

SON Trial

Tribunal Hearing
on Monday, November 25, 2019



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Court File No. 94-CQ-50872CM

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

- and -

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

Court File No. 03-CV-261134CM1

A N D B E T W E E N:

CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and
SAUGEEN FIRST NATION
Plaintiffs

- and -

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

--- This is the VOLUME 65/DAY 65 of the transcript
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 25th day of November, 2019.

B E F O R E:

The Honourable Justice Wendy M. Matheson

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

2

3 Krista Nerland, Esq., for the Plaintiffs,
4 & Cathy Guirguis, Esq., The Chippewas of
5 Saugeen First Nation,
6 and the Chippewas of
7 Nawash First Nation.

8

9

10 Michael McCulloch, Esq., for the Defendant,
11 & Barry Ennis, Esq., The Attorney General
12 Of Canada.

13

14 Peter Lemmond, Esq., for the Defendant,
15 & Jennifer Le Pan, Esq., Her Majesty the
16 & Richard Ogden, Esq., Queen in Right of
17 Ontario.

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

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WITNESS: TYLER D. WENTZELL; previously sworn.

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4421:	Chapter 3 excerpt from the book entitled, "Historic Fort York" by Karl Benn.	8492

10:01:09	1	-- Upon commencing at 10:01 a.m.
10:01:15	2	
10:01:29	3	THE COURT: Yes, Mr. McCulloch.
10:01:36	4	MR. McCULLOCH: A minor administrative
10:01:38	5	matter left over from Friday.
10:01:40	6	On Friday, my friends agreed to make
10:01:46	7	SC1118 a "British Officer's Understanding of
10:01:51	8	Military Aid to the Civil Power in 1854" to be made
10:01:57	9	a lettered exhibit, Exhibit A-3 and that we were to
10:02:03	10	file a redacted version of that report this
10:02:06	11	morning.
10:02:06	12	We have redacted the report, we've
10:02:10	13	served it upon our friends, they have agreed that
10:02:14	14	it should be made a numbered exhibit. The SC
10:02:19	15	number is SC1452.
10:02:28	16	THE COURT: Mr. Registrar.
10:02:30	17	THE REGISTRAR: Yes, Your Honour.
10:02:32	18	THE COURT: Next numbered exhibit?
10:02:33	19	THE REGISTRAR: Exhibit No. 4414.
10:02:37	20	THE COURT: Thank you.
10:02:38	21	EXHIBIT NO. 4414: "British Officer's
10:02:38	22	Understanding of Military Aid to the
10:02:40	23	Civil Power in 1854" redacted version.
10:02:40	24	MR. McCULLOCH: Thank you, Your Honour.
10:02:42	25	THE COURT: Okay. Go ahead,

10:02:44	1	Ms. Nerland.
10:02:48	2	MS. NERLAND: Thank you.
10:02:48	3	TYLER D. WENTZELL; previously sworn.
10:02:48	4	CROSS-EXAMINATION BY MS. NERLAND:
10:02:51	5	Q. Good morning, Mr. Wentzell.
10:03:01	6	I also have just a couple of matters to
10:03:03	7	clear up from Friday.
10:03:05	8	The first is, on Friday you'll recall
10:03:07	9	that we discussed the 1851 Magistrate's Manual
10:03:11	10	which is Exhibit 4408, and the title page was
10:03:13	11	missing, as was the introduction to the manual
10:03:16	12	which sets out what the document is.
10:03:18	13	Now, actually, it was just the
10:03:20	14	annotated version that was missing those parts of
10:03:23	15	the document, the regular version had them. And so
10:03:25	16	what we've done is matched the annotated version to
10:03:28	17	the original in ready.
10:03:29	18	And we've also corrected the annotation
10:03:32	19	that blocked the line of text. And with that, I
10:03:38	20	think I'm going to return to my questions.
10:03:41	21	THE COURT: Are you asking for the
10:03:44	22	amended version to be marked as an exhibit?
10:03:47	23	MS. NERLAND: Your Honour, the original
10:03:48	24	version, the non-annotated, which was marked as an
10:03:51	25	exhibit was correct. It was only the annotation

10:03:54 1 that needed to be updated.

10:03:56 2 THE COURT: I thought you said there
10:03:57 3 was a cover page missing and a few other things.

10:04:00 4 MS. NERLAND: Just in the annotated
10:04:02 5 version, Your Honour.

10:04:03 6 THE COURT: I see. Go ahead.

10:04:04 7 BY MS. NERLAND:

10:04:04 8 Q. One more clearing up matter that
10:04:06 9 I'd like to deal with you, Mr. Wentzell.

10:04:08 10 On Friday I asked you a question about
10:04:10 11 whether the law enforcement institutions that
10:04:12 12 operate today, were different from the institutions
10:04:14 13 that operated between 1836 and 1854.

10:04:18 14 And when I was reviewing our
10:04:20 15 transcript, I realized I misspoke, and I referred
10:04:24 16 to the 18th-century in my question and not the
10:04:27 17 19th-century. So I just want to rephrase that
10:04:29 18 question for you to ensure your opinion is still
10:04:30 19 the same.

10:04:30 20 You would agree with me that the
10:04:32 21 civilian and military law enforcement institutions
10:04:35 22 that existed between 1836 and 1854, so that is the
10:04:40 23 mid-19-century --

10:04:40 24 A. Yes.

10:04:42 25 Q. -- are quite different from the

10:04:43 1 institutions that exist today?

10:04:44 2 **A.** Yes.

10:04:45 3 **Q.** Thank you.

10:04:54 4 On Friday you confirmed that between
10:04:56 5 1836 and 1854, the first step to deal with an
10:04:59 6 ordinary law enforcement issue, like making an
10:05:02 7 arrest, would be to rely on the regular civilian
10:05:05 8 law enforcement institutions and that the militia
10:05:10 9 and military would only be called in if those
10:05:13 10 institutions couldn't do the job; is that right?

10:05:14 11 **A.** Yes.

10:05:15 12 **Q.** And you've expressed in your
10:05:16 13 second report at page 10, which is now
10:05:20 14 Exhibit 4414, the conclusion that constables were
10:05:23 15 weak in Upper Canada between 1836 and 1854.

10:05:27 16 And we talked about that a little bit
10:05:29 17 about that on Friday, and I want to ask you just a
10:05:33 18 few questions more about that conclusion.

10:05:33 19 If a constable in this period was
10:05:36 20 charged with making an arrest, or issuing a warrant
10:05:38 21 and he failed to do it, he could be indicted for
10:05:42 22 neglecting his duty; is that right?

10:05:45 23 **A.** I do not know that for a fact, but
10:05:48 24 that certainly seems reasonable to me.

10:05:51 25 **Q.** I would like to open up the

10:06:04	1	Magistrate's Manual from 1851, which is Exhibit
10:06:10	2	No. 4408.
10:06:11	3	MS. NERLAND: Can we go to page 184 of
10:06:12	4	the document? Okay, we'll return to this, that's
10:06:12	5	fine. We'll get ourselves sorted out.
10:06:12	6	BY MS. NERLAND:
10:06:18	7	Q. My apologies, we'll come back to
10:06:20	8	this point.
10:06:20	9	I'd like to open up S1266. So this is
10:06:29	10	an excerpt of David Murray's book, "Colonial
10:06:33	11	Justice: Justice, Morality and Crime in the
10:06:37	12	Niagara District 1791 to 1849". And this excerpt
10:06:42	13	includes pages 26 to 41, and 64 to 74, plus the
10:06:47	14	associated end notes. This is one of Canada's
10:06:50	15	productions.
10:06:51	16	Are you familiar with this book?
10:06:52	17	A. Vaguely. I haven't looked at it
10:06:55	18	in quite a while but, yes, I am familiar with it.
10:06:58	19	MS. NERLAND: Your Honour, I would like
10:06:59	20	to add this as the next exhibit.
10:07:01	21	THE COURT: Mr. Registrar.
10:07:02	22	THE REGISTRAR: Exhibit No. 4415.
10:07:02	23	EXHIBIT NO. 4415: Excerpt from the book
10:06:32	24	entitled, "Colonial Justice: Justice,
10:06:35	25	Morality and Crime in the Niagara

10:06:37	1	District 1791 to 1849", by David Murray.
10:07:05	2	BY MS. NERLAND:
10:07:05	3	Q. Can we turn to page 71 of this
10:07:07	4	excerpt, which is PDF image 27, please. And if we
10:07:14	5	can go to the bottom paragraph.
10:07:16	6	Here the book is talking about
10:07:18	7	constables in the Niagara District, and I'm not
10:07:21	8	going to read it aloud. I will give you a moment
10:07:23	9	to read it, though.
10:07:34	10	A. (Witness reviews document).
10:07:35	11	I've read it.
10:07:36	12	Q. Okay. Then can we turn to the
10:07:38	13	bottom of page 72, please. Again, the bottom
10:07:41	14	paragraph.
10:07:53	15	A. (Witness reviews document).
10:07:54	16	I'm done.
10:07:54	17	Q. So the research that's recounted
10:07:56	18	in this book, suggests that constables in Niagara
10:07:59	19	did in fact typically follow the orders that were
10:08:02	20	given to them; is that right?
10:08:02	21	A. Yes. That certainly doesn't seem
10:08:05	22	surprising to me.
10:08:07	23	Q. And Murray also states that
10:08:09	24	constables across Upper Canada functioned -- in the
10:08:09	25	period he's writing about, which is prior to 1849

10:08:14 1 -- with reasonable effectiveness; is that right?

10:08:16 2 **A.** Yes. Also in a reasonably
10:08:18 3 populated area.

10:08:20 4 **Q.** Well, his observation about
10:08:23 5 reasonable effectiveness, though, says: "In
10:08:25 6 Niagara as in other parts of Upper Canada".

10:08:28 7 So there's no reason to think that this
10:08:31 8 general observation about Upper Canada wouldn't
10:08:33 9 extend to constables in the Saugeen Peninsula area;
10:08:36 10 is there?

10:08:36 11 **A.** I couldn't speak to that.

10:08:39 12 **Q.** Okay.

10:08:43 13 **A.** It seems reasonable, but I have no
10:08:45 14 independent expertise of the capacity of those
10:08:48 15 constables in that area at that time. Just that in
10:08:50 16 general, their ability to project authority was
10:08:54 17 limited. But in their -- the areas in which they
10:08:58 18 generally operated, their capacity was reasonable.

10:09:00 19 **Q.** Okay. You say at the bottom of
10:09:17 20 page 10 of Exhibit 4414, your second report, that a
10:09:22 21 single constables can be responsible for an entire
10:09:26 22 town or county; is that right?

10:09:27 23 **A.** Yes.

10:09:28 24 **Q.** And this is part of the reason
10:09:29 25 that you conclude constables had a limited capacity

10:09:32	1	to maintain civil order?
10:09:33	2	A. Yes, they're often called upon to
10:09:36	3	do more than what a modern observer would consider
10:09:38	4	to be reasonable in terms of scope of duties.
10:09:40	5	Q. Now you don't have any citation
10:09:44	6	for this proposition in your report?
10:09:46	7	A. No.
10:09:46	8	Q. I'd like to go now to SC1402.
10:09:51	9	This is an excerpt from a book by Greg Marquis
10:09:57	10	called, "Policing Canada's Century: A History of
10:10:00	11	the Canadian Association of Chiefs of Police".
10:10:03	12	And the excerpt we have here is
10:10:05	13	Chapter 1, which is policing in 19th century
10:10:08	14	Canada. Are you familiar with this book?
10:10:10	15	A. Yes, I am.
10:10:11	16	MS. NERLAND: Your Honour, I'd like to
10:10:12	17	add this as the next exhibit.
10:10:16	18	THE COURT: Scroll down to see the
10:10:18	19	author, please.
10:10:25	20	Mr. Registrar.
10:10:26	21	THE REGISTRAR: Exhibit No. 4416.
10:10:28	22	EXHIBIT NO. 4416: Excerpt from the
10:10:28	23	book entitled, "Policing Canada's
10:10:28	24	Century: A History of the Canadian
10:10:28	25	Association of the Chiefs of Police",

10:10:29	1	by Greg Marquis.
10:10:29	2	MS. NERLAND: And can we please turn to
10:10:32	3	page 17. I think it's 17 of the document, not of
10:10:35	4	the book. Yes, it's PDF image 6.
10:10:35	5	BY MS. NERLAND:
10:10:38	6	Q. So I've highlighted in green on
10:10:40	7	the right-hand side, just one sentence which says:
10:10:44	8	"By 1852, there were roughly
10:10:47	9	2,800 constables in Upper Canada
10:10:49	10	scattered among 550 towns and
10:10:53	11	townships".
10:10:55	12	It's fine if you don't know this, but
10:10:57	13	there were about 25 counties in Upper Canada in
10:11:00	14	1852; is that right?
10:11:01	15	A. That seems reasonable to me, but I
10:11:05	16	do not know that independently.
10:11:06	17	Q. So if there were 2,800 constables
10:11:08	18	in 1852, I want to put it to you that most counties
10:11:12	19	had quite a lot more than a single constable?
10:11:16	20	A. Again, both of us are inferring a
10:11:18	21	great deal here. But I would offer that some of
10:11:20	22	those 25 counties were very big, and almost empty
10:11:25	23	in terms of, in terms of western settlement.
10:11:29	24	So there were certain towns and
10:11:31	25	counties that until the 1856 County and Boroughs

10:11:35 1 Police Act, however was mandatory, wouldn't
10:11:37 2 necessarily have had a concentration of constables;
10:11:41 3 whereas others would be much higher.

10:11:43 4 So of those 28 constables, how many of
10:11:46 5 those are in Toronto; how many of those are in
10:11:48 6 London; how many of those are in Amherstburg? And
10:11:51 7 by the time you've done the math on that, how many
10:11:53 8 are scattered in rural areas? Very few, I would
10:11:56 9 offer. But again, we're both inferring based on
10:11:59 10 this passage.

10:12:00 11 Q. And as we've discussed, more could
10:12:01 12 be appointed in those more rural areas by Justices
10:12:06 13 of the Peace as required?

10:12:07 14 A. Absolutely. And the appointment
10:12:09 15 of constables could be a very temporary thing, so
10:12:11 16 those 2,800 constables may have all been appointed
10:12:14 17 at one particular moment, but six months later the
10:12:17 18 number could be much higher or much lower.

10:12:19 19 Q. They're generally over the period
10:12:21 20 from 1836 to 1854, what we saw was actually an
10:12:26 21 increasing number of constables --

10:12:27 22 A. Yes.

10:12:28 23 Q. -- across Upper Canada?

10:12:29 24 A. Yes.

10:12:29 25 Q. I'd like to ask you now about

10:12:34 1 special constables, which you discuss at
10:12:37 2 paragraph 27 of your second report, Exhibit
10:12:42 3 No. 4414.

10:12:42 4 The conclusion you express here is that
10:12:43 5 they -- and I'm quoting you:

10:12:46 6 "[...] slightly offset the
10:12:48 7 limits of other forms of law
10:12:49 8 enforcement in a colony."

10:12:52 9 **A.** Yes.

10:12:52 10 **Q.** So what you're saying,
10:12:53 11 essentially, is that special constables could be
10:12:54 12 used to fill the gaps in the ordinary law
10:12:56 13 enforcement apparatus, like constables, if the
10:12:59 14 relevant authorities decided to appointment them?

10:13:01 15 **A.** Yes.

10:13:01 16 **Q.** And special constables could be
10:13:04 17 appointed directly by two Justices of the Peace; is
10:13:10 18 that right?

10:13:10 19 **A.** I don't believe I say as much, and
10:13:15 20 I don't have any independent knowledge of that.
10:13:18 21 But that would seem reasonable to me; I have no
10:13:21 22 reason to doubt that.

10:13:25 23 **Q.** I'd like to open up for just a
10:13:27 24 second to SC1423, this is a statute.

10:13:36 25 **MS. NERLAND:** Can we scroll down to the

10:13:38	1	title of the statute, please.
10:13:38	2	BY MS. NERLAND:
10:13:39	3	Q. It's "10 and 11 Victoria Chapter 12".
10:13:42	4	"This is an Act to amend the laws
10:13:44	5	relative to the appointment of Special Constables,
10:13:46	6	and for the better preservation of the peace." And
10:13:49	7	it's dated 28th of July, 1847.
10:13:54	8	MS. NERLAND: And I'd like to add this
10:13:56	9	as the next exhibit.
10:13:58	10	THE COURT: Mr. Registrar.
10:14:02	11	THE REGISTRAR: Exhibit No. 4417.
10:14:04	12	EXHIBIT NO. 4417: Statute 10 and 11
10:14:05	13	Victoria Chapter 12 July 28, 1847.
10:14:05	14	BY MS. NERLAND:
10:14:06	15	Q. So I just want to point you to
10:14:08	16	Section 2 here.
10:14:09	17	"That in all cases where it
10:14:12	18	shall be made to appear to any two
10:14:14	19	or more Justices of the Peace of any
10:14:16	20	District, City or Town in this
10:14:19	21	Province, upon the oath of any
10:14:21	22	credible witnesses, that any tumult,
10:14:24	23	riot or felony has taken place, or
10:14:26	24	is continuing, or may be reasonably
10:14:30	25	apprehended in any Parish, Township

10:14:32	1	or Town, or place situate within the
10:14:34	2	limits for which the said respective
10:14:36	3	Justices usually act. As such,
10:14:39	4	Justices shall be of the opinion
10:14:39	5	that the ordinary officers appointed
10:14:39	6	for preserving the peace are not
10:14:39	7	sufficient for the preservation of
10:14:39	8	the peace, and for the protection of
10:14:42	9	the inhabitants, and the security of
10:14:43	10	the property in any such Parish,
10:14:45	11	Township or Town, or place as
10:14:47	12	abovesaid, then and in every such
10:14:49	13	case, Justices or any two or more
10:14:52	14	Justices acting for the same limits
10:14:52	15	are hereby authorized to nominate
10:14:55	16	and appoint [...]"
10:14:56	17	And it explains how they may be
10:14:58	18	appointed, people to act as special constables. I
10:14:58	19	won't to read the whole...
10:15:05	20	So you'll agree with me that it seems
10:15:08	21	that two Justices of the Peace could in fact
10:15:13	22	appointment.
10:15:13	23	A. That's what it says.
10:15:14	24	Q. And special constables who didn't
10:15:15	25	fulfill their duties, they were also --

10:15:17	1	A. Subject to discipline.
10:15:18	2	Q. Subject to discipline. Fines,
10:15:20	3	jail?
10:15:20	4	A. Yes.
10:15:21	5	Q. And so they had incentive to
10:15:23	6	follow the orders that were given to them?
10:15:25	7	A. Absolutely. And I've seen nothing
10:15:26	8	to indicate -- we've come to this point a few
10:15:30	9	times. I've seen nothing to indicate that there
10:15:32	10	were instances of disobedience once they were given
10:15:36	11	such grant. The question would be one of capacity
10:15:38	12	as to whether or not they could fulfill that order
10:15:41	13	on their own, or if they needed special constables
10:15:44	14	appointed, invocation of posse comitatus, or
10:15:47	15	request for assistance with the malitia or the
10:15:50	16	permanent forces.
10:15:50	17	Q. Sorry. So when you say, "when
10:15:51	18	they needed the assistance of special constables",
10:15:54	19	we're talking here about special constables. So it
10:15:57	20	would be the assistance potentially --
10:15:59	21	A. Sorry. I was referring to the
10:16:01	22	base of the constables performing the duties who
10:16:06	23	could then be supported by appointment of special
10:16:08	24	constables, invocation of posse comitatus, or
10:16:10	25	request for assistance for the use of malitia or

10:16:13 1 permanent force soldiers.

10:16:15 2 Q. Right. So there were a range of
10:16:17 3 options starting from special constables and
10:16:20 4 malitias, then the military?

10:16:20 5 A. Yes. And also the appointment of
10:16:22 6 more constables, which was a reasonable
10:16:24 7 administrative process, which in the context of the
10:16:27 8 19th century, I make that point, because it's
10:16:29 9 relevant that unlike today, a police constable is a
10:16:32 10 graduate of a recognized training institution, is
10:16:35 11 properly accredited, and has a certain degree of
10:16:38 12 education.

10:16:39 13 A constable, in this context, it didn't
10:16:43 14 take much to train them, it was not a specialized
10:16:46 15 field yet.

10:16:47 16 Q. Right. But they were still able
10:16:48 17 to fulfill the orders given to them with reasonable
10:16:51 18 effectiveness as we saw?

10:16:52 19 A. Yes. But in terms of the
10:16:56 20 capacity, one shouldn't expect them to be able to
10:16:59 21 perform a duty much more complex than a reasonable
10:17:03 22 healthy fit, male of the same time period. They
10:17:10 23 didn't have specialized training in, say, search
10:17:12 24 and seizure, or armed combat or something like
10:17:15 25 that. That wasn't something they had or did.

10:17:17 1 Q. But issuing a warrant or making an
10:17:18 2 ordinary arrest, this is the kind of thing we would
10:17:21 3 expect them to do with reasonable effectiveness as
10:17:25 4 Professor Murray says in his book?

10:17:27 5 A. Absolutely.

10:17:28 6 Q. Okay. So you brought up posse
10:17:28 7 comitatus.

10:17:28 8 A. Yes.

10:17:31 9 Q. And I'm glad I heard you say it
10:17:33 10 out loud. In your report, at paragraph 28 of your
10:17:37 11 second report --

10:17:38 12 A. Uhm-hmm.

10:17:39 13 Q. -- and you write:

10:17:40 14 "[...] this also enabled
10:17:41 15 officers of the law to press any
10:17:44 16 able bodied man into service in the
10:17:46 17 enforcement of their duties."

10:17:49 18 A. Yes.

10:17:49 19 Q. So when you refer to "officers of
10:17:50 20 the law", that would include Justices of the Peace?

10:17:52 21 A. Justices of the Peace, constables,
10:17:55 22 special constables. I am not familiar with the use
10:17:58 23 of sheriffs in this context, but I would think that
10:18:01 24 would be likely.

10:18:02 25 Q. I'm going to ask you now about

10:18:10	1	Indigenous constables in this period.
10:18:11	2	A. Okay.
10:18:12	3	Q. Can we turn up SC1406, please.
10:18:19	4	This is a letter from T.G. Anderson who
10:18:22	5	is the Superintendent of the Indian Department for
10:18:28	6	a number of Bands, including the Saugeen Ojibway.
10:18:30	7	And he's writing to his superior officer in 1843,
10:18:33	8	March 14, 1843. I'd like to add this as the next
10:18:38	9	exhibit.
10:18:38	10	THE COURT: Mr. Registrar.
10:18:40	11	THE REGISTRAR: Exhibit No. 4418.
10:18:40	12	EXHIBIT NO. 4418: Letter from T.G.
10:18:41	13	Anderson dated March 14, 1843.
10:18:41	14	BY MS. NERLAND:
10:18:42	15	Q. So I know you haven't looked at
10:18:44	16	the primary records in detail, so I'm just going to
10:18:47	17	give you a moment to look at this document and I'm
10:18:49	18	going to go through a few points in it with you
10:18:51	19	before I ask my question.
10:18:51	20	A. (Witness reviews document).
10:18:52	21	Q. So if you look at the area marked
10:18:55	22	in green on top, this is a description of the
10:18:59	23	contents of the letter written by another person in
10:19:03	24	the department. And it says:
10:19:05	25	"T.G. Anderson forwards his

10:19:07	1	suggestions on various topics,
10:19:09	2	number of equipment requisite for
10:19:10	3	approaching distribution at
10:19:12	4	Manitoulin, etcetera, etcetera".
10:19:15	5	It seems to be written from
10:19:17	6	Manitowaning, which is on Manitoulin Island.
10:19:21	7	So I want to go down to the bottom
10:19:22	8	paragraph now. And it says:
10:19:24	9	"I would, in conclusion, beg
10:19:26	10	leave to suggest to the committee
10:19:27	11	that the Legislature be solicited to
10:19:30	12	pass an act reserving this island"
10:19:32	13	-- Manitoulin -- "exclusively for
10:19:32	14	the Indians, prohibiting white
10:19:34	15	people or others under heavy penalty
10:19:36	16	from coming to it for in the proper
10:19:39	17	purposes to, and particularly for
10:19:40	18	the selling or giving directly or
10:19:42	19	indirectly spirituous liquors of any
10:19:45	20	kind. The punishment by this law
10:19:47	21	should be summary with absolute
10:19:49	22	power invested in proper persons to
10:19:51	23	carry it into effect, admitting
10:19:53	24	Indians as fully competent
10:19:54	25	witnesses, and if necessary, to be

10:19:56 1 employed as peace officers or

10:19:58 2 constables on such occasions."

10:20:01 3 And so here Anderson is suggesting a

10:20:04 4 mechanism to protect Manitoulin Island from white

10:20:07 5 encroachment, essentially, by appointing Indigenous

10:20:13 6 constables; is that fair?

10:20:14 7 **A.** Yes.

10:20:14 8 **Q.** And so did you consider the

10:20:14 9 appointment of Indigenous constables from among the

10:20:18 10 Saugeen Ojibway, in your assessment of the

10:20:20 11 potential strength of the constabulary force in

10:20:23 12 this period on Saugeen Peninsula?

10:20:24 13 **A.** I don't think I drew any

10:20:28 14 distinction in terms of background, of who the

10:20:30 15 constables can be; they could be anyone as far as I

10:20:38 16 know.

10:20:38 17 **Q.** On Friday when my friend was

10:20:40 18 asking you about the instruments of civil power in

10:20:43 19 Upper Canada, you mentioned briefly sheriffs.

10:20:45 20 **A.** Uhm-hmm.

10:20:46 21 **Q.** And you would agree with me that

10:20:48 22 sheriffs were one of the instruments of civil power

10:20:50 23 between 1836 and 1854?

10:20:52 24 **A.** I would. But I believe the

10:20:55 25 context of my comment regarding sheriffs is that I

10:20:57	1	do not have any real knowledge of sheriffs'
10:21:00	2	authority.
10:21:00	3	Q. Okay.
10:21:09	4	MS. NERLAND: Just a moment,
10:21:10	5	Your Honour.
10:21:27	6	BY MS. NERLAND:
10:21:28	7	Q. I'd like to return very briefly to
10:21:30	8	the strength of the militia between 1836 and 1854,
10:21:33	9	which we discussed on Friday.
10:21:35	10	MS. NERLAND: Can we please turn up
10:21:38	11	SC1450.
10:21:38	12	BY MS. NERLAND:
10:21:43	13	Q. Just to get a bit of context of
10:21:45	14	what the document is, the title is, "Return of
10:21:48	15	Officers Proposed to Fill Ten Companies of Indians
10:21:51	16	Each 50 Strong".
10:21:53	17	If we scroll down to the second page,
10:21:56	18	we can see there in green, that it's written at
10:22:02	19	Toronto, 5th of March, 1846. And this is signed
10:22:05	20	again by T.G. Anderson who we just discussed.
10:22:10	21	MS. NERLAND: So can we scroll back up
10:22:12	22	to the first page?
10:22:17	23	Your Honour, I'd like to have this
10:22:19	24	added as the next exhibit, please.
10:22:22	25	THE COURT: Would you please read again

10:22:31	1	the title of the document?
10:22:33	2	MS. NERLAND: "Return of Officers
10:22:35	3	Proposed to Fill Ten Companies of Indians Each 50
10:22:40	4	Strong".
10:22:41	5	THE COURT: And the author of the
10:22:42	6	document is who?
10:22:43	7	MS. NERLAND: T.G. Anderson.
10:22:45	8	THE COURT: All right. Mr. Registrar.
10:22:47	9	THE REGISTRAR: Exhibit No. 4419.
10:22:50	10	EXHIBIT NO. 4419: Document entitled,
10:22:50	11	"Return of Officers Proposed to Fill
10:22:50	12	Ten Companies of Indians Each 50
10:22:50	13	Strong", signed by T.G. Anderson, dated
10:22:52	14	March 5, 1846.
10:22:54	15	THE COURT: Can you go back to the end
10:22:56	16	of the document?
10:23:04	17	Please go ahead.
10:23:05	18	MS. NERLAND: Thank you, Your Honour.
10:23:07	19	BY MS. NERLAND:
10:23:10	20	Q. T.G. Anderson is not known for his
10:23:12	21	good handwriting. If you want to take a --
10:23:13	22	THE COURT: I don't know why you say
10:23:15	23	that, Counsel, as an observation.
10:23:16	24	MS. NERLAND: Pardon me?
10:23:18	25	THE COURT: Are you giving evidence

10:23:19	1	about his handwriting?
10:23:21	2	MS. NERLAND: No, Your Honour.
10:23:22	3	THE COURT: It looks perfectly fine to
10:23:23	4	me. The quality of the copy is another matter.
10:23:27	5	You better ask your question.
10:23:30	6	MS. NERLAND: All right, Your Honour.
10:23:31	7	BY MS. NERLAND:
10:23:31	8	Q. So this seems to be a list of
10:23:32	9	proposed officers for ten companies of Indian
10:23:36	10	troops of some kind; is that right?
10:23:38	11	A. It would appear to be. I have not
10:23:41	12	seen this document before, it seems to be very
10:23:44	13	interesting, though.
10:23:45	14	Q. Essentially this looks to be a
10:23:46	15	proposal for an Indian militia of some kind?
10:23:48	16	A. It does.
10:23:49	17	Q. In your instructions were you
10:23:50	18	asked to consider the potential for an Indigenous
10:23:52	19	militia to address squatting on the Saugeen
10:23:56	20	Peninsula?
10:23:56	21	A. No.
10:23:56	22	Q. And did you consider it?
10:23:58	23	A. No. It had honestly been my
10:24:01	24	understanding that First Nations people had
10:24:06	25	generally been excluded from mandatory military

10:24:09 1 service at this time period. This is the first
10:24:10 2 time I've seen this document, though, and it is
10:24:13 3 intriguing.

10:24:14 4 Q. Would you agree with me that one
10:24:17 5 benefit of an Indigenous militia made up of the
10:24:19 6 Saugeen Ojibway, is that it could be deployed from
10:24:21 7 the very location where the squatters were located?

10:24:24 8 A. That would certainly seem to be an
10:24:25 9 advantage.

10:24:26 10 Q. And so there would be no real need
10:24:26 11 to move the troops any distance in this
10:24:28 12 circumstance?

10:24:28 13 A. Or sustain them once they were
10:24:31 14 there.

10:24:32 15 Q. Thank you.

10:24:37 16 I want to talk now about how the
10:24:39 17 British military was actually used in between 1836
10:24:41 18 and 1854 in Upper Canada.

10:24:43 19 A. Certainly.

10:24:43 20 Q. So in your first report, which is
10:24:46 21 Exhibit 4405, "Considerations Affecting an
10:24:51 22 Expedition to Secure the Saugeen Peninsula". At
10:24:53 23 page 7, you say that:

10:24:54 24 "The two priorities of the
10:24:56 25 British Army in the Canadas were:

10:24:59	1	1) deterring or defending an
10:25:01	2	attack by the United States; and
10:25:03	3	2) maintaining civil order."
10:25:05	4	Is that correct?
10:25:06	5	A. Yes.
10:25:06	6	Q. And at para 31 of this report, you
10:25:12	7	observed that one of the things the military was
10:25:14	8	involved in between 1836 and 1854 was assisting
10:25:18	9	with putting down riots; is that right?
10:25:20	10	A. Yes.
10:25:20	11	Q. And this includes riots by the
10:25:23	12	Orange Order?
10:25:23	13	A. Yes.
10:25:23	14	Q. And the Orange Order, that was a
10:25:26	15	Protestant political organization?
10:25:28	16	A. Yes, it was.
10:25:28	17	Q. And they got into conflict with
10:25:31	18	Upper Canada's Catholic minority; is that right?
10:25:33	19	A. Yes.
10:25:33	20	Q. And in your second report,
10:25:41	21	Exhibit 4414, at paragraph 31 you identify -- oh,
10:25:48	22	no, this is your first report still, I apologize.
10:25:51	23	You identify 16 riots associated with
10:25:53	24	the Orange Order in Toronto between 1841 and 1867;
10:25:58	25	is that right?

10:25:58	1	A. Yes.
10:25:59	2	Q. But the military didn't intervene
10:26:01	3	in every riot?
10:26:02	4	A. No.
10:26:02	5	Q. Only when they breach with
10:26:06	6	significant scale?
10:26:07	7	A. Yes.
10:26:07	8	Q. But in that case, the British
10:26:10	9	military was typically able to spare troops to
10:26:13	10	assist?
10:26:13	11	A. Yes.
10:26:14	12	Q. At paragraph 50 of your second
10:26:29	13	report, now Exhibit 4414, you discuss an incident
10:26:34	14	at Mica Bay.
10:26:36	15	A. Yes.
10:26:37	16	Q. You're there?
10:26:48	17	A. Yes.
10:26:48	18	Q. To assist us in talking about this
10:26:51	19	incident, I'd like to bring up now SC1124.
10:26:56	20	MS. NERLAND: Can you scroll down to
10:26:57	21	the title page of the document, please? The
10:26:59	22	article. Thank you.
10:26:59	23	BY MS. NERLAND:
10:27:00	24	Q. This is an article entitled, "The
10:27:02	25	Mica Bay Affair: Conflict on the Upper Lakes

10:27:07	1	Mining Frontier, 1840 to 1850" by Nancy and Robert
10:27:16	2	Wightman.
10:27:17	3	Are you familiar with this article?
10:27:18	4	A. Yes.
10:27:19	5	MS. NERLAND: Your Honour, I'd like to
10:27:20	6	add this article as the next exhibit.
10:27:21	7	THE COURT: Mr. Registrar.
10:27:23	8	THE REGISTRAR: Exhibit No. 4420.
10:27:25	9	EXHIBIT NO. 4420: Article entitled,
10:27:02	10	"The Mica Bay Affair: Conflict on the
10:27:06	11	Upper Lakes Mining Frontier, 1840 to
10:27:09	12	1850", by Nancy and Robert Wightman.
10:27:28	13	BY MS. NERLAND:
10:27:28	14	Q. So I'd like to start by going to
10:27:30	15	page 197 of the document, which is, I believe,
10:27:33	16	page 6 of the PDF.
10:27:35	17	So we have here a map, which is a
10:27:37	18	little difficult to see, but it shows the region
10:27:40	19	north of Sault Ste. Marie, and it shows the Mica
10:27:40	20	Bay Mining Company holdings.
10:27:49	21	MS. NERLAND: Can you scroll down a
10:27:50	22	little so we can see the whole map?
10:27:50	23	BY MS. NERLAND:
10:27:56	24	Q. So this map shows the Mica Bay
10:27:59	25	Mining Company holdings to be north of Sault Ste.

10:28:00	1	Marie; is that right?
10:28:00	2	A. Yes.
10:28:01	3	Q. And you'd agree that this region
10:28:03	4	was more remote in 1849 than the Saugeen Peninsula?
10:28:08	5	A. Yes. You would have to pass the
10:28:12	6	Saugeen Peninsula from the major garrison outpost
10:28:15	7	in order to get to Mica Bay.
10:28:16	8	Q. And so it had fewer roads
10:28:19	9	servicing it, for instance?
10:28:20	10	A. Yes. Realistically marching there
10:28:27	11	would be possible, not advisable. Use of
10:28:31	12	watercraft to get there by way of the Great Lakes
10:28:34	13	would be the only really feasible way of getting
10:28:38	14	there.
10:28:38	15	Q. And there were not very many
10:28:40	16	Euro-Canadian settlers in this region at the time?
10:28:44	17	A. No.
10:28:45	18	Q. And the same is true of not just
10:28:47	19	the mining outpost at Mica Bay, but also Sault Ste.
10:28:50	20	Marie, which we see on the bottom of the map?
10:28:51	21	A. Yes.
10:28:51	22	Q. This was also more remote in 1849
10:28:55	23	than the Saugeen Peninsula?
10:28:55	24	A. Very remote, yes.
10:28:56	25	Q. And unlike the Saugeen Peninsula,

10:28:58 1 it wasn't part of any county or district at this
10:29:01 2 point?

10:29:02 3 **A.** I couldn't speak to the civil
10:29:04 4 boundaries at the time, but it was certainly
10:29:11 5 remote, with limited mechanisms of civil control.

10:29:15 6 **Q.** In 1849 there were unlikely to
10:29:19 7 have been any constables in this area, for
10:29:21 8 instance?

10:29:21 9 **A.** There would be certainly a lower
10:29:25 10 concentration of constables, but certainly one
10:29:30 11 would think that Sault Ste. Marie would be large
10:29:32 12 enough to have -- be one of those -- one or similar
10:29:36 13 kind of communities we were discussing earlier, but
10:29:39 14 I do not know what the standing of the constabulary
10:29:43 15 was at that time.

10:29:45 16 **Q.** Okay. Now maybe you can tell me
10:29:47 17 whether you agree with the general propositions
10:29:49 18 about what happened at Mica Bay, which are drawn
10:29:51 19 from this article.

10:29:52 20 The Quebec Superior Mining Association
10:29:55 21 began to construct mining facilities in the area
10:29:58 22 near Mica Bay in around 1847?

10:30:01 23 **A.** Yes.

10:30:01 24 **Q.** The Indigenous people in the
10:30:03 25 region, which included Batchewana and Garden River,

10:30:07	1	were concerned about what they saw as a trespass on
10:30:10	2	their territory?
10:30:11	3	A. Yes.
10:30:11	4	Q. And they complained to the Crown
10:30:13	5	about that trespass?
10:30:14	6	A. Yes.
10:30:14	7	Q. When their protests yielded no
10:30:16	8	results, they took control of the mine and its
10:30:18	9	property?
10:30:19	10	A. Yes.
10:30:19	11	Q. And that was in early November of
10:30:22	12	1849?
10:30:22	13	A. Yes.
10:30:23	14	Q. The wives and children of the
10:30:27	15	miners were safely evacuated by boat on November 10
10:30:32	16	of 1849?
10:30:32	17	A. Yes.
10:30:32	18	Q. And the head of the mine, and all
10:30:34	19	of the miners were safely evacuated a week later by
10:30:38	20	November 18th?
10:30:39	21	A. Yes.
10:30:39	22	Q. I want to take you to the bottom
10:30:41	23	of page 201 of this article now, which is image 10.
10:30:45	24	I want to go to "Definite news..."
10:30:52	25	I'm just going to give you a moment to

10:30:57	1	read this paragraph.
10:30:58	2	A. (Witness reviews document).
10:31:20	3	Okay.
10:31:21	4	MS. NERLAND: Can you scroll down to
10:31:21	5	the next page, please?
10:31:21	6	BY MS. NERLAND:
10:31:22	7	Q. And just read the rest of the
10:31:24	8	section here.
10:31:24	9	A. (Witness reviews document).
10:31:27	10	Yes, done.
10:31:31	11	Q. So it seems that just a few days
10:31:33	12	later, on November 20th, the Government appointed a
10:31:35	13	magistrate to the district to supervise or attend
10:31:39	14	with the military; is that right?
10:31:40	15	A. Yes.
10:31:40	16	Q. That was Mr. Ironside?
10:31:42	17	A. Yes.
10:31:42	18	Q. And by that point, by
10:31:44	19	November 20th, the Government had already deployed
10:31:46	20	87 members of the rifle brigade to protect the
10:31:50	21	property of the mining company from Indigenous
10:31:52	22	people?
10:31:52	23	A. Yes, deployed. I wouldn't infer
10:31:57	24	from that they have departed. And we have them
10:32:01	25	arriving at Sault Ste. Marie on December 2nd.

10:32:04 1 Q. Right. So they had left their
10:32:07 2 garrison or wherever they were stationed?

10:32:10 3 A. Yes.

10:32:10 4 Q. And so the weather conditions were
10:32:13 5 bad, and even still, they made it to Sault Ste.
10:32:14 6 Marie in less than two weeks by, I think,
10:32:16 7 December 1st, actually, of 1849?

10:32:18 8 A. Yes, but it says that they --
10:32:22 9 Sault Ste. Marie --

10:32:22 10 (Witness reviews document).

10:32:29 11 The following day, so December 1st, the
10:32:32 12 following day, they collected the second Justice of
10:32:35 13 the Peace and reached Sault Ste. Marie. So I read
10:32:36 14 that as December 2nd.

10:32:37 15 Q. December 2nd, okay.

10:32:38 16 A. That they reached Sault Ste. Marie.

10:32:40 17 Yes, two weeks, that certainly makes
10:32:42 18 sense. And I think that's in line with my earlier
10:32:44 19 report about how long it would take to get to the
10:32:46 20 Saugeen Peninsula, because I would -- again, it
10:32:49 21 doesn't state the route here, so I'm inferring
10:32:56 22 based on knowledge of geology and marching rates,
10:32:57 23 that this was likely a garrison that departed from
10:33:00 24 Toronto, or nearby, went up the Penetang Road and
10:33:05 25 departed by steamer, call it two days -- not by

10:33:07 1 steamer, scratch that -- but by commercial vessel.
10:33:12 2 Two days on the water, that certainly makes sense,
10:33:16 3 roughly ten days marching, two days by water, fits
10:33:19 4 within that timeline.

10:33:20 5 Q. In any event, we can conclude that
10:33:22 6 at this point, the Imperial Crown was able to spare
10:33:27 7 these 87 soldiers to defend southern property
10:33:29 8 rights?

10:33:29 9 A. Yes.

10:33:30 10 Q. Even though they were in the
10:33:31 11 process of reducing the numbers of Imperial troops
10:33:35 12 garrisoned in Quebec and what is now Ontario in
10:33:37 13 Upper Canada?

10:33:37 14 A. Yes. They clearly perceived this
10:33:38 15 as sufficiently severe to warrant that deployment.

10:33:43 16 Q. So I would suggest to you that the
10:33:52 17 Crown could and did send military troops in aid of
10:33:57 18 civil power when it was consistent with its
10:34:00 19 priorities to do so?

10:34:00 20 A. I would absolutely agree with the
10:34:02 21 "could" portion of that statement. As to the
10:34:04 22 "did", it's notable that, to my knowledge, this is
10:34:06 23 the only such instance.

10:34:09 24 It is certainly possible, but it's not
10:34:10 25 something they did as a matter of routine.

10:34:13 1 Q. So if protecting Saugeen was a
10:34:19 2 priority, the way protecting the mine at Mica Bay
10:34:21 3 was, and if for some reason, which we don't need to
10:34:25 4 get into, ordinary civilian law enforcement wasn't
10:34:29 5 enough, you'd agree that the British military could
10:34:34 6 have managed to find a few troops for that as well?

10:34:34 7 A. Certainly. From the standpoint
10:34:34 8 of, if the request for assistance had been made,
10:34:36 9 and they had received it, they would almost
10:34:39 10 certainly have deployed whatever number of troops
10:34:44 11 they deemed required --

10:34:45 12 Q. Okay.

10:34:47 13 A. -- within the constraints outlined
10:34:49 14 in the report.

10:34:49 15 Q. At paragraph 38 of your first
10:35:13 16 report, I'll give you a moment to get there.

10:35:27 17 A. I am there.

10:35:28 18 Q. You discuss the need for garrisons
10:35:30 19 to leave a skeleton crew behind to guard tactical
10:35:35 20 infrastructure?

10:35:36 21 A. Yes.

10:35:36 22 Q. I want to bring up SC1396, which
10:35:40 23 is an excerpt from Karl Benn's book, "Historic Fort
10:35:45 24 York". This is an excerpt of a portion of
10:35:47 25 Chapter 3, which deals with Toronto and the Fort

10:35:50	1	York garrison between 1815 and 1945. Are you
10:35:54	2	familiar with this book?
10:35:55	3	A. Yes, I am.
10:35:56	4	MS. NERLAND: Your Honour, I'd like to
10:35:57	5	add this excerpt as the next exhibit.
10:35:59	6	THE COURT: Mr. Registrar.
10:36:00	7	THE REGISTRAR: Exhibit No. 4421.
10:36:02	8	EXHIBIT NO. 4421: Chapter 3 excerpt
10:36:02	9	from the book entitled, "Historic Fort
10:36:03	10	York" by Karl Benn.
10:36:03	11	BY MS. NERLAND:
10:36:03	12	Q. I want to go to page 94 of this.
10:36:10	13	I've got a section marked here for you. I'll give
10:36:17	14	you a moment to read it.
10:36:19	15	A. (Witness reviews document).
10:36:29	16	I've read it.
10:36:29	17	Q. So Benn is writing here about Fort
10:36:36	18	York during the Lower Canada rebellion; is that
10:36:39	19	right?
10:36:39	20	A. Yes.
10:36:39	21	Q. So that's in 1838?
10:36:41	22	A. Yes, or 1837.
10:36:41	23	Q. 1837...
10:36:44	24	A. Running into 1838.
10:36:45	25	Q. Okay. And he says that when the

10:36:47 1 garrison was deployed to assist Lower Canada in the
10:36:50 2 Lower Canada rebellion, eight men were left behind
10:36:54 3 to guard tactical infrastructure?

10:36:54 4 **A.** Yes.

10:36:55 5 **Q.** So this is the kind of scale of
10:36:56 6 force we're talking about when you refer to leaving
10:36:59 7 troops behind to guard tactical infrastructure?

10:37:01 8 **A.** Yes. This was the skeleton crew,
10:37:03 9 and it was also the famous skeleton crew viewed as
10:37:07 10 why Bond Head likely would have been
10:37:08 11 court-martialed if the Upper Canada rebellion had
10:37:12 12 not actually been defeated by the militia.

10:37:15 13 The decision to leave only eight royal
10:37:19 14 artillery was viewed to be quite the error.

10:37:22 15 **Q.** In the context of an emergency
10:37:24 16 like that?

10:37:24 17 **A.** Yes. Bond Head famously
10:37:27 18 underestimated the level of dissatisfaction that
10:37:29 19 existed in Upper Canada, thought that the only
10:37:33 20 threat was in Lower Canada, and rather abruptly
10:37:37 21 emptied Upper Canada of its permanent force
10:37:41 22 soldiers. Almost to the disaster, but fortunately
10:37:45 23 as you discussed on Friday, the militia was able to
10:37:48 24 stymie him.

10:37:48 25 **Q.** The militia swooped in to save the

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day.

A. Yes. And First Nations warriors, that part is often left out of the calculus.

Q. I want to turn now to paragraph 53 of your first report, Exhibit 4405.

MS. NERLAND: Can we bring this up, please?

BY MS. NERLAND:

Q. So you were talking here about the risk that the military proceeded by land to the Saugeen Peninsula, could bring camp followers along with them to the Saugeen?

A. Yes.

Q. This risk would not arise if the mission proceeded by water; is that correct?

A. It would -- I don't want to say that it would not arise, but the risk and certainly the scope of it would be much reduced.

Q. And a targeted and temporary mission with a limited number of soldiers, for instance, to assist with difficult arrests, that wouldn't be likely to attract camp followers to Saugeen?

A. Again, I don't want to say that there would be no risk of it, but it would be

10:39:02 1 drastically lessened. The difference between a
10:39:05 2 standing garrison force where an entrepreneur
10:39:09 3 moving up to buy and sell their wares, versus a
10:39:12 4 temporary operation; very different in scale, yes.

10:39:16 5 Q. So the key issue is really whether
10:39:18 6 there's a sustained garrison at the base of the
10:39:21 7 Peninsula when we're talking about camp followers?

10:39:23 8 A. Yes. The longer they're there,
10:39:25 9 the more robust the travelling economy would
10:39:28 10 become.

10:39:28 11 Q. And so similarly, if the soldiers
10:39:29 12 were at garrisons some distance away from Saugeen,
10:39:31 13 the camp followers would be drawn to that garrison,
10:39:35 14 not to necessarily the Peninsula where the patrols
10:39:38 15 were happening, for instance?

10:39:38 16 A. Yes. So to use the Mica Bay, for
10:39:40 17 example, where the soldiers largely operated out of
10:39:43 18 Sault Ste. Marie, and took ships to Mica Bay first
10:39:47 19 for, you know, that one advanced party that went
10:39:50 20 out -- and to my knowledge, that's the only time
10:39:52 21 they ventured to Mica Bay -- whatever effects they
10:39:54 22 would have had on the local economy, would be
10:39:57 23 localized to Sault Ste. Marie and not elsewhere.

10:39:59 24 Q. So if we assume a similar type of
10:40:01 25 mission to Mica Bay was sent to the Peninsula, if

10:40:03 1 indeed it was required, then there wouldn't have
10:40:06 2 been much of an issue with camp followers in that
10:40:10 3 circumstance?

10:40:10 4 **A.** No. The issue with camp followers
10:40:12 5 would be wherever they established their garrison.

10:40:15 6 **Q.** Okay. At paragraph 32 of your
10:40:17 7 first report, you talk about the critical
10:40:21 8 garrisons --

10:40:21 9 (Reporter sought clarification).

10:40:30 10 **Q.** I said I'll give him a moment
10:40:30 11 to...

10:40:34 12 **A.** I am there.

10:40:36 13 (Witness reviews document).

10:40:45 14 **Q.** And you cite Montreal, Quebec City
10:40:47 15 and Kingston as the most important garrisons?

10:40:53 16 **A.** Yes.

10:40:53 17 **Q.** There was a Naval base at
10:40:56 18 Penetanguishene until 1856, wasn't there?

10:40:58 19 **A.** There was. It was really more of
10:41:02 20 a storehouse for most of this time period. For
10:41:05 21 instance, following the Rush-Bagot agreement, there
10:41:10 22 was a stone frigate established in Kingston, and a
10:41:13 23 similar establishment was set up in Penetanguishene.

10:41:16 24 So there was a teeny tiny series of
10:41:21 25 buildings up there, they're still there, it's a

10:41:23 1 Heritage site, but for the most part, it can't
10:41:28 2 really be described as a "garrison" as much as
10:41:31 3 "storehouse". But good infrastructure for any
10:41:34 4 operation that would be launched from there. And
10:41:36 5 indeed that was its purposes for future hostilities
10:41:39 6 on the Great Lakes.

10:41:40 7 Q. So then another route to get to
10:41:42 8 the Peninsula, besides the ones you mentioned at
10:41:45 9 paragraph 16 to 21 of your report would be to
10:41:47 10 proceed from Toronto to Penetanguishene by land and
10:41:50 11 then by boat?

10:41:51 12 A. Yes. I don't think that would be
10:41:53 13 very effective for the cordon sanitaire operation
10:41:57 14 that was described in the hypothetical. But
10:41:59 15 certainly -- and that's why I immediately thought
10:42:01 16 that the route described to get to Mica Bay
10:42:04 17 probably was by Penetanguishene. So you go up that
10:42:08 18 road, board ships, the infrastructure would be
10:42:10 19 there, and then go where you wish by ship.

10:42:13 20 Q. And so a more targeted mission,
10:42:15 21 something like Mica Bay, could be run that way?

10:42:17 22 A. Certainly.

10:42:18 23 Q. And in this circumstance, if there
10:42:20 24 were camp followers, we would expect them to go to
10:42:25 25 Penetanguishene, not the Peninsula; is that right?

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A. Yes.

Q. I want to finish with just a few questions about your methodology and the instructions you received from Canada for the expert opinion that you've provided over the past couple of days to the Court.

So we've talked about when the military or a malitia would be called in to assist civil power?

A. Yes.

Q. And in your report, and in your testimony, you've used words like "insurgencies", or "insurrections", and you've given examples of riots and rebellions as instances when local law enforcement couldn't handle the situation?

A. Yes.

Q. Essentially, we're talking about when there was some significant threat to the public peace?

A. Yes.

Q. And that's when the military and malitia would be called in to aid in civil power?

A. Yes.

Q. And you opined on the considerations that might arise for a military

10:43:21 1 officer called upon to establish a cordon sanitaire
10:43:25 2 in those circumstances?

10:43:26 3 **A.** Yes.

10:43:27 4 **Q.** You talked about size of the force
10:43:30 5 available, transportation, those kinds of things?

10:43:31 6 **A.** Yes.

10:43:32 7 **Q.** So I just want to be clear about
10:43:33 8 the scope of what you were asking about that.

10:43:35 9 You're not expressing an opinion that
10:43:37 10 there was this kind of threat to public peace on
10:43:39 11 the Peninsula between 1836 and 1854, that would
10:43:44 12 bring the matter beyond the capacity of ordinary
10:43:47 13 civilian law enforcement to necessitate calling in
10:43:53 14 the malitia or the military?

10:43:54 15 **A.** That's right. To my knowledge,
10:43:54 16 there was no such threat at this timeframe.

10:43:57 17 **Q.** And you haven't reviewed or
10:43:59 18 referred to any documents that would suggest this
10:44:01 19 was the situation on the ground in the Peninsula
10:44:05 20 prior to 1854?

10:44:06 21 **A.** No, there's nothing that has
10:44:07 22 indicated to me that that was the case.

10:44:09 23 **Q.** And you haven't reviewed or
10:44:13 24 referred to any documents that would suggest the
10:44:16 25 military or the malitia was called in to assist the

10:44:19 1 local law enforcement on the Peninsula prior to or
10:44:23 2 around 1854?

10:44:23 3 **A.** No. To my knowledge, there was no
10:44:25 4 such operation.

10:44:26 5 **Q.** And you haven't reviewed or
10:44:27 6 referred to any documents that tell us what, if
10:44:29 7 any, local law enforcement steps were taken by
10:44:32 8 constables and sheriffs to enforce the law against
10:44:35 9 squatters on the Peninsula prior to or in 1854?

10:44:39 10 **A.** No, that was not in the scope of
10:44:42 11 the research and opinion that I was asked to
10:44:43 12 provide.

10:44:44 13 **Q.** So, similarly, you haven't
10:44:46 14 reviewed or referred to any document that indicates
10:44:49 15 that civilian law enforcement capacities were
10:44:54 16 exhausted on the Peninsula. You know, that
10:44:56 17 civilian law enforcement was unable to handle the
10:45:00 18 situation such that the civil power required the
10:45:02 19 military there?

10:45:03 20 **A.** No, I could only speak to the
10:45:05 21 generally limited capacity of law enforcement, but
10:45:07 22 not at all the specific incapacity or incapability
10:45:11 23 of law enforcement in the Bruce Peninsula at this
10:45:16 24 time.

10:45:16 25 **Q.** And so the opinions you expressed

10:45:18 1 in your report and in your testimony about the
10:45:20 2 challenges of a military expedition on the Saugeen
10:45:23 3 Peninsula, it's confined to a hypothetical scenario
10:45:26 4 involving a sustained cordon sanitaire complete
10:45:30 5 with a garrison nearby?

10:45:32 6 **A.** Garrison would be a requirement
10:45:36 7 for erecting a cordon sanitaire; yes, that is correct.

10:45:40 8 **Q.** And so I'd like to confirm with
10:45:42 9 you finally that Canada did not ask you to answer
10:45:45 10 this question: Based on the documentary record,
10:45:48 11 did the civil power require assistance from the
10:45:50 12 military or militia to protect the peninsula from
10:45:54 13 squatters prior to 1854?

10:45:56 14 **A.** No, that was not the question I
10:45:58 15 was asked to answer.

10:46:01 16 **Q.** Okay.

10:46:01 17 **MS. NERLAND:** Thank you, Mr. Wentzell.
10:46:03 18 Thank you, Your Honour, those are my
10:46:05 19 questions.

10:46:05 20 **THE COURT:** Mr. McCulloch?

10:46:07 21 **MR. McCULLOCH:** No reply or re-examination.

10:46:11 22 **THE COURT:** Thank you, sir. That
10:46:14 23 concludes your testimony. Thank you for coming to
10:46:18 24 testify in the trial. You can step down from the
10:46:21 25 witness stand.

10:46:22 1 THE WITNESS: Thank you, Your Honour.

10:46:22 2 (Tyler Wentzell was excused from the
10:46:24 3 proceedings).

10:46:24 4 THE COURT: Our out-of-town witness is
10:46:31 5 not coming in until tomorrow, we settled that on
10:46:32 6 Friday.

10:46:33 7 Do any counsel have any matters they
10:46:35 8 wish to raise?

10:46:35 9 (No response).

10:46:36 10 No.

10:46:37 11 I have one matter I wish to raise.

10:46:40 12 As counsel knows, last week we set a
10:46:44 13 high-level schedule to consider an issue that's
10:46:47 14 arisen between the parties about something that's
10:46:50 15 called "Phase 1B" -- that name coming from an order
10:46:58 16 of Justice Gans from February of this year -- and
10:47:02 17 when that phase would take place. And that phase
10:47:07 18 is not a part of the proceedings we're busy with
10:47:11 19 now in the sense that it is not part of the
10:47:14 20 schedule that we're all working from. And that may
10:47:19 21 change, but as of now that's the situation.

10:47:23 22 I directed the parties, on whichever
10:47:29 23 date that was last week that we discussed the
10:47:32 24 schedule, that the oral submissions on that issue
10:47:34 25 would take place on January 8th, and that the

10:47:39	1	written material, which could include evidence, but
10:47:42	2	definitely shall include submissions, should in its
10:47:46	3	entirety have been filed with the court no later
10:47:49	4	than December 20th.
10:47:52	5	I left it to the parties to discuss and
10:47:57	6	hopefully agree on the exchange of materials before
10:48:00	7	that date. Has any progress been made on that
10:48:04	8	schedule?
10:48:07	9	MS. GUIRGUIS: Not yet, Your Honour.
10:48:09	10	THE COURT: Not yet.
10:48:10	11	Okay, I wish to say this about the
10:48:11	12	schedule.
10:48:13	13	In order that it be orderly, it cannot
10:48:18	14	be the case that everything is filed on the last
10:48:20	15	day. Now, I believe I said that last week as well,
10:48:23	16	but I want to emphasize that for everyone to
10:48:27	17	understand the position of the other parties and
10:48:31	18	significantly what material they intend to rely on,
10:48:34	19	in addition to their written submissions, they
10:48:36	20	really need to have that material in a reasonable
10:48:40	21	time before that day, in case they want to
10:48:45	22	supplement their own material or whatever.
10:48:47	23	So if the parties come to an alternate
10:48:52	24	agreement that facilitates this, that's fine with
10:48:55	25	me, but in that time does tend to go by quickly,

10:49:00 1 and I do expect the parties to be using some of the
10:49:03 2 downtime this week, as I said last week, to address
10:49:07 3 that issue. I want to say today, that if you have
10:49:10 4 not otherwise come to an agreement on when the
10:49:14 5 materials that you're relying on will be exchanged,
10:49:19 6 then I will require that they be exchanged no later
10:49:22 7 than the 13th of December. So that by that date,
10:49:26 8 everyone sees all of the documentary evidence or
10:49:30 9 whatever else the other parties wish to rely on in
10:49:36 10 support of their submissions. And again, it is not
10:49:43 11 going to work if everyone exchanges on the 20th and
10:49:46 12 sees it for the first time, the positions that each
10:49:49 13 of you will be taking.

10:49:51 14 So if the written submissions aren't
10:49:54 15 done by the 13th -- if they are, that would be
10:49:57 16 better -- but if they're not done by the 13th, and
10:50:01 17 subject to you coming forward to me and saying,
10:50:04 18 "Your Honour, I have a problem"; I'd like to see
10:50:06 19 the parties notifying the other parties of their
10:50:09 20 position by that same date of December 13th. All
10:50:17 21 right?

10:50:17 22 Now does anyone have any difficulty
10:50:20 23 with that?

10:50:20 24 MR. McCULLOCH: No, Your Honour.

10:50:21 25 THE COURT: Mr. Lemmond?

10:50:23	1	MR. LEMMOND: No, Your Honour.
10:50:24	2	THE COURT: All right. Ms. Guirguis?
10:50:27	3	MS. GUIRGUIS: No, Your Honour.
10:50:28	4	THE COURT: All right. Could one of
10:50:29	5	you please undertake to ensure that counsel to the
10:50:32	6	municipalities who are not present in court today,
10:50:35	7	are directed to this small passage of today's
10:50:38	8	transcript.
10:50:39	9	Mr. McCulloch, could I ask you to do
10:50:40	10	that?
10:50:41	11	MR. McCULLOCH: Certainly, Your Honour.
10:50:43	12	THE COURT: So to e-mail them that they
10:50:45	13	should be sure to look at the small passage of
10:50:48	14	today's transcript so that they can be completely
10:50:50	15	up-to-date on the schedule, all right?
10:50:53	16	All right. Anything else that anyone
10:50:55	17	wishes to raise?
10:50:57	18	Is it Mr. Morin tomorrow,
10:50:59	19	Mr. McCulloch?
10:50:59	20	MR. McCULLOCH: Yes, Jean-Pierre Morin.
10:51:03	21	THE COURT: Can you let me know what
10:51:06	22	his title is? I reviewed the transcript, and I did
10:51:09	23	not find enough information in it since he is not
10:51:11	24	an expert witness. What is his formal position?
10:51:14	25	MR. McCULLOCH: According to his

10:51:15 1 signature block, Departmental Historian CIRNAC.

10:51:20 2 THE COURT: And for the record, can you
10:51:21 3 give the long version of CIRNAC, please?

10:51:24 4 MR. McCULLOCH: Crown-Indigenous
10:51:29 5 Relations and Northern Affairs Canada.

10:51:35 6 THE COURT: He's coming down from
10:51:37 7 Ottawa?

10:51:39 8 MR. McCULLOCH: Yes, Your Honour.

10:51:40 9 THE COURT: All right. We will adjourn
10:51:42 10 until tomorrow morning at 10 o'clock.

11

12 -- Court adjourned at 10:52 a.m.

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REPORTER'S CERTIFICATE

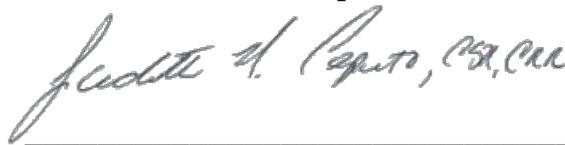
I, JUDITH M. CAPUTO, RPR, CSR, CRR,
Certified Shorthand Reporter, certify;

That the foregoing proceedings were
taken before me at the time and place therein set
forth at which time the witness was put under oath
by the court registrar;

That the testimony of the witness and
all objections made at the time of the examination
were recorded stenographically by me (Note: Not
all quotes have been verified against source
document, but transcribed as read into the record);

That the foregoing is a Certified
Transcript of my shorthand notes so taken.

Dated this 6th day of December, 2019.



NEESON COURT REPORTING INC.

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

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