

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

VOL 48 DAY 48
October 02, 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 48 / DAY 48 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 2nd 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.

10:01:37 2 THE COURT: Mr. Registrar, further to
10:01:39 3 the direction yesterday, I understand that you
10:01:42 4 have now marked as trial exhibits a list of what
10:01:47 5 counsel described yesterday as secondary source
10:01:49 6 material for this gentleman's report. Can you
10:01:51 7 please put on the record what exhibits you
10:01:54 8 marked?

10:01:55 9 THE REGISTRAR: Yes, Your Honour.
10:01:56 10 "White Man's Law", chapter 4 to 7, document
10:01:59 11 number SC1142. It's Exhibit Number 4278.

10:02:05 12 EXHIBIT NO. 4278: Chapters 4 and 7 of
10:02:05 13 the book entitled "White Man's Law",
10:02:05 14 authored by Sidney Haring; Document
10:02:05 15 SC1142.

10:02:08 16 THE REGISTRAR: Document SC1144, "Land
10:02:12 17 Settlement in Upper Canada" is Exhibit 4279.

10:02:16 18 EXHIBIT NO. 4279: "Land Settlement in
10:02:17 19 Upper Canada"; Document SC1144.

10:02:18 20 THE REGISTRAR: Document SC1138 "Land
10:02:20 21 Policies in Upper Canada" is Exhibit 4280.

10:02:24 22 EXHIBIT NO. 4280: "Land Policies in
10:02:25 23 Upper Canada"; Document SC1138.

10:02:27 24 THE REGISTRAR: Document SC1139 "Land
10:02:33 25 Power and Economics" is Exhibit 4281.

10:02:36 1 EXHIBIT NO. 4281: "Land Power and
10:02:37 2 Economics"; Document SC1139.
10:02:38 3 THE REGISTRAR: Document number 1166
10:02:39 4 "Landscape of Longing" is Exhibit 4282.
10:02:45 5 EXHIBIT NO. 4282: "Landscape of
10:02:45 6 Longing"; Document 1166.
10:02:48 7 THE REGISTRAR: Document SC1013, "The
10:02:51 8 Manitoulin Incident of 1863" is Exhibit number
10:02:53 9 4283.
10:02:55 10 EXHIBIT NO. 4283: "The Manitoulin
10:02:55 11 Incident of 1863"; Document SC1013.
10:02:57 12 THE REGISTRAR: Document number S1548
10:02:59 13 "The Effect of Land Policies in Upper Canada,
10:02:59 14 Collingwood Township" is Exhibit 4284.
10:03:05 15 EXHIBIT NO. 4284: "The Effect of Land
10:03:07 16 Policies in Upper Canada, Collingwood
10:03:07 17 Township"; Document S1548.
10:03:15 18 THE REGISTRAR: Document number S1431
10:03:16 19 "Lands and Policies, Attitudes and Controls and
10:03:16 20 Alienation of Lands in Ontario during the First
10:03:16 21 Century of Settlement" is Exhibit 4285.
10:03:19 22 EXHIBIT NO. 4285: "Lands and
10:03:19 23 Policies, Attitudes and Controls and
10:03:19 24 Alienation of Lands in Ontario during
10:03:19 25 the First Century of Settlement";

10:03:19 1 Document S1431.

10:03:21 2 THE REGISTRAR: Document S1452 "The

10:03:22 3 History of County of Bruce and the minor

10:03:22 4 municipalities therein" is Exhibit number 4286.

10:03:25 5 EXHIBIT NO. 4286: "The History of

10:03:25 6 County of Bruce and the minor

10:03:25 7 municipalities therein"; Document

10:03:25 8 S1452.

10:03:27 9 THE REGISTRAR: Document number S0445,

10:03:28 10 "A New History of the County of Grey" is Exhibit

10:03:35 11 number 4287.

10:03:36 12 EXHIBIT NO. 4287: "A New History of

10:03:37 13 the County of Grey"; Document S0445.

10:03:39 14 THE REGISTRAR: Document number S1803

10:03:40 15 "Agents of Progress" is Exhibit 4288.

10:03:44 16 EXHIBIT NO. 4288: "Agents of

10:03:44 17 Progress"; Document S1803.

10:03:46 18 THE REGISTRAR: Document number S0366,

10:03:46 19 "The Ordinary People of Essex" is Exhibit number

10:03:52 20 4289.

10:03:53 21 EXHIBIT NO. 4289: "The Ordinary

10:03:54 22 People of Essex"; Document S0366.

10:03:55 23 THE REGISTRAR: And the last exhibit

10:03:56 24 is SC1125, "Mackenzie: A Political Biography"

10:04:04 25 is Exhibit number 4290."

10:04:06 1 EXHIBIT NO. 4290: "Mackenzie: A
10:04:07 2 Political Biography"; Document SC1125.
10:04:08 3 THE COURT: Thank you, Mr. Registrar.
10:04:09 4 Please go ahead, Ms. Guirguis.
10:04:12 5 MS. GUIGRUIS: Thank you, Your Honour.
10:04:12 6 I've also provided to Mr. Registrar
10:04:16 7 this chart, a copy for your reference, that has
10:04:17 8 all the exhibit numbers listed of those
10:04:17 9 secondary sources; and also a printed copy of
10:04:20 10 the errata that you requested yesterday.
10:04:23 11 THE COURT: The chart you're referring
10:04:24 12 to is that the one, Mr. Registrar, that you were
10:04:26 13 just mentioning?
10:04:28 14 THE REGISTRAR: Yes.
10:04:29 15 THE COURT: Can we just put that in as
10:04:30 16 a lettered exhibit.
10:04:31 17 THE REGISTRAR: Yes, Your Honour.
10:04:33 18 Lettered Exhibit Q-2.
10:04:35 19 EXHIBIT NO. Q-2: Chart of exhibit
10:04:37 20 numbers for source material.
10:04:41 21 THE COURT: Thank you. Please go
10:04:42 22 ahead, counsel.
10:04:43 23 MS. GUIGRUIS: Thank you, Your Honour.
10:04:43 24 SIDNEY HARRING: PREVIOUSLY AFFIRMED.
10:04:46 25 EXAMINATION IN-CHIEF BY MS. GUIRGUIS:

1 (CONTINUED)

2 Q. Good morning, Professor Harring.

3 A. Good morning.

4 Q. So we're going to be continuing
5 from yesterday. We are under the second heading
6 of squatting happening on Saugeen lands in the
7 early to mid-19th century.

8 And while we're talking about
9 secondary sources, I just wanted to follow-up on
10 something we had talked about yesterday. You
11 mentioned two local histories that you relied on
12 that were made exhibits, and then three others
13 that I want to make brief mention of: John, C.
14 Walsh, "Landscapes of Longing" which is Exhibit
15 4282; Bill Shannon, "The Effect of Land Policies
16 in Upper Canada, Collingwood Township", Exhibit
17 4284; and Howard Richards, "Lands and Policies,
18 Attitudes and Controls and Alienation of Lands
19 in Ontario during the First Century of
20 Settlement", Exhibit 4285.

21 You cited all of these with respect to
22 your discussion about squatting on Saugeen lands
23 in the early to mid-19th century, correct?

24 A. Yes.

25 Q. Can you comment on the

1 reliability and the authority of these sources?

2 A. These are well-known scholarly
3 works that scholars in the field routinely cite.

4 And I guess those of us who are
5 scholars, you use each other's work. You read
6 it and you sort of internally and externally
7 validate it. You don't want to -- you never
8 cite anything you think is wrong.

9 But if it seems reasonable to you in
10 relationship to other work and you cite it, and
11 then you give them credit for the work.

12 Q. And I note that two of these, the
13 John C. Walsh publication, Bill Shannon are both
14 thesis documents, dissertations presented. So
15 how do you rely on thesis?

16 A. You trust -- a thesis is less
17 reliable because it's not been through an
18 external review process, but, you know, having
19 done two theses in my own life, you trust the
20 committee. And been on thesis committees.

21 As it's said, the thesis committee and
22 the chair of the committee is responsible for
23 the integrity of the scholarship, and you can't
24 submit it without a solid professional
25 evaluation that it's accurate.

10:07:06 1 Q. Thank you.

10:07:08 2 We also left off yesterday talking
10:07:09 3 about squatting on the peninsula after 1836, and
10:07:14 4 I wanted to clarify when I looked at -- looked
10:07:17 5 back at and I think there was some confusion
10:07:20 6 about the reference of Saugeen lands and the
10:07:24 7 peninsula versus the reserve.

10:07:26 8 So we're talking about squatting on
10:07:28 9 the peninsula after 1836. And after 1836, you
10:07:30 10 testified yesterday that when you talk about
10:07:32 11 Saugeen lands, you're referring to the area
10:07:35 12 surrendered -- sometimes the area surrendered in
10:07:39 13 Treaty 45 1/2 which is south of the peninsula
10:07:41 14 and the peninsula itself.

10:07:44 15 So I just want to clarify what Saugeen
10:07:46 16 lands refers to at different times, because
10:07:49 17 we're dealing with the time period of the late
10:07:50 18 18th century to mid-19th century. So just so
10:07:53 19 we're clear for the record, referring to Exhibit
10:07:56 20 P behind you --

10:07:57 21 A. Yes.

10:07:58 22 Q. -- before 1836 and the Treaty 45
10:08:02 23 1/2 surrender, Saugeen lands, as you use it,
10:08:05 24 refers to lands surrendered in Treaty 45 1/2
10:08:08 25 which is in light green, and also the peninsula

10:08:11 1 itself from and including the half-mile strip
10:08:14 2 which is in white and extending to the tip of
10:08:16 3 the peninsula, and so including the lands in
10:08:20 4 yellow, orange and red, is that correct?

10:08:23 5 A. Again, prior to --

10:08:25 6 Q. Prior to 1836?

10:08:26 7 A. Right.

10:08:28 8 Q. And after 1836 in the record,
10:08:31 9 this area that I referred to as the peninsula,
10:08:33 10 it's also referred to in the historical
10:08:36 11 documents as the Saugeen reserve or the Indian
10:08:38 12 reserve?

10:08:39 13 A. Right.

10:08:40 14 Q. And I understand that when you
10:08:41 15 refer to Saugeen lands in the time period after
10:08:44 16 1836, this is the area you're referring to, the
10:08:48 17 yellow, the white, the orange, and the red?

10:08:50 18 A. Right. After 1836, the lands of
10:08:55 19 a Treaty 45 1/2 are Crown lands, having been
10:08:57 20 ceded and the Saugeen retained the lands of
10:09:03 21 Treaty 67 and Treaty 72 for the time being.

10:09:08 22 Q. And then after 1851, so you refer
10:09:11 23 to Treaty 67 the surrender of the half-mile
10:09:14 24 strip, that is the white strip on Exhibit P?

10:09:16 25 A. Right.

1 Q. The boundary of the Saugeen
2 reserve is moved about a half mile north,
3 correct?

4 A. About a half mile, right.

5 Q. So after 1851 reference to
6 Saugeen lands or the Saugeen reserve or the
7 Indian reserve in the record includes the lands
8 in yellow, orange, and red, that's correct?

9 A. Right.

10 Q. Okay. And then in 1854 we have
11 the surrender of the lands marked in yellow on
12 Exhibit P under Treaty 72?

13 A. Right.

14 Q. So continuing on there, leaving
15 where we left off yesterday, you mentioned
16 yesterday and also note in your report that
17 there's complaints about squatters. The
18 documents show that there's complaints about
19 squatters on the peninsula. And you said you
20 relied on that as evidence of squatters being
21 there.

22 So I would like to turn to some of
23 these examples that you note in your report.
24 You mention in your report that there are
25 Saugeen complaints about squatters being on the

10:10:08 1 lands, and I'd like to bring up the example
10:10:10 2 that's at page 16 from 1843. So at this point
10:10:14 3 Saugeen lands refers to the peninsula, including
10:10:16 4 the half-mile strip.

10:10:17 5 And you're referring to a response
10:10:20 6 that Chief Wahbahdik received from the executive
10:10:23 7 council. So this is Exhibit 1434, if we can
10:10:29 8 bring that up.

10:10:58 9 So you cite this response from the
10:11:00 10 executive council to Chief Wahbahdik's complaint
10:11:03 11 at page 3 of the document, which is PDF image
10:11:06 12 3 --

10:11:07 13 A. Right.

10:11:07 14 Q. -- about the intrusion of white
10:11:09 15 settlers on the reserve saying that they would
10:11:12 16 do -- well, about the intrusion of the white
10:11:16 17 settlers on the reserve. And you said that they
10:11:18 18 said they would do nothing.

10:11:20 19 So the words that you cite at page 30,
10:11:31 20 you cite from:

10:11:34 21 "So as soon as the territory in
10:11:35 22 the neighbourhood from Owen Sound
10:11:37 23 shall be attached to an organized
10:11:37 24 district, the complaint of the Indian
10:11:38 25 Chief of the intrusion of white

10:11:41 1 settlers upon the reserved lands may
10:11:43 2 be in some measure avoided by the
10:11:45 3 appointment of magistrates of the
10:11:47 4 Village of Sydenham who would
10:11:49 5 endeavour to enforce the law against
10:11:51 6 the trespassers."

10:11:53 7 What does "be attached to an organized
10:11:56 8 district" mean in this response?

10:11:58 9 A. It would mean that a county would
10:11:59 10 be -- a county or some other unit of government
10:12:01 11 would be created. I think they are referring to
10:12:03 12 a county.

10:12:03 13 But organized district refers to a --
10:12:06 14 like for the Crown to politically constitute
10:12:09 15 some kind of rural governmental district.

10:12:13 16 Q. Why was this something that they
10:12:14 17 say would need to be in the case in order for
10:12:16 18 the complaint to be dealt with?

10:12:18 19 A. Well, it's -- I mean it's -- I
10:12:20 20 found this kind of curious. I mean, you read
10:12:23 21 this -- I mean, it's a government document so on
10:12:25 22 one hand you say, okay, Chief Wahbahdik
10:12:28 23 complained about squatters north of the boundary
10:12:32 24 line. And there is a response here saying,
10:12:34 25 they're not -- they seem to -- they're not

10:12:37 1 saying he's lying. So it seems there are
10:12:40 2 squatters north of the boundary line.

10:12:42 3 They're saying we can't -- as soon as
10:12:44 4 an organized district is created, we can appoint
10:12:49 5 magistrates and we can somehow act on this
10:12:52 6 action, but we can't now because the political
10:12:56 7 district hasn't been created.

10:12:57 8 However, there is a statute of 1839 --
10:12:59 9 this is 1843 -- which appoints Indian
10:13:07 10 Commissioners to deal with squatters. So it
10:13:13 11 would seem that the Indian Commissioners were
10:13:18 12 empowered to find a local official and take the
10:13:22 13 complaint to them.

10:13:23 14 So I'm not sure what -- why they're
10:13:27 15 requiring a magistrate in Sydenham when they
10:13:31 16 could have gone to say a magistrate in
10:13:35 17 hypothetically Owen Sound, somewhere nearby.

10:13:38 18 Q. So we're going to talk about --
10:13:40 19 and I'm going to ask you about the 1839 statute,
10:13:42 20 which you've mentioned, in a little bit. I just
10:13:46 21 want to ask you about this response from the
10:13:48 22 executive -- what's your view of this response?

10:13:52 23 A. Well, he's not going to do
10:13:56 24 anything. He'll do something maybe at some
10:13:58 25 later point maybe when a magistrate is

10:14:01 1 appointed, whenever that is.

10:14:02 2 Q. And I would also like to talk
10:14:04 3 about mill sites which you mention in your
10:14:05 4 report as a form of squatting. You also
10:14:08 5 mentioned mill sites yesterday briefly. Why do
10:14:11 6 you make note of building mill sites as a
10:14:14 7 particular type of squatting?

10:14:17 8 A. It's an accelerated form of
10:14:22 9 squatting. Remember I said yesterday -- I tried
10:14:24 10 to communicate that there are many different
10:14:27 11 kinds of squatting. And a common element to
10:14:30 12 them is that they're all after some kind of
10:14:32 13 economic advantage.

10:14:33 14 Mill sites are town sites. And town
10:14:35 15 sites are -- the site of that land can be
10:14:39 16 subdivided potentially in a few years, as soon
10:14:42 17 as settlement occurs, into town lots, which can
10:14:46 18 be sold for much more money than a farm can be
10:14:51 19 sold for.

10:14:51 20 So there was an incentive for
10:14:53 21 speculators to move ahead of the settlement line
10:14:58 22 to try to tie up mill sites before somebody else
10:15:02 23 gets it. It's all a race.

10:15:04 24 So if I get to the mill site first and
10:15:06 25 I can squat there, just -- and then either build

1 a mill or pretend to build a mill, because it
2 often isn't clear, and hold that land until
3 hopefully again it's alienated, you know, ceded
4 by the Indians, made available for settlement.
5 I can sell the lots around the mill for a good
6 deal of money.

7 Q. So in your report at, I believe,
8 around pages 35 to 36 you refer to a few
9 examples of individuals setting up mill sites on
10 or near the peninsula prior to Treaty 72.

11 A. Yes.

12 Q. The first example that I want to
13 ask you about is about Alexander McNabb. You
14 say he's a Crown Lands Agent seeking a lease
15 inside the Saugeen reserve. Can you elaborate
16 on this example and the mill site inside the
17 Saugeen reserve?

18 A. If you -- I'm -- there's three
19 mill sites and McNabb is in -- I think it's on
20 the river Sable, isn't it?

21 Q. Uhm-hmm.

22 A. Okay. There are three mill
23 sites, Colpoy's Bay, the river Sable and the
24 Saugeen River. These are the three that are
25 discussed. I don't know if -- there may be

10:16:20 1 another one that is not discussed, but this is
10:16:23 2 where moving waters meet the -- or is hitting
10:16:26 3 the fall line where there is enough power to
10:16:29 4 drive a mill. So you need moving water, a lot
10:16:32 5 of moving water.

10:16:34 6 Sergeant McNabb who is a land
10:16:35 7 Commissioner, which means he is a government
10:16:38 8 official, is attempting to lease a mill site on
10:16:44 9 the Sable River, I gather, but I don't have --
10:16:48 10 it's ten miles or so. It's a good distance
10:16:52 11 inside the Treaty 72 lands. It's not on the
10:16:55 12 border. It's well inside.

10:16:56 13 Similarly -- well, I'm getting ahead
10:16:59 14 of myself. He's trying to get himself a mill
10:17:02 15 site. Now, he knows, you know, he cannot engage
10:17:07 16 in a land negotiation with the Indians. It's
10:17:11 17 illegal -- sorry, under the law at the time. So
10:17:16 18 somehow as Crown Lands Commissioner he is trying
10:17:19 19 to move himself into a mill site which would,
10:17:22 20 you know, surely suggest that he's -- he's
10:17:26 21 engaged in the trade -- attempted trade of
10:17:31 22 Indian lands in order to enrich himself by
10:17:35 23 profiting off the mill site.

10:17:38 24 Q. So you refer to a letter which is
10:17:40 25 Exhibit 1799. It's an 1850 letter from

1 Mr. Chesley to Anderson. It's one of these that
2 is difficult to read.

3 You noted in your report that
4 Mr. Chesley was asking Anderson to grant the
5 lease to McNabb because he is a friend of his.

6 A. Right.

7 Q. Do you know what happened with
8 this application to lease it?

9 A. Well, I think the lease -- the
10 lease isn't granted, is not granted. He is
11 attempting to lease it. He has a letter here
12 from some important person supporting it.

13 So what this shows, again, is that
14 Anderson is, of course, the Indian Commissioner.
15 They are trying to influence the Indian
16 Commissioner to grant some kind of a lease to
17 this mill so that McNabb and his, you know,
18 partners, if any, can start a mill operation
19 which requires employees.

20 And more importantly, requires either
21 timber or wheat because you are going to mill
22 one thing or another. You're going to be
23 milling lumber or you're going to be milling
24 wheat, grain. Maybe another grain.

25 So you're assuming some settlement,

10:19:07 1 some farming, some workers to do these things.
10:19:10 2 So there's settlement -- they're negotiating for
10:19:13 3 settlement activity while the Treaty 72 lands
10:19:18 4 have not been ceded, and McNabb is trying to
10:19:22 5 build influence with the government to get
10:19:24 6 this -- to get this advantage.

10:19:32 7 Q. Another example that you talk
10:19:33 8 about, and I think this refers one of the other
10:19:35 9 mills, I think you said there are three sites in
10:19:38 10 the record, it's a plan -- it's at page 36 --
10:19:39 11 it's a plan to construct a mill at Colpoy's Bay?

10:19:42 12 A. Yes.

10:19:45 13 Q. And you talk about the
10:19:48 14 instructions. This is 1852 from Anderson to
10:19:51 15 Gleason about the mill at Colpoy's Bay. Can you
10:19:56 16 elaborate on this example of Mr. Gleason? This
10:20:08 17 is around page 36 of your report.

10:20:15 18 A. Okay, sorry. I just need a
10:20:16 19 moment to refresh myself.

10:20:18 20 Q. The reference that you have at
10:20:19 21 your footnotes 105 to 106 with respect to the
10:20:23 22 back and forth between Anderson and Gleason is
10:20:26 23 Exhibits 1936 --

10:20:27 24 A. Right.

10:20:28 25 Q. -- and 19 --

10:20:28 1 A. There's actually quite an
10:20:29 2 exchange between Anderson and Gleason. It's
10:20:32 3 some number of letters. I find it interesting
10:20:41 4 because Anderson actually is asking Gleason to
10:20:44 5 leave and Gleason is going through a number of
10:20:49 6 subterfuges, insisting that he has got a right
10:20:52 7 to be there, which he can't.

10:20:53 8 I mean, he is arguing with the Indian
10:20:55 9 Commissioner about whether he has a right to be
10:20:58 10 there. It's Treaty 72 land. It is, in fact, a
10:20:58 11 crime to occupy Indian lands, again. So he is
10:21:01 12 denying it. And then he engages in some
10:21:06 13 interesting subterfuges, including he tries to
10:21:09 14 lease it from the Indians. At another point he
10:21:11 15 claims he is an employee of the Indians, which I
10:21:27 16 find incredible.

10:21:28 17 But he doesn't -- he doesn't move. He
10:21:29 18 is just writing letters. It's all by letter.
10:21:30 19 He doesn't move. He stays there for a number of
10:21:33 20 years, 1851, 1852.

10:21:35 21 And Anderson, who has the legal power
10:21:38 22 to reject him, doesn't do it.

10:21:40 23 There's also some -- at some point he
10:21:46 24 asks that the mill be evaluated by another
10:21:48 25 miller, by two independent millers to be

1 evaluated so that he can sell it.

2 Q. So I'm going to ask to pull up a
3 couple of these letters. One is Exhibit 1936.
4 This is Anderson to Gleason, 28th of June 1852.
5 This one does have a transcript.

6 A. It's clear enough. "Have you
7 been informed" --

8 THE COURT: Sir, you haven't been
9 asked a question yet.

10 THE WITNESS: Sorry.

11 BY MS. GUIGRUIS:

12 Q. Here we have superintendent --
13 or, sorry, TJ Anderson, Superintendent of Indian
14 Affairs writing to Gleason saying that:

15 "Having been informed that you
16 are in occupation of a place of an
17 Indian Saugeen reserve, that you are
18 disturbing timber on the same reserve
19 and are building a saw mill ... this
20 is, therefore, to warn you that if you
21 do not retire from the reserve you
22 will be subject to an actual trespass
23 [...]"

24 So this is one of the warnings that
25 you're saying Anderson sent to him?

10:22:44 1 A. Yes.

10:22:44 2 Q. And do you know what happened
10:22:46 3 afterwards?

10:22:46 4 A. He stays. The other interesting
10:22:51 5 threat here is he's threatening, you know, action
10:22:54 6 trespass without receiving any remuneration for
10:22:56 7 your work. He is sort of arguing that there's
10:22:59 8 no privilege -- no privilege of pre-emption will
10:23:02 9 be awarded, although one could question whether
10:23:05 10 Anderson has the legal authority to do that, but
10:23:08 11 he's threatening it.

10:23:10 12 THE COURT: Sir, it's going to be a
10:23:11 13 long day.

10:23:12 14 THE WITNESS: Sorry.

10:23:13 15 THE COURT: I would like you to listen
10:23:13 16 to counsel's questions and answer them. There
10:23:18 17 may be other things you find interesting, but I
10:23:21 18 would like you to focus on counsel's questions.

10:23:24 19 THE WITNESS: Sorry, Your Honour.

10:23:25 20 THE COURT: All right.

10:23:27 21 BY MS. GUIGRUIS:

10:23:29 22 Q. So he stays and then we have the
10:23:30 23 next letter that you cite which is December
10:23:32 24 29th, 1852, from Gleason responding to Anderson.
10:23:36 25 This is Exhibit 1961.

10:23:54 1 So based on your -- I don't have a
10:23:56 2 precise pinpoint, but you have described that he
10:23:59 3 stayed. What do you know about the response
10:24:01 4 that Gleason made to Anderson, without having to
10:24:03 5 get into reading this writing?

10:24:05 6 A. I'm trying to read it. First of
10:24:07 7 all he's denying he's trespassing. He's staying
10:24:13 8 there trespassing, denying he's trespassing.

10:24:18 9 But he isn't moving.

10:24:24 10 Q. So let me ask this, based on your
10:24:26 11 review of the record, these letters that you've
10:24:28 12 cited and the rest of your review of the record,
10:24:31 13 do you know, what, if anything else, Anderson
10:24:34 14 did to have Gleason removed?

10:24:37 15 A. Nothing in the record.

10:24:44 16 Q. In your report you also talk
10:24:45 17 about the 1851 treaty for the half-mile strip
10:24:48 18 which is Treaty 67. We've mentioned that. And
10:24:51 19 at page 17 you say, you make the conclusion
10:24:55 20 that:

10:24:55 21 "The opening of the half-mile
10:24:56 22 strip in 1851 and 1852 would have
10:25:00 23 encouraged [the] view that it was only
10:25:02 24 a matter of time that local white
10:25:04 25 settlers to gain the right to legally

10:25:06 1 settle on Indigenous lands."

10:25:08 2 A. Yes.

10:25:12 3 Q. Why is your opinion that the
10:25:13 4 opening of the half mile strip would have
10:25:16 5 encouraged that view with respect to the rest of
10:25:18 6 the reserve?

