

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

DAY 59 VOL 59
November 01, 2019



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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

- and -

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

Court File No. 03-CV-261134CM1

A N D B E T W E E N:

CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and
SAUGEEN FIRST NATION
Plaintiffs

- and -

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

--- This is VOLUME 59 / DAY 59 of the trial
proceedings in the above-noted matter, being
held at the Superior Court of Justice, 330
University Avenue, Courtroom 5-1 Toronto,
Ontario, on the 1st day of November 2019

B E F O R E:

The Honourable Justice Wendy M. Matheson

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

Cathy Guirguis, Esq., for the Plaintiffs,
& Krista Neland, Esq. the Chippewas of
Nation, and the
Chippewas of Nawash
First Nation.

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

Peter Lemmond, Esq., for the Defendant,
& David Feliciant, Esq., Her Majesty the
& Richard Ogden, Esq. Queen in Right of
& Julia McRandall, Esq. Ontario.

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I N D E X

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WITNESS: DOUGLAS McCALLA

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1 --- Upon commencing at 10:02 a.m.

10:02:34 2 THE COURT: Morning, Ms. Guirguis.

10:02:37 3 MS. GUIGRUIS: Morning, Your Honour.

10:02:54 4 THE COURT: Please go ahead.

10:02:58 5 MS. GUIGRUIS: Thank you.

10:02:58 6 DOUGLAS McCALLA: PREVIOUSLY AFFIRMED

10:02:58 7 CROSS-EXAMINATION BY MS. GUIRGUIS:

10:02:58 8 (Continued)

10:02:59 9 Q. Good morning, Professor McCalla.

10:03:03 10 A. Morning.

10:03:03 11 Q. Today I just want to start by

10:03:05 12 clearing up a couple of things from yesterday,

10:03:07 13 so the first thing, is during the examination

10:03:09 14 yesterday I referred to -- I had asked you

10:03:13 15 whether Colonel Bruce was the Lieutenant

10:03:15 16 Governor or the Governor General of the Province

10:03:19 17 of Canada. And you rightly corrected me saying

10:03:23 18 it's Lord Elgin, the mistake I made is that

10:03:24 19 Lord -- James Bruce, who is Lord Elgin, was the

10:03:26 20 Governor General from 1847 to 1854 and I mixed

10:03:31 21 him up with his brother, Colonel Bruce, is that

10:03:33 22 correct?

10:03:33 23 A. Yes.

10:03:34 24 Q. Okay, thank you.

10:03:36 25 A. I suspected that was the story.

10:03:38 1 Q. Right, just wanted to make sure.

10:03:40 2 Thank you.

10:03:41 3 The other thing I wanted to clarify
10:03:43 4 was I want to bring up Exhibit 1108. So this
10:03:52 5 was the notice with respect to Indian lands on
10:03:54 6 the Huron Reserve. And we had had some
10:03:56 7 discussion about where the Huron Reserve was.

10:03:59 8 And you had thought -- you said that
10:04:01 9 you thought that it was in the Treaty 45 1/2
10:04:04 10 area, and I just wanted to clarify exactly where
10:04:08 11 the Huron Reserve is.

10:04:09 12 So I wanted to bring up -- so the
10:04:15 13 notice itself says that it's referring to the
10:04:18 14 "Huron Reserve in the western district". Right
10:04:23 15 there in the middle of the paragraph, called the
10:04:26 16 "Huron Reserve in the western district".

10:04:28 17 So I wanted to bring up SC1297 to
10:04:33 18 clarify the area that we're talking about. So
10:04:39 19 this is a map that we pulled from the Archives
10:04:43 20 of Ontario. It's on the Ontario Ministry of
10:04:48 21 Government Consumer Services' website called --
10:04:52 22 and it's a website referred to as "The Changing
10:04:55 23 Shape of Ontario the Early Districts and
10:04:57 24 Counties, 1788 to 1899".

10:05:00 25 So here we have a map outlining Upper

1 Canada in 1838. And in the corner in the left
2 you see, I think it's referring to this Kent and
3 Essex area, which is the western district. And
4 so that doesn't include, the western district in
5 1838 didn't include the area that we're talking
6 about, the peninsula and the Crown land, right?

7 A. Yes. I didn't catch the "western
8 district" in that dense pros.

9 Q. Nor did I in the notice, so I
10 just wanted to make sure this was clear for the
11 record, what we're talking about, where we're
12 talk about at this time.

13 So, Your Honour, if I can add this map
14 as an exhibit?

15 THE COURT: Mr. Registrar.

16 THE REGISTRAR: Exhibit number 4377.

17 EXHIBIT NO. 4377: Map from the
18 Archives of Ontario outlining Upper
19 Canada in 1838.

20 BY MS. GUIGRUIS:

21 Q. And then I would like to bring up
22 another map at SC1295. So here's another map.
23 And this is from Canada's archive collection,
24 it's a drawn map and you will see -- I think if
25 we zoom in we can see that the green portion

10:06:12 1 here is labeled as the "Huron Reserve". Does
10:06:16 2 that -- yes.

