

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

VOL 49 DAY 49
October 03, 2019



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Court File No. 94-CQ-50872CM

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

Plaintiffs

- and -

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

Defendants

Court File No. 03-CV-261134CM1

A N D B E T W E E N:

CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and
SAUGEEN FIRST NATION

Plaintiffs

- and -

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

Defendants

--- This is VOLUME 49 / DAY 49 of the
transcript of the trial proceedings in the
above-noted matter, being held at the Superior
Court of Justice, 330 University Avenue,
Courtroom 5-1 Toronto, Ontario, on the 3rd day
of October 2019.

B E F O R E:

The Honourable Justice Wendy M. Matheson

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

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

Michael Beggs, Esq., for the Defendant,
& Michael McCulloch, Esq., Attorney General
& Barry Ennis, Esq., of Canada.
& 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 10:04 a.m.

10:04:14 2 THE COURT: Morning, Mr. Beggs.

10:04:18 3 MR. BEGGS: Thank you, Your Honour.

10:04:18 4 There's two administrative matters to deal with
10:04:21 5 first. The first is, I made inquiries with
10:04:24 6 Professor von Gernet about his availability next
10:04:28 7 week. Unfortunately he can't move up his date
10:04:31 8 from Friday to Wednesday or Thursday.

10:04:32 9 THE COURT: That's perfectly okay. I
10:04:34 10 do appreciate that you made the inquiries. It
10:04:37 11 doesn't affect me at all, but I did think if
10:04:40 12 there was flexibility there might be one or two
10:04:42 13 people in the room who would prefer not to be
10:04:45 14 here at 4:30 on a Friday afternoon before
10:04:48 15 Thanksgiving. But we can only do what we can
10:04:49 16 do, and I appreciate the effort you made.

10:04:51 17 MR. BEGGS: Thank you. I had hopes
10:04:52 18 myself.

10:04:53 19 THE COURT: It may not take the full
10:04:54 20 day anyway. I realize that.

10:04:56 21 MR. BEGGS: No. My friend also has --

10:04:59 22 THE COURT: Yes, Ms. Guirguis, please
10:05:01 23 go ahead.

10:05:02 24 MS. GUIRGUIS: Morning, Your Honour.
10:05:02 25 So I actually have two administrative matters.

10:05:04 1 The first one is just about Exhibit 1799, which
10:05:08 2 was mentioned in our examination in-chief.
10:05:09 3 We've added a transcript.
10:05:12 4 THE COURT: Very good. Yes.
10:05:13 5 MS. GUIRGUIS: SC1210. And this
10:05:15 6 exhibit is the letter from Chesley to Anderson,
10:05:24 7 October 10th, 1855. So --
10:05:30 8 THE COURT: Just give me a moment,
10:05:30 9 counsel. So is it a transcript to Exhibit 1799?
10:05:41 10 MS. GUIRGUIS: That's correct.
10:05:43 11 THE COURT: Mr. Registrar, what is the
10:05:44 12 next Exhibit number?
10:05:44 13 THE REGISTRAR: Exhibit Number 4230.
10:05:47 14 THE COURT: 4230. All right.
10:05:47 15 EXHIBIT NO. 4230: Transcript of
10:05:48 16 Exhibit 1799; Document SC1210.
10:05:50 17 MS. GUIRGUIS: Thank you, Your Honour.
10:05:51 18 So the second matter is that we received
10:05:53 19 documents this morning from Canada, at about
10:05:58 20 8:30 this morning, and from what they provided,
10:06:01 21 the information they provided to us, it seems
10:06:03 22 that we're in a situation where we have about --
10:06:05 23 approximately 460 pages that have not been
10:06:08 24 disclosed previously. So we are in a position,
10:06:11 25 again, of asking the court's permission to have

10:06:14 1 some time this morning to review those
10:06:16 2 documents.

10:06:17 3 And in addition, from our preliminary
10:06:19 4 look from it, these are documents that we would
10:06:22 5 want to be able to discuss with the witness
10:06:30 6 briefly. I've checked with my friends from
10:06:33 7 Canada, and I don't believe they have an
10:06:34 8 objection to that. I'm not sure from Ontario
10:06:36 9 whether they would.

10:06:39 10 THE COURT: Can you give me a --
10:06:40 11 perhaps I'll ask Mr. Beggs to do it because you
10:06:41 12 just received it.

10:06:41 13 Mr. Beggs, can you give me an idea of
10:06:46 14 both the reasons for the timing and the general
10:06:49 15 nature of the new documents, please?

10:06:54 16 MR. BEGGS: Certainly, Your Honour.
10:06:56 17 For the timing, unfortunately it's just been a
10:06:59 18 matter of scrambling to keep up with the court
10:07:05 19 moving ahead quicker than expected. There
10:07:08 20 certainly was no intention to save it to
10:07:10 21 cross-examination, so I have no problems with
10:07:12 22 Mr. Guirguis' suggestion.

10:07:16 23 The -- so far as the nature goes, I
10:07:18 24 believe most of them are government documents or
10:07:22 25 government reports. I believe two of them in

1 particular are lengthy documents, which I'm
2 going to discuss with my friend to pinpoint
3 exactly the relevant parts, so those two
4 documents are approximately 200 pages each.

5 And I'll identify which parts of those
6 they have to go -- that I intend to go through,
7 which hopefully will save them reading the whole
8 series there.

9 There are a few letters but mostly
10 government reports.

11 THE COURT: It's unusual to request
12 the chance to discuss a document with the
13 witness who is under cross-examination.
14 Ms. Guirguis says you consent.

15 MR. BEGGS: Yes, Your Honour. I mean,
16 it may be that she wants to look at them first
17 and decide whether it is necessary and -- but
18 I'm confident enough that Professor Harring will
19 be independent and not -- and it won't cause
20 problems.

21 THE COURT: All right. What's
22 Ontario's position?

23 MR. LEMMOND: Your Honour, I'm not
24 familiar with the documents, so I really don't
25 have much to add except that if Canada is

1 comfortable with this approach, I'm happy to
2 rely upon Canada's confidence.

3 THE COURT: While you're on your feet,
4 Mr. Lemmond, and I won't hold you to this, but I
5 was going to raise a scheduling question, so I
6 might as well deal with it now. Do you have a
7 rough idea of how long your cross-examination
8 will be?

9 MR. LEMMOND: Yes, Your Honour, I'm
10 hoping I can keep it within a day.

11 THE COURT: All right. Ms. Guirguis,
12 now, obviously you haven't read the documents
13 yet, so it may be, as occurred the other time,
14 that on review of the documents you may have
15 either more or less to ask for.

16 And Mr. Beggs has very helpfully
17 indicated that he will pinpoint for you in the
18 two long documents the portion of the document
19 that is potentially going to arise in that
20 cross-examination.

21 And I take it from your estimate that
22 the other documents are probably not lengthy.

23 MS. GUIRGUIS: That's correct, Your
24 Honour.

25 THE COURT: And how many are there all

10:09:40 1 together?

10:09:45 2 MS. GUIRGUIS: I think that there
10:09:45 3 are -- the documents that were added this
10:09:48 4 morning, I believe that there's about 30? Is
10:09:51 5 that correct? To the Redi database and I think
10:09:59 6 a little -- about half of those are documents
10:10:01 7 that we haven't seen before.

10:10:04 8 THE COURT: All right.

10:10:05 9 MS. GUIRGUIS: Or that haven't been
10:10:06 10 disclosed before.

10:10:17 11 THE COURT: And I was going to
10:10:18 12 indicate to counsel that I needed to have our
10:10:21 13 midday break at 12:45 instead of 1:00 o'clock.
10:10:24 14 That may be irrelevant in all the circumstances,
10:10:28 15 but I put it on the table.

10:10:31 16 I also wanted to raise with counsel,
10:10:33 17 now having heard from Mr. Beggs about
10:10:35 18 Dr. von Gernet, to arrive at some clarity about
10:10:38 19 next week so people can make their own, you
10:10:41 20 know, professional commitments and so on without
10:10:44 21 wondering when they will be required to come
10:10:46 22 here.

10:10:47 23 So, starting with that, it seems,
10:10:53 24 subject to this period of adjournment that
10:10:57 25 you're requesting -- and what length are you

10:11:00 1 requesting, counsel?

10:11:02 2 MS. GUIRGUIS: We think the morning
10:11:02 3 should be sufficient, so if we resumed at noon
10:11:05 4 is what we were thinking, to be able to review
10:11:07 5 the documents --

10:11:08 6 THE COURT: This gets into my telling
10:11:10 7 you about the 12:45.

10:11:14 8 MS. GUIRGUIS: Yes.

10:11:14 9 THE COURT: So you're asking for a
10:11:15 10 couple of hours.

10:11:18 11 MS. GUIRGUIS: I'm asking for a couple
10:11:19 12 of hours, that's correct.

10:11:20 13 THE COURT: All right. And I will
10:11:20 14 certainly give you time to look at them, so that
10:11:23 15 part is no problem.

10:11:24 16 MS. GUIRGUIS: Thank you, Your Honour.

10:11:25 17 THE COURT: And if it is on consent,
10:11:27 18 after you concluded that process that you sit
10:11:30 19 with the witness over some of them, then I will
10:11:34 20 permit that. And it seems to me that you can
10:11:37 21 directly deal with opposite counsel about that
10:11:41 22 once you've concluded your look.

10:11:43 23 MS. GUIRGUIS: Thank you, Your Honour.

10:11:44 24 THE COURT: So perhaps what makes
10:11:46 25 sense is that you have your couple of hours

10:11:50 1 plus, and I'm not saying you should do it, but
10:11:53 2 if you conclude you want to and it's on consent,
10:11:57 3 you could deal with Mr. -- excuse me, Professor
10:11:59 4 Harring being shown whatever it is as well this
10:12:05 5 morning.

10:12:09 6 MS. GUIRGUIS: Okay.

10:12:10 7 THE COURT: It would seem to me there
10:12:12 8 would be more than enough time to do those two
10:12:15 9 things. Do you agree?

10:12:15 10 MS. GUIRGUIS: I would agree, Your
10:12:16 11 Honour, thank you.

10:12:16 12 THE COURT: And given that I would be
10:12:16 13 needing to rise from court at 1:00, I think the
10:12:18 14 best thing would be to resume at 2:15, which
10:12:21 15 gives everyone a little extra time to accomplish
10:12:22 16 the things you've just described.

10:12:25 17 Now, let's assume we're going to do
10:12:27 18 that. Mr. Beggs will probably be until midday
10:12:31 19 tomorrow, based on his current estimate. And
10:12:34 20 Mr. Lemmond until midday on Monday, and there
10:12:36 21 would be time for slippage and reply and so
10:12:41 22 forth.

10:12:42 23 Are counsel comfortable that I can say
10:12:45 24 today that for next week our sitting days will
10:12:48 25 be Monday and Friday so people can proceed to

1 make other professional commitments on the
2 intervening three days? Is everybody
3 comfortable with that?

4 MR. BEGGS: Yes, Your Honour.

5 THE COURT: Okay. The plaintiffs'
6 counsel is nodding her head.

7 MS. GUIRGUIS: Yes, Your Honour.

8 THE COURT: Canada says "yes".
9 Ontario?

10 MR. LEMMOND: Yes, Your Honour.

11 THE COURT: I just think it's better
12 than hanging, wondering for a couple more days.
13 And it also permits Professor Haring to have
14 some certainty around his commitment so he will
15 know that he will conclude on Monday and can
16 make other professional commitments if he wishes
17 to and perhaps even more important, appropriate
18 travel arrangements.

19 Okay. So that's good. So what we'll
20 do is we will resume at 2:15 on the
21 understanding that everything has been sorted
22 out. I am going to ask counsel -- I'm sure
23 there won't be a problem, but I would like to
24 know if there is one. I'm not anticipating any
25 problems will arise, but if you do anticipate a

10:13:55 1 problem that will need to be dealt with at 2:15,
10:13:58 2 if you could email my assistant. I'm really,
10:14:02 3 really not expecting that that is going to
10:14:05 4 happen. Okay?

10:14:06 5 Now, is that a satisfactory process,
10:14:08 6 Ms. Guirguis, to deal with the current
10:14:10 7 situation?

10:14:11 8 MS. GUIRGUIS: Yes, it is. Thank you,
10:14:11 9 Your Honour.

10:14:12 10 THE COURT: And do any other counsel
10:14:13 11 wish to raise anything at this time? No. All
10:14:15 12 right. We'll adjourn and resume at 2:15.

10:18:33 13 -- RECESSED at 10:14 P.M. --

02:09:16 14 -- RESUMED AT 2:18 P.M. --

02:18:19 15 THE COURT: Mr. Beggs.

02:18:21 16 MR. BEGGS: Thank you, Your Honour.
02:18:25 17 If I could ask Professor Haring to return to
02:18:28 18 the stand, please?

02:18:29 19 THE COURT: Just while he's doing
02:18:29 20 that, I take it that matters were worked out
02:18:31 21 satisfactorily over the break?

02:18:33 22 MS. GUIGRUIS: Yes, Your Honour.

02:18:34 23 THE COURT: Thank you, Ms. Guirguis.
02:18:42 24 Please go ahead.

02:18:44 25 MR. BEGGS: Thank you.

02:18:44 1 CROSS-EXAMINATION BY MR. BEGGS:
02:18:44 2 (Continued).
02:18:46 3 Q. Good afternoon, Professor
02:18:46 4 Harring.
02:18:47 5 A. Good afternoon, sir.
02:18:49 6 Q. If I could take you back to your
02:18:50 7 report, I'd actually like to go to the second
02:18:53 8 page for a moment, to the list of questions you
02:18:56 9 were asked in writing this report.
02:18:59 10 And I'd like to look at question 3(d):
02:19:08 11 "How effective would a policy of
02:19:12 12 leasing lands to squatters instead of
02:19:15 13 selling it to them outright have been
02:19:20 14 at reducing public pressure for a land
02:19:22 15 surrender on the Saugeen Peninsula in
02:19:24 16 the 1850s?"
02:19:26 17 And I'd like to turn to your answer at
02:19:38 18 page 62, I believe. That's under heading 4,
02:19:53 19 yes. Now, do you recall your answer here, do
02:19:55 20 you?
02:19:58 21 A. May I read it?
02:20:00 22 Q. Certainly.
02:20:29 23 A. (Witness reading the document.)
02:20:30 24 I remember writing this.
02:20:31 25 Q. Is there anything on the next

02:20:33 1 page? It's a short answer, I know. No, okay.

02:20:40 2 My question is actually for
02:20:41 3 clarification. When you were writing the
02:20:44 4 answer, were you answering whether leasing of --
02:20:53 5 I mean, you refer to Crown lands. So were you
02:20:55 6 referring to lands such as the Treaty 45 1/2
02:20:58 7 lands releasing pressure on the Treaty 72 lands?
02:21:05 8 Or were you referring to leasing of Treaty 72
02:21:08 9 lands? Or both?

02:21:18 10 A. This is five years ago, but I
02:21:21 11 believe I was referring to both.

02:21:22 12 Q. Okay. So you were considering
02:21:24 13 the idea of leasing -- possibly the First
02:21:28 14 Nations leasing their lands in conjunction with
02:21:32 15 the Crown?

02:21:33 16 A. Well, you -- yes, you see it's
02:21:35 17 quite a short section.

02:21:38 18 Q. Yes.

02:21:38 19 A. Because leasing never loomed
02:21:40 20 large in North America.

02:21:46 21 Q. All right. And I do see the
02:21:47 22 first sentence you have is:

02:21:49 23 "It is quite difficult to
02:21:50 24 speculate about policies that were not
02:21:52 25 engaged in."

02:21:54 1 Now, if I could go to page 9? If I
02:22:02 2 could -- so here you're describing what you
02:22:13 3 meant by "squatter", and you discussed it with
02:22:15 4 my friend and myself previously, and:

02:22:20 5 "[...] 'squatter' refers to any
02:22:21 6 person who settles on land without
02:22:24 7 some lawful right to do so."

02:22:25 8 And:

02:22:25 9 "In formal terms this legal right
02:22:29 10 of occupancy could refer to a deed,
02:22:31 11 but more often it was a certificate of
02:22:32 12 possession, a location ticket, some
02:22:34 13 kind of lease or other right as a
02:22:37 14 tenant or a renter."

02:22:42 15 So again you're open to the
02:22:43 16 possibility that the First Nations could, if
02:22:46 17 done properly, lease their lands to
02:22:48 18 non-Indigenous people?

02:22:53 19 A. As I said, it was not widely or
02:22:58 20 hardly engaged in in Canada or, more broadly,
02:23:03 21 North America, if there had been a legal regime
02:23:07 22 permitting that. It wasn't legal, of course,
02:23:08 23 under the -- either the 1839 or the 1850 Act.
02:23:16 24 But had it been legal, obviously Indians could
02:23:20 25 lease their land, if they could have found

02:23:22 1 people who would accept -- who wanted the
02:23:25 2 leaseholds.

02:23:26 3 Q. Okay. And when you were
02:23:45 4 discussing with my friend the three mill sites,
02:23:53 5 and they were at the Rivierre Aux Sauble and
02:23:59 6 Colpoy's Bay --

02:24:00 7 A. Colpoy's Bay.

02:24:00 8 Q. -- and the Saugeen River, is that
02:24:03 9 correct?

02:24:04 10 A. Yes.

02:24:04 11 Q. And we talked about the Rivierre
02:24:11 12 Aux Sauble in conjunction with Alexander McNabb
02:24:15 13 already I believe?

02:24:16 14 A. Yes.

02:24:16 15 Q. And Colpoy's Bay involved
02:24:19 16 Mr. Gleason?

02:24:20 17 A. Gleason.

02:24:21 18 Q. Squatting. And the third mill
02:24:26 19 site we haven't discussed, but it was being
02:24:32 20 sought by various people, including a
02:24:36 21 Mr. Hamilton and a Mr. Lyons, is that right?

02:24:40 22 A. It's not in front of me, but I
02:24:41 23 believe so.

02:24:48 24 Q. And I take it from your evidence
02:24:49 25 then if the legal regime permitted it, it was

02:24:53 1 acceptable for a -- a settler or a
02:24:56 2 non-Indigenous person to come to an arrangement
02:24:59 3 to lease such mill sites?

02:25:05 4 A. I've -- I've given that some
02:25:07 5 thought and I think -- I presume that to be true
02:25:13 6 because there were -- their talk of leasing
02:25:16 7 these, you know, by the Indian Department, it's
02:25:19 8 still, you know, a kind of -- it's taking land
02:25:25 9 from Indians without a cession, although it's an
02:25:32 10 intermediate -- more intermediate kind of
02:25:34 11 process. Because then what's the relationship
02:25:36 12 between a leasing of 99 years, for example, at
02:25:40 13 Grand River? A lease can be a significant
02:25:43 14 property impediment.

02:25:46 15 Also, the reality is that a mill lease
02:25:50 16 opens up land around it because of -- the mill
02:25:53 17 needs either timber or grain to carry out its
02:26:00 18 function. So if you leased a small plot for a
02:26:04 19 mill site, what's the impact of that on the
02:26:08 20 other land usages around it that haven't been
02:26:11 21 leased?

02:26:12 22 Q. Okay. If I could call up Norman
02:26:58 23 Robertson's book "History of the County of
02:27:02 24 Bruce", Exhibit 4286?

02:27:55 25 Actually, can we go back to your

02:27:57 1 report for a moment, page 35? Now, this -- you
02:28:18 2 discussed this with my friend, the
02:28:21 3 correspondence of Mr. Chesley calling Mr. McNabb
02:28:24 4 "a friend of mine", you discussed that the other
02:28:28 5 day, that's correct? Do you recall talking
02:28:31 6 about this situation?

02:28:33 7 A. Yes.

02:28:39 8 Q. And it mentions that Mr. McNabb
02:28:41 9 was appointed the Crown Lands Agent for Bruce in
02:28:43 10 May of 1851, and he held that position until he
02:28:48 11 died in 1882. And then it says "the lease was
02:28:53 12 granted". That's not correct, is it?

02:28:56 13 A. I believe I corrected myself --

02:28:58 14 Q. Oh, did you?

02:29:00 15 A. -- before. The one document says
02:29:02 16 that the lease was granted, and then there's a
02:29:05 17 letter from Toronto that cancels that.

02:29:09 18 Q. Right.

02:29:09 19 A. So it was not in fact granted.

02:29:11 20 Q. Okay. And the requests for the
02:29:20 21 lease at Saugeen River were never granted prior
02:29:25 22 to the Treaty of 72 surrender, were they?

02:29:34 23 A. I don't believe so. I don't have
02:29:36 24 the document in front of me.

02:29:53 25 Q. And Mr. Gleason was eventually

02:30:08 1 evicted in -- following the treaty, wasn't he?

02:30:12 2 A. When did you say?

02:30:14 3 Q. Following the treaty. Or do you
02:30:16 4 know?

02:30:16 5 A. After -- I mean, he doesn't get
02:30:18 6 the lease eventually. But my point is that he's
02:30:21 7 staying there for several years arguing with the
02:30:24 8 agent about whether or not he's even there. I
02:30:27 9 mean, he denies being a squatter.

02:30:30 10 So the point was -- really went to the
02:30:33 11 presence of squatters on the reserve.

02:30:36 12 Q. Okay.

02:30:37 13 A. Before cession.

02:30:38 14 Q. Right. If I could go back to
02:30:43 15 Mr. Robertson's book now? And that was Exhibit
02:30:49 16 4286, and if I could go to page 196? So that
02:31:23 17 looks like it will be 213 in the PDF. Actually,
02:31:32 18 if we could scroll up a bit?

02:31:36 19 Mr. Robertson used a lot of documents
02:31:39 20 in his book, is that correct?

02:31:41 21 A. Yes.

02:31:49 22 Q. So we'll need to scroll up a
02:31:51 23 little bit more. We can stop there. It says:

02:31:56 24 "After a delay of nearly a year
02:31:57 25 the sale of Indian lands was at length

02:32:00 1 held at Owen Sound, the date being
02:32:02 2 Tuesday, September 2nd, 1856. The
02:32:05 3 auctioneer was J. G. Gale of that
02:32:08 4 town. The particulars of the sale are
02:32:10 5 so fully and explicitly given in
02:32:13 6 Mr. Bartlett's official report that it
02:32:16 7 is here given in full."

02:32:18 8 And it's dated 20th of November, 1856.

02:32:21 9 So if we could go back to page 196, to the
02:32:24 10 middle of the page? It refers to -- if you can
02:32:37 11 see sort of the bottom third:

02:32:37 12 "The Au Sable Mill Site,
02:32:38 13 comprising 1,100 acres of land offered
02:32:41 14 at 2,000 pounds, sold for 2,390
02:32:45 15 pounds. The Mill Site near Owen Sound
02:32:48 16 containing 45 acres, put up at 500
02:32:52 17 pounds, sold for 760 pounds."

02:32:56 18 So, first of all, do you accept
02:32:58 19 that -- without checking for yourself, that it's
02:33:07 20 likely Mr. Robertson is quoting the letter
02:33:09 21 directly -- or correctly?

02:33:11 22 A. I would assume so.

02:33:18 23 Q. And from this letter it appears
02:33:21 24 that both the Au Sable Mill and the Colpoy's Bay
02:33:21 25 Mill were sold at the Treaty 72 sale?

02:33:30 1 A. Yes, it does.

02:33:31 2 Q. And that would imply that they
02:33:33 3 managed to get rid of Mr. Gleason eventually?

02:33:35 4 A. I can't say that's clear from
02:33:36 5 this fact because he could still be there, and
02:33:39 6 he could be expecting to sell his right of
02:33:40 7 preemption. It's not clear from this document.
02:33:44 8 It's -- these also sell for -- you know, 2,390
02:33:49 9 pounds is a lot of money.

02:33:52 10 Q. Yes. Now, you had indicated, I
02:34:01 11 believe, in your evidence that when land sales
02:34:07 12 took place over land which people had been
02:34:09 13 squatting on, and correct me if I'm wrong, but I
02:34:15 14 believe you indicated that the sales would
02:34:17 15 suffer because of people having to take into
02:34:19 16 account improvements or the difficulty of
02:34:24 17 getting rid of occupants?

02:34:27 18 A. I said they might -- it could
02:34:28 19 because you're adding a fee on top of the price
02:34:32 20 of the land. So you really have -- you
02:34:35 21 really -- so that there is a kind of encumbrance
02:34:39 22 here because, A), you have a person there that
02:34:42 23 you have to get rid of somehow; and, B), the
02:34:46 24 person expects to be paid or bought off.

02:34:49 25 So that is a -- any time you're

02:34:50 1 dealing with a large land sale and that's going
02:34:52 2 on, you've got that happening. I suppose that's
02:34:55 3 balanced off by the fact that there's some value
02:34:58 4 being created by this right of preemption.

02:35:02 5 You're buying something. You're buying a farm
02:35:04 6 that's hypothetically half complete or partially
02:35:08 7 complete.

02:35:09 8 So -- it's -- you know, land is like
02:35:12 9 that. It's a balancing test in the marketplace.
02:35:15 10 So it just creates difficulties, I would say.

02:35:19 11 Q. Okay. And did you review any
02:35:26 12 land sale records for treaties -- the Treaty 72
02:35:29 13 land to see whether prices went up or down?

02:35:34 14 A. I looked at a lot of land sale
02:35:37 15 records. They're quite chaotic, and it's quite
02:35:41 16 difficult to figure anything out from them. And
02:35:43 17 you can see that in the descriptions of what
02:35:45 18 happened. Most of the land winds up getting
02:35:48 19 repossessed because people can't make the
02:35:51 20 payments.

02:35:51 21 That of course goes -- it would
02:35:54 22 include the problem of the right of preemption
02:35:57 23 because if I'm a poor farmer and I'm buying a
02:35:59 24 farm just -- I'll make up a number, for \$100 and
02:36:02 25 I'm paying 10 percent down and 10 percent a year

02:36:06 1 for 9 years, and then there's someone there who
02:36:09 2 wants \$50 for his preemption, I'm cash strapped.
02:36:16 3 I have an economic problem. I might not be able
02:36:19 4 to make the second and third payment if I pay
02:36:22 5 for the preemption.

02:36:23 6 On the other hand, if I try to just
02:36:25 7 throw the guy off or get around the preemption,
02:36:26 8 you're causing, you know -- these are just
02:36:30 9 difficulties. You're causing trouble, conflict.

02:36:38 10 Q. Where did you obtain the records
02:36:41 11 of the land sales to check this?

02:36:42 12 A. I got records from a number of
02:36:44 13 sources. I don't recall.

02:36:53 14 Q. And these are the records for
02:36:54 15 individual sales for properties?

02:36:55 16 A. I don't remember. This was five
02:36:57 17 years ago I wrote this. I remember what they
02:36:58 18 looked like and --

02:37:10 19 Q. Okay. I'd like to move topics
02:37:11 20 for a moment back to something you discussed
02:37:14 21 with my friend, which was an incident in 1863
02:37:20 22 involving Manitoulin Island. Do you recall
02:37:23 23 that?

02:37:23 24 A. Yes.

02:37:36 25 Q. Now, you've given a couple of

1 descriptions in different places of this event.

2 If I could take you to your book "White Man's

3 Law", chapter 7, page 153, which is Exhibit

4 4278. So page -- it's actually page 152, it

5 begins, and it goes to page 153. It's a short

6 section.

7 A. I don't --

8 Q. Yes, we'll get it. So it's the
9 bottom of page 152. If you can take a moment to
10 review it that would be helpful. It's just two
11 paragraphs.

12 A. (Witness reading the document.)

13 Okay.

14 Q. So the next paragraph is on the
15 next page.

16 A. Okay.

17 Q. Now, I'd like to summarize a
18 couple of the points from this passage, these
19 two paragraphs that you've put in "White Man's
20 Law". And basically you indicate that the
21 Indigenous people threatened fishermen at
22 knifepoint -- sorry, if we could go up to the
23 paragraph:

24 "[...] that 50 Indians returned
25 the next day, that the Indian

02:41:33 1 Department dealt with this with the
02:41:36 2 fishery inspector, William Gibbard,
02:41:40 3 recruiting 13 armed police officers
02:41:43 4 from Toronto and Barrie going to
02:41:45 5 Wikwemikong to arrest them. The
02:41:51 6 police had guns. A small police party
02:41:54 7 was inadequate. The Indigenous people
02:41:58 8 agreed to appear, but Gibbard broke
02:42:03 9 his promise by arresting a person at
02:42:07 10 another location. The charges were
02:42:13 11 dropped. The person was recharged and
02:42:16 12 bailed by their attorney. Gibbard was
02:42:19 13 murdered by persons unknown. The
02:42:21 14 charges were not pursued."

02:42:24 15 And you finish with -- and then this
02:42:26 16 is the point I think that you're making here in
02:42:28 17 your book:

02:42:29 18 "Significant here is the legal
02:42:30 19 structuring of the Manitoulin
02:42:33 20 incident: The Indians believed that
02:42:35 21 they were sovereign, that they owned
02:42:37 22 their fishery and had a right to
02:42:39 23 protect it. The Ontario government
02:42:44 24 sent a large party of the police to
02:42:45 25 arrest what amounted to an entire

02:42:47 1 Indian band on petty criminal
02:42:50 2 charges."

02:42:51 3 And you rely on three sources for this
02:42:55 4 sanction; a book called "Forever on the Fringe"
02:43:03 5 and articles by Mr. Wright and Mr. Layton. Do
02:43:07 6 you recall those sources?

02:43:08 7 A. The Layton article on the
02:43:10 8 Manitoulin incident of 1863.

02:43:16 9 Q. Yes.

02:43:16 10 A. Yes.

02:43:17 11 Q. So that was the version in "White
02:43:18 12 Man's Law". If I could go to your report at
02:43:21 13 page 58? So it starts where:

02:43:35 14 "A violent attempt of the
02:43:38 15 Canadian government to arrest Indians
02:43:41 16 on Manitoulin Island [...]"
02:43:42 17 And perhaps if you could read that
02:43:44 18 paragraph that would be good. Not out loud,
02:43:45 19 just to yourself.

02:44:20 20 A. (Witness reading the document.)
02:44:21 21 Okay.

02:44:21 22 Q. So in this version you indicate
02:44:23 23 that the Indigenous people were asserting their
02:44:26 24 treaty rights, but they threatened a fisherman.
02:44:30 25 But the Canadian authorities overreacted to this

02:44:33 1 threat, and the authorities sent 22 constables
02:44:39 2 from Collingwood, Barrie and Toronto and
02:44:42 3 proceeded to Manitoulin by boat.

02:44:45 4 In the confrontation with Mr. Gibbard
02:44:50 5 arrested one Indian. Mr. Gibbard mysteriously
02:44:54 6 died while returning the Indian to the island
02:44:59 7 after a court had refused to convict him.

02:45:02 8 And then you say the details are not
02:45:04 9 important here. But you do say:

02:45:06 10 "[...] it is clear that the
02:45:07 11 government had no difficulty nine
02:45:07 12 years after the Saugeen surrender in
02:45:07 13 raising a considerable armed force to
02:45:09 14 protect the rights of white fishermen
02:45:11 15 on the Manitoulin Reserve, after they
02:45:13 16 were unable to provide any legal
02:45:15 17 protection against squatters to the
02:45:17 18 Saugeen."

02:45:18 19 If we could go to the last sentence:

02:45:21 20 "It is impossible to believe that
02:45:22 21 if the Saugeen had resorted to their
02:45:23 22 own resources to forcibly drive white
02:45:27 23 squatters from their lands that
02:45:28 24 Canadian and British authorities would
02:45:29 25 not have intervened with similar

02:45:32 1 force."

02:45:32 2 So do you agree that you've
02:45:34 3 characterized this differently because you want
02:45:36 4 to make a different point?

02:45:38 5 A. No, it's -- it's -- I think one
02:45:44 6 way to see it is there's 15 years or so, so
02:45:49 7 there's information that's -- I've learned over
02:45:54 8 the 15 years going from -- you know, the
02:45:57 9 difference in constables. I also make the point
02:46:00 10 in the middle of this:

02:46:04 11 "While the details of the
02:46:04 12 incident are not important here, it's
02:46:07 13 clear the government had no difficulty
02:46:09 14 nine years after the Saugeen surrender
02:46:11 15 in raising a considerable armed force
02:46:13 16 [...]"

02:46:13 17 I'm simply using the example to prove
02:46:16 18 that point, you know, whether it's -- you know,
02:46:21 19 any time you get a description from the frontier
02:46:24 20 of, you know, 50 or -- Indians and, you know,
02:46:29 21 the number of militia or constables or militia
02:46:38 22 that show up or don't show up, the numbers are
02:46:42 23 difficult to figure out.

02:46:43 24 And you read -- you're reading
02:46:44 25 different -- mostly, you know, accounts. And --

02:46:47 1 so over time I got different information about,
02:46:53 2 for example the 22 armed constables, not 13
02:46:57 3 policemen. But the outline of the story as it's
02:47:01 4 wrapped around the point, I think, is -- is --
02:47:01 5 is -- the core story's accurate and it makes the
02:47:04 6 point.

02:47:05 7 There are a couple of details in it
02:47:07 8 that are different. I didn't change it to fit
02:47:10 9 the report. I could have made it work in the
02:47:13 10 report using the facts from the -- as I wrote
02:47:19 11 them in the book.

02:47:21 12 Whether it's a treaty violation is
02:47:23 13 a -- I'm talking -- whenever I talk about a
02:47:26 14 treaty violation, I'm saying it's a -- it's how
02:47:28 15 the Indians perceived the treaty.

02:47:36 16 We're talking with -- well, these are
02:47:38 17 Indians perceiving the treaty. So whether or
02:47:40 18 not it is a treaty violation is of course a
02:47:43 19 legal question that would need to be resolved in
02:47:46 20 the appropriate forum, and that wasn't here.
02:47:51 21 That question was never decided.

02:47:52 22 But I didn't -- if you're suggesting I
02:47:54 23 would change the facts to fit the report, that
02:47:57 24 wasn't my intention. It was -- you have to
02:48:00 25 imagine when you're writing legal history you

02:48:03 1 have -- you know, the volume of documents
02:48:05 2 available is bigger than a room, and you're
02:48:08 3 using much smaller piles of documents. And
02:48:13 4 there's an inherent selectivity in it. There's
02:48:16 5 also an inherent -- you know, your perception at
02:48:20 6 the time.

02:48:21 7 It's a fluid, intellectual process.
02:48:27 8 So, you know, on one hand I'm sorry the accounts
02:48:29 9 are different 15 years apart. On the other
02:48:32 10 hand, if I learned something then the second
02:48:36 11 account might be more accurate. You can't stand
02:48:38 12 on something you said 20 years ago if you get
02:48:41 13 different information.

02:48:42 14 Q. Now, the sources you rely on in
02:48:44 15 your report, it is in fact only one source,
02:48:47 16 which is the Layton book -- Layton article that
02:48:49 17 you rely on in "White Man's Law"?

02:48:53 18 A. I read it differently. I mean,
02:48:55 19 I'm just -- I'm reading it -- and I'm -- well, I
02:48:58 20 read other documents too. I'm citing the Layton
02:49:01 21 report.

02:49:01 22 Q. I see. And I guess that was one
02:49:08 23 of my questions, was, did you look at any
02:49:11 24 primary documents about this event?

02:49:13 25 A. In the 2013 report I did not. I

02:49:25 1 cannot recall -- I read, you know, I mean,
02:49:29 2 literally thousands of documents for "White
02:49:30 3 Man's Law". I can't recall -- I mean, I read
02:49:34 4 many primary documents. I do not recall if I
02:49:39 5 read primary documents in the context of writing
02:49:41 6 that.

02:49:43 7 Q. And I'd like to take you back to
02:49:45 8 your testimony yesterday, which we have only a
02:49:56 9 rough transcript. But in your testimony
02:49:58 10 yesterday it appears at page 51 in the rough
02:50:02 11 transcript at 11:02, 45 seconds you said:

02:50:14 12 "When you have an event where you
02:50:15 13 get a small Indian pushback, in this
02:50:18 14 case I'm not remembering exact
02:50:19 15 numbers, but a handful of Indians sort
02:50:23 16 of accost a handful of fishermen on
02:50:26 17 Manitoulin Island, basically eject
02:50:28 18 them for, again, fishing on Indian
02:50:30 19 land, in their view, and on -- you
02:50:32 20 know, the officials in Ontario summon
02:50:34 21 up -- I lay it out in the book -- a
02:50:36 22 militia or militia-like body composed
02:50:39 23 of constables, some game wardens,
02:50:42 24 evidently a few volunteers from the
02:50:45 25 lower Georgian Bay area who get in a

02:50:48 1 boat, 20 of them get in a boat, sail
02:50:48 2 up to Manitoulin Island, arrest one
02:50:50 3 Indian who's still there, hasn't even
02:50:50 4 left in the process of -- evidently
02:50:54 5 they went out into Georgian Bay to
02:50:56 6 search for -- or the boat went out,
02:50:58 7 and one of the commissioners fell
02:50:59 8 overboard by -- he had nothing to do
02:51:02 9 with this. So they lost the white
02:51:05 10 commissioner. And they came back to
02:51:07 11 Toronto with the Indian who had been
02:51:09 12 arrested, and at trial cases were
02:51:12 13 dismissed."

02:51:13 14 And you were asked what the relevance
02:51:14 15 of this was, and you said:

02:51:15 16 "The relevance of it is that the
02:51:17 17 Crown clearly had the capacity to
02:51:19 18 mount substantial law enforcement
02:51:21 19 operations in this period."

02:51:23 20 And I would suggest, again, that
02:51:28 21 you've characterized or selected facts to make
02:51:32 22 your point here that the Canadian government was
02:51:39 23 in the wrong and overreacted with a large force
02:51:44 24 of -- you said militia, game wardens, constables
02:51:55 25 and a few volunteers. Do you agree with that or

02:51:58 1 disagree?

02:51:59 2 A. I mean, again, I'll assume the
02:52:07 3 transcript that you read to me, you know, I'm
02:52:09 4 speaking in -- as best I can in this box about
02:52:15 5 anything you choose to ask me.

02:52:19 6 The outline of all three accounts
02:52:21 7 leads to my conclusion. There are differences
02:52:25 8 between them, but they're not -- and, you know,
02:52:31 9 some of those differences might be, you know, on
02:52:33 10 a scale of materiality depending on how you're
02:52:37 11 assessing it.

02:52:38 12 When you're looking at my conclusion
02:52:40 13 and what point I was trying to make, I think
02:52:42 14 there's consistency here. But I do concede
02:52:46 15 there -- that the differences you're pointing
02:52:48 16 out are there.

02:53:02 17 Q. For the purposes of what we're
02:53:04 18 trying to consider in this trial, I would like
02:53:06 19 to take you to one of the primary sources to see
02:53:10 20 if you agree on what we can derive from the
02:53:22 21 facts. If I can call up SC1189? Have you ever
02:53:40 22 seen this document before?

02:53:46 23 A. Um, I can't see enough of it now
02:53:59 24 to recognize it. Can you scroll it down a bit
02:54:23 25 more?

02:54:37 1 THE COURT: We now have a different
02:54:38 2 document on the screen, sir. Which one is it
02:54:40 3 you're asking the witness about?

02:54:44 4 MR. BEGGS: It's a collection of
02:54:45 5 documents.

02:54:45 6 THE COURT: If you could be specific
02:54:47 7 sir, because it sounded like a single document,
02:54:49 8 which we've now gone past.

02:54:51 9 BY MR. BEGGS:

02:54:52 10 Q. Okay. If we can scroll up to the
02:54:54 11 top part of this page? This is a return before
02:55:02 12 the government collecting documents, copies of
02:55:05 13 reports, et cetera with respect to the events of
02:55:07 14 Manitoulin Island and the events considered
02:55:09 15 concerning Mr. Gibbard.

02:55:14 16 Have you seen this collection of
02:55:15 17 documents before or that you recall?

02:55:17 18 A. I'm trying to recall. I mean, I
02:55:21 19 see it now. I didn't cite it in my book, so I'm
02:55:28 20 sort of deducing that had I seen it when I wrote
02:55:32 21 my book I would have cited it. Therefore I
02:55:35 22 assume I didn't.

02:55:38 23 You must recognize that the number of
02:55:39 24 documents I've held in my hand over this time
02:55:44 25 is -- you know, my mind doesn't recall them all.

02:55:49 1 But I didn't cite it in my book, so
02:55:52 2 I'm not aware of having seen this document
02:55:55 3 before.

02:55:56 4 Q. Okay. I would like to ask that
02:55:58 5 this return of documents pertaining to
02:56:02 6 Manitoulin Island be made the next exhibit, Your
02:56:06 7 Honour.

02:56:08 8 THE COURT: Mr. Registrar -- oh,
02:56:09 9 sorry, Ms. Guirguis, were you standing up?

02:56:12 10 MS. GUIRGUIS: Yes, I was going to
02:56:13 11 ask, is it just this part of the document, Your
02:56:15 12 Honour, or is it the entire collection?

02:56:18 13 THE COURT: It seems to be a 41-page
02:56:20 14 document, Mr. Beggs. Is this the entire
02:56:23 15 collection that you've described?

02:56:25 16 MR. BEGGS: It's the entire
02:56:26 17 collection, and I'll be starting at page 34.

02:56:32 18 THE COURT: Ms. Guirguis?

02:56:34 19 MS. GUIRGUIS: That's fine. No
02:56:36 20 objection, Your Honour.

02:56:36 21 THE COURT: All right. Thank you.
02:56:37 22 Mr. Registrar.

02:56:39 23 THE WITNESS: Exhibit Number 4301.

02:56:41 24 EXHIBIT NO. 4301: Documents
02:56:41 25 pertaining to Manitoulin Island;

02:56:41 1 Document SC1189.

02:56:42 2 THE COURT: What page did you say,

02:56:42 3 sir, you were going to?

02:57:03 4 BY MR. BEGGS:

02:57:03 5 Q. It's page 34 of the PDF. The

02:57:03 6 pages are not numbered in the document.

02:57:03 7 So this document in the collection is

02:57:04 8 dated 27th of July, 1863. And if we can scroll

02:57:10 9 down a bit to the next page -- well, actually,

02:57:15 10 it's another page over. Farther down, please.

02:57:17 11 It's written by Mr. Gibbard and addressed to the

02:57:29 12 Honourable Sir William McDougall, Commissioner

02:57:34 13 of Crown lands.

02:57:39 14 And if we can go back up to the top of

02:57:41 15 that letter?

02:57:41 16 If I could ask you to read that

02:58:02 17 passage down to where it begins, "that on

02:58:05 18 arrival at Wikwemikong"?

02:58:07 19 A. Sorry, from the beginning to --

02:58:09 20 Q. From "sir" down to "that on

02:58:13 21 arrival".

02:58:16 22 A. Read it out loud or read it to

02:58:17 23 myself --

02:58:18 24 Q. To yourself, please.

02:59:10 25 A. (Witness reading the document.)

02:59:12 1 To "that on arrival"?

02:59:13 2 Q. Yes, that's right. So what I
02:59:14 3 wanted to ask you about is the process by which
02:59:17 4 this force was gathered.

02:59:20 5 So from the document it appears that
02:59:25 6 Mr. Gibbard, who is a fishery overseer or
02:59:28 7 inspector, recruited a force of police from
02:59:34 8 Toronto, which he calls "eight special
02:59:40 9 constables", is that correct?

02:59:45 10 A. I'm -- you almost need -- I need
02:59:48 11 to add these up on your fingers.

02:59:51 12 He gets three from -- I mean, it's
02:59:52 13 sort of like three from here and four from
02:59:54 14 there, and I'm trying to count that up, having
02:59:56 15 not seen it before. He comes up with a -- I'm
03:00:00 16 trying to -- you know, Captain Prince, eight
03:00:04 17 special constables, that's 11. Sorry to do
03:00:07 18 this. Chief Constable Rogers, that's 12. Four
03:00:10 19 others, that's 16. Chief Constable Dudgeon,
03:00:18 20 that's 17. Seven others, that's 24, right?
03:00:23 21 "With a boat."

03:00:24 22 Q. Okay.

03:00:26 23 A. I just want to point out, one
03:00:28 24 account said 22; the account I cited said 13.
03:00:32 25 We already have three sets of numbers.

03:00:35 1 And so, you know, it's a fascinating
03:00:41 2 document, I have to say, from just that detail
03:00:43 3 on -- I wish I'd seen it. The easiest thing to
03:00:52 4 admit in writing a legal history is that somehow
03:00:55 5 you missed a document, because you miss
03:00:57 6 documents. You simply can't process all the
03:01:00 7 documents in a history of Canada.

03:01:02 8 So I -- obviously I would have loved
03:01:05 9 to have had this document.

03:01:09 10 So now it's 24 police, so all of our
03:01:12 11 accounts are wrong.

03:01:13 12 Q. Okay. So, yes, they gathered
03:01:15 13 them from Toronto, Barrie and Collingwood,
03:01:17 14 correct?

03:01:18 15 A. I think I said that, right?

03:01:20 16 Q. Yes.

03:01:20 17 A. Yeah, you see.

03:01:21 18 Q. And the people from Toronto were
03:01:23 19 police officers, is that right?

03:01:25 20 A. Right.

03:01:26 21 Q. And the people from Barrie and
03:01:28 22 Collingwood were constables?

03:01:30 23 A. Special constables.

03:01:31 24 Q. Right.

03:01:32 25 A. Which, I mean -- I mean, I assume

03:01:35 1 they're raised for the occasion, but the
03:01:36 2 question being, what the word -- what the phrase
03:01:39 3 "special constable" means. And it could mean
03:01:42 4 different things in a context like this.

03:01:47 5 Q. Right. And he says he agreed to
03:01:49 6 pay the constables \$2 per day, each man to bring
03:01:53 7 a revolver, and then a few others he pays \$3 a
03:01:56 8 day, is that correct?

03:01:58 9 A. Yeah, I'm trying to -- I'm
03:02:00 10 fascinated again, and they're all men of great
03:02:03 11 respectability.

03:02:04 12 Oh, I guess Chief Constable and
03:02:11 13 Detective Colgan get \$3 a day. I'm trying to
03:02:16 14 figure this out though. It's not clear.

03:02:19 15 Q. And then it says he ascertained
03:02:21 16 from Captain Prince of the Toronto force that:

03:02:24 17 "[...] the above sums were, if
03:02:26 18 anything, below the usual rates for
03:02:28 19 such special services, and all refused
03:02:30 20 to go on such an expedition for less."

03:02:35 21 Does that coincide with your
03:02:36 22 understanding of constables and --

03:02:38 23 A. The question of what a constable
03:02:40 24 is being paid in 1863?

03:02:43 25 Q. Right.

03:02:44 1 A. I mean, I understand mid-19th
03:02:53 2 century a dollar a day is good pay for an
03:02:56 3 average worker. These were obviously highly
03:02:59 4 specialized function areas. It also says they
03:03:02 5 wanted extra pay because it was a job they
03:03:04 6 didn't want to do.

03:03:07 7 But you understand my point here was
03:03:09 8 that the government had no point raising these
03:03:13 9 people nor paying them to do this job.

03:03:15 10 THE COURT: I'm totally lost, all
03:03:17 11 right? The question was, what is a constable
03:03:19 12 paid in 1863? That was the question. What is a
03:03:24 13 constable paid in 1863?

03:03:26 14 And now you're talking about something
03:03:28 15 else altogether. So maybe Mr. Beggs is happy, I
03:03:30 16 don't know.

03:03:31 17 THE WITNESS: Sorry.

03:03:32 18 THE COURT: But I would like to know
03:03:33 19 the answer to the question, if you know it.

03:03:35 20 THE WITNESS: I don't know.

03:03:38 21 THE COURT: All right. That's fine.

03:03:39 22 THE WITNESS: It says 2, \$3 a day.

03:03:48 23 BY MR. BEGGS:

03:03:49 24 Q. Now, from your research is it
03:03:57 25 correct that constables operated on a fee basis

03:04:00 1 that they were paid for specific services, not
03:04:03 2 salaries?

03:04:11 3 A. I think the question of how law
03:04:13 4 enforcement officers were paid in different
03:04:16 5 contexts at this time, sometimes people were
03:04:19 6 paid in a fee per service, others were salary.
03:04:24 7 I can't say among these people at this time. I
03:04:29 8 don't know.

03:04:31 9 Q. If I could go down to the
03:04:33 10 sentence -- sorry, two sentences that begin
03:04:38 11 "that on arrival". The one that says:

03:04:43 12 "That on arrival within the
03:04:44 13 District I swore in the special
03:04:46 14 constables, made out the summonses and
03:04:49 15 prepared warrants, fully expecting to
03:04:51 16 meet with some violence or opposition
03:04:53 17 from the parties named."

03:04:55 18 So from that we can discern that in
03:05:00 19 this case the constables had to be sworn in, is
03:05:03 20 that correct?

03:05:05 21 A. Yes.

03:05:07 22 Q. As special constables, that's
03:05:09 23 right?

03:05:09 24 A. Yes.

03:05:10 25 Q. And that there had to be warrants

03:05:13 1 to give these people authority, is that right?

03:05:21 2 A. I'm -- you know, again, from this
03:05:24 3 information what -- I'm thinking, what names are
03:05:28 4 they putting on the summonses and warrants?
03:05:31 5 Because -- and if you're fully expecting to meet
03:05:35 6 with some violence or opposition from the
03:05:38 7 parties named, they have some names.

03:05:41 8 It's just hard for me to tell. But I
03:05:43 9 take this as a description of what's going on,
03:05:46 10 but I can't really fully answer that question.

03:05:51 11 Q. Would you agree that generally
03:05:53 12 speaking constables didn't have much authority
03:05:56 13 to act absent warrants?

03:06:03 14 A. I've always accepted under the
03:06:05 15 common law if one saw a crime committed in front
03:06:08 16 of them you could make an arrest. So I'm trying
03:06:10 17 to figure out what legal regime they're
03:06:12 18 operating under at this time, but they did take
03:06:16 19 the time on this data -- on this document to
03:06:23 20 fill out summonses and prepare warrants.

03:06:26 21 Q. Well, that's something I actually
03:06:27 22 want to ask you about, the difference between
03:06:31 23 constables of the 1850s and what we understand
03:06:36 24 police being today. A constable -- they were
03:06:45 25 not the same, were they?

03:06:46 1 A. No, it's evolving.

03:06:47 2 Q. And constables had certain
03:06:49 3 authority which was limited in certain ways?

03:06:53 4 A. Yes. And it was changing.

03:07:04 5 Q. Sorry? I didn't catch --

03:07:04 6 A. Oh, sorry. They have limited
03:07:05 7 authority in certain ways, but it's rapidly
03:07:07 8 evolving in this period because society is
03:07:10 9 getting more complex and the needs of law
03:07:13 10 enforcement are getting more complex.

03:07:15 11 Q. Would you agree that ordinarily
03:07:15 12 constables can only act in the county for which
03:07:19 13 they're appointed?

03:07:24 14 A. It would depend on the statute at
03:07:26 15 the time, and I simply don't have the statute of
03:07:29 16 the time in front of me.

03:07:30 17 Q. Okay.

03:07:31 18 A. I mean, they have some authority
03:07:32 19 from some place that limits them, but I don't
03:07:36 20 know the extent of that at this time.

03:07:42 21 But they're sworn in specially when
03:07:44 22 they arrive at Manitoulin. So if a -- if they
03:07:49 23 had authority in Parry Island and didn't at
03:07:54 24 Manitoulin, they were sworn in again. So they
03:07:58 25 had authority in Manitoulin because they were

1 sworn in.

2 So had they gone somewhere else could
3 they have been sworn in there? In that case
4 there, the fact that they're limited by a
5 particular jurisdiction seems to be a bit
6 expandable or fungible.

7 Q. Okay. But the swearing in in
8 different locations was a necessary step, is
9 that right?

10 A. Well, I'm actually sitting here
11 thinking, what if they hadn't been sworn in?
12 How would the story be different? Would one of
13 the Indians who'd been arrested then argue that
14 the arrest was illegal because the constable
15 hadn't been properly sworn in?

16 You know, these things are pretty
17 complicated, and this narration doesn't really
18 provide all the context I need. So I'm asking
19 questions, you know, just as I read this. I'm
20 trying to understand honestly what's going on
21 and what the legal basis of this is.

22 Q. Now, I believe you said a few
23 minutes ago that you thought a constable if he
24 saw a crime being committed in front of him
25 could act without a warrant, is that correct?

03:09:26 1 A. Again, I said that, and it's an
03:09:30 2 ordinary assumption of the way that law
03:09:32 3 enforcement operates. Even, for example, I
03:09:35 4 mean, at the time a night watchman who's being
03:09:39 5 paid by, you know, me to watch my warehouse, if
03:09:42 6 he sees a person being robbed while he's walking
03:09:49 7 around my warehouse, I assume he would seize
03:09:53 8 them.

03:09:54 9 You might call it -- and then we'd
03:09:56 10 say, what's his legal power to arrest? I would
03:09:59 11 need to look at the statutes governing the
03:10:01 12 situation at the time. It's not obvious to me
03:10:03 13 now, as I sit here, and from my work on police
03:10:07 14 history in the 1830s, '40s, '50s, '60s,
03:10:15 15 when this is happening, the police powers are
03:10:18 16 changing rapidly; because legislatures are
03:10:19 17 giving the police more powers, because they're
03:10:23 18 exactly the kind of situations we're talking
03:10:25 19 about.

03:10:25 20 So the question again, if these
03:10:26 21 officers had acted on Manitoulin Island without
03:10:29 22 being sworn in, how would that have come out in
03:10:32 23 court later? Would these arrests, for example,
03:10:34 24 have been nullified because the special
03:10:37 25 constables didn't have authority? I can't say.

03:10:41 1 I kind of doubt it, but it is a period where all
03:10:44 2 this is changing.

03:11:02 3 Q. But you would agree that in this
03:11:04 4 scenario Mr. Gibbard did pay the constables and
03:11:07 5 did prepare warrants of some kind?

03:11:09 6 A. Yes.

03:11:14 7 Q. Now, it refers to the Toronto
03:11:15 8 Police Force. Could you tell me when the
03:11:17 9 Toronto Police Force was formed?

03:11:19 10 A. No, I don't know.

03:11:20 11 Q. Most police forces in
03:11:22 12 metropolitan cities around the world were only
03:11:28 13 developed in the 19th century, is that correct?

03:11:30 14 A. Yeah, I mean, 1830s, '40s,
03:11:34 15 '50s, you very commonly get municipal police
03:11:38 16 forces that evolve from night watches. But I
03:11:41 17 can't say for Toronto because every city is
03:11:43 18 different, and Toronto of course is established
03:11:45 19 relatively -- you know, I mean, not late as
03:11:47 20 cities go in Canada, but you know, from -- you
03:11:50 21 know, it's a tiny town, time of the War of 1812.
03:11:56 22 So I can't tell you the date.

03:11:57 23 And probably there were several
03:11:59 24 precursors of the Toronto Police as the
03:12:02 25 institution evolved in the 1820s, '30s and

03:12:06 1 '40s.

03:12:07 2 Q. Do you know if there were any
03:12:08 3 police in any other city in Upper Canada besides
03:12:12 4 Toronto at the time?

03:12:13 5 A. What do you mean -- whether --
03:12:14 6 what the legal status of Kingston or Hamilton is
03:12:20 7 at this time? I don't know.

03:12:22 8 Q. You don't know if they had police
03:12:24 9 --

03:12:24 10 A. I don't know when they became
03:12:26 11 cities. I mean, they were evolving from, you
03:12:29 12 know, the -- I mean, the growth of a place like
03:12:33 13 Buffalo, for example, is 10,000 to half a
03:12:35 14 million at this time. I believe Toronto, you
03:12:37 15 know, is behind that, but it approximates that
03:12:42 16 kind of rapid growth.

03:12:43 17 Q. So it had to be a large city to
03:12:46 18 have a police force as opposed to constables?

03:12:50 19 A. Yeah, I mean, it's happening in
03:12:55 20 the range of some tens of thousands. I don't
03:12:57 21 know what you mean by "a large city". Obviously
03:13:00 22 compared to now, not large but large at the
03:13:03 23 time.

03:13:12 24 Q. Do you know if the towns near the
03:13:15 25 Treaty 72 area had any police forces around

1 1850?

2 A. Well, I would assume -- I
3 actually -- you saw I tried to figure that out.
4 And I looked at Owen Sound. And the -- Owen
5 Sound I believe has a jail, I remember, in 1853
6 and a sheriff. And that's what you would get in
7 a typical rural area, the sheriff deputizing
8 or -- deputizing people or appointing special
9 constables as he might have needed to.

10 Ordinarily when you get a county, you
11 get a sheriff and a jail, you know,
12 civilization.

13 So, you know, that would -- so
14 presumably the sheriff in Owen Sound in 1853
15 would have had the ability to appoint constables
16 as he needed, probably a process similar to
17 this, had something happened, and I'm simply --
18 well, this is 1863, so we're in that range of
19 law enforcement development and capacity.

20 Q. Here it refers to chief
21 constables in Barrie and Collingwood. What
22 would the difference between a chief constable
23 and a sheriff be?

24 A. A sheriff is a county official,
25 whether elected or appointed in those days I

03:14:45 1 don't know. A chief constable ordinarily comes
03:14:49 2 in in a municipal context, as I understand it.

03:14:54 3 Q. Do they have different powers or
03:14:57 4 just --

03:14:58 5 A. I would -- we can deduce some of
03:15:03 6 that from here. But I would need to look at the
03:15:06 7 criminal procedure laws enforced in the 18 --
03:15:08 8 well, here 1863; 1853 in the case of Owen Sound
03:15:13 9 and see, you know, what that is.

03:15:18 10 You know, we still have those -- we
03:15:21 11 still have those kinds of issues about the
03:15:24 12 powers of the various kinds of law enforcement.
03:15:28 13 So obviously whether -- I mean, they're both
03:15:34 14 strengths and weaknesses of expanding and
03:15:36 15 restricting powers. I can't say how this is
03:15:40 16 sorting out in this context because I haven't
03:15:44 17 researched it.

03:15:45 18 Q. So we know that Grey County had a
03:15:49 19 sheriff, correct?

03:15:51 20 A. Yes.

03:15:51 21 Q. At the time? Or actually I think
03:15:53 22 in 1854 they had a sheriff?

03:15:56 23 A. Somewhere in that period. I
03:15:57 24 don't have the documents in front of me.

03:15:58 25 Q. Well, I think you referred to a

1 letter from Mr. Oliphant to Sheriff Schneider?

2 A. Yeah, right. It was the letter
3 dated, though, 1850 or 1854. I mean, I'm just
4 not remembering the date on that letter now.

5 Q. Okay. So there was a sheriff in
6 Owen Sound?

7 A. Schneider. His name was
8 Schneider.

9 Q. And we know that Grey County only
10 became a separate county in 1853, correct?

11 A. Yes. I believe so.

12 Q. And so presumably Sheriff
13 Schneider only started to sheriff about 1853?

14 A. It would seem so.

15 Q. And we know that Bruce County was
16 still connected to Huron County in 1854?

17 A. Right. It doesn't have its own
18 sheriff.

19 Q. So presumably there's a sheriff
20 in Huron County?

21 A. I don't know who it is but
22 presumably there is.

23 Q. And do we know whether there was
24 any constables in Huron and Bruce?

25 A. I don't know.

03:17:15 1 Q. And do you know whether there's
03:17:17 2 any constables in Grey County?

03:17:19 3 A. I don't know. I presume if this
03:17:30 4 process was operating at the time, they could
03:17:31 5 have gotten constables from Collingwood, Barrie
03:17:36 6 and Toronto had they had a legal problem of the
03:17:38 7 kind of magnitude described here. That's my
03:17:42 8 argument.

03:17:43 9 Q. Okay. If I could call up a
03:17:56 10 different document? If I could call up document
03:18:26 11 SC1185? If you can scroll down to the title?

03:20:22 12 This is another return, which is a
03:20:30 13 collection of documents, with the legislative
03:20:33 14 assembly, which contains:

03:20:41 15 "A copy of the circular issued
03:20:43 16 from the Attorney General's department
03:20:45 17 bearing the date of the 14th of
03:20:48 18 January, 1882, with respect to
03:20:49 19 efficiency or otherwise of the present
03:20:51 20 system detecting crime and bringing
03:20:53 21 the offenders to justice with the
03:20:55 22 answers to the circular and any other
03:20:58 23 correspondence on the subject."

03:21:00 24 And it's dated March 17th, 1884. So,
03:21:12 25 Professor Harring, I appreciate you haven't had

03:21:15 1 a chance to look at the entirety of this, but
03:21:17 2 from the title, do you recall if you've seen
03:21:20 3 this before?

03:21:21 4 A. I don't believe I've seen this
03:21:23 5 document before, and I'm relatively sure of that
03:21:26 6 because I don't -- my book on "White Man's Law"
03:21:32 7 doesn't deal with the general problem of crime
03:21:34 8 in Canada as late as 1882. It's -- I'm finished
03:21:38 9 with most of it by then, so I've not seen this
03:21:43 10 document before.

03:21:44 11 Q. And that's actually what I want
03:21:45 12 to ask you about first. So it's about crime and
03:21:50 13 detecting crime in 1882 to 1884. That's post
03:21:53 14 confederation?

03:21:56 15 A. Yes.

03:21:58 16 Q. And it's 30 years after the date
03:22:06 17 of Treaty 72. Has law enforcement changed
03:22:11 18 dramatically in that time period?

03:22:18 19 A. In Canada you mean?

03:22:19 20 Q. Between -- in Ontario between
03:22:20 21 1854 and 1884.

03:22:23 22 A. I would assume it would have in
03:22:25 23 the cities, maybe less in the country. The
03:22:27 24 rural areas have different levels of
03:22:28 25 development. But I haven't researched this in

03:22:31 1 this period, and I've not seen this document.

03:23:18 2 Q. In that case I would like to ask
03:23:19 3 that this collection of documents pertaining to
03:23:19 4 the Attorney General's circular of January 1882
03:23:19 5 be made the next exhibit, Your Honour.

03:23:22 6 THE COURT: Mr. Registrar.

03:23:22 7 THE REGISTRAR: Exhibit Number 4302.

03:23:23 8 EXHIBIT NO. 4302: Collection of
03:23:23 9 documents pertaining to the Attorney
03:23:23 10 General's circular of January 1882;
03:23:23 11 Document SC1185.

03:23:30 12 BY MR. BEGGS:

03:23:31 13 Q. If we could scroll down to the
03:23:31 14 next page? So this is a letter written by the
03:23:32 15 -- from the Attorney General's office on January
03:23:35 16 14th, 1884. And if you could take a moment to
03:23:40 17 read that letter?

03:23:56 18 A. (Witness reading the document.)

03:24:36 19 Okay. I'm finished.

03:24:37 20 Q. So basically would you agree that
03:24:37 21 the Attorney General's office is seeking
03:24:40 22 information from -- throughout the province on
03:24:41 23 the administration of justice?

03:24:44 24 A. That's what he's apparently
03:24:46 25 trying to do.

03:24:46 1 Q. Okay. If we could scroll down to
03:24:48 2 where some of the answers are? This section is
03:24:57 3 called an "abstract of answers", and it appears
03:25:00 4 to be organized by county. If we could scroll
03:25:03 5 down to hopefully look at Bruce?

03:25:06 6 So here is a summary of the answers
03:25:08 7 from Bruce County organized by the names of the
03:25:18 8 people.

03:25:18 9 Actually, we better go back to the
03:25:21 10 letter to clarify what we're talking about. So
03:25:29 11 the question is:

03:25:30 12 "[...] whether you consider the
03:25:32 13 constabulary force in your counties
03:25:34 14 reasonably sufficient for the purpose
03:25:36 15 or whether you think that in the
03:25:38 16 interests of the due administration of
03:25:39 17 justice this force, as now
03:25:41 18 constituted, requires to be
03:25:43 19 supplemented by the appointment of
03:25:45 20 detectives or constables paid by
03:25:48 21 salary instead of fees."

03:25:50 22 And it asks, do people escape
03:25:53 23 detection and that sort of thing. So we can go
03:25:58 24 back to County of Bruce.

03:26:07 25 A. Okay.

03:26:07 1 Q. So in the County of Bruce in 1882
03:26:16 2 the answers were roughly, a judge said:
03:26:19 3 "It was reasonably sufficient for
03:26:19 4 the county, the force that is in
03:26:22 5 existence."
03:26:24 6 The sheriff said:
03:26:24 7 "The present system is
03:26:25 8 insufficient but do not think it
03:26:28 9 necessary to employ permanent
03:26:32 10 detective paid by salary or if some
03:26:36 11 officer would offer to do this as
03:26:36 12 occasion arises, it would be
03:26:36 13 sufficient."
03:26:40 14 The county attorney said:
03:26:42 15 "Salaried detectives not
03:26:43 16 necessary in Bruce but county attorney
03:26:46 17 should have authority to pay extra in
03:26:50 18 special cases."
03:26:51 19 The chief of police said:
03:26:52 20 "Present quite insufficient and
03:26:54 21 fees do not pay. One good detective
03:26:57 22 should be appointed by the government
03:26:59 23 for the county."
03:27:00 24 The county treasurer said:
03:27:02 25 "Think there should be at least

03:27:04 1 one constable of proper training, paid
03:27:07 2 by salary, who could act as a
03:27:09 3 detective."
03:27:11 4 And the county warden said:
03:27:14 5 "Present system is quite
03:27:15 6 sufficient for Bruce."
03:27:16 7 That's a bit varying in opinion, would
03:27:18 8 you agree?
03:27:19 9 A. Yes.
03:27:19 10 Q. But if we can extrapolate from
03:27:22 11 that, it appears, first of all, that there is a
03:27:24 12 sheriff and a chief of police in 1882 in Bruce,
03:27:27 13 is that right?
03:27:29 14 A. Yes, whether the chief of police
03:27:31 15 is like the Southampton chief of police or
03:27:34 16 whether it's county chief of police would be
03:27:36 17 interesting.
03:27:37 18 I'm not sure what his relationship is
03:27:40 19 to this, but there is a chief of police.
03:27:43 20 Q. And it does appear from these
03:27:45 21 answers that what constables there are are paid
03:27:48 22 by fees and not by salary, is that correct?
03:27:52 23 A. Well, it's also interesting in
03:27:53 24 that the original letter up front is asking
03:27:56 25 about the sufficiency of the constabulary force,

03:28:00 1 and here they're talking about the -- they
03:28:06 2 appear to be talking about the way law
03:28:08 3 enforcement works in -- more generally.

03:28:11 4 I'm not sure they're talking about the
03:28:12 5 same thing because -- because the categories are
03:28:17 6 kind of, you know, I think a bit murky and it's
03:28:21 7 a bit unclear what each of these different
03:28:24 8 county officials is seeing the county's law
03:28:27 9 enforcement operating in -- being sufficient or
03:28:32 10 not in different ways, which is interesting.

03:28:42 11 But the people called "constables"
03:28:46 12 seem to be being paid by fees, although they're
03:28:50 13 questioning whether that's a good way to do it
03:28:52 14 as continuing policy.

03:28:56 15 Q. Would it be fair to assume that
03:29:00 16 between 1854 and 1882 there would be more
03:29:07 17 constables in the 1882 period than there were
03:29:09 18 back in 1854?

03:29:12 19 A. I mean, normally you would
03:29:14 20 assume, you know, development with more
03:29:18 21 population, you would have more constables, but
03:29:21 22 with local variations you often find some
03:29:26 23 idiosyncratic things happening.

03:29:28 24 So I think as a general assumption and
03:29:30 25 not, again, understanding the context, that

03:29:32 1 would be a good assumption. But every county is
03:29:35 2 different, especially when it comes to paying
03:29:38 3 for services that cost money.

03:29:41 4 So I would assume increase, but I
03:29:44 5 can't say that that invariably would have
03:29:47 6 happened in every county without looking at more
03:29:51 7 data.

03:29:54 8 And you can see the local officials
03:29:56 9 are all over the place about what's going on.

03:30:01 10 Q. If we could scroll down to the
03:30:03 11 Grey County entry? So in Grey County there's
03:30:14 12 four answers. One from the sheriff:

03:30:20 13 "Two or three competent
03:30:22 14 detectives or constables would be more
03:30:24 15 successful than the entire present
03:30:24 16 constabulary force of the county,
03:30:25 17 suggests inspectors with licences
03:30:27 18 should be appointed constables and
03:30:29 19 paid liberal fees for services in
03:30:31 20 detecting crime in addition to their
03:30:33 21 salaries. Otherwise constables paid
03:30:35 22 by salaries should be appointed."

03:30:39 23 The police magistrate says:

03:30:41 24 "Present system of appointment
03:30:42 25 very unsatisfactory and qualification

03:30:44 1 of men not considered. Criminals
03:30:46 2 often escape for want of proper
03:30:48 3 prosecution. Questions if payment by
03:30:51 4 salary would remedy evil unless force
03:30:51 5 was supervised by a commissioner, or
03:30:55 6 board of commissioners as in cities.
03:30:57 7 County attorney should prosecute all
03:30:59 8 cases where the defendant elects to be
03:31:01 9 tried by police magistrate under
03:31:03 10 Summary Trials Act."
03:31:06 11 The chief constable says:
03:31:07 12 "Present system unsatisfactory
03:31:08 13 and criminals escape, who under a
03:31:12 14 salaried constable system would be
03:31:14 15 brought to justice, but does not think
03:31:16 16 this is so to any great extent. It
03:31:17 17 would be an advantage if services of a
03:31:19 18 detective were available."
03:31:20 19 And the treasurer said:
03:31:22 20 "In country places does not think
03:31:25 21 salaried officers would do. In towns
03:31:27 22 it is the best system. The present
03:31:29 23 force is quite sufficient."
03:31:31 24 So, again, there's some difference in
03:31:34 25 opinion?

03:31:34 1 A. Yes.

03:31:35 2 Q. And, again, it appears there's a
03:31:42 3 sheriff and a chief constable within the county
03:31:44 4 somewhere to apply. You would agree with that?
03:31:50 5 That there's --

03:31:51 6 A. Yes. Yes, I mean, you can see
03:31:56 7 that the sheriff talks about the entire present
03:31:59 8 constabulary force of the county as though -- I
03:32:02 9 don't know what "entire present" is, but it's
03:32:06 10 clearly larger, and he wants two or three
03:32:09 11 competent detectives, who I assume would be
03:32:12 12 salaried, would be more successful than the
03:32:15 13 entire present. I wonder how many the entire
03:32:18 14 present constabulary force is on a fee basis.

03:32:21 15 It's sort of interesting the treasurer
03:32:23 16 doesn't want any salaried officers because that
03:32:26 17 would of course accrue to the county treasury.

03:32:29 18 I mean, it does illustrate the social,
03:32:31 19 political, local character of law enforcement
03:32:34 20 and what people are trying to accomplish in
03:32:38 21 different ways, all these presumably wanting to
03:32:42 22 do the best for the community.

03:32:47 23 Q. So if I can make some general
03:32:49 24 points, and you let me know if you agree with
03:32:52 25 them or not.

03:32:54 1 It appears that in 1882, constables
03:33:00 2 within County of Grey and Bruce were compensated
03:33:06 3 by fees, not salaries. Is that correct?

03:33:12 4 A. Yes.

03:33:14 5 Q. And that at least some of the
03:33:17 6 officials of those counties believed that system
03:33:21 7 is ineffective and that criminals escape
03:33:24 8 justice. Is that correct?

03:33:26 9 A. Yes.

03:33:26 10 Q. Thank you.

03:40:53 11 Looking at the time, Your Honour, I
03:41:10 12 guess I should ask if now would be a good time
03:41:10 13 for a break?

03:41:14 14 THE COURT: Yes, we can take the
03:41:16 15 afternoon break at this time.

03:41:17 16 -- RECESSED AT 3:41 P.M. --

03:41:17 17 -- RESUMED AT 3:54 P.M. --

03:55:15 18 THE COURT: Please go ahead,
03:55:25 19 Mr. Beggs.

03:55:27 20 MR. BEGGS: Thank you, Your Honour.

03:55:29 21 BY MR. BEGGS:

03:55:29 22 Q. If we could go back to the
03:55:30 23 document we were looking at? So this is still
03:55:43 24 Exhibit 4302. If I could jump to page 19 of the
03:56:09 25 document? If we could just scroll up for a

03:56:53 1 moment?

03:56:54 2 It appears that the letter at the top
03:56:58 3 is the response of William Sutton. And if we
03:57:02 4 can just scroll up? And he's the -- he's
03:57:06 5 writing from the Sheriff's Office in Walkerton.
03:57:10 6 So Walkerton would be Bruce County, is that
03:57:13 7 correct?

03:57:14 8 A. I believe so.

03:57:15 9 Q. So we were talking about whether
03:57:18 10 there was -- or who the chief of police would
03:57:22 11 be. If we can go down to page 20, these are the
03:57:29 12 more detailed answers that were given by the
03:57:30 13 individual officers. So if you can scroll down.
03:57:31 14 There we have Captain Moffat of the chief of
03:57:35 15 police of Walkerton. And I think you said that
03:57:40 16 you would assume that would be a municipal body?

03:57:42 17 A. Yes.

03:57:42 18 Q. So I'd like to look at his
03:57:42 19 answer, which begins:

03:57:53 20 "Dear Sir, In reply to your
03:57:55 21 circular of the 14th, in regard to the
03:57:55 22 government appointing detectives paid
03:57:55 23 by salary instead of fees, I think you
03:57:57 24 cannot do a better thing for the very
03:58:00 25 simple reason that if any crime is

03:58:02 1 committed up in this part of the
03:58:03 2 province, the constables are very
03:58:05 3 careless about doing anything because
03:58:07 4 if they follow a criminal and do not
03:58:09 5 catch him or her, as the case may be,
03:58:12 6 they are not likely to get anything
03:58:13 7 for it. And even if they do succeed
03:58:17 8 the fees will not pay the expenses
03:58:19 9 half the time."

03:58:26 10 And then he gives a specific case.

03:58:29 11 But would you agree that that's a good snapshot
03:58:33 12 of the problem of constables operating by fees?

03:58:36 13 A. Well, this is one person's
03:58:39 14 snapshot. There have been other things said
03:58:42 15 about the problem, including the opposite, that
03:58:45 16 they would chase down people on all kinds of
03:58:49 17 pretext to collect a fee.

03:58:51 18 Q. Ah.

03:58:51 19 A. So there is obviously a problem
03:58:53 20 in law enforcement on a fee-per-service basis.
03:58:57 21 And I would say that this person's summarizing
03:59:01 22 his experiences with it probably very
03:59:03 23 accurately. But there would be other
03:59:05 24 experiences with it too.

03:59:06 25 And there's probably a reason we don't

03:59:08 1 do this, you know, that the salaried police
03:59:11 2 forces or law enforcement became the norm.

03:59:22 3 Q. If we could go to page 31? That
03:59:24 4 would take us to Grey County. And you can
03:59:32 5 actually go to the top for a moment. That's the
03:59:34 6 answer of Charles H. Moore, the sheriff in Grey
03:59:38 7 County. You can go to the top of his letter
03:59:47 8 actually. That's page 30. Okay. Yes, you have
03:59:50 9 it.

03:59:52 10 "My Dear Sir, In reply to your
03:59:54 11 circular of the 14th instant, I would
03:59:57 12 state that two or three competent
03:59:57 13 detectives or constables would be more
03:59:59 14 successful in detecting crime than the
04:00:01 15 entire constabulary force in this
04:00:03 16 county."

04:00:04 17 So that was in the summary.

04:00:06 18 A. Yes.

04:00:08 19 Q. "For this reason, that the
04:00:09 20 township constables are without
04:00:10 21 experience and their remuneration not
04:00:12 22 sufficiently large to command the
04:00:13 23 services of an efficient officer,
04:00:13 24 unless supplemented by a liberal
04:00:15 25 reward."

04:00:17 1 And if we could scroll down to the end
04:00:19 2 of this letter:
04:00:23 3 "I believe that criminals now
04:00:24 4 escape detection or conviction who,
04:00:26 5 under such an arrangement as above
04:00:27 6 suggested, would probably be brought
04:00:29 7 to justice. The evil exists to a
04:00:32 8 greater extent than is generally
04:00:34 9 supposed, but owing to the expense
04:00:34 10 that would have to be incurred by an
04:00:37 11 officer in obtaining evidence required
04:00:38 12 to secure a conviction and not
04:00:40 13 provided in any tariff or fees the
04:00:43 14 offender is allowed to go unpunished."
04:00:47 15 And then the next letter is a letter
04:00:51 16 from a police magistrate, George Spencer.
04:00:57 17 Sorry, actually, back with the sheriff's letter.
04:01:00 18 So Sheriff Moore appears to have the same view
04:01:04 19 as the Bruce County officer, is that correct?
04:01:10 20 A. Yes.
04:01:10 21 Q. And -- but you indicated there
04:01:14 22 was a different -- the opposite view was
04:01:16 23 possible?
04:01:17 24 A. Pardon me? I didn't hear.
04:01:18 25 Q. You indicated that the opposite

04:01:20 1 view was possible?

04:01:21 2 A. The opposite view is -- the other
04:01:21 3 thing you need to keep in mind is that if the
04:01:25 4 sheriff -- if we have more full-time constables
04:01:28 5 they are going to be employees of the sheriff.
04:01:30 6 He's building his own office, which, you know,
04:01:34 7 one -- he could be doing this for completely
04:01:38 8 legitimate reasons.

04:01:40 9 But obviously he is a full-time law
04:01:41 10 enforcement officer and has some stake in
04:01:44 11 believing that full-time law enforcement
04:01:46 12 officers, especially working under him, are
04:01:48 13 preferable.

04:01:49 14 So there is a bureaucratic reason for
04:01:51 15 this evolution too. Just a number of reasons
04:01:53 16 coming together, I think, at one time.

04:01:55 17 Q. If we could look at the next
04:01:57 18 letter of Magistrate Spencer. After the first
04:02:05 19 paragraph he begins:

04:02:09 20 "The present system of detecting
04:02:10 21 crime and bringing offenders to
04:02:10 22 justice is faulty in the extreme.
04:02:10 23 County constables, men appointed
04:02:11 24 through the favour of some magistrate
04:02:14 25 or reeve, not on account of efficiency

04:02:16 1 but perhaps because the poor man wants
04:02:16 2 an opportunity of making money by the
04:02:18 3 office, either legitimately or
04:02:21 4 illegitimately, are entrusted with
04:02:24 5 most important duties.

04:02:26 6 Ignorant, conceited, not amenable
04:02:26 7 to discipline, as is often the case
04:02:28 8 with them, sometimes I've had too much
04:02:30 9 reason to suppose, even in league with
04:02:34 10 criminals. Sometimes through jealousy
04:02:35 11 one constable thwarting another
04:02:35 12 constable's case, as I have often
04:02:35 13 suspected and as has often been
04:02:38 14 alleged to me.

04:02:40 15 It is not to be marvelled that
04:02:42 16 the cases of grave crime fall through,
04:02:44 17 which under a better system would be
04:02:47 18 prosecuted through to conviction. In
04:02:51 19 this county, Grey, at any rate I do
04:02:52 20 not consider the constabulary force
04:02:55 21 sufficient or fit for the purpose of
04:02:57 22 detecting crime and punishing the
04:02:59 23 criminals. Far from it.

04:03:00 24 I do not think that the
04:03:00 25 appointment of salaried detectives or

04:03:00 1 constables instead of men paid under
04:03:03 2 the present fee system would be of
04:03:05 3 much effect unless a commissioner,
04:03:06 4 board of commissioners, or some such
04:03:09 5 official or officials were appointed
04:03:11 6 to look after the detectives or
04:03:12 7 constables. Such a detective or
04:03:14 8 constable without constant supervision
04:03:15 9 might, after a time, be conveniently
04:03:16 10 blind and deaf, drawing a salary but
04:03:19 11 allowing his office to become as much
04:03:20 12 as sinecure as possible."

04:03:27 13 Perhaps we can scroll down to the
04:03:29 14 bottom? Okay, there. Just before the spot
04:03:29 15 "suggestions", he says:

04:03:36 16 "I don't not think there has ever
04:03:40 17 been a conviction for murder in this
04:03:42 18 county, although many murders have
04:03:42 19 been committed. Our County of Grey is
04:03:42 20 proverbial for that kind of thing."

04:03:46 21 If we could flip to the next page? He
04:03:57 22 starts talking about other law enforcement in
04:04:00 23 the middle of the paragraph beginning "I think
04:04:02 24 that if the geographical jurisdiction". In the
04:04:07 25 middle of that he says:

04:04:09 1 "At present country cases are
04:04:10 2 dealt with by JPs who are sometimes
04:04:10 3 swayed by private friendship or by
04:04:12 4 private enmity, who sometimes try to
04:04:15 5 evade trouble particularly as in
04:04:17 6 felonies, there are no fees for them;
04:04:19 7 and even in indictable misdemeanors
04:04:19 8 the fees do not much more than pay for
04:04:19 9 the stationery. Besides that, the
04:04:24 10 JPs do not like to deal with such
04:04:26 11 cases from want of experience."
04:04:28 12 And he suggests that it should be
04:04:32 13 under the control of the government, which
04:04:34 14 presumably is the provincial government.
04:04:36 15 If I could scroll down to near the
04:04:36 16 bottom, he says, the third last paragraph:
04:04:50 17 "I hope that from the many
04:04:50 18 replies you will get to your circulars
04:04:50 19 the Attorney General will be able to
04:04:50 20 shape out something to lessen the
04:04:53 21 awful amount of crime. I see from
04:04:55 22 yesterday's papers three more murders
04:04:56 23 have been committed."
04:04:57 24 And then he says -- apologizes for
04:05:03 25 taking so long because it was an interesting

04:05:05 1 subject to him.

04:05:12 2 Given these observations about the
04:05:16 3 system of constables for fees and returning to
04:05:22 4 the subject matter of the case, do you think it
04:05:26 5 would be reasonable to expect local constables
04:05:29 6 to enforce the protection of Indian land
04:05:35 7 statutes?

04:05:38 8 A. I think you can see -- I mean,
04:05:39 9 it's a complicated answer.

04:05:44 10 And our starting point here is getting
04:05:46 11 together this, you know, force of different
04:05:51 12 people from -- what is it? In Parry Sound,
04:05:55 13 Barrie and Toronto to go up to Manitoulin Island
04:05:58 14 and carry off this, you know, quite -- carry off
04:06:01 15 this quite complicated law enforcement
04:06:04 16 operation, which was the point I was trying to
04:06:06 17 make, which we had three different accounts of
04:06:10 18 unfortunately, but the point stands.

04:06:12 19 You can see we have a lot of different
04:06:14 20 opinions going on here. There's, no question, a
04:06:19 21 problem with constables.

04:06:21 22 But they've been -- and everywhere --
04:06:25 23 you know, I suppose in modern Canada and the
04:06:28 24 United States they move from constables to more
04:06:30 25 full-time law enforcement over this period.

04:06:34 1 I think it's -- you know, the accounts
04:06:36 2 of how lawless these places are, how many
04:06:39 3 murders there are in Owen Sound, I take that
04:06:42 4 with a bit of a grain of salt. I don't
04:06:44 5 fundamentally see Owen Sound as a lawless place
04:06:48 6 in 1883.

04:06:49 7 We're seeing a lot of -- you might say
04:06:51 8 "axes to grind", "different opinions" would be
04:06:56 9 another way to put it. But there's problems.

04:07:00 10 But at the same time these counties
04:07:01 11 are all operating law enforcement systems that I
04:07:06 12 dare say "seem to be working", in quotation
04:07:09 13 marks, at a local level, although given that
04:07:11 14 this magistrate is talking about all the murders
04:07:14 15 that are being unpunished.

04:07:17 16 I mean, I just -- I'm seeing context
04:07:18 17 here. You know, there's a -- I mean, without
04:07:22 18 exaggerating it, there's a thesis or a
04:07:23 19 dissertation in this. This is all the legal
04:07:27 20 history that we haven't done.

04:07:29 21 So there's clearly a problem with
04:07:31 22 constables, I would agree with you on that. We
04:07:34 23 also have law enforcement going on here, and
04:07:36 24 we've seen a big job being officially done.

04:07:40 25 So it's a complicated question, but

04:07:42 1 there's a problem with constables. But I
04:07:43 2 wouldn't say, to answer it, that I would say
04:07:46 3 that they couldn't enforce the law against
04:07:50 4 squatters from this date in, say, the middle
04:07:53 5 1850s, which we're talking about, or that
04:07:59 6 Sheriff Schneider or his counterpart wouldn't
04:08:03 7 have been up to the task of appointing
04:08:09 8 appropriate officials, not that law enforcement
04:08:13 9 is ever easy.

04:08:19 10 Q. Would you agree that the task of
04:08:37 11 excluding squatters is not one that's likely to
04:08:39 12 be -- to provide the kind of monetary
04:08:44 13 remuneration that the constables seem to require
04:08:49 14 to act?

04:08:50 15 A. I mean, again, the question
04:08:52 16 "monetary remuneration" is a local -- well, it's
04:08:57 17 a political or legal question.

04:09:00 18 This seems to be saying that if
04:09:02 19 constables are going after monetary reward, it
04:09:06 20 might be a question of, you know, raising the
04:09:09 21 fee for the service.

04:09:16 22 So I'm just saying it's more
04:09:18 23 complicated than that. But the reality is that
04:09:22 24 when people think about the history of rural
04:09:24 25 Canada in this period, you know, lots of stuff

04:09:27 1 went on, lots of ragged edges, but it's a --
04:09:31 2 it's a law-abiding people, and this is a
04:09:37 3 law-abiding province in the late 19th century,
04:09:40 4 middle to late 19th century. I said "late"
04:09:44 5 because these are late. Middle to late.

04:09:48 6 Q. Do you think that the material
04:09:51 7 that we've just read in this 1882, '84 document
04:10:01 8 is not likely to be reflective of conditions in
04:10:11 9 1854?

04:10:16 10 A. We're dealing with very general
04:10:18 11 descriptions by local officials of crime and
04:10:21 12 violence; some of which may be exaggerated, some
04:10:25 13 of which may not be.

04:10:27 14 I'd like to see more data. But I
04:10:29 15 think these people -- I would take them to
04:10:33 16 represent the officials that they in fact are,
04:10:34 17 their opinions being a broad range of opinions,
04:10:37 18 yes.

04:10:43 19 Q. I'm going to move to some
04:10:45 20 different topics. If I can call up your report,
04:10:49 21 which is Exhibit 4276, and if we can go to page
04:11:08 22 59 at the top? That actually doesn't appear to
04:11:35 23 be what I'm looking for, so I'll get back to
04:11:38 24 that.

04:11:38 25 If I could turn actually back to

04:11:40 1 Mr. Gilbert Patterson's book? You refer to
04:11:50 2 him -- you quoted from him to the phrase of --
04:11:56 3 that the -- the administration of Indian affairs
04:12:01 4 was lax, is that correct?

04:12:05 5 A. I don't have the quote in front
04:12:06 6 of me.

04:12:07 7 Q. Okay. Well, if we could put the
04:12:09 8 report back up?

04:12:10 9 A. But I take your word for it.

04:12:14 10 Q. We'll bring the report back up
04:12:16 11 and go to page 69. I think that was the end of
04:12:19 12 the document. So in the middle of that
04:12:27 13 paragraph you refer to --

04:12:30 14 A. Lax state of administration .

04:12:32 15 Q. " [...] through Gilbert
04:12:34 16 Patterson's discussion of the 'lax
04:12:39 17 state of administration of Indian
04:12:42 18 lands' [...]"

04:12:42 19 Now, Mr. Patterson's book was about
04:12:46 20 land policy prior to 1840, is that correct?

04:12:50 21 A. Right, this is -- that's why he
04:12:51 22 used Lillian Gates for the later period. He's
04:12:55 23 finished, and he comes up to the end of Grand
04:12:57 24 River, the big problems at Grand River
04:13:00 25 basically.

04:13:04 1 Q. So his conclusion that the
04:13:05 2 administration of Indian lands was lax would be
04:13:09 3 reflective of that time period --

04:13:10 4 A. Grand River, mostly Grand River.
04:13:12 5 Sorry.

04:13:13 6 Q. If we could call up
04:13:14 7 Mr. Patterson's book? It's Exhibit 4279.

04:14:20 8 Do you recall that Mr. Patterson's
04:14:28 9 description -- sorry, if we could jump to page
04:14:31 10 235. Oh, this doesn't have ...

04:14:56 11 Mr. Patterson, in some of the pages
04:14:58 12 you quoted from, was referring to the fact that
04:15:00 13 the administration of lands was complicated by
04:15:05 14 the fact that sales took place through the Crown
04:15:08 15 Lands Department, surveys were done by the
04:15:11 16 surveying department, and Indian affairs was
04:15:14 17 dealt with by the Indian Department, is that
04:15:15 18 correct? Do you recall that?

04:15:18 19 A. I don't recall that. Now, I
04:15:20 20 haven't read it here.

04:15:26 21 Q. And that one of the things he
04:15:28 22 notes at the end of the book is that the
04:15:30 23 decision was made to have the Indian Department
04:15:33 24 start to administer sales rather than doing it
04:15:36 25 through the Crown Land Department, is that

04:15:37 1 correct? It's not in the text we're looking at,
04:15:42 2 but do you recall that?

04:15:45 3 A. I mean, I'll actually rely on
04:15:48 4 your summary, but I don't recall it as I sit
04:15:51 5 here.

04:15:51 6 Q. Do you know of that of your own
04:15:54 7 knowledge that there was a switch from the Crown
04:15:55 8 Land Department to the Indian Department?

04:15:57 9 A. Well, it's a proposal and of
04:15:59 10 course it's what happens at Saugeen. And I
04:16:01 11 think it's based on the fact that there's so
04:16:03 12 much trouble connected to Grand River.

04:16:08 13 Q. If we can scroll up to the last
04:16:10 14 paragraph? Yes, there we go. So this last
04:16:16 15 paragraph in this book -- or at least in this
04:16:20 16 chapter says, "So the matter remained when
04:16:24 17 [...]"

04:16:29 18 And essentially he was talking about
04:16:31 19 fees being lightened by removing other
04:16:33 20 departments.

04:16:34 21 "So the matter remained when the
04:16:37 22 administrations of the two provinces
04:16:37 23 were joined by the Act of Union. And
04:16:37 24 considering the lack of proper
04:16:37 25 business management, the same remarks

04:16:40 1 apply as in the case of the Crown
04:16:42 2 lands generally, save that a large
04:16:45 3 part of the blame attached directly to
04:16:48 4 the home government through the
04:16:49 5 military department. But in the
04:16:51 6 matter of corruption and dishonest
04:16:53 7 practices generally it should be
04:16:55 8 remembered that the opportunities and
04:16:56 9 inducements created by the peculiar
04:16:59 10 nature of Indian lands themselves and
04:17:02 11 the unsophisticated character of the
04:17:02 12 owners were both numerous and
04:17:06 13 powerful, while the chances of
04:17:06 14 detection were comparatively slight.
04:17:08 15 It would appear to be a matter of some
04:17:11 16 congratulation that the administration
04:17:12 17 so consistently maintained its
04:17:14 18 comparatively high level of
04:17:16 19 integrity."
04:17:17 20 Now, first of all, this book was
04:17:23 21 written in 1921, is that correct?
04:17:25 22 A. Yes.
04:17:25 23 Q. So Mr. Patterson appears to have
04:17:27 24 had his own prejudices, would you agree?
04:17:30 25 A. Yes. Right. And I'm thinking

04:17:31 1 immediately that a common -- his last sentence
04:17:34 2 appears to be partly inconsistent with the rest
04:17:37 3 of the paragraph. And one thing that went on in
04:17:43 4 school, you know, I'm old, you understand, but
04:17:45 5 you would not be overly critical of your
04:17:48 6 government in -- at the end of your
04:17:51 7 dissertation, right? Or your thesis. You
04:17:54 8 wouldn't -- it was more unseemly. And I'm
04:17:56 9 thinking, you know, back to the '50s and I'm
04:17:58 10 remembering the history that I studied.

04:18:02 11 So he's very critical in the
04:18:06 12 paragraph, and he adds this laudatory line in
04:18:09 13 the end that seems inconsistent. But you've got
04:18:13 14 his facts. You've got his whole argument of 235
04:18:17 15 pages that we can deal with. And he's a
04:18:19 16 competent historian, so we take all of this.

04:18:23 17 You know, the idea of blaming the
04:18:24 18 Indians because they didn't -- you know, for
04:18:26 19 some reason didn't understand what was going on,
04:18:28 20 right? We take that now with -- we don't
04:18:32 21 believe that, or we don't, we don't -- we -- you
04:18:36 22 know, I mean, I don't want to use the word
04:18:38 23 "racist". It's ethnocentric. It's
04:18:42 24 inappropriate given our -- the way that we think
04:18:46 25 about these issues now.

04:18:49 1 Q. And I take it from what you just
04:18:51 2 said that you wouldn't agree with the last
04:18:55 3 sentence that some congratulation was
04:18:58 4 appropriate?

04:18:58 5 A. No.

04:19:00 6 Q. Okay.

04:19:00 7 A. I don't think his data shows it.

04:19:05 8 Q. While I'm discussing the issue of
04:19:09 9 corruption, if I could go to page 47 of your
04:19:19 10 report? You refer in that last sentence on the
04:19:28 11 first paragraph, after having talked about
04:19:34 12 Jarvis you refer:

04:19:36 13 "Perhaps not irrelevant to this
04:19:40 14 analysis, Jarvis was forced from
04:19:40 15 office in 1845 on charges of
04:19:41 16 corruption involving virtually all
04:19:47 17 phases of his management of Indian
04:19:48 18 matters, including land matters."
04:19:51 19 My question is, what do you mean by
04:19:54 20 it's "perhaps not irrelevant"?

04:20:00 21 A. I'm trying to put my -- imagine
04:20:06 22 why. Oh, what I mean by "irrelevant", if you
04:20:13 23 take the sentence before he says:

04:20:14 24 "[...] it would be 'impolitic' to
04:20:17 25 forcibly remove [...]"

04:20:18 1 The squatters:

04:20:19 2 "[...] the Crown had the power,

04:20:20 3 but not the political will."

04:20:23 4 You know, "not irrelevant to this

04:20:25 5 analysis" is that he may have had a corruption

04:20:28 6 problem, along with his lack of political will.

04:20:31 7 And this is a complicated problem in a

04:20:34 8 legal history. We have corruption in, well,

04:20:37 9 western legal systems, and I'm -- again, I

04:20:42 10 have -- and so it's always hard to write legal

04:20:46 11 history if corruption is present because how do

04:20:49 12 you measure it? How do you even find it?

04:20:52 13 Because it doesn't come out in the data. I

04:20:57 14 mean, it's in fact concealed.

04:21:00 15 So it's a tough thing to write about.

04:21:02 16 So I'm -- I'm simply saying, we need to consider

04:21:05 17 this as a force when you're talking about, well,

04:21:08 18 it was impolitic to remove squatters. It's

04:21:11 19 impolitic and making money off this on the side?

04:21:14 20 How do you -- you know, evaluating that is hard

04:21:17 21 because I don't -- by definition your data is

04:21:22 22 either imperfect, skewed, buried, and it is a

04:21:28 23 problem in -- you know, because you can -- well,

04:21:31 24 I'll stop there.

04:21:33 25 Q. So you see the connection being

04:21:34 1 that -- with respect to how Jarvis managed
04:21:39 2 issues about squatters, is that right?

04:21:45 3 A. Yes.

04:21:45 4 Q. It's not -- for example, I
04:21:47 5 thought perhaps an alternative reading of the
04:21:50 6 sentence was that Jarvis was being punished for
04:21:55 7 calling the government imbecilic earlier or
04:22:00 8 criticizing the government?

04:22:02 9 A. I honestly hadn't thought about
04:22:04 10 that.

04:22:04 11 Q. Okay.

04:22:05 12 A. But, you know, let's face it, I
04:22:06 13 mean, we're looking at these documents and we're
04:22:09 14 trying to imagine. I mean, I was thinking, you
04:22:13 15 raise a great point. How did his superiors feel
04:22:16 16 when he called them imbecilic? That was
04:22:20 17 imprudent of him clearly.

04:22:20 18 And I can't imagine in the context of
04:22:23 19 the Canadian politics of the day they weren't
04:22:26 20 deeply offended, but I don't know that.

04:22:47 21 Q. If we could go to page 63? Now,
04:22:57 22 when you were being examined by my friend you
04:23:03 23 discussed some of the suitability of the
04:23:05 24 peninsula for farmland. And you indicated that
04:23:09 25 it was -- some was good and some was bad. And

04:23:14 1 basically I think you said that according to the
04:23:17 2 science of the day they had -- they thought some
04:23:19 3 of it was worth farming on, is that correct?

04:23:24 4 A. Yes, it's -- it's a tough -- I
04:23:28 5 mean, it's a -- the question is given -- they
04:23:34 6 had decent knowledge of the Saugeen Peninsula
04:23:36 7 and the land forms there.

04:23:38 8 Their knowledge about agricultural
04:23:39 9 science in the mid-19th century was imperfect
04:23:44 10 compared to our knowledge of agricultural
04:23:47 11 science now. And the fact is that in both the
04:23:50 12 United States and Canada they set out a lot of
04:23:52 13 land for farming that in fact couldn't be
04:23:54 14 farmed. So these farmers who took this land in
04:23:56 15 the 1850s, many of them failed or didn't really
04:24:00 16 have a chance.

04:24:01 17 Q. And people did try and farm in
04:24:03 18 areas such as Muskoka or other areas?

04:24:06 19 A. You see this going west from
04:24:08 20 Ottawa on the TransCanada, the farms in
04:24:12 21 Peterborough going up into New England and
04:24:14 22 Upstate New York, the same kind of problem.

04:24:17 23 Q. If we can scroll down on this
04:24:20 24 page, on this answer? So in the paragraph
04:24:24 25 beginning "While this concession", yes, halfway

04:24:24 1 down. The sentence begins "We cannot say". It
04:24:24 2 says:

04:24:32 3 "We cannot say why Rankin
04:24:35 4 misrepresented these 190,000 acres,
04:24:38 5 but probably in common with most white
04:24:40 6 Canadians of the day, he was caught up
04:24:41 7 in a booster mentality that was blind
04:24:41 8 to the harsh reality of northern
04:24:43 9 farming."

04:24:46 10 So are you saying that Rankin
04:24:50 11 deliberately misrepresented the --

04:24:53 12 A. No, no, his conscious --
04:24:53 13 absolutely not deliberately. It was his
04:24:57 14 consciousness was of that age. And so your
04:25:03 15 optimism about Canadian land was a real thing,
04:25:08 16 and it was a construct. It was a, you know, in
04:25:13 17 some ways -- but it was how he honestly saw it.

04:25:16 18 Q. Okay.

04:25:37 19 Your Honour, I'll be moving on to a
04:25:38 20 new topic, and I believe I should be able to
04:25:41 21 finish at lunch tomorrow as I suggested -- or I
04:25:42 22 indicated. So I would suggest now would be a
04:25:45 23 good time to adjourn.

04:25:46 24 THE COURT: Yes, we can adjourn at
04:25:48 25 this time. And, sir, you probably don't need

04:25:50 1 this reminder that you should engage yourself on
04:25:53 2 other matters and not on this matter as you are
04:25:56 3 still under cross-examination.

04:25:57 4 THE WITNESS: Yes, Your Honour.

5 THE COURT: We'll resume at 10:00
6 o'clock tomorrow.

7 --- Whereupon the proceedings were
8 adjourned at 4:26 p.m.

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REPORTER'S CERTIFICATE

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

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

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

That the foregoing is a true and
accurate transcript of my shorthand notes so
taken. Dated this 18th day of October 2019.



PER: HELEN MARTINEAU
CERTIFIED SHORTHAND REPORTER

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