10:25:19 7 A. The goal of squatters, as I
10:25:22 8 explained yesterday, is to get the fee. And
10:25:25 9 they're operating in a world of rumours and
10:25:30 10 frontier information. But once land was
10:25:33 11 actually taken from a reserve by cession, once
10:25:36 12 the cession actually occurred, and as the -- was
10:25:41 13 speedily surveyed and allocated, when land
10:25:44 14 wasn't actually being speedily surveyed and
10:25:47 15 allocated in general, it's communicating to
10:25:51 16 local settlers that this land is going to be
10:25:56 17 ceded from the Indians and made available.

10:26:03 18 And if this land has been taken the
10:26:05 19 expectation is that other lands will be taken
10:26:07 20 shortly.

10:26:12 21 Q. I see that we have a transcript
10:26:13 22 of the last letter that I was just referring to,
10:26:15 23 Gleason responding to Anderson making his case
10:26:18 24 that he's not trespassing. And he mentions here
10:26:28 25 in the middle of the second paragraph: "I sent

1 the chiefs to Colonel Bruce in Toronto."

2 Who is Colonel Bruce that he's talking
3 about?

4 A. Colonel Bruce is the
5 Superintendent of Indian Affairs.

6 Q. So he sent the chiefs -- in this
7 letter he's saying that he sent the chiefs on to
8 speak to Colonel Bruce about staying on the
9 reserve?

10 A. That's what he's saying. And
11 they -- he's saying, I believe:

12 "I sent by the chiefs to Colonel
13 Bruce in Toronto to do what the answer
14 was, yes, go on, orally."

15 But there's no record of this and --
16 or whether it was the chiefs or Colonel Bruce
17 that said, yes, go on. The chiefs, of course,
18 can't cede their land to a private person. It
19 violates -- again.

20 Q. Okay. So I'd like to move on to
21 talking about the third heading that I have on
22 the outline for your examination, the
23 legislation about squatting in Upper Canada in
24 the early to mid-19th century.

25 First you talk about legislation

10:27:48 1 available in the 19th century, but before
10:27:50 2 talking about that, when do you first see the
10:27:52 3 Crown -- from your review of the record, when do
10:27:54 4 you first see the Crown responding to or
10:27:58 5 discussing squatting in Upper Canada?

10:28:02 6 A. It would be around Grand River
10:28:08 7 after the War of 1812, so I mean 20 years, 30
10:28:12 8 years before this.

10:28:13 9 Q. You've talked about the 1839
10:28:15 10 Crown Lands Protection Act, so I'd like to bring
10:28:18 11 that up. That's Exhibit 1301. And do you have
10:28:34 12 a paper copy in front of you?

10:28:37 13 A. Yes.

10:28:43 14 Q. So this is about a few pages.
10:28:45 15 I'm just wondering, can you briefly summarize
10:28:47 16 your understanding of how this legislation could
10:28:50 17 have been used to deal with squatters in Upper
10:28:53 18 Canada in the 19th century? In the mid-19th
10:29:00 19 century so--

10:29:02 20 THE COURT: Just before you answer,
10:29:02 21 can you repeat that please?

10:29:03 22 BY MS. GUIGRUIS:

10:29:04 23 Q. Sure. Can you summarize your
10:29:05 24 understanding of how this 1839 legislation could
10:29:10 25 be used to deal with squatters in Upper Canada?

10:29:13 1 THE COURT: I'm just mulling over your
10:29:15 2 question, counsel. Yes, Mr. Beggs.

10:29:18 3 MR. BEGGS: Your Honour, I'm concerned
10:29:19 4 that it is effectively asking the witness to
10:29:22 5 interpret the statute.

10:29:26 6 THE COURT: Well, it's certainly
10:29:27 7 asking the witness to interpret the statute, but
10:29:30 8 are you objecting to it on that basis?

10:29:32 9 MR. BEGGS: Yes, Your Honour.

10:29:43 10 THE COURT: Ms. Guirguis, do you have
10:29:45 11 any response that?

10:29:47 12 MS. GUIGRUIS: Your Honour, my
10:29:47 13 intention -- my question is aimed at asking the
10:29:51 14 witness, yes, to talk about his understanding of
10:29:53 15 the statute and what it did in that historical
10:29:55 16 period or what it could have provided in that
10:29:57 17 historical period in terms of responding to
10:29:59 18 squatters in Upper Canada.

10:30:03 19 THE COURT: I'm pausing because as a
10:30:12 20 legal historian, I have found that this
10:30:14 21 gentleman is qualified to talk historically
10:30:20 22 about what the laws were and what occurred under
10:30:22 23 them, which is different from what might be
10:30:26 24 possible or might be done under them, which
10:30:31 25 starts to drift into interpreting a domestic

10:30:43 1 statute.

10:30:43 2 And I recognize the domestic statute
10:30:46 3 is old, and you might find some areas where you
10:30:49 4 can ask this witness questions, but I think your
10:30:52 5 question as presently worded somewhat overbroad
10:30:59 6 by asking a high level opinion about what would
10:31:02 7 be capable of being done under this domestic
10:31:05 8 statute, as opposed to what was done.

10:31:18 9 Having said that, I'll give you some
10:31:20 10 latitude to look historically at the statute,
10:31:22 11 but I do find that a very broad question which
10:31:25 12 invites just a wholesale interpretation and
10:31:31 13 deployment of a domestic statute a little
10:31:34 14 problematic.

10:31:35 15 So may I ask you if you could ask a
10:31:37 16 more focused question, and we'll see how we do
10:31:45 17 if there is a continued objection or not.

10:31:47 18 MS. GUIGRUIS: Thank you, Your Honour.

10:31:48 19 BY MS. GUIGRUIS:

10:31:50 20 Q. So, Professor Haring, the 1839
10:31:53 21 Act before us right now, without us having to
10:31:56 22 read through all of the details, could you
10:31:59 23 highlight what this Act is?

10:32:04 24 THE COURT: You mean as a general
10:32:05 25 matter?

10:32:06 1 MS. GUIGRUIS: No, in respect of --

10:32:08 2 BY MS. GUIGRUIS:

10:32:08 3 Q. This is an act for the protection
10:32:10 4 of lands of the Crown in this Province from
10:32:12 5 trespass and injury. What powers did it give to
10:32:14 6 the government to protect against trespass and
10:32:18 7 injury?

10:32:18 8 THE COURT: Well, perhaps what you
10:32:19 9 could do, just to make it less broad --

10:32:21 10 MS. GUIGRUIS: Yes.

10:32:22 11 THE COURT: -- if you wish to ask the
10:32:24 12 question to identify the parts of the
10:32:25 13 legislation that he regards as giving some
10:32:28 14 power, then that's fine.

10:32:30 15 MS. GUIGRUIS: Yes.

10:32:31 16 THE COURT: That would be more
10:32:32 17 specifically tied to the legislation. I'm not
10:32:35 18 sure that it's -- it still encroaches on what
10:32:40 19 Mr. Beggs complains about, but I'll permit that.

10:32:48 20 MS. GUIGRUIS: All right. Thank you,
10:32:48 21 Your Honour, yes.

10:32:48 22 Q. That's my intention right now is
10:32:50 23 to identify the parts that this witness -- of
10:32:53 24 this legislation that deals with trespass on
10:32:58 25 Crown lands at that time.

10:33:10 1 A. Trying to be mindful of the
10:33:13 2 narrow question I'm operating under, I guess the
10:33:22 3 narrow answer, it appoints an unlimited number
10:33:25 4 of Indian Commissioners or provides for the
10:33:28 5 appointment of an unlimited number of Indian
10:33:31 6 Commissioners by the Lieutenant Governor. No
10:33:33 7 limit is set.

10:33:34 8 And these Indian Commissioners are
10:33:36 9 given the power to -- upon a complaint of
10:33:47 10 trespass on an Indian reserve, they are given
10:33:49 11 the power to notify the person and give them 30
10:33:57 12 days to leave.

10:33:58 13 Q. Okay. So let's maybe slow this
10:34:00 14 down so we can target the specific examples.
10:34:04 15 Where is the section that deals with the
10:34:05 16 appointment of commissioners?

10:34:12 17 A. It's a dense paragraph.

10:34:14 18 THE COURT: To help you out, counsel,
10:34:16 19 I can read this piece of legislation and I'm
10:34:19 20 going to.

10:34:20 21 MS. GUIGRUIS: Okay.

10:34:20 22 THE COURT: If there is a particular
10:34:21 23 section that you think this gentleman has a
10:34:24 24 legal history, or sections, to add to the words
10:34:28 25 of the legislation, unless one of the

10:34:31 1 defendant's counsel leaps to their feet right
10:34:33 2 now, I have no problem with you taking the
10:34:35 3 gentleman to the section or sections if you want
10:34:37 4 him to give some legal history that would
10:34:40 5 provide me with useful context.

10:34:43 6 That's perfectly fine. I don't think
10:34:45 7 you have to -- he doesn't have to search if you
10:34:47 8 know where you're going.

10:34:48 9 MS. GUIGRUIS: Okay. Thank you, Your
10:34:49 10 Honour.

10:34:52 11 BY MS. GUIGRUIS:

10:34:52 12 Q. So if we can turn section 1?

10:34:57 13 THE COURT: After the preamble I
10:34:59 14 presume?

10:35:00 15 MS. GUIGRUIS: I believe so. Yes.
10:35:00 16 Sorry. It's not on the first page I guess.

10:35:19 17 THE COURT: Just take your time,
10:35:20 18 counsel.

10:35:23 19 MS. GUIGRUIS: It's not as clearly
10:35:24 20 marked as more modern statutes.

10:35:27 21 THE COURT: That's okay. Just take
10:35:28 22 your time. Counsel, you can rephrase your
10:36:08 23 question as to what you wanted to ask?

10:36:11 24 BY MS. GUIGRUIS:

10:36:11 25 Q. So looking at the preamble you

10:36:14 1 had mentioned that -- that there is a provision
10:36:22 2 for appointing Commissioners of Indian Lands?

10:36:27 3 A. Yes.

10:36:29 4 Q. I'm sorry, I can't -- and would
10:36:31 5 you be able to let me -- let us know where
10:36:34 6 that -- where we would find that?

10:36:40 7 THE COURT: Can you expand it a bit
10:36:41 8 for my benefit and also for Professor Harring's
10:36:45 9 benefit. Enlarge the text a bit.

10:36:55 10 BY MS. GUIGRUIS:

10:36:56 11 Q. That is small print, so if you
10:36:58 12 can zoom in, please. There we go.

10:37:03 13 So this is the section that you note
10:37:07 14 about Commissioners being appointed?

10:37:09 15 A. Right.

10:37:09 16 Q. Okay. Sorry, one moment Your
10:37:17 17 Honour.

10:37:18 18 THE COURT: Just take your time.

10:37:46 19 MS. GUIGRUIS: I'm going to leave it
10:37:47 20 because I think the plain reading of the
10:37:50 21 legislation will get us what we need to get.

10:37:53 22 THE COURT: Thank you, counsel.

10:37:53 23 MS. GUIGRUIS: Thank you.

10:37:59 24 My apologies for that confusion and
10:38:02 25 technical difficulties.

10:38:04 1 THE COURT: These things happen in the
10:38:04 2 mornings.
10:38:10 3 BY MS. GUIGRUIS:
10:38:10 4 Q. In addition, you also talk about
10:38:11 5 the 1850 Act for better protection of Indians of
10:38:14 6 Upper Canada at your -- in your report?
10:38:16 7 A. Yes.
10:38:17 8 Q. That's at page 48 so that is
10:38:19 9 Exhibit 1784. And if we scroll to section 9 of
10:38:43 10 this legislation, it's right there at the bottom
10:38:55 11 of the PDF image page 5. This provision
10:38:58 12 similarly provides for appointment of
10:39:00 13 Commissioners, is that correct?
10:39:02 14 A. Yes.
10:39:06 15 Q. So the only thing -- now this
10:39:30 16 provision 2, it refers to the previous -- it
10:39:33 17 refers to Commissioners appointed under the Acts
10:39:35 18 of Parliament in the next section of this Act.
10:39:38 19 What's it referring to? Your understanding from
10:39:41 20 the history? Is it -- sorry, what's it
10:39:45 21 referring to?
10:39:46 22 A. The previous statute.
10:39:47 23 Q. The previous statute, okay. So
10:39:52 24 you noted under both these Acts that
10:39:54 25 Commissioners could be appointed, and

1 Commissioners that are appointed have authority
2 under this Act, which we can read on our own.

3 To your knowledge, based on your
4 review of the record, were any Commissioners
5 appointed under the 1839 or 1850 Act?

6 A. There were Commissioners
7 appointed.

8 Q. So I just wanted to -- I want to
9 go to the top of your page 56 of your expert
10 report.

11 Here you make a note. Here is where
12 you are discussing the appointment of
13 commissioners with respect to the Acts, and you
14 make a statement at the end:

15 " [...] the Crown had taken some
16 action, they still had not appointed a
17 commissioner to enforce the 1850 Act."

18 Can you comment on that?

19 A. The last sentence of that
20 paragraph?

21 Q. That's right.

22 A. Yeah, I'm saying that while we
23 have settlers here, the -- I say the Crown had
24 taken some action and still had not appointed a
25 Commissioner to enforce the 1850 Act -- that's

10:41:32 1 wrong. They had appointed Commissioners and
10:41:35 2 there was a Commissioner Anderson, for example,
10:41:37 3 at Saugeen -- is empowered to enforce the Act,
10:41:42 4 and I believe so is McNabb.

10:41:43 5 Q. Okay. Thank you. I want to pull
10:41:45 6 up Exhibit 1839 that refers to appointment of
10:41:52 7 Commissioners. There is a transcript that we
10:41:54 8 have at SC1175. Let's pull that up instead.

10:42:53 9 So letter dated February 18, 1851,
10:42:57 10 from Colonel Bruce to Superintendent Anderson?

10:43:03 11 A. Yes.

10:43:05 12 Q. And it's -- it says:

10:43:06 13 "With reference to your letter of
10:43:08 14 the 10th," it says, "I transmit here
10:43:12 15 with an exemplification of the
10:43:14 16 Commissioner appointing you one of the
10:43:15 17 commissioners to carry into effect the
10:43:15 18 provisions of the Statute of Upper
10:43:17 19 Canada, 2 Victoria chapter 15 for the
10:43:20 20 protection of Crown lands from
10:43:23 21 trespass."

10:43:25 22 So this is confirming that Anderson --

10:43:28 23 A. Yes, he was a Commissioner at the
10:43:30 24 time of those letters to Gleason and could have
10:43:34 25 enforced the statute on his own authority.

1 Q. So from your review of the
2 historical record, can you comment on whether or
3 how Anderson and the others enforced their
4 authority as Commissioners under this Act?

5 A. There is quite a literature on
6 this Act, because it's normally seen as a fore
7 runner of the Indian Act of Canada.

8 And the -- I have not personally
9 found -- only a few letters written under the
10 Act threatening enforcement, but scholars
11 generally agree that it wasn't enforced in terms
12 of removing squatters from Indian land.

13 Q. And when I say "the Act", I'm
14 referring to both 1839 and then what replaced it
15 in 1850.

16 A. Right. And in fact 1850 is seen
17 as an attempt to strengthen the 1839 Act because
18 it hadn't been enforced.

19 Q. I'd like to bring up another
20 exhibit, which a letter shortly after this again
21 from Colonel Bruce to Anderson, February 26,
22 1851. It's Exhibit 1842. We have a transcript
23 at SC1174, which we can bring up instead.

24 THE COURT: Did you wish to mark 1175?

25 MS. GUIGRUIS: Yes, we can mark it as

10:45:26 1 a transcript to the --

10:45:32 2 THE COURT: Mr. Registrar.

10:45:33 3 THE REGISTRAR: Exhibit 4291.

10:11:39 4 EXHIBIT NO. 4291: letter dated

10:11:39 5 February 18, 1851, from Colonel Bruce

10:11:39 6 to Superintendent Anderson; Document

10:11:39 7 SC1175.

10:45:36 8 THE COURT: That is the letter

10:45:37 9 appointing Anderson as Commissioner?

10:45:39 10 MS. GUIGRUIS: Yes.

10:45:40 11 THE COURT: And now you have moved to

10:45:42 12 which document?

10:45:43 13 MS. GUIGRUIS: SC1174 that is a

10:45:45 14 transcript of Exhibit 1842.

10:45:50 15 THE COURT: And do you request to mark

10:45:51 16 it as well?

10:45:52 17 MS. GUIGRUIS: Yes, please, Your

10:45:52 18 Honour.

10:45:53 19 THE COURT: Mr. Registrar.

10:45:54 20 THE REGISTRAR: Exhibit number 4292.

10:45:57 21 EXHIBIT NO. 4292: Document SC1174

10:45:57 22 which is a transcript of Exhibit 1842.

10:46:06 23 BY MS. GUIGRUIS:

10:46:07 24 Q. So about half-way down the

10:46:08 25 paragraph, Colonel Bruce writes:

1 "I concur with you in thinking
2 that powers vested in the
3 commissioners by the Indians in the
4 Protection Act should be exercised
5 with caution and forbearance and that
6 it would be more in the interest of
7 the Indians that advantages should be
8 taken of the present opportunity to
9 give full publicity to its provisions,
10 particularly those of a public
11 character, than to carry them very
12 rigidly into effect."

13 And so on. Professor Haring can you
14 comment on Bruce's instructions to Anderson
15 here?

16 A. At the simplest level, at the
17 time Anderson is sending letters and back and
18 forth with Gleason and refusing to remove him
19 from squatting on Colpoy's Bay on the Indian
20 reserve. He is getting a letter from Colonel
21 Bruce, Superintendent of the Indian Department,
22 telling him to exercise forbearance. Trying to
23 get the words exactly right.

24 Trying to exercise forbearance of
25 these powers thinking that it would give the --

10:47:18 1 that we shouldn't be carrying it into effect
10:47:21 2 because somehow it might induce the Indians not
10:47:23 3 to enforce it. On its face, it's contravening
10:47:33 4 the statute.

10:47:35 5 Q. So shifting then, I mean we've
10:47:37 6 touched on it, but shifting to the Crown's
10:47:39 7 response to the heading -- under the heading of
10:47:41 8 the Crown's response, which is my fourth
10:47:43 9 heading, to squatting on Saugeen lands in early
10:47:46 10 to mid-19th century.

10:47:48 11 Professor Harring, based on your
10:47:51 12 review of the historical record, can you comment
10:47:54 13 on the enforcement, if any, of the 1839
10:47:57 14 legislation with respect to squatting that was
10:47:59 15 happening on Saugeen lands at that time?

10:48:05 16 A. I've looked as hard as I could to
10:48:08 17 find evidence of enforcement, and you simply
10:48:10 18 don't find it. It's not being enforced.

10:48:13 19 Q. And based on your review of the
10:48:15 20 historical record, can you comment on the
10:48:17 21 enforcement, if any, of the 1850 legislation
10:48:22 22 with respect to squatting that was happening on
10:48:23 23 the Saugeen lands at that time?

10:48:25 24 A. Yes, the 1850 statute was
10:48:28 25 supposed to strengthen the 1839 statute. It's

10:48:31 1 not enforced either.

10:48:41 2 Q. Based on your review of the
10:48:43 3 record, do you have an opinion about why the
10:48:44 4 Crown would not have enforced the 1839 and 1850
10:48:48 5 legislation on Saugeen lands?

10:48:51 6 A. It's' -- I mean, my view, and I
10:48:57 7 think consistent with most scholars of Indian
10:49:00 8 affairs at this time, what's going on is that
10:49:03 9 the Crown is choosing not to enforce these laws
10:49:09 10 against squatters because the Crown is -- or the
10:49:17 11 Crown officials on the frontier are sympathetic
10:49:19 12 to squatters, even in league with squatters in
10:49:23 13 respect of the money being made through
10:49:26 14 speculation and are trying to speed up access to
10:49:28 15 Indian lands by using the squatters to help
10:49:31 16 remove them.

10:49:42 17 Q. Being in league with the
10:49:43 18 squatters in respect to the money they made and
10:49:45 19 so on, you talk about this in your report, and
10:49:49 20 one of the footnotes that you have is to a
10:49:51 21 thesis by Vosburgh. Let me just get the
10:50:03 22 exhibit. That's Exhibit 4288.

10:50:07 23 We don't need to bring it up but I'm
10:50:09 24 just wondering whether you can comment on the
10:50:11 25 reliability and authority of that source that

10:50:15 1 you've cited there?

10:50:17 2 A. I found the thesis to be a
10:50:18 3 reputable academic work and the scholarship
10:50:21 4 seemed sound.

10:50:22 5 Q. Thank you.

10:50:31 6 We talked about your opinion on why
10:50:32 7 the legislation wasn't enforced. Can you
10:50:34 8 comment on the resources, in your view, that
10:50:38 9 would have been needed to enforce this
10:50:40 10 legislation in respect of squatting on Saugeen
10:50:45 11 lands in the mid-19th century?

10:50:48 12 THE COURT: Mr. Lemmond?

10:50:49 13 MR. LEMMOND: Your Honour, I believe
10:50:50 14 the question treads into the territory that we
10:51:00 15 were dealing with on his qualification
10:51:02 16 yesterday. This is a question in relation to
10:51:03 17 the possibility of enforcement on squatting.

10:51:20 18 THE COURT: Your question is put
10:51:22 19 slightly differently but still calls upon this
10:51:28 20 witness to give an opinion on what resources
10:51:31 21 would have been available under the rubric of
10:51:36 22 the Crown administrative/enforcement structure,
10:51:41 23 so it does overlap with my ruling yesterday.

10:51:47 24 Why do you say this gentleman is
10:51:49 25 qualified to say what -- well, your question was

10:51:55 1 what resources would have been needed. So are
10:51:56 2 you saying that he is qualified to enumerate
10:51:58 3 people, money, administrative structure, or
10:52:03 4 whatever else would be required? And that
10:52:07 5 certainly didn't come up yesterday.

10:52:11 6 MS. GUIGRUIS: No, that didn't and I
10:52:12 7 think that's the difference between -- I'm not
10:52:14 8 asking what were available but what would have
10:52:17 9 been -- yes, his opinion on what resource would
10:52:19 10 have been needed.

10:52:20 11 THE COURT: Needed, but it's not
10:52:21 12 exactly the same.

10:52:22 13 MS. GUIGRUIS: That's right.

10:52:23 14 THE COURT: But I don't think I heard
10:52:25 15 anything yesterday to suggest that this
10:52:26 16 gentleman would be qualified to line up the
10:52:34 17 equipment, people, structure, money, weapons,
10:52:38 18 whatever else would -- to answer your question
10:52:42 19 the witness would have to be qualified to give
10:52:47 20 an opinion.

10:52:48 21 Is there an opinion in his report on
10:52:50 22 this subject?

10:52:56 23 MS. GUIGRUIS: Yes, I believe so. Can
10:52:57 24 I have one second just to look at the
10:53:00 25 qualification?

10:53:01 1 THE COURT: Of course. Remembering
10:53:03 2 the question was: What resources would have
10:53:05 3 been needed? I'm not sure it's exactly what we
10:53:10 4 dealt with yesterday, but it raises a similar
10:53:12 5 concern.

10:53:54 6 MS. GUIGRUIS: Your Honour, I would
10:53:54 7 suggest that it falls -- he has been qualified
10:54:02 8 to provide expert opinion on colonial land
10:54:04 9 policy, settlement regimes, settlement practices
10:54:07 10 under the first one and actual law enforcement
10:54:09 11 in relation to Indigenous lands in the late 18th
10:54:12 12 and 19th century of what is now Ontario. So I
10:54:14 13 think that this falls under it.

10:54:16 14 I'm not asking him to opine on what
10:54:18 15 could have been available or military resources,
10:54:21 16 or the -- or similar. But based on his review
10:54:26 17 of the historical record and his expertise, and
10:54:29 18 what is set out in the legislation, if he can
10:54:32 19 provide his view on what -- what would be needed
10:54:41 20 to actually enforce the law -- and maybe perhaps
10:54:44 21 we can even go further to say if there's
10:54:48 22 examples in the historical record of actual law
10:54:51 23 enforcement of these Acts and what resources
10:54:54 24 were required.

10:54:55 25 THE COURT: That second branch I don't

1 think would have drawn objection.

2 MS. GUIGRUIS: Right.

3 THE COURT: But what would have been
4 needed is -- I don't think, regardless of
5 whether it came up yesterday, I don't think this
6 gentleman has been qualified as an expert in how
7 one would assess the people, resources,
8 infrastructure required to meet any particular
9 problem, let alone this one.

10 He has been qualified to talk about
11 the fact of, or lack thereof, of enforcement.
12 He's been talking about that a good deal this
13 morning. Those are the historical facts that
14 he's looked into.

15 But I will grant an objection to
16 inviting him to say what would be needed to
17 enforce because I don't think he's been
18 established to be an expert in that sort of
19 assessment of resources and deployment on the
20 ground in the mid-19th century in that region,
21 which would be something that could be done but
22 hasn't been established with this gentleman.

23 MS. GUIGRUIS: Okay, thank you, Your
24 Honour.

25 THE COURT: There are a myriad of

1 other questions you mentioned along the way that
2 you were interested in that would not have this
3 difficulty.

4 MS. GUIGRUIS: Right.

5 BY MS. GUIGRUIS:

6 Q. You mentioned in your report that
7 the Crown did take steps to protect the
8 peninsula after the surrender in Treaty 72. Can
9 you expand on what they did?

10 A. Well, there's a long -- a
11 document that -- as Indian Superintendent
12 Oliphant leaves the occasion of cession, leaves
13 the cession process, he notes squatters on
14 Saugeen lands and issues an order that -- issues
15 posters -- issues post orders that trespassing
16 is forbidden and that trespassers will be
17 prosecuted. And, obviously, he could have
18 posted such an order at any prior point in time.
19 Or anyone -- Commissioner Anderson could have
20 too.

21 Q. And what you're referring to is
22 Exhibit 2153, a notice that was posted from
23 Oliphant to Sheriff Schneider. If we can pull
24 that up? Is this the notice that you're
25 referring to?

10:58:10 1 A. Yes. And the irony here is that
10:58:12 2 this goes the day after surrender to a sheriff
10:58:16 3 who is obviously available, because they are
10:58:19 4 involving -- inviting his authority to be
10:58:24 5 asserted here. And Anderson, under the powers
10:58:27 6 of Indian Commissioner, didn't need to have this
10:58:34 7 long exchange back and forth with Gleason. He
10:58:37 8 could have ejected him.

