13 21 been squarely on the breach of fiduciary duty
10:31:22 22 claim.

10:31:23 23 And I think it's fair to say that the
10:31:25 24 flavour of the productions of all the Municipal
10:31:28 25 Defendants was really focused on the issues as they

1 had been framed by the main protagonist, if you
2 will. So while, for example, the Township of
3 Georgian Bluffs produced a number of historical
4 documents relating to dealings with the road
5 allowances over the years, and communications with
6 the First Nations relating to road allowances, the
7 focus at that time had not been on the
8 expenditures.

9 THE COURT: I'm just asking about
10 May 13th, 2019. At that time, around or coincident
11 with the commencement of this trial, the obligation
12 on, at least your client having made the amendment
13 to its pleadings -- and on all the other ones if
14 you're asking me to imply it into those pleadings
15 -- was to promptly produce their documents. And
16 the Plaintiffs don't have to ask for them, it's
17 your obligation.

18 Now whatever you might believe is meant
19 by "promptly produce your documents" does not
20 include January of 2020. Now, it depends on the
21 nature of the documents. And you know we've had
22 lots of late productions in this trial but when
23 we're talking about financial statements, and
24 that's opening a whole factual inquiry, it's not,
25 you know, a few new letters from a subject that's

10:32:56 1 been on the table all these years.

10:32:58 2 And I'm really, really struggling with
10:33:01 3 the idea that you should be able to go out
10:33:04 4 underneath the admission you have in your ASF,
10:33:10 5 which I presume is of some use to you, and get into
10:33:13 6 the details at this late stage.

10:33:16 7 MS. DOUGHERTY: I guess the challenge
10:33:18 8 with the admission that we have, and you're quite
10:33:23 9 right, it is of use to the Municipal Defendants to
10:33:26 10 have the admission that they've expended
10:33:28 11 significant resources relating to their road
10:33:32 12 allowances from the time that they got statutory
10:33:35 13 jurisdiction, so it's correct that that is a useful
10:33:38 14 admission.

10:33:38 15 But the concern is that in order to
10:33:47 16 give some clarity to what that means, or some
10:33:51 17 context, it's necessary to put a number to it.

10:33:56 18 THE COURT: Well, if that was a case
10:33:58 19 then those documents should have been produced a
10:34:01 20 long time ago. And that would have given -- well,
10:34:04 21 I don't know what would have happened. I guess I
10:34:06 22 shouldn't speculate.

10:34:07 23 But that is interesting, and if it's
10:34:12 24 correct, then in and around May of last year,
10:34:16 25 people should have been getting busy and producing

10:34:20 1 financial records.

10:34:22 2 MS. DOUGHERTY: Well, what I can say
10:34:25 3 about the past year as well is that the
10:34:33 4 Municipalities and the Plaintiffs as well, have
10:34:35 5 been busy in large measure as between the two of
10:34:42 6 them, focused on trying to mediate and resolve the
10:34:47 7 claims against the Municipalities.

10:34:50 8 And the Municipalities have been
10:34:53 9 dealing with this litigation, I think it's fair to
10:35:00 10 say, on a shoe string.

10:35:01 11 THE COURT: I understand that, Counsel,
10:35:03 12 and I've made various rulings, at least the phasing
10:35:07 13 order expressly refers to that. It doesn't help
10:35:10 14 today.

10:35:11 15 Today we have a situation where your
10:35:14 16 client wishes to go below a general agreement into
10:35:20 17 some financial information which was not properly
10:35:22 18 disclosed. And the Plaintiffs that are objecting,
10:35:28 19 because they haven't had their discovery rights.
10:35:31 20 So that's our situation. And I haven't even asked
10:35:35 21 you yet about the fact that none of the other
10:35:37 22 Municipalities have pleaded this. I'm sure you
10:35:40 23 have something to say about that.

10:35:42 24 MS. DOUGHERTY: I have to say, I'm not
10:35:45 25 entirely sure that that is correct and I don't have

10:35:49 1 all of the other Municipalities' pleadings here
10:35:54 2 with me today.

10:35:55 3 THE COURT: No, I've read them all this
10:35:57 4 morning. All right? And they're not all the same,
10:36:02 5 I'm sure you know that you're the only municipality
10:36:05 6 that expressly put this in as a new paragraph. I'm
10:36:08 7 not saying that one might not try and eke out an
10:36:13 8 argument that is implicit or, as what usually
10:36:17 9 occurs, is don't get preoccupied with the formality
10:36:21 10 of the pleadings, because I can amend them today;
10:36:24 11 which is what usually comes up.

10:36:25 12 So I don't want to get too preoccupied
10:36:28 13 with the pleadings, but I am very concerned about
10:36:30 14 the lack of disclosure of documents, on the
10:36:36 15 financial stuff in particular.

10:36:39 16 MS. DOUGHERTY: Justice Matheson, I
10:36:44 17 appreciate the concern that you have expressed
10:36:45 18 about that. The other thing that I would say about
10:36:49 19 it is my friend has talked about in order to deal
10:36:55 20 with a bona fide purchaser argument, the need to be
10:36:58 21 able to cross-examine the purchaser on all of these
10:37:05 22 specific surrounding circumstances of the purchase
10:37:08 23 and to probe down into things like consideration
10:37:11 24 and so forth. And this is not the conventional
10:37:15 25 bona fide purchaser case.

10:37:18 1 It's not as if there's a live witness
10:37:21 2 who can speak to the circumstances. It's all
10:37:26 3 something that's being argued based on historical
10:37:29 4 and archival documents. And what I would say is
10:37:33 5 that the "financial evidence", so to speak, or
10:37:38 6 expenditure evidence that the Municipalities are
10:37:41 7 seeking to lead is, at this stage, nothing more
10:37:48 8 complicated than "here is the global figure" and
10:37:53 9 "here is the road subsidy that we received for that
10:37:58 10 year that could be backed out of it".

10:38:00 11 It is more about putting a total to
10:38:04 12 what is meant by a significant or substantial
10:38:11 13 expenditure.

10:38:13 14 THE COURT: I understand that. I
10:38:17 15 understand that. I don't see how it helps you. So
10:38:20 16 if I put aside to one side the arguments about we
10:38:23 17 need to know each individual parcel and what
10:38:26 18 happened there; put those to one side.

10:38:26 19 And I assume that what you're hoping to
10:38:28 20 do next week is just to put a global figure on it,
10:38:31 21 I don't know what the global figure would be, but
10:38:33 22 let's just assume that it's very large, all right?
10:38:36 23 It seems to me that the Plaintiffs would be
10:38:39 24 entitled to, first of all, understand not just the
10:38:44 25 audited financial statements but whatever relevant

10:38:51 1 backup paperwork there would be to those
10:38:54 2 expenditures, so that they fully understand the
10:38:56 3 financial statements.

10:38:57 4 And then they would be making
10:38:59 5 submissions about whether or -- cross-examination
10:39:02 6 first, presumably, and then submissions, about
10:39:04 7 whether or not I should pay any attention to those
10:39:06 8 numbers. And none of that has taken place, because
10:39:09 9 you all haven't produced your documents.

10:39:10 10 So leaving aside the issue of whether
10:39:13 11 it should be in Phase 1 or Phase 2, I'm struggling
10:39:17 12 with how you can come forward now and say, well, we
10:39:20 13 should be able to tell you that it's X-million or
10:39:26 14 billion dollars -- I have no idea what it is --
10:39:29 15 without the Plaintiffs having had a fair chance to
10:39:31 16 test the number.

10:39:32 17 And it's too late to do it now, unless
10:39:34 18 you tell me that there's some solution I don't know
10:39:38 19 of, I don't see why it should be coming up now.

10:39:42 20 MS. DOUGHERTY: Well, all I can say
10:39:45 21 with respect to that is that these are archival
10:39:51 22 documents. They're audited financial statements in
10:39:54 23 circumstances where my understanding is there are
10:39:59 24 no further underlying records in relation to how
10:40:06 25 those financial statements were prepared.

10:40:09 1 THE COURT: Well, that may be so. But,
10:40:11 2 you know, I can't accept that from you from the
10:40:14 3 podium. I accept it at the level that I accept it
10:40:17 4 as counsel you wouldn't tell me something you
10:40:19 5 didn't believe was correct. But, you know, the
10:40:22 6 discovery process is intended to give the opposite
10:40:25 7 party an opportunity to test the evidence as it
10:40:30 8 occurred, you know. They're not obliged to take it
10:40:34 9 from you.

10:40:38 10 MS. DOUGHERTY: Well, what I would say
10:40:39 11 with respect to the discovery process is while it
10:40:42 12 is true that the Municipalities did not have a
10:40:46 13 complete set of financial statements in their
10:40:50 14 original productions, certainly the Municipalities
10:40:53 15 have consistently taken this position from -- the
10:40:57 16 position from day 1 in the litigation that they had
10:41:00 17 expended a very considerable amount of money and
10:41:06 18 time in improving and maintaining their municipal
10:41:11 19 road networks and they weren't just volunteers or
10:41:14 20 people who gratuitously got these roads.

10:41:18 21 So it wasn't --

10:41:19 22 THE COURT: Well, you have all that in,
10:41:21 23 it's in the ASF, it's all in already. We don't
10:41:25 24 need a witness to come in and say what's in the
10:41:28 25 ASF. So I don't really think -- I mean I'm not

10:41:29 1 sure it's helpful to you but it doesn't really help
10:41:32 2 the determination of this motion especially.

10:41:36 3 MS. DOUGHERTY: I would say also that
10:41:37 4 my friends are in a position to call reply evidence
10:41:42 5 with respect to those global figures if they're led
10:41:47 6 in the municipal evidence.

10:41:48 7 THE COURT: How are they supposed to
10:41:50 8 conduct a cross-examination next week? You don't
10:41:54 9 do that after your cross-examination, you do it
10:41:57 10 before your cross-examination. And as you know, as
10:42:00 11 counsel, I've been on the Municipalities for the
10:42:03 12 better part of last year, urging them to come and
10:42:06 13 say, you know, what kind of evidence they intend to
10:42:09 14 call. And you know, that's fine, but it's a little
10:42:16 15 late to say they can call reply evidence.

10:42:21 16 MS. DOUGHERTY: Well, the
10:42:26 17 Municipalities, as I believe you're aware, have
10:42:29 18 retained Dr. Reimer and had an expert report
10:42:32 19 prepared and there was a whole database of very
10:42:36 20 specific municipal documentation relating to that
10:42:39 21 expert report.

10:42:41 22 We considered calling that evidence in
10:42:46 23 Phase 1, and then determined, no, that's not really
10:42:50 24 Phase 1 evidence, that's Phase 2 evidence. Phase 1
10:42:54 25 evidence is for the broader brush, if you will,

1 more basic evidence as opposed to the highly
2 specific parcel-by-parcel evidence. And so --

3 THE COURT: Yes, and that's not what
4 I'm referring to.

5 Dr. Reimer was on your witness list, I
6 think from the outset. And the only thing that
7 happened is that she came off the witness list.

8 But the question of whether you would
9 be putting forward any other evidence was raised
10 periodically through last year, to the point where
11 I, at one point, said that you must tell me by such
12 and such a date; and you did. And that's all fine.

13 But I think unless you have something
14 to add, you've heard my concern about this issue.

15 MS. DOUGHERTY: I have, Your Honour.
16 What I would say is that with respect to the
17 proposed evidence, it is relevant, in my
18 submission, to the Phase 1 argument. I've set out
19 some of the caselaw with respect to the legal test
20 for bona fide purchaser for value without notice.
21 That starts at paragraph 18 of the Municipalities'
22 factum.

23 And it has been recognized is that the
24 issue of whether someone is a bona fide purchaser
25 for value, when you look at the "for value" issue,

10:44:48 1 really turns on whether they've acquired their
10:44:50 2 title in exchange for valuable consideration. And
10:44:54 3 my submission is that this evidence goes directly
10:44:58 4 to that question and arguing that at Phase 2 is too
10:45:04 5 late for the various reasons that I have discussed
10:45:10 6 previously.

