

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

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VOL 47 DAY 47  
October 01, 2019

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1 Court File No. 94-CQ-50872CM

2 ONTARIO

3 SUPERIOR COURT OF JUSTICE

4 B E T W E E N:

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

6 Plaintiffs

6 - and -

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

11 Defendants  
12

13 Court File No. 03-CV-261134CM1

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

15 CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and  
15 SAUGEEN FIRST NATION

16 Plaintiffs

16 - and -

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

18 Defendants  
19

20 -----  
21 --- This is VOLUME 47 / DAY 47 of the trial  
21 proceedings in the above-noted matter, being  
22 held at the Superior Court of Justice, 330  
22 University Avenue, Courtroom 5-1 Toronto,  
23 Ontario, on the 1st day of October 2019.  
23 -----

24 B E F O R E:

25 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.  
& Alexandra Collizza, Esq.,

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

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1 --- Upon commencing at 10:01 a.m.

10:01:14 2 THE COURT: Morning counsel.

10:01:15 3 MS. GUIGRUIS: Morning, Your Honour.

10:01:23 4 THE COURT: Just before we move to the  
10:01:24 5 next witness, counsel, in a trial management  
10:01:30 6 conference in August I directed that Canada and  
10:01:32 7 Ontario provide a summary of the information  
10:01:38 8 they may wish to introduce in phase 1B of this  
10:01:45 9 trial and that has to do with an ongoing process  
10:01:47 10 of determining how that phase will be addressed.

10:01:50 11 Yesterday my office also received  
10:01:52 12 copies of that material. My main intention in  
10:01:57 13 directing that they could be provided is in  
10:01:59 14 order that the plaintiff could consider their  
10:02:01 15 position. And I may get information eventually,  
10:02:07 16 but I don't need it now. So I'm going to set  
10:02:10 17 those to one side and not review them.

10:02:13 18 At such time as we have submissions  
10:02:15 19 about phase 1(B), it may be that these sorts of  
10:02:20 20 materials get filed and I'll look at them in due  
10:02:22 21 course, but for now I'm just going to put it to  
10:02:24 22 one side. It was mainly for purposes of  
10:02:27 23 facilitating the plaintiffs' consideration of  
10:02:29 24 their position.

10:02:31 25 So that's an administrative matter.

1 Is there any other such matter or are we  
2 proceeding directly with Mr. Harring this  
3 morning?

4 MS. GUIGRUIS: We don't have any other  
5 administrative matters.

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

8 MS. GUIGRUIS: Thank you, Your Honour.  
9 So I would like to call Professor Sidney Harring  
10 as the plaintiffs' next witness.

11 THE COURT: Sir, this a very big room  
12 and you need to be heard by everyone so you need  
13 to keep your voice higher than usual. I'm  
14 illustrating the point.

15 MR. HARRING: Yes.

16 THE COURT: Just think of the people  
17 in the back row. They need to hear you clear as  
18 a bell.

19 MR. HARRING: I understand.

20 SIDNEY HARRING: AFFIRMED.

21 EXAMINATION IN-CHIEF BY MS. GUIRGUIS:

22 MS. GUIGRUIS: Before proceeding with  
23 the qualification I would like to add Professor  
24 Sidney Harring's expert report as an exhibit, as  
25 well as the errata.



10:04:27 1 THE COURT: We can do that, but I have  
10:04:28 2 a note that there's some dispute about the scope  
10:04:30 3 of this gentleman's testimony, so I think it  
10:04:34 4 might be preferable to deal with that first.

10:04:40 5 MS. GUIGRUIS: Yes, we'll do, Your  
10:04:41 6 Honour.

10:04:42 7 BY MS. GUIGRUIS:

10:04:42 8 Q. Okay. So I'd like to bring up a  
10:04:44 9 copy of your curriculum vitae, Professor  
10:04:47 10 Harring, which I understand that you have a hard  
10:04:50 11 copy in front of you so. This is SC1095.  
10:05:01 12 Professor Harring is this version of your CV up  
10:05:03 13 to date and accurate?

10:05:05 14 A. Yes.

10:05:13 15 Q. Your Honour, I would like to mark  
10:05:14 16 that as the next exhibit.

10:05:16 17 THE COURT: Mr. Registrar.

10:05:18 18 THE REGISTRAR: Exhibit 4270.

10:05:19 19 EXHIBIT NO. 4270: Curriculum vitae of  
10:05:21 20 Professor Sidney Harring.

10:05:25 21 BY MS. GUIGRUIS:

10:05:27 22 Q. Professor Harring, I would like  
10:05:28 23 to start by asking you a bit about your  
10:05:30 24 education, which starts on the first page of  
10:05:31 25 your CV. You have a law degree from the

1 University of Wisconsin?

2 A. Yes, I do.

3 Q. And you also hold a Ph.D. in  
4 sociology from that same university?

5 A. Yes.

6 Q. For your Ph.D. dissertation what  
7 did you research?

8 A. I researched a legal history of  
9 the Buffalo police department between 1872 and  
10 1915.

11 Q. And what was the main thesis of  
12 that research?

13 A. At the time in the 1970s there  
14 were theoretical debate about the creation of  
15 the police force, the origin of the police  
16 force, and the structure of the police force in  
17 modern society, how it came to have the powers  
18 it had and how it came to be used the way it  
19 was.

20 So this was a case study trying to  
21 show where the Buffalo police department came  
22 from and how they functioned in this period.

23 Q. Can you tell us a bit about what  
24 it means to come at research about the  
25 historical development of the police as a

10:06:42 1 sociologist?

10:06:43 2 A. Okay. Well, remember I'm -- I'm  
10:06:47 3 trained as a lawyer also. So it's -- I see  
10:06:51 4 it -- there was a common approach to the  
10:06:54 5 sociology of law and criminology that was  
10:06:58 6 historical, where you don't understand the  
10:07:00 7 institutions as static but that they evolve over  
10:07:03 8 time in response to the specific social forces.

10:07:06 9 So you're studying the evolution and  
10:07:13 10 change, social change by using history,  
10:07:17 11 historical methods and historical materials to  
10:07:20 12 shed light on the current structure of the  
10:07:23 13 institution.

10:07:30 14 Q. I would like to turn now to touch  
10:07:31 15 a bit on your professional portion of your  
10:07:33 16 background, which is also starting on page 1 of  
10:07:34 17 your CV. What is your current job title?

10:07:36 18 A. I'm a professor emeritus.

10:07:38 19 Q. What does "emeritus" mean?

10:07:41 20 A. "Emeritus" means essentially that  
10:07:42 21 I'm retired, but I get to, in an honorary way,  
10:07:46 22 hold the title "professor" forever.

10:07:49 23 Q. And how long have you been  
10:07:50 24 emeritus?

10:07:54 25 A. 2012.

10:07:56 1 Q. When did you begin your career as  
10:07:59 2 a professor?

10:08:02 3 A. I was trained in the sociology  
10:08:05 4 department to be a professor. So we had -- as  
10:08:08 5 part of our training we had four-year tenure as  
10:08:11 6 teaching assistants from 1969.

10:08:14 7 I became a full-time college professor  
10:08:17 8 in 1973, four years later. And I've taught ever  
10:08:22 9 since in a number of different contexts, which  
10:08:25 10 that's 40 years.

10:08:30 11 Q. And I see that started at the  
10:08:32 12 State University of New York --

10:08:34 13 A. Yes.

10:08:35 14 Q. -- from your CV? And in 1979 you  
10:08:38 15 moved to the State University of the City  
10:08:40 16 University of New York.

10:08:41 17 A. Well, the City University of New  
10:08:43 18 York is -- it's anomalous; it's a State  
10:08:47 19 university, but if they merged the State and  
10:08:49 20 city universities it would be essentially the  
10:08:51 21 biggest university in the universe and  
10:08:53 22 ungovernable.

10:08:55 23 So the State has maintained two  
10:08:57 24 different systems. So it is a State university  
10:08:59 25 but it is the City University of New York.

10:09:01 1 Q. And what was your role at the  
10:09:02 2 City University of New York starting in 1979?

10:09:06 3 A. Well, in 1979 I moved from  
10:09:09 4 Buffalo to John J. College of Criminal Justice,  
10:09:13 5 and I was an associate professor in the  
10:09:15 6 Department of Law, Police Science and Criminal  
10:09:18 7 Justice Administration, I believe it's called.

10:09:24 8 Originally assistant professor and  
10:09:26 9 then promoted. So I taught both undergraduate  
10:09:30 10 and graduate students in criminal justice,  
10:09:32 11 police science for four years.

10:09:36 12 Q. And then after those four years  
10:09:37 13 you moved over to the law school at the City  
10:09:39 14 University of New York?

10:09:41 15 A. They began the law school in 1983  
10:09:43 16 and I was among the founding faculty, six of us  
10:09:47 17 I think.

10:09:48 18 Q. You were awarded tenure in 1985?

10:09:52 19 A. Yes.

10:09:54 20 Q. When did you become a full  
10:09:55 21 professor then?

10:09:56 22 A. I need to look. I have forgotten  
10:10:00 23 all these dates. 1990.

10:10:04 24 Q. What does it mean to be promoted  
10:10:07 25 from an associate professor to a full professor

1 at the City University of New York?

2 A. It's the -- it's a rigorous  
3 process that involves establishing, you know,  
4 besides your -- that you're a good teacher, that  
5 you have done research of a national and even  
6 international standard attested to by typically  
7 seven to ten evaluations of leading scholars in  
8 your field.

9 Q. And I understand one of the  
10 courses that you taught at the City University  
11 of New York was American Indian law?

12 A. Yes.

13 Q. When did you teach that course?

14 A. I taught it roughly every other  
15 year for the time I was there. It varied. It  
16 varied sometimes, but roughly every other year.

17 Q. And the time that you were there  
18 was about 1984 to 2012?

19 A. '83 to 2012, so it would be 30  
20 years, more or less.

21 Q. What topics did you cover when  
22 you taught about American Indian law?

23 A. Again it could vary. In fact,  
24 over 30 years it did vary. But you start with  
25 the foundational cases with the Royal

1 Proclamation, because the United States is a  
2 colony. You start with the Royal Proclamation  
3 and move pretty quickly through the American  
4 Revolution and into what we call the Marshall  
5 trilogy, the Cherokee cases, the three cases  
6 that John Marshall decided in the 1830s that  
7 really, you know, set the first definition of  
8 what we'd call American Indian law and are now  
9 cited in almost every case that follows in the  
10 United States.

11 Then finishing that you would move  
12 through the 19th century, the determination  
13 period. And then you pretty much have to move  
14 into topics like how the criminal law impacts on  
15 Indians and, for example, environmental law  
16 became increasingly important over this time.

17 You'd look at the -- and always the  
18 most recent cases. You have to get up into what  
19 the Supreme Court is doing now because, again,  
20 that varied over time, even during my 30 years'  
21 teaching.

22 Q. And you also taught legal history  
23 at the City University of New York?

24 A. Yes.

25 Q. When did you teach legal history?

10:12:44 1 A. Three or four times. It wasn't  
10:12:47 2 taught as often as American Indian law because,  
10:12:49 3 again, what your demand is of law professor is  
10:12:53 4 for the big doctrinal courses around the bar. I  
10:12:58 5 thought criminal law, criminal procedure,  
10:13:00 6 property, torts once.

10:13:03 7 But those are the courses where you  
10:13:04 8 sort of earn your bread and butter and then you  
10:13:06 9 have to negotiate with the dean to get the  
10:13:09 10 interesting courses, right? Indian law and  
10:13:13 11 legal history. They pretty much had to offer  
10:13:15 12 Indian law regularly because students demand it,  
10:13:17 13 it's not quite true of legal history but I  
10:13:20 14 taught it regularly.

10:13:21 15 Q. So I would like to talk a bit  
10:13:22 16 about your visiting professorships and what your  
10:13:26 17 CV also details over the course of your career.  
10:13:28 18 You have held a number of visiting teaching  
10:13:30 19 positions outside of the United States and  
10:13:32 20 fellowships.

10:13:33 21 And your CV indicates that two of  
10:13:36 22 these fellowships brought you to the University  
10:13:37 23 of Saskatchewan?

10:13:39 24 A. Yes.

10:13:41 25 Q. And the first time was in 1994 to



1 1995?

2 A. Yes.

3 Q. Please tell us what you were  
4 doing 1994 to 1995 while at the University of  
5 Saskatchewan?

6 A. Okay. Well, I taught Canadian  
7 Indian law for the first time, although I had  
8 been interested in it and been researching it.  
9 So I taught Canadian Indian law to Canadian law  
10 students. And I taught criminal law, Canadian  
11 criminal law.

12 So I had -- you like actually teaching  
13 the large doctrinal classes because it gives you  
14 a much bigger cross-section of the students.  
15 You've got a very selective student body in  
16 Indian law, a good selection but still it's  
17 selective. So it's really interesting to teach  
18 them both.

19 Q. And were you doing research when  
20 you were in Saskatchewan?

21 A. Yes.

22 Q. Why did you travel to  
23 Saskatchewan to do the research that you were  
24 doing?

25 A. Well, I was in the middle of

10:14:38 1 writing "White Man's Law" when I went to  
10:14:41 2 Saskatchewan, and it may be one of the reasons  
10:14:44 3 that they invited me. It probably was. Because  
10:14:49 4 they are considering candidates for the chair  
10:14:51 5 and they want people doing interesting stuff in  
10:14:54 6 relationship to what is going on there.

10:14:55 7 So I was -- and for me the access to a  
10:14:59 8 Canadian law library is invaluable if you live  
10:15:01 9 in New York. So it was a good chance for me to  
10:15:05 10 do that research.

10:15:07 11 Plus, my work is very archival and the  
10:15:10 12 chair carries with it a research budget that  
10:15:12 13 allowed me to travel. So even though ironically  
10:15:15 14 the libraries I -- the archives I use most often  
10:15:22 15 are the archives of Ontario and the National  
10:15:24 16 Archives of Canada, which are closer to New York  
10:15:26 17 City than they are to Saskatchewan, so I had  
10:15:29 18 been working in them all along.

10:15:30 19 So over that time I was able to get to  
10:15:33 20 these libraries to work in Saskatchewan and also  
10:15:35 21 to work in the archives in British Columbia  
10:15:38 22 because I had not worked there.

10:15:44 23 Q. I am going to come back and talk  
10:15:45 24 to you about "White Man's Law", but you  
10:15:48 25 mentioned that you were doing research during

10:15:50 1 that time and you mentioned that it was  
10:15:51 2 supported by funding from the Law Foundation of  
10:15:53 3 Saskatchewan Chair?

10:15:55 4 A. Yes.

10:15:55 5 Q. And you returned to the  
10:15:56 6 University of Saskatchewan in 2012?

10:15:58 7 A. Yes.

10:16:05 8 Q. And at that time your CV  
10:16:05 9 indicates that you're the Law Foundation of  
10:16:07 10 Saskatchewan Chair and Law Incumbent Policy?

10:16:11 11 A. Yes.

10:16:11 12 Q. So what were you researching on  
10:16:12 13 that more recent trip?

10:16:14 14 A. I had -- I've always had been  
10:16:16 15 researching Indian law and policy. And I had --  
10:16:18 16 you know, you have grand ideas and you have less  
10:16:21 17 grand ideas. I had an idea then that I would  
10:16:23 18 write another book, a history of the Indian Act.  
10:16:26 19 I have not done that. I do not intend to do it.

10:16:34 20 Q. Another visiting professorship  
10:16:35 21 that you mention in your CV is that you were a  
10:16:35 22 visiting fellow at the Australian National  
10:16:38 23 University in Canberra in 1997, is that correct?

10:16:43 24 A. I was there twice. I think '97  
10:16:46 25 is the second time.

10:16:47 1 Q. And when was the first time?

10:16:49 2 A. I don't know. I'd have to look  
10:16:50 3 at my CV.

10:16:53 4 Q. I think that I read it was 1992.

10:16:54 5 A. Okay. I do not have the dates  
10:16:56 6 memorized. I have it as 1992 also.

10:17:00 7 Q. And I don't want to turn this  
10:17:02 8 into a test of your memory of dates.

10:17:05 9 A. I have to say, in retirement you  
10:17:07 10 write off a lot of your CV.

10:17:12 11 Q. And what were you researching  
10:17:13 12 while at the Australian National University?

10:17:15 13 A. Well, they were interested in my  
10:17:18 14 work on Indian law, Indigenous rights in the  
10:17:22 15 United States and Canada. Because at that time  
10:17:25 16 Australia is -- the High Court of Australia  
10:17:30 17 comes down with the Mabo decision which  
10:17:33 18 recognizes Aboriginal title in the set of  
10:17:36 19 islands between Queensland and Papua New Guinea  
10:17:43 20 but later extended to Australia generally.

10:17:46 21 And so once the court decided that,  
10:17:49 22 there is a whole range of issues open about what  
10:17:52 23 comes next.

10:17:53 24 And, of course, the United States and  
10:17:55 25 Canada are both -- were both far ahead of

10:17:58 1 Australia in developing Indigenous -- legal  
10:18:02 2 regimes that included Indigenous people or  
10:18:05 3 thinking about Indigenous law.

10:18:09 4 Q. And under your fellowships, you  
10:18:12 5 note that you are a visiting fellow at the  
10:18:13 6 University of New South Wales and Sydney,  
10:18:15 7 Australia in 1986?

10:18:18 8 A. Yes.

10:18:18 9 Q. And what were you researching  
10:18:20 10 when you were undertaking that fellowship?

10:18:21 11 A. I was working on Australian legal  
10:18:24 12 history and thinking about how it was like or  
10:18:26 13 unlike Canadian and American legal history.

10:18:28 14 And about this time I think the number  
10:18:30 15 of I would say younger scholars, because I was  
10:18:33 16 in those days, were starting to be interested in  
10:18:36 17 comparative approaches to Indigenous law and  
10:18:38 18 Indigenous rights. Because we have a common --  
10:18:41 19 we have English common law in common and all  
10:18:44 20 this law in many ways is derivative, even though  
10:18:49 21 each country has its own law and legal culture.

10:18:54 22 Q. You've been a Fulbright scholar  
10:18:57 23 three times over the course of your career, is  
10:18:59 24 that correct?

10:18:59 25 A. Yes.

10:19:00 1 Q. What is a Fulbright scholar?

10:19:06 2 A. Well, a Fulbright scholar is a  
10:19:09 3 Fulbright professor or both. I did both when I  
10:19:12 4 was holding Fulbright. It's the United States  
10:19:15 5 State Department. It's named after the late  
10:19:18 6 Senator J. William Fulbright who was an  
10:19:21 7 internationalist and, you know, a real believer  
10:19:24 8 in the international understanding and education  
10:19:27 9 exchanges to advance world peace.

10:19:33 10 And the Fulbright program works in  
10:19:35 11 both directions. There are hundreds of foreign  
10:19:37 12 scholars in the United States as Fulbright  
10:19:39 13 professors, including Canadians. And then there  
10:19:42 14 are American scholars overseas as Fulbright  
10:19:45 15 professors.

10:19:46 16 And you are, you know -- the processes  
10:19:48 17 differ country by country because you have --  
10:19:53 18 it's a two-stage process where you're selected  
10:19:56 19 by the State Department and then the country has  
10:19:58 20 to approve you or pick you, also select you.

10:20:02 21 So they have to be interested in what  
10:20:04 22 you might do when you get there. And I was just  
10:20:08 23 extremely lucky in getting, you know, really  
10:20:11 24 unique law professor placements.

10:20:14 25 I've taught law in six law schools on

1 four continents. I mean, I did the best I  
2 could. It's daunting, but I feel very good to  
3 have done that.

4 Q. And as a Fulbright scholar where  
5 were you working or placed?

6 A. Okay. The first one was Faculty  
7 of Law and Administration at the MARA Institute  
8 of Technology. MARA is an acronym in Malay -- I  
9 can't say it -- in Shah Alam, a suburb of Kuala  
10 Lumpur. And I taught jurisprudence and  
11 sociology of law there.

12 Jurisprudence is interesting because a  
13 third of our students went straight into the  
14 Magistracy. They have a federal magistrates'  
15 course, like the civil code countries do. So  
16 you, at age 25, become a magistrate out in  
17 the -- far and away. And through your great  
18 judging you work your way to the Supreme Court  
19 over 30 years, if you're good.

20 It's -- so your students, who are  
21 studying jurisprudence, are not as bored as they  
22 might be in the United States because they are  
23 going to be judges soon.

24 Q. So that was in Malaysia?

25 A. Yes.

1 Q. And you had another one that I  
2 want to ask you about and that was in Namibia  
3 from 1995 to 1996?

4 A. Yes.

5 Q. And you were teaching human  
6 rights?

7 A. Human rights law, yes. And  
8 developing a human rights documentation centre.

9 This Fulbright I really tried hard to  
10 get.

11 This is -- for those of you that know  
12 your African history this is four years after  
13 independence, after a war. There are land mines  
14 all over the north; in a country that had been  
15 occupied by South Africa and denied education to  
16 black people, which means there was no law  
17 school.

18 They created a law school in 1994. I  
19 was not there. But the first year from '94, was  
20 the second year in '95 when I was there.

21 And because Namibia has a unique legal  
22 history, having been created by the United  
23 Nations, they wanted to incorporate culture of  
24 human rights in the law of the country in from  
25 the beginning. And they wanted their students



10:22:35 1 to be -- seriously understanding human rights so  
10:22:38 2 that it could be applied throughout the legal  
10:22:40 3 system.

10:22:41 4 We had 14 students maybe, 16. And  
10:22:48 5 they -- we had to teach them, you know -- we had  
10:22:51 6 to develop Indigenous human rights in the  
10:22:53 7 context of Namibian rights, which means  
10:22:56 8 Indigenous rights, rights for women,  
10:22:59 9 environmental rights.

10:23:01 10 Namibia is the only constitution -- I  
10:23:02 11 mean first constitution in the world that has  
10:23:05 12 environmental rights included in the  
10:23:08 13 constitution. Some really interesting things.

10:23:10 14 And there is no law; as of 1991 when  
10:23:12 15 it became independent there was no law, except  
10:23:15 16 they had a saving clause incorporating South  
10:23:18 17 African law because you can't have no law. So  
10:23:20 18 it's sort of anomalous because you can't really  
10:23:22 19 have South African law either because of  
10:23:25 20 apartheid.

10:23:28 21 But they had a constitution and a  
10:23:29 22 saving clause and that was what we had to work  
10:23:32 23 with.

10:23:33 24 Q. Can you tell me about how, if at  
10:23:34 25 all, this is related to your focus on Indigenous

1 land rights and colonial policy?

2 A. Well, it partly stems from the  
3 work I started to do in Australia. First you  
4 have the United States and then you have Canada,  
5 in my view, and then you work in Australia a  
6 little bit or a lot, I mean three times.

7 And it evolves by the 1990s that  
8 Indigenous rights are basic human rights when  
9 you're talking about, you know, poor people  
10 being incorporated into some of these countries.

11 And, you know, that can be especially  
12 true in Africa where you get more poverty and  
13 less law. And the law is, you know, whatever it  
14 is. You could call it colonial law, imposed  
15 law, you know, sort of borrowed legal regimes.

16 So it was, you know, challenging to  
17 think about this and teach it.

18 And then teaching human rights, the  
19 modern way of teaching law is you get your  
20 students out there. You don't want the dry  
21 classroom stuff.

22 So we sent our students out to their  
23 communities to find out what the human rights  
24 issues were. And land rights, Indigenous land  
25 rights and women's rights were overwhelmingly

1 the issues students came back with.

2 And, you know, starting from zero I  
3 would know nothing about this except, you know,  
4 you can read. And you study and you ask around  
5 and talk to people. And I was able to write  
6 about, you know, Indigenous land rights under  
7 the Namibian Constitution by the end of the  
8 year.

9 Q. Thank you. So I'd like now to  
10 shift and ask you about your research and  
11 publications that starts at page 3 of your CV.  
12 As a researcher what general approach, what  
13 discipline do you identify with?

14 A. Legal history.

15 Q. And what kinds of questions are  
16 you interested in answering as a legal  
17 historian?

18 A. If I could say a word about legal  
19 history? As it evolved over 40 years many  
20 scholars would commonly make a distinction  
21 between the old and new legal history. And the  
22 old legal history, which is what I would have  
23 learned in law school mostly, is a history of  
24 judging -- judges, statutes, great legal events,  
25 and I mean that kind of thing.

10:26:20 1 Younger scholars beginning, beginning  
10:26:23 2 '70s, '80s, '90s, started to think about how  
10:26:30 3 different groups of ordinary people fit into the  
10:26:33 4 law, women probably coming up first. Where are  
10:26:39 5 women in legal history? And then in America  
10:26:43 6 blacks and slavery. Where is slavery in legal  
10:26:46 7 history? Some kind of an accident?

10:26:51 8 And then Indigenous legal history  
10:26:53 9 comes very quickly in there, Hispanics, poor  
10:27:00 10 people. Where the evolution of a bankruptcy  
10:27:01 11 law, for example, which is large in the  
10:27:03 12 scholarship of Elizabeth Warren, you know,  
10:27:05 13 looking at bankruptcy law from the bottom up,  
10:27:09 14 poor people's bankruptcy, poor people's debt.

10:27:13 15 So a whole bunch of ideas came out of  
10:27:15 16 that. And I started to look at Indigenous law  
10:27:24 17 and Indigenous people in relation to the law in  
10:27:26 18 that context. And so it came directly out of I  
10:27:32 19 suppose the '80s and '90s and that -- I'm  
10:27:36 20 influenced by the scholarship going on around  
10:27:38 21 me.

10:27:41 22 Q. So I'd like to ask you now about  
10:27:42 23 your research that you mentioned earlier on the  
10:27:45 24 development of law enforcement institutions.  
10:27:48 25 You mentioned that you did that as part of your

10:27:50 1 dissertation?

10:27:51 2 A. Yes.

10:27:51 3 Q. You have written a book called  
10:27:53 4 "Policing a Class Society: The Experience of  
10:27:56 5 American Cities, 1865 to 1915"?

10:28:00 6 A. Yes.

10:28:01 7 Q. And it was published in 1983?

10:28:03 8 A. Yes.

10:28:04 9 Q. So this -- what was the question  
10:28:07 10 that you were trying to answer in this book?