10:58:38 9 If you read further into the statute,
10:58:40 10 because Gleason was illegally leasing or
10:58:43 11 attempting to lease Crown land, the Commissioner
10:58:46 12 could have appointed any literate person to help
10:58:49 13 him, if the sheriff wasn't available, commanding
10:58:51 14 him to arrest such person or persons. And the
10:58:55 15 penalty at the point goes up to, for a leaser
10:58:59 16 person pretending to use the law to get Indian
10:59:02 17 power, 200 pound fine and prosecution for a
10:59:05 18 misdemeanor instead of an offence, which I
10:59:09 19 gather would -- carries about a year in jail in
10:59:12 20 the common law. And he didn't do that.

10:59:24 21 Q. I want to turn in your report,
10:59:24 22 you describe several examples of the Crown
10:59:28 23 employing enforcement measures for different
10:59:31 24 reasons. So I would like to turn to each and
10:59:33 25 then ask you to elaborate on your view as to how

10:59:37 1 they are relevant to what we were discussing
10:59:40 2 yesterday and that is with respect to the law
10:59:42 3 enforcement with respect to squatters on Saugeen
10:59:44 4 lands in general, and the peninsula in
10:59:45 5 particular.

10:59:46 6 The first example that you mention
10:59:48 7 around page 57 of your report is the Saugeen
10:59:51 8 tearing out surveyor stakes, and the surveyor
10:59:55 9 Rankin being offered military aid. And you
10:59:58 10 refer to two exhibits, newspaper articles, I
11:00:00 11 believe, from 1855 in the Daily Leader, Exhibits
11:00:04 12 2246, 2247. We don't need to go to them in any
11:00:10 13 particular detail, but could you elaborate on
11:00:16 14 this example?

11:00:18 15 A. You know, as a sociologist, as a
11:00:21 16 legal historian, you are concerned with these
11:00:23 17 events that trigger actions that you might not
11:00:27 18 expect.

11:00:27 19 So here we have a sort of classic
11:00:30 20 frontier land problem where the surveyors
11:00:34 21 surveying where the Indians thought he shouldn't
11:00:39 22 be surveying. Just a dispute over the boundary.
11:00:42 23 And the Indians reacted by tearing up the
11:00:46 24 surveyor stakes.

11:00:49 25 A newspaper urged that the militia be

11:00:53 1 called up, which is, I think, a newspaper
11:01:01 2 agitation of some sentiment about maybe putting
11:01:04 3 the Indians in their place or protecting Rankin,
11:01:07 4 who is a government official.

11:01:09 5 Nothing came of it because no one in
11:01:12 6 the Saugeen Peninsula thought there was any
11:01:15 7 serious danger to Rankin, and all he has to do
11:01:18 8 is put the stakes back.

11:01:20 9 I mean, it's not -- it would take him
11:01:23 10 some time to do that, but it's a pretty ordinary
11:01:26 11 exchange that isn't particularly threatening.
11:01:31 12 But the idea here was that the militia might be
11:01:34 13 called up, or the militia might be available,
11:01:37 14 urged by the press is a bit, you know, a window
11:01:39 15 into how people saw these things at the time.

11:01:42 16 Q. What's the relevance of this
11:01:43 17 example to actual law enforcement with respect
11:01:45 18 to squatters on Saugeen lands?

11:01:48 19 A. Well, just like Commissioner
11:01:56 20 Oliphant sends a letter to the sheriff, it
11:01:59 21 indicates that the sheriff is there, Sheriff
11:02:02 22 Schneider, in fact, County of Grey. This
11:02:04 23 indicates that there is a militia there that
11:02:07 24 could go do this.

11:02:09 25 Q. The second incident you mention

1 is the 1863 Manitoulin Island incident. You
2 rely on a source that's been added as an exhibit
3 which is by Douglas Layton, and the exhibit is
4 4238, just to note on the record.

5 Can you elaborate on this incident?

6 A. Yes. Again it's -- many, you
7 know, Indian historians cite it because the
8 settlement of Ontario is so nonviolent. I mean,
9 intended to occur under the rule of law and all
10 of that as I layout in my book.

11 When you have an event where you get a
12 small Indian push back, in this case -- I'm not
13 remembering exact numbers -- but a handful of
14 Indians sort of accost a handful of fishermen on
15 Manitoulin Island, basically eject them for,
16 again, fishing on Indian land, in their view.

17 And on -- you know, the officials in
18 Ontario summon up and -- I lay it out in the
19 book, a militia or militia-like body composed of
20 constables, some game wardens, evidently a few
21 volunteers, from the lower Georgian Bay area who
22 get in a boat, 20 of them, get in a boat, sail
23 up to Manitoulin Island, arrest one Indian who
24 is still there, hasn't even left, in the process
25 of -- evidently they went out into Georgian Bay

11:03:50 1 to search for -- or the boat went out and one of
11:03:53 2 the Commissioners fell overboard by -- he had
11:03:57 3 nothing to do with this. So they lost the white
11:03:59 4 Commissioner.

11:04:00 5 And then came back to Toronto with the
11:04:02 6 Indian who had been arrested and at trial the
11:04:06 7 cases were dismissed.

11:04:08 8 Q. What's the relevance of this
11:04:09 9 example of actual law enforcement with respect
11:04:12 10 to squatters on Saugeen lands?

11:04:16 11 A. The relevance of it is that the
11:04:17 12 Crown clearly had the capacity to mount
11:04:21 13 substantial law enforcement operations in this
11:04:24 14 period.

11:04:30 15 Q. The other example you site is the
11:04:31 16 Mackenzie rebellion of 1837 and 1838. You cited
11:04:36 17 "The Civil Biography of Mackenzie," again, just
11:04:40 18 for the record, that's been added as an exhibit,
11:04:43 19 Exhibit 4290. Can you elaborate on this example
11:04:49 20 and its relevance?

11:04:50 21 A. I mean, every historian of Upper
11:04:53 22 Canada in this period looks at the rebellion as
11:04:57 23 a kind of high water, an event that defines
11:05:02 24 Canadian history, among other things. We have
11:05:08 25 Chancellor McCaully and Chief Justice John

1 Beverley Robinson turning out armed to put it
2 down.

3 The reports talk about some force
4 of -- they say up to a thousand but then they
5 say maybe only 500 organized by Mackenzie to
6 capture Toronto on behalf of people who felt
7 left out of the established order.

8 THE COURT: I'm just going to
9 interrupt you, sir. Yes, Mr. Beggs?

10 MR. BEGGS: Your Honour, I think we're
11 getting into the territory of potential law
12 enforcement. It appears that the suggestion is
13 that large bodies of military or militia could
14 have been used in another scenario, which is
15 getting pretty far, actually, from law
16 enforcement at all.

17 THE COURT: We are far from law
18 enforcement since we seem to be in the Mackenzie
19 rebellion. But Ms. Guirguis, what do you have
20 to say about the objection?

21 MS. GUIGRUIS: My question was really
22 about the examples that have been cited about
23 enforcement or Crown activities enforcing
24 against people in various situations. And
25 what's the relevance to the question that we

11:06:12 1 have at hand and is the actual law enforcement
11:06:16 2 with respect to squatters on Saugeen lands and
11:06:18 3 the peninsula.

11:06:20 4 THE COURT: And your position is that
11:06:22 5 the Mackenzie rebellion should be informing that
11:06:29 6 question? It's not your position so much as
11:06:31 7 your witness' opinion, is that correct?

11:06:34 8 MS. GUIGRUIS: That's correct. My
11:06:34 9 witness' opinion talks about the Mackenzie
11:06:36 10 rebellion. I'm trying to elicit and get him to
11:06:37 11 elaborate on the relevance.

11:06:41 12 THE COURT: I am going to permit you
11:06:42 13 to ask this gentleman questions, subject to
11:06:48 14 relevance, about what transpired there. But
11:06:51 15 that does not mean that this witness is
11:06:53 16 qualified to opine on whether one thousand
11:06:59 17 people could have been marshaled in the Bruce
11:07:01 18 Peninsula, which is a different question.

11:07:06 19 And I'm not sure whether he was going
11:07:07 20 there or not. So far he has limited his answer
11:07:11 21 to what transpired in the Mackenzie rebellion
11:07:16 22 and I'm going to permit that.

11:07:19 23 MS. GUIGRUIS: Thank you, Your Honour.

11:07:26 24 THE COURT: Sir, you were in the
11:07:27 25 middle of your answer, but I'm going to ask

11:07:29 1 counsel to give you the help of a prompt before
11:07:35 2 you get started, a specific question or if you
11:07:38 3 wish to restate the old question. It's up to
11:07:41 4 you.

11:07:44 5 MS. GUIGRUIS: Thank you, Your Honour.

11:07:44 6 BY MS. GUIGRUIS:

11:07:45 7 Q. So Professor Harring, I had asked
11:07:47 8 you to elaborate on the example that you provide
11:07:49 9 of the Mackenzie rebellion of 1837 and 1838, and
11:07:54 10 you were discussing what transpired at that
11:07:57 11 event.

11:07:57 12 A. Okay. It's -- Mackenzie and a
11:07:59 13 force of apparently about 500 -- there are huge
11:08:03 14 exaggerations in the numbers in everybody's
11:08:05 15 opinion who has analyzed it.

11:08:08 16 And they march on Toronto. They are
11:08:12 17 met with an informal military force that is
11:08:15 18 quickly raised from among the citizens of
11:08:18 19 Toronto led by some important people. And
11:08:22 20 there's much military expertise in Toronto at
11:08:25 21 this time.

11:08:26 22 So the military force that's raised,
11:08:29 23 which may have involved, again, to give
11:08:31 24 exaggeration of numbers, a few thousand, five
11:08:34 25 thousand at most, immediately dispersed the

1 Mackenzie rebellion. The rebels were sent
2 running.

3 And in fact I always like to include
4 the fact is that the Six Nations allies of the
5 Crown mobilized themselves to join the Queen's
6 militia in chasing down the rebels as they
7 headed for the American border. They were all
8 dispersed. Some of them were hanged and the
9 threat was dispersed quickly.

10 Q. I'd like to refer back to an
11 example that you've talked about already, the
12 Six Nations Grand Rivers. And you referred to
13 this in "White Man's Law", which has also been
14 added as an exhibit.

15 Can you elaborate on this example and
16 this relevance to what we're talking about with
17 respect to actual law enforcement and with
18 respect to squatters on the Saugeen lands?

19 A. Generally without any document?
20 I mean, I can do it.

21 What's going on the Grand River
22 reserve regarding squatters?

23 Q. Yes.

24 A. Okay. A lot of documents here.
25 And the squatting problem at the Grand River

1 reserve, the squatters are never removed and the
2 problem remains through the whole colonial
3 period.

4 There is a government report I cite in
5 my book that, from 1840 saying there are almost
6 as many squatters on the reserve, 2,000, as
7 there are Grand River Indians, 2,200.

8 And it becomes, of course, sort of
9 fundamental in the way that the Crown and Crown
10 agents operating in Indian affairs see the
11 squatter problem in relationship to Indians.

12 And in fact most scholars say that the
13 1839 and 1850 Acts are essentially prompted by
14 the events at Grand River, even though they
15 clearly apply to Indians everywhere in Canada,
16 hoping that what happened at Grand River, you
17 know, the problem is somehow -- could be
18 controlled if the statutes had been followed.
19 The statutes were clearly intended to be
20 enforced.

21 Q. And what is the relevance to the
22 question that we're discussing today, the actual
23 law enforcement with respect to squatters on
24 Saugeen lands?

25 A. Well, given the powers that the

1 Indian Commissioners had, which is to order
2 removal in 30 days with a -- either a jail term
3 for an offence or a small fine, 20 pounds in the
4 first statute and then, you know, potentially
5 200 pounds, and a misdemeanor jail time in the
6 second statute.

7 These statutes weren't enforced, and
8 the squatters were allowed to remain on the
9 land, as plaintively as we see in the
10 correspondence between Anderson and Gleason.
11 You know, Gleason boldly -- even denying that
12 he's a squatter when everyone -- everyone knows
13 that he is and the chain of letters shows it.

14 Q. Thank you. So I want to move to
15 my fifth heading, which is questions that you
16 were asked to talk about squatting and land
17 sales post Treaty 72, 1854.

18 And Your Honour, just to give my
19 friends fair warning, I believe I'm going to be
20 done by the morning break.

21 THE COURT: Thank you, counsel.

22 BY MS. GUIGRUIS:

23 Q. So I would like to discuss the
24 questions that you were asked to answer about
25 what happened after Treaty 72, the land sales of

1 the surrendered lands.

2 How, if at all, did the practice of
3 squatting impact the sale of the surrendered
4 lands?

5 A. Again, there is a number of
6 documents in this. You know several ways. For
7 one thing it causes chaos in land allocation
8 because, you know, you buy land -- I might buy
9 land and there could be someone on it when I get
10 there.

11 And then the question is, you know,
12 not only is there a question about how I evict
13 the person, but I may owe the person -- the
14 person may ask me for pre-emption, for money for
15 pre-emption rights. And then we're into a
16 problem of access to law and justice in courts
17 on the frontier, a very complicated fact
18 pattern.

19 Factual issues being, you know, lots
20 of exaggeration perhaps on all sides about their
21 values of their improvements.

22 You know every kind of possibility of
23 deception and fraud is exaggerated just given
24 the distance and land -- each piece of land
25 being unique, for example, all that kind of

11:13:56 1 thing.

11:13:57 2 So the problem is huge. You're making
11:13:58 3 a -- you've got a chaotic situation and then
11:14:02 4 adding to the price of the land, and at a time
11:14:04 5 when people don't have much money and it's hard
11:14:06 6 to sell the land anyway. The farmers are cash
11:14:10 7 poor. Different levels of cash poor, but
11:14:12 8 everyone would agree they're cash poor.

11:14:53 9 Q. You said that someone would buy
11:14:55 10 land and someone would be on it. How would that
11:14:58 11 typically resolve?

11:15:00 12 THE COURT: Sorry, can I just
11:15:00 13 understand the question?

11:15:01 14 MS. GUIGRUIS: Yes.

11:15:02 15 THE COURT: The previous question was
11:15:02 16 very specific as of 1854 on the lands that are
11:15:07 17 in Exhibit P. Is this also about that or is it
11:15:11 18 about something else?

11:15:14 19 MS. GUIGRUIS: This is about those --
11:15:15 20 what we're talking about lands as they were --
11:15:18 21 yes, after 1854.

11:15:20 22 THE COURT: So this is a question of
11:15:21 23 not hypothetically how these things would
11:15:24 24 resolve but what historical facts is this
11:15:28 25 witness aware of, from that time and that

11:15:30 1 location, about how these did resolve?

11:15:33 2 MS. GUIGRUIS: That's correct.

11:15:34 3 THE COURT: Yes, I have no problem
11:15:35 4 with that. Go ahead.

11:15:37 5 MS. GUIGRUIS: Okay. That's correct.
11:15:39 6 So, yeah.

11:15:40 7 BY MS. GUIGRUIS:

11:15:41 8 Q. From your awareness of the
11:15:42 9 historical facts, how did those things resolve?
11:15:44 10 Those lands being sold with people already on
11:15:47 11 them?

11:15:48 12 A. Well, they were resolved any
11:15:52 13 number of ways. There ends up being a squatter
11:15:56 14 commission which is appointed by the Crown to
11:15:57 15 attempt to resolve some of the more complicated
11:16:02 16 situations, but most of these would have been
11:16:06 17 worked out in informal ways between the people
11:16:10 18 involved.

11:16:11 19 But it was chaos which lowers the
11:16:13 20 value of the land because it's less attractive.
11:16:17 21 The squatter commission dealt with some examples
11:16:20 22 of the chaos.

11:16:23 23 Q. You mentioned the squatter
11:16:25 24 commission in your report as well. Which lands
11:16:27 25 were they dealing with?

11:16:28 1 A. The squatter commission was
11:16:29 2 appointed to deal with lands that had been
11:16:31 3 surrendered before Treaty 72 which -- and before
11:16:36 4 Treaty 67, which means the lands surrendered by
11:16:41 5 Treaty 45 1/2, the settled lands south of the
11:16:44 6 half-mile strip.

11:16:57 7 Q. Okay. Thank you.

11:16:57 8 So I would like to bring up two
11:16:59 9 documents, SC1122 and SC1123. The first one is
11:17:11 10 a little more difficult to read, but this is the
11:17:15 11 first report of this -- what you refer to as the
11:17:18 12 "squatters commission" authored by Olge R. Gowan
11:17:31 13 and Morgan Hamilton. This is 1857. Is that the
11:17:35 14 squatters' commission you're referring to?

11:17:38 15 A. Yes.

11:17:39 16 Q. Your Honour, I would like to have
11:17:40 17 this marked as an exhibit, the first report of
11:17:43 18 the Commissioners relative to the counties of
11:17:46 19 Huron and Bruce, 1854 to 1857?

11:17:49 20 THE COURT: Mr. Registrar.

11:17:51 21 THE REGISTRAR: Exhibit 4293.

11:17:53 22 EXHIBIT NO. 4293: First report of the
11:17:53 23 Commissioners relative to the counties
11:17:53 24 of Huron and Bruce, 1854 to 1857.

25

1 BY MS. GUIGRUIS:

2 Q. And then the second document is
3 SC1123. This is an appendix to "Legislative
4 Assembly of the Province of Canada". If you
5 scroll down it's appendix number 22. And I
6 think it's -- yeah, half-way down the page it
7 starts there.

8 And again it's the final report of the
9 Commissioners Olge R. Gowan and Morgan Hamilton,
10 relative to the counties of Huron and Bruce.
11 And it's dated March 20, 1858. So this is the
12 final report of what you refer to as the
13 "squatters commission"?

14 A. Right.

15 MS. GUIGRUIS: Your Honour, I would
16 like to have this marked as the next exhibit.

17 THE COURT: Can we just go back to the
18 previous page, please, and enlarge it? All
19 right. That's 2015.

20 THE REGISTRAR: Exhibit number 4294.

21 EXHIBIT NO. 4294: Appendix 22 to
22 "Legislative Assembly of the Province
23 of Canada"; Document SC1123.

24 BY MS. GUIGRUIS:

25 Q. So you mentioned that the

1 squatters commission was appointed to deal with
2 what you called confusion and the land sales,
3 and it was dealing for land sales for the Treaty
4 45 1/2 area. Can you summarize what is relevant
5 about these reports to land sales after 1854
6 too?

7 A. Right. They're probably the best
8 description I've seen about what was going on on
9 the ground in this area at this time. And this
10 is the process that was happening, you know, up,
11 as we said, up in all of these areas up to 1854.

12 And the question would be then, what
13 about the process might have changed afterwards?
14 And of course we don't have that report. But
15 what you see down here is corruption, chaos,
16 people paying for land and not getting it; land
17 Commissioners pocketing land. McNabb seems to
18 be a thief. I mean in the -- they talk about
19 his corruption repeatedly. I'm not -- I don't
20 believe I'm exaggerating.

21 And you think this is more corrupt
22 than even I thought it was at that time. So I
23 think it's a window into how these -- the Crown
24 lands south of -- well, the half-mile strip and
25 south, south of the half-mile strip were being

11:20:48 1 allocated. They don't apply to the half mile
11:20:51 2 strip. Let me be clear.

11:20:54 3 So it's a problem of squatting, chaos,
11:20:56 4 corruption, land sales, all layers -- all in
11:20:58 5 layers.

11:21:04 6 Q. Professor Harring, at the time of
11:21:07 7 Treaty 72 and based on your review of the
11:21:09 8 historical record, what information, if any did
11:21:12 9 the Crown have on the suitability of the lands
11:21:15 10 of the peninsula for agriculture?

11:21:20 11 A. Well, they had to survey -- well,
11:21:23 12 first of, I mean different government officials
11:21:25 13 had been present there in different government
11:21:27 14 capacities. For second, surveyor Rankin, who
11:21:33 15 had been in the area a long time, I can't say
11:21:35 16 how long, but ten years I believe, a long time,
11:21:37 17 had been across it and asked to survey it. And
11:21:41 18 he summarizes it fairly accurately. And anyone
11:21:44 19 who knows land in the north sort of has some
11:21:47 20 sense of what's there.

11:21:49 21 A lot of it is swampy, a lot of it is
11:21:51 22 rocky, there is a lot of good land. So when you
11:21:53 23 are going to take a farm it matters what land
11:21:56 24 you get. Because a swampy hundred-acre farm is
11:22:01 25 worthless; a rocky hundred-acre farm is

1 worthless. Good land is worth lots.

2 So, but Rankin had communicated this
3 to the government pretty accurately. I think
4 his main assessment is that there is a lot of
5 good land in the southern half of the peninsula
6 and much less good land in the northern half of
7 the peninsula. And I think everyone who's been
8 there knows that to be true.

9 So it's held up pretty well. So the
10 government had a pretty good idea of the
11 farmability (sic) of it.

12 That said it's clear in that -- this
13 context and other contexts that -- and well even
14 in the United States where I live I was going to
15 say, where the government was overly optimistic
16 about the settlability (sic) of northern land.
17 We all know that. Anyone who's seen the farms
18 around Ottawa knows that.

19 That the government thought that they
20 could move settlers profitably much further
21 north than they actually could. But that
22 doesn't get resolved historically for another
23 number of years.

24 So the belief might have been overly
25 optimistic about some of these lands, but within

11:23:11 1 the science of their time Rankin gave them a
11:23:14 2 good base.

11:23:17 3 Q. So Rankin -- the report or the
11:23:20 4 survey that you referred to, just for reference,
11:23:22 5 you referred to it at footnotes 179 of your
11:23:25 6 report and I believe it's Exhibit 2104, just for
11:23:30 7 reference point.

11:23:42 8 So, Professor Harring, there's one
11:23:42 9 source -- I've been asking you to comment on the
11:23:45 10 authority of your sources. And there's one
11:23:49 11 source that I wanted to ask you about, Gilbert
11:23:50 12 Patterson, "Land Settlement in Upper Canada,
11:23:53 13 1783-1840," which is Exhibit 4279. You rely on
11:23:57 14 that throughout your report.

11:23:58 15 Can you comment on your view of the
11:24:00 16 authoritative -- of whether this is an
11:24:03 17 authoritative source?

11:24:04 18 A. It's an authoritative text. I
11:24:05 19 think that after Lillian Gates it is the most
11:24:08 20 authoritative text of the Upper Canadian land
11:24:19 21 policy.

11:24:20 22 Q. Thank you, Professor Harring.
11:24:20 23 Those are my questions.

11:24:23 24 THE COURT: Given the time, we'll take
11:24:24 25 the morning break at this time. Who for Canada

1 is cross-examining this gentleman?

2 MR. BEGGS: I will be, Your Honour.

3 THE COURT: Sir, you mentioned you
4 testified before so you may be aware that you
5 are now going to be under cross-examination.

6 THE WITNESS: Yes.

7 THE COURT: And that means you cannot
8 discuss this matter with anyone at all.

9 THE WITNESS: I understand.

10 THE COURT: And you need also to not
11 go off on curiosity-driven inquires of your own,
12 if you are wondering about something. You will
13 be asked certain questions and that will
14 commence at the end of the morning break in 20
15 minutes.

16 -- RECESSED AT 11:25 A.M. --

17 -- RESUMED AT 11:49 A.M. --

18 CROSS-EXAMINATION BY MR. BEGGS:

19 Q. Good morning, Mr. Harring.

20 A. Good morning, sir.

21 Q. You talked about that Gilbert
22 Patterson was one of the most recognized
23 sources?

24 A. Yes.

25 Q. I noticed that some versions of

11:51:45 1 his books refer to him as George Patterson. Do
11:51:49 2 you have any idea as to why that is?

11:51:52 3 A. I don't know. There are actually
11:51:53 4 a number of authors who use different names
11:51:55 5 throughout their careers. And, you know, it's
11:51:58 6 maddening because you can wonder whether it is
11:52:00 7 the same person, but I don't know why he did.

11:52:07 8 Q. But in any event, it's the work
11:52:10 9 itself that is recognized as being
11:52:11 10 authoritative?

11:52:12 11 A. Yes.

11:52:13 12 Q. If I could call up your report,
11:52:15 13 which is Exhibit 4276, and we'll be going to
11:52:34 14 page 6 of the report. But while we're doing
11:52:38 15 that, you wrote this report in 2013, is that
11:52:41 16 correct?

11:52:48 17 A. I wrote it a few years ago. I
11:52:50 18 don't remember that it was 2013.

11:52:53 19 Q. And did you have any assistance
11:52:55 20 writing the report or was it you yourself?

11:52:57 21 A. I wrote it myself.

11:52:58 22 Q. And that included the sources and
11:52:59 23 the footnotes?

11:53:00 24 A. Yes.

11:53:00 25 Q. And the errata that we've made an

1 exhibit as well recently, is that your work as
2 well? The errata to the --

3 A. The errata is my work. I
4 double-checked some sources and found some
5 sources, yes.

6 Q. Now, as I understand your
7 position, you agree that there is a -- there was
8 a genuine problem of squatting occurring on the
9 Treaty 72 lands, if I may call them that, prior
10 to the surrender itself?

11 A. Yes.

12 Q. And there was also a real danger
13 that squatting would increase over time?

14 A. As the line of settlement moved
15 west, squatting increased pressure on lands in
16 waves, yes.

17 Q. And the Saugeen and Nawash knew
18 about the squatting occurring?

19 A. Yes.

20 Q. And they knew that it could get
21 worse?

22 A. I think everybody knew.

23 Q. So on page 6 of your report, if
24 we could scroll down a bit. So there is a quote
25 from professor -- I assume it's Professor Gates?

11:54:35 1 A. Gates, yes.

11:54:36 2 Q. It says:

11:54:38 3 "Squatters became so fundamental
11:54:40 4 in the settling of Upper Canada that
11:54:41 5 'the usefulness of squatters in
11:54:44 6 opening up new country was generally
11:54:47 7 admitted, and, from an early date, the
11:54:49 8 squatter was popularly regarded as
11:54:49 9 equitably entitled to compensation for
11:54:49 10 his improvements if he were
11:54:53 11 dispossessed.' "

11:54:54 12 Now Gates wasn't specifically talking
11:54:56 13 about Indian lands there, was she? She was
11:54:58 14 talking about --

11:54:59 15 A. No, she's not talking
11:55:00 16 specifically.