10:06:21 3 So if we zoom out we can see the area
10:06:23 4 that we're talking about that it's near Lake St.
10:06:27 5 Clair, and I would describe that as kind of the
10:06:30 6 Windsor area?

10:06:31 7 A. Yes.

10:06:32 8 Q. Your Honour, if I can make this
10:06:33 9 the next exhibit?

10:06:37 10 THE COURT: Mr. Registrar.

10:06:39 11 THE REGISTRAR: Exhibit number 4378.

10:06:41 12 EXHIBIT NO. 4378: Map from Canada's
10:06:41 13 archive collection depicting the Huron
10:06:41 14 Reserve.

10:06:43 15 BY MS. GUIGRUIS:

10:06:44 16 Q. So all this just shows that you
10:06:45 17 would agree that the Huron Reserve, which is in
10:06:47 18 the western district, which is in the Windsor
10:06:49 19 area?

10:06:51 20 A. Yes. I might have guessed it was
10:06:53 21 around Lake St. Clair as well but I respect the
10:06:57 22 last map there and we'll follow it, I have no
10:06:59 23 reason to doubt it.

10:07:00 24 Q. Thank you, sir.

10:07:07 25 So to continue on from where we were

10:07:09 1 yesterday -- we can take the notice down.

10:07:14 2 We had just gone through Oliphant's
10:07:16 3 proposal and scheme for funding of the Indian
10:07:20 4 Agency. And I was going to take you to Exhibit
10:07:23 5 2320, which is -- well, and this document, this
10:07:37 6 exhibit we have a report from Lord Burrie [ph]
10:07:38 7 who is Oliphant's replacement, correct?

10:07:43 8 A. Yes.

10:07:45 9 Q. So it starts at -- his report
10:07:48 10 starts at enclosure number 2, which is page 17
10:07:52 11 of the document, and page 3 of the PDF.

10:08:05 12 THE COURT: Counsel, can you enlarge
10:08:06 13 that please?

10:08:15 14 BY MS. GUIGRUIS:

10:08:15 15 Q. So it's dated December 5th, 1855.
10:08:18 16 Are you familiar with this document?

10:08:20 17 A. No, I'm not.

10:08:21 18 Q. You're not, okay.

10:08:25 19 So I'm not going to take you through
10:08:27 20 the whole thing. It's essentially comments from
10:08:29 21 Lord Burrie upon taking over Oliphant's post,
10:08:33 22 and in it he critiques Oliphant's proposal about
10:08:38 23 funding of the Indian Agency.

10:08:40 24 He notes that the report, Oliphant's
10:08:42 25 proposal, got a lot of attention. And he has

10:08:45 1 criticisms as -- well, he has a few criticisms
10:08:49 2 but one of them is that it's overly optimistic.

10:08:52 3 I want to take a look at one paragraph
10:08:54 4 in particular, which is at page 21 of the
10:08:56 5 document and page 7 of the PDF.

10:09:15 6 So here he says:

10:09:17 7 "From the examination of
10:09:18 8 Mr. Oliphant's scheme we therefore
10:09:20 9 deduce the following facts: a period
10:09:22 10 of from six to eight years must elapse
10:09:24 11 if this report be adopted before any
10:09:26 12 change at all can be made. It is one
10:09:29 13 entirely prospective in its character.
10:09:32 14 Land recently surrendered to the
10:09:34 15 Crown, known as the Saugeen Reserve,
10:09:34 16 must be sold and the accounts closed
10:09:36 17 before the sum on which Mr. Oliphant
10:09:39 18 counts as the basis of his scheme can
10:09:41 19 be made available.

10:09:42 20 Supposing the land, all to be
10:09:44 21 sold at once, of which there is no
10:09:47 22 reasonable hope, the terms of the sale
10:09:48 23 (one third of the purchase money on
10:09:51 24 each lot down and remainder in six
10:09:53 25 annual installments) would defer the

10:09:56 1 collection of the whole and to one sum
10:09:58 2 for seven years, and experience of
10:10:00 3 like sales has shown that this would
10:10:02 4 be even further protracted. Even then
10:10:05 5 the imperial funds would not be
10:10:07 6 completely relieved. The Manitoulin
10:10:08 7 Island establishment being left to
10:10:11 8 burden on. The object of entirely
10:10:13 9 erasing the Indian Department from the
10:10:16 10 estimates would therefore not be
10:10:17 11 attained."

10:10:19 12 So you would agree that the view that
10:10:20 13 Lord Burrie is expressing here is that
10:10:22 14 Oliphant's expectations were not reasonable?

10:10:24 15 A. They were -- well, there are two
10:10:30 16 stages. I think Oliphant himself allowed for
10:10:32 17 the fact that it was going to take quite a few
10:10:33 18 years to realize the money. So, from the point
10:10:35 19 of view of time I think there's maybe actually
10:10:37 20 some agreement between them.

10:10:39 21 But he's saying that the basic
10:10:43 22 objective of getting rid of all of the costs to
10:10:45 23 the Indian Department is not practicable. But I
10:10:50 24 think, and I seem to recall that Oliphant didn't
10:10:53 25 expect the money was all going to come in on the

1 first day of the sale. He projected it was
2 going to take some years to realize the funds
3 from the sale of the lands.

4 This is a clear and concise exposition
5 of the problem.

6 Q. Right. Which we discussed
7 yesterday. And I believe Oliphant's estimate
8 was that it would take up to five years, if I
9 recall correctly. You might recall?

10 A. I'll take your word for it.

11 Q. Yeah. And so what Lord Burrie is
12 saying that it would take more like six to eight
13 years. So, in any case, he is definitely
14 expressing the view that he thinks Oliphant was
15 being overly optimistic?

16 A. Overly optimistic about -- well,
17 about the timing for the sales, but he's not
18 really questioning the amount that might be
19 realized, as far as I read this on first
20 exposure. He's saying simply that the
21 Manitoulin establishment will still remain
22 whatever happens, but he's not actually saying
23 that we couldn't realize whatever it was, 13,000
24 pounds or whatever it was. He's simply saying
25 if we do it will be quite a few years from now.

10:12:05 1 Q. Right. So would you agree with
10:12:21 2 me that he thinks that Oliphant overstated the
10:12:24 3 immediate potential benefits to be derived from
10:12:27 4 the surrender of the peninsula?

10:12:29 5 A. I cannot recall Oliphant's
10:12:32 6 precise phrasing about how rapidly he imagined
10:12:35 7 his grand scheme was going to be realized. I
10:12:37 8 don't recall what he said in his reorganization
10:12:42 9 scheme about how quickly it could all be
10:12:44 10 effected.

10:12:46 11 I certainly recall him as being
10:12:48 12 optimistic, but I don't recall the specifics on
10:12:50 13 timing that he had. But I certainly remember
10:12:55 14 him as saying, we couldn't sell all the lands
10:12:58 15 immediately.

10:12:59 16 Q. Now, you yesterday also testified
10:13:00 17 that you -- I think you had said that there was
10:13:03 18 a number of -- I don't want to -- I don't know
10:13:07 19 if I'm paraphrasing using the language that you
10:13:10 20 did, but there was a number of obstacles with
10:13:12 21 respect to Oliphant's proposal, to it working
10:13:15 22 out. Is that fair?

10:13:21 23 A. Well, the obstacles that we might
10:13:24 24 have talked about, and my memory is a bit
10:13:27 25 unspecific on this, were simply the amount of

10:13:29 1 time it was going to take to raise the money.

10:13:31 2 And I don't think we entered into the issues of
10:13:37 3 how it would have been reasonable to take money
10:13:40 4 that had been promised to the Saugeen Indians
10:13:43 5 and use it for something else. Because, as I
10:13:47 6 recall the terms of the treaty --

10:13:49 7 Q. That's right.

10:13:49 8 A. -- the money was to have been
10:13:51 9 invested for the benefit of those making the
10:13:54 10 surrender. So I don't ever remember seeing
10:13:57 11 exactly how he was going to -- I think it came
10:14:00 12 by in one of the documents you showed me
10:14:02 13 yesterday, how he was effectively going to tax
10:14:06 14 each band for a share of the Indian Department
10:14:09 15 expenses. But that seemed to me to be a
10:14:13 16 separate matter from the initial realization of
10:14:16 17 the -- from the sale of the lands.

10:14:18 18 Q. That's right. So the point that
10:14:19 19 you mentioned is that, in addition to the time
10:14:21 20 that it would take to potentially sell all of
10:14:23 21 these lands, is that it was likely unrealistic
10:14:27 22 that he was going to be able to appropriate the
10:14:29 23 funds from the bands themselves to use it for
10:14:32 24 his plan, is that correct?

10:14:33 25 A. Well, I don't remember saying

10:14:35 1 that, but I -- it seems to me reasonable to say
10:14:38 2 that, and -- but I don't know whether that was
10:14:44 3 the stumbling block on all of this in the end,
10:14:46 4 but it seemed to me that he left out some pretty
10:14:51 5 important factors in being able to realize his
10:14:54 6 scheme.

10:15:00 7 Q. So in your assessment -- so
10:15:00 8 moving away from Lord Burrie's assessment of
10:15:03 9 Oliphant's expectations and his plan, in your
10:15:06 10 assessment, which we talked about earlier, of
10:15:09 11 Oliphant's different accounts of the Treaty 72
10:15:12 12 council you described, especially Oliphant's
10:15:16 13 1887 account, as him having a penchant for
10:15:20 14 exaggeration. Do you recall that phrasing? The
10:15:23 15 second report. Or, no, in your first report, my
10:15:27 16 apologies.

10:15:28 17 A. I don't recall it but I believe
10:15:29 18 it whether it's there or not. Particularly in
10:15:33 19 that report where he continues to believe in his
10:15:37 20 13,000 pounds per year as an example.

10:15:43 21 Q. And ultimately that 13,000 pounds
10:15:46 22 do you know whether it was realized?

10:15:48 23 A. I have no knowledge of that but I
10:15:51 24 have great doubts that it was.

10:15:56 25 Q. So with this in mind I want to

10:15:57 1 turn back very briefly to the second report you
10:16:02 2 were asked to prepare about Conrad Van Dusen's
10:16:06 3 "The Indian Chief". We talked about that
10:16:08 4 briefly about a day and a half ago.

10:16:12 5 And the conclusion that you have at
10:16:14 6 that -- in that report, at page 12, is that you
10:16:17 7 think it's unlikely that Crown agents made the
10:16:19 8 statement quoted at page 51 of "The Indian
10:16:23 9 Chief", that SON members would ride in
10:16:32 10 carriages, roll in wealth and fare sumptuously
10:16:32 11 every day if they surrendered the peninsula.

10:16:32 12 So putting aside -- I'd like you to
10:16:34 13 put aside your assessment of Van Dusen's
10:16:37 14 reliability, because I understand your
10:16:39 15 conclusion is based on your assessment of that,
10:16:41 16 and whether or not the exact phrase about
10:16:44 17 carriages was specifically said.

10:16:50 18 Based on your assessment of Oliphant,
10:16:51 19 and what we just talked about -- what we talked
10:16:53 20 about yesterday in terms of his belief that he
10:16:55 21 required the entire peninsula to affect his
10:16:59 22 scheme to fund the Indian Agency, would you
10:17:01 23 agree, based on all of this, that it's
10:17:04 24 reasonable to assume that Oliphant would have
10:17:06 25 overstated the potential benefits the Saugeen

1 Anishinaabe in an effort to secure the surrender
2 in October 13, 1854?

3 A. I can't rule out the possibility,
4 but I will say that in his report to Lord Elgin
5 he mentioned the sum of a hundred thousand
6 pounds, which I think was not an unrealistic
7 sum.

8 Whether that sum or those precise
9 numbers were -- came up in the negotiation I
10 have no way of knowing.

11 Q. So the sum may not have come up
12 in the negotiation but what I'm asking is, in
13 his fervor to, say, secure the surrender of the
14 whole peninsula, so that -- because according to
15 his calculation, and in his mind, he needed the
16 whole peninsula to get to the sum of a hundred
17 thousand pounds; is it reasonable to assume he
18 would have overstated the benefits to the
19 Saugeen Anishinaabe so that Oliphant could
20 secure the surrender of the lands.

21 A. I have no basis for having an
22 opinion on that.

23 Q. Thank you, sir. So there's one
24 more thing I want to ask you about. So I'd like
25 to pull up SC1293.

10:18:44 1 So coming back to your book, "Planting
10:18:46 2 the Province" at page 273, which is, I believe,
10:18:51 3 page -- if we scroll down page 3 of this PDF.

10:18:58 4 So this is Table 5.9 from your book.
10:19:04 5 And in it you summarize Indian agriculture in
10:19:08 6 Upper Canada in 1856, is that right?

10:19:10 7 A. Yes.

10:19:12 8 Q. The last column records output
10:19:15 9 for the Saugeen band for 1856. And so from this
10:19:22 10 table I see that the population of Saugeen at
10:19:25 11 that time was 260 people?

10:19:27 12 A. This was the -- would have been
10:19:30 13 from my source, which would be given down at the
10:19:32 14 bottom of that table.

10:19:34 15 Q. So we can scroll down and take a
10:19:36 16 look at it. So the source here is saying it's
10:19:41 17 the Report of the Special Commissioners on
10:19:43 18 Indian Affairs?

10:19:44 19 A. Yes.

10:19:45 20 Q. And it's an 1858 source?

10:19:47 21 A. Yes. I have no independent basis
10:19:50 22 beyond that document.

10:19:50 23 Q. That's fine. Your Honour, can I
10:19:53 24 add this as the next exhibit?

10:19:56 25 THE COURT: Is this another excerpt

1 from this gentleman's book?

2 MS. GUIGRUIS: That's correct.

3 THE COURT: It seems to be 3-pages
4 long. Is there a description you can give to
5 it?

6 MS. GUIGRUIS: Yes, Table 5.9 at page
7 273 of "Planting the Province", by Professor
8 McCalla.

9 THE COURT: Mr. Registrar?

10 THE REGISTRAR: Exhibit 4379.

11 EXHIBIT NO. 4379: Table 5.9 at page
12 273 of "Planting the Province",
13 authored by Professor Douglas McCalla.

14 BY MS. GUIGRUIS:

15 Q. You can scroll back down to the
16 table. So, based on that source what the table
17 is telling us is that there was a population of
18 260 people in the band at that time?

19 A. That's what the source says, yes.

20 Q. And it also -- when it says
21 "Acres Cleared" it says that Saugeen has cleared
22 1.2 acres of land for agriculture?

23 A. 1.2 acres of land per capita. I
24 think those are per-capita figures.

25 Q. Okay.

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10:22:18 20
10:22:20 21
10:22:23 22
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10:22:30 24
10:22:33 25

A. So you need to multiply 260 by
1.2.

Q. Okay. Thank you, sir, those are
all the questions I have for you today.

THE COURT: Mr. Beggs, re-examination?

MR. BEGGS: Yes, Your Honour.

RE-EXAMINATION BY MR. BEGGS:

Q. I just have -- morning, Professor
McCalla.

A. Morning.

Q. I just have two questions for
you, one of which -- I'll get to this transcript
in a moment. But the first question is, are you
aware of any evidence that Mr. Oliphant had done
calculations of how much money he would need
prior to the surrender?

A. I'm trying to recall whether his
letters had already hinted at a grand scheme
before he went to the peninsula.

There may be a hint of that in the
Margaret Oliphant collection of documents on
him, but I can't recall precisely. I think he
may have eluded in general to a grand scheme for
reorganizing things. It appears that he was
young and enthusiastic.

10:22:35 1 Q. Thank you. Now, if I could ask
10:22:37 2 my friends to call up that transcript again? So
10:22:40 3 this is a few pages from yesterday's rough
10:22:45 4 transcript, and we don't have the final
10:22:48 5 transcript yet but the rough transcript is
10:22:50 6 exactly that, it hasn't -- although the
10:22:54 7 reporters do an excellent job it hadn't been
10:22:56 8 vetted or corrected in any way.

10:22:59 9 And if we could scroll down to the
10:23:00 10 next page, there's a statement there at the top,
10:23:06 11 the question:

10:23:08 12 "That is their fundamental
10:23:10 13 objective"

10:23:12 14 And I wanted to ask you, if we could
10:23:15 15 scroll back up to the previous paragraph, the
10:23:16 16 question, what that -- what "that" refers to?
10:23:19 17 What is their fundamental objective that you
10:23:21 18 were referring to?

10:23:40 19 A. Well, I think, based on a quick
10:23:42 20 re-read that is fostering a settlement.

10:23:45 21 Q. Okay. Thank you. Those are my
10:23:47 22 questions, Your Honour.

10:23:50 23 THE COURT: Sir, I have a couple of
10:23:51 24 questions as well.

10:23:53 25 Late yesterday in answering questions

10:23:57 1 from Ms. Guirguis involving the conversion of
10:24:01 2 currency I think, on at least if not more
10:24:04 3 occasions when asked about pounds sterling, you
10:24:09 4 said it ought to be pounds Halifax, or words to
10:24:14 5 that effect. Can you explain to me what that
10:24:18 6 means and how it relates to pounds sterling?

10:24:26 7 THE WITNESS: The British, of course,
10:24:30 8 conducted their accounts in pounds sterling, but
10:24:35 9 each British colony ended up with its own
10:24:40 10 currency which had an exchange rate with the
10:24:42 11 pound sterling.

10:24:44 12 In other words, the colonies had
10:24:45 13 pounds but they didn't have pounds sterling.
10:24:48 14 And the standard in Upper Canada, and Lower
10:24:50 15 Canada, and the Maritimes was the pound Halifax
10:24:54 16 currency, which was the equivalent of four
10:24:57 17 dollars. So it was actually based on the
10:25:00 18 American dollar, if you like. So a Halifax
10:25:05 19 pound was four dollars.

10:25:13 20 A British pound through from 1820 to
10:25:15 21 the period that this is focusing on, right
10:25:17 22 through to the 1850's, was about \$4.85. So a
10:25:22 23 British pound was worth about 20 percent more
10:25:25 24 than a Halifax pound.

10:25:30 25 But the problem with accounts is

10:25:32 1 knowing what they're in because often it just
10:25:35 2 says "pounds". But I normally assume that if
10:25:37 3 it's a colonial document the pound is a Halifax
10:25:40 4 pound; if it's a British document it's probably
10:25:43 5 a sterling pound.

10:25:46 6 THE COURT: Thank you.

10:25:47 7 My second question is this, yesterday
10:25:49 8 you were asked a number of questions about the
10:25:51 9 1839 and 1850 legislation that empowered certain
10:25:58 10 things to be done?

10:25:59 11 THE WITNESS: Yes.

10:26:01 12 THE COURT: And starting with the 1839
10:26:05 13 legislation you pointed out, in answer to
10:26:08 14 questions -- let me take a step back.

10:26:11 15 You were asked a series of questions
10:26:12 16 in the same form about various enforcement
10:26:16 17 mechanisms, and the questions follow generally
10:26:19 18 the form of whether in your research you'd seen
10:26:21 19 any evidence of certain enforcement steps on the
10:26:24 20 Saugeen Peninsula before October 13, 1854. Do
10:26:29 21 you recall that series of questions.

10:26:31 22 THE WITNESS: Yes, I do, Your Honour.

10:26:32 23 THE COURT: And the same form of
10:26:33 24 questions was asked of you with respect to the
10:26:35 25 1850 Act.

10:26:37 1 THE WITNESS: Yes.

10:26:37 2 THE COURT: In the first several
10:26:40 3 answers you said that that question, or that
10:26:47 4 subject matter had not been part of your
10:26:50 5 research.

10:26:51 6 THE WITNESS: Yes.

10:26:52 7 THE COURT: And you went on to answer
10:26:53 8 the questions.

10:26:54 9 As the questions continued through the
10:26:55 10 1839 and the 1850 Act you did not answer one way
10:27:01 11 or the other as to whether that subject matter
10:27:05 12 had been part of your research. I don't want to
10:27:11 13 overcomplicate it but I would like to know to
10:27:14 14 what extent those questions did go into areas
10:27:25 15 that were part of your research?

10:27:26 16 THE WITNESS: I think it's fair to say
10:27:28 17 none of them go into areas of my research.

10:27:30 18 THE COURT: Thank you, sir.

10:27:32 19 Ms. Guirguis do you have any questions
10:27:34 20 arising from my questions.

10:27:37 21 MS. GUIGRUIS: One moment, Your
10:27:37 22 Honour.

10:27:38 23 THE COURT: Yes.

10:27:53 24 MS. GUIGRUIS: Yes, Your Honour I have
10:27:54 25 one question.

10:27:55 1 THE COURT: Yes.

10:27:55 2 FURTHER CROSS-EXAMINATION

10:27:55 3 BY MS. GUIRGUIS:

10:27:56 4 Q. Sir, about pages 25 and 26 of
10:28:00 5 your report you do talk about obstacles that
10:28:03 6 constables would have faced to enforce against
10:28:05 7 squatters. So I take it from your answer to Her
10:28:10 8 Honour's question you haven't looked at how they
10:28:13 9 were empowered to enforce local legislation and
10:28:18 10 that legislation in particular?

10:28:19 11 A. Not that legislation in
10:28:21 12 particular. I have considered the issue in
10:28:23 13 general, not particularly in relation to the
10:28:26 14 Saugeen Peninsula and not in particular to in
10:28:29 15 relation to these statutes.

10:28:32 16 Q. Thank you, sir.

10:28:34 17 THE COURT: Mr. Beggs.

10:28:35 18 MR. BEGGS: No, Your Honour.

10:28:37 19 THE COURT: Sir, that concludes your
10:28:39 20 testimony. Thank you for coming to assist us
10:28:41 21 with this matter. You can step down from the
10:28:43 22 witness box.

10:28:45 23 THE WITNESS: Thank you, Your Honour.

10:28:50 24 THE COURT: I don't know where you
10:28:52 25 have to travel today but I want you to know it's

1 snowing north of the City. Hopefully it's
2 stopped by now.

3 THE WITNESS: We live in the snow
4 belt.

5 THE COURT: Very good. I hope it's
6 the southern snow belt.

7 THE WITNESS: I think we're safe.

8 THE COURT: All right. Mr. Beggs.

9 MR. BEGGS: Yes, Your Honour. I made
10 inquiries as to the possibility of anybody come
11 today or Monday but I have been unsuccessful.

12 The next two witnesses are
13 Professors -- are scheduled witnesses, are
14 Professors Beaulieu and Mr. Wentzell.
15 Mr. Wentzell is at a conference and unavailable,
16 and Professor Beaulieu is one of the two
17 witnesses that we had who had health problems,
18 who also lives in Montreal and is actively
19 teaching as a university Professor so he was
20 unable to advance his attendance any earlier.

21 I understand that bringing forward
22 anybody from the late witnesses scheduled would
23 cause problems in interfering with the
24 plaintiffs' preparation. They haven't had
25 sufficient time to prepare for some of the

1 witnesses that are at the end and some of the
2 counsel are not available right now.

3 THE COURT: What about your fact
4 witness? Why can't that person come for Monday.
5 I'm trying to remember from your opening, you
6 did name the person. I can't recall that
7 person's name but I think that person's evidence
8 is scheduled for a relatively short, maybe a
9 day, a day and a half.

10 MR. BEGGS: There are two fact
11 witnesses both scheduled for a day and a half.
12 They had indicated they would not be available
13 this early, but -- and, to be honest, we haven't
14 formally served will-says yet, but we have been
15 exchanging information about our agreed
16 statements of facts that we had hoped to replace
17 them.

18 So, unfortunately, I seem to be in a
19 position of not having somebody available for
20 Monday.

21 THE COURT: Ms. Guirguis? Some of
22 this seems to be the result of plaintiffs'
23 counsels' request, is that correct? I'm not
24 suggesting it's incorrect but can you give me
25 your position, please?

10:31:23 1 MS. GUIGRUIS: Yes, Your Honour. I
10:31:23 2 think from what we -- from speaking to my friend
10:31:26 3 is that the fact witnesses, as I understand, are
10:31:29 4 not available and also we have not received
10:31:31 5 will-says so we wouldn't be prepared to
10:31:34 6 cross-examine them even if they were able to
10:31:36 7 come in for next week.

10:31:37 8 And I think the one other option was
10:31:40 9 one of the experts that Ms. Pelletier is set to
10:31:45 10 be examining, and she's just returned to the
10:31:47 11 country so likely would have a lot of difficulty
10:31:52 12 being able to prepare and probably not able to
10:31:55 13 in time.

10:32:00 14 THE COURT: Thank you, Ms. Guirguis.
10:32:02 15 Does Ontario have anything to say
10:32:03 16 about this?

10:32:06 17 MR. OGDEN: No.

10:32:07 18 THE COURT: All right. Well, I guess
10:32:08 19 I will say the following: first of all,
10:32:10 20 Mr. Beggs, do not assume that this is going to
10:32:12 21 be the way this is going to go when we resume
10:32:15 22 starting on November 18th; and, because of that,
10:32:17 23 I want to see those ASFs, or if they are
10:32:20 24 not -- will-say statements, or whatever you're
10:32:25 25 doing, going across as soon as possible. How

1 soon can that be? Next week sometime?

2 MR. BEGGS: Yes, Your Honour.

3 THE COURT: And let's say by one week
4 from today? Is that satisfactory? You can
5 manage that?

6 MR. BEGGS: Yes, Your Honour.

7 THE COURT: So that will solve that
8 problem. And those people should -- and I
9 understand they're going to have other
10 commitments but I believe they're civil
11 servants, isn't that correct?

12 MR. BEGGS: Yes, they are.

13 THE COURT: Then I would like you to
14 put them on notice that they might be required
15 to come on short notice. Are they here or in
16 Ottawa?

17 MR. BEGGS: They're both in Ottawa,
18 Your Honour.

19 THE COURT: Well, there's a good plane
20 that goes back-and-forth. So you put them on
21 notice, sir.

22 MR. BEGGS: Yes, Your Honour.

23 THE COURT: The second thing is, on
24 the plaintiffs' side, although I'm going to
25 permit it this time, for the most part counsel

1 are obligated to be ready.

2 So, because of Ms. Pelletier specific
3 situation of being away and this being
4 unexpected I am not going to have a problem with
5 that, but going forward that is not going to do,
6 all right?

7 Witnesses can sometimes be called out
8 of order; you will stand up and say if there's
9 some problem you can't solve, but for the most
10 part you should be ready to go.

11 And everyone's been doing their best,
12 I recognize that. So I just want to make sure
13 we stay only track, starting on November the
14 18th, and that would be -- I know I'm getting a
15 new schedule but is that the same person as
16 previously scheduled? November 18th is that
17 Professor Beaulieu.

18 MR. BEGGS: Yes, Your Honour.

19 MS. GUIGRUIS: All right.

20 MR. BEGGS: Your Honour, I might point
21 out, since I haven't mentioned it before, that,
22 as we discussed, for Professor Beaulieu's health
23 issues we've broken his testimony by including
24 a -- Mr. Wentzell in the middle of him so as to
25 give Professor Beaulieu an opportunity to rest

10:34:34 1 during his lengthy examination. And I had
10:34:41 2 understood that that was fine with the court
10:34:42 3 previously. That way -- we wanted 4-day weeks
10:34:45 4 for Professor Beaulieu and by introducing
10:34:48 5 Mr. Wentzell in between we'd use up the whole
10:34:53 6 week.

10:34:54 7 THE COURT: Right. Well, as presently
10:34:55 8 estimated you're planning to be about three days
10:34:58 9 with Professor Beaulieu?

10:35:01 10 MR. BEGGS: Yes, Your Honour.

10:35:02 11 THE COURT: And that would include, I
10:35:03 12 take it, a possible scope issue? Or we ruled on
10:35:08 13 that one already.

10:35:09 14 MR. BEGGS: Yes, Your Honour.

10:35:10 15 THE COURT: So that's been done.
10:35:10 16 That's helpful.

10:35:11 17 And I don't have a problem, subject to
10:35:13 18 the plaintiffs agreeing, which I take it they
10:35:16 19 have, with splitting up this gentleman's
10:35:20 20 testimony, especially to accommodate his health
10:35:23 21 situation.

10:35:23 22 Is it your intention to essentially go
10:35:27 23 as far as you can get in four days and then have
10:35:29 24 him back later? Or is there something else you
10:35:32 25 have planned?

10:35:32 1 MR. BEGGS: No, I intended to go as
10:35:34 2 far as we can in the four days.

10:35:36 3 THE COURT: All right. So you get
10:35:37 4 through your chief and some of the cross but not
10:35:39 5 finished.

10:35:40 6 MR. BEGGS: Yes, Your Honour.

10:35:41 7 THE COURT: All right. Thank you.

10:35:45 8 Now, Ontario, I noticed when I was
10:35:47 9 reviewing the schedule that you have
10:35:50 10 optimistically put a little time beside each one
10:35:53 11 of Canada's witnesses, which reminds me to raise
10:35:56 12 again what I raised with you earlier this week,
10:35:58 13 which is the intention to either seek leave to
10:36:03 14 examine or cross-examine a co-defendant's
10:36:08 15 witness; you told me you were not going to do
10:36:14 16 that with this gentleman and you did not.

10:36:17 17 At what point in time were you hoping
10:36:19 18 to come to a landing on whether you were going
10:36:22 19 to be doing that for any of these witnesses?

10:36:27 20 MR. FELICIAN: The reason we put time
10:36:28 21 there was to accommodate the remote possibility
10:36:31 22 that something --

10:36:31 23 THE COURT: Yes, I'm fine with that.

10:36:32 24 MR. FELICIAN: Yes.

10:36:32 25 MS. GUIGRUIS: So here we are. So

1 when are we moving from possibilities to
2 actualities?

3 MR. FELICIANANT: We have no current
4 plan --

5 THE COURT: No present intention.

6 MR. FELICIANANT: -- to cross-examine.
7 However, if a witness says something that is
8 truly unexpected we would then ask you for leave
9 to cross-examine on a very narrow point that may
10 be adverse in interest to us. That was the
11 reason we allocated some time.

12 THE COURT: Okay. So it's not that
13 you're otherwise planning to wade in with these
14 people.

15 MR. FELICIANANT: No, we don't have any
16 present intention.

17 THE COURT: All right. In that case,
18 in the updated schedule that I'm expecting to
19 receive perhaps you could look at whether it's
20 really necessary to reserve a quarter of a day
21 for that remote possibility for each and every
22 witness? Perhaps you have already addressed
23 that in looking at the schedule, I don't know.

24 MR. BEGGS: Your Honour, if I may
25 interject? The schedule for Professor Beaulieu,

10:37:52 1 for example, his estimated was actually 8.25
10:37:55 2 days.

10:37:56 3 THE COURT: That's what I have, yes.

10:37:56 4 MR. BEGGS: But we've only allocated
10:37:57 5 him 8 days in the calendar.

10:38:00 6 THE COURT: So you've already drawn a
10:38:01 7 line through Ontario's time?

10:38:04 8 MR. BEGGS: In that sense, yes, Your
10:38:06 9 Honour.

10:38:07 10 THE COURT: Well, listen, I'm going to
10:38:08 11 be getting that schedule so I just wanted to
10:38:11 12 raise that with Ontario. I have no trouble at
10:38:12 13 all with allowing prudently for a possibility
10:38:15 14 that may arise, and that's what you have done.

10:38:18 15 But as we go forward, as you know, I'd
10:38:20 16 like you to look hard at these numbers and
10:38:22 17 change them as appropriate now that we're into
10:38:25 18 Canada's case. In addition to looking at your
10:38:26 19 own case you should be looking hard at the
10:38:29 20 Canada numbers as well.

10:38:30 21 Is there anything else anyone wishes
10:38:30 22 to raise?

10:38:36 23 MR. FELICIAN: I can advise we did
10:38:38 24 get the calendar, you probably haven't got it
10:38:40 25 yourself yet but it may be in the works.

10:38:43 1 THE COURT: That's fine, I wasn't
10:38:44 2 expecting it before now anyway.

10:38:53 3 The last thing I want to raise, if no
10:38:53 4 one else has something, I did have an email sent
10:38:55 5 out to all of you about some information that I
10:38:57 6 would like to have before the end of November.
10:39:01 7 I assume that's okay since I have heard nothing
10:39:03 8 about it, but I wanted to say that if it can be
10:39:06 9 sooner than the end of November that's always a
10:39:10 10 good thing.

10:39:10 11 I didn't want to create issues with
10:39:13 12 counsel. I know you've got some things you're
10:39:16 13 working on but sooner is better. All right?

10:39:23 14 Because, as you know, we're not
10:39:25 15 sitting the first week of December so if it's at
10:39:28 16 all possible I would really prefer to get that
10:39:30 17 the day before we have the week off for other
10:39:33 18 reasons.

10:39:36 19 One last chance, anything anyone wants
10:39:38 20 to raise?

10:39:39 21 MR. FELICIAN: Just forecasting very
10:39:41 22 far into the future, there is a very specific
10:39:43 23 day in December, December 18th, assuming a
10:39:46 24 witness is still going that day, we have a -- an
10:39:51 25 office holiday party over lunch, which is

10:39:54 1 basically right next door. So we were hoping we
10:39:56 2 could adjust the lunch time schedule to
10:39:58 3 accommodate us going to this lunch.

10:40:02 4 It's at the University Club so it's
10:40:04 5 just down the road. And it would be from 12:00
10:40:06 6 to 1:30 as opposed to our usual lunch. So I
10:40:11 7 just raise that now to think about for
10:40:12 8 scheduling, if that would be agreeable for
10:40:15 9 everybody if we could adjust the lunch time that
10:40:17 10 day.

10:40:17 11 THE COURT: All right. Well, thank
10:40:21 12 you for raising it. Please raise it again
10:40:25 13 perhaps on the Monday of that week. And orderly
10:40:29 14 an extra 15 minutes for lunch on a special
10:40:32 15 request would not be a problem. But --
10:40:36 16 especially in this trial where those kind of
10:40:39 17 requests have been rare, if at all.

10:40:41 18 But as to where we are and who is on
10:40:46 19 their feet, and all those things, there is
10:40:47 20 always the possibility, albeit remote, that it
10:40:52 21 might be less than ideal.

10:40:54 22 Rather than focusing on that small
10:40:57 23 possibility we should marshal on ahead. All
10:41:00 24 right.

10:41:03 25 Thank you everybody. Adjourned to

10:41:04

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November 18th.

--- Whereupon the proceedings were
adjourned at 10:41 a.m.

REPORTER'S CERTIFICATE

I, HELEN MARTINEAU, CSR, Certified
Shorthand Reporter, certify;

That the foregoing proceedings were
taken before me at the time and place therein
set forth;

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 true and
accurate transcript of my shorthand notes so
taken. Dated this 11th day of November, 2019.



PER: HELEN MARTINEAU
CERTIFIED SHORTHAND REPORTER

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