

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

DAY 57 VOL 57
October 30, 2019



77 King Street West, Suite 2020
Toronto, ON M5K 1A2
1.888.525.6666 | 416.413.7755

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

- and -

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

Court File No. 03-CV-261134CM1

A N D B E T W E E N:

CHIPPEWAS OF NAWASH UNCEDED FIRST NATION and
SAUGEEN FIRST NATION
Plaintiffs

- and -

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

--- This is VOLUME 57 / DAY 57 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 30th 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
& Mr. Morales, Esq., Nation, and dollars
& Mr. Townshend, Esq., Chippewas of Nawash
First Nation.

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

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

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1 --- Upon commencing at 10:06 a.m.

10:06:19 2 THE COURT: Morning, Mr. Townshend.

10:06:22 3 MR. TOWNSHEND: Morning, Your Honour.

10:06:22 4 I just wanted to introduce a member of our team
10:06:25 5 who hasn't appeared in this proceeding before.

10:06:29 6 This is Mr. Morales.

10:06:32 7 THE COURT: Welcome, sir.

10:06:32 8 Mr. Beggs, just give me a moment. The
10:06:36 9 connection hasn't gone through yet. Think of it
10:07:10 10 as Monday morning.

10:09:15 11 Mr. Townshend, I got your email.

10:09:17 12 Thank you very much. It's helpful.

10:10:05 13 Please go ahead, Mr. Beggs.

10:10:09 14 MR. BEGGS: Thank you, Your Honour.

10:10:10 15 As you know the defendant, the Attorney General
10:10:12 16 of Canada, gave a brief opening at the outset of
10:10:15 17 this case. The Court gave permission for us to
10:10:18 18 provide additional remarks at the beginning of
10:10:21 19 Canada's case. We prepared a chart of experts
10:10:26 20 similar to that which the Plaintiffs provided at
10:10:29 21 the beginning in their opening, and which we
10:10:32 22 offer for the assistance of the court.

10:10:36 23 I've provided paper copies to the
10:10:38 24 Registrar and it's on the database as SC1282.

10:10:48 25 THE COURT: Mr. Registrar, can you

10:10:49 1 hand me one of the paper copies, please?

10:10:52 2 THE REGISTRAR: It's on your desk,
10:10:54 3 Your Honour.

10:11:02 4 THE COURT: It's here. Wonderful.

10:11:02 5 Before you go on, Mr. Beggs, can the
10:11:04 6 people in the back row hear Mr. Beggs? Yes?
10:11:07 7 Okay, please go ahead. So I have a list of four
10:11:15 8 witnesses.

10:11:18 9 MR. BEGGS: There's more on the back.

10:11:20 10 THE COURT: Seven all together.

10:11:22 11 MR. BEGGS: Seven expert witnesses,
10:11:23 12 yes.

10:11:24 13 THE COURT: All right.

10:11:25 14 MR. BEGGS: And I think if we can call
10:11:27 15 up that chart. I would just ask that it be made
10:11:31 16 a lettered exhibit.

10:11:34 17 THE COURT: Yes, Mr. Registrar.

10:11:36 18 THE REGISTRAR: Lettered exhibit,
10:11:38 19 Exhibit Y-1.

10:11:40 20 (Exhibit number later corrected to
10:11:40 21 X-1)

10:11:41 22 EXHIBIT NO. X-1: List of seven expert
10:11:42 23 witnesses with chart.

10:11:43 24 MR. BEGGS: And the chart that you
10:11:44 25 have before you is arranged in the order in

1 which it's anticipated the witnesses will
2 appear, and that may change but, generally
3 speaking, this is the order the schedule now
4 contemplates.

5 THE COURT: And it's the final witness
6 who has the potential health problem?

7 MR. BEGGS: That's correct, Your
8 Honour.

9 THE COURT: All right.

10 MR. BEGGS: So in these opening
11 remarks I will actually be addressing the
12 witnesses in the context of the topics they will
13 be addressing rather than the order of
14 appearance, but I will start by making some
15 brief remarks before going into the evidence of
16 witnesses in more detail.

17 As we know by now, the title case
18 concerns the waters and lake beds of portions of
19 Lake Huron and Georgian Bay, as well as any
20 islands in that territory.

21 The Plaintiffs have pled that they
22 historically held and continue to retain
23 Aboriginal title to the beds of the Great Lakes
24 surrounding the entirety of the Saugeen or Bruce
25 Peninsula.

10:12:45 1 Canada respectfully acknowledges that
10:12:47 2 Indigenous peoples have a unique connection to
10:12:50 3 and constitutionally-protected interest in their
10:12:53 4 lands and territories.

10:12:55 5 The Plaintiffs say that there is
10:12:57 6 sufficient evidence of physical occupation and
10:13:00 7 exclusivity with respect to the claim area at
10:13:02 8 the date of the assertion of Crown sovereignty
10:13:05 9 to establish Aboriginal title.

10:13:08 10 Canada is of the view that the
10:13:09 11 available evidence does not demonstrate that the
10:13:12 12 claim area was held with a degree of physical
10:13:16 13 occupation and exclusivity that is commensurate
10:13:19 14 with Aboriginal title.

10:13:21 15 The area at issue is vast, including
10:13:25 16 significant portions of Lake Huron and Georgian
10:13:27 17 Bay, and was historically used freely by other
10:13:30 18 Indigenous peoples, the French and the British.

10:13:35 19 Because the plaintiff has a different
10:13:36 20 view of their relationship to the waters of Lake
10:13:38 21 Huron and Georgian Bay, the parties may require
10:13:43 22 judicial guidance to assist in reconciling their
10:13:46 23 different understandings of this issue.

10:13:48 24 It follows the Canada puts into issue,
10:13:49 25 for the purposes of this case, the existence of

1 Aboriginal title in any part of the claim area.

2 The treaty case, on the other hand,
3 concerns the peninsula, more specifically the
4 making of Treaty 72 on October 13th, 1854,
5 between the Crown and the plaintiffs. As we've
6 heard, the treaty surrendered approximately
7 450,000 acres in the peninsula for land
8 settlement. The land was to be sold with the
9 proceeds to be paid to the plaintiffs. Excepted
10 from the treaty were three reserves totaling
11 nearly 50,000 acres.

12 The plaintiffs make two arguments with
13 respect to the treaty case. First, this trial
14 is about the appropriateness of the surrender.
15 The plaintiffs have alleged that the treaty
16 itself was an equitable wrong such that they
17 seek damages of \$180 billion for breach of
18 fiduciary duty, \$80 billion in damages and \$10
19 billion in punitive damages, from each of Canada
20 and Ontario, and for a constructive trust to be
21 imposed on all lands not held by third parties.

22 Secondly, the plaintiffs further
23 allege that the treaty does not accurately
24 reflect the terms agreed upon and seek
25 rectification for that reason.

1 It is Canada's position that there
2 were no mistakes, mutual or otherwise, of the
3 sort alleged in the drafting of the treaty.

4 Canada acknowledges that the
5 interpretation of treaties and treaty rights and
6 interests require that the perspectives of both
7 the Crown and the Indigenous parties to the
8 treaties be taken into account in order to
9 properly interpret and fully appreciate the
10 treaty terms, spirit and intent.

11 Canada also acknowledges that the
12 spirit and intent of the parties to the treaties
13 may be reflected in both oral and written
14 histories.

15 Canada also acknowledges the
16 importance of treaty making in treaties as
17 frameworks for living together, including the
18 modern expression of these relationships as
19 foundations for the ongoing pursuit of
20 reconciliation based on the recognition of
21 rights, respect and cooperation.

22 While Canada takes a different view of
23 the provisions at issue from the plaintiffs,
24 Canada remains committed to honouring its treaty
25 promises.

1 Returning now to the title action and
2 the evidence concerning it, the parties have
3 agreed that there's no clear jurisprudence
4 dealing with the claims to Aboriginal title to
5 the beds of navigable waters such as Lake Huron
6 and Georgian Bay. The parties have also agreed
7 that 1763 is the date of the British Crown's
8 assertion of sovereignty.

9 The plaintiffs have alleged one
10 particular material fact to support their claim.
11 In 1763 the plaintiffs and other Anishinaabe
12 allies controlled all the strategic access
13 points to Georgian Bay and Lake Huron. Canada
14 is of the view that the available evidence shows
15 that the plaintiffs and their Anishinaabe allies
16 did not control such key strategic access
17 points, certainly not at Detroit
18 Michilimackinac.

19 The legal issues, of course,
20 pertaining to a claim of Aboriginal title to
21 submerged lands will be addressed in closing
22 arguments, and I will be sticking to the
23 relevant facts under the current test for
24 Aboriginal title.

25 Despite it being common ground that

10:17:20 1 the relevant date is 1763, the Court has heard
10:17:24 2 evidence with respect to the alleged occupation
10:17:27 3 for thousands of years of the peninsula, or to
10:17:29 4 the south of the peninsula, from Dr. Williamson,
10:17:34 5 Dr. Valentine and Dr. McCarthy, and in the oral
10:17:37 6 history evidence of many community witnesses,
10:17:39 7 most importantly for this purpose Lenore
10:17:43 8 Keeshig.

10:17:46 9 Dr. von Gernet, one of Canada's
10:17:48 10 experts, refers to this evidence as "deep time
10:17:51 11 evidence". With respect to the archeological
10:17:56 12 evidence Canada will be calling Ms. Meg Morden
10:17:59 13 of the University of Toronto School of
10:18:01 14 Continuing Studies.

10:18:02 15 Ms. Morden is an archeologist with
10:18:06 16 familiarity in the practice of archeology in
10:18:10 17 Ontario and of archeological methodology in
10:18:13 18 general. She will be addressing the expert
10:18:15 19 evidence of Dr. Williamson. Her evidence will
10:18:18 20 focus on the limits of the archeological
10:18:22 21 evidence that was used by Dr. Williamson, what
10:18:25 22 can and what cannot be determined from the
10:18:29 23 artefactual record with a degree of certainty.

10:18:32 24 In addition to the archeological
10:18:37 25 evidence, the plaintiffs in their opening stated

10:18:41 1 that they will be juxtaposing myth with geology.

10:18:48 2 If I could call up their -- the transcript of

10:18:50 3 the opening statement, volume 1, day 1, April

10:18:55 4 25th, 2019, page 31. The plaintiff said that:

10:19:06 5 "[...] it seems like the myths

10:19:06 6 relate to geological events that

10:19:06 7 happened 8,000 or more years ago. It

10:19:06 8 would suggest it had been passed down

10:19:06 9 for that long."

10:19:17 10 The plaintiffs then explained how they

10:19:19 11 are going to use that evidence.

10:19:21 12 "Now, are we going to ask for a

10:19:24 13 finding of fact that each myth relates

10:19:26 14 to a specific geological event? No,

10:19:28 15 we're not. We're not even going to

10:19:31 16 ask for a finding of fact that one or

10:19:33 17 more of the myths have been passed

10:19:34 18 down for thousands of years. Neither

10:19:36 19 of those things are necessary, and we

10:19:38 20 misunderstand the way we are trying to

10:19:41 21 use this evidence.

10:19:42 22 Rather, the traditional knowledge

10:19:48 23 holders, for my clients, say they've

10:19:49 24 always been in their territory. We

10:19:51 25 are suggesting that the correspondence

10:19:51 1 between myth and geology, is some
10:19:51 2 corroboration of that.

10:19:55 3 And that when you take that
10:19:56 4 together with the anthropology, the
10:19:58 5 linguistics, the archeology and the
10:20:00 6 historical evidence, as a totality, we
10:20:02 7 are pressing that as supporting a
10:20:04 8 finding that SON was present in their
10:20:07 9 territory at 1763. [...] that is a
10:20:10 10 key finding that we will be asking
10:20:12 11 for.

10:20:12 12 And we suggest it would be
10:20:14 13 inappropriate to consider each piece
10:20:15 14 of evidence separately, find it didn't
10:20:17 15 quite pass the threshold and dismiss
10:20:20 16 it; because that's not how we're
10:20:21 17 trying to do it. It's the totality of
10:20:23 18 things that may not be persuasive
10:20:24 19 enough, but when we have enough of
10:20:24 20 them, the picture becomes different."

10:20:29 21 This puts the Court in a novel
10:20:31 22 position. Despite what we've just heard,
10:20:36 23 effectively the Court is being asked to
10:20:40 24 determine, or at least take into account, what
10:20:43 25 happened ten thousand years ago, whether

1 Paleo-Indians, as they have been referred to,
2 observed the breaking of the Notawe barrier, or
3 tasted the salinity of Georgian Bay that
4 incorporated these events into specific stories
5 of the inventors of Nanabush and then retained
6 these stories unchanged for thousands of years.

7 Because of the novelty of this claim
8 with respect to the juxtaposition of oral
9 history and geological evidence, an approach
10 that has been referred to as geomythology,
11 Canada will be calling two expert witnesses to
12 address different aspects of the plaintiffs'
13 assertion.

14 Professor Laurel Bowman of the
15 University of Victoria, the last witness that
16 we'll hear, is a classicist with special
17 expertise in the methodology and inquiry into
18 historical content of orally-transmitted
19 narratives. It may seem unusual to call a
20 classicist to a case of this nature, but this is
21 a field in which attempts have been made to
22 apply geomythology.

23 Professor Bowman provides an
24 explanation of geomythology as a discipline.
25 She will discuss the basic principles to be

1 applied when assessing the historicity (sic) of
2 a given oral tradition directed specifically
3 toward establishing the reliability of the
4 apparent contradictions between geological
5 events -- sorry, not contradictions but
6 connections between geological events and the
7 stories transmitted via oral tradition.

8 As the Court knows, Canada will also
9 be calling Dr. Alexander von Gernet. The Court
10 is familiar with Dr. von Gernet from earlier
11 motions, and he has been qualified and granted
12 leave to testify in this proceeding. The Court
13 has a short report from Dr. von Gernet in which
14 he discusses numerous variations of the
15 particular Anishinaabe geomyths presented by the
16 plaintiffs, set in locations from the Atlantic
17 coast to Minnesota.

18 In his oral evidence Dr. von Gernet
19 will address the reality that these variants
20 need to be considered when attempting to assess
21 the historicity of a single version as reporting
22 the link between an event of the distant past
23 and traditional Indigenous stories. Most
24 importantly, Dr. von Gernet will provide the
25 Court with a methodology to assess these claims.

10:23:18 1 Apart from geomythology the Court has
10:23:21 2 already heard the evidence from Professor
10:23:24 3 Williamson, which included evidence about the
10:23:26 4 significant population and group changes which
10:23:28 5 occurred among Indigenous groups in the area.
10:23:31 6 The Court must consider whether reasonable
10:23:33 7 inferences about continuity can be drawn from
10:23:34 8 this evidence.

10:23:38 9 The Crown's position is that the issue
10:23:39 10 is not whether continuous occupation was
10:23:42 11 interrupted, but whether the plaintiffs'
10:23:45 12 occupation can be traced back to 1763 at all.

10:23:49 13 With respect to the presence or lack
10:23:51 14 thereof of the Saugeen on the peninsula in 1763
10:23:54 15 Canada is not calling a separate expert. Canada
10:23:58 16 will be relying on the evidence of the
10:24:00 17 plaintiffs experts, Ontario's experts, the
10:24:03 18 agreed statements of fact and the answers to
10:24:05 19 interrogatories.

10:24:15 20 With respect to the question of
10:24:16 21 exclusivity the basic issue is whether the
10:24:19 22 evidence supports the assertion that in 1763 the
10:24:23 23 plaintiffs had the intention and capacity to
10:24:25 24 use, occupy and control exclusively the
10:24:28 25 territory in the contested area. The plaintiffs

10:24:33 1 must demonstrate continuous occupation of or
10:24:36 2 substantial connection to the land since that
10:24:38 3 date. The plaintiffs must also offer evidence
10:24:41 4 to establish sufficient pre-sovereignty
10:24:46 5 occupation and exclusive historic occupation.

10:24:49 6 Briefly stated, the plaintiffs must
10:24:50 7 establish exclusive use and occupation of an
10:24:53 8 area tens of thousands of square kilometres in
10:24:56 9 size, most of which is submerged lands.

10:25:00 10 The evidence, to date, has not
10:25:02 11 demonstrated that the plaintiffs had the intent
10:25:05 12 and capacity to meet the requirement of
10:25:07 13 exclusive use and occupation to significant
10:25:11 14 portions of Lake Huron and Georgian Bay, in the
10:25:14 15 view of the Crown.

10:25:15 16 These areas have been used freely by
10:25:18 17 the public, including other distinct Indigenous
10:25:21 18 groups, throughout all the relevant historical
10:25:24 19 periods.

10:25:24 20 The Court has heard that the weather
10:25:26 21 around the peninsula and the peninsula shores
10:25:29 22 made the waters surrounding the western part of
10:25:32 23 the peninsula, at least, so dangerous that most
10:25:35 24 vessels regularly avoided it.

10:25:39 25 The evidence has shown that given

10:25:41 1 these conditions the inhabitants of the
10:25:43 2 peninsula did not venture far off shore.

10:25:51 3 In their Statement of Claim the
10:25:53 4 plaintiffs asserted that they and their allies
10:25:55 5 controlled key access points to Lake Huron and
10:25:58 6 Georgian Bay. The Court has heard evidence that
10:26:01 7 at various times Indigenous peoples have made
10:26:04 8 use of portions of or access points to Lake
10:26:06 9 Huron and Georgian Bay as did Europeans. The
10:26:10 10 French constructed forts at such -- several such
10:26:14 11 access points, including Detroit, Sault Ste.
10:26:16 12 Marie and Michilimackinac.

10:26:18 13 The Court must consider whether the
10:26:21 14 evidence put forward to date indicates the
10:26:24 15 plaintiffs maintained control sufficient to
10:26:25 16 maintain exclusive use and occupation of these
10:26:28 17 bodies of water, such as to exclude others from
10:26:30 18 the lake had they chosen to do so.

10:26:34 19 The access points identified by the
10:26:36 20 plaintiffs to Lake Huron and Georgian Bay can be
10:26:40 21 seen in Professor Driben's report at Exhibit
10:26:44 22 4324, page 129, which we recently discussed with
10:26:53 23 the last witness. Professor Driben marked
10:26:58 24 several of the access points on that map with a
10:27:00 25 circle.

1 In the pleadings the plaintiffs
2 identified Colpoy's Bay portage, St. Clair
3 River, Nottawasaga River, French River, Sault
4 Ste. Marie and Michilimackinac. With the
5 exception of the Colpoy's Bay portage the
6 plaintiffs do not plead that they themselves
7 controlled such points but instead that they
8 were controlled by allies.

9 Given the nature of Aboriginal title
10 any assertion for exclusive use and occupation
11 must be limited to the territories exclusively
12 used and occupied by the plaintiffs themselves,
13 and as both Professor Benn indicated and
14 Professor Driben's map shows, Colpoy's Bay is
15 not itself an access point to the title claim
16 area but rather a passage within the territory.

17 The rest of the entry points, the St.
18 Claire River, the Nottawasaga River, the French
19 River, Sault Ste. Marie, Michilimackinac are not
20 within the area over which the plaintiffs assert
21 title.

22 The Court has already heard the
23 evidence of Professor Hinderaker, Professor Benn
24 and Dr. Williamson that Detroit was settled by
25 the French who invited various indigenous groups

1 to settle there. The Court has also heard of
2 the divided positions of the Indigenous peoples
3 at various locations, particularly
4 Michilimackinac where the Ojibwe and Odawa
5 differed in their support of the English.

6 The evidence will show that the
7 British and French both used the Great Lakes
8 freely, including the contested area.

9 To assist the Court in understanding
10 the context of the claim area in the 18th
11 century, Canada will be calling Professor Alain
12 Beaulieu of the Université du Québec à Montréal.
13 Professor Beaulieu is a historian with special
14 expertise in native-newcomer relations in New
15 France in the early years of the British regime
16 in Canada. He has already been qualified to
17 testify in this case.

18 Professor Beaulieu provided three
19 written reports for this case. The first was
20 French, British and Aboriginal peoples in the
21 Great Lakes area 1600 to 1774. Among the
22 questions Professor Beaulieu was asked to answer
23 was, who used the Great Lakes and for what
24 purposes between 1701 and 1774? And did the
25 French feel themselves bound to seek permission

1 from Indigenous communities when they used the
2 Great Lakes and built forts and trading posts at
3 certain locations?

4 Professor Beaulieu's evidence will
5 reveal that the French had control over key
6 locations in the Great Lakes through the use of
7 their forts until the cession to Britain.

8 In the second report Professor
9 Beaulieu -- which was entitled "Congress at
10 Niagara in 1764: The Historical Context and
11 Meaning of the British Aboriginal Negotiations",
12 as the title suggests, this report is focused on
13 what has been referred to by the plaintiffs as
14 "The Treaty of Niagara" and examines the context
15 of Niagara, any commitments made and the
16 relationship to the Royal Proclamation.

17 Professor Beaulieu's last report
18 concerned translation issues regarding French
19 documents relative to the Iroquois wars in the
20 mid-17th century. The issue there was whether
21 current scholarship in the Iroquois incursion
22 into what is now Ontario is based on a
23 19th-century mistranslation.

24 Should the plaintiffs demonstrate
25 Aboriginal title over the claim area it may

10:30:44 1 impact on rights otherwise held in common by all
10:30:47 2 Canadians or residents. Additionally, it would
10:30:50 3 have an impact upon international obligations
10:30:52 4 that Canada has assumed with the United States.
10:31:01 5 Canada will be calling a nonexpert, Ms. Felicia
10:31:05 6 Minotti of Global Affairs Canada. She will be
10:31:07 7 providing evidence of international treaties and
10:31:09 8 obligations that Canada has entered into with
10:31:10 9 respect to the Great Lakes.

10:31:13 10 Returning now to the treaty action, as
10:31:16 11 the Court has heard many times by now, in
10:31:20 12 October 1854 Laurence Oliphant visited Saugeen
10:31:24 13 for the purposes of negotiating a surrender. He
10:31:26 14 met with the Saugeen and Owen Sound First
10:31:30 15 Nations with the result being the surrender of
10:31:31 16 the majority of the peninsula in Treaty 72.

10:31:34 17 So I'll turn now to the two issues in
10:31:38 18 the treaty action, the breach of fiduciary duty
10:31:41 19 claim and the rectification claim. The
10:31:43 20 plaintiffs' main claim is that in the course of
10:31:46 21 negotiating the surrender of the peninsula in
10:31:49 22 Treaty 72, the Crown engaged in conduct which
10:31:51 23 breached fiduciary duties of the plaintiffs and
10:31:54 24 breached the honour of the Crown, including the
10:31:56 25 very asking for the surrender. Canada has heard

1 a fair degree of evidence with respect to the
2 making of Treaty 72 already, both from experts
3 and through the documentary record.

4 With respect to the documentary record
5 the most important documents remain Oliphant's
6 report to Lord Elgin, dated November 3rd, 1854,
7 and the treaty document itself.

8 As the Court is well aware treaty 72
9 was preceded by Treaty 45 1/2 on August 9th,
10 1836. That treaty surrendered the area south of
11 present-day Owen Sound to just south of
12 Goderich.

13 And it's indicated on the map, which
14 is Exhibit P, which we have before us for many
15 weeks now -- I'm sure we're all familiar with.
16 It's marked in the portion below the white line
17 in the light green.

18 The text of Treaty 72, if I could call
19 it up -- sorry, Treaty 45 1/2, if I could call
20 it up for a moment? It's trial Exhibit 1131.

21 It said:

22 "You have heard the proposal I
23 have just made to the Chippewas and
24 Ottawas [...]"

25 Skipping down:

1 "I now propose to you that you
2 should surrender to your Great Father
3 the Saugeen territory you at present
4 occupy, and that you should repair
5 either to this island or to that part
6 of your territory which lies on the
7 north of Owen Sound, upon which proper
8 houses shall be built for you, and
9 proper assistance given to enable you
10 to become civilized and to cultivate
11 land, which your Great Father engages
12 forever to protect for you from the
13 encroachments of the whites."

14 It's important to remember that this
15 action is not about whether Treaty 45 1/2 was
16 valid. Indeed the plaintiffs rely on Treaty 45
17 1/2 and assert that the assurance given there
18 created a fiduciary duty and that seeking a
19 surrender in Treaty 72 was a breach of that
20 duty.

21 Canada will be offering the evidence
22 of Professor Paul McHugh of the University of
23 Cambridge. Professor McHugh is a professor of
24 law and legal history with special expertise in
25 the evolution of the legal principles and

10:34:20 1 policies that affected the conduct of Crown
10:34:24 2 relations with Indigenous peoples in the British
10:34:27 3 empire in the 18th and 19th centuries.

10:34:30 4 He wrote a report that he entitled
10:34:34 5 "Treaty 45 1/2, the Crown's Unremitted
10:34:37 6 Solitude and the Forever Promise to the
10:34:40 7 Saugeen Ojibwe Nation, a Report on British
10:34:42 8 Imperial Policy and Practice in Upper Canada
10:34:46 9 during the 1830s".

10:34:47 10 Professor McHugh was asked to report
10:34:49 11 on the historical circumstances surrounding the
10:34:52 12 conclusion of Treaty 45 1/2 with particular
10:34:55 13 reference to the forever promise. He was
10:34:56 14 especially asked to report on the nature of the
10:34:58 15 promise at the time that it was issued and how
10:35:00 16 it would have been viewed at that time by the
10:35:03 17 Crown.

10:35:06 18 He was also asked to set the promise
10:35:08 19 in the broader context of Imperial policy
10:35:09 20 towards Indigenous peoples in Upper Canada
10:35:13 21 during the early to mid-19th century. Professor
10:35:16 22 McHugh also provides an outline of the
10:35:18 23 development of Indian policy and practice in
10:35:20 24 Upper Canada prior to 1860.

10:35:24 25 Professor McHugh places Treaty 45 1/2

10:35:26 1 in its historical setting, in its own time
10:35:31 2 rather than how it may have been interpreted
10:35:34 3 later.

10:35:35 4 An examination of the events of this
10:35:40 5 treaty, and later the treaty of 1854, requires
10:35:47 6 that one understand the context of the times and
10:35:49 7 avoid attributing modern behaviour to 19th
10:35:52 8 century actors on any side.

10:35:54 9 It is important to emphasize that
10:35:56 10 Professor McHugh provides a historic account of
10:36:00 11 how Imperial and colonial officials perceived
10:36:04 12 the treaty at their time and their perception of
10:36:05 13 how the Saugeen viewed it. It is not an
10:36:07 14 examination of the Saugeen's view of Treaty 45
10:36:09 15 1/2.

10:36:14 16 The Court has heard about how the text
10:36:15 17 of Treaty 45 1/2 contemplates the Saugeen
10:36:19 18 settling into houses and cultivating land or
10:36:22 19 farming it, actions which the plaintiffs'
10:36:24 20 experts have admitted would have made the task
10:36:28 21 of protecting the land against encroachment
10:36:30 22 easier.

10:36:31 23 The Court has heard the evidence and
10:36:32 24 seen the documentary record that Sir Francis
10:36:35 25 Bond Head originally intended that the

1 indigenious people of this area migrate to
2 Manitoulin Island. This, however, they refused
3 to do. Thus, Treaty 45 1/2 was modified such
4 that instead the First Nations remained on the
5 peninsula north of present-day Owen Sound and
6 Southampton.

7 If we look at the original handwritten
8 treaty, Exhibit 1132, you can turn it over, it
9 has come out in the evidence that one of the
10 terms of Treaty 45 1/2, which was not modified
11 but was in the original proposal to migrate to
12 Manitoulin Island, was a promise of protection
13 from encroachment. You will recall that this
14 came out in the evidence of Professor Brownlie.

15 The Court will also recall that
16 Professor Brownlie and Professor Driben
17 acknowledged the ambiguity of the wording of the
18 forever promise, that it possibly was only
19 intended by the Crown to protect cultivated
20 land. Professor Brownlie rejected this
21 interpretation on the basis of the subsequent
22 actions of the parties.

23 Canada's evidence will show that the
24 Crown did not resile from the forever promise.
25 The Crown did act to protect the peninsula as a

1 whole. The Crown did not shirk its duties. The
2 Crown has already heard the evidence of the
3 various statutes and proclamations issued by the
4 Crown forbidding squatting on Indian lands. The
5 Crown has heard the evidence that the Crown
6 representatives endeavoured to protect the legal
7 interests of the lands, either the lands
8 themselves or the proceeds from sale. The Crown
9 has heard of the appointment of Commissioners
10 responsible for taking action against squatters
11 when a complaint was made. The Court has heard
12 about the notices issued by the Commissioners,
13 for example, Exhibit 1586, which warned the
14 general public against squatting on Indian
15 lands.

16 The Court has heard of some of the
17 actions taken by Commissioners against
18 squatters. The Court has also heard of the
19 inherent difficulties of protecting squatting in
20 such a vast area as the peninsula. There's been
21 evidence of a land boom and the demand for
22 settlers among -- sorry, the demand for land
23 among settlers in Upper Canada.

24 The evidence is that the settlement
25 and farming by the Saugeen contemplated by

1 Treaty 45 1/2 did not occur and that another
2 strategy for attempting to secure the land, the
3 immigration of other First Nations to the
4 peninsula, also largely fit in.

5 The plaintiffs have offered the
6 opinion of Professor Harring, who asserted that
7 the British empire has such limitless resources
8 that it could easily have protected the
9 peninsula against squatters had it wished to.

10 With respect to the ability of the
11 Crown to protect the Saugeen reserve from
12 encroachment, Canada will be offering two
13 witnesses. Our first witness, the witness we'll
14 hear from today, Professor Douglas McCalla of
15 the University of Guelph, is an economic
16 historian with special expertise in social and
17 economic history of 19th century Upper Canada or
18 Canada West. He submitted two reports for the
19 benefit of the court.

20 The first report is entitled,
21 "Population Growth in the Search for Land in
22 Upper Canada and Related Questions," and in this
23 report Professor McCalla addressed several
24 questions: What was the experience of
25 population growth in Upper Canada between 1830

1 and 1867? What was the relationship between the
2 expansion of settlement and the availability of
3 land that the government expected to be arable?
4 What problems did the flow of migrants and
5 expansion of settlement create for the colonial
6 government? How did they respond? And how, in
7 the context of the time, could it have responded
8 differently? And finally, what were the
9 military resources available to the Government
10 of Canada for use in Canada West circa 1850?

11 This evidence will set the historical
12 context of Treaty 72 with respect to the
13 pressures and threats of encroachment the Crown
14 and Saugeen were facing.

15 Professor McCalla also provides a more
16 general expertise as a historian to assist the
17 Court. In his first report professor McCalla
18 addressed the problem of multiple or conflicting
19 accounts of the same event by the same author at
20 different times. The Court, of course, will see
21 that this pertains to the record of Laurence
22 Oliphant who provided several accounts of the
23 treaty negotiations over 40 years.

24 Professors Brownlie, Haring and
25 Driben have already given the Court helpful

10:41:28 1 evidence on this and Professor McCalla goes
10:41:31 2 somewhat deeper.

10:41:33 3 In his second report professor McCalla
10:41:34 4 addresses the evidence provided by Reverend
10:41:37 5 Conrad van Dusen in his 1867 book "Indian
10:41:40 6 Chief". Once again Professors Brownlie, Driben
10:41:44 7 and Harring indicated caution with respect to
10:41:46 8 the source, which is also reflected in Professor
10:41:50 9 McCalla's report.

10:41:52 10 It is important to note that Professor
10:41:53 11 McCalla's reports are not an examination of all
10:41:58 12 of the circumstances of the negotiation but
10:41:59 13 rather just these narrow points.

10:42:02 14 Returning to the issue of using the
10:42:05 15 military to protect the peninsula, Canada is
10:42:07 16 offering the evidence of Mr. Tyler Wentzell.
10:42:09 17 Mr. Wentzell is a lecturer with the Canadian
10:42:09 18 Forces College. He's a military historian with
10:42:09 19 particular expertise in the practicalities of
10:42:09 20 military police cooperation. He brings both
10:42:16 21 historical and practical expertise to the issue
10:42:23 22 of using the military to guard against
10:42:26 23 squatters. His first report was entitled "A
10:42:31 24 British Officers understanding of military aid
10:42:32 25 to the civil power in 1854".

10:42:35 1 Essentially, Mr. Wentzell was asked,
10:42:38 2 what would an officer in the regular British
10:42:41 3 army have thought were the legal limits on what
10:42:43 4 his men could be called up to do to assist the
10:42:45 5 civil power? And would it make a difference if
10:42:50 6 the civil power was a colonial government?

10:42:52 7 Mr. Wentzell's second report is
10:42:54 8 entitled, "Considerations affecting a military
10:42:56 9 expedition to secure the Bruce Peninsula against
10:43:00 10 encroachment by squatters between 1836 and
10:43:03 11 1854." And the question is obviously -- is
10:43:06 12 obvious from the title.

10:43:06 13 Simply put, the expert evidence of
10:43:11 14 Mr. Wentzell will show that the view espoused by
10:43:17 15 Professor Haring is not so straightforward.
10:43:17 16 Military resources were scarce. There were
10:43:17 17 limits to the use of military in this fashion,
10:43:21 18 and the use of military to patrol or cut off
10:43:26 19 access to the peninsula, as proposed by the
10:43:28 20 plaintiffs, would have had the opposite effect
10:43:30 21 intended.

10:43:34 22 We've already heard evidence that both
10:43:36 23 the First Nations and the Crown were aware of
10:43:37 24 the pressures of settlement that were building
10:43:39 25 at the time of Treaty 72 and were expected to

1 result in increasing encroachment over the
2 peninsula. The negotiators of Treaty 72 were
3 concerned that unless the lands were sold and
4 the proceeds provided to the Saugeen and Owen
5 Sound Bands the First Nations might desert lands
6 all together to settlers or squatters and
7 receive no compensation for the loss.

8 By 1854 the Crown came to the
9 conclusion that it would not be able to prevent
10 the wave of settlement it expected to come.

11 We've already heard the evidence of
12 Professor Brownlie, and the documentary record
13 of the various discussions that were held with
14 the plaintiffs, about the possibility of
15 surrender in order to ensure that the plaintiffs
16 would receive the value of their land.

17 The Court has heard that Band members
18 were willing to entertain a surrender. Of
19 course seeing the letters written in March 1854
20 by Chief Peter John Kegedonce and Charles
21 Keeshig separately advocating a surrender,
22 there's been evidence about various discussions
23 occurring with Band members during which a
24 willingness to surrender was expressed.

25 In August 1854 the plaintiff First

1 Nations met at Nawash with Captain Anderson,
2 during which the Bands indicated they were
3 amenable to surrender but no agreement was
4 reached as to how much land to surrender.

5 Professor Driben indicated his opinion
6 was that the First Nations came to the August
7 meeting prepared to make a surrender.

8 It's common ground that it was always
9 within the power of both Indigenous parties and
10 the Crown to entertain surrender for land. This
11 is accepted by all the parties and their
12 experts.

13 We've heard the evidence of Chief
14 Kahgee that the Saugeen and Nawash were active
15 agents in the negotiations, in other words, not
16 mere dupes of the government.

17 This case is not about a
18 misunderstanding of Treaty 72. The parties used
19 a map to facilitate discussions. As mentioned
20 in Oliphant's report, the text of the treaty was
21 written up in the presence of the chiefs and
22 read and explained to them. The evidence to
23 date has demonstrated that in addition to Peter
24 Jacobs, the Indigenous Methodist Minister acting
25 as translator, at least four of the Indigenous

1 signatories to the treaty were fluent in both
2 English and Anishinaabemowin, David Sawyer,
3 Charles Keeshig, John Beattie and Peter Jones
4 Kegedonce. In addition, Professor Brownlie
5 admitted that it was likely other warriors,
6 including the literate-most Madwayosh were
7 present. Professor Corbiere admitted that the
8 Anishinaabemowin understood such concepts as
9 "sale".

10 The Court has heard and seen the
11 documentary evidence to show that in years
12 following Treaty 72 the First Nations did not
13 challenge the surrender on the above-complaint
14 grounds, but instead exhorted the Crown to sell
15 the land faster. On several occasions the First
16 Nations asked the Crown to purchase any
17 remaining unsold land so that they could receive
18 the proceeds quicker.

19 In 1896 discussions occurred between
20 the First Nations and Canada about unsold land
21 with the result the plaintiffs were given
22 further reserve land but the remainder was to be
23 sold.

24 Similarly the First Nations were very
25 vocal in articulating any complaints they had

1 following the treaty. The Court has heard that
2 their primary concern immediately following the
3 Treaty was to persuade the Crown to require
4 actual settlement of the lands.

5 It's Canada's position that the Crown
6 negotiators endeavoured to act at all times with
7 honour and respect for the Indigenous parties to
8 preserve and protect the legal interest in their
9 land. Canada's position is that Treaty 72 was a
10 reasonable solution to a looming crisis not an
11 exploitative bargain.

12 Finally, the plaintiffs argue that the
13 text of Treaty 72 contains mistakes that require
14 correction. If I could call up the opening
15 statement of the plaintiffs' again, on April
16 25th, 2019, page 30?

17 The plaintiffs, in their opening
18 statement, indicated that they are abandoning
19 their claim for rectification of the treaty with
20 respect to shorelines and lake beds of internal
21 water bodies, at the very top:

22 "And another thing that was
23 pleaded was that in Treaty 72, the
24 internal lakes and shorelines had not
25 been included in the scope of Treaty

10:47:55 1 72. That remains part of the
10:47:57 2 evidence, and will factor into the
10:47:58 3 remedies, but we're not pursuing that
10:48:01 4 as a separate and independent cause of
10:48:01 5 action as it was originally
10:48:03 6 contemplated."

10:48:04 7 And as such we won't make further
10:48:06 8 comment on that issue here.

10:48:08 9 But the plaintiffs do, however, assert
10:48:10 10 that Treaty 72 did not have any effect on such
10:48:13 11 traditional harvesting rights of the plaintiffs
10:48:15 12 as may have existed at the time.

10:48:18 13 The evidence from community witnesses
10:48:20 14 has been clear that the plaintiffs assert a
10:48:22 15 right to engage in these practices not only over
10:48:25 16 Crown land but as well as third-party private
10:48:28 17 property.

10:48:29 18 The plaintiffs have not defined what
10:48:31 19 Aboriginal rights they are asserting, but the
10:48:35 20 position is that any rights they had were not
10:48:37 21 surrendered by the Treaty. It should be
10:48:38 22 observed that the issue of Aboriginal licence
10:48:39 23 case only pertains to the Treaty 72 area. While
10:48:44 24 the Court has heard evidence of practices
10:48:48 25 engaged in it by the plaintiffs outside the

1 Treaty 72 area, particularly in the Treaty 45
2 1/2 area, this is not relevant to the sanction.
3 Canada will not be offering expert evidence on
4 this topic.

5 In understanding the intention of the
6 treaty Canada will be relying on the evidence of
7 the plaintiffs and Ontario's witnesses, the
8 Agreed Statements of Fact and the Answers to
9 Interrogatories.

10 With respect to the rectification of
11 the treaty, it's Canada's position that there
12 was no mutual or unilateral mistake. Treaty 72
13 refers to a full and complete surrender. Both
14 parties understood that the surrender was for
15 sale and development, and the plaintiffs were
16 giving up harvesting rights over surrendered
17 land. The Court has already heard evidence that
18 the land was intended for sale for agricultural
19 purposes.

20 If I could submit this, Professor
21 Harring acknowledged that although parts of the
22 peninsula may not be ideal for growing crops
23 there was a belief that it held good farm land.

24 The Court has also heard evidence that
25 Bands at the time emphasized that they wanted

10:49:47 1 actual settlement to occur and not just for the
10:49:49 2 land to be sold to absent speculators.

10:49:53 3 The Band acknowledged several times
10:49:55 4 following the Treaty that they were aware such
10:49:56 5 rights as they may have had were surrendered.
10:49:59 6 In 1896 they went so far as to request that
10:50:04 7 hunting reserves be created.

10:50:05 8 So it remains Canada's position that
10:50:08 9 the written text of the Treaty 27 is a complete
10:50:12 10 and accurate record of the agreement between the
10:50:13 11 parties on the point of harvesting rights.

10:50:19 12 Through the course of the plaintiffs'
10:50:21 13 case the issue of the operations of the Indian
10:50:23 14 Department, particularly in the 20th century,
10:50:25 15 has arisen from time to time.

10:50:27 16 As such Canada will be calling Mr.
10:50:28 17 Jean Pierre Morin, who is a historian employed
10:50:32 18 by CIRNAC, Crown Indigenous Relations in
10:50:35 19 Northern Affairs Canada. He will not be
10:50:39 20 providing expert evidence or opinion evidence,
10:50:41 21 but will be simply explaining how the Indian
10:50:44 22 Department was structured in the 19th century to
10:50:46 23 the present. This will allow the Court to
10:50:49 24 better understand the documentary record before
10:50:51 25 it.

1 The Court has heard a great deal of
2 evidence that is not directly relevant to the
3 issues in the litigation. It is not an issue
4 whether members of the Band were allowed to
5 attend schools after age 16 or whether members
6 of the Bands were cheated by local merchants.

7 As I've already noted, the validity of
8 Treaty 45 1/2 is not in dispute and whether
9 there are Aboriginal rights over the area
10 surrendered in Treaty 45 1/2.

11 It is not about whether Treaty 72 is
12 invalid because from an Anishinaabe point of
13 view ceremonies were not followed.

14 There has been a lot of evidence from
15 community witnesses, as well as Professors
16 Harring and Brownlie, that asserts that the
17 communities did not receive the proceeds of the
18 sale.

19 Although the plaintiffs are alleging
20 that the Crown exaggerated the benefits of
21 Treaty 72, the plaintiffs are not putting in
22 issue whether the sale of Treaty 72 lands or
23 other implementation obligations were fulfilled
24 properly. That issue is the subject of other
25 actions which have been mostly stayed pending

10:52:03 1 the resolution of this case.

10:52:06 2 An issue that has taken up a great
10:52:09 3 deal of time is whether an Indian Agent burned
10:52:11 4 or instructed others to burn documents
10:52:13 5 pertaining to the history of the community.
10:52:15 6 Canada has no documentary evidence to
10:52:17 7 definitively answer the question as to whether
10:52:19 8 or not this event occurred.

10:52:23 9 It is Canada's position that if such a
10:52:25 10 burning occurred it was most likely a routine
10:52:26 11 disposal of materials, possibly when the Cape
10:52:30 12 Croker office was closed on June 30th, 1988, and
10:52:34 13 amalgamated with the Saugeen office.

10:52:36 14 The evidence presented by the
10:52:38 15 plaintiffs does not disclose which, if any, of
10:52:41 16 the documents held in Band safes were allegedly
10:52:43 17 saved from burning but could have included
10:52:45 18 materials as innocuous as an outdated Criminal
10:52:48 19 Code.

10:52:52 20 To conclude, it's Canada's position
10:52:54 21 that the evidence will not be sufficient to
10:52:57 22 establish Aboriginal title in this case. The
10:53:00 23 evidence shows and will show that the area was
10:53:05 24 historically used freely by other Indigenous
10:53:08 25 people, the French and the British. It is also

10:53:13 1 Canada's position that the making of Treaty 72
10:53:14 2 was done in a fair and reasonable manner and
10:53:17 3 motivated by the exigencies at the time and was
10:53:20 4 recognized by both sides.

10:53:22 5 There was no breach of fiduciary duty
10:53:25 6 and the honour of the Crown was upheld.

10:53:28 7 And finally, it is Canada's position
10:53:29 8 that there were no mutual mistakes -- sorry,
10:53:31 9 there were no mistakes, mutual or otherwise,
10:53:33 10 with respect to harvesting rights in the
10:53:35 11 drafting of the treaty.

10:53:36 12 However, while Canada takes a
10:53:38 13 different view of the provisions at issue from
10:53:40 14 the plaintiffs, Canada remains committed to
10:53:42 15 honouring its treaty promises.

10:53:46 16 Thank you, Your Honour. That's my
10:53:48 17 opening statement.

10:53:50 18 THE COURT: Thank you, Mr. Beggs. Now
10:53:52 19 along the way in your opening statement I think
10:53:54 20 twice you mentioned written interrogatories,
10:53:58 21 which is fine. I'm assuming that is part of the
10:54:01 22 discovery process.

10:54:02 23 I just want to remind you that that
10:54:04 24 material should be the subject of early notice
10:54:08 25 to the plaintiffs so they can review those

10:54:10 1 interrogatories and exercise their rights, under
10:54:15 2 the rules, with respect to the completeness of
10:54:17 3 the proposed read-ins.

10:54:19 4 MR. BEGGS: Yes, Your Honour.

10:54:20 5 THE COURT: That's under control I
10:54:22 6 take it?

10:54:23 7 MR. BEGGS: Yes, Your Honour.

10:54:25 8 THE COURT: All right. Please go
10:54:26 9 ahead.

10:54:27 10 MR. BEGGS: Thank you, Your Honour. I
10:54:28 11 would like to call the first witness, Professor
10:54:31 12 Douglas McCalla.

10:54:44 13 THE REGISTRAR: Your Honour, Canada's
10:54:50 14 expert witness chart should be X-2 not Y-1.

10:54:57 15 THE COURT: So the document that I
10:54:57 16 marked Y1 should be X-2. All right. Thank you.

10:55:38 17 DOUGLAS MCCALLA: AFFIRMED.

10:55:38 18 THE COURT: Now, Professor McCalla,
10:55:40 19 first of all we have in this trial -- at least I
10:55:42 20 have taken to referring to experts whose history
10:55:47 21 is as a professor by the term "professor".

10:55:50 22 THE WITNESS: That's fine.

10:55:51 23 THE COURT: And, secondly, we have a
10:55:52 24 very large room and we have challenges
10:55:54 25 associated with the witness being heard at the

10:55:58 1 back of the room. And I've said to others with
10:56:02 2 your professional background, imagine you're
10:56:05 3 teaching a course in a big room and you'll be
10:56:08 4 well heard.

10:56:09 5 THE WITNESS: I will do my best, Your
10:56:10 6 Honour.

10:56:11 7 THE COURT: And that microphone does
10:56:12 8 assist but you need to be, you know, fairly
10:56:16 9 close to it for it to be meaningful.

10:56:19 10 THE WITNESS: Thank you, Your Honour.
10:56:20 11 I'll appreciate a prompt if I lose track of
10:56:25 12 that.

10:56:25 13 THE COURT: Oh, you will get one no
10:56:27 14 doubt, but just at the beginning I can tell you
10:56:29 15 will have to work a little bit to get your voice
10:56:30 16 up. I'm sure you have a lot of practice doing
10:56:32 17 that. Go ahead, Mr. Beggs.

10:56:35 18 MR. BEGGS: Thank you, Your Honour.

10:56:37 19 Your Honour, we've provided a list of
10:56:40 20 secondary sources, which we'll be asking to make
10:56:46 21 exhibits, to the Registrar. Perhaps we can do
10:56:52 22 that before we start? The list is at SC1281.

10:56:58 23 THE COURT: Now, Mr. Registrar, I've
10:57:00 24 given some thought to this process, which has
10:57:03 25 been undertaken at my request, and this very

10:57:07 1 helpful list has all the document numbers on the
10:57:13 2 left of the chart, and I do not think it is
10:57:15 3 necessary to read all of this into the record.

10:57:18 4 Instead, I think it is sufficient to
10:57:21 5 mark this list as a lettered exhibit. And I
10:57:22 6 would ask you, Mr. Registrar, to read the
10:57:25 7 document number in the left-hand side and the
10:57:28 8 associated exhibit number, but you need not read
10:57:32 9 the descriptions because we will have the
10:57:34 10 lettered exhibits.

10:57:36 11 THE REGISTRAR: I will, Your Honour.

10:57:37 12 THE COURT: So what is the next
10:57:38 13 lettered exhibit?

10:57:40 14 THE REGISTRAR: The next lettered
10:57:41 15 Exhibit is Y1.

10:57:42 16 EXHIBIT NO. Y1: List of secondary
10:57:42 17 source.

10:57:42 18 THE COURT: Okay. Y1 is the secondary
10:57:43 19 source list that Mr. Beggs just referred to.

10:57:47 20 And, Mr. Registrar, can you take us
10:57:49 21 through the assignment of numbers to that chart,
10:57:51 22 please?

10:57:52 23 THE REGISTRAR: Document number S0193
10:57:52 24 is going to be exhibit number 4353.

10:57:57 25 EXHIBIT NO. 4353: Excerpt from the

10:57:57 1 book entitled "Replenishing the Earth.
10:57:57 2 The Settler Revolution and the Rise of
10:57:57 3 the Anglo-World, 1783-1939", authored
10:57:57 4 by James Belich. Document number
10:57:57 5 S-0193.
10:57:59 6 THE REGISTRAR: S-0365 is Exhibit
10:58:02 7 number 4354.
10:58:05 8 EXHIBIT NO. 4354: Book entitled
10:58:05 9 "Land, power, and Economics on the
10:58:05 10 Frontier of Upper Canada", authored by
10:58:05 11 John Clarke. Document number S-0365.
10:58:08 12 THE REGISTRAR: S-0367, 4355.
10:11:36 13 EXHIBIT NO. 4355: Book entitled "The
10:11:36 14 Ordinary People of Essex:
10:11:36 15 Environment, Culture, and Economy on
10:11:36 16 the Frontier of Upper Canada",
10:11:36 17 authored by John Clarke. Document
10:11:36 18 number S-0367.
10:11:36 19 THE REGISTRAR: S-0420, 4356.
10:11:36 20 EXHIBIT NO. 4356: Excerpt from the
10:11:36 21 book entitled "British Emigration to
10:11:36 22 British North America: The First
10:11:36 23 Hundred Years", authored by Helen I.
10:11:36 24 Cowan. Document number S-0420.
10:11:36 25 THE REGISTRAR: S-0435, 4357.

10:11:36 1 EXHIBIT NO. 4357: Excerpt from the
10:11:36 2 book entitled "The Politics of
10:11:36 3 Population: State Formation,
10:11:36 4 Statistics, and the Census of Canada,
10:11:36 5 1840-1875", authored by Curtis Bruce.
10:11:36 6 Document number S-0435.
10:11:36 7 THE REGISTRAR: S-0633, 4358.
10:11:36 8 EXHIBIT NO. 4358: Excerpt from the
10:11:36 9 book entitled "Hopeful Travellers:
10:11:36 10 Families, Land, and Social Change in
10:11:36 11 Mid-Victorian Peel County, Canada
10:11:36 12 West", authored by David Gagan.
10:11:36 13 Document number S-0633.
10:11:36 14 THE REGISTRAR: S-1146, 4359.
10:11:36 15 EXHIBIT NO. 4359: Excerpt from the
10:11:36 16 book entitled "Planting the Province:
10:11:36 17 The Economic History of Upper Canada
10:11:36 18 1784-1870", authored by Douglas
10:11:36 19 mcCalla. Document number.
10:11:36 20 S-1146.
10:11:36 21 THE REGISTRAR: S-1527, Exhibit 4360.
10:11:36 22 EXHIBIT NO. 4360: Excerpt from the
10:11:36 23 book entitled "The Ojibwa of Southern
10:11:36 24 Ontario - The Surrenders: 'You Have
10:11:36 25 Swept Away All Our Pleasant Lands' ",

10:11:36 1 authored by Peter Schmalz. Document
10:11:36 2 number S-1527.
10:58:32 3 THE REGISTRAR: Document number
10:58:32 4 S-1542, Exhibit 4361.
10:11:36 5 EXHIBIT NO. 4361: Excerpt from the
10:11:36 6 book entitled "British Regulars in
10:11:36 7 Montreal: An Imperial Garrison,
10:11:36 8 1832-1854", authored by Elinor Kyte
10:11:36 9 Senior. Document number S-1542.
10:58:37 10 THE REGISTRAR: S-1639, 4362.
10:11:36 11 EXHIBIT NO. 4362: Excerpt from the
10:11:36 12 book entitled "Canada and the British
10:11:36 13 Army 1846-1871: A Study in the
10:11:36 14 Practice of Responsible Government",
10:11:36 15 authored by C.P. Stacy. Document
10:11:36 16 number S-1639.
10:58:44 17 THE REGISTRAR: S-1805, 4363.
10:11:36 18 EXHIBIT NO. 4363: Article entitled
10:11:36 19 "Deserving of Fabourable
10:11:36 20 Consideration: Crown Land Agents,
10:11:36 21 Surveyors, and Access to Crown Lands
10:11:36 22 in Upper Canada", in "Transatlantic
10:11:36 23 Subjects: Ideas, Institutions, and
10:11:36 24 Social Experience in
10:11:36 25 Post-Revolutionary British North

10:11:36 1 America", authored by Michelle
10:11:36 2 Vosburgh. Document number S-1805.
10:58:48 3 THE REGISTRAR: S-1843, 4364.
10:11:36 4 EXHIBIT NO. 4364: Excerpt from the
10:11:36 5 book entitled "The Great Land Rush and
10:11:36 6 the Making of the Modern World,
10:11:36 7 1650-1900", authored by John C.
10:11:36 8 Weaver. Document number S-1843.
10:58:53 9 THE REGISTRAR: S-1875, 4365.
10:11:36 10 EXHIBIT NO. 4365: Excerpt from the
10:11:36 11 book entitled "Tenants in Time:
10:11:36 12 Family Strategies, Land, and
10:11:36 13 Liberalism in Upper Canada,
10:11:36 14 1799-1871", authored by Catharine Anne
10:11:36 15 Wilson. Document number S-1875.
10:59:08 16 THE COURT: Please go ahead.
10:59:10 17 MR. BEGGS: Thank you, Your Honour.
10:59:11 18 Perhaps we can also make the two reports of
10:59:13 19 Professor McCalla exhibits at this time? I
10:59:16 20 understand that they are on consent, as has been
10:59:19 21 the practice.
10:59:24 22 THE COURT: Mr. Beggs, you have got
10:59:24 23 counsel standing up beside you.
10:59:27 24 MS. GUIRGUIS: Your Honour.
10:59:27 25 THE COURT: Yes, counsel.

10:59:27 1 MS. GUIRGUIS: So we have been trying
10:59:27 2 to resolve with our friends is that we take
10:59:27 3 issue with one of the reports, just a particular
10:59:27 4 section on page 25 and 26.

10:59:39 5 THE COURT: Is it the first or the
10:59:40 6 second report?

10:59:41 7 MS. GUIRGUIS: The first report, the
10:59:42 8 one entitled, "Population Growth and the search
10:59:45 9 for land in Upper Canada Related Questions."

10:59:48 10 THE COURT: And can you direct me to
10:59:49 11 the specific section, counsel, that you're
10:59:52 12 concerned about?

10:59:52 13 MS. GUIRGUIS: Yes, the -- so the
10:59:54 14 second paragraph on page 25, which begins :

10:59:59 15 "The second was actively to
11:00:01 16 enforce the existing treaty [...]"

11:00:03 17 That sentence. We take -- we object
11:00:14 18 to whether or not the witness has the expertise
11:00:14 19 to opine on military strategy and enforcement.

11:00:19 20 THE COURT: Is it that entire long
11:00:22 21 paragraph that you're talking about there?

11:00:24 22 MS. GUIRGUIS: Yes, that paragraph.
11:00:25 23 And then also on page 26 it's a paragraph that
11:00:28 24 starts -- yes, sorry. It's the paragraph that
11:00:33 25 starts at the bottom of page 25 and then goes to

11:00:37 1 the top of page 26.

11:00:41 2 THE COURT: And unless you have a
11:00:43 3 further submission now, Ms. Guirguis, my
11:00:46 4 preference would be, as we've done with some of
11:00:48 5 your expert witnesses, to have the
11:00:51 6 qualifications and tender completed and then I
11:00:54 7 will anticipate that you, in your submissions on
11:00:58 8 the tender, are going to say something perhaps a
11:01:00 9 bit more about that section.

11:01:02 10 Because you'll recall that -- I can
11:01:03 11 recall at least one or maybe two of the
11:01:09 12 plaintiffs' experts were the subject of a
11:01:10 13 similar objection, and that was the context that
11:01:15 14 we proceeded with so that I'll be able to better
11:01:19 15 appreciate your submissions on what I would call
11:01:22 16 a scope issue.

11:01:25 17 MS. GUIRGUIS: That's right.

11:01:26 18 THE COURT: Thank you for alerting me
11:01:27 19 to that.

11:01:27 20 MS. GUIGRUIS: Thank you.

11:01:27 21 THE COURT: Mr. Beggs, under the
11:01:27 22 circumstances I think we can wait to mark the
11:01:36 23 two reports.

11:01:37 24 I also have this gentleman's
11:01:39 25 curriculum vitae. Has that been updated since

11:01:42 1 the copy was provided to me or is this still
11:01:43 2 the --

11:01:44 3 MR. BEGGS: Yes, Your Honour. There
11:01:45 4 is a new updated version of the curriculum
11:01:49 5 vitae, which is document SC1254. This is an
11:02:01 6 updated CV to the ones that were attached to the
11:02:03 7 back of his reports. And I'd ask that this be
11:02:07 8 made an exhibit, Your Honour.

11:02:11 9 THE COURT: Mr. Registrar.

11:02:13 10 THE REGISTRAR: Exhibit number 4366.

11:02:14 11 EXHIBIT NO. 4366: Updated version of
11:02:17 12 the curriculum vitae of Douglas
11:02:17 13 McCalla.

11:02:19 14 THE COURT: We'll deal with the report
11:02:20 15 marking after the tender is completed.

11:02:23 16 MR. BEGGS: Yes, Your Honour. And for
11:02:26 17 the sake of clarity I'll call up the proposed
11:02:30 18 qualification, which is SC1283.

11:02:38 19 THE COURT: I think this is my
11:02:40 20 language more than counsels, but I call them
11:02:41 21 "tenders".

11:02:43 22 MR. BEGGS: Yes, sorry, tender.

11:02:54 23 THE COURT: Are you planning to go
11:02:55 24 through the background of this gentleman first?

11:02:58 25 MR. BEGGS: Yes, Your Honour.

11:03:14 1 Just to indicate where we are, if you
11:03:14 2 go to the second page of that. Sorry.
11:03:14 3 So we're seeking to tender him as an
11:03:18 4 economic historian with special expertise in the
11:03:20 5 social and economic history of 19th century
11:03:22 6 Upper Canada/Canada West, which extends to
11:03:25 7 social and economic interactions of civilians
11:03:27 8 and the military.
11:03:30 9 THE COURT: And, Mr. Registrar, what's
11:03:31 10 the next lettered exhibit?
11:03:33 11 THE REGISTRAR: Lettered Exhibit Y-2.
11:03:36 12 EXHIBIT NO. Y-2: Tender on
11:03:39 13 qualifications.
10:55:10 14 EXAMINATION IN-CHIEF BY MR. BEGGS:
10:55:12 15 (On qualifications.)
11:03:44 16 Q. Good morning, Professor McCalla.
11:03:50 17 Now, do you have before you your CV?
11:03:53 18 A. Yes, I do.
11:03:53 19 Q. Okay. And I'd like to start with
11:04:02 20 a discussion of your education. Could you tell
11:04:08 21 me where you did your graduate studies?
11:04:13 22 A. Yes. I did a Masters Degree at
11:04:15 23 the University of Toronto in -- completed in
11:04:19 24 1965, and a doctoral degree in history at the
11:04:22 25 University of Oxford. I was actually at Oxford

1 from 1965 to '68. And in the manner of things
2 in those days I got a teaching job before I
3 finished the thesis, but the thesis was
4 submitted and accepted in 1972.

5 Q. And when referring to that, if I
6 could look at the second page of your CV.

7 THE COURT: Can somebody put it up on
8 the screen?

9 MR. BEGGS: Yes, sorry.

10 THE COURT: There we go.

11 BY MR. BEGGS:

12 Q. If we can turn to page 2, under
13 the section at the top, which is "Awards", and
14 there is a 1965 to 1968 entry, which is the time
15 you -- that corresponds to your attendance at
16 Oxford, it says "Rhodes Scholarship". Could you
17 tell me about that, please?

18 A. Yes. The Rhodes scholarship I
19 think is fairly well known in the world as a
20 scholarship that seeks to identify future
21 leaders. They have become much more explicit
22 about fighting the world's fight. It was
23 permissible to be a historian when I was
24 applying for the scholarship and, in fact, there
25 still are historians.

1 One of those whose names went by in
2 the list of sources, James Belich, is not only
3 the Professor of Imperial History at Oxford now
4 but a Rhodes scholar.

5 There is two aspirants for the
6 Democratic nomination for the U.S. presidency at
7 the moment who are Rhodes scholars. There's
8 been one American president that is a Rhodes
9 scholar. We have our current Minister of
10 Foreign Affairs is a Rhodes scholar.

11 It's a very competitive scholarship,
12 and I was lucky in Alberta to get a fellow year
13 in applications, put it that way.

14 It's a distinct honour to have a
15 scholarship which has more than a century-long
16 history behind it and which is still one of the
17 most actively-pursued and widely-recognized
18 scholarships in the world.

19 Q. And while we're on the subject, I
20 believe in your publications there is a
21 reference to the Rhodes scholarship?

22 A. Yes. As the Rhodes Trust
23 approached its 100th anniversary I was invited
24 to write the official history of the scholarship
25 in Canada and had complete access to the Trust

11:06:58 1 files, many of which in those days were in the
11:07:01 2 vault at McCarthy Tetrault because the secretary
11:07:04 3 of the Trust of Canada was there.

11:07:07 4 The rest of which were in the archives
11:07:09 5 at Oxford, some of which are also in the
11:07:12 6 National Archives of Canada.

11:07:14 7 And so I put together a history of
11:07:17 8 what the scholarship had meant in Canada, who
11:07:20 9 had applied for it, who had succeeded, what they
11:07:23 10 had done in their lives, as much as was possible
11:07:26 11 within a single book chapter.

11:07:28 12 It became really a chapter on the
11:07:31 13 history of 20th century Canada. And I wound up
11:07:34 14 writing something long enough to be a book and
11:07:37 15 then had to shrink it down to a single chapter;
11:07:41 16 but it is an account of the Rhodes' Trust from
11:07:45 17 its origins to the late 1990s.

11:07:48 18 One of the interesting features of it
11:07:49 19 was the initial trust was set up by a Canadian.
11:07:52 20 In other words, after Cecil Rhodes died he left
11:07:57 21 a will saying, "Please establish this
11:07:59 22 scholarship". And a Canadian, George Parkin,
11:08:01 23 was appointed to set up the Rhodes scholarships
11:08:05 24 world wide.

11:08:06 25 So I wound up writing the -- really

1 the main section on how the scholarships were
2 organized for their first 15 years, as Parkin
3 went all around the world recruiting people to
4 designate scholars, finding people who would
5 organize the scholarship competition in each
6 jurisdiction.

7 For what it's worth, there are 32
8 scholarships in the United States and there are
9 now 11 in Canada, smaller numbers in Australia,
10 South Africa, New Zealand, smaller commonwealth
11 countries as well. And now under the new aegis
12 of the Rhodes Trust, there are scholarships from
13 Israel, Palestine, Saudi Arabia, China as they
14 are expanding their reach.

15 But I cut off in the 1990s and had
16 an extraordinary experience reading all of the
17 files of the Trust and shrinking that into
18 25,000 words.

19 Q. Thank you. Returning for a
20 moment to your Masters Degree, did you have a
21 specific area of focus in your research?

22 A. The Masters Degree involved
23 writing -- it was the first year the University
24 of Toronto did not require a thesis, but -- so
25 we were expected to write a major research

11:09:24 1 paper, which turned out to look awfully much
11:09:27 2 like a thesis by the time you were done.

11:09:29 3 And I wrote a -- in response to my
11:09:31 4 supervisor, Professor J.M.S. Careless, who was
11:09:35 5 the chair of the history department at the
11:09:37 6 University of Toronto at the time, and one of
11:09:39 7 the two or three leading historians of Canada at
11:09:42 8 the time in fact. He was really interested in
11:09:44 9 how the leadership of Toronto had changed in the
11:09:46 10 mid-19th century from the Tory elite that were
11:09:54 11 famous for running the province earlier in its
11:09:56 12 history.

11:09:57 13 And, with that as an inspiration, I
11:09:59 14 went out to investigate the business leadership
11:10:02 15 in Toronto in the 1850s. And not to his
11:10:05 16 surprise I discovered that virtually none of
11:10:09 17 these people had grown up in Upper Canada, they
11:10:11 18 were immigrants from Britain.

11:10:13 19 And most of them were hopeful sale
11:10:15 20 merchants. They were not -- that was what
11:10:20 21 business was in Toronto in the 1850s.

11:10:24 22 One of the best sources I found to
11:10:25 23 research that was --

11:10:27 24 THE COURT: I'm just going to
11:10:28 25 interrupt you for a minute, sir, because I want

11:10:30 1 you to focus on the questions. Don't get -- I
11:10:33 2 appreciate you're trying to be helpful but I
11:10:34 3 don't think we need to get into the sources for
11:10:36 4 that masters thesis.

11:10:39 5 THE WITNESS: I thought it could be
11:10:40 6 relevant.

11:10:42 7 THE COURT: Mr. Beggs, you can be
11:10:42 8 sure -- I can promise you will ask another
11:10:45 9 question if you overlook something.

11:10:47 10 MR. BEGGS: Thank you, Your Honour.

11:10:49 11 BY MR. BEGGS:

11:10:49 12 Q. And what was your doctoral thesis
11:10:54 13 about?

11:10:55 14 A. The doctoral thesis was the
11:11:04 15 history of a Trans-Atlantic business which
11:11:05 16 happened to have left records. There were not
11:11:06 17 many that I found. The Cannon family were based
11:11:08 18 in Glasgow and initially in Toronto and
11:11:11 19 subsequently in Hamilton; and they built up what
11:11:14 20 was in the mid-1850s the largest business in
11:11:17 21 Canada, the largest private business. There
11:11:20 22 were railroads and banks but that was the
11:11:23 23 largest private business.

11:11:24 24 And they left 130,000 pages of records
11:11:26 25 that I was able to work through to understand

11:11:29 1 the Trans-Atlantic trade between the 1830s and
11:11:32 2 the 1860s.

11:11:34 3 Q. And did your doctoral thesis
11:11:37 4 achieve any recognition?

11:11:39 5 A. Well, it appears, in due course a
11:11:42 6 much shrunken version of it, as a book called
11:11:45 7 "The Upper Canada Trade" which was published in
11:11:48 8 1979 by the University of Toronto Press.

11:12:06 9 Q. Now, what is your current
11:12:07 10 position?

11:12:07 11 A. I hold the rank of university
11:12:09 12 professor emeritus at Guelph, which is a -- I'm
11:12:12 13 not sure what other universities have that rank
11:12:14 14 but Guelph does.

11:12:15 15 Q. And is that different from the
11:12:16 16 professor emeritus you are at Trent?

11:12:22 17 A. Well, yes, in this sense that if
11:12:25 18 you're a full professor at the University of
11:12:26 19 Guelph and you retire you become a professor
11:12:29 20 emeritus, but your department can nominate you,
11:12:38 21 in an elaborate nomination process, for the
11:12:40 22 higher rank of university professor emeritus.
11:12:43 23 And it recognizes that you've done
11:12:45 24 international -- internationally-recognized
11:12:48 25 research and it carries with it the expectation

11:12:51 1 that you're going to continue to do research.

11:12:53 2 So all full professors at Guelph can
11:12:56 3 become professor emeritus, but only a much
11:12:59 4 smaller number become university professor
11:13:03 5 emeritus. The nomination goes through the same
11:13:05 6 process as if you were getting promoted.

11:13:10 7 Q. And also under your academic
11:13:15 8 appointments at the University of Guelph --
11:13:27 9 sorry, do you teach as a university professor
11:13:29 10 emeritus?

11:13:30 11 A. No, I'm retired.

11:13:32 12 Q. And prior to 2010 were you
11:13:34 13 teaching at Guelph?

11:13:35 14 A. Yes.

11:13:38 15 Q. And you were at Guelph from 2002
11:13:42 16 to 2010 for teaching?

11:13:43 17 A. Yes.

11:13:44 18 Q. What is the Canada research chair
11:13:47 19 in rural history that you've marked on your CV?

11:13:51 20 A. The Canadian government has a
11:13:53 21 program, the federal government, it's one of its
11:13:56 22 main ways of reaching into a provincial
11:13:58 23 jurisdiction, if you like. It established a
11:14:01 24 program in 2000 to support advanced research in
11:14:08 25 Canadian universities, and there are now about

1 1900 CRCs allocated to all of the universities
2 in Canada in numbers of -- according to their
3 research weight, shall we say.

4 40 percent of the chairs are in
5 medicine, 40 percent in science, 20 percent in
6 humanities and social science. I was the first
7 appointee in social science at the University of
8 Guelph. And I can tell you how I got recruited
9 for that but perhaps you can ask about that if
10 you want.

11 Q. I think we'll hold off on that
12 for the moment, but how long all together have
13 you been teaching history?

14 A. Well, I began teaching at Trent
15 University in 1968, retired from there when I
16 moved to Guelph in 2002. So I retired from
17 Trent on December 31st, 2001 and continued to
18 teach at Guelph until 2010. And I've been
19 retired since then but continuing research.

20 Q. And is the teaching for
21 undergraduates or graduate students?

22 A. At Trent University it was
23 entirely undergraduate. At the University of
24 Guelph it was senior undergraduate and graduate
25 students. So, in fact, I haven't given a

11:15:31 1 university lecture in more than 20 years.

11:15:39 2 Q. Do you have any experience in
11:15:40 3 teaching historical methods to students?

11:15:43 4 A. Well, at the University of Guelph
11:15:44 5 one -- it has a joint doctoral program with
11:15:47 6 Waterloo and Wilfred Laurier. And I was asked
11:15:51 7 to lead the doctoral comprehensive seminar, and
11:15:59 8 that takes the student through the whole field
11:16:01 9 of Canadian history. They have to show
11:16:04 10 expertise across the whole range of what
11:16:07 11 historians are currently working on.

11:16:10 12 So it involves the students reading
11:16:13 13 about 120 books during the year, covering the
11:16:16 14 whole range of what is currently Canadian
11:16:17 15 history in French as well as in English. And I
11:16:20 16 have to say that I don't think any of the
11:16:21 17 students that I was teaching read all of the 120
11:16:25 18 but I did.

11:16:27 19 Q. And before I move from your
11:16:28 20 appointments I see there's an appointment in
11:16:31 21 1995 at a university in Japan?

11:16:36 22 A. Yes.

11:16:37 23 Q. Tell us briefly what that is
11:16:38 24 about.

11:16:39 25 A. Yes. For quite a few years the

1 University of Tsukub, which is an
2 internationally-oriented Japanese university --
3 it's a national university, a government
4 university, but they have an area studies
5 program and they bring in professors from the
6 United States, Europe, South Asia, China.

7 They have language professors so they
8 are designed to open up Japanese students out a
9 little bit into the world. For historical
10 reasons Canada was in there and I was invited to
11 take that chair for one year. It was a year to
12 teach about Canada to Japanese students.

13 Q. And do you know why you were
14 invited?

15 A. This is one that ran along lines
16 of connection, shall we say. The issue that was
17 raised in Japan was, who can we get? The
18 current professor would be asked, have you got
19 any ideas? And they wanted somebody senior. We
20 had known -- my wife and I had known two of the
21 previous professors, and so when they phoned me
22 and said, would you be interested? I said, yes
23 immediately.

24 I think the recommendation was from
25 one of my Trent colleagues whom they approached

1 first. But it is done by -- I won't say an old
2 boys' network or anything because it was, who
3 can we find who is senior and has the time
4 available and is willing to risk all the
5 strangeness of living in another culture?

6 Q. So if I can turn to your awards
7 section? You've already mentioned the Rhodes
8 scholarship. Can you tell me particularly what
9 the Killam Research Fellowship is?

10 A. It is provided for by the will of
11 Lady Killam which is administered by the Canada
12 Council, and it is an award to support advanced
13 researchers with exciting programs. It's open
14 to scholars in every field of Canada. So this
15 year, for example, all the winners were in the
16 natural sciences.

17 So I think it's the most prestigious
18 scholarship you can apply for in Canada because
19 there are only five or six a year, and it buys
20 you something really precious for an academic,
21 two years off from your teaching.

22 So it demands an application that can
23 compete with sciences and medicine as well. And
24 there are about five or six per year.

25 Q. And several points, you have

1 grants or fellowship from SSHRC. Could you tell
2 us what that is and what the grants would be?

3 A. Yes. The SSHRC is the main
4 research grant for social sciences in Canada.
5 It's somewhat of a poor cousin to the sciences.
6 It has a much smaller budget but it is the main
7 source of funding, and you apply there if you
8 want to get your research -- funded for your
9 research; also you can get funding for
10 conferences.

11 It has a very low success rate, it has
12 to be said, mainly because it doesn't have a
13 large budget. It's worth adding I was also on
14 the SSHRC history committee for two years and
15 would have been its chair except for going to
16 Japan. But its field is the whole -- the
17 history committee is the field of all history in
18 Canada, British classical, et cetera.

19 Q. And at Trent University you had
20 something called the Distinguished Faculty
21 Research Award. What was that?

22 A. At Trent -- Trent has always had
23 a distinguished teacher award because it was an
24 important part of Trent University to take
25 teaching very seriously.

11:20:41 1 And in the 1980s some faculty
11:20:44 2 members decided it was desirable also to
11:20:46 3 recognize distinguished research. And so
11:20:51 4 there's a rotation, science, social science,
11:20:54 5 humanities. So I was the 10th winner of that
11:20:58 6 and the third winner in the humanities. And
11:21:00 7 it's meant to recognize a career of research
11:21:04 8 which has been internationally recognized for
11:21:07 9 its excellence.

11:21:16 10 Q. And the Talman award, can you
11:21:22 11 tell me briefly about that?

11:21:23 12 A. The Talman award recognizes a
11:21:25 13 very distinguished founder of Ontario history
11:21:28 14 and it's for the best book in social and
11:21:30 15 economic history of Ontario.

11:21:33 16 Q. And which book was that?

11:21:34 17 A. "Planting the Province."

11:21:36 18 Q. And while we're on that book, you
11:21:39 19 also have a -- which is on page 2, you also have
11:21:46 20 a mention of "A Choice Outstanding Academic Book
11:21:50 21 for 1993", what was that?

11:21:54 22 A. "Choice" is a reviewing magazine
11:21:56 23 basically for librarians. And it tells them --
11:22:01 24 it helps them to decide what books to buy. And
11:22:05 25 about 10 percent of all academic books that came

1 to "Choice" for review in that year would be
2 designated an outstanding academic book, which
3 meant they are saying, you as a university or a
4 major public library ought to own this book.

5 Q. And how would you describe the
6 reception that "Planting the Province" received
7 among the academic field?

8 A. I believe it's been very well
9 received, except that one or two of its core
10 ideas have continued to bounce off most textbook
11 authors. But, in general, I found people have
12 treated it very seriously. It was very well
13 reviewed.

14 I couldn't have asked for better
15 reviews, but there are signs in some of the
16 standard textbooks that it may not yet have
17 penetrated there.

18 Q. And just jumping back for a
19 moment, at the top of page 2 there is a mention
20 of an award from the Champlain Society. Can you
21 tell us what the Champlain Society is and what
22 the award is for?

23 A. The Champlain Society is an
24 organization that publishes documents. It is a
25 membership society you can join. It was founded

1 by Sir Edmund Walker in about 1905 and it's been
2 publishing historical documents ever since.

3 And it was -- Floyd Chalmers arranged
4 for it to present an annual award for the best
5 book in Ontario history. Chalmers was very
6 interested in promoting Canadian history,
7 Canadian art, Canadian culture, and this was his
8 way of recognizing work in Ontario History. So
9 that was for 1993 the best book in Ontario
10 history.

11 Q. And that was again "Replanting
12 the Province"?

13 A. Yes.

14 Q. If we jump down to your books
15 then, you mentioned your doctoral thesis. Is
16 that the book from 1979?

17 A. Yes.

18 Q. And did that differ substantially
19 from your doctoral thesis?

20 A. It was about half as long,
21 clearer in argument but pretty thick with facts
22 just the same.

23 Q. And with respect to "Planting the
24 Province" would you be able to briefly summarize
25 what the thesis of the book was?

11:24:48 1 A. The core argument of the book was
11:24:55 2 that you needed to look at the whole of the
11:24:58 3 Canadian economy to understand how it developed.
11:25:01 4 And the convention at the time was to look
11:25:03 5 narrowly at what it exported, which in all the
11:25:08 6 textbooks are wheat and pine timber.

11:25:12 7 And "Planting the Province", I think,
11:25:16 8 demonstrates that you can't explain the
11:25:20 9 development of the Province by just the wheat
11:25:23 10 and pine timber. What you had to look at above
11:25:27 11 all was agriculture and how agriculture took
11:25:30 12 shape; and the whole pattern of an economy built
11:25:33 13 around the people who came and settled and -- or
11:25:37 14 resettled, as the current preferred language is,
11:25:41 15 to the kind of economy they made by actually
11:25:45 16 coming, clearing land.

11:25:46 17 And so the book investigated all the
11:25:49 18 ways in which a more balanced economy took shape
11:25:55 19 from the very beginning. So I'm not sure if
11:25:58 20 that's helpful but it's a start.

11:26:01 21 Q. Thank you. And while we're
11:26:03 22 discussing the book, could you tell me did --
11:26:06 23 did the military figure at all into your
11:26:16 24 research for that book?

11:26:18 25 A. Yes. One way of thinking about

11:26:23 1 it -- I hit it quite early in the research, a
11:26:29 2 quote from Richard Cartwright Jr., who was the
11:26:32 3 most eminent merchant in Upper Canada, and it's
11:26:35 4 in the early 1790s. He said:

11:26:38 5 "As long as the British
11:26:40 6 government shall see fit to hire men
11:26:42 7 and send them here to eat our flour,
11:26:45 8 we'll go on very well".

11:26:47 9 And that highlighted for me very early
11:26:51 10 the need to think about British expenditures,
11:26:53 11 and in particular the garrison in Upper Canada,
11:26:56 12 which turned out to spend more money every year
11:26:59 13 in Upper Canada than all the money earned by
11:27:01 14 provincial exports.

11:27:04 15 And as the book went forward, I
11:27:10 16 monitored British government expenditures and
11:27:12 17 that is a major theme in my chapter on
11:27:15 18 government in the economy. And one element of
11:27:19 19 British expenditures was what was spent on the
11:27:22 20 military.

11:27:24 21 And to do that I systematically kept
11:27:26 22 track of the size of the garrison as a proxy for
11:27:30 23 how much was being spent on the army on an
11:27:33 24 everyday basis. So it figures as a consumer of
11:27:37 25 produce early on and as a source of British

11:27:40 1 expenditure in the province later on, as part of
11:27:47 2 a bigger picture of what the British government
11:27:51 3 was spending in Upper Canada.

11:27:53 4 For what it's worth, the British
11:27:53 5 taxpayers spent more on Upper Canada than Upper
11:27:54 6 Canada taxpayers did through the whole period to
11:27:58 7 1840.

11:28:04 8 Q. And just to step back for a
11:28:04 9 moment, I should have asked, did your book "The
11:28:06 10 Upper Canada Trade", touch on garrisons or the
11:28:09 11 military at all?

11:28:11 12 A. Well, as I say it touched on it
11:28:14 13 in the context, particularly of purchasing. So
11:28:16 14 I read all of the purchasing records for many
11:28:19 15 years and later read the documents attesting to
11:28:21 16 overall strength.

11:28:23 17 Through other research I've
11:28:24 18 encountered particularly the relationship
11:28:28 19 between officers and the communities that they
11:28:31 20 were in. So I did two biographies for the
11:28:37 21 "Dictionary of Canadian Biographies" in which
11:28:40 22 this figures prominently.

11:28:42 23 Q. And which biographies were those?

11:28:44 24 A. One is Quinten St. George --
11:28:48 25 there is a street named after him not far from

11:28:52 1 here -- who was a French Royalist who somehow
11:28:55 2 ended up as a fur trader north of Toronto
11:28:58 3 shortly after 1800. He was lucky to escape
11:29:02 4 execution in the French revolution.

11:29:04 5 And when I was writing his biography,
11:29:05 6 it turned out that what made his career in
11:29:08 7 Canada was his relationship to the officers in
11:29:12 8 the garrison in Toronto. He got the purchasing
11:29:15 9 contracts. He socialized with the officers.
11:29:21 10 They appreciated finding a sophisticated
11:29:24 11 Frenchman in the Canadian backwoods.

11:29:28 12 A somewhat similar experience with
11:29:30 13 Isaac Buchanan, a merchant I studied for my
11:29:34 14 doctoral thesis. When he was a young man in
11:29:37 15 Toronto in the 1830s he found the local elite
11:29:42 16 very hostile to him as they were Anglicans and
11:29:46 17 he was a Presbyterian. They were fighting for
11:29:50 18 jobs; he was looking for business. And his
11:29:52 19 closest friends were the officers in the British
11:29:54 20 garrison, again.

11:29:55 21 So I found myself thinking about the
11:29:57 22 social life of garrison cities where the British
11:30:02 23 officers turned out to be an important part of
11:30:05 24 the fabric of society, if you like.

11:30:09 25 Q. And I think your entries in the

1 "Dictionary of Canadian Biographies" appear on
2 page 5 of your CV. Can you tell us briefly how
3 you came to write those and what the
4 requirements were for --

5 THE COURT: Just before you embark on
6 that I'm going to take the morning break. And
7 Mr. Beggs, it's up to you how you use your time
8 as opposed to -- qualifications as opposed to
9 examination in-chief, but I'm not entirely clear
10 on the relevance of some of this detail. Just
11 as a heads-up. We'll take 20 minutes.

12 -- RECESSED AT 11:32 A.M. --

13 -- RESUMED AT 11:52 A.M. --

14 THE COURT: Please go ahead.

15 MR. BEGGS: Thank you, Your Honour.

16 BY MR. BEGGS:

17 Q. Now, looking at your most recent
18 book, which is on page 2, "Consumers in the
19 Bush", is that -- what time period is that book
20 about?

21 A. "Consumers in the Bush" covers
22 the period from 1808 to 1861. It's a book
23 about -- based on country store accounts of what
24 ordinary, rural, Upper Canadians bought from
25 country stores and what we can learn about their

11:53:17 1 lives and the Upper Canadian economy from those
11:53:21 2 records.

11:53:23 3 Q. And I see that it received an --
11:53:26 4 or was short-listed for an award as well, is
11:53:29 5 that correct?

11:53:29 6 A. Yes, it was one of five books
11:53:31 7 short-listed for the Canadian Historical
11:53:32 8 Association's prize for the best book of the
11:53:35 9 year in Canadian history. It did not win but it
11:53:38 10 was a surprise and an honour to be even
11:53:41 11 short-listed.

11:53:42 12 Q. Now, generally speaking what time
11:53:45 13 period would you say most of your research has
11:53:47 14 been in?

11:53:51 15 A. My research has largely covered
11:53:53 16 the period 1784 to 1871. All of my publications
11:53:59 17 on Upper Canada fit in that. There are, of
11:54:02 18 course, publications outside of that period as
11:54:04 19 well, but we can go into them if you want. I
11:54:07 20 wouldn't mention them unless you ask.

11:54:09 21 Q. Now, and with respect to Upper
11:54:13 22 Canada is that with respect to the entirety of
11:54:15 23 Upper Canada or any particular area?

11:54:19 24 A. The first book ended up focusing
11:54:23 25 particularly on Hamilton and the whole western

1 peninsula because that is where the Buchanans
2 ended up with their main focus of a business in
3 Canada.

4 Everything else spans -- well the
5 "Consumers in the Bush" is mainly east of
6 Toronto. "Planting the Province" covers the
7 whole province up to somewhere where the north
8 begins, shall we say. It doesn't cover northern
9 Ontario at all.

10 Q. Now, when you mentioned the
11 peninsula there do you mean what might be called
12 southwestern Ontario, is that correct?

13 A. Yes.

14 Q. Now I want to go briefly to a
15 couple of your books or your articles or
16 chapters. If I could go to page 3 there is a
17 chapter called "The Economic Impact of the Great
18 War" in a book called "Canada and the First
19 World War". Could you briefly tell us what your
20 chapter was about there?

21 A. Yes, the chapter was meant to
22 assess the -- one of the standard stories in
23 Canadian history is how the First World War
24 transformed Canadian society and the Canadian
25 economy. And I was asked to do that topic for a

11:55:59 1 book to honour a historian I very much admired,
11:56:04 2 Robert Craig Brown.

11:56:06 3 But as I researched it I discovered
11:56:07 4 that almost everything that was said to be an
11:56:12 5 economic impact of the First World War had
11:56:14 6 started before; the trends began long before the
11:56:17 7 First World War.

11:56:18 8 It was not as transformative for the
11:56:21 9 economy as it may have been for Canadian values
11:56:23 10 and other things of that sort, but for the
11:56:26 11 economy it was not transformative.

11:56:29 12 And there are a number of different
11:56:31 13 trends that are tracked through there.

11:56:35 14 Q. And three chapters down there is
11:56:37 15 a chapter called "Railways and the Development
11:56:41 16 of Canada West 1850-1870". Can you briefly tell
11:56:46 17 us what your thesis was there?

11:56:50 18 A. The core thesis was to try to
11:56:51 19 investigate what railways meant for economic
11:56:56 20 development. And it had two aspects, the
11:57:01 21 investment phase, which concentrated between
11:57:04 22 1852 and 1857 when the railroads were being
11:57:08 23 built; and there's quite a lot of attention to
11:57:11 24 the economic impact of a lot of capital being
11:57:16 25 spent on railroads in a short period of time.

1 The more -- the part I found more
2 interesting was, what did it mean to have
3 railroads? In other words, how were they used
4 after they were built, which almost nothing had
5 been written on. For what it's worth it's a
6 modern thing. Passengers were really important.

7 Q. Okay. I'm going to skip a number
8 of these. In fact, I'm going to go to page 5
9 where you had an article entitled, near the top,
10 "The Loyalist Economy of Upper Canada,
11 1784-1806". Can you tell us what research you
12 conducted for that?

13 A. That became the first chapter of
14 "Planting the Province" so, in a sense, we've
15 already covered that in talking about "Planting
16 the Province."

17 That's where I first got into studying
18 the garrison and its expenditures along with all
19 the other facets of the economy's domestic and
20 international roots and dynamics.

21 Q. And in the middle of the page
22 there's a section called "Editorial Work", and
23 we've already spoken about the Champlain
24 Society, but can you tell us what the "Canadian
25 Historical Review" was and what your role was

11:58:55 1 there?

11:58:55 2 A. The "Canadian Historical Review"
11:58:57 3 is the leading journal in Canadian history; and
11:59:00 4 it publishes in every area of Canadian history
11:59:03 5 and reviews books in every area of Canadian
11:59:06 6 history. So the editors, since starting a few
11:59:10 7 years before I took that on, they have a system
11:59:12 8 of rotating editorships, three-year terms, no
11:59:17 9 one serves more than one term.

11:59:18 10 And the responsibility is to put out a
11:59:21 11 journal that will interest Canadian historians
11:59:23 12 of every specialty. So we had to commission
11:59:25 13 reviews right across the range of Canadian
11:59:28 14 historical studies, find reviewers, know who was
11:59:32 15 working in every subfield of Canadian history,
11:59:36 16 plus accept articles in every subfield of
11:59:40 17 Canadian history.

11:59:41 18 And we would have to send them out for
11:59:43 19 appraisal, find appraisers, decide which were
11:59:46 20 worthy of inclusion. But the main point is that
11:59:49 21 the CHR is the leading journal of Canadian
11:59:52 22 history, the oldest -- no, it's not the oldest.
11:59:54 23 So just leave it at that.

11:59:57 24 Q. And on page 6 when you have a
12:00:00 25 section on reviews of books, how is it that one

12:00:11 1 would get picked to review a book in these
12:00:14 2 journals?

12:00:15 3 A. Well, editors have to decide who
12:00:18 4 might know about the book and be qualified to
12:00:23 5 write a review for their readers so that their
12:00:25 6 readers will have an appreciation within the
12:00:28 7 context of that particular field or subfield.

12:00:32 8 There's one secondary element to it,
12:00:35 9 which I know from experience, finding someone
12:00:38 10 who hasn't already been committed to write the
12:00:40 11 review for some other journal. But to be asked
12:00:43 12 to review a book is a sign that the editor of
12:00:45 13 the journal you're -- that's contacting you
12:00:48 14 thinks that you're qualified to review that
12:00:51 15 book.

12:00:51 16 Q. And am I correct that a number of
12:00:54 17 the books you've reviewed are books that you
12:00:57 18 relied on in your reports?

12:00:58 19 A. A number of them are, yes.

12:01:24 20 Q. Now, could you tell us what
12:01:31 21 familiarity a historian who focuses on the 19th
12:01:37 22 century in Upper Canada would have with military
12:01:40 23 matters?

12:01:41 24 A. I think it depends on which
12:01:42 25 military matters you're asking about. I think

1 anybody studying Upper Canada, the Province of
2 Canada, would have to know the basic outlines of
3 what the military was used for, what its
4 strength was. Particularly important to any
5 social historian is how the military were used
6 in support of order and particularly in support
7 of the civil power.

8 And you certainly cannot teach the
9 history of that period without talking about the
10 War of 1812, rebellions, the American civil war.

11 One of the larger themes of the whole
12 period is the gradual withdrawal after 1850 of
13 British forces from Canada and Britain's
14 determination to make Canadians stand on their
15 own.

16 Q. And did you teach courses that
17 included those aspects?

18 A. Yes, at Trent.

19 Q. And have you conducted research
20 such as you just described?

21 A. Well, I mentioned the research
22 for "Planting the Province", which relied on
23 garrison size and the expenditures on the
24 garrison as one strand of appreciating what
25 Britain was spending. And there's a table in

12:02:58 1 "Planting the Province" that tracks British
12:03:02 2 expenditure on the garrison throughout the
12:03:03 3 period to 1840.

12:03:08 4 Q. Thank you. Your Honour, I
12:03:09 5 believe those are my questions.

12:03:12 6 THE COURT: Can we get the tender back
12:03:14 7 up on the screen?

12:03:27 8 MR. BEGGS: Yes, I believe it's
12:03:29 9 Exhibit Y-2.

12:03:30 10 THE COURT: Exhibit Y-2.

12:03:30 11 MR. BEGGS: It's on the second page.
12:03:30 12 So we will be asking -- well, I understand the
12:03:44 13 objection pertains to the second part of the
12:03:47 14 first sentence, but we would submit that
12:03:52 15 Professor McCalla is amply qualified as an
12:03:56 16 economic historian, with special expertise in
12:04:00 17 the social and economic history of 19th century
12:04:03 18 in Upper Canada/Canada West.

12:04:05 19 And I believe we've demonstrated how
12:04:11 20 his expertise in the military is sufficient for
12:04:13 21 the purposes for which he opines in his reports.

12:04:20 22 THE COURT: All right. Ms. Guirguis,
12:04:22 23 submissions?

12:04:29 24 MS. GUIRGUIS: Thank you, Your Honour.
12:04:31 25 One technical issue, one of our

1 iPads stopped working so perhaps at the next
2 break that can be taken care of. But we are
3 making do with the one.

4 CROSS-EXAMINATION BY MS. GUIGRUIS:

5 (On qualifications.)

6 Q. Good afternoon, Professor
7 McCalla. My name is Cathy Guirguis and I'm a
8 lawyer for the plaintiffs, and I'm just going to
9 ask you a few questions this morning.

10 You've talked with my friend about
11 your research as it related to the military, and
12 you responded that you've done research about
13 British expenditures in the colony, including
14 military expenditures on garrisons and their
15 supplies, relationships between garrisons and
16 communities, particularly the relationship, the
17 economic relationship with merchants you've
18 looked at.

19 My question for you is that the
20 research is not about how the military makes its
21 decisions, correct?

22 A. Correct.

23 Q. And the research is not about
24 whether, when, and if permanent troops are
25 needed to deal with trespass on lands?

12:05:40 1 A. Except from secondary sources.

12:05:49 2 Q. So that's a yes? It's not about

12:05:50 3 that, your own research?

12:05:52 4 A. Well, my own primary source

12:05:54 5 research, no.

12:05:55 6 Q. Thank you. And the research is

12:05:56 7 not about the size and nature of a force to be

12:05:59 8 deployed in a given situation to be effective,

12:06:01 9 correct?

12:06:03 10 A. Except, again, with the same

12:06:05 11 caveat that -- from secondary sources.

12:06:08 12 Q. Thank you. And also, just to

12:06:10 13 confirm, your research has not been about what

12:06:12 14 constables could do or could not do from a law

12:06:17 15 enforcement perspective?

12:06:19 16 A. Again, from secondary sources.

12:06:21 17 Q. But your own direct research?

12:06:23 18 A. My direct research is not on

12:06:25 19 that.

12:06:29 20 Q. You don't have any research or

12:06:31 21 direct research about challenges to law

12:06:33 22 enforcement that they faced, other than the

12:06:35 23 survey of the expenditures of the 19th century,

12:06:39 24 correct?

12:06:40 25 A. Not primary research, except may

1 I introduce one slight variation? One of the
2 volumes I edited for the Champlain Society was
3 on the Rebellion of 1837, and it is full of
4 documents on this issue. So I worked very
5 closely with the volume editors on that volume.

6 Q. But you are not a military
7 historian, correct, sir?

8 A. No.

9 Q. Thank you. Those are my
10 questions.

11 THE COURT: Any re-examination?

12 MR. BEGGS: No, Your Honour.

13 THE COURT: Ms. Guirguis, what are
14 your submissions about the tender?

15 MS. GUIRGUIS: Your Honour, I don't
16 have a particular issue with the tender as it's
17 drafted but rather with its scope and whether it
18 covers off the opinions that I pointed you to on
19 pages 25 and 26.

20 So my submissions relate largely just
21 to that scope and to those two particular
22 paragraphs on those pages.

23 What my friends have shown is that
24 Professor McCalla has some limited expertise on
25 how the military was resourced in the sense, for

1 instance, of the grants it received from the
2 Imperial Crown and the expenditures it made on
3 things like rations. I can see the relationship
4 between expertise on military expenditure and
5 concern about garrison levels, the matters
6 addressed in question 4, which is page 27 of his
7 report.

8 I don't think that this is at the
9 heart of his expertise but I'm content to make
10 submissions on that matter as a matter of Hoyt
11 [ph].

12 What I'm more concerned with, and
13 where I have more trouble, is when it comes to
14 the questions of what law enforcement or
15 military could or couldn't do from an
16 operational perspective.

17 So it's the bottom of paragraph --
18 sorry, bottom of the paragraph at page 25 which,
19 is where Professor McCalla says:

20 "But a small force, all that
21 could have been sent and sustained,
22 could not be everywhere at once, nor
23 could patrolling be sure of resolving
24 the issue of squatters already on the
25 land."

1 I don't think what a small first force
2 could or couldn't do is something that Professor
3 McCalla has ever researched, written or taught
4 about, as he has discussed today.

5 I have a similar problem starting with
6 the third sentence of the first full paragraph
7 on page 25 where he says:

8 "Intervening against speculative
9 activity on the scale of that in 1854
10 would in any case have severely
11 challenged constables from the area
12 even if they were willing to act."

13 My submission is that the operational
14 capacity of 19th century constables is not
15 within Professor McCalla's expertise.

16 And the same problem arises further or
17 down in the same paragraph, the section dealing
18 with what British commanders would have welcomed
19 after the experience with the Gavazzi riots.

20 And, as noted, this goes also on to page 26, the
21 first paragraph where he opines on:

22 "[...] unless troops were
23 permanently based in the area,
24 becoming a long-term police force,
25 this was a temporary response [...]"

1 In any event, his testimony on these
2 points with respect to military decisions, we
3 would also submit, is not necessary under the
4 Mohan test because Canada is calling another
5 witness, Mr. Tyler Wentzell, to opine on just
6 these issues.

7 So those are my submissions, Your
8 Honour.

9 THE COURT: Just before you sit down.
10 I'm pausing over your submission about primary
11 research because we had another expert witness
12 in this trial -- I don't want to put it too
13 highly, but it was Professor Harring who, when
14 it came to Canada and Ontario and Upper Canada,
15 and the relevant time period, and the relevant
16 location in Ontario for this case, and correct
17 me if I'm wrong, but my recollection is that he
18 mainly testified based on secondary sources and
19 was shown a number of primary documents in his
20 testimony that he had never seen before.

21 I'm not suggesting that he needed to
22 have seen them all before, but my recollection
23 is that secondary sources was what he relied on
24 in his report, if not entirely then for the most
25 part.

12:12:04 1 And how is that -- I mean, almost all
12:12:07 2 of our experts, certainly all of our historians,
12:12:10 3 have relied extensively on secondary sources. I
12:12:24 4 certainly agree with your submission that this
12:12:27 5 gentleman is not a military historian, but I'm
12:12:30 6 having trouble with the suggestion that relying
12:12:30 7 on secondary sources -- if that's a frailty we
12:12:33 8 have a lot of witnesses who have done just that.

12:12:37 9 So do you have anything to add with
12:12:38 10 respect to that observation?

12:12:40 11 MS. GUIRGUIS: With respect to that
12:12:41 12 observation, Your Honour, is that the -- more so
12:12:44 13 the submission is about the nature of the fact
12:12:46 14 that he's not a military historian. If he's a
12:12:49 15 military historian and opining on what the
12:12:52 16 military would have made decisions on I would
12:12:54 17 expect he would be relying on secondary sources,
12:12:57 18 as others have. But the secondary sources in
12:13:00 19 the research he has done is about particular
12:13:02 20 events, I believe he said about rebellions and
12:13:04 21 wars and so on, not about -- and his expertise
12:13:08 22 is not as a military historian. So I would
12:13:12 23 place -- I would stress that point.

12:13:20 24 THE COURT: All right. Mr. Beggs.

12:13:23 25 MS. GUIRGUIS: Thank you, Your Honour.

12:13:26 1 MR. BEGGS: Thank you, Your Honour.

12:13:27 2 I agree that Professor McCalla is not
12:13:30 3 a military historian. I don't believe he would
12:13:34 4 describe himself as such. But there is a
12:13:39 5 certain level of familiarity which someone
12:13:41 6 working in the field of 19th century history in
12:13:48 7 Upper Canada, social and economic history, would
12:13:51 8 necessarily have and acquire.

12:13:55 9 And Professor McCalla has certainly
12:13:57 10 acquired that over his decades of teaching and
12:14:00 11 research into this specific area and time
12:14:05 12 period. And so the report that is submitted and
12:14:11 13 the questions he was asked were at a high level.

12:14:17 14 They weren't details of strategic
12:14:26 15 necessities, or military planning, or mistakes
12:14:30 16 that might have been made in that context. They
12:14:34 17 were assessments of how many troops are
12:14:36 18 available? Where are they located? And then
12:14:40 19 practical application of those facts to the
12:14:47 20 circumstances on the Bruce Peninsula. How would
12:14:50 21 one get there and what that would mean?

12:14:56 22 So I would submit that his expertise
12:15:04 23 as an internationally-recognized historian in
12:15:07 24 this time period and location is sufficient to
12:15:10 25 cover any concerns about what his knowledge of

12:15:12 1 the military in that time period in Upper Canada
12:15:16 2 would require.

12:15:18 3 As far as the suggestion that the same
12:15:20 4 materials covered by Professor Wentzell, we have
12:15:28 5 experienced some overlap with witnesses already
12:15:30 6 and to some extent that may be unavoidable.

12:15:33 7 We've tried to keep the topics
12:15:35 8 separate and in this context Professor McCalla
12:15:42 9 is largely speaking at a very high level, a
12:15:46 10 macro level, if you will, of the role of the
12:15:48 11 military, whereas Mr. Wentzell will be speaking
12:15:51 12 about practical, on-the-ground realities and
12:15:57 13 movements.

12:16:08 14 Those are my submissions on this
12:16:09 15 issue, Your Honour.

12:16:12 16 THE COURT: Reply? I don't know if
12:16:14 17 it's reply but I'll give you the last word if
12:16:16 18 you have anything further to say.

12:16:19 19 MS. GUIRGUIS: No, Your Honour, thank
12:16:20 20 you.

12:19:06 21 THE COURT: This is my ruling on the
12:19:09 22 limited objection made by plaintiffs' counsel to
12:19:14 23 the tender.

12:19:16 24 --- RULING ---

12:19:19 25 Without trying to summarize the

12:19:21 1 entirety of the objection, plaintiffs' counsel
12:19:24 2 submits that while this gentleman has some
12:19:27 3 limited expertise on how the military were
12:19:30 4 resourced, he is not a military historian, and
12:19:34 5 she submits that he is not qualified to give
12:19:36 6 some of the opinions expressed on pages 25 and
12:19:39 7 26 of his first report.

12:19:43 8 While not objecting to the language of
12:19:45 9 the tender, per se, plaintiffs' counsel objects
12:19:49 10 to the proposed qualification to the extent that
12:19:52 11 it includes that area of opinion that I just
12:19:56 12 mentioned.

12:19:58 13 I agree, and indeed I think everyone
12:20:00 14 agrees, that this gentleman is not a military
12:20:03 15 historian. However, as plaintiffs' counsel
12:20:09 16 fairly noted, he does have general expertise
12:20:12 17 about the relevant military events that
12:20:15 18 transpired during the period of the focus of his
12:20:20 19 own historical expertise.

12:20:26 20 And I'm satisfied that this general
12:20:28 21 expertise arises through his expertise as a
12:20:31 22 historian, teaching and doing research for that
12:20:34 23 area and in that time period, as he testified
12:20:39 24 one would expect of any historian.

12:20:46 25 This gentleman has focused on history

1 in the relevant part of Ontario and in a time
2 period that is significant to this trial,
3 especially in the 19th century. And I'm
4 satisfied that he is qualified to testify about
5 the full scope of the tender; and I accept the
6 tender as a result.

7 I note, however, that in considering
8 his evidence about economic interactions and the
9 military, as referred to in the tender, I will
10 take the plaintiffs' counsel's submissions into
11 account when weighing that evidence.

12 That concludes my reasons for
13 decision, Madam Reporter.

14 Please go ahead, Mr. Beggs.

15 MR. BEGGS: Thank you, Your Honour.

16 EXAMINATION IN-CHIEF BY MR. BEGGS:

17 Q. I'd ask if we could call up the
18 first report by Professor McCalla.

19 THE COURT: There are two reports.
20 The first report shall be the next exhibit, with
21 the proviso that I just included as part of my
22 ruling.

23 Mr. Registrar, what is the next
24 exhibit number?

25 THE REGISTRAR: Exhibit number 4367.

12:22:17 1 EXHIBIT NO. 4367: First report of
12:22:17 2 Professor Douglas McCalla.
12:22:20 3 THE COURT: And then the second report
12:22:21 4 shall be the next exhibit.
12:22:26 5 THE REGISTRAR: Exhibit number 4368.
12:22:29 6 EXHIBIT NO. 4368: Second report of
12:22:29 7 Professor Douglas McCalla.
12:22:31 8 THE COURT: Now, Professor, in this
12:22:32 9 trial by marking your two reports as trial
12:22:36 10 exhibits, and subject to the ruling that I just
12:22:39 11 made, what that means is that all of that is
12:22:40 12 already in evidence and Mr. Beggs is not called
12:22:43 13 upon to get you to say all of those words again;
12:22:48 14 and this is the way we've been proceeding as an
12:22:52 15 efficiency.
12:22:53 16 So just answer the questions, sir, not
12:22:59 17 feeling any responsibility to cover everything.
12:23:01 18 Mr. Beggs will no doubt direct you to what
12:23:04 19 aspects of your evidence he wishes to have you
12:23:07 20 elaborate on or explain.
12:23:09 21 THE WITNESS: Thank you, Your Honour.
12:23:10 22 THE COURT: Please go ahead.
12:23:12 23 MR. BEGGS: Thank you, Your Honour.
12:23:13 24 BY MR. BEGGS:
12:23:15 25 Q. Now, when you prepared this

12:23:16 1 report did you review any of the reports of
12:23:21 2 plaintiffs' expert witnesses?

12:23:27 3 A. As will be evident from a few
12:23:29 4 references in the report I did read Professor
12:23:32 5 Brownlie and Professor Harring's reports, which
12:23:36 6 were sent to me at the time that I was preparing
12:23:39 7 this report.

12:23:41 8 Q. And in preparation for your
12:23:44 9 testimony today did you review any transcripts
12:23:49 10 of previous testimony in this case?

12:23:52 11 A. I was sent the transcripts and I
12:23:54 12 read them generally, yes, for those two
12:23:58 13 witnesses.

12:24:00 14 Q. That was Harring and Brownlie?

12:24:03 15 A. Yes, not all of Professor
12:24:04 16 Brownlie's, just a few sections.

12:24:08 17 Q. Okay, thank you.

12:24:08 18 And, now, in your first report on page
12:24:18 19 1 -- page 2 -- sorry. It's page 1 of the
12:24:25 20 report, which appears to be page 3 of the
12:24:28 21 document, you set out your methodology for this
12:24:31 22 report and I believe it's the same for both
12:24:34 23 reports. Can you tell us briefly what your
12:24:36 24 methodology in the reports were?

12:24:38 25 A. Yes, it seemed to me that for the

12:24:41 1 questions I was asked what was necessary was to
12:24:43 2 review all of the relevant secondary literature
12:24:46 3 that I knew of, connect that to my own primary
12:24:49 4 research, where it was relevant, and write a
12:24:52 5 short report to answer the questions that were
12:24:56 6 posed of me.

12:24:58 7 Q. And in a footnote at the bottom
12:25:00 8 of the page you refer to "primary" and
12:25:02 9 "secondary" sources. Could you tell us briefly
12:25:05 10 what those terms mean to a historian?

12:25:07 11 A. Well, a primary source is an
12:25:10 12 original document, generally contemporary with
12:25:13 13 the event or process you're trying to describe.

12:25:16 14 A secondary source is subsequent
12:25:21 15 writings by historians and others based on those
12:25:24 16 primary documents.

12:25:25 17 Q. With that in mind, would you
12:25:27 18 describe the books written by Laurence Oliphant
12:25:32 19 as primary or secondary sources?

12:25:35 20 A. In the context of this case they
12:25:36 21 would be primary sources.

12:25:37 22 Q. And the book by Conrad Van Dusen
12:25:39 23 "The Indian Chief", what would that be?

12:25:43 24 A. I would see that as a primary
12:25:45 25 source.

12:25:45 1 Q. Thank you. If I can take you to
12:25:59 2 page 4 of your report? And it has a table in
12:26:01 3 there, Table 1. We can see both Table 1 and
12:26:08 4 Figure 1. Could you tell me what the
12:26:11 5 relationship between these two -- this table and
12:26:14 6 this chart -- or figure, if you will?

12:26:21 7 A. Yes, Figure 1 is a visual
12:26:23 8 representation of the first column of Table 1,
12:26:25 9 that is the total population of Upper Canada
12:26:28 10 from 1826 to 1871.

12:26:36 11 Q. And can you tell us from this
12:26:42 12 information what was happening to the population
12:26:43 13 of Upper Canada between say 1831 and 1871?

12:26:48 14 A. The thing to point out about the
12:26:51 15 figures is that it's a logarithmic scale on the
12:26:55 16 left-hand side, which means a constant rate of
12:26:59 17 change shows up as a straight line. And,
12:27:01 18 basically, the graph shows a straight line until
12:27:04 19 1851 and then the curve levels off to '61 and
12:27:09 20 '71.

12:27:09 21 And what it's actually showing is that
12:27:11 22 the population is doubling every decade from
12:27:15 23 1821 to '51, 1826 to '51, and that could be
12:27:23 24 projected backwards all the way to the beginning
12:27:26 25 of Upper Canada. So from 1784 to 1851 the

12:27:31 1 population doubles every decade.

12:27:50 2 Q. Now, we've heard about Canada
12:27:51 3 West and Upper Canada. Are they the same
12:27:53 4 territory or is there any difference between
12:27:55 5 them?

12:27:56 6 A. They're the same territory.

12:28:00 7 Q. And so we're talking about the
12:28:05 8 same territory for -- is it the same territory
12:28:09 9 between Upper Canada, and Ontario and Canada
12:28:12 10 West? Is it all consistent territory?

12:28:15 11 A. Well, Ontario has a whole lot of
12:28:17 12 north that was not part of Upper Canada or
12:28:20 13 Canada West. So Ontario was a much bigger
12:28:23 14 province and it got bigger after Confederation.

12:28:26 15 Q. And does that figure into the
12:28:27 16 last number for 1871?

12:28:29 17 A. Probably not. I think the
12:28:30 18 population for 1871 was very much the same
12:28:33 19 territory as was embraced by the earlier
12:28:36 20 figures.

12:28:38 21 Q. Now, from the footnote it says --
12:28:40 22 it cites your book, "Planting the Province", as
12:28:45 23 the source for this information. Could we go to
12:28:48 24 that book, which was made an exhibit this
12:28:57 25 morning? Well, an excerpt was made an exhibit,

1 Exhibit 4359, and it's page 2. It's not the
2 entire book but page 249 of the document, which
3 I believe is page 32 of the PDF, there is a
4 chart there. Is this the source of the
5 information you used?

6 A. Yes.

7 Q. And where did you get the
8 information when you put this chart together?

9 A. The main source is from the 4th
10 volume of the Canadian census of 1871, which was
11 a compendium of all the censuses that had ever
12 been taken in any of the component colonies of
13 Canada. And they gathered all the censuses that
14 had previously been taken for Nova Scotia, New
15 Brunswick, Upper Canada, Lower Canada and
16 printed them up all in one volume. So that's
17 the main source.

18 There are some estimates involved for
19 the earlier data and I explain those estimates
20 in the book.

21 Q. Right. And I think there is an
22 asterisk at the bottom which says:

23 "Until at least 1817, and
24 possibly until 1840s, this is a
25 population of European ancestry only;

12:30:35 1 from 7,000 to 10,000 Indians should be
12:30:39 2 added."

12:30:40 3 Can you tell us why it was only
12:30:42 4 European population during that period?

12:30:44 5 A. Well, it has to be said that the
12:30:46 6 main theme of "Planting the Province" was what
12:30:49 7 happened when this land got resettled. So the
12:30:52 8 main focus was the economy that was being
12:30:54 9 created.

12:30:55 10 There are sections in the book,
12:30:57 11 however, that attempt to address the Indigenous
12:31:01 12 economy and the many ways in which Indigenous
12:31:03 13 people were taking -- very much taking care of
12:31:06 14 themselves.

12:31:08 15 And so I sought to balance it by
12:31:12 16 considering the main population figures and what
12:31:17 17 was driving them, without ruling out the -- but
12:31:21 18 it seemed to me important for the analysis to
12:31:24 19 separate Indigenous from non-Indigenous in order
12:31:27 20 to get at what I was primarily studying.

12:31:31 21 Q. Would the inclusion or exclusion
12:31:32 22 of that population be -- affect the overall
12:31:38 23 trend?

12:31:39 24 A. It affects the overall picture in
12:31:41 25 the 1780s and 1790s. It's a rounding error by

12:31:48 1 the time you get to the 1830s because the
12:31:51 2 contrast is between Indigenous populations which
12:31:54 3 grew slowly, if at all, and the exponentially
12:31:58 4 expanding European population.

12:32:00 5 Q. And if we can scroll up a bit on
12:32:02 6 this page? In addition to population we have a
12:32:08 7 column "Acres Under Culture". Could you tell us
12:32:12 8 what "under culture" means in this context?

12:32:15 9 A. Well, it's a good question. It's
12:32:17 10 what the assessment rolls and the censuses
12:32:20 11 considered to be land that was being actively
12:32:22 12 worked as opposed to land that was merely owned
12:32:30 13 and occupied but not being actively worked. It
12:32:32 14 was an attempt to get at what land was being
12:32:35 15 used by farmers.

12:32:37 16 Q. And what was the source of that
12:32:39 17 information for you in this?

12:32:41 18 A. Same source, the 1871 census,
12:32:44 19 which is, for the land under culture, I believe
12:32:47 20 it -- the census in turn drew on tax
12:32:51 21 assessments, property tax assessments.

12:33:11 22 Q. Now, what was causing the
12:33:16 23 population to double every ten years?

12:33:18 24 A. There were two factors. One was
12:33:21 25 natural increase, people married relatively

12:33:25 1 young and tended to have large families. And
12:33:29 2 the general -- the impression is that natural
12:33:33 3 increase alone, a higher birth rate than death
12:33:37 4 rate, would have expanded the population
12:33:39 5 doubling it every 25 years.

12:33:42 6 But you add immigration and immigrants
12:33:46 7 having families and their families expanding,
12:33:48 8 the population was growing at 7 percent a year,
12:33:54 9 which, in effect, doubles the population every
12:33:57 10 10 years.

12:33:57 11 So it's the combination of high rate
12:33:59 12 of natural increase, one of the highest in
12:34:01 13 recorded history, and a high rate of population
12:34:09 14 increase from immigration.

12:34:12 15 Q. If we can go to page 6 of your
12:34:14 16 report? There's some discussion of this there.
12:34:28 17 Actually, before we get to that can you go back
12:34:30 18 to page 5?

12:34:36 19 So referring to the birth rates your
12:34:41 20 first sentence on the page it says:

12:34:45 21 "Throughout the settlement era
12:34:46 22 marriage and birth rates were high,
12:34:49 23 among the highest in the western
12:34:51 24 world."

12:34:52 25 What region are you talking about

12:34:55 1 that's the highest in the western world?

12:34:59 2 A. Well, I'm talking about the
12:35:00 3 settlement era in Upper Canada. The western
12:35:04 4 world is Western Europe and its settlement
12:35:10 5 colonies.

12:35:21 6 Q. If we can scroll down to the next
12:35:22 7 page, the diagram there? Can you tell us what
12:35:25 8 this diagram shows us?

12:35:27 9 A. It's a chart of immigrant
12:35:31 10 arrivals recorded at Quebec from 1829 to '59.
12:35:37 11 You can see it fluctuates quite widely. Well,
12:35:46 12 I'll just leave it at that. It shows the
12:35:49 13 numbers that they counted at Quebec each year.

12:35:52 14 Q. Now, would all immigration come
12:35:54 15 through Quebec?

12:35:56 16 A. The majority did. Some
12:35:58 17 immigration came through New York primarily; and
12:36:03 18 there were some Americans that came to Upper
12:36:04 19 Canada as well, particularly in the early
12:36:07 20 period, but not so much in the period covered by
12:36:10 21 this graph.

12:36:11 22 Over against that some of the people
12:36:12 23 who arrived in Quebec later moved to the United
12:36:15 24 States.

12:36:17 25 Q. And -- but at a general level

1 does this graph accurately represent a trend or
2 not?

3 A. Well, not a trend but it
4 represents the pattern, because there is quite a
5 lot of fluctuation in the graph.

6 Q. And can you tell us what was
7 happening in 1854 from this chart or from your
8 research?

9 A. Well, 1854 has the highest --
10 more or less tied high with 1831 and 1832 for
11 the second most immigrants to arrive in a single
12 year. Only 1847, the Irish famine, which we all
13 know about, outranked 1854 and the early
14 1830s. Over 50,000 immigrants arrived in
15 Quebec in 1854.

16 Q. And what happens after 1854 to
17 the immigration?

18 A. Well, you can see it falls off
19 very quickly, '55 and '56, bounces a bit in '57
20 and then falls off the chart at the end.

21 Q. And are you aware of the reason
22 for that decline?

23 A. There are -- there are two
24 reasons. One, from '57 on there is a major
25 commercial crisis in 1857 and the Upper Canadian

12:37:37 1 economy is savagely damaged by the commercial
12:37:40 2 crisis. And immigrants don't go to countries
12:37:45 3 they think are in economic crisis.

12:37:53 4 So that could have been a normal
12:37:55 5 fluctuation, but if the graph were extended it
12:37:57 6 would not bounce back because they had reached
12:38:03 7 the limit of settlement in Upper Canada
12:38:06 8 basically at the end of the 1850s.

12:38:10 9 Q. And what do you mean by "the
12:38:11 10 limit of settlement"?

12:38:13 11 A. Well, it's land in the southern
12:38:14 12 part of the province that people believed could
12:38:17 13 be farmed and were prepared to try and farm.

12:38:19 14 Q. And what -- I don't think I asked
12:38:21 15 this, what was the source for this information
12:38:23 16 about immigration arrivals?

12:38:29 17 A. It is ultimately the records of
12:38:31 18 the immigration agent at Quebec City, but it is
12:38:34 19 a very well-known book by Helen I. Cowan on
12:38:39 20 British immigration to Canada.

12:38:47 21 Q. And I believe that's Exhibit
12:38:48 22 4356, the -- if we can call it up for a moment?
12:39:05 23 Sorry, for my friend, it's S0420. Is this the
12:39:25 24 book you're referring to?

12:39:26 25 A. Yes, it is.

12:39:36 1 Q. And are these the numbers that
12:39:37 2 you were using?

12:39:38 3 A. Yes.

12:39:39 4 Q. Thank you.

12:39:56 5 Now, going back to the question of
12:39:58 6 population growth, was that rate of increase the
12:40:09 7 same throughout the colony?

12:40:18 8 A. No. What I've given are
12:40:20 9 aggregate figures covering the whole colony, but
12:40:23 10 there's a variation in how fast the population
12:40:26 11 grows depending on where you are.

12:40:29 12 In the older, settled districts
12:40:31 13 natural increase continues to be high, but
12:40:35 14 immigrants don't find a place, so it's
12:40:38 15 particularly high on the newly-opening areas.
12:40:42 16 So the rates are much higher in newly-opening
12:40:46 17 areas than they are in the longer-settled
12:40:49 18 districts.

12:40:49 19 Q. If I could go to page 7 of your
12:40:51 20 report? There's a table there and it refers to
12:41:01 21 counties, Huron, Bruce and Grey County. Where
12:41:08 22 are they roughly located?

12:41:11 23 A. Well, they are in the -- well, I
12:41:14 24 guess you can say the northern part of
12:41:17 25 southwestern Ontario.

12:41:19 1 Q. And would the Bruce Peninsula be
12:41:21 2 included in that?

12:41:22 3 A. Yes, it's part of the Bruce
12:41:23 4 County that's counted there.

12:41:30 5 Q. Can you tell us from this table
12:41:30 6 what was happening to the population in those
12:41:33 7 counties?

12:41:34 8 A. As you can see it's growing much
12:41:36 9 faster than doubling in a single decade. In
12:41:39 10 Huron it more than doubles, almost triples; in
12:41:43 11 Grey it triples; and in Bruce it grows ten times
12:41:47 12 in one decade whereas doubling was the norm for
12:41:50 13 the whole province. But, in fact, the whole
12:41:53 14 province, the rate of growth slowed in the
12:41:56 15 1850s and didn't double in the 1850s for the
12:41:58 16 whole province.

12:42:04 17 Q. And is the source for this the
12:42:06 18 same sources that you used?

12:42:09 19 A. Yes, it is the 1871 census,
12:42:13 20 volume 4.

12:42:13 21 Q. Now, just beneath that there's a
12:42:16 22 reference to "explosive colonization". Could
12:42:18 23 you tell us briefly what is meant by that term?

12:42:28 24 A. What James Belich means by it is
12:42:32 25 that people from the British Isles basically

1 were heading forth into the world to make their
2 way, plus their descendants.

3 So in the United States' context
4 "explosive colonization" includes the expansion
5 from the east coast into the west.

6 The core idea that this is not a
7 planned, in the sense of collectively planned,
8 movement of people. It is a movement of people
9 looking to better themselves by reaching new
10 lands. And Belich charts it across Canada, the
11 United States, Australia and New Zealand.

12 It should be said that for his account
13 of Upper Canada he does draw rather heavily on
14 "Planting the Province", but he describes the
15 same phenomenon in the American west, in
16 Australia and in New Zealand.

17 Q. And there's also reference to a
18 phrase "settler revolution". Is that any
19 different or what is that?

20 A. It's the same process he's
21 talking about. The important part of it is that
22 it's driven by the settlers, which is why he
23 calls it a "settler revolution". It's not
24 something that some higher official planned.
25 It's driven by the drives (sic) of people

12:44:15 1 seeking out new territories for themselves.

12:44:22 2 Q. And there's also a term from John
12:44:24 3 Weaver below, "the great land rush". Was that
12:44:29 4 the same or different?

12:44:31 5 A. It's pretty much the same. If
12:44:34 6 I'm allowed one quick digression?

12:44:38 7 Belich writes a lot about Upper
12:44:40 8 Canada; he's a New Zealander.

12:44:43 9 Weaver, the Ontario historian, writes
12:44:46 10 a lot about New Zealand, but they think they are
12:44:48 11 describing the same process.

12:45:05 12 Q. Did your research indicate
12:45:07 13 whether that process was having any impact on
12:45:09 14 the Bruce Peninsula?

12:45:11 15 A. Neither of these books mentions
12:45:12 16 the Bruce Peninsula at all, so any comments I
12:45:15 17 make about the area of the Bruce Peninsula are
12:45:19 18 inferred from rather than directly commented
12:45:22 19 from.

12:45:23 20 These are grand macro studies. They
12:45:26 21 don't -- they use examples but I don't recall
12:45:29 22 the Bruce being one of them.

12:45:59 23 Q. Now, on page 8 of your report
12:46:01 24 under the heading "Question 2" you refer to the
12:46:04 25 government being plural in this period. Can you

1 explain what you mean by that?

2 A. Well, broadly speaking, there
3 were parts of the governance of the Province of
4 Canada, or of Upper Canada, that were directly
5 controlled from Britain, other parts that were
6 controlled from within the colony by the
7 colonial government. But one could push that
8 farther and say that within the colonial
9 government and even within the Imperial
10 government, separate departments could have
11 quite distinct policies and sometimes
12 conflicting policies as well.

13 So, broadly speaking, I was
14 distinguishing between British and Upper
15 Canadian there, but you could, within each,
16 pursue them so you could find different offices
17 with different objectives.

18 Q. And in that respect are you aware
19 of whether the Indian Department had the same
20 objectives as the Crown Land Department?

21 A. My best guess, I cannot say
22 directly from documents about that. I would
23 hypothesize no.

24 Q. On page 9 there's discussion, but
25 can you tell us about how the colonial

12:47:44 1 government was reacting to the population
12:47:47 2 explosion?

12:47:48 3 A. The colonial government was
12:47:50 4 excited about it. They thought this is what
12:47:53 5 Canada should be and it wanted to enhance the
12:48:03 6 process.

12:48:03 7 Q. And did the process have any
12:48:05 8 positive economic benefits?

12:48:08 9 A. Certainly the government thought
12:48:09 10 so. And it probably did but there were times,
12:48:18 11 as in 1847 when a lot of famine immigrants
12:48:22 12 arrived, that it was devastating to the colony
12:48:25 13 in the short-term. The diseases of the famine,
12:48:34 14 the cholera outbreaks and typhoid and so on,
12:48:35 15 were not positive results but the politicians
12:48:40 16 were basically for growth.

12:48:46 17 Q. And on the page we're looking at
12:48:48 18 right now, sort of half-way down there is
12:48:50 19 reference to Francis Hincks:

12:48:52 20 "[...] [seeing] immigration and
12:48:53 21 the sale of new lands for settlement
12:48:55 22 as vital to the public credit [...]"
12:48:57 23 Can you explain how that worked or
12:48:59 24 what his thinking was?

12:49:03 25 A. Well, Hincks dreamt of continuing

12:49:09 1 the development process. He particularly wanted
12:49:11 2 to get railroads built and was the source of
12:49:16 3 legislation that allowed the Canadian government
12:49:18 4 to back railway company bonds. But in return
12:49:21 5 for having an expanding, credit-driven
12:49:27 6 government involved within the economy he felt
12:49:30 7 that there needed to be more lands brought into
12:49:32 8 production to secure to increasing public debt.

12:49:43 9 Q. And did the imperial government
12:49:44 10 have the same view as the colonial government
12:49:49 11 about this population explosion?

12:49:51 12 A. Again, I don't want to comment
12:49:52 13 directly. I don't think they saw any problem
12:49:54 14 with it, no.

12:49:55 15 Q. If I can go to page 10, you have
12:49:57 16 a table there. Is this based on the same
12:50:07 17 information we saw earlier in your book?

12:50:09 18 A. Yes.

12:50:13 19 Q. And can you tell us if this
12:50:15 20 information shows any general trend?

12:50:19 21 A. Well, it shows two trends. The
12:50:25 22 one column is "Land Occupied", that is land that
12:50:29 23 someone can claim ownership to. And I have no
12:50:31 24 idea how the census takers identified that. To
12:50:35 25 the extent that in 1826 and '31 this was based

1 on tax records and that would be local tax
2 rolls.

3 The more interesting figure in some
4 respects is the "Land Under Culture", which is
5 the proportion of all the land that's being
6 occupied that is being brought into production.

7 If one pursues it closely one can see
8 that not even -- less than one fifth of the
9 occupied land was under culture in 1826, by 1861
10 almost half of it and by 1871 more than half of
11 all the occupied land is under culture.

12 It may be worth saying one more thing
13 on that. Almost every farm kept some land in
14 forest, so you would never expect 100 percent of
15 the occupied land to be under culture.

16 Q. Okay. Thank you. Now, in your
17 report at page 19 you refer to a land sale from
18 Minto Township. And can you tell me what the
19 source for this information was about this land
20 sale?

21 A. Well, the -- where I first
22 discovered it was in an article by Michelle
23 Vosburgh, who has written more on the actual
24 mechanism of land sales in Upper Canada than
25 anybody else.

12:53:13 1 And I, in turn, checked it back in the
12:53:15 2 "Toronto Leader", which was the government
12:53:19 3 newspaper in Toronto. And this was its comment
12:53:22 4 on the impending sale so I actually did look at
12:53:30 5 the primary source in this case.

12:53:32 6 Q. And I believe, just for
12:53:33 7 reference, the article by Michelle Vosburgh is
12:53:37 8 Exhibit 4363 but we won't call that up right
12:53:41 9 now.

12:53:43 10 Can you tell me roughly where Minto
12:53:45 11 Township is in relation to the Bruce Peninsula?

12:53:58 12 A. Minto Township is considerably
12:53:59 13 south and east of the Bruce Peninsula. It
12:54:03 14 depends on how you come at it.

12:54:04 15 It's north of Guelph and quite
12:54:06 16 considerably south of Owen Sound so it's not in
12:54:14 17 the immediate vicinity of the Bruce Peninsula.

12:54:16 18 Q. And can you summarize briefly
12:54:18 19 what happened at the land sale?

12:54:22 20 A. Well, according to the story,
12:54:23 21 people who wanted to participate engaged in
12:54:26 22 violent fighting as they tried to jockey for a
12:54:31 23 position in the sale. And then subsequently it
12:54:38 24 turned out that there were many conflicting
12:54:40 25 claims to the lots and the land agent had

12:54:43 1 extraordinary difficulty in sorting out who
12:54:46 2 actually had the prior claim to lots that he had
12:54:50 3 sold in this auction.

12:54:51 4 There were so many people trying to
12:54:53 5 get access to land there at the time that they
12:54:55 6 created all these conflicting obligations, and
12:54:58 7 some of them thought they could sort it out by a
12:55:01 8 fist fight.

12:55:05 9 Q. Do you know why the land was --
12:55:10 10 Minto township was not sold until 1854?

12:55:19 11 A. No, except -- no, I don't know.
12:55:21 12 I don't know specifically the sequencing in
12:55:23 13 which the Crown decided to bring new townships
12:55:26 14 onto the market.

12:55:32 15 Q. And I think you also refer to
12:55:37 16 your report -- in your report to another land
12:55:42 17 sale in Southampton.

12:55:45 18 A. Yes.

12:55:45 19 Q. On page 21? Could you briefly
12:55:49 20 describe what happened there?

12:55:59 21 A. This draws on Norman Robertson's
12:56:03 22 history of the County of Bruce, which is
12:56:05 23 certainly one of the best documented county
12:56:09 24 histories I know of for Upper Canada. It is an
12:56:13 25 unusually impressive document of its kind for

12:56:16 1 its period and he's recalling the sale. And
12:56:21 2 we're now much closer to the Bruce Peninsula in
12:56:24 3 Southampton where thousands of people
12:56:27 4 participated in an attempt to gain access to the
12:56:31 5 land.

12:56:32 6 I'm not sure -- again, it refers to
12:56:36 7 some of these lands having been surveyed for
12:56:38 8 some years. So why exactly the Crown had
12:56:41 9 delayed bringing them to market until now I
12:56:44 10 don't know.

12:56:44 11 But the key point is that a lot of the
12:56:46 12 people were squatting on these lands and had to
12:56:50 13 get to Southampton in order to get their claims
12:56:53 14 registered when the lands were formally put on
12:56:55 15 the market.

12:56:56 16 In other words, he's saying that in
12:56:57 17 that area the expectation of the sale had
12:57:01 18 prompted a lot of people to settle in advance.

12:57:05 19 Q. And how close were the Minto sale
12:57:07 20 and the Southampton sale in time?

12:57:10 21 A. I think they were two weeks
12:57:12 22 apart.

12:57:36 23 Q. Now, what tools did the colonial
12:57:43 24 government have to direct where people settled?

12:57:49 25 A. The main tool was deciding -- if

12:57:55 1 we're talking about the 1840s and '50s, it
12:57:58 2 was deciding what townships to survey and when
12:58:02 3 to put them on the market.

12:58:08 4 There's a counter-example, which is
12:58:11 5 they could decide to survey and put the land on
12:58:13 6 the market and nobody came, which happened in
12:58:16 7 the Ottawa-Huron tract in the same period.

12:58:20 8 So the main tool was conducting --
12:58:24 9 designating a township, surveying it and putting
12:58:27 10 the land on the market.

12:58:29 11 Q. And do you know why nobody came
12:58:30 12 to the other -- the example you mentioned?

12:58:34 13 A. Evidently people did not see the
12:58:35 14 lands as promising, promising for agriculture.
12:58:41 15 A few people did go.

12:58:56 16 Q. And you mentioned putting the
12:58:57 17 land up for sale, did people occupy the land
12:59:00 18 prior to sale?

12:59:02 19 A. Well, it's apparent in some of
12:59:04 20 these 1850s' cases that they did. I'm not as
12:59:14 21 sure for some of the earlier sales. But, in
12:59:17 22 fact, there were other instances where people
12:59:20 23 bought land and found somebody had already
12:59:25 24 staked a claim to it, but not in as large
12:59:29 25 numbers as was happening in the 1850s.

12:59:32 1 Q. And where was that happening?

12:59:34 2 A. Well, I'm not a -- it's not been
12:59:36 3 studied everywhere in the province. There is
12:59:38 4 general literature on squatting, which if you
12:59:40 5 want to ask about it we can talk about it but I
12:59:44 6 wouldn't otherwise go into it.

12:59:50 7 John Clarke, whose books have been
12:59:52 8 mentioned, he studied it for Essex County and
12:59:55 9 found scattered places where there was
12:59:57 10 squatting.

12:59:58 11 And my understanding from
01:00:00 12 Dr. Harring's work is that there was -- from
01:00:02 13 local history around Guelph, is that there was a
01:00:05 14 serious squatting problem on the Grand River
01:00:07 15 Reserve.

01:00:08 16 So it appeared that on lands adjacent
01:00:15 17 or within lands thought of to be reserves for
01:00:21 18 Indigenous people there were people prepared to
01:00:25 19 come to some kind of a deal that allowed them to
01:00:27 20 be there on a farm and, by definition,
01:00:30 21 virtually, they were squatters. Although in
01:00:36 22 some cases I believe bands had co-operated with
01:00:36 23 their being there.

01:00:37 24 Q. You mentioned John Clarke, I
01:00:39 25 believe that's Exhibit 4355, "The Ordinary

01:00:41 1 People of Essex", is that correct? Is that the
01:00:44 2 book you're referring to?
01:00:45 3 A. Yes.
01:00:46 4 Q. And is that one of the books you
01:00:48 5 did a review of in your CV?
01:00:50 6 A. Yes.
01:00:51 7 Q. And did that work deal with any
01:00:56 8 lands belonging to Indigenous people?
01:01:00 9 A. Yes, in the -- it's on Essex
01:01:01 10 County, so to the extent that there were
01:01:07 11 Indigenous people in Essex he doesn't get into
01:01:10 12 neighbouring territories, however, so it's only
01:01:12 13 the Indigenous people in Essex County.
01:01:19 14 Q. Your Honour, I believe it's 1:00
01:01:21 15 o'clock and it might be appropriate for a break
01:01:24 16 at this point.
01:01:26 17 THE COURT: All right, 2:15.
01:01:28 18 -- RECESSED AT 1:01 P.M. --
01:28:58 19 -- RESUMED AT 2:18 P.M. --
02:18:29 20 THE COURT: Please go ahead.
02:18:30 21 MR. BEGGS: Thank you, Your Honour.
02:18:37 22 BY MR. BEGGS:
02:18:38 23 Q. Good afternoon, Professor
02:18:38 24 McCalla. I'd like to go to page 16 of your
02:18:42 25 report, which is page 18 of the document. No,

02:18:51 1 I'm wrong. So the top of page 16.

02:18:55 2 Second line you say:

02:18:57 3 "[...] in the mid-1850s when
02:19:00 4 demand from a rapidly growing
02:19:02 5 population combined with inflation to
02:19:04 6 produce a runaway land boom."

02:19:07 7 Could you explain how population and
02:19:13 8 inflation would create a land boom, briefly?

02:19:16 9 A. Well, what -- the population
02:19:18 10 would create one part of the land boom, and what
02:19:20 11 the inflation would do is raise the price of the
02:19:23 12 land. In other words, if there are a lot of
02:19:27 13 immigrant arrivals in the span of a few years
02:19:30 14 that's one of the main drivers for the land
02:19:33 15 boom.

02:19:34 16 But the thing that adds to the -- adds
02:19:36 17 fuel to the fire, if you like, is that prices
02:19:38 18 are seen to be going up quickly, which creates
02:19:41 19 the sense that you have to buy now or miss out,
02:19:44 20 or buy now or pay more soon.

02:19:52 21 So the inflationary part is what
02:19:54 22 really fuels the way the boom develops in the
02:20:00 23 1850s.

02:20:01 24 Q. I think there is reference to
02:20:03 25 that in the next paragraph in the second

02:20:03 1 sentence.

02:20:06 2 "Such a 'severe price rise'
02:20:07 3 fostered a sense of urgency both among
02:20:09 4 those seeking to buy land to farm and
02:20:10 5 among those seeking speculative
02:20:13 6 returns."

02:20:23 7 So how would this sense of urgency be
02:20:26 8 manifested?

02:20:27 9 A. It would be manifested in the
02:20:29 10 desire to get in while you could for either of
02:20:32 11 those motivations. And some of the motivations
02:20:35 12 could blur together in various ways.

02:20:37 13 But if you wanted to catch the rise,
02:20:42 14 catch the wave while it's going on, timing is of
02:20:44 15 the essence and you can't wait. So it's urgent
02:20:47 16 that you get in if you're going to be a part of
02:20:50 17 this.

02:20:55 18 Q. Now, a couple of lines later you
02:20:58 19 refer to this as being a "bubble". Can you
02:21:00 20 explain what that means?

02:21:02 21 A. Well, it turned out that this
02:21:06 22 inflationary boom, driven by massive expansion
02:21:09 23 of capital imports and credit, hit upon a rock
02:21:15 24 in the 1857 financial crisis. In September of
02:21:19 25 '57 markets crashed in New York and London and,

02:21:23 1 accordingly, in Montreal and Toronto as well.

02:21:26 2 And at that point people discovered
02:21:29 3 that they'd been paying more for land than it
02:21:33 4 could immediately justify, for various reasons.
02:21:37 5 And so prices turned downward from there and
02:21:40 6 they fell quite sharply until 1862, but the
02:21:44 7 crash of 1857 turns from -- and you discover
02:21:47 8 it's a bubble only after the fact.

02:22:04 9 Q. Okay. Would it have been
02:22:05 10 apparent to anybody in October of 1854 that a
02:22:08 11 crash was coming or this was a bubble?

02:22:12 12 A. I don't think so. Maybe there
02:22:14 13 was somebody in Upper Canada who thought this
02:22:16 14 was crazy but most businessmen plunged right in;
02:22:21 15 most politicians were right on side with it; and
02:22:24 16 many people who wanted to engage in the land
02:22:26 17 market were as well.

02:22:29 18 So there must have been somebody who
02:22:33 19 said, this is crazy. It can't go on. But my
02:22:36 20 general impression is not many. There is a
02:22:40 21 quote from John A. McDonald there about how he
02:22:43 22 bought all these lands and now he's trying to
02:22:45 23 figure out how to pay for them.

02:22:50 24 THE COURT: I am going to ask you to
02:22:52 25 pause. We are having another light problem,

02:22:54 1 happily not because they're falling on the
02:22:54 2 ground. Can you just try turning this -- I
02:22:58 3 don't know how many go off if you turn this one
02:23:01 4 off. This is getting a little bit much.

02:23:09 5 It's a bit dark.

02:23:16 6 Mr. Beggs, can you manage with that?

02:23:20 7 MR. BEGGS: Yes, this is fine.

02:23:22 8 THE COURT: I'm really having
02:23:23 9 difficulty with this very bright light directly
02:23:26 10 above me. And, as some of you know, we solved
02:23:29 11 the problem by turning them all off but now we
02:23:32 12 are having the problem with the other ones.

02:23:35 13 So we'll try this. And I have my CSO
02:23:40 14 looking into a work-around but I can't get it
02:23:43 15 set up this afternoon. All right. Please go
02:23:46 16 ahead. Thank you very much for being patient
02:23:48 17 with the lighting issues.

02:23:52 18 MR. BEGGS: Thank you, Your Honour.

02:23:55 19 THE COURT: It's much better from
02:23:56 20 where I sit.

02:23:58 21 MR. BEGGS: It's fine for me.

02:23:59 22 THE COURT: Let's give it a try.

02:24:00 23 BY MR. BEGGS:

02:24:01 24 Q. If I can go to the next page,
02:24:02 25 page 17, you include a quote from David Gagan.

1 Is that how you pronounce that?

2 A. Yes, that's right.

3 Q. It's on the bottom of the page.
4 Can you explain who David Gagan is.

5 A. David Gagan was a very serious
6 social scientist, historian who went on to be
7 dean at McMaster and then vice-president of
8 Simon Fraser, but he did pioneering work
9 studying the land market and -- in Peel county
10 in the mid-19th century.

11 And this quote comes from his work
12 when he was doing some of the first
13 computer-driven analyses of the actual land
14 records. So he was working up close with the
15 original documents and applying advanced social
16 science techniques to try and pull meaning out
17 of them, and then expressing it, as you can see,
18 in quite clear, dramatic prose.

19 He is a very well-recognized Canadian
20 social historian.

21 Q. And for reference that has been
22 made an exhibit. That book has been made
23 Exhibit 4358. Did his conclusion about "a mania
24 for land at any price being in full flight" in
25 1853, is that limited to Peel or is that more

02:25:36 1 generally --

02:25:37 2 A. No, it's much more general. And
02:25:39 3 part of his story is how many people are going
02:25:42 4 through Peel and going on and buying land
02:25:44 5 elsewhere. He's not studying them when they
02:25:45 6 leave Peel.

02:25:45 7 He is one of the first researchers to
02:25:47 8 discover how much movement there was through the
02:25:50 9 counties near Lake Ontario towards the
02:25:53 10 settlement frontier during this period.

02:26:06 11 Q. And what was the impact of the
02:26:07 12 crash of 1857 on the Upper Canada economy?

02:26:12 13 A. Well, it caught people who were
02:26:17 14 deeply in debt. And there was a period, really
02:26:21 15 almost the whole next decade, when people worked
02:26:23 16 these things out.

02:26:24 17 We have some experience in modern
02:26:25 18 times with financial crises and it takes time to
02:26:29 19 work things out.

02:26:30 20 But there were lots of people who had
02:26:33 21 productive farms. There were lots of businesses
02:26:35 22 that hadn't borrowed too much. There were
02:26:38 23 people who, for whatever reason, got out of the
02:26:40 24 land market just in time.

02:26:42 25 And there were all sorts of reasons

02:26:44 1 why the underlying strength of the economy
02:26:47 2 revealed itself over the next five or six years,
02:26:50 3 but it was extremely tight from 1857 to '59.

02:26:56 4 And in my research I found 25 major
02:27:00 5 businesses that failed in Toronto in the first
02:27:03 6 three months, and many more failed thereafter.

02:27:20 7 Q. Now, if I can take you to page 23
02:27:22 8 of the report, in the first full paragraph?

02:27:27 9 So you were asked a question how the
02:27:30 10 colonial government might have responded
02:27:32 11 otherwise to the flow of migrants, taking into
02:27:34 12 account the context of the time. And you state:

02:27:39 13 "My considered opinion is that
02:27:40 14 the colony's leading political and
02:27:42 15 business figures were so caught up in
02:27:44 16 the boom that it is impossible to
02:27:47 17 imagine them thinking otherwise in
02:27:49 18 1854-5."

02:27:56 19 When you say "thinking otherwise",
02:27:58 20 what was their thinking that the -- the supposed
02:28:01 21 thinking of the figures that you're talking
02:28:04 22 about?

02:28:04 23 A. Well, the general sense of all
02:28:07 24 the historiography, and certainly of my own
02:28:11 25 research, is they said, finally people are

02:28:13 1 recognizing what a spectacularly good economy
02:28:16 2 this is and we are really going full steam
02:28:18 3 ahead.

02:28:19 4 Everything in this is appropriate.
02:28:20 5 We're getting the newest technology, railways.
02:28:23 6 Our banks are happily prospering and lending out
02:28:27 7 large amounts of money. This is how it was
02:28:30 8 meant to be. We have this very healthy
02:28:31 9 agriculture. Our exports are booming. What
02:28:34 10 could be better?

02:28:36 11 Q. And how -- would the Imperial
02:28:48 12 government have had any different view of this?

02:28:52 13 A. Well, I've not studied, you know,
02:28:55 14 the minutes of the British Cabinet, or anything
02:28:57 15 of this kind, but remember parts of this boom,
02:29:01 16 or at least of the crash, happened in Britain as
02:29:04 17 well.

02:29:04 18 But my general sense is the Imperial
02:29:07 19 government thought itself considerably more
02:29:12 20 detached from the grubby, colonial realities in
02:29:16 21 which the colonial politicians were caught up.

02:29:20 22 So Imperial statesmen imagined at
02:29:21 23 least that they had a higher view of how the
02:29:24 24 colony should function.

02:29:26 25 Q. If I can go to the bottom of page

02:29:27 1 21? You refer to Laurence Oliphant and Lord
02:29:35 2 Elgin as Imperial officials. So would that same
02:29:44 3 characterization apply to them that they would
02:29:47 4 think more as Imperial officials rather than
02:29:50 5 colonial officials?

02:29:51 6 A. Well, I think definitely that's
02:29:53 7 how they imagined themselves. Whether they too
02:29:56 8 got caught up in the spirit of the times is a
02:29:59 9 separate matter.

02:30:00 10 But if you'd asked them they would
02:30:02 11 certainly have said they were above the
02:30:05 12 hurly-burly of colonial politics.

02:30:08 13 Q. Now, this particular reference
02:30:15 14 asks about squatters and it says they would have
02:30:22 15 known that "similar issues had arisen in other
02:30:26 16 contexts."

02:30:27 17 Can you tell us what other contexts
02:30:29 18 the issue of squatters would have arisen that
02:30:32 19 they would be aware of?

02:30:34 20 A. Well, the examples that I offer
02:30:35 21 in the report include the Indigenous issues at
02:30:41 22 Credit River, Tyandaga, Grand River, and there
02:30:45 23 certainly had been issues in the Lake St. Clair
02:30:53 24 region.

02:30:54 25 New Zealand was very much an issue at

02:30:56 1 the time where quite complex land battles were
02:30:59 2 going on; and part of it was that there were
02:31:02 3 people wanting to run sheep making private deals
02:31:04 4 with individual Māori to set up sheep stations
02:31:08 5 and going around the British claim to
02:31:13 6 controlling all the property transactions.

02:31:16 7 And there were many variations on
02:31:17 8 that, which John Weaver has written about, so
02:31:20 9 that my understanding is that Imperial officials
02:31:22 10 would hear about what happened elsewhere in the
02:31:25 11 empire and certainly at this time New Zealand
02:31:27 12 was a hot issue.

02:31:30 13 So they would have known about
02:31:32 14 specific Canadian cases where there had been
02:31:35 15 difficulties with Indigenous people and settlers
02:31:42 16 encountering each other on the same property,
02:31:44 17 and the examples I mentioned here are on
02:31:48 18 Indigenous lands.

02:31:49 19 Q. And what would Imperial officials
02:31:54 20 have learned from that experience?

02:31:56 21 A. I think -- I think that
02:32:03 22 ultimately what they would have learned is we
02:32:06 23 should get out in front of it. We should
02:32:10 24 anticipate the problem and try to solve it
02:32:13 25 before it gets too bad.

02:32:25 1 Q. And how would they be able to get
02:32:26 2 ahead of it?

02:32:27 3 A. Well, they could attempt to
02:32:30 4 develop a system of land cessions that would
02:32:36 5 bring the disputed lands into the regular
02:32:38 6 settlement framework. There were other
02:32:42 7 possibilities.

02:32:42 8 In New Zealand eventually the British
02:32:44 9 government sent 12,000 soldiers as part of --
02:32:49 10 but that was because they hadn't addressed it in
02:32:52 11 advance. So I think that's my main answer, that
02:32:57 12 you were in the context of the times think of
02:33:01 13 negotiating a treaty.

02:33:03 14 Q. And were all squatters or
02:33:30 15 settlers simply seeking to farm? Or what was
02:33:34 16 their goal?

02:33:37 17 A. Well, squatting by its nature is
02:33:40 18 not very well documented. People didn't write
02:33:43 19 down, I'm squatting. This is what my intention
02:33:45 20 is. But there are clearly two distinguishable
02:33:53 21 principles.

02:33:54 22 One is, I really want to establish a
02:33:56 23 claim on this land on which I can settle
02:33:59 24 permanently and make a farm and raise my family,
02:34:09 25 and all of that.

02:34:10 1 The other is, I can stake an interest
02:34:12 2 which I can then sell to somebody who wants to
02:34:15 3 farm.

02:34:16 4 It should be said as a third factor
02:34:18 5 there that there's so much movement that people
02:34:20 6 who might have started out as, I want to settle
02:34:23 7 here permanently, might turn around and accept
02:34:25 8 an offer and sell their interests, so the two
02:34:29 9 merged together.

02:34:46 10 Q. And did the government have any
02:34:48 11 preference, the colonial government have any
02:34:50 12 preference as to whether actual settlers settled
02:34:54 13 on land or -- or whether it was other absentees?

02:35:00 14 A. Well, my understanding is that
02:35:01 15 the principle of public policy through most of
02:35:05 16 this period, certainly by the 1840s and
02:35:09 17 probably the '30s, was that we want an actual
02:35:12 18 settlement. That's what we want. That's our
02:35:14 19 objective.

02:35:15 20 Q. And what did the government do to
02:35:16 21 encourage that?

02:35:17 22 A. Well, they could set settlement
02:35:21 23 terms on property when it was sold.

02:35:23 24 They could say, you must clear so much
02:35:27 25 land; you must fence so much land; you must

02:35:29 1 build a house of a certain size; you must clear
02:35:33 2 the road in front of your property. Those were
02:35:35 3 the main ones you might say.

02:35:37 4 Q. And could somebody be inclined to
02:35:39 5 avoid those obligations or circumvent them?

02:35:44 6 A. Well, apparently they were pretty
02:35:46 7 commonly avoided because it was very difficult
02:35:49 8 for a small government to be everywhere. And in
02:35:51 9 the end the bias of policy was to give quite a
02:35:54 10 lot of leeway on meeting those conditions. That
02:35:57 11 is to say, leeway in terms of time, as far as I
02:36:01 12 know, not leeway in terms of fulfilling the
02:36:04 13 conditions. So somebody might take much longer
02:36:11 14 than the originally prescribed period to fulfill
02:36:15 15 them.

02:36:34 16 Q. On page 24 of your report, the
02:36:36 17 paragraph beginning, "It may exceed", you were
02:36:46 18 asked in your report to consider -- in your
02:36:51 19 informed opinion -- let me look at the exact
02:36:55 20 question.

02:37:10 21 How could the colonial government have
02:37:12 22 responded differently in the context of the time
02:37:14 23 to the flow of migrants and expansion of
02:37:19 24 settlement? And you proposed three
02:37:25 25 possibilities. Can you tell us what those three

02:37:27 1 possibilities are, briefly?

02:37:29 2 A. Well, I suggested doing nothing
02:37:34 3 is one of the possibilities and letting the
02:37:36 4 situation develop, is one of the suggestions.

02:37:44 5 The third (sic) was to find ways to
02:37:46 6 protect the lands. And I suggested a number of
02:37:49 7 issues that might arise in trying to monitor the
02:37:55 8 situation on the spot to protect the lands.

02:38:00 9 And the third was to investigate on
02:38:04 10 the ground and try to identify which land was
02:38:09 11 really in demand and then work out some solution
02:38:14 12 that would bring that land into production. And
02:38:17 13 I did mention the possibility of leasing as well
02:38:23 14 as the land cession.

02:38:24 15 Q. And was leasing a common
02:38:25 16 practice?

02:38:26 17 A. It turns out that in Upper Canada
02:38:29 18 it was very common at different levels, but it's
02:38:32 19 until quite recently largely ignored.

02:38:50 20 Q. Would -- I'll step back.

02:39:05 21 In your second alternative, you
02:39:09 22 describe it on page 25, "[...] as to actively
02:39:14 23 enforce the existing treaty". Now, which treaty
02:39:18 24 are you referring to there?

02:39:19 25 A. Well, my understanding of Treaty

02:39:21 1 45 1/2, which I'm not expert on but I understand
02:39:26 2 to this extent, the clause you spoke of this
02:39:29 3 morning as "forever".

02:39:44 4 Q. Now, on that same paragraph you
02:39:46 5 refer to something called the "Gavazzi riot" in
02:39:53 6 Montreal. Can you tell us briefly what that
02:39:55 7 was?

02:39:56 8 A. Gavazzi was an ex-Roman Catholic
02:39:59 9 priest who was lecturing in North America
02:40:03 10 denouncing the evils of Popery and the Catholic
02:40:08 11 church. And it was somewhat provocative of him
02:40:11 12 and his supporters in the Montreal community to
02:40:15 13 schedule a big public meeting in Montreal, which
02:40:17 14 was the centre of a very powerful Catholic
02:40:21 15 movement, the Catholic population.

02:40:24 16 And the protests at Gavazzi's
02:40:28 17 appearance were such that the police lost
02:40:30 18 complete control. The army was called in. And,
02:40:33 19 as I quote in the report, the troops ended up
02:40:39 20 shooting -- killing five of the rioters or the
02:40:42 21 protestors. But essentially the protestors were
02:40:46 22 trying to stop Gavazzi from speaking.

02:40:56 23 Q. And you quote from a letter
02:40:57 24 written by the commander of the forces. Did you
02:41:06 25 see the original letter of that document?

02:41:08 1 A. No, I'm relying on the secondary
02:41:11 2 source there of Elinor Kyte Senior --

02:41:15 3 Q. That's Elinor Kyte Senior you
02:41:18 4 said?

02:41:19 5 A. Yes.

02:41:19 6 Q. And I believe that's Exhibit
02:41:21 7 4361, but that's a quotation -- what is that a
02:41:30 8 quotation from?

02:41:30 9 A. Well, it's from Lieutenant
02:41:33 10 General William Rowland who was the commander in
02:41:39 11 Montreal.

02:41:40 12 Q. And what does it indicate about
02:41:42 13 how the troops regarded their use here?

02:41:49 14 A. Well, it's clear that aid to the
02:41:51 15 civil power of this kind was not something that
02:41:52 16 Imperial officers welcomed.

02:41:55 17 And they were called out a lot to deal
02:41:58 18 with issues on canal construction as well. And
02:42:02 19 they felt, throughout, that colonial authorities
02:42:06 20 should do more to police their own society.

02:42:35 21 Q. Now I want to turn to the fourth
02:42:37 22 question you were asked about military
02:42:38 23 resources, it's on page 27 of your report. But
02:42:45 24 can you just briefly tell me what was happening
02:42:47 25 to the size of the military in Canada in the

1 1850s?

2 A. Well, the basic tendency,
3 beginning around 1850 but accelerating in 1854,
4 was to withdraw Imperial troops from Canada.
5 And there were several motives for that, one of
6 which was the British were fighting a war
7 somewhere else in 1854, but another is it was
8 part of a general move to retrenchment in
9 Britain.

10 They were more and more anxious to --
11 not only to foster responsible government in the
12 colony but to foster responsible financial
13 management in the colony as well, namely not to
14 rely on the British taxpayer to pay for colonial
15 expenses.

16 So even without the Crimean War I
17 think the number of troops would have been drawn
18 down, but they were probably drawn down more
19 quickly because Britain had need for troops
20 elsewhere.

21 Q. And where were troops located in
22 Upper Canada at least?

23 A. Well, for sure there were some in
24 Toronto. Kingston was their main base. They
25 had drawn back from outlying bases such as

02:44:06 1 Penetang and Amherstburg earlier in the 1850s.
02:44:09 2 The garrisons in Penetang and Amherstburg were
02:44:13 3 both withdrawn in about 1851 or '52 as part of a
02:44:20 4 consolidation.

02:44:21 5 There had been a few troops in
02:44:23 6 Niagara. I think -- I can't from memory say
02:44:28 7 where the garrison in London was removed, but
02:44:31 8 the main focus was Kingston, Montreal and
02:44:34 9 Quebec; and after the Gavazzi riots more Quebec
02:44:40 10 than Montreal.

02:44:41 11 Plus there were many -- there was
02:44:42 12 substantial Imperial presence in Halifax as
02:44:45 13 well.

02:44:52 14 Q. Now, if troops wanted to travel
02:44:55 15 from their base to the Bruce Peninsula, how
02:45:00 16 would they travel in the 1850s?

02:45:05 17 A. Well, they -- the most obvious
02:45:12 18 way by 1854 was by rail. You could get to
02:45:16 19 Barrie by train and then it's cross country from
02:45:24 20 then.

02:45:25 21 By 1855 the railway ran to
02:45:27 22 Collingwood, it was completed in 1854 so you
02:45:31 23 could get from Toronto to the Bruce Peninsula
02:45:34 24 quite quickly. Alternatively, and for some
02:45:37 25 purposes you might have wanted to use steam boat

02:45:40 1 services which would go all the way around, but
02:45:43 2 the normal route was overland.

02:45:44 3 And I imagine the troops would have
02:45:46 4 marched, if they hadn't gone by train rather
02:45:48 5 than taking a steam boat the length of Lake Erie
02:45:51 6 and Lake Huron to get there. But there was
02:45:54 7 steam boat service to that part of the world.

02:46:05 8 Q. I'd like to turn to the last
02:46:06 9 section of your first report, question 5, which
02:46:09 10 starts at page 28.

02:46:15 11 And you were asked how a historian
02:46:17 12 would read and resolve conflicting or multiple
02:46:20 13 views of the same event by the same author
02:46:23 14 written at widely separated times?

02:46:27 15 Now, first of all, is that a common
02:46:29 16 problem to historians?

02:46:34 17 A. Probably relatively common. It's
02:46:36 18 not one that I have met that often but some
02:46:39 19 people do tell the same story several times over
02:46:42 20 the course of their lives.

02:46:44 21 In the kind of work I've done I
02:46:46 22 haven't met a lot of those but it's certainly a
02:46:49 23 common enough problem.

02:46:51 24 Q. And how do you suggest, in your
02:46:53 25 report, addressing this problem?

02:46:55 1 A. Well, I suggest looking for
02:47:01 2 variations between the reports to see if they
02:47:05 3 offer any clues; I suggest considering the
02:47:09 4 motivation for writing the reports; I suggest
02:47:12 5 considering the intended audience, and so that's
02:47:15 6 the starting point. Then you go to examining
02:47:19 7 the actual documents with those principles in
02:47:22 8 mind.

02:47:24 9 And there I comment that you'd think
02:47:26 10 the contemporary document would normally be the
02:47:29 11 most appropriate, but there are circumstances in
02:47:31 12 which you would consider the later ones to be
02:47:34 13 more appropriate because the author had come
02:47:37 14 into possession of more knowledge, or the author
02:47:40 15 knew the outcome and that reshaped the sense of
02:47:44 16 what the original document had described.

02:47:48 17 Q. And in this specific case, with
02:47:51 18 respect to Laurence Oliphant, are you aware of
02:47:56 19 the reasons he would have written his 1887 book
02:48:00 20 "Episodes in a Life of Adventure"?

02:48:05 21 A. I am not aware of the specific
02:48:06 22 reason, other than to write a book that would
02:48:09 23 justify his life and sell books. But I don't
02:48:12 24 know whether there was a particular crisis in
02:48:15 25 Oliphant's life at that moment that caused him

02:48:18 1 to want to write it. He was a fairly prolific
02:48:21 2 author, as I understand, and wrote a good deal.

02:48:36 3 Q. What about his book "Minnesota
02:48:39 4 and the Far West", are you aware of the reasons
02:48:41 5 he would have written that book?

02:48:43 6 A. Well, I can only say the same
02:48:43 7 thing, that he was a prolific writer and he
02:48:47 8 wrote for the British. And presumably -- I
02:48:49 9 assume it's mainly a British public. I am not
02:48:52 10 aware of his American readership. But there was
02:48:54 11 a great market for this kind of book, personal
02:48:57 12 experiences in the wilds of North America.

02:49:14 13 Q. And in those circumstances how
02:49:16 14 would a historian treat such books?

02:49:18 15 A. Well, what I've said was that you
02:49:22 16 would look for whether the later ones have
02:49:26 17 additional information that was not available at
02:49:32 18 the time of writing the first report.

02:49:36 19 And the 1887 one still has many
02:49:40 20 clearly -- things that were clearly refuted by
02:49:44 21 experience after 1854, he hadn't changed his
02:49:47 22 story despite that.

02:49:52 23 And you would consider that he is
02:49:55 24 writing for a popular audience in Britain. And
02:49:58 25 there was a whole genre of writing to popular

02:50:00 1 audiences in Britain.

02:50:02 2 And many of the travel accounts that
02:50:05 3 one can find in the first half of the 19th
02:50:08 4 century -- there were hundreds of these books
02:50:10 5 written -- have certain themes in common. And
02:50:15 6 emphasizing the wildness of Canada and
02:50:17 7 emphasizing the savageness of savages were two
02:50:22 8 of the standard themes that apparently the
02:50:24 9 British public welcomed.

02:50:26 10 Q. And with respect to Oliphant's
02:50:30 11 report to Lord Elgin, did you have any concerns
02:50:33 12 about bias there?

02:50:39 13 A. I don't like the word "bias" but
02:50:42 14 "perspective". He certainly wants to make the
02:50:45 15 best story he can about what he's just done and
02:50:49 16 what he proposes can be done as a result of his
02:50:53 17 brilliant handiwork. He is not understating his
02:50:57 18 own importance, shall we say.

02:50:59 19 But I have no reason to think that he
02:51:11 20 would tell outright falsehoods which people who
02:51:13 21 had been present and knew about this could
02:51:17 22 contradict.

02:51:30 23 Q. Now in this section of your
02:51:32 24 report on page 30 there is a map, and can you
02:51:37 25 tell us what this map shows?

02:51:42 1 A. Well, it reproduces a map that
02:51:43 2 probably you have had in evidence because it's
02:51:46 3 by Rankin. It's his map of the counties of Grey
02:51:50 4 and Bruce and it was adapted to highlight the
02:51:56 5 roads that are shown on that.

02:51:59 6 And it shows that there are really
02:52:01 7 three roads from the south, plus the road along
02:52:06 8 the shore of Georgian Bay, that would lead to
02:52:09 9 this part of the world.

02:52:15 10 Q. If I could call up Exhibit 2181
02:52:22 11 to the screen? Is this the map that you relied
02:52:41 12 upon? Should I zoom in a bit?

02:52:47 13 A. I don't need to zoom in just to
02:52:49 14 make sure it's Rankin 1855, but I believe it is.
02:52:54 15 I had cartographer who worked from this to
02:52:58 16 produce the map that's in my report, so it's not
02:53:01 17 meant to be a duplicate of the map but a map
02:53:05 18 drawn from the information on this.

02:53:17 19 Q. And just if we can go back to the
02:53:20 20 map in your report on page 30, there's -- the
02:53:39 21 words that are printed in various areas,
02:53:43 22 "Bruce", "Grey", "Simcoe", can you tell me what
02:53:47 23 they indicate?

02:53:48 24 A. They would -- they indicate
02:53:50 25 counties.

02:53:52 1 Q. And where did you say the Minto
02:54:04 2 sale took place earlier in your report?

02:54:09 3 A. Well, the sale took place in
02:54:12 4 Elora, which is at the bottom of that map.

02:54:15 5 Q. And Minto is in?

02:54:16 6 A. It's in Wellington County.

02:54:40 7 Q. I'm not going to go through your
02:54:41 8 analysis in detail of the Oliphant versions. I
02:54:51 9 just want to go to the last page of your report,
02:54:54 10 page 32, where there's some discussion as to how
02:55:14 11 much money might be derived from the sale. But
02:55:20 12 what did Oliphant expect to derive from the sale
02:55:23 13 in his 1854 report?

02:55:28 14 A. As I recall he was talking about
02:55:32 15 a hundred thousand pounds.

02:55:35 16 Q. Okay. And in his later books
02:55:38 17 what sort of projection -- or it wasn't a
02:55:40 18 projection, but in his later books what was he
02:55:43 19 claiming?

02:55:43 20 A. Well, he claimed later that they
02:55:45 21 had actually raised 13,000 pounds. So he's
02:55:49 22 claiming that that was the sum that was raised.
02:55:52 23 I have no independent basis for knowing what was
02:55:54 24 actually raised.

02:55:57 25 Q. I'd like to turn to your second

02:55:59 1 report now, which is Exhibit 4368. Now, can you
02:56:39 2 tell me who Conrad Van Dusen was?

02:56:43 3 A. Well, my knowledge of Van Dusen
02:56:45 4 is based on rather limited reading, but he was a
02:56:51 5 Methodist missionary in the Owen Sound or
02:56:55 6 Colpoy's Bay side of the Bruce Peninsula.

02:57:02 7 Q. And what sources did you look at
02:57:04 8 for learning about Reverend Van Dusen?

02:57:10 9 A. Well, I read the "Dictionary of
02:57:12 10 Canadian Biography" article on him. I read the
02:57:17 11 article in the "Dictionary of Canadian
02:57:19 12 Biography" of David Sawyer, who was the Indian
02:57:22 13 Chief that's the subject of the book. I read
02:57:25 14 several books on the history of Methodist
02:57:27 15 missionaries. And I looked at some other
02:57:31 16 particular sources on the issue, such as Peter
02:57:37 17 Schmalz's histories of the peoples there.

02:57:53 18 Q. If I can call up Exhibit 2658?
02:58:56 19 If I could go to page 51 of the book? Sorry,
02:59:04 20 this is the book "The Indian Chief" by Conrad
02:59:09 21 Van Dusen.

02:59:36 22 There's a quote in the middle of this
02:59:37 23 page which says:

02:59:41 24 "They were told that from the
02:59:43 25 sale of the land they would soon have

02:59:45 1 a large income that they would all be
02:59:47 2 able to ride in carriages, roll in
02:59:51 3 wealth and fare sumptuously every
02:59:54 4 day."

02:59:56 5 Now, is that quotation the basis of
02:59:59 6 your report?

02:59:59 7 A. Yes, that's what I was asked to
03:00:01 8 comment on and that's what I did comment on.

03:00:23 9 Q. And what was your overall
03:00:24 10 conclusion about how likely it was that this was
03:00:27 11 an accurate statement made by the Crown to the
03:00:35 12 Indigenous people in Owen Sound and Saugeen?

03:00:38 13 A. My ultimate conclusion was that
03:00:40 14 this was a very unlikely statement to have been
03:00:43 15 made, and that's what the report addresses.

03:00:50 16 Q. And basically what were your
03:00:51 17 reasons for that conclusion?

03:00:55 18 A. Well, there are multiple reasons.
03:00:58 19 It may take me a minute to collect them all. I
03:01:01 20 apologize if I take too long.

03:01:04 21 But we can begin with one really
03:01:10 22 material one. There were no carriages to speak
03:01:12 23 of in Bruce at the time, and highly unlikely
03:01:14 24 that anybody would have been attracted to the
03:01:16 25 notion of having a carriage when there were no

03:01:20 1 roads and hardly any horses.

03:01:23 2 There were fewer horses in Bruce
03:01:24 3 County than any other county in southern
03:01:27 4 Ontario, as it happens, at the time. But that's
03:01:35 5 a kind of practical one.

03:01:38 6 The larger one is that this is
03:01:40 7 standard missionary phraseology. And all of his
03:01:43 8 emphasis is on the frugality and industry that
03:01:47 9 he wishes to encourage amongst the people of the
03:01:51 10 Bruce Peninsula; and he does not -- and he
03:01:52 11 contrasts that with luxury and indolence, and so
03:01:57 12 on, and that is a standard missionary trope to
03:02:00 13 set these diametrically opposed things.

03:02:03 14 So he is in favour of frugality and
03:02:06 15 industry, and he contrasts it with these wild
03:02:09 16 promises that are being made.

03:02:13 17 The third thing is that he doesn't
03:02:15 18 really pin down how he heard it, who might have
03:02:18 19 told him or even when it happened.

03:02:22 20 A fourth thing, which goes with the
03:02:27 21 sense of the sentence before that quote:

03:02:33 22 "[...] the most ignorant and
03:02:37 23 indolent part of the tribe [...]"

03:02:39 24 When I looked at the people who
03:02:40 25 actually signed the treaty that didn't seem to

03:02:45 1 fit the interpretation that Van Dusen was
03:02:48 2 otherwise offering.

03:02:49 3 Four of the signers of the tribe went
03:02:51 4 with him to Quebec to try to meet the Governor
03:02:53 5 General just a few months later.

03:02:56 6 He includes a number of community
03:02:58 7 petitions and documents signed by people who
03:03:00 8 also signed the treaty, including David Sawyer.

03:03:05 9 And for him to say that this quotation
03:03:09 10 appealed to the ignorant and the indolent
03:03:12 11 doesn't seem to explain why these people, who
03:03:14 12 are otherwise representatives, leaders of the
03:03:17 13 community, would have responded to the appeal.

03:03:46 14 Q. And are you aware from this book
03:03:48 15 what Van Dusen's image of the Crown agents was?

03:03:54 16 A. He presents a very negative image
03:03:57 17 of the Crown agents nearly at all times, and of
03:04:00 18 people in the community who are thought to be in
03:04:02 19 league with the Crown agents as well.

03:04:49 20 Q. And on page 11 there's a map. Is
03:05:02 21 this essentially the same map we saw in the
03:05:04 22 previous report?

03:05:05 23 A. Yes, it is the same map.

03:05:11 24 Q. And for what purpose did you
03:05:15 25 include this map here?

03:05:16 1 A. I'm trying to recall why I
03:05:28 2 included it, and I think it's because I was
03:05:30 3 asked to in order to reinforce the connection
03:05:33 4 between the two reports.

03:05:43 5 It may have had to do also with what
03:05:45 6 roads were available to ride your carriages on.
03:05:48 7 Now that I think about it, that's the reason
03:05:49 8 that comes to me now. It's another way of
03:05:52 9 demonstrating what the available roads were.

03:06:02 10 Q. If I could just -- oh, sorry, is
03:06:05 11 there any indication in the book as to whether
03:06:10 12 Van Dusen was present at the Oliphant
03:06:13 13 negotiations?

03:06:15 14 A. No.

03:06:17 15 Q. And was there any indication as
03:06:18 16 to whether he was present at the August Anderson
03:06:23 17 negotiations?

03:06:24 18 A. That I can't recall but I have no
03:06:26 19 knowledge of that.

03:06:29 20 Q. If I could just have a moment?
03:06:46 21 Those are my questions. Thank you,
03:06:47 22 Your Honour.

03:06:49 23 THE COURT: Thank you.

03:07:02 24 Before Ms. Guirguis gets started, and
03:07:04 25 this is a nonsequitur so don't be distracted by

03:07:11 1 it, but I was trying to remember, Ontario, now
03:07:21 2 that we're in Canada's case, and Ms. Guirguis
03:07:25 3 may even know the answer. There was a witness
03:07:27 4 in Canada's case that Ontario was contemplating
03:07:28 5 seeking leave to ask questions of. Is that
03:07:33 6 still true and, if so, who's the witness?
03:07:44 7 Obviously nothing is popping to mind.

03:07:49 8 MR. OGDEN: If there was, Your
03:07:50 9 Honour --

03:07:51 10 THE COURT: It's not a pressing issue?
03:07:52 11 I'm sorry, it's just because Canada has now
03:07:52 12 started it becomes relevant if it is going to
03:07:52 13 occur.

03:07:56 14 MR. OGDEN: It would be very unlikely
03:07:58 15 we'll have any questions of this witness, Your
03:07:59 16 Honour.

03:07:59 17 THE COURT: It wasn't whether you will
03:08:01 18 have any questions, because I know I said at the
03:08:04 19 time something like, unless demonstrated
03:08:09 20 otherwise you would have to seek leave to do
03:08:10 21 in-chief; and then if you wanted to
03:08:15 22 cross-examine you'd have to seek leave to do
03:08:17 23 that as well, persuade me that the witness was
03:08:22 24 adverse. So those are the options. Either
03:08:24 25 option requires leave.

03:08:31 1 Again, my apologies for interrupting
03:08:34 2 this witness' evidence. He is the first one
03:08:36 3 where it might perhaps arise so I wish to know
03:08:39 4 if it's going to arise.

03:08:41 5 MR. OGDEN: Not with this witness.

03:08:42 6 THE COURT: Not with this witness.
03:08:42 7 That's fair enough. If it is going to arise,
03:08:44 8 the more advance notice the better, especially
03:08:48 9 to plaintiffs' counsel so that they can prepare
03:08:50 10 if they wish to make any submissions about that.

03:08:54 11 MR. OGDEN: Yes, Your Honour.

03:08:56 12 THE COURT: Thank you.

03:08:59 13 Now, Ms. Guirguis, would you like to
03:09:01 14 take an early afternoon break?

03:09:04 15 MS. GUIRGUIS: I was just going to ask
03:09:05 16 for that, Your Honour.

03:09:12 17 THE COURT: We'll take 20 minutes.

03:09:14 18 -- RECESSED AT 3:09 P.M. --

03:19:42 19 -- RESUMED AT 3:34 P.M. --

03:34:05 20 THE COURT: We have some of our lights
03:34:07 21 back. We're fortunate in our electronic trial
03:34:09 22 that I think most of you are entirely using
03:34:11 23 computer screens so that helps a lot with the
03:34:16 24 light situation.

03:34:57 25 Please go ahead.

03:34:59 1 CROSS-EXAMINATION BY MR. GUIRGUIS:

03:35:03 2 Q. Good afternoon, Professor

03:35:04 3 McCalla. I'm going to ask you some questions
03:35:07 4 about the two reports and with respect to what
03:35:09 5 my friend was just speaking to you about.

03:35:12 6 I might jump around a bit. I'm doing
03:35:14 7 things a bit out of order but I'll try to be
03:35:17 8 clear about what I'm asking you about.

03:35:19 9 So you've just spoken to Mr. Beggs
03:35:22 10 about your second report about Van Dusen, that's
03:35:26 11 Exhibit 4368. We don't need to pull it up, but
03:35:30 12 at page 12, this is something you were just
03:35:32 13 speaking to Mr. Beggs about, about the roads
03:35:35 14 accommodating carriages.

03:35:38 15 You say at page 12:

03:35:39 16 "It is all together unlikely that
03:35:40 17 in 1854 the roads in Bruce would have
03:35:40 18 allowed anyone to travel by carriage
03:35:43 19 or to imagine that they would be able
03:35:45 20 to do so in the foreseeable future."

03:35:48 21 So I just want to call up Exhibit
03:35:51 22 3927. So this is an Agreed Statement of Facts
03:36:01 23 regarding the events in 1854 concerning the
03:36:04 24 negotiation of Treaty 72; it's an Agreed
03:36:04 25 Statement of Facts between all the parties. If

03:36:07 1 we can scroll down to paragraphs 11 and 12 of
03:36:07 2 this document, which I believe are on the second
03:36:07 3 page.

03:36:19 4 So paragraph 11 says:

03:36:19 5 "On September 24, 1854, SGIA
03:36:23 6 Laurence Oliphant left Quebec City to
03:36:25 7 travel to Saugeen to negotiate a
03:36:27 8 surrender."

03:36:29 9 Paragraph 12 says:

03:36:30 10 "On arriving at Toronto, he was
03:36:32 11 joined by James Ross MPP. They then
03:36:35 12 travelled to Guelph, rented a carriage
03:36:36 13 there, proceeded to Owen Sound, and
03:36:39 14 travelled from there to Saugeen."

03:36:42 15 So this tells us that Oliphant rented
03:36:45 16 a carriage to go to Treaty Council in 1854. My
03:36:50 17 question is, you would agree that this is
03:36:51 18 evidence contrary to the proposition that you
03:36:53 19 report, correct?

03:36:54 20 A. No, I don't think it contradicts
03:36:56 21 it at all. This says -- I was not aware of
03:36:58 22 the -- that he had travelled to Guelph and then
03:37:01 23 gone by road from there. My report speculated
03:37:04 24 that he went by rail to Barrie, but this road
03:37:07 25 from Guelph to Owen Sound shows clearly on the

03:37:10 1 map that I provided.

03:37:12 2 It doesn't say that they continued by
03:37:15 3 carriage to Saugeen. So getting to Owen Sound
03:37:17 4 by carriage is not the same as enjoying riding
03:37:20 5 around the Bruce Peninsula in the carriage.

03:37:24 6 Q. So you're reading this as saying
03:37:26 7 that they proceeded to Owen Sound, left the
03:37:28 8 carriage there that they rented and then
03:37:29 9 travelled in another way to Saugeen?

03:37:31 10 A. That's certainly what Oliphant
03:37:33 11 says in at least one or two of his reports,
03:37:35 12 though those are the two that I'm skeptical
03:37:39 13 about.

03:37:39 14 But it's possible they even went by
03:37:42 15 carriage to Saugeen, but that still wouldn't say
03:37:46 16 what use would a carriage be to somebody living
03:37:48 17 in the Bruce Peninsula in 1854.

03:37:51 18 And the document -- the data I give in
03:37:53 19 the report suggests that there were very few
03:37:56 20 carriages in all of Bruce County, even in 1861.

03:38:02 21 Q. That's fine. I accept that.
03:38:03 22 Leaving aside the issue of whether it was common
03:38:05 23 to travel by carriage, my question is about the
03:38:08 24 roads in Bruce in 1854; if Oliphant did proceed
03:38:12 25 from Owen Sound and travel to Saugeen, that they

03:38:14 1 could accommodate the carriage. Would you agree
03:38:17 2 with that?

03:38:17 3 A. I have no idea about that road.
03:38:18 4 He doesn't say he travelled by carriage in that
03:38:20 5 last stretch. And at one time he says he
03:38:23 6 travelled on -- on horseback, so I simply don't
03:38:26 7 know.

03:38:27 8 But -- no, I just don't know.

03:38:39 9 Q. So I'd like to switch to your
03:38:41 10 first report and, again, something that you were
03:38:43 11 just speaking to Mr. Beggs about. So this is
03:38:45 12 the first report, which is Exhibit 4367.

03:38:49 13 Again we don't need to bring it up,
03:38:51 14 but at the last few pages of your report when
03:38:54 15 you're comparing different accounts by Oliphant
03:38:56 16 of the October 13th, 1854, treaty, and you
03:39:00 17 conclude that:

03:39:01 18 "The errors and inconsistencies
03:39:03 19 in the 1887 report specifically are
03:39:07 20 cause for skepticism about elements of
03:39:10 21 a later story that cannot be directly
03:39:13 22 tested."

03:39:14 23 When you say "directly tested", is it
03:39:16 24 fair to assume that if there was a piece of
03:39:19 25 corroborating evidence, or an element in the

03:39:21 1 later 1887 report, that you would be less
03:39:25 2 skeptical of its truth?

03:39:26 3 A. Of the report as a whole? No, I
03:39:28 4 would still be skeptical of it. If there is a
03:39:31 5 corroborating document I would rely on the
03:39:33 6 corroborating document alone rather than saying
03:39:35 7 that it validates the earlier interpretation.

03:39:38 8 Q. Well, my question isn't about the
03:39:40 9 report as a whole, I'm saying the specific point
03:39:42 10 in the report. If there was corroborating
03:39:44 11 evidence about a specific point in the report?

03:39:47 12 A. Well, it might -- it might
03:39:49 13 confirm that that particular point was true but
03:39:52 14 not more.

03:39:53 15 Q. So I'd like to ask you about
03:39:55 16 Oliphant's statement in his 1887 account about
03:40:00 17 the interpreter being -- having a pecuniary
03:40:04 18 interest. And I would like to pull up Exhibit
03:40:06 19 2966, which is Oliphant's 1887 account. So if
03:40:18 20 we go to page 71 of the document, which is PDF
03:40:21 21 image 9, if we could zoom in on page 71. So he
03:40:47 22 says here:

03:40:48 23 "I again, by the advice of my
03:40:50 24 interpreter, retired to let them fight
03:40:52 25 it out which, as he afterwards assured

03:40:52 1 me, they did literally with their
03:40:53 2 fists. And as he believed himself to
03:40:55 3 be pecuniarily interested he remained
03:40:58 4 to take part in the mêlée. The course
03:41:01 5 of proceeding, I left him to reconcile
03:41:08 6 with his own consciousness as a
03:41:10 7 religious teacher."

03:41:12 8 So -- he's -- sorry about that. So
03:41:19 9 he's referring to the interpreter Peter Jacobs,
03:41:22 10 is that correct?

03:41:23 11 A. That would be my understanding.

03:41:25 12 Q. And he's saying that Peter Jacobs
03:41:27 13 has a pecuniary interest in the surrender, yes?

03:41:32 14 A. Yes.

03:41:33 15 Q. So I'd like to pull up Exhibit
03:41:37 16 2469. So this a two-page document. It is a
03:41:57 17 receipt, Peter Jacobs' receipt for 50 pounds for
03:42:04 18 services rendered -- sorry, is that highlighted
03:42:07 19 in blue?

03:42:15 20 "Peter Jacobs receipt for 50
03:42:17 21 pounds for services rendered
03:42:18 22 Mr. Oliphant in obtaining a surrender
03:42:21 23 of the Saugeen Peninsula."
03:42:23 24 And the second page is just further on
03:42:25 25 receipt. We see the date, it's dated the Indian

1 Department Toronto, 28th of March 1857.

2 And, again, the second page of the
3 document just reiterates that this is a:

4 "Receipt for the sum of 50 pounds
5 currency and payment for my services
6 rendered Mr. Oliphant, Superintendent
7 General, in procuring a surrender for
8 the Saugeen Peninsula."

9 And signed by Peter Jacobs.

10 So this is payment for his
11 interpretation services of the 1854 Treaty?

12 A. It might be more than that as
13 well, I don't know. It doesn't say for
14 interpretation alone, does it? I don't know
15 what other services there might have been. I
16 just -- it doesn't say for interpreting.

17 Q. For services rendered in
18 procuring the surrender of the Saugeen
19 Peninsula, yes?

20 A. Yes, that's what it says.

21 Q. So I'd like to take you to one
22 more document and then ask a question, Exhibit
23 4352.

24 This is an excerpt of Canada's answers
25 to discovery questions regarding the salary of

03:43:51 1 interpreters in and around this time. So if we
03:44:03 2 go to page 70, so if we keep scrolling down in
03:44:07 3 this chart. Right here.

03:44:14 4 This says:

03:44:15 5 "Within the Saugeen and Owen
03:44:16 6 Sound Bands the following salaries
03:44:18 7 were paid 1853-1855."

03:44:21 8 And we have a list of salaries that
03:44:23 9 are paid to people that worked as interpreters,
03:44:29 10 and perhaps other things. When you look at
03:44:36 11 this, this tells us -- you'd agree that this
03:44:39 12 tells us that the high end of an annual salary
03:44:42 13 for interpretation services was about 50 pounds?

03:44:44 14 A. That appears to be what it says,
03:44:46 15 yes.

03:44:49 16 Q. But based on the information in
03:44:50 17 this chart you'd agree with me that the payment
03:44:53 18 to Peter Jacobs for his services rendered
03:44:55 19 Mr. Oliphant in obtaining a surrender of the
03:44:59 20 Saugeen Peninsula in 1854, if he was just
03:45:01 21 providing interpretation, was very high?

03:45:04 22 A. If it was narrowly for one day of
03:45:07 23 interpretation, yes.

03:45:09 24 Q. If it was for three months,
03:45:11 25 according to this chart, if we look at Charles

03:45:13 1 Keeshick (sic), for example, the third line
03:45:16 2 down in this chart. "Interpreter", acting as an
03:45:19 3 interpreter for three months he was paid 12
03:45:23 4 pounds, 10 shillings. So in comparison to that
03:45:27 5 even if it was for more than one day it's still
03:45:30 6 high?

03:45:30 7 A. Yes, if it's strictly for
03:45:32 8 interpreting services.

03:45:44 9 Q. The receipt that we have
03:45:45 10 outlining Peter Jacobs' high payment for
03:45:48 11 services rendered in the Saugeen -- in procuring
03:45:49 12 or assisting Mr. Oliphant in preparing surrender
03:45:50 13 of the Saugeen Peninsula, you'd agree with me
03:45:54 14 that this receipt is a piece of corroborating
03:45:56 15 evidence for Oliphant's proposition that the
03:45:59 16 interpreter had a pecuniary interest?

03:46:02 17 A. Not necessarily. Because
03:46:05 18 there -- the fact that a payment was made later
03:46:11 19 doesn't mean that a promise of payment was made
03:46:13 20 earlier. It's possible it was but I don't know
03:46:18 21 that for sure.

03:46:20 22 Part of my reaction to that is that
03:46:23 23 people who came upon hard times often petitioned
03:46:26 24 the government for payment and the government
03:46:29 25 found reasons to pay them something if they were

03:46:32 1 sympathetic.

03:46:34 2 The classic example in Upper Canada is
03:46:35 3 that after 47 years Laura Secord got a hundred
03:46:40 4 pounds for her services during the War of 1812.
03:46:43 5 She petitioned on-and-off from 1832 and in 1860
03:46:48 6 was paid a hundred pounds. So there is a
03:46:51 7 pattern of petitioning.

03:46:54 8 So I don't know why the date on this
03:46:56 9 receipt is 1857 if this payment had been
03:47:00 10 promised before the Treaty. And for the
03:47:02 11 pecuniary interest to be clear Jacobs would have
03:47:06 12 had to know in advance that this was what was
03:47:10 13 going to be his payment. And, if that was the
03:47:13 14 case, it's puzzling it took them so long to pay.

03:47:24 15 So the gap between the service
03:47:25 16 rendered and the time of payment leaves me open
03:47:28 17 to questioning whether there were other factors
03:47:30 18 in how he persuaded the government that he was
03:47:33 19 entitled to payment for his services.

03:47:35 20 Q. The receipt was very specific to
03:47:37 21 say:

03:47:38 22 "Services rendered procuring the
03:47:40 23 surrender of the peninsula"?

03:47:42 24 A. Yes, it does say that.

03:47:43 25 Q. And that event took place one

03:47:45 1 day, October 13th, 1854, correct?

03:47:48 2 A. Yes, the event took place on one
03:47:49 3 day.

03:47:50 4 Q. So you'd agree with me that
03:47:52 5 that's different than service in a war?

03:47:55 6 A. Well, Laura Secord's was for one
03:47:57 7 day's March to warn the generals.

03:48:01 8 So I'm saying that retroactive
03:48:03 9 payments can reflect a sense in the government
03:48:07 10 that there's some justice and it may be for
03:48:10 11 longer services that Jacobs had performed but
03:48:14 12 that this was the one they would specifically
03:48:17 13 identify for purposes of the public accounts.

03:48:19 14 Q. So your conclusion would be that
03:48:21 15 it's a coincidence that we see a receipt for 50
03:48:23 16 pounds, what you've said is a high -- at the
03:48:26 17 high end of the annual salary, what we see from
03:48:28 18 the comparison, a high end of an annual salary
03:48:31 19 for an interpreter, and it's a coincidence that
03:48:34 20 Oliphant also described his interpreter as
03:48:38 21 having a pecuniary interest?

03:48:40 22 A. No, I'm not saying that it's a
03:48:42 23 coincidence necessarily. I'm saying that what
03:48:47 24 the payment was for, or the key to whether he
03:48:50 25 knew he had a pecuniary interest was if he had

03:48:54 1 been promised this sum of money in advance for
03:48:56 2 advancing the cause of the negotiations, and in
03:48:58 3 that case I would have to accept that.

03:49:03 4 Q. So let me ask it this way then,
03:49:05 5 based on the receipt and what you've just said,
03:49:07 6 is it fair to treat that proposition that
03:49:10 7 Oliphant makes, that he is pecuniarily
03:49:13 8 interested, the one that he makes in his later
03:49:16 9 report, despite all the shortcomings that you do
03:49:19 10 find in the later report, with less skepticism?

03:49:22 11 A. Not much less because of the
03:49:24 12 overall tone of that later report. The
03:49:28 13 stereotypes that Oliphant pours in there, the
03:49:30 14 savage ugs, and so on. It's a very unpleasant
03:49:36 15 report and so I discount the whole passage
03:49:38 16 because I see him wanting to dramatize the
03:49:45 17 episode for his British readership.

03:49:49 18 But the fact that there's a receipt
03:49:50 19 seems to me what you would want to rely on by
03:49:51 20 itself, not reading the extra document at all.

03:50:14 21 Q. I'd like to get into a different
03:50:14 22 subject matter entirely. So staying with your
03:50:15 23 first report I'd like to discuss population
03:50:21 24 growth in the mid-19th century and resulting
03:50:23 25 land boom in Upper Canada, which you deal with

03:50:25 1 in your report, pages 4 to 10 and also at page
03:50:28 2 26.

03:50:35 3 So at page 26 of your report you state
03:50:38 4 the following conclusion, relying on John Weaver
03:50:39 5 and James Belich:

03:50:44 6 "The main argument by both Weaver
03:50:45 7 and Belich is that 'explosive
03:50:49 8 colonization', the flow of
03:50:50 9 land-hunters and settlers, was
03:50:52 10 powerful and persistent enough that in
03:50:54 11 the circumstances like those in 1854
03:50:56 12 [...]"

03:50:58 13 You know what? Maybe we'll bring up
03:51:00 14 the report so I don't have to read it. So it's
03:51:03 15 Exhibit 4367. It starts on page 26 goes to 27.
03:51:47 16 The main argument is that:

03:51:49 17 "The main argument by both Weaver
03:51:49 18 and Belich is that 'explosive
03:51:49 19 colonization', the flow of
03:51:49 20 land-hunters and settlers, was
03:51:49 21 powerful and persistent enough that in
03:51:49 22 the circumstances like those in 1854,
03:51:49 23 governments sooner or later responded
03:51:59 24 by seeking a land cession."

03:52:02 25 You've talked about this with my

03:52:09 1 friend this morning -- this afternoon, about
03:52:11 2 your conclusion that colonization was explosive
03:52:14 3 and there was a steady flow of land hunters and
03:52:17 4 settlers, and that the government would
03:52:18 5 respond -- one option available to it was
03:52:19 6 responding seeking a land cession.

03:52:27 7 And when you say "explosive
03:52:29 8 colonization", citing Weaver and Belich, your
03:52:33 9 conclusion is that the series of events was
03:52:35 10 inevitability? It's inevitable?

03:52:39 11 A. I think in history we try not to
03:52:40 12 have inevitabilities, and I did suggest that
03:52:44 13 there were alternatives which were not followed.
03:52:48 14 I've tried to weigh the reasons why the outcome
03:52:52 15 was what it was but I didn't say it was
03:52:56 16 inevitable.

03:52:57 17 Q. So if we look at Belich, which is
03:52:59 18 Exhibit 4353, if we go to page 281? I don't
03:54:06 19 have the PDF page numbers listed out yet.

03:54:23 20 THE COURT: Counsel, recognizing that
03:54:24 21 we're perhaps a little ahead of your anticipated
03:54:27 22 schedule, and I know you're trying hard not to
03:54:30 23 ask for any indulgence, but I would be prepared
03:54:33 24 to give you one.

03:54:34 25 It's almost 4:00 o'clock. And I know

03:54:39 1 you were very helpful to get your help here as
03:54:42 2 quickly as possible, but for the sake of half an
03:54:45 3 hour I would certainly entertain a request to
03:54:48 4 stop at this time so you can get yourself
03:54:50 5 organized for tomorrow.

03:54:52 6 MS. GUIRGUIS: I would certainly
03:54:53 7 appreciate that, Your Honour, and I also believe
03:54:54 8 that we can cut our cross down as well.

03:54:56 9 THE COURT: Well, it's no problem at
03:54:57 10 all.

03:54:59 11 MS. GUIRGUIS: Thank you.

03:54:59 12 THE COURT: Sir, I don't know if
03:55:00 13 you've testified before.

03:55:03 14 THE WITNESS: I have.

03:55:04 15 THE COURT: If you have then you may
03:55:05 16 know that there's very strict rules about
03:55:07 17 cross-examination.

03:55:09 18 THE WITNESS: Yes, I understand them,
03:55:10 19 Your Honour.

03:55:10 20 THE COURT: And to oversimplify them
03:55:13 21 it means you should do nothing at all on this
03:55:15 22 matter.

03:55:16 23 THE WITNESS: Thank you.

03:55:17 24 THE COURT: Don't speak with anyone
03:55:20 25 until tomorrow morning at 10:00 o'clock.

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THE WITNESS: I appreciate the advice.
I'll be happy to follow it.
THE COURT: I'm sure you have other
things to occupy you as well.
THE WITNESS: I do.
THE COURT: We'll resume tomorrow
morning at 10:00 o'clock.
--- Whereupon the proceedings were
adjourned at 3:55 p.m.

REPORTER'S CERTIFICATE

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

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

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

That the foregoing is a true and
accurate transcript of my shorthand notes so
taken. Dated this 11th day of November 2019.



PER: HELEN MARTINEAU
CERTIFIED SHORTHAND REPORTER

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