11:55:07 17 Q. And you say underneath there:

11:55:08 18 "This thesis, unchallenged in
11:55:11 19 Canadian historiography, both puts the
11:55:15 20 squatter at the center of Upper
11:55:18 21 Canadian expansion and also provides a
11:55:20 22 basis for the legal interest in
11:55:21 23 lands[...]"

11:55:27 24 If I could go to the next page, page
11:55:29 25 7, so in that paragraph beginning, "The economic

11:55:48 1 basis[...]"?

11:55:49 2 A. "The economic basis [...]," okay.

11:55:49 3 Q. The third sentence I believe:

11:55:51 4 "Squatters developed this

11:55:52 5 frontier at no cost to the

11:55:54 6 government."

11:55:55 7 I think this is similar to what

11:55:56 8 you said yesterday?

11:55:57 9 A. That's based on Gates.

11:55:59 10 Q. Yes, they advanced --

11:55:59 11 A. And also the work I --

11:55:59 12 -- REPORTER CLARIFICATION --

11:56:05 13 Q. "They advanced into unsurveyed

11:56:09 14 lands, built farms ahead of any road

11:56:09 15 system themselves, built a rudimentary

11:56:09 16 road system, undertook all the risks

11:56:11 17 of the sale of their produce, and for

11:56:14 18 a time even spared the government the

11:56:16 19 cost of the land survey and basic land

11:56:18 20 administration costs."

11:56:20 21 So you would agree that at the time,

11:56:25 22 among some people at least, squatters were seen

11:56:31 23 to have some social value?

11:56:33 24 A. Well, Chief Justice John Beverley

11:56:36 25 Robinson concedes that. So many people saw

11:56:39 1 that. I can't say everybody saw that or -- but
11:56:42 2 it was widely admitted.

11:56:53 3 Q. And that's actually part of the
11:56:54 4 problem with controlling squatting is that
11:56:56 5 people didn't -- people tolerated it somewhat?
11:57:02 6 Because it had some social value?

11:57:04 7 A. People tolerated it and the
11:57:05 8 government tolerated it.

11:57:07 9 Q. Yes. If we could go to page 69
11:57:33 10 of your report, at the very end, it is the end
11:57:34 11 of the report and also the end of the page.

11:57:41 12 You're talking about Treaty 45 1/2,
11:57:42 13 and this was -- there was some discussion
11:57:46 14 yesterday about the issue of legal opinions in
11:57:49 15 your evidence. And I'm not going to ask you for
11:57:52 16 a legal opinion, but you refer to several
11:57:56 17 quotes. Those are quotes from various -- are
11:58:01 18 they from academics or are they from --

11:58:16 19 A. No, they're various quotes in
11:58:16 20 the --

11:58:16 21 -- REPORTER CLARIFICATION --

11:58:17 22 THE COURT: Madam Reporter, I'll help
11:58:17 23 with this. I think it makes it more difficult
11:58:17 24 if Madam Reporter has to speak up. So I'm going
11:58:17 25 to ask her to resist that temptation.

1 Sir, you will get into this habit, but
2 the habit you need to get into is to wait until
3 Mr. Beggs has finished his question before you
4 start your answer.

5 THE WITNESS: Yes, Your Honour.

6 THE COURT: This is not
7 conversational, so it's a bit difficult.
8 Otherwise Madam Reporter can't manage.

9 THE WITNESS: Sorry, Your Honour.

10 THE COURT: Everyone has the same
11 problem, sir. You will get into the habit.

12 Mr. Beggs I think you should repeat
13 your question.

14 BY MR. BEGGS:

15 Q. Yes, Your Honour. So these
16 quoted words, are they the words of academics or
17 witnesses at the time?

18 A. They are taken from Canadian
19 government reports describing Canadian
20 government land policy or -- I'll take that
21 back. I took them from either the scholarly
22 work. Some of them, I think "imbecilic", is
23 taken from a government report. And it's all
24 work that I cited in my reports. You can find
25 those words. I can't here without research but

1 I could.

2 All language of the Upper Canadian
3 officials of the day, so I did say what the
4 source of those words were.

5 Q. Although I believe the phrase
6 "lax", for example, you attribute to Gilbert
7 Patterson, higher up on the same page?

8 A. He would have been citing
9 someone, I believe. I would need to look. I
10 certainly can honestly say in my work I would
11 never refer to any government as imbecilic. I
12 wouldn't do that. It's not good scholarly
13 practice.

14 Q. Now we're going to go through a
15 couple of spots where I think I want to
16 distinguish between whether your statements are
17 intended to be legal opinions or historical
18 facts.

19 If I could go to page 82, which is in
20 the footnotes and it's footnote 131. It's the
21 reference to Blackstone's commentaries. Now
22 you're saying that the law of trespass -- well,
23 are you saying that this is a historical fact
24 that that is what the law of trespass was in the
25 1850s or are you interpreting Blackstone?

12:01:10 1 A. Well, I mean, I'm -- when you're
12:01:14 2 writing about what's going on with law and
12:01:20 3 society, one of the questions always is, where
12:01:21 4 is the law coming from?

12:01:23 5 Upper Canada at that time would have
12:01:25 6 adopted the English common law and whatever
12:01:27 7 statutes of England and Canada applied here.
12:01:33 8 The basis of the law of trespass, it is a common
12:01:36 9 law crime or a common law tort or common law
12:01:39 10 property right. And I'm -- which means it would
12:01:42 11 have come from the customary experience of the
12:01:44 12 English people.

12:01:46 13 Blackstone codified -- wrote -- not
12:01:48 14 codified. He wrote it on the treatise. So I'm
12:01:51 15 not sure how your question -- I didn't make up
12:01:53 16 the law of trespass.

12:01:55 17 Q. Well, what I'm wondering is, are
12:02:00 18 you saying that the court needs to learn
12:02:03 19 something historical about the law of trespass
12:02:05 20 or that the court can just apply the law of
12:02:09 21 trespass as it knows it?

12:02:10 22 A. Well, given that the common law
12:02:12 23 runs in Canada at the time, these judges --
12:02:16 24 well, the point I'm trying to make is that we
12:02:18 25 didn't need the statutes of 1839, 1850 except to

12:02:22 1 elaborate and increase the penalties, because
12:02:24 2 squatting on Indian -- squatting on anybody's
12:02:27 3 land, Indian land or otherwise, would have been
12:02:29 4 a trespass at common law.

12:02:31 5 That's the point I'm trying to make.
12:02:32 6 And I'm trying to do it not to tell people what
12:02:35 7 the law is, but to tell people what the
12:02:39 8 framework of squatting and settlement is at this
12:02:43 9 time in a -- within -- with reference to law.

12:02:48 10 But the point being you don't need new
12:02:49 11 statutes. You have got common law trespass.

12:02:53 12 Q. Okay. If I could go to page 31
12:02:56 13 of your report. It's the bottom of the
12:03:18 14 penultimate paragraph I guess. "Given the poor
12:03:21 15 quality of much of the land [...]", and it goes
12:03:25 16 on. Do you see that spot there?

12:03:29 17 A. I'm not seeing it.

12:03:32 18 Q. It's above the paragraph "The
12:03:34 19 problem [...]".

12:03:35 20 A. I see it.

12:03:36 21 Q. Okay. So:

12:03:37 22 "Given the poor quality of much
12:03:39 23 of the land [...]", and that continues
12:03:41 24 on for a bit, but then it says, "[...]"
12:03:44 25 but overpaying for a piece of land

12:03:46 1 does not, in any law at the time,
12:03:49 2 invalidate the purchase."

12:03:52 3 That's a legal opinion, isn't it? I
12:03:53 4 mean it is a simple legal opinion, but it is a
12:03:55 5 legal opinion?

12:03:56 6 A. It's interesting. As a legal
12:03:56 7 historian, I often think about this when I write
12:03:56 8 it. I understand what you're getting at, and I
12:04:00 9 think about this often when I write it.

12:04:02 10 And I was even thinking here and, as a
12:04:05 11 law professor, you know, I realize that caveat
12:04:11 12 emptor, buyer beware ordinarily still prevails
12:04:15 13 to the law of property, okay. There's a legal
12:04:18 14 opinion. So this is kind of a generalizable
12:04:18 15 statement that I suppose if I were a good lawyer
12:04:24 16 at the time, and I had a really, really bad
12:04:27 17 purchase, I might make an argument about it.

12:04:30 18 But it's a principle, I think, that is
12:04:32 19 governing some of these processes. I don't know
12:04:34 20 how you write about legal history law and talk
12:04:36 21 about the legal principles that are structuring
12:04:39 22 these processes.

12:04:40 23 So I think we're somewhere between
12:04:43 24 what I'm trying to say and the point you're
12:04:45 25 trying to make. It's not as clear that it's a

12:04:48 1 legal opinion as opposed trying to tell them
12:04:50 2 what was socially happening at the time, or a
12:04:53 3 combination of both.

12:04:55 4 Q. Okay. This morning in the
12:05:37 5 transcript about 10:16 you were discussing
12:05:41 6 Alexander McNabb, the land Commissioner or the
12:05:44 7 land agent?

12:05:45 8 A. Yes.

12:05:46 9 Q. And I believe you were talking
12:05:50 10 about one of the mill sites. And you said he
12:05:52 11 knows that he can not negotiate with the
12:05:56 12 Indigenous people. And you said it was illegal
12:06:01 13 and that was the law at the time. This is my
12:06:05 14 handwritten notes, not direct exactly.

12:06:08 15 But you said it was the law at the
12:06:10 16 time, which I guess might be a historical
12:06:14 17 statement. I guess that was intended to be a
12:06:16 18 historical statement?

12:06:18 19 A. I guess if you're -- I believe
12:06:19 20 it's 18 -- well, I'm trying -- the date would
12:06:23 21 be, it's an 1850 statute. But, again, if you're
12:06:27 22 talking about someone's legal behaviour, by
12:06:29 23 definition it's in reference to some body of
12:06:31 24 law; otherwise it isn't legal behaviour.

12:06:33 25 So I guess I wouldn't -- it wasn't so

12:06:41 1 much a legal conclusion as trying to describe
12:06:44 2 his behaviour in relation to the legal system or
12:06:46 3 a body of law.

12:06:48 4 Q. While I'm on that issue, maybe
12:06:50 5 I'll put some general propositions to you. You
12:06:53 6 defined what you were talking about what
12:06:56 7 squatters meant yesterday -- meant to you at
12:06:57 8 least, and the different kinds of squatters.

12:07:00 9 A. Yes.

12:07:01 10 Q. Now, I'm going to suggest a
12:07:08 11 couple of things to you and you can tell me
12:07:10 12 whether you agree with them.

12:07:12 13 But a person -- you said, I think,
12:07:22 14 that a person essentially walking through the
12:07:27 15 territory, the Indian lands as they were calling
12:07:33 16 them, was not necessarily a squatter. They may
12:07:36 17 be trespassing, but they are not a squatter.
12:07:39 18 They are just passing through?

12:07:41 19 A. Right.

12:07:42 20 Q. Now, a person who had permission
12:07:48 21 of both the government and the First Nations,
12:07:51 22 they wouldn't be a squatter, would they?

12:07:53 23 A. Well, you have to read -- I mean,
12:07:56 24 it would be in -- this relationship would be
12:07:57 25 laid out in the statute of 1850. If the

1 permission were legal --

2 Q. Yes, that's my --

3 A. -- they wouldn't be a squatter.

4 Q. If there was a formal permission
5 granted by the -- and I'm not talking about an
6 individual Indigenous person --

7 A. Yes, I think the --

8 Q. If the community formally leased
9 a -- in this case, in Alexander McNabb's case, a
10 mill and the government approved that lease, he
11 wouldn't be a squatter?

12 A. In the government legally
13 approved the lease, he wouldn't be a squatter.

14 Q. Yes.

15 A. The essence of the statute of
16 1850 is that you can't make legal contracts with
17 Indians.

18 Q. But I don't want to debate the
19 law.

20 A. Without the sanction of the
21 Crown, that would be.

22 Q. Yes. So with the sanction of the
23 Crown, you could make a legal --

24 A. Presumably, yes.

25 Q. And then you wouldn't be a

12:08:53 1 squatter?

12:08:53 2 A. And then you wouldn't be a
12:08:55 3 squatter.

12:09:05 4 Q. Going back to one last point
12:09:07 5 about legal issues, if I could go to page 31
12:09:11 6 which goes over to page 32. So it's the third
12:09:24 7 last line of page 31 you wrote:

12:09:27 8 "As of 1856 the Crown was --
12:09:31 9 incredibly -- unsure what legal powers
12:09:32 10 it had to deal with squatters of this
12:09:33 11 type."

12:09:39 12 A. I'm referring to the next
12:09:41 13 sentence, using that as an example.

12:09:43 14 Q. Yes, I'm just trying to figure
12:09:44 15 out what this type was. In any event:

12:09:47 16 "R.T. Pennefather wrote to the
12:09:50 17 Attorney General on 25 September 1856
12:09:52 18 asking for a legal opinion on whether
12:09:54 19 those sales could be 'legally
12:09:55 20 cancelled'. He further asked about
12:09:57 21 the legal status of a 'sheriff's deed
12:10:00 22 to same lands.' This is nothing less
12:10:03 23 than evidence of the negligence and
12:10:05 24 incompetence of the Crown's land
12:10:07 25 administration."

12:10:08 1 A. Okay.

12:10:09 2 Q. That last sentence --

12:10:10 3 THE COURT: Sorry. Sir, you're

12:10:13 4 waiting for the question to finish. I know

12:10:16 5 you're poised to bounce in there but wait until

12:10:18 6 the question is finished.

12:10:21 7 THE WITNESS: Sorry, Your Honour, I

12:10:22 8 talk too long.

12:10:23 9 THE COURT: No, no. It's not long.

12:10:24 10 It's wait. Wait until Mr. Beggs is finished,

12:10:27 11 take a deep breath and then start your answer.

12:10:28 12 Because he wasn't finished.

12:10:31 13 BY MR. BEGGS:

12:10:32 14 Q. Thank you, Your Honour. So the

12:10:32 15 last sentence is your legal opinion, is it not?

12:10:36 16 That you've got -- that this is evidence of

12:10:43 17 negligence on the part of the Crown?

12:10:45 18 A. It's my conclusion. And the

12:10:46 19 conclusion -- can I say what it's based on?

12:10:49 20 Q. Certainly.

12:10:50 21 A. You're seeing this person as

12:10:52 22 being a -- a responsible -- I've forgotten what

12:10:57 23 exactly his role is at the moment without

12:10:59 24 notes -- but as a Crown official with an

12:11:05 25 important role in land sales, he's asking what

1 legal powers he has to deal with squatters who
2 are interfering with land selections and the
3 land sale process.

4 And he wants to know if fraudulent
5 sales could be legally canceled. And then he's
6 asking about the legal status of a sheriff's
7 deed to a repossessed property, I believe. When
8 I refer to "same lands", it's lands that have
9 been sold and repossessed for nonpayment. And
10 my simple assumption is that a Crown land
11 official responsible for land distribution and
12 sale should know what his legal power is.

13 Q. So your suggestion is that the
14 fact Mr. Pennefather was asking this question in
15 1856 shows incompetence on the part of the
16 Crown?

17 A. Yes. Well, I mean negligence or
18 incompetence. He could know and not be acting.
19 I mean -- he could know what his -- he could be
20 fully appraised of the law and be asking what it
21 is simply to delay or obfuscate.

22 Q. Well, such --

23 A. I don't know.

24 Q. Would you entertain the idea that
25 it doesn't need to be so sinister as delay or

1 obfuscate, but it may be simply an official
2 asking for an official position to rely on so he
3 could show people?

4 A. There is some complexity here
5 that requires some context. I mean you've read
6 a lot of my work obviously, and one of the
7 things, you try not to be too judgmental about
8 actors in a context and try to give them
9 every -- you want to stretch out the evidence,
10 evaluate it. We have lots of unknowns in this
11 process.

12 I simply found it -- this is an
13 important land sale. It involves the livelihood
14 of the Saugeen tribe. And I thought it was, in
15 my view, if I read the documents again and we
16 discussed them further, my opinion might evolve,
17 but that he should know this information.
18 Whether he wants a letter to empower him, again,
19 I think some of this came up.

20 Like, I'm not certain that a Crown
21 actor in 1856 needs a letter before he can carry
22 out his responsibilities. He might have wanted
23 one. Can't say he didn't. But it didn't seem
24 credible to me.

25 Q. Okay.

12:14:03 1 A. But I'm making an evaluation.

12:14:05 2 You're right.

12:14:11 3 Q. If we could call up that letter.
12:14:13 4 It's Exhibit 2426. So there we are. It's the
12:14:29 5 letter dated 25th September 1856 and it's to
12:14:33 6 Attorney General McDonald, that would be John A
12:14:38 7 McDonald, correct? And Solicitor General Smith:

12:14:45 8 "Gentlemen, I am directed to
12:14:46 9 request your opinion on the following
12:14:48 10 fronts. These:
12:14:48 11 1st. The Crown in its capacity of
12:14:52 12 trustee sells Indian lands on
12:14:52 13 condition that payment be made by
12:14:53 14 stated installments with interest.
12:14:56 15 Can such sale be legally cancelled and
12:14:59 16 the land resold upon failure on the
12:15:00 17 part of the purchaser or his
12:15:04 18 representative to perform the
12:15:05 19 conditions of sale in cases where the
12:15:06 20 original purchaser or his assignee
12:15:13 21 resides upon the land in question?"
12:15:16 22 So he is talking about a purchaser who
12:15:17 23 is not paying installments?

12:15:20 24 A. Yes.

12:15:20 25 Q. That is not a squatter, is it?

12:15:23 1 When you say they're -- you said in your
12:15:24 2 paragraph in your report that they are talking
12:15:25 3 about squatters. This is not squatters.
12:15:30 4 Somebody bought the land.

12:15:32 5 A. Well the original purchaser or
12:15:34 6 his assignee, we simply don't know. I mean this
12:15:36 7 is someone there who purchased, okay.

12:15:38 8 Q. So --

12:15:38 9 A. It may have been a squatter who
12:15:38 10 purchased --

12:15:40 11 THE COURT: Sir, we cannot make a
12:15:45 12 record of this trial if you interrupt each
12:15:47 13 other.

12:15:48 14 THE WITNESS: Sorry.

12:15:48 15 THE COURT: It's okay. It takes a
12:15:49 16 little practice. Stay the course. I lost track
12:15:54 17 of the answer, because counsel and the witness
12:15:57 18 were talking at the same time.

12:16:11 19 You said something like, the original
12:16:13 20 purchaser or his assignee, we simply don't know.
12:16:16 21 And I think Mr. Beggs was trying to ask you a
12:16:18 22 question and I've lost it. We simply didn't
12:16:20 23 hear it. Over to you Mr. Beggs.

12:16:21 24 MR. BEGGS: Thank you, Your Honour.
25

12:16:21 1 BY MR. BEGGS:

12:16:22 2 Q. Whether he is an assignee or the
12:16:24 3 original purchaser, that is not a squatting
12:16:27 4 situation, is it?

12:16:34 5 A. I can't tell that in this
12:16:35 6 information. That's all. It's not.

12:16:36 7 Q. Second, I'm just going to
12:16:37 8 continue reading:

12:16:38 9 "Is the Indian Department bound
12:16:43 10 to recognize the title of a person
12:16:45 11 claiming under a sheriff's deed to
12:16:47 12 land situated as in the previous query
12:16:50 13 or, in other words, would such a deed
12:16:52 14 place the holder of it in a better
12:16:54 15 position than that of the original
12:16:56 16 purchaser, subsequent to his default
12:16:59 17 and previously to the sale of his
12:17:02 18 interest by the sheriff?"

12:17:03 19 And is that the end of letter I think?

12:17:09 20 Yes. So that's the end of the letter.

12:17:11 21 Now, you're suggesting that this
12:17:13 22 letter indicates that either Mr. Pennefather
12:17:19 23 didn't know what he was doing or didn't care, is
12:17:21 24 that correct?

12:17:22 25 A. Yes. I thought he should --

12:17:25 1 sorry. I thought in the context of a large
12:17:33 2 Indian land sale where these issues are pretty
12:17:36 3 obvious, he should know the law of what -- of
12:17:38 4 the land administration that he's doing.

12:17:41 5 Q. And if we could go back to your
12:17:42 6 report at footnote 95, which is page 79 of your
12:17:46 7 report? This is the same topic, just the
12:17:55 8 footnote to the thing we were talking about. So
12:17:58 9 95. Yes.

12:17:59 10 So after the -- after the citation,
12:18:01 11 you say:

12:18:02 12 "The answer to both of these
12:18:04 13 legal questions should have been clear
12:18:06 14 under the law of property in Ontario
12:18:08 15 at that time."

12:18:12 16 Now, is that -- are you actually
12:18:14 17 talking about the law of property at that time
12:18:16 18 or are you talking about the law of property
12:18:18 19 now?

12:18:18 20 A. I said "at that time".

12:18:20 21 Q. Yes. Just checking.

12:18:21 22 A. I mean, yeah, sorry.

12:18:39 23 Q. Just to tie this issue off,
12:18:41 24 you're not saying that asking for legal advice
12:18:44 25 is negligent conduct?

12:18:47 1 A. I would say it depends what kind
12:18:50 2 of legal advice you're asking, given your
12:18:52 3 training and experience and your responsibility
12:18:55 4 in -- we're dealing with someone here who is
12:18:57 5 handling, what were we talking about, hundreds
12:19:01 6 of Indian land sales. I mean, some large number
12:19:04 7 of land sales, in a context where people don't
12:19:07 8 have money. Squatters have been there forever.

12:19:10 9 This was chaotic before the Crown took
12:19:13 10 possession. And people aren't paying. Land is
12:19:17 11 being repossessed. Land is being sold that
12:19:20 12 someone else is occupying, which is the
12:19:22 13 situation as I've described it this morning.

12:19:25 14 And he seems to have no legal -- he's
12:19:29 15 been in position two years. He seems to have no
12:19:32 16 idea of the law structuring his official
12:19:37 17 position. I found that a bit incredulous.

12:19:41 18 If -- with a kind of follow-up, there
12:19:44 19 is a -- you know, chaos is functional on some
12:19:48 20 level. So if your goal is to, you know, if you
12:19:51 21 don't care or you're being careless about this
12:19:54 22 or the Indian, the money the Indians get doesn't
12:19:57 23 matter, and there are many reasons why you might
12:20:00 24 simply be handling this. Getting the letter
12:20:04 25 could be another way of covering your proverbial

1 act. You're right in that sense.

2 But it still strikes me as being, you
3 know, incompetent for an official at that level
4 with this level of responsibility.

5 Q. Okay. While we're on the subject
6 of legal advice, not yours, but historically.

7 A. Sure.

8 Q. While we're on the subject of
9 legal advice and I'm just qualifying I'm not
10 talking about your legal advice but the legal
11 advice being given to the departmental
12 officials, can we go to Exhibit 2371?

13 So this is a letter dated May 23rd,
14 1856, so earlier the same year. I think it's
15 from Pennefather, we can check, but it's to
16 Alexander McNabb. And if I could read it:

17 "I am directed to acknowledge the
18 receipt of your letter of 15th Inst
19 enclosing one from the postmaster of
20 Saugeen complaining against
21 [something] squatters on the Indian
22 town [...]"

23 Could you blow it up more? Yes.

24 "Indian town surrendered for
25 having plowed a portion [...] the

12:22:28
12:22:31
12:22:33
12:22:43
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leading road."

Actually I'm going to postpone this until I make more sense out of it.

A. Okay.

Q. I want to jump to your book, "White Man's Law" for a moment and the portion I want to look at is Exhibit 4271. And I'm looking for page 151 of the text. It would seem this is an excerpt and I am hoping I have the right one.

Well, while I'm on that, actually I'll stay on that section. If I could go to page 45 of the text?

And this is in your chapter on the Six Nations. And perhaps we won't even need it, but I want to ask you about one of the scenarios you mentioned which was the one involving Mr. James Hagar in your text. Do you recall that?

A. I need to --

Q. It's at the bottom starting with "Mary Martin".

A. Okay.

Q. So you've read --

A. I see as far -- it needs to be scrolled here.

12:24:47 1 Q. That's all I wanted to ask, that
12:24:49 2 section.

12:24:49 3 A. Okay.

12:24:49 4 Q. It mentions the Onondaga. Who
12:24:52 5 are the Onondaga?

12:24:54 6 A. One of the Six Nations nations.

12:24:55 7 Q. So they are Iroquois, I take it?

12:24:58 8 A. From the area of what's now
12:25:00 9 Syracuse.

12:25:03 10 Q. And there's mention of a dispute
12:25:04 11 in 1832 with Mr. Hagar. It's in the paragraph
12:25:13 12 beginning, "Upon hearing [...]".

12:25:15 13 It says:

12:25:17 14 "The Indians had been involved in
12:25:19 15 an ongoing land dispute with Hagar, a
12:25:22 16 squatter, dating back to 1832 when he
12:25:24 17 settled on land which he had illegal
12:25:24 18 bought from an individual Onondaga but
12:25:25 19 which the Onondaga had opposed because
12:25:28 20 it contained a sacred site used in the
12:25:31 21 White Dog ceremony."

12:25:34 22 Can you tell me what the White Dog
12:25:34 23 ceremony is you're referring to?

12:25:37 24 A. It's a -- it is an Onondaga
12:25:43 25 ceremonial right. I am not an anthropologist,

12:25:46 1 but it is a very important ceremonial rite.

12:25:50 2 Q. And what was the source of this
12:25:52 3 information about the 1832 --

12:25:55 4 A. You know, again, I wrote this 25
12:25:57 5 years ago. I need to see the footnotes. I need
12:26:00 6 to be refreshed.

12:26:08 7 Q. Okay. The footnotes just refer
12:26:09 8 to the case involving Mary Martin. So I'm not
12:26:12 9 sure if page 150 is in this section.

12:26:30 10 You do have a section you referred to
12:26:32 11 yesterday talking about the legal history of the
12:26:34 12 Chippewas of Cape Croker, is that correct?

12:26:38 13 A. Not connected to this, sorry.

12:26:40 14 Q. It's not connected to the Six
12:26:42 15 Nations, but it's in "White Man's Law"?

12:26:45 16 A. Okay. I'm just trying to --

12:27:03 17 Q. It's in "White Man's Law".
12:27:03 18 Exhibit 4278 for the next part of your book. So
12:27:51 19 you have a section about the legal history of
12:27:55 20 the Chippewa at Cape Croker?