10:28:09 11 A. Okay. You have to -- first of  
10:28:11 12 all, we -- no one likes -- it's hard to talk  
10:28:16 13 about your doctoral dissertation 40 years later.

10:28:23 14 The police were a big issue in the  
10:28:27 15 1960s and '70s when I was in law school.  
10:28:31 16 And there was a big debate about the police, you  
10:28:34 17 know, how they were structured, whose interest  
10:28:39 18 they served. You have got racism and student  
10:28:43 19 unrest and all those things.

10:28:45 20 And in the context of the 1960s and  
10:28:51 21 '70s, you know, you're arguing basically just  
10:28:54 22 some version of politics. Looking at the roots  
10:28:56 23 of things is a way to get through that.

10:28:59 24 So Buffalo was a unique situation.  
10:29:04 25 First of all, it's an opportunity because you

10:29:06 1 can see from my CV that I was working there  
10:29:08 2 without a dissertation, which is an  
10:29:09 3 uncomfortable position to be in at age 25. And,  
10:29:14 4 secondly, Buffalo was a unique American city in  
10:29:20 5 that it boomed in the 1840s and '50s with  
10:29:26 6 the Erie Canal; they did a decade before that.

10:29:31 7 And for those in -- police histories  
10:29:34 8 in general at that time, the London bobbies, the  
10:29:38 9 Boston police, the New York police, the classic  
10:29:41 10 police histories talk about how first you have  
10:29:43 11 night watchman, but then you have an urban  
10:29:46 12 society that becomes less stable because there  
10:29:48 13 are different kinds of people living there.

10:29:50 14 So instead of having a reactive force,  
10:29:52 15 like night watch men who are called to protect  
10:29:56 16 the property rights of the people who employ  
10:29:59 17 them, you needed a public force that would  
10:30:02 18 intervene in human events and "police", in  
10:30:04 19 quotation marks, the structure of the urban  
10:30:06 20 society.

10:30:07 21 So we get the idea of a police  
10:30:09 22 institution that is a completely different kind  
10:30:11 23 of institution than exists before. And then how  
10:30:14 24 do you structure urbanism? And you have got  
10:30:16 25 Buffalo there which is a classic example.

10:30:19 1 So I went to the archives, my first  
10:30:22 2 great archives in Buffalo. And for those of you  
10:30:24 3 that understand archives, all the police records  
10:30:28 4 from 1872 on go there. In fact I believe I  
10:30:31 5 started in 1872 because that's where the records  
10:30:34 6 started.

10:30:35 7 So you have piles -- I mean feet and  
10:30:42 8 feet and piles and piles of records and you read  
10:30:42 9 through them. This is before archival  
10:30:47 10 databases. You get the actual files. You put  
10:30:50 11 on -- well, sometimes they ask you to wear white  
10:30:53 12 gloves other times they don't. And you sit  
10:30:55 13 there for months with note cards.

10:30:58 14 I mean, it is -- it was a different  
10:31:00 15 world, and I did that. I finished the  
10:31:02 16 dissertation in a couple of years. And it was  
10:31:05 17 published, and an expanded version. So I worked  
10:31:10 18 on it because it was an important question and  
10:31:13 19 also because the data was there.

10:31:15 20 Q. And did you look at the question  
10:31:16 21 of how law enforcement worked and looking at how  
10:31:19 22 the police --

10:31:20 23 A. Yes. That's -- and I believe, I  
10:31:22 24 don't have the book in front of me, but I  
10:31:24 25 believe I had chapters dealing with different

10:31:26 1 factors: Ordinary crime, vagrancy, saloons and  
10:31:30 2 the alcohol problem, that kind of thing.

10:31:34 3 So I broke down different aspects of  
10:31:36 4 police enforcement, police law enforcement over  
10:31:39 5 30 years, seeing how it had changed. You've  
10:31:41 6 got -- I had all the court records.

10:31:43 7 So you are able to look at -- I mean,  
10:31:45 8 who the police arrest, what the courts do with  
10:31:47 9 it, what the newspaper says about it, and then  
10:31:51 10 all of the -- you know, any first-person or  
10:31:54 11 secondary accounts that are written about it.

10:31:57 12 And you get lucky breaks. Like Jack  
10:32:00 13 London gets arrested for vagrancy and locked up  
10:32:05 14 in the Erie County jail and writes about it.  
10:32:07 15 You feel good that day. You know, it's a gift.  
10:32:09 16 You don't find that much. But you're able to  
10:32:11 17 say a lot about vagrancy because Jack London  
10:32:16 18 could describe being arrested in Buffalo and  
10:32:20 19 locked up quite well.

10:32:21 20 And you work with that kind of  
10:32:23 21 material between the archives and everything  
10:32:24 22 else you can find.

10:32:26 23 Buffalo, in a dissertation you want a  
10:32:28 24 confined universe because if you don't, you  
10:32:30 25 can't finish it and you get in trouble.



1 As you get your dissertation  
2 published, your tenure, you work with bigger  
3 questions and bigger archives.

4 So the book actually was not the  
5 dissertation. The dissertation was about half  
6 the book. My editor said I needed to broaden it  
7 to make it publishable. So I went and did  
8 archival work in Cleveland, Toledo, Detroit,  
9 Chicago and Milwaukee I believe. I mean that's  
10 the list. I think St. Paul too.

11 And you would -- you wind up with a  
12 chapter in each of those cities so that you're  
13 talking about the industrial revolution in the  
14 midwest, essentially, or the Great Lakes area,  
15 which makes it a more saleable and generalizable  
16 thesis.

17 THE COURT: Counsel, I should just say  
18 I'm losing a bit of track of where this is  
19 going. So maybe you can help me with your  
20 questions so I understand where this is going.

21 MS. GUIGRUIS: Absolutely, Your  
22 Honour. I just wanted to establish that  
23 Professor Haring has looked at law enforcement.

24 THE COURT: I understand that point,  
25 but we're well afield of that at the moment so I

1 want to get back to what we're trying to do.

2 MS. GUIGRUIS: Thank you, Your Honour.

3 BY MS. GUIGRUIS:

4 Q. I want to turn to your research  
5 on the subject of colonial law and policy. What  
6 areas or subject matters of colonial law have  
7 you researched?

8 A. Almost -- I mean as a teacher of  
9 history I have read many books and archives.  
10 Almost all my writing, I believe all my writing  
11 is about Indigenous people.

12 Q. And in what regions of Canada  
13 have you studied this-- the colonial land and  
14 policy on Indigenous peoples? What regions of  
15 Canada?

16 A. I tried to do it Canada-wide. I  
17 have worked in the Yukon. I've worked in the  
18 Northwest Territories.

19 THE COURT: I'm sorry, I don't  
20 understand the question and I need to. Are you  
21 asking this gentleman where the Indigenous  
22 people that he studies are from or where he  
23 personally has gone to study them?

24 MS. GUIGRUIS: What regions of Canada  
25 he has focused on in his studies.

10:34:52 1 THE COURT: Yes, focused on. Not  
10:34:54 2 where he has gone.

10:34:55 3 MS. GUIGRUIS: Yes, my apologies.

10:34:55 4 THE COURT: Perhaps you could --

10:34:56 5 THE WITNESS: I was trying to list the  
10:34:57 6 archives I worked --

10:34:59 7 THE COURT: Okay. I'm going to ask  
10:35:00 8 you to listen more carefully to the question. I  
10:35:02 9 didn't understand it, but the question is, what  
10:35:04 10 were you focusing on, not where did you go and  
10:35:06 11 what did you read.

10:35:08 12 THE WITNESS: Well, I was trying to  
10:35:12 13 write a legal history of Indians' Canadian law  
10:35:12 14 Canada wide. It may have been too bold an  
10:35:14 15 undertaking but that's what I was trying to do,  
10:35:15 16 and I worked from one -- from Nova Scotia to  
10:35:25 17 Vancouver Island and into the north.

10:35:27 18 BY MS. GUIGRUIS:

10:35:28 19 Q. When you have undertaken this  
10:35:29 20 research in Canada on Indigenous peoples, to  
10:35:33 21 what extent have you studied the role of law  
10:35:35 22 enforcement?

10:35:38 23 A. Well, I mean, one of the first  
10:35:40 24 things that -- when you look at the earliest  
10:35:44 25 Indigenous -- Indian, Indigenous native cases

10:35:47 1 you get many criminal cases that involve arrest.  
10:35:50 2 Because that's how you -- that's often how poor  
10:35:53 3 people come in contact with legal systems.

10:35:56 4 There are, you know, many affirmisms  
10:35:58 5 (sic) about that in criminal justice, but the  
10:36:01 6 police are a legal institution that are out  
10:36:03 7 there enforcing law in a way far beyond the  
10:36:05 8 reach of judges.

10:36:07 9 Q. I'd like to ask you about your  
10:36:09 10 book "White Man's Law" that you mentioned  
10:36:12 11 before. It was published in 1998 by the Osgoode  
10:36:17 12 Society for Canadian Legal History, correct?

10:36:19 13 A. Yes.

10:36:20 14 Q. Very briefly, can you tell us  
10:36:21 15 what "White Man's Law" is about?

10:36:34 16 A. Briefly. It was -- it is,  
10:36:35 17 because it exists -- it is a history of -- a  
10:36:38 18 legal history of how the Indigenous people of  
10:36:41 19 Canada, the native people of Canada, were  
10:36:43 20 incorporated into 19th century Canadian  
10:36:46 21 jurisprudence.

10:36:49 22 Q. What regions of the country does  
10:36:51 23 White Man's Law focus on?

10:36:53 24 A. There are -- the core of it, half  
10:36:58 25 the book probably is Ontario or Upper Canada;

10:37:05 1 then there are chapters on Atlantic Canada, the  
10:37:08 2 Prairie, British Columbia. And a few other -- a  
10:37:18 3 chapter, for example on witch killings that was  
10:37:24 4 essentially Manitoba, but -- Manitoba and  
10:37:27 5 Ontario. So there are a few chapters that  
10:37:29 6 involve several areas, but that's the structure  
10:37:31 7 of it.

10:37:32 8 Q. So I would like to open up S0751.  
10:37:36 9 This is an excerpt of "White Man's Law" which  
10:37:38 10 includes the introduction, first chapter, second  
10:37:42 11 chapter and third chapter.

10:37:48 12 So, Your Honour, I would like to add  
10:37:50 13 this excerpt of "White Man's Law" as the next  
10:37:56 14 exhibit.

10:37:57 15 THE COURT: Mr. Registrar.

10:38:00 16 THE REGISTRAR: Exhibit number 4271.

10:38:02 17 EXHIBIT NO. 4271: Excerpt of the book  
10:38:04 18 "White Man's Law", authored by Sidney  
10:38:04 19 Harrington; introduction, first  
10:38:04 20 chapter, second chapter and third  
10:38:04 21 chapter.

10:38:05 22 THE COURT: Thank you.

10:38:05 23 BY MS. GUIGRUIS:

10:38:06 24 Q. Can we turn to the bottom of page  
10:38:08 25 7, which is PDF image number 21? And at the

10:38:17 1 bottom about halfway through that paragraph it  
10:38:18 2 starts off by saying:

10:38:21 3 "Traditional legal history, the  
10:38:23 4 history of judges, courts and cases  
10:38:24 5 has given way to a new legal history  
10:38:24 6 focusing on the social impact of law  
10:38:27 7 on the various peoples and processes  
10:38:29 8 that make up Canada."

10:38:32 9 Can you please explain what this  
10:38:34 10 means?

10:38:34 11 A. I think I said something about  
10:38:37 12 that earlier, that we -- there are at least  
10:38:41 13 several different ways of writing legal history,  
10:38:43 14 but one is to look at how law structured  
10:38:46 15 relationships between the Canadian state and the  
10:38:50 16 peoples that make up Canada.

10:38:55 17 Q. Chapter two, which has been added  
10:38:57 18 as part of this excerpt, is a case study of the  
10:39:00 19 Six Nations of the Grand River tract, correct?

10:39:03 20 A. Yes.

10:39:04 21 Q. Can you tell us briefly about the  
10:39:05 22 argument that you make in this chapter?

10:39:08 23 A. Okay. Trying to be brief. These  
10:39:17 24 are complicated arguments. The gist of the  
10:39:20 25 argument is that the relationship between

1 Canadian law and native people starts with Grand  
2 River, even though it's not the first thing that  
3 happened.

4 Because you get, at Grand River, two  
5 things coming together, two forces coming  
6 together. You get a large and relatively  
7 experienced and educated Native American people  
8 coming to Canada as allies of the Crown with  
9 loyalists from New York State.

10 And they wind up settling with other  
11 loyalists, just south of -- outskirts -- you  
12 know, south of Toronto. So they're settling,  
13 not in the hinterlands like where many  
14 Indigenous people are, but settling near the  
15 heart of settled Canada, colonially-settled  
16 Canada.

17 And it immediately becomes a  
18 complicated legal relationship because the Six  
19 Nations Iroquois assert legal rights against the  
20 Crown and the Crown has to respond. And this  
21 isn't clear how the Crown should respond in  
22 the -- as Canada is itself being created. So  
23 it's, for a legal historian, a great window into  
24 how it all begins.

25 Q. And you received a National

1 Endowment for the Humanities Fellowship to  
2 support the research in this book, correct?

3 A. Yes.

4 Q. And what is the National  
5 Endowment for the Humanities?

6 A. The National Endowment for the  
7 Humanities is, again, a United States government  
8 agency that funds major scholarly work in the  
9 humanities, including history and legal history.

10 Q. You also noted in your CV that  
11 the research for the book was also supported by  
12 the Lloyd Lewis fellowship from the Newberry  
13 Library?

14 A. Yes.

15 Q. And also several grants from the  
16 Canadian embassy?

17 A. Yes, Canadian studies grants from  
18 the Canadian embassy in Washington. They were  
19 very generous.

20 Q. And this book was a finalist for  
21 the Donner prize in 1998?

22 A. Yes.

23 Q. What is the Donner prize?

24 A. Donner prize is a prize for the  
25 best book on Canadian public policy awarded each



1 year. And I was pleased that it was considered.  
2 It did not win.

3 I was pleased it was considered as a  
4 book in public policy and not legal history.  
5 Because those of us who write about legal  
6 history want our writing to be relevant in terms  
7 of policy. It is not dead, old stuff. It is  
8 people living their lives today under the  
9 influence of a legal -- of said legal laws and  
10 legal institutions.

11 Q. I want to turn to another book  
12 you wrote called "Crow Dog's Case: American  
13 Indian Sovereignty, Tribal Law, and United  
14 States Law in the Nineteenth Century" which was  
15 published in 1994.

16 A. Yes.

17 Q. I'd like to turn up SC1162. This  
18 is an excerpt of "Crow Dog's Case," chapters 1  
19 and chapter 7 to 9. Your Honour, I would like  
20 to add this as the next exhibit.

21 THE COURT: Mr. Registrar.

22 THE REGISTRAR: Exhibit 4272.

23 EXHIBIT NO. 4272: Excerpt from the  
24 book "Crow Dog's Case: American Indian  
25 Sovereignty, Tribal Law, and United

10:42:35 1 States Law in the Nineteenth Century",  
10:42:35 2 authored by Sidney Harrington,  
10:42:35 3 chapters 1 and chapter 7 to 9;  
10:42:35 4 Document SC1162.  
10:42:36 5 THE COURT: Thank you.  
10:42:36 6 BY MS. GUIGRUIS:  
10:42:43 7 Q. Professor Harring, can you tell  
10:42:44 8 the Court in a few sentences what is the focus  
10:42:46 9 of this book?  
10:42:48 10 A. Um, this is written before --  
10:42:52 11 well -- it's a different book than "White Man's  
10:42:56 12 Law." It focuses more specifically on one  
10:43:01 13 doctrinal area of American Indian law, which is  
10:43:04 14 the question of sovereignty, which is -- you  
10:43:10 15 know, in the Marshall trilogy John Marshall  
10:43:14 16 attributes the status to American Indians called  
10:43:17 17 "domestic dependent nations", which is a bit --  
10:43:22 18 well, it's very contradictory. But the -- it  
10:43:26 19 implies some idea of sovereignty under the  
10:43:31 20 umbrella of American power.  
10:43:35 21 That's not unheard of in the world. I  
10:43:38 22 was -- you know, it was common understanding in  
10:43:42 23 Europe. Greenland today might be an example of  
10:43:45 24 this where Greenlanders have sovereignty in  
10:43:53 25 domestic affairs, but Denmark controls defence.

1 And we have not worked that out in the United  
2 States. We still have sovereignty cases  
3 regularly in American courts, I would say every  
4 year.

5 And the tribes still assert  
6 sovereignty routinely. And one classic example  
7 in the United States and Canada is that American  
8 Indians have the right to their own legal  
9 institutions and operate court systems and  
10 police systems on the reserves; they claim that  
11 their jurisdiction is concurrent with the United  
12 States.

13 So if you hypothetically committed a  
14 car theft in the Navajo Nation, it's -- the  
15 federal government would take jurisdiction under  
16 the Major Crimes Act, but if they drop the  
17 charges or you were acquitted, the Navajo Nation  
18 might try you again; and double jeopardy doesn't  
19 apply because it's two sovereignties. I  
20 don't -- anyway.

21 So sovereignty is still there. And I  
22 was trying, again, to show how that sovereignty  
23 was developed in several hundred cases so that  
24 it doesn't come out of nowhere.

25 It's shaped by native people in

1 relation to the American legal system.

2 Q. So is it fair to say that it's  
3 looking at the question of law enforcement in  
4 the U.S. in that context?

5 A. Yes.

6 Q. And the research for "Crow Dog's  
7 Case" was also funded by the National Endowment  
8 for the Humanities?

9 A. Yes.

10 Q. So in addition to your books, I  
11 want -- I counted on your CV that you've  
12 published about 34 articles and 17 book  
13 chapters. I won't go through them all, but I  
14 want to ask you about three pieces as a sample  
15 in relation to what we're talking about today.

16 A. Okay.

17 Q. The first piece I want to discuss  
18 is a book chapter called "There Seemed To Be No  
19 Recognized Law: Canadian Law and the Plains  
20 Indian Nations", page 6 of your CV.

21 We can bring up an excerpt at SC1110.  
22 It was published in a collection called "Laws  
23 and Societies in the Canadian Prairie West,  
24 1670-1940." Can you give us a brief summary of  
25 this article?

10:46:24 1 A. Yes. This was for a little  
10:46:34 2 history conference in Calgary. And the theme  
10:46:38 3 was, again, how was western Canadian legal  
10:46:40 4 history distinct or different from the rest of  
10:46:45 5 Canadian legal history? Because, of course, of  
10:46:47 6 the unique social characteristics of the  
10:46:51 7 Prairies.

10:46:52 8 And the foundational myth of law on  
10:46:55 9 the Prairie is that in reaction to the  
10:47:03 10 difficulties of settling Ontario, the Canadian  
10:47:08 11 government was determined that law should go  
10:47:10 12 ahead of settlement.

10:47:12 13 So the Royal Canadian Mounted Police,  
10:47:15 14 in its first iterations, was created and sent  
10:47:17 15 ahead of settlement to make sure that Indians  
10:47:26 16 were settled, help with surveys, all of that.

10:47:29 17 And, therefore, we get an orderly  
10:47:32 18 settlement of the Prairies that contrasts with  
10:47:40 19 Ontario. It's more complicated than that but  
10:47:43 20 this took on that question or that relationship.

10:47:48 21 Q. I'm not sure if you mentioned  
10:47:50 22 this, but what time period did the article focus  
10:47:53 23 on?

10:47:54 24 A. I haven't looked at it in years.  
10:47:55 25 I believe the 1870s and '80s, maybe into the

10:48:00 1  
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10:48:41 23  
10:48:42 24  
10:48:45 25

'90s.

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

THE COURT: Counsel, doesn't page 1 say what the time period is? You're on page 2 right now. Did I read that incorrectly?

MS. GUIGRUIS: Sorry?

THE COURT: Can you go back to page 1 of the PDF.

MS. GUIGRUIS: Oh, that's the title of the book.

THE COURT: So somewhere within that broad band.

MS. GUIGRUIS: Yes, and then his article is focused on a particular --

THE COURT: Thank you. Mr. Registrar.

THE REGISTRAR: Exhibit number 4273.

EXHIBIT NO. 4273: Excerpt from a book chapter called "There Seemed to Be No Recognized Law": Canadian Law and the Plains Indian Nations".

BY MS. GUIGRUIS:

Q. The next article I want to discuss is called "The Rich Men of the Country, Canadian Law in the Land of the Copper Inuit,

1 1914-1930".

2 A. Yes.

3 Q. And that was published in the  
4 Ottawa Law Review in 1989?

5 A. Yes.

6 Q. So if we turn up SC1109? This  
7 was a peer-reviewed article, correct?

8 A. Yes.

9 Q. And in the introduction of the  
10 article you describe this piece as "an  
11 ethnolegal history of the imposition of Canadian  
12 law on the Copper Inuit people". What do you  
13 mean by that?

14 A. Okay, this followed -- I went  
15 north with a Canadian, a flying court to  
16 Coppermine and some other cities and observed  
17 trials and talked to legal officials.

18 And it was clear that in order to  
19 understand what was going on there in 1990,  
20 1989, 1990, you needed to pay attention to the  
21 traditional law of the Inuit people who lived  
22 there, that they're still living in their law.  
23 They have not given it up.

24 It's a -- every situation is -- every  
25 Indigenous situation is unique depending on

10:50:18 1 history and power and colonialism and things  
10:50:24 2 like that. And you quickly sense in the Arctic  
10:50:27 3 that it's unique.

10:50:28 4 And I wondered, you know, what does  
10:50:30 5 the existence of Inuit law underneath or beside  
10:50:37 6 Canadian law, however you want to juxtapose it,  
10:50:40 7 work? And how do these things get sorted out?

10:50:43 8 So I started to look at Inuit law. I  
10:50:45 9 went to the archives in Ottawa, which, again,  
10:50:48 10 had an -- and Yellowknife, which again had the  
10:50:52 11 cases. These cases were in thick files in the  
10:50:55 12 archives.

10:50:56 13 So I got the cases out. And you're  
10:50:58 14 dealing with one of the classic Canadian dramas,  
10:51:01 15 where a Mountie and a dog sled goes six hundred  
10:51:06 16 miles to make an arrest for a crime. And then,  
10:51:09 17 you know, brings the Inuit back and they, you  
10:51:12 18 know, they try them, applying laws best they can  
10:51:16 19 in extremely difficult conditions.

10:51:19 20 So I tried to write about that, trying  
10:51:21 21 again to explore the edges. And the word  
10:51:24 22 "ethnolegal history" is, I was taking into  
10:51:28 23 account how Indigenous law -- the word comes  
10:51:31 24 from ethnography -- how Indigenous law meets  
10:51:34 25 Canadian law and they are intertwined somehow.



1 Q. Your Honour, I would like to add  
2 this article as the next exhibit.

3 THE REGISTRAR: Exhibit number 4274.

4 EXHIBIT NO. 4274: Article titled "The  
5 Rich Men of the Country, Canadian Law  
6 in the Land of the Copper Inuit,  
7 1914-1930".

8 BY MS. GUIGRUIS:

9 Q. The final article I want to ask  
10 you about is titled "The Six Nations  
11 Confederacy, Aboriginal Sovereignty, and Ontario  
12 Aboriginal Law, 1790-1860"?

13 A. Yes.

14 Q. This was published in a 1998  
15 volume entitled "Earth, Air, Water, Fire,  
16 Studies in Canadian Ethnohistory". The document  
17 number is SC1111.

18 Can you briefly tell us what this  
19 article argues?

20 A. Okay, again I would think -- I  
21 mean, I like to think that my work is both  
22 complicated and simple at the same time. I  
23 mean, you're dealing with very complicated  
24 themes, trying to untangle them.

25 And this is derived from a chapter in

1 "White Man's Law". Some of the research, in  
2 other words, is overlapping. And I presented  
3 this topic at a conference that led to the book.

4 But, again, I'm trying to look at --  
5 and the Aboriginal sovereignty comes from -- the  
6 Six Nations believed they were sovereign. They  
7 believed they had cut a deal as allies of the  
8 Crown with, you know, Canadian authorities. And  
9 they acted that way, acted under that  
10 assumption.

11 And it quickly led to conflict. And I  
12 tried to, you know, lay out some the cases, lay  
13 out some of the problems, and, you know, as of  
14 1860, I mean this is still not resolved. But,  
15 again, trying to cast some light on it by  
16 looking at the origins.

17 Q. How, if at all, does the article  
18 then address the enforcement of colonial laws  
19 and policies in relation to the land?

20 A. One of the big issues up front is  
21 that they wind up with a significant squatter  
22 problem almost from the start.

23 So they think they own their land.  
24 The land is very valuable; it's in settled  
25 territory so it's in close proximity to many

10:54:09 1 white settlers, I doubt many nonwhite settlers.  
10:54:15 2 And this conflict came to Canadian courts very  
10:54:19 3 quickly, I mean in the early parts of the 19th  
10:54:21 4 century.

10:54:23 5 Q. Your Honour, I would like to add  
10:54:24 6 this article as the next exhibit.

10:54:27 7 THE COURT: Mr. Registrar.

10:54:28 8 THE REGISTRAR: Exhibit number 4275.

10:54:30 9 EXHIBIT NO. 4275: Article titled "The  
10:54:31 10 Six Nations Confederacy, Aboriginal  
10:54:31 11 Sovereignty, and Ontario Aboriginal  
10:54:31 12 Law, 1790-1860".

10:54:34 13 BY MS. GUIGRUIS:

10:54:34 14 Q. So we started talking about your  
10:54:36 15 research, your early research about the  
10:54:39 16 evolution of policing and law enforcement. Do  
10:54:43 17 you see a connection between that early work and  
10:54:45 18 colonial land policy and Indigenous rights?

10:54:49 19 A. Criminal law is running --  
10:54:49 20 criminal law and criminal law enforcement is  
10:54:51 21 running through it. So you also -- it's  
10:54:56 22 axiomatic that any court case, a reported case  
10:55:02 23 requires that the case winds up in front of a  
10:55:07 24 judge somehow. And that there are many ways to  
10:55:10 25 get there, of course, but one of them involves

10:55:12 1 police and sheriffs and jails and that process.