10:45:11 7 My simple submission with respect to
10:45:18 8 the financial evidence is that the fact that it is
10:45:27 9 in an audited financial statement and it's an
10:45:30 10 archival document provides some confidence in the
10:45:33 11 reliability of the evidence contained in the
10:45:38 12 document, particularly where all that is looked to
10:45:43 13 be included in the testimony is that sort of global
10:45:48 14 total figure which, in my submission, is important
10:45:55 15 to add some clarity to what is already acknowledged
10:46:00 16 in the Agreed Statement of Facts.

10:46:03 17 So subject to any questions that --

10:46:07 18 THE COURT: I think the one thing you
10:46:09 19 haven't dealt with is that I take separate
10:46:11 20 objection to the very last sentence of one of the
10:46:18 21 Will-Says which deals with notice.

10:46:18 22 MS. DOUGHERTY: Thank you.

10:46:20 23 THE COURT: And Ms. Pelletier's
10:46:22 24 submission is that that is a limitation period
10:46:26 25 fact, and that's been deferred.

1 What is your submission on that? When
2 your clients got notice, why do you say that should
3 go in at this time?

4 MS. DOUGHERTY: Because in part, we're
5 arguing that we are bona fide purchasers for value
6 without notice. And so the issue of, if and when
7 we got notice and what that notice was, is
8 pertinent at this stage to that bona fide purchaser
9 argument.

10 THE COURT: The other thing you haven't
11 addressed is whether I was right or wrong when I
12 said to Ms. Pelletier, that it seemed from the
13 pleadings and the opening statements that you had
14 two types of arguments.

15 One is that the assumption of
16 obligations was the, I'm going to use the word
17 "consideration" just for a short cut; and the
18 second was the financial expenditures. Is that an
19 accurate description of the two planks to the
20 argument?

21 MS. DOUGHERTY: Yes. And I would say
22 that the two planks are attached. Because the
23 expenditures made go hand-in-hand with the
24 obligations assumed. Because, in practical terms,
25 the obligations are to maintain, improve, all of

10:47:39 1 the practical requirements that go along with
10:47:42 2 managing a network of road allowances, and all of
10:47:46 3 that has a price tag attached to it.

10:47:50 4 So by assuming the responsibilities
10:47:56 5 relating to road improvement and maintenance and so
10:48:02 6 forth, and then by proceeding to fulfill them, and
10:48:08 7 by expending then significant amounts to do that,
10:48:13 8 those are both consideration for the transfer of
10:48:21 9 the road allowances.

10:48:23 10 THE COURT: So essentially the
10:48:24 11 assumption of the obligations is consideration and
10:48:28 12 then the discharge of the obligations is also
10:48:32 13 consideration.

10:48:33 14 MS. DOUGHERTY: Yes, in my submission.

10:48:34 15 THE COURT: All right. Thank you.

10:48:35 16 Mr. Beggs, are you taking a position on
10:48:37 17 this motion?

10:48:38 18 MR. BEGGS: Your Honour, we're not --

10:48:42 19 THE COURT: I called it a motion, on
10:48:43 20 this objection.

10:48:44 21 MR. BEGGS: We're not taking a position
10:48:45 22 on the objection but there is a quick point that I
10:48:48 23 need to address for my friends', the Plaintiffs'
10:48:52 24 statements this morning.

10:48:53 25 THE COURT: Well, I think Ms. Dougherty

1 said she was finished but she's still at the
2 podium. Did you overlook something, Counsel?

3 MS. DOUGHERTY: I did. I overlooked
4 one thing, which is -- which is to say and I -- I'm
5 hesitant to raise this. But I've heard this
6 discussion going on with respect to late produced
7 expert reports and additional documents between the
8 other parties, and I haven't heard my friends ask
9 for an adjournment to deal with this.

10 But, you know, in my submission if what
11 my friends are saying is there's no way we're going
12 to be ready next week to deal with these global
13 figures, is it possible to push the evidence of the
14 Municipal Defendants later in the hearing to
15 provide my friends with sometime to --

16 THE COURT: You mean later than the
17 end? You're at the end of the hearing, it can't be
18 later than that.

19 MS. DOUGHERTY: The municipal
20 witnesses, I thought were up on the 12th and 13th.

21 THE COURT: Whatever the dates are,
22 it's the end. There is a reply witness -- anyway,
23 asking for an adjournment to be later in the
24 evidence is not asking for an adjournment at all
25 because you are at the end of the evidence.

1 MS. DOUGHERTY: Those are all my
2 submissions and otherwise I rely on what's in the
3 Municipalities' written reply.

4 THE COURT: Mr. Beggs, what is it that
5 you wanted to mention in relation to the
6 Plaintiffs' submissions?

7 MR. BEGGS: It was simply a statement
8 by my friend. It appeared at 10:08:01 on the
9 transcript.

10 THE COURT: Which transcript?

11 MR. BEGGS: The live transcript from
12 this morning.

13 THE COURT: Hold on, what was it again?

14 MR. BEGGS: 10:08 and one second. I
15 think if we're all the same, I hope we're all the
16 same.

17 THE COURT: 10:08...

18 MR. BEGGS: And one second.

19 THE COURT: All right.

20 MR. BEGGS: And it was where my friend
21 was referring to discovery which would be
22 necessary, and the first aspect was whether
23 property taxes were paid on shorelines subject to
24 the claim.

25 THE COURT: Yes?

10:51:26 1 MR. BEGGS: And my concern is, there
10:51:28 2 are no shorelines subject to the claim, because
10:51:31 3 that claim was abandoned in the opening of the
10:51:34 4 Plaintiffs. And any other properties that happened
10:51:39 5 to be on the shoreline to which a constructive
10:51:41 6 trust would apply, Canada or Ontario's property
10:51:43 7 would not have taxes attached to it.

10:51:45 8 So I just wanted to make sure that we
10:51:47 9 weren't reversing the abandonment of that claim.

10:51:53 10 THE COURT: All right. Thank you for
10:51:54 11 raising that. I'm sure Ms. Pelletier will deal
10:51:57 12 with it in reply.

10:51:58 13 Ontario, are you taking a position?
10:52:01 14 Mr. Ogden?

10:52:05 15 MR. OGDEN: Ontario is not taking a
10:52:06 16 position, Your Honour, but I wonder if I may add
10:52:08 17 something in an effort to clarify or to assist.

10:52:11 18 I'm looking at the phasing order and
10:52:17 19 paragraph 2(a)(2). And it refers to Limitations or
10:52:27 20 laches defences applicable to any of the
10:52:29 21 Plaintiffs' causes of action in general.

10:52:33 22 And I wonder whether some of this
10:52:35 23 evidence might be relevant to the prejudice aspect
10:52:39 24 of a laches defence?

10:52:42 25 THE COURT: Advanced by whom?

10:52:44 1 MR. OGDEN: By the Municipalities.

10:52:54 2 It's just a thought I would offer at
10:52:57 3 this point, Your Honour.

10:52:58 4 THE COURT: All right.

10:52:59 5 MR. OGDEN: And the second point is a
10:53:01 6 practical point that notwithstanding the order, the
10:53:04 7 question of whether the Municipalities can make
10:53:08 8 this argument and whether it's practical to do so,
10:53:14 9 might be addressed later after the close of the
10:53:17 10 evidence and if there is sufficient evidence at
10:53:21 11 this point, notwithstanding the current wording --
10:53:27 12 the wording of the order.

10:53:29 13 THE COURT: All right.

10:53:30 14 MR. OGDEN: Thank you, Your Honour.

10:53:31 15 THE COURT: Ms. Pelletier.

10:53:33 16 MS. PELLETIER: Thank you, Your Honour.
10:53:35 17 I'll begin by addressing my friend from
10:53:39 18 Canada's point about the reference I made to
10:53:43 19 "shoreline properties". I apologize, I misspoke.
10:53:46 20 I meant to say "shore road allowances".

10:53:53 21 THE COURT: All right.

10:53:54 22 MS. PELLETIER: In response to the
10:53:56 23 Municipalities' submissions, I believe my friend
10:53:58 24 first is mischaracterizing how we have defined the
10:54:01 25 scope of the claim.

1 My friend has talked about -- appears
2 to be arguing that we've made a claim for the
3 entire territory, and save and except those lands
4 that are held by bona fide purchasers, and those
5 that are not make it to Phase 2. And that's not in
6 fact what we have done.

7 We have claimed land -- it is true that
8 we are not claiming land held by third parties. We
9 have claimed land against the Crown's and the
10 Municipalities. And those are defined in the
11 Statement of Claim.

12 And the Municipalities' land that is
13 claimed is within the scope of the claim, is
14 clearly defined in our Statement of Claim, at
15 paragraph 4. And I wondered if we could turn to
16 that.

17 THE COURT: Mr. Registrar, can I get
18 Volume 1 of the trial record for the action, that
19 includes the Municipalities, please.

20 Where are we in the Statement of Claim?
21 MS. PELLETIER: Paragraph 4, Your
22 Honour.

23 THE COURT: Yes.

24 MS. PELLETIER: So:

25 "In relation to the lands

10:55:09 1 subject to Treaty 72 except those
10:55:11 2 lands subject to boundary
10:55:13 3 rectification claim, and in relation
10:55:15 4 to those lands subject to the
10:55:17 5 boundary rectification claim [...]"

10:55:19 6 Etcetera, etcetera:

10:55:20 7 "[...] the Plaintiffs,
10:55:21 8 Chippewas of Saugeen First Nations
10:55:23 9 and Chippewas of Nawash First Nation
10:55:25 10 claim against the defendants [...]"
10:55:28 11 Then it lists the Municipalities.
10:55:30 12 And then (1), or sorry sub (a), 4(a):

10:55:35 13 "A declaration that the
10:55:36 14 Plaintiffs are the beneficial owners
10:55:38 15 of any road allowances located over
10:55:40 16 lands purportedly surrendered by
10:55:42 17 Treaty No. 72, and which have not
10:55:46 18 been patented and to which the
10:55:49 19 Municipal Defendants are purportedly
10:55:51 20 entitled by virtue of Section 262(1)
10:55:56 21 of the Municipal Act, as amended, or
10:56:00 22 predecessor sections, and which have
10:56:01 23 not been conveyed by the Municipal
10:56:05 24 Defendants, including more
10:56:06 25 particularly those lands set out in

10:56:09 1 schedules [...]"

10:56:11 2 Etcetera, etcetera.

10:56:13 3 So my friend I believe pointed to this
10:56:15 4 section and said that there was a carveout, a
10:56:17 5 carveout for bona fide purchasers. And I
10:56:19 6 highlight, Your Honour, that to the extent there's
10:56:21 7 a carveout in this section, it's for those lands
10:56:24 8 that were held by the municipality and that have
10:56:26 9 been conveyed and patented to bona fide purchasers
10:56:30 10 for value without notice. It does not include the
10:56:34 11 Municipalities themselves.

10:56:37 12 THE COURT: So you're saying there's
10:56:38 13 nothing in this document that excludes the lands
10:56:42 14 described by the Municipalities just now?

10:56:45 15 MS. PELLETIER: Correct. To the
10:56:46 16 opposite, it includes them very clearly.

10:56:59 17 The other point I'd like to address is
10:57:01 18 to my friend's comment that there had in fact been
10:57:04 19 expenditures that -- on some of the unopened road
10:57:08 20 allowances.

10:57:09 21 Again, to the extent that this is the
10:57:11 22 case, it would be subject to discovery and we have
10:57:13 23 no evidence on that.

10:57:19 24 And my final point is just a highlight,
10:57:24 25 Your Honour, that the caselaw that my friend has

10:57:26 1 highlighted, all deals with the defence of a bona
10:57:33 2 fide purchaser for value to a constructive trust.
10:57:34 3 So again, all of the cases talk about the idea of a
10:57:38 4 bona fide purchaser for value being a defence to a
10:57:40 5 remedial issue.

10:57:42 6 That's all, Your Honour, thank you.

10:57:46 7 THE COURT: Wait, you better not sit
10:57:49 8 down without dealing with the late-breaking request
10:57:52 9 for an adjournment.