12:27:57 21 A. A couple of pages.

12:27:59 22 Q. Yes. And you refer to John
12:28:02 23 Borrows having written about his people?

12:28:05 24 A. Yes.

12:28:06 25 Q. Do you know John Borrows

12:28:08 1 personally?

12:28:08 2 A. I've met him. I don't know him
12:28:10 3 personally.

12:28:11 4 Q. He wasn't at Saskatchewan at the
12:28:13 5 same time as you?

12:28:14 6 A. He and I overlapped -- actually
12:28:17 7 he sublet the house I was living with from me,
12:28:20 8 so we've had a legal relationship in that
12:28:22 9 context. I've talked to him at a few
12:28:24 10 conferences, but actually he arrived after I
12:28:27 11 left. So we actually did not work together as
12:28:31 12 faculty.

12:28:37 13 Q. But this section on Cape Croker
12:28:39 14 is based on his, one of his articles?

12:28:41 15 A. Yes.

12:28:41 16 Q. And the article being, "The
12:28:44 17 Genealogy of Law", is that correct?

12:28:54 18 A. Yes.

12:28:55 19 Q. And in the first full paragraph
12:28:55 20 there it's talking about the ancestors of Mr.
12:28:57 21 Borrows or Professor Borrows.

12:28:59 22 A. Yes.

12:28:59 23 Q. And one of his ancestors was
12:29:01 24 Peter Kegedonce Jones, is that correct?

12:29:04 25 A. Yes.

12:29:04 1 Q. And it says that he was in school
12:29:06 2 in 1836 when the Nation relinquished 1,500,000
12:29:11 3 acres of land through Treaty 45 1/2, and you
12:29:21 4 base that information on Professor Borrow's,
12:29:23 5 correct?

12:29:23 6 A. It's based entirely on his -- his
12:29:25 7 secondary -- his source is the source of the
12:29:28 8 paragraph.

12:30:11 9 Q. Now, I want to discuss some of
12:30:13 10 your sources in your report. You mentioned this
12:30:16 11 morning the thesis of Michelle Vosburgh to --
12:30:21 12 Exhibit 4288. I believe you said that was well
12:30:25 13 done, as a thesis?

12:30:26 14 A. She writes about -- I was
12:30:28 15 impressed with the sort of originality of her
12:30:30 16 sources in going -- in studying survey, which is
12:30:35 17 incredibly important in legal history but very
12:30:38 18 much not studied.

12:30:57 19 Q. And this morning you were talking
12:30:58 20 about -- I better find it -- about Alexander
12:30:59 21 McNabb. So this was in relation to the
12:31:17 22 discussion of the squatter's commissions, and
12:31:20 23 you were mentioning that they discussed
12:31:22 24 Alexander McNabb, is that correct?

12:31:24 25 A. Yes.

12:31:26 1 Q. And you refer to the corruption
12:31:28 2 and chaos. And you said, and this is around
12:31:33 3 11:20 on the transcript, that McNabb seems to
12:31:38 4 have been a thief. And then I'm not sure if
12:31:39 5 the transcript was correct or not. It said --
12:31:41 6 no offence to the reporter. I just want to make
12:31:46 7 sure I heard it right. You either said I'm
12:31:54 8 exaggerating or I'm not exaggerating. Do you
12:31:55 9 know what you said?

12:31:56 10 A. I said -- I believe I said I'm
12:31:57 11 not exaggerating, but I can't --

12:31:59 12 Q. And you did say that --

12:32:02 13 A. It was a comment.

12:32:02 14 Q. -- the corruption was even more
12:32:04 15 than I thought.

12:32:05 16 A. It surprised me that what I --
12:32:07 17 I'm kind of jaded, having seen a million
12:32:10 18 documents, but the -- looking at the Squatter
12:32:13 19 Commission Report, the corruption described in
12:32:18 20 there is surprising. I mean, you know, okay,
12:32:21 21 that's all.

12:32:22 22 Q. Now the Squatter Commission
12:32:23 23 Report mainly deals with two land agents, John
12:32:29 24 Clarke and Alexander McNabb, is that correct?

12:32:33 25 A. I believe so. I didn't -- again,

1 I don't have the document in front of me.

2 Q. We may go back to them, to the
3 documents if necessary, but -- now, the
4 Commissioners found that Mr. Clarke had acted in
5 a fairly corrupt manner, is that correct?

6 A. I believe so.

7 Q. But the Commissioners didn't find
8 that Alexander McNabb had behaved corruptly, did
9 they?

10 A. It's not my memory of it, but we
11 would need the document.

12 Q. The same Squatter Commissions
13 were discussed by both Lillian Gates and
14 Vosburgh, is that right?

15 A. Again, without the sources it is
16 a long time ago. I believe so, but it's a long
17 time ago.

18 Q. So you don't know or if you do
19 you can let me know.

20 A. I don't have those documents at
21 my hip.

22 THE COURT: Sir, you're talking at the
23 same time.

24 BY MR. BEGGS:

25 Q. You don't know whether Gates or

1 Vosburgh agreed or not agreed with the Squatter
2 Commission's conclusions?

3 A. Given that I wrote this five
4 years ago without reading her -- and she has a
5 complicated detailed argument and I would need
6 to read it. That's all.

7 Q. And Ms. Vosburgh's study, as we
8 said, is Exhibit 4288. I want to see if I can
9 find it here. My apologies the long documents
10 take a little bit of time.

11 While I'm waiting for the document,
12 perhaps I'll ask a couple of different
13 questions. You referred a couple of times to
14 John Leslie as a source in your report?

15 A. Yes.

16 Q. Who is John Leslie? Do you know?

17 A. Now, John Leslie wrote a
18 government report on -- I'm trying to think.
19 Again, I have a million documents. On the early
20 Indian Act or --

21 Q. If I can interrupt, I believe,
22 just before we get back to this but we'll keep
23 it so we don't lose it, that he wrote -- John
24 Leslie wrote -- he was cited --

25 A. It's a government report. Again,

1 I have a million documents in my, you know, not
2 in my head.

3 Q. Do you consider John Leslie to be
4 a reliable source?

5 A. It is a Canadian government
6 report from the -- I think the Department of
7 Indian Affairs and Northern Development.

8 Q. Is that a yes or is that a no?

9 A. I mean, I would attribute it -- I
10 would believe it reliable unless I had
11 information to the contrary.

12 Q. Okay. So jumping back to
13 Ms. Vosburgh, you're not aware if she's
14 Professor Vosburgh, are you?

15 A. I don't know anything about her.
16 Her work.

17 Q. So if I could go to page 136 of
18 her thesis? This is -- if we can scroll up a
19 bit.

20 A. I'm reading. I'm reading
21 something.

22 THE COURT: Sir, can you just wait?
23 You haven't been asked a question yet.

24 BY MR. BEGGS:

25 Q. So the paragraph begins, "In this

12:37:15 1 final report", and this is referring to the
12:37:17 2 Squatter Commission Report. So the -- as you
12:37:22 3 spoke this morning, there was two reports that
12:37:24 4 you identified this morning, an initial report
12:37:27 5 and a final report.

12:37:28 6 A. Yes.

12:37:28 7 Q. So:

12:37:29 8 "In this final report they also
12:37:31 9 discuss the charges made against the
12:37:32 10 Bruce County agent, McNabb, and their
12:37:36 11 findings with regards to the
12:37:37 12 allegations. In general although the
12:37:39 13 charges made against McNabb were
12:37:42 14 similar to those leveled against
12:37:46 15 Clarke, upon examination of the
12:37:47 16 complaints the Commissioners did not
12:37:49 17 find the sort of systemic corruption
12:37:51 18 that characterized Clarke's agency.
12:37:53 19 There were some irregularities in a
12:37:54 20 number of isolated cases. Gowan and
12:37:58 21 Hamilton [...]"

12:37:59 22 Two of the Commissioners I believe, is
12:38:03 23 that correct?

12:38:03 24 A. Yes.

12:38:05 25 Q. " [...] believed that most

12:38:05 1 resulted from simple mistakes or
12:38:08 2 misunderstandings rather than attempt
12:38:09 3 to circumvent land policy. For
12:38:09 4 example, there were outright
12:38:09 5 appearances of fraudulent activities
12:38:12 6 because McNabb was not only a Crown
12:38:15 7 agent but also the local agent for the
12:38:16 8 Bank of Upper Canada. Further McNabb
12:38:18 9 seemed to have made a practice of
12:38:18 10 penciling in the names of persons who
12:38:22 11 allegedly claimed certain lots and was
12:38:23 12 accused on the face of such notations
12:38:26 13 to have favoured certain parties in
12:38:27 14 the sales of lots to the detriment of
12:38:28 15 those who applied to purchase lots.
12:38:31 16 Gowan and Hilton however were
12:38:33 17 convinced that the pencil notations
12:38:33 18 were merely intended as a reminder of
12:38:35 19 claimants. McNabb did not use them to
12:38:37 20 extort money from other would-be
12:38:39 21 purchasers. Unfortunately for McNabb
12:38:42 22 these negotiations were viewed rather
12:38:44 23 suspiciously by applicants, especially
12:38:44 24 by those disappointed in their
12:38:46 25 attempts to purchase lands. McNabb

1 sold more than 200 acres to the same
2 individual in some cases, but the
3 Commissioners are more inclined to
4 believe that such errors were the
5 result of business pressure and other
6 accidental circumstances since it
7 would have been so easy for him to
8 have evaded this portion of the
9 government instructions without
10 detection had he been inclined to do
11 so."

12 Does that refresh your memory?

13 A. It refreshes my memory. I
14 remember this now. Given my reading of the
15 report, I found this kind of incredible. That's
16 all. And I mean, it may be, for example, that
17 McNabb was, you know, not as corrupt as Clarke.

18 I'm also remembering, you know, in the
19 back of my mind that I may have read other
20 documents about McNabb's behaviour, and really
21 concluded that the commission was excusing him,
22 siding with him, excusing him, or giving him,
23 you know, if you will, acquitting him, although
24 it's not a criminal proceeding; dismissing his
25 responsibility in a way that might have been, is

1 suspicious, let's say, disingenuous or
2 political. So I read what she's saying her and
3 recognize it. I read it differently.

4 Q. Okay. And things that -- no, I
5 won't say that because you don't recall.

6 You did speak about the local
7 histories, still talking about sources, and you
8 spoke about Norman Robertson. If we can go back
9 to your report for a moment, which is -- and I'm
10 at footnote 182. Okay. So you've cited
11 Robertson many times in your report. And in
12 footnote 182 you say:

13 "In view of my reliance on
14 Robertson's account in the analysis
15 which follows, it is important to note
16 that at the time of his authorship of
17 his history of Bruce County, in 1906,
18 he occupied the official position of
19 Treasurer of Bruce County. In that
20 office he would still have been
21 dealing with the economic consequences
22 of these two re-valuations, as well as
23 the economic inability of these
24 settlers to pay their land taxes --
25 fifty years after the initial sales.

12:41:48 1 Given the ordinary life expectancy of
12:41:50 2 a farmer at the time, his information
12:41:52 3 would be substantially primary
12:41:52 4 accounts, either of the farmers or of
12:41:52 5 then contemporary government records."

12:41:57 6 So I think you indicated already that
12:41:59 7 you found some reliability in Robertson but you
12:42:02 8 confirmed that here, is that correct?

12:42:05 9 A. Any time you use one of these
12:42:10 10 informally-written local histories, you have to
12:42:13 11 ask yourself how credible it is because we're
12:42:15 12 dealing with hierarchies of sources. And there
12:42:18 13 is a tension here in legal history because it's
12:42:29 14 hard to get to grass roots things because the
12:42:31 15 records are governmental. So you want to use
12:42:33 16 these sources because they give you perspective.
12:42:37 17 You still, you know, wonder how reliable they
12:42:39 18 are.

12:42:40 19 I'm still asking myself, how do you
12:42:42 20 think about this person? And I'm trying to
12:42:44 21 think of, you know, what life -- he's alive in
12:42:49 22 1906 writing and this -- these things happened
12:42:53 23 50 years before. So he either has direct
12:42:58 24 accounts as treasurer or possibly, you know,
12:43:02 25 primary accounts or -- then you're getting --

12:43:06 1 you know, secondary stories, story of children,
12:43:09 2 stories of descendants.

12:43:11 3 And the best thing you can do with
12:43:13 4 these sources is simply, you know, use them as
12:43:18 5 best you can as giving him as much credibility
12:43:22 6 as you think but also contextualize it. And I
12:43:27 7 was trying to do that here.

12:43:28 8 So I'm hopeful -- I'm kind of trusting
12:43:33 9 Robertson and giving him as much credibility as
12:43:35 10 I think we can extend to him given his informal
12:43:38 11 training in the circumstances. I'm trying to be
12:43:41 12 honest about that.

12:43:54 13 Q. If I could call up
12:43:55 14 Mr. Robertson's book, it's Exhibit 4286. This
12:44:05 15 might be another large document.

12:44:50 16 While I'm waiting for the "History of
12:44:52 17 the County of Bruce" to come up, with respect to
12:44:56 18 Mr. Robertson's sources, do you recall that one
12:44:59 19 of his sources, one of his informants in the
12:45:03 20 acknowledgments was Frederick Lamorandiere?

12:45:09 21 A. I don't know. I'm not denying
12:45:11 22 it.

12:46:06 23 Q. This is the acknowledgment in
12:46:06 24 Mr. Robertson's book:

12:46:08 25 "The author has met with the

12:46:09 1 greatest kindness and willingness to
12:46:11 2 oblige from everyone from whom
12:46:14 3 information has been sought. He
12:46:15 4 desires to tender his most heartfelt
12:46:17 5 thanks to all those who have so aided
12:46:18 6 him, especially [...]"

12:46:19 7 And he mentions several people. It
12:46:24 8 says above that:

12:46:24 9 "The late Fred Lamorandiere
12:46:34 10 Indian Interpreter."

12:46:35 11 A. Yes.

12:46:35 12 Q. Are you aware of who
12:46:36 13 Mr. Lamorandiere is?

12:46:40 14 A. I honestly didn't research his
12:46:41 15 work as an Indian interpreter. I am not
12:46:44 16 familiar with his work.

12:46:45 17 Q. Thank you. If I could go back to
12:46:46 18 your report for a moment, and again, still
12:46:48 19 talking about sources, if we could go to
12:46:53 20 footnote 102?

12:47:08 21 So footnote 102 and 104 he referred to
12:47:12 22 something as "Sue Robinson Peters, Saugeen
12:47:17 23 Nawash Treaty number 72, Claim Narrative". Can
12:47:21 24 you tell me who Ms. Peters is?

12:47:24 25 A. I don't know. I used the -- I

1 saw the document and I -- you see, I'm using a
2 chronology of events here. I am using it in a
3 secondary way. I've forgotten the point but I
4 don't know who she is.

5 Q. Are you aware that this document
6 is a claims petition by plaintiffs?

7 A. I can tell that from its -- yeah,
8 I can tell that from its attribution.

9 Q. Isn't that rather unusual to use
10 as a historical source?

11 A. Let me say, I've used sources
12 from claim narratives carefully and very
13 selectively and very rarely. You write legal --
14 you can say I wrote this report roughly, if you
15 look at -- if you compare it to my book, as you
16 have in front of you, using the same kinds of
17 methodologies.

18 And, you know, I mean, for example,
19 any government official might make a
20 self-serving statement in a report. You read it
21 and you cite it and you recognize its context.

22 So, you know, given the context here,
23 it's a -- it's small point. Cited is what it is
24 so that anyone that reads it can evaluate it.

25 I'm not -- I don't believe I overused

12:48:39 1 these kinds of sources, but I use -- I'm kind
12:48:44 2 of -- well, I don't want to use the term
12:48:47 3 "scavenger", but you read everything and you
12:48:51 4 make a narrative in that context and justify it
12:48:55 5 as well as you can.

12:48:56 6 And your credibility is in your
12:48:58 7 argument, your integrity and your footnotes and
12:49:01 8 anybody can read the footnotes.

12:49:04 9 Q. While we're on the same page
12:49:07 10 between them is footnote 103 and it refers to a
12:49:10 11 document from 1852, but it refers to something
12:49:16 12 called "Ron Plaskett, "What Do You Know" Ontario
12:49:23 13 Steelheaders Newsletter".

12:49:24 14 A. No, it was funny --

12:49:26 15 THE COURT: Sir?

12:49:26 16 THE WITNESS: Sorry.

12:49:26 17 THE COURT: You haven't been asked a
12:49:27 18 question yet.

12:49:29 19 THE WITNESS: Sorry.

12:49:30 20 BY MS. GUIGRUIS:

12:49:30 21 Q. Can you tell me what the Ontario
12:49:31 22 Steelheaders is?

12:49:32 23 A. I know what steelheads are.

12:49:34 24 Q. Okay. What are steelheads?

12:49:36 25 A. Steelheads are, I assume, the

12:49:38 1 fishers of steelheads.

12:49:40 2 Q. Is this a newsletter you read?

12:49:42 3 A. I found it on line and there was
12:49:43 4 something as argument that I found -- I found --
12:49:51 5 I believed it was accurate. It was interesting,
12:49:54 6 and it fit into an argument I was making. You
12:50:00 7 can pull it up what I used them for.

12:50:03 8 Q. Okay. Well, I think it's for the
12:50:03 9 quote that's in the footnote there?

12:50:05 10 A. But, again, it's cited so you
12:50:07 11 can --

12:50:09 12 Q. Well, I don't know if we need to
12:50:10 13 necessarily go through it. You did read the
12:50:13 14 article, did you?

12:50:14 15 A. Yes.

12:50:15 16 Q. And at some point in the article
12:50:16 17 he gives a description of a ghostly cat haunting
12:50:19 18 a local house?

12:50:21 19 A. You have to refresh me.

12:50:33 20 Q. It's -- that's fine.

12:50:36 21 If we can go back to your report,
12:50:38 22 footnote 92? So you cited an article by Peggy
12:50:50 23 J. Blair from the Ottawa Law Review. Do you
12:50:53 24 know who Peggy J. -- well, are you aware that
12:50:57 25 Peggy J. Blair is a lawyer?

12:50:59 1 A. I'm aware that she's a lawyer,
12:51:01 2 yeah.

12:51:03 3 Q. And are you aware that she was
12:51:06 4 the defence lawyer for the Nawash defendants in
12:51:10 5 this case that she's talking about?

12:51:12 6 A. I was going to add that I believe
12:51:14 7 she had some relationship with this case. We're
12:51:23 8 talking almost 30 -- I have trouble with dates.
12:51:26 9 We're back 20, 25 years ago. I read the article
12:51:32 10 way before I had any relationship with this
12:51:36 11 case. It is an article published -- it's a
12:51:39 12 scholarly article published by Ottawa Law Review
12:51:44 13 and in that context, you know, I used it.

12:52:15 14 Q. If we could go to page 30 of your
12:52:17 15 report? So I'm looking for the text which
12:52:21 16 Ms. Blair's article refers to. So it's the
12:52:24 17 paragraph beginning "While the discussion
12:52:29 18 [...]".

12:52:38 19 A. Footnote 92.

12:52:40 20 Q. Yes, the footnote is in the
12:52:42 21 middle of the paragraph?

12:52:44 22 A. Footnote 92.

12:52:45 23 Q. Yes.

12:52:46 24 "While the discussion so far has
12:52:47 25 emphasized the demand by squatters for

12:52:51 1 Indian lands, there were parallel
12:52:52 2 demands by squatters for Indian
12:52:52 3 resources, specifically forests and
12:52:53 4 the fishery on the Saugeen Peninsula.
12:52:55 5 Both of these resources were rich, and
12:52:57 6 easily accessible from Lake Huron and
12:53:00 7 Georgian Bay. Fishermen could set up
12:53:05 8 a camp, deplete the Indian fishery,
12:53:06 9 and move on."

12:53:08 10 So what part of that is Ms. Blair's
12:53:11 11 source or --

12:53:14 12 A. She's describing the fishery as
12:53:15 13 I -- again, I read this article -- I mean, I
12:53:18 14 read it five years ago. I first read it 20
12:53:21 15 years ago.

12:53:22 16 Other documents describe the fishery
12:53:24 17 on the Saugeen Peninsula in Georgian Bay. I
12:53:27 18 read many of those documents.

12:53:31 19 I'm using footnote 92 to describe what
12:53:35 20 the fishery is about. This actually isn't a
12:53:39 21 highly controversial or legal or political use
12:53:44 22 of her -- any of her conclusions. It's factual.

12:53:49 23 Q. Well, I would suggest to you that
12:53:51 24 if the footnote is intended to refer to the
12:53:54 25 sentence:

1 " [...]fishermen could set up a
2 camp, deplete the Indian fishery and
3 move on [...]"

4 That doesn't appear in her article?

5 A. I meant it for the -- well,
6 let's -- I meant it for the first half of the
7 paragraph and -- and either believe that it was
8 deducible from her writing or it came in from my
9 other reading.

10 Q. Okay.

11 A. I can't say now without the
12 original documents in front of me. Do you think
13 it's not true? Sorry.

14 Q. Well, you can agree or not, but
15 I'm suggesting to you that the sentence
16 "fishermen can set up camp" does not appear in
17 Ms. Blair's article, not the sentence but the
18 facts.

19 A. I understand. I would -- when
20 you write legal history, you're just trying to
21 write a narrative that is interesting and
22 accurate. And, you know, one view would be a
23 fact is everything you know, plus everything you
24 can infer from what you know.

25 So it wound up in there, and I can't

1 reproduce right now my writing process, but I
2 was trying to be accurate.

3 Q. Can I call up document SC1176?
4 So what we have here is an essay by John Leslie.

5 A. John Leslie.

6 Q. Have you ever read this essay
7 before?

8 A. I can't recognize it from this
9 excerpt.

10 Q. To be honest, we've only been
11 able to find it on line.

12 A. I have a printed -- I have a
13 printed copy that I got in Ottawa of something
14 that he wrote on the origin of Indian treaties.
15 I can't be certain this is another version of
16 that document in this format without reading it.

17 Q. Are you familiar with -- now this
18 is actually not about the history of treaties
19 but the history of a documentary collection
20 called the "Treaties, Surrenders and Agreements"
21 collection. Are you familiar with that
22 collection?

23 A. I have been in the library in
24 Archives Canada writing my book many years ago
25 when all this stuff was -- when I was there, I

1 worked with the documents that I got from the
2 archives. I understand since then this
3 collection has been reorganized and put on line.
4 I've not used it on line. I'm actually very bad
5 at computers at my age. All my research was in
6 the original documents.

7 Q. Your Honour, I would like to ask
8 to make this essay by Mr. John Leslie an
9 exhibit?

10 THE COURT: Any objection?
11 Mr. Registrar.

12 THE REGISTRAR: Exhibit 4295.

13 EXHIBIT NO. 4295: Essay by Mr. John
14 Leslie.

15 MR. BEGGS: And, Your Honour, I'm
16 afraid I've committed the cardinal sin of
17 skipping Ms. Blair's article, which was S0238.
18 And I wonder if I can make the article by Peggy
19 Blair an exhibit as well?

20 THE COURT: Mr. Registrar?

21 THE REGISTRAR: Exhibit 4296.

22 EXHIBIT NO. 4296: Article by
23 Ms. Blair; Document S0238.

24 MR. BEGGS: Thank you, Your Honour.
25 If I may, before I move onto the next topic,

12:59:11 1 suggest that we break for lunch at this point.

12:59:14 2 THE COURT: Yes, 2:15. Sir, you will
12:59:18 3 remember what I said this morning about not
12:59:20 4 engaging yourself on this subject matter or
12:59:23 5 discussing it with anyone.

12:59:25 6 THE WITNESS: Yes, Your Honour.

12:59:25 7 -- RECESSED AT 12:59 P.M. --

12:59:25 8 -- RESUMED AT 2:15 P.M. --

12:59:25 9 THE COURT: Please go ahead.

12:59:25 10 MR. BEGGS: Thank you, Your Honour.

02:16:44 11 BY MR. BEGGS:

02:17:08 12 Q. I'd like to call up Exhibit 4295.
02:17:12 13 I think that's the article by John Leslie we
02:17:16 14 just made an exhibit just before the break.

02:18:13 15 If I could scroll down to page 3 I
02:18:16 16 believe. It's under the heading "Published",
02:18:21 17 "Published Versions".

02:18:26 18 Professor Harring, under the section
02:18:30 19 "Published Versions of the Collection", and as I
02:18:33 20 said before the break, this is an article about
02:18:41 21 the collection, archival collection of treaties,
02:18:47 22 it says:

02:18:48 23 "The Canadian government
02:18:48 24 published the text of the
02:18:49 25 consecutively registered treaties,

02:18:52 1 surrenders and agreements ITS 1 to 280
02:18:54 2 1/2, in Indian treaties and surrenders
02:18:57 3 from 1680 to 1890, in two volumes,"
02:19:01 4 and it gives the date 1905, "and those
02:19:06 5 numbered ITS 281 to 283 in "Indian
02:19:11 6 Treaties and Surrenders" from two
02:19:11 7 number wave number 1 to number 483
02:19:16 8 volume 3."
02:19:17 9 And the date is 1912. Have you had
02:19:19 10 occasion to look at these volumes?
02:19:22 11 A. The volumes?
02:19:22 12 Q. The volume, yes.
02:19:23 13 A. Yeah, I believe my version is
02:19:24 14 from the Coles Publishing Company of 18 -- 1971
02:19:27 15 I believe. I may have another version of
02:19:30 16 this -- the Fifth House Publishing in Saskatoon.
02:19:36 17 Q. And those are fairly widely-used
02:19:37 18 versions of the Treaties?
02:19:39 19 A. Most scholars would have them on
02:19:41 20 the shelf.
02:19:42 21 Q. Yes. If I could go up a bit to
02:19:42 22 the next page. Sorry, under "The Organization
02:20:07 23 of the Collection", it says:
02:20:08 24 "The structure and numbering
02:20:09 25 schemes for the Indian treaties

02:20:11 1 surrendered and agreements (ITS)
02:20:15 2 Collection were created by the
02:20:16 3 officials in the Indian Affairs
02:20:16 4 Department in the 1880s before the
02:20:17 5 collection was transferred to the
02:20:18 6 public archives. Indian Affairs
02:20:21 7 assigned each transaction a
02:20:21 8 consecutive ITS registration number.
02:20:25 9 Treaty 60 and Treaty 61, for example,
02:20:27 10 are the Robinson-Superior and
02:20:30 11 Robinson-Huron treaties of 1850. The
02:20:33 12 Indian Affairs Department numbering
02:20:35 13 system is quirky. In order to add new
02:20:37 14 discoveries to the collection,
02:20:38 15 officials assigned fractions and
02:20:40 16 letters to the original consecutive
02:20:44 17 numbers. For instance, Treaty 27 1/4
02:20:46 18 of 1822 is the definitive version of
02:20:47 19 the preliminary Treaty 27 of 1819. A
02:20:50 20 reserve land surrender in southwestern
02:20:53 21 Ontario involving the Chippewa of the
02:20:55 22 Caradoc on February 13, 1849, has a
02:20:55 23 consecutive registration number of 582
02:21:01 24 one half C. The ITS numbering system
02:21:05 25 appears in published collections."

02:21:08 1 And would you agree that the numbers
02:21:10 2 of the treaties we're dealing with, 45 1/2, 67
02:21:14 3 and 72, are part of that consecutive series?

02:21:19 4 A. I've never researched that
02:21:21 5 myself.

02:21:22 6 Q. Okay.

02:21:23 7 A. I assume they are, but --

02:21:25 8 Q. But have you looked at the Coles
02:21:26 9 version that you have and --

02:21:28 10 A. I have --

02:21:34 11 Q. Sorry, just perhaps to qualify
02:21:37 12 it. When you say Cole's version, you're not
02:21:40 13 talking about a Cole's note type of a --

02:21:40 14 A. No, no, no. I'm saying -- I
02:21:40 15 bought it on Yonge Street in 1975.

02:21:42 16 THE COURT: Professor, we're having a
02:21:44 17 lot of talking on top of each other.

02:21:46 18 THE WITNESS: Sorry.

02:21:58 19 THE COURT: That's all right. Got to
02:21:58 20 get back in the saddle for the afternoon. Now
02:21:58 21 is a good time.

02:21:58 22 THE WITNESS: Okay. Sorry.

02:21:58 23 THE COURT: Mr. Beggs please repeat
02:22:00 24 your question.

25

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02:22:42 17
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02:22:57 25

BY MR. BEGGS:

Q. So the Coles version you're referring to is an authoritative collection of treaties?

A. Yes.

Q. And in that version you see them numbered consecutively? Is that correct?

A. Again, I believe so. I don't have it in front of me.

Q. If we could scroll down to the section -- sorry, page 3 "Completeness of the Collection":

"The principal collection of treaties, surrenders and agreements is not complete. The document series was originally collected, organized and numbered by Indian affairs as a distinct departmental collection. Only an estimated 10 percent of the ITS collection consists of treaties known to have been negotiated. These treaties are sometimes originals, often copies and duplicates. Additional treaties can be found in other record group collections, such

02:22:58 1 as RG10, Indian Affairs records. The
02:23:01 2 vast majority of documents in the ITS
02:23:04 3 collection are surrenders from First
02:23:05 4 Nations reserves, attachments and
02:23:08 5 other land-related agreements."

02:23:32 6 Now, I want to take you to a part of
02:23:34 7 your report. If I could go to your report at
02:23:37 8 page 8? At the very bottom of the page, you're
02:23:50 9 talking about surrenders of lands and you say,
02:23:52 10 at the last sentence:

02:23:55 11 "The Saugeen were only one Indian
02:23:57 12 Nation caught up in this process: the
02:23:59 13 numbered sequence of the treaty system
02:24:01 14 indicates that there were 27 other
02:24:02 15 Indian treaties between 45 and 72,
02:24:02 16 securing other Indian lands for white
02:24:09 17 settlement."

02:24:11 18 Would you agree that based on what
02:24:12 19 we've just gone through in the Leslie article
02:24:14 20 that it's not just a simple question of
02:24:19 21 deducting 45 from 72? That there could be more?
02:24:23 22 There could be less?

02:24:24 23 A. Yes, there are treaties and
02:24:25 24 treaty-like documents in other places. They're
02:24:27 25 all over the place.

02:24:28 1 Q. Okay. I want to turn to the
02:24:53 2 statutes that you discussed this morning, among
02:24:56 3 others. First of all, though, I want to talk
02:25:03 4 about how statutes were referred to in official
02:25:09 5 documents or correspondence back in the 1850s.

02:25:13 6 So this being a British colony at the
02:25:16 7 time, would you agree that statutes, for
02:25:25 8 example, what is called an Act 1839, and Act for
02:25:30 9 the Protection of the Lands of the Crown in this
02:25:32 10 Province from Trespass and Injury would usually
02:25:35 11 be referred to by its reference?

02:25:37 12 A. You mean --

02:25:38 13 Q. Sorry, go ahead.

02:25:39 14 A. Sorry.

02:25:39 15 Q. Okay. Would that Act be referred
02:25:42 16 to as "2 Vic. Cap. 15"?

02:25:47 17 A. Something like that, yes.

02:25:48 18 Q. Assuming that was the correct
02:25:50 19 citation.

02:25:51 20 A. Yes.

02:25:51 21 Q. But that is format that it was
02:25:52 22 often referred to in correspondence, is that
02:25:54 23 correct?

02:25:56 24 A. Yeah, many times.

02:25:57 25 Q. People wouldn't write the whole

02:25:59 1 name out. They would just say the Act "2 Vic."?

02:26:05 2 A. That is not completely consistent
02:26:07 3 across these documents. Different people are
02:26:09 4 referring to statutes in different ways. But I
02:26:11 5 don't disagree with your use of 2 Vic.

02:26:18 6 Q. Okay. I just wanted to keep that
02:26:19 7 in mind as we look at the documents that we'll
02:26:22 8 sometimes see it not described by its title but
02:26:26 9 by its numbering or citation. Do you agree with
02:26:29 10 that?

02:26:29 11 A. Yes.

02:26:51 12 Q. Now if I could go to page 48 of
02:27:01 13 your report? It's at the top there. You're
02:27:31 14 talking about -- you're talking about Jarvis, so
02:27:36 15 you must be talking about the 1839 statute, is
02:27:40 16 that correct?

02:27:41 17 A. Which sentence?

02:27:42 18 Q. When it starts:

02:27:43 19 "As Jarvis appears to say, the
02:27:45 20 statute was designed to provide notice
02:27:47 21 of a change in Crown policy [...]"
02:27:49 22 Jarvis was in the early 1840s,
02:27:52 23 right?

02:27:52 24 A. Sorry, I'm not --

02:27:54 25 Q. Top of the page.

02:27:55 1 A. I've got it.

02:28:19 2 Q. So you would agree he is talking
02:28:21 3 about the 1839 statute, is that right?

02:28:23 4 A. I believe the footnote is from
02:28:25 5 1840. I mean, I'm trying to --

02:28:28 6 Q. Sure. We'll go there in a
02:28:29 7 moment.

02:28:30 8 A. It would have to be because it
02:28:32 9 isn't after 1850. It is in the early 1840s,
02:28:36 10 so it would have to be the 1839 statute.

02:28:40 11 Q. Right. So where you say:
02:28:41 12 "Historians are in agreement that
02:28:44 13 the law was rarely enforced and there
02:28:44 14 is no record that it was enforced at
02:28:44 15 all regarding Saugeen lands."
02:28:47 16 It goes to footnote 133.

02:28:50 17 A. Yes.

02:28:50 18 Q. So I believe that was one of the
02:28:53 19 footnotes that was in the errata.

02:29:05 20 A. I would have to check.

02:29:07 21 Q. If I can call up the errata? I
02:29:32 22 believe it's Exhibit 4277. So if we could go
02:30:01 23 down to the comment on footnote 133, so it's
02:30:05 24 probably half-way through the document.
02:30:14 25 So what we appear to have is the

02:30:21 1 citation is -- so the citation is to -- I just
02:30:40 2 want to make sure that's correct.

02:30:40 3 So the citation for the statement
02:30:42 4 "Historians of the Period" goes to John Leslie,
02:30:45 5 and the errata seems to be to change the page
02:30:49 6 numbers to a large number of pages, 83 to 84, 87
02:30:55 7 to 88, 94 to 95, 96, 106, 145, 147, 151, 156,
02:31:02 8 and 189. And those are all in John Leslie
02:31:06 9 "Commissions of Inquiry into Indian Affairs in
02:31:10 10 Canada, 1828-1858".

02:31:13 11 Now, I'd like to call up that
02:31:18 12 document, which is not an exhibit yet. It's
02:31:23 13 S1020. If I could go to page 189 which is the
02:32:40 14 last page you cited.

02:33:17 15 What I would suggest to you, Professor
02:33:19 16 Harring, is that none of the pages that you've
02:33:22 17 included in your errata make mention that the
02:33:26 18 law was rarely enforced.

02:33:35 19 A. You're talking about a large
02:33:36 20 number of pages in a large document. As I sit
02:33:39 21 here, I can't confirm or deny that. I would
02:33:44 22 need to carefully research those pages and think
02:33:49 23 about what I was trying to say.

02:33:52 24 Q. Okay. If I could go back to your
02:34:06 25 report at page 82 -- sorry, actually while I

02:34:12 1 have that Leslie article, could I make that the
02:34:16 2 next exhibit, Your Honour? This is John Leslie
02:34:20 3 "Commissions of Inquiry"?

02:34:24 4 THE COURT: Mr. Registrar.

02:34:25 5 THE REGISTRAR: Exhibit 4297.

02:34:27 6 EXHIBIT NO. 4297: John Leslie's
02:34:29 7 "Commissions of Inquiry".

02:34:33 8 BY MR. BEGGS:

02:34:34 9 Q. I'd like to go back to your
02:34:35 10 report. If I could go to page 82, which is in
02:34:46 11 your citations? And go to footnote 137. In
02:34:59 12 that footnote you state:

02:35:02 13 "My own research on squatting on
02:35:04 14 the Six Nations Grand River Reserve
02:35:06 15 indicates little effort to enforce
02:35:09 16 either the 1839 or 1850 Acts. No
02:35:12 17 historian reports enforcement of the
02:35:15 18 1839 Act. There are a few reports of
02:35:17 19 enforcement of the 1850 Act,
02:35:19 20 particularly at Grand River."

02:35:22 21 And again it refers to Dr. Leslie's
02:35:25 22 article. And, again, I believe those were
02:35:30 23 changed in the errata.

02:35:34 24 And I would suggest to you that,
02:35:36 25 again, those pages don't -- in the errata don't

02:35:45 1 support your proposition, but I -- would your
02:35:49 2 answer again be that you can't recall the --

02:35:52 3 A. No. Here I can a little --
02:35:54 4 sorry.

02:35:55 5 Q. Go ahead.

02:35:56 6 A. Here I can say a little more.
02:35:56 7 I'm talking about my own research on squatting
02:36:00 8 and what I found other historians to have --
02:36:04 9 having read other secondary, historical
02:36:07 10 accounts.

02:36:07 11 In my own work, again, there are few
02:36:09 12 reports of enforcement of the 1850 Act,
02:36:12 13 particularly at Grand River. And then I say
02:36:14 14 "see also", so I'm actually referring to my own
02:36:16 15 research at that point and talking about
02:36:19 16 experience with lots of these documents.

02:36:23 17 On the Leslie citing, I would need to
02:36:28 18 look at it and think about it in the context of
02:36:31 19 what I'm saying.

02:36:32 20 Q. Okay. Now, it's my
02:36:33 21 understanding -- you say:

02:36:42 22 "No historian reports enforcement
02:36:45 23 of 1839 [...]"

02:36:48 24 You're not talking about just Grand
02:36:50 25 River? You're talking about anywhere in Upper

02:36:51 1 Canada?

02:36:52 2 A. Well, it's obviously what I know,
02:36:53 3 right. It can't be any historian -- it may be a
02:36:54 4 badly worded statement, but it can't be any
02:36:56 5 historian anywhere in the world ever. It has to
02:37:00 6 be what I found in my research. I would say
02:37:04 7 it's badly put.

02:37:05 8 But I'm trying to say that there's
02:37:08 9 kind of -- there is a historical consensus that
02:37:11 10 these Acts weren't enforced.

02:37:13 11 Q. Now, when you researched and
02:37:20 12 wrote your chapter on Six Nations and your other
02:37:26 13 articles on the Six Nations squatting issues,
02:37:29 14 you cited a number of cases. And you cited a
02:37:32 15 number of cases in your chapter on John Beverley
02:37:36 16 Robinson. Did any of those cases involve the
02:37:39 17 1839 Act?

02:37:40 18 A. Some of them did. And there's
02:37:43 19 actually analysis of that in the book.

02:37:47 20 Q. So wouldn't -- so they involved
02:37:52 21 the 1839 Act, but they don't involve enforcement
02:37:53 22 of it?

02:37:55 23 A. I think in the book I make the
02:37:58 24 point that there's -- some of these acts are
02:38:05 25 white people trying to enforce them against

02:38:07 1 other white people when there are disputes
02:38:09 2 between squatters. This is an enforcement
02:38:13 3 action that is concerning removing white people
02:38:16 4 from Indian land so that you get disputes
02:38:19 5 between white squatters over whose squatter
02:38:24 6 rights should dominate the situation.

02:38:26 7 Some of these cases go to -- go to
02:38:29 8 court. But in removing squatters from Indian
02:38:34 9 land is -- is not a regular activity and is an
02:38:39 10 example of a failure, a systemic failure to
02:38:43 11 enforce the statute.

02:38:54 12 Q. Now I'm just doing this from
02:38:54 13 memory so correct me if I'm wrong, but didn't
02:38:54 14 your chapter on John Beverley Robinson refer to
02:38:58 15 actions by a superintendent named Keating trying
02:39:02 16 to remove people from Walpole reserve lands?

02:39:06 17 A. There's some -- there's some --
02:39:12 18 again, it's a question of -- enforcement means
02:39:13 19 to me some kind of government effort to enforce
02:39:16 20 a statute as opposed to occasionally different
02:39:20 21 officials came upon people in different
02:39:26 22 situations and the statute came up. But you
02:39:28 23 don't see anything like what you could call law
02:39:31 24 enforcement in relationship to removing the
02:39:34 25 thousands of squatters that existed in Indian

1 land from those lands under the statute.

2 Q. Okay. I want to take a look at
3 the statute briefly. It's Exhibit 1301. I
4 believe we pulled it out this morning. So it
5 has the date "Passed 11th May, 1839". This is
6 not the right Act. Sorry. This is an Act about
7 Superior Courts.

8 Maybe can we go to the next page? I
9 think this might be a title page. There we go.

10 Yes, this is the right page. So this
11 one also says "Passed 11th May 1839", and it's
12 chapter 15. And 1839 being the second year of
13 the reign of Queen Victoria, this would read as
14 "2VICT" --

15 A. 2VICT, yeah.

16 Q. -- "cap 15".

17 Now, I think you may have answered
18 this this morning but I'll check. Are you aware
19 of any earlier act that purported to protect
20 Indian lands? Sorry, in Upper Canada?

21 A. I'm thinking. As I sit here,
22 I've seen lots of acts in the Canadian colonies,
23 including I'm thinking, you know, Nova Scotia
24 and New Brunswick. As I'm sitting here, I can't
25 easily answer that question without -- you're

02:42:36 1 asking if I'm situationally aware of it this
02:42:41 2 second. What I'm saying is, I would just need
02:42:43 3 to -- it's just a more complicated question that
02:42:46 4 I wouldn't want to answer incorrectly without
02:42:48 5 some time looking at some stuff.

02:42:58 6 Q. That's fine. If I could call up
02:43:00 7 Exhibit 1746? So this has a lengthy title, "An
02:43:58 8 Act to explain and amend an Act of Parliament of
02:44:01 9 the late Province of Upper Canada passed in the
02:44:04 10 second year of Her Majesty's reign intituled, an
02:44:11 11 Act for the protection of the lands of the Crown
02:44:13 12 in this province from trespass and injury and to
02:44:16 13 make further provision for that purpose". So
02:44:19 14 this is an Act amending the 1839, is that
02:44:22 15 correct?

02:44:23 16 A. From the caption, yes. From the
02:44:25 17 caption, yes.

02:44:26 18 Q. Right. And it is dated 25th of
02:44:29 19 April 1849. So again, the citation would be 12
02:44:33 20 vict cap 9. And can you tell us from a
02:44:44 21 historical point of view why it was -- why
02:44:46 22 people felt it was necessary to amend the Act?

02:44:50 23 A. I'd need to read the statute. I
02:44:52 24 can't --

02:44:52 25 Q. Okay.

02:44:53 1 A. I have a snippet of it here.

02:45:09 2 Q. We'll go on then. If we can go
02:45:11 3 to the 1784 exhibit, 1784. This is the other
02:45:15 4 exhibit, other act that you looked at this
02:45:17 5 morning.

02:45:46 6 So this is:

02:45:46 7 "An Act for the protection of the
02:45:51 8 Indians in Upper Canada from
02:45:53 9 imposition, and the property occupied
02:45:54 10 or enjoyed by them from trespass and
02:45:59 11 injury."

02:45:59 12 And it's dated 10th of August, 1850.

02:46:03 13 And the citation is at the top 13 and
02:46:07 14 "14 vict cap 74".

02:46:12 15 Now, without reading the Act and just
02:46:21 16 from your knowledge of the historical situation,
02:46:24 17 this Act didn't replace or repeal the previous
02:46:27 18 Act. They both continued to be enforced?

02:46:30 19 A. Right. It elaborates on it and
02:46:32 20 you can see it covers a number of areas not
02:46:35 21 covered by -- for example the Indian -- Indian
02:46:38 22 debt collection, contracts with Indians, taxes
02:46:41 23 on Indians, that kind of thing. Plus it
02:46:44 24 increased penalties. It is an extremely dense
02:46:48 25 Act. There's a great deal in this Act. It's

02:46:48 1 hard to -- it takes a while to read it.

02:47:17 2 Q. And the Act says at some point
02:47:19 3 that in order to be enforced, there has to be a
02:47:20 4 proclamation, that the territory --

02:47:21 5 A. And that happens later for the
02:47:23 6 Saugeen reserve, the next year I believe.

02:47:26 7 Q. If we can go there at Exhibit
02:47:27 8 1895. So, yes, this is -- sorry, maybe -- can
02:47:51 9 you identify this document? Okay.

02:47:54 10 Well, it says:

02:47:58 11 "Proclamation placing certain
02:48:01 12 tracts of land set apart for the
02:48:04 13 Indians under the provisions of the
02:48:06 14 Act 13 and 14 Vict chapter 74".

02:48:11 15 And it is dated -- that's just when
02:48:18 16 it's recorded. If we could go to page 3 of this
02:48:22 17 document.

02:48:33 18 So you can see from the handwriting on
02:48:36 19 the side of it that it refers to the Saugeen
02:48:40 20 near the bottom. And just trying to figure out
02:48:46 21 where it starts. Oh, so it starts:

02:48:52 22 "And the tract of land occupied
02:48:54 23 by the Saugeen and Owen Sound Indians
02:48:56 24 bounded upon the north, east and west
02:48:58 25 by the waters of Lake Huron and the

02:49:02 1 Georgian Bay and Owen Sounds Bays and
02:49:05 2 on the south by a strip of land lately
02:49:09 3 ceded [...]"
02:49:09 4 A. To the Crown.
02:49:11 5 Q. "[...] to the Crown by the Saugeen
02:49:12 6 Indians and those settled at Owen Sound,
02:49:15 7 and which abuts in part on the townships
02:49:18 8 of Derby and Arran containing about
02:49:23 9 428,800 acres together with all of the
02:49:27 10 islands within 7 miles of the coast."
02:49:30 11 So is this the proclamation that
02:49:33 12 brings this into --
02:49:35 13 A. Not having read it, I believe so.
02:49:40 14 Q. And so likely the strip of land
02:49:54 15 lately ceded, and this is of November 1851, it's
02:49:59 16 referring to the Treaty 67, is that --
02:50:04 17 A. It appears to be the half-mile
02:50:05 18 strip.
02:50:06 19 Q. And when it refers to the
02:50:08 20 Townships of Derby and Arran, so Derby is the
02:50:12 21 township in the County of Grey just south of 67,
02:50:14 22 is that right?
02:50:15 23 A. I need a map.
02:50:17 24 Q. Sure.
02:50:19 25 THE COURT: Just while you're looking

02:50:19 1 for a map, Mr. Beggs, I think you're
02:50:21 2 contributing to my difficulty with the two of
02:50:23 3 you talking on top of each other, and I don't
02:50:28 4 want the witness to be rebuked by me. He is
02:50:32 5 doing his best. You need to as well.

02:50:34 6 So I would appreciate it if you could
02:50:35 7 try to make the start and finish of your
02:50:44 8 questions more clear. Because I am having
02:50:46 9 trouble following the back and forth as I think
02:50:48 10 you both are trying to do a good job here.

02:50:51 11 If you could help out with that, I
02:50:52 12 would appreciate it. All right?

02:50:56 13 MR. BEGGS: Yes, Your Honour.

02:50:57 14 THE COURT: The witness has a few maps
02:50:58 15 to choose from, and I'm sure he'll indicate
02:51:01 16 which one he's going to point at.

02:51:04 17 THE WITNESS: I can't find Arran and
02:51:06 18 Derby on the map. I need a map in front of me
02:51:09 19 to talk geography.

02:51:11 20 BY MR. BEGGS:

02:51:12 21 Q. I will bring up a map later on in
02:51:15 22 this examination and we can talk a bit about it.

02:51:19 23 If we can call up SC1181. Can we
02:52:31 24 scroll down a bit please?

02:52:44 25 So the Treaty 72 area was surrendered

1 in October of 1854, correct?

2 A. Yes.

3 Q. And as a result of that
4 surrender, the lands that were held as reserves,
5 if I can call it that, changed for the Saugeen
6 and the Nawash from what it had been before?

7 A. Yes.

8 Q. And so would you agree it was
9 necessary to issue a new proclamation setting
10 out protection for the reserves that were in
11 place after Treaty 72?

12 A. I'm just trying to -- I'm trying
13 to see what you mean. You mean that the
14 previous statute would now not have any meaning
15 because that land is no longer Indian land?

16 Q. Yes.

17 A. I can't read this, you
18 understand, so I'm trying to -- I think we both
19 appreciate now how hard it is to work with these
20 documents and how careful you are to be.

21 Q. Yes.

22 A. It's easy to make a mistake.

23 Q. What I'm suggesting is that the
24 statute, the 1850 statute is still in effect,
25 correct?

02:54:12 1 This is 1856 we're looking at.

02:54:15 2 A. Protecting -- if the statute is a
02:54:19 3 general statute in Canada, it's still in force.
02:54:22 4 To the extent it protects Indian lands, if these
02:54:26 5 are no longer Indian lands, those places in the
02:54:29 6 statute, those parts of the statute would appear
02:54:31 7 to be just ineffective as a matter of law.

02:54:34 8 I'm just saying that, not able to read
02:54:36 9 this.

02:54:37 10 Q. Certainly. But the proclamation
02:54:43 11 that we just looked at from 1851 wouldn't have
02:54:46 12 any effect any more because that territory was
02:54:48 13 no longer separate as a reserve. So what I'm
02:54:55 14 suggesting is that there would need to be a new
02:54:58 15 proclamation setting out the modern territories,
02:55:01 16 if you will?

02:55:02 17 A. That seems to be a reasonable
02:55:03 18 interpretation, but not having read both of
02:55:06 19 these statutes in the context, I'm not sure I
02:55:11 20 can say that yet. And I can't read this.

02:55:15 21 Q. Fair enough. But I believe where
02:55:18 22 it says "first", it says:

02:55:21 23 "First the reserve adjoining the
02:55:23 24 Town of Southampton bounded on the
02:55:25 25 west by a straight line [...]"

02:55:27 1 And so forth, and then it refers to
02:55:28 2 the river Saugeen. So I appreciate that you
02:55:32 3 can't read it, but I would like to ask that this
02:55:34 4 be made the next exhibit, in any event.

02:55:42 5 THE COURT: Mr. Registrar.

02:55:44 6 THE REGISTRAR: Exhibit 4298.

02:55:46 7 EXHIBIT NO. 4298: Document 1181.

02:55:52 8 THE COURT: Mr. Beggs, is that 1181?
02:55:55 9 It is. All right.

02:56:07 10 BY MR. BEGGS:

02:56:08 11 Q. I'd like to call up Exhibit 2371.
02:56:40 12 This morning I referred to -- I believe this is
02:56:43 13 what I was trying to read this morning.

02:56:53 14 So this is a letter -- yes, this is a
02:56:55 15 letter from Mr. Pennefather to Mr. McNabb dated
02:56:58 16 23rd of May 1856. Now -- okay, I'm just going
02:57:18 17 to go through it with you.

02:57:20 18 If you go down to the second paragraph
02:57:22 19 which starts "With reference [...]?"

02:57:24 20 A. Okay.

02:57:28 21 Q. "With reference to your
02:57:29 22 suggestion that instructions be
02:57:31 23 transmitted to you for the removal of
02:57:33 24 the squatters or the immediate opening
02:57:35 25 by them of the new line of road, I am

02:57:37 1 directed to transmit to you the
02:57:40 2 following opinion of the solicitor of
02:57:42 3 this department, the statute 2 vict
02:57:51 4 c15, secl authorizes the Commissioners
02:57:56 5 appointed under that Act to inquire
02:57:58 6 into complaints against persons
02:58:00 7 illegally possessing themselves of the
02:58:02 8 lands of the Crown for cession of
02:58:04 9 which to the Crown no agreement hath
02:58:09 10 been made with the tribes occupying
02:58:30 11 the same. Section 2 authorizes the
02:58:33 12 Commissioners, or any of them, if on
02:58:41 13 investigation of complaint made it be
02:58:42 14 made appear that such person is
02:58:47 15 unlawfully in possession to notify the
02:58:50 16 intruder to leave in 30 days. If he
02:58:53 17 do not, Commissioner may issue warrant
02:58:58 18 for his removal. Section 8 requires
02:59:00 19 party to be summoned, statute 12 vict
02:59:05 20 6.4" and I think it's secl, "extended
02:59:13 21 provisions of previous Act to all
02:59:16 22 lands whatsoever of the Crown for
02:59:18 23 which no grant lease letter of licence
02:59:21 24 and hath issued."
02:59:23 25 Now, I'm not going to ask you if

02:59:26 1 that's the correct interpretation of the
02:59:29 2 statute, but would you agree that that's the
02:59:30 3 interpretation at that time that the Crown seems
02:59:34 4 to have been adopting of what the statute meant?

02:59:38 5 A. Again, in the context.
02:59:43 6 Everything -- these documents are read together
02:59:45 7 by everybody. This refers back to another
02:59:47 8 document. It would seem to say something like
02:59:49 9 that.

02:59:50 10 I would, you know, as a -- I would
02:59:52 11 hope a professionally-competent legal historian
02:59:57 12 would take some time and think about these in
02:59:59 13 relationship, maybe even go back to another
03:00:01 14 document, you know, confirm these things.

03:00:03 15 But that's a reasonable
03:00:06 16 interpretation.

03:00:15 17 Q. I wonder if I can call up SC1179?

03:00:19 18 A. Sorry, what was the date of that
03:00:20 19 document again as it disappears?

03:00:22 20 Q. That was May 18, 1856.

03:00:26 21 A. So we're after that.

03:00:27 22 Q. Yes. But in 1856 it was still
03:00:44 23 the same statutes in effect, right? The 1839
03:00:48 24 and 1850 statutes?

03:00:50 25 A. Yes. Again, it's the meaning and

03:00:57 1 the context that I'm trying to puzzle with.

03:01:00 2 Q. Yes.

03:01:00 3 A. And you understand, if you were
03:01:01 4 working on something as a legal historian, you
03:01:05 5 would have all of the documents laid out in
03:01:07 6 front of you. You would be marking language.
03:01:09 7 You'd be putting some question marks in the
03:01:09 8 marginalia asking about what is this
03:01:13 9 relationship.

03:01:13 10 And you would ponder it through, maybe
03:01:16 11 over an hour, maybe come back to it. It's that
03:01:19 12 kind of a process. And, you know, they don't
03:01:22 13 pop up like this. So it's difficult in this
03:01:24 14 context.

03:01:53 15 Q. This is a document dated April
03:01:55 16 28th, 1857 and it's from the office of the
03:01:57 17 Attorney General, Upper Canada. And I
03:02:17 18 appreciate that, as you said, there's
03:02:22 19 correspondence back and forth on these issues.

03:02:26 20 And it starts:

03:02:27 21 "In the matter of the letter of
03:02:28 22 David Thorburn dated 22nd of April
03:02:30 23 1857, and the reference thereon made
03:02:31 24 to this department of April 23rd, 1857
03:02:37 25 [...]"

03:02:39 1 So I appreciate you don't have those
03:02:40 2 in front of you right now.

03:02:41 3 A. No.

03:02:42 4 Q. But it goes on to say:

03:02:45 5 "1. The Governor General is
03:02:48 6 authorized to appoint two or more
03:02:50 7 Commissioners to inquire into any
03:02:54 8 complaint that may be made to them or
03:02:56 9 any of them against any person for
03:02:58 10 having unlawfully cut down or removed
03:03:01 11 any timber, trees, stone or soil in
03:03:04 12 Indian lands, or having done any other
03:03:16 13 willful and unlawful injury thereon."
03:03:20 14 And it gives a citation "2 vic cap 15
03:03:21 15 sec 1". If we could scroll down a bit.

03:03:39 16 "2. If the person charged with
03:03:42 17 the offence shall be found guilty
03:03:44 18 thereof -- of the Commissioners, or
03:03:48 19 any of them, may order and direct that
03:03:50 20 he pay a fine to Her Majesty not
03:03:53 21 exceeding 20 pounds, and in default of
03:03:57 22 paying the same that he be committed
03:03:59 23 to the common goal of the district for
03:04:02 24 a period not exceeding three months."
03:04:07 25 And there's some sort of symbol on

1 that it says "sec 2".

2 "3. The Commissioners may issue
3 any warrant or warrants under their
4 hands and seals directed to any
5 sheriff, gaoler or peace officer of
6 the district", and then it's
7 underlined, "in which any proceeding
8 shall be had before them."

9 And again it's the symbol and sec 9.
10 You don't know what that symbol is, do
11 you? If it's a letter, in the parentheses
12 there?

13 A. 4. No.

14 Q. "4. The Commissioners shall have
15 power to summon before them any person
16 as a witness to give evidence upon the
17 subject of any complaint."

18 The symbol "sec 6", I think.

19 "5. In case of any summary
20 conviction of any party by the
21 Commissioners for trespass committed
22 upon any such lands, it shall be
23 lawful to remove any such conviction
24 as, of course, by certiorari into the
25 Court of Queen's Bench, and thereupon

03:05:26 1 for the satisfaction of the fine, or
03:05:31 2 imposed by such conviction to issue
03:05:34 3 into any of the districts (counties)
03:05:37 4 of Upper Canada 1 or more writs of the
03:05:56 5 era vaseus and capias ad satus (ph.)",
03:05:56 6 my latin is not good, "in the nature
03:05:57 7 of the Exchequer long writ. (12 vic
03:06:06 8 cap, sec 6)."

03:06:10 9 "6. It is also enacted that if
03:06:14 10 any person with the consent in writing
03:06:14 11 of the commissioners, shall trespass
03:06:14 12 upon any said lands or roads, or road
03:06:18 13 allowances, by cutting any trees
03:06:21 14 [...]"

03:06:28 15 I think that might be a scroll between
03:06:31 16 "with" and "the" to say "without" but I'm not
03:06:35 17 certain about that.

03:06:38 18 And:

03:06:41 19 "[...]cutting any trees and (C)
03:06:42 20 each person so trespassing shall for
03:06:48 21 every tree forfeit five pounds, and
03:06:48 22 for cutting saplings and (C) under the
03:06:52 23 value of five, one pound such fine to
03:06:59 24 be recovered by distress and sale of
03:07:01 25 the goods and chattels of the party

03:07:06 1 fined, or the Commissioners may,
03:07:08 2 without proceeding by distress order,
03:07:12 3 the party to be imprisoned in the
03:07:17 4 common gaol as aforesaid, for a period
03:07:36 5 not exceeding three days when the fine
03:07:46 6 shall not exceed five pounds, or for a
03:07:51 7 period not exceeding three months when
03:07:52 8 the fine shall exceed that sum. (13 &
03:07:59 9 14 vic cap 74, sec 12)"

03:08:09 10 A. Yes.

03:08:10 11 Q. "7. It appears to me", so this
03:08:15 12 is now the author speaking I guess?

03:08:15 13 A. Yes.

03:08:15 14 Q. "That the several statutes being
03:08:16 15 in pari materia must be construed as
03:08:16 16 one and taken to extend to trespasses
03:08:16 17 committed in Indian lands, roads and
03:08:18 18 road allowances, and that the
03:08:19 19 procedure, according to the amount of
03:08:21 20 the fine, may be either under the Act
03:08:23 21 of 2 vic, or 13 & 14 vic.

03:08:35 22 8. A review of the statutes
03:08:39 23 convinces one that the commissioners
03:08:39 24 have only a local jurisdiction that
03:08:39 25 has power to proceed against parties

03:08:39 1 resident in that particular county for
03:08:43 2 trespasses committed in that county,
03:08:44 3 and not for trespasses committed in
03:08:47 4 any county other than the one in which
03:08:49 5 the parties reside for the power to
03:08:52 6 commit, in the event of default or
03:08:54 7 contempt, is only to gaol of the
03:08:57 8 county in which the lands are situate.
03:09:01 9 The acts contemplate proceedings for
03:09:03 10 removals of squatters from Indian
03:09:03 11 Lands and for punishment of
03:09:05 12 trespassers upon Crown Indian lands.
03:09:08 13 The former must necessarily be local
03:09:11 14 but the latter not so much so. And
03:09:16 15 yet in regard to procedure and
03:09:18 16 punishment no distinction of a
03:09:19 17 substantive character appears to be
03:09:19 18 observed. An amendment and
03:09:23 19 consolidation of the Acts would be
03:09:25 20 more desirable where empowered to
03:09:25 21 proceed against trespassers no matter
03:09:27 22 where residence should be given in
03:09:32 23 express terms."
03:09:40 24 And from there on I think he just
03:09:42 25 talks about suggestions on the way that law

03:09:49 1 could be improved.

03:09:50 2 Now, again, appreciating that you're
03:09:52 3 looking at this in isolation and not in context,
03:09:58 4 for example, from a historical point of view,
03:10:00 5 would you agree that this represents the Crown's
03:10:05 6 or at least the Solicitor General's or Attorney
03:10:08 7 General's view of these statutes?

03:10:11 8 A. View of the statutes?

03:10:12 9 Q. Yes.

03:10:12 10 A. Sorry, I'm having a little
03:10:14 11 trouble hearing you.

03:10:16 12 Q. Sorry.

03:10:17 13 A. I'm recognizing, again, these are
03:10:20 14 dense. I'm recognizing the words as many of
03:10:23 15 them being from the other -- they're
03:10:25 16 paraphrasing or referring back to both -- to the
03:10:31 17 other statutes. And the question, of course, is
03:10:33 18 how are they working in relationship to each
03:10:35 19 other and the effect of what's still going on.

03:10:39 20 I can't figure it out as I sit here
03:10:41 21 looking at this dense document.

03:10:42 22 I'm --

03:10:44 23 THE COURT: I'm just going to
03:10:45 24 interrupt you, sir. I'm going to ask Mr. Beggs
03:10:48 25 to repeat his question. He's not asking you to

03:10:53 1 figure that out.

03:10:55 2 THE WITNESS: Okay, sorry.

03:10:55 3 THE COURT: And I would like to know
03:10:56 4 what your answer is.

03:10:57 5 THE WITNESS: Sorry, I didn't hear the
03:10:58 6 question.

03:10:58 7 MR. BEGGS: I think it was a bit of a
03:10:58 8 long question.

03:11:04 9 THE COURT: Well, the question itself
03:11:05 10 was not long, but the witness can be forgiven
03:11:09 11 for having sat through a very long preliminary
03:11:13 12 step.

03:11:15 13 BY MR. BEGGS:

03:11:15 14 Q. Yes. Appreciating that you're
03:11:19 15 looking at this letter in isolation and not in
03:11:22 16 its context, would you agree that this letter
03:11:30 17 from either the Attorney General or Solicitor
03:11:32 18 General indicates what the view of the Crown or
03:11:39 19 at least the Attorney General took of the
03:11:42 20 statutes? The 1859 and -- sorry, 1839 and 1850
03:11:52 21 statutes?

03:11:52 22 A. Okay. I'll answer that. I would
03:11:55 23 say it sounds like it does but what I don't know
03:12:00 24 is what's going on -- what event has brought
03:12:05 25 this to the attention of this official?

03:12:07 1 Because you would think, you know, he
03:12:09 2 didn't write this letter for no reason.
03:12:11 3 Something caused it. And understanding it in
03:12:16 4 that context would help me. But it clearly
03:12:19 5 is -- I believe it is what you say it is.

03:12:22 6 Q. Okay. Could I ask that this
03:12:24 7 letter dated April 28, 1857 be made the next
03:12:31 8 exhibit?

03:12:32 9 THE COURT: Mr. Registrar?

03:12:34 10 MS. McRANDALL: Exhibit 4299.

03:12:36 11 EXHIBIT NO. 4299: Letter dated April
03:12:37 12 28, 1857.

03:13:02 13 BY MR. BEGGS:

03:13:02 14 Q. I'm going to shift directions a
03:13:04 15 bit. I'd like to talk about --

03:13:06 16 THE COURT: If you're going to do
03:13:07 17 that, I might take the afternoon break if you're
03:13:10 18 changing directions.

03:13:12 19 MR. BEGGS: Yes, Your Honour.

03:13:14 20 THE COURT: Unless that will interfere
03:13:15 21 with your plan?

03:13:18 22 MR. BEGGS: No.

03:13:18 23 THE COURT: We'll take the afternoon
03:14:25 24 break. Twenty minutes.

03:14:26 25 -- RECESSED AT 3:14 P.M. --

03:14:32 1 -- RESUMED AT 3:36 P.M. --

03:36:44 2 THE COURT: Please go ahead.

03:37:03 3 BY MR. BEGGS:

03:37:05 4 Q. Thank you, Your Honour. I would

03:37:06 5 like to return to something my friend touched on

03:37:08 6 this morning, which I want to clarify what areas

03:37:13 7 of land we're talking about. And like with my

03:37:16 8 friend, I'm going to refer to the map behind

03:37:18 9 you, Exhibit P, which is to your right.

03:37:22 10 So I think there's essentially three

03:37:27 11 areas that you talk about in your report.

03:37:31 12 A. Right.

03:37:31 13 Q. There's the area surrendered by

03:37:33 14 Treaty 45 1/2, which is the light green.

03:37:36 15 A. Right.

03:37:37 16 Q. And actually I want -- one page

03:37:44 17 you mentioned the treaty -- the surrenders of

03:37:47 18 Treaty 45 and 45 1/2, but 45 is just Manitoulin,

03:37:53 19 right?

03:37:53 20 A. I was referring to Manitoulin

03:37:54 21 Island as just being -- the processes were

03:37:57 22 slightly connected.

03:37:58 23 Q. But 45 doesn't concern us at this

03:38:01 24 point?

03:38:01 25 A. Right. No.

03:38:02 1 Q. So 45 1/2 is the light green
03:38:04 2 area. And the white line is the half-mile strip
03:38:08 3 in Treaty 67?

03:38:10 4 A. Yes.

03:38:11 5 Q. And north of the white line, the
03:38:14 6 peninsula is -- well, with the exceptions of the
03:38:19 7 surrendered reserves --

03:38:21 8 A. Treaty 72 except for the land
03:38:23 9 that is reserved.

03:38:27 10 Q. Okay. Now, the 45 1/2 area goes
03:38:29 11 from south of Goderich over to Arthur and to the
03:38:33 12 Nottawasaga River roughly?

03:38:35 13 A. Right.

03:38:38 14 Q. And it goes as far north as just
03:38:40 15 south of Saugeen and Owen Sound, is that
03:38:42 16 correct?

03:38:44 17 A. I've seen it on the map, yes.

03:38:52 18 Q. And I think you indicate in your
03:38:53 19 report that with the surrender in Treaty 45 1/2,
03:38:57 20 these lands were no longer being treated as
03:39:00 21 Indian lands. They were just being treated as
03:39:03 22 Crown lands, is that correct?

03:39:04 23 A. Well, it depends. Treaty by
03:39:07 24 whom? But essentially the Crown has taken
03:39:10 25 title -- taken title lands and made them

03:39:13 1 available for settlement so settlers are -- so
03:39:16 2 it's seen as Crown lands by the Crown and the
03:39:20 3 people who are settling.

03:39:29 4 Q. But in Treaty 45 1/2, the Saugeen
03:39:31 5 weren't getting the proceeds from the sales of
03:39:33 6 the property, correct?

03:39:34 7 A. I have not been asked to look
03:39:37 8 into the details of 45 1/2. I believe that.

03:39:41 9 Q. Okay.

03:39:42 10 A. But I haven't looked at it in any
03:39:44 11 detail.

03:39:45 12 Q. What I'm saying is that if
03:39:46 13 somebody was squatting in a 45 1/2 territory,
03:39:49 14 after 1836 --

03:39:53 15 A. Right.

03:39:53 16 Q. -- it wouldn't affect directly
03:40:00 17 the Saugeen or the Nawash?

03:40:03 18 A. The question is directly -- not
03:40:04 19 directly, but my argument is that it put -- it
03:40:07 20 kept the area, defined the area as being open to
03:40:12 21 settlement and open to potentially more
03:40:14 22 settlement.

03:40:15 23 So if settlers or squatters moved
03:40:18 24 there, legal settlers or -- because you could
03:40:21 25 get a legal title in Treaty 45 1/2 lands if they

03:40:25 1 moved there and lots of people moved there.

03:40:29 2 It would create more of some kind of
03:40:32 3 an expectation that more Saugeen lands might be
03:40:37 4 ceded and made available for settlement by the
03:40:39 5 government. Just an expectation.

03:41:01 6 Q. Now in the early 1830s and
03:41:03 7 1840s in Upper Canada and out west, areas were
03:41:11 8 divided administratively into districts as
03:41:14 9 opposed to counties, is that correct?

03:41:17 10 A. Districts I guess and then
03:41:18 11 counties, and then townships after counties.

03:41:22 12 Q. Right. So counties after
03:41:23 13 districts?

03:41:24 14 A. Right.

03:41:24 15 Q. Okay. And originally much of the
03:41:37 16 Treaty 45 1/2 territory was within the Huron
03:41:41 17 district, is that right?

03:41:43 18 A. I believe so, yes.

03:41:54 19 Q. And could I call up Exhibit 1601?
03:42:25 20 If we could scroll down a bit please -- well,
03:42:28 21 actually this is a statute obviously, correct?

03:42:30 22 A. Right.

03:42:31 23 Q. And it's a statute describing the
03:42:33 24 district of Huron?

03:42:34 25 A. Yes.

03:42:35 1 Q. And it's dated 23rd May 1846?

03:42:38 2 A. Yes.

03:42:40 3 Q. And so on the right there's some
03:42:57 4 smaller printing and the smaller printing says:
03:43:02 5 "A certain tract of country to
03:43:03 6 the north, northward of the district
03:43:06 7 of Huron to be attached to the said
03:43:09 8 district."
03:43:10 9 A. Yes.

03:43:10 10 Q. And the text of the statute says
03:43:12 11 at that point that:
03:43:14 12 "All that portion of this
03:43:15 13 province, lying to the northward of
03:43:17 14 the district of Huron and bounded on
03:43:19 15 the north by Lake Huron and Georgian
03:43:21 16 Bay, which is not included in either
03:43:24 17 of the districts of Wellington or
03:43:27 18 Simcoe, shall here and after for all
03:43:29 19 purposes of and connected with the
03:43:31 20 administration of justice, civil and
03:43:33 21 criminal, form part of the said
03:43:35 22 district of Huron, anything in any act
03:43:42 23 or law to the contrary
03:43:44 24 notwithstanding."
03:43:45 25 And then it goes on about judges and

03:43:47 1 warrants and justices of the peace, and the
03:43:54 2 sheriff, bailiff and constable of the District
03:43:56 3 of Huron.

03:44:00 4 So without interpreting the statute,
03:44:01 5 would you agree that as a matter of practice
03:44:08 6 from 1846 on, the Saugeen Peninsula was being
03:44:12 7 administered, if you will, by the administrative
03:44:18 8 body of the District of Huron?

03:44:20 9 A. According to the terms of this
03:44:22 10 statute, yes. I was just thinking as -- you
03:44:24 11 know, again reading the statute, the Acts of
03:44:28 12 1839 and 1850 have language about the Land
03:44:31 13 Commissioner calling on any sheriff, and I'm
03:44:34 14 immediately thinking, how do I construct that in
03:44:37 15 relation to this statute?

03:44:40 16 Because it would seem any sheriff
03:44:42 17 would mean this sheriff or, say, the sheriff in
03:44:45 18 the next county over heading toward Owen Sound
03:44:49 19 or Collingwood which becomes relevant a couple
03:44:53 20 of years later.

03:44:54 21 So you need to understand that's --
03:44:56 22 and honestly I don't know how that would have
03:44:59 23 been resolved.

03:45:05 24 Q. If I could call up Exhibit 1754?
03:45:22 25 So again, this one is:

03:45:23 1 "An Act to divide the District of
03:45:23 2 Huron, in the provinces of Canada, and
03:45:23 3 for other purposes therein mentioned".
03:45:23 4 And it's dated 30th of May 1849. Have
03:46:11 5 you seen this before?
03:46:12 6 A. I have.
03:46:12 7 Q. If we could scroll down to the
03:46:12 8 middle of the page. And it says on the right
03:46:14 9 side: "County of Huron divided into three
03:46:18 10 counties." And then it says Perth, Bruce and
03:46:23 11 Huron.
03:46:26 12 And it says:
03:46:27 13 "[...] to be called respectively
03:46:29 14 the County of Huron, the County of
03:46:32 15 Perth and the County of Bruce and the
03:46:33 16 County of Perth shall include and
03:46:35 17 consist of [...]"
03:46:37 18 And it lists a number of townships.
03:46:39 19 "The County of Bruce shall
03:46:40 20 include and consist of the townships
03:46:40 21 of Huron, Kinloss, Culross, Carrick,
03:46:47 22 Kincardine, Greenoch, Brant, Bruce,
03:46:51 23 Saugeen, Eldersley and Arran."
03:46:55 24 This is 1849. All those townships are
03:47:00 25 below the Treaty 67 line, is that correct?

03:47:02 1 A. I believe so. I would have to
03:47:04 2 look at the map but I believe so.

03:47:06 3 I would also note, if I could, this
03:47:08 4 statute is three years after the statute that
03:47:11 5 you previously showed me. The county has been
03:47:12 6 subdivided into three counties -- the district
03:47:15 7 has been subdivided into three counties and
03:47:18 8 townships in those three years because it's
03:47:20 9 filled with settlers. Just, you know, so we're
03:47:24 10 seeing political development accompanying the
03:47:29 11 land settlement.

03:47:30 12 Q. Right. So as more settlers or at
03:47:32 13 least population come into this area, the
03:47:35 14 administrative local governments start to be
03:47:39 15 established?

03:47:40 16 A. Exactly.

03:47:44 17 Q. And so if I can go to section 2
03:47:46 18 of this Act? It's slightly lower. And it says:

03:47:52 19 "And it be enacted that all the
03:47:55 20 peninsular tract of land lying to the
03:47:56 21 northward of the townships of Derby,
03:47:59 22 Arran, and Saugeen and between Lake
03:48:00 23 Huron and the Georgian Bay, and known
03:48:06 24 as the Indian reserve, together with
03:48:08 25 every island in Lake Huron or the

03:48:11 1 Georgian Bay, or any portion of which
03:48:14 2 lie within 10 miles of the shore of
03:48:16 3 said peninsular tract of land (unless
03:48:20 4 such island shall lie further south
03:48:22 5 than the northern boundary line of the
03:48:22 6 township of Derby, Arran and Saugeen)
03:48:26 7 shall be annexed to form part of the
03:48:29 8 County of Waterloo. And that each
03:48:31 9 such island in Lake Huron as shall lie
03:48:38 10 further south than set boundary line
03:48:40 11 shall form part of such of the said
03:48:43 12 counties of Huron or Bruce
03:48:46 13 respectively as such islands shall be
03:48:49 14 most adjacent to."

03:48:51 15 So not worrying about the islands for
03:48:53 16 the moment, the townships of Derby, Arran and
03:48:59 17 Saugeen are the townships which border the
03:49:02 18 half-mile strip, is that right?

03:49:04 19 A. Yes.

03:49:04 20 Q. Or what becomes known as the
03:49:06 21 half-mile strip?

03:49:07 22 A. Exactly.

03:49:08 23 Q. And so essentially this is
03:49:10 24 telling us that everything north of Derby, Arran
03:49:15 25 and Saugeen is now going to be administered in

03:49:19 1 the County of Waterloo, is that correct?

03:49:21 2 A. Yes, I'm sort of shaking my head
03:49:23 3 out of disbelief at what the legislature -- what
03:49:26 4 the people in Toronto were doing. But you can
03:49:29 5 see. It's showing there is enormous political
03:49:32 6 development here very quickly as the land is
03:49:35 7 filling up, and they are trying to set up an
03:49:39 8 appropriate political legal infrastructure that
03:49:41 9 will handle what is going on.

03:49:43 10 I don't know what sense it makes to
03:49:45 11 attach to the County of Waterloo, but that's not
03:49:47 12 my job.

03:49:48 13 Q. Sure. So I want to go to the
03:49:50 14 next change, I believe, which is Exhibit 1871.

03:50:17 15 "An Act to make certain
03:50:18 16 alterations in the territorial
03:50:21 17 divisions of Upper Canada" dated
03:50:23 18 August 2nd, 1851.

03:50:25 19 So this is still prior to the
03:50:27 20 half-mile strip surrender?

03:50:29 21 A. And a year after the previous
03:50:32 22 statute. Things are happening very quickly.

03:50:35 23 Q. Okay. If I could scroll down to
03:50:36 24 next page. Farther down, please.

03:50:55 25 A. You scrolled passed it.

03:50:58 1
03:50:59 2
03:51:01 3
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03:51:14 11
03:51:15 12
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03:53:02 24
03:53:05 25

THE COURT: Sir, you have not been asked a question.

THE WITNESS: Sorry, I missed something. He was scrolling down past something I was trying to read, but it may have been irrelevant.

THE COURT: I want you to just pause. When you're asked a question, you may need to have some adjustment on the screen.

THE WITNESS: Okay.

BY MR. BEGGS:

Q. If we can keep going down to the next section? So at least there is a schedule and if we can scroll down to the County of Bruce? So 28 is the County of Grey, and it says:

"The County of Grey shall consist of the townships of Derby, Sydenham, St. Vincent, Sullivan, Holland, Euphrasia, Collingwood, Bentinck, Glen Elk, Artemesia, Osprey, Normanby, Egremont, Proton and Malancthon together with that portion of the Peninsular tract of land known as the Indian reserve situated between a line

03:53:08 1 drawn northward from the northeast
03:53:10 2 angle of Arran and the northwest angle
03:53:13 3 of Derby until it strikes Colpoy's Bay
03:53:17 4 on the east side of the Indian village
03:53:19 5 and the waters of the Georgian Bay
03:53:22 6 together with the islands contiguous
03:53:25 7 thereto."

03:53:27 8 And before we try and figure that out,
03:53:29 9 the next one says:

03:53:32 10 "29, the County of Bruce shall
03:53:40 11 consist of the townships of Huron,
03:53:42 12 Kinloss, Culross, Carrick, Kincardine,
03:53:45 13 Greenoch, Brant, Bruce, Saugeen,
03:53:47 14 Eldersley and Arran together with all
03:53:49 15 of the portion of the peninsula tract
03:53:51 16 of land known as the Indian reserve,
03:53:54 17 and not included in the County of
03:53:55 18 Grey, together with all of the islands
03:53:56 19 in Lake Huron and Georgian Bay
03:53:59 20 contiguous thereto."

03:54:01 21 So the county -- if you can look at
03:54:05 22 Exhibit Q there for a moment, just to your left.
03:54:13 23 Is to your left side? The Grey County is on the
03:54:17 24 east side of the -- of this area, is that
03:54:21 25 correct? Grey County is on the east?

03:54:25 1 Huron-Bruce is on the west?

03:54:28 2 A. Yes.

03:54:28 3 Q. So Grey County, that's the top --

03:54:31 4 A. Stops here.

03:54:33 5 Q. Yes. So there's a line that goes

03:54:35 6 from Saugeen or Southampton straight across to

03:54:42 7 Owen Sound, and that's roughly the half-mile

03:54:45 8 strip area, is that correct?

03:54:47 9 A. Yes.

03:54:48 10 Q. And so the portion of Grey, which

03:54:51 11 is just south of that, is Derby Township,

03:54:56 12 correct?

03:54:57 13 A. Well, Derby Township doesn't

03:54:59 14 appear to appear in this map. I see Derby,

03:55:01 15 okay.

03:55:02 16 Q. I think that is a --

03:55:03 17 A. It is Derby, yes. But I can't

03:55:07 18 tell if it's a township, but that seems right.

03:55:09 19 Q. And so, I mean now there's a road

03:55:11 20 on that map, but it effectively -- the portion

03:55:14 21 to the right of the road going up directly to

03:55:18 22 Colpoy's Bay is the town -- is the part of the

03:55:22 23 reserve that's part of the County of Grey, is

03:55:24 24 that right?

03:55:25 25 A. I'm struggling with the statute

03:55:28 1 and the geography but that seems to be right.

03:55:31 2 Q. And the rest to the left and all
03:55:32 3 the way up would be Bruce Peninsula -- or Bruce
03:55:35 4 County?

03:55:36 5 A. Right.

03:55:37 6 Q. And that was 1851.
03:55:49 7 Now, if we could go to your report at
03:55:51 8 page 56?

03:56:09 9 A. 2-6.

03:56:11 10 Q. 56. So the paragraph beginning:

03:56:16 11 "While Bruce County was created
03:56:17 12 in 1849, it did not have its own
03:56:20 13 county government until 1857, first
03:56:22 14 merged administratively with the
03:56:24 15 counties of Huron and Perth, later
03:56:25 16 with Grey. At the time of Treaty 72
03:56:28 17 it was merged with Grey County, formed
03:56:29 18 in 1853, for administrative purposes,
03:56:32 19 probably because most of Bruce County
03:56:34 20 was convenient to Owen Sound."

03:56:37 21 Now, I would suggest to you that Bruce
03:56:39 22 County was connected to Huron and Perth, but
03:56:43 23 would you agree that Bruce County was never
03:56:46 24 connected with Grey Township, administratively?

03:56:50 25 A. I'm simply not -- I'm not sure

03:56:53 1 sitting here with my memory of those -- those
03:56:56 2 fast-moving statutes that just appeared. I
03:56:59 3 could be wrong about that.

03:57:10 4 Q. To be fair, looking at one of the
03:57:12 5 footnotes, I'll try and find the page for you.
03:57:14 6 But footnote 158 is page 84.

03:57:33 7 So 158 gives the citation of the 1849
03:57:38 8 statute we just looked at, and it also refers to
03:57:40 9 the Robertson, "History of the County of Bruce".

03:57:49 10 You can tell me whether you recall or
03:57:50 11 not, but from my reading of those passages cited
03:57:54 12 in the history of the County of Bruce, it
03:57:56 13 doesn't say that Bruce was merged with Grey but
03:58:00 14 does say there was a proposal to make Owen Sound
03:58:04 15 the county town but that proposal was voted
03:58:07 16 down. Does that sound familiar?

03:58:10 17 A. Let me say, you know, I struggle
03:58:14 18 to make sense of this political geography that
03:58:17 19 you just read.

03:58:20 20 I do not remember how I came up with
03:58:22 21 this conclusion, this footnote. It could be
03:58:26 22 wrong.

03:58:27 23 Q. Okay.

03:58:31 24 A. My concern was where a sheriff
03:58:34 25 was and where a jail was and trying to figure

03:58:37 1 these things out.

03:58:37 2 Q. Right.

03:58:37 3 A. But, okay.

03:58:43 4 Q. Actually -- if I could have a
03:58:49 5 moment? I'd like to ask you, I think you
03:59:10 6 referred to the manner in which grants were
03:59:17 7 given early on.

03:59:18 8 A. Pardon?

03:59:19 9 Q. Sorry, the manner in which grants
03:59:21 10 were given early on in Upper Canada?

03:59:23 11 A. Referring to something --

03:59:25 12 Q. Yes.

03:59:26 13 A. Okay.

03:59:27 14 Q. Sort of --

03:59:27 15 A. Okay.

03:59:28 16 Q. Sort of different, but if we step
03:59:32 17 back to when it was the District of Huron, for
03:59:35 18 example, and we talk about settlement at that
03:59:37 19 time, was there a period in which free grants
03:59:40 20 were given?

03:59:42 21 A. The land policy was changing.
03:59:45 22 Well, you saw how the political geography was
03:59:47 23 changing. Land policy was changing rapidly too.
03:59:51 24 There were free grants sometimes in some places.
03:59:53 25 I can't say here without sources which free --

03:59:56 1 when and where free grants were.

03:59:59 2 Q. Okay.

03:59:59 3 A. But they did exist.

04:00:01 4 Q. What are free grants?

04:00:02 5 A. Free grant is a free grant of
04:00:05 6 land. And it was a way of dealing with the
04:00:07 7 problem of settlers not being able to pay. So
04:00:11 8 rather than have someone sell it for money they
04:00:13 9 can't pay and take it back, give out free land,
04:00:17 10 which gets you rapid settlement. But the
04:00:22 11 disadvantage is you're not exactly sure of the
04:00:25 12 clientele, because people could have taken land
04:00:27 13 and they weren't able to take care of it.

04:00:30 14 But there were free land grants. It
04:00:34 15 came up off and on in Canada because the
04:00:37 16 Americans did it. So it's a policy that existed
04:00:39 17 that, you know, obviously it works, right?
04:00:43 18 People will take free land.

04:00:45 19 Q. Now, I think it was yesterday you
04:00:47 20 described a process at one point where people
04:00:56 21 would petition for grants of land perhaps based
04:00:58 22 of their military service in the War of 1812 or
04:01:02 23 the Revolutionary war. Is that part of the free
04:01:07 24 grant process or is that a different process?

04:01:09 25 A. It was another -- those were free

04:01:09 1 too. It was a different process and it's
04:01:11 2 earlier. You don't have many soldiers left by
04:01:15 3 the 1840s and '50s.

04:01:19 4 Q. Okay.

04:01:19 5 A. Well, I'm sure you really have to
04:01:21 6 struggle with Gates to see the different regimes
04:01:24 7 changing as they go.

04:01:26 8 And I suppose it's an attribute of
04:01:29 9 even good government that it's willing to
04:01:31 10 experiment and try different things. On the
04:01:33 11 other hand, you know, failure with the land
04:01:40 12 distribution policy has long-term consequences
04:01:43 13 because of, you know, granting someone a piece
04:01:45 14 of land means they own it.

04:01:47 15 And then, you know, the Crown has to
04:01:51 16 deal with that in terms of any future
04:01:53 17 development of land. So if the wrong person
04:01:56 18 owns it, you've got trouble, or the wrong
04:01:58 19 people, class of people.

04:02:07 20 Q. So am I understanding correctly
04:02:10 21 then that free grants were in place at different
04:02:14 22 times during different parts of the province?

04:02:18 23 A. Again, I don't have Lillian Gates
04:02:20 24 in front of me, that would be my source, but
04:02:22 25 yes.

04:02:23 1 Q. So you can't -- and I have no
04:02:25 2 idea, but one cannot say that as this year, the
04:02:35 3 Upper Canada government shifted from giving free
04:02:37 4 grants to going --

04:02:39 5 A. Well there were some -- there
04:02:39 6 were some changes in policies that happened I
04:02:42 7 can't -- that happened because of something
04:02:44 8 happened some year. But in general, it's -- the
04:02:48 9 kind of development you just described in those
04:02:51 10 statutes we just read, things are changing very
04:02:55 11 rapidly. And land is a problem. Land
04:02:57 12 distribution is a problem.

04:02:58 13 And there were different methods to
04:03:00 14 fix it, different parliamentary commissions,
04:03:03 15 different legislative assembly commissions,
04:03:03 16 different reports and different strategies in
04:03:05 17 different places at different times. I can't
04:03:08 18 talk about them specifically without a source.

04:03:12 19 Q. Now, the -- keeping in mind the
04:03:17 20 different areas of land surrenders, the three
04:03:20 21 areas that we talked about, the Treaty 45 1/2,
04:03:23 22 the Treaty 67, and the Treaty 72 areas, you
04:03:33 23 would agree that there were -- people were
04:03:36 24 appointed to be the land sales agents for
04:03:38 25 those --

04:03:39 1 A. Yes.

04:03:39 2 Q. -- areas? Different areas?

04:03:43 3 A. Yes.

04:03:43 4 Q. And so if we were talking about

04:03:54 5 the Treaty 45 1/2 area and we were talking about

04:04:11 6 the land sales agents, would you agree that the

04:04:16 7 land sales agent for -- in the late 1840s or

04:04:20 8 1850s for the County of Grey, for example, was

04:04:25 9 George Jackson? Does that sound familiar?

04:04:28 10 A. The name sounds familiar. I just

04:04:30 11 need to see a document. I don't have that in my

04:04:32 12 memory.

04:04:33 13 Q. But you would agree that

04:04:34 14 Alexander McNabb was a land sales agent for

04:04:38 15 Bruce County?

04:04:40 16 A. He was a land sales agent for

04:04:41 17 Bruce County, yes.

04:04:43 18 Q. And did you -- and thinking about

04:04:50 19 the squatter's commission that we discussed

04:04:51 20 earlier today, the other individual mentioned

04:04:53 21 there, John Clarke, he was the land sales agent

04:04:56 22 for Huron, is that correct?

04:04:58 23 A. I believe so. But I would, again

04:05:00 24 I would like to see it, confirm that, but I

04:05:03 25 believe that.

04:05:08 1 Q. So if we're reading something and
04:05:10 2 we see -- actually I'll cover this first.

04:05:12 3 And those people were employed by the
04:05:15 4 Crown Lands Department, is that correct?

04:05:16 5 A. Yes.

04:05:20 6 Q. When Treaty 67 happened, the land
04:05:31 7 sales agent appointed was a man by the name John
04:05:35 8 McLean, is that correct?

04:05:37 9 A. Again, I'll accept that. I'd
04:05:41 10 like to see a document. I need my recollection
04:05:43 11 refreshed.

04:05:44 12 Q. We'll come to a document at a
04:05:46 13 later point.

04:05:48 14 It wasn't, for example, Alexander
04:05:50 15 McNabb who was selling the land on half-mile
04:05:53 16 strip?

04:05:54 17 A. I believe he's selling land south
04:05:56 18 of half mile strip.

04:05:58 19 Q. And then when -- but John McLean,
04:06:01 20 perhaps you can't recall this, but if you can,
04:06:04 21 was not employed by the Crown Lands Department
04:06:08 22 but was employed by the Indian Department, is
04:06:10 23 that correct? He was to sell the lands on the
04:06:12 24 half-mile strip?

04:06:13 25 A. The Indian Department was trying

04:06:15 1 to sell the land for the benefit of the Indians,
04:06:18 2 that shift happens, I believe so.

04:06:27 3 Q. And likewise the Treaty 72 lands
04:06:28 4 were not sold by the Crown Lands Department.
04:06:31 5 They were sold by the Indian Department?

04:06:33 6 A. The Indian Department is selling
04:06:35 7 them for the benefit of the Indians.

04:06:37 8 Q. And there was some competition
04:06:38 9 for the position of sales agent for the Treaty
04:06:39 10 72 lands, is that correct?

04:06:41 11 A. I believe there is probably
04:06:42 12 competition for all these jobs. They were good
04:06:45 13 jobs.

04:06:46 14 Q. I think you mentioned that
04:06:47 15 Charles Rankin wanted the position. Charles
04:06:50 16 Rankin was a surveyor, that's correct?

04:06:52 17 A. Yes.

04:06:52 18 Q. He wanted the position, didn't
04:06:54 19 get it, and then delayed the survey as a result,
04:06:59 20 is that correct? I think you say that in your
04:07:01 21 report?

04:07:02 22 A. Yeah. Again, I would need to
04:07:04 23 refresh my recollection, but that makes sense.
04:07:06 24 Obviously he seems to have been a bit angry.

04:07:13 25 Q. And there was also

04:07:15 1 correspondence -- did you see any correspondence
04:07:21 2 indicating that Alexander McNabb wanted the job
04:07:23 3 of land sales agent? Did you come across that?

04:07:26 4 A. It seems to have his -- he wanted
04:07:28 5 a mill site. He wanted to be a land sales
04:07:31 6 agent. He was involved.

04:07:35 7 Q. But the actual land sales agent
04:07:37 8 appointed was a guy named Bartlet, is that
04:07:40 9 right?

04:07:41 10 A. Again, I don't have it. I'll
04:07:42 11 believe you. It makes sense. I don't want to
04:07:50 12 make a mistake without, you know --

04:07:53 13 Q. It's probably in your report.

04:07:54 14 A. Sorry, a lot of names.

04:08:39 15 Q. We can come back to that and look
04:08:41 16 at some documents at a later point. But
04:08:43 17 generally speaking if one were reading the
04:08:45 18 documentary record and we were seeing about
04:08:50 19 Alexander McNabb selling lands, we would know
04:08:52 20 that we were talking about lands south of the
04:08:55 21 half-mile strip in Bruce County?

04:08:59 22 A. I think what I would say there is
04:09:06 23 a lot of operators if I can use the term -- sort
04:09:08 24 of official, unofficial operations with land and
04:09:11 25 some speculation and some dealings under the

04:09:17 1 table and above the table.

04:09:19 2 And I can't say that he might not have
04:09:24 3 been trying to sell land on the -- that he had
04:09:26 4 some kind of arrangement with the other side.

04:09:29 5 I see it as being that chaotic, so I'm
04:09:31 6 not -- especially given my view of McNabb.

04:09:36 7 Q. And thinking about that, thinking
04:09:38 8 about the squatters commission and his comments
04:09:41 9 about McNabb, the squatters commission was about
04:09:44 10 lands in the 45 1/2 area, correct?

04:09:47 11 A. It was.

04:09:47 12 Q. They weren't about anything
04:09:48 13 farther north?

04:09:49 14 A. It was not concerned about the
04:09:50 15 half mile strip. My concern simply was when you
04:09:54 16 have chaos in the area and people, you know,
04:09:57 17 buying and selling above and table and under the
04:09:59 18 table, that I wasn't certain about what kind of
04:10:07 19 stuff might be going on and that was my point.

04:10:10 20 Q. And you're familiar with
04:10:12 21 something described as the big land sale in
04:10:14 22 1854?

04:10:16 23 A. I've read about it, and I'd need
04:10:18 24 to refresh my recollection to discuss it with
04:10:20 25 you now, but I'm familiar with it.

04:11:15 1 Q. Now, I think you mentioned this
04:11:16 2 morning about how one could observe
04:11:21 3 geographically the movement of settlement toward
04:11:25 4 the peninsula, if you will?

04:11:27 5 A. Yes, if you -- one way would be
04:11:28 6 to look at the line of statutes that you just
04:11:31 7 showed me. That line is developing rapidly.

04:11:36 8 Q. And things such as roads and
04:11:40 9 other facilities were getting closer, if you
04:11:44 10 will, to the peninsula?

04:11:46 11 A. Yes.

04:11:46 12 Q. As the 19th century wore on?

04:11:48 13 A. Yes.

04:11:51 14 Q. Now, you mentioned in your
04:11:52 15 report, and I think you mentioned yesterday as
04:11:55 16 well, that one of the causes that Professor
04:12:00 17 Gates identified for squatting was the lack of
04:12:06 18 surveyed lands. Is that right?

04:12:09 19 A. Yes.

04:12:09 20 Q. That the Crown was taking too
04:12:11 21 long to survey the lands?

04:12:12 22 A. That's actually an issue that
04:12:14 23 comes up in some of the documents about Treaty
04:12:17 24 45 1/2 lands.

04:12:20 25 Q. Yes.

04:12:21 1 A. And the contrary, the half mile
04:12:22 2 strip was surveyed relatively quickly so they
04:12:28 3 could put it up for sale.

04:12:35 4 Q. And I believe you quote from
04:12:37 5 Norman Robertson in "The History of the County
04:12:40 6 of Bruce" using the phrase "Crown inertia" or
04:12:46 7 "departmental inertia" as Mr. Robinson's guess
04:12:51 8 as to why the surveys were taking so long, is
04:12:54 9 that right?

04:12:55 10 A. It's in there. Obviously the
04:12:57 11 local settlers were the ones that were the most
04:12:59 12 injured by this. Because the surveying meant
04:13:02 13 that the land could be marked into plots for
04:13:06 14 sale and it was the first part of the sales
04:13:08 15 process.

04:13:26 16 Q. Would you say that the effect of
04:13:27 17 the delay or, if you want, failure of the
04:13:31 18 government to survey lands closer to the
04:13:38 19 peninsula had the effect of slowing development
04:13:48 20 closer to the Indigenous peoples?

04:13:52 21 A. Make sure I understand that.
04:13:52 22 Failing to survey had the effect of slowing down
04:13:55 23 development?

04:13:56 24 Q. Yes.

04:14:01 25 A. You could say that might be the

04:14:02 1 case. On the other hand, if you are getting a
04:14:05 2 large clamouring for land and people are
04:14:07 3 unconcerned about legality or desperately moving
04:14:11 4 in anyway, it might not slow it down but would
04:14:15 5 also add to the instability of the process
04:14:18 6 overall.

04:14:19 7 I mean it could cut both ways I think.

04:14:22 8 Q. Right. So it could be a
04:14:23 9 situation where if they didn't survey the land,
04:14:30 10 as they didn't for quite some time, there was a
04:14:33 11 buildup of demand that resulted in squatting?

04:14:37 12 A. Exactly.

04:14:38 13 Q. Whereas if they had surveyed the
04:14:40 14 land settlers, not squatters, would have begun
04:14:52 15 to approach the boundaries of the reserve
04:14:55 16 quickly?

04:14:56 17 A. Yes, more stable settlers. More
04:14:57 18 law-abiding, more stable settlers, settlers that
04:14:58 19 had the money to buy the land. You would have
04:15:00 20 had a different settlement pattern had you had
04:15:02 21 it surveyed and purchasable as opposed to
04:15:04 22 inviting in squatters, you know, hoping for
04:15:07 23 something.

04:16:21 24 Q. Now, were you aware that -- or
04:16:22 25 did you come across evidence that spoke of

04:16:30 1 migration of Indigenous peoples to the Bruce
04:16:33 2 Peninsula apart from the Saugeen and Nawash?
04:16:37 3 A. I did not research the -- the
04:16:41 4 Indigenous population of the Bruce Peninsula. I
04:16:44 5 wasn't asked.
04:16:45 6 Q. Okay.
04:16:47 7 A. I have a general awareness but
04:16:49 8 that is not my expertise.
04:16:58 9 Q. And Treaty 45 1/2 spoke
04:17:00 10 specifically about the encroachments of whites,
04:17:03 11 is that right?
04:17:03 12 A. Yes, there is that language, that
04:17:06 13 language in the treaty.
04:17:07 14 Q. So one wouldn't consider
04:17:10 15 Indigenous people who moved to the peninsula as
04:17:13 16 being squatters, for example?
04:17:16 17 A. No one did.
04:17:17 18 Q. No.
04:17:18 19 A. They were invited as a kind of
04:17:20 20 nation to nation or brother to brother. I'm
04:17:23 21 just answering this, but they would never --
04:17:26 22 Indigenous people were not squatters.
04:17:30 23 The one exception is, of course, the
04:17:31 24 huge fight -- you see some of this in the
04:17:34 25 statute about non-Indigenous people moving onto

04:17:38 1 the reserve and forming relationships with an
04:17:42 2 Indigenous person as some kind of a pretext to
04:17:47 3 get land. Some of those are called squatters.

04:17:51 4 Q. Right.

04:17:52 5 A. But not -- and of course, you
04:17:53 6 know, racial identity gets to be -- can be quite
04:17:57 7 confusing in this period for some people. So
04:17:59 8 you get those kinds of problems, but in -- as a
04:18:02 9 general, you know, rule, no one ever thought of
04:18:06 10 Indigenous people as being squatters.

04:18:19 11 Q. And this might sound like a jump
04:18:23 12 in topic, but I will circle back, you -- one of
04:18:28 13 your articles that we looked at this morning was
04:18:32 14 part of a collection entitled "Earth, Fire,
04:18:37 15 Air" --

04:18:38 16 A. Yes, David McNabb.

04:18:39 17 Q. Right. So who is David McNabb?

04:18:42 18 A. David McNabb is, I would say, I
04:18:45 19 was going to say old, but he's my age.

04:18:48 20 David McNabb is a recognized scholar
04:18:51 21 in Ontario, Upper Canada, Indigenous history.
04:19:00 22 He's written a lot. He's been around a lot on
04:19:06 23 the reserves. He knows a lot. I understand
04:19:09 24 he's ill these days, but...

04:19:11 25 Q. Oh dear.

04:19:12 1 A. But I haven't seen him in years,
04:19:14 2 but I used to run into him in the archives 20
04:19:17 3 years ago.

04:19:20 4 Q. And that book was -- when the
04:19:26 5 book went by as an exhibit, I think, it had --
04:19:29 6 on the cover it said "Edited by David McNabb
04:19:36 7 for" and there was an Indigenous word. Do you
04:19:38 8 know what that was --

04:19:40 9 A. Yeah, I can explain the context.
04:19:42 10 There is an Algonquin conference held annually
04:19:45 11 and that year it was held -- it was sponsored by
04:19:48 12 and held at Walpole Island First Nation. And
04:19:51 13 they -- I believe that language comes from the
04:19:54 14 Walpole Island First Nation in Anishinaabek. I
04:19:58 15 don't even myself know what it says.

04:20:01 16 But the context was it came out of
04:20:04 17 that -- it was an academic conference. There
04:20:07 18 were lots of academics there. You know again,
04:20:09 19 some of the papers were collected and published
04:20:12 20 by David McNabb because it is a way to
04:20:15 21 distribute people's work.

04:20:18 22 Q. And did Mr. -- was is it
04:20:23 23 Professor McNabb?

04:20:25 24 A. I guess he has been a professor
04:20:27 25 off and on through his career.

04:20:29 1 Q. Professor McNabb, is he
04:20:31 2 associated with Walpole Island, do you know?

04:20:34 3 A. You know, I can't tell you. I
04:20:35 4 believe he did work for them --

04:20:37 5 Q. Okay.

04:20:37 6 A. -- as a -- research, historical
04:20:39 7 research. I believe that, but I can't swear to
04:20:44 8 it.

04:20:44 9 Q. Okay.

04:20:46 10 A. He's done research for many
04:20:48 11 Indigenous Nations.

04:20:55 12 Q. Now, returning to the question of
04:21:05 13 squatters again. So Indigenous people would not
04:21:10 14 be -- the Indigenous people who came to the
04:21:16 15 Bruce Peninsula anyway would not be considered
04:21:19 16 squatters?

04:21:19 17 A. No. And I want to say again -- I
04:21:20 18 was thinking about this -- it is an informal
04:21:22 19 usage. You and I can call each other squatters.
04:21:25 20 It was used in some pejorative ways, in other --
04:21:28 21 in different ways by different people. So I
04:21:30 22 can't say that no one --

04:21:33 23 Q. Fair enough.

04:21:34 24 A. -- in history ever used that.
04:21:35 25 But it simply wasn't a usage that was -- that I

04:21:39 1 recognize from historical documents.

04:21:44 2 Q. What about missionaries that came
04:21:46 3 to the territory, would they be considered
04:21:49 4 squatters if they lived there?

04:21:51 5 A. You know, I have a --
04:21:51 6 missionaries are not -- I have a -- you know. I
04:22:00 7 can get into the religious wars, as you
04:22:02 8 understand. I'm a Lutheran but, so I'm just
04:22:04 9 saying I'm not an expert in missionaries. They
04:22:12 10 were on the reserves.

04:22:13 11 One view is that maybe they shouldn't
04:22:15 12 have been there. But it's not for me to decide.
04:22:18 13 I'm not an expert on it. But they had
04:22:20 14 permission from somebody or the Crown ignored
04:22:23 15 them. The Crown may simply have ignored them
04:22:25 16 because they were playing an important role in
04:22:27 17 the "civilization" or the "assimilation" of the
04:22:33 18 Indian tribes.

04:22:34 19 So things went on that were not
04:22:36 20 particularly legal simply because they were
04:22:38 21 permitted by usage or custom. So I don't know
04:22:41 22 what the legal status of the missionaries on the
04:22:44 23 reserves is. Never studied it.

04:22:54 24 Q. But if a missionary were to
04:22:56 25 engage in property transactions with the

04:22:58 1 local -- by buying or selling land
04:23:00 2 purportedly --
04:23:02 3 A. Because some of them did.
04:23:03 4 Q. -- that would be probably getting
04:23:04 5 into squatting or something of improper --
04:23:08 6 A. Well, as --
04:23:09 7 THE COURT: I'm just going to
04:23:10 8 interrupt the two of you as you interrupt each
04:23:12 9 other, which I find unhelpful.
04:23:16 10 This gentleman has just said at some
04:23:18 11 length he has no expertise in this area, sir.
04:23:20 12 If you want to ask him some questions go ahead,
04:23:23 13 but it's mystifying to me how it would be
04:23:29 14 helpful. Perhaps you have a plan and if you do
04:23:32 15 go ahead.
04:23:48 16 Mr. Beggs as you mull that over,
04:23:50 17 perhaps in the adjournment to tomorrow
04:23:53 18 morning -- but I don't want to stop you if you
04:23:56 19 are in the middle of something. So I give you
04:23:58 20 the two options.
04:24:05 21 MR. BEGGS: No, now would be a
04:24:07 22 convenient time, Your Honour.
04:24:08 23 THE COURT: And for purposes of
04:24:09 24 planning tomorrow, without anybody holding you
04:24:12 25 to it, so Ontario is on the ready, does Ontario

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need to be on the ready?

MR. BEGGS: No, Your Honour. I believe I'll take the whole day tomorrow.

THE COURT: All right. I'm sure Ontario will be ready if that turns out not to be the case, but it's helpful to have some indication. All right.

--- Whereupon the proceedings were adjourned at 4:24 p.m.

REPORTER'S CERTIFICATE

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

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

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

That the foregoing is a true and
accurate transcript of my shorthand notes so
taken. Dated this 17th day of October 2019.



PER: HELEN MARTINEAU
CERTIFIED SHORTHAND REPORTER

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