10:55:16 2 And you can see it. Quite early in  
10:55:18 3 the 19th century you have -- you sit in  
10:55:21 4 Brantford or in the Ontario archives, the  
10:55:23 5 judges' bench books. These judges are riding  
10:55:25 6 circuit in Brantford, and they are writing down  
10:55:29 7 what cases they heard and what the dispositions  
10:55:33 8 were.

10:55:33 9 It's quite imperfect and a lot of the  
10:55:36 10 records are missing, but you can get a sense of  
10:55:39 11 what's going on when native people and white  
10:55:41 12 people meet at Brantford in the, say, 1820s.

10:55:46 13 Q. So those are my questions with  
10:55:48 14 respect to your qualifications, Professor  
10:55:51 15 Haring. And I would like to pull up our  
10:55:54 16 proposed qualification which is SC1168.

10:55:58 17 THE COURT: Did you say 1168?

10:55:58 18 MS. GUIGRUIS: Yes, 1168. I would  
10:56:08 19 like to qualify Professor Haring as a  
10:56:12 20 sociologist and legal historian with expertise  
10:56:16 21 in the history of the interaction of Indigenous  
10:56:19 22 peoples and common law legal systems, and  
10:56:22 23 capable of giving opinion evidence on colonial  
10:56:28 24 land policy, land settlement regimes and land  
10:56:31 25 settlement practices, and land sales in the late

10:56:35 1 18th and the 19th century in what is now  
10:56:37 2 Ontario, and potential and actual law  
10:56:41 3 enforcement in relation to Indigenous lands in  
10:56:43 4 the late 18th and the 19th century in what is  
10:56:46 5 now Ontario.

10:56:47 6 THE COURT: Does Canada wish to ask  
10:56:49 7 this witness questions about his credentials?

10:56:53 8 MR. BEGGS: Yes, I do, Your Honour.

10:56:56 9 THE COURT: Please go ahead,  
10:56:56 10 Mr. Beggs.

10:56:59 11 CROSS-EXAMINATION BY MR. BEGGS

10:57:02 12 ON QUALIFICATIONS:

10:57:27 13 Q. Good morning, Professor Harring,  
10:57:29 14 I'm going to move ahead while my colleague is  
10:57:32 15 setting up here.

10:57:33 16 A. Good morning.

10:57:36 17 Q. I believe you were called to the  
10:57:37 18 bar in Wisconsin in 1972, is that correct?

10:57:41 19 A. Yes.

10:57:41 20 Q. And did you practice as a lawyer  
10:57:42 21 there?

10:57:44 22 A. I have. I have practiced -- I  
10:57:46 23 have taught most of my life, as my CV makes  
10:57:47 24 clear. I have always had a licence and I've  
10:57:52 25 always handled cases pro bono, a mixture of

1 criminal and property usually; but I've  
2 practiced -- I was also admitted in New York in  
3 1990 so I've kept a licence for exactly that  
4 purpose.

5 Q. And have you been called to the  
6 bar in any Canadian province?

7 A. No.

8 Q. Now, you said that you taught  
9 criminal law at the University of Saskatchewan  
10 in 1994?

11 A. Yes.

12 Q. That was one term? It was a  
13 single class?

14 A. Taught it all year.

15 Q. A full year?

16 A. The full year. It was a  
17 full-year course.

18 Q. And was that a first-year course?

19 A. You know as I'm thinking -- it  
20 was a first-year small section course, that was  
21 their structure. So I'm hoping I'm right when I  
22 said it was a full year. I remember it was a  
23 full year.

24 It's possible it wasn't but I remember  
25 it as a full year, a first-year course.

1 Q. And did you have any knowledge of  
2 Canadian criminal law before teaching that?

3 A. No. Honestly, I'm a common law  
4 scholar.

5 Q. Sorry?

6 A. I'm a common law scholar. And I  
7 arrived at the university and the dean asked me  
8 if I could teach a course.

9 And one of the great things -- I'm a  
10 life-long learner. And as a common law scholar  
11 and a professor I thought, I can read these  
12 statutes. I can read the cases and keep ahead  
13 of first year students and do a professional  
14 job; because if I couldn't have done it I  
15 wouldn't have done it.

16 And I had -- there were a couple of  
17 professors teaching other sections who I could  
18 ask questions to. And the dean asked me to, as  
19 I said, and I did it. And I hope I did a good  
20 job.

21 Q. And was Canadian criminal law  
22 significantly different than American?

23 A. Yes, it's -- American criminal  
24 law is different state to state. We have model  
25 penal code states and states that are more

10:59:54 1 rooted in the common law. Canada has a penal  
10:59:57 2 code. So I had to use the Canadian penal code  
10:59:59 3 and the cases that had -- were major  
11:00:04 4 interpretations of the Canadian penal code.

11:00:08 5 Q. Now, I believe I saw somewhere  
11:00:14 6 that you've actually written four books, is that  
11:00:16 7 correct?

11:00:19 8 A. It depends -- it could depend on  
11:00:22 9 what you count as a book. I have some reports.  
11:00:24 10 I would say three books, but there are other  
11:00:27 11 documents in here that are, for example, reports  
11:00:29 12 that I don't count as books. Because a book for  
11:00:32 13 me is a major university press, monograph, or a  
11:00:36 14 major commercial press that is refereed and has  
11:00:40 15 academic integrity behind it.

11:00:43 16 Q. And the three books that you're  
11:00:44 17 referring to are the ones my friend took you  
11:00:46 18 through?

11:00:47 19 A. Yes.

11:00:47 20 Q. The 1983 policing book, the 1994  
11:00:51 21 "Crow Dog's Case" and the 1994 "White Man's  
11:00:56 22 Law"?

11:00:56 23 A. Yes, and the "Buffalo Police",  
11:00:57 24 those three.

11:00:57 25 Q. The "Buffalo Police" is your



11:00:59 1 dissertation?

11:01:00 2 A. Yes, it is published by Rutgers  
11:01:02 3 University Press, five years later as a  
11:01:04 4 university press monograph.

11:01:05 5 Q. And that is the 1983 book on  
11:01:08 6 policing?

11:01:09 7 A. Yes.

11:01:09 8 Q. And now a second edition of your  
11:01:11 9 book just came out in 2017, is that correct?

11:01:14 10 A. Okay, yes. It's the same book  
11:01:16 11 though. I wrote a new forward trying to talk  
11:01:19 12 about the same book almost 40 years later. So  
11:01:22 13 the context is different.

11:01:24 14 Q. Okay. But the rest of the book  
11:01:26 15 is the same?

11:01:27 16 A. The rest of the book is the same.  
11:01:29 17 I thought it would have been dishonest to change  
11:01:31 18 it.

11:01:32 19 Q. And the book still expresses your  
11:01:34 20 opinion on policing, the history of policing?

11:01:38 21 A. Um, if you went through it line  
11:01:40 22 by line, this is a doctoral dissertation. I was  
11:01:46 23 in graduate school. I was younger,  
11:01:48 24 hypothetically more radical than I am now.  
11:01:53 25 There are -- every honest scholar who looks back

1 on their work comes up with things they might  
2 write differently.

3 But I'm proud of the work and  
4 essentially believe that it's a fair  
5 representation of what I'm describing.

6 Q. Okay. And it -- I believe you  
7 listed several cities, but looking from your  
8 introduction it's based largely on Buffalo,  
9 Milwaukee, Chicago, Detroit, Toledo and  
10 Pittsburgh? Is that --

11 A. I think I listed those off in my  
12 testimony, but I worked in and out of several  
13 cities. Those are major cities that I looked  
14 at.

15 Q. But it does not refer to law  
16 enforcement in Canada at all?

17 A. No.

18 Q. And "Crow Dog's Case" book does  
19 not refer -- does not describe Canadian law?

20 A. I mean, for example, the Mounties  
21 apparently kicked Sitting Bull out of Canada  
22 back to the United States. I mean, only in an  
23 incidental way. It does not refer -- there are  
24 a few references but it doesn't refer in any  
25 detailed way to Canadian law.

1 Q. And I think actually in your  
2 introduction to "White Man's Law" you mentioned  
3 that you first intended to ignore the border but  
4 then reconsidered that approach?

5 A. Yes.

6 Q. Because the -- it was too  
7 complicated?

8 A. Well, you need to know your  
9 limits. It was, first, too complicated and,  
10 secondly, the Crow Dog hinged on sovereignty.  
11 Sovereignty wouldn't have been an appropriate  
12 category to talk about how Canadian Indigenous  
13 law met Canadian law, because the term didn't  
14 have the -- a legal recognition in Canada as it  
15 did in the United States. So it would have been  
16 a different book.

17 Q. Now, have you ever provided  
18 evidence to a court before?

19 A. Yes.

20 Q. Have you ever testified in  
21 Canada?

22 A. No.

23 Q. I know you did an Acknowledgment  
24 of Expert Duties as required by Ontario law, and  
25 I want to mention one particular reference in

1 Rule 53.03, 2.01. so this is part of the "Rules  
2 of Civil Procedure for Ontario."

3 The rule I'm referring to says that:

4 "The expert's opinion respecting  
5 each issue should be set out in the  
6 report."

7 A. Okay.

8 Q. And:

9 "[...] where there is a range of  
10 opinions given, a summary of the range  
11 and the reasons for the expert's own  
12 opinion within that range."

13 So the question I wanted to ask was,  
14 you did give a description of the historiography  
15 of land policy in Upper Canada in your report?

16 A. Yes.

17 Q. I didn't see a description of  
18 issues of law enforcement and where your  
19 opinions on law enforcement fall within a range  
20 in your report. And I wanted to take you to the  
21 2017 preface to your book "Policing a Class  
22 Society", which is SC1169. And this is just a  
23 new preface. And if I could go to page xvi?  
24 Two more pages down.

25 So you did mention how your book is --

1 was produced in the '70s. If we could scroll  
2 down a bit. You mention analytically scholars  
3 that moved far to the right in the last three  
4 decades.

5 Would you say that your views, as  
6 expressed in -- well, first of all you mention  
7 radical criminology at the bottom of the  
8 paragraph.

9 A. Yes.

10 Q. Is that what you describe your  
11 work as, radical criminology?

12 A. There was a radical criminology  
13 movement in the '60s and '70s that I was a  
14 part of. I haven't talked with anyone about  
15 radical criminology in 20 years, 30 years. I  
16 was more radical in graduate school than I am  
17 now.

18 Q. Just to simplify my question, how  
19 do you feel your work in this policing book fits  
20 on the range of sociology and criminal justice  
21 academic work?

22 A. Well, I mean, I have a Ph.D. in  
23 criminology and sociology of law, and I taught  
24 in City University of New York a lot of things.  
25 It is within the range of discussion in a modern

1 course in criminology.

2 You would talk about conservative and  
3 radical -- America is more politicized than  
4 Canada is, I think I can say. You would talk  
5 about conservative and liberal radical  
6 approaches to understanding the police.

7 And I mention the idea that there is  
8 this idea that if we train the police better and  
9 get rid of the bad apples, everything will be  
10 fine. I think if you look at policing in  
11 America today it is pretty mean. It's still  
12 pretty mean. And the -- our legal institutions  
13 have had a great deal of difficulty coming to  
14 terms with it.

15 I mean, I could talk about that in  
16 more detail, but this is written in that  
17 context.

18 Q. If I could say it would be an  
19 interesting discussion, but I don't want to take  
20 up the Court's time.

21 A. I was actually not trying to take  
22 you there.

23 Q. No, but essentially your -- one  
24 of the main points of your book on policing is  
25 that it has to be understood, and I'm -- this is

11:09:34 1 my generalization so please correct me.

11:09:36 2 A. Sure.

11:09:37 3 Q. It has to be understood that the  
11:09:39 4 police were created to maintain the existing  
11:09:44 5 class-based political order and protect property  
11:09:47 6 for the upper classes or land-holding classes  
11:09:51 7 and were not actually intended as guardians of  
11:09:56 8 the public, if you will.

11:10:00 9 A. Yes.

11:10:00 10 Q. And you must recognize that to  
11:10:02 11 understand the problems today facing reform of  
11:10:04 12 policing?

11:10:07 13 A. That's true. It's a perspective.  
11:10:09 14 It's something to look at when you're talking  
11:10:11 15 about how to get better policing and why, for  
11:10:14 16 example -- I mean, we have the problem of the  
11:10:16 17 over criminalization of the black people in the  
11:10:23 18 United States, a huge problem in our criminal  
11:10:25 19 justice system that that system really can't  
11:10:27 20 touch.

11:10:27 21 And understanding the relationship  
11:10:29 22 between race and class and how police are  
11:10:31 23 trained and how they operate isn't an  
11:10:34 24 illegitimate set of concerns to write about.

11:10:39 25 Q. And is that view widely accepted

11:10:43 1 in your field?

11:10:45 2 A. I'm not alone. I'd have to  
11:10:47 3 survey. There is a -- there are a number of  
11:10:51 4 criminologists who you might say subscribe to  
11:10:57 5 some version of this view. There are a number  
11:10:59 6 of very conservative criminologies who think --  
11:11:01 7 I don't even want to summarize what they think  
11:11:04 8 but we know what it is, and then there are  
11:11:05 9 people all over in between.

11:11:07 10 You see the same thing in law school.  
11:11:09 11 How do you understand -- you start talking about  
11:11:11 12 -- I mean the United States Supreme Court,  
11:11:13 13 Justice Scalia. This comes up in our classrooms  
11:11:18 14 and you cannot avoid teaching it.

11:11:20 15 What I always tried to do, and I  
11:11:21 16 believe in academic freedom. You -- I make my  
11:11:24 17 students read the text and try to use their own  
11:11:30 18 imagination, creativity, and I would say their  
11:11:33 19 own history and politics and where they grew up  
11:11:35 20 and how they were raised, to try to understand  
11:11:39 21 why they see things in particular ways.

11:11:45 22 Q. Now, turning back to the  
11:11:46 23 qualifications that have been presented to the  
11:11:48 24 court, it was -- potential and actual law  
11:11:56 25 enforcement is the first part of it.



1 When we speak of law enforcement, are  
2 we speaking about law enforcement by the Crown?

3 A. Yes.

4 Q. We're not talking about  
5 Indigenous law enforcement?

6 A. I mean when I saw Indigenous law  
7 enforcement, there's some times when Indigenous  
8 people engaged in law enforcement activity as  
9 well as where the idea comes up. The idea of  
10 Indian rangers, for example, comes up a couple  
11 of times in the documents.

12 There are some Indians in the militia.  
13 Of course the Six Nations in Grand River were  
14 heavily militarized by having served in the war.

15 So it comes up and essentially it's  
16 law enforcement by whatever sources of law  
17 enforcement there were.

18 And, of course, as Upper Canada  
19 evolves, these institutions grow and become more  
20 institutionalized and change.

21 Q. Are you asserting that you have  
22 expertise in Indigenous law enforcement history?

23 A. Sure. Whenever I've seen it I've  
24 studied it.

25 Q. Okay.

11:13:00 1 A. I read widely and I read  
11:13:02 2 everything.

11:13:02 3 Q. And you said when working on the  
11:13:04 4 Copper Inuit work, you tried to understand Inuit  
11:13:08 5 law and you did so by going to the archives, is  
11:13:11 6 that correct?

11:13:11 7 A. Well, I was also in Coppermine.  
11:13:14 8 I was there.

11:13:16 9 Q. Sorry, who did you talk to?

11:13:17 10 A. I talked to -- I asked the  
11:13:19 11 Mounties, what's going on here? I talked to the  
11:13:22 12 judge, who kindly flew me up in his plane. I  
11:13:26 13 talked to both lawyers.

11:13:28 14 And that's what's going on at the  
11:13:30 15 present time. What was. And I wondered how it  
11:13:32 16 evolved. So the history, you know, I'm not  
11:13:35 17 saying how much history the judge or the Mountie  
11:13:37 18 or the lawyers knew -- that wouldn't have even  
11:13:39 19 mattered to me. I would have done my own  
11:13:42 20 history anyway. Not that I didn't trust them,  
11:13:46 21 but a good scholar does his own work or her own  
11:13:49 22 work.

11:13:49 23 So I went to the archives as a result  
11:13:51 24 of that trip. And I think I have a fair  
11:13:54 25 understanding of how the Royal Canadian Mounted

1 Police work in the Arctic.

2 Q. And so I mentioned that what  
3 I'm -- what I'm talking about, at least in part  
4 now, law enforcement by the Crown, is that only  
5 the British Crown or are you looking at the  
6 French period?

7 A. I can't read French.

8 Q. So, okay.

9 A. Sad that I have inadequate  
10 language skills. I wish that I could have read  
11 French.

12 Q. So when it says "late 18th  
13 century" what timeframe are you thinking of?

14 A. At Grand River?

15 Q. Well, your qualification says:

16 "[...] potential and actual law  
17 enforcement in relation to Indigenous  
18 lands in the late 18th and 19th  
19 century."

20 A. It would be from the beginning  
21 of -- from the movement of the Loyalists to  
22 Upper Canada, by the Grand River of Six Nations.

23 Q. So it's the Grand River that's  
24 the start of the --

25 A. Yeah, the Loyalist migration.

1 Q. So did I understand you correctly  
2 that the book the "White Man's Law" came before  
3 the chapter in the David McNabb book? They are  
4 both 1998.

5 A. As I said, in retirement my  
6 dates -- I need to look at --

7 Q. They are both dated 1998. I just  
8 thought --

9 A. Yeah, I would have -- I would  
10 have written white -- if it's published in 1998  
11 it was written or finished essentially 1997. I  
12 believe -- I would -- I don't honestly remember  
13 what I'm writing in each day as I wrote them.

14 They are closely related. I would  
15 believe that the article in the McNabb book came  
16 after the book. I may have written them at the  
17 same time. I may have been moving back and  
18 forth.

19 Q. You mentioned various archives  
20 you visited for writing "White Man's Law" and  
21 one of them was the archives of Ontario. And  
22 apart from the archives of Ontario there is not  
23 many archives that you actually visited in  
24 Ontario, is there?

25 A. Brantford. Six Nations archives

11:16:35 1 the tribal archives themselves, what they had,  
11:16:38 2 they had a history room. And I worked in  
11:16:42 3 Brantford in some local archives. I have to say  
11:16:45 4 that my memory -- but I worked in Brantford in  
11:16:50 5 the Six Nations in their records.

11:16:53 6 Q. And Six Nations archives had  
11:16:55 7 material on law enforcement?

11:16:57 8 A. I worked in Walpole Island  
11:16:59 9 archives too. Walpole -- these -- the modern  
11:17:05 10 tribal archives often have had people, in  
11:17:10 11 connection with their land claims cases, collect  
11:17:12 12 documents. So they have collected documents  
11:17:14 13 from other archives and done some fairly  
11:17:18 14 extensive research.

11:17:20 15 And, you know, they will let you use  
11:17:24 16 it if you ask them nicely and they respect you.

11:17:27 17 I don't remember exactly what I saw  
11:17:30 18 there.

11:17:31 19 Q. Okay.

11:17:32 20 A. Nor do I remember honestly -- the  
11:17:34 21 main archives are the archives in Ontario which  
11:17:37 22 are very good, and the national archives in  
11:17:39 23 Ottawa. I used both of them more extensively  
11:17:43 24 than any others.

11:17:45 25 Q. Now, correct me if I'm wrong, but

1 the Attorney General files at the Ontario  
2 archives have been culled, is that not correct?  
3 They have been reduced to very few historical  
4 documents? Does that sound familiar?

5 A. I can't answer that. I don't  
6 remember.

7 Q. So in "White Man's Law" then you  
8 dealt with crimes against Indigenous people. We  
9 mentioned that Indigenous were often --

10 A. Yes.

11 Q. They were --

12 A. And crimes committed by  
13 Indigenous people.

14 Q. And by Indigenous people as well.

15 A. Because I'm interested in law  
16 enforcement. So you -- whether or not they're  
17 actors -- acted on or actors, and remember my  
18 Ph.D. is in sociology of law and criminology.

19 Q. Right.

20 A. So the law enforcement -- and if  
21 I see -- if you're trying to do the history of  
22 ordinary people in the context of Canadian law,  
23 you really do have to deal with lots of criminal  
24 arrests and activities, even if there is not  
25 arrests; if the sheriff went out and looked

11:18:54 1 at -- the sheriff had a complaint and went out  
11:18:56 2 that's information.

11:18:58 3 Often nothing happens. You see  
11:19:01 4 something criminal in an archival record and you  
11:19:05 5 find nothing else, but you know that this  
11:19:08 6 thing -- there is a report at least that it  
11:19:11 7 happened.

11:19:21 8 Q. Apart from the chapter on  
11:19:23 9 squatting in the Six Nations and the chapter  
11:19:26 10 summarizing the jurisprudence of John Beverly  
11:19:29 11 Robinson, does any of the other material in the  
11:19:32 12 book deal with law enforcement protecting  
11:19:38 13 Indigenous lands?

11:19:39 14 A. I think I talk about British  
11:19:40 15 Columbia, Saskatchewan. It's always an issue.  
11:19:44 16 Again, put most simply, if you have the simplest  
11:19:48 17 dispute on the frontier between say a white  
11:19:51 18 settler and an Indigenous person they get into  
11:19:53 19 a -- like, a fight or -- and someone calls the  
11:19:57 20 police.

11:19:58 21 So land disputes often involve  
11:20:02 22 bringing in law enforcement. So it comes up  
11:20:05 23 across the country.

11:20:07 24 I remember writing about it in -- also  
11:20:09 25 in Newfoundland, sorry, Nova Scotia, not

1 Newfoundland. I'm not sure what now is in that  
2 book and is in other things I've written. We're  
3 talking 20 years or more.

4 If you show it to me I can talk about  
5 it.

6 Q. And when your expertise refers to  
7 "potential law enforcement", what is meant by  
8 "potential law enforcement"?

9 A. Well, you would often teach --  
10 you would teach in sociology of law, for example  
11 that every police officer in every case has a  
12 choice of intervening or not. And we all --  
13 everyone knows it's actually madikin [ph.] in  
14 policing that the police let go more offences  
15 than they charge people for.

16 Because their idea -- they're trying  
17 to structure human behaviour and that's not  
18 always the most efficient way to do it by  
19 arresting people and hailing them into court.

20 So you get lots of activity that's  
21 arrest or not. And you simply -- so the nature  
22 of studying policing is studying law enforcement  
23 and the failure of law enforcement, or the  
24 choice not to enforce the law.

25 Q. Well, not enforcing the law is



11:21:34 1 not necessarily a failure, is it?

11:21:36 2 A. No, that's what I meant. I  
11:21:38 3 corrected myself. Right.

11:21:40 4 I would assume that the average police  
11:21:42 5 officer chooses to enforce the law or not to  
11:21:46 6 enforce the law is making a completely rational  
11:21:49 7 choice based on their experience and training.

11:21:51 8 Q. So potential law enforcement is  
11:21:53 9 about choices, it's not about brainstorming  
11:21:54 10 possible --

11:21:56 11 A. Choices within a legal framework.

11:22:06 12 Q. Now, in your Copper Inuit  
11:22:08 13 article, which I think is called Rich Man's --

11:22:14 14 A. "Rich Men of the Country", I  
11:22:16 15 believe.

11:22:16 16 Q. "Rich Men of the Country," yes.  
11:22:26 17 You talk about the RCMP and this morning you  
11:22:28 18 mentioned its first iterations. When did the  
11:22:31 19 first iteration of the RCMP start?

11:22:33 20 A. It's in Alberta and Saskatchewan,  
11:22:35 21 the Prairie provinces, I believe 1874, but in --  
11:22:39 22 if I'm off by a year or two, again it's my --

11:22:44 23 Q. And that was the North West  
11:22:45 24 Mounted Police?

11:22:46 25 A. They've had several names. It

1 was originally North West Mounted Police, and  
2 their --

3 Q. And then in 1904 it became the  
4 Royal North West Mounted Police?

5 A. Their name has changed I think  
6 once or twice.

7 Q. Would you agree that it became  
8 the RCMP in 1920?

9 A. Okay. That's -- I mean, I  
10 didn't -- I believe they became RCMP in 1920.

11 Q. One question I have is, in your  
12 Copper Inuit article you refer only to the RCMP,  
13 although the article covers an earlier period.  
14 Is there a particular reason to choose that?

15 A. I mean the question is who goes  
16 out there in the earlier period to enforce  
17 Canadian law?

18 Q. I guess what I'm saying is there  
19 was no RCMP in 1916?

20 A. Well, okay. You're saying there  
21 is an error in the --

22 Q. I'm just asking, was it an error  
23 or was it a choice? Or was it --

24 A. I'd have to read the whole story.  
25 I mean, some official who was in the Royal

1 Canadian Mounted Police -- maybe a precursor  
2 organization was sent out to do this.

3 I understand the history of the Royal  
4 Canadian Mounted Police and I understand it had  
5 several names. I understand when each year each  
6 name was changed.

7 Q. I'd like to take you to an  
8 article, it's SC1170. And this is an article  
9 not by you but by a gentleman by the name of  
10 Graham Price, and the article is about the King  
11 v Alikomiak Is that how I pronounce that?

12 A. I...

13 Q. Okay. But that's one of the same  
14 individuals that your Copper Inuit article is  
15 about?

16 A. Yes.

17 Q. Have you read this article?

18 A. I read this article a long time  
19 ago.

20 Q. Okay.

21 A. I don't remember it.

22 Q. Could I take you to page 21, and  
23 22 on the PDF. Near the bottom he's just  
24 talking about the different accounts and notes  
25 that yours is one of the most significant

11:25:17 1 accounts of the trial. It says:

11:25:19 2 "Harring's article proceeds on  
11:25:20 3 the basis that there was no transcript  
11:25:21 4 of the trial. Because of his lack of  
11:25:21 5 access to the trial transcript, and  
11:25:24 6 his partial reliance on newspaper  
11:25:26 7 accounts, he concluded that the  
11:25:28 8 accused made a full confession on the  
11:25:30 9 witness stand. In fact, Alikomiak did  
11:25:34 10 not give evidence. Harring's error is  
11:25:35 11 understandable given the sources from  
11:25:35 12 which he worked."

11:25:37 13 Is that correct? Is he correct in  
11:25:38 14 what he says there?

11:25:40 15 A. I'm not -- out of context, I'm  
11:25:42 16 not sure he's correct. Any legal historian is  
11:25:52 17 limited to the sources with which they work. So  
11:25:55 18 if I didn't see the source I wouldn't have cited  
11:25:55 19 it.

11:25:55 20 Q. Okay.

11:25:55 21 A. You do the best research you can  
11:25:57 22 and find as many sources as you can. You don't  
11:25:59 23 always come up with every source.

11:26:01 24 I don't know. I can't explain this  
11:26:03 25 without a -- the full context and without doing

1 some more reading.

2 Q. The paragraph -- the next  
3 paragraph continues:

4 "Other errors Harring makes seem  
5 to arise from his American legal  
6 background. For example, he cites  
7 Bishop Lucas' account of the court  
8 being accompanied by the hangman and  
9 bringing lumber for the gallows even  
10 though the 'judge was still  
11 considering what sentence to impose.'  
12 In 1923, a conviction for murder led  
13 automatically to the death sentence.  
14 There was no discretion in the hands  
15 of the sentencing judge. Dubuc made  
16 this very clear to Alikomiak when  
17 sentencing him."

18 And I won't bother reading the quote.

19 "Further niggling errors arise in  
20 Morrison's and Harring's accounts.  
21 Harring refers to T.L. Cory as the  
22 Commissioner of the Northwest  
23 Territories. The Commissioner, W.W.  
24 Cory, was T.L. Cory's father. Harring  
25 refers to the Commissioner of the

11:26:58 1 Northwest Territories signing the  
11:26:58 2 death warrants. This was not a task  
11:26:58 3 of the Commissioner. Only the  
11:26:58 4 Governor General in Council (the  
11:26:59 5 federal Cabinet, in reality) could  
11:27:01 6 commute the death sentence. The  
11:27:03 7 Secretary of the State, representing  
11:27:04 8 the Cabinet, informed the Commissioner  
11:27:07 9 of the Northwest Territories that the  
11:27:07 10 Cabinet was unable to order any  
11:27:07 11 interference with the sentence of the  
11:27:10 12 court."

11:27:11 13 And then he talks about Professor  
11:27:13 14 Morrison. And then it scrolls down:

11:27:23 15 "What do these minor inaccuracies  
11:27:26 16 indicate? Only that legal historians  
11:27:26 17 from whatever discipline they approach  
11:27:26 18 their subject, must be cautious when  
11:27:26 19 relying on secondary sources and very  
11:27:26 20 attentive to the possibility of  
11:27:26 21 inaccuracies in even the primary  
11:27:31 22 sources."

11:27:33 23 So would you consider that criticism  
11:27:35 24 fair or --

11:27:35 25 A. It's fair. I would say -- but he

11:27:39 1 also says minor inaccuracies and he talks about  
11:27:43 2 niggling accounts. Any time you try to write a  
11:27:46 3 history of Canada, or a legal history of Canada,  
11:27:48 4 you are relying on a mixture of primary source,  
11:27:50 5 secondary sources. You're going to make  
11:27:53 6 mistakes either in your own reading or  
11:27:55 7 derivative from your sources, which is I think  
11:27:58 8 half of what he's saying.

11:28:00 9 It's unavoidable and it's -- I would  
11:28:02 10 say probably true of everybody's historical work  
11:28:05 11 to a greater or lesser degree. You want to  
11:28:07 12 write as error-free history as you can. There's  
11:28:11 13 no question about it. There is only one  
11:28:13 14 professional standard.

11:28:14 15 But you want to tell the story and you  
11:28:21 16 do as much research as you have the time and can  
11:28:24 17 afford. And when you think you've got it, you  
11:28:26 18 write it up as well as you can.

11:28:28 19 And I'm -- I'm sorry about the minor  
11:28:31 20 inaccuracies. And would just say he calls them  
11:28:33 21 "minor inaccuracies".

11:28:39 22 I'm not sure actually he's right about  
11:28:43 23 everything. I don't believe in the history of  
11:28:44 24 the death penalty which I've actually researched  
11:28:46 25 and not written about.

1 Most scholars say that even when there  
2 was a mandatory death penalty everybody wasn't  
3 executed. There were commutations and things  
4 that happened. So the idea that we had like a  
5 mandatory death penalty and everybody was hanged  
6 in some dark age in the past seems to be a  
7 fiction.

8 I don't know. I have not worked on  
9 the death penalty in Canada so I can't say that  
10 every single person who got the death penalty in  
11 1920 was hanged but I doubt it.

12 Q. And, lastly, your works on the  
13 Six Nations' squatting law enforcement issue  
14 doesn't refer to the involvement of the military  
15 at all. Do you have any expertise on the  
16 military?

17 A. The military shows up in the  
18 chapter, doesn't it?

19 Q. I could be wrong.

20 A. Well, I'm --

21 Q. Did they use the military?

22 A. The military shows up in policing  
23 in Buffalo, in America off and on, and it's a  
24 common hue and cry. You know, the police are  
25 inadequate, therefore, we need the military,



1 comes up.

2 So, for example, the -- when you have  
3 the Mackenzie rebellion, your policing capacity  
4 is overwhelmed. I think we would all agree to  
5 that. And then some kind of a militia or  
6 military organization appears and seems it's  
7 kind of hybrid. It is not the British military  
8 but it's people with military experience who are  
9 called out.

10 I gather Justice MacAuley commanded  
11 part of the militia. John Beverly Robinson  
12 volunteered to put down the rebellion.

13 So these are military, quasi-military  
14 organizations that appear and disappear as  
15 events come and go in Canadian history. So  
16 you're aware when that happens.

17 Understanding where the military is  
18 located and how generals control them is often a  
19 different issue than the policing problem you're  
20 looking at.

21 Q. So you're including the military  
22 as one of the options for law enforcement?

23 A. It's a back-up. It's always --  
24 you know, inherently available as a back-up.

25 Q. Those are my question, Your

1 Honour .

2 THE COURT: Thank you. Is somebody  
3 going to ask this gentleman questions for  
4 Ontario?

5 MR. LEMMOND: Yes, Your Honour I have  
6 one question, maybe two.

7 THE COURT: All right. Why don't you  
8 go ahead, then.

9 CROSS-EXAMINATION BY MR. LEMMOND

10 ON QUALIFICATIONS:

11 Q. Good morning. I'm Peter Lemmond  
12 and I'm counsel for Ontario. And my first  
13 question for you is this, you would agree that  
14 the circumstances of law enforcement in late  
15 19th century, fast-growing American industrial  
16 cities was quite different than the  
17 circumstances of law enforcement in rural, Upper  
18 Canada, Canada West in the 1830s, '40s and  
19 '50s?

20 A. It's quite different. There are  
21 overlapping similarities but it's quite  
22 different.

23 Q. Would you agree that rural  
24 policing and rural law enforcement in Upper  
25 Canada at the time, Canada West also 1830s,

1 '40s and '50s was a highly localized affair?

2 A. There may be something to that  
3 but it may not be that simple. You've got --  
4 you know, Toronto is dominant and that casts a  
5 shadow over the environs.

6 And, you know, I might say, you know,  
7 I grew up on a farm and lived under rural law  
8 enforcement the early part of my life, so I get  
9 how they operate as police and how they are like  
10 or different than city police. But it's law  
11 enforcement.

12 Q. Let me put the question a  
13 different way. Would you agree that law  
14 enforcement officials in the rural counties of  
15 Ontario, such as Grey County, Bruce County were  
16 largely municipally controlled?

17 A. They're locally controlled.  
18 There's always a tension between local control  
19 and the metropolitan's overarching policies that  
20 can't be ignored by local sheriffs or they  
21 don't -- there's tension there. That's all.

22 Q. So you would agree, for example,  
23 they are operating within a provincially set  
24 legal framework?

25 A. Yes, and there is supervision and

11:33:23 1 there's trouble if things go wrong in the  
11:33:27 2 country that's inconsistent with what should be  
11:33:29 3 happening in the view of the officials in  
11:33:33 4 Ontario.

11:33:35 5 Q. Thank you, Professor Harring.

11:33:38 6 THE COURT: Any re-examination,  
11:33:39 7 counsel?

11:33:40 8 MS. GUIGRUIS: No.

11:33:40 9 THE COURT: We'll take the morning  
11:33:42 10 break and have submissions after the break.

11:33:44 11 -- RECESSED AT 11:33 A.M. --

11:33:44 12 -- RESUMED AT 11:55 A.M. --

11:57:17 13 THE COURT: Ms. Guirguis, the last  
11:57:19 14 time we had an issue, I think I invited  
11:57:21 15 Mr. Townshend to speak to the issue, because, of  
11:57:24 16 course, he knew what it was, before the  
11:57:26 17 defendants made their submissions.

11:57:32 18 But I'm going to invite you to tell me  
11:57:34 19 what you submit would be helpful, and then I'll  
11:57:40 20 hear from the other side. Because there is more  
11:57:51 21 than one way to deal with it.

11:57:53 22 MS. GUIGRUIS: I understood, Your  
11:57:55 23 Honour, that they would provide us submissions  
11:57:55 24 first so that we would know exactly what to  
11:57:55 25 respond to.

11:57:59 1 THE COURT: All right. Well, let's do  
11:57:59 2 that then. Mr. Beggs. Just give me a movement.  
11:58:07 3 It would help me, sir, first of all,  
11:58:10 4 is the issue the same as Ontario? Or are you --  
11:58:17 5 MR. LEMMOND: It is, Your Honour.  
11:58:18 6 THE COURT: It is the same.  
11:58:20 7 So it would help me if you began by  
11:58:22 8 telling me what amendments you would request be  
11:58:27 9 made to the tender and then explain why.  
11:58:33 10 MR. BEGGS: Certainly, Your Honour.  
11:58:34 11 THE COURT: I have a printed copy,  
11:58:36 12 thanks to somebody.  
11:58:38 13 MR. BEGGS: Thank you, Your Honour.  
11:58:38 14 We have no difficulty with the introductory  
11:58:43 15 statement or item number 1.  
11:58:46 16 I actually take the position that item  
11:58:47 17 number 2 should be struck out in its entirety.  
11:58:53 18 However, if Your Honour finds that there is some  
11:58:58 19 expertise in law enforcement I would suggest it  
11:59:01 20 be limited to removing "potential and actual" as  
11:59:08 21 a distinction to say :  
11:59:11 22 "[...] law enforcement in  
11:59:12 23 relation to Indigenous lands in the  
11:59:15 24 19th century in what is now Ontario".  
11:59:19 25 So I would take out "late 18th" as

11:59:21 1 well.

11:59:29 2 That would be if Your Honour accepts  
11:59:31 3 there is expertise in the law enforcement, but  
11:59:32 4 that is actually a point that I'm raising.

11:59:34 5 THE COURT: All right. Please go  
11:59:34 6 ahead.

11:59:35 7 MR. BEGGS: Thank you, Your Honour.

11:59:38 8 Professor Harring has demonstrated  
11:59:40 9 that he has significant expertise in a wide  
11:59:44 10 variety of areas. However, most of the work he  
11:59:46 11 has done -- well not most of it, a fair share of  
11:59:50 12 the work he has done pertains specifically to  
11:59:53 13 the American experience, the American urban  
11:59:56 14 experience, or to other areas of Canada, BC, the  
12:00:04 15 Northwest Territories, Manitoba and often in the  
12:00:08 16 20th century context, which is quite different  
12:00:12 17 when it comes to law enforcement and policing  
12:00:15 18 than the rural 19th century would be.

12:00:22 19 So I would submit that most of the  
12:00:24 20 expertise that has been put forward in evidence  
12:00:26 21 today is not relevant to the experience -- to  
12:00:30 22 expertise in law enforcement in Ontario in the  
12:00:35 23 19th century.

12:00:41 24 What evidence of expertise we have  
12:00:43 25 pertains to the Six Nations, which is a quite

12:00:45 1 different situation. As Professor Harring  
12:00:49 2 indicated, the Six Nations migrated to Ontario  
12:00:53 3 with the Loyalists and took up territory in a  
12:00:57 4 manner quite different from the plaintiffs, who  
12:01:02 5 assert that they had been there since time  
12:01:04 6 immemorial.

12:01:11 7 And I would suggest that the  
12:01:12 8 experience of the Six Nations is not readily  
12:01:13 9 transferable to a general expertise in law  
12:01:18 10 enforcement in relation to Indigenous lands.

12:01:23 11 And I would suggest that law  
12:01:25 12 enforcement in the 19th century necessarily  
12:01:32 13 involves factors other than police. I would  
12:01:40 14 disagree with Professor Harring that the  
12:01:42 15 military can be seen as an adjunct of the law  
12:01:45 16 enforcement -- those are my words not his -- but  
12:01:48 17 the law enforcement options.

12:01:53 18 I have seen no evidence that he has  
12:01:55 19 expertise in the use of military at all. The  
12:01:58 20 fact that the military arose occasionally in  
12:02:01 21 relation to certain events does not provide the  
12:02:06 22 expertise that the Court would require.

12:02:19 23 And finally I would suggest that the  
12:02:20 24 work that has been done with respect to the Six  
12:02:24 25 Nations, in fact, does not focus on the question

1 of law enforcement. It focuses on the problem,  
2 squatting, but the issue of what the Crown did  
3 does not -- is not the focus of that research.

4 THE COURT: When you say the Crown do  
5 you mean the Federal Crown?

6 MR. BEGGS: At that time the British  
7 and the colonial government.

8 THE COURT: Can you show -- were you  
9 wrapping up?

10 MR. BEGGS: I was wrapping up, yes,  
11 Your Honour.

12 THE COURT: Can you illustrate, with  
13 reference to the report, an example or examples  
14 of opinions proffered by this gentleman that you  
15 say fall within subparagraph numbered 2 of the  
16 tender and, therefore, are the subject of your  
17 objection?

18 MR. BEGGS: Yes. If I can take a  
19 moment and get you pages?

20 THE COURT: Yes, take a minute. A  
21 great deal of the report deals with squatting,  
22 and without suggesting that that doesn't  
23 implicate enforcement, I take it that with  
24 respect to squatting, at least as a general  
25 subject matter, it may fall under number 1 and



12:03:48 1 you're not objecting to that.

12:03:51 2 MR. BEGGS: That was my view, Your  
12:03:52 3 Honour.

12:03:53 4 THE COURT: So I'm looking for an  
12:03:54 5 example of something you are objecting to.

12:05:15 6 MR. BEGGS: So, Your Honour, on page  
12:05:16 7 56, second paragraph, beginning with:

12:05:21 8 "While Bruce County was created  
12:05:23 9 in 1849, as a discussion of various  
12:05:25 10 law enforcement mechanisms available  
12:05:27 11 within Grey County [...]."

12:05:31 12 And I would suggest that that would be  
12:05:35 13 encompassed by this objection.

12:05:53 14 As well as on page 58 it begins:

12:06:00 15 "This makes clear that the Crown  
12:06:00 16 had sufficient capacity to protect the  
12:06:04 17 boundaries of the Saugeen and other  
12:06:04 18 Indian reserves: it had a regular  
12:06:04 19 army, as well as a militia, local  
12:06:04 20 sheriffs, deputies, and constables."

12:06:10 21 And that paragraph would include the  
12:06:12 22 next paragraph as well dealing with an armed  
12:06:14 23 force in Manitoulin as well as the next  
12:06:26 24 paragraph, "Why the Crown did not use force  
12:06:27 25 [...]."

And I believe there's one more.

12:06:34 1 THE COURT: Just while you're looking,  
12:06:35 2 I don't recall the gentleman distinguishes  
12:06:38 3 between the provincial and Federal Crown, but I  
12:06:41 4 guess that's because all this took place when it  
12:06:43 5 was the British Crown, so you don't have to make  
12:06:46 6 any distinctions. Is that your understanding of  
12:06:48 7 the report?

12:06:50 8 MR. BEGGS: Yes, Your Honour.

12:06:51 9 THE COURT: So the Crown here is  
12:06:52 10 referring to the British Crown?

12:07:03 11 MR. BEGGS: I believe it's always  
12:07:03 12 referring to the British Crown. And also I  
12:07:11 13 believe on page 46 there is a discussion of  
12:07:14 14 possibly using Cherokee Rangers which I think  
12:07:18 15 would, again, fall under the law enforcement  
12:07:21 16 issue. That's the paragraph beginning, "In an  
12:07:25 17 Appendix of this same report [...]" page 46.

12:07:28 18 Those are the areas that I had general  
12:07:37 19 concerns with.

12:07:39 20 THE COURT: Those are the examples?

12:07:40 21 MR. BEGGS: Yes.

12:07:41 22 THE COURT: Anything further?

12:07:43 23 MR. BEGGS: No, Your Honour.

12:07:44 24 THE COURT: All right. Counsel for  
12:07:46 25 Ontario?

12:07:54 1 MR. LEMMOND: Your Honour, Ontario has  
12:07:55 2 much the same concerns as put forward by  
12:07:58 3 Mr. Beggs.

12:08:01 4 Looked at in one way, Your Honour, on  
12:08:04 5 one hand it's a distinct thing for an  
12:08:09 6 ethnohistorian, or a historian, or a legal  
12:08:13 7 historian to pull together information  
12:08:16 8 pertaining to Crown resources and Crown actions  
12:08:20 9 in relation to lands and potential civilian  
12:08:30 10 activity. It is another thing, however, to  
12:08:33 11 provide an opinion that suggests that there is a  
12:08:39 12 measurable standard that was not met.

12:08:43 13 In other words, to provide an opinion  
12:08:45 14 on what was possible and to inform that opinion  
12:08:49 15 by an account of what was historically and  
12:08:51 16 realistically doable in the circumstances.

12:08:54 17 And I would suggest that that latter  
12:08:56 18 kind of opinion is the opinion that has been put  
12:08:59 19 forward by Professor Harring.

12:09:05 20 THE COURT: Help me with what you mean  
12:09:06 21 by "the latter". You mentioned what was  
12:09:08 22 possible; you mentioned what was historically  
12:09:10 23 and realistically doable.

12:09:14 24 MR. LEMMOND: Right. So an opinion  
12:09:15 25 that essentially adjudicates on, provides an

1 opinion on whether or not the conduct of the  
2 Crown was satisfactory with regard to what was  
3 doable or possible in the historical  
4 circumstances.

5 And I would suggest that is a rather  
6 more involved exercise that in order for it to  
7 be of some utility and value to the Court, it  
8 has to be founded on a fairly deep foundation of  
9 knowledge of the period of the time and the  
10 general constellation involved in the historical  
11 circumstances.

12 So I'm suggesting, Your Honour,  
13 firstly that the opinion offered by Mr. Haring,  
14 Professor Haring, is of the latter sort. And  
15 his experience and work has touched upon  
16 policing but largely in a very different  
17 context, in an American-policing context or a  
18 later Canadian-policing context.

19 The portion of his work that is  
20 somewhat germane is relatively limited and, as  
21 Mr. Beggs pointed out, has more to do with  
22 events on Six Nations in dealing with some court  
23 cases in relation to the occupation of lands by  
24 the Six Nations -- sorry, by white people on Six  
25 Nations' largely in relation to proceedings

12:10:31 1 brought between the settlers as opposed to law  
12:10:35 2 enforcement in relation to the settlers by the  
12:10:38 3 civil authorities.

12:10:44 4 So we identify the same concern and  
12:10:45 5 would suggest the same remedy, Your Honour,  
12:10:47 6 which is expunging those portions of the report  
12:10:52 7 that go to the larger, more complex series of  
12:10:55 8 enforcement questions addressed in Professor  
12:10:59 9 Harring's report.

12:11:01 10 So I would agree with the paragraphs  
12:11:04 11 identified by Mr. Beggs and just identify one  
12:11:07 12 further piece, which is page 61. And it's the  
12:11:16 13 last paragraph on page 61, continuing to page  
12:11:20 14 62.

12:11:29 15 And those are my submissions, Your  
12:11:31 16 Honour, subject to any questions you may have.

12:11:33 17 THE COURT: Well, I do have a  
12:11:34 18 question. I'm not sure, now that I've heard the  
12:11:42 19 parties say what their objections are. I will  
12:11:52 20 raise this question because it has not been  
12:11:54 21 raised.

12:11:57 22 In and amongst this lengthier report  
12:11:59 23 this gentleman comments -- I'll use the word  
12:12:05 24 "comments", you may consider that as a general  
12:12:08 25 word that includes referencing statements made

1 by other academics and other documents and  
2 potentially opinions as well -- on the meaning  
3 of certain treaties that are at issue in this  
4 lawsuit.

5 Now, the tender says nothing at all  
6 about treaties, and Ms. Guirguis did not attempt  
7 to elucidate an expertise in that area. And  
8 just yesterday we had an expert in that area so  
9 none of that surprises me; but now that I've  
10 heard the objections of Canada and Ontario I  
11 must ask Canada and Ontario, what is your -- I  
12 know your position is you've not objected to it.  
13 So I must ask it this way, do you take the  
14 position that this gentleman is qualified to --  
15 or I should otherwise receive evidence about the  
16 meaning of certain treaties that are at issue in  
17 this lawsuit from him? Because there's material  
18 like that in this document.

19 So if you want to take a minute and  
20 think about that or you're busy nodding your  
21 head.

22 MR. LEMMOND: I think that is a very  
23 fair observation, Your Honour.

24 THE COURT: It's a question is what it  
25 is.

1 MR. LEMMOND: And it is of concern to  
2 us that --

3 THE COURT: That part of the tender is  
4 not really in this document but it is in the  
5 report so I feel I must raise it.

6 MR. LEMMOND: I hadn't contemplated,  
7 Your Honour, in terms of formally excluding  
8 those portions of the report. At the very least  
9 though I think they should be given little to no  
10 regard at the minimum as a matter of weight that  
11 they're not -- they're providing a gloss on the  
12 meaning of the treaty as we have seen from this  
13 entire endeavour is an radically different  
14 proposition than providing an informed view  
15 based upon extensive research.

16 So a mere reference, a sentence,  
17 paragraph here or there, I think it would be  
18 difficult to cull those, though not impossible.

19 THE COURT: I'm not talking about  
20 culling anything. As I understand it this  
21 document is going in on consent and I'm not  
22 inviting you to withdraw your consent.

23 But prior to this witness I have had  
24 at least one other witness where the request was  
25 made to, as you put it today in similar fashion,

12:14:47 1 give little or no weight to what was frankly a  
12:14:50 2 small component of the gentleman's opinion. And  
12:14:54 3 that might be said here too.

12:14:56 4 But if you look at the penultimate  
12:14:59 5 conclusion, is that the right word? The  
12:15:02 6 conclusion -- the "penultimate" might mean the  
12:15:04 7 thing before -- the conclusion of this  
12:15:06 8 gentleman's report does expressly speak to the  
12:15:10 9 meaning of Treaty 45 1/2 which is a live issue  
12:15:15 10 in this trial so I feel like I should have  
12:15:18 11 submissions on it.

12:15:18 12 I think your submission is that it  
12:15:20 13 should be given little or no weight? Is that  
12:15:22 14 the gist of it?

12:15:24 15 MR. LEMMOND: Yes, Your Honour. And  
12:15:25 16 as I was thinking of potential other remedies I  
12:15:27 17 think what I said first is probably the better  
12:15:29 18 position, which is that it should be given  
12:15:31 19 little to no weight, especially in light of the  
12:15:35 20 ample evidence that otherwise put before this  
12:15:36 21 Court on those topics and particularly these  
12:15:38 22 treaties.

12:15:39 23 THE COURT: All right. Canada, what  
12:15:40 24 is your response to my question?

12:15:49 25 MR. BEGGS: Thank you, Your Honour. I



12:15:50 1 hadn't actually considered that issue. I didn't  
12:15:52 2 see it as a matter of qualifications, because no  
12:15:55 3 expert could be qualified to opine on a legal  
12:15:58 4 matter for the Court.

12:16:00 5 I had identified several, including  
12:16:03 6 the last sentence in the conclusion which  
12:16:05 7 purports to say what -- essentially what  
12:16:12 8 standard is required as a result of the treaty.

12:16:17 9 I had intended to question the witness  
12:16:19 10 about whether these and other statements were  
12:16:25 11 historical, factual-based statements or --

12:16:30 12 THE COURT: Well, you don't -- I mean  
12:16:30 13 you are going to get a full right of  
12:16:32 14 cross-examination, sir. And you don't have to  
12:16:38 15 tell me or inform the witness of what you are  
12:16:40 16 going to ask him about.

12:16:42 17 MR. BEGGS: I agree that with respect  
12:16:43 18 to those statements they should just be given  
12:16:45 19 little weight by the Court.

12:16:53 20 THE COURT: I'll hear from  
12:16:55 21 Ms. Guirguis about this, but it may be that it  
12:16:57 22 should be left until the end of his evidence.  
12:17:01 23 Thank you, sir.

12:17:03 24 MR. BEGGS: Thank you.

12:17:03 25 THE COURT: Plaintiffs' counsel to

1 deal with all issues, please go ahead.

2 MS. GUIGRUIS: Thank you, Your Honour.

3 So as I understand it, and as my  
4 friends put it, they are objecting to the second  
5 portion of the tender that we have proposed:

6 "[...] potential and actual law  
7 enforcement in relation to Indigenous  
8 lands in the late 18th and the 19th  
9 century in what is now Ontario."

10 First off, I mean, the legal test  
11 doesn't set the bar so high. It's just that the  
12 expert is shown to have acquired a special or  
13 peculiar knowledge; that's set out in paragraph  
14 27 of Mohan.

15 And we would submit that Professor  
16 Harring has met that because his specialized  
17 knowledge extends not just to colonial law and  
18 policy in respect to Indigenous lands in the  
19 18th and 19th centuries, but also to how those  
20 policies and that law was enforced on the  
21 ground.

22 Professor Harring is a legal historian  
23 and sociologist by training and by practice so  
24 his research focuses on law and action, so how  
25 law and policy plays out on the ground. And, as

12:18:20 1 he explained, that that is in large part a  
12:18:23 2 question of enforcement and that is whether and  
12:18:26 3 when, how law and policy is applied in practice.

12:18:29 4 He has extensive training, expertise,  
12:18:32 5 researching the application of enforcement of  
12:18:34 6 law in the 19th century both generally and in  
12:18:38 7 relation to Indigenous lands.

12:18:40 8 We went through how he has published  
12:18:42 9 widely on the topic of law enforcement so there  
12:18:44 10 was policing in a class society.

12:18:47 11 And my friend is suggesting -- my  
12:18:50 12 friends, I think both are suggesting that he's  
12:18:52 13 looked at it in a different context. And they  
12:18:55 14 asked some questions about how policing class  
12:18:57 15 society in Buffalo how the police institution  
12:19:02 16 came to be is different than the situation we're  
12:19:04 17 looking at here and saying that he's limited  
12:19:06 18 because it's a different context.

12:19:08 19 But he answered that question based on  
12:19:10 20 his knowledge of knowing this different context.  
12:19:12 21 That is clear from "White Man's Law", from the  
12:19:15 22 research and publications that he has about  
12:19:17 23 policing in Upper Canada and the rural  
12:19:21 24 environment in Upper Canada in the late 18th  
12:19:24 25 century and 19th century as well.

12:19:26 1 That does include the Six Nations  
12:19:28 2 example. I would disagree with my friend that  
12:19:31 3 there is any difference between how long the  
12:19:34 4 First Nations were there, Six Nations coming  
12:19:35 5 over in the 1790s as Loyalists, essentially,  
12:19:40 6 and settling there versus what we're dealing  
12:19:43 7 with here, being time immemorial.

12:19:47 8 The colonial land policy and laws are  
12:19:50 9 the same. Dealing with a squatter problem is  
12:19:53 10 the same and the reactions to it and the tools  
12:19:55 11 and choices available to law enforcement are the  
12:19:55 12 same. And that is something that Professor  
12:19:57 13 Harring has published on, has researched on, and  
12:20:00 14 has expertise on.

12:20:01 15 THE COURT: I was just going to ask  
12:20:02 16 you a question about that, because there is no  
12:20:04 17 doubt that this gentleman has expertise, but  
12:20:07 18 unlike many of the other expert witnesses that I  
12:20:09 19 have heard from, in his qualifications I have  
12:20:13 20 heard almost nothing, not nothing but almost  
12:20:15 21 nothing about any particular research,  
12:20:20 22 investigation, the review of material  
12:20:23 23 specifically focused on these First Nations and  
12:20:27 24 their area of what we call the claim area. It's  
12:20:32 25 just almost nonexistent in this discussion.

12:20:35 1 So why do you submit I should -- I  
12:20:37 2 think what you're asking me to do is assume that  
12:20:40 3 this gentleman has the depth of expertise in  
12:20:45 4 relation to the claim area and these particular  
12:20:49 5 First Nations?

12:20:52 6 MS. GUIGRUIS: Because this witness  
12:20:53 7 has expertise in looking at settlement happening  
12:20:55 8 in Upper Canada in the relevant time period and  
12:20:58 9 the way that that settlement was moving  
12:21:00 10 throughout Upper Canada. So he was looking  
12:21:02 11 at -- and what he was asked to do is looking at  
12:21:04 12 the legislation available to protect against  
12:21:07 13 squatting. Most of the report is to do with  
12:21:09 14 squatting.

12:21:10 15 THE COURT: Which is not really what  
12:21:10 16 we're talking about.

12:21:12 17 MS. GUIGRUIS: Not what we're talking  
12:21:13 18 about.

12:21:14 19 THE COURT: No.

12:21:15 20 MS. GUIGRUIS: And then to look  
12:21:15 21 specifically as to whether -- the expertise that  
12:21:17 22 is really you see in "White Man's Law" and what  
12:21:20 23 he's looked at there and the questions he has  
12:21:24 24 looked at there and to apply it to these  
12:21:25 25 particular First Nations in this area.

12:21:28 1 THE COURT: But "White Man's Law" is  
12:21:29 2 not about these First Nations.

12:21:32 3 MS. GUIGRUIS: No. It is not about  
12:21:32 4 these First Nations but it is about rural  
12:21:33 5 settlement in Upper Canada in and around the  
12:21:37 6 same time. So, yes, it can be inferred that  
12:21:39 7 they're having the same experiences, that the  
12:21:41 8 government is making the same choices as Upper  
12:21:45 9 Canada fills up.

12:21:47 10 THE COURT: The other thing that's  
12:21:48 11 noticeable in its absence when reviewing this  
12:21:53 12 gentleman's qualifications is any depth of  
12:21:56 13 experience with respect to the British Crown in  
12:22:00 14 particular and the organization, structure, and  
12:22:04 15 manner in which that -- I call it the Crown, but  
12:22:08 16 the government that sits underneath it operates.  
12:22:11 17 I didn't hear anything at all about that.

12:22:16 18 How do you submit I should conclude  
12:22:18 19 that this gentleman is in a position to talk  
12:22:21 20 about how that relatively complex institute,  
12:22:27 21 collection of institutions conducted itself?

12:22:32 22 MS. GUIGRUIS: So, again, Your Honour  
12:22:33 23 I think that what we've gone through looking at  
12:22:35 24 "White Man's Law", looking at "The Rich Men of  
12:22:38 25 the Country, Canadian Law", looking at the

12:22:40 1 Copper Inuit, looking at the Prairie article, as  
12:22:43 2 well, which were all added, Canadian law and the  
12:22:45 3 Prairie First Nations, does consider that  
12:22:47 4 question of the British colonial government, the  
12:22:50 5 legislation and tools that were available to  
12:22:53 6 him.

12:22:53 7 So he does have expertise in looking  
12:22:55 8 at that. And also how that was enforced on the  
12:22:59 9 ground.

12:23:00 10 THE COURT: In the Prairies.

12:23:02 11 MS. GUIGRUIS: In the Prairies and in  
12:23:04 12 Upper Canada, which is of more particular  
12:23:07 13 interest, of course, to us. And that I do think  
12:23:10 14 we see in his articles, the articles that we  
12:23:12 15 went to and also in his book, the "White Man's  
12:23:17 16 Law." That was part of his research. That was  
12:23:19 17 part of the research that he did while in  
12:23:20 18 Saskatchewan and over the years.

12:23:22 19 He has published extensively on  
12:23:25 20 Canadian colonial law.

12:23:27 21 THE COURT: Well, he has not published  
12:23:29 22 extensively on the events and the peoples and  
12:23:31 23 the legal relationships that we have to confront  
12:23:37 24 in this trial. So I think what you're saying is  
12:23:39 25 that he has a more general expertise that could

12:23:43 1 be applied. Is that the gist of it?

12:23:46 2 MS. GUIGRUIS: I think that's correct,  
12:23:47 3 is that the general expertise about Upper Canada  
12:23:50 4 and the settlement of Upper Canada and the  
12:23:52 5 colonial land policy and so on and so forth that  
12:23:54 6 I'm talking about being applied to this area.

12:23:57 7 The reality is that there is not many  
12:23:59 8 people that have published academically about  
12:24:02 9 these particular First Nations.

12:24:04 10 THE COURT: Talking about  
12:24:04 11 publications, we have had a series of experts in  
12:24:06 12 this trial who have demonstrated a significant  
12:24:09 13 amount of research, inquiries, investigations  
12:24:16 14 into these particular First Nations.

12:24:20 15 All right. Well, I wanted to ask  
12:24:21 16 those two questions and I interrupted you so  
12:24:24 17 please continue.

12:24:26 18 MS. GUIGRUIS: Well, I think that I  
12:24:32 19 actually went through most of what I think I was  
12:24:34 20 going to go through.

12:24:35 21 And as I said, he has done extensive  
12:24:39 22 research and has a broad body of work in  
12:24:42 23 colonial law and policy. We do think that that  
12:24:44 24 can -- that is applicable here, the expertise  
12:24:48 25 that this witness -- the evidence that this



12:24:51 1 expert opinion, that this expert witness is  
12:24:53 2 being asked to provide is drawing on that, to  
12:24:57 3 look at how colonial law operates and is  
12:24:59 4 enforced on the ground.

12:25:01 5 He's looked at it in various former  
12:25:03 6 colonies, Canada, U.S., Australia, and he has  
12:25:06 7 looked at it and it includes Canada and Upper  
12:25:06 8 Canada and the area that we're looking at.

12:25:15 9 THE COURT: When you say it includes  
12:25:15 10 Upper Canada are you talking about the Six  
12:25:17 11 Nations research?

12:25:18 12 MS. GUIGRUIS: I'm talking about the  
12:25:19 13 Six Nations research and the other Canadian  
12:25:20 14 research that we see in "White Man's Law".

12:25:24 15 THE COURT: Upper Canada.

12:25:24 16 MS. GUIGRUIS: Upper Canada.

12:25:24 17 THE COURT: You're talking about the  
12:25:24 18 Six Nations research?

12:25:26 19 MS. GUIGRUIS: That's correct.

12:25:37 20 THE COURT: Right. Don't leave the  
12:25:38 21 subject without dealing with the time issue that  
12:25:40 22 was raised, the distinction between the 18th and  
12:25:40 23 the 19th century.

12:25:41 24 MS. GUIGRUIS: Sorry?

12:25:41 25 THE COURT: One of the objections was

1 based on the time period in the tender, that it  
2 was one thing to talk about the 19th century,  
3 but you're also asking for the 18th century.

4 Don't stop before you've dealt with  
5 that.

6 MS. GUIGRUIS: That's right. So the  
7 late 18th century -- again, this relates to the  
8 Six Nations research that was done in "White  
9 Man's Law". When we say the "Six Nations  
10 research" what Professor Harring was also  
11 looking at was the law and policy that was  
12 available after the American Revolution and how  
13 that was applied, how Canada was settled  
14 differently than -- and how the Loyalists were  
15 received into Canada. So we're talking about  
16 the late 18th century, 1790s and on.

17 So he does have expertise there and  
18 has done research and published in that area as  
19 well.

20 And so that's -- we're dealing with  
21 late 18th century and then the 19th century. So  
22 that's the expertise that we submit that he does  
23 have and the ability to speak about that time  
24 period as well.

25 I think I have addressed that our

12:26:51 1 submissions as to why -- because he has that  
12:26:57 2 expertise in police enforcement in the States  
12:26:59 3 doesn't exclude the fact that he has expertise  
12:26:59 4 in law enforcement here.

12:27:03 5 THE COURT: I'm struggling with that,  
12:27:06 6 counsel, because it is a very big leap. No  
12:27:12 7 question that this gentleman has significant  
12:27:13 8 expertise in police enforcement especially in  
12:27:17 9 metropolitan America in the 20th century.  
12:27:19 10 Clearly he does.

12:27:22 11 But we're not dealing with  
12:27:23 12 metropolitan America in the 20th century and  
12:27:27 13 nothing I've heard suggests to me that whatever  
12:27:29 14 the structural problems were in Buffalo or  
12:27:36 15 elsewhere are translatable into the 18th and  
12:27:39 16 19th century on the Bruce Peninsula, which is  
12:27:43 17 what we're concerned about. I'm not saying  
12:27:45 18 they're not. I just haven't heard anything that  
12:27:48 19 says that they are.

12:27:48 20 And there is also a very big leap at  
12:27:50 21 least in Canada between the police and the  
12:27:53 22 military. And, again, nothing put in front of  
12:27:56 23 me to base a conclusion that they are the same  
12:27:59 24 or similar in the United States from Canada.

12:28:06 25 So please address the submission with

12:28:08 1 respect to not just the police but the military.

12:28:12 2 MS. GUIGRUIS: The military and  
12:28:12 3 police, yes.

12:28:13 4 And -- yes. And to be clear, Your  
12:28:15 5 Honour, the reason why his understanding of and  
12:28:19 6 his research and his work on the U.S. law  
12:28:22 7 enforcement and policing institutions in the  
12:28:25 8 U.S. is at all relevant here is that he has an  
12:28:28 9 understanding of law enforcement institutions.  
12:28:31 10 And we'll leave that there.

12:28:33 11 Why we're saying that he has expertise  
12:28:35 12 in enforcement here, law enforcement here is  
12:28:38 13 because of his particular study in Upper Canada,  
12:28:40 14 colonial land policy and its enforcement here.

12:28:43 15 We're talking about both police and  
12:28:45 16 military.

12:28:47 17 THE COURT: Just before you move on,  
12:28:48 18 he's testified that he has done research and  
12:28:54 19 seen, as I think he put it this morning, not  
12:28:57 20 surprisingly, that conflicts over land have  
12:29:00 21 generated criminal proceedings. And he has  
12:29:02 22 looked at some court documents that reflect  
12:29:05 23 those criminal proceedings.

12:29:06 24 He has not testified that he has done  
12:29:09 25 any kind of comprehensive review, top-down, of

12:29:13 1 how in Canada, at the time, authority was  
12:29:17 2 given/not given, institutions were  
12:29:20 3 established/not established, jurisdictions and  
12:29:24 4 what their people were/weren't allowed to do.

12:29:27 5 But he has testified that on an  
12:29:29 6 anecdotal basis he has looked at what he has  
12:29:34 7 seen in archives and so forth about criminal  
12:29:36 8 proceedings.

12:29:37 9 And so I'm struggling with the idea  
12:29:40 10 that that is a basis upon which you can say that  
12:29:42 11 20th century American policing in major centres  
12:29:48 12 will inform the question of what we have to deal  
12:29:51 13 with.

12:29:53 14 MS. GUIGRUIS: Well, in fairness I  
12:29:53 15 think that I may be have misspoken or I didn't  
12:29:58 16 explain that properly.

12:29:59 17 I don't think that the midwestern  
12:30:01 18 institutions, 20th century police institutions  
12:30:04 19 will inform the -- will inform his expertise  
12:30:09 20 about what we see here in Upper Canada. I think  
12:30:11 21 that this is -- that's simply that part of it,  
12:30:14 22 is to demonstrate that he has an understanding  
12:30:19 23 of law enforcement institutions in general.

12:30:21 24 His experience with it, that is his  
12:30:23 25 sociology background, his background in research

1 and in his career.

2 Now, putting that aside, is that he  
3 turned to the question, which is answered  
4 largely in the articles in "White Man's Law"  
5 about Upper Canada and the institutions that  
6 exist here to deal with criminal activity, which  
7 would include trespass and offences and so on  
8 and so forth, in response to squatting.

9 So looking at the question of  
10 squatting is also -- part of it is looking at  
11 what was available to stop it, because it was  
12 not legal at the time, and how that was done.

13 So that's the question that he  
14 researched and looked at for "White Man's Law",  
15 and then also for this expert opinion that we're  
16 hoping he can provide here in this court.

17 THE COURT: Looking at the opinions,  
18 including an opinion that the Crown, and this is  
19 the British Crown, had:

20 "[...] sufficient resources to  
21 put a small armed force on the  
22 boundary of the Saugeen Reserve".

23 This is a very specific opinion which  
24 needs to be built from the bottom up, not taking  
25 an experience from over here and saying, I

12:31:33 1 should infer that it applies over here; and  
12:31:36 2 would require considerable expertise in exactly  
12:31:41 3 what resources were available to the Crown at  
12:31:43 4 exactly that time.

12:31:45 5 And I haven't heard anything this  
12:31:46 6 morning that suggests that this gentleman has  
12:31:50 7 that expertise. I'm pausing over that.

12:31:59 8 I agree that in other parts of this  
12:32:01 9 report, in fact, most of the report is an  
12:32:03 10 account of what was transpiring with respect to  
12:32:06 11 not just squatting but events that were taking  
12:32:10 12 place with respect to either existing legal  
12:32:14 13 regimes or -- well, that's probably overstating  
12:32:17 14 it. But recognitions of what was going on, what  
12:32:22 15 steps were being taken about what was going on;  
12:32:26 16 what steps were not being taken about what was  
12:32:28 17 going on. I'm not asking about any of that.

12:32:31 18 I'm asking about these bigger, broader  
12:32:33 19 statements about -- such as the one on the top  
12:32:37 20 of page 58.

12:32:42 21 MS. GUIGRUIS: He's drawing on the  
12:32:43 22 experience and the research that he has looking  
12:32:43 23 at different examples of what was available in  
12:32:48 24 terms of resources.

12:32:50 25 And what he has researched and

1 published does demonstrate that he has a  
2 particular and special familiarity with those  
3 different examples of what was available to the  
4 British Crown at that time, what they were able  
5 to draw up in different circumstances in and  
6 around the study area.

7 THE COURT: Can you point me to  
8 something, one of the writings of this gentleman  
9 which says he has done appropriately deep dive  
10 into that question of the resources available to  
11 the British Crown in the Saugeen at this time?

12 MS. GUIGRUIS: In the Saugeen at this  
13 time?

14 THE COURT: In the Saugeen at this  
15 time. This is what this opinion is about. It  
16 is not a general proposition; it is very  
17 specific. And I did not hear anything this  
18 morning that would provide a foundation for this  
19 gentleman having that particular expertise.

20 MS. GUIGRUIS: Other than what we see  
21 in "White Man's Law" dealing with Upper Canada  
22 and we would say that that -- hang on. Maybe we  
23 have another example.

24 THE COURT: Please go ahead.

25 MS. GUIGRUIS: Yes, it's -- so more



1 broadly the "White Man's Law" does deal with  
2 Upper Canada and the things that we would see  
3 here. So we do submit that his expertise is --

4 THE COURT: That is the Six Nations.

5 MS. GUIGRUIS: That is the Six  
6 Nations, but there is a small excerpt in "White  
7 Man's Law". What I'm not sure is whether it's  
8 in the excerpt that we added that deals with the  
9 Chippewas of Nawash and Saugeen and does deal  
10 with this area. But I would have to have a  
11 moment to look it up.

12 THE COURT: You do have a colleague to  
13 help you out.

14 MS. GUIGRUIS: Yes, I do.

15 THE COURT: And I will give you time  
16 to look it up.

17 MS. GUIGRUIS: Thank you, Your Honour.

18 So there is a page on 150 to 151,  
19 sorry, yes, actually 150 to 152 and it begins  
20 mid-paragraph where Professor Haring is talking  
21 about the Cape Croker band petitioning for  
22 enfranchisement:

23 "[...] asking the chief to get  
24 control of tribal money from a corrupt  
25 Indian agent [...]"

12:36:08 1 So there is further about the legal  
12:36:13 2 history of the Chippewa at Cape Croker with  
12:36:17 3 respect to asserting their rights and to the  
12:36:19 4 protection of lands.

12:36:20 5 So I would like to look at it a bit  
12:36:22 6 closer before I summarize it for you  
12:36:24 7 incorrectly.

12:36:25 8 THE COURT: Just take a minute and  
12:36:25 9 look at it and answer my question, does it deal  
12:36:30 10 with the British Crown structure, institutions,  
12:36:34 11 authorities, and departments, whatever you want  
12:36:38 12 to call it, police, military in any way at all  
12:36:42 13 or in-depth? So take a quick look at it.

12:36:48 14 MS. GUIGRUIS: Thank you, Your Honour.  
12:37:45 15 No, Your Honour that doesn't  
12:37:47 16 specifically and I don't think that is what you  
12:37:49 17 would be looking for.

12:37:50 18 So the other example with respect to  
12:37:52 19 the military and dealing with the military; it's  
12:37:54 20 not with respect to the Chippewas of Nawash or  
12:37:57 21 the Chippewas of Saugeen. But there are  
12:38:00 22 incidents, for example, the Manitoulin incident  
12:38:03 23 that is cited right after that comes from the  
12:38:05 24 report that talks about military enforcement  
12:38:12 25 examples that did happen.

1 I think that with respect to the  
2 military the question about the enforcement,  
3 understanding police enforcement, whether it's  
4 military enforcement and the tools of the  
5 British military, is as Professor Harring  
6 answered in his -- in the questions that my  
7 friends put to him, is that at different times  
8 in this period, the late -- the late 18th  
9 century and 19th century is that at times the  
10 military pops up, militia pops up. So his  
11 opinion speaks to that as to when it is  
12 available and when it can be called upon.

13 THE COURT: He did say that, counsel,  
14 but in fairness to the witness he was talking  
15 about it in the colloquial way, not in the way  
16 that would suggest that he had done in his  
17 career as a military historian.

18 We have already heard from a military  
19 historian for many days. I know what a military  
20 historian, what kind of background they have.  
21 Not to suggest it has to be the same, because it  
22 doesn't.

23 MS. GUIGRUIS: And that's fair.

24 THE COURT: I don't want you to finish  
25 without dealing with the point I raised, but you

12:39:19 1 may not yet be finished at this point.

12:39:22 2 MS. GUIGRUIS: Let me check my notes,  
12:39:24 3 because they are in several different places.

12:39:46 4 I think that's -- there was one point  
12:39:48 5 that my friend brought up and I wasn't sure if I  
12:39:50 6 understood it correctly from Mr. Lemmond about  
12:39:55 7 Crown resources and actions regarding lands  
12:39:58 8 versus suggesting a doable standard.

12:40:01 9 I don't know if I understood that  
12:40:02 10 correctly, but I would just simply say that  
12:40:06 11 Professor Haring, and I think this is clear, is  
12:40:09 12 that he's researched and published on the tools  
12:40:11 13 available to the government and whether they  
12:40:15 14 were actually being enforced in response to  
12:40:17 15 squatting.

12:40:19 16 So we submit that his expertise with  
12:40:23 17 respect to enforcement is there.

12:40:25 18 THE COURT: With respect to squatting?

12:40:27 19 MS. GUIGRUIS: That's right.

12:40:29 20 THE COURT: Anything further? You  
12:40:29 21 have to deal with my point still about treaty  
12:40:32 22 interpretation. And I recognize you didn't  
12:40:36 23 tender him for that, counsel.

12:40:38 24 MS. GUIGRUIS: That's correct.

12:40:39 25 THE COURT: But it was in the report

12:40:40 1 so I felt I had to raise it.

12:40:48 2 MS. GUIGRUIS: Your Honour, I think we  
12:40:48 3 have largely looked at this as -- we've provided  
12:40:51 4 a historic -- when Professor Brownlie testified  
12:40:54 5 with respect to the treaty and the understanding  
12:40:56 6 of the treaty of 45 1/2 and the obligations  
12:40:58 7 under that, that's why we tendered him.

12:41:04 8 THE COURT: He had considerable  
12:41:05 9 background in Canadian treaties, yes.

12:41:07 10 MS. GUIGRUIS: That's right. So we  
12:41:08 11 haven't proposed to tender Professor Haring as  
12:41:13 12 an expert in treaty making. The question of  
12:41:16 13 whether the Crown undertook the obligation to  
12:41:17 14 protect forever, if I recall correctly, from  
12:41:17 15 Treaty 45 1/2 is not a question that we're  
12:41:20 16 intending to elicit expert evidence from this  
12:41:24 17 witness on; because we see that as basically a  
12:41:31 18 determination of a legal issue as well.

12:41:32 19 THE COURT: Yes, and that was raised.  
12:41:34 20 So would it be fair to say it this way, that the  
12:41:37 21 extent this gentleman may comment in his report  
12:41:41 22 on what Treaty 45 1/2 either means or requires  
12:41:45 23 that that would be not something you would be  
12:41:48 24 advancing as expert opinion evidence but just  
12:41:52 25 commentary that happens to appear in his report?

12:41:55 1 Is that the gist of it?

12:41:57 2 MS. GUIGRUIS: I think that's correct.

12:42:04 3 THE COURT: Anything further?

12:42:05 4 MS. GUIGRUIS: No, Your Honour. Thank

12:42:06 5 you.

12:42:07 6 THE COURT: Any reply?

12:42:11 7 MR. BEGGS: No, Your Honour.

12:42:13 8 MR. LEMMOND: No, Your Honour.

12:42:15 9 THE COURT: I'm going to obviously

12:42:17 10 retire to consider this and make a ruling.

12:42:22 11 Given the time of day, it's coming on quarter to

12:42:25 12 1:00, I think we might as well just come back

12:42:29 13 after lunch because I don't anticipate I will

12:42:32 14 have been able to review all your arguments in

12:42:35 15 15 minutes and get a ruling ready. So if

12:42:38 16 counsel could come back for 2:15. That includes

12:42:41 17 you, sir.

01:10:58 18 -- RECESSED AT 12:42 P.M. --

01:10:58 19 -- RESUMED AT 2:39 P.M. --

02:39:52 20 THE COURT: I have to attend a meeting

02:39:53 21 at 4:30 which means I have to break early. Lots

02:39:57 22 of options, but I think, unless there is an

02:40:04 23 objection, I am going to give my ruling. It is

02:40:06 24 going to be well past our normal start time. So

02:40:11 25 my suggested approach is to stop early and not

02:40:14 1 have an afternoon break. Is that acceptable to  
02:40:16 2 you, Ms. Guirguis? It's your witness.

02:40:19 3 MS. GUIGRUIS: Yes, that's fine.

02:40:21 4 THE COURT: Since we're starting late  
02:40:22 5 it won't mean that he has a protracted period of  
02:40:34 6 testimony.

02:40:35 7 MS. GUIGRUIS: Yes, that's fine.

02:40:37 8 THE COURT: For some reason the  
02:40:38 9 technology is grumpy today.

02:40:54 10 I can't give a ruling until the  
02:40:56 11 computer comes up. All right.

02:42:13 12 -- RULING --

02:42:13 13 I'm going to indicate the ruling on  
02:42:15 14 the tender and then give you my reasons for  
02:42:18 15 decision afterward so you're not sitting and  
02:42:20 16 wondering what I've done. And the answer to  
02:42:23 17 what I've done is I'm going to stroke out, under  
02:42:27 18 paragraph 2, the words "potential and". So that  
02:42:32 19 is the change that I'm making to the requested  
02:42:35 20 ruling, tender that is, to strike out those two  
02:42:40 21 words.

02:42:41 22 And my reasons are as follows:

02:42:47 23 Plaintiffs have tendered this witness  
02:42:50 24 as set out in a written tender that has not yet  
02:42:56 25 been marked as an exhibit, but we will mark as

02:42:59 1 an exhibit.

02:43:00 2 The defendants object to a portion of  
02:43:03 3 the tender. There is no objection to the  
02:43:07 4 following:

02:43:08 5 Dr. Harring is a sociologist and legal  
02:43:11 6 historian with expertise in the  
02:43:13 7 history of the interaction of  
02:43:15 8 Indigenous peoples and common law  
02:43:17 9 legal systems and capable of giving  
02:43:19 10 opinion evidence on:

02:43:21 11 1. Colonial land policy, land  
02:43:25 12 settlement regimes, and land  
02:43:27 13 settlement practices, and land sales  
02:43:29 14 in the late 18th and 19th century in  
02:43:32 15 what is now Ontario".

02:43:36 16 That part of the tender is not the  
02:43:37 17 subject of an objection, and I accept that this  
02:43:40 18 gentleman has the expertise needed for that  
02:43:43 19 portion of the tender.

02:43:46 20 There are two issues that I am  
02:43:47 21 addressing in this ruling. The first issue is  
02:43:51 22 an objection to the second subparagraph of the  
02:43:54 23 tender, and the second issue is one that I  
02:43:58 24 raised.

02:43:58 25 Dealing with my issue first, since it



02:44:04 1 was not raised by the defendants, I raised an  
02:44:07 2 issue because this gentleman's report includes  
02:44:11 3 commentary, opinions and conclusions on the  
02:44:14 4 subject of the interpretation of treaties,  
02:44:15 5 especially Treaty 45 1/2, which is at issue in  
02:44:20 6 this litigation.

02:44:22 7 However, Plaintiffs' counsel does not  
02:44:25 8 proffer this witness as an expert in treaty law,  
02:44:28 9 nor would he be permitted to give evidence about  
02:44:31 10 Canadian law in that expert evidence is not  
02:44:35 11 permitted on domestic law. And there are also  
02:44:39 12 other impediments to this witness testifying  
02:44:41 13 about such matter in any event.

02:44:44 14 I raised this because, on consent,  
02:44:46 15 this report is going in as the main part of this  
02:44:49 16 witness' examination in-chief.

02:44:53 17 Plaintiff's counsel has confirmed to  
02:44:56 18 me that to the extent that the report contains  
02:44:59 19 such findings, opinions and conclusions, they  
02:45:01 20 are not being relied upon let alone as expert  
02:45:05 21 opinion evidence.

02:45:07 22 With that confirmation and given that  
02:45:09 23 the tender doesn't cover this in any event, I'm  
02:45:12 24 satisfied that we can proceed without more at  
02:45:15 25 this stage.

02:45:16 1 I will take this into account when  
02:45:18 2 considering the report, which will become a  
02:45:21 3 trial exhibit. Canada has indicated that it had  
02:45:25 4 planned to cross-examine on those comments and  
02:45:28 5 it is free to do so.

02:45:29 6 The second issue is the objection by  
02:45:37 7 both Canada and Ontario to the second  
02:45:37 8 subparagraph of the tender. It provides as  
02:45:43 9 follows -- and I'll re-read the prefix that this  
02:45:48 10 gentleman would be capable of giving opinion  
02:45:51 11 evidence on:

02:45:51 12 "2) potential and actual law  
02:45:56 13 enforcement in relation to Indigenous  
02:45:58 14 lands in the late 18th and 19th  
02:46:01 15 century on what is now known as  
02:46:02 16 Ontario".

02:46:06 17 Both Canada and Ontario submit that  
02:46:07 18 this witness has not been shown to be qualified  
02:46:10 19 to testify about these matters.

02:46:11 20 The witness certainly has expertise in  
02:46:15 21 issues around policing, however it mainly  
02:46:18 22 relates to the U.S. urban experience, and it  
02:46:23 23 mainly relates to the 20th century context.

02:46:26 24 He has also done research regarding  
02:46:29 25 Indigenous people in Ontario, but that research

02:46:32 1 mainly relates to the Six Nations Iroquois  
02:46:34 2 experience after they immigrated to the south  
02:46:39 3 portion of Ontario. This witness also has some  
02:46:43 4 background regarding other areas of Canada,  
02:46:45 5 including earlier time periods.

02:46:48 6 The evidence before me on the witness'  
02:46:51 7 expertise does not establish a depth of  
02:46:54 8 knowledge regarding the plaintiff First Nations  
02:46:56 9 or the Plaintiff's claim area at issue in this  
02:47:00 10 trial. However, I accept that some of his other  
02:47:03 11 Canadian work could inform, to some extent, some  
02:47:06 12 understanding of the situation of these two  
02:47:09 13 First Nations, the claim area and related law  
02:47:13 14 enforcement.

02:47:16 15 Another difficulty is that the  
02:47:17 16 evidence does not provide a foundation for a  
02:47:20 17 significant expertise regarding the British  
02:47:22 18 Crown and law enforcement, its governance  
02:47:26 19 structures and institutions at the relevant  
02:47:29 20 time, its military at the relevant time and  
02:47:33 21 place. Nor the extent of its resources  
02:47:35 22 available at the relevant time and place; nor is  
02:47:39 23 there a foundation to show that U.S. military  
02:47:42 24 history is analogous.

02:47:47 25 There is some evidence to show that

02:47:49 1 this witness has some knowledge about  
02:47:51 2 interactions between the Indigenous persons  
02:47:54 3 elsewhere in Canada and law enforcement and/or  
02:47:58 4 between Indigenous persons in Canada and the  
02:48:00 5 court system, which I have taken into account.

02:48:11 6 As well, squatting, which is the main  
02:48:14 7 focus of this gentleman's report, does involve  
02:48:19 8 some historical facts regarding the interactions  
02:48:21 9 between various people in relation to squatters  
02:48:25 10 and, to some extent, law enforcement.

02:48:30 11 Bearing in mind the evidence before me  
02:48:32 12 and the submissions that the parties, I conclude  
02:48:34 13 that the tender is overbroad.

02:48:35 14 There is not the required foundation  
02:48:38 15 for opinions about potential law enforcement by  
02:48:41 16 the Crown at the relevant time and place or what  
02:48:46 17 ought to have or could have been done by the  
02:48:48 18 Crown through its law enforcement avenues,  
02:48:55 19 including the military or other options.

02:48:59 20 For example, there is not necessary  
02:49:01 21 foundation for an opinion expressed on page 58  
02:49:04 22 of the report regarding whether the British  
02:49:06 23 Crown had sufficient capacity to protect the  
02:49:09 24 boundaries of the Saugeen from white  
02:49:11 25 encroachment.

02:49:13 1                   However, I recognize that this witness  
02:49:14 2                   has done research that has led to historical  
02:49:17 3                   evidence about events that transpired at the  
02:49:19 4                   relevant time, and I will permit him to testify  
02:49:23 5                   regarding those historical facts, including  
02:49:25 6                   those that may relate to law enforcement.

02:49:29 7                   As for the last objection, that there  
02:49:31 8                   is not a foundation for accepting a tender  
02:49:35 9                   involving the 18th century, the Plaintiff's  
02:49:37 10                  counsel clarifies that this was intended to mean  
02:49:41 11                  1790 and forward, which I find is satisfactory.

02:49:47 12                  Therefore, I amended the tender to  
02:49:48 13                  remove the words "potential and" from  
02:49:53 14                  subparagraph 2 of the Plaintiff's proposed  
02:49:57 15                  tender. That concludes my reasons for decision.

02:50:00 16                  Mr. Registrar, what is the next  
02:50:02 17                  lettered exhibit?

02:50:03 18                  THE REGISTRAR: Lettered Exhibit T, as  
02:50:05 19                  in Tom, 2.

02:50:09 20                  THE COURT: So the unamended tender  
02:50:11 21                  will be lettered Exhibit T-2.

10:11:36 22                  EXHIBIT NO. T-2: Unamended tender for  
10:11:36 23                  Professor Haring.

02:50:14 24                  THE COURT: And the report,  
02:50:14 25                  Mr. Registrar? What is the next exhibit number?

02:50:18 1 THE REGISTRAR: Next exhibit number,  
02:50:20 2 Your Honour, is 4276.  
02:50:25 3 EXHIBIT NO. 4276: Report of  
02:50:27 4 Dr. Sidney Haring.  
02:50:34 5 THE COURT: The other thing,  
02:50:35 6 Ms. Guirguis, I don't think you have marked the  
02:50:37 7 curriculum vitae, did you?  
02:50:40 8 MS. GUIGRUIS: I believe that I did.  
02:50:42 9 THE COURT: Did you?  
02:50:43 10 THE REGISTRAR: Yes. Exhibit 4270.  
02:50:51 11 THE COURT: Please go ahead,  
02:50:52 12 Ms. Guirguis.  
02:50:58 13 MS. GUIGRUIS: Thank you, Your Honour.  
02:50:58 14 We've also -- in addition to Professor Haring's  
02:51:01 15 report we've provided our friends with an  
02:51:03 16 errata, which is document number SC1159, which I  
02:51:06 17 would like to mark as an exhibit as well. I  
02:51:10 18 just need to set up...  
02:51:32 19 THE COURT: Just while you do that,  
02:51:33 20 Mr. Registrar, what is the next exhibit for the  
02:51:36 21 errata?  
02:51:38 22 THE REGISTRAR: 4277.  
02:51:40 23 EXHIBIT NO. 4277: Errata for  
02:51:41 24 Professor Haring; Document SC1159.  
02:52:33 25 MS. GUIGRUIS: Thank you, Your Honour.

02:52:39 1 So SC1159 is the errata. I've also circulated a  
02:53:05 2 list to my friends of secondary sources that  
02:53:08 3 where cited in Professor Harring's report that  
02:53:11 4 they've agreed to add as exhibits. And I've  
02:53:14 5 given a list to the Registrar and I would  
02:53:16 6 propose to add them now. It's a batch of about  
02:53:19 7 ten documents.

02:53:21 8 THE COURT: Mr. Registrar, we're  
02:53:26 9 stopping at 4:00 o'clock. Would you be able to  
02:53:29 10 assign numbers to them at that time?

02:53:32 11 THE REGISTRAR: Yes.

02:53:33 12 THE COURT: Or do you need them before  
02:53:34 13 then, counsel?

02:53:35 14 MS. GUIGRUIS: No, I think that should  
02:53:36 15 be fine.

02:53:37 16 THE COURT: I appreciate the process  
02:53:39 17 you've used. If Mr. Registrar has a list and  
02:53:43 18 then I think what we'll do is he will, between  
02:53:46 19 the end of court today and the start of court  
02:53:48 20 tomorrow morning, assign numbers and perhaps,  
02:53:51 21 sir, you can just hand write them on the piece  
02:53:53 22 of paper.

02:53:55 23 THE REGISTRAR: I will.

02:53:55 24 THE COURT: And then I will have you  
02:53:56 25 put it on the record what the range numbers are

02:53:59 1 and you can mark that as a lettered exhibit or,  
02:54:02 2 something.

02:54:04 3 THE REGISTRAR: Sure.

02:54:05 4 THE COURT: Thank you for doing it  
02:54:06 5 that way, counsel. That's helpful.

02:54:08 6 MS. GUIGRUIS: Thank you, Your Honour.

02:54:10 7 THE COURT: Do remind me tomorrow  
02:54:10 8 morning if -- well, Mr. Registrar won't let me  
02:54:10 9 forget so we will be fine.

02:54:14 10 MS. GUIGRUIS: Thank you, Your Honour.  
02:54:14 11 The last piece is I wanted to hand up an outline  
02:54:18 12 of the examination of Professor Sidney Harring,  
02:54:19 13 again which I've shared with my friends and I  
02:54:19 14 understand they don't have any objection to us  
02:54:19 15 providing.

02:54:22 16 THE COURT: Do you happen to have a  
02:54:23 17 paper copy of the errata? You don't usually  
02:54:28 18 need them, but with the expert reports maybe you  
02:54:41 19 can get one for tomorrow morning?

02:54:43 20 MS. GUIGRUIS: Yes, we can get one for  
02:54:43 21 you tomorrow morning.

02:54:43 22 THE COURT: That's fine. We'll mark  
02:54:43 23 the outline of the examination as the next  
02:54:46 24 lettered exhibit, Mr. Registrar. Is there a PDF  
02:54:54 25 of this for Mr. Registrar?



02:54:56 1 MS. GUIGRUIS: We can add one tonight  
02:54:58 2 to the database.  
02:55:00 3 THE REGISTRAR: Lettered Exhibit S-1.  
02:55:03 4 EXHIBIT NO. Q-1: Outline of the  
02:55:05 5 examination of Professor Harring.  
02:55:05 6 [Exhibit number as corrected later in  
02:55:05 7 the transcript.]  
02:55:06 8 THE COURT: Please go ahead.  
02:55:07 9 MS. GUIGRUIS: Thank you, Your Honour.  
02:55:07 10 EXAMINATION-IN-CHIEF BY MS. GUIRGUIS:  
02:55:08 11 Q. Professor Harring, so I'd like to  
02:55:10 12 turn now to ask you some substantive questions  
02:55:13 13 about your expert opinion. First I'd like to  
02:55:15 14 turn to page 2 of your report, which is  
02:55:18 15 exhibit -- I'm sorry, I forgot to mark that  
02:55:18 16 down.  
02:55:18 17 THE COURT: 4276.  
02:55:18 18 MS. GUIGRUIS: 4276, thank you, Your  
02:55:18 19 Honour.  
02:55:34 20 THE REGISTRAR: Court's indulgence,  
02:55:35 21 Sorry, Your Honour, the last lettered exhibit is  
02:55:38 22 going to be Q-1, "S" is already marked.  
02:55:41 23 THE COURT: Okay.  
02:55:42 24 BY MS. GUIGRUIS:  
02:55:43 25 Q. So your expert report, Exhibit

02:55:46 1 4276, turn to page 2 of the report. And at  
02:55:54 2 paragraph 3 you list six questions that you were  
02:55:56 3 asked. We don't need to read these out. But  
02:55:59 4 from what I can read -- what we can all read,  
02:56:01 5 would it be fair to say that all of these  
02:56:03 6 questions deal with squatting and Crown land  
02:56:05 7 policy in the mid-19th century?

02:56:09 8 A. It would be fair to say that,  
02:56:10 9 yes.

02:56:10 10 Q. Can you briefly describe how you  
02:56:12 11 went about answering these questions?

02:56:17 12 A. I essentially continued the  
02:56:21 13 research methods that I used in "White Man's  
02:56:23 14 Law". I located all the documents that I could  
02:56:27 15 find and read them and, you know, made notes and  
02:56:35 16 organized them. And -- my first level search.

02:56:41 17 Secondly, I went and I looked at all  
02:56:43 18 the secondary sources I could find. Chiefly you  
02:56:46 19 can see relying on Lillian Gates, probably the  
02:56:51 20 greatest expert on Canadian land disposition at  
02:56:58 21 the time. But essentially all of the published  
02:57:01 22 documents that I could locate and read and  
02:57:04 23 organize and analyze in relation to the  
02:57:06 24 documents.

02:57:12 25 Q. I would like to unpack the

02:57:13 1 answers to the questions based on the substance  
02:57:15 2 of your report and using the outline that I  
02:57:17 3 provided to Her Honour.

02:57:19 4 So the first area that I want to  
02:57:21 5 discuss with you is squatting in Upper Canada in  
02:57:24 6 the early to mid-19th century. So Professor  
02:57:28 7 Harring, I would like to start by asking you  
02:57:31 8 about some of the terms that we see in the  
02:57:33 9 questions that you were asked and that you've  
02:57:35 10 used throughout your report.

02:57:37 11 Can you please tell us what you're  
02:57:38 12 talking about when you refer to squatting in  
02:57:40 13 this time period?

02:57:44 14 A. A squatter, briefly, is a  
02:57:47 15 trespasser on the land who is permanent or  
02:57:51 16 semipermanent as opposed to a trespasser who  
02:57:56 17 might wander across the land and take something.

02:57:58 18 They are referred to in a number of  
02:58:00 19 different terms in the documents. And there  
02:58:02 20 were different kinds of squatting, but  
02:58:05 21 essentially, broadly construed by I think  
02:58:07 22 everyone it's someone who is illegally occupying  
02:58:13 23 Crown land in a permanent or semipermanent way.

02:58:17 24 Q. When you say "Crown land", do you  
02:58:19 25 include Indian reserve land?

02:58:21 1 A. Yes, all land that -- the Crown  
02:58:21 2 claimed it owned Indian reserve land and Indian  
02:58:24 3 reserve land is seen, for example, in the  
02:58:26 4 Statute of 1839 is described as Crown land.

02:58:29 5 And, of course, the evidence, much of  
02:58:32 6 the evidence seemed to be that squatters didn't  
02:58:35 7 particularly care or know whose land they were  
02:58:38 8 on much of the time, and the land often wasn't  
02:58:41 9 surveyed or marked either. So it's kind of open  
02:58:45 10 land that's unoccupied which winds up being  
02:58:50 11 Crown land.

02:58:51 12 Some of it could be owned by  
02:58:53 13 speculators who owned large amounts of land so  
02:58:55 14 some of it was private land but most of it was  
02:59:03 15 the Crown land.

02:59:04 16 Q. You discuss in your report,  
02:59:04 17 around pages 9 to 11, where you talk about  
02:59:04 18 different types of squatters. Can you tell us  
02:59:04 19 about those different types of squatters?

02:59:04 20 A. Page 11?

02:59:04 21 Q. 9 to 11, around that.

02:59:25 22 A. Essentially the range of  
02:59:27 23 squatters included a wide variety of imagination  
02:59:30 24 and creativity in rural land occupation. You  
02:59:34 25 could put two ideal types on each end.

02:59:38 1 The type that got the most respect was  
02:59:42 2 the so-called "deserving squatter" or someone --  
02:59:50 3 a farmer who intended to occupy and farm the  
02:59:54 4 land legally but was unable to do that for some  
02:59:57 5 reason, therefore, lived there while they tried  
02:59:59 6 to legalize their status, the so-called  
03:00:01 7 "respectful squatter", in quotation marks, but  
03:00:06 8 we find other words.

03:00:07 9 The opposite end of that are what you  
03:00:10 10 could call timber thieves, or land pirates, or,  
03:00:14 11 you know, timberjackers. These were people who  
03:00:18 12 were intentionally outlaws. They never intended  
03:00:27 13 legal status. They never intended to stay and  
03:00:29 14 farm the land. They are in a subsistence  
03:00:34 15 economy where they would take what they could.

03:00:37 16 Maybe a -- you know, timber, potash,  
03:00:41 17 stone, whatever -- given the constraints of  
03:00:44 18 moving it long distances, but timber and lumber  
03:00:47 19 were always sellable because of the constant  
03:00:51 20 construction going on on the frontier. So these  
03:00:54 21 were land thieves who squatted while they stole.  
03:00:57 22 And then moved on as soon as they exploited the  
03:01:01 23 area and moved somewhere else and presumably  
03:01:04 24 repeated the process.

03:01:05 25 In between you have different people

03:01:07 1 with different levels of intention. And you  
03:01:12 2 had -- some squatters, I suppose the standard in  
03:01:16 3 between ones would be someone who knew they  
03:01:19 4 didn't have a right to be there, but thought  
03:01:21 5 they could improve the land while they were  
03:01:24 6 squatting say for several years, collect some  
03:01:29 7 payment for it, and then have some cash and move  
03:01:31 8 on and repeat the process. So they're sort of  
03:01:35 9 making a living by being itinerant squatters on  
03:01:39 10 the moving frontier.

03:01:41 11 And again, you have to imagine the  
03:01:43 12 ingenuity and creativity of rural American  
03:01:46 13 entrepreneurs, rural Canadian entrepreneurs.  
03:01:49 14 Lots of variations.

03:01:51 15 Q. You also use the terms "legal"  
03:01:53 16 and "illegal" settlers throughout your report.

03:01:58 17 What do you mean by legal and illegal  
03:02:00 18 settlers?

03:02:01 19 A. Well, a legal settler has gotten  
03:02:04 20 some kind of a legal title or lease or  
03:02:06 21 permission or right of occupation which could  
03:02:10 22 come a number of ways.

03:02:11 23 I mean, I could be a rich speculator  
03:02:13 24 and I could tell someone that they had my  
03:02:15 25 permission to stay on the land and develop it as

03:02:18 1 best they could and maybe we can come to  
03:02:19 2 accommodation some day if we could. They would  
03:02:22 3 be a legal settler.

03:02:24 4 The illegal settlers are all, by  
03:02:27 5 definition, squatters. They are illegally  
03:02:29 6 occupying either Crown or private land, mostly  
03:02:33 7 Crown land.

03:02:34 8 Q. And finally you have used this  
03:02:36 9 word when we're talking right now "speculation"  
03:02:39 10 or "speculator". What does that refer to?

03:02:44 11 A. Okay, speculation was almost --  
03:02:45 12 it's a speculative economy as the land -- as  
03:02:48 13 people move west the land values rise.

03:02:51 14 So a common practice, a common legal  
03:02:54 15 practice would be to take a legal form and  
03:02:56 16 improve its value, sell it at a high price, move  
03:03:00 17 on. Take another legal form, improve its value  
03:03:05 18 and sell it and move on.

03:03:06 19 They are essentially both a farmer - a  
03:03:08 20 legal farmer and a legal speculator at the same  
03:03:10 21 time. I believe one of the notes in here, I  
03:03:13 22 found an assistant surveyor who was both  
03:03:17 23 squatting and speculating at the same time.

03:03:21 24 You're thinking, this is almost the  
03:03:23 25 trifecta of what he could have done on land. He

03:03:25 1 is surveying it, squatting on it, and  
03:03:29 2 speculating and gambling that he's guessing that  
03:03:32 3 his squatter rights are going to increase in  
03:03:35 4 value so he will be able to sell them.

03:03:37 5 And you simply have to see -- or  
03:03:40 6 imagine, almost unimaginable I think in a modern  
03:03:43 7 urban setting like Toronto, on an open frontier  
03:03:47 8 with unclear land law you would get, in the  
03:03:55 9 1830s, '40s, '50s, very imaginative  
03:03:59 10 approaches to individual arrangements in this  
03:04:03 11 kind of a context.

03:04:05 12 Q. So in this time period in Upper  
03:04:07 13 Canada was speculation a legal practice?

03:04:10 14 A. Well, it becomes -- it -- I  
03:04:13 15 describe it as quasi-legal. It's quasi-legal  
03:04:24 16 for several reasons. One is, as I told students  
03:04:26 17 in property, possession is a property right. So  
03:04:28 18 the simple act of occupying property, possessing  
03:04:32 19 it, there is a maxim, which I Googled last night  
03:04:35 20 even in Canada, possession is nine-tenths of the  
03:04:38 21 law, which, you know, we all learned in law  
03:04:41 22 school I think.

03:04:42 23 I just checked it last night to make  
03:04:45 24 sure it was a maxim in Canada and it came up,  
03:04:52 25 because I didn't want to make that mistake.



03:04:54 1 Similarly, of course, the right of  
03:04:55 2 possession leads to various sorts of property  
03:05:02 3 rights, including adverse possession in the  
03:05:05 4 common law. So although ordinarily adverse  
03:05:08 5 possession is not running against the Crown,  
03:05:10 6 runs against the Crown for a longer period, but  
03:05:13 7 it runs against individuals.

03:05:15 8 So there always is this idea that  
03:05:17 9 somehow you can convert your illegal occupation  
03:05:21 10 into a legal occupation.

03:05:23 11 Thirdly, Canadian law came to  
03:05:25 12 recognize a right of pre-emption. And the right  
03:05:30 13 of pre-emption comes from the two principles I  
03:05:35 14 just laid out, that if someone moved on the land  
03:05:37 15 and improved it, say built a hut, cleared a  
03:05:39 16 potato patch or cleared an acre or two a year,  
03:05:43 17 they were adding substantially to the value of  
03:05:45 18 the land; so the next person who came could  
03:05:49 19 purchase the pre-emption right and be two years  
03:05:53 20 ahead because they don't have to build a house  
03:05:55 21 and they don't have to clear the acre or two.

03:05:58 22 And we have, you know -- it actually  
03:06:00 23 evolves into the law as a principle in equity.  
03:06:03 24 As the law is moving from chancery to equity,  
03:06:10 25 the common law, of course, is an evolving --

03:06:15 1 it's the -- it's the evolving law of  
03:06:17 2 English-speaking peoples.

03:06:18 3 So as these different property rights  
03:06:21 4 arise, the law takes account of them. And  
03:06:24 5 equity, of course, was created the commercial  
03:06:28 6 revolution to allow types of property rights  
03:06:31 7 that didn't exist previously in the common law.

03:06:37 8 So the courts start to come up with an  
03:06:39 9 idea that there is a right of pre-emption and  
03:06:41 10 John Beverley Robinson, Chief Justice of Canada,  
03:06:45 11 himself says he doesn't like it. But it's been  
03:06:47 12 too universally recognized to disavow.

03:06:51 13 So begrudgingly, and I could see how a  
03:06:54 14 conservative judge would be uncomfortable with  
03:06:56 15 it because it does up-end property rights,  
03:07:01 16 traditional property rights.

03:07:03 17 So in that way, squatting became  
03:07:06 18 quasi -- I suppose there is a fourth way too in  
03:07:09 19 that if in common usage of whatever officials  
03:07:11 20 were on the frontier, surveyors, land  
03:07:15 21 commissioners, Indian agents, if they started to  
03:07:18 22 just leave squatters alone, you know -- it's  
03:07:23 23 sort of analogous, I suppose, to driving past a  
03:07:26 24 certain number of speed traps and not being  
03:07:28 25 stopped. The law in effect is evolving.

03:07:36 1 So if the officials on the frontier  
03:07:38 2 are benign towards squatters or don't report  
03:07:42 3 them, don't eject them, don't enforce, you know,  
03:07:45 4 it's against the law of trespass without even a  
03:07:49 5 statute, it again becomes quasi-recognized by  
03:07:55 6 the law.

03:07:56 7 THE COURT: Counsel, I didn't want to  
03:07:58 8 interrupt your witness.

03:08:01 9 Sir, I'm struggling a bit because  
03:08:05 10 neither you nor anyone else is really entitled  
03:08:08 11 to make statements about current law.

03:08:12 12 THE WITNESS: Sorry.

03:08:12 13 THE COURT: And that's fine because  
03:08:14 14 that's not why you're here. You were asked  
03:08:17 15 about events in the 19th century and I think you  
03:08:23 16 were answering, I suspect, about events in the  
03:08:26 17 19th century.

03:08:28 18 THE WITNESS: Yes.

03:08:29 19 THE COURT: But it would be of  
03:08:30 20 assistance to me that you, using your choice of  
03:08:34 21 words, remember that you're talking about a  
03:08:40 22 historical legal situation and not today.  
03:08:43 23 Because I'm finding the switching back and forth  
03:08:46 24 with the present tense confusing.

03:08:49 25 And I know that counsel is intending

03:08:50 1 to get you to speak about laws as they existed  
03:08:55 2 at certain historical points in time. So I'm  
03:08:58 3 just going to ask you to try.

03:08:59 4 It's hard, to try and really focus on  
03:09:03 5 the time period and historical law and not  
03:09:09 6 switch back and forth between the present and  
03:09:11 7 the past, okay? Because I'm going to have a  
03:09:14 8 hard time unscrambling it otherwise.

03:09:16 9 Sorry to interrupt you, Ms. Guirguis.  
03:09:18 10 I know that is what you were attempting to  
03:09:20 11 achieve, and I know the witness is trying to be  
03:09:22 12 helpful.

03:09:23 13 THE WITNESS: Yes. I'm sorry, Your  
03:09:24 14 Honour.

03:09:25 15 THE COURT: No, no. It's all right.  
03:09:25 16 I just wanted to get started on the right foot  
03:09:28 17 here. Please go ahead.

03:09:29 18 MS. GUIGRUIS: Thank you, Your Honour.

03:09:30 19 BY MS. GUIGRUIS:

03:09:30 20 Q. The other item -- and I do want  
03:09:32 21 to, at a later stage, get into or perhaps touch  
03:09:37 22 on again the pre-emption privileges that were  
03:09:42 23 recognized and/or existed at that time, whether  
03:09:44 24 your view that squatting was viewed as  
03:09:46 25 quasi-legal. But I just want to go back to the

03:09:49 1 one point where we were talking about

03:09:51 2 speculation at that time --

03:09:52 3 A. Yes.

03:09:52 4 Q. -- in the 19th century.

03:09:55 5 Speculation, as I understand it, as you've

03:09:57 6 explained it, is a practice of someone buying

03:09:59 7 land but not living on it?

03:10:00 8 A. And that is legal.

03:10:02 9 Q. That was legal?

03:10:03 10 A. Was legal.

03:10:03 11 Q. Okay. Thank you. So squatting

03:10:09 12 in the 19th century, what did a squatter

03:10:11 13 settlement look like?

03:10:15 14 THE COURT: Can you be more specific?

03:10:17 15 MS. GUIGRUIS: Yes.

03:10:17 16 THE COURT: We have huge time period,

03:10:18 17 so I have geographic concerns. I want to make

03:10:23 18 sure we're focused on the subject matter of the

03:10:27 19 trial. So if you can try and be more specific.

03:10:29 20 I don't like to interrupt, but such a broad

03:10:32 21 question. A hundred years with no particular

03:10:40 22 location. I don't think that's what you're

03:10:41 23 going for.

03:10:41 24 MS. GUIGRUIS: No, not at all.

25

03:10:41 1 BY MS. GUIGRUIS:

03:10:42 2 Q. In the mid 19th century or in the  
03:10:42 3 19th century, when we're talking about -- and to  
03:10:45 4 be fair you refer to Saugeen lands in your  
03:10:47 5 report.

03:10:47 6 A. Yes.

03:10:48 7 Q. So when you say Saugeen lands,  
03:10:49 8 what are you referring to?

03:10:51 9 A. I'm referring to --

03:10:54 10 Q. There is a map behind you. There  
03:10:56 11 are two maps if you want to take a look. There  
03:10:58 12 is Exhibit P and Q. You're referring to Exhibit  
03:11:02 13 Q.

03:11:03 14 A. Mostly the 1850s I'm referring  
03:11:04 15 to the former Saugeen lands ceded in Treaty 45  
03:11:07 16 1/2.

03:11:11 17 Later in the report there is a  
03:11:12 18 question of squatting on actual Saugeen lands  
03:11:16 19 that have not been surrendered by treaties, I  
03:11:19 20 believe 67 and 72. So there's -- and you're  
03:11:24 21 seeing squatters moving.

03:11:26 22 You can actually see it if you look at  
03:11:28 23 the township histories. The townships filled in  
03:11:34 24 sequence, often slightly before surveying itself  
03:11:37 25 and legal land being made available, because

03:11:47 1 squatters are hoping, or guessing, or imagining  
03:11:50 2 that they might get a spot of -- a spot of land  
03:11:54 3 that becomes legally available to them so they  
03:11:57 4 can, in fact, buy it and make a farm there.

03:12:05 5 THE COURT: Counsel, can you just put  
03:12:07 6 on the record -- I mean, for the record what the  
03:12:08 7 area that the witness was pointing to?

03:12:10 8 MS. GUIGRUIS: Absolutely. So for the  
03:12:11 9 record he is pointing at Exhibit Q, and the  
03:12:13 10 witness was referring to the lands that are  
03:12:17 11 south of Owen Sound, running down to Collingwood  
03:12:21 12 over to Goderich and running up Lake Huron back  
03:12:27 13 north towards the Highway 21 line.

03:12:33 14 BY MS. GUIGRUIS:

03:12:34 15 Q. So in that area and based on what  
03:12:37 16 you reviewed in the historical records, what  
03:12:41 17 would a squatter settlement look like?

03:12:45 18 A. Okay. There would be a number of  
03:12:46 19 forms because -- just like the amount of  
03:12:48 20 imagination existed. In general, a way to  
03:12:51 21 understand it is that you've got a line of  
03:12:53 22 settlement moving along the frontier as lines  
03:12:58 23 behind it, I mean, between this area and  
03:13:01 24 Toronto. Because lower -- Upper Canada is  
03:13:06 25 settled from the Great Lakes, from Ontario to

03:13:09 1 Erie north and west.

03:13:13 2 Those lands are occupied or full or  
03:13:15 3 unavailable for any kind of settlement,  
03:13:17 4 squatting or buying, except to the extent that  
03:13:19 5 they held by speculators which they usually are  
03:13:22 6 squatting because they can't afford that land.

03:13:25 7 So they are moving in a moving line of  
03:13:27 8 settlement that you can literally see in the  
03:13:29 9 various literatures.

03:13:32 10 And you know it's not a line of  
03:13:34 11 settlement, like a line in the sand or a pencil  
03:13:38 12 line; it's a fluid area where land is being --  
03:13:44 13 is seen as being occupiable, obtainable.

03:13:50 14 And the hope is that it will be --  
03:13:53 15 ultimately be legalized in some way, maybe a  
03:13:57 16 pre-emption right, maybe an actual title.

03:13:59 17 So you've got an area, and I suppose  
03:14:01 18 it's 10 or 15 or 20 miles wide, and that varies  
03:14:05 19 depending how good the land is and how many  
03:14:08 20 people are there.

03:14:10 21 And we all know, I mean, one of the  
03:14:11 22 things about Canadian land is that there's  
03:14:13 23 better land and worse land. And settlers figure  
03:14:17 24 that out very quickly because their lives  
03:14:19 25 depended on it.



03:14:20 1 So, for example, if you have a stretch  
03:14:22 2 of swamp, you'd skip that. If someone hears  
03:14:26 3 that there is a great valley ten miles over or a  
03:14:30 4 mill site or a river valley, you might skip ten  
03:14:34 5 miles and head up there because you would  
03:14:36 6 perceive yourself as gaining a temporary  
03:14:36 7 advantage.

03:14:45 8 At the same time you can't go too far  
03:14:47 9 because people forget that the settlers at this  
03:14:50 10 time were very interdependent. These are  
03:14:52 11 subsistence peoples. They are exchanging goods  
03:14:57 12 with each other. Food is hard to come by. A  
03:15:00 13 farm doesn't yield for several years. Maybe a  
03:15:02 14 patch of potatoes the second or third year,  
03:15:05 15 cabbages. So you have got to be trading for  
03:15:08 16 bacon and flour and necessities like that.

03:15:11 17 The flour is always being milled  
03:15:13 18 behind you; it's rarely being milled ahead of  
03:15:16 19 you because it hasn't been settled. So you have  
03:15:20 20 to trade back to get flour.

03:15:23 21 So your transportation at the time and  
03:15:24 22 your need for support, you might need help  
03:15:26 23 building a house, you might need help clearing  
03:15:30 24 land. So you can't be too far from your  
03:15:32 25 neighbours. So these aren't solitary people.

03:15:35 1 Although I wouldn't say that if one  
03:15:37 2 weren't a timber thief, he wouldn't want to get  
03:15:40 3 20 miles ahead of his neighbours, but he can't  
03:15:44 4 get too far ahead because he can't sell the  
03:15:47 5 timber.

03:15:48 6 So there are geographical constraints  
03:15:51 7 structuring both legal settlement and squatter.  
03:15:54 8 Roads, rivers, the lakes become a transportation  
03:15:57 9 corridor, all of that.

03:16:00 10 So that's what it looks like. When  
03:16:02 11 you actually take a -- I hate to call it taking  
03:16:06 12 a squat, but when you take a piece of land, and  
03:16:11 13 it's sometimes called a squat in the literature,  
03:16:14 14 but I prefer to say just taking a piece of land,  
03:16:16 15 you have to build yourself a shelter. And the  
03:16:20 16 shelter can be varying levels of rudimentary  
03:16:26 17 depending on the money you have, whether you  
03:16:28 18 have nails, what kind of materials.

03:16:32 19 Many of them were log. Many of them  
03:16:35 20 were lumber, because lumber is sawn. Some of  
03:16:39 21 them were just, you know, hovels built with  
03:16:43 22 piles of the branches. We have those  
03:16:44 23 descriptions. There are descriptions in the  
03:16:45 24 literature. Many descriptions so I'm not  
03:16:47 25 imagining this.

03:16:48 1 Obviously a more substantial squatter  
03:16:52 2 who has a more permanent intent to stay on the  
03:16:57 3 land would be likely to build a better house,  
03:17:00 4 but not necessarily.

03:17:02 5 Then you clear land. You're clearing  
03:17:05 6 what we call stump farms, and you're clearing  
03:17:09 7 without a chain saw, with an axe or a saw. This  
03:17:13 8 often is described as a two-person job. You  
03:17:16 9 know, cutting big trees by yourself is  
03:17:18 10 difficult.

03:17:21 11 So people would exchange labour.  
03:17:22 12 People sometimes hired other people. They  
03:17:25 13 had -- if they, for example, sold a farm and  
03:17:28 14 were moving west to try to make a bigger farm  
03:17:31 15 they might have capital.

03:17:33 16 So, and a person could clear an acre  
03:17:36 17 or two a year. So you can start to imagine -- I  
03:17:41 18 hate to -- start to imagine an acre. I was  
03:17:45 19 going to try to compare it to the size of the  
03:17:47 20 courtroom but I can't.

03:17:48 21 THE COURT: I think you should stop  
03:17:50 22 and take a breath and maybe Ms. Guirguis can  
03:17:53 23 remind you of the question, because you may  
03:17:56 24 discover you've gone into --

03:17:59 25 THE WITNESS: What it looked like.

03:18:01 1 THE COURT: -- a great deal of detail.

03:18:03 2 THE WITNESS: I thought she wanted a

03:18:04 3 great deal of detail.

03:18:07 4 THE COURT: One thing you can be sure

03:18:08 5 of for all lawyers, sir, is that if you overlook

03:18:12 6 something they will ask you another question;

03:18:13 7 and maybe she did, but now that you're getting

03:18:14 8 down to that level of detail I'm going to get

03:18:14 9 back to Ms. Guirguis.

03:18:15 10 THE WITNESS: I'm sorry, I was

03:18:17 11 intending a detailed answer.

03:18:20 12 MS. GUIGRUIS: Certainly. Thank you.

03:18:21 13 THE COURT: You've certainly covered

03:18:23 14 many, many aspects of what I thought maybe

03:18:25 15 counsel --

03:18:26 16 BY MS. GUIGRUIS:

03:18:26 17 Q. It did. It may have crossed off

03:18:28 18 some questions in the future so that's great.

03:18:31 19 A. You understand I want people to

03:18:33 20 understand.

03:18:34 21 Q. Yes, you are a professor so I

03:18:37 22 appreciate that.

03:18:37 23 A. I kind of like squatters in a way

03:18:43 24 being an old farmer. You know, this is

03:18:45 25 heritage.

03:18:45 1 Q. And thank you for that. That  
03:18:47 2 gives us a picture of what we were looking for.

03:18:49 3 One follow-up question that I have had  
03:18:50 4 is this line of settlement that you describe of  
03:18:56 5 settlers moving and clearing land, and so on,  
03:18:58 6 that would have continued north, past the part  
03:19:01 7 that we were talking about, north of Owen Sound  
03:19:03 8 as well?

03:19:04 9 A. It's going on through this whole  
03:19:06 10 period until they reach a limit where it can't  
03:19:10 11 geographically or ecologically work any more.

03:19:12 12 Q. Now let's shift to talking about  
03:19:15 13 why, in your view, and based on literature you  
03:19:17 14 have reviewed, was squatting happening in Upper  
03:19:20 15 Canada in the early to mid-19th century? Why  
03:19:23 16 was it happening?

03:19:25 17 A. Okay. Several reasons. I'm  
03:19:37 18 relying on Lillian Gates, and this is  
03:19:38 19 essentially her main thesis, and she is the  
03:19:41 20 leading authority on land settlement in Canada  
03:19:45 21 at this time I believe.

03:19:48 22 MS. GUIGRUIS: Just to pause there;  
03:19:48 23 for the record, Your Honour, Lillian Gates is  
03:19:50 24 one of those sources that we will be adding as a  
03:19:50 25 secondary source in an exhibit later, Your

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Honour .

BY MS. GUIGRUIS:

Q. Sorry, go ahead, professor.

A. And it's also consistent with my own research, but essentially squatting is going on because the land is -- because land that can be purchased at a reasonable price is not readily available.

It has to do with legal land settlement practices determined by the British and Canadian governments.

Q. So I would like to pull up the Buller report, which you mention and cite in your report at page 4. This is already an exhibit. It's appended to a report from Lord Durham so it's Exhibit 1284, and it is a report dated March 5th, 1839.

First of all, Professor Harring, can you tell me who is the Buller that is writing the Buller report?

A. He is Commissioner of Crown Lands and Immigration.

Q. And what is Lord Durham's report about?

A. Lord Durham is sent to Canada to

03:21:00 1 essentially report on problems with settlement  
03:21:04 2 of Canada, like, what's -- you know, what's  
03:21:07 3 going wrong and what is happening there.  
03:21:09 4 Parliament is very concerned. Canada is a  
03:21:12 5 major -- well, I won't say it's a Crown jewel of  
03:21:16 6 the British empire but it's a very important  
03:21:19 7 colony. And there's some difficulties of  
03:21:27 8 different types, not entirely with land, but  
03:21:29 9 this report comes out of that process.

03:21:38 10 And then I assume Lord Durham himself  
03:21:40 11 didn't know much about land in Canada so he  
03:21:42 12 subcontracted the report to Buller, Commissioner  
03:21:46 13 of Crown lands, who then reported in this  
03:21:50 14 detail.

03:21:50 15 Q. And the section that you cite is  
03:21:52 16 on page 106 and 107 which is PDF image 109 and  
03:21:57 17 110?

03:21:58 18 A. Yes.

03:21:59 19 Q. What is the relevance of Buller's  
03:22:02 20 report to the question of -- to the topic of  
03:22:06 21 squatting that we're talking about in the 19th  
03:22:09 22 century?

03:22:09 23 A. Well, I mean the first thing that  
03:22:12 24 jumped out at me is that it's a recognition of  
03:22:15 25 squatting being central to the Canadian

03:22:18 1 settlement at the highest levels of government.

03:22:20 2 This is a report on what needs to be  
03:22:22 3 done in Canada; what should be done in Canada;  
03:22:24 4 what can be done in Canada, commissioned by  
03:22:27 5 Parliament and their leading expert says this.

03:22:31 6 And I simply use it because it makes  
03:22:35 7 it clear that this understanding of where  
03:22:40 8 squatting fit into the settlement pattern was  
03:22:43 9 universally understood and officially  
03:22:44 10 understood.

03:22:53 11 Q. Thank you. You mentioned that  
03:22:54 12 your view is that one of the reasons that you  
03:22:56 13 rely on the secondary sources for this is that  
03:22:59 14 squatting is going on because the land is not  
03:23:01 15 readily available and can't be purchased at a  
03:23:04 16 reasonable price at this time. So in the 19th  
03:23:07 17 century what was the process of land allocation?

03:23:11 18 A. It changes, but the -- one  
03:23:15 19 outline of it, an outline of it is that -- and I  
03:23:21 20 don't want to -- after the American Revolution  
03:23:25 21 and the Loyalists came to Canada, there was an  
03:23:28 22 idea that somebody had really gone wrong in the  
03:23:30 23 United States.

03:23:31 24 That essentially, you know, too much  
03:23:33 25 land available too cheaply had created a sort of



03:23:37 1 democratic rabble that destabilized the  
03:23:41 2 political and social order. I mean I think  
03:23:42 3 that's fair to summarize that.

03:23:47 4 Well, it was more complicated than  
03:23:48 5 that, but it's a -- I would start. Then the  
03:23:53 6 idea in Canada was that they would create a more  
03:23:55 7 orderly society modeled, you know, just loosely  
03:24:02 8 on England, but with a local -- I don't want to  
03:24:08 9 call it an aristocracy because that is not fair,  
03:24:12 10 with successful locals, locally-established land  
03:24:17 11 entrepreneurs settling large areas in an orderly  
03:24:21 12 way, making land available to vetted, orderly  
03:24:26 13 settlers who would be loyal to King and Crown,  
03:24:31 14 attend the Anglican church, pay their taxes, and  
03:24:34 15 I guess be a more orderly conservative kind of  
03:24:43 16 people than you would find had caused the  
03:24:46 17 Loyalist immigration in the first place from the  
03:24:49 18 United States.

03:24:49 19 So the -- I don't want to use richer  
03:24:51 20 because it gets into class, but high-ranking  
03:24:54 21 army officers, servants of the Crown, I mean  
03:24:59 22 officials of the Crown, people who worked for  
03:25:02 23 the government who had proven themselves loyal  
03:25:05 24 could get big grants.

03:25:08 25 And then people who had been loyal on

03:25:12 1 smaller levels could get smaller grants to the  
03:25:14 2 point where say an ordinary militia man, an  
03:25:18 3 ordinary soldier in the Revolutionary War who  
03:25:19 4 came to Canada as a Loyalist might get a hundred  
03:25:20 5 acres. It's not consistent. Because you apply  
03:25:22 6 for a grant and -- individually and different  
03:25:26 7 people got different grants, some political  
03:25:29 8 connections, that kind of thing.

03:25:30 9 But in general there was a slow, very  
03:25:33 10 orderly process where a few people got a lot of  
03:25:37 11 land so that the poorer people didn't have  
03:25:44 12 access to cheap land easily.

03:25:49 13 Q. So following on that at page 6 of  
03:25:52 14 your expert report you detail five causes for  
03:25:56 15 why squatting was happening in the 19th century.

03:26:03 16 A. Yes.

03:26:04 17 Q. And I'd just like you to  
03:26:04 18 elaborate briefly on each of these. The first  
03:26:04 19 one is you say that the only way to get land was  
03:26:07 20 making a petition to the Governor in Council  
03:26:09 21 which was slow?

03:26:11 22 A. Yes.

03:26:12 23 Q. Can you elaborate on that?

03:26:13 24 A. Again, this is completely a  
03:26:14 25 political process. I mean, I would -- as a

03:26:25 1 Loyalist sergeant in the army, I would petition  
03:26:28 2 that, you know, I had served for seven years in  
03:26:28 3 the army and I had done this and I had done  
03:26:28 4 that, and I had brought my family to Canada and  
03:26:32 5 I was a hard-working person and I would like to  
03:26:34 6 have five hundred acres of land.

03:26:36 7 And maybe I'd get it, maybe I'd get  
03:26:39 8 two. Maybe it would go in a pile some place.

03:26:42 9 So it was -- because these are being  
03:26:44 10 handed out one at a time by the Governor in  
03:26:48 11 Council looking at -- and I would have my  
03:26:49 12 friends write letters.

03:26:53 13 So you just see that kind of a  
03:26:54 14 process. It smacks of politics. It smacks of  
03:26:57 15 just a tedious bureaucratic process; but it  
03:27:01 16 means that it's slow and I'm frustrated while I  
03:27:06 17 wait, or I might be frustrated. I might get 200  
03:27:10 18 acres and then sell a hundred of them and be  
03:27:13 19 quite well off, but I have no predictability  
03:27:22 20 until something happens.

03:27:23 21 Q. Now do you know from your review  
03:27:23 22 of the sources and the historical record, when  
03:27:24 23 we're talking about slow do we mean months, a  
03:27:27 24 year?

03:27:27 25 A. Oh, never happened. You see

03:27:28 1 letters, you know, I asked last year or the year  
03:27:32 2 before and the year before. There are plenty of  
03:27:34 3 letters like that saying how hard they worked  
03:27:37 4 and how loyal they were. And, you know, they  
03:27:39 5 can be painful to read. People also -- there is  
03:27:44 6 a lot of chicanery and lying and fraud. I can  
03:27:47 7 say I was a Loyalist in New Jersey and not have  
03:27:50 8 been one. And they are suspicious of that. And  
03:27:54 9 how do they know? I need some letters.

03:27:56 10 So you have -- we don't have  
03:27:58 11 fingerprints. We don't have -- I mean it's a  
03:28:00 12 time when information is difficult to organize  
03:28:06 13 and retrieve.

03:28:08 14 Q. The second reason you cite is  
03:28:09 15 that there is a shortage of surveyed lands for  
03:28:12 16 small scale settlement because large grants are  
03:28:15 17 being made to privileged people?

03:28:16 18 A. Huge grants. For example, one  
03:28:18 19 book by Clarke on Essex County, Essex County  
03:28:22 20 down just below Detroit on Lake Erie. Someone  
03:28:28 21 got the whole county, or most of the county, and  
03:28:30 22 he's giving it out. He's actually trying to  
03:28:33 23 give it out but he wants money so people have to  
03:28:38 24 have money.

03:28:39 25 And he is giving it out to people who

03:28:41 1 he trusts he can work with. So it's pretty hard  
03:28:44 2 to imagine a person having a county and then  
03:28:46 3 allocating it among applicants. I mean, it's  
03:28:49 4 going to be, again, a slow, tedious process.  
03:28:53 5 People make a downpayment and not be able to pay  
03:28:55 6 any more so you have to kick them off.

03:28:59 7 They tried leasing and leasing seems  
03:29:01 8 to fail in North America because the legal  
03:29:05 9 culture is that people want the fee, they want  
03:29:08 10 to own the land.

03:29:10 11 Q. You mentioned John Clarke, "The  
03:29:12 12 Ordinary People of Essex", is this another  
03:29:15 13 source that we'll be adding as well as another  
03:29:18 14 John Clarke publication? So is John Clarke  
03:29:21 15 writing at -- he's writing about the same period  
03:29:23 16 of time, in the 19th century?

03:29:25 17 A. Yes, the settlement of this time.  
03:29:27 18 And he is very different than Gates in his  
03:29:30 19 methodology. He is writing now. Gates is many  
03:29:33 20 years ago. And he is what you call a modern  
03:29:36 21 social historian, so he is using lots of data,  
03:29:39 22 economic measures, he's counting the bushels of  
03:29:47 23 wheat, that kind of stuff, which is a modern way  
03:29:49 24 of doing social history. But it is incredibly  
03:29:50 25 intricate and he is able to very clearly

03:29:53 1 document how the land is being allocated and  
03:29:56 2 what works and what doesn't work.

03:30:01 3 But I believe one number in there is,  
03:30:01 4 in the 1820s, 65 percent of Essex is still --  
03:30:04 5 is not allocated. By 1850, 37 percent is still  
03:30:09 6 not allocated. And he's trying to allocate it,  
03:30:12 7 but, you know, one person at a time. It's a  
03:30:15 8 difficult process.

03:30:16 9 Q. So I take it that Clarke, in both  
03:30:19 10 of those sources, you find him to be an  
03:30:22 11 authoritative and reliable source?

03:30:24 12 A. Yes.

03:30:24 13 Q. So let's go back to the list from  
03:30:25 14 your report. The third cause that you talk  
03:30:30 15 about for squatting in the 19th century, in  
03:30:34 16 Upper Canada, is that there were no local agents  
03:30:36 17 to make land accessible to small-scale settlers?

03:30:39 18 A. Yes, many of the initial sales  
03:30:40 19 systems involve offices in Toronto, or in  
03:30:43 20 Kingston, or wherever the capital is moving.

03:30:46 21 But you would have to -- there are  
03:30:48 22 stories of people going out a hundred miles and  
03:30:51 23 finding a farm and then walking back to Toronto.  
03:30:56 24 And then finding the office busy or closed or  
03:30:58 25 some record says that you can't have that piece.

03:31:00 1 So then you're walking back there.

03:31:02 2 It was just a tedious process that  
03:31:06 3 hurt people, made people angry. Made people --  
03:31:11 4 you could be -- angry at the government. A  
03:31:15 5 feeling that they weren't being fairly treated.

03:31:22 6 From that obviously comes the idea by  
03:31:23 7 the 1840s and '50s of having local land agents  
03:31:26 8 which would solve the problem if the local land  
03:31:28 9 agents did their jobs and were honest which we  
03:31:31 10 have some evidence on that later.

03:31:37 11 Q. The fourth reason, the fourth  
03:31:37 12 cause that you talk about is that the  
03:31:39 13 desirable -- is that there were desirable lands  
03:31:42 14 that lay idle. Can you elaborate on that?

03:31:44 15 A. Well, if you have got say one  
03:31:46 16 third or two thirds of Essex county unoccupied,  
03:31:50 17 this becomes a constant temptation to the poor  
03:31:53 18 and landless. Like, I've got nothing and right  
03:31:55 19 there is this magnificent stretch of potentially  
03:32:01 20 developable land, and I have no way of getting  
03:32:04 21 it.

03:32:10 22 It follows in, I suppose, to the  
03:32:13 23 criminological idea that the poor people, the  
03:32:14 24 poor and landless are tempted by seeing riches  
03:32:17 25 that they can just take. And, of course, they

03:32:28 1 did. So it's just a temptation.

03:32:36 2 Q. When you say "lay idle", it was  
03:32:38 3 lands that hadn't been farmed? Is that what --

03:32:39 4 A. It could be different -- maybe  
03:32:40 5 never taken up. Maybe it had been farmed once,  
03:32:44 6 twice, or three times and continually  
03:32:47 7 repossessed because the people couldn't pay.  
03:32:50 8 But it's farmland that's just empty for one  
03:32:53 9 reason or another.

03:32:54 10 Also you have Crown land that the  
03:32:56 11 Crown is holding on to to increase the value so  
03:32:58 12 they can sell it for more money. So this idle  
03:33:00 13 land is held by both speculators but also by the  
03:33:04 14 Crown, which there were some Crown strategies to  
03:33:07 15 hold on to the land deliberately for 10 years  
03:33:10 16 and 20 years and let the value rise, which meant  
03:33:12 17 that in selling it, the Crown would have more  
03:33:15 18 money to develop Canada.

03:33:19 19 Q. And then the fifth cause that you  
03:33:21 20 list is that there was a class of backwoods men  
03:33:24 21 that were accustomed to exploiting land and were  
03:33:27 22 not disposed to obey regulations of a  
03:33:30 23 monarchical government. Can you elaborate on  
03:33:37 24 that?

03:33:37 25 A. I'm glad that Gates described



03:33:39 1 them before me. It's quite a description.

03:33:42 2 This is part of the politics of the  
03:33:43 3 settlement of Upper Canada. At this time New  
03:33:52 4 England is -- the agriculture in New England is  
03:33:55 5 coming to be played out. This is the 1820s at  
03:33:58 6 the time Toronto -- or Canada starts to boom.  
03:34:01 7 So Americans are coming west along the Erie  
03:34:04 8 canal. I think it opened in 1825. They get to  
03:34:08 9 Buffalo. They are looking for cheap land. They  
03:34:11 10 are two ways they can go, on a steamer to the  
03:34:12 11 American midwest or Canada.

03:34:16 12 And rumours are flying. People are  
03:34:19 13 entrepreneurs, different kinds of politics, but  
03:34:24 14 according to Gates there is this group of back  
03:34:27 15 woodsmen that are kind of like rough, angry,  
03:34:30 16 Americans who think, well, you know, let's go to  
03:34:33 17 Canada and see if we can get some cheap land, by  
03:34:38 18 hook or by crook.

03:34:40 19 They were -- and not disposed to obey  
03:34:43 20 the regulations of monarchical government. They  
03:34:48 21 didn't like the Crown. Their revolution was  
03:34:50 22 about that. So this would have meant, even  
03:34:53 23 recently stirred up in the War of 1812 which by  
03:34:57 24 1820, 1830 isn't that far over.

03:35:01 25 And so I've seen -- it's not clear how

03:35:07 1 many Americans were in Canada, because we don't  
03:35:09 2 have visas in those days. But I've seen data, a  
03:35:13 3 quarter, a third of the settlers in Canada at  
03:35:17 4 that time may have been Americans looking for  
03:35:22 5 cheap land.

03:35:24 6 Many of them stayed and became loyal  
03:35:26 7 Canadians and all of that. Many of them went  
03:35:28 8 back to the United States, which you could  
03:35:30 9 always do.

03:35:33 10 Q. So you know that Lillian Gates  
03:35:35 11 described this before you did right now, that  
03:35:37 12 she described this as a cause.

03:35:39 13 So Lillian Gates, you talked about her  
03:35:42 14 book. Was there any other sources that you used  
03:35:45 15 in coming to these conclusions?

03:35:47 16 A. Oh, you see it. When you read  
03:35:49 17 the accounts of squatters, you get a -- the  
03:36:01 18 hard-working, waffly-minded squatters who want  
03:36:06 19 to obtain land and want to build an orderly  
03:36:06 20 society really don't like these people.

03:36:09 21 It's rabble or it's -- you know,  
03:36:12 22 whatever images you want to convey of a group of  
03:36:16 23 people that aren't going to play by the rules  
03:36:18 24 and are going to cheat. And they are not nice  
03:36:21 25 neighbours, often I assume. Some may have been

03:36:23 1 nice neighbours for a while.

03:36:25 2 So there's a tension even then because  
03:36:30 3 these people actually aren't good for the lawful  
03:36:34 4 squatters because they are spoiling the land.  
03:36:36 5 They might clear it, but they also take  
03:36:39 6 everything of value. They are rapacious and  
03:36:45 7 then they move on.

03:36:45 8 So there are tensions and that's why  
03:36:47 9 you want to emphasize that squatters are a wide  
03:36:50 10 range of people and squatting includes a wide  
03:36:54 11 range of behaviours.

03:36:55 12 Q. And what was the role, if any, of  
03:36:57 13 Indigenous lands in this -- in the Crown's land  
03:37:00 14 policy at the time?

03:37:02 15 A. Okay. The Crown land policy on  
03:37:05 16 Indigenous land is, (A), that it's Crown land  
03:37:11 17 held for the benefit of Indians subject to  
03:37:14 18 treaties, if I can say that. I'm trying not to  
03:37:20 19 make a legal conclusion.

03:37:22 20 But even the first land statute of  
03:37:25 21 1839 it talks about Crown land and Indian land  
03:37:29 22 in the same category.

03:37:31 23 And given that we don't have surveys,  
03:37:33 24 given that we could be beyond the line of  
03:37:35 25 settlement, the line between Indian land and

03:37:38 1 Crown land -- and then, of course, you have  
03:37:41 2 clergy lands and school lands which are Crown  
03:37:44 3 lands held to be sold for the creating churches  
03:37:48 4 and schools. They are still Crown lands. So  
03:37:53 5 different land was held off from sale for  
03:37:56 6 different reasons.

03:37:57 7 And it is not clear whether squatters  
03:37:59 8 fully knew in each situation whether land was  
03:38:03 9 Indian land, if I can say that, or another kind  
03:38:07 10 of Crown land, or owned by a speculator. You  
03:38:09 11 could be honestly confused.

03:38:12 12 I'm certain there were local stories  
03:38:14 13 and local rumours and local information about  
03:38:16 14 who they thought owned what because it's too  
03:38:19 15 important for it not to have happened.

03:38:21 16 But we're before surveys so this could  
03:38:28 17 be based on rumour and be highly inaccurate.

03:38:32 18 Q. In your report and also I believe  
03:38:33 19 this is some of what you were talking about  
03:38:35 20 before, about squatting being viewed as  
03:38:42 21 quasi-legal, you describe squatting as being  
03:38:45 22 useful in the 19th century. Can you elaborate  
03:38:48 23 briefly on why?

03:38:49 24 A. Okay. These people open up the  
03:38:51 25 frontier at little or no cost to the government.

03:38:54 1 They are creating a settled Canada in a ragged  
03:38:58 2 kind of way. But they are doing it for free.

03:39:02 3 Now you're out there without the  
03:39:03 4 government services, taking care of themselves.  
03:39:06 5 They are building rudimentary roads, fences,  
03:39:10 6 tracts of different sorts; enforcing, you know,  
03:39:15 7 informal customary rules that go with  
03:39:19 8 settlement.

03:39:20 9 All of the people who have studied law  
03:39:23 10 and order on the frontier, both in the United  
03:39:25 11 States and Canada, have been amazed at how  
03:39:29 12 lawful the frontier was. When you think they  
03:39:31 13 are ahead of not only settlement, but they are  
03:39:34 14 ahead of law too.

03:39:35 15 So they want to get along. I mean,  
03:39:38 16 this is -- these are hard-working people who, I  
03:39:42 17 guess, or even hard-working thieves, some of  
03:39:47 18 them, who want to achieve their goals and get on  
03:39:51 19 with their lives.

03:40:01 20 Q. You talked about pre-emption  
03:40:03 21 privileges and pre-emption rights in the context  
03:40:05 22 of 19th century squatting, so I think we have a  
03:40:08 23 good sense of that, that those rights that a  
03:40:11 24 squatter might have which you referred to as  
03:40:13 25 pre-emption privileges.

03:40:16 1 A. Right.

03:40:16 2 Q. Is that related -- you mentioned  
03:40:16 3 selling squatter rights elsewhere in your  
03:40:20 4 report? Maybe in the same area.

03:40:20 5 A. Yes.

03:40:20 6 Q. Is that related? How are they  
03:40:23 7 related?

03:40:23 8 A. Well, this is -- we're -- we're  
03:40:26 9 related to -- we're talking an incredible legal  
03:40:30 10 structure almost without law. So it's -- on the  
03:40:35 11 frontier I've set up a farm; I've cleared two  
03:40:39 12 acres; I've got a shack. And either -- or a  
03:40:43 13 number of things could happen. One is someone  
03:40:46 14 else comes along, and I've decided I'm not going  
03:40:49 15 to get a title, or I'm tired of waiting to get a  
03:40:51 16 title. I think I'll leave and try my luck  
03:40:57 17 somewhere else.

03:40:57 18 So I sell this person my pre-emption  
03:41:01 19 right. They give me some number of dollars for  
03:41:03 20 the house, the fences, my two cleared acres,  
03:41:06 21 maybe even my tools, whatever I can leave.  
03:41:09 22 Maybe some livestock or I might take the  
03:41:12 23 livestock and go, different arrangements.

03:41:15 24 But I can actually sell the  
03:41:16 25 pre-emption right without any law being

03:41:18 1 involved. There is no lawyers here. So you  
03:41:21 2 give me some number of dollars for it, then I  
03:41:23 3 have cash. Then I can move on and try my luck  
03:41:25 4 again somewhere else.

03:41:26 5 The person behind me starts two or  
03:41:31 6 three years ahead of where they would have been  
03:41:33 7 because they have a house, rudimentary as it  
03:41:35 8 might be. They have land cleared. And they  
03:41:38 9 can -- so they are starting ahead of where they  
03:41:41 10 would have been had they started to try to clear  
03:41:46 11 two acres themselves.

03:41:47 12 And they are thinking maybe they can  
03:41:49 13 get title somehow, which would give them not  
03:41:52 14 only this two-acre field and a fence and a  
03:41:55 15 house, but a fee. And that's what the end --  
03:42:01 16 that's what people want. Because if they  
03:42:03 17 actually get the fee then they can sell it and  
03:42:06 18 move on but they can sell it for a lot more than  
03:42:08 19 the pre-emption right.

03:42:10 20 And this is a continuing process in  
03:42:13 21 the frontier. One thing that is often said is  
03:42:16 22 that people forget how much the ordinary farmers  
03:42:19 23 were also land speculators. Just because I'm  
03:42:23 24 building an ordinary farm, but the value is  
03:42:26 25 going up every day as people move in and the

03:42:29 1 land is more scarce and more valuable, and the  
03:42:33 2 farm becomes more productive and more valuable.

03:42:36 3 Q. Based on what you've reviewed in  
03:42:40 4 the historical record, was there an  
03:42:43 5 expectation -- do you know whether there was an  
03:42:46 6 expectation of the recognition of these kinds of  
03:42:49 7 pre-emption rights on Saugeen lands in the  
03:42:52 8 mid-18th century?

03:42:54 9 A. If you read both the documents  
03:42:56 10 and the early histories, the county histories,  
03:42:57 11 it's clear that there was. So it's extending  
03:43:01 12 over into here.

03:43:04 13 This is the process and they're,  
03:43:09 14 again -- they're hoping. They're being  
03:43:11 15 optimistic and hoping that things work out in  
03:43:13 16 their favour. And they are people who have  
03:43:15 17 little or nothing, so they have little to lose.

03:43:18 18 Q. When you refer to the early  
03:43:19 19 histories, what sources are you referring to?

03:43:23 20 A. There's a history of the County  
03:43:24 21 of Bruce. There's a history of the County of  
03:43:28 22 Grey that goes through township by township  
03:43:31 23 describing the early settlers and their poor  
03:43:35 24 farms, their early farms.

03:43:36 25 And then if you -- when you read



03:43:39 1 primary documents, there are letters back and  
03:43:41 2 forth about pre-emption rights and what someone  
03:43:45 3 has and some disputes about these things, those  
03:43:48 4 kinds of records.

03:43:50 5 Q. So just to clarify, "The History  
03:43:54 6 of the County of Bruce" is the publication by  
03:43:56 7 Norman Robertson?

03:43:57 8 A. Yes.

03:43:57 9 Q. And then the "History of the  
03:43:58 10 County of Grey" is by Arthur Davidson?

03:44:02 11 A. Yes.

03:44:02 12 Q. So both will be added as  
03:44:03 13 exhibits, Your Honour.

03:44:04 14 You said that they referred to the  
03:44:05 15 early settlers. Is that different from  
03:44:07 16 squatters?

03:44:09 17 A. You have to -- it's interesting.  
03:44:09 18 Because squatters is referred to in different  
03:44:15 19 terms. And by the time they write those books,  
03:44:17 20 some people don't want to think that their roots  
03:44:21 21 are squatting. So you read the language, and  
03:44:23 22 they will be describing an early settler and  
03:44:25 23 then the date of settlement will be three years  
03:44:28 24 before it was surveyed.

03:44:29 25 So the person was a squatter, because

03:44:32 1 to be settled on unsurveyed land, by definition,  
03:44:37 2 makes you a squatter because you can't have a  
03:44:39 3 legal right to be there.

03:44:40 4 I think in the 1850s people weren't  
03:44:43 5 worried about being addressed as squatters but  
03:44:46 6 I'm not sure, you know, by 1900, you know, we're  
03:44:49 7 sort of the end of Victorian era. People are a  
03:44:59 8 bit more proud of their origins, one might say,  
03:45:01 9 and you don't want to think of your family that  
03:45:03 10 way.

03:45:04 11 So I think they don't -- they use the  
03:45:06 12 word "squatting" and they talk about some people  
03:45:08 13 as squatters; but others are simply described as  
03:45:11 14 early settlers but they are too early to have  
03:45:14 15 been legally there.

03:45:15 16 Q. And those local histories, do you  
03:45:17 17 find them to be reliable sources on submission?

03:45:20 18 A. I grew up with them. They're  
03:45:24 19 romantic. They're wonderful little histories.

03:45:27 20 You need to be -- on a scale of 1 to  
03:45:30 21 10, they could be like a 7, 8 or 9. There are  
03:45:33 22 stories in there that might not be true; there  
03:45:36 23 are exaggerations. But when it says John Smith  
03:45:39 24 and his family took the farm in 1857, it's  
03:45:44 25 probably accurate.

03:45:45 1 You worry about embellishments in  
03:45:48 2 details. And these are oral histories maybe 50  
03:45:51 3 years later. So you can see what happens to  
03:45:53 4 oral history in 50 years. So there can be  
03:45:58 5 distortions, but by and large these are -- they  
03:46:04 6 are written for all over Canada and the United  
03:46:07 7 States. They are wonderful local histories to  
03:46:09 8 read, and they give an enormous and interesting  
03:46:13 9 window into our rural roots.

03:46:18 10 Q. That brings me into, under the  
03:46:20 11 second heading and a subject that I wanted to  
03:46:24 12 speak to you about was squatting happening on  
03:46:26 13 Saugeen lands in the early to mid-19th century,  
03:46:29 14 which we've touched on already in the questions  
03:46:39 15 so far.

03:46:44 16 So in addition to these local  
03:46:45 17 histories is there any other evidence or sources  
03:46:47 18 that you rely on to support the conclusions that  
03:46:49 19 you come to and that are elaborated in your  
03:46:51 20 report about squatting on Saugeen lands during  
03:46:54 21 that time?

03:46:54 22 A. Well, in reading the documents  
03:46:59 23 and reports, you have lots of references to  
03:47:00 24 squatting on -- in this area that -- that would  
03:47:05 25 have been Saugeen lands defined by those ceded

03:47:08 1 in Treaty 45 1/2 formally Saugeen lands. And  
03:47:11 2 then others pushing the boundary of the  
03:47:15 3 half-mile strip, cession 57, and then some on  
03:47:20 4 Treaty 72 lands.

03:47:22 5 You get just the word "squatter"  
03:47:25 6 mentioned or some person being there who simply  
03:47:27 7 can't be there because it's -- sometimes you  
03:47:30 8 have to try and figure out where they were,  
03:47:32 9 because the description can be a little vague.

03:47:34 10 So it's some detective work. But  
03:47:36 11 there are numerous reference to them in the  
03:47:36 12 documents.

03:47:47 13 Q. Let's just pause there. You  
03:47:47 14 mentioned treaties. I think you said Treaty 57  
03:47:53 15 but it's Treaty 67 that you're referring to?  
03:47:56 16 The Half-Mile Strip?

03:47:57 17 A. Yes, sorry. 57 is a mistake,  
03:47:57 18 yes.

03:47:58 19 Q. So if you turn, on the other side  
03:47:59 20 of you is Exhibit P. Can we just confirm you  
03:48:01 21 are talking about -- there's the line that runs  
03:48:05 22 at the base of the peninsula. It's in white on  
03:48:07 23 Exhibit P?

03:48:08 24 A. Yes.

03:48:08 25 Q. Is that what you're talking

03:48:09 1 about, Treaty 67?

03:48:11 2 A. It's Treaty 67, yes. Yes. 57  
03:48:13 3 was a mistake. I misspoke. And others are  
03:48:17 4 Treaty 72 and others are on ceded lands that had  
03:48:23 5 formerly been Saugeen but were now Crown lands,  
03:48:26 6 concededly Crown lands.

03:48:29 7 I find it interesting, the mention, of  
03:48:37 8 course, in Treaty 45 1/2 of the fact that  
03:48:44 9 squatting is mentioned in the treaty. Suddenly  
03:48:49 10 mentioned in the treaty is -- one inference a  
03:48:53 11 legal historian would make is why is it there,  
03:48:55 12 unless it's going on? Because there is no  
03:48:57 13 reason to put it there.

03:48:58 14 And then who put it there? One  
03:49:01 15 inference would mean that this -- Saugeen  
03:49:03 16 Indians put it there because they wanted it  
03:49:05 17 there because they were concerned.

03:49:07 18 And they might have been concerned  
03:49:08 19 about other events because another inference is,  
03:49:11 20 if squatting is general then it's general. And,  
03:49:16 21 again, you can't put -- you can't put names.  
03:49:20 22 Squatting is an anonymous activity.

03:49:25 23 So you're trying to describe -- like  
03:49:29 24 trying to describe a historical crime pattern  
03:49:35 25 being unable to name the individual criminals.

03:49:38 1 On one hand you can describe it; on the other  
03:49:42 2 hand these people are anonymous and wanted to be  
03:49:44 3 anonymous until they could register their fee.

03:49:49 4 Q. Let me ask you about post-Treaty  
03:49:51 5 45 1/2, so that is post-1836 and after that  
03:49:55 6 treaty.

03:49:56 7 What evidence, if any, have you seen  
03:49:58 8 that demonstrates they were squatting on the  
03:50:01 9 Saugeen Peninsula? I'm talking -- so let's  
03:50:11 10 refer to Exhibit P, the yellow area.

03:50:19 11 A. Okay. There's some letters from  
03:50:20 12 Indians referring to squatters, asking that  
03:50:24 13 something be done with them and that they be  
03:50:26 14 removed. Again, I don't have these letters in  
03:50:29 15 front of me.

03:50:31 16 THE COURT: Can I just interrupt the  
03:50:31 17 witness? I've lost track of the question. You  
03:50:35 18 said post 1836?

03:50:37 19 MS. GUIGRUIS: That's correct, yes.

03:50:37 20 THE WITNESS: I'm sorry.

03:50:37 21 THE COURT: So the question was,  
03:50:38 22 evidence of squatting post-1836 in particular?

03:50:44 23 MS. GUIGRUIS: That's correct.

03:50:46 24 THE COURT: All right. Please go  
03:50:46 25 ahead, sir.

03:50:47 1 THE WITNESS: So you're asking -- let  
03:50:48 2 me understand this then. You're asking about  
03:50:49 3 post treaty -- you're asking about the  
03:50:53 4 peninsula?

03:50:55 5 BY MS. GUIGRUIS:

03:50:55 6 Q. Well, I'm asking, so in 1836  
03:50:56 7 Treaty 45 1/2 surrenders what we see on Exhibit  
03:51:01 8 P on that, say, light green area?

03:51:03 9 A. Yes.

03:51:04 10 Q. So that's --

03:51:05 11 A. Yeah.

03:51:06 12 Q. So what's remaining is the  
03:51:08 13 reserve on the peninsula.

03:51:09 14 A. Right.

03:51:10 15 Q. So I'm asking what, if any, is  
03:51:12 16 there evidence that there's any squatting  
03:51:15 17 happening on the reserve?

03:51:16 18 A. On the reserve.

03:51:18 19 THE COURT: Okay. Now I'm confused  
03:51:19 20 again.

03:51:20 21 MS. GUIGRUIS: Yes.

03:51:21 22 THE COURT: So we have an Exhibit P,  
03:51:23 23 which has both yellow -- which I think might be  
03:51:29 24 what you're asking about.

03:51:31 25 MS. GUIGRUIS: Yes.

03:51:31 1 THE COURT: But in the same area, red  
03:51:33 2 and orange, and certainly the word "reserve" can  
03:51:40 3 be attributed to the red. So I'm confused by  
03:51:42 4 your question.

03:51:43 5 MS. GUIGRUIS: Yes, sorry.

03:51:45 6 THE COURT: Before the witness answers  
03:51:46 7 can you please help me with that?

03:51:50 8 MS. GUIGRUIS: So after 1836 the areas  
03:51:50 9 that we see on the map we've heard from other  
03:51:54 10 evidences that the -- those differentiations  
03:51:58 11 between the red and the orange, the white and  
03:52:01 12 the yellow, I'm referring to that as the  
03:52:05 13 peninsula. And I referred to it as the reserve  
03:52:08 14 as it's been referred to by other historians,  
03:52:11 15 but we can refer to it as the peninsula.

03:52:14 16 THE COURT: So the question is  
03:52:15 17 basically the peninsula north of the one-mile  
03:52:18 18 strip?

03:52:19 19 MS. GUIGRUIS: Including the one-mile  
03:52:20 20 strip.

03:52:20 21 THE COURT: Including the one-mile  
03:52:20 22 strip. All right. Go ahead.

03:52:22 23 THE WITNESS: The Half-Mile Strip.

03:52:24 24 MS. GUIGRUIS: Yes, the Half-Mile  
03:52:24 25 Strip. Thank you, Your Honour.



03:52:27 1 THE WITNESS: There are a number of  
03:52:28 2 documents that describe squatters on that  
03:52:30 3 reserve during the period. I've referred you to  
03:52:39 4 many of them in the report.

03:52:58 5 MS. GUIGRUIS: Your Honour, you wanted  
03:52:58 6 to break at 4:00 o'clock. It is a few minutes  
03:53:01 7 before four. We had one administrative matter  
03:53:05 8 we wanted to speak to. This might be a good  
03:53:07 9 point to stop.

03:53:09 10 THE COURT: That's fine.

03:53:10 11 If you wish, sir, you can step down  
03:53:12 12 from the witness box. We're going to deal with  
03:53:14 13 an administrative matter and then start back  
03:53:17 14 tomorrow morning.

03:53:18 15 THE WITNESS: Yes, Your Honour.

03:53:19 16 MS. GUIGRUIS: It is a short  
03:53:19 17 administrative matter. It's about scheduling  
03:53:20 18 the witness Ryan Lauzon.

03:53:24 19 THE COURT: Oh yes. Next week, were  
03:53:24 20 we thinking about that?

03:53:24 21 MS. GUIGRUIS: We were thinking about  
03:53:25 22 next week. I think we've discussed with counsel  
03:53:28 23 and everyone would prefer to have some more time  
03:53:30 24 to look at the background information, so if  
03:53:33 25 October 21st works for Your Honour that would

03:53:44 1 work for all counsel.

03:54:00 2 THE COURT: Just give me a moment.

03:54:00 3 MS. GUIGRUIS: So that's first day  
03:54:01 4 when Dr. Driben will be called, and we can just  
03:54:03 5 have Ryan come in for an hour.

03:54:07 6 THE COURT: Yes. I'm just throwing it  
03:54:07 7 up on my screen here. Give me a moment. Is it  
03:54:22 8 Driben? Is that how it's pronounced?

03:54:26 9 MS. GUIGRUIS: Yes.

03:54:27 10 THE COURT: So that will likely leave  
03:54:28 11 us -- today is Tuesday -- with two blank days  
03:54:39 12 next week, if not more. Is Professor Driben --  
03:54:52 13 where is he or she from?

03:54:53 14 MS. GUIGRUIS: Thunder Bay.

03:54:56 15 THE COURT: That is not going to be an  
03:54:58 16 easy situation. I appreciate that getting the  
03:55:01 17 new witness in is advisable, and it's only a  
03:55:05 18 short witness.

03:55:06 19 MS. GUIGRUIS: Yes, that's correct.

03:55:07 20 THE COURT: Half a day. So, yes,  
03:55:08 21 October 21st. And I realize you're reaching the  
03:55:10 22 end of your list so it's not like you can  
03:55:12 23 wrestle up someone else, so don't worry about  
03:55:15 24 that.

03:55:15 25 MS. GUIGRUIS: Thank you, Your Honour.

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THE COURT: Is Professor von Gernet local? I think he is.

MR. BEGGS: Yes, Your Honour he is.

THE COURT: I don't want to upset the arrangements that have already been made, if that's what it is, but if there were flexibility to do his voir dire earlier next week, if we get done on -- I mean on the current estimates, this gentleman will be finished by Tuesday, if not before.

It might be worth making the inquiry. I don't want to create a problem if you have made the arrangements already.

MR. BEGGS: Well, we have certainly made sure he can be there on the Friday, but we can check and see if he can come earlier.

THE COURT: It's just an idea. There will still be a gap, so I'm not going to press you on it. And as we are reaching the end of the plaintiffs' case, I am not going to press the plaintiffs on it either.

--- Whereupon the proceedings were adjourned at 3:56 p.m.

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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 15th day of October 2019.



PER: HELEN MARTINEAU  
CERTIFIED SHORTHAND REPORTER

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