10:57:53 10 MS. PELLETIER: We would strongly
10:57:54 11 adjourn, your Honour. I can't imagine a brief
10:57:57 12 adjournment would be sufficient and this late in
10:57:59 13 the game we would not consent to that.

10:58:03 14 I did remember one other small point,
10:58:06 15 Your Honour.

10:58:06 16 And I missed one sentence from one of
10:58:12 17 the Will-Says that I would also take issue with.

10:58:15 18 THE COURT: Just give me a moment to
10:58:17 19 find it. Yes.

10:58:28 20 MS. PELLETIER: It is the Will-Say of
10:58:32 21 Wendy Hunter.

10:58:33 22 THE COURT: Yes?

10:58:35 23 MS. PELLETIER: It's the last line in
10:58:37 24 the second paragraph:

10:58:40 25 "The financial commitment

1 required by the municipality to meet
2 those standards".

3 THE COURT: All right. Anything else?

4 MS. PELLETIER: No, that's all, Your
5 Honour. Thank you.

6 THE COURT: Now I'm going to take this
7 issue under reserve and I obviously have to read
8 the written material filed by the Municipalities
9 which I was just given now. As I mentioned at our
10 case conference, it does not affect the ability of
11 any of these four people to testify because it is a
12 -- not unimportant, but from a Will-Say standpoint,
13 a small component of their proposed evidence. And
14 I don't see practically how I can give you a ruling
15 today anyway, but I will certainly give you one on
16 Monday.

17 This brings me to another scheduling
18 problem, which is unfortunate given that this took
19 a lot longer than I expected. But I have a
20 scheduling problem this afternoon. So we will
21 resume with Dr. Reimer after a short break, so
22 people can get organized, but I have to rise at
23 1:00 o'clock.

24 Now if that is -- I'm looking at
25 Ms. Pelletier -- is Ms. Guirguis here? She is.

1 Ms. Guirguis, I invite you to tell me
2 at 1:00 o'clock, whether you think, as we can, that
3 we should start 9:30 today to make up the time, if
4 you can think about that until then.

5 MS. GUIRGUIS: Thank you.

6 THE COURT: So we'll take a short break
7 to allow counsel to reorganize themselves and
8 resume in about ten minutes.

9 -- RECESS TAKEN AT 11:01 a.m. --

10 -- UPON RESUMING AT 11:14 a.m. --

11 (Whereupon Ms. Dougherty, Ms. McKenna,
12 Ms. Pelletier, Mr. Townshend excused themselves
13 from the proceedings).

14 THE COURT: Mr. Registrar, I'd like you
15 to assign lettered exhibit numbers, keeping with
16 our past practice, to three documents that relate
17 to the objection this morning.

18 THE REGISTRAR: Yes, Your Honour.

19 THE COURT: First is the e-mail I
20 referred to from Plaintiffs of February 27th at
21 6:00 p.m., which will not presently be in the RETI
22 database. It's a document that has the four
23 Will-Says attached that Ms. Pelletier itemized her
24 objections to.

25 And Ms. Guirguis, I'm sure in due

1 course you can provide that image to Mr. Registrar.

2 MS. GUIRGUIS: Yes, Your Honour.

3 THE COURT: The cover e-mail doesn't
4 really say anything but the cover e-mail and the
5 four attachments that would be the next lettered
6 exhibit, Mr. Registrar.

7 THE REGISTRAR: Next lettered exhibit
8 it's Y-3.

9 THE COURT: Y-3.

10 EXHIBIT NO. Y-3: Cover e-mail dated
11 February 27, 2020, with attached
12 Will-Say Statements (four).

13 THE COURT: Then municipal counsel
14 filed -- I don't think we need to mark cases -- but
15 she filed an outline. Again, I don't expect you to
16 have an image for it. But it's called, "An Outline
17 of the Municipal Defendants Argument Re: Objection
18 to Evidence From Municipal Witnesses".

19 Mr. Registrar, if you could assign a
20 letter to that.

21 THE REGISTRAR: Letter Z-3.

22 THE COURT: Z-3?

23 EXHIBIT NO. Z-3: Document entitled "An
24 Outline of the Municipal Defendants
25 Argument Re: Objection to Evidence

1 From Municipal Witnesses".

2 THE COURT: If someone could please
3 communicate with Ms. Dougherty to provide an image.

4 Ms. Guirguis, you're nodding your head.

5 MS. GUIRGUIS: Yes, we can do that as well.

6 THE COURT: You can do that as well.
7 All right. I like to keep track of those things.

8 I have a lot of material up here, so
9 before you begin, could you let me know which of
10 the many volumes I should have handy for wherever
11 you are in your cross.

12 MS. GUIRGUIS: So the section now I'm
13 going to be continuing on with Dr. Reimer's
14 Squatting Report which is Exhibit 4708. And likely
15 referring also to Volume 3, which is Exhibit 4703.

16 THE COURT: Just let me get those.

17 Okay, I have those materials, Counsel.
18 Please go ahead.

19 MS. GUIRGUIS: Thank you, Your Honour.

20 DR. GWEN REIMER; Previously sworn.

21 CROSS-EXAMINATION BY MS. GUIRGUIS (CONT'D):

22 Q. Good morning, Dr. Reimer.

23 A. Good morning.

24 Q. So we left off yesterday talking
25 about one exhibit I'll just bring up to refresh

1 your memory. It was Exhibit 2074.

2 This was the letter dated March 27th,
3 1854, from a William Bull to the Crown Lands
4 Commissioner Morin?

5 A. Yes.

6 Q. And I had asked you about the
7 bottom sentence when he was asking whether there
8 would be a sale of the Peninsula lands anytime soon
9 and then the last sentence:

10 "[...] if so, whether there
11 was anything to prevent individuals
12 from settling on it in anticipation
13 of such sale."

14 THE WITNESS: Yes.

15 BY MS. GUIRGUIS:

16 Q. So I'd like to bring up the
17 response that Mr. Bull received, which is
18 Exhibit 2079.

19 So this is a handwritten document and
20 it's the second letter on the page. I do have a
21 transcript at Exhibit 4810, that we can refer to
22 instead.

23 Here it is. So if you can take a look
24 at the letter. It's from Bruce, the Superintendent
25 general, to Mr. Bull responding to his letter.

11:20:04 1 A. (Witness reviews document).

11:20:04 2 Yes, I see that.

11:20:05 3 Q. So this response, it doesn't say
11:20:10 4 anything to answer Mr. Bull's question about
11:20:14 5 whether there's anything preventing him from
11:20:16 6 settling there, which means the Peninsula lands,
11:20:19 7 the lands north of Derby and Arran, in advance of
11:20:23 8 them becoming on sale?

11:20:26 9 A. There's not -- there's no specific
11:20:28 10 response to that question that had been posed by
11:20:32 11 Bull.

11:20:32 12 Q. Thank you.

11:20:33 13 If I can turn now I'd like to bring up
11:20:35 14 SC1923. So this is a copy of the advertisement for
11:20:53 15 the first land sale of Saugeen lands after
11:20:56 16 Treaty 72 to be held in Owen Sound. And we see
11:21:02 17 that it's dated at the bottom, the Indian
11:21:09 18 Department office in Toronto, 18th July 1856.

11:21:16 19 MS. GUIRGUIS: Your Honour, I'd like to
11:21:17 20 make this the next exhibit.

11:21:24 21 THE COURT: I'm surprised it's not
11:21:27 22 already in, counsel, but if it's not that's fine.

11:21:30 23 MS. GUIRGUIS: I'm surprised of that,
11:21:32 24 too.

11:21:34 25 THE REGISTRAR: Exhibit No. 4834.

11:20:51 1 EXHIBIT NO. 4834: Copy of
11:20:53 2 advertisement for the first land sale
11:20:55 3 of Saugeen lands after Treaty 72,
11:21:09 4 Indian Department Office, Toronto,
11:21:12 5 July 18, 1856.

11:21:45 6 BY MS. GUIRGUIS:

11:21:45 7 Q. So, Dr. Reimer, I've marked the
11:21:48 8 passage I wanted you to look at. It's the second
11:21:51 9 paragraph from the bottom beginning with "The
11:21:54 10 department reserves [...]" ending with "[...] the
11:21:57 11 15th August next".

11:22:12 12 A. (Witness reviews document).
11:22:13 13 I've read it.

11:22:14 14 Q. So this part of the notice
11:22:15 15 communicates that people who have squatted on the
11:22:19 16 Peninsula could receive payment for their
11:22:20 17 improvements?

11:22:21 18 A. That's what this paragraph states,
11:22:24 19 yes.

11:22:25 20 Q. And it's not -- it doesn't
11:22:28 21 distinguish -- there's nothing distinguishing in
11:22:31 22 any way between people who may have squatted on the
11:22:34 23 Peninsula prior to the surrender from those who had
11:22:37 24 been squatting only after the surrender?

11:22:40 25 A. It doesn't. I would, before

1 offering any definite opinion about this paragraph,
2 want to know to what extent this is a standard
3 paragraph in land sale notices.

4 Q. Okay. But you agree that it
5 doesn't make any differentiation between
6 pre-surrender squatters and post-surrender
7 squatters?

8 A. Not specifically.

9 Q. Thank you. I'd like to open now
10 SC1924. This is a transcript plus letter. It's
11 dated August 9th, 1856.

12 If we go to page 2 of the PDF we can
13 see the original letter. I'm sorry, can we go up
14 one page, actually. So 2 of the PDF.

15 We can see there, it's upsidedown but
16 it says "W.R. Bartlett"?

17 A. Yes.

18 Q. Okay. And it's sending an
19 enclosure to someone named "Rob Lewis"; is that
20 correct?

21 A. Sorry, sending an enclosure to Rob
22 Lewis?

23 Q. Or it's sending an enclosure about
24 payment for improvements made by a Rob Lewis, I
25 think is what's described.

11:24:17 1 A. Is it possible to flip this so I
11:24:20 2 can just see...
11:24:21 3 Q. Yes.
11:24:22 4 A. Perfect. Okay. You can flip it
11:24:24 5 back then.
11:24:27 6 Go ahead.
11:24:30 7 MS. GUIRGUIS: Your Honour, I'd like to
11:24:31 8 add this as the next exhibit.
11:24:32 9 THE COURT: Mr. Registrar.
11:24:34 10 THE REGISTRAR: Exhibit No. 4835.
11:24:36 11 EXHIBIT NO. 4835: Letter from W.R.
11:24:36 12 Bartlett to R. Lewis, dated August 9,
11:24:42 13 1856.
11:24:42 14 BY MS. GUIRGUIS:
11:24:42 15 Q. So W.R. Bartlett was the Indian
11:24:46 16 Agent at Owen Sound?
11:24:47 17 A. Yes, he was the land sale agent
11:24:49 18 and Indian Agent, yes.
11:24:51 19 Q. So if we can go back up to the
11:24:54 20 transcript. If you take a look at this.
11:25:05 21 A. (Witness reviews document).
11:25:17 22 Scroll down, please. Okay.
11:25:26 23 (Witness reviews document).
11:25:27 24 Q. So Amabelz is one of the southern
11:25:30 25 townships of the newly surrendered peninsula,

11:25:32 1 correct?

11:25:33 2 A. Yes.

11:25:33 3 Q. And so this seems to be an account
11:25:35 4 about what amount to pay squatters in this township
11:25:39 5 for improvements that they've made to properties on
11:25:41 6 which they had squatted?

11:25:43 7 A. It's a claim for that, that's my
11:25:45 8 understanding.

11:25:46 9 Q. So this would be an example of
11:25:48 10 squatters on the Peninsula seeking to claim payment
11:25:51 11 for improvements that they've made?

11:25:53 12 A. Yes.

11:25:54 13 Q. Okay. Let's turn now to
11:26:03 14 Exhibit 2416. This is another letter from William
11:26:10 15 Bartlett dated August 25, 1856. And we have an
11:26:28 16 exhibit -- if I can just find the number.
11:26:29 17 Exhibit 4812 is the transcript.

11:26:40 18 So, Dr. Reimer, if you can take a look
11:26:42 19 at this letter and particularly the highlighted
11:26:45 20 portion from "William Simpson [...]" to "[...]
11:26:51 21 consideration"?

11:26:56 22 THE COURT: You said Exhibit 4812 but
11:26:59 23 that's not what this document says.

11:27:02 24 MS. GUIRGUIS: No, we still have the
11:27:03 25 old RETI.

11:27:05 1 THE COURT: So long as you're sure.

11:27:06 2 MS. GUIRGUIS: Yes.

11:27:07 3 THE COURT: All right.

11:27:08 4 THE WITNESS: (Witness reviews

11:27:08 5 document).

11:27:11 6 Yes, I've read this.

11:27:11 7 BY MS. GUIRGUIS:

11:27:18 8 Q. So this is another example of a

11:27:19 9 squatter on the Peninsula being paid for their

11:27:21 10 improvements, yes?

11:27:22 11 A. Yes. Wait, being paid for their

11:27:26 12 improvements?

11:27:27 13 Q. Or claiming payment?

11:27:28 14 A. Yes.

11:27:36 15 Q. What we have is a letter from --

11:27:37 16 correspondence from the Indian Agent -- or sorry,

11:27:39 17 not the Indian Agent, the Lands Agent taking this

11:27:42 18 claim, correct?

11:27:42 19 A. Yes.

11:27:43 20 Q. Okay. So based on what we've

11:27:46 21 reviewed, these records that there were -- we can

11:27:50 22 conclude that there's records that there were some

11:27:52 23 squatters on the Peninsula?

11:27:54 24 A. Yes, although it's difficult from

11:27:57 25 these two documents to determine whether it was

11:28:00 1 before or after the surrender in 1854.

11:28:04 2 Q. But those squatters, whether
11:28:06 3 before or after, are seeking claims for payments
11:28:09 4 for improvements that they've made by virtue of
11:28:11 5 squatting?

11:28:12 6 A. Yes.

11:28:12 7 Q. So, would it be plausible to
11:28:17 8 assume that these squatters were in fact rewarded
11:28:21 9 for their illegal settlement on the Peninsula?

11:28:24 10 THE COURT: Yes, Mr. Feliciant.

11:28:27 11 MR. FELICIAN: Your Honour, I think
11:28:29 12 the word "illegal" was used in a question yesterday
11:28:34 13 and I didn't rise but it's been using again today.
11:28:36 14 Dr. Reimer is not a lawyer, she cannot comment on
11:28:39 15 any question that assumes that people are acting
11:28:42 16 illegally or legally. And I would question whether
11:28:45 17 that is an appropriate word and it really is a
11:28:48 18 matter for argument at the end of the trial.

11:28:51 19 THE COURT: Ms. Guirguis.

11:28:52 20 MS. GUIRGUIS: Your Honour, we're
11:28:54 21 referring to documents that are referring to
11:28:56 22 squatters and to the practice of squatting.

11:28:58 23 And I think that the definition of
11:29:02 24 "squatting" that most people have accepted,
11:29:06 25 historians, the ethnohistorians and historians

1 we've heard from and based on the documents that
2 we've looked at, is that it does involve some form
3 of unauthorized occupation of lands.

4 THE COURT: It strikes me as easy to
5 solve this objection, Counsel. There are various
6 definitions of squatting and if, in your
7 submission, the definition gets you where you're
8 trying to go, then perhaps use of that word would
9 not draw an objection.

10 Up to you, but I have some trouble with
11 the current form of the question.

12 MS. GUIRGUIS: I can rephrase, thank
13 you, Your Honour.

14 BY MS. GUIRGUIS:

15 Q. So Dr. Reimer, based on what we've
16 reviewed, those squatters which were on the
17 Peninsula, would it be reasonable to assume that
18 that -- they were in fact rewarded by being paid
19 for their improvements on the lands that they
20 squatted on?

21 A. I report on these cases in my
22 Squatters's Supplementary Report. I do not use the
23 word "rewarded", I don't know whether that is the
24 appropriate term, but it is certainly not the term
25 that I used.

1 Bartlett was asked to investigate these
2 claims by squatters. He did so in Section 6.1.4 of
3 my supplementary report. On page 10, I state:

4 "In December 1856 Crown Land
5 Agent W.R. Bartlett reported on 22
6 claims by squatters on the
7 Peninsula, including five persons on
8 Rankins August 1855 list that I
9 discussed earlier. Four cases were
10 allowed."

11 And that would be my preferred word to
12 describe what these documents are stating. The
13 cases were allowed, and the current document up on
14 the screen is one of those that:

15 "[...] was allowed on the basis
16 that these persons had been
17 disappointed when the sale in 1855
18 was postponed or because they
19 purchased or leased properties from
20 Indians before the issue of an 1855
21 notice."

22 "The remaining 18 cases were
23 not recommended either because they
24 had cut trees purely on speculation
25 of raising the squatter claim, or

11:31:34 1 because they purchased property from
11:31:37 2 Indians after the issue of the 1855
11:31:40 3 notice."

11:31:45 4 BY MS. GUIRGUIS:

11:31:45 5 Q. So in that section when you say
11:31:47 6 "allowed" you mean that they were paid?

11:31:49 7 A. They were allowed to -- the
11:31:55 8 squatters claims were allowed.

11:31:57 9 Q. Okay. I want to ask you some more
11:32:09 10 about the big land sale of 1854.

11:32:15 11 So, first of all, the term "the big
11:32:18 12 land sale" that's a term coined by Robertson who is
11:32:21 13 the author of the history of the County of Bruce,
11:32:26 14 correct?

11:32:26 15 A. That is correct, yes.

11:32:27 16 Q. So it's called "big" in relation
11:32:31 17 to other land sales that occurred in Bruce County?

11:32:34 18 A. Robertson characterizes it as the
11:32:40 19 "big event" of 1854.

11:32:42 20 Q. I want to go down to Exhibit 4288,
11:32:45 21 which is a publication by Michelle Vosberg, "Agents
11:32:52 22 of Progress", which we've referred to with other
11:32:55 23 witnesses in this trial. If we go to page 117,
11:32:57 24 which is PDF 125.

11:33:04 25 There's a table that she has here,

11:33:07 1 table 5-1 entitled, "Crown Lands Sold in Canada
11:33:12 2 West, 1848 - 1857". If you can take a look at
11:33:18 3 that.

11:33:30 4 A. (Witness reviews document).

11:33:31 5 Yes.

11:33:31 6 Q. So the surrendered lands on the
11:33:33 7 Peninsula didn't go on sale until 1856, correct?

11:33:36 8 A. Correct.

11:33:37 9 Q. Okay. And nearly 1 million acres
11:33:41 10 were sold, according to this chart that we see
11:33:45 11 here, in 1854 and 1855, that's elsewhere in Upper
11:33:50 12 Canada?

11:33:50 13 A. In Canada West, yes.

11:33:52 14 Q. Oh, yes. Which I refer to
11:33:55 15 interchangeably.

11:33:56 16 A. That's fine, I think many people
11:33:58 17 do.

11:33:59 18 Q. So there are actually a lot of
11:34:03 19 other land sales in Upper Canada in 1854?

11:34:05 20 A. Yes.

11:34:06 21 Q. And those were sales of lands
11:34:08 22 outside of the Peninsula?

11:34:09 23 A. That's my understanding, yes.

11:34:11 24 Q. Okay. Now I want to go to
11:34:16 25 Exhibit 4293. This is the Gowen and Hamilton first

1 report of the Commissioners relative to the
2 counties of Huron and Bruce, 1854 to 1857.

3 It's a report known as the "Squatters
4 Commission Report". Which I believe you do refer
5 to in your Squatting Report as well?

6 A. I think I do, yes.

7 Q. Okay. So this is a report that
8 deals with allocation of land in Huron and Bruce
9 counties. And there's two reports, this is the
10 first one dated February 4th, 1856.

11 So if we go to page 22, which is PDF
12 image 26, I've highlighted a portion here.

13 Unfortunately I don't have a transcript. Are you
14 able to read this?

15 A. Yes.

16 Q. If you can look at "A very great
17 number [...]" until the last word of "[...]
18 compunction".

19 A. (Witness reviews document).

20 Okay.

21 Q. So you would agree with me that
22 this would suggest that the land sales agent sold
23 large tracts of land, and we're talking about Huron
24 and Bruce here, to large speculators -- or to
25 non-resident speculators?

11:36:05 1 A. Let me just read it more
11:36:07 2 carefully.

11:36:07 3 Q. Absolutely.

11:36:08 4 A. (Witness reviews document).
11:36:33 5 Yes, okay, I see that now.

11:36:35 6 Q. And that they're commenting on
11:36:36 7 rather -- that they were doing this rather than
11:36:39 8 limiting the sales to 100 acres per person?

11:36:43 9 A. You know, this paragraph seems to
11:36:45 10 be relating to complaints somewhere. I don't know
11:36:51 11 where. I understand that this report is an
11:36:55 12 investigation into a couple of the agents in
11:36:58 13 various parts of Huron and Bruce. So this
11:37:02 14 paragraph is referring to this kind of activity
11:37:06 15 somewhere and by whom. And we don't know where or
11:37:10 16 who the Land Agent is, that is being discussed in
11:37:14 17 this paragraph.

11:37:14 18 Q. Right. So the report, you're
11:37:18 19 aware that it deals with Bruce and Huron?

11:37:20 20 A. Correct.

11:37:20 21 Q. And in your review it dealt --
11:37:25 22 did you note which Land Agents were assigned to
11:37:30 23 Bruce and Huron?

11:37:30 24 A. If you could just give me a moment
11:37:33 25 to look at my report.

11:37:34 1 Q. Yes. And you mention this report,
11:37:36 2 I can even give you the citation at page 5 of your
11:37:38 3 Squatters Report, Section 3.4.4.

11:37:43 4 A. (Witness reviews document).
11:37:44 5 Right. So McNabb was one of the
11:37:54 6 agents. And I know that they investigated another
11:37:57 7 agent, I'm not sure if I name the other agent here.
11:38:08 8 I believe it will have been the agent that was in
11:38:11 9 charge of the land sales in Huron. And I don't
11:38:16 10 have his -- I can't see his name here, and he was
11:38:20 11 found to have committed some frauds.

11:38:24 12 McNabb, the criticisms of his land sale
11:38:29 13 activities were less serious.

11:38:32 14 Q. Right.

11:38:33 15 A. All right. So that's fine.

11:38:35 16 Q. So it's land sales agents
11:38:40 17 responsible for Huron and Bruce?

11:38:41 18 A. That is my understanding, yes.

11:38:43 19 Q. So responsible for lands in Huron
11:38:45 20 and Bruce, meaning lands in Upper Canada that are
11:38:48 21 nearby the Peninsula, correct?

11:38:50 22 A. Correct, yes.

11:38:50 23 Q. Okay. So what this passage is
11:38:52 24 suggesting that the land sale agents sold large
11:38:55 25 tracts of lands to speculators above and beyond the

11:38:58 1 limit that was supposed to be set of 100 acres per
11:39:02 2 buyer?

11:39:02 3 A. In this particular paragraph, yes.
11:39:05 4 But again, I reiterate I'm not sure what part of
11:39:08 5 this report is referring to who or where.

11:39:10 6 Q. Right.

11:39:11 7 A. And just to clarify it's Bruce and
11:39:13 8 Grey, not Bruce and Huron. That's my
11:39:17 9 understanding. It was happening in Huron as well,
11:39:20 10 but in my supplementary report I focus in on the
11:39:24 11 Crown and school lands that were open for sale in
11:39:28 12 Bruce County and Grey County, all right?

11:39:30 13 Q. So this practice, just on a
11:39:32 14 general level, without assigning it to a specific
11:39:34 15 agent, that's happening in the counties nearby the
11:39:39 16 Peninsula, would you agree with me that to the
11:39:42 17 extent that this was happening, practices like
11:39:44 18 this, made it more difficult for actual settlers to
11:39:47 19 access lands?

11:39:48 20 A. In this particular instance,
11:39:50 21 that's what this paragraph is stating, yes.

11:39:52 22 Q. Okay. Would you agree with me
11:39:54 23 that therefore fostered more demand for lands on
11:39:57 24 the Peninsula?

11:39:58 25 A. I can't say. That's speculating

1 ahead of time. But I do argue in my supplementary
2 report that it did increase an awareness of the
3 demand for lands by settlers and speculators as
4 well on the Peninsula.

5 So there was an increased awareness of
6 the demand.

7 Q. And when you say that is
8 "speculating ahead of time" this is in 1856 that
9 this report is released?

10 A. Yes, but they're referring to what
11 happened in 1854.

12 Q. Right. So if this practice was
13 happening in 1854 would you agree with me that the
14 fact that they are selling large tracts of lands to
15 speculators, larger than the limit of 100 acres per
16 person, that that made less -- land less available
17 for settlers, and would therefore increase and
18 foster the demand on the Peninsula?

19 A. In Grey and Bruce in
20 September 1854? Because that's what this report is
21 specifically about.

22 Q. Okay.

23 A. So you're asking me whether this
24 would have increased a demand for land on the
25 Peninsula, when it became available for sale?

11:41:18 1 That is similar to the conclusion that
11:41:20 2 I draw, that's the significance of this land sale
11:41:24 3 is that it increased an awareness among Crown
11:41:28 4 officials, residents, municipalities and likely the
11:41:32 5 First Nations as well, of a heightened demand for
11:41:36 6 land in the region. I'm not sure if I'm answering
11:41:41 7 your question.

11:41:42 8 Q. Let me phrase it slightly
11:41:44 9 differently.

11:41:45 10 Because what I'm asking is not just
11:41:46 11 when the lands became available for sale on the
11:41:50 12 Peninsula, but prior to taking the surrender.

11:41:52 13 If lands are being sold in larger
11:41:54 14 parcels to land speculators versus to individual
11:41:57 15 settlers, then it creates -- would you agree with
11:42:01 16 me that that created a demand for land even though
11:42:04 17 there may have been vacant lands?

11:42:06 18 A. Just generally created a demand
11:42:13 19 for lands? Yes, I would agree with that.

11:42:15 20 Q. Okay. And that would have
11:42:17 21 increased the demand for more land in Upper Canada
11:42:20 22 including demand for the Peninsula?

11:42:21 23 A. Yes. And I think that that's a
11:42:31 24 common conclusion that myself and several experts
11:42:34 25 have drawn. That there was certainly an increased

1 demand for land at this -- at exactly this time.

2 Q. Okay. And so to meet that demand,
3 we know what did happen was the surrender of the
4 Peninsula and eventual sale. It would have been
5 open to Crown officials instead to rigorously
6 enforce actual limits on the size of parcels that
7 were sold; would you agree with that?

8 A. I'm sorry, you're going to have to
9 repeat that, I lost track of your question.

10 Q. Sure. To meet that demand, it
11 would have also been open to Crown officials to
12 rigorously enforce the limits on the size of
13 parcels that were sold to each individual, making
14 sure that more settlers have access to these lands
15 that were available?

16 A. Well, I think you're asking me
17 whether a main motivation was purely to sell land
18 to actual settlers as opposed to sell land to meet
19 a demand for land.

20 So again, there is a question of
21 motivation there that I am not sure I can answer in
22 the context of what happened in 1854, in
23 September 1854. So if you're saying that -- asking
24 is it one option that the Crown agents would have,
25 to limit the sale of lands in 1 or 200-acre lots to

11:44:17 1 settlers? That will have been an option likely,
11:44:21 2 yes. It's consistent with land grants along the
11:44:27 3 colonization roads.

11:44:29 4 There were a variety of methods that
11:44:31 5 were used, explored, attempted, tried, auctions,
11:44:39 6 free grants, etcetera, in order to provide and open
11:44:41 7 up more settlement lands.

11:44:46 8 So if I'm not answering your question,
11:44:48 9 you can ask it again. But limiting it to 1- to
11:44:54 10 200-acre lots for actual farming and/or settlement
11:44:58 11 was one option, yes.

11:45:00 12 Q. And enforcing that limitation as
11:45:02 13 well, that's what I'm asking you about. Because
11:45:03 14 that limitation isn't -- did exist and what we see
11:45:07 15 in the squatters commission report is that Crown
11:45:10 16 Land Agents sometimes didn't adhere to it. So
11:45:13 17 there could have been more rigorous enforcement of
11:45:16 18 that?

11:45:16 19 A. That was a --

11:45:18 20 MR. BEGGS: Sorry, I'm concerned that
11:45:20 21 Counsel may be giving evidence. But correct me if
11:45:23 22 it is in the record.

11:45:25 23 But counsel is putting to the witness
11:45:27 24 that there was a strict limitation of 100 acres.
11:45:30 25 And that's certainly not from this document. And I

1 think in fairness to the witness, if this is being
2 pursued to this extent, that limitation wherever it
3 is found should be put to the witness.

4 THE COURT: Ms. Guirguis?

5 MS. GUIRGUIS: Your Honour, I'm just
6 speaking -- I was asking that question based on the
7 excerpt of what we've reviewed which is speaking to
8 the 100 acres and often the agent selling the
9 200 acres. But I'm content to leave it at that.

10 THE COURT: Your final question used
11 the word "enforcement". I think that's why
12 Mr. Feliciant stood up. It has another connotation
13 to it. It would suggest there's some sort of law
14 or regulation or other, you know, such instrument
15 that's being enforced. I'm not sure if that's what
16 you were particularly concerned about when you used
17 that word.

18 Do you want to try rephrasing your
19 question? It's up to you.

20 MS. GUIRGUIS: I'm fine to leave it
21 there, Your Honour, thank you.

22 THE COURT: All right.

23 BY MS. GUIRGUIS:

24 Q. Okay. So, you've expressed the
25 opinion at 3.6, which is in your Squatting Report,

1 Exhibit 4708, that the big land sale escalated the
2 pressure for settlement lands in Bruce and Grey
3 counties.

4 So I just want to clarify. You're not
5 suggesting that the big land sale triggered the
6 Crown decision to get surrender of the Peninsula
7 then.

8 A. No, I'm not suggesting that.

9 Q. Okay. You agree that the
10 historical record shows that the Crown made the
11 decision to get the Peninsula before the big land
12 sale?

13 A. Yes, it was a process over months,
14 yes.

15 Q. Okay. So I want to shift to now
16 look at Volume 3 of your report.

17 A. Okay.

18 Q. Which is Exhibit 4703. And I want
19 to talk about what you summarized about what the
20 Crown did to stop encroachments on the Saugeen
21 Reserve. You've dealt with this at pages 110 to
22 115 of your report, which are -- which is under a
23 section called Section 4.2.4, "Encroachment
24 Protection Issues on the Saugeen Reserve"?

25 A. Okay.

11:48:21 1 Q. So your discussion under this
11:48:24 2 section cites, or talks about what I would separate
11:48:28 3 out, and I don't think that you quite put it as
11:48:31 4 five examples. But I would separate it out as five
11:48:32 5 different examples of the Crown dealing with the
11:48:35 6 squatting -- dealing with squatting on the
11:48:36 7 Peninsula.

11:48:36 8 You talk about a T.G. Anderson's note
11:48:40 9 that McGregor was a squatter; T.G. Anderson posting
11:48:46 10 a public notice.

11:48:47 11 You talk about the Crown dealings with
11:48:49 12 a Mr. Withers?

11:48:51 13 Crown dealings with a Mr. Gleason.

11:48:55 14 And warnings sent by John McLean; is
11:49:00 15 that a fair summary?

11:49:01 16 A. I'll take your word for it.

11:49:03 17 Q. So just as an organizational tool,
11:49:06 18 I've divided it up that way, and I'd like to talk
11:49:09 19 about a few of these.

11:49:10 20 We've already talked about McGregor.
11:49:16 21 So I'd like to talk now about the remaining
11:49:20 22 examples.

11:49:22 23 I'd like to start with Anderson's
11:49:24 24 notice. So at page 112 of your report you write:

11:49:28 25 "On February 2, 1846, Anderson

11:49:31 1 released a public notice to
11:49:33 2 squatters and trespassers on Indian
11:49:38 3 lands."

11:49:39 4 And you cite the notice which is
11:49:45 5 Exhibit 1586, which I'd like to bring up. This
11:50:02 6 notice is dated February 2nd, 1846.

11:50:07 7 This notice was published at the
11:50:10 8 Toronto office, correct? That's what it means when
11:50:21 9 it says, "Indian Office, Toronto"?

11:50:26 10 A. Oh, yes.

11:50:27 11 Q. And T.G. Anderson had a number of
11:50:33 12 First Nations under his superintendence; correct?

11:50:34 13 A. That is correct.

11:50:35 14 Q. That included -- so it was
11:50:36 15 Saugeen, it was also Snake Island, Beausoleil Rama,
11:50:43 16 Rice Lake, Mud Lake, Credit River, Mohawks at Bay
11:50:46 17 of Quinte and the Algonquins of Bedford; does that
11:50:51 18 sound right?

11:50:51 19 A. It may be correct. He was in
11:50:52 20 charge of the central superintendency.

11:50:58 21 Q. So this notice that's posted, or
11:51:01 22 that's on the screen in front of us that he posted,
11:51:04 23 it could have been in relation to any or all of
11:51:06 24 these First Nations, yes?

11:51:07 25 A. I take this to mean all.

11:51:10 1 Q. All of them.

11:51:12 2 A. It's a general notice.

11:51:15 3 Q. So there's no specific mention of

11:51:17 4 the Peninsula or of the Saugeen reserve?

11:51:19 5 A. No.

11:51:19 6 Q. And there's nothing to indicate

11:51:21 7 where it was posted?

11:51:23 8 A. Where it was posted, no.

11:51:29 9 Q. There's nothing to indicate on it

11:51:32 10 who, if anyone, it was sent to directly.

11:51:37 11 A. Just give me a moment, please?

11:51:43 12 Q. Absolutely.

11:51:44 13 A. (Witness reviews document).

11:51:57 14 Okay. Can you repeat the question,

11:51:59 15 please.

11:51:59 16 Q. Sure. There's nothing to indicate

11:52:01 17 who, if anyone, it was sent to directly?

11:52:05 18 A. I think there may be -- not on

11:52:07 19 this particular notice, no. There may be

11:52:10 20 documentation in the database as to what newspapers

11:52:16 21 or the like, where it was printed and where it was

11:52:20 22 posted. But I did not document that.

11:52:22 23 Q. Okay. So I want to go to another

11:52:26 24 notice, Exhibit 1108. So this is dated

11:52:38 25 February 25th, 1836. It's a notice from James

1 Givens, who is the Chief Superintendent of Indian
2 Affairs.

3 So this is a specific notice we see
4 from the heading, with respect to the Huron
5 reserve?

6 A. Correct.

7 Q. And the concept of the notice is
8 about warning the squatters to vacate those
9 specific lands?

10 A. Could you make it a bit larger,
11 please?

12 Q. Yes, we can.

13 A. Thank you.

14 (Witness reviews document).

15 Yes.

16 Q. So this demonstrates that notice
17 could be, and sometimes was given with respect to
18 specific Indian reserves?

19 A. Yes.

20 Q. And you've done an extensive
21 review of the historical record in respect of this
22 subject matter for this litigation. Have you come
23 across any notice that is specific to the Saugeen
24 Reserve?

25 A. I do not believe I did.

11:54:03 1 Q. That's, I guess, except for the
11:54:05 2 notice that we see after the surrender of the
11:54:08 3 Peninsula in 1854 from Oliphant?

11:54:10 4 A. Correct.

11:54:11 5 Q. Okay. And that notice was sent by
11:54:15 6 Oliphant on October 14th, 1854. So the day after
11:54:19 7 the Peninsula was surrendered?

11:54:21 8 A. Correct.

11:54:22 9 Q. So I want to turn to the example
11:54:28 10 that you discussed about the Crown's dealings with
11:54:30 11 someone named Mr. Withers.

11:54:35 12 So this is at page 113 of your
11:54:39 13 Volume 3. And you reference actions taken with
11:54:42 14 regard to a squatter named Mr. Withers. You also
11:54:46 15 mention him in your more recent Squatting Report --

11:54:49 16 A. Correct.

11:54:49 17 Q. -- at 2.1.2 and you say he was
11:54:54 18 prosecuted for trespass.

11:54:57 19 So I'd like to go to Exhibit 4286,
11:55:01 20 which is Robertson, The History of the County of
11:55:04 21 Bruce. If we turn to page 26, which is PDF
11:55:17 22 page 38.

11:55:18 23 If we can look at this section that's
11:55:20 24 marked in the green box beginning with the words,
11:55:22 25 "Shortly after opening the navigation [...]" and

1 going to the next page and ending with the words
2 "[...] take steps to collect or have the timber
3 seized".

4 A. (Witness reviews document).

5 Scroll down, please.

6 (Witness reviews document).

7 Okay.

8 Q. So from this description of
9 Mr. Withers, it's saying that he operated a mill,
10 correct?

11 A. Yes.

12 Q. And you would agree with me that
13 Robertson places Withers' mill site in the town of
14 Kindcardine in 1848?

15 A. Yes, Kindcardine, yes.

16 Q. And Kindcardine is just south of
17 the Peninsula, correct?

18 A. Yes.

19 Q. You can use Exhibit P for
20 reference, but Kindcardine is in the area that was
21 surrendered in 1836, correct?

22 A. Yes, that is correct.

23 Q. So the site that Withers was
24 occupying illegally was not part of the reserve?

25 A. No, you're correct.

11:57:46 1 Q. So the enforcement measures taken
11:57:49 2 against Withers is not an example then really of
11:57:52 3 the Crown taking measures to protect the Saugeen
11:57:54 4 Reserve, they were protecting the Crown lands that
11:57:57 5 were already surrendered?

11:58:02 6 A. (Witness reviews document).

11:58:16 7 Yes, I think you're correct.

11:58:18 8 Q. Thank you. So if we can go to
11:58:21 9 Exhibit 1754, before we leave Mr. Withers, one more
11:58:28 10 question.

11:58:30 11 This is legislation from 1849 that's
11:58:34 12 called, "An Act to Define, Divide the District of
11:58:40 13 Huron in the Province of Canada and For the
11:58:43 14 Purposes Therein Mentioned." And it's dated
11:58:53 15 May 30th, 1849.

11:58:54 16 And I'm just bringing you to a short
11:58:56 17 part of the preamble, and if we can zoom to that,
11:58:59 18 and at the bottom half of the preamble a portion
11:59:01 19 marked in green. And if you can read to yourself
11:59:03 20 from the words, "That for all the purposes of the
11:59:07 21 Act [...]". So a couple of lines under where we
11:59:10 22 marked in green, to the last line "[...] of the
11:59:14 23 said Act".

12:00:04 24 A. (Witness reviews document).

12:00:05 25 Okay.

12:00:05 1 Q. So this just tells us on a simple
12:00:07 2 reading that presumably the Township of Kindcardine
12:00:10 3 was part of the District of Bruce?

12:00:12 4 A. Correct.

12:00:13 5 Q. In 1849?

12:00:14 6 A. Correct.

12:00:14 7 Q. So the fact that Withers was
12:00:17 8 prosecuted in Kindcardine in 1850, this suggests
12:00:23 9 that the courts and law enforcement systems in the
12:00:26 10 area were sufficiently well-developed enough in
12:00:30 11 Bruce, to manage the prosecution of a trespasser?

12:00:33 12 A. Yeah --

12:00:35 13 MR. FELICIAN: I rise only because
12:00:37 14 Dr. Reimer has said she is not an expert in law
12:00:40 15 enforcement.

12:00:46 16 THE COURT: Ms. Guirguis.

12:00:53 17 MS. GUIRGUIS: Well, Your Honour, she's
12:00:56 18 reviewed the documentary -- the historical record
12:01:00 19 with respect to prosecutions and actions taken with
12:01:05 20 respect to activity that was happening at that
12:01:07 21 time.

12:01:08 22 THE COURT: This is the solicitation of
12:01:10 23 an opinion, which at least presumptively based on
12:01:16 24 Mr. Feliciant's objection, is outside her
12:01:19 25 expertise.

12:01:20 1 Why should you be able to do that?

12:01:25 2 MS. GUIRGUIS: Okay. I can leave it,

12:01:27 3 Your Honour.

12:01:28 4 BY MS. GUIRGUIS:

12:01:32 5 Q. So let's move on to the Gleason

12:01:35 6 example. So this is mentioned in your Volume 3

12:01:43 7 report, pages 114 to 115. You say that:

12:01:52 8 "In June 1852 Anderson was

12:01:54 9 compelled to warn an illegal

12:01:56 10 occupant of Saugeen Nawash lands to

12:01:58 11 either remove or be prosecuted."

12:02:03 12 You note that:

12:02:04 13 "This same individual,

12:02:06 14 Mr. Gleason, was again reprimanded

12:02:08 15 several months later when he was

12:02:09 16 reminded that it was well-known to

12:02:11 17 everyone who chooses to make the

12:02:13 18 inquiry that no Indian has a right

12:02:14 19 to grant any permission of the kind

12:02:16 20 to cut timber without leave from the

12:02:19 21 Honorable, the Superintendent

12:02:20 22 General of Indian Affairs."

12:02:21 23 You're quoting there.

12:02:24 24 A. Yes, I see it.

12:02:26 25 Q. Okay. So in your review of the

1 records, did you come across any evidence that
2 Mr. Gleason was ever removed or prosecuted for his
3 activities?

4 A. (Witness reviews document).

5 I indicate that I did not find
6 documentation to determine the outcome of this
7 incident.

8 Q. Okay. So I want to go to
9 Exhibit 1967. This is a letter from Anderson to
10 Gleason, and I have a transcript of this at
11 Exhibit 4756.

12 Thank you. So if you can take a look
13 at this letter and let me know when you're ready
14 then I'll ask you some questions.

15 A. (Witness reviews document).

16 Okay.

17 Q. So we can assume from this letter
18 since Anderson sent it to Gleason that he knew who
19 Gleason was and where he was generally located,
20 correct?

21 A. Yes.

22 Q. Okay. And from the content of
23 this letter, it seems that any permission Gleason
24 had was from individual Indians and not from the
25 Chief and Council, correct?

12:05:54 1 A. That is correct.

12:05:55 2 Q. So he will be considered an

12:06:00 3 unauthorized occupant on the reserve or a squatter?

12:06:04 4 A. By Indian Affairs, yes.

12:06:05 5 Q. Okay. So I'd like to turn now to

12:06:09 6 SC1740.

12:06:23 7 So this is a letter from Gleason to

12:06:43 8 Pennefather dated September 22nd, 1856. We have

12:06:48 9 the transcript and then the original letter behind

12:06:51 10 it.

12:06:54 11 MS. GUIRGUIS: Your Honour, I'd like to

12:06:55 12 add this as the next exhibit.

12:06:57 13 THE COURT: Mr. Registrar.

12:06:58 14 THE REGISTRAR: Exhibit No. 4836.

12:07:00 15 EXHIBIT NO. 4836: Letter from Gleason

12:06:43 16 to Pennefather dated September 22,

12:06:47 17 1856.

12:07:05 18 BY MS. GUIRGUIS:

12:07:05 19 Q. So in 1856 Pennefather was the

12:07:07 20 Superintendent General of Indian Affairs, correct?

12:07:09 21 A. Yes.

12:07:10 22 Q. So if you can take a moment to

12:07:15 23 review the letter and let us know when you'd like

12:07:17 24 us to scroll?

12:07:18 25 A. (Witness reviews document).

12:07:20 1 Sorry, is the date on this letter?

12:07:24 2 Q. I think it's at the bottom or it's
12:07:28 3 either on the original. We can scroll down to take
12:07:31 4 a look at it.

12:07:34 5 So let's go to the original letter --

12:07:56 6 A. I think it's on the cover there.

12:07:59 7 Looks like September 1856. Thank you.

12:08:12 8 (Witness reviews document).

12:08:39 9 Scroll down, please.

12:10:13 10 (Witness reviews document).

12:10:50 11 Okay.

12:10:51 12 Q. So based on this letter, we see
12:10:54 13 that as of 1856, Gleason is still located on what
12:11:03 14 would have been, up until Treaty 72, the Saugeen
12:11:08 15 Reserve.

12:11:09 16 A. This is 1856.

12:11:10 17 Q. That's right. So what was
12:11:15 18 formally known as the Saugeen Reserve, he's going
12:11:18 19 in there and finishing his mill at this point?

12:11:21 20 A. Can we just go up. I want to see
12:11:23 21 the dates that he -- I know he talks about when he
12:11:25 22 started. I think he said around the 1850s.

12:11:32 23 (Witness reviews document).

12:11:32 24 Go up a little bit further, please.

12:11:42 25 Autumn 1850. So the process started in

12:11:44 1 the autumn of 1850. Okay. If you could ask your
12:11:46 2 question again, please. Sorry.

12:11:47 3 Q. So as of 1856, this letter,
12:11:50 4 Gleason is still located on these lands; he's not
12:11:59 5 been evicted?

12:12:00 6 A. I'm not sure if he is. The mill
12:12:02 7 apparently is still there, and if I -- I read it
12:12:08 8 quickly, but it appears the Colpoy's Bay Band is
12:12:11 9 hoping to buy him out.

12:12:12 10 So I suppose at that point he is still
12:12:16 11 at least part-owner of the mill at Colpoy's Bay.

12:12:20 12 Q. Okay. So now I want to go to your
12:12:39 13 discussion of John McLean.

12:12:42 14 THE COURT: Counsel, you can pick the
12:12:44 15 time but somewhere in the next ten minutes I want
12:12:46 16 to take a very short morning break. You tell me
12:12:49 17 when.

12:12:50 18 MS. GUIRGUIS: This is a good time to
12:12:51 19 do that, Your Honour.

12:12:52 20 THE COURT: We're just going to take
12:12:54 21 ten minutes because we had that earlier late start.

12:13:33 22 -- RECESS TAKEN AT 12:13 p.m. --

12:26:26 23 -- UPON RESUMING AT 12:26 p.m. --

12:26:30 24 MS. GUIRGUIS: Thank you, Your Honour.

25

12:26:31 1 BY MS. GUIRGUIS:

12:26:32 2 Q. So, Dr. Reimer, we left off about
12:26:35 3 to go into some questions about John McLean who
12:26:40 4 we've talked about already; that he was a Crown
12:26:43 5 land commissioner at Guelph -- stationed at Guelph
12:26:45 6 and was appointed as a commissioner to protect the
12:26:49 7 Saugeen Reserve. We talked about him yesterday?

12:26:51 8 A. Yes.

12:26:51 9 Q. So I'd like to turn to SC1741.

12:27:00 10 So this is a letter from Mr. McLean to
12:27:02 11 Colonel Bruce dated July 19th, 1852, is the
12:27:08 12 transcript followed by the original letter.

12:27:10 13 MS. GUIRGUIS: Your Honour, I'd like to
12:27:11 14 add this as the next exhibit.

12:27:14 15 THE COURT: Mr. Registrar.

12:27:16 16 THE REGISTRAR: Exhibit No. 4837.

12:27:00 17 EXHIBIT NO. 4837: Letter from
12:27:01 18 Mr. McLean to Colonel Bruce dated
12:27:05 19 July 19th, 1852.

12:27:19 20 BY MS. GUIRGUIS:

12:27:25 21 Q. Dr. Reimer, if you could take a
12:27:26 22 moment to review and then let me know.

12:27:58 23 A. (Witness reviews document).

12:28:00 24 Okay.

12:28:01 25 MS. GUIRGUIS: One moment, Your Honour.

12:28:01 1 BY MS. GUIRGUIS:

12:28:16 2 Q. So this tells us that McLean was
12:28:19 3 the Land Agent in charge of sales in the area of
12:28:22 4 the Half Mile Strip, correct?

12:28:29 5 When it talks about the south end of
12:28:31 6 the Peninsula; is that right?

12:28:42 7 A. (Witness reviews document).

12:28:46 8 MR. FELICIAN: I don't mean to object.
12:28:48 9 But it seems to me it was an offer. I don't see
12:28:51 10 where it says that he was appointed as a
12:28:53 11 commissioner.

12:28:53 12 MS. GUIRGUIS: That's right. My
12:28:54 13 apologies. I think that I'm confused with another
12:28:57 14 letter, maybe a discussion we had previous.

12:28:59 15 BY MS. GUIRGUIS:

12:29:00 16 Q. But this is an offer to appoint
12:29:01 17 him as a commissioner --

12:29:02 18 A. Yes.

12:29:03 19 Q. -- is that right? Okay.

12:29:07 20 And you've noted before that -- you've
12:29:08 21 noted in your report that he was a commissioner
12:29:12 22 appointed to prevent depredations on the Saugeen
12:29:16 23 Reserve, so what we're looking at is the offer for
12:29:19 24 that office?

12:29:20 25 A. Do you have a page number in my

12:29:21 1 report where I discuss this? Or it may have been
12:29:24 2 in Volume 1, I'm not sure.

12:29:25 3 Q. No, it's at Volume 3, it's at
12:29:32 4 page 115.

12:29:33 5 A. 115?

12:29:35 6 Q. That's correct.

12:29:52 7 A. Yes, okay.

12:29:53 8 Q. Okay. So he's responding to the
12:29:55 9 offer that's been made in this letter, correct?

12:29:57 10 A. Yes.

12:29:58 11 Q. Okay. And he makes note that he's
12:30:03 12 occupying the position of manager at a Guelph
12:30:08 13 branch at the Bank of Montreal, it seems?

12:30:11 14 A. Yes.

12:30:12 15 Q. Okay. So in other words, he has
12:30:13 16 another, possibly, full-time job in Guelph?

12:30:16 17 A. Which he says he may find that he
12:30:20 18 has a considerable amount of spare time, but yes.

12:30:23 19 Q. If we could turn now SC1742.

12:30:38 20 So this is Bruce's response to McLean.
12:30:47 21 It's a letter from Bruce to McLean dated July 15,
12:30:51 22 1852. And again we have the transcript followed by
12:30:54 23 the original letter.

12:30:55 24 MS. GUIRGUIS: Your Honour, I'd like to
12:30:57 25 add this as the next exhibit.

12:30:58 1 THE COURT: Mr. Registrar.

12:30:59 2 THE REGISTRAR: Exhibit No. 4838.

12:31:01 3 EXHIBIT NO. 4838: Letter from

12:30:48 4 Lieutenant Governor Bruce to John

12:30:48 5 McLean dated July 15, 1852.

12:31:03 6 BY MS. GUIRGUIS:

12:31:05 7 Q. So, Dr. Reimer, if you could take

12:31:07 8 a look at this letter, in particular if you can

12:31:09 9 just look at the first paragraph, from "Sir [...]"

12:31:12 10 to "[...] some other arrangements".

12:31:28 11 A. (Witness reviews document).

12:31:29 12 Okay.

12:31:30 13 Q. So this excerpt to this letter is

12:31:32 14 telling us -- this is the one that's telling us

12:31:34 15 that he's appointed as the agent for the sale of

12:31:39 16 land surrendered by the Saugeen Indians --

12:31:39 17 A. Correct.

12:31:41 18 Q. -- which would be the Half Mile

12:31:42 19 Strip?

12:31:42 20 A. Correct.

12:31:43 21 Q. And also that Bruce is going ahead

12:31:44 22 and appointing him as a commissioner to -- for the

12:31:49 23 protection of the Saugeen Reserve?

12:31:50 24 A. Correct.

12:31:51 25 Q. Okay. Earlier we talked about

1 Exhibit 1952, which was a letter from John McLean
2 to Lieutenant Governor Bruce dated October 15th,
3 1852. We don't necessarily need to go to it,
4 unless you'd like to.

5 But if you recall, it was reporting
6 complaints from the Owen Sound Indians about
7 encroachment on their lands.

8 A. Yes.

9 Q. You recall that?

10 A. Yes. About timber cutting, I
11 believe.

12 Q. That's right. And he was asking
13 Bruce what he could do in respect of that and what
14 powers he had to act?

15 A. Yes, that's what I recall.

16 Q. I'd like to go to Bruce's response
17 to Mr. McLean to that letter which is SC1270. This
18 is dated October 29th, 1852, it was just at the
19 top. Letter from Lieutenant Governor Bruce to John
20 McLean. Again, this is a transcript in front of
21 the original letter.

22 MS. GUIRGUIS: Your Honour, I'd like to
23 add this as the next exhibit.

24 THE COURT: What is the date of this
25 document?

12:33:06 1 MS. GUIRGUIS: It's right here.

12:33:12 2 THE COURT: I see. It has a question
12:33:14 3 mark beside it. Is that because you're unsure of
12:33:17 4 your translation?

12:33:18 5 MS. GUIRGUIS: It may be that it looked
12:33:19 6 a little ambiguous. We can go to the original
12:33:24 7 letter.

12:33:35 8 THE COURT: That qualifies as a poor
12:33:38 9 copy.

12:33:38 10 Can you go back to the transcript,
12:33:40 11 please?

12:33:45 12 Mr. Registrar, do you have a way of
12:33:47 13 recording that the date is unclear?

12:33:55 14 THE REGISTRAR: I can write a new --

12:33:58 15 THE COURT: I guess we can put a silent
12:34:01 16 description, that says "date unclear".

12:34:05 17 What is the next exhibit number?

12:34:07 18 THE REGISTRAR: 4839.

12:34:09 19 EXHIBIT NO. 4839: Letter from
12:32:55 20 Lieutenant Governor Bruce to John
12:32:57 21 McLean October 29, 1852.

12:34:15 22 BY MS. GUIRGUIS:

12:34:15 23 Q. Perhaps if we could just scroll to
12:34:18 24 the original letter, and I can ask you, Dr. Reimer,
12:34:21 25 if you're able to make it out?

12:34:23 1 A. Sure. I would read this as 9th
12:34:31 2 October.

12:34:33 3 Q. Okay.

12:34:33 4 THE COURT: Rather than "29th"?

12:34:34 5 THE WITNESS: What looks like the "2"
12:34:37 6 seems to be the end of the word before it, which
12:34:42 7 might be Québec. But it is unclear.

12:34:47 8 BY MS. GUIRGUIS:

12:34:51 9 Q. Well, if you could take a moment
12:34:53 10 and look at the content of the letter, have a look.
12:34:57 11 I've highlighted the bottom paragraph,
12:34:59 12 but if you want to review the whole letter, then
12:35:03 13 perhaps I can ask you questions about it.

12:35:05 14 A. Sure.

12:35:07 15 (Witness reviews document).

12:35:22 16 Okay.

12:35:22 17 Q. So the ambiguity with the date
12:35:26 18 aside, in terms of reading the date, in terms of
12:35:29 19 the content, having in mind the letter that we
12:35:32 20 reviewed from John McLean to Lieutenant Governor
12:35:36 21 Bruce, would you agree with me that this seems to
12:35:39 22 be responsive to Mr. McLean and his inquiries in
12:35:42 23 that letter from October 15th, 1852.

12:35:45 24 A. Yes, in part.

12:35:48 25 Q. Okay. In that, in the second

1 paragraph, Bruce is going through what seemed to be
2 various legislation, references to legislation?

3 A. Correct.

4 Q. Okay. So, essentially, Bruce is
5 letting McLean know of the legislative authority or
6 what authority he has to deal with squatters and
7 other forms of encroachment on Indian lands?

8 A. Yes, that's what it says.

9 Q. Okay. He also recommends telling
10 him that they wouldn't -- telling them that they
11 wouldn't get any money for their improvements on
12 the lots?

13 A. Yes.

14 Q. But Bruce doesn't recommend to
15 McLean removing them?

16 A. Not in this letter.

17 Q. So I'd like to go back to a letter
18 that we looked at earlier which is Exhibit 4830.

19 A. Could I just make one more comment
20 about that previous letter?

21 Q. Yes.

22 A. Could we go back to it, please?

23 (Witness reviews document).

24 The last sentence says:

25 "To prevent squatting, it may

12:37:24
12:37:26
12:37:27
12:37:31
12:37:32
12:37:35
12:37:40
12:37:50
12:37:54
12:38:01
12:38:04
12:38:07
12:38:10
12:38:11
12:38:15
12:38:17
12:38:31
12:38:35
12:38:38
12:38:39
12:38:41
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be advisable to give notice that sales will be made without any reference to improvements [...]"
To my mind this is a reference to the Half Mile Strip sales that he's describing in the previous paragraph.

Q. Okay. So the letter that Mr. McLean coming back to -- sorry, for the record -- Exhibit 4830. The letter that McLean does write to Mr. William Harrison that we've looked at before, so he's writing this a few weeks after he's received the letter we just looked at from Bruce?

A. What is the date?

Q. If you can scroll up.

A. Okay.

Q. So that's November 18th, 1852. So McLean doesn't refer to any of the powers of the authorities that Bruce directed to him in this letter, correct?

A. No.

Q. He doesn't provide any explanation about the risk of prosecution to Mr. Harrison?

A. Just give me a moment, please.

Q. Sure.

A. (Witness reviews document).

12:38:59 1 Okay, what was your question, please?

12:39:21 2 Q. He doesn't explain the risk of
12:39:23 3 prosecution to Mr. Harrison in this letter?

12:39:25 4 A. He's not itemizing his authority
12:39:29 5 under legislation as detailed in the previous
12:39:31 6 letter you showed me, no.

12:39:33 7 Q. And he doesn't follow Bruce's
12:39:38 8 recommendation to tell Mr. Harrison that he won't
12:39:40 9 receive money for improvements?

12:39:41 10 A. Not in this letter, no.

12:39:43 11 Q. Okay. In your review of the
12:39:46 12 records for this litigation, you didn't -- did you
12:39:52 13 come across any evidence that McLean ever evicted
12:39:56 14 or removed anyone from the Saugeen Reserve?

12:39:58 15 A. That's a broad question. Off the
12:40:02 16 top of my head, I do not recall.

12:40:04 17 Q. Did you come across any evidence
12:40:09 18 that Mr. MacLean ever recommended a prosecution in
12:40:13 19 respect of someone squatting or trespassing on the
12:40:18 20 Saugeen Reserve?

12:40:18 21 A. Again off the top of my head, I
12:40:20 22 don't recall.

12:40:20 23 Q. But you haven't -- to your
12:40:22 24 knowledge you haven't provided any citations of
12:40:24 25 those examples?

12:40:25 1 A. Not that I recall, no.

12:40:27 2 Q. Okay. So, I'd like to turn to
12:40:37 3 page 97 of your Volume 3 report which is
12:40:43 4 Exhibit 4703. This is at PDF page 107.

12:40:56 5 And it's the paragraph starting with
12:41:00 6 "Evidence indicates [...]" and it ends with
12:41:03 7 "[...] squatting on public lands".

12:41:17 8 A. (Witness reviews document).

12:41:18 9 Yes, okay.

12:41:19 10 Q. Okay. So this paragraph you're
12:41:21 11 talking about how Indian Agents used the powers
12:41:23 12 under the 1839 Act to deal with squatting or
12:41:27 13 encroachments on Indian lands?

12:41:29 14 A. Yes.

12:41:30 15 Q. But none of the examples that
12:41:33 16 you've cited here are about enforcement on the
12:41:35 17 Saugeen Reserve, correct?

12:41:36 18 A. I'm sorry, can you repeat that?

12:41:41 19 Q. None of the examples that you've
12:41:43 20 cited here are about enforcement on the Saugeen
12:41:47 21 Reserve, correct?

12:41:47 22 A. Yes, that's correct.

12:41:55 23 Q. I'd like to ask you now about the
12:41:58 24 1839 Act that you mention here called, "Act for the
12:41:58 25 Protection of the Lands of the Crown in This

1 Province With Trespass and Injury." Which is, for
2 the record, at Exhibit 1301.

3 You discuss this legislation at
4 Volume 3 of your report, pages 95 and at page 110.

5 From your review, you noted that this
6 was in theory a tool available to officials to
7 remove squatters, correct?

8 A. I'm seeing it on page 94 of my
9 Volume 3 report. Can I just review that paragraph?

10 Q. Yes.

11 A. (Witness reviews document).

12 Okay I've reviewed it.

13 Q. So you noted that this was a
14 theory, in theory a tool available to officials to
15 remove squatters.

16 A. I'm just pausing at the wording of
17 your question. This -- I understood -- I
18 understand the 1839 Act as the authority by which
19 the Commissioners were guided and were authorized
20 to deal with squatting and trespass. Is that an
21 answer to your question?

22 Q. It is, yes. Thank you.

23 So I'm not looking for your legal
24 interpretation of how the Act works; but I wanted
25 to ask you about your understanding based on your

12:43:53 1 general familiarity, and what you've just said
12:43:55 2 there.

12:43:55 3 And I'm wondering if we can do this
12:43:57 4 without going to the Act, because you've reviewed
12:44:00 5 it. We've gone to this Act a few times in this
12:44:02 6 Court.

12:44:02 7 But I'm wondering if I can put to you a
12:44:04 8 series of propositions to see if that lines up with
12:44:07 9 your general understanding, basic understanding of
12:44:09 10 the 1839 Act and then I want to ask you a few
12:44:12 11 questions.

12:44:12 12 A. Okay.

12:44:13 13 Q. So, would you agree that the 1839
12:44:17 14 Act includes measures that could be taken against
12:44:20 15 people who are not authorized -- who are occupying
12:44:25 16 and taking timber and other resources from Indian
12:44:30 17 lands?

12:44:30 18 A. Yes.

12:44:30 19 Q. And would you agree that those
12:44:32 20 measures include, that a commissioner appointed
12:44:36 21 under the Act, could have complaints investigated?

12:44:39 22 A. Yes.

12:44:39 23 Q. That Commissioners could give
12:44:43 24 notice and require offenders to leave the lands
12:44:45 25 that they're occupying?

12:44:46 1 A. Yes.

12:44:47 2 Q. And that if the offender did not
12:44:52 3 leave, a warrant could be issued to a sheriff and
12:44:54 4 the sheriff could remove the offender?

12:44:57 5 A. Yes.

12:44:59 6 Q. And if the offender returns they
12:45:04 7 can be put into the gaol, or prison for a certain
12:45:07 8 amount of time, or fined?

12:45:08 9 A. Yes.

12:45:09 10 Q. And also that Commissioners could
12:45:15 11 seize timber that had been stolen from Crown or
12:45:19 12 Indian lands?

12:45:19 13 A. Yes.

12:45:19 14 Q. So I'd like to do the same for the
12:45:27 15 1850 Indian Lands Protection Act which you also
12:45:30 16 speak about in your report. The 1850 Indian Lands
12:45:36 17 Protection Act, is at Exhibit 1784, for reference.

12:45:40 18 You discuss this act at pages 97 to 98
12:45:47 19 of your Volume 3 report. And pages 115 to 116. If
12:45:57 20 you want to take a moment to review that.

12:46:00 21 A. (Witness reviews document).

12:47:08 22 Yes.

12:47:09 23 Q. Okay. So I'd like to do the same,
12:47:12 24 put to you a series of propositions and see if you
12:47:14 25 agree based on your basic familiarity and

12:47:17 1 understanding of having reviewed that.

12:47:19 2 Would you agree that the 1850 Indian
12:47:22 3 Land Protection Act includes measures that can be
12:47:25 4 taken against people who didn't have authorization,
12:47:28 5 who were occupying and taking timber and other
12:47:31 6 resources from Indian lands?

12:47:33 7 A. Yes.

12:47:34 8 Q. And it would also include measures
12:47:41 9 that could be taken against people purchasing,
12:47:44 10 leasing and selling Indian lands without the
12:47:47 11 Crown's consent?

12:47:48 12 A. I summarize it as "purchasing" but
12:47:55 13 it may also include leasing, yes.

12:48:02 14 Q. Would you agree that those
12:48:04 15 measures would -- could include -- Commissioners
12:48:07 16 can issue warrants to remove offenders?

12:48:09 17 A. Again, I don't describe it in that
12:48:17 18 level of detail in my report but -- so I hesitate
12:48:28 19 to answer one way or the other without looking at
12:48:31 20 the Act.

12:48:31 21 Q. Okay. So maybe I will bring up
12:48:45 22 just to -- because I -- just to go over this one,
12:48:49 23 these -- couple of small points is that
12:48:52 24 Exhibit 1784, if we could bring that up and I'll
12:48:56 25 let you take a look at that, just to refresh your

12:48:59 1 memory.

12:49:00 2 If we can go to Section 10. So this is
12:49:24 3 the PDF page 5.

12:49:36 4 THE COURT: I think it's going to take
12:49:38 5 longer than the time we have left this morning for
12:49:40 6 the witness to have a fair chance to read that,
12:49:42 7 Counsel.

12:49:43 8 Is this something you're wishing for
12:49:47 9 her to read.

12:49:49 10 MS. GUIRGUIS: Well --

12:49:50 11 THE COURT: Leaving aside the challenge
12:49:52 12 of doing so, I'm sure that can be resolved.

12:49:58 13 MS. GUIRGUIS: Well, perhaps I can move
12:49:59 14 on to the questions that I want to ask in relation
12:50:05 15 to this legislation, I think that should be --

12:50:13 16 Let me ask the question and see if
12:50:16 17 Dr. Reimer is okay with answering those quote
12:50:20 18 without reading through. If not then we can --

12:50:21 19 THE COURT: She's already demurred on
12:50:23 20 the first few questions, so we know the answer to
12:50:26 21 that at least in part.

12:50:27 22 MS. GUIRGUIS: That's right.

12:50:32 23 BY MS. GUIRGUIS:

12:50:32 24 Q. Let me ask you. Dr. Reimer, you
12:50:34 25 talked about your review of the historical record

1 with my friend, Mr. Feliciant, when he asked about
2 your qualifications and methodology?

3 A. Correct.

4 Q. And you noted that you had
5 reviewed thousands of documents?

6 A. Correct.

7 Q. And that was completed as part of
8 your preparation of several reports for this
9 litigation?

10 A. Yes.

11 Q. Including the reports and sections
12 that deal with squatting and encroachment and
13 protection issues on the Saugeen Reserve?

14 A. Correct.

15 Q. So based on that review of the
16 historical record, did you come across any evidence
17 of a warrant being issued pursuant to the 1839 Act
18 in relation to lands on the Saugeen Reserve prior
19 to October 14th, 1854?

20 A. I do not recall coming across any
21 such documentation.

22 Q. Did you come across any evidence
23 of a person being committed to "goal", prison?

24 THE COURT: It's a "jail", just so you
25 know. Odd spelling, but that's what it is.

12:51:24 1 MS. GUIRGUIS: Thank you, Your Honour.

12:51:29 2 THE COURT: That's all right.

12:51:29 3 BY MS. GUIRGUIS:

12:51:29 4 Q. Did you come across any person
12:51:31 5 being committed to jail pursuant to the 1839 Act as
12:51:35 6 a result of squatting on the Saugeen Reserve prior
12:51:37 7 to October 14th, 1854?

12:51:40 8 A. I did not come across any such
12:51:42 9 documentation.

12:51:44 10 Q. Did you come across any evidence
12:51:46 11 of being -- of a person being fined pursuant to the
12:51:50 12 1839 Act as a result of squatting on the Saugeen
12:51:54 13 Reserve prior to October 14, 1854?

12:51:57 14 A. Having been fined, that is
12:52:00 15 something I would want to go back and check on.

12:52:07 16 Q. Do you recall whether you cited
12:52:09 17 any of that evidence in your report?

12:52:11 18 A. That's what I would want to check
12:52:13 19 on.

12:52:14 20 Q. Okay. Did you come across any
12:52:21 21 evidence of such a person being fined pursuant to
12:52:23 22 the 1839 Act as a result of taking timber from the
12:52:27 23 Saugeen Reserve prior to October 14th, 1854?

12:52:31 24 A. I don't recall. I don't recall
12:52:36 25 finding such documentation.

1 Q. So I have similar questions with
2 respect to the 1850 Act. So I will ask them, but
3 if you prefer that we -- that you have a look at
4 the Act, we can leave that for another time.

5 A. I would just ask for some
6 clarification first. And this is just me asking
7 for you to clarify -- I mean, my understanding is
8 that the 1839 Act -- never mind. I think I'm going
9 to leave it where it is and review my report based
10 on the questions that you've asked, if that's
11 acceptable?

12 Q. Sorry, I think I'm confused as
13 to...

14 A. You were asking about fines.

15 Q. Yes. Well, no, what I'm asking
16 about now is I'd like to know whether you want to
17 review the 1850 Act or whether I can put these
18 questions to you. Perhaps I'll put the question to
19 you about the 1850 Act and then we'll see.

20 A. Sure. Why don't you do that.

21 THE COURT: Did you not just do that,
22 Counsel?

23 MS. GUIRGUIS: The 1839 Act I asked
24 about.

25 THE COURT: All right. I guess my

12:53:56 1 notes are wrong. I've got several questions after
12:54:00 2 you began with the 1850 Act.

12:54:23 3 So back at, I don't know, five or more
12:54:27 4 minutes you said:

12:45:22 5 "[...] I'd like to do the same
12:45:26 6 for the 1850 Indian Lands Protection
12:45:26 7 Act [...]"

12:54:31 8 And then there's a series of questions
12:54:36 9 after that.

12:54:36 10 MS. GUIRGUIS: About what's in the Act.

12:54:38 11 Now I'd like to ask about the review of
12:54:40 12 the evidence in the historical record, which I can --

12:54:43 13 THE COURT: I think you already asked,
12:54:44 14 but you know, if you're not sure, I suppose you can
12:54:46 15 ask it again.

12:54:47 16 You got tripped up on fines but you got
12:54:53 17 everything up to that point covered.

12:54:56 18 MS. GUIRGUIS: Right.

12:54:57 19 THE COURT: I'm going to make a
12:54:59 20 suggestion, Counsel. Since you're coming back on
12:55:01 21 Monday anyway, why don't you review the transcript
12:55:04 22 and if you've missed something, that's fine.

12:55:08 23 And if you want the witness to review
12:55:10 24 the Act in the interval, then you can ask her to do
12:55:13 25 that right now. It's up to you.

1 MS. GUIRGUIS: Yes, I will ask the
2 witness to review the 1850 Act, just so that you
3 have that fresh in mind.

4 THE WITNESS: I think we can have a
5 more profitable conversation then, yes.

6 THE COURT: Something about the old
7 format just makes it almost -- I'm not even going
8 to try and describe this page.

9 How are we doing on three more days
10 next week, Counsel?

11 MS. GUIRGUIS: That should be fine,
12 your Honour. I don't think we need to start early.

13 THE COURT: All right. So we'll resume
14 on Monday.

15 Does that change if I want to take the
16 first half an hour to make a ruling? I mean, I
17 don't think it will take that long, but I've been
18 wrong before.

19 MS. GUIRGUIS: I should be okay. But I
20 think I don't want to speak for my friends for
21 re-examination.

22 THE COURT: Yes, and I'm not too
23 worried about that as a length-of-time proposition.
24 We can always start early on Tuesday, if on
25 reflection you think there's a bit more time or if

1 Ontario also feels that way, all right?

2 MS. GUIRGUIS: Thank you, Your Honour.

3 THE COURT: We'll resume at

4 10:00 o'clock on Monday then.

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6 -- Court adjourned at 12:56 p.m.

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REPORTER'S CERTIFICATE

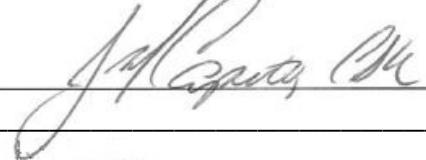
I, JUDITH M. CAPUTO, RPR, CSR, CRR,
Certified Shorthand Reporter, certify;

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 18th day of March, 2020.



NEESONS, A VERITEXT COMPANY